

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,

No. 61324

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Tracie K. Lindeman
Clerk of Supreme Court

Appellants,

vs.

THE STATE OF NEVADA STATE
ENGINEER; THE STATE OF NEVADA
DIVISION OF WATER RESOURCES; AND
KOBEL VALLEY RANCH, LLC, A NEVADA
LIMITED LIABILITY COMPANY,

Respondents.

MICHEL AND MARGARET ANN
ETCHEVERRY FAMILY, LP, A NEVADA
REGISTERED FOREIGN LIMITED
PARTNERSHIP; DIAMOND CATTLE
COMPANY, LLC, A NEVADA LIMITED
LIABILITY COMPANY; AND KENNETH F.
BENSON, AN INDIVIDUAL,

No. 63258

Appellants,

vs.

STATE ENGINEER, OF NEVADA, OFFICE
OF THE STATE ENGINEER,
DEPARTMENT OF CONSERVATION AND

NATURAL RESOURCES; AND KOBEH
VALLEY RANCH, LLC, A NEVADA
LIMITED LIABILITY COMPANY,
Respondents.

MOTION TO REISSUE ORDER AS A PUBLISHED OPINION
PURSUANT TO NRAP 36(f)

All Appellants in this matter, by and through their respective counsel, and pursuant to NRAP 36(f), hereby file this motion to reissue the unpublished Order of Reversal and Remand, issued by this Court on September 18, 2015, as an opinion to be published in the Nevada Reports as follows:

I.

CRITERIA FOR PUBLICATION

NRAP 36(c) states that “[a]n unpublished disposition, while publicly available, may not be cited as precedent except in very limited circumstances” Whereas, “[a] published disposition is an opinion designated for publication in the Nevada Reports and may be cited as precedent.” NRAP 36(c) (emphasis added).

This Court decides whether to publish a disposition if it:

- (1) Presents an issue of first impression;
- (2) Alters, modifies, or significantly clarifies a rule of law previously announced by the court; or
- (3) Involves an issue of public importance that has application beyond the parties.

NRAP 36(c).

For the reasons set forth below, the Appellants are in agreement that this case is appropriate for publication because the reasoning set forth in the unpublished disposition has precedential value and therefore should be published as an opinion in the Nevada Reports to be cited as such.¹

II.

THIS CASE IS APPROPRIATE FOR PUBLICATION

This case is appropriate for publication in the Nevada Reports because it presents an issue of first impression and involves an issue of public importance that has application beyond the parties. This case clarifies the authority granted by law to the State Engineer when considering applications that conflict with existing rights. In short, this case concludes that the State Engineer may not grant applications that conflict with existing rights conditioned upon the development of a mitigation plan in the future or unsupported findings that mitigation would be

¹ Appellants note the filing of a Motion to Reissue Order as Published Opinion by non-party Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, on Behalf of Cleveland Ranch (“Cleveland Ranch”), on September 28, 2015. Although Appellants agree with the arguments in favor of publication raised by Cleveland Ranch in its Motion, Appellants have chosen to submit their own Motion to Reissue in this matter to raise additional arguments supporting publication that have application beyond the parties and Cleveland Ranch.

sufficient to rectify the conflict. Such applications must be denied per the Legislature's directive in NRS 533.370(2).

Furthermore, this case involves an issue of public importance beyond the parties. The prior appropriation doctrine and "first in time is the first in right" is the rule in Nevada. Prosole v. Steamboat Canal Co., 37 Nev. 154, 166, 140 P. 720, 724 (1914) (acknowledging the "just and well-established rule that in cases [of water appropriation] the first in time is the first in right"). All present and future applicants before the State Engineer, and all existing water rights holders in the State of Nevada, need to know the precedential value of this case when filing applications to appropriate or change and relying on mitigation measures in the application process. Finally, publication would assist the State Engineer in making his determinations pursuant to NRS 533.370(2) on proposed appropriations.

A. This Case Presents an Issue of First Impression Regarding the Authority of the State Engineer When Granting Applications That Conflict With Existing Water Rights.

In its Order of Reversal and Remand entered on September 18, 2015, this Court concluded "the State Engineer's decision to grant KVR's applications cannot stand." Order at page 15. This Court noted that "the very evidence upon which the State Engineer relied demonstrates that KVR's appropriation would cause the complete depletion of the source of existing water rights." Order at page

8. This Court determined that an appropriation that would completely deplete the source of existing water rights “conflicts with” those existing rights as used in NRS 533.370(2).

To the extent that KVR’s proposed appropriations would deplete the water available to satisfy existing rights at issue, they are undeniably “in opposition” thereto, and thus “conflict with” the existing rights under NRS 533.370(2).

Order at page 9 (footnote omitted).

Despite such conflict with existing rights, this Court noted that the State Engineer granted KVR’s applications based on a mitigation plan to be developed at a later date. This Court stated as follows:

Nowhere in the ruling, however, does the State Engineer articulate what mitigation will encompass, even in the most general sense. And evidence of what that mitigation would entail and whether it would indeed fully restore the senior water rights at issue is lacking: there was no mitigation plan in the record before the district court or in existence when KVR’s applications were granted.

Order at page 10 (emphasis added).

This Court rejected the arguments of the State Engineer and KVR that the State Engineer “may leave for a later day . . . the determination of exactly what KVR’s mitigation would entail.” Order at page 13. Instead, this Court determined that the State Engineer’s decision to grant an application on the basis that the

proposed use or change would not conflict with existing rights under NRS 533.370(2) “must be made upon presently known substantial evidence, rather than information to be determined in the future, for important reasons.” Order at page 13. Therefore, specific mitigation techniques must be in evidence and considered by the State Engineer at the time of making the decision of whether to grant the applications under NRS 533.370(2) so those who may protest the applications “have a full opportunity to be heard, a right that includes the ability to challenge the evidence upon which the State Engineer’s decision may be based.” Order at page 13. This Court stated as follows:

[A]llowing the State Engineer to grant applications conditioned upon development of a future 3M Plan when the resulting appropriations would otherwise conflict with existing rights, could potentially violate protestants’ rights to a full and fair hearing on the matter, a rule rooted in due process.

Order at page 14 (citing Revert v. Ray, 95 Nev. 782, 787, 603 P.2d 262, 264 (1979)).

In addition, this Court stated that “the State Engineer’s decision to grant an application must be sufficiently explained and supported to allow for judicial review.” Order at page 14. This Court stated as follows:

The State Engineer thus may not defer the determination of what mitigation would encompass to a later date: even if he may grant applications where the

resulting appropriations would conflict with existing rights based upon the finding that the applicant would be able to successfully mitigate that deleterious effect, an assumption that we do not adopt today, the finding must be based upon evidence in the record to support that mitigation would be successful and adequate to fully protect those existing rights.

Order at pages 18-19.

Accordingly, this Court ruled that the State Engineer may not defer a clearly defined mitigation plan until a later date. Such mitigation measures must be addressed and in evidence at the time of the State Engineer's determination on the applications. This is an important issue of first impression in the State of Nevada, and this Court's ruling has significant precedential value necessitating publication in the Nevada Reports.

B. This Case Involves an Issue of Public Importance That Has Application to All Present and Future Applicants Before the State Engineer and All Existing Water Rights Holders in the State of Nevada.

At its core, this case involves the sanctity of the prior appropriation doctrine. Since water continues to be a valuable and limited resource in this State, the issue of what constitutes effective and successful mitigation measures will continue in areas of this State where water is the most difficult to appropriate without impacting existing water rights. As such, this Court's ruling in this case

needs to be published and made precedent for all applicants and existing water rights holders to follow.

As determined by the Court in its Order, the State Engineer exceeded his authority when he granted applications that conflict with existing rights based on a mitigation plan to be developed in the future. Prior to the issuance of this Court's Order on September 18, 2015, the State Engineer believed he had authority to grant applications that conflict with existing rights. Publication of this Court's Order as an opinion is important to set the parameters of the authority of the State Engineer when considering applications that conflict with existing rights.

Further, this Court's Order clearly states that the State Engineer may not defer to a later date a determination of what mitigation would entail. This is an important issue for the State of Nevada, the State Engineer, applicants before the State Engineer, and all water rights holders because the Order clarifies that a mitigation plan must be in place at the time of the State Engineer's determination on an application. Therefore, publication of the Order as an opinion is warranted.

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III.

THE TEXT OF THE ORDER DOES NOT NEED TO BE REVISED FOR PUBLICATION

NRAP 36(g)(4) states that the granting of a motion to reissue an order as a published opinion is in the sound discretion of this Court. Publication is disfavored, however, “if revisions to the text of the unpublished disposition will result in discussion of additional issues not included in the original decision.” NRAP 36(g)(4).

In this case, the Order issued by this Court on September 18, 2015, does not require revisions to the text for publication. The Order succinctly sets forth the background facts and procedural history regarding KVR’s applications and the protests made thereto. Further, this Court conducted a thorough analysis of the legal issues supporting its Order.

Although this Court’s Order does not address all issues raised in the consolidated appeals, the pertinent issue of the State Engineer’s authority when granting applications that conflict with existing rights is fully discussed in the Order. The primary issue relevant for publication is that this Court has clarified the authority granted by law to the State Engineer when considering applications that conflict with existing rights. This Court has concluded that successful mitigation measures must be in evidence at the time of the hearing on the

applications before the State Engineer. Therefore, there should be no need for the discussion of additional issues in a published opinion that are not already included in the Order issued on September 18, 2015.

IV.

CONCLUSION

Based upon the foregoing, it is respectfully requested that this Court reissue the order entered on September 18, 2015, as an opinion to be published in the Nevada Reports.

DATED this 1st day of October, 2015.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(1)(c), I hereby certify that I am an employee of ALLISON MacKENZIE, LTD., Attorneys at Law, and that on this date, I caused the foregoing document to be served on all parties to this action by:

✓ Court's eFlex electronic filing system

as follows:

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✓ Placing a true copy thereof in a sealed postage prepaid envelope in the United States Mail in Carson City, Nevada

as follows:

William E. Nork
825 West 12th Street
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DATED this 1st day of October, 2015.

/s/ Nancy Fontenot
NANCY FONTENOT