

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

IN THE MATTER OF THE FORFEITURE OF )  
PERMIT 11711 FILED TO APPROPRIATE THE )  
UNDERGROUND WATER OF THE LAS VEGAS )  
VALLEY HYDROGRAPHIC BASIN (212), AND )  
APPLICATION 72642 FILED TO CHANGE THE )  
POINT OF DIVERSION AND PLACE OF USE )  
OF PERMIT 11711, CERTIFICATE 3185, CLARK )  
COUNTY, NEVADA. )

**RULING**  
**#6065**

**GENERAL**

Permit 11711 was granted by the State Engineer to Eastland Heights Water Company on March 26, 1947, to appropriate 0.30 cubic feet per second (cfs) of the underground waters of the Las Vegas Valley Hydrographic Basin for quasi-municipal and domestic purposes within the SE $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 19, T.20S., R.61E., M.D.B.&M.<sup>1</sup> The point of diversion is described as being located within the SW $\frac{1}{4}$  SE $\frac{1}{4}$  of said Section 19.

After filing proof of beneficial use of the waters as allowed under the permit, Certificate 3185 was issued by the State Engineer on January 24, 1949. The certificate of appropriation allows for the diversion of underground water at a rate of 0.30 cfs for quasi-municipal and domestic purposes within the SE $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 19, T.20S., R.61E., M.D.B.&M.<sup>1</sup>

**FINDINGS OF FACT**

**I.**

The records in the Office of the State Engineer reflect that Permit 11711, Certificate 3185, is a non-revocable water right issued for quasi-municipal and domestic purposes with a diversion rate of 0.30 cfs; however, no annual total acre-foot duty was specified. The map filed in the Office of the State Engineer that accompanied the proof of beneficial use clearly defined the place of use as within the SE $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 19, T.20S., R.61E., M.D.B.&M. lying south and west of U.S. Highway No. 95, excepting Lot Nos. 1 and 10, Block 21, Eastland Heights No. 1, Section 19, T.20S., R.61E., M.D.B.&M. Nevada Revised Statute § 533.060(1) provides that any appropriation of water is limited and restricted to as much as may be necessary, when reasonably and economically used for beneficial purposes. Therefore, the total quantity of the

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<sup>1</sup> File No. 11711, official records in the Office of the State Engineer.

water that may be appropriated under Certificate 3185 is limited and restricted to so much water as was necessary for the certificated uses and that quantity is the basis, the measure, and the limit of the right to the use of the water. A certificated cubic foot per second diversion rate is an instantaneous measurement of the groundwater withdrawal and does not measure the total quantity of water that is reasonably and necessary for the permitted/certificated use of water. If the certificated diversion rate of 0.30 cfs is expanded continuously for a period of one year, meaning the well was pumped 24 hours a day 365 days a year, this quantity would equate to 217.2 acre-feet annually. The State Engineer finds this quantity simply represents the numerical expansion of the diversion rate and does not establish the certificated total quantity of water actually beneficially used or allowed to be used.

## II.

The map filed in the Office of the State Engineer that supported the proof of beneficial use indicates 34 homes were within the place of use of Permit 11711, Certificate 3185 at the time the proof of beneficial use was filed. The State Engineer finds that the 34 homes within the place of use existing at the time the proof of beneficial use was filed are the only legal uses authorized under the certificate and the quantity of water necessary to meet those uses was the limit and extent of the certificated appropriation as authorized under Permit 11711, Certificate 3185. The State Engineer further finds that the quantity of water necessary to serve the 34 homes at the time the proof of beneficial use was filed under Permit 11711 was 1,000 gallons per day (1.12 acre-feet annually) for each house originally certificated, which equates to 38.1 acre-feet annually.

## III.

By letter dated July 17, 2009, the State Engineer quantified the total duty of water authorized by Permit 11711, Certificate 3185 and indicated that based on a total of 34 homes and a standard daily allocation of 1,000 gallons per day per home, the annual duty for the 34 homes is 12,410,000 gallons per year or approximately 38.1 acre-feet annually. The letter indicated that if the permit holder had any information showing an amount greater than 38.1 acre-feet was used from the well appurtenant to the place of use under Certificate 3185, that the water right holder was to provide information as to the purpose for which any water was used, indicate where that use took place, i.e., the place or lots where the water use occurred, and the amount used quantified by same means. The response to the State Engineer's July 17, 2009, letter was found to be insufficient and a subsequent letter was sent on January 11, 2010, requesting additional information. By letter dated April 6, 2010, the Permittee's legal counsel stated that the homes

within Eastland Heights Tract No. 1, which is the place of use of Permit 11711, were conveyed to the city water system in 1968. The records of the Las Vegas Valley Water District (LVVWD) confirm that the homes within the place of use under Permit 11711, Certificate 3185 (Eastland Heights Tract No. 1) were connected to the LVVWD system in late 1964 or early 1965. Also, according to LVVWD records, none of the homes within the place of use of Permit 11711, Certificate 3185 are equipped with backflow prevention devices, which further supports a finding that these homes are not connected to an alternate water source. The State Engineer finds the homes within the permitted place of use under Permit 11711, Certificate 3185, have not used water under this permit since the mid-1960s.

#### IV.

Under Nevada Revised Statute § 534.090, failure for five successive years after April 15, 1967, to use beneficially all or part of the underground water for the purpose for which the right is acquired works a forfeiture. The period of non-use of Permit 11711, Certificate 3185, begins prior to 1969. The State Engineer finds that the five successive years of non-use occurred from 1969 through 1973 with continued non-use to date. Additionally, the State Engineer also finds that the Permittee did not provide any evidence to indicate any use as authorized under the permit had occurred after 1969, and in fact, the Permittee's legal counsel specifically indicated that the homes within Eastland Heights Tract No. 1 (which is the place of use of Permit 11711, Certificate 3185) were conveyed to the LVVWD's water system in approximately 1968.

#### V.

In the letter from the Permittee's legal counsel dated April 6, 2010, it was stated that water had been used outside the place of use of Permit 11711, Certificate 3185, and within the place of use of Permits 11210 and 11738. Under Nevada water law, any person who wishes to appropriate any of the public waters, or to change the point of diversion, manner 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 or place of use, apply to the State Engineer for a permit to do so.<sup>2</sup> It is clear, from the Permittee's legal counsel's own statement, the homes within the place of use of Permit 11711, Certificate 3185 were connected to the LVVWD water system in 1968 and the water from Permit 11711, Certificate 3185 was illegally used outside the authorized place of use under Permit 11711, Certificate 3185. The

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<sup>2</sup> NRS § 533.325.

State Engineer finds that the use of water from the well under Permit 11711, Certificate 3185 on land located in the SW $\frac{1}{4}$  SE $\frac{1}{4}$ , the NE $\frac{1}{4}$  NE $\frac{1}{4}$ , or the NW $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 19, T.20S., R.61E., M.D.B.&M. cannot constitute beneficial use under Permit 11711, Certificate 3185. The State Engineer also finds that water under Permit 11711, Certificate 3185 may only be placed to beneficial use within the SE $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 19, T.20S., R.61E., M.D.B.&M., for quasi-municipal and domestic purposes, as specified in the terms of the certificate.

#### VI.

In 1995, legislation was passed to amend the groundwater forfeiture statute (NRS § 534.090). The amendment requires the State Engineer to notify the owner of any water right governed by the statute after four consecutive years of non-use in basins where the State Engineer keeps pumpage records. This notification is referred to as a "Four-Year Non-Use Letter". The owner then has one year from the date of the notice to resume beneficial use of the water or file for an extension of time to prevent forfeiture. The statute was enacted in 1995 and the State Engineer has applied the statute where the non-use occurred in 1995 or later. When the forfeiture has occurred prior to 1995, the forfeiture statute that was in place at the time of the forfeiture is enforced. This interpretation of the water law is fully supported in the legislative history. The State Engineer finds that in this case, the forfeiture occurred prior to 1995, and the statute did not require notification prior to initiation of a forfeiture proceeding.

#### VII.

Water right permits are issued for a specific point of diversion, place of use and manner of use and with specific terms and conditions. Any use of water contrary to the specific limitations of a water right permit is not allowed. If a permit holder wishes to obtain a new water right or change the point of diversion, place of use and manner of use, of an existing water right, he must apply to the State Engineer for a permit to do so.<sup>3</sup>

Application 72642 was filed April 25, 2005, to change the point of diversion and place of use of Permit 11711, Certificate 3185. Nevada Revised Statute § 533.325 provides that an application can be filed to change water already appropriated. Water already appropriated refers to water represented by a permit or certificate in good standing. Where a certificated water right has not been used for five consecutive years a forfeiture has worked and the water right is not in good standing and cannot be used to support a change application. The State Engineer finds that

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<sup>3</sup> NRS § 533.325.

five successive years of non-use of the water under Permit 11711, Certificate 3185 occurred before change Application 72642 was filed; therefore, the right sought to be changed was not in good standing and there was no water right under Permit 11711, Certificate 3185 available to be changed.

## CONCLUSIONS

### I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>4</sup>

### II.

The State Engineer concludes that in order for a water right permit to ripen into a water right certificate the permittee must file proof of the application of the water to beneficial use within the time frame set forth in the permit or in any extension of time granted by the State Engineer.<sup>5</sup> After a certificate is issued on a permit, failure for five successive years on the part of the certificate holder to use beneficially all or any part of the underground water of the state of Nevada for the purpose for which the right is acquired or claimed works a forfeiture of the right to the use of that water or the extent of the non-use.<sup>6</sup>

Forfeiture must be demonstrated by clear and convincing evidence. Clear and convincing evidence is that evidence that falls somewhere between a preponderance of the evidence and the higher standard of beyond a reasonable doubt.<sup>7</sup> By letter from Permittee's legal counsel dated April 6, 2010, information was obtained that the place of use under Permit 11711, Certificate 3185 (Eastland Heights Tract No. 1) was connected to the LVVWD water system in approximately 1968; thus, the Permittee admits there was no use of the water as authorized under the permit for over 40 years. The Permittee's legal counsel argues that since the water was used elsewhere the State Engineer should exercise equitable authority and not forfeit the water right and grant the change application.

The State Engineer concludes that he does not have equitable authority, but must rather follow the mandates of the water law, which provides that failure to use water as authorized for five consecutive years works a forfeiture of the water right. The State Engineer concludes that

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<sup>4</sup> NRS § Chapters 533 and 534.

<sup>5</sup> NRS § 533.140.

<sup>6</sup> NRS § 534.090.

<sup>7</sup> 1 Clifford S. Fishman, Jones on Evidence § 3:10 (7<sup>th</sup> ed. 1993).

the water right was not placed to beneficial use as authorized under Permit 11711, Certificate 3185 from the period of 1969 through 1973, with continued non-use to date; thus, supporting a determination that the water right was forfeited.

**III.**

Application 72642 was filed to change the point of diversion and place of use of Permit 11711, Certificate 3185. The application was filed in 2005, subsequent to the period of forfeiture under Permit 11711, Certificate 3185. An application may be filed to change the point of diversion, manner or place of use of water already appropriated.<sup>8</sup> Water already appropriated, in reference to a change application, refers to water represented by a water right permit or certificate in good standing. Where a water right certificate has been forfeited, 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 concludes that Permit 11711, Certificate 3185 is not in good standing and cannot support change Application 72642. The State Engineer concludes Application 72642 must be denied.

**RULING**

Permit 11711, Certificate 3185 is hereby declared forfeited. Application 72642 is hereby denied on the grounds that the water right requested for change has been declared forfeited; therefore, there is no water available to be changed.

Respectively Submitted

  
JASON KING, P.E.  
State Engineer

Dated this 10th day of  
November, 2010.

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<sup>8</sup> NRS § 533.325.