

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

# 4644

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 2 non-contiguous parcels 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.<sup>2</sup>

After filing proof of beneficial use of the waters as allowed under the permit, Certificate 3233 was issued by the State Engineer on April 6, 1949. The certificate of appropriation allows for the diversion of underground water at a rate of 0.10 cfs for quasi-municipal and domestic purposes within the NW $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 28, T.20S., R.61E., M.D.B.&M.<sup>2</sup>

II.

After all parties of interest were duly noticed by certified mail, a public administrative hearing was held on February 19, 1998, before the State Engineer to consider the possible

<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.

forfeiture of a portion of Permit 11409, Certificate 3233, under the terms of Nevada Revised Statute (NRS) § 534.090.<sup>3</sup>

FINDINGS OF FACT

I.

The records in the office of the State Engineer reflect that Permit 11409, Certificate 3233, is a non-revocable water right issued for quasi-municipal and domestic purposes to serve three (3) existing dwellings on one 3 acre parcel, known then as the Theodore Werner property, and one (1) existing dwelling and swimming pool on the other non-contiguous 2 acre parcel of land, known then as the Kenneth Searles property together with their associated landscaping such as lawns and gardens. The map filed in the office of the State Engineer that accompanied the application was also used for filing the Proof of Beneficial Use and was used for issuing the certificate. The total quantity of the water right under Certificate 3233 is limited and restricted to so much water as was necessary<sup>4</sup> for the certificated uses and that quantity is the basis, the measure, and the limit of the right<sup>5</sup> to the use of the water. A certificated diversion rate is an instantaneous measurement of the maximum authorized rate of the withdrawal from the groundwater reservoir. If the certificated diversion rate of 0.10 cfs is expanded continuously for a period

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<sup>3</sup> Exhibit No. 1, public administrative hearing before the State Engineer, February 19, 1998.

<sup>4</sup> NRS § 533.060(1).

<sup>5</sup> NRS § 533.035.

of one year, this quantity would equate to 72.4 acre-feet. However, this quantity simply represents the numerical expansion of the diversion rate and does not establish the certificated quantity of water beneficially used of the subject waters as described in the Proof of Beneficial Use filed in the office of the State Engineer.<sup>1</sup> The State Engineer finds the four dwellings, swimming pool and associated landscaping are the only legal uses authorized under the certificate and the quantity of water necessary to meet those uses is the extent of the certificated appropriation as authorized under Permit 11409, Certificate 3233.

The State Engineer further finds that the quantity of water necessary to serve the four dwellings, swimming pool, and associated landscaping under Permit 11409, Certificate 3233, was approximately 29.48 acre-feet annually in 1949. This equates to 1.12 acre-feet for each of the four houses originally certificated, along with five acre-feet per acre to support the associated landscaping and swimming pool.

## II.

The records in the office of the State Engineer as of the date of the administrative hearing 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 Werner, a 25% undivided interest, and Miriam DeMarco and Michael DeMarco, a 75% undivided interest. Evidence as to title was submitted during the administrative hearing and is part of this record and indicates that there are issues as to who actually owns the water right that is the subject of this ruling.

The conveyance of ownership of the subject water right can be addressed through the statutory provisions dealing with the assignment of water rights. The duties of the State Engineer concerning conveyances are outlined in NRS § 533.382 through 533.387, inclusive. The issue of title was not the purpose of the administrative hearing. In light of the State Engineer's decision that a portion of this certificate is forfeited, if the parties choose to pursue the matter as to ownership they can settle it between themselves, or it can be determined in the appropriate court of law. The State Engineer finds that he will not address the ownership issue in this ruling.

**III.**

Each year from 1989 through 1996 employees of the office of the State Engineer performed what are known as groundwater pumpage inventories which document the use of water within the place of use of Permit 11409, Certificate 3233.<sup>6</sup> Pieces of real property change ownership and configuration over time. As of the date of the notice of possible forfeiture, the place of use under Certificate 3233 encompassed only the following Clark County Assessor's parcel numbers (APN) as described below with their corresponding owner of record as listed in the Clark County Assessor's office:<sup>1</sup>

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

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 originally the Searles' property, and the parcels now in the name of Daniels were the Werners' property. The State Engineer finds that the four above referenced Clark County Assessor's parcel numbers are the only parcels within the authorized place of use under Certificate 3233.

#### IV.

The house on the property now known as the Zampa parcel, identified as Clark County APN 139-28-301-025, did not originally receive water under the certificate and in 1995 the State Engineer discovered the house was receiving water from the subject well. The pumpage inventory reflects this water use after the discovery.<sup>7</sup> In 1996, the Zampa home was disconnected from the subject well and was connected to and is currently being served water by the Las Vegas Valley Water District.<sup>8</sup> The subject well did not have a totalizing meter on the discharge pipe during the years 1989 to 1996. However, various methodologies

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<sup>7</sup> Exhibit No. 6, public administrative hearing before the State Engineer, February 19, 1998.

<sup>8</sup> Transcript, p. 16, public administrative hearing before the State Engineer, February 19, 1998.

have been developed and refined over the years that can quantify the amount of water actually put to beneficial use for domestic and landscaping purposes. The comparison of an average sized home with a water meter and a similar home on a domestic well in the same general vicinity indicates that an average home uses 1.12 acre-feet annually. This figure has been used for quite some time by the State Engineer's office in estimating the amount of water used in a single family dwelling. The State Engineer finds that the maximum use of water for domestic purposes on Clark County APN 139-28-301-025 (the Zampa property) during the five years in question is 1.12 acre-feet annually. The State Engineer further finds that the water right appurtenant to this parcel is not forfeited and is in good standing as of 1996.

v.

Certificate 3233 was issued for four homes, but the field investigations from 1989 to 1996 revealed only one home on what is now the Daniels' property being served by the well, and in 1995 one home on what is now Ms. Zampa's property was served by the well. The original house on what was originally the Searles' property was bulldozed in the mid-1980's.<sup>9</sup> In 1996, Clark County APN 139-28-301-025 (the Zampa property) was disconnected from the subject well and established water service with the Las Vegas Valley Water District. This action provided the first opportunity for the State Engineer's office to discover that an additional

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<sup>9</sup> Transcript, p. 16, public administrative hearing before the State Engineer, February 19, 1998.

house outside the certificated place of use on Clark County APN 139-28-301-022 (the DeMarcos' property) was being served by the subject well. The pumpage inventory of 1996 reflects this discovery as one average house outside of the certificated place of use.<sup>10</sup> The previous pumpage inventories for the years 1989 through 1995, inclusive, do not reflect use of water from the subject well to Clark County APN 139-28-301-022, held in the name of Angelo Thomas and Janet L. DeMarco. The subject well has water lines that go in a northerly direction towards the Daniels' property and it is not readily apparent that these water lines would also serve the DeMarcos' property.<sup>11</sup> Currently, there is an existing water line from the Las Vegas Valley Water District in front of the DeMarco's property.<sup>12</sup> The records in the office of the State Engineer indicate that at the time of the administrative hearing the DeMarcos were owners of record of a portion of the subject water right; however, ownership appears to be at issue. The State Engineer finds that the DeMarco's property under Clark County APN 139-28-301-022 has been connected to and served water for domestic purposes by the subject well without the benefit of

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<sup>10</sup> Exhibit No. 6, public administrative hearing before the State Engineer, February 19, 1998.

<sup>11</sup> Transcript, p. 48, public administrative hearing before the State Engineer, February 19, 1998.

<sup>12</sup> Ibid.

being within the certificated place of use since 1947,<sup>13</sup> which includes the five years in question. The State Engineer further finds that as of the date of the public administrative hearing there had been no request filed to change any portion of Certificate 3233 to add the DeMarcos' property to the place of use nor is there an existing valid permitted water right that would include the DeMarcos' property, and there may be an issue as to DeMarcos having title to any of the water right.<sup>14</sup>

VI.

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 the authorized place of use under 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(s) of record of the water right which is to be declared forfeited.<sup>15</sup> The records in

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<sup>13</sup> Transcript, p. 51, public administrative hearing before the State Engineer, February 19, 1998.

<sup>14</sup> NRS 533.325 is exclusive and in order to include the DeMarco property (APN 139-28-301-022) within the place of use of Permit 11409 a change application would have been required and a permit issued by the State Engineer.

<sup>15</sup> NRS § 534.090.

the office of the State Engineer are public records and this sometimes leads to a request by an interested person that they be notified of any correspondence concerning a particular file. Such a request was received from Land Development and is noted on the State Engineer's file cover.<sup>1</sup> The notice of the possible forfeiture letter was sent via certified mail to the owners of record and those persons identified by the Clark County Assessor as owning the land within the certificated place of use. A courtesy copy was sent to Land Development.<sup>2</sup> The State Engineer finds that the notice of the possible forfeiture dated, August 15, 1997, was properly served.

#### VII.

The Daniels' property, identified as Clark County APN's 139-28-302-012 and 139-28-302-014, are two contiguous parcels that are 1.00 and 2.08 acres in size, respectively, and receive their potable water from the subject well. At the administrative hearing, Mr. Daniels testified that nearly two acres of the Daniels' property is gardens and there is use of water associated with a nine bedroom house.<sup>16</sup> The State Engineer finds that the maximum quantity of water authorized for use for gardens and landscaping is 10 acre-feet and the domestic use is 1.12 acre-feet for a total of 11.12 acre-feet used on Clark County APN's 139-28-302-012 and 139-28-302-014 during the years from 1989 through

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<sup>16</sup> Transcript, pp. 18, 135-140, public administrative hearing before the State Engineer, February 19, 1998.

1996. The State Engineer further finds that the 11.12 acre-feet of water right appurtenant to these parcels is not forfeited.

VIII.

Clark County APN 139-28-301-024 is currently in the name of A. Kent Greene. Evidence submitted during the administrative hearing indicated that the property was purchased on August 25, 1978, from Kenneth M. Searles by Bonanza Properties, a Nevada partnership of which Mr. Greene is a partner.<sup>17</sup> The original Searles' property was subdivided in 1979 by Mr. Greene and created Clark County APN's 139-28-301-025 (now known as the Zampa parcel) and 139-28-301-024 (now known as the Greene parcel). The evidence further indicated that Mr. Greene as owner of Clark County APN 139-28-301 024 had not diverted water from the subject well since 1981 for use on APN 139-28-301-024.<sup>18</sup> The parcel originally contained a single family dwelling and a swimming pool; however, there has not been a dwelling on the Greene property since the mid-1980's and the swimming pool has not been used for a number of years.<sup>19</sup> The State Engineer finds that from 1981 through 1996 no water was beneficially used as authorized by Permit 11409, Certificate 3233, on the Greene parcel and no

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<sup>17</sup> Exhibit No. 15, public administrative hearing before the State Engineer, February 19, 1998.

<sup>18</sup> Transcript, pp. 28, 66, 107, 113, 148, and 170, public administrative hearing before the State Engineer, February 19, 1998.

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

evidence was provided that showed any use during that period of time thereby working a forfeiture of the water right appurtenant to Clark County APN 139-28-301-024.

IX.

The forfeiture period is from January 1, 1989, to August 15, 1996, which is the date the Notice of possible forfeiture of a portion of water right under Permit 11409, Certificate 3233, was issued by the State Engineer. Evidence and testimony was provided to attempt to show a resumption of use of water from the subject well on Clark County APN 139-28-301-024 (the Greene property); however, that use did not occur until after the date of the Notice of possible forfeiture.<sup>20</sup> On August 22, 1997, water was diverted for the subject well and "irrigated" seed scattered by Mr. Lance Gonzales on Mr. Greene's property.<sup>21</sup> Weeds germinated after application of water from the subject well. There was no turning of the soil prior to the scattering of seeds and the applied waters mainly watered the natural weeds existing in the area that grew to four or five feet in height, and cannot be considered beneficial use of the subject waters.<sup>22</sup> The resumption of substantial use of water right after the statutory

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<sup>20</sup> Transcript, pp. 29, 66-67, 107, 115, 148, and 170, Exhibit No. 9, public administrative hearing before the State Engineer, February 19, 1998.

<sup>21</sup> Transcript, pp. 158, 170-171, public administrative hearing before the State Engineer, February 19, 1998.

<sup>22</sup> Transcript, pp. 157-159, public administrative hearing before the State Engineer, February 19, 1998.

period of non-use "cures" claims to forfeiture so long as no claim or proceeding of forfeiture has begun.<sup>23</sup> The State Engineer finds that the notice of possible forfeiture dated August 15, 1997, began the forfeiture proceeding and no attempts at cure could occur after that date; therefore, water used on August 22, 1997, cannot be considered in a claim of cure. The State Engineer further finds that prior preparation which includes the purchasing of irrigation pipe and associated supplies<sup>24</sup> does not constitute use of the corpus of the water during the forfeiture period. The State Engineer finds that a forfeiture of the water right on the Greene property known as Clark County APN 139-28-301-024 was not cured before August 15, 1997.

X.

An application requesting an extension of time to prevent a forfeiture was submitted by Afton Thornton Werner and received in the office of the State Engineer October 28, 1996.<sup>1,25</sup> The application explains the reasons for the non-use and that one year was anticipated before use would resume. The records in the office of the State Engineer at the time of the filing of the

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<sup>23</sup> Town of Eureka v. State Engineer, 108 Nev. 163, 862 P. 2d 948 (1992).

<sup>24</sup> Exhibit Nos. 21 and 22, public administrative hearing before the State Engineer, February 19, 1998.

<sup>25</sup> Exhibit No. 23, public administrative hearing before the State Engineer, February 19, 1998.

application for extension of time to prevent a forfeiture reflect that Afton Thornton Werner was once an owner of record in the amount of 25% of Permit 11409, Certificate 3233; however, Afton Thornton Werner has not owned property within the place of use for over 20 years. Even if there was a reservation of a water right in the deeds that transferred the property, there was no place to put the water to beneficial use owned by Werner.<sup>26</sup> The period of non-use is from January 1, 1989, to August 15, 1996. The State Engineer finds that the non-use of water for a period of five years occurred prior to the submittal of the application for extension of time to prevent a forfeiture; therefore, the State Engineer finds that the application for extension of time to prevent a forfeiture should be denied.

#### CONCLUSIONS

##### I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>27</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

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<sup>26</sup> Transcript, p. 119, public administrative hearing before the State Engineer, February 19, 1998.

<sup>27</sup> NRS § Chapters 533 and 534.

of time granted by the State Engineer.<sup>28</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>29</sup>

Forfeiture must be demonstrated by clear and convincing evidence. 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.<sup>30</sup> 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.<sup>31</sup> The State Engineer concludes that a portion of the certificated water right was not placed to beneficial use as authorized under Permit 11409, Certificate 3233.

### III.

The forfeiture statute in Nevada is exclusive of who owns the water right, and therefore, the issue of ownership is not considered. The conveyance of the ownership of Permit 11409, Certificate 3233, to those claiming an interest by submittal of

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<sup>28</sup> NRS § 533.140.

<sup>29</sup> NRS § 534.090.

<sup>30</sup> 1 Clifford S. Fishman, Jones on Evidence § 3:10 (7<sup>th</sup> ed. 1993).

<sup>31</sup> Id. at 239.

evidence does not change the consideration of forfeiture. The State Engineer concludes that the issue of ownership has no bearing on the forfeiture proceeding.

IV.

The State Engineer concludes that Certificate 3233 was issued in accordance with the applicable statutes and that beneficial use is the limit and extent of the right to the use of the ground water in a quantity sufficient to serve four single family dwellings, a swimming pool, and associated landscaping.

V.

The State Engineer concludes that the property described as Clark County APN 139-28-301-025, in the name of Patricia L. Zampa is within the place of use of Permit 11409, Certificate 3233, and that use of ground water from the subject well occurred during the forfeiture period in the amount of 1.12 acre-feet for domestic purposes and is not forfeited.

VI.

The State Engineer concludes that the properties described as Clark County APN's 139-28-302-012 and 139-28-302-014, in the name of Lawrence Jr. and Claudia Daniels, are within the place of use of Permit 11409, Certificate 3233, and that during the forfeiture period use of ground water from the subject well occurred in the amount of 11.12 acre-feet and is not forfeited.

VII.

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 receiving its domestic water supply from the

subject well, but is outside of the place of use of Permit 11409, Certificate 3233, and no change application was ever filed as of the date of the administrative hearing to legally entitle use of the water under Permit 11409, Certificate 3233, at this parcel. Therefore, the use of water at the DeMarco property cannot be considered a beneficial use under Permit 11409, Certificate 3233.

VIII.

The State Engineer concludes that the water right appurtenant to Clark County APN 139-28-301-024 in the name of A. Kent Greene is forfeited and no cure of that forfeiture occurred prior to the proceeding of forfeiture beginning.

IX.

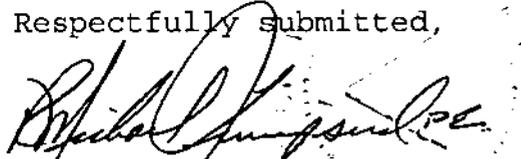
The State Engineer concludes that the application requesting an extension of time to prevent a forfeiture was submitted after the forfeiture occurred, and therefore, must be denied.

RULING

The issue of ownership of the water right is not determined by this action. The water right appurtenant to Clark County APN 139-28-301-024 in the name of A. Kent Greene is hereby declared forfeited. The use of water from the subject well during the forfeiture period for domestic purposes for the DeMarcos' property, which is Clark County APN 139-28-301-022, is outside of the certificated place of use; and therefore, does not constitute use of that portion of the certificated water right. The right to beneficially use 12.24 acre-feet annually for quasi-municipal and domestic purposes under Permit 11409, Certificate 3233, with 1.12 acre-feet appurtenant to Clark County APN 139-28-301-025, where

the property owner is Patricia L. Zampa, and with 11.12 acre-feet appurtenant to Clark County APN's 139-28-302-012, and 139-28-302-014, where the property owners are Lawrence Jr. and Claudia Daniels, is not forfeited. The application requesting an extension of time to prevent a forfeiture is hereby denied and all remaining portions of Permit 11409, Certificate 3233, are hereby declared forfeited.

Respectfully submitted,



R. MICHAEL TURNIPSEED, P.E.  
State Engineer

RMT/RKM/cl

Dated this 9th day of  
July, 1998.