

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

IN THE MATTER OF THE FORFEITURE OF )  
PERMIT 23834, CERTIFICATE 6614, )  
IN THE TRUCKEE MEADOWS GROUNDWATER )  
BASIN (087), WASHOE COUNTY, NEVADA. )

RULING

# 4740

GENERAL

I.

Permit 23834 was granted by the State Engineer to Washoe County Fair and Recreation Board on November 15, 1967, to appropriate 0.668 cubic feet per second of the underground waters of the Truckee Meadows Groundwater Basin for air conditioning purposes to serve the Pioneer Theater Auditorium within the NE¼ SE¼ of Section 11, T.19N., R.19E., M.D.B.&M. <sup>1</sup> The point of diversion is described as being located within the NE¼ SE¼ of said Section 11. After filing proof of beneficial use of the waters as allowed under the permit, the State Engineer issued Certificate 6614 on March 29, 1968, for 0.401 cubic feet per second, not to exceed 0.259 million gallons per day.<sup>1</sup>

II.

By letter dated November 3, 1998, the State Engineer informed the permittee that the water right issued under Permit 23834, Certificate 6614, may be subject to forfeiture pursuant to NRS § 534.090. The State Engineer informed the permittee that if it had any information that showed the water was used for the purpose for which the permit was issued within the five-year period prior to the date of the letter that it should submit that information to the State Engineer by December 4, 1998.

FINDINGS OF FACT

I.

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 State of Nevada for the purpose for which the right is acquired or

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<sup>1</sup> File No. 23834, official records in the office of the State Engineer.

claimed works a forfeiture of the right to the use of that water to the extent of the nonuse.<sup>2</sup>

Each year, but for 1992, from 1985 through 1998 employees of the office of the State Engineer performed what are known as groundwater pumpage inventories which document the use of water under Permit 23834, Certificate 6614.<sup>3</sup> The State Engineer finds that for each of the years from 1985 through 1998 the pumpage inventories indicate that no water was used as allowed under the permit.

## II.

In response to the State Engineer's letter of November 3, 1998, by letter dated December 4, 1998, Summit Engineering on behalf of the Reno-Sparks Convention and Visitors Authority ("RSCVA") (previously known as the Washoe County Fair and Recreation Board) requested a one-year extension of time to prevent the forfeiture of the permit/certificate and indicated that the well is still equipped with a motor and pump, and that more than one person has the authority to access systems that enable workers to keep the building and grounds in good working order. This leads to a situation where more than one person carries a set of keys for the room where the well resides, and may have at any time turned on the motor and pumped the water. The State Engineer finds the statement that several persons had access to the room and could have turned on the well lacks credibility as to proof of use of the water as authorized under the permit.

## III.

On February 11, 1999, a meeting was held at the Pioneer Theater with representatives of the RSCVA and the State Engineer's office. A memo from that meeting indicates that the well at issue does have an electric motor on the top of the casing, but that the power cable to the motor was severed and there was no electrical power being delivered to the motor.<sup>1</sup> The memo further indicates

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<sup>2</sup> NRS § 534.090.

<sup>3</sup> Official records in the office of the State Engineer.

that the discharge pump that originally led to the Truckee River from the cooling system has been disconnected and sealed.

The State Engineer finds that the Proof of Beneficial Use filed under Permit 23834 indicated that the water used under this permit returns to the Truckee River. If the discharge pump has been disconnected and sealed, the State Engineer finds the water cannot be used as authorized under the permit for a cooling system.

IV.

At the February 11, 1999, meeting, after visiting the authorized well, the group at the meeting then went to a room on the lowest level of the basement of the building which contains a "second well" in which there is a sump which pumps water out of the basement of the building. A representative for RSCVA contended that the activity of the sump pump constitutes a beneficial use of water under the permit.

The Proof of Completion filed under Permit 23834 indicated that the well under this permit was drilled to a depth of 485 feet. The State Engineer finds that Permit 23834 does not authorize the "use" of ground water for a sump pump and that the pumping of water out of the basement of Pioneer Theater does not constitute a beneficial use of water as allowed under the permit nor is the pumping of water from a sump, from an alleged "second well", a use of the groundwater for the authorized purpose of air conditioning.

V.

By letter dated February 26, 1999, a representative for the permittee indicated that at that time the well was not connected to the air conditioning coolant piping system and the motor was not connected to power, but that the well could be reconnected to the coolant piping system, the river discharge system and power with a minimal investment of time and finances.<sup>1</sup> The State Engineer finds that the permittee did not provide any credible evidence of use of the water as authorized under Permit 23834, Certificate 6614, during the period of 1985 to the present, the fact that minimal time and cost could reconnect the system is of no relevance, and the water right is subject to forfeiture.

## CONCLUSIONS

### I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>4</sup>

### 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). Nevada Revised Statute § 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 had passed prior to the passage of the 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 concludes that since more than 5 years of non-use 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.

### 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.<sup>5</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>6</sup>

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<sup>4</sup> NRS Chapters 533 and 534.

<sup>5</sup> Clifford S. Fishman, Jones on Evidence Section 3:10, at 238 (7th Ed. 1992).

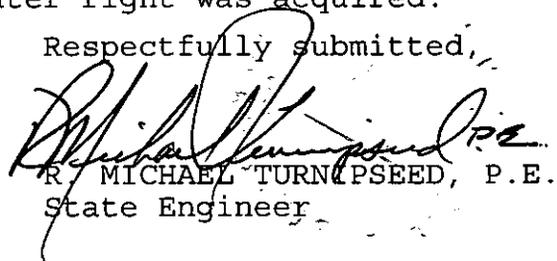
<sup>6</sup>Id. at 239.

The State Engineer concludes that clear and convincing evidence is found in the pumpage inventories and other evidence that for the more than five successive years from 1985 through 1998 no water was placed to beneficial use for cooling or air conditioning purposes. Further, the pumping of water out of a basement through a sump pump is not a beneficial use of water as authorized under Permit 23834, Certificate 6614.

RULING

Certificate 6614 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.

Respectfully submitted,

  
R. MICHAEL TURNPSEED, P.E.  
State Engineer

RMT/SJT/cl

Dated this 8th day of  
June, 1999.