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Summary of Bacher v. State Engineer, 122 Nev. Adv. Op. No. 95

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ADMINISTRATIVE LAW – JUDICIAL REVIEW

Summary

Appeal from a district court order denying appellants’ petition for judicial review in a water rights case.

Disposition/Outcome

The Nevada Supreme Court reversed the district court’s order denying appellants’ petition for judicial review.

Factual and Procedural History

In 1999, Vidler Water Company (“Vidler”) sought an interbasin groundwater transfer from the Sandy Valley Basin in Mesquite Valley to the Ivanpah Basin in Primm. Primm South Real Estate Company (“Primm South”) had several new projects planned for the Primm area. An engineering firm advised Primm South that some of these projects would not be possible without securing more water rights for use in Primm. Primm South authorized Vidler to act as its agent in obtaining these rights. Vidler declared that the water yearly allocated from the Ivanpah Basin exceeded the amount of water that was being naturally replenished. Thus, Vidler applied to the State Engineer for an interbasin groundwater transfer from the Sandy Valley Basin to the Ivanpah Basin.

Under NRS 533.370(6), when reviewing an application for an interbasin groundwater transfer, the State Engineer must analyze the applicant’s need to import water. In 2001, the State Engineer reviewed the application and considered Primm South’s current year’s water usage. Primm South held permits for 751 acre-feet annually (afa), yet reported only using approximately 62 percent of that amount. Vidler’s application requested an additional 1,400 afa be transferred for Primm South’s use. The appellants, Sandy Valley residents, opposed Vidler’s application. At an application hearing, Primm South’s vice-president, Doug Clemetson, offered an explanation for the seemingly unfounded request.

Clemetson testified that Primm South’s future developments required additional water. Specifically, a power plant expansion was in the first phase of construction, but the project could almost double in size. Likewise, Primm South planned a mall expansion. Also, more water was needed for 300 apartment units, comprising the second phase of an employee housing project. Further, the company considered building an industrial warehouse park. While, if the industrial warehouse was not built, and the amount of people attracted to the area increased, the company planned to build a theme

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park. Finally, if train service from Las Vegas was established, Primm South would support the endeavor by building a station.

Finding the evidence and testimony sufficient, the State Engineer approved Vidler's application in part, authorizing an interbasin groundwater transfer of 415 afa. In agreement with Vidler, the State Engineer found that Ivanpah Basin's yearly appropriations exceeded the amount replenished. Consequently, the State Engineer could not approve the transfer were it not in the public's interest. In particular, the transfer could not detrimentally impact the Sandy Valley Basin. Determining that the transfer of 415 afa did not detrimentally impact the basin, the State Engineer approved the application at this lower rate.

In response, Sandy Valley residents filed a petition in district court for judicial review. The court denied the petition. On appeal, the residents challenge Vidler's authority to show need for water rights on Primm South's behalf, the State Engineer's conclusions regarding the transfer's impact on the Sandy Valley Basin, and Primm South's need for additional water rights.

Justice Hardesty, with Justices Maupin and Gibbons concurring, reversed the district court's order denying the Sandy Valley residents' petition for judicial review. The court held that no substantial evidence supported the State Engineer's decision to grant Vidler's application for an interbasin groundwater transfer.

Discussion

Third-Party Need

The court rejected the Sandy Valley residents' claim that an applicant for interbasin groundwater transfer must show its own need for the water. Though the court agreed that the applicant must provide evidence of need for the water, the statute is ambiguous as to whose need must be proven.² As this was an issue of first impression for Nevada, the court looked to related Nevada law, other jurisdictions, and the public policy behind the statute.

Nevada, along with other jurisdictions, has traditionally allowed third-party applications for water permits. In *Prosole v. Steamboat Canal Co.*, the court found it reasonable to allow an appropriator to apply for water rights through another agency.³ Similarly, Wyoming and New Mexico acknowledge a third-party's ability to apply for, and establish need for water rights.⁴ In *Mathers*, the New Mexico Supreme Court concluded its law did not require the applicant to show its own need for water rights

² NEV. REV. STAT. § 533.370(6) (2005) provides that the State Engineer must consider "(a) Whether the applicant has justified the need to import the water from another basin" in determining whether an application for interbasin groundwater transfer must be rejected.

³ 37 Nev. 154, 158-59, 140 P. 720, 722 (1914).

⁴ *Scherck v. Nichols*, 95 P.2d 74, 79 (Wyo. 1939); *Mathers v. Texaco, Inc.*, 421 P.2d 771, 778 (N.M. 1966).

when applying to appropriate water for beneficial use.⁵ The court found this reasoning particularly persuasive because of New Mexico’s similar statutory construction. Nevada also requires the applicant to show “beneficial use” when applying for an interbasin groundwater transfer.⁶

Further, the court considered that allowing third-parties to establish need for water rights was consistent with public policy. The court recognized that Nevada law has never required appropriators to apply for their own water permits. Accordingly, to require applicants to show their own need for water rights would be unreasonable.

However, the court warned that demonstration of third-party need is limited by the anti-speculation doctrine.⁷ The third-party applying for water rights must show an agency or contractual relationship with the party who actually purports to put the water to beneficial use. This requirement bars the applicant from establishing beneficial use through mere speculation regarding the appropriator’s water needs.

Here, Vidler did not violate the anti-speculation doctrine. Primm South authorized Vidler to apply for the additional water rights, and Vidler’s justification for the water transfer was based upon Primm South’s future development projects.

Impact on the Sandy Valley Basin

The court also rejected the residents’ claim that the State Engineer abused his discretion by determining the Sandy Valley Basin would not be detrimentally impacted by the transfer.⁸ When reviewing a State Engineer’s decision on appeal, the court is limited to determining whether the record includes substantial evidence to support the decision.⁹

In this case, the record reflects that the State Engineer took several factors into consideration, including some that could be considered unfavorable to the Sandy Valley Basin.¹⁰ Yet, he concluded the impact would be merely negligible. Because the State Engineer did consider a variety of factors, and found the impact would not be detrimental, the court found the State Engineer’s decision was supported by substantial evidence.

⁵ *Id.*

⁶ NEV. REV. STAT. § 533.030(1) (2005); *See also*, NEV. REV. STAT. § 533.045 (2005) (“[N]o person shall be permitted to divert or use . . . water[] . . . except at such times as the water is required for a beneficial purpose.”).

⁷ The court adopted the anti-speculation doctrine from *Three Bells Ranch v. Cache La Poudre*, 758 P. 2d 164, 173 n. 11 (Colo. 1988), explaining that the requirement is “fundamental to our State’s water law jurisprudence” and consistent with Nevada law’s statutory language and goals. *Bacher v. State Engineer*, 122 Nev. Adv. Op. No. 95, 13 (Nov. 22, 2006).

⁸ NEV. REV. STAT. § 533.370(6)(d) (2005) requires that the State Engineer consider “whether the proposed action is an appropriate long-term use which will not unduly limit the future growth and development in the basin from which the water is exported.”

⁹ *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979).

¹⁰ The State Engineer considered: a report by an experienced geologist, which he considered inconclusive; well testing in the Sandy Valley Basin, and; the Sandy Valley Basin’s large agricultural uses in California.

The State Engineer's Finding That Vidler Presented Evidence Justifying a Need to Import Water Under NRS 533.370(6)(a)

The court agreed with the residents that Vidler failed to satisfy the need requirement of NRS 533.370(6)(a). Though the court inferred an argument could be made opposing the State Engineer's finding that the Ivanpah Basin's yearly appropriations exceeded the amount of water being replenished,¹¹ the residents failed to raise the issue at the administrative level. Thus, the residents could not make this claim on appeal.¹² Nevertheless, the court considered the record still lacked the evidence to support a finding of Vidler's need to import water.

Specifically, the court considered Primm South's under-utilization of the water currently available through Primadonna's permits.¹³ Further, the record lacked specificity regarding the amount of water Primm South's future projects would require. Because the record did not reflect calculations of water usage by project, nor the amount of imported water required for each project, the court found a fundamental defect in the State Engineer's decision. The record does not justify the need to import 415 afa of water from the Sandy Valley Basin. Therefore, the court concluded the State Engineer abused his discretion in finding that Vidler presented sufficient evidence of need under NRS 533.370(6)(a).

Conclusion

The court found the record lacked sufficient evidence to support the State Engineer's finding of sufficient need to import water from the Sandy Valley Basin to the Ivanpah Basin. While the court accepts the ability of third-parties to establish need for water, and defers to the State Engineer's judgment in approving water rights applications, the court requires the record to reflect substantial evidence justifying these decisions. Here, the evidence presented lacked the necessary calculations required for a reviewing court to accept the State Engineer's conclusion. Therefore, the court reversed the district court's order denying the Sandy Valley resident's petition for judicial review.

¹¹ In making this determination, the State Engineer relied upon a previous ruling: Ruling No. 4326 dated April 16, 1996.

¹² *Dubray v. Coeur Rochester Inc.*, 112 Nev. 332, 337 n.2, 913 P.2d 1289, 1292 n.2 (1996).

¹³ Primadonna Corporation is the entity under which Primm South held water rights. The record revealed Primm South's current consumption of its yearly water permits was only at 62%. Additionally, the State Engineer acknowledged that, with recharge credits, Primadonna held permits to pump up to 1,734 afa.