

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

IN THE MATTER OF APPLICATION 53716 FILED )  
TO CHANGE THE POINT OF DIVERSION, PLACE )  
AND MANNER OF USE OF WATER PREVIOUSLY )  
APPROPRIATED FROM THE UNDERGROUND WATERS )  
OF THE TRUCKEE MEADOWS GROUNDWATER BASIN )  
(87), WASHOE COUNTY, NEVADA. )

RULING

# 4488

GENERAL

I.

Application 53716 was filed by Westpac Utilities, a Division of Sierra Pacific Power Company ("SPPC"), on July 27, 1989, to change the point of diversion, place and manner of use of 2.460 cubic feet per second (cfs), not to exceed 187.9 acre-feet annually (afa), of the underground waters previously appropriated for industrial purposes under Permit 23009, Certificate 7376. The applicant proposes to use the water for municipal purposes with the place of use identified as the SPPC water service area. The proposed point of diversion is described as being located within the NE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 6, T.18N., R.20E., M.D.B.&M.<sup>1</sup>

II.

On January 9, 1991, a public administrative hearing was held before the State Engineer to consider Application 53716 and to receive evidence relating to the matter of whether Permit 23009, Certificate 7376, should be declared forfeited pursuant to NRS 534.090.<sup>2</sup>

FINDINGS OF FACT

I.

In order for a water right permit to ripen into a 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

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<sup>1</sup>File No. 53716, official records in the Office of the State Engineer.

<sup>2</sup>Transcript, public administrative hearing before the State Engineer, January 9, 1991, (hereinafter "Transcript").

any extension of time granted by the State Engineer.<sup>3</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>4</sup>

At the January 9, 1991, public administrative hearing, SPPC supplied evidence that water had been used under Permit 23009 by CB Concrete Company as late as June 1976,<sup>5</sup> but that the MGM Grand Hotel and Casino purchased the gravel pit site on April 1, 1976,<sup>6</sup> and built its structure on the well site sometime afterwards. Permit 23009, Certificate 7376, was purchased by the applicant SPPC from the MGM Grand Hotel and Casino on January 28, 1980.<sup>7</sup> However, SPPC did not apply to change the point of diversion, place and manner of use of the water under Permit 23009 until July 17, 1986, when it filed Application 50017 (later withdrawn and replaced by Application 53716).<sup>8</sup> The State Engineer finds that the period of non-use addressed with regard to the forfeiture of Permit 23009 is 1980 to 1986.

## II.

SPPC provided testimony and evidence at the public administrative hearing in support of its argument that groundwater withdrawals had been limited by the State Engineer to 12,000 acre-

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<sup>3</sup>NRS 533.410.

<sup>4</sup>NRS 534.090.

<sup>5</sup>Exhibit No. 8, public administrative hearing before the State Engineer, January 9, 1991, (hereinafter "Exhibit No. 8").

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

<sup>7</sup>Exhibit No. 6.

<sup>8</sup>Exhibit No. 14 (Attachment 17) and Transcript p. 14.

feet annually.<sup>9</sup> Exhibit 14 (Attachment 11) is a letter dated October 8, 1979, from then State Engineer William J. Newman, to the Mayors of Reno and Sparks indicating that the safe yield of ground water in the Truckee Meadows area from a SPPC report is 12,000 acre-feet annually, and that to date SPPC reported the maximum groundwater withdrawals for peaking purposes in any single year had been approximately 8,000 acre-feet.<sup>10</sup> The State Engineer finds that the letter from State Engineer Newman put a restriction on the signing of any new subdivision or condominium plats within the SPPC service area until the SPPC could demonstrate that additional water was available to supply the new demand. This letter did not put a restriction on pumping on the utility or the purchase of additional water rights for use in the service area.

### III.

Even though the applicant did not provide any specific evidence of a restriction on its pumping of ground water from the basin, the records of the State Engineer indicate that an understanding had been in place for a number of years concerning the amount of water that SPPC was allowed to pump under SPPC's then existing water right permits.<sup>11</sup> The State Engineer finds that State Engineer Peter Morros did not restrict the diversion rates or annual duties under any existing individual water rights as a part of the overall cap on SPPC groundwater pumping.

### IV.

SPPC believes the restriction on its pumping of ground water was in place as early as 1979. The State Engineer finds that the

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<sup>9</sup>Transcript, pp. 40-46, Exhibit 14 (Attachment 11).

<sup>10</sup>Exhibit 14 (Attachment 11).

<sup>11</sup>Letter from Peter G. Morros, State Engineer, to Robert Firth, Manager, Gas and Water Planning, Sierra Pacific Power Company, dated February 13, 1986. The State Engineer took administrative notice of the records of the Office of the State Engineer, Transcript, p. 12.

agreement restricting groundwater pumping did not apply to Permit 23009, as the SPPC did not even own Permit 23009 until its purchase in 1980, and the restrictions placed on the SPPC pumping did not apply to other water rights the SPPC did not own at the time the agreement was reached.

V.

The SPPC prepares water-consumption reports which show the amount of water used from each of the groundwater wells operated by the utility.<sup>12</sup> The State Engineer finds that no use of water as allowed under Permit 23009 was shown on either the 1980, 1986 or 1987 reports.

VI.

When asked if the well authorized under Permit 23009 still exists, SPPC testified that the well was there in 1979 when it was checked by the MGM, but that indications were that the well may have collapsed, and was capped after the attempt to test it.<sup>13</sup> The State Engineer finds no evidence was provided that any use of the water as authorized under Permit 23009 has occurred since the well was tested in 1979.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and of the subject matter of this action and determination.<sup>14</sup>

II.

The Nevada Supreme Court held that in the case of a forfeiture, the State bears the burden of providing by clear and convincing evidence, a statutory period of non-use.<sup>15</sup> Clear and

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<sup>12</sup>Exhibit 13.

<sup>13</sup>Transcript, pp. 65-66, 72.

<sup>14</sup>NRS Chapters 533 and 534.

<sup>15</sup>Town of Eureka v. Office of the State Engineer, 108 Nev. 163, 862 P.2d 948, 952 (1992).

convincing evidence is that evidence which falls somewhere between a preponderance of the evidence and the higher standard of beyond a reasonable doubt.<sup>16</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>17</sup>

Evidence provided by SPPC showed that the last time the water was used under Permit 23009 was when the MGM ran a short test on the well in 1979, and the well was capped at that time. SPPC did not provide any evidence of use of water as allowed under Permit 23009 from the time it purchased the water right in January 1980 until the time it filed Application 50017 on July 17, 1986. The State Engineer concludes it is highly probable that no water was used as authorized under Permit 23009 from 1980 through 1986; thus, there is clear and convincing evidence that no water was used under Permit 23009, Certificate 7376, for five successive years working a forfeiture of the water right.

### III.

NRS 533.345(1) provides that an application can be filed to change the place of diversion, manner or place of use of water already appropriated. Water already appropriated refers to water represented by a permit or certificate in good standing.<sup>18</sup> The State Engineer concludes that where a 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.

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<sup>16</sup> Clifford S. Fishman, Jones on Evidence Section 3:10, at 238 (7th Ed. 1992).

<sup>17</sup> Id. at 239.

<sup>18</sup> NRS 533.324.

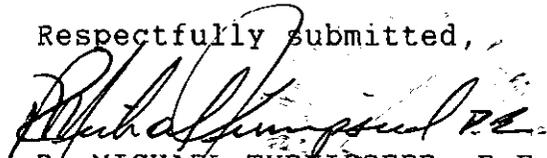
IV.

The State Engineer concludes that change Application 53716 cannot be granted as the underlying Permit 23009 which supported the change application has been forfeited; therefore, no water right exists which can be used to support the change application.

RULING

The right to beneficially use water under Permit 23009, Certificate 7376, is hereby declared forfeited on the basis that the holder of the right failed to beneficially use the water for the purposes for which the subject water right was acquired for a period exceeding five successive years. As the base permit supporting Application 53716 has been declared forfeited, change Application 53716 is hereby denied.

Respectfully submitted,

  
R. MICHAEL TURNIPSEED, P.E.  
State Engineer

RMT/SJT/ab

Dated this 16th day of  
January, 1997.