

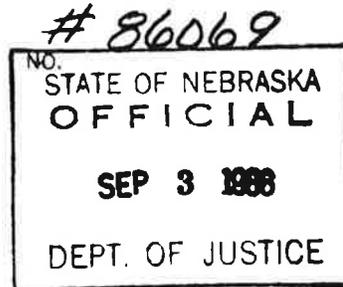
DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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August 26, 1986



SUBJECT: Cancellation of Water Rights

REQUESTED BY: J. Michael Jess, Director, Department of Water Resources

OPINION BY: LeRoy W. Sievers, Assistant Attorney General

QUESTION: Does a ten year statute of limitation apply to nonused water rights?

CONCLUSION: Yes.

The Department of Water Resources periodically adjudicates water appropriations by scheduling hearings concerning whether or not water appropriations are currently being used for some beneficial purpose or if they have ceased to so be used. If the appropriation ceases to be used for more than three consecutive years, the Department gives notice to the owner of such appropriation to show cause why the same should not be declared forfeited. Examples of sufficient cause are set forth in Neb.Rev.Stat. §46-229.04 (Reissue 1984) which was amended by LB 380 of the 1983 Session Laws which had an effective date of approximately August 23, 1983. If no one appears or sufficient cause is not shown, then the appropriation is statutorily forfeited. The question you have raised is whether the ten year statute of limitation is a basis for cancelling water rights otherwise excused by Neb.Rev.Stat. §46-229.04. To answer this question, requires an examination of the basis for the loss of an appropriative right other than the statutorily defined forfeiture.

Nonuser, among other doctrines, has been recognized by the Nebraska Supreme Court as a common law basis for the loss of water appropriations if nonuse is continued for the period of the statute of limitations. Farmer's Canal Company v. Frank, 72 Neb. 136, 100 N.W. 286 (1904), Kersenbrock v. Boyes, 95 Neb. 406, 145

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N.W. 987 (1914), State v. Nielsen, 163 Neb. 362, 79 N.W.2d 721 (1956), Northport Irrigation District v. Jess, 215 Neb. 152, 337 N.W.2d 733 (1983). This distinction between forfeiture and nonuser was stated in the Northport case as follows:

Nonuse for over three years terminates the right by statutory cancellation proceedings. Neb.Rev.Stat. §46-229.02 (Reissue 1978). In State v. Nielsen, 163 Neb. 372, 79 N.W.2d 721 (1956), this court held that where the evidence shows that irrigation rights have not been used for more than ten years, the provisions of Neb.Rev.Stat. §25-202 (Reissue 1975), caused the clear loss of the appropriation right, independent of any cancellation proceeding.

Id. at 162.

Additionally, the court in State v. Nielsen, said:

The courts of this state have recognized two methods of loss of irrigation rights independent of statutory procedure for cancellation by the Department of such rights. These two methods may be classified as abandonment of water rights, or nonuser of such rights for the period of statutory limitations relating to real estate.

Supra at 381. Additionally, appropriations have been cancelled through application of the nonuser doctrine in proceedings initiated by show cause order issued by the predecessor of the current Department of Water Resources. See, Kersenbrock v. Boyes, 95 Neb. 406, 145 N.W. 987 (1914).

LB 380 of the 1983 Session Laws became effective shortly after the date of the Northport case. LB 380 amended Neb.Rev.Stat. §46-229.04 by requiring that the three years of nonuse be consecutive years and it also for the first time listed eight specific basis for excusing use that would be adequate to prohibit cancellation of the water right. LB 380 also amended §46.229.02 in part by indicating that if an applicant does not comply with conditions for approval of a water appropriation, then the department would have the right to cancel that appropriation.

LB 380 did not include any specific repeal of the common law nonuser basis for cancellation of water rights. The Nebraska Supreme Court in Egbert v. Wenzl, 199 Neb. 573, 260 N.W.2d 480 (1977) said: "Statutes are not to be understood as effecting any changes in the common law beyond that which is clearly indicated."

That LB 380 did not indicate a repeal of nonuser as a basis for cancelling water appropriations is reinforced by reviewing the history of LB 380. LB 380 came about as a result of a study conducted by the Nebraska Natural Resources Commission which was embodied in its report "Policy Issue Study on Selected Water Right Issues, Report No. 3, Water Rights Adjudication". The study advocated three specific changes which were identified as alternatives No. 2B, No. 2D and No. 4. Those three changes were to specify that the three year nonuse must be for consecutive years, that failure to comply with a condition of a permit would be a basis for cancellation of a water right, and specifying eight reasons excusing nonuse of water sufficient to be adequate cause so as to prevent the cancellation of a water right. Id. at I-II. As was previously noted, those specifically advocated changes were adopted by the legislature as set forth in LB 380.

The study considered other alternatives including No. 5. It was in part as follows: "Alternative #5 (Abrogate Nonuser and Prescription) was rejected for the reason that there is value . . . (2) in setting an upper limit of ten years on nonuse of a water appropriation." Id. at II. The report recognized that the elimination of this common law right of cancelling water rights would require specific legislation indicating that the right had been revoked. The report stated "Implementation of this alternative would require legislation action abrogating nonuser and prescription as methods effecting the loss of water rights". Id. at I, 4-7. The study now contains an update which indicates that the Nebraska legislature enacted legislation adopting all of the Natural Resources Commission's recommendations as outlined in the report. Since the study's recommendations included that nonuser not be eliminated, this is a clear indication the Natural Resources Commission considered that LB 380 did not abrogate nonuser. It can easily be seen how this conclusion was reached.

In testimony before the Public Works Committee the bill's sponsor Senator Hoagland in part said as follows:

LB 380 is one of a number of bills that have been introduced this session, Senator Schmidt and members of the Public Works Committee, which incorporate recommendations of the state water planning and review process, which is currently underway by the Nebraska Natural Resources Commission. I have a copy here with me of the full study entitled 'Water Right Adjudication' and LB 380 basically incorporates the recommendations of this particular study. We have with us today Ms. Annett Kovar, who is an attorney with the Nebraska Natural Resources Commission, who prepared the report. . . . This has been a project that has been near and dear to Ms. Kovar's heart for many, many months and she understands the law, current case law

dealing with the forfeiture of surface water appropriations better than I do. What I intend to do, Senator Schmidt, after I give the committee a brief review, is to refer any technical questions to her because she is the expert in this area.

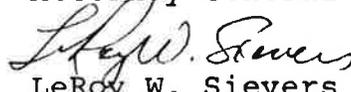
Later, Ms. Kovar testified as follows:

Mr. Chairman, members of the committee, my name is Annette Kovar and I am testifying today on behalf of the Natural Resources Commission. LB 380 adopts the recommendations of the Natural Resource Commission presented to this committee in the reported title, Water Rights Adjudication.

From these passages it is clear that the bill's sponsor and author of the legislation, as well as the author of the study, both intended LB 380 to adopt the recommendations as set forth in the policy study. As has been noted, that study recommended certain specific changes in the statutory provisions relating to forfeiture of water appropriations as authorized by statute but also recommended against abrogating the common law basis of cancellation of water rights by nonuser. The study also recognizes that if those rights were to be abrogated such abrogation had to be specifically set forth in the legislation. A review of the testimony before the Public Works Committee reflects that not one witness ever mentioned the ten year statute of limitation nor mentioned any intention of the legislature to repeal it or the common law doctrine of nonuser. Moreover, LB 380 itself did not contain any specific language specifically repealing that common law doctrine. As a result, there is no credible evidence that LB 380 intended in any way to abrogate nonuser as a basis for cancellation of water rights. It still exists. As a consequence, the ten year statute of limitation encompassed within this common law doctrine of nonuser can be applied by the Department in proceedings in which the validity of water rights are adjudicated.

Sincerely,

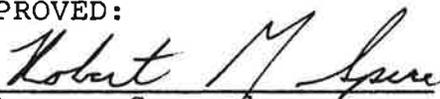
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