

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

IN THE MATTER OF THE FORFEITURE OF)
A PORTION OF THE WATER RIGHTS UNDER)
PERMIT 10409, CERTIFICATE 2779,)
APPROPRIATED FROM AN UNDERGROUND)
SOURCE WITHIN THE LAS VEGAS)
GROUNDWATER BASIN (212), CLARK)
COUNTY, NEVADA.)

RULING

4529

GENERAL

I.

Permit 10409 was filed on July 26, 1939, by Edna L. Umbaugh to appropriate 1.0 cubic foot per second (cfs) of water from the Las Vegas Groundwater Basin for the irrigation of 20 acres of land within the S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 6, T.21S., R.61E., M.D.B.&M. The three proposed points of diversion were described as being located within the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of said Section 6. Certificate 2779 was issued under Permit 10409 on March 9, 1944, for 0.20 cfs, not to exceed 144.5 acre feet annually (afa).¹

II.

By letter dated September 25, 1996, the State Engineer informed the permittee Las Vegas Mortgage Company that the remaining portion of Permit 10409 may be subject to forfeiture under the provisions of NRS 534.090. Pursuant to the letter, the permittee was given until November 1, 1996, to file any information which the permittee may have showing the water had been placed to the permitted beneficial use.

III.

On November 1, 1996, the State Engineer received a letter from the agent for the permittee indicating the permittee's belief that

¹ Permit No. 10409, official records in the office of the State Engineer.

the balance of the water under Permit 10409² was available to the permittee.¹

IV.

After all parties of interest were duly noticed by certified mail, on March 5, 1997, an administrative hearing was held before representatives of the office of the State Engineer to consider the possible forfeiture of a portion of Permit 10409, Certificate 2779.³

FINDINGS OF FACT

I.

The certificated place of use under Permit 10409, Certificate 2779, consisted of 20 acres of land within the S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 6, T.21S., R.61E., M.D.B.&M. This acreage was reduced by the approval of several change applications which transferred portions of the water from the original place of use to new locations. The portion of Permit 10409, Certificate 2779, which remained after the approval of the change applications was forfeited in 1977 for non-use of the water for a period in excess of the statutory period.⁴ The State Engineer finds that the 1977 forfeiture action was restricted to those portions of the original place of use under Permit 10409, Certificate 2779, not abrogated by the change applications.

II.

Application 26868 had been filed on August 4, 1972, by the Las Vegas Mortgage Co. to change the point of diversion and the place

² The State Engineer notes that the letter referred to Permit 10479; however, it also referred to Certificate 2779, which is the certificate issued under Permit 10409.

³ Transcript, public administrative hearing before the State Engineer, March 5, 1997, (hereinafter "Transcript").

⁴ State Engineer Order Nos. 654 and 655, dated March 10, 1977, official records in the office of the State Engineer. Order No. 654 forfeited 0.135 cfs, 94.8 afa, and Order No. 655 forfeited 0.145 cfs, 10.43 afa.

of use of 0.023 cfs, not to exceed 16.8 afa, a portion of the water previously appropriated under Permit 10409, Certificate 2779. Permit 26868 was approved on October 14, 1975, for irrigation and domestic purposes within the W $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 35, T.19S., R.62E., M.D.B.&M.⁵ Under the terms of the permit, Proof of Commencement of Work was due to be filed in the office of the State Engineer on or before May 14, 1976.

Application 30271 was filed on May 24, 1976, by the Las Vegas Mortgage Company to change the point of diversion and place of use of 0.023 cfs, not to exceed 16.8 afa, of the water previously appropriated under Permit 26868. Permit 30271 was approved on September 16, 1976, for quasi-municipal and domestic purposes within the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 26, T.21S., R.61E., M.D.B.&M.⁶

Application 46903 was filed on May 12, 1983, by the Las Vegas Mortgage Company to change the point of diversion and place of use of 0.023 cfs, not to exceed 16.8 afa, of the water previously appropriated under Permit 30271.⁷

Application 46903 was timely protested by the Las Vegas Valley Water District on the following grounds:

Two water district pipelines with sufficient pressure and quantity are adjacent to the proposed place of use, which represents a change in the point of diversion and place of use of water already appropriated. One is approximately 200 feet and the second approximately 625 feet from the proposed point of diversion. These existing pipelines can supply the amount of water proposed for diversion provided the applicant pays all necessary fees and charges required for connecting to the water district's distribution system.

⁵ File No. 26868, official records in the office of the State Engineer.

⁶ File No. 30271, official records in the office of the State Engineer.

⁷ File No. 46903, official records in the office of the State Engineer.

The State Engineer finds that Application 46903 was never permitted.

III.

Application 51916 was filed on March 11, 1988, by the Las Vegas Mortgage Company to change the point of diversion and place of use of 0.023 cfs, not to exceed 16.8 afa, a portion of the water previously appropriated under Permit 10409.⁸ The State Engineer finds that by letter dated March 31, 1988, Permits 26868, 30271 and Application 46903 were withdrawn by the permittee in order to allow Application 51916 to be processed. The State Engineer finds that when Permits 26868, 30271 and Application 46903 were withdrawn by the permittee, Permit 10409, Certificate 2779, became subject to the forfeiture provisions of NRS 534.090 as the 16.8 afa had not been used at the original place of use since the water was moved to a new place of use under change Application 26868 in 1975.

IV.

The State Engineer finds that Application 51916 was denied on May 29, 1991, and upon said denial the only water right left in existence was the base right from which the applicant sought to transfer said water, i.e., Permit 10409, Certificate 2779. All the other permits and applications in the series of transactions had been withdrawn by the permittee. The State Engineer finds that when Application 51916 was denied it did not reactivate those permits and applications which the Las Vegas Mortgage Company had withdrawn, but rather only left the base water right in existence.

V.

Each year from 1991 through 1995 employees of the office of the State Engineer performed what are known as groundwater pumpage inventories which documented the actual use of water under Permit

⁸ File No. 51916, official records in the office of the State Engineer.

10409, Certificate 2779.⁹ The annual groundwater pumpage inventories for the Las Vegas Groundwater Basin for the years 1991 through 1995 show that no water was used as authorized under Certificate 2779 for irrigation on any of the 2.328 acres of the land to which the water right was appurtenant when Permits 26868, 30271 and Application 46903 were withdrawn. Testimony provided by Robert Coache, a staff member of the office of the State Engineer and the individual who performed the inventories for those years confirmed that no irrigation had occurred on the authorized place of use.¹⁰ The State Engineer finds that from 1991 through 1995 no water was used as authorized by Permit 10409, Certificate 2779, and the permittees did not provide any evidence to show use of water as authorized under the certificate.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and of the subject matter of this action and determination.¹¹

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.¹²

III.

The Nevada Supreme Court has held that forfeiture must be established by clear and convincing evidence of the statutory

⁹ Exhibit No. 3, public administrative hearing, March 5, 1997.

¹⁰ Transcript, pp. 5 - 12.

¹¹ NRS Chapters 533 and 534.

¹² NRS 534.090.

period of nonuse.¹³ 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.¹⁴ 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.¹⁵

The State Engineer concludes clear and convincing evidence was found in the testimony of Mr. Coache and the evidence provided through the pumpage inventories that for the five successive years from 1991 through 1995 no water was used as allowed under that portion of Permit 10409, Certificate 2779, appurtenant to the 2.328 acres and no evidence was provided by the permittee to show use of the water in the manner authorized under Permit 10409, Certificate 2779, at the authorized place of use.

¹³ Town of Eureka v. Office of the State Engineer, 108 Nev. 163 (1992).

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

¹⁵ Id. at 239.

RULING

The right to beneficially use 0.023 cfs, 16.8 afa, of water appropriated under that portion of Permit 10409, Certificate 2779, appurtenant to 2.328 acres of land in the S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 6,¹⁶ T.21S., R.61E., is hereby declared forfeited.

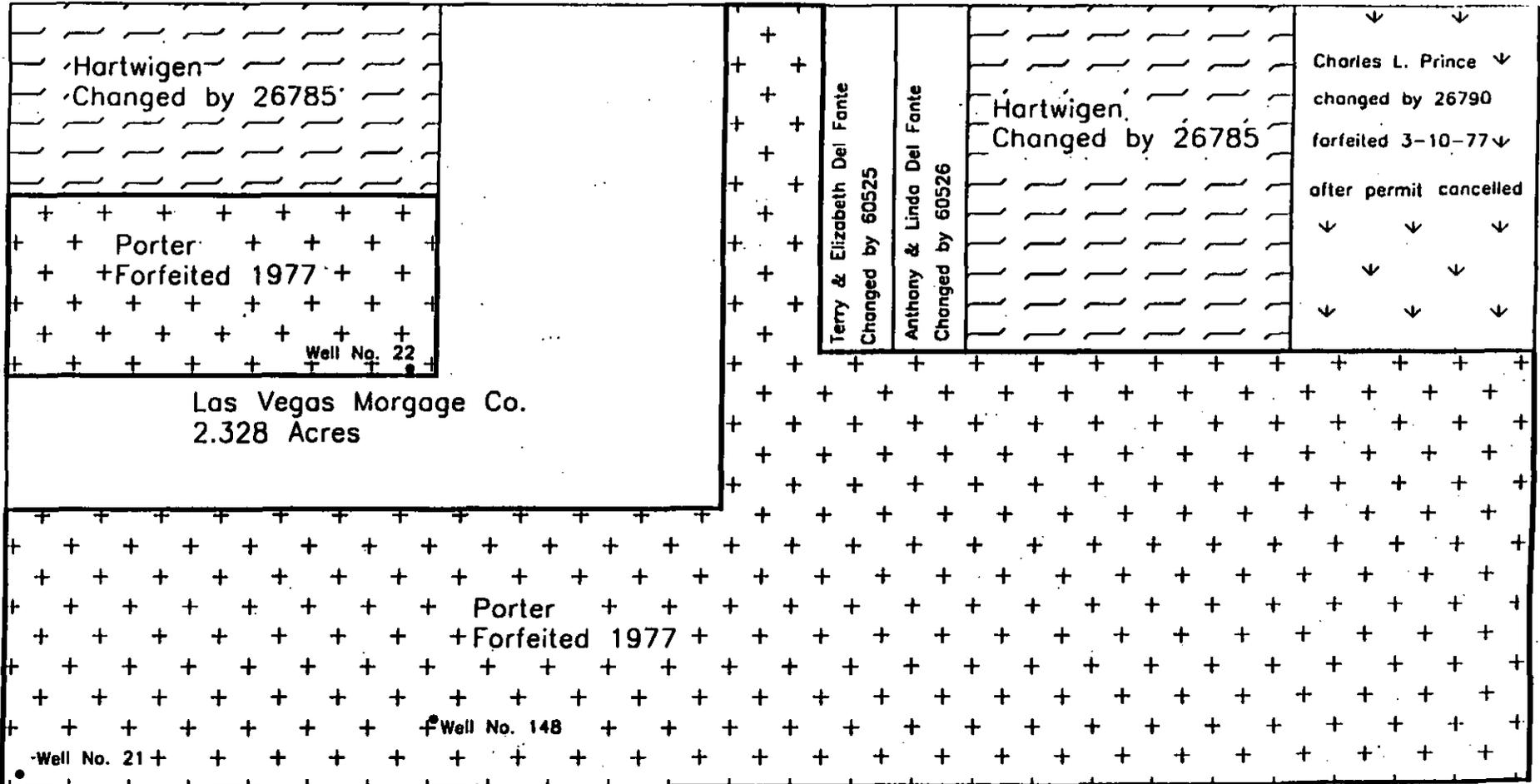
Respectfully submitted,


E. MICHAEL TURNIPSEED, P. E.
State Engineer

RMT/MDB/ab

Dated this 3rd day of
June, 1997.

¹⁶ See, map attached to and made part of this ruling.



Hartwigen
 Changed by 26785

+ + + + +
 + + Porter + + + +
 + + Forfeited 1977 + +
 + + + + + + + +
 + + + + + + + +
 Well No. 22

Terry & Elizabeth Del Fante
 Changed by 60525

Anthony & Linda Del Fante
 Changed by 60526

Hartwigen
 Changed by 26785

Charles L. Prince
 changed by 26790
 forfeited 3-10-77
 after permit cancelled

Las Vegas Mortgage Co.
 2.328 Acres

Porter
 Forfeited 1977

Well No. 148

Well No. 21