

IN THE SUPREME COURT OF THE STATE OF NEVADA

EUREKA COUNTY, A POLITICAL)
SUBDIVISION OF THE STATE OF;) No. 61324
NEVADA; KENNETH F. BENSON,)
INDIVIDUALLY; DIAMOND CATTLE) District Clerk
COMPANY, LLC, A NEVADA LIMITED) CV1108-165
LIABILITY COMPANY; MICHEL AND) CV1108-165
MARGARET ANN ETCHEVERRY FAMILY,) CV1112-165
LP, A NEVADA REGISTERED FOREIGN) CV1202-170
LIMITED PARTNERSHIP,)
)
)
Appellants,)
v.)
)
)
THE STATE OF NEVADA State Engineer;)
THE STATE OF NEVADA DIVISION OF)
WATER RESOURCES; AND KOBEH)
VALLEY RANCH, LLC, A NEVADA)
LIMITED LIABILITY COMPANY,)
)
)
Respondents.)
_____)

BRIEF OF *AMICUS CURIAE* NV ENERGY

Supporting the Nevada State Engineer
and
Requesting Affirmance of the Decision of the Seventh Judicial District Court

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I.

STATEMENT OF INTEREST

NV Energy¹ is a public utility company regulated by the Public Utilities Commission and supplies energy services and products to over 2.4 million Nevadans. In order to meet that demand, NV Energy holds an extensive portfolio of water resources, including permitted and certificated water rights throughout the State to supply water to its existing power generation facilities. In order to continue to meet the electricity needs of current and future Nevada residents, NV Energy also engages in long range planning for construction of additional power generation facilities and expansion of existing facilities. This long range planning necessarily includes ensuring that the contemplated expanded and additional facilities will have the requisite water resources for their construction and operation. Accordingly, to secure water supplies for those facilities, NV Energy has filed, or otherwise acquired, applications for additional water rights with the State Engineer.

NV Energy's interest in this litigation flows from the potential impact this Court's decision may have upon its pending and future applications for water rights and its planned future development of water resources. Thus, NV Energy sought leave to file this *amicus curiae* brief in support of Respondent State of Nevada, State Engineer (State Engineer) on the limited issue of the State Engineer's authority under Nevada's water law to condition issuance of permits upon development, approval and implementation of monitoring, management and mitigation plans (3M Plans) to address any potential impacts the beneficial use of water under the newly permitted water right may have upon existing water rights. NV Energy's position on this issue provides this Court with the perspective of Nevada's primary electric utility, which relies on its substantial portfolio of water rights and water rights applications in the State of Nevada to plan for and provide electricity to 2.4 million Nevadans.

¹ As mentioned in NV Energy's motion for leave to file this brief, this brief is submitted on behalf of Sierra Pacific Power Company and Nevada Power Company, both doing business as NV Energy. For ease of reference, these two entities are hereinafter together referred to as NV Energy.

1 Nevada is the most arid state in the country, and its water resources are scarce.
2 NV Energy appreciates that there must be a balance struck between protection of
3 existing rights and development of available water resources. Conditioning permit
4 approval upon 3M Plans strikes that balance. NV Energy agrees that the State
5 Engineer has the authority under Nevada law to issue a permit to an applicant
6 conditioned upon that applicant monitoring and managing the water resource to be
7 utilized by the applicant in order to ascertain if any existing rights are being
8 negatively impacted; and if so, to implement approved mitigation measures to ensure
9 that a conflict with existing water rights does not arise. Such conditional approval
10 allows for a planned and measured development of the water resource, while still
11 protecting existing rights—a much better approach than outright denial of applications
12 premised on potential impacts on existing rights, which is the position of Appellant
13 Eureka County.

14 If this Court were to reverse the District Court, as urged by Appellants, NV
15 Energy's ability to use Nevada's groundwater resources for power generation to meet
16 the energy needs of Nevada's citizens would be severely curtailed. Therefore, NV
17 Energy urges this Court to affirm the decision of the District Court.

18 II.

19 ARGUMENT

20 A. The State Engineer May Issue a Water Right Permit Conditioned upon the 21 Development and Implementation of a 3M Plan to Identify and Address 22 Potential Impacts on Existing Water Rights.

23 “The water of all sources of water supply within the boundaries of the State
24 whether above or below the surface of the ground, belongs to the public.” NRS
25 533.025. A water right holder, whether the right is in the form of a vested right,
26 permit or certificate, does not own the water, “they merely enjoy the right to
27 beneficial use.” *Desert Irrigation Ltd. v. State of Nevada*, 113 Nev. 1049, 1059, 944
28 P.2d 835, 842 (1997).

///

1 No person may divert and use water without first applying for and being
2 granted a permit to appropriate that water from the State Engineer, who is statutorily
3 responsible for the administration of all water rights in this state.² NRS 533.325;
4 NRS 534.050(1),(3); NRS 534.110(1). Upon satisfaction of other statutory criteria
5 not relevant in this case, the State Engineer will issue a permit to appropriate water
6 provided (1) there is water available in the proposed source of supply, (2) the
7 proposed use or change does not “conflict” with existing rights or with protectable
8 interests in existing domestic wells, and (3) the proposed use or change does not
9 threaten to prove detrimental to the public interest. NRS 533.370(2).

10 A permit to use water is an “inchoate usufructuary right” subject to the terms
11 and conditions in the permit itself and to the statutory requirements of NRS Chapter
12 533.³ *Desert Irrigation*, 113 Nev. at 1059, 944 P.2d at 842. In accordance with
13 Nevada’s prior appropriation water law, a condition that universally appears in a
14 permit is that it is issued subject to existing rights. NRS 533.430. As discussed
15 further below, when granting an application, the State Engineer may also impose
16 additional conditions to ensure compliance with Nevada’s water laws. Thus, when
17 the State Engineer conditions diversion and use of water under the permit on
18 development and approval of a 3M Plan, as is the case here, not a single drop of water
19 may be pumped until that condition is satisfied. Both of these requirements ensure
20 that a conflict with existing rights will not arise.

21 However, by way of a mechanical reading of the statute, Appellant Eureka
22 County argues that NRS 533.370 compels the State Engineer to deny a water right
23 application if the proposed appropriation would *potentially* impact or impair existing
24

25 ² Unless the water in question is used under a vested water right that has been established by
26 use of the water prior to the enactment of Nevada’s statutory water code in 1913. NRS 533.085(1).

27 ³ Additionally, a permit is subject to cancellation or rescission if the terms of the permit are
28 not met or the applicant does not otherwise comply with the statutory requirements to perfect the
permit. NRS 533.390(2); 533.410.

1 water rights because *potential* negative impacts or impairments are somehow
2 equivalent to an existing conflict. Eureka Cty Open. Brf. at 34-37. Eureka County
3 further argues that once a potential impact is identified, the State Engineer is without
4 the authority to issue a permit subject to the development and implementation of a 3M
5 Plan, and his only course of action is to rigidly deny the application. *Id.* at 42-45.

6 The District Court properly rejected this harsh, mechanical construction of the
7 statute and recognized that given Nevada's scarce water resources, generally any
8 development of groundwater will likely have some impact upon existing rights.
9 Findings of Fact, Conclusions of Law, and Order Denying Petitions for Judicial
10 Review (Order) at 12. Such potential impacts do not require the State Engineer to
11 summarily deny the permits on the basis that a conflict with existing rights *may* arise.
12 Rather, as the District Court correctly found, "NRS 533.370(2) does *not* prevent the
13 State Engineer from *granting* applications that may impact existing rights if the
14 existing right can be protected through mitigation, thus *avoiding* a conflict with
15 existing rights." *Id.* (emphasis added).

16 The District Court correctly found that identification of a potential adverse
17 impact of a proposed appropriation does not automatically equate to an existing
18 conflict requiring an outright denial of the application. Nevada law specifically
19 contemplates that a new appropriation of water may impact existing rights. In NRS
20 534.110(5), the Legislature provided that even if the water table will be lowered
21 under the proposed groundwater appropriation, *i.e.*, will impact existing rights, the
22 State Engineer may grant the application so long as existing water rights and interests
23 in domestic wells can continue to be satisfied under the "express conditions" of the
24 permit.

25 If there are potential adverse impacts, the State Engineer is fully vested with
26 the authority to condition issuance of the permit upon terms and conditions which he
27 deems necessary to avoid or address that impact. In this case, he required the
28 development and implementation of a 3M Plan. Nowhere in Nevada's water statutes

1 is there a prohibition against the State Engineer granting a water right application
2 subject to certain terms and conditions, including the requirement that a 3M Plan be
3 developed by the applicant, approved by the State Engineer, and then implemented
4 by the applicant to address adverse impacts on existing water rights, thus avoiding a
5 conflict with those rights.

6 Absent an express prohibition, there need not be a specific grant of authority
7 for the State Engineer to impose permit conditions. The State Engineer possesses
8 such authority because he has the authority to grant or deny an application to
9 appropriate water in the first instance. *See S. Pac. Co. v. Olympian Dredging Co.*,
10 260 U.S. 205, 43 S.Ct. 26, 27 (1922) (“power to approve implies the power to
11 disapprove and the power to disapprove necessarily includes the lesser power to
12 condition an approval”).

13 The federal district court vested with jurisdiction over the Alpine Decree
14 adjudicating the rights of the Carson River agrees. In *United States v. Alpine Land*
15 *& Reservoir Co.*, 919 F. Supp. 1470, 1479 (D. Nev. 1996), which the District Court
16 relied upon in reaching its conclusion in this case, the State Engineer had granted
17 applications to change the manner and place of use and point of diversion of Carson
18 River water rights previously used for irrigation. *Id.* at 1472. The applicant had
19 proposed to “strip” irrigated land of its water and utilize that water for storage in a
20 downstream reservoir. *Id.* The State Engineer granted the applications expressly
21 subject to existing water rights and the express condition that no irrigation wells
22 would be drilled on the land stripped of its water rights. *Id.* Interpreting Nevada law,
23 the federal district court held that “[t]he State Engineer has the inherent authority to
24 condition his approval of an application to appropriate based on his statutory
25 authority to deny applications if they impair existing water rights.” *Id.* at 1479.

26 A similar result was reached by the Supreme Court of Washington in *State v.*
27 *Crown Zellerback Corp.* 602 P.2d 1172, 1173 (Wash. 1979). In that case, the court
28 was examining the authority of the Departments of Fisheries and Game to issue

1 permits approving hydraulic projects, subject to certain terms and conditions. *Id.* at
2 1172. While no express grant of authority existed for those departments to impose
3 any condition upon a hydraulic project permit, the court nonetheless found such
4 authority implied, and held that by virtue of the legislature granting the departments
5 the power to approve applications and issue hydraulic project permits, the
6 “departments have been delegated the authority to impose requirements or conditions
7 on permits.” *Id.*

8 There can be no doubt that the State Engineer has the authority to condition
9 approval of water right applications upon certain requirements and that authority
10 extends to imposing a 3M Plan. That authority flows from the express power granted
11 to him to approve or deny water right applications and also specifically from several
12 Nevada water statutes. *See* NRS 534.110(5) (requiring State Engineer to impose
13 express conditions to protect existing water rights in event groundwater table is
14 lowered by newly approved appropriation); *see also* NRS 533.024 (policy of the State
15 is to protect domestic wells from “unreasonable adverse effects . . . *which cannot be*
16 *reasonably mitigated*”) (emphasis added). Therefore, the arguments of Appellants
17 in this regard should be rejected and the District Court’s decision affirmed.

18 **B. Mitigation is an Essential Component to the Development of Water Resources**
19 **in this State.**

20 “Water in Nevada . . . is a precious and increasingly scarce resources.
21 Consequently, state regulation like that in NRS Chapters 533 and 534 is necessary to
22 strike a sensible balance between the current and future needs of Nevada citizens and
23 the stability of Nevada’s environment.” *Bacher v. Office of State Engineer*, 122 Nev.
24 1110, 1116, 146 P.3d 793, 797 (2006). This “sensible balance” approach is on
25 essential element of NV Energy’s strategy in planning for the energy needs of
26 Nevada’s citizens. The District Court found that Eureka County’s proposed “no
27 impact” rule would “create a near impossibility for the future development of any new
28 groundwater in the State of Nevada contrary to legislative intent and public policy.”

1 Order at 13-14. NV Energy agrees and observes that there is nothing “sensible” about
2 the approach urged by Eureka County.

3 As previously discussed, the State Engineer has the authority to impose
4 conditions upon approval of any permit. One of the most important tools utilized by
5 the State Engineer is the requirement that the applicant develop a 3M Plan to monitor
6 and manage the development of the permitted right, and, if necessary, mitigate any
7 adverse impacts the use of the junior right may have on senior rights. There are a
8 variety of mitigation measures, including financial compensation, alternative sources
9 of water, and curtailment and cessation of pumping. Successful mitigation ensures
10 that the holders of existing rights will continue to enjoy the full benefit of their water
11 rights. Such a solution strikes a balance between existing rights and future needs and
12 thus furthers an important public policy consideration inherent in Nevada’s prior
13 appropriation water law scheme. Stated bluntly, this “balanced” approach is critical
14 to keeping the lights on in Nevada.

15 III.

16 CONCLUSION

17 NV Energy is Nevada’s power company— over 2.4 million Nevadans depend
18 on NV Energy to provide them with electricity. NV Energy depends on Nevada’s
19 water resources, which are owned by the public, to provide that electricity. The rote,
20 mechanical approach Eureka County takes in its interpretation of NRS 533.370 is
21 wholly inconsistent with the “sensible balance” approach identified by this Court in
22 *Bacher*. The inevitable effect of the County’s approach is that development of
23 Nevada’s scarce water resources for the benefit of the public would be prevented
24 based on speculative impacts.

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26 ///

27 ///

28 ///

1 Engineers are problem-solvers, and the State Engineer's authority and duty to
2 solve Nevadas' water problems should not be eroded in this fashion. The District
3 Court's order should be affirmed.

4 RESPECTFULLY SUBMITTED this 13 day of February, 2013.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect, Times New Roman 14 point font. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is (1) proportionately spaced, has a typeface of 14 points or more, and contains 2777 words; and (2) does not exceed 15 pages. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this B day of February, 2013

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CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Nevada Rules of Appellate Procedure, I hereby certify that I am an employee of the law firm DYER, LAWRENCE, FLAHERTY, DONALDSON & PRUNTY and that on this 13th day of February, 2013, I caused a true and correct copy of the foregoing BRIEF OF *AMICUS CURIAE* NV ENERGY to be served on all parties to this action by placing a true copy thereof in a sealed postage prepaid envelope in the United States Mail in Carson City, Nevada, addressed to:

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