

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

IN THE MATTER OF THE FORFEITURE OF )  
 PERMIT 22735, CERTIFICATE 6938, WITHIN )  
 THE PAHRUMP VALLEY HYDROGRAPHIC )  
 BASIN (162), NYE COUNTY, NEVADA. )

**RULING**  
**#6343**

**GENERAL**

**I.**

Application 22735 was filed on August 25, 1965, by Perry L. Bowman and Norma Bowman and was permitted on April 15, 1966, for irrigation purposes. After filing the required Proof of Application of Water to Beneficial Use, Certificate 6938 was issued on February 18, 1969, for the irrigation of 407.5 acres, not to exceed 5.2 acre-feet per acre for a total of 2,119.0 acre-feet annually (afa). The point of diversion is described as being a well located within the SW¼ SE¼ of Section 3, T.21S., R.54E., M.D.B.&M. The certificated place of use is identified in the following table:<sup>1</sup>

Acres	QQ	Q	Section	Township	Range
6	NE	SE	9	21S	54E
38.1	NW	SE	9	21S	54E
8.2	SE	SE	9	21S	54E
38	SW	SE	9	21S	54E
39.6	NE	SW	9	21S	54E
39.7	NW	SW	9	21S	54E
39.6	SE	SW	9	21S	54E
39.4	SW	SW	9	21S	54E
39.3	NE	NW	16	21S	54E
39.7	NW	NW	16	21S	54E
40.5	NE	NE	17	21S	54E
39.4	NW	NE	17	21S	54E

<sup>1</sup> File No. 22735, official records in the Office of the State Engineer.

## II.

The relevant portion of the water right that is the subject of this ruling is 1,184.6461 afa under the permit.<sup>2</sup> A quiet title action over the ownership of this portion of the water right resulted in the reported opinion of *Adaven Mgt. Inc. v. Mountain Falls Acquisition Corp.*, 124 Nev. Adv. Op. 67, 191 P.3d 1189 (2008). Upon the resolution of the quiet title action, Mountain Falls Acquisition Corporation (MFAC) was confirmed by the State Engineer as holder of this portion of the water right in the State Engineer's records on October 20, 2008.<sup>3</sup> As discussed in the *Adaven* case, this portion of Permit 22735 was determined to be owned by MFAC, and the underlying real property was confirmed to be owned by Adaven Management, Inc.<sup>4</sup>

### FINDINGS OF FACT

#### I.

“Water being state property, the state has a right to prescribe how it may be used, and the Legislature has stated that the right of use may be obtained in a certain way.”<sup>5</sup> Because the state has a right to designate the method of appropriation, it also can designate how long water may be permitted to run idly and not be beneficially used.<sup>6</sup> Because of Nevada's arid geography, vital public policy considerations dictate that the State Engineer monitor the beneficial use of water.<sup>7</sup>

The State Engineer's oversight of the beneficial use of water occasionally requires forfeiture of water rights due to lack of use or cancellation due to lack of development. Forfeiture of water rights “is the penalty fixed by statute for the failure to do, or the unnecessary delay in doing, certain acts tending toward the consummation of a right within a specified time; or, after the consummation of the right, the failure to use the same for the period specified by the statute.”<sup>8</sup> Thus, the intention of the owner of the water right to continue to possess and use the right is not controlling in a forfeiture analysis, but rather, only whether the water has been put to beneficial use.<sup>9</sup>

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<sup>2</sup> Although the water right is a certificated right, it is referred to generally herein as the permit or water right.

<sup>3</sup> File No. 22735, confirmation letter dated October 20, 2008, official records in the Office of the State Engineer; *see also*, NRS § 533.386(6).

<sup>4</sup> Nev. Adv. Op. 67, 191 P.3d 1189 (2008) and *see* File No. 22735, Nye County Recorder's document No. 679553 (recorded February 22, 2007).

<sup>5</sup> *In re Manse Springs*, 60 Nev. 280, 287, 108 P.2d 311, 315 (1940).

<sup>6</sup> *Id.*

<sup>7</sup> *Dept. of Cons. and Natural Resources, Div. of Water Resources v. Foley*, 121 Nev. 77, 79, 109 P.3d 760, 761 (2005).

<sup>8</sup> *In re Manse Springs*, 60 Nev. 280, 288, 108 P.2d 311, 315 (1940), citing Kinney on Irrigation and Water Rights, Vol. 2, 2d ed., p. 2020, § 1118.

<sup>9</sup> *Id.* at 287-288.

The State Engineer's oversight of the beneficial use of water in the state occurs, in part, through annual crop and pumpage inventories, including an inventory conducted in Pahrump Valley. During the years 2005-2011, the Pahrump Valley Pumpage Inventory documented the non-use of MFAC's water right for irrigation.<sup>10</sup> During the 2007 inventory, the State Engineer also observed that the well authorized under Permit 22735 was capped. Where there has been at least 4 consecutive years, but less than 5 consecutive years of non-use, NRS § 534.090(1) requires that:

. . . the State Engineer shall notify the owner of the water right . . . by registered or certified mail that the owner 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 [an extension of time].

The State Engineer finds that pursuant to this statutory requirement, on July 11, 2012, a notification of four years of non-use of a portion of Permit 22735, Certificate 6938 was served by certified mail to MFAC (Four-Year Letter). The Four-Year Letter advised MFAC that it had until July 11, 2013, to put the water right to beneficial use or seek an extension of time pursuant to NRS § 534.090(2) to prevent a forfeiture.<sup>1</sup>

## II.

On June 21, 2013, MFAC filed an Application for Extension of Time to Prevent a Forfeiture (First Extension). In the First Extension, MFAC conceded the water right had not been placed to beneficial use since it acquired it through a foreclosure in 2001. In the First Extension, MFAC identified its progress toward resuming beneficial in the year preceding the extension as:<sup>1</sup>

. . . actively working toward a determination of the best use of their rights under Permit 22735, including coordination discussion with representatives of Utilities Inc. of Nevada, the Pahrump Utilities Co. of Nevada, and the Nye County Water District.

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<sup>10</sup> Groundwater Pumpage Inventory Pahrump Valley, No. 162 (2005, 2006, 2007, 2008, 2009, 2010 and 2011), official records in the office of the State Engineer.

Additionally MFAC stated it was committed to the beneficial use of its portion of Permit 22735 and would continue to pursue any potential alternative determined to be worth pursuing. In the First Extension, MFAC stated the anticipated time required to resume beneficial was “unknown.” The State Engineer finds that MFAC was granted an extension of time to June 21, 2014.<sup>1</sup>

### III.

On June, 20, 2014, MFAC filed an Application for Extension of Time to Prevent a Forfeiture (Second Extension). Under Question 6 on the extension form, MFAC gave reasons for non-use as lack of ownership of the land to where the water right was appurtenant and the depressed local economy and the lack of business development. In the Second Extension, MFAC identified its progress toward resuming beneficial use in the year preceding the extension as:<sup>1</sup>

[p]ursuing the possibility of changing the Permit 22735 rights from irrigation to a utility service, MFAC has been in discussion with Adaven Management regarding the potential for an agreement allowing a resumption of irrigation of the Adaven-owned acreage.

The State Engineer finds that the Second Extension was granted to June 21, 2015.

### IV.

On June 16, 2015, MFAC filed another Application for Extension of Time to Prevent a Forfeiture (Third Extension). In 2015, MFAC provided many statements that were identical, or very near, to its statements made in extension requests in 2013 and 2014.

In the Third Extension, MFAC cited:

1. Lack of legal access to the permitted place of use owned by Adaven, but that there were discussions between these parties about resumption of the irrigation project, however, admitting there is currently no arrangement in place.
2. The downturn in the economy and lack of business development.
3. That MFAC had alternatively been in discussions with Pahrump Utility Company, Inc. (PUCI) to change the water right to other manners of use once the economy improves sufficiently.

The State Engineer finds that as with prior years, MFAC admitted it was uncertain when beneficial use will resume.

V.

With regard to extensions of time to prevent a forfeiture, NRS § 534.090(2) states that:

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 the holder's failure to use all or any part of the water beneficially for the purpose for which the holder's 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;
- (d) Any prolonged period in which precipitation in the basin where the water right is located is below the average for that basin or in which indexes that measure soil moisture show that a deficit in soil moisture has occurred in that basin;
- (e) Whether a groundwater management plan has been approved for the basin pursuant to NRS 534.037; and
- (f) Whether the holder has demonstrated efficient ways of using the water for agricultural purposes, such as center-pivot irrigation.

A. NRS § 534.090(2)(b), (d)-(f).

MFAC has not cited drought or the unavailability of water as reasons supporting its extension request. As well, a groundwater management plan has not been approved for the basin pursuant to NRS § 534.037. Finally, MFAC indicated in its response to Question 2 on the extension request that the non-use of the water was not due to improved irrigation efficiencies, such as the use of center pivot irrigation. Therefore, the State Engineer finds that that grounds cited in NRS § 534.090(2)(b), (d)-(f) are inapplicable to the Third Extension when considering whether the extension should be granted.

B. NRS § 534.090(2)(a), (c).

Nevada Revised Statute § 534.090(2)(a) and (c) require the State Engineer to examine whether the holder has shown good cause for the holder's failure to use all or any part of the water beneficially for the purpose for which the holder's right is acquired or claimed, and whether any economic conditions or natural disasters which made the holder unable to put the water to that use.

*1. Lack of access to place of use*

MFAC points to lack of legal access to the real property which is owned by Adaven, which real property serves as the place of use under the permit. MFAC stated in its extension requests between 2013-2015 that there have been discussions between it and Adaven about resuming irrigation under the permitted use; however, MFAC admits that there is currently no agreement in place.

The State Engineer finds that MFAC was aware as early as 2006, when the district court judgment was entered, that the water and land were adjudged to be owned by different parties; yet, nine years later in 2015, MFAC is still relying on lack of access to the place of use as an excuse for non-use of the water. Nevada Revised Statute 533.040(2) provides that “[i]f at any time it is impracticable to use water beneficially or economically at the place to which it is appurtenant, the right may be severed from the place of use and be simultaneously transferred and become appurtenant to another place of use, in the manner provided in this chapter, without losing priority of right.” MFAC’s references to potential change applications in its extension requests reveals that it knows full-well that it has the option to file a change application to put the water to beneficial use at a different place of use, yet is has failed to do so.<sup>11</sup>

The fact that MFAC has cited the same “ongoing” discussions between MFAC and Adaven for three years leads the State Engineer to believe that such efforts, if true, appear half-hearted and have failed to culminate in any such agreement in any event. The State Engineer finds that lack of access to the place of use in this case is not a persuasive reason to continue granting MFAC extensions of time particularly where MFAC has known of the issue of separate ownership of the land and water since 2006. This finding is supported by existing law which permits MFAC to seek a change in the place of use in order to resume beneficial use.

*2. Economic conditions which made the holder unable to put the water to use.*

MFAC next points to the economic downturn, the onset of which it states coincided with the resolution of the Nevada Supreme Court appeal in 2008. MFAC asserts that the water right was intended for a residential housing project and the downturn in the economy has prevented MFAC’s borrower from pursuing the project.

Here, the project is, and remains an irrigation project. Economic conditions are not preventing MFAC from beneficially using the water under its current permitted use (*i.e.*,

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<sup>11</sup> Indeed, in *Bailey v. State*, 95 Nev. 378, 594 P.2d 734 (1979) (citing *Ophir Mining Co. v. Carpenter*, 4 Nev. 534, 543-44 (1869)) the court reaffirmed that the right to the use of running water is based upon appropriation, and not upon an ownership in the soil.

irrigation), because, as discussed above, the impediment to the irrigation project is lack of access to the place of use. Consequently, the State Engineer finds that economic conditions have not prevented MFAC from beneficially using the water for irrigation.

Although MFAC asserts that the intended use of the water right was going to be for a large scale residential real estate development in Pahrump, MFAC never filed for a change in the manner of use; therefore, the State Engineer finds it appropriate to limit the examination of economic conditions as affecting the permitted use, and not a different unknown project for which use of the water was never approved by the State Engineer.<sup>12</sup>

3. *Whether the Third Extension violates the anti-speculation doctrine.*

Having considered the reasons mandated by NRS § 534.090, the State Engineer is called upon in this case to examine whether the Third Extension violates the anti-speculation doctrine.

a. Overview of the doctrine.

In *Bacher v. State Engineer*, the Nevada Supreme Court formally adopted the anti-speculation doctrine.<sup>13</sup> In discussing anti-speculation in the *Adaven* case, the court recognized that Nevada's adoption of the doctrine was based on *Colorado River Water Conservation Dist. v. Vidler Tunnel Water Co.*, 594 P.2d 566 (Colo. 1979) (*Vidler*). The Nevada Supreme Court has stated "[the anti-speculation] doctrine precludes speculative water right acquisitions without a showing of beneficial use. Precluding applications by persons who would only speculate on need ensures satisfaction of the beneficial use requirement that is so fundamental to our State's water law jurisprudence."<sup>14</sup>

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<sup>12</sup> *Ophir Silver Mining Co. v. Carpenter*, 4 Nev. 534 (1869) appears to support this proposition. There, the court examined the issue of whether reasonable diligence had been exercised in the construction of necessary works for claim to an earlier priority date. The appropriator argued his short illness, lack of money to construct the works and economic conditions were circumstances to be considered in determining reasonable diligence. The Nevada Supreme Court opined that these types of conditions were conditions incident to the person and not to the project; and as such, did not excuse the appropriator's delays in the work. The court did not expand its consideration of another project for which the water was not approved. *See also, The Subdistrict v. Chevron Shale Oil Co.*, 986 P.2d 918 (Colo. 1999) (discussing economic conditions of shale industry on appropriator's progress *on the project*, further suggesting that consideration of economic conditions are confined to project for which the water right is approved).

<sup>13</sup> 122 Nev. 1110, 146 P.3d 793 (2006).

<sup>14</sup> 122 Nev. at 1121, 146 P.3d at 799.

After *Vidler*, Colorado codified the speculation doctrine in statute. Appropriations or a speculative sale or transfer could be shown when the:

purported appropriator . . . does not have either a legally vested interest or a reasonable expectation of procuring such interest in the lands or facilities to be served by such appropriation, unless such appropriator is a governmental agency or an agent in fact for the persons proposed to be benefited by such appropriation [or if the appropriator] does not have a specific plan and intent to . . . [put] a specific quantity of water [to] specific beneficial use[].<sup>15</sup>

b. The doctrine can be applied to extensions of time

It is clear from *Bacher* and the legislative history of NRS § 533.370(1)(c)(2), that the doctrine always applies under the current law at the inception of an appropriation when a permit is granted.<sup>16</sup> The legislative history of NRS § 533.395 also indicates that the doctrine applies to extensions of time filed to prevent cancellation of the right for failure to perfect the right.<sup>17</sup>

The State Engineer has not previously addressed the application of the doctrine to extensions of time to prevent a forfeiture of a certificated right. Such extensions may be requested in order to resume beneficial once the right has been perfected and a certificate has been issued, but a period of non-use occurred after the issuance of the certificate.<sup>18</sup>

In examining the issue, the State Engineer is mindful of the declaration by the Nevada Supreme Court in *Preferred Equities Corp. v. State Engineer* that “[t]he preeminent public policy concern in Nevada regarding water rights is beneficial use . . . . The legislature has recognized that water is a limited resource in Nevada and it belongs to the public; therefore, one

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<sup>15</sup> See generally, Darrel Brown, *The Colorado Supreme Court Addresses Reasonable Diligence in the Continuation of a Conditional Water Right*, 3 Denv. U. L. Rev. 98, 100 (1999).

<sup>16</sup> *Bacher*, *id.* (referring to the *acquisition* of the right, and stating that adoption of the doctrine comports with NRS § 533.370(1)(c)(2), which is one prong of the standard for granting an application to appropriate).

<sup>17</sup> Hearings on A.B. 624, 67<sup>th</sup> Leg. (1993) (testimony that provisions codified at NRS § 533.370(1)(c)(2), *supra*, and for extensions of time to avoid cancellation (NRS § 533.395) were passed to prevent speculation); and see generally, *e.g.*, *Desert Irr. Ltd. v. State*, 113 Nev. 1049, 944 P.2d 835 (1997) (a mere statement of intent to put water to beneficial use, uncorroborated with any actual evidence, after nearly twenty years of nonuse is insufficient to justify a sixteenth extension to file proof of beneficial use resulting in cancellation of the right).

<sup>18</sup> As explained in *Andersen Family Associates v. Ricci*, 124 Nev. 182, 179 P.3d 1201 (2008), a “permitted” right is one granted after the State Engineer approves a party’s application for a water right. In order to perfect a permitted right, a party must file proof of beneficial use with the State Engineer. Once proof has been filed, the State Engineer will issue a certificate in place of the permit. Therefore a “certificated” right is a perfected water right. Cancellation applies to permitted rights, whereas forfeiture applies to certificated rights. *Cf.*, NRS §§ 533.395, 534.090.

who does not put it to a beneficial use should not be allowed to hold it hostage.”<sup>19</sup> *And see also, Bacher*, 122 Nev. at 1118, 146 P.3d at 797 (citing *Barnes v. Sabron*, 10 Nev. 217 (1875) (the right to use water for a beneficial use depends on a party actually using the water)); *U.S. v. Orr Water Ditch Co.*, 309 F.Supp.2d 1245 (D. Nev. 2004) (beneficial use is the foundation of the doctrines of forfeiture, abandonment, and lack of perfection).

While beneficial use is the cornerstone of Nevada water law, the concept of diligence also runs deep through the water law.<sup>20</sup> Because the law requires the diligent perfection of a right when it is issued, the State Engineer believes that a measure of diligence must also be employed in the resumption of use of the water to avoid forfeiture of the right. This is true, for it would be inconsistent to require diligence in the perfection of a right, but to not require diligence in the resumption of beneficial use after a period of non-use. Consequently, the anti-speculation doctrine is a means for the State Engineer to examine whether a water right holder is diligently acting to resume beneficial use; or, to determine whether the water right holder is improperly hoarding the water right without resuming use, contrary to the tenet of beneficial use.<sup>21,22</sup>

c. A balance must be struck between the State Engineer’s oversight of beneficial use and the alienability of water rights.

In *Bacher*, the Supreme Court stated that it adopted the anti-speculation doctrine as a limitation on an entity's ability to demonstrate beneficial use when it did not have definite plans to put water to beneficial use or a contractual relationship with an entity that had such plans. The court held it was reasonable to assume the Legislature intended water right applicants to rely

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<sup>19</sup> 119 Nev. 384, 389, 75 P.3d 380, 383 (2003) (additional citations omitted).

<sup>20</sup> *Bailey v. State*, 95 Nev. 378, 594 P.2d 734 (1979) (The concept of diligence in the application of water to beneficial use has its origins in the early development of the principles of prior appropriation in the water law of the Western states); *Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co.*, 245 F. 9 (9th Cir. 1917) (Whether appropriator of water from public stream has used due diligence to utilize water for beneficial use must be determined upon facts of particular case); *and see Trans-County Water Inc. v. Central Colo. Water Conservancy Dist.*, 727 P.2d 60, 65 (Colo. 1986) (to allow, an applicant to maintain a conditional appropriation indefinitely and without progress frustrates the fundamental policy of promoting the maximum use of the State’s limited water supply).

<sup>21</sup> The State Engineer believes an examination of anti-speculation doctrine is not required in every extension of time, but where the reasons given in the extension suggest that non-use has occurred on speculative grounds, an examination of the doctrine is appropriate and that the language of the forfeiture statute is broad enough to allow for such consideration. *See* NRS § 534.090(2) (the State Engineer shall *among other reasons* consider. . . ).

<sup>22</sup> In Colorado, a perfected right is referred to as an absolute right. Colo. Rev. Stat. § 37-92-103(3)(a) provides that anti-speculation applies to absolute rights in addition to conditional rights, providing further support that in Nevada, the doctrine also applies to certificated rights.

on a third party's need to establish beneficial use, but that a third-party's need was also limited by the anti-speculation doctrine.<sup>23</sup>

Two years after *Bacher*, the Nevada Supreme Court decided *Adaven* in 2008. Citing Colorado authorities, the *Adaven* court stated that the anti-speculation doctrine does not prevent a property owner from selling to a third party his right to draw water, but that the doctrine focuses on use of water, not ownership. Accordingly, the Nevada Supreme Court clarified that it did not adopt the anti-speculation doctrine in *Bacher* to limit the free alienability of water rights, and that the doctrine by itself does not limit transfers of water rights ownership.

Taking *Bacher* and *Adaven* together, the State Engineer finds there must be a balance between his oversight of the use of water in the state and the alienability of water rights through transfers of ownership. The inquiry is relevant here, where MFAC indicates it may convey the water upon some future agreement to PUCI; therefore, the State Engineer is guided by Colorado's post-*Vidler* definition of a speculative sale or transfer.<sup>24</sup>

MFAC admits that it is not a property developer, but is a banking institution. The Third Extension appears to concede that MFAC cannot put the water to beneficial use itself; but rather, it intends to rely on another entity to beneficially use the water either by agreement or a conveyance, although it has failed to secure any agreements for that purpose. Specifically, MFAC states in the Third Extension that it is exploring "options to change the Water Rights' manner of use to quasi-municipal and to bank the Water Rights with PUCI [Pahrump Utility Company, Inc.] for dedication in connection with future residential and commercial land development once the Pahrump economy improves sufficiently."

In 2013, MFAC stated it was "coordinating a discussion" with representatives of PUCI; and in 2014, it stated it was "pursuing possibly changing" the manner of use to quasi municipal with PUCI. It is apparent that MFAC presently has no specific plan or agreement to put any specific quantity of the water right to beneficial use. What is more, it is troubling to the State Engineer that since 2013, MFAC has stated it is still "unknown" when beneficial use will resume. These statements lead the State Engineer to find that MFAC is not approaching

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<sup>23</sup> 122 Nev. at 1119, 146 P.3d at 798-99.

<sup>24</sup> See, pp. 7-8, *supra*.

resumption of beneficial use with any particular sense of urgency or diligence.<sup>25</sup> Most telling; however, is MFAC's statement in the latest extension request that its discussions with PUCI hinge on *future land development once the economy improves sufficiently*. In *Bacher*, the Nevada Supreme Court appears to have rejected such a concept, noting that speculative evidence of development projects is not sufficient to survive a substantial evidence inquiry on review.<sup>26,27</sup> Here, MFAC admits awaiting future demand to create a need for the water in order to resume beneficial use. The State Engineer finds this paradigm falls squarely within the anti-speculation doctrine.

In light of the foregoing facts, the State Engineer finds that MFAC has failed to secure a legally vested interest or a reasonable expectation of procuring such interest in land serving as the place of use, and that MFAC does not have a specific plan or commitment to put a specific quantity of water back to beneficial use.<sup>28</sup> Accordingly, State Engineer finds that the Third Extension is barred by the anti-speculation doctrine.

## CONCLUSIONS OF LAW

### I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>29</sup>

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<sup>25</sup> A useful comparison can be made to a different portion of Permit 22735. On the same date the Four-Year letter was sent to MFAC (July 11, 2012), a Four-Year letter was also sent to B-PVL2, LLC, the owner of a 240.24 af portion of Permit 22735. B-PVL2 also filed an extension of time in 2013 to resume beneficial use, which extension was supported by a record of conversations the owner's agent had engaged in with various parties including PUCI, which discussions culminated in a Notice of Intention to dedicate its water right to PUCI, which was included with the extension request.

<sup>26</sup> *Bacher*, 122 Nev. at 1123, 146 P.3d at 801, fn. 37; *see also, Vidler*, 594 P.2d at 569 (Concluding the trial court erred in awarding a condition decree where no sufficient evidence was presented that anyone committed to actual beneficial use of the water not intended for use on its own land, including the failure to provide evidence of firm sale arrangements. Also stating that in essence, the water rights sought by Vidler were on the assumption that growing population would produce a general need for more water in the future).

<sup>27</sup> In short, the State Engineer finds there is no bright line distinction when a party indicates it is attempting to sell a water right versus when it becomes a speculative hoarding of the right as the reason for non-use. Like extensions of time to avoid cancellation, this is a fact-dependent inquiry.

<sup>28</sup> *See, Vidler*, 594 P.2d at 568 ("The mere negotiations with other municipalities clearly do not rise to the level of definite commitment for use required to prove the intent here required.")

<sup>29</sup> NRS Chapters 533 and 534.

**II.**

“[G]ood cause is a relative and highly abstract term such that its meaning must be determined not only by the verbal context of the statute in which the term is employed, but also by the context of the action and procedures involved and the type of case presented.”<sup>30</sup> “Good cause” is understood to mean “[a] legally sufficient reason,” and it reflects “the burden placed on [a party] to show why a request should be granted or an action excused.”<sup>31</sup>

From the above-stated findings of fact, the State Engineer concludes that the Third Extension is not supported by good cause and the extension is accordingly denied.

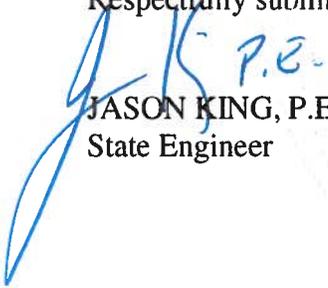
**III.**

A statutory period of non-use must be shown by clear and convincing evidence.<sup>32</sup> Clear and convincing evidence is a higher standard than proof by the preponderance of the evidence and requires “evidence establishing every factual element to be highly probable.”<sup>33</sup> The State Engineer concludes by clear and convincing evidence that the water under Permit 22735, Certificate 6938, has not been placed to beneficial use for more than five successive years. Accordingly, pursuant to NRS § 534.090, the 1,184.6461 acre-feet, a portion of the water right under Permit 22735, Certificate 6938, in the name of Mountain Falls Acquisition Corporation, is subject to forfeiture.

**RULING**

The portion of water under Permit 22735, Certificate 6938, in the name of Mountain Falls Acquisition Corporation, in the amount of 1,184.6461 acre-feet, is hereby declared forfeited.

Respectfully submitted,

  
JASON KING, P.E.  
State Engineer

Dated this 28th day of  
April, 2016.

<sup>30</sup> *Nunnery v. State*, 127 Nev. Adv. Op. 69, 263 P.3d 235 (2011) (quoting *Wray v. Folsom*, 166 F.Supp. 390, 394 (W.D.Ark. 1958) (internal quotations omitted)).

<sup>31</sup> *Joseph v. Hess Oil V.I. Corp.*, 651 F.3d 348 (3d Cir. 2011) (citing Black's Law Dictionary 251 (9th ed. 2009)).

<sup>32</sup> *Town of Eureka v. State Engineer*, 108 Nev. 163, 826 P.2d 948 (1992).

<sup>33</sup> *Ferguson v. Las Vegas Metro. Police Dep't*, 131 Nev. Adv. Op. 94, \_\_\_ P.3d \_\_\_ (2015) (citing *In re Discipline of Drakulich*, 111 Nev. 1556, 1567, 908 P.2d 709, 715 (1995) (additional citation omitted)).