

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,

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,

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.

No. 61324

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**MOTION TO
REISSUE ORDER AS
A PUBLISHED
OPINION**

Pursuant to NRAP 26(c), 27(d) and 36(f), non-party Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints on Behalf of Cleveland Ranch (“Cleveland Ranch”) moves the Court to reissue as a published opinion its September 28, 2015, unanimous unpublished Order of Reversal and Remand (the “Order”) in this matter (the “Eureka County Combined Proceedings”).

Publication under Rule 36(f)(3) is proper as the Order satisfies each of NRAP 36(c)’s three criteria for publication, as it:

(1) “Presents an issue of first impression,” by declaring that the State Engineer must base a decision to grant or deny an application to appropriate water upon presently known substantial evidence and not upon evidence that might be produced in the future;¹

(2) “Alters, modifies, or significantly clarifies a rule of law previously announced by the Court,” by making clear that the ruling of *Revert v. Ray*, 95 Nev. 782, 787, 603 P.2d 262, 264 (1979), means that “those who protest an application to appropriate or change existing water rights must have

¹ Order, p. 13 (“though the State Engineer certainly may use his experience to inform his decision making, his decisions must be supported by substantial evidence in the record before him...”); *id.* (“the State Engineer’s decision to grant an application...must be made upon presently known substantial evidence, rather than information to be determined in the future....”)

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;"² and

(3) "Involves an issue of public importance that has applications beyond the parties," by clarifying the statutory criteria and due process considerations required for approval of applications to appropriate a most limited and valuable resource. These issues will arise in nearly every current and future water rights application to be confronted by the State Engineer, including the pending applications that involve Cleveland Ranch as a protestant.

Cleveland Ranch also satisfies NRAP 36(f)(3)'s requirement that a non-party must identify its interest in obtaining publication. Cleveland Ranch is currently protesting the Southern Nevada Water Authority's ("SNWA's") 1989 applications, which have been the subject of two prior Nevada Supreme Court published opinions,³ and which this Court has remanded for further proceedings by three recent unpublished orders,⁴ and which still is partially

² Order, p. 13.

³ *Great Basin Water Network v. Taylor*, 126 Nev. Adv. Op. 2, 222 P.3d 665 (2010), *superseded and withdrawn upon rehearing* by *Great Basin Water Network Network v. Taylor*, 126 Nev. Adv. Op. 20, 234 P.3d 912, 914, n. 1 (2010).

⁴ (1) Case No. 64815, *State Engineer vs. Millard County, Utah*, the subject of this Court's unpublished February 6, 2015, Order Dismissing

under this Court's review following the September 2, 2015, argument of Cleveland Ranch's writ petition.⁵ The Order at issue here will clarify the standards applicable to the State Engineer's approval of all water applications.

Finally, the policies of NRAP 36(f)(4) (disfavoring publication if it will result in discussion of additional issues not included in the original unpublished order) are not implicated because no revision is required since the Order is of general applicability to proceedings on water applications before the State Engineer, or potentially in other similar administrative agency proceedings, and provides guidance to both the administrative agency and to the district courts, thereby serving the public interest and promoting judicial economy.

Appeal; (2) Case No. 65775, *Southern Nevada Water Authority vs. Seventh Judicial District Court, Respondent, Millard County, Utah, et al., Real Party in Interest*, the subject of this Court's unpublished May 21, 2015, Order Denying Petition for Writ of Mandamus or Prohibition; and (3) Case No. 65776, *Jason King, P.E., in his capacity as the Nevada State Engineer, et al., vs. Seventh Judicial District Court, Respondent, and Millard County, Utah, et al., Real Party in Interest*, the subject of this Court's May 21, 2015, Order Denying Petition for Writ of Mandamus.

⁵ Case No. 65424, *Corporation of the Presiding Bishop of the Church of Latter-Day Saints vs. The Seventh Judicial District Court, Respondent, Jason King, P.E. (State Engineer), Real Party in Interest*, in which oral argument was held September 2, 2015.

I. Publication of the Order Serves the Public Interest and Promotes Judicial Economy

The Court's unpublished Order is logically applicable and likely controlling as to significant issues remaining in the remanded proceedings on SNWA's 1989 applications since the Order specifically addresses what evidence is required to support approval of water applications under NRS 533.370(2). For example, at p. 9, the Order defines what is meant by "conflicts with" as used in NRS 533.370(2), explaining: "To the extent that [the] 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)." The Order also recognized that if existing surface rights holders are required to use water from another source they might need new applications or risk loss of depleted rights. These considerations are highly pertinent to the proceedings remaining before the State Engineer as to the SNWA applications.⁶

⁶ Order, pp. 11-12 ("[T]o the extent KVR's mitigation would involve substitute water sources...[,] there was no evidence before the State Engineer that KVR applied for or committed certain of its already obtained water rights to mitigation or where the substitute water would otherwise come from. And, using the State Engineer's numbers regarding the amount of water in the basin, there may not be any water left to use for mitigation after KVR's appropriation.... This is setting aside the further, specious assumption that water from a different source would be a sufficient replacement. Take, for example, the testimony given by an existing rights holder... that he had seen problems before with piping in water for animals because the pipes can freeze

Publication of the Order would serve the best interests of the public and judicial economy by 1) reducing uncertainty as to important legal questions and thereby avoiding inconsistent district court results and 2) clarifying the process to be conducted by the State Engineer in accord with due process.

II. No Revision of the Order Is Required for Its Publication

The Court's Order is reasoned and complete on its face, applicable to SNWA's lingering 1989 Applications, and a necessary and valuable authority in the resolution of other water applications in the State of Nevada. No revision of the Order to address additional issues is required.

III. Conclusion

This Court has frequently reissued unpublished orders as published opinions where requested by parties, non-parties or even the district court as in the public interest⁷ or, prior to enactment of NRAP 36(f), apparently

and interfere with the flow in the extreme cold weather. Given these, seemingly supported, concerns over such potential problems, it is therefore unclear that substitution water, if available, would be sufficient.... Added to this, a surface water rights holder may be found to have abandoned its right if it no longer delivers the water or maintains the source of diversion.”)

⁷ See, e.g., *State v. Smith*, 131 Nev. Adv. Op. 63, __ P.3d __, 2015 WL 5165885, n. 1 (2015) (upon defendant's motion); *Buzz Stew, LLC v. City of North Las Vegas*, 131 Nev. Adv. Op. 1, 341 P.3d 646, n. 1 (2015) (upon motions of respondent City of North Las Vegas and nonparty NDOT); *State ex rel. Department of Business and Industry v. Nevada Association Services*, 128 Nev. Adv. Op. 34, 294 P.3d 1223, n. 1 (2002) (upon motion of the respondent and “other interested parties”); *Royal Ins. v. Eagle Valley*

sometimes *sua sponte* “[b]ecause of the paucity of published authority on the issue....”⁸

For the reasons stated above, Cleveland Ranch believes that reissuance of the Order as a published opinion of the Court is necessary and proper.

Dated this 28th day of September, 2015.

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By 

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on Behalf of Cleveland Ranch

Construction, Inc., 110 Nev. 119, 867 P.2d 1146, n. 1 (upon the District Court’s request).

⁸ *Richards v. Conklin*, 94 Nev. 84, 575 P.2d 588, n. 1 (1978) (“This case was disposed of by an unpublished order.... Because of the paucity of published authority on the issue we have been requested to publish the order as an opinion.”); *see also*, to the same effect, *Bongiovi v. Bongiovi*, 94 Nev. 321, 579 P.2d 1246, n. 1 (1978), and *Rupley v. State*, 93 Nev. 60, 650 P.2d 146, n. 1 (1977).

CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d), I certify that on the 28th day of September, 2015, I caused a copy of the foregoing MOTION TO REISSUE ORDER AS A PUBLISHED OPINION to be served on the parties and counsel of record *VIA THE COURT'S EFLEX ELECTRONIC FILING SYSTEM. and VIA U.S. MAIL, POSTAGE PREPAID, ADDRESSED TO:*

William E. Nork, Settlement Judge
825 W. 12th Street
Reno, NV 89503

Hon. Gary D. Fairman
Seventh Judicial District Court, Dept. 7
P.O. Box 151629
Ely, Nevada 89315

Dated this 28 day of September, 2015.


An employee of Hejmanowski & McCrea, LLC