

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

IN THE MATTER OF THE POSSIBLE)
FORFEITURE OF PERMIT 17300,)
CERTIFICATE 5063, FILED TO)
TO APPROPRIATE THE PUBLIC WATERS OF)
AN UNDERGROUND SOURCE WITHIN THE)
CARSON VALLEY HYDROGRAPHIC BASIN)
(105), DOUGLAS COUNTY, NEVADA.)

RULING

5097

GENERAL

I.

Permit 17300 was granted by the State Engineer to San Leandro Rock Co. on September 26, 1957, to appropriate 1.0 cubic foot per second (cfs) of the underground waters of the Carson Valley Hydrographic Basin for industrial and domestic use purposes, i.e., the washing of sand and gravel in a gravel plant and for the office and grounds connected with the plant within the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 30, T.13N., R.20E., M.D.B.&M.¹ The point of diversion is described as being located within the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 30. After Proof of Application of Water to Beneficial Use was filed, the State Engineer issued Certificate 5063 on December 30, 1960, for 1.0 cfs.²

II.

By letter dated April 1, 1993, Permit 17300, Certificate 5063 was assigned to Eagle Valley Construction (Attn: Ivan Farnworth) in the records of the State Engineer. The water right was transferred pursuant to a deed dated December 24, 1991.³ On August 29, 1996, the records of the State Engineer were revised to reflect that a 0.206 cfs portion of Permit 17300 was assigned to the James Michael Hickey Family Trust Agreement dated June 7, 1995, and a 0.017 cfs portion assigned to the Town of Minden.

¹ File No. 17300, official records in the office of the State Engineer.

² Exhibit No. 2, public administrative hearing before the State Engineer, May 22, 2001 (hereinafter "Exhibit No.").

³ Exhibit No. 4.

III.

On October 7, 1998, the Town of Minden filed Application 64507 to change the point of diversion, place, and manner of use of 12.30 acre-feet annually (afa), a portion of the water previously appropriated under Permit 17300, Certificate 5063.

IV.

On May 7, 1999, John C. Serpa filed Application 65114 to change the point of diversion, place, and manner of use of 0.777 cfs, not to exceed 562.525 afa, a portion of the water previously appropriated under Permit 17300, Certificate 5063.

V.

By letter dated May 11, 1999, the State Engineer informed the permittee holders that the water right issued under Permit 17300, Certificate 5063, may be subject to forfeiture pursuant to NRS § 534.090.⁴ The notification informed the permit holders that the water use inventory and field investigations performed by the Division of Water Resources found that, except for 10 afa used under Temporary Permits 60067-T and 61224-T,⁵ there had been no pumpage under the permit since at least November 14, 1990. The State Engineer informed the permittees that if they had any information that showed the water was used for the purpose for which the permit was issued subsequent to November 14, 1990, that information should be supplied to the State Engineer within 60 days of the date of the letter. At the time of the State Engineer's notice of possible forfeiture, the owners of record of Permit 17300, Certificate 5063, in the office of the State Engineer were Eagle Valley Construction Company, Town of Minden, and Hickey Family Trust Agreement dated June 7, 1995.

⁴ Exhibit No. 23.

⁵ In the 1995 and 1996 water years.

VI.

At the time of the public administrative hearing on the possible forfeiture of Permit 17300, Certificate 5063, the holders of the water right were: the Town of Minden (0.017cfs); James Michael Hickey Family Trust Agreement dated June 7, 1995 (0.206 cfs); and John Serpa (0.777cfs).⁶

VII.

Instead of filing any information as to water use as directed by the State Engineer's letter, an agent for John C. Serpa on July 9, 1999, filed an Application for Extension of Time to Prevent a Forfeiture and indicated that if the Application for Extension of Time was denied, a public administrative hearing on the possible forfeiture was requested.⁷ The Application for Extension of Time to Prevent a Forfeiture was pending at the time of the public administrative hearing, and also will be considered in this ruling.

VIII.

After all parties of interest were duly noticed by certified mail, a public administrative hearing was held on May 22, 2001, before representatives of the office of the State Engineer regarding the possible forfeiture of Permit 17300, Certificate 5063, at Carson City, Nevada.⁸

FINDINGS OF FACT

I.

The State Engineer finds that NRS § 534.090 provides that after a certificate is issued on a permit, failure for five successive years on the part of the certificate holder to beneficially use all, or any part, of the underground water of the

⁶ Exhibit No. 4.

⁷ Exhibit No. 24.

⁸ Transcript, public administrative hearing before the State Engineer, May 22, 2001 (hereinafter "Transcript").

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.⁹

For water rights in basins for which the state engineer keeps pumping records, if the records of the state engineer indicate at least 4 consecutive years, but less than 5 consecutive years, of nonuse of all or any part of such a water right which is governed by this chapter, the state engineer shall notify the owner of the water right, as determined in the records of the office of the state engineer, by registered or certified mail that he has 1 year after the date of the notice in which to use the water right beneficially and to provide proof of such use to the state engineer or apply for relief pursuant to subsection 2 to avoid forfeiting the water right. (Emphasis added.) If, after 1 year after the date of the notice, proof of beneficial use is not sent to the state engineer, the state engineer shall, unless he has granted a request to extend the time necessary to work a forfeiture of the water right, declare the right forfeited within 30 days.

* * *

2. The state engineer may, upon the request of the holder of any right described in subsection 1, extend the time necessary to work a forfeiture under that subsection if the request is made before the expiration of the time necessary to work a forfeiture. (Emphasis added.) The state engineer may grant, upon request and for good cause shown, any number of extensions, but a single extension must not exceed 1 year. In determining whether to grant or deny a request, the state engineer shall, among other reasons, consider:

- (a) Whether the holder has shown good cause for his failure to use all or part of the water beneficially for the purpose for which his right is acquired or claimed;
- (b) The unavailability of water to put to a beneficial use which is beyond the control of the holder;
- (c) Any economic conditions or natural disasters which made the holder unable to put the water to that use; and
- (d) Whether the holder has demonstrated efficient ways of using the water for agricultural purposes, such as center-pivot irrigation.

⁹ NRS § 534.090.

II.

The Hearing Officer noticed on May 18, 2001, prior to the date of the administrative hearing, that the James Michael Hickey Family Trust had not claimed its certified notice of the hearing.¹⁰ The certified notice had been returned to the office of the State Engineer on May 7, 2001, marked by the U.S. Postal Service as "Unclaimed". The notice was re-sent to this permit holder on May 8, 2001; however, this notice also came back as unclaimed. The Hearing Officer on May 18, 2001, prior to the date of the hearing, telephoned the James Michael Hickey Family Trust and was informed of something to the effect that the "postman always comes while we're at lunch, and we don't usually pick up certified mail figuring it is junk mail." A copy of the hearing notice was sent by facsimile to the James Michael Hickey Family Trust on May 18, 2001. No one appeared at the time and place of the public administrative hearing on behalf of permit holder James Michael Hickey Family Trust Agreement dated June 7, 1995; therefore, the State Engineer finds no evidence was provided to support any claim to prevent the forfeiture of the 0.206 cfs portion of Permit 17300, Certificate 5063, held by the James Michael Hickey Family Trust Agreement dated June 7, 1995.

III.

The State Engineer finds that evidence exists in the records of the State Engineer that the well authorized under Permit 17300, Certificate 5063, was plugged and abandoned on December 12, 1995,¹¹ and that a firehouse and parking lot had been constructed on the site of the former gravel operation by 1996.

¹⁰ Transcript, pp. 5-6.

¹¹ Exhibit No. 17; Transcript, pp. 36-37.

IV.

Permit 17300, Certificate 5063, was issued at a time when state engineers issued some permits where the only quantification of the total water right was by a diversion rate. A total duty of acre-feet authorized under the permit was not identified in the permit or certificate. This permit and certificate are of that type. However, every permit and certificate is limited to the ultimate quantity of water put to beneficial use at the time of filing Proof of Beneficial Use. In those instances where a certificate or permit does not provide for a specific total quantity of water authorized, when the State Engineer is performing pumpage inventories, his field investigators will take the diversion and expand it as if the well ran 24 hours a day, 7 days a week, for 365 days a year as an estimate of the absolute maximum amount of water that could have ever been applied to beneficial use under such a permit. The State Engineer finds in this instance, that would equate to 722.11 afa.¹² However, the State Engineer finds that evidence provided by the last operator of the gravel operation, as indicated below, indicates that nothing near that quantity of water has been used in a long time, if ever. Ninety-five (95) acre-feet described below was used in 1990.

V.

Each year from 1987 through 1998 employees of the office of the State Engineer performed what are known as groundwater pumpage inventories, which are on-site inspections for each water right permit in the groundwater basin where pumpage inventories are conducted, and which documented the use of water under Permit 17300, Certificate 5063.¹³ The purpose of groundwater pumpage inventories is an overall basin management tool. By looking at the amount of water pumped from the groundwater basin under each

¹² Transcript, p. 21.

¹³ Transcript, pp. 19-31; Exhibit Nos. 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, and 21.

permit/certificate authorized by the State Engineer, and documenting illegal uses, the State Engineer is able to approximate the amount of ground water pumped from the groundwater basin. A groundwater pumpage inventory's purpose is not really to serve as a policing tool for taking enforcement actions against illegal uses of water, but it is used as a tool to document the use of water under permits and certificates issued by the State Engineer.

Testimony was provided that pumpage inventories for the Carson Valley groundwater basin began in 1988, and in that year the staff from the Division of Water Resources constructed a pumpage inventory for the water year 1987 (1986-1987), and for water year 1988 (1987-1988).¹⁴ In June 1988, field investigators from the Division of Water Resources visited the site and contacted the Manager/Dispatcher of the gravel operation¹⁵ and inquired as to how much water was used under Permit 17300 the previous two years.¹⁶ The Manager/Dispatcher, upon further research, informed the field investigators in a telephone conversation that water use was 150,000 gallons per day, 20 days a month, for 10 months out of the year.¹⁷ The 1987 pumpage inventory, which covers the water year of 1986-1987, and the 1988 pumpage inventory, which covers the water year of 1987-1988, indicated that 92.1 acre-feet had been used as authorized under Permit 17300.¹⁸ This number was calculated by Division of Water Resource's employees from the figures of use provided by the manager of the user of the water,¹⁹ and was considered to be very

¹⁴ Transcript, pp. 19-31, 46, 61-64.

¹⁵ Exhibit Nos. 6 and 7; Transcript, pp. 19-32, 61-63.

¹⁶ The Division of Water Resources was creating a pumpage inventory for the 1987 water year (1986-1987) and for the water year 1988 (1987-1988) in 1988.

¹⁷ Exhibit Nos. 6 and 7; Transcript, pp. 13-47.

¹⁸ Exhibit Nos. 5 and 8.

¹⁹ Exhibit Nos. 6 and 7; Transcript, pp. 21-24, 30, 47-48, 62-64.

reasonable, because on first impression the field investigators believed that no use of the water was taking place.²⁰ At the administrative hearing, the agent for Mr. Serpa argued that the Manager/Dispatcher was not someone who could be relied upon to give the Division of Water Resources a figure as to how much water the company used the previous two years. The State Engineer finds it was and is completely reasonable for field investigators from the Division of Water Resources to rely on the representations made by the manager of a company as to how much water that company used in previous years. The State Engineer finds calculations based on facts as to water use provided by the manager of an operation, in conjunction with a visit to the site, are reliable and clear and convincing evidence to support the numbers entered in the 1987 and 1988 pumpage inventories, finds the water use in the 1987 and 1988 water years was 92.1 acre-feet for each year, and finds that challenges to the credibility of the manager made by a new holder of a portion of the permit, which portion was not even acquired until over 10 years past the contact with the manager, do not hold much merit.

VI.

The 1989 pumpage inventory, which covers the water year of 1988-1989, indicated that 92.0 acre-feet had been used as authorized under Permit 17300.²¹ This was a figure that was calculated by staff after an on-site inspection,²² perceiving no difference in water use from the previous year, talking to employees who indicated the operation was running like it had always been running, but rounding off the figure.²³

²⁰ Transcript, pp. 50-55.

²¹ Exhibit No. 9.

²² Transcript, p. 47.

²³ Transcript, pp. 32, 64-65.

The 1990 pumpage inventory, which covers the water year of 1989-1990, and was performed on November 14, 1990,²⁴ indicated that 95.0 acre-feet had been used as authorized under Permit 17300.²⁵ This was a figure that was calculated by staff after an on-site inspection, perceiving no difference in water use from the previous year, talking to employees who indicated the operation was running like it had always been running, but adding some 2.5 acre-feet for the domestic use, and rounding off the figure.²⁶ The State Engineer finds that calculations based on facts as to water use provided by the manager of the operation, as well as the site visit, are reliable and clear and convincing evidence to support the numbers entered in the 1987, 1988, 1989, and 1990 pumpage inventories, finds the water use in the 1989 water year was 92.0 acre-feet and in the 1990 water year was 95.0 acre-feet, and this was the last year there is any evidence of water use as authorized under Permit 17300, Certificate 5063. Therefore, the State Engineer finds as to 627.11 acre-feet of water under the permit there is clear and convincing evidence of non-use of the water right for the 11 year period of 1987 through 1999 prior to the notice of possible forfeiture being sent out in May 1999.

VII.

Eagle Valley Construction Company took over ownership of the gravel plant by deed dated December 24, 1991.²⁷ The 1991 pumpage inventory, which covers the water year of 1990-1991, and was performed on December 6, 1991,²⁸ indicated that zero acre-feet had been used as authorized under Permit 17300.²⁹ This was a figure

²⁴ Exhibit No. 7.

²⁵ Exhibit No. 10.

²⁶ Exhibit No. 10; Transcript, pp. 47, 54, 65.

²⁷ Exhibit No. 4.

²⁸ Exhibit No. 7.

²⁹ Exhibit No. 12.

that was determined by staff after an on-site inspection where they found the plant to be all locked up, and no one was there. In previous years there had been someone there at this time of the year. The field investigators attempted to call the telephone numbers on signs which were posted, but found no one answering the telephones.¹⁰

Mr. Serpa's agent argued that since the plant only operated 10 months out of the year when Eagle Valley was operating it, it was reasonable that no one was there at that time, but that the failure of someone to be there at the time of field inspection did not indicate no water use for the water year. In the previous year, when the Division of Water Resource's employees had been there merely three weeks before, they had found employees on site.¹¹ While Mr. Serpa's agent argued this was an insufficient way to investigate if water had been used this water year, the State Engineer finds the staff made the attempts necessary to find some activity related to the site, was a reasonable interpretation of whether water had been used, and that while Mr. Serpa's agent argues water was used earlier in the year, he did not provide any evidence to show proof of any use of the water; therefore, the State Engineer doubts the validity of the allegation.

VIII.

The 1992 pumpage inventory, which covers the water year of 1991-1992, indicated that zero acre-feet had been used as authorized under Permit 17300.¹² This was a figure that was determined by staff after an on-site inspection, and finding that the plant site was empty, there was no equipment, no berms, no ponds as if gravel was being washed, and the office was shut up.¹³

¹⁰ Transcript, pp. 65-66.

¹¹ Exhibit No. 7.

¹² Exhibit No. 13.

¹³ Transcript, pp. 65-66, 77-78.

The 1993 pumpage inventory,³⁴ which covers the water year of 1992-1993, the 1994 pumpage inventory,³⁵ which covers the water year of 1993-1994, the 1995 pumpage inventory,³⁶ which covers the water year of 1994-1995, the 1996 pumpage inventory,³⁷ which covers the water year of 1995-1996, the 1997 pumpage inventory,³⁸ which covers the water year of 1996-1997, the 1998 pumpage inventory,³⁹ which covers the water year of 1997-1998, and the 1999 pumpage inventory,⁴⁰ which covers the water year of 1998-1999 all were performed in the same manner as those pumpage inventories described above, and each time the site was found unoccupied⁴¹ and all indicated that zero acre-feet had been used as authorized under Permit 17300. The State Engineer finds there is clear and convincing evidence that from 1990 through 1999 no water was used as authorized from the point of diversion under Permit 17300 or in the manner of use authorized under the permit.

IX.

In response to the State Engineer's notice of possible forfeiture dated May 11, 1999, on July 9, 1999, an agent for Mr. John Serpa filed an Application for Extension of Time to Prevent a Forfeiture in which he argues that the filing of change Application 65114 on May 7, 1999, prior to the State Engineer's notice of possible forfeiture dated May 11, 1999, "cured" any possible forfeiture of the water right even though he further

³⁴ Exhibit No. 14.

³⁵ Exhibit No. 15.

³⁶ Exhibit No. 16.

³⁷ Exhibit No. 18.

³⁸ Exhibit No. 19.

³⁹ Exhibit No. 20.

⁴⁰ Exhibit No. 21.

⁴¹ Transcript, p. 78.

indicates that that he does not know the date and extent the water was used last under Permit 17300.⁴² Mr. Serpa argues that Nevada Revised Statute § 534.090 provides in part that the State Engineer may, "upon the request of the holder of any right described in subsection 1, extend the time necessary to work a forfeiture under that subsection if the request is made before the expiration of the time necessary to work a forfeiture." The State Engineer finds the Application for Extension of Time to Prevent a Forfeiture was filed after the date of the May 11, 1999, notice of possible forfeiture; therefore, it is not timely because the claim of forfeiture had already begun. The State Engineer further finds that the Application for Extension of Time to Prevent a Forfeiture was filed long after the 5 years of non-use had run, and, therefore, is also not timely as it must be filed before the expiration of the time necessary to work a forfeiture.

X.

Mr. Serpa also alleges in the Application for Extension of Time to Prevent a Forfeiture that in 1995 the Nevada State Legislature instituted a process whereby the State Engineer was required to notify the water-right holder where 4 years of non-use had occurred, and that the State Engineer never sent any such notice to the holders of Permit 17300, and he should have been offered a 4-year non-use letter.

As to Mr. Serpa's argument that the State Engineer had not provided the permittee with a four-year notice of non-use of the water under the provisions of Nevada Revised Statute § 534.090(1), NRS § 534.090 provides that if the records of the State Engineer indicate at least four consecutive years, but less than 5 consecutive years, of non-use of all or any part of such water right then the State Engineer is to provide the permittee with notice of possible forfeiture. The legislature was very clear in its language that if more than 5 years of non-use of all or a portion of the water right had passed prior to the passage of the

⁴² Exhibit No. 24.

amendment to NRS § 534.090, which added the provision for four-year non-use notice in 1995, the State Engineer was not required to provide those persons with a four-year notice of non-use. The State Engineer finds that since more than 5 years of non-use of the major portion of this water right had passed prior to 1995, the State Engineer was not required by law to provide the permittee with a four-year non-use notice of possible forfeiture.

XI.

Nevada Revised Statute § 533.090(2) provides that in considering an Application for Extension of Time to Prevent a Forfeiture, the State Engineer may extend the time necessary to work a forfeiture under that subsection if the request is made before the expiration of the time necessary to work a forfeiture. The State Engineer in determining whether to grant or deny a request is to consider, among other reasons: (a) whether the holder has shown good cause for his failure to use all or part of the water beneficially for the purpose for which his right is acquired or claimed; (b) the unavailability of water to put to a beneficial use which is beyond the control of the holder; (c) any economic conditions or natural disasters which made the holder unable to put the water to that use; and (d) whether the holder has demonstrated efficient ways of using the water for agricultural purposes, such as center-pivot irrigation.

The State Engineer finds, as established by the Nevada Supreme Court in the Town of Eureka case⁴¹, the filing of a change application does not cure a forfeiture, only substantial beneficial use of the water subject to the possible forfeiture prior to the notice of possible forfeiture can be considered in

⁴¹ Town of Eureka v. State Engineer, 108 Nev. 63 (1992).

any analysis of whether a water right has been cured." The State Engineer finds that the provisions of NRS § 533.090(2) for filing an Application for Extension of Time to Prevent a Forfeiture clearly indicate that whether or not an extension is granted is discretionary with the State Engineer, and the mere filing of an application does not mean the granting of one. The State Engineer finds Mr. Serpa did not provide any good cause for the failure on the part of the permit holders to use all or part of the water beneficially for the purpose for which his right is acquired or claimed. The State Engineer finds no evidence was presented to indicate the water was unavailable for beneficial use which was beyond the control of the holder, or that any economic conditions or natural disasters made the holders of the water right unable to put the water to that use. The State Engineer finds that 11 years of non-use had occurred as to the greatest portion of the water right prior to the effective date of the NRS § 533.090 4 year non-use notice provision.

" See also, Bing Construction Co. of Nevada, Inc. v. State Engineer, In and for the Ninth Judicial District Court, Order dated August 16, 2000, wherein the District Court of the jurisdiction in which this water right exists held that actions other than actual application of water to beneficial use do not cure a forfeiture. Citing to Wheatland Irrigation Dist. v. Laramie Rivers Co., 659 P.2d 561 (Wyo. 1983). Only actual use of the water prevents a forfeiture. The court held that the petitioners attempt to demonstrate cure to the forfeiture through use of the water rights during the approval process with Douglas County for plans to build a subdivision, rather than actual use of the water, was insufficient to argue cure of the forfeiture. See also, State Engineer's Ruling No. 4916, dated May 5, 2000, where the State Engineer held that the filing of a change application does not prevent the State Engineer from determining whether a water right requested for a change is subject to forfeiture nor is the filing of a change application a "use" of water that prevents a declaration of forfeiture.

XII.

On October 7, 1998, the Town of Minden filed change Application 64507 requesting to change the point of diversion, place of use, and manner of use of a portion of 12.30 afa of the water previously appropriated under Permit 17300, Certificate 5063. By letter dated July 9, 1999, the Town of Minden responded to the State Engineer's notice of possible forfeiture indicating that the town acquired its 12.30 afa portion of Permit 17300 by the development approval process and began providing water service to the commercial properties within the place of use beginning in 1995. Since that time almost complete development of the property has occurred and the town is actively purveying water to each developed parcel. The Town of Minden described how it has expanded the place of use under other water rights it holds to include the place of use authorized under Permit 17300. For example, Exhibit No. 40 shows how the Town of Minden has expanded its place of use under Permits 49954-49959, inclusive, and those permits now encompass within their places of use the place of use where the gravel operation used to be physically located. It indicated that under Applications 60635-60641, inclusive, it further expanded its place of use⁴⁵.

Nevada Revised Statute § 533.325 provides that any person who wishes to appropriate any of the public waters, or to change the place of diversion, manner of use or place of use of water already appropriated, shall, before performing any work in connection with such appropriation, change in place of diversion or change in manner or place of use, apply to the state engineer for a permit to do so. The State Engineer finds no permit had been granted to change the point of diversion of the water appropriated under Permit 17300 prior to use of water by the Town of Minden out of a different well to serve the place of use under Permit 17300; therefore, any diversion out of another well permitted for the Town of Minden's use to service the place of use under Permit

⁴⁵ Exhibit No. 41.

17300 was use of water under those permits, and not under Permit 17300 or the change application the Town had filed. The State Engineer finds that the only authorized point of diversion for use of the water under Permit 17300 is that well described in the permit, and the use of water out of another well to this place of use is not an authorized use of water under Permit 17300, and cannot be used to support a claim of cure as to the Town of Minden's portion of the water right. The State Engineer finds that 8 years of non-use of the water right had occurred prior to the Town of Minden filing its change application.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁴⁶

II.

The permittee raised a concern in its December 4, 1998, letter that the State Engineer had not provided the permittee with a four-year notice of non-use of the water under the provisions of Nevada Revised Statute § 534.090(1). The State Engineer concludes that since more than 5 years of non-use had passed as to the major portion of the water right under Permit 17300 prior to 1995 the State Engineer was not required by law to provide the permittee with a four-year non-use notice of possible forfeiture.

III.

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.⁴⁷ To establish a fact by clear and convincing evidence, a party must persuade the trier of

⁴⁶ NRS chapters 533 and 534.

⁴⁷ 1 Clifford S. Fishman, Jones on Evidence Section 3:10, at 238 (7th Ed. 1992).

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."⁴⁸

The State Engineer concludes that clear and convincing evidence is found in the pumpage inventories, site inspections, and other evidence that for more than five successive years from 1990 through 1999 no water was placed to beneficial use as authorized under Permit 17300. Further, the pumping of water out of another Town of Minden well authorized under another permit number is not a beneficial use of water as authorized under Permit 17300, Certificate 5063.

IV.

The State Engineer concludes as to the 0.206 cfs, portion of the water right held by the James Michael Hickey Family Trust, that the evidence is clear and convincing as to the non-use of that portion of the water right, that no evidence was presented to show use of the water, and the water right is subject to forfeiture.

V.

The State Engineer concludes that the Town of Minden's use of water out of a well authorized under another permit to service this place of use does not "cure" the forfeiture of a portion of the water right under Permit 17300 since the use of water under Permit 17300 was not authorized out of the Town of Minden's well as the State Engineer had not granted a permit to do so. The State Engineer concludes there is clear and convincing evidence of non-use of the Town of Minden's portion of Permit 17300, Certificate 5063 for the statutory period of time prior to the filing of the change application, and the water right is subject to forfeiture.

⁴⁸ Id. at 239.

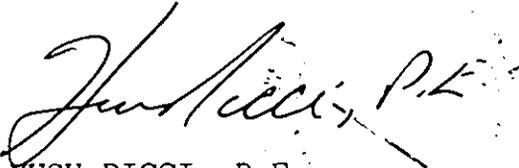
VI.

The State Engineer concludes that there is clear and convincing evidence of non-use for the statutory period of that portion of the water right purchased by Mr. Serpa, that no evidence was presented to show use of the water, and the water right is subject to forfeiture. The State Engineer concludes the Application for Extension of Time to Prevent a Forfeiture was not timely filed as it was filed after the time had passed for working the forfeiture, and there is no evidence to support a reason for granting the extension.

RULING

The Application for Extension of Time to Prevent a Forfeiture filed by Mr. Serpa is hereby denied. Certificate 5063 is hereby declared forfeited because of the failure for a period exceeding five successive years on the part of the holders of the water right to beneficially use the water for the purposes for which the subject water right was acquired.

Respectfully submitted,



HUGH RICCI, P.E.
State Engineer

HR/SJT/jm

Dated this 11th day of
January, 2002