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### Benson v. State Engineer, 131 Nev. Adv. Op. 409 (Sep. 24, 2015)

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*Nevada Law Journal*

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## ADMINISTRATIVE LAW: WATER RIGHTS

### **Summary**

The Court held that NRS § 533.395 requires a party seeking relief from the cancellation of a water permit to exhaust all available administrative remedies before seeking judicial review, even if the State Engineer is not authorized to provide the particular remedy that the party seeks. If the State Engineer is authorized by NRS § 533.395 to provide a party with a remedy, then the doctrine of futility does not apply to excuse the NRS § 533.394(4) exhaustion requirement. Therefore, the party must first show that the administrative process would afford him or her “no relief at all” before seeking judicial review without first exhausting all administrative remedies.

### **Background**

Appellant Patti Benson’s parents (Joseph Rand and Ellen Rand) owned and operated a farming property in Eureka County. A water permit with an appropriation date of 1960 benefited the property. Joseph Rand died in 2008, and later in the same month the “Joseph L. and Ellen M. Rand Revocable Living Trust” was created to manage the farming property.

Because the current well on the property did not produce sufficient water, an agent acting on behalf of the trust applied for a water right permit at a new well head location, intending to divert water from an underground source via the newly drilled well. The State Engineer conditionally authorized the appropriation of “632 acre-feet annually for irrigation and domestic use from the Diamond Valley Hydrographic Basin,” provided that proof of completion of the new well, proof of beneficial use of the water, and a supporting map would be filed with the State Engineer within one year. This permit used the original appropriation date of 1960.

Due to financial complications, the trust was unable to complete drilling the well by 2010, leading Ellen Rand to seek an extension to complete the work and file the required documents with the State Engineer. The State Engineer granted the request and expanded the time for completion by one year. The same request was granted again in 2011 and 2012.

Ellen Rand died on March 31, 2013, and Benson inherited the farming property and water rights. On July 11, 2013, the State Engineer sent a “final notice” to the trust stating that if they did not file the required documents or request an extension within 30 days the water permit would be canceled. Benson recorded a quitclaim deed on July 24, 2013 with the Eureka County recorders office. The record does not show that she filed a report of conveyance with the State Engineer, as required by NRS § 533.384. On September 11, 2013, the State Engineer canceled the water permit for failure to comply with its terms and sent notice to the Rands that they could appeal to the State Engineer for a public hearing within 60 days.

Instead of appealing to the State Engineer for administrative review, Benson filed the underlying petition for judicial review in the district court, seeking an order vacating the State Engineer’s decision to cancel the permit. The State filed a motion to dismiss Benson’s petition, arguing that “NRS § 533.395(4) required the district court to dismiss the petition for failure to exhaust administrative remedies and seek review of the permit cancellation at a public hearing

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<sup>1</sup> By Cassandra Ramey.

before the state engineer.”<sup>2</sup> Benson responded that she was not required to seek administrative review because she properly petitioned for judicial review under NRS § 533.450, claiming that seeking administrative review would have been in vain and futile. Benson contented that even if she applied for administrative review and the State Engineer rescinded the cancellation, the State Engineer’s statutory remedy under NRS § 533.395(3) would be insufficient as she would lose her 1960 appropriation date and would not be able to use the well as planned. The district court granted the State Engineer’s motion to dismiss Benson’s petition. Benson appealed.

## **Discussion**

### *Statutory procedures applicable to the cancellation of water permits*

Under NRS § 533.410, the State Engineer is authorized to cancel a landowner’s water permit when the landowner fails to comply with its terms. After a permit is canceled, the permit holder may request a review within 60 days. The state engineer may “affirm, modify or rescind the cancellation.”<sup>3</sup> When a State Engineer modifies or rescinds a canceled permit, the original appropriation date is “vacated and replaced by the date of the filing of the written petition with the State Engineer.”<sup>4</sup> Therefore, under Nevada law a state engineer does not have the authorization to reinstate a water permit with its original appropriation date. The Court further states that under NRS § 533.595(4), and NRS § 533.450, the cancellation of a permit may not be the subject of any judicial proceedings unless it has first been filed for review with the state engineer.<sup>5</sup>

### *Exhaustion of administrative remedies is required before seeking judicial review of a State Engineer’s decision*

In normal circumstances, a person seeking relief from an agency decision must first exhaust all available administrative remedies before seeking review from a district court. However, the Court states that exhaustion is not required when administrative proceedings are “vain and futile” or when the “agency clearly lacks jurisdiction.”<sup>6</sup> “Thus, a party may proceed directly to judicial review when the administrative proceedings would be futile.”<sup>7</sup> In this case Benson asserted that pursuant to NRS § 533.395(3), petitioning the State Engineer would be futile because the State Engineer has denied all applications to appropriate groundwater for irrigation purposes since 1979<sup>8</sup> and “even if the cancellation of her permit was rescinded, the State Engineer would be required to reinstate the water permit with a priority date of 2013, instead of its original date of 1960.” Such a ruling would prohibit Benson from using the well as intended from the original permit.

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<sup>2</sup> NEV. REV. STAT. § 533.395(4) provides that “The cancellation of a permit may not be reviewed or be the subject of any judicial proceedings unless a written petition for review has been filed and the cancellation has been affirmed, modified or rescinded pursuant to subsection 2.”

<sup>3</sup> NEV. REV. STAT. § 533.395(2).

<sup>4</sup> NEV. REV. STAT. § 533.395(3).

<sup>5</sup> See *Howell v. Ricci*, 124 Nev. 1222, 1228, 197 P.3d 1044, 1048 (2008).

<sup>6</sup> *Englemann v. Westergard*, 98 Nev. 348, 353, 647 P.2d 385, 398 (1982).

<sup>7</sup> See *Nev. Dep’t of Taxation v. Scotsman Mfg. Co.*, 109 Nev. 252, 849 P.2d 317 (1993).

<sup>8</sup> See *OFFICE OF THE STATE ENG’R OF THE STATE OF NEV.* State Engineers Order No. 1226 (2013).

Rejecting an analogy to the Court's holding in *Englemann v. Westergard*, the Court found that *Englemann* is distinct from the current case, stating that the limitations period did not prevent Benson from seeking administrative review. Further, the Court disagrees with Benson's assertion that a water permit with an appropriation date of 2013 gives her no remedy at all, stating that even though a water permit with a 2013 expiration date places her "near the end of the line to appropriate water," this is still a form of relief. Even though this is not the form of relief that Benson preferred, the Court does not "consider administrative proceedings to be futile solely because the statute prevents the petitioner from receiving his or her ideal remedy through administrative proceedings."

Had Benson gone through the administrative proceedings and "a permit with a 2013 priority date did not allow her to appropriate sufficient water, seeking judicial review would have *then* been permissible." If NRS § 533.395 authorizes the State Engineer to provide a party with any remedy, the doctrine of futility does not apply, and the party is not excluded from complying with NRS § 533.395(4)'s exhaustion requirement. Therefore, a petitioner must prove that the administrative review process would provide him or her "no relief at all" before being allowed to petition for judicial review.

The Court recognizes that requiring a petitioner to show that the administrative process provides "no relief at all" creates a more narrowly tailored definition of futility in Nevada than there is in federal courts. The Court considers this necessary for four reasons: (1) the unique nature of water rights; (2) administrative review requires a public hearing, allowing for public scrutiny that is necessary due to the scarcity of water in Nevada's desert climate; (3) the stricter standard provides the district court with a fully developed record, factual findings by an administrative body with expertise on water appropriation, thus placing the district court in a better position to determine these issues; and (4) the stricter standard allows the State Engineer to "correct its own mistakes and protect judicial resources."

### *Equitable relief*

Benson additionally asserted that she was not required to seek administrative review because "the State Engineer is not empowered to grant equitable relief; specifically, the State Engineer cannot reinstate her water permit with its original priority date." Benson relied upon the court's holding in *State Engineer v. American National Insurance Co.* to make this argument. Here, the Court showed that Benson failed to show the elements that allowed American National to receive equitable relief—namely, that Benson has not shown: (1) that her family has expended any funds towards improvements or completed any portion of the project, (2) that the water was put to beneficial use, (3) that a third party would not be harmed by her appropriation of water, or (4) that such an appropriation would benefit Eureka County.<sup>9</sup>

Further, the Court demonstrated that *American National* is not applicable to this case because at the time of that decision, NRS § 533.395 had not yet been amended to allow parties to petition the State Engineer to review a canceled permit. Since American National did not have a remedy at law to address the deprivation of its water right at that time, it was appropriate to grant them equitable relief through judicial review.

Since Benson failed to show that the law did not provide her with an adequate legal remedy, her "unsupported suspicions" that the remedy would have been inadequate were

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<sup>9</sup> See *State Eng'r v. American Nat'l Ins. Co.*, 88 Nev. 424, 498 P.2d 1329 (1972).

insufficient to excuse her noncompliance with NRS § 533.395(2) and (4). Therefore, the district court properly ruled that it could not grant Benson equitable relief.

### **Conclusion**

“NRS § 533.395 requires a party who is aggrieved by the cancellation of a water permit to exhaust all available administrative remedies pertaining to the State Engineer’s decision on a water permit before filing a petition for judicial review with the district court.” Because Benson failed to first file a written request for the State Engineer to review its decision to cancel her water rights permit, the Court affirmed the district court order dismissing her petition for judicial review in a water law matter.