

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 HYDROGRAPHIC BASIN (212),)
CLARK COUNTY, NEVADA.)

SECOND RULING ON
REMAND
5126

GENERAL

I.

Permit 11409 was granted by the State Engineer to Theodore Werner and Kenneth Searles on April 17, 1946.¹ That permit allowed for the appropriation of 0.10 cubic feet per second of the underground waters of the Las Vegas Artesian Hydrographic Basin for the manner of use and place of use as authorized, that being for quasi-municipal purposes for three (3) existing dwellings on one three-acre parcel, then known as the Theodore Werner property, and one existing dwelling and a swimming pool on the other non-contiguous two-acre parcel of land, then known as the Kenneth Searles property, together with their associated landscaping.

II.

On July 9, 1998, the State Engineer issued State Engineer's Ruling No. 4644 in the matter of the possible forfeiture of Permit 11409, Certificate 3233. That ruling was appealed to the district court by the DeMarcos who own a piece of property, which is outside the certificated place of use,² but which has been using water from the subject well for quite some time. The district court by decision dated April 5, 1999, upheld the State Engineer's determinations that there was clear and convincing evidence that a certain portion of the water rights appurtenant to the Zampa property (a portion of the original Searles property) and a certain portion of the water rights appurtenant to the Daniels property (the original Werner property) were not forfeited. The

¹ Exhibit No. 4, public administrative hearing before the State Engineer, February 19, 1998.

² Exhibit No. 5, public administrative hearing before the State Engineer, February 19, 1998.

district court further upheld the State Engineer's declaration of forfeiture regarding all remaining portions of Permit 11409, Certificate 3233. However, the district court was concerned that the State Engineer may have overlooked that the DeMarcos had filed a change application to move water rights to their property. This application was filed days before the administrative hearing, which had been postponed several times. The district court remanded the matter to the State Engineer to articulate whether or not he took the filing of the change application into consideration in making his ruling, and if so, why the filing of the change application, which was after the date of notice of possible forfeiture, was not a sufficient basis for the DeMarcos to protect what interest they may have in Permit 11409, Certificate 3233.

III.

In State Engineer's Ruling on Remand No. 4907, dated April 18, 2000, the State Engineer held that unpermitted use outside the certificated place of use does not cure a partial forfeiture and the filing of a change application after the forfeiture proceeding had been initiated does not cure a forfeiture. Therefore, the State Engineer upheld his forfeiture determinations found in Ruling No. 4644.

The DeMarcos again appealed the State Engineer's decision, and the district court by decision dated August 27, 2001, held that the DeMarcos had gone far beyond the limited issue for which the case was remanded and noted that the district court had previously upheld the various aspects of the State Engineer's determination with the exception of the matter remanded. The district court disagreed with the State Engineer's position that once the notice of possible forfeiture is served one is barred from seeking to cure.

The State Engineer recognizes this is the law of this case, but strongly disagrees with the district court's decision for

several reasons. One, if a person could file a change application after the notice of possible forfeiture, and in effect forestall the forfeiture; the purpose of the forfeiture statute is completely defeated. Second, the Nevada Supreme Court in its decision in the case of Town of Eureka v. State Engineer, 108 Nev. 163, 948 P.2d 948, 952 (1992), specifically held that "[u]nder the rule we adopt, substantial use of water rights after the statutory period of non-use 'cures' claims to forfeiture so long as no claim or proceeding of forfeiture has begun." (Emphasis added.) In this case, a proceeding for declaration of forfeiture was initiated by the notice of possible forfeiture, and by the fact that the administrative hearing had been set, but postponed several times; therefore, a claim and proceeding for declaration of forfeiture had been initiated prior to the DeMarcos filing a change application.

The district court also disagreed that the record in the case supports the contention that all the DeMarcos have offered on the issue of cure is the mere filing of a change application, but rather that the record supports the view that the DeMarcos have been using water from the permitted well for over 50 years.

The district court further held that the State Engineer did not address the question of whether a change in place of use can ever take place before a forfeiture. The district court remanded the matter in order to allow the DeMarcos the opportunity to demonstrate that their circumstances go beyond solely filing a change application, so that the State Engineer could determine whether or not, if a change application had been made consistent with the use the DeMarcos actually did make of the water, was it likely the change application would have been granted.

FINDINGS OF FACT

I.

On or about December 12, 2001, the State Engineer's Hearing Officer had a telephone conversation with the DeMarcos' legal

counsel as to whether an administrative hearing should be held, or whether some sort of brief should be filed by the DeMarcos analyzing the hearing record, in order to present the DeMarcos' argument as to the matter remanded. DeMarcos' legal counsel opted for the latter and was given until January 28, 2002, to file said document. The State Engineer finds DeMarcos timely filed a document titled Petitioners' Brief to State Engineer for Decision on Remand.

II.

The State Engineer must begin his findings by indicating that there seems to be confusion on the part of the DeMarcos, their legal counsel and the court as to curing a forfeiture versus the filing of a change application, which are two completely distinct matters. Forfeiture or the cure of a forfeiture only goes to use as authorized by the water right permit. A cure is substantial reuse of the water from the point of diversion authorized, for the manner of use authorized and on the place of use authorized by the permit. It has nothing to do with unauthorized use such as the DeMarcos use, which is a use outside the authorized and certificated place of use, and was not accounted for when the original proof of beneficial use of water under the permit was filed in the Office of the State Engineer in 1949. The Nevada Supreme Court³ understood this when it indicated that "forfeiture is not effective, if, after the statutory period of non-use, the original owner or appropriator resumes use of water prior to a third party's claim of right." (Emphasis added.) To cure a forfeiture, the use must be that use as authorized under the permit, which is not the case in this matter.

The district court on this remand ordered the State Engineer to consider whether a change in place of use can ever take place before a forfeiture. Nevada Revised Statute § 533.325 provides

³ Town of Eureka v. State Engineer, 108 Nev. 163, 862 P.2d 948, 952 (1992).

that "[a]ny 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 in connection with such appropriation, change in place of diversion or change in manner of use or place of use, apply to the state engineer for a permit to do so." (Emphasis added.)

When an application is filed to change the point of diversion, place or manner of use of a water right, the State Engineer reviews the status of the water right being sought to be changed. Nevada Revised Statute § 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. Where the water right being sought to be changed has not been placed to beneficial use for the statutory 5-year forfeiture period, the State Engineer makes a determination whether the water right that is being requested to be changed is subject to forfeiture in order to determine whether the water right is in good standing and can be changed. If the water right is no longer valid, it is not in good standing and cannot be used to support a change application. The State Engineer finds that a change in place of use cannot take place before a permit is granted by the State Engineer. The State Engineer finds that prior to granting a change in place of use, as is the case here, the State Engineer determines whether the water sought to be changed is in good standing. If it is in good standing, for example, it has not been cancelled or is not subject to a declaration of forfeiture, it most likely can be changed. But, if the right requested to be changed is subject to a declaration of forfeiture, the State Engineer makes a determination as to the possible forfeiture; therefore, as the

court put it "a change in place of use cannot take place before a forfeiture."

III.

The district court's other remanded issue is whether or not, if a change application had been made consistent with the use the DeMarcos actually did make of the water on their property, was it likely it would have been granted. The State Engineer will begin with the simple analysis as to the remanded issue, but will point out below the various problems associated with that question.

In Volume I of the Record on Review in this matter, which is a copy of the official permit file found in the Office of the State Engineer, there is a copy of Clark County Assessor's map, which clearly indicates the location of the DeMarcos' two (2) parcels in relation to the permitted place of use. See, Exhibit A attached. The north parcel is a 0.66 acre parcel and the south parcel is a 0.63 acre parcel. The DeMarcos' properties are east of that portion of the place of use under Permit 11409 known as the Kenneth Searles property. If the change application had been filed prior to the forfeiture proceeding ever beginning, as discussed below, the water use on the DeMarcos' property is very limited.

Testimony from the public administrative hearing provided by the DeMarcos own mother indicated that water had never been used on the parcel on 1900 West Bonanza (APN 139-28-301-027), which is 0.63 of an acre. Mrs. DeMarco testified that this is a vacant lot and the faucet that would have provided water to that parcel had been capped in 1953 or 1954, because they did not use it.⁴

The only evidence of water use provided by the DeMarcos own testimony was use on APN's 139-28-301-022, which is 0.66 of an acre, containing a house, 6-7 trees, a swimming pool and grass. That being the case, the State Engineer finds - setting aside the

⁴ Transcript, pp.132 -133, public administrative hearing before the State Engineer, February 19, 1998.

multiple issues discussed below including, issues of title, if the DeMarcos actually received any water by the deeds, and if they did how much they got, the expansion of the water right without authorization, and who's land is being stripped of water since the district court has already affirmed the forfeiture of the water right on the land from which the DeMarcos can trace their title, if any - the maximum amount that could be considered to be changed would be 4.42 acre-feet, since there was no water use on the 0.63 acre parcel. That 4.42 acre-feet represents the 5 acre-feet per acre duty for the southern Nevada area for the 0.66 of an acre ($5 \times 0.66 = 3.3$), plus an additional 1.12 acre-feet for domestic use under a quasi-municipal permit such as this. The State Engineer finds this is a quantity of water far beyond that generally considered necessary for a parcel of this size. The domestic well exception in Nevada,⁵ which provides for water use for one house and associated landscaping allows for 1,800 gallons per day, which converts to 2.02 acre-feet per year.

IV.

A. Title Problem - DuBois (DeMarcos predecessors in interest) Failure to Record with the Office of the State Engineer the Purchase and Change in Place of Use of a Portion of the Water Right

The State Engineer has consistently indicated there are title problems in this matter, but was able to avoid them due to the forfeiture proceeding. However, he now believes he must point them out to the court and the DeMarcos. Exhibit B attached is presented to help show the problem.

Application 11409 was filed on October 25, 1945. Permit 11409 was granted under that application to Theodore Werner and Kenneth Searles on April 17, 1946. But, on November 20, 1945, Kenneth and Mildred Searles had conveyed their 1/2 interest in the

⁵ NRS § 534.013; 534.180.

well and water to Theodore and Afton Thornton Werner. This deed was not filed in the Office of the State Engineer until August 28, 1946. When this deed was filed in 1946, the Office of the State Engineer interpreted it as vesting 3/4ths of the interest in Permit 11409 in Theodore Werner and 1/4th interest in the permit in Afton Thornton Werner with no interest remaining in Kenneth Searles.

However, then on February 7, 1947, Searles sold a 1/6th interest in the well with rights to 1/3rd of the flow to Louis and Gertrude DuBois (the DeMarcos predecessors in interest). But, as just noted, according to the records of the State Engineer's Office, Searles had nothing to sell as he had conveyed the whole water right to the Werners. Therefore, the deeds could be interpreted as conveying nothing to the DeMarcos.

The DuBois never filed anything with the Office of the State Engineer indicating an ownership interest in the well or water. The 1913 water law in effect at that time provided that "[a]ny application for permit or any permit to appropriate water, may be assigned subject to the conditions of the permit, but no such assignment shall be binding except between the parties thereto, unless filed for record in the office of the state engineer."⁶ (Emphasis added.) This statutory language stayed the same through the mid-1990's.⁷ Since, the assignment of a portion of the water right to the DuBois (DeMarcos) was not filed in the Office of the State Engineer, it was not binding on the State Engineer.

Then on March 2, 1949, even though Kenneth and Mildred Searles in 1945 had conveyed their 1/2 interest in the well and water to Theodore and Afton Thornton Werner, Theodore Werner and Kenneth Searles jointly filed a Proof of Application of Water to

⁶ Session law of Nevada, Act of March 22, 1913, chp. 140, § 66, 1913.

⁷ See, NRS § 533.385 (1993). The recording statutes were amended in 1995.

Beneficial Use as required under the terms of their permit. In the remarks section of that proof they indicated that "[w]ater is serviced to four (4) dwellings, for domestic purposes; together with approx. 5 acres of landscaping (trees, shrubs, and gardens). A swimming pool 30' by 54' having a depth of 4.5' at one end and 7' at the other end is used during the summer months."⁸ There is no mention of a portion of the water having been sold, and in fact, Werner and Searles filed for the full amount of the water for themselves, and for the exact uses as indicated under the original application. There is no proportionate discount of the diversion rate for the sale of a portion of the water right to the DeMarcos predecessors in interest.

When the State Engineer issued the final certificate on the water right on April 6, 1949, he issued it to Theodore Werner 3/4ths interest and Afton Thornton Werner 1/4th interest.⁹ The present State Engineer assumes the certificate was issued in the Werners' names alone because the State Engineer in 1949 believed from the November 25, 1945, deed that Searles no longer had an ownership interest in the permit. Furthermore, after the certificate was issued there is nothing in the records of the Office of the State Engineer until the 1990's to indicate that anyone raised a concern with how title was held at that time.

Now, recently it has come to the State Engineer's attention that by document dated April 30, 1949, Theodore and Afton Thornton Werner conveyed an undivided 1/2 interest in Permit 11409 to Kenny Searles.¹⁰ This affirms for the State Engineer that there is a question whether Searles actually sold anything to the

⁸ File No. 11409, official records in the Office of the State Engineer.

⁹ Exhibit No. 3, public administrative hearing before the State Engineer, February 19, 1998.

¹⁰ Records in the Office of the State Engineer.

DuBois/DeMarcos, because the records of the State Engineer indicated at the time Searles sold to DuBois he did not own anything.

B. Title Problem - The Incomplete Chains of Title Over the Years and Continuing Title Problems

Until this forfeiture proceeding, since none of the many deeds transferring the Werner and Searles properties were not filed in the Office of the State Engineer, the State Engineer acted on those documents that were filed to transfer the water right permit. However, a caveat was always given that the assignment of title could be subject to amendment upon receipt of additional information. The State Engineer now knows that the Werners sold their property to others indicating to those persons they got a share of the well and water. Searles property has also been conveyed multiple times. Then in 1991, Michael DeMarco filed two quitclaim deeds with the Office of the State Engineer.¹¹ By letter dated December 27, 1991, the State Engineer informs Michael DeMarco that he needed to complete the chain of title from Theodore and Afton Werner to Kenneth Searles as the records of the Office of the State Engineer indicated that Kenneth and Mildred Searles had sold by deed dated November 20, 1945, their 1/2 interest to the Werners. Therefore, in 1991 the DeMarcos were made aware there were title problems in relation to Permit 11409.

The State Engineer must have been satisfied with the documentation filed by Michael DeMarco, because by letter dated January 30, 1992, Miriam and Michael DeMarco were informed that Permit 11409 had been assigned to them, but they were also informed that the assignment reflected only the information that had been filed with the Office of the State Engineer and could be subject to amendment upon receipt of additional documentation.¹²

¹¹ File No. 11409, official records in the Office of the State Engineer.

¹² File No. 11409, official records in the Office of the State

By letter dated September 13, 1996, the Office of the State Engineer informed Miriam and Michael DeMarco that the records of the Office of the State Engineer were being revised to show Miriam and Michael DeMarco holding a 75% undivided interest and Afton Thornton Werner holding a 25% undivided interest in Permit 11409. The DeMarcos were again cautioned that the assignment reflected only the information that had been filed with the Office of the State Engineer and could be subject to amendment upon receipt of additional documentation.¹³ This proportioning of the assignment of the water right reflects that the State Engineer did not have Searles, who sold to DeMarcos predecessor DuBois, as an owner of the water right and again raises the question of what Searles sold to DeMarcos predecessor, if anything. Further, this does not address that the DeMarcos were holding title to water rights that were appurtenant to other people's properties, and many other deeds and conveyances of this water right have been made.

But the title problems do not end there. Over the course of the hearing process and since that time various other deeds have been filed with the State Engineer. On February 7, 1947, the DeMarcos' predecessor DuBois conveyed their interest to Nig and Marge Graham. However, on April 30, 1949, it appears that the Werners and Searles attempted to fix the problem of the State Engineer's records reflecting ownership of the entire water right in the Werners' names, and by deed Theodore and Afton Thornton Werner conveyed an undivided 1/2 interest in Permit 11409 to Kenny Searles. However, this still does not reflect that Kenneth Searles had sold a portion of the water right to the DuBois - Graham - DeMarcos. They are trading portions of the water right as if the DuBois deed never existed.

Engineer.

¹³ File No. 11409, official records in the Office of the State Engineer.

If one were to use the doctrine of after acquired title,¹⁴ it could put part of the title back into Searles name that could have then been conveyed to the DeMarcos predecessor. However, this still does not address the problem discussed below that Theodore Werner and Kenneth Searles filed for the full water right not accounting for the fact that a portion of the water had been sold and was being used on the DeMarco property.

Be that as it may, it could be said by using a different analysis than the State Engineer used in 1949, because of the after acquired title provision, that as of 1956 37.5% of the water right was in the name of Theodore Werner, 12.5% in Afton Thornton Werner, 16.67% in Kenneth and Mildred Searles and 33.33% in Nig and Marge Graham (DeMarcos predecessor coming through the Searles chain of title). However, other interpretations of the deeds can be made, and this does not account for things such as the Werners sale of their property to the Romeros in 1962 and the water remaining appurtenant to property the DeMarcos do not own since no change application was timely filed.

C. DFA, LLC c/o Don Ahern Claim to Portion of Water Right Off the Werner Portion of the Original Place of Use.

When Werner & Searles filed their Proof of Application of Water to Beneficial Use they indicated that the water was used by four (4) dwellings together with approximately 5 acres of landscaping and a swimming pool. In Ruling No. 4644, the State Engineer found that this beneficial use equated to 29.48 acre feet and this decision was upheld by the district court. The water was appurtenant to the Searles property, which the State Engineer has declared all forfeited, except for 1.12 acre-feet appurtenant to the Zampa portion of the original Searles property. The water right on the Werner portion of the property, of which 11.12 acre-feet was declared to be in good standing (this is the Daniels'

¹⁴ NRS § 111.160.

portion of the property) is appurtenant to that property. The records of the State Engineer indicate that the Daniels have sold their property to DFA, LLC c/o Don Ahern who has requested assignment of the 11.12 acre-feet portion of the water right into the name of DFA, LLC.¹⁵

The State Engineer finds there are continuing title problems associated with Permit 11409, and before any application could be considered, the title issues need to be resolved, particularly since the original water rights were appurtenant to and apparently being used on property the DeMarcos never owned. This means that when a portion of the water right was sold to DeMarcos predecessor in interest an equal portion of the original place of use (the Searles/Werner) properties had to be dried up or in water law terminology "stripped of water rights." But as discussed below, this did not happen.

v.

Accounting for DeMarcos Use Expands the Water Right to An Amount Greater Than Authorized Under the Original Permit and Certificate.

Another problem that has to be considered if the State Engineer is to consider the district court's hypothetical is that if the DeMarcos are allowed to consider their use a part of Permit 11409 that in effect enlarges Permit 11409 beyond the original amount permitted by the State Engineer. The permit was issued only for the 4 dwellings and 5 acres authorized under the permit. When the Werners and Searles filed their Proof of Application of Water to Beneficial Use, they filed for the full amount of the water right as permitted. They did not account for any water sold to the DeMarcos predecessor, and there was no proportional discount of the diversion rate or total duty taken to account for any water sold to the DeMarcos predecessor. If the use by DeMarcos predecessor is counted under the permit, it expands the

¹⁵ Official records in the Office of the State Engineer.

permit beyond the amount originally authorized by the State Engineer. It is the State Engineer who determines the amount authorized for appropriation, and people cannot just change the amount permitted by independent acts of selling water rights to another person. Theodore Werner and Kenneth Searles did not account for use of water by the DeMarcos when they filed their proof of beneficial use, since no deduction for that use was taken out of the original permit or certificate. The State Engineer finds that if the DeMarcos use is counted as a valid use of water it will expand, without the benefit of law, the permit beyond the quantity of water granted by the State Engineer in 1946 under Permit 11409.

VI.

What Proportion of the Water Right Was Appurtenant to the Searles Property, Which is Where the DeMarcos Chain of Title Appears to Originate

Theodore and Afton Thornton Werner sold their 3-acre parcel to Donald and Barbara Romero by deed dated September 14, 1962. The State Engineer believes, based on the information he has now, that resulted in the Romeros owning 50% of the water right, Searles Inc.¹⁶ owning 16.67% of the water right and the DeMarcos as successors to the DuBois/Grahams with 33.33% of the water right. Again, the following analysis leaves out the title issues and the issue that DeMarcos use is an unauthorized expansion of the original certificate. The DeMarcos obtained a quitclaim deed from Theodore Werner in 1991 indicating he was conveying anything he owned to them. However, he had already conveyed his 50% ownership in the water right to the Romeros, he no longer owned any of the property to which the water right is appurtenant, thereby raising

¹⁶ The State Engineer is leaving out some chain of title facts not relevant to this discussion in an attempt not to thoroughly confuse the matter, but notes there are serious problems with the chain of title.

the question of if he really had anything to convey to the DeMarcos, since a water right not reserved out of land transfer is considered appurtenant to that land and goes with the transfer.¹⁷ Furthermore, the water right on the Werner/Daniels portion of the property is appurtenant to that property, and the records of the State Engineer indicate that the Daniels have sold their property to DFA, LLC c/o Don Ahern who has requested assignment of 11.12 acre-feet portion of the water right into the name of DFA, LLC.¹⁸ Mr. Ahern believes he is the owner of the water right appurtenant to the Daniels property.

The District Court has already affirmed the State Engineer's determination of the quantity of water placed to beneficial use on the authorized place of use, that being 29.48 acre-feet annually. So, while deeds evidence could under one interpretation show that the DeMarcos own 33.33% of the 29.48 acre-feet, the State Engineer questions whether Kenneth Searles could have sold a portion of the water right that the records of the State Engineer did not show he owned at that time. Also, if the DeMarcos right comes out of the Searles chain of title, it means that Searles sold most of his water to DeMarco and there should only have been 1/6th of the right left on his property.

The State Engineer finds that if the DeMarcos own 33.33% of the total water right, that quantity was 9.83 acre-feet annually prior to the forfeiture, but only show use of a calculated maximum allowable use amount of 4.42 acre-feet. The State Engineer finds that title in the matter is extremely confusing and that the matter may require the title be quieted by a district court. However, the State Engineer finds that using the doctrine of after acquired title that the DeMarcos most likely can show ownership of 33.33% of the 50% of the water right that Searles could possibly

¹⁷ NRS § 533.040.

¹⁸ Official records in the Office of the State Engineer.

claim, with their claim coming through the Searles chain of title. That quantity would be stripped off the Searles portion of the property, but that has been forfeited, except for the 1.12 acre-feet which belongs to the Zampa property. The water right appurtenant to the Werner/Romero/Daniels portion of the original property is owned by someone else.

VII.

If the DuBois/Grahams/DeMarcos Had Filed a Change Application Where Was the Water Stripped From Out of the Original Place of Use?

The District Court has affirmed that the quantity of the water under the original certificate totals 29.48 acre-feet annually. The District Court has asked the State Engineer on this remand to consider the question of whether or not, if a change application had been made consistent with the use the DeMarcos actually did make on their property, was it likely to have been granted. First, this raises the issue of what property would the water right have been stripped from if the change application had been timely filed for the amount of water the DeMarcos had used on their property.

The DeMarcos chain of title appears to have come through Searles, and if they only got water from Searles, the Searles' property was the 2-acre parcel with 1 house and a swimming pool. If the portion of the original water right that was appurtenant to the Searles property was the amount that was used on that property, that maximum amount was 11.12 acre-feet, and if the DeMarcos own 33.33% of that 11.12 acre-feet they had title to 3.71 acre-feet of the water right under Permit 11409. Therefore, setting aside the other issues, the State Engineer would not grant a change application for the 4.42 acre-feet, but rather 3.71 acre-feet.

If the 29.48 acre-feet were divided equally between Theodore Werner and Kenneth Searles, there was 14.74 acre-feet owned by

Kenneth Searles, and if the DeMarcos got 33.33% of that 14.74 acre-feet their predecessor purchased 4.91 acre-feet. Therefore, the State Engineer may have granted a change application for the 4.42 acre-feet.

If they got 33.33% of the entire 29.48 acre-feet, the DeMarcos got 9.83 acre-feet, but that required a proportionate reduction of the use on both the Searles and Werner properties, which was not done as indicated when they filed their proof of beneficial use.

The water right that was appurtenant to the Searles property was all forfeited, except the 1.12 acre-feet appurtenant to the Zampa portion of the original Searles property, and it is not possible to give the Zampa water to the DeMarcos.

The water right on the Werner/Daniels portion of the property is appurtenant to that property. The district court has already affirmed that 11.12 acre-feet appurtenant to that property was not declared forfeited by the State Engineer. The current records of the State Engineer indicate that the Daniels have sold their property to DFA, LLC c/o Don Ahern who has requested assignment of the 11.12 acre-feet portion of the water right into the name of DFA, LLC.¹⁹ So, if water is going to be given to the DeMarcos, who's water is it going to be taken and what is the legal basis for doing so?

CONCLUSIONS

I.

The State Engineer concludes that a change in place of use cannot take place without permission from the State Engineer through the granting of a permit on an application, and if a change in place of use is requested the State Engineer will review the status of the water right being requested for change to determine if it is a water right in good standing or not. The

¹⁹ Official records in the Office of the State Engineer.

State Engineer reviews whether a water right is subject to forfeiture before granting a change application.

II.

The State Engineer concludes there are possible title issues remaining as to DeMarcos. The State Engineer has made a finding of fact - setting aside all the problems mentioned - as to if the DeMarcos had filed a change application for the 4.42 acre-feet that they testified they had made actual use of on their property, whether it may have been granted. The State Engineer concludes since this is not specifically before him it is not appropriate to make a conclusion of law or a ruling on a hypothetical.

Respectfully submitted,



HUGH RICCI, P.E.
State Engineer

HR/SJT/jm

Dated this 5th day of
June, 2002.

NOTES

This map is for assessment use only and does NOT represent a survey. No liability is assumed for the accuracy of the data delineated herein. Information on roads and other non-assessed parcels may be obtained from the Road Document Listing in the Assessor's Office.

This map is compiled from official records, including surveys and deeds, but only contains the information required for assessment. See the recorded documents for more detailed legal information.

USE THIS SCALE (FEET) WHEN MAP REDUCED FROM 11X17 ORIGINAL

MAP LEGEND

- PARCEL BOUNDARY 001
- - - SUBD BOUNDARY 1.00
- - - ROAD EASEMENT 202
- - - PW/LD BOUNDARY 5
- - - NON-PARCEL LOT LINE 5
- - - MATCH LINE / LEADER LINE 5
- ROAD ID NUMBER GL5

ASSESSOR'S PARCELS - CLARK CO., NV.
M. W. Schofield, Assessor

T20S R61E

R60E	R61E	R62E
125	124	123
138	139	140
163	162	161

28

8	5	4	3	2	1
7	8	9	10	11	12
13	14	15	16	17	18
19	20	21	22	23	24
25	26	27	28	29	30
31	32	33	34	35	36

N 2 SW 4

8	4	8	4
5	1	5	1
6	2	6	2
7	3	7	3
8	4	8	4
5	1	5	1

139-28-3



Scale: 1"=200' Rev: 02/01/02

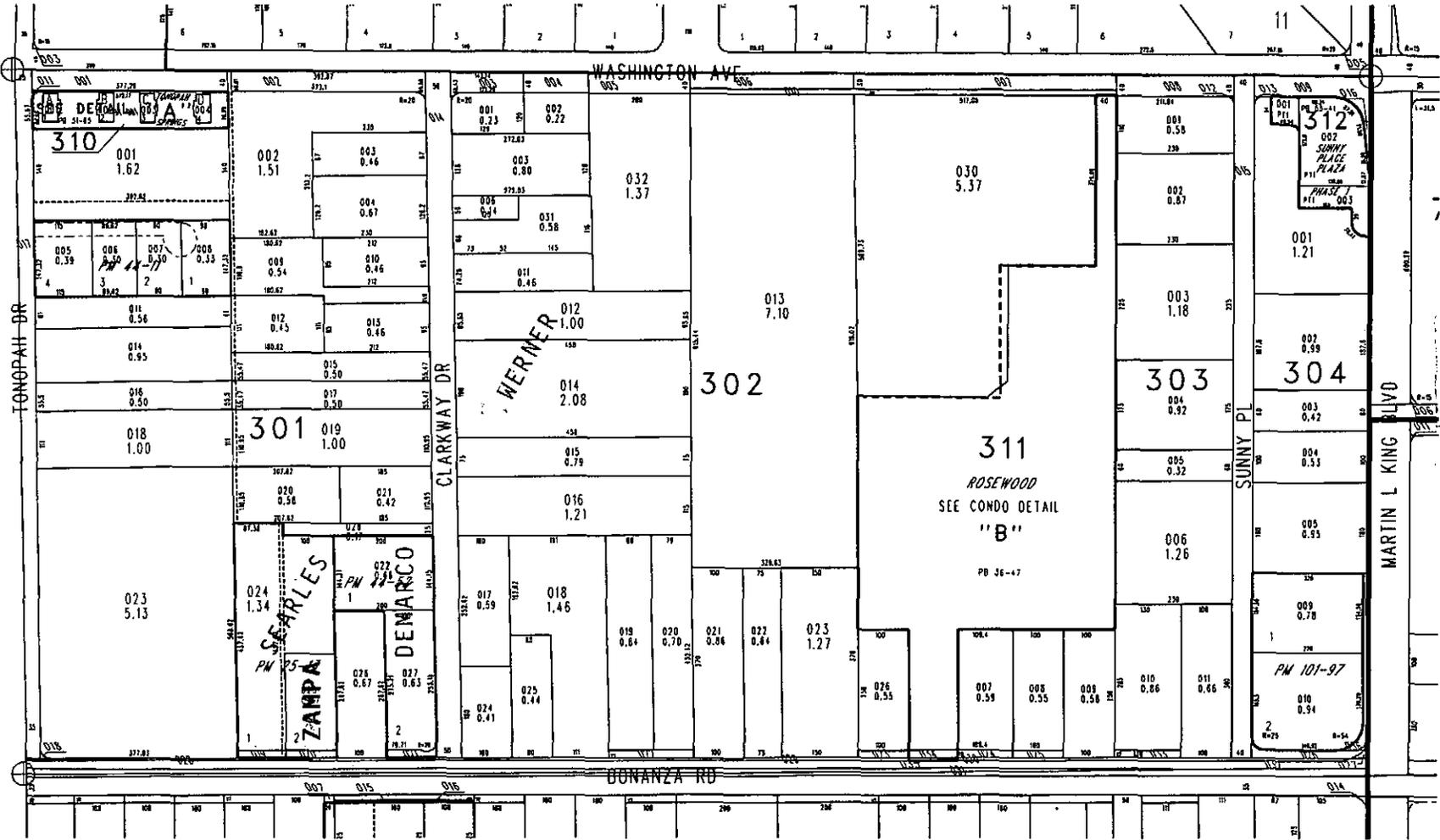


EXHIBIT A

EXHIBIT B

	<u>Searles portion</u>	<u>Werner portion</u>
10-25-45	Application filed by Theodore Werner and Kenneth Searles	
Ownership per State Engineer's records	1/2	1/2
<hr/>		
11-25-45	Kenneth and Mildred Searles convey their 1/2 interest in the well to Theodore and Afton Thornton Werner - nothing filed with the Office of the State Engineer	
<hr/>		
04-17-46	Permit granted to Theodore Werner and Kenneth Searles	
<hr/>		
08-28-46	Deed from Kenneth and Mildred Searles conveying 1/2 interest in the well to Theodore and Afton Thornton Werner filed in Office of the State Engineer for decades	
Ownership per State Engineer's records	0	3/4ths Theodore Werner and 1/4th Afton Thornton Werner
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02-07-47	Searles sells 1/6th interest in well and 1/3rd interest in flow to Louis and Gerturd DuBois - DeMarcos predecessor in interest. No deed recorded with the Office of the State Engineer.	
Ownership per State Engineer's records	0	3/4ths Theodore Werner and 1/4th Afton Thornton Werner

03-02-49 Theodore Werner and Kenneth Searles jointly filed a Proof of Application of Water to Beneficial Use for full amount of water - no reduction for sale of portion of water to DeMarcos' predecessor

Ownership 0 3/4ths Theodore
per State Engineer's records Werner and
1/4th Afton
Thornton Werner

04-06-49 State Engineer issues certificate on permit

Ownership 0 3/4ths Theodore
per State Engineer's records Werner and
1/4th Afton
Thornton Werner

05-17-49 Theodore and Afton Thornton Werner convey an undivided 1/2 interest in Permit 11409 to Kenny Searles. This document was not known by State Engineer to exist until this recent controversy, nothing ever recorded with state engineer.

Ownership 0 3/4ths Theodore
per State Engineer's records Werner and
1/4th Afton
Thornton Werner