

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

IN THE MATTER OF THE FORFEITURE )  
OF PERMIT 45531, CERTIFICATE )  
11433, PAHRUMP VALLEY GROUNDWATER )  
BASIN (162), NYE COUNTY, NEVADA. )

RULING

# 4355

GENERAL

I.

Application 45531 was filed by Edward J. and Warren M. Lewis on April 13, 1982, to change the place of use of 1.15 cubic feet per second (cfs) of the underground waters of the Pahrump Valley Groundwater Basin, previously appropriated under Permit 27536, Certificate 8230. Permit 45531 was approved on December 14, 1982, for 1.15 cfs for irrigation and domestic use. Certificate 11433 under Permit 45531 was issued on May 30, 1986, for 0.97 cfs of water and not to exceed 600 AFA for the irrigation of 120 acres of land located within portions of the NE $\frac{1}{4}$  and the NW $\frac{1}{4}$  of Section 32, T.19S., R.53E., M.D.B.&M. The point of diversion is located within the NE $\frac{1}{4}$  NE $\frac{1}{4}$  of said Section 32.<sup>1</sup>

II.

In January 1990 documents were submitted to the Office of the State Engineer requesting assignment of the ownership of Permit 45531, Certificate 11433, from Edward J. and Warren M. Lewis to Preferred Equities Corporation. On September 12, 1990, Permit 45531, Certificate 11433, was assigned to show Preferred Equities as the owner of record.<sup>1</sup>

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<sup>1</sup> File No. 45531, official records in the office of the State Engineer.

III.

On August 28, 1992, a request to assign Permit 45531, Certificate 11433, to the Central Nevada Utilities Company was filed in the Office of the State Engineer. On November 2, 1993, Permit 45531, Certificate 11433, was assigned to the Central Nevada Utilities Company as owner of record in the Office of the State Engineer.<sup>1</sup>

FINDINGS OF FACT

I.

On October 6, 1989, Edward J. and Warren M. Lewis filed in the Office of the State Engineer an application for extension of time to avoid the forfeiture of Certificate 11433.<sup>1</sup> Because Certificate 11433 was not issued under Permit 45531 until May 30, 1986, the first date that Certificate 11433 could even be considered for forfeiture was May 31, 1991.<sup>2</sup> On October 11, 1989, the Office of the State Engineer returned the request for extension of time to the permittee because the request was prematurely filed.<sup>1</sup> If an extension of time is granted, it is granted for only one year from the date the extension was filed in the Office of the State Engineer. The State Engineer finds that if the October 6, 1989, request for extension of time had been granted it only would have been granted to October 6, 1990, seven months before any five year period of nonuse would have run.

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<sup>2</sup>Certificate 11433, dated May 30, 1986, Official Records in the Office of the State Engineer.

II.

On June 4, 1992, a second application for extension of time to avoid the forfeiture of Certificate 11433 was filed by Preferred Equities Corporation.<sup>1</sup> On December 15, 1992, an administrative hearing was held before the State Engineer in Las Vegas, Nevada, to consider the possible forfeiture of Permit 45531, Certificate 11433 and the 1992 application for extension of time to avoid the forfeiture.<sup>3</sup>

Each year from 1986-1991, employees of the Office of the State Engineer visited the Pahrump Valley and conducted what are known as groundwater pumpage inventories which documented the use of water under Certificate 11433 for each of the identified years.<sup>4</sup> The pumpage inventories indicated that from 1986-1991 no water had been used for irrigation as allowed under Certificate 11433.<sup>4</sup>

Testimony and evidence at the administrative hearing established that the 120 acres located within the NW $\frac{1}{4}$  and NE $\frac{1}{4}$  of Section 32, T.19S., R.53E., M.D.B.&M., described as the place of use under Permit 45531, Certificate 11433, were not cultivated or irrigated during the period 1986 through 1991, nor was water diverted from the source and placed to beneficial use under Permit 45531, Certificate 11433, during this time period.<sup>5</sup> Additionally,

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<sup>3</sup> Transcript, Public Administrative Hearing before the State Engineer, December 15, 1992.

<sup>4</sup> Hearing Exhibit 2, Public Administrative Hearing before the State Engineer, December 15, 1992.

<sup>5</sup> Transcript p. 11-12; Public Administrative Hearing Before the State Engineer, December 15, 1992.

the permittee did not supply any evidence that water was diverted and put to beneficial use during the period considered for forfeiture, 1986-1991.<sup>3</sup> The State Engineer finds that the pumpage inventories and the testimony of the individual who performed the inventories provide clear and convincing evidence that water was not used under Permit 45531, Certificate 11433 during the years 1986 through 1991. The State Engineer further finds the application for extension of time to avoid the forfeiture, filed on June 4, 1992, was filed after the statutory period of non-use had expired.

#### CONCLUSIONS

##### I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>6</sup>

##### II.

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>7</sup>

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<sup>6</sup> NRS Chapters 533 and 534.

<sup>7</sup> NRS 534.090.

III.

Because the law disfavors a forfeiture, there must be clear and convincing evidence of the statutory period of non-use, for the State Engineer to declare a forfeiture.<sup>8</sup>

IV.

An application for extension of time to avoid a forfeiture may be filed with the Office of the State Engineer,<sup>9</sup> and if the application is granted, it is granted for one year from the date the request for extension of time is filed.

V.

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>10</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>11</sup> The State Engineer concludes based on the pumpage inventories showing no use of the water from 1986-1991, and on the lack of any evidence of use of the waters as allowed under the Permit/Certificate, it is highly probable that no water was placed to beneficial use under Permit 45531, Certificate

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<sup>8</sup> Town of Eureka v. Office of the State Eng'r of Nevada, 108 Nev, 826 P.2d 948 (1991).

<sup>9</sup> NRS 534.090(2).

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

<sup>11</sup> Id. at 239.

11433. Thus, there is clear and convincing evidence that no water was used under Permit 45531, Certificate 11433, for five successive years working a forfeiture of the water right under Nevada law.

**VI.**

The State Engineer concludes that the request for extension of time to avoid the forfeiture filed on October 6, 1989, by Edward J. and Warren M. Lewis was prematurely filed, and was correctly returned to the permittee.

**VII.**

The State Engineer concludes that the request for extension of time to avoid the forfeiture filed on June 4, 1992, by Preferred Equities Corporation was not timely. Forfeiture had worked in 1991 when the permittee had failed to use the water for five successive years. The 1992 request for extension of time to prevent a forfeiture was filed after the five successive years of non-use had run; therefore, State Engineer could not under the law consider that request for extension of time.<sup>12</sup>

**RULING**

The right to beneficially use water under Permit 45531, Certificate 11433, is hereby declared forfeited because of failure for a period exceeding 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. As the application

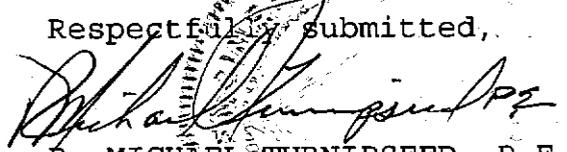
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<sup>12</sup>NRS 534.090.

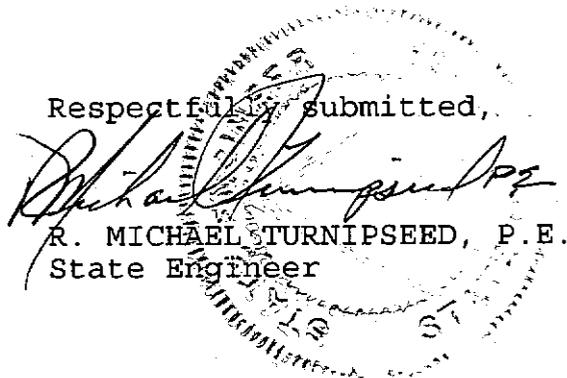
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for extension of time to avoid the forfeiture, filed on June 4, 1992, was not timely filed in conformance with NRS 534.090(2), it is hereby denied.

Respectfully submitted,



R. MICHAEL STURNIPSEED, P.E.  
State Engineer



RMT/SJT/ab

Dated this 4th day of  
JUNE, 1996