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Wilson, P.E. v. Pahrump Fair Water, LLC 137 Nev. Adv. Op. 2 (February 25, 2021)

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NEVADA STATE ENGINEER RESTRICTIONS ON DRILLING OF WELLS PURSUANT
TO ORDER No. 1293A

Summary

In an opinion drafted by Justice Pickering, the Nevada Supreme Court considered the scope of NRS 534.110(8), which allows the State Engineer to restrict the drilling of wells in specific basins if the State Engineer determines that the drilling of additional wells would result in undue interference with existing wells.² At issue in this case was the State Engineer’s Order No. 1293A, which prohibits the drilling of additional domestic wells in the Pahrump Artesian Basin unless the drilling applicant relinquishes 2.0 acre-feet annually from an alternate source.³ Respondents, Pahrump Fair Water, LLC, along with its individual members (“PFW”) challenged the order, arguing that (1) the State Engineer lacked authority to issue the Order because substantial evidence did not support the conclusion that the drilling of wells would result in undue interference with existing wells and (2) the State Engineer violated due process by issuing the order without providing notice and a public hearing. The Court reversed the district court’s decision invalidating the Order and held that NRS 534.110(8) authorized the State Engineer’s Order based on substantial existing evidence, and that because water is a public resource—as opposed to a private resource—and because Nevada’s allocation system for water does not guarantee there will be enough to meet every request for it, that notice and a hearing prior to the State Engineer’s restriction was not necessary.

Background

As it currently stands, the Pahrump Artesian Basin is over-allocated, but not over-pumped.⁴ It is over-allocated because the Basin’s sustainable yield is 20,000 acre-feet annually (“afa”), but there are roughly 82,000 afa that are currently allocated for permitted uses as well as existing domestic wells operating in the Basin without a permit.⁵ Moreover, there are concerns about future domestic well allocations, which, based on land availability, could lead to a possible commitment of an amount five times the Basins’ sustainable yield.⁶ However, the Basin is not currently over-pumped because not all water-rights owners exercise the full allotment of their rights annually, and the average water draw per domestic well is about .5 afa out of the permitted 2 afa.⁷ Nevertheless, concerns about the Basin and historical effects of over-pumping and additional future domestic well allocations are long-standing. The State Engineer designated a portion of the

¹ By Theresa Thibeau.

² NEV. REV. STAT. 534.110(8) (2019).

³ State Engineer Order No. 1293A (July 12, 2018).

⁴ See Nye Cty. Water Dist. Staff & Groundwater Mgmt. Plan Comm. Members, *Pahrump Basin 162 Groundwater Management Plan* 6 (Oct. 16, 2015) (2015 GW1VIP); Nye Cty. Water Dist., *Pahrump Basin 162 Groundwater Management Plan* 5–10 (Feb. 2018) (2018 GWMP).

⁵ *Id.*

⁶ See 2015 GWMP 7.

⁷ *Id.*

Basin as an area in need of regulation 80 years ago and has since expanded that designation to the entirety of the Basin.⁸

As a result, the State Engineer and Nye County have undertaken conservation action over the Basin, including outlining a 50-year water need strategy, forming an advisory committee to address over-appropriation, and creating a Groundwater Management Plan.⁹ In 2016, the Nye County Water District, operating under the Groundwater Management Plan, requested that the State Engineer issue an order requiring relinquishment of existing water rights prior to the drilling of new domestic wells in the Basin.¹⁰ Based on this request, and after determining that any drilling of new wells in the Basin would unduly interfere with existing wells, the State Engineer issued Order No. 1293, which required relinquishment of existing water rights before new domestic wells could be drilled in the Basin.¹¹ The Order was issued on December 19, 2017 without notice, and it took immediate effect.¹² The State Engineer subsequently denied 22 notices of intent to drill domestic wells filed between December 15 and December 19, 2017. Respondents PFW challenged the order, and the district court concluded that the State Engineer lacked the authority to issue the requirement because substantial evidence did not support it and violated due process by issuing the order without providing notice and a public hearing. This appeal followed.

Discussion

State Engineer Authority

The Court first addressed whether Order No. 1293A was valid given the scope of the State Engineer's authority under NRS 534.110(8).¹³ The Court looked at the plain meaning of NRS 534.110(8), which provides:

In any basin or portion thereof in the State designated by the State Engineer, the State Engineer may *restrict drilling of wells in any portion thereof if the State Engineer determines that additional wells would cause an undue interference with existing wells*. Any order or decision of the State Engineer so restricting drilling of such wells may be reviewed by the district court of the county pursuant to NRS 533.450.¹⁴

The Court concluded that a straightforward reading of the text supported the validity of Order No. 1293A and the specific 2.0 afa requirement.¹⁵ The Court noted that although at one time there was a broad exclusion of domestic wells from Nevada's statutory water laws, that the

⁸ See State Engineer Order No. 176 (Mar. 11, 1941); State Engineer Order No. 1252 (Apr. 29, 2015).

⁹ See Thomas S. Buqo, Dep't. of Nat. Res. & Fed. Facilities, *Nye County Water Resources Plan 1* (Aug. 2004); 2015 GWMP 4–10.

¹⁰ See 2018 GWMP 4.

¹¹ State Engineer Order No. 1293 (Dec. 19, 2017). Note that before the district court ruled on Order No. 1293, the State Engineer revoked Order No. 1293 and issued an amended order, No. 1293A, which was almost entirely identical to Order No. 1293, except that it exempted from the 2.0 afa requirement (1) the 22 notices of intent to drill filed between December 15 and December 19 and (2) any person who had filed either a zoning or building application as of December 19, 2017.

¹² *Id.*

¹³ NEV. REV. STAT. 534.110(8) (2019).

¹⁴ *Id.* (Emphasis added).

¹⁵ State Engineer Order No. 1293A (July 12, 2018).

Legislature eliminated it and domestic wells are encompassed in the statute’s definition of the term “wells.”

Next, the Court found that substantial evidence existed to support the State Engineer’s decision in issuing Order No. 1293A. The Court reasoned that substantial evidence exists when a “reasonable mind would accept it as adequate support of the conclusion.” Applying this standard, the Court examined the adequacy of a 2017 study of the Basin by John Klenke (“the Klenke study”), which the State Engineer relied upon in issuing the Order.¹⁶ The Klenke study did not account for new domestic wells, but still concluded that well failures were likely to result under the current conditions.¹⁷ The Court found that despite the Klenke study’s limitations, the State Engineer could still reasonably infer that if the Basin’s wells are likely to fail—even absent new drilling—that additional drilling would increase well failure. Additionally, the Court determined that deference to the State Engineer in finding substantial evidence was especially warranted because the term “undue interference” is technical and scientifically complex, and undefined by the Legislature. Lastly, the Court noted that, contrary to PFW’s belief, the State Engineer was not required to hold a hearing or develop a more robust record prior to issuing Order 1293A. Although there are general requirements under Nevada’s Administrative Procedure Act, the State Engineer is exempted from these requirements.¹⁸

Due Process Violation

The Court held that issuing Order No. 1293A did not constitute a due process violation. Although the State Engineer did not provide notice or a hearing, because the Order limited future water rights—not established water rights—there was no due process violation. The Court reasoned that under Nevada’s system of prior appropriation, a landowner does not have an established property right in untapped groundwater.¹⁹ Moreover, although the Court acknowledged that constitutional procedural protections may be available for established expectancy interests, that they did not apply here, because a property owner could not have a reasonable expectation to drill into a basin that has been over-allocated. The Court noted that landowners with vested water rights in established domestic wells have a greater interest in the Basin’s water supply, in terms of both established property rights and reasonable reliance.

Conclusion

The Court concluded that because the State Engineer acted with proper authority and there was no due process violation, that the State Engineer’s Order No. 1293A was valid. The Court reversed the district court’s order and reinstated Order No. 1293A. The Court also remanded with instructions for the district court to consider PFW’s takings claim.²⁰

¹⁶ See John Klenke, Nye Ct. Water Dist., *Estimated Effects of Water Level Declines in Pahrump Valley on Water Well Longevity*, at vi (Jan. 2017).

¹⁷ *Id.*

¹⁸ See NEV. REV. STAT. 233B.039(1)(i) (2020).

¹⁹ Ross E. DeLipkau & Earl M. Hill, *The Nevada Law of Water Rights* 6-3 to 6-4 (2010).

²⁰ PFW raised a takings issue in its initial complaint, but the district court declined to reach the issue. The State Engineer did not raise the issue on appeal, and PFW asked that in the event of reversal, the Court remand the takings issue for the district court to resolve.