

IN THE MATTER OF FORFEITURE AND/OR)
ABANDONMENT OF WATER RIGHTS UNDER)
PERMIT 23711, CERTIFICATE 6794;)
PERMIT 23738, CERTIFICATE 6529; AND)
PERMIT 23739, CERTIFICATE 6723 TO)
APPROPRIATE THE WATERS OF AN UNDER-)
GROUND SOURCE IN DIAMOND VALLEY,)
EUREKA COUNTY, NEVADA.)

R U L I N G

153

GENERAL

I

Application 23711 was filed by Leta B. Bishop on February 23, 1967 to appropriate underground water for irrigation purposes. The proposed place of use was the N1/2 and NW1/4 SW1/4 Section 28, T.20N., R.53E., M.D.B.&M. A permit was issued under Application 23711 on November 29, 1967 for 4.7 c.f.s. of water for irrigation and domestic purposes. Certificate 6794 was issued under said permit on October 1, 1968.

II

Application 23738 was filed by Leta B. Bishop on March 8, 1967 for permission to change the point of diversion of waters heretofore appropriated under Permit 21595. The proposed place of use under Application 23738 was Lots 1, 2, 3, 4, 5, 6, 7 and 11, Section 28, T.20N., R.53E., M.D.B.&M. A permit was issued under Application 23738 on August 8, 1967 for 5.4 c.f.s. of water for irrigation and domestic purposes. Certificate 6529 was issued under said permit on February 9, 1968. 1/

III

Application 23739 was filed by Leta B. Bishop on March 8, 1967 for permission to change the point of diversion of waters heretofore appropriated under Permit 19296. The proposed place of use under the application was Lots 1, 2, 3, 4, 5, 6, 7 and 11, Section 28, T.20N., R.53E., M.D.B.&M. A permit was granted under Application 23739 on August 8, 1967 for 5.0 c.f.s. of water for irrigation and domestic purposes. Certificate 6723 was issued under said permit on August 16, 1968. 2/

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. 3/ Extensive evidence testimony and arguments were presented at the hearing. 4/

II

Mr. Ralph Gamboa, Water Commissioner for the State Engineer's office, testified that he had knowledge and familiarity with Section 28, T.20N., R.53E., M.D.B.&M., dating back to 1972. He testified that from

1973 through 1977 there was crops grown on various portions of the N1/2 of said Section 28, but that no crop had ever been grown to his knowledge on the NW1/4 of the SW1/4 (Lot 11) of Section 28. Mr. Gamboa identified and interpreted an aerial photograph of the property in question. Said photo was dated September, 1973. 5/ His testimony was that the photograph showed no crop in the NW1/4 of the SW1/4 of said Section 28. 6/

III

Mr. Wayne Testolin, Water Commissioner for the State Engineer's office testified in concurrence with Mr. Gamboa regarding the use of water of water on Section 28 for the period 1973 through 1977, and in interpretation of the aerial photograph of the area in question. 7/

IV

Mr. Edwin Bishop, husband of the permittee Leta B. Bishop, testified during the hearing that they had not used water on Lot 11 (NW1/4 SW1/4 said Section 28) during the last 5 years. He testified "we did plant one crop there but that was the only time we ever planted one and that was prior to the five year period, so we don't question Lot 11 at all in any regard". 8/

V

There was no evidence, information or testimony submitted that would confirm that water was applied to the NW1/4 SW1/4 (Lot 11) of Section 28, T.20N., R.53E., for the irrigation of crops during the period of 1973 through 1977. 9/

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. 10/

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". 11/ Notice of this order was published in the Eureka Sentinel on the following dates: December 27, 1975, January 3, 10, 17 and 24, 1976. 12/

CONCLUSIONS

II

The State Engineer has jurisdiction of the parties in the subject matter of this action. 13/

II

The source of water under Permits 23711, Certificate 6794; Permit 23738, Certificate 6529 and Permit 23739, Certificate 6723 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." 14/

IV

The water rights under Permit 23711, Certificate 6794; Permit 23738, Certificate 6529 and Permit 23739, Certificate 6723 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. 15/

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. 16/

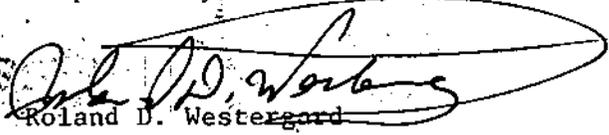
IX

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 23711, Certificate 6794; Permit 23738, Certificate 6529 and Permit 23739, Certificate 6723 on the NW1/4 SW1/4 Section 28, T.20N., R.53E., M.D.B.&M. Evidence, information and data available establish that water was used from the wells described under the above permits on acreage within the N1/2 of said Section 28 during the years 1973 through 1977.

RULING

It is hereby ruled and declared that that portion of the rights to appropriate water under Permit 23711, Certificate 6794; Permit 23738, Certificate 6529 and Permit 23739, Certificate 6723 appurtenant to the NW1/4 SW1/4 (Lot 11) of Section 28, T.20N., R.53E., 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. That portion of the rights under the above permits appurtenant to portions of the N1/2 of Section 28, T.20N., R.53E., M.D.B.&M. are declared to be not forfeited at this time.

Respectfully submitted,



Roland D. Westergard
State Engineer

BLR/RDW/bl

Dated this 7th day

of SEPTEMBER, 1978.

FOOTNOTES

1. State Exhibit No. 5, in the Transcript of the Public Hearing in the Matter of the Consideration for Forfeiture and/or Abandonment Pursuant to NRS 534.090 of Various Water Rights in Diamond Valley, Eureka County, Nevada, February 16, 1978. (Hereinafter referred to as February 16, 1978 Transcript.)
2. State Exhibit No. 8, February 16, 1978 Transcript.
3. State Exhibit No. 1, February 16, 1978 Transcript.
4. February 16, 1978 Transcript.
5. State Exhibit No. 9, February 16, 1978 Transcript.
6. February 16, 1978 Transcript, Pages 7 through 19.
7. Pages 20 through 22, June 28, 1978 Transcript.
8. February 16, 1978 Transcript, Page 19.
9. February 16, 1978 Transcript and Public Records located within the State Engineer's Office.
10. Public Records in the Office of the State Engineer.
11. State Exhibit No. 3, February 16, 1978 Transcript.
12. Public Records within the Office of the State Engineer.
13. NRS 534.090
14. NRS 534.090
15. Statutes of Nevada, 1967 Regular Session, Volume II, Page 1053.
16. NRS 534.090