
IN THE SUPREME COURT OF THE STATE OF NEVADA

EUREKA COUNTY, a political subdivision of)
the State of Nevada; KENNETH F. BENSON,)
individually; DIAMOND CATTLE COMPANY,)
LLC, a Nevada limited liability company; and)
MICHEL AND MARGARET ANN)
ETCHEVERRY FAMILY, LP, a Nevada)
registered foreign limited partnership,)

Appellants,)

vs.)

THE STATE OF NEVADA STATE ENGINEER;)
THE STATE OF NEVADA DIVISION OF)
WATER RESOURCES; and KOBEH VALLEY)
RANCH, LLC, a Nevada limited liability company,)

Appellees.)

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APPEAL

FROM THE SEVENTH JUDICIAL DISTRICT COURT, EUREKA COUNTY
THE HONORABLE DAN L. PAPEZ, DISTRICT JUDGE
District Court Case Numbers: CV1108155, CV1108156,
CV1108157, CV1112164, CV1112165, CV1202170

**APPELLANTS KENNETH F. BENSON, DIAMOND CATTLE COMPANY
LLC, AND MICHEL AND MARGARET ANN ETCHEVERRY FAMILY
LP'S ANSWERING BRIEF TO AMICI CURIAE BRIEFS**

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ANSWER

Appellants KENNETH F. BENSON, DIAMOND CATTLE COMPANY, LLC, and MICHEL AND MARGARET ANN ETCHEVERRY FAMILY, LP, (collectively referred to herein as “Appellants”), by and through their attorneys of record, Schroeder Law Offices, P.C., file this Response to Amici Curiae Briefs.

I.

PROCEDURAL HISTORY

Appellants filed their Opening Brief in this matter on December 27, 2012 (Doc. 2012-40976). Appellant Eureka County filed its Opening Brief on the same date (Doc. 2012-40828). Appellee Nevada State Engineer and Intervenor-Appellee Kobeh Valley Ranch, LLC (“KVR”) filed Answering Briefs on February 4 and 5, 2013, respectively (Doc. 2013-03604 and -03651).

On February 13, 2013, NV Energy filed a Motion for Leave to File Brief of Amicus Curiae (Doc. 2013-04741). On February 14, 2013, Municipal Water Purveyors¹ provided notice of Amicus Curiae Brief (Doc. 2013-04768), and Nevada Mining Association filed a Motion to Appear as Amicus Curiae and Join in the Brief of the Municipal Water Purveyors (Doc. 2013-04767).

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¹ “Municipal Water Purveyors” includes Carson City, City of Fernley, Gardnerville Ranchos General Improvement District, City of Henderson, City of Las Vegas, Town of Minden, City of North Las Vegas, Southern Nevada Water Authority, and Truckee Meadows Water Authority.

On February 26, 2013, Appellants moved this Court for Leave to File a Response to Amici Briefs (Doc. 2013-05904). Appellants' Motion was granted by Order of this Court dated March 25, 2013 (Doc. 2013-08784).

II.

ARGUMENT SUMMARY

- A. Prior to permit issuance, impacts and conflicts existed. In such cases, Nevada law requires protection of prior existing rights when "conflicts" exist.
- B. Empowered and directed by law when conflicts and impacts exist, the State Engineer is required to impose conditions, not after the fact.
- C. Nevada Law outlines the statutory analysis that first requires a determination of what constitutes "reasonable lowering;" and secondly, protection of this reasonable level by expresses conditions at permit issuance.
- D. Appellants request the State Engineer to follow the statutory scheme; which is not a request for a "no impact rule."
- E. When the State Engineer relies on evidence not in the record to find existing water uses are protected, procedural due process is violated.
- F. Proposed hypothetical mitigation measures are neither appropriate to protect existing rights, nor consistent with Nevada Law.

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G. After the fact mitigation, violates the concept of priority and the Prior Appropriation Doctrine. The State Engineer holds the responsibility to protect existing rights. Shifting the burden to the priority right holder and requiring them to protect their property interests, is contrary to Nevada Law.

III.

ARGUMENT

As explained below, the arguments submitted by Amici Curiae are overly broad and do not account for the specific facts of this case. The arguments are misleading, and as such not helpful for determination of the specific issues before this Court.

A. Impacts versus Conflicts

Municipal Water Purveyors (joined by Nevada Mining Assoc.) argue Applications do not “conflict” with existing water use rights, Applications only “impact” rights, and Nevada law does not require that Applications be denied based on “impacts.” Purveyors Br. at 6.

Contrary to Amici’s argument, the State Engineer admitted that its finding of “impacts” in Ruling No. 6127 actually constituted a finding of “conflicts.” The State Engineer’s Corrected Answering Brief states as follows:

The State Engineer also took notice of *conflicts* that may occur:

However, the Applicant’s groundwater model does indicate that there may be an impact to several small springs located on the

valley floor of Kobeh Valley near the proposed well locations...

JA Vol. 34 at 6417, 6429; Vol. 35 at 6792, 6804 (emphasis added).

The State Engineer's Ruling No. 6127 *ultimately* found no conflicts because, and only because, conflicts could allegedly be avoided by implementing a monitoring, management and mitigation plan ("3M Plan"). JA Vol. 26 at 5006. Amici ignore this important distinction. **The State Engineer found conflicts at the time the Permits were issued**, however, the State Engineer determined that conflicts could be avoided through future development and implementation of a 3M Plan.²

Moreover, the "impacts versus conflicts" debate is irrelevant in the case of vested rights (water uses commencing prior to the Nevada water code). Nevada Revised Statute § 533.085 states:

Nothing contained in this chapter shall *impair* the vested right of any person to the use of water, nor shall the right of any person to take and use water be *impaired or affected* by any of the provisions of this chapter where appropriations have been initiated in accordance with law prior to March 22, 1913.

(Emphasis added). Therefore, there can be no impairment or detrimental effect on vested rights, which is a lower standard than the State Engineer's definition of "conflict."

² The conflict finding is consistent with the record, evidencing the flow of springs on the Kobeh Valley floor will cease. JA Vol. 3 at 490, 531.

Amici's opinions regarding conflicts versus impacts are not helpful to the matters before this court. The issue here is whether the State Engineer erred by determining that all conflicts (and effects in the case of vested rights) could be avoided by mere reference to the future development of a 3M Plan without sufficient evidence in the record to support that finding.

B. The State Engineer's Power to Impose Conditions

Amici argue that the State Engineer can consider mitigation measures when determining whether to approve water use applications, and can impose mitigation conditions on water use permits. Purveyors Br. at 3-14; NV Energy Br. at 3-7. Municipal Water Purveyors state: "Nevada statutes clearly authorize the State Engineer to consider mitigation measures before he finds whether a conflict exists with existing rights." Purveyors Br. at 10.

Appellants have not argued against the unremarkable position that the State Engineer can consider mitigation in the application process and can impose mitigation conditions in permits. Amici again fail to understand the facts of this particular case. Here, the issue is whether, once the State Engineer finds conflict, the State Engineer may then declare that all conflicts are cured by a hypothetical, non-existent 3M Plan. App. Op. Br. at 19-23.

The State Engineer admits the 3M Plan did not exist at the time administrative hearings were held and Ruling No. 6127 was issued. SE Ans. Br. at

33 (“No 3M Plan existed at the time the applications were considered.”). KVR’s witnesses admitted at hearing that no mitigation plan existed and testimony about possible mitigation was “speculative” at best. *See, e.g.*, JA Vol. 2 at 315 (Testimony by Patrick Rogers: “I don’t know what we would propose in a mitigation plan. A mitigation plan hasn’t been developed yet. It would be speculative to say what we would or would not propose.”).

Appellants agree that the State Engineer can review a mitigation plan, proposed as part of an application, when deciding whether to grant the application. If the application lists specific mitigation measures that will be utilized to avoid conflicts, or specific measures are entered in the record for the State Engineer’s consideration, then it is reasonable for the State Engineer to consider those specific measures and determine whether those measures will avoid conflicts, as required by NRS § 533.370(2). In such a case, the specific measures (express conditions) should be placed in the permit as required by NRS § 534.110. However, those are not the facts of this case.

Here, the State Engineer determined that Applications will conflict with existing water use rights. JA Vol. 34 at 6417, 6429; Vol. 35 at 6792, 6804. With a finding of conflict, NRS § 533.370(2) requires that Applications be denied. Instead, without any evidence in the record as to specific mitigation measures to cure known conflicts, the State Engineer determined that all conflicts would be

cured by development and implementation of a 3M Plan in the future. Although the State Engineer can impose permit conditions, including that a 3M Plan be developed and implemented, the State Engineer cannot rely on a hypothetical, not-of-record 3M Plan to make the specific finding that all conflicts will be cured. That finding is baseless, and thus arbitrary and capricious. *City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994).

It may be helpful for this Court to ask the following questions:

- 1) Will Applications conflict with existing water use rights without a 3M Plan? Here, the State Engineer admitted Applications would conflict. JA Vol. 34 at 6417, 6429; Vol. 35 at 6792, 6804.
- 2) Can the State Engineer rely on the *mere suggestion* of a 3M Plan to make the specific finding that all conflicts *will* necessarily be avoided?

Appellants would suggest that the State Engineer may only rely on evidence in the record, and here there is no evidence in the record that the found conflicts will be avoided, because no specific mitigation measures were proposed during the proceedings or included in the Permits. As admitted by KVR, all types of hypothetical mitigation discussed at hearing were “speculative.”

Amici’s argument that the State Engineer has inherent authority to place conditions on water use permits is irrelevant. Here, the issue is whether the State

Engineer may rely on a hypothetical future condition to find all conflicts with existing rights will be avoided when there is no evidence in the record to support that finding.

C. Impacts to Existing Rights & Express Conditions

Amici argue that the State Engineer can approve new appropriations that would reasonably impact groundwater rights under NRS § 534.110(4) and (5). Purveyors Br. at 6; NV Energy Br. at 4. Amici fail to realize that the State Engineer failed to follow the statutory requirements outlined in NRS § 534.110(4) and (5). As required by these specific provisions, the State Engineer failed to determine that the predicted lowering would be reasonable, and failed to impose express conditions to protect existing rights.

Nevada Revised Statute § 534.110(4) provides that each appropriation of groundwater acquired under the code allows a *reasonable* lowering of the static water level at the appropriator's point of diversion. Nevada Revised Statute § 534.110(5) provides that new groundwater permits may be issued that lower the point of diversion of a prior appropriator, so long as protectable interests in domestic wells and the rights of holders of existing appropriations can be satisfied by express conditions in the permits. In the case of vested rights (that predate the Nevada water code), nothing in the water code may "impair the vested right of any person to the use of water, nor shall the right of any person to take and use water

be impaired or affected by any of the provisions of this chapter where appropriations have been initiated in accordance with law prior to March 22, 1913.”³ NRS § 533.085.

To summarize, water use rights appropriated under the Nevada water code allow for reasonable lowering at the appropriator’s point of diversion. The State Engineer can grant new appropriations that would reasonably lower the point of diversion of an existing appropriator, but only if “express conditions” in the permit protect interests in domestic wells and existing rights. However, nothing in the Nevada water code, including NRS § 534.110(4) and (5), can “impair” or “affect” a vested right to use water.

The State Engineer admitted at hearing that he did not impose any express conditions in the Permits as required by NRS § 534.110(4) and (5):

THE COURT: Did the State Engineer in his ruling expressly state how petitioners’ water rights would be satisfied by some lowering of the water table and the impacts to their rights?

MR. STOCKTON: He did not.

JA Vol. 35 at 6694.

Further, the State Engineer admitted at hearing that NRS § 534.110(5) requires that express conditions be included in Permits to avoid those known

³ The Nevada code addressing “percolating water” (the underground water not within a defined boundary), was not enacted until March 25, 1939. Thus, vested pre-code rights for percolating water may be as late as March 24, 1939. NRS § 534.100(1).

effects. JA Vol. 35 at 6694-6700 (“So all these effects that you know about, based on the geology, that statute applies to and you can put in the permit terms.” JA Vol. 35 at 6698-6699. “So if we knew what they were going to be, I would agree the statute would apply and require specific terms.” JA Vol. 35 at 6699).

Despite evidence in the record regarding the predicted drawdown caused by Applications (*see, e.g.*, JA Vol. 9 at 1552b), and known effects to water uses on the floor of Kobeh Valley (*see, e.g.*, JA Vol. 3 at 531; JA Vol. 4 at 623; JA Vol. 36 at 6961; JA Vol. 26 at 5005), the State Engineer failed to determine whether the predicted drawdown was reasonable, and failed to impose express conditions on the Permits to ensure existing rights would be satisfied.⁴ Amici’s interpretation of

⁴ The State Engineer, KVR and Amici, continue to rely on and seek the ability to require future mitigation as opposed to simply implementing express conditions into the permit. Several prior appropriation states routinely implement express conditions to deal with what a reasonable lowering of a groundwater table may be. There is nothing in Nevada Law that prevents an express condition, like the following example, from being placed into a permit. The following example of an express condition is found in State of Oregon water use Permit No. G-16557:

The water user shall discontinue use of, or reduce the rate or volume of withdrawal from, the well(s) if any of the following events occur:

- A. Annual water-level measurements reveal an average water-level decline of three or more feet per year for five consecutive years; or
- B. Annual water-level measurements reveal a water-level decline of 15 or more feet in fewer than five consecutive years; or
- C. Annual water-level measurements reveal a water-level decline of 25 or more feet; or
- D. Hydraulic interference leads to a decline of 25 or more feet in any neighboring well with senior priority.

The period of restricted use shall continue until the water level rises above the decline level which triggered the action or the Department determines, based on the permittee's and/or the Department's data and analysis, that no

the relevant statutes omits the step-by-step statutory procedure, and is not helpful to the Court's determination.

D. No Impact Rule

Amicus NV Energy argues that Appellants propose a “no impact rule” that is contrary to development in Nevada. NV Energy Br. at 6. Amici further opine about the scarcity of water in Nevada and the importance of allowing water resources to be developed. NV Energy Br. at 2; Purveyors Br. at 1.

Appellants never asked that the State Engineer impose a “no impact rule.” Appellants merely ask that the State Engineer comply with Nevada law and deny applications when the State Engineer finds conflicts with existing rights. Although water development is important in Nevada, development interests are not “above the law” that require existing property rights to be protected.

E. Procedural Due Process

Amici Municipal Water Purveyors state: “Appellants argue the State Engineer's decision to impose mitigation as an express condition of a groundwater right denies procedural due process to existing water right owners.” Purveyors Br.

(Cont.)

action is necessary because the aquifer in question can sustain the observed declines without adversely impacting the resource or causing substantial interference with senior water rights. The water user shall not allow excessive decline, as defined in Commission rules, to occur within the aquifer as a result of use under this permit. If more than one well is involved, the water user may submit an alternative measurement and reporting plan for review and approval by the Department.

at 15. Once again, Amici misunderstand the issues presented for appeal.

Here, Appellants do not argue that the State Engineer violates procedural due process when he imposes mitigation conditions on permits, in general. Instead, Appellants point out that the State Engineer violated procedural due process here when he relied on evidence not of record to make a specific finding that mitigation would cure any and all conflicts with existing water use rights. As explained above, the 3M Plan was not entered in the record, and it was an error for the State Engineer to rely on a hypothetical, not-of-record plan to determine Applications would not conflict with existing water use rights.

When the district court determined Ruling No. 6127 did not violate Appellants' procedural due process rights, it did so based on very specific assumptions. The District Court upheld Ruling No. 6127 because it assumed (incorrectly in hindsight) that Appellants would be afforded procedural due process in the preparation of the 3M Plan. The District Court stated:

The State Engineer granted KVR's applications upon evidence before him that unappropriated water was available in Kobeh Valley and that the water could be appropriated and used by KVR in a mining project without conflict to existing rights because existing rights could be made whole through mitigation. ***The key to protecting existing rights will be the 3M Plan which will first serve to identify impacts and the extent of those impacts, and second, to develop and implement mitigation efforts to ensure impacted existing rights are made whole. As inferred from the record, test pumping and analysis of pumping data, as it relates to impacts to existing rights, obviously takes time to complete. That data will form the basis of a 3M***

(Cont.)

See, Permit:

http://apps.wrd.state.or.us/apps/wr/wrinfo/wr_details.aspx?snp_id=166656

Plan ultimately submitted to the State Engineer for approval. The specifics of a 3M Plan not known at the time of the hearings will be made known after the data is collected and analyzed with input from Eureka County.

The Plan will be submitted to the State Engineer in all transparency and the State Engineer must approve the 3M Plan before production pumping is allowed. In the Court's view, ***that developmental sequence does not violate the due process rights of Eureka County or other Petitioners*** and the Court so finds.

JA Vol. 36 at 6905 (emphasis added).

In reality, no additional tests or analysis were completed prior to submitting the 3M Plan to the State Engineer, and Appellants were not provided opportunity to participate in preparation of the Plan. In fact, the 3M Plan was approved by the State Engineer following oral argument in this case and before the District Court issued its decision that set out a course that, if followed, might have avoided the due process violation.

The 3M Plan does not identify impacts or implement mitigation efforts. The 3M Plan merely creates a plan to create a plan based on future monitoring activities. App. Op. Br. Attachment 1. Amici's interpretation of the issues is again incorrect, and Amici's arguments are not helpful to resolution of this matter.

F. Proposed Mitigation Measures are not Appropriate

Amici Municipal Water Purveyors argue that allowable mitigation may include "financial compensation" or "supplying alternative water." Purveyors Br. at 8. In contradiction, the Purveyors then state: "Successful mitigation ensures the holder of the existing right will receive the same amount of water, at the same

point of diversion and place of use, and during the same period.” *Id.* Amici’s arguments are convoluted and misstate the standards for mitigation in the context of Nevada water law.

In Nevada, administrative (code) water rights are property rights with several distinct elements, including the source of water. NRS § 533.335. Vested rights are similarly based upon the means by which pre-code appropriators put certain sources of water to beneficial use. *See, e.g., In re Waters of Horse Springs v. State Engineer*, 99 Nev. 776, 778 (1983). Municipal Water Purveyors’ suggestion that “supplying alternative water” is adequate mitigation conflicts with Nevada water law and could lead to serious adverse consequences for appropriators.

For example, if appropriators were forced to accept alternative water supplies in lieu of the sources permitted by their water use rights, those appropriators may be subject to abandonment for failure to use their water use rights. *See, e.g.,* NRS § 533.060(4) (providing that proof of use includes proof of delivery of water under the water use right, not from a different source). Additionally, Purveyors’ argument would allow appropriators to use water from new sources without application, transfer, or other right, as required by law. NRS § 533.060(5) (“Any such right to appropriate any of the water must be initiated by applying to the State Engineer for a permit to appropriate the water as provided in

this chapter.”).

Nothing in the record supports the Municipal Water Purveyors’ conflicting statement that appropriators will be supplied with the same water, at the same point of diversion and place of use, during the same period. The State Engineer admits that the 3M Plan contemplates providing water from alternative sources. SE Ans. Br. at 21. Further, the 3M Plan expressly allows supply of water from alternate sources, financial compensation for loss, property acquisition or replacement, and more. App. Op. Br. Attachment 1. However, the suggestion that any of these measures might be accomplished without the conflicting and affected water right holders’ acquiescence, bodes on suggesting that the State Engineer’s mitigation powers extend to condemnation when he approves Permits.

Amici’s arguments fail to consider the types of mitigation proposed in this case, including financial compensation for conflicts to water use rights, and substitution of other water for an appropriator’s permitted, certificated or vested rights. Amici’s arguments are not helpful to resolution of this matter.

G. After-the-Fact Mitigation & Burden-Shifting

Amici Water Purveyors argue that additional “protections” are available to water right holders after the KVR application process is complete, such as petitioning for judicial review of State Engineer mitigation decisions, or petitioning the State Engineer for water regulation. Purveyors Br. at 17. Amici misunderstand

the necessary timing of mitigation requirements in Nevada. Further, Purveyors ask this Court to shift the State Engineer's duty to avoid conflicts onto existing water right holders, so that existing water users have the burden to seek relief after injury, rather than the State Engineer preventing injury as required by law.

The timing of mitigation is a critical issue under Nevada water law. The doctrine of prior appropriation, adopted by the Nevada State Legislature, provides that "priority of appropriation gives the superior right." *Ophir Silver Min. Co. v. Carpenter*, 4 Nev. 534, 1868 WL 2014, *2 (1869). The State Engineer and KVR hypothesize that the 3M Plan will be sufficient to mitigate any conflicts with existing water uses because KVR will monitor water resources for existing and potential conflicts. SE Ans. Br. at 6; KVR Ans. Br. at 12-15. However, both the State Engineer and KVR recognize that KVR's proposed water use may create conflicts that must be mitigated after-the-fact. *Id.* Such after-the-fact mitigation is in direct conflict with NRS § 533.370(2) and the Prior Appropriation Doctrine.

Nevada Revised Statute § 533.370(2) does not provide that conflicts may occur, so long as the junior appropriator "makes it up" to the senior water user at some time in the future. The statute provides that the application must be denied. Unless the State Engineer can impose mitigation measures that "ensure that any existing water rights are satisfied to the extent of the water right permit" (Ruling

No. 6127, PSROA Vol. 1 at 27) and that no conflicts will occur, the Applications must be denied.

Finally, the Nevada Revised Statutes place the burden on the State Engineer to determine no conflicts exist before applications are approved. NRS § 533.370(2). Given that groundwater sources cannot be easily viewed so that enforcement cannot be anticipated before an unreasonable lowering of the water level occurs at the existing appropriator's point of appropriation, these statutory provisions critically protect Nevada's groundwater resources.

Amici's position that existing water users are protected because they can petition the State Engineer to regulate conflicts down the road is contrary to Nevada's law for groundwater permitting. Amici ask this Court to place additional burdens and expense on water users to protect their water use rights. This Court should not accept Amici's invitation to put Nevada groundwater and property rights at risk.

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IV.

CONCLUSION

For the reasons stated above and in Appellants' other briefing in this matter, this Court should reverse the District Court's denial of the Petitions for Judicial Review, and should remand the case to the District Court for entry of judgment reversing State Engineer Ruling No. 6127. Amici's arguments are not persuasive.

DATED this 24th day of April, 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 Microsoft Word in 14 point Times New Roman font.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 29(e) and 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 3699 words.

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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 24th day of April, 2013.

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PROOF OF SERVICE

Pursuant to NRAP 25(d), I hereby certify that on the 24th day of April, 2013, I caused a copy of the foregoing ***APPELLANTS KENNETH F. BENSON, DIAMOND CATTLE COMPANY LLC, AND MICHEL AND MARGARET ANN ETCHEVERRY FAMILY LP'S ANSWERING BRIEF TO AMICI CURIAE BRIEFS*** to be served on the following parties as outlined below:
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