

IN THE MATTER OF PROTESTED PERMIT)
21570 REMANDED TO THE STATE ENGINEER)
BY THE NEVADA SUPREME COURT TO THE)
ISSUE OF ADVERSE POSSESSION OF THE)
WATERS OF BEATTY SPRINGS, OASIS)
VALLEY, NYE COUNTY, NEVADA)

R U L I N G

INTRODUCTION

Application 21570 was filed to appropriate the waters of Beatty Springs, Oasis Valley, Nye County, Nevada. Application 21570 was protested and the State Engineer's decision was appealed to the District Court then to the Nevada Supreme Court. The Supreme Court remanded the issue of adverse possession to the State Engineer for a determination. Revert v. Ray, 95 Nev. 782, 1979.

FINDINGS OF FACT

I

Application 21570 was filed on October 7, 1963 by Clara Alberta Ray and Theodore T. Ray to appropriate 5.0 c.f.s. of water from Revert Springs (Beatty Springs) for municipal and domestic purposes. The point of diversion is within the SE $\frac{1}{4}$ SW $\frac{1}{4}$ Section 5, T.12S., R.47E., M.D.B.&M. The place of use is within portions of Section 7, T.12S., R.47E., M.D.B.&M. The period of use to be from January 1 to December 31 of each year. 1/

II

A protest to the granting of Application 21570 was timely filed on April 2, 1964 by Arthur F. Revert, Robert A. Revert and Norman L. Revert, Trustees of the A. Revert Trust. The basis of the protest was that the waters of Beatty Springs are not public waters subject to appropriation and that the protestants had a vested right to such water and further, that the applicants failed to demonstrate how they would place the water to a beneficial use. 2/

III

A hearing in the matter of protested Application 21570 was held before the State Engineer on September 16, 1965 at Tonopah, Nevada. 3/

IV

The State Engineer issued a ruling dated January 18, 1966 overruling the protest on the grounds that the granting of Application 21570 would not be detrimental to the public welfare. 4/

V

An appeal to the January 18, 1966 decision by the State Engineer was filed on February 15, 1966 by the A. Revert Trust, et al in the Fifth Judicial District Court, Nye County, Nevada.

VI

A hearing was held before the Fifth Judicial District Court, Tonopah, Nevada, on February 1, 1967. The Court affirmed the decision of the State Engineer by opinion dated August 16, 1977 by Judge William P. Beko.

VII

The A. Revert Trust, et al filed notice of appeal of the decision by the Fifth Judicial Court to the Nevada Supreme Court on September 30, 1977.

VIII

Pursuant to the Nevada Supreme Court opinion dated December 18, 1979, the Fifth Judicial District Court remanded the claim of adverse possession by the A. Revert Trust, et al to the State Engineer for a determination.

IX

A hearing was held, after proper notice, before the State Engineer on October 23, 1980 in Beatty, Nevada, for the purpose of taking additional testimony and evidence on the single issue of adverse possession. The record was left open for the submission of certain documentary evidence by the Reverts. The Reverts then submitted certified copies of 44 documents from the National Archives and Record Service, Washington, D.C. The documents pertain to the land patent of John K. Brunk. These documents are admitted into evidence as a single exhibit as the protestant's next in order. Both parties have submitted written argument on the legal and factual bases for their respective positions.

X

Based on the record established from hearings before the State Engineer and briefs and hearings before the Court, the following findings and conclusions are made concerning adverse possession:

1. No instruments of transfer have been submitted which transfer the water rights in Beatty Springs from Montilius M. Beatty to John K. Brunk. Because the evidence is insufficient to establish any color of title in Brunk or his successors to a water right previously owned by Beatty, Brunk and his successors did not make their use of water under claim or color of title to a water right.
2. John K. Brunk filed an application for patent of the land appurtenant to Beatty Springs in 1911 and received patent in 1913. The patent gave no water right to Brunk. Neither Brunk nor his successors ever filed an application with the State Engineer for a permit to appropriate water prior to the filing of Application 21570. No permit has ever been issued to Brunk or his successors.

3. The co-existence of Brunk and Bullfrog to the use of the waters of Beatty Springs establishes that there was adequate water to supply the needs of both Bullfrog and Brunk, and that one was using water with the full knowledge and permission of the other. Because there was adequate water to supply the needs of Brunk and his successors without impairing or conflicting with the needs of Bullfrog and the town of Ryolite, the use by Brunk and others was not adverse or hostile to the use by Bullfrog. The evidence does not establish that there was ever such an invasion of Bullfrog's rights that Bullfrog would have had grounds for an action against Brunk or his successors, through regulatory action by the State Engineer or through the court.
4. Brunk's use of the water was certainly open and notorious for all the world to see with irrigated fields, water line to supply the town of Beatty and an application for patent of the land. Bullfrog was also publicly serving water to the town of Ryolite. The fact that Bullfrog continued to use water and that Ryolite was supplied concurrently with Brunk's and Palmer's uses establishes that, even if abandonment occurred as late as 1920, Brunk's use was not exclusive for any 5 year period prior to abandonment, that it was not continuous for any 5 year period prior to abandonment, and that it was interrupted on innumerable occasions by Bullfrog's use during any 5 year period prior to Bullfrog's abandonment of any rights it may have had.
5. The permissive character of everyone's use is shown by the statement of Elzie E. Palmer, a successor to Brunk, that he tapped the Bullfrog water line with permission of the owner.
6. There is no evidence in the record of any court action or other conflict with the co-existence and use of the waters of Beatty Springs by Bullfrog and Brunk and his successors. The absence of conflict and hostility establishes either that Brunk and Palmer never intentionally impaired Bullfrog's use, that they never actually impaired Bullfrog's use, or that they did not make Bullfrog aware of any impairment or aware of any adverse and hostile intent to impair Bullfrog's use. The conditions under which these several uses of water were made were not so manifestly hostile, notorious or injurious that notice to Bullfrog will be presumed.
7. The Revert claim for adverse possession is not complete in that a quantity of water is not clearly identified. Certainly not all of the waters of Beatty Springs are claimed to have been adversely possessed as there was a co-existence and use by a second party of those same waters.

DECISION

The evidence presented in this matter does not establish adverse possession by Brunk or the Palmers to all or any portion of the water of Revert Springs aka Beatty Springs, Oasis Valley, Nye County, Nevada, prior to Bullfrog's abandonment. Therefore, the waters of Beatty Springs are unappropriated public waters subject to appropriation under Permit 21570.

Respectfully submitted,



Peter G. Morros
State Engineer

PGM/bc

Dated this 29th day of
JULY, 1981.

FOOTNOTES

1. Application 21570 in evidence and a matter of record, State Engineer's office.
2. Protest to Application 21570 in evidence and a matter of record, State Engineer's office.
3. Transcript of hearing in evidence and a matter of record, State Engineer's office.
4. Ruling in evidence and a matter of record, State Engineer's office.