

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

IN THE MATTER OF THE POSSIBLE)
FORFEITURE OF PERMIT 17747,)
CERTIFICATE 5091, FILED TO)
APPROPRIATE THE PUBLIC WATERS OF)
THE TRUCKEE MEADOWS GROUNDWATER)
BASIN (87), WASHOE COUNTY, NEVADA.)

RULING
4658

GENERAL

I.

Permit 17747 granted by the State Engineer on March 17, 1959, authorized RNI Building Corporation to appropriate the underground waters of the Truckee Meadows Groundwater Basin for cooling (air and equipment) and domestic purposes within the N $\frac{1}{2}$ of Lot 4, SW $\frac{1}{4}$ of Section 11, T.19N., R.19E., M.D.B. & M.¹ The point of diversion is described as being located within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 11. After filing proof of beneficial use of the waters as required under the permit, the State Engineer issued Certificate 5091 on February 10, 1961, authorizing the appropriation of 1.0 cubic foot per second for cooling and domestic purposes at the Reno Gazette Journal Building located at 401 West Second Street, Reno, Nevada.¹

FINDINGS OF FACT

I.

By letter dated June 3, 1992, the State Engineer informed the permittee and Old College, the assessed owner of record of the relevant land, that a portion of the water right under Permit 17747, Certificate 5091, may be subject to forfeiture as described under Nevada Revised Statute § 534.090.¹ On March 6, 1998, Permit 17747 was assigned in the records of the office of the State Engineer to Old College.¹ By letter dated April 9, 1998, the State Engineer for a second time informed the permittee that a portion of the water right under Permit 17747, Certificate 5091, may be subject to forfeiture as described under Nevada Revised Statute § 534.090.¹

¹ File No. 17747, official records of the office of the State Engineer.

The State Engineer further notified the permittee that the records of the State Engineer indicated that from January 1, 1987, through January 1, 1992, the maximum quantity of water used from the permitted well was 42.0 acre-feet, and that from October 1, 1992, through September 30, 1997, the maximum water use was 33.0 acre-feet annually. The letter provided the permittee the opportunity to supply the State Engineer with any information it may have to demonstrate the maximum water usage from January 1, 1987, through January 1, 1992, and October 1, 1992, through September 30, 1997. The State Engineer finds the renotification of possible forfeiture on April 9, 1998, provided the permittee the opportunity to demonstrate any water use up and through April 9, 1998.

II.

The State Engineer finds that on April 22, 1998, the permittee's legal counsel filed a Memorandum with attached exhibits in response to the April 9, 1998, notice of possible forfeiture supplying the State Engineer with its evidence of water use through the relevant time frame.¹

III.

The following is found in the records of the State Engineer and the Memorandum and affidavits filed by the permittee. RNI used the water under Permit 17747 for cooling the printing presses, air conditioning and domestic use with cooling water discharged to the city's storm drain system, a tributary to the Truckee River. In 1982 the property and water rights were sold to Old College, and by 1987 the use of the building was decreasing and Old College closed down as an academic institution in late 1988.¹ In 1986, 422.31 acre-feet of water were used under Permit 17747.²

On March 18, 1988, the City of Reno issued a Notice of Violation to Old College that it was prohibited from discharging

² Exhibit C.13, Permittee's Memorandum in response to notice of possible forfeiture.¹

cooling water into the storm drain system.¹ The building saw minimal use from 1989 through 1994, and in 1994 Old College donated the property to the University of Nevada, however, retaining the water rights under Permit 17747, with the understanding that the well and water system could be used at UNR's discretion.¹ In 1996-1997, the University of Nevada began using the ground water for cooling and domestic purposes, including discharge into the storm drain until the City of Reno again ordered a stoppage due to code violations.¹ On September 12, 1998, Old College completed a retrofit of its cooling system and confirmed discontinuance of water use.¹ In the Permittee's Memorandum, it is indicated that from August 1996 through July 1997 40,041,000 gallons of water were pumped over an eleven month period totaling 122.88 acre-feet, and no water was used from August 1997 through November 1997.¹ Legal counsel for the permittee provided no evidence or reason why the air conditioning needs for August of 1996 to July of 1997 were three to four times that required for any of the previous 9 years. If they had converted to some other type of air conditioning then one must presume that they pumped the well down the storm drain simply to preserve the water right.

The State Engineer finds the permittee did not contest the State Engineer's records that from 1987 through 1991 the maximum quantity of water used was 41.74 acre-feet. The State Engineer further finds that the permittee's evidence as to the use of 122.88 acre-feet of water from August 1996 through July 1997 was not rebutted. The State Engineer finds that from January 1, 1987, through January 1, 1992, the maximum usage of water from the permitted well was 41.74 acre-feet, from October 1, 1992, through July 1996, the maximum usage of water from the permitted well was 33 acre-feet, and from August 1996 through July 1997 the maximum water use was 122.88 acre-feet annually.

IV.

The State Engineer finds that from 1987 through July 1996 water use under Permit 17747 was substantially reduced, and as provided for in NRS § 534.090, the permittee never filed a request for extension of time to prevent any possible forfeiture.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.³

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.⁴ Non-use must be shown by clear and convincing evidence.⁵ 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.⁶ 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.⁷

The State Engineer concludes clear and convincing evidence is found in the State Engineer's pumpage reports and the evidence

³ NRS Chapters 533 and 534.

⁴ NRS § 534.090.

⁵ Town of Eureka v. State Engineer, 108 Nev. 163, 862 P.2d 948 (1992).

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

⁷ Id. at 239.

provided by the permittee that between 1988 and 1997 the maximum quantity of water used under Permit 17747 was 122.88 acre-feet annually. The State Engineer concludes that any possible forfeiture was cured up to 122.88 acre-feet annually of water under Permit 17747.

III.

The permittee, citing to the case of Manse Spring, alleges that if the appropriator does not cause the non-use of the water (if the failure to use is not the fault of the appropriator) the standard for forfeiture is not met. That is, if the failure to place the water to beneficial use is completely beyond the control of the permittee, the forfeiture does not occur. The State Engineer does not agree that the permittee's interpretation of the Nevada Supreme Court's decision in Manse Spring, or Nevada statutory water law is complete.

NRS § 534.090 provides that the State Engineer may, upon the request of the holder of any ground water right, extend the time necessary to work a forfeiture, if the request is made before the expiration of the time necessary to work a forfeiture. The statute provides that the State Engineer may grant, upon a request and for good cause shown, an extension of the time to work a forfeiture. In considering whether to grant or deny a request, the State Engineer shall consider, among other reasons, whether the holder has shown good cause for the failure to use all or part of the water for the purpose for which the right was acquired, the unavailability of water which is beyond the control of the holder, or any economic conditions or natural disasters which made the holder unable to put the water to use.

Forfeiture works in a five year period, yet in early 1992 four years into the reduced use or non-use period, the permittee did not file a request for extension of time to prevent the working of the forfeiture. The State Engineer concludes that although the law provides a method by which to request an extension of time to

prevent the working of a forfeiture, the permittee did not timely file any request for extension of time, even though water use was substantially reduced after 1986.

IV.

The permittee in its Memorandum cites to the cases of Manse Spring, Alamo Water, Chavez, Hodges, Horse Creek, Morris, New Mexico Products, Rocky Ford, Schreck, Yentzer for the proposition that if failure to use the water is not the fault of the appropriator, if the failure to place the water to beneficial use is completely beyond the control of the permittee, or if the appropriator does not cause the non-use of the water, the standard for forfeiture is not met. The cases cited to by the permittee address the issues of no forfeiture for non-use in situations of drought or where the water fails to reach the point of diversion without the fault of the appropriator, but at all times he is ready, willing and able to put the water to beneficial use. The cases also address the issue of no forfeiture for non-use where the failure to use is a result of physical causes beyond the control of the appropriator, such as floods which destroy dams and ditches, or where water was wrongfully withheld depriving one of its use.

The cases ignore Nevada water law's statutory provision found in NRS § 534.090 providing that the State Engineer may, upon the request of the holder of any ground water right, extend the time necessary to work a forfeiture, if the request is made before the expiration of the time necessary to work a forfeiture and it meets the certain considerations identified above.

By March 1988 the City of Reno had ordered Old College to stop discharging cooling water into the storm drain, and by late 1988 Old College closed as an academic institution; therefore, by 1988 Old College knew it had reduced water use under Permit 17747. The State Engineer concludes that these reasons for inability to use the water beyond the permittee's control are not the same kinds of issues that were considered by the courts in the cases cited to by

the permittee, and the permittee failed to take advantage of the statutory procedure which may have afforded it an opportunity to have other factors considered to prevent the working of forfeiture of the rest of the water right which was not used above and beyond the 122.88 acre-feet.

V.

The permittee argues that an exception to the forfeiture should be recognized to the extent of 422.31 acre-feet (the amount of water last used in 1986) on the grounds that it was forced to discontinue use by the City of Reno; therefore, non-use was out of its control. This argument ignores the fact that the law provided means by which to file an extension of time to prevent the working of a forfeiture, and ignores the fact that the institution itself ceased to function as an academic institution as of late 1988. The Court in Manse Spring held that it would take into consideration the circumstances of the particular case, and would not cause to be forfeited or taken away valuable rights when the non-use of water was occasioned by justifiable causes. However, the Court went on to note that circumstances preventing a loss because of non-use should be **much stronger** where Section 8 (the forfeiture law) applies than in cases where said law does not apply (pre-statutory vested water rights).

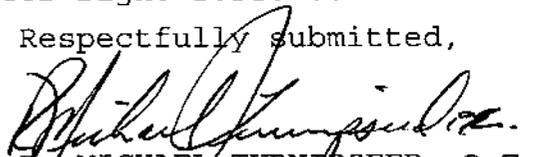
The State Engineer concludes that the forfeiture law applies to this water right and evidence of any circumstances attempting to show justifiable causes of non-use must be strong. The permittee had known since 1988 that it could not use the water for cooling purposes if it was going to discharge those waters to the storm drain system. Four years of non-use of the water had passed before the State Engineer notified the permittee in 1992 of its failure to use said waters and within that four years the permittee had not taken advantage of the law which provides for the filing of extensions of time to prevent a forfeiture. The State Engineer concludes that permittee's evidence of justifiable causes, in light

of the provisions in Nevada law for filing of extensions of time to prevent a forfeiture, does not raise to the level of uncontrollable circumstances found in the cases cited by the permittee which would prevent the working of a partial forfeiture above the 122.88 acre-feet of water actually used.

RULING

A portion of Permit 17747, Certificate 5091, is hereby declared forfeited because of the 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. Under Permit 17747, Certificate 5091, there remains in good standing as of July 1997 122.88 acre-feet of water with the remainder of the water right forfeited.

Respectfully submitted,


R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/SJT/cl

Dated this 30th day of
July, 1998.