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Eureka Cnty. v. Off. of State Engr. of State of Nev., Div. of Water Resources, 131 Nev. Adv. Op. 84 (Oct. 29, 2015)

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CONSTITUTIONAL LAW: JUDICIAL REVIEW

Summary

For the State Engineer to grant water rights applications, there must be evidence to support the decision and the new rights must not substantially conflict with existing rights. On appeal from the District Court, the Court found no evidence to support the granted application, and held the use of Respondent's rights would severely impact the water table. The Court reversed and remanded the case for proceedings consistent with the opinion.

Background

General Moly Inc. sought to establish a molybdenum mine in Eureka County, Nevada. The large mine required groundwater from local water basins that already source other existing water rights. The new use of the water would create a drawdown of the water table. Respondent Kobeh Valley Ranch (KVR) held water rights for General Moly Inc. General Moly Inc.'s previous and existing rights were also transferred to KVR, and KVR filed several applications to appropriate the water and change the point of diversion, location of use, and manner of use of their existing water rights. Appellant Eureka County, and individual Appellants Kenneth Benson and Michel and Margaret Etcheverry (Benson-Etcheverry), protested the applications under the NRS², claiming the groundwater appropriations would conflict with existing water rights.

The State Engineer approved KVR's initial applications, but upon review, the District Court vacated the approvals and remanded for a new hearing. The State Engineer held another hearing with more evidence, and again granted KVR's applications filed under Ruling 6127. While the State Engineer admitted KVR's pumping might impact the water table, KVR could mitigate the impact and prepare a management plan (3M Plan) that monitored the water levels. The State Engineer approved KVR's 3M Plan, but retained the ability to modify or monitor the plan as needed.

Appellants Eureka County and Benson-Etcheverry petitioned for judicial review concerning the State Engineer's overall conclusions. Appellant Benson-Etcheverry also petitioned for judicial review over the approved 3M Plan. The District Court denied both petitions, claiming there was enough evidence to support KVR's use of the water rights. Additionally, the District Court held that under the NRS³, the State Engineer has the discretion to approve applications that might impact existing rights, as long as the impact is mitigated. Appellants Benson-Etcheverry appealed the District Court's order denying judicial review of the 3M plan, and Appellants Eureka County and Benson-Etcheverry appealed the District Court's order denying judicial review of Ruling 6127.

Discussion

¹ By Chelsea Finnegan

² NEV. REV. STAT. § 533.370(2)

³ *Id.*

The Court began its analysis on the duties of the State Engineer. After reviewing *Desert Irrigation, Ltd. v. State*⁴ and sections of the NRS⁵, the Court found the State Engineer's job is to administer water rights and approve applications if the applicant meets the statutory requirements. However, the Court also discussed the NRS exception⁶, which allows for the rejection of applications that conflict with existing rights or is against the public's interest. Lastly, the Court noted the State Engineer's option to conditionally grant applications that plan for the mitigation of conflict. While the Court does not challenge the State Engineer's discretion to grant applications with proposed mitigation plans⁷, the Court found a lack of evidence to support the State Engineer's decision under these facts.

The Court concluded that KVR's water pumping could have a severe impact on the water table and potentially cause the complete depletion of existing water rights. The State Engineer recognized the negative impact on the drawdown from KVR's water pumping, but did not consider the contradictory supplemental evidence that showed the severe depletion of the water source. Evidence included flow reports and testimony both finding the well would dry up with overuse. Evidence included flow reports and testimony both finding the well would dry up with overuse. Therefore, the Court found that severe depletion of the water source was substantial enough to meet the "conflict" standard under the NRS exception⁸.

Furthermore, the Court held KVR's 3M Plan was unreliable and speculative. The State Engineer alleged the 3M Plan would ameliorate the depletion of the water source through monitoring and management. However, the Court found the 3M Plan vague and undeveloped. The State Engineer did not provide evidence of what the 3M Plan entailed or prove there was a plan to fully restore existing water rights. The Court found the application should not have been granted upon this lack of evidence.

The State Engineer offered expert testimony to show mitigation would be successful, but there was no explanation of what techniques would work in this case. The State Engineer also argued the 3M Plan might encompass substitution water to mitigate the water depletion. The Court repudiated this argument and questioned where the water would come from and the ability to find a sufficient replacement for the existing rights holders. The Court argued if existing rights holders must use substituted water, the holders may later be found to have abandoned their rights⁹. Under the NRS¹⁰, using water not from the approved specified water source might require a new permit. Finally, KVR argued the State Engineer's decision was based on experience and specialized knowledge in the area, therefore should be given great weight. However, the Court found that while expertise is important, there must also be substantial evidence to support the State Engineer's conclusions.

Overall, the Court required more evidence concerning KVR's future mitigation plan. The mitigation plan must specifically address the problem and have substantial evidence supporting that mitigation efforts will curtail any conflicts. The Court held the decision to grant an application with a mitigation plan must have substantial evidence for several reasons. First,

⁴ *Desert Irrigation, Ltd. v. State*, 113 Nev. 1049, 1061, 944 P.2d 835, 843 (1997).

⁵ NEV. REV. STAT. § 533.370(1).

⁶ NEV. REV. STAT. § 533.370(2).

⁷ *See Town of Eureka v. Office of State Eng'r of State of Nev., Div. of Water Res.*, 108 Nev. 163, 165, 826 P.2d 948, 949 (1992) (When a question of fact exists, there must be substantial evidence to support the State Engineer's decision).

⁸ *Id.*

⁹ NEV. REV. STAT. § 533.060(4)(a)-(d).

¹⁰ *See* NEV. REV. STAT. § 533.060(5).

grievances must be heard. Protesters have the right to challenge evidence before the State Engineer grants proposed applications¹¹. A conditional approval may violate a challenger's Due Process right¹², and forcing Appellant Benson-Etcheverry to prolong their challenge over the 3M Plan would not "undo a decision to grant applications for a proposed use or change that may have been erroneous." Secondly, the State Engineer must be able to explain the decision to allow for judicial review¹³. There must be a rational connection between the evidence and the decision, and the decision may not be made on future speculation. Here, the State Engineer deferred explanation of the mitigation plan and did not provide evidence to support the future protection of the current rights holders.

Conclusion

Finding no substantial evidence to support the State Engineer's ruling, the Court reversed and remanded the matter to the District Court for proceedings consistent with this opinion. The State Engineer must reject applications that conflict with existing rights when there is not enough evidence to support mitigation efforts, and Appellants met the burden to show the decision was unsupported.

¹¹ *Revert v. Ray*, 95 Nev. 782, 787, 603 P.2d 262, 264 (1979); NEV. REV. STAT. § 533.365(5).

¹² *Ray*, 603 P.2d at 264.

¹³ *Id.* at 265.