

**IN THE OFFICE OF THE STATE ENGINEER  
OF THE STATE OF NEVADA**

IN THE MATTER OF APPLICATION 83246T )  
FILED TO CHANGE THE PUBLIC WATERS )  
OF AN UNDERGROUND SOURCE WITHIN )  
THE QUINN RIVER VALLEY-OROVADA )  
SUBAREA, HYDROGRAPHIC BASIN (33A), )  
HUMBOLDT COUNTY, NEVADA. )

**RULING**  
**#6287**  
**VACATED**  
**IN PART**  
**DATE 4/22/16**

**GENERAL**

**I.**

Application 83246T was filed on November 8, 2013, by Rodney and Virginia St. Clair to change the point of diversion of 1.57 cubic feet per second (cfs), a portion of Proof of Appropriation V-010493. The proposed point of diversion is described as being within the NE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 10, T.42N., R.37E., M.D.B.&M. The existing point of diversion is described as being located within the NE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 8, T.42N., R.37E., M.D.B.&M. The proposed manner of use is unchanged and is for irrigation and domestic purposes, and the existing place of use is described as being located within the NE $\frac{1}{4}$  NW $\frac{1}{4}$ , SE $\frac{1}{4}$  NW $\frac{1}{4}$ , SW $\frac{1}{4}$  NW $\frac{1}{4}$  and NW $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 8, all in T.42N., R.37E., M.D.B.&M.<sup>1</sup>

**FINDINGS OF FACT**

**I.**

Rodney and Virginia St. Clair acquired the NW $\frac{1}{4}$  of Section 8, T.42 N., R.37E., M.D.B.&M, on August 12, 2013. The chain of title to the property reveals that George Crossley obtained a patent from the United States for this and other land<sup>2</sup> in 1924 pursuant to the Homestead Act of 1862. In his affidavit in support of his land patent application, Crossley affirmed that a well had been drilled in the NW $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 8, which was used to irrigate 40 acres of clover in that quarter-quarter, and 20 acres of clover in the NW $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 7, T.42 N., R.37E., M.D.B.&M.<sup>3</sup>

<sup>1</sup> File No. 83246T, official records in the Office of the State Engineer.

<sup>2</sup> The land patent also included portions of Section 7, which is not at issue in this Ruling.

<sup>3</sup> File No. V-010493, official records in the Office of the State Engineer.

Two months after the land patent was issued to Crossley, the land was deeded to Albert H. Trathen in June of 1924. Ownership of the property remained in the Trathen family through Albert Trathen's devisee's and descendants until 2013, when the Applicants purchased the property in August of 2013 from John Metheven, Jr., and Albert F. Trathen.<sup>3</sup>

## II.

Upon taking ownership of the property, Applicants discovered the remnants of the well casing in Section 8 purportedly drilled by Crossley in or around 1924. After discovering the casing, Applicants filed Proof of Appropriation V-010493. Proof of Appropriation V-010493 filed on November 8, 2013, and later amended on December 6, 2013, claims a vested right to an underground water source for the irrigation of 160.0 acres of land in the NW¼ of Section 8, T.42N., R.37E., M.D.B.&M.<sup>3</sup> In addition to filing the vested claim, Applicants also seek to change a portion of Proof of Appropriation V-010493 by Application 83246T.<sup>1</sup> In order to determine whether the State Engineer can grant Application 83246T, the State Engineer finds he must first examine the validity of Proof of Appropriation V-010493.

## III.

A vested right to underground percolating water must be demonstrated by diversion and application to beneficial use prior to March 25, 1939.<sup>4,5</sup> Applicants cite several pieces of evidence they contend supports Proof of Appropriation V-010493. First, Applicants assert that George Crossley acquired the land patent in 1924 pursuant to the Homestead Act of 1862, and the purpose of the Homestead Act was to settle and cultivate the land.<sup>3</sup> Next, Applicants include several articles authored by George Crossley for the Orovada Weekly Journal, which articles identify irrigation and irrigation practices in Orovada area in the 1920s, particularly irrigation of alfalfa occurring by the use of drilled wells.<sup>3</sup>

Applicants next point to the well casing itself, stating that the 8-inch well casing is made of rolled thin metal with horizontal riveted seams. The casing was placed in short

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<sup>4</sup> NRS § 534.080(1).

<sup>5</sup> Applicants failed, in Proof of Appropriation V-010493, to state when the ditch or other works was initiated and when it was completed, which may squarely identify whether Applicants are claiming a vested right to artesian or percolating groundwater. See NRS § 533.080(1). Applicants stated in response to Question 2 on the proof form that the "POD is a drilled 8" well with pump, [and that] water [is] pumped or gravity fed to place of use," and the State Engineer finds that the use of a pump indicates that Applicants' claim of vested right is to percolating groundwater.

sections and connected with riveted collars. This construction technology, Applicants assert, was used until the mid-1930s, and well drilling at the time the well was completed was made using cable drill rigs.<sup>3</sup> During Applicants' site survey, a relatively intact drill rig was located adjacent to the property, which was identified as an Armstrong Manufacturing Company: Waterloo, IA drill rig (a.k.a. Spudder). Applicants include evidence to assert that Armstrong Manufacturing Company ceased making these drill rigs in 1933.<sup>3</sup>

Finally, Applicants submit an aerial map which purports to show land disturbance in the NW¼ of Section 8 that they claim shows irrigation in that location in July, 1954.<sup>3</sup>

The State Engineer finds there is sufficient evidence to prove that a vested right to underground waters was established prior to March 25, 1939. The land patent application filed by Crossley in 1924 indicated a drilled well with 8-inch casing was used for irrigation of a portion of the NW¼ of Section 8. The evidence concerning the drilled well is consistent with well construction methodology at the time, and the drill rig located nearby, which may have been the same or similar model, ceased to be manufactured by 1933. Together, these facts evidence that underground waters were appropriated by the drilled well and used beneficially for irrigation prior to March 25, 1939.

On the other hand, the State Engineer finds that the newspaper articles do not help establish the perfection of the vested right. Of the two newspaper articles submitted from September, 1924, neither article mentions the Crossley property, but instead, one written by Crossley refers to irrigation generally in the Quinn River Valley; and the second article refers to G.L. Grandstrum, Fred Lettman, Dr. Harlan and Henry Helbig. Accordingly, the State Engineer rejects the newspapers articles as proof supporting the vested right. Notwithstanding, in light of the other evidence discussed above, the State Engineer finds sufficient evidence to demonstrate the establishment of a vested right to underground waters in support of Proof of Appropriation V-010493.

#### IV.

Even where there may be proof supporting the perfection of a vested right, the State Engineer must go one step further and determine whether the right continues to exist to present day, including determining whether the right has been abandoned.

Nevada Revised Statute § 534.090(4) addresses abandonment of underground waters.<sup>6</sup> Abandonment of a water right is the voluntary “relinquishment of the right by the owner with the intention to forsake and desert it.” *In re Manse Spring*, 60 Nev. 280, 108 P.2d 311, 315 (1940). Abandonment is the union of acts and intent; and, under Nevada law is “a question of fact to be determined from all the surrounding circumstances.” *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979); *see also In re Manse Spring*, 108 P.2d at 316 (stating that courts must determine the intent of the claimant to decide whether abandonment has taken place, and in this determination may take non-use and other circumstances into consideration).

Non-use for a period of time may inferentially be some evidence of intent to abandon a water right. *Franktown Creek Irr. Co., Inc. v. Marlette Lake Co. and the State Engineer of the State of Nevada*, 77 Nev. 348, 354 (1961). Although a prolonged period of non-use may raise an inference of intent to abandon, it has been held it does not create a rebuttable presumption of abandonment. *U.S. v. Orr Water Ditch Co.*, 256 F.3d 935, 945 (9th Cir. 2001). At a minimum, then, proof of continuous use of the water right should be required to support a finding of *lack* of intent to abandon. *U.S. v. Alpine Land & Reservoir Co.*, 291 F.3d 1062, 1077 (9th Cir. 2002).

As discussed above, the newspaper articles do not directly or even inferentially demonstrate continuous use of the water on the subject property. Indeed, when the articles were written in September, 1924, Crossley had already deeded the NW¼ of Section 8 to Trathen some three-months earlier in June of 1924. Thus, the newspaper articles are insufficient to prove continued irrigation was occurring in the NW¼ of Section 8.

The photographs of the well casing strongly support a case for abandonment of the water right. The casing is silted in and shows areas which are rusted through, confirming that the casing is unusable in its current condition and that it has gone unused for a significant period of time. As well, Proof of Appropriation V-010493 concedes the water

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<sup>6</sup> It states: “A right to use underground water whether it is vested or otherwise may be lost by abandonment. If the State Engineer, in investigating a groundwater 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 or her examination that an abandonment has taken place, the State Engineer shall so state in the ruling approving the application. If, upon notice by registered or certified mail to the owner of record who had the prior right, the owner of record of the prior right fails to appeal the 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.”

has not been used each and every year since the right was initiated; and, the response to Question 16 on the proof form likewise admits the land has not been irrigated recently, and, in fact, it is unknown what years the land was, or was not, irrigated. These facts favor finding that there has not been continuous use of the water since perfection of the water right by Crossley.

In correspondence from the Office of the State Engineer dated December 2, 2013, Applicants were advised that the aerial photograph they submitted only showed the NW¼ NW¼ of Section 8 (40 acres) – not the entire NW¼ of Section 8 (160 acres), as suggested by Applicants.<sup>3</sup> Further, the Office of the State Engineer informed Applicants that it was questionable whether the 1954 image showed disturbed land at all in light of future aerial images from 1968, 1975, 1986, 1999, 2006 and 2013, which showed no surface disturbance or development.<sup>3</sup> In the same letter, Applicants were informed that the evidence demonstrating continuous beneficial use to the present time was insufficient, yet no additional evidence was filed by Applicants in support of the Proof to demonstrate continuous beneficial use.<sup>7</sup>

Even if the State Engineer afforded Applicants every benefit of doubt by considering the 1954 aerial photograph for the quarter-quarter depicted, this singular piece of evidence to suggest continued beneficial use of the water is insufficient to overcome a finding of abandonment. No evidence has been presented to demonstrate that the water was used continuously between 1924 and 1954 or from 1954 to the present. *See Alpine Land & Reservoir Co., supra*. The State Engineer finds no evidence pointing to a *lack* of prior owners' intent to abandon the water right.

While sufficient evidence to support a vested right at the time the well was drilled and the land patent exists, the decayed state of the casing, Applicants' admission the water has not been used continuously coupled with the admission they are without knowledge of when it was, or was not used, in addition to the failure of evidence of continuous beneficial use of the water, compels the State Engineer to find that Proof of Appropriation V-010493 has been abandoned.

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<sup>7</sup> *See, e.g., Nev. Op. Atty. Gen. 270 (June 28, 1927) (the State Engineer may compel the owner of a vested right to submit his proof of such right as authorized by law).*

V.

“If [a person] voluntarily abandons his right to use water, the water becomes a part of the natural stream or source and again reverts to the state absolutely without any title to its use outstanding against the state.” *In re Manse Spring*, 60 Nev. at 280, 108 P.2d at 315. In finding that the vested right claimed under Proof of Appropriation V-010493 has been abandoned, the State Engineer necessarily finds that the water sought to be changed by Application 83246T has reverted to the state absolutely, and is not available under the water right forming the basis for Application 83246T; consequently Application 83246T is subject to denial.

**CONCLUSIONS OF LAW**

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>8</sup>

II.

The State Engineer is prohibited by law from granting an application to change which requests to appropriate the public waters where:<sup>9</sup>

- A. there is no unappropriated water at the proposed source;
- B. the proposed use or change conflicts with existing rights;
- C. the proposed use or change conflicts with protectable interests in existing domestic wells as set forth in NRS § 533.024; or
- D. the proposed use or change threatens to prove detrimental to the public interest.

III.

The State Engineer concludes that Proof of Appropriation V-010493 is abandoned.

IV.

The State Engineer concludes that by the abandonment of vested right evidenced by Proof of Appropriation V-010493, the water reverted to the source; therefore, there is no water available under the water right that is the basis for Application 83246T and granting a change application based on an abandoned water right would threaten to prove detrimental to the public interest.

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<sup>8</sup> NRS Chapters 533, 534.

<sup>9</sup> NRS § 533.370(2).

**RULING**

The State Engineer hereby declares Proof of Appropriation V-010493 abandoned. Application 83246T is hereby denied on the grounds that there is no unappropriated water available under the water right that is the basis for Application 83246T and that granting a change application based on an abandoned water right would threaten to prove detrimental to the public interest.

Respectfully submitted,



JASON KING, P.E.  
State Engineer

Dated this 25th day of  
July, 2014.