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*Anderson Family Assocs. v. State Engineer, 124 Nev. Adv. Op. No. 17
(March 27, 2008)*¹

WATER LAW – VESTED RIGHTS

Summary

NRS 533.085(1), Nevada’s non-impairment statute, prevents an entity from losing priority to use its prestatutory vested water rights when the State Engineer cancels and later reinstates a permit modifying such water rights, as is typically required by NRS 533.395(3).

Disposition/Outcome

Petition denied. The Court affirmed the district court’s dismissal of the Anderson Family Associates’ (AFA) petition for judicial review of the State Engineer’s decision.

Factual and Procedural History

In an 1885 decree, the district court first apportioned water rights to the Ash Canyon Creek (ACC). Appellant AFA and respondent Carson City own rights under this decree as successors in interest to the original owners.

In 2000, Carson City contacted the State Engineer for a description of the various ownership interests in ACC. The State Engineer stated that Carson City owned 60.608 percent of ACC’s flow while AFA owned 29.872 percent of ACC’s flow with 6.2757 percent of AFA’s interest belonging to the Donald A. Andersen Trust (DAT). Following the State Engineer’s response, the DAT sold its interest in ACC waters to Carson City. Shortly before this sale, the State Engineer granted a Carson City application for a permit to change the manner and location of a portion of its ACC use for municipal purposes. The State Engineer conditioned the permit on Carson City filing proof of completion of the approved work by June 23, 2004.

The State Engineer notified Carson City that the permit was subject to cancellation when the City failed to file the required proof of completion by the June 23, 2004 deadline. The State Engineer eventually canceled the City’s permit because the City did not satisfy the completion requirement. On August 24, 2004, Carson City petitioned the State Engineer to rescind the cancellation. The State Engineer eventually extended the City’s proof of completion deadline for one year from the original date after Carson City complied with several procedural steps required by the State Engineer. Carson City successfully filed its proof of work completion within the new deadline.

After the State Engineer reinstated the City’s permit, AFA sent a letter to the State Engineer arguing that NRS 533.395(3) in combination with the permit’s cancellation

¹ By Michael J. Gayan.

required a loss of priority for the DAT water rights. The State Engineer's responded that NRS 533.085(1) prohibited Nevada's water law statutes from impairing water rights that vested before the adoption of the state's statutory scheme. AFA sought judicial review of the State Engineer's decision. The district court denied AFA's petition based on the non-impairment provision in NRS 533.085(1). AFA filed this appeal.

Discussion

Conflict between NRS 533.085(1) and NRS 533.395(3)

AFA argued that NRS 533.395(3)'s plain language required the loss of priority in this case because the State Engineer canceled and reinstated the City's permit modifying the place and manner of use. However, the State Engineer and the district court disagreed with AFA because the City's water rights vested before Nevada enacted NRS Chapter 533.

NRS 533.395(3) provides, "If [a] decision of the State Engineer modifies or rescinds the cancellation of a permit . . . , the effective date of the appropriation under the permit is vacated and replaced by the date of the filing of the written petition with the State Engineer." In contrast, NRS 533.085(1) states, "Nothing contained in [Chapter 533] shall impair the vested right of any person to the use of water . . . where appropriations have been initiated in accordance with law prior to March 22, 1913." When two unambiguous statutes are in conflict, general provisions must yield to specific mandates.

The State Engineer contended that NRS 533.085(1) prevented the application of NRS 533.395(3) because it would operate as an impairment of prestatutory vested water rights. AFA argued the plain language of NRS 533.395(3) required a loss of priority upon the reinstatement of the City's canceled permit. The court disagreed with AFA for the following reasons.

Types of water rights in Nevada

Nevada recognizes three different types of water rights: vested, permitted, and certificated. Vested rights are those in existence under Nevada's common law prior to NRS Chapter 533's enactment in 1913.² Permitted water rights are granted after the State Engineer approves a party's "application for water rights."³ Finally, certificated rights are granted after a party perfects a permitted water right⁴ by filing proof of beneficial use with the State Engineer and receiving a certificate in place of the permit.⁵

² See *Ormsby County v. Kearney*, 37 Nev. 314, 352-53 (1914).

³ *Silver Lake Water v. Public Serv. Comm'n*, 107 Nev. 951, 952 n.1 (1991); see NEV. REV. STAT. §§ 533.325-.380 (describing application and approval process for permits).

⁴ *Desert Irrigation, Ltd. v. Nevada*, 113 Nev. 1049, 1059 n.5 (1997); see *Silver Lake Water*, 197 Nev. at 952 n.1; NEV. REV. STAT. §§ 533.325-.380 (describing application and approval process).

⁵ *Silver Lake Water*, 107 Nev. at 952 n.1; NEV. REV. STAT. §§ 533.325-.380.

Effect of Applying for a permit to modify the use of vested rights

AFA argued that Carson City lost the priority for its vested water rights to the ACC by applying for and receiving a permit modifying those rights. However, water rights acquired before 1913 can only be lost in accordance with the law in existence at that time, which is through intentional abandonment.⁶ AFA's argument failed because no applicable Nevada law suggests modification of vested rights equates to intentional abandonment of those rights.

The Court's conclusion squared with two previous opinions discussing vested water rights in Nevada. First, the court previously explained that although NRS 533.085(1) does not prevent application of Nevada's water law act to vested water rights, the water law act may not impair the quantity or value of those rights.⁷ Here, a loss of priority for Carson City's water rights to the ACC would impair the value of these rights. Therefore, NRS 533.395(3) cannot apply to Carson City's vested water rights.

Second, the court previously held that NRS 533.085(1) prevents the operation of a statute requiring forfeiture of vested water rights after five years of continuous non-use because forfeiture would impair such rights.⁸ The *Manse Spring* court also held that vested water rights can only be lost through intentional abandonment. Here, because a loss of priority could result in an actual loss of rights in years of low flow, the forfeiture provision cannot override the protection of vested water rights under NRS 533.085(1).

Prestatutory vested water rights remain subject to state regulation. Therefore, holders of such rights must obtain proper permits and documentation to modify the use of such vested rights, and the State Engineer has authority to cancel the permits. Cancellation of the permits does not violate NRS 533.085(1) because it would not impair the underlying water rights; cancellation would only prevent the use of the vested water rights in the modified manner.

Conclusion

Carson City's prestatutory vested water rights did not lose priority under NRS 533.395(3) because NRS 533.085(1) prevents the impairment of such rights. However, vested water rights remain subject to state regulation. Holders of vested rights may lose the ability to exercise their vested rights if they fail to comply with all state permit requirements. The court denied AFA's petition because the State Engineer properly reinstated Carson City's permit.

⁶ In re Waters of Manse Spring, 60 Nev. 280, 289 (1940).

⁷ See *Ormsby County*, 37 Nev. at 314.

⁸ *Manse Spring*, 60 Nev. at 283-84, 289.