

IN THE MATTER OF FORFEITURE AND/OR)
ABANDONMENT OF WATER RIGHTS UNDER)
PERMIT 20481, CERTIFICATE 6782 and)
PERMIT 20482, CERTIFICATE 6781 TO)
APPROPRIATE THE WATERS OF AN UNDER-)
GROUND SOURCE IN DIAMOND VALLEY,)
EUREKA COUNTY, NEVADA.)

R U L I N G

GENERAL:

I

Application 20481 was filed by Coleman Wade on May 23, 1962 to appropriate underground water for irrigation and domestic purposes. The proposed place of use was the S½ of Section 11, T.20N., R.53E. M.D.B.& M. A permit was issued under Application 20481 on February 19, 1963 for 5.4 c.f.s. of water for irrigation and domestic purposes. Certificate 6782 was issued under said Permit on September 30, 1968.¹

There is a series of assignments of interest in Permit 20481. The current owners of record are Charles E. and Jeanette C. Reynolds, husband and wife.

II

Application 20482 was filed by Coleman Wade on May 23, 1962 to appropriate water from an underground source for irrigation and domestic purposes. The proposed place of use was the S½ of Section 11, T.20N., R.53E., M.D.B.& M. A permit was issued under Application 20482 on February 19, 1963 for 5.4 c.f.s. of water for irrigation and domestic purposes. Certificate 6781 was issued under said permit on September 30, 1968.²

There is a series of assignments of interest in Permit 20482. The current owners of record are Charles E. and Jeanette C. Reynolds, husband and wife.

FINDINGS

I

In a letter of January 19, 1977, to the State Engineer, Kenneth E. and Earlene Stenton requested initiation of proceedings to declare water permits issued for the S½ of Section 11, T.20N., R.53E., forfeited and/or abandoned.³

II

By letter of January 28, 1977, parties of interest were notified that a field investigation would be held on February 17, 1977, in the matter of the forfeiture and abandonment of the subject rights.4/

III

A field investigation was held on February 17, 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.5/

IV

Parties of interest were given notice by letter of April 1, 1977, that a hearing in the matter of forfeiture and/or abandonment of subject water rights was scheduled for Thursday, April 19, 1977, in the Eureka County Court-house, Eureka, Nevada.6/

V

The hearing was convened as scheduled. Counsel for Charles E. and Jeannette C. Reynolds, 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".7/ Mr. C. E. Horton, Attorney at law, representing the Reynolds, made the following statement in support of the motion for continuance; "Now, the issues in this case have so much at stake, I don't think this calls for any summary or hasty determination, so I join in the motion and respectfully ask that the matter be continued until such time as we can prepare a case and have our witnesses present, and also determine whether or not the Legislature is going to change the presently existing law".8/

The motion for continuance was granted.9/

VI

By letter of April 19, 1977, Kenneth B. and Earlene Stenton demanded that the State Engineer withdraw all of

VI (Continued)

the protests the Stentons had made against the subject water rights. The letter included a similar demand for the State Engineer to enforce NRS 534.090.10/

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 Courthouse, Eureka, Nevada.11/

Extensive evidence, testimony and arguments were presented at the hearing.12/

VIII

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 11, T.20N., R.53E., M.D.B. & M., dating back to 1972. He testified that upon his inspection of the subject property in 1972, 1973, 1975 and 1976, that there was no evidence of crops or application of water on the described property. He testified that in 1975 approximately 80 acres in the SE $\frac{1}{4}$ of the Section had been ready for planting but no crop was grown nor water applied. In 1973 and 1975, both wells had been equipped with Cat-Diesel motors and Johnson Gearheads on Layne and Bowler pumps. In 1976, the wells were still equipped with the Johnson gearheads and Layne and Bowler pumps but the motors had been removed. During this testimony, Mr. Gamboa was asked the following question by the State Engineer; "Mr. Gamboa, from your observation over the period 1972 to 1976, is it your opinion that there was or was not any water placed to beneficial use on the S $\frac{1}{2}$ of Section 11 from the wells that were to be appurtenant to that property?" Mr. Gamboa answered as follows; " I would have to say there was not."13/

Mr. Gamboa identified and interpreted an aerial photograph of the property in question. Said photo was dated September, 1973.14/ His testimony was that said photograph showed no signs of crops on the described property.15/

IX

Mr. Wayne Testolin, Water Commissioner for the State Engineer's office, testified in concurrence with Mr. Gamboa

IX (Continued)

regarding the status of equipment on the wells under Certificate 6781 and 6782, the lack of crops and application of water for the period 1972 through 1976 and interpretation of the aerial photograph of the area in question.16/

X

Mr. Laverne Machacek testified that the only crop that was ever grown on that property was to prove beneficial use on the wells in 1962.17/

XI

Mr. Jerry Machacek testified that, as far as he knew, water has not been put to beneficial use since 1963 on that piece of property.18/

XII

There was no information, evidence or testimony submitted that would in any way indicate, infer or confirm that water was applied to the S $\frac{1}{2}$ of Section 11 for the irrigation of crops during the period of 1972 through 1976.19/

XIII

Mr. Kolve Klindt, lessee of the S $\frac{1}{2}$ of Section 11, T.20N., R.53E. testified that in conversations with representatives of the State Engineer's office and through correspondence directed to Mr. Reynolds that he had been informed that the water rights appurtenant to the S $\frac{1}{2}$ of said Section 11 were valid and "permanent".20/

XIV

Mr. Richard Kephart, a resident of Diamond Valley, testified that in 1975 he seeded approximately 120 acres of winter wheat on the SE $\frac{1}{4}$ of said Section 11, however, Mr. Kephart stated that he did not see any water applied to the crop.21/

XV

Mr. C. E. Horton, attorney for Charles B. and Jeanette Reynolds, introduced into evidence an affidavit by Mr. Reynolds, dated June 3, 1977. The basis of the affidavit was that on August 7, 1972, the Reynolds' entered into a lease agreement with a Mr. Dexter Hurley for the S $\frac{1}{2}$ of said

XV (Continued)

Section 11. One of the provisions of the lease was that Mr. Hurley should irrigate and farm the said land. Mr. Hurley failed to properly irrigate said farmlands and the Reynolds initiated court action on October 7, 1974, to have the lease cancelled so that possession of the property could be returned to the Reynolds. The lease was subsequently cancelled by Judgement dated June 17, 1976. Attached to the affidavit is a copy of the lease executed between Reynolds and Hurley.22/

XVI

Mr. C. E. Horton introduced into evidence the affidavit of Mrs. Joan Shangle, Clerk of the Third Judicial District Court of the State of Nevada, in and for the County of Eureka. The affidavit of Mrs. Shangle corroborated the Reynolds affidavit with regard to dates on the lease and subsequent court action.23/

XVII

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, 1975.24/

XVIII

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."25/

Notice of this Order was published in the Eureka Sentinel on the following dates; December 22, 1975; January 3, 10, 17, 24, 1976.26/

CONCLUSIONS

I

The State Engineer has jurisdiction of the parties and the subject matter of this action.27/

II

The source of water under Permit 20481, Certificate 6782 and Permit 20482, Certificate 6781, is underground water.

III

Nevada Revised Statute 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."

IV

The water rights under Permit 20481, Certificate 6782 and Permit 20482, Certificate 6781, 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.^{28/}

VI

Nevada Revised Statutes 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 forfeiture of underground water rights as provided in NRS 534.090. Representatives of persons interested in the Diamond Valley area and 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.^{29/}

IX

Representatives and/or employees of the State Engineer's office are neither required nor qualified to provide legal advice. They are responsible for making public records available and providing assistance where and when possible. Upon inquiry, they indicate to the best of their knowledge, the status of any particular water right as reflected in records available to them.

X

Indications of the status of a water right by employees of the State Engineer's office does not and cannot waive or jeopardize statutory provisions regarding the right to use or the right to continued use of the water under any given right.

XI

"any application for a permit or any permit to appropriate water may be assigned subject to the conditions of

XI (Continued)

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. "30/

The current owners of Permit 20481, Certificate 6782 and Permit 20482, Certificate 6781, therefore are bound by their predecessors' and lessees' action or inaction as it relates to the possible forfeiture of said rights.

XII

Evidence, information and data available clearly and conclusively establish that for a period in excess of five successive years water has not been beneficially used for the purposes for which the water rights were acquired under Permit 20481, Certificate 6782 and Permit 20482, Certificate 6781.

RULING

I

It is hereby ruled and declared that rights to appropriate water under Permit 20481, Certificate 6782 and Permit 20482, Certificate 6781 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 purpose for which said rights were acquired. No finding is made or entered regarding abandonment of said rights.

Respectfully submitted,


Roland D. Westergard
State Engineer

RDW/bl

Dated this 29th day
of August 1977.

FOOTNOTES

1. State Exhibit No. 7, June 15, 1977 Transcript.
2. State Exhibit No. 6, June 15, 1977 Transcript.
3. State Exhibit No. 5, June 15, 1977 Transcript.
4. State Exhibit No. 8, June 15, 1977 Transcript.
5. State Exhibit No. 9, June 15, 1977 Transcript.
6. State Exhibit No. 1, April 19, 1977 Transcript.
7. Reporter's 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 19th transcript) Page 6, lines 10 through 16.
8. April 19th transcript, page 11, lines 6 through 12.
9. April 19th transcript, page 22, lines 17 through 19.
10. State Exhibit No. 3, June 15, 1977 Transcript.
11. State Exhibit No. 2, June 15, 1977 Transcript.
12. Reporter's 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 15th Transcript.)
13. June 15th Transcript, page 26, lines 24 through 26 and page 27, lines 1 through 3.
14. State Exhibit No. 12, June 15, 1977 Transcript.
15. June 15th transcript, pages 24 and 25.
16. June 15th transcript, pages 28 through 31.
17. June 15th transcript, page 31.
18. June 15th transcript, page 32.
19. June 15th transcript and public records located in within the State Engineers office.
20. June 15th transcript, pages 33 through 39.
21. June 15th transcript, pages 40 through 41.
22. Reynolds - Exhibit A, June 15, 1977 Transcript.
23. Reynolds - Exhibit B, June 15, 1977 Transcript.

FOOTNOTES (Continued)

24. Public Records within the office of the State Engineer.
25. State Exhibit No. 57, June 15, 1977 Transcript.
26. Public records within the office of the State Engineer.
27. NRS 534.090
28. Statutes of Nevada, 1967 Regular Session, Volume II on Page 1,053.
29. NRS 534.090
30. NRS 533.385