

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

IN THE MATTER OF THE FORFEITURE OF )  
PERMIT 12978, CERTIFICATE 3894, AND )  
PERMIT 12979, CERTIFICATE 3895, AND )  
CHANGE APPLICATIONS 51868, 51869, )  
53786, 53787, 56299-T AND 56300-T )  
FILED TO CHANGE THE POINT OF )  
DIVERSION AND PLACE AND MANNER OF )  
USE OF WATERS PREVIOUSLY )  
APPROPRIATED FROM AN UNDERGROUND )  
SOURCE WITHIN THE TRUCKEE MEADOWS )  
GROUNDWATER BASIN (87), WASHOE )  
COUNTY, NEVADA. )

RULING

# 4454

GENERAL

I.

Water right Certificate 3894 was issued under Permit 12978 on October 15, 1952, to Rewana Farms, Inc.<sup>1</sup> Certificate 3894 allowed for the diversion of 0.0062 cubic feet per second (cfs) or sufficient water for the stockwatering of 200 cattle and barn use within the SE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 30, T.19N., R.20E., M.D.B.&M.<sup>2</sup> The point of diversion is described as being located at Brooks Well No. 1 within the SE $\frac{1}{4}$  NE $\frac{1}{4}$  of said Section 30.

II.

Water right Certificate 3895 was issued under Permit 12979 on October 15, 1952, to Rewana Farms, Inc.<sup>3</sup> Certificate 3895 allowed for the diversion of 0.085 cfs of water for dairy processing and domestic use within the NE $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 30, T.19N., R.20E., M.D.B.&M.<sup>4</sup> The point of diversion is described as being located at Brooks Wells No. 2A and 2B within the NE $\frac{1}{4}$  SE $\frac{1}{4}$  of said Section

<sup>1</sup>File No. 12978, official records in the Office of the State Engineer.

<sup>2</sup>Exhibit No. 2, public administrative hearing before the State Engineer, October 11, 1991. (Hereinafter "Exhibit No. 2").

<sup>3</sup>File No. 12979, official records in the Office of the State Engineer.

<sup>4</sup>Exhibit No. 3.

30. The water from the wells was commingled and used to serve a milk processing plant, dairy barns, corrals and dwellings.<sup>1</sup>

III.

Application 51868 was filed on February 25, 1988, by Westpac Utilities, a division of Sierra Pacific Power Company, to change the point of diversion, place and manner of use of 0.085 cfs, not to exceed 61.43 acre-feet annually (afa), of the water previously appropriated under Permit 12979, Certificate 3895, for municipal purposes within the certificated water service territory of Sierra Pacific Power Company.<sup>5</sup> The proposed point of diversion is described as being located within the NW $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 31, T.19N., R.20E., M.D.B.&M.<sup>6</sup>

IV.

Application 51869 was filed on February 25, 1988, by Westpac Utilities, a division of Sierra Pacific Power Company, to change the point of diversion, place and manner of use of 0.0062 cfs, not to exceed 4.48 afa, of the water previously appropriated under Permit 12978, Certificate 3894, for municipal purposes within the certificated water service territory of Sierra Pacific Power Company.<sup>7</sup> The proposed point of diversion is described as being located within the NW $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 31, T.19N., R.20E., M.D.B.&M.<sup>8</sup>

V.

Application 53786 was filed on August 23, 1989, by the Airport Authority of Washoe County to change the place of use and manner of use of 0.0062 cfs of the water previously appropriated under Permit

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<sup>5</sup>File No. 51868, official records in the Office of the State Engineer.

<sup>6</sup>Exhibit No. 4.

<sup>7</sup>File No. 51869, official records in the Office of the State Engineer.

<sup>8</sup>Exhibit No. 5.

12978, Certificate 3894, for irrigation purposes within portions of Sections 20, 29 and 30, T.19N., R.20E., M.D.B.&M.<sup>9</sup> The proposed point of diversion is described as being located within the SE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 30, T.19N., R.20E., M.D.B.&M.<sup>10</sup>

VI.

Application 53787 was filed on August 23, 1989, by the Airport Authority of Washoe County to change the place of use and manner of use of 0.085 cfs of the water previously appropriated under Permit 12979, Certificate 3895, for irrigation purposes within portions of Sections 20, 29 and 30, T.19N., R.20E., M.D.B.&M.<sup>11</sup> The proposed point of diversion is described as being located within the NE $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 30, T.19N., R.20E., M.D.B.&M.<sup>12</sup>

VII.

Application 56299-T was filed on May 16, 1991, by the Airport Authority of Washoe County to change the place of use and manner of use of 0.0106 cfs of the water previously appropriated under Permit 12978, Certificate 3894, for irrigation purposes within portions of Sections 21, 22, 27 and 28, T.19N., R.20E., M.D.B.&M.<sup>13</sup> The proposed point of diversion is described as being located within the SE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 30, T.19N., R.20E., M.D.B.&M.<sup>14</sup>

VIII.

Application 56300-T was filed on May 16, 1991, by the Airport Authority of Washoe County to change the place of use and manner of

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<sup>9</sup>File No. 53786, official records in the Office of the State Engineer.

<sup>10</sup>Exhibit No. 6.

<sup>11</sup>File No. 53787, official records in the Office of the State Engineer.

<sup>12</sup>Exhibit No. 7.

<sup>13</sup>File No. 56299-T, official records in the Office of the State Engineer.

<sup>14</sup>Exhibit No. 8.

use of 0.145 cfs of the water previously appropriated under Permit 12979, Certificate 3895, for irrigation purposes within portions of Sections 21, 22, 27 and 28, T.19N., R.20E., M.D.B.&M.<sup>15</sup> The proposed point of diversion is described as being located within the NE $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 30, T.19N., R.20E., M.D.B.&M.<sup>16</sup>

IX.

After all parties of interest were duly noticed by certified mail, a public administrative hearing was held on October 11, 1991, before representatives of the Office of the State Engineer at Carson City, Nevada.<sup>17</sup> The hearing was scheduled to determine the true present owner of Permit 12978, Certificate 3894, and Permit 12979, Certificate 3895, and to determine whether or not the water rights evidenced by said certificates had been forfeited under the terms of NRS 534.090.<sup>18</sup>

FINDINGS OF FACT

I.

Testimony was provided that the dairy (Model Dairy), which operated at the place of use under Permits 12978 and 12979, closed its doors in 1975 and no other dairy has operated at the place of use since that date.<sup>19</sup> From 1985 through 1991 employees of the Office of the State Engineer physically visited the Truckee Meadows Groundwater Basin and conducted what are known as groundwater pumpage inventories which documented the use of water as authorized

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<sup>15</sup>File No. 56300-T, official records in the Office of the State Engineer.

<sup>16</sup>Exhibit No. 9.

<sup>17</sup>Public administrative hearing before the State Engineer, October 11, 1991. (Hereinafter "Transcript".)

<sup>18</sup>The State Engineer notes a typographical error in the hearing notice found in Exhibit No. 1 as it identifies the forfeiture statute as NRS 533.090. However, the forfeiture statute with regard to underground waters is found in NRS 534.090.

<sup>19</sup>Transcript, p. 18.

under Permit 12978, Certificate 3894, and Permit 12979, Certificate 3895, for each of those years.<sup>20</sup> For each of the years from 1985 through 1991 the pumpage inventories indicated that no water had been used as authorized under either certificate.<sup>21</sup> The employee who had been performing the pumpage inventories since 1987 testified that he had not found an existing well since he started doing the pumpage inventories, that his predecessor who trained him indicated that he had not found the wells, and that he had not seen cattle at the place of use since 1987.<sup>22</sup>

Barry Brooks, owner of Model Dairy from 1955 through July 1977, testified that the dairy had been sold in 1977.<sup>23</sup> Further evidence indicated that the dairy began using water supplied by Sierra Pacific Power Company in 1964,<sup>24</sup> and that the dairy only used Brooks Well 2A occasionally for approximately another two years after it began using water supplied by Sierra Pacific Power Company.<sup>25</sup>

Bob Esperance testified on behalf of the Airport Authority that Warehouse Market leased the Model Dairy facility prior to the Airport Authority's purchase of the property in January 1986 and used the facility to store cheese, equipment, display cases, and to clean and renovate equipment. However, Mr. Esperance had no personal knowledge of the existence of the wells or from where Warehouse Market obtained water.<sup>26</sup> The State Engineer finds that

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<sup>20</sup>Official records of the Office of the State Engineer.

<sup>21</sup>Exhibit No. 17, and official records of the Office of the State Engineer.

<sup>22</sup>Transcript, pp. 23 - 25.

<sup>23</sup>Transcript, pp. 27 - 30.

<sup>24</sup>Exhibit No. 16.

<sup>25</sup>Transcript, pp. 28 - 33; Exhibit No. 10; Exhibit No. 13.

<sup>26</sup>Transcript, pp. 34 - 40.

even if the Warehouse Market used the wells, which the State Engineer finds unlikely as water was supplied to the facility by Sierra Pacific Power Company, no evidence was provided which showed any use of the wells and the commercial use by Warehouse Market was not authorized under the certificates.

The State Engineer further finds that from 1985 through 1991 no water was used as authorized by Permit 12978, Certificate 3894 or Permit 12979, Certificate 3895, and no evidence was provided that showed any use of either Brooks Well No. 1, 2A or 2B during that period of time thereby working a forfeiture of the water rights.

## II.

While a portion of the hearing in this matter was concerned with the dispute between the Airport Authority and Westpac Utilities as to ownership of Permits 12978 and 12979, since that time the State Engineer has initiated a policy that the Division of Water Resources does not resolve disputes between private parties as to the ownership of water rights. In light of the State Engineer's decision that these certificates are forfeited, if the parties choose to pursue the matter as to ownership they can either settle it between themselves or in the appropriate court and then inform the State Engineer as to the outcome. The State Engineer finds he will not rule on the ownership issue.

## III.

The State Engineer finds that a permit cannot be granted under change applications 51868, 51869, 53786, 53787, 56299-T, 56300-T because there is no valid water right that can be changed by the applications.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and of the subject matter of this action and determination.<sup>27</sup>

II.

The State Engineer concludes that in order for a water right permit to ripen into a water right certificate the permittee must file proof of the application of the water to beneficial use within the time frame set forth in the permit or in any extension of time granted by the State Engineer.<sup>28</sup> After a certificate is issued on a permit, failure for five successive years on the part of the certificate holder to use beneficially all, or any part of the underground water of the State of Nevada for the purpose for which the right is acquired or claimed, works a forfeiture of the right to the use of that water to the extent of the nonuse.<sup>29</sup>

Forfeiture must be demonstrated by clear and convincing evidence. Clear and convincing evidence is that evidence which falls somewhere between a preponderance of the evidence and the higher standard of beyond a reasonable doubt.<sup>30</sup> To establish a fact by clear and convincing evidence a party must persuade the trier of fact that the proposition is highly probable, or must produce in the mind of the fact finder a firm belief or conviction that the allegations in question are true.<sup>31</sup> The State Engineer concludes based on the pumpage inventories showing no use of the water from 1985 - 1991, on the evidence that the dairy began to use

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<sup>27</sup> NRS Chapters 533 and 534.

<sup>28</sup> NRS 533.410.

<sup>29</sup> NRS 534.090.

<sup>30</sup> 1 Clifford S. Fishman, Jones on Evidence Section 3:10, at 238 (7th Ed. 1992).

<sup>31</sup> Id. at 239.

water supplied by Sierra Pacific Power Company in 1964, on the fact that the dairy closed in 1975, and on the lack of any evidence of use of the waters as allowed under the Permits/Certificates, that no water was placed to beneficial use as authorized under Permit 12978, Certificate 3984, or under Permit 12979, Certificate 3985. The State Engineer further finds there is clear and convincing evidence that no water was used for the purpose for which the water rights were acquired under Permit 12978, Certificate 3984 or under Permit 12979, Certificate 3985, for five successive years working a forfeiture of the water rights under Nevada law.

III.

NRS 533.345(1) provides that an application can be filed to change the point of diversion, manner or place of use of water already appropriated. Water already appropriated, in reference to a change application, refers to water represented by a water right permit or certificate in good standing.<sup>32</sup> Where a water right certificate has been forfeited the water right is no longer valid; thus, it is not in good standing and cannot be used to support a change application.

In the case of change Applications 51868, 51869, 53786, 53787, 56299-T, 56300-T the underlying certificates have been forfeited. The State Engineer concludes that as Certificates 3894 and 3895 have been forfeited no water right exists that can be used to support the change applications.

RULING

The right to beneficially use 0.0062 cubic feet per second (cfs) or sufficient water for 200 cattle for stockwatering and barn use under Permit 12978, Certificate 3894 appurtenant to the SE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 30, T.19N., R.20E., M.D.B.&M. is hereby declared forfeited based on the failure for a period of five successive years on the part of the holder of the right to beneficially use

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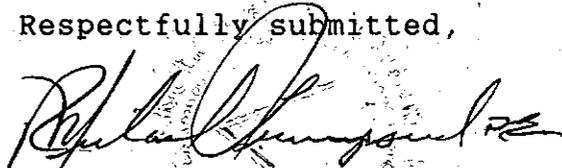
<sup>32</sup>NRS 533.324.

the water for the purposes for which the subject water right was acquired. No water right remains in existence under Certificate 3894.

The right to beneficially use 0.085 cubic feet per second of water for dairy processing and domestic use under Permit 12979, Certificate 3895 appurtenant to the NE $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 30, T.19N., R.20E., M.D.B.&M. is hereby declared forfeited based on the failure for a period of five successive years on the part of the holder of the right to beneficially use the water for the purposes for which the subject water right was acquired. No water right remains in existence under Certificate 3895.

Change Applications 51868, 51869, 53786, 53787, 56299-T, 56300-T are hereby denied as the underlying certificates which supported the change applications have been forfeited.

Respectfully submitted,



R. MICHAEL TURNIPSEED, P.E.  
State Engineer

RMT/SJT/ab

Dated this 19th day of  
November, 1996.