

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

IN THE MATTER OF APPLICATION 75154)
FILED TO APPROPRIATE THE PUBLIC)
WATERS OF AN UNDERGROUND)
SOURCE WITHIN THE PINE VALLEY)
HYDROGRAPHIC BASIN (53), EUREKA)
COUNTY, NEVADA.)

RULING

#6090

GENERAL

I.

Application 75154 was filed on December 4, 2006, by Kenneth R. Buckingham to appropriate 0.03 cubic foot per second of water from an underground source for stock watering purposes (500 Cattle). The proposed place of use is described as being located within the NE½ NE¼ of Section 7, T.25N., R.49E., M.D.B.&M. The proposed point of diversion is described as being located within the NE¼ NE¼ of said Section 7.¹

II.

Application 75154 was timely protested by the U.S.D.I. Bureau of Land Management (BLM) on the following grounds:¹

The application, which is being protested, is for water rights on an existing site of which the water rights were applied for on July 16, 1948 (Application number 12544). In 1951, following submittal of proof of beneficial use, the State of Nevada granted a certificate of appropriation for this site (Certificate number 3732). This new application will be in direct conflict with the provisions of these documents.

The present holders of these documents are Tom and Volina Connolly of the Flying T Ranch, located in Eureka County. The State of Nevada transferred these documents to the Connolly's on July 14, 2003. Mr. Connolly also holds a current grazing permit for this location (BLM Authorization Number 2706002).

On February 17, 1967, under the mandates provided by Section 4 of the Taylor Grazing Act of 1934, the Battle Mountain BLM Field Office issued a Range Improvement Application and Permit for this site for the purpose of furnishing stock with water. That application is still valid and on record in the Battle Mountain Field Office (Permit number N6-4-462).

¹ File No. 75154, official records in the Office of the State Engineer.

The BLM wishes to facilitate the orderly administration of the range and minimize unauthorized livestock drift between the JD and Grass Valley allotments.

III.

Application 75154 was timely protested by Tom and Volina Connolly on the following grounds:¹

We, Tom & Volina Connolly purchased Permit #12544, Baumann Well #2, with the Baumann Ranch from George and Edna Penola, in 2001. The transfer of water rights took place July 14, 2003, as evidenced by accompanying letter. This places our ownership at less than a four year period, prior to Buckingham's filing on our permit. Our intent is to place a submersible pump in the well in 2007 and make beneficial use of the water for livestock watering. (See attached paper)

[From attached paper] The Baumann Well is a vital part of our future use of this area. Please take note of letter dated Dec. 6, 2006, from State Division of Water Resources, stating the States [sic] position on our Permit # 12544. Thank you for your attention to the above.

IV.

Application 75154 was timely protested by American AgCredit, FLCA (formerly Intermountain Federal Land Bank, FLCA) on the summarized grounds that Permit 12544, Certificate 3732 is pledged as security for a loan to Thomas P. and Volina Connolly. The Protestant has filed a Deed of Trust and Notice of Pledge with the Office of the State Engineer that has been acknowledged and gives the Protestant an interest in this matter.¹

FINDINGS OF FACT

I.

Nevada Revised Statute § 533.365(3) provides that it is within the State Engineer's discretion to determine whether a public administrative hearing is necessary to address the merits of a protest to an application to appropriate the public waters of the State of Nevada. The State Engineer finds that a hearing is not necessary to consider the merits of the protests to Application 75154.

II.

A determination was made, after an examination of the records of the Office of the State Engineer, that the proposed water source has a prior water right permit and associated certificate at the well site being Permit 12544, Certificate 3732 (hereinafter,

“Permit 12544”).² Permit 12544 was approved for stock watering purposes from an underground source. The well was drilled and water was placed to beneficial use as evidenced by the issuance of Certificate of Appropriation 3732, on December 3, 1951.

Application 75154 was filed to appropriate water from an existing well, Baumann Well #2, for stock watering purposes. The remarks section of Application 75154 notes that there is an existing water right on the well that the Applicant is requesting the State Engineer to declare forfeited and abandoned.¹ In support of this claim of forfeiture and abandonment, the Applicant submitted three sworn statements, including the Applicant’s, regarding non-use of Baumann Well #2.³ Applicant Buckingham indicated that the well had not been pumped from 1997 to around 2002; Randy Buffington indicated no use from 1980 to early 1983; Dalton Wilson, 25 year resident, indicated that the last time well was in operation was 1991. It should be noted that Applicant Buckingham stated in a letter dated April 12, 2007, that, “He [Connolly] put a submersible pump in the well after I filed on the well water right.”⁴ This statement, along with Protestant Connolly’s photographic evidence of beneficial use of the water in January of 2007,⁵ appears to contradict the affidavit of Dalton Wilson, February 20, 2007, who indicated that the well has not been in operation since 1991.

A review of records in the Office of the State Engineer show that there are no pumpage inventories, measurements or records that would shed further light on the non-use issue. In the absence of his own records, the State Engineer may rely upon other evidence; however, because the law disfavors a forfeiture there must be clear and convincing evidence of the statutory period of non-use, and that any forfeiture has not been cured by resumption of use, for the State Engineer to declare a forfeiture.⁶

Nevada Revised Statutes (NRS) § 534.090, provides for the forfeiture and abandonment of water rights. The essential element of forfeiture is the failure for five consecutive years after April 15, 1967, to beneficially use the water. In 1995, the statute

² Water Rights Database, Hydrographic Abstract, Basin 31, official records in the Office of the State Engineer.

³ See, Chilton letter with attached statements, February 21, 2007, official records in the Office of the State Engineer.

⁴ See, letter from Kenneth Buckingham, April 12, 2007, File No. 75154, official records in the Office of the State Engineer.

⁵ File No. 75154, official records in the Office of the State Engineer.

⁶ *Town of Eureka v. State Engineer*, 108 Nev. 163, 826 P.2d 948 (1992).

was amended to provide that the State Engineer shall give notice of pending forfeiture after 4 consecutive years of non-use by certified mail to the owner of record giving that owner 1 year from the date of the notice to beneficially use the water or file for an extension of time to prevent forfeiture. However, the holder of a water right may also cure forfeiture and revitalize the right by substantial use of the right after the statutory period of non-use, so long as no claim or proceeding of forfeiture has begun.⁷

The Nevada Division of Water Resources (Division), by letter of July 14, 2003, confirmed that Permit 12544 had been assigned to show Protestants Thomas P. Connolly and Volina L. Connolly as current owners of record. On December 6, 2006, in response to a phone call inquiry from Thomas Connolly, the Division made the following determination⁸ regarding the status of the water right:

Pursuant to our phone conversation of December 4, 2006 this letter is notification as to the current status of Permit 12544, Certificate 3732. Permit 12544, Certificate 3732 was issued for stockwatering purposes and is currently in good standing with this office. This office does not at this time have sufficient evidence of non-use to consider Permit 12544, Certificate 3732 for forfeiture. I am enclosing for your information a copy of Nevada Revised Statutes (NRS) § 534.090, which is the Statute that pertains to forfeiture of water rights.

A review of File No. 12544 shows that the water right is currently in good standing. In addition, there are no records in the file that indicate an intent by the current owner of record to abandon the water right.⁹ Conversely, the owner of Permit 12544 has filed a protest to Application 75154 to protect his existing water right, equipped the well with a submersible pump and has submitted photographic evidence of beneficial use of the water in 2007.¹⁰ The three photographs, dated January 29, 2007, show water being pumped from the well to a blue stock tank and show cattle watering at the stock tank. The presence of a submersible pump was confirmed by Division personnel in November of 2007, and it was noted that the well appeared to be operable at that time.¹¹

⁷ *Town of Eureka v. State Engineer*, 108 Nev. 163, 826 P.2d 948 (1992).

⁸ See, Division letter to Thomas Connolly, December 6, 2006, File No. 12544, official records in the Office of the State Engineer.

⁹ File No. 12544, official records in the Office of the State Engineer.

¹⁰ File No. 75154, official records in the Office of the State Engineer.

¹¹ Field Investigation of Baumann Well, November 13, 2007, File No. 75154, official records in the Office of the State Engineer.

The abandonment of a water right in Nevada is the relinquishment of a right with the intention to forsake it. Within the meaning of the term abandonment an intent to abandon is a necessary element. Non-use of a water right is only some evidence of an intent to abandon the right and does not create a rebuttable presumption of abandonment under Nevada law.

The State Engineer finds that Permit 12544 is in good standing and that the owner of record Connolly has shown no intent to abandon the water right. The State Engineer finds that the Applicant has not provided clear and convincing evidence of forfeiture and there is evidence that water was beneficially used for the purpose for which the water right was acquired in 2007. The State Engineer finds that the approval of Application 75154, to establish a water right permit at Protestant Connolly's Baumann Well #2 would conflict with the existing water right under Permit 12544 and threaten to prove detrimental to the public interest.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and of the subject matter of this action and determination.¹²

II.

Before either approving or rejecting an application, the State Engineer may require such additional information as will enable him to properly guard the public interest.¹³

III.

The State Engineer is prohibited by law from granting an application to appropriate the public waters where:¹⁴

- A. there is no unappropriated water at the proposed source;
- B. the proposed use conflicts with existing rights;
- C. the proposed use conflicts with protectible interests in existing domestic wells as set forth in NRS § 533.024; or
- D. the proposed use threatens to prove detrimental to the public interest.

¹² NRS Chapters 533 and 534.

¹³ NRS § 533.375.

¹⁴ NRS § 533.370 (5).

IV.

The State Engineer concludes that approval of Application 75154 would conflict with a prior existing right under Permit 12544.

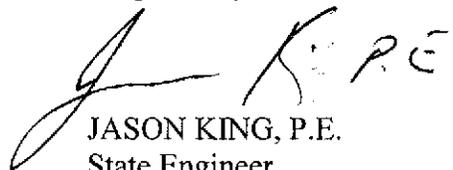
V.

Protestant Connolly submitted evidence showing that he installed a submersible pump in his well, Baumann Well #2, and used at least some water for stock water use as allowed under Permit 12544 in early 2007. The State Engineer concludes there is not clear and convincing evidence to support forfeiture or abandonment of Permit 12544.

RULING

The protests are upheld and Application 75154 is hereby denied on the grounds that its approval would conflict with existing rights.

Respectfully submitted,


JASON KING, P.E.
State Engineer

Dated this 15th day of
February, 2011.