

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

IN THE MATTER OF THE POSSIBLE FORFEITURE OF )  
PERMIT 11409, CERTIFICATE 3233, FILED TO )  
APPROPRIATE THE PUBLIC WATERS OF THE )  
LAS VEGAS ARTESIAN GROUNDWATER BASIN (212), )  
CLARK COUNTY, NEVADA. )

RULING  
ON REMAND

# 4907

GENERAL

I.

Permit 11409 was granted by the State Engineer to Theodore Werner and Kenneth Searles on April 17, 1946, to appropriate 0.10 cubic feet per second (cfs) of the underground waters of the Las Vegas Artesian Groundwater Basin for quasi-municipal and domestic purposes on two unattached parcels of land within the NW $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 28, T.20S., R.61E., M.D.B.&M.<sup>1</sup> The point of diversion is described as being located within the NW $\frac{1}{4}$  SW $\frac{1}{4}$  of said Section 28.

After filing proof of beneficial use of the waters as allowed under the permit in the office of the State Engineer, Certificate 3233 was issued by the State Engineer. The certificate of appropriation allows for the diversion of underground water at a rate of 0.10 cfs for quasi-municipal and domestic purposes to serve three (3) existing dwellings on 3 acres of land, known then as the Theodore Werner property, and one (1) existing dwelling and swimming pool on the other non-contiguous 2 acres of land, known then as the Kenneth Searles property together with their associated landscaping such as lawns and gardens within the NW $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 28, T.20S., R.61E., M.D.B.&M.<sup>1,2</sup>

<sup>1</sup> File No. 11409, official records in the office of the State Engineer.

<sup>2</sup> Exhibit No. 3, public administrative hearing before the State Engineer, February 19, 1998. The supporting map which accompanies Permit 11409, Certificate 3233 shows the location of the dwelling units and swimming pool in relation to the well.

II.

The office of the State Engineer conducts annual groundwater pumpage inventories of the water rights in the Las Vegas Artesian Basin. A summary of the pumpage inventories for the subject permit from 1989 through 1996 indicates the maximum use of water is six acre-feet annually from the subject well.<sup>3</sup> During the site investigations for the years 1995 and 1996 discoveries surrounding the use of water from the subject well were noted. In 1995 an additional house (Zampa) within the certificated place of use was found to be served by the well, then in 1996, the Zampa house was disconnected from the well to receive water service from the Las Vegas Valley Water District. The investigations also noted use of water from the well by the DeMarcos for household purposes outside of the certificated place of use.<sup>4</sup>

III.

An application for extension of time to prevent working of a forfeiture was received in the office of the State Engineer on October 28, 1996, by Afton Thornton Werner. A written request inquiring as to the status of the extension request was received in the office of the State Engineer on February 20, 1997. On August 15, 1997, a notice of possible forfeiture of a portion of the water right under Permit 11409, Certificate 3233, was sent by certified mail to the owners of record being Miriam and Michael DeMarco a 75% undivided interest and Afton Thornton Werner a 25% undivided interest and the owners of land within the certificated

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<sup>3</sup> Exhibit No. 6, public administrative hearing before the State Engineer, February 19, 1998.

<sup>4</sup> Transcript p. 16, public administrative hearing before the State Engineer, February 19, 1998.

place of use. A courtesy copy of the notice of possible forfeiture was also sent to those individuals requesting correspondence pertaining to the subject water right. The landowners noticed within the certificated place of use were determined from the records of the Clark County Assessor's Office. The following Clark County Assessor's parcel numbers (APN) are described below with their corresponding Clark County Assessor's owner of record:

139-28-301-024 Greene, A. Kent  
139-28-301-025 Zampa, Patricia L.  
139-28-302-012 Daniels, Lawrence Jr. & Claudia  
139-28-302-014 Daniels, Lawrence Jr. & Claudia

The parcels now in the name of Ms. Zampa and Mr. Greene were previously the Searles' property and the parcels now in the name of the Daniels were originally the Werner's property.

Subsequent to the notice of possible forfeiture of a portion of Permit 11409, Certificate 3233, the office of the State Engineer received a complaint alleging illegal use and waste of water on the Greene parcel from the well. The office of the State Engineer responded to these allegations through correspondence requesting additional information as to the illegal use and the issue of possible forfeiture of a portion of the subject water right from the parties involved. The office of the State Engineer then received a request for a hearing to address the issue of forfeiture of a portion of Permit 11409, Certificate 3233.

#### IV.

On October 14, 1997, a notice of hearing was sent to all parties of interest concerning the possible forfeiture of the subject water right to be held on December 8, 1997. The office of

the State Engineer received a request to postpone the hearing on November 6, 1997. Then on November 25, 1997, a notice of postponement rescheduling the hearing was sent out to all parties of interest by certified mail. Application 63848 was filed in the office of the State Engineer on February 17, 1998, and the public administrative hearing to consider evidence and testimony on the possible forfeiture was held two days later on February 19, 1998.

As a result of the testimony and evidence received at the public administrative hearing, State Engineer's Ruling No. 4644 was issued on July 9, 1998, which determined the limit and extent of the water right under Permit 11409, Certificate 3233 to be 29.48 acre-feet annually of which 17.24 acre-feet was declared forfeited. The remaining portion of the water rights under Permit 11409, Certificate 3233, which is 12.24 acre-feet annually, being 11.12 acre-feet annually appurtenant to the Daniels' parcel and 1.12 acre-feet annually appurtenant to the Zampa parcel, was determined to be in good standing.

The State Engineer's ruling was timely appealed by Miriam DeMarco, Michael DeMarco and Angelo (Tom) DeMarco to the Eighth Judicial District Court.<sup>5</sup> On April 5, 1999, the Court remanded the issue to the State Engineer to consider whether or not the filing of an application to change the subject permit by the DeMarcos would affect any determinations made in his ruling.

#### FINDINGS OF FACT

##### I.

Application 63848 was filed February 17, 1998, by Michael DeMarco, Angelo Thomas DeMarco and Janet Lang DeMarco to change

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<sup>5</sup> Appeal was filed pursuant to NRS § 534.450, and is on file in the office of the State Engineer.

the place of use of 0.10 cfs of underground water previously appropriated under Permit 11409, Certificate 3233,<sup>6</sup> for quasi-municipal purposes from the same point of diversion described as being located within the NW¼ SW¼ of Section 28, T.20S., R.61E., M.D.B.&M. The proposed place of use under Application 63848 is described as being located within the NW¼ SW¼ of said Section 28, further identified as Clark County APN's 139-28-302-012 and 139-28-302-014 (3 acres) which are the Daniels' parcels and two parcels being Clark County APN's 139-28-301-22 and 139-28-301-027 (1.29 acres) owned by the DeMarcos. In review of the application and accompanying map by the office of the State Engineer, the publication for public notice and protest period all occurred in conformance with the statutory provisions for processing an application to change. Then on November 26, 1998, the application became ready for a determination by the State Engineer. The State Engineer finds that he could take no action on Application 63848 until November 26, 1998. The State Engineer further finds that the filing of an application to change does not allow use of the water as proposed until the State Engineer grants approval.<sup>7</sup>

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<sup>6</sup> Application 63848, official records in the office of the State Engineer. The DeMarcos filed Application 63848 to change all of Permit 11409, Certificate 3233. However, at the time of filing Application 63848, the records in the office of the State Engineer indicated that the DeMarcos were the owners of a 75% undivided interest in Permit 11409, Certificate 3233. The question arises as to how the DeMarcos could make an application with respect to rights they did not have. Furthermore, the State Engineer recognizes that there is a question as to who actually has current ownership of Permit 11409, Certificate 3233, due to submittal of multiple additional deeds subject to interpretation and confirmation.

<sup>7</sup> NRS § § 533.325 and 533.370(5).

II.

The sequence of events concerning the forfeiture of a portion of Permit 11409, Certificate 3233, consist of the following:

<u>Date</u>	<u>Action</u>
August 15, 1997.	Notice of possible forfeiture of a portion of Permit 11409, Certificate 3233 is mailed.
February 17, 1998.	Application 63848 is filed to change the place of use of Permit 11409, Certificate 3233.
February 19, 1998.	Public administrative hearing held on the possible forfeiture of a portion of Permit 11409, Certificate 3233.
July 9, 1998.	State Engineer's Ruling No.4644 forfeiting a portion of Permit 11409, Certificate 3233 is issued.

The State Engineer finds that the notice of possible forfeiture dated, August 15, 1997, began the forfeiture proceeding and no attempts to cure the forfeiture could occur after that date.<sup>8</sup> The State Engineer further finds that the filing of Application 63848 to change the place of use of Permit 11409, Certificate 3233, occurred after the forfeiture proceeding was initiated and that the mere filing of an application to change an existing water right does not cure the claim of

<sup>8</sup> Town of Eureka v. State Engineer, 108 Nev. 163, 862 P.2 948 (1992). (The resumption of substantial use of a water right after the statutory period of non-use "cures" claims to forfeiture so long as no claim or proceeding of forfeiture has begun.)

forfeiture. Therefore, the filing of Application 63848 does not have and cannot have an effect on the decision as to partial forfeiture of Permit 11409, Certificate 3233.

**III.**

The owners of record in the office of the State Engineer for Certificate 3233, as of the date of the notification of possible forfeiture, reflected Afton Thornton Werner having a 25% undivided interest, and Miriam DeMarco and Michael DeMarco having a 75% undivided interest. The State Engineer's office contacted the Clark County Assessor's office for determination of the owners of record of the land comprising of the place of use under Certificate 3233. The State Engineer finds that the DeMarcos were not an owner of land within the certificated place of use as of the date of notice of possible forfeiture of a portion of Permit 11409, Certificate 3233.

The forfeiture of a right to the use of ground water requires that the State Engineer's office send notice by registered or certified mail to the owner of record of the water right which has been declared forfeited.<sup>9</sup> The DeMarcos received notice since their return receipt was signed and returned to the office of the State Engineer.<sup>1</sup> The State Engineer finds that the notice of the possible forfeiture dated August 15, 1997, was properly served upon the owners of record, one of those being the DeMarcos.

**IV.**

The records in the office of the State Engineer as of the date of the notice of possible forfeiture of a portion of Permit 11409, Certificate 3233, reflect that a conveyance had been made to change the ownership of the water right under Permit 11409, Certificate 3233 from the original permittees to Afton Thornton

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<sup>9</sup> NRS § 534.090.

Werner, a 25% undivided interest, and Miriam DeMarco and Michael DeMarco, a 75% undivided interest. This confirmation of title by the office of the State Engineer to a portion of the subject water right occurred in 1991<sup>1</sup>. The duties of the State Engineer concerning conveyances of title to water rights are outlined in NRS §§ 533.382 through 533.387, inclusive. Reports of conveyance of water rights are confirmed on a regular basis in the office of the State Engineer. The notification by this office to the new owner that a confirmation of a report of conveyance is complete does not change the water right in any manner. The State Engineer finds that a conveyance of the title to a water right does not change the place of use of an existing water right.<sup>10</sup>

v.

The pumpage inventories of the subject well indicate the amount of water use under Permit 11409, Certificate 3233. The office of the State Engineer discovered the use of water from the well under permit 11409, Certificate 3233, by the DeMarcos on Clark County APN 139-28-301-022 in 1996. The 1996 inventory reflected this use as one average house on the well, however, the dwelling is outside of the certificated place of use. During the public administrative hearing, testimony was provided confirming the fact that the Demarcos' property under Clark County APN 139-28-301-022 has been hooked up to and is being served water for household purposes from the subject well without the benefit of

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<sup>10</sup> The statutory procedure to change the place of use of a water right is contained in NRS § 533.325, which was not followed until the filing of Application 63848 on February 17, 1998. "Any person who wishes to appropriate any of the public waters, or to change the place of diversion, manner of use or place of use of water already appropriated, shall, before performing any work (Emphasis added) in connection with such appropriation, change in place of diversion or change in manner or place of use, apply to the state engineer for a permit to do so."

being within the certificated place of use.<sup>4</sup> The State Engineer finds that the use of water from the well by the DeMarcos occurred outside of the certificated place of use and does not constitute beneficial use of the water as allowed under Permit 11409, Certificate 3233.<sup>11</sup>

### CONCLUSIONS

#### I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>12</sup>

#### II.

The State Engineer concludes that Application 63848 was filed after the proceeding initiating forfeiture had begun and that the mere filing of an application to change an existing water right is not a sufficient basis to protect a water right since the application itself does not 'cure' the forfeiture. The State Engineer further concludes that no legal use of water under Application 63848 could have been authorized by the State Engineer as of the date of the administrative hearing because the application had not completed the statutory provisions allowing the State Engineer to take action.

#### III.

The State Engineer concludes that if Application 63848 were to be approved, it would be limited to no more than the quantity put to beneficial use at the time the proof of beneficial use was made under Permit 11409 in 1949.<sup>13</sup>

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<sup>11</sup> NRS § 533.040.

<sup>12</sup> NRS chapters 533 and 534.

<sup>13</sup> NRS § 533.035.

**IV.**

The conveyance of the ownership of Permit 11409, Certificate 3233, to those claiming an interest by submittal of evidence as to title does not change the consideration of forfeiture. The State Engineer concludes that confirmation of the conveyance of title to a water right does not grant or authorize any change in the use of that certificated water right and that the issue of ownership has no bearing on the forfeiture proceeding. The State Engineer further concludes, based on the pumpage inventories and the evidence presented at the public administrative hearing, that a portion of the certificated water right was not placed to beneficial use for more than five consecutive years.

**V.**

Nevada Revised Statutes provide that all water used for beneficial purposes shall remain appurtenant to the place of use, subject to the filing of a change in the place of use under certain conditions.<sup>14</sup> The State Engineer concludes that the right to the use of water as described under Permit 11409, Certificate 3233, is restricted to the place where acquired and shall remain appurtenant to the place of use unless a change application is granted by the State Engineer as provided under NRS § 533.325.

**VI.**

The State Engineer concludes that the property described as Clark County APN 139-28-301-022, in the name of Angelo Thomas and Janet L. DeMarco is outside of the place of use of Permit 11409, Certificate 3233, is receiving water from the subject well and

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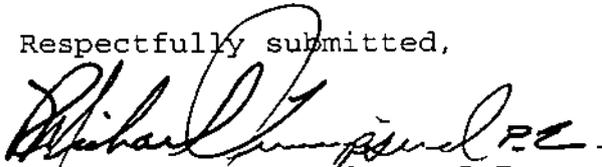
<sup>14</sup> NRS § 533.040.

that the use of water at the DeMarco property cannot be considered as beneficial use under Permit 11409, Certificate 3233, and thus can not be considered a 'cure' of the partial forfeiture.

RULING

The use of water from the well under Permit 11409, Certificate 3233, during the forfeiture period for a dwelling on the DeMarco property identified as Clark County APN 139-28-301-022 is outside of the certificated place of use, therefore, this use does not constitute a cure of the partial forfeiture of the certificated water right. The mere filing of an application to change an existing water right after the proceeding initiating forfeiture has begun does not cure forfeiture and the consideration of the filing of Application 63848 has no affect on previous Ruling No. 4644 under Permit 11409, Certificate 3233. Therefore, Ruling No. 4644 is upheld and the limit and extent of the water right was determined to be 29.48 acre-feet annually of which 17.24 acre-feet of water under Permit 11409, Certificate 3233, is forfeited.

Respectfully submitted,

  
R. MICHAEL TURNIPSEED, P.E.  
State Engineer

RMT/RKM/cl

Dated this 18th day of  
April, 2000.