

IN THE OFFICE OF THE STATE ENGINEER

IN THE MATTER OF EXTENSIONS OF TIME)  
UNDER PERMITS 35147 THROUGH 35152,) )  
INCLUSIVE, BY MT. ROSE SERVICE CO.)  
FROM UNDERGROUND SOURCES IN WASHOE)  
COUNTY, NEVADA. )

RULING

GENERAL

I.

Permits 35147 through 35152, inclusive, were issued<sup>1</sup> on July 5, 1978, to the Mt. Rose Water Company, Inc., to change 5.0 cubic feet per second (hereinafter c.f.s.) each of water from an underground source for quasi-municipal purposes. Ownership of the permits was subsequently transferred to Mt. Rose Service Co.<sup>2</sup> on July 8, 1980. Permits 35147 through 35152, inclusive, were issued with the condition that the place of use under each permit was limited to that area described in the agreement dated June 19, 1978.<sup>3</sup> The place of use encompasses approximately 5,600 acres of land located within

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<sup>1</sup> Permits 35147 through 35152, inclusive, were approved and issued as applications to change the place of use of Permits 28424 through 28430, inclusive. Permits 28424 through 28430, inclusive, were originally issued for quasi-municipal purposes on October 30, 1974, to Lee Hale and Co. Subsequent to the issuance of permits under Applications 28424 through 28430, inclusive, transfers of ownership of the permits were made on the records of the State Engineer's office to Mt. Rose Water Co., Inc., on July 5, 1978. (See public record in the office of the State Engineer.) The total combined annual duty of water was limited to 1,095 million gallons under Permits 28424 through 28430, inclusive.

<sup>2</sup> Public record in the office of the State Engineer under Permit 35147.

<sup>3</sup> The Mt. Rose Water Co., Inc., and Mt. Rose Property Owners Association, Inc., David D. Sinai, J. S. Wisham, Harry P. Callahan and Violet M. Callahan entered into an agreement on June 19, 1978, which resulted in a mutually agreed to reduction in the place of use under Permits 35147 through 35152, inclusive. Permits 35147 through 35152, inclusive, were also issued with the condition that the final allocation of water under Application 30261 shall be deducted from the annual duty of water under Permits 35147 through 35152, inclusive, but shall not exceed 109.5 million gallons annually. Permit 30261 was subsequently issued to Uplands, Inc., on August 11, 1978, limited to 109.5 million gallons annually for quasi-municipal purposes. The place of use under this permit was within the place of use of Permits 28424 through 28430, inclusive, but was excluded from the place of use described and set forth under the agreement described above. See public record in the office of the State Engineer under Permit 35147.

the Galena Subbasin of the Pleasant Valley Ground Water Basin within Washoe County, Nevada.<sup>4</sup> On June 18, 1984, Mt. Rose Service Co. submitted applications for extension of time for the filing of the proofs of beneficial use under Permits 35147 through 35152, inclusive.<sup>5</sup>

## II.

An administrative hearing in the matter of the subject applications for extension of time was held before the State Engineer on August 2, 1985, and August 15, 1985.<sup>6</sup> Protests to the granting of the applications for extensions of time by Tina M. Nesler, Robert V. and Harry P. Callahan and George Poore were received into the record.<sup>7</sup> The protests generally contend that the permittee has not demonstrated due diligence and good faith in perfecting the appropriations set forth under the subject permits. The permittee and protestants made evidentiary presentations at the hearing. Additionally, the State Engineer took administrative notice of all records and information available in the State Engineer's office.<sup>8</sup> The permittee and protestants submitted post-hearing statements summarizing their positions.

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<sup>4</sup> Water Resources - Reconnaissance Series Report 57 titled "A Brief Water-Resources Appraisal of the Truckee River Basin, Western Nevada" and Open File Report 84-433 titled "Water Resources Appraisal of the Galena Creek Basin, Washoe County, Nevada". An administrative hearing before the State Engineer on May 21st through 23rd, 1984, in the matter of Applications to Change 47127 through 47132, inclusive, and 47133 through 47140, inclusive, and Applications to Appropriate 42900 through 42902, inclusive, 46958 through 46961, inclusive, and 46440 through 46450, inclusive, provides a substantial record on the hydrologic elements of the Galena Creek Ground Water Subbasin.

<sup>5</sup> Applications for extension of time are public record in the office of the State Engineer and also copies were entered into the record of the administrative hearing before the State Engineer on August 2, 1985. See State of Nevada Exhibit 4.

<sup>6</sup> Transcript of the administrative hearing is available in the office of the State Engineer as a matter of public record.

<sup>7</sup> State of Nevada Exhibits 2 and 3, administrative hearing, public record in the office of the State Engineer.

<sup>8</sup> See transcript of administrative hearing, p. 8, public record in the office of the State Engineer.

III.

In response to the provisions of NRS 533.380 and 533.395,<sup>9</sup> the State Engineer has conducted an administrative hearing for the purpose of developing a record of testimony and evidence for a factual determination and judgment in this matter to properly protect the public interest.

FINDINGS OF FACT

I.

On March 1, 1978, the State Engineer described and designated the Pleasant Valley Ground Water Basin as a ground water basin in need of additional administration under the provisions of NRS Chapter 534 (Conservation and Distribution of Underground Water).<sup>10</sup> The Galena Creek Ground Water Basin is a subbasin element of the Pleasant Valley Ground Water Basin, which is additionally considered a physiographic element of the Truckee River Basin.

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<sup>9</sup> NRS 533.380(4) specifically provides:

"4. Whenever the holder of a permit issued for any municipal or quasi-municipal use of water on any land for which a final subdivision map has been recorded pursuant to chapter 278 of NRS requests an extension of time to apply the water to a beneficial use, the state engineer shall, in determining whether to grant or deny the extension, consider, among other reasons:

- (a) Whether the holder has shown good cause for not having made a complete application of the water to a beneficial use;
- (b) The number of parcels of land and commercial or residential units which are contained in or planned for the subdivision;
- (c) Any economic conditions which affect the ability of the holder to make a complete application of the water to a beneficial use; and
- (d) Any delays in the development of the subdivision which were caused by unanticipated natural conditions." (Underlining added.)

NRS 533.395(1) specifically provides:

"(1) If, in the judgment of the state engineer, the holder of any permit to appropriate the public water is not proceeding in good faith and with reasonable diligence to perfect the appropriation, the state engineer may require at any time the submission of such proof and evidence as may be necessary to show a compliance with the law. If, in his judgment, the holder of a permit is not proceeding in good faith and with reasonable diligence to perfect the appropriation, the state engineer shall cancel the permit and advise the holder of its cancellation."

<sup>10</sup> State Engineer's Order No. 709, public record in the office of the State Engineer.

II.

Existing rights exceed 3,000 acre-feet within the Galena Creek Ground Water Basin and, in addition, there are presently in excess of 370 domestic wells within the boundaries of the basin. The State Engineer has denied prior applications to appropriate ground water within the Galena Creek Ground Water Basin including applications of the protestants in this matter.<sup>11</sup>

III.

The permittee under Permits 35147 through 35152, inclusive, is a Nevada Corporation which became a jurisdictional public utility in 1983 at the direction of the Public Service Commission.<sup>12</sup>

IV.

Permits were issued under Applications 28424 through 28430, inclusive, on October 30, 1974. The proofs of beneficial use and supporting maps were due on May 30, 1979, under the terms of conditions of the permits. Subsequently, change applications 35147 through 35152, inclusive, were granted on July 5, 1978, to change the place of use under Permits 28424 through 28430, respectively. The proofs of beneficial use and supporting maps were due under Permits 35147 through 35152, inclusive, on May 30, 1979. Six - one year extensions of time were granted in 1979, 1980, 1981, 1982, 1983 and 1984 for the filing of beneficial use under the subject permits.<sup>13</sup>

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<sup>11</sup> Public record in the office of the State Engineer. See also footnote 4.

<sup>12</sup> See testimony of Ralph P. Cromer, transcript of administrative hearing, pp. 50-51, public record in the office of the State Engineer. The Galena Water Co., a subsidiary of the Mt. Rose Service Company, has made application to the Public Service Commission for a certificate of public convenience and necessity.

<sup>13</sup> Public record in the office of the State Engineer under Permits 28424 through 28430, inclusive, and Permits 35147 through 35152, inclusive. Permits issued under 35147 through 35152, inclusive, abrogate all rights under Permits 28424 through 28430, inclusive.

V.

The wells under Permits 35147 through 35152, inclusive, have been drilled and construction completed including the installation of pumps and motors.<sup>14</sup>

VI.

On August 5, 1983, Applications 47127 through 47132, inclusive, to change the point of diversion and place of use of a portion of Permits 35147 through 35152, inclusive, were filed by Mt. Rose Service Company. Subsequently, permits were granted on August 1, 1985, by the State Engineer approving 47127 through 47132, inclusive, and title was transferred to the Galena Resort Company.<sup>15</sup>

VII.

Will serve commitments by Mt. Rose Service Company to approved subdivision development are well documented by the record of evidence and testimony.<sup>16</sup> Existing commitments total 505 acre-feet per year on approved development. Additionally, Mt. Rose Service Company represents that they will make available water rights for compensation to the protestants in the amount of 360 acre-feet per year.<sup>17</sup>

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<sup>14</sup> See affidavits of proof of completion of work on file as public record in the office of the State Engineer under Permits 35147 through 35152, inclusive.

<sup>15</sup> Public record in the office of the State Engineer. The changes under Permits 47127 through 47132, inclusive, removed the points of diversion and places of use to the upper reaches of the Galena Creek drainage to support a recreational ski resort development. The total combined annual duty of water under Permits 35147 through 35152, inclusive, was reduced by 1,000 acre-feet upon approval of 47127 through 47132, inclusive. Extensive administrative hearings before the State Engineer were held in the matter of Permits 47127 through 47132, inclusive. See footnote 4.

<sup>16</sup> Testimony of Garrett W. Lemon, pp. 11 through 20; testimony of Brien V. Walters, pp. 23 through 42 and p. 122; testimony of Ralph P. Kramer, pp. 49 through 75 and 95 through 115; Permittee's Exhibits "E", "G" and "H", administrative hearing, public record in the office of the State Engineer.

<sup>17</sup> See "Amended Summary of Existent and Known Potential Water Obligation" submitted under cover letter of Richard G. Campbell on September 13, 1985, public record in the office of the State Engineer under applications for extension of time - Permits 35147 through 35152, inclusive. Also, State of Nevada Exhibit "4", administrative hearing, public record in the office of the State Engineer. Additionally, a copy of a proposed agreement was submitted to the State Engineer on August 29, 1985, with a cover letter under the signature of Richard G. Campbell, public record in the office of the State Engineer.

VIII.

The concepts of reasonable diligence and good faith as set forth under the provisions of NRS 533.395(1) and related case law<sup>18</sup> mandates discussion in the context of the original intent manifested under the subject permits in this matter. The principles or guidelines respecting diligence may necessarily vary, depending on what beneficial use of the water is intended by the permittee; the intent being expressed in the application to appropriate. Reasonable diligence and good faith are important public policy concepts, in view of the limited and finite nature of the water resource, and it is imperative that the statutory appropriation process not be abused through monopoly of a public resource. The record does not support progressive and diligent development of the resource consistent with the permittee's original intent. Rather, the record demonstrates an intent of monopolizing or reserving the right indefinitely through extensions of time to the detriment of both the protestants noted herein and the general public.<sup>19</sup> Accordingly, the State Engineer finds that the permittee is no longer proceeding toward placing the water to a beneficial use as originally intended in its applications, that the permittee has violated the established prerequisite guideline for a finding of due diligence and good faith. The State Engineer further finds that, to continue to grant extensions of time for the filing of beneficial use to a permittee in the face of substantial and conclusive evidence that the permittee is not proceeding in good faith to carry out the original intent of the appropriations, would not be in the public

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<sup>18</sup> See footnote 9. NRS 533.395(1). The Nevada Supreme Court in Engleman v. Westergard, 98 Nev. 348, 647 P.2d 385 (1982), reaffirmed the necessity of an applicant exercising reasonable diligence in putting water to beneficial use as required by statute. See also, Vol. I, W. A. Hutchins, Water Rights Laws in the Nineteen Western States, pp. 373-389 (1971).

<sup>19</sup> Protestants' Winburn and Poore applications to appropriate were previously denied in proceedings before the State Engineer based, in part, on adverse effect on existing rights. See public record in the office of the State Engineer under Applications 46959, 46960 and 46961. Transcript of administrative hearing before the State Engineer, Vol. III, pp. 687 through 692. See also footnote "4".

interest and would further adversely and unreasonably effect the interests of the protestants.

CONCLUSIONS

I.

The State Engineer has jurisdiction of the parties and the subject matter of this action.<sup>20</sup>

II.

The intent at the time of the application is controlling for the purposes of determining good faith and due diligence in accordance with Nevada Water Law. The State Engineer may require, at any time, the submission of such proof and evidence as may be necessary to show that the permittee is proceeding in good faith and with reasonable diligence.<sup>21</sup>

III.

If, in his judgment, the State Engineer finds that the permittee is not proceeding in good faith and with reasonable diligence to perfect the appropriation, he shall cancel the permit and advise the permittee of its cancellation.<sup>22</sup>

IV.

Approved subdivision developments subject to a will serve commitment by Mt. Rose Service Co. in the amount of 505 acre-feet per year are entitled to an additional extension of time for a period of 1 year from May 30, 1985, consistent with the provisions of NRS 533.380(4).

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<sup>20</sup> NRS Chapters 533 and 534.

<sup>21</sup> See footnote 18.

<sup>22</sup> NRS 533.395(1).

V.

The record of evidence presented at the administrative proceeding set forth in the findings is substantial and conclusive that the permittee, under Permits 35147 through 35152, inclusive, is not proceeding with good faith and reasonable diligence to perfect the beneficial use under the remaining portion of the subject appropriations.

RULING

The applications for extension of time under Permits 35147 through 35152, inclusive, are herewith approved in the amount of 505 acre-feet per year for existing approved subdivision development. The remaining portions of Permits 35147 through 35152, inclusive, are herewith deemed cancelled on the grounds that the permittee, Mt. Rose Service Co., has failed to exercise reasonable diligence and good faith to put water to beneficial use as required by statute.

Respectfully submitted,



PETER G. MORROS  
State Engineer

PGM/bl

Dated this 3rd day of  
FEBRUARY, 1986.