IN THE SUPREME COURT OF THE STATE OF NEVADA

SIERRA PACIFIC INDUSTRIES, a California corporation,

Appellant,

vs.

JASON KING, P.E., in his capacity as Nevada State Engineer; DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION, an agency of the State of Nevada; and INTERMOUNTAIN WATER SUPPLY, LTD., a Nevada limited liability company,

Respondents.

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Case No. 73933

RESPONDENT STATE ENGINEER'S SUPPLEMENTAL BRIEF IN RESPONSE TO APPELLANT'S NOTICE OF SUPPLEMENTAL AUTHORITIES

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I. INTRODUCTION

On November 6, 2017, at 4:18 p.m., Sierra Pacific Industries filed a Notice of Supplemental Authorities presenting to the Court the Colorado case, *Front Range Resources, LLC v. Colorado Groundwater Comm'n*, 415 P.3d 807 (Colo. 2018). Oral argument was held the following day, November 6, 2018.

Sierra Pacific raised the case for the assertion that option contracts do not satisfy the good faith and reasonable diligence requirement established under NRS 533.380 for an extension of time to perfect a water right. The State Engineer objected to the filing of the case on two grounds: (1) the filing was untimely, as Sierra Pacific had knowledge of the *Front Range* case since at least August 17, 2018, when it made a similar filing in advance of oral argument on a related matter; and (2) the case is distinguishable and not controlling in this matter. The Court invited the State Engineer to file a supplemental response within ten days concerning the application of *Front Range* to this case.

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II. LEGAL DISCUSSION

A. *Front Range Resources, LLC v. Colorado Groundwater Comm'n* Is Not Persuasive Authority in this Case

Contrary to the proposition that Sierra Pacific asserts through the introduction of *Front Range*, the State Engineer properly considered an option contract secured for the design and construction of a pipeline in granting Intermountain Water Supply, Ltd.'s extensions of time under NRS 533.380. First, the facts and circumstances present in this case are distinguishable from those in *Front Range*. Second, the use of an option contract does not constitute a per-se violation of the anti-speculation doctrine in Colorado or Nevada. Third, there is no legal precedent in Nevada that applies the anti-speculation doctrine, as articulated for new appropriations in *Bacher v. State Engineer*, 122 Nev. 1110, 146 P.3d 793 (2006), to applications for extensions of time.

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1. Intermountain's applications for extensions of time are not "new appropriations" or "changes to existing rights," therefore *Front Range* has no application to this case

The Colorado supreme court's decision in *Front Range* was predicated on the analysis of a new appropriation of water and a change to existing rights, not an application for an extension of time to perfect an existing, permitted water right. The *Front Range* case involves a "replacement plan" policy in Colorado that allows water users to withdraw groundwater from a fully appropriated alluvial aquifer upon replacing the withdrawn groundwater with other sources of water. *Front Range*, 415 P.3d. at 808. The preliminary question in *Front Range* turned on whether the inclusion of Front Range's existing water rights in its replacement plan were "new appropriations" or "changes of existing rights." *Id*. Front Range proposed a replacement plan to increase the use of its existing wells and construct thirty-one new, large-capacity, wells to recharge and withdraw groundwater from the Lost Creek Basin

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aquifer. *Id*. The district court concluded on summary judgment,[1] which the supreme court affirmed, that treatment of Front Range's water rights in the replacement plan were new appropriations and changes of existing rights, triggering application of the anti-speculation doctrine to the replacement plan. *Id*. at 812.

There is no dispute by the Nevada State Engineer that the anti-speculation doctrine applies to new appropriations or changes to existing rights through NRS 533.370. However, the case now before the Court does not involve new appropriations or changes to existing rights. Rather, the issue to be resolved is whether, as Sierra Pacific alleges, the anti-speculation doctrine applies to extensions of time pursuant to NRS 533.380 *after* permits have been issued—an issue of first impression in Nevada, and one not answered by *Front Range*. The factual background of *Front Range* is so dissimilar from the facts at bar that the Colorado supreme court's holdings in that case are not applicable here. Indeed, as explained above, *Front Range* involved a replacement plan premised upon existing rights that were proposed to be re-injected and

[1] Unlike Nevada, Colorado law explicitly allows for *de novo* review on judicial review of decisions of the Colorado Groundwater Commission or the State Engineer. CWS 37-90-115(1)(b)(III).

recovered at a later time. The court found that the conditions of the replacement plan actually constituted a new appropriation and change application.

Front Range's new appropriation was dependent upon an option contract where an end-user had the sole discretion to exercise the option to purchase the new "replacement plan" water. *Id.* at 813. Because the court in *Front Range* was examining the plan through the lens of a new appropriation, the court found the option contract violated the anti-speculation doctrine under this particular set of facts. *Id.* at 813-814. This was because the other contracting party had the absolute discretion to exercise the option to purchase, and place to beneficial use, some or none of the water. *Id.* at 813. Therefore, the court found there was not enough evidence to show an intent by the other contracting party to place the water to a beneficial use. *Id.* Notably, the *Front Range* court limited its decision by specifically stating that it was not adopting "a bright-line rule that option contracts can never satisfy the anti-speculation doctrine." *Id.*

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2. The acceptance of an option contract for design and construction of works does not violate the anti-speculation doctrine

NRS 533.380 provides the "reasonable diligence" standard that the State Engineer applies to determine whether to grant an extension of time. Specifically, "work on one feature of the project or system may be considered in finding that reasonable diligence has been shown." NRS 533.380(6). NRS 533.380 mirrors CRS 37-92-301(4)(c), Colorado's extension of time statute. The State Engineer relied upon the factors outlined by the Colorado supreme court in *Municipal Subdistrict, Northern Colorado Water Conservancy District v. Chevron Shale Oil Co.*, 986 P.2d 918 (Colo. 1999), to help interpret NRS 533.380. JA 16-18. As articulated by the *Chevron* court, a "necessary contract" is one of many types of activities that may constitute "work on one feature" to support a reasonable diligence finding under NRS 533.380(6). *See Chevron Shale Oil Co.*, 986 P.2d at 918. Applying this statutory standard, the State Engineer reviewed Intermountain's applications that included, among other activities, an option contract for the design and construction of its pipeline. JA 17-18; JA 654-657.

The purpose of the project is key for measuring whether there has been "work on one feature" of the project to support a finding that reasonable diligence has been shown under NRS 533.380(6). The purpose of the project contemplated by Intermountain's applications is to build a pipeline to provide water to serve a projected demand, as identified by governmental entities, in the North Valleys of Washoe County. JA 2282 (permitted "[Place of Use] is in the northern Reno-Sparks/North Valleys area via proposed pipeline to Lemmon Valley").[2] The 22-mile pipeline would begin at one point in the Bidel Flat hydrographic basin and end at another point in Lemmon Valley, as specified on the face of the permit. JA 833. While the pipeline itself would end in Lemmon Valley, the place of use of the water spans five hydrographic basins. The place of use,

[2] *See also* JA 649-653 (Intermountain's application references various Water Resource Plans, including the Western Regional Water Commission's 2011-2030 Comprehensive Regional Water Management Plan and the TMWA Plan); JA 2424 (Washoe County Regional Water Management Plan to Include the North Valley Strategy); JA 171-173 (TMWA's Plan, Table 20, Table 21, and Figure 30: Map of Proposed Importation Projects); JA 2342 (Bureau of Land Management's "North Valleys Rights-of-Way Projects Final Environmental Impact Statement—Fish Springs Ranch and Intermountain Water"); JA 6 (as conceded in Sierra Pacific's Petition for Judicial Review, "the proposed purpose of those appropriations is to construct and operate an interbasin pipeline to bring municipal water to the North Valleys of the Reno/Sparks area.").

described by section, township, and range, includes portions of "Lemmon Valley West" (Basin 092A), "Lemmon Valley East" (Basin 092B), "Warm Springs Valley" (Basin 084), "Spanish Springs Valley" (Basin 085), and "Sun Valley" (Basin 086). JA 833-834.[3]

The fact that the permitted place of use encompasses not only Lemmon Valley but other adjacent hydrographic basis is consistent with the original intent of the project. Therefore, in examining whether to grant extensions of time to Intermountain, the State Engineer considered the types of activities that constituted "work on one feature" of the 22-mile pipeline project. JA 17. Along with other activities, Intermountain presented evidence that it had negotiated an option contract for engineering and construction purposes. JA 656; *see* JA 6.

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[3] The State Engineer recognizes that the "Cold Springs" hydrographic basin (Basin 100) is not encompassed within the permitted place of use. However, given the fact that the project is for the construction of a pipeline with its place of completion in Lemmon Valley, such is consistent with the express terms of the permit. Should Intermountain seek to eventually expand the place of use to encompass the Cold Springs hydrographic basin, Intermountain would be required to file a change application. The pipeline is intended to supply water for future development in a region that is within the five basins identified in the permitted place of use.

Here, Intermountain did not present the option contract for a new appropriation, but rather as evidence of one of many activities that would satisfy the reasonable diligence inquiry required for extensions of time to perfect an existing appropriation. JA 16-18. The construction of the pipeline is necessary for the project to ultimately fulfill its purpose, and the option contract supported, in part, the State Engineer's finding that Intermountain had shown progress towards the project's completion under NRS 533.380. Thus, *Front Range* is not persuasive authority supporting Sierra Pacific's assertion that the option contract in this case violates the anti-speculation doctrine.

B. *Front Range* Does Not Apply to Projects Developed to Meet the Future Demands of Governmental Entities

Front Range further raises a "governmental entity exception" to the anti-speculation doctrine, should the anti-speculation doctrine extend beyond new appropriations of water. *Front Range*, 415 P.3d at 813-814. In Colorado, a governmental entity exception to the anti-speculation doctrine exists, which allows a water appropriation based on projected needs for an area. *See* 94 C.J.S. Waters § 381, *citing City of Thornton v. Bijou Irr. Co.*, 926 P.2d 1 (Colo. 1996), and *Upper Yampa Water*

Conservancy Dist. v. Dequine Family L.L.C., 249 P.3d 794 (Colo. 2011); *Pagosa Area Water & Sanitation Dist. v. Trout Unlimited*, 170 P.3d 307 (Colo. 2009) ("50 years is a reasonable planning period"). The purpose of the exception allows the dedication of water to meet future projected demand for an area, so long as that projected demand is reasonable and identified as part of the local water plan. *Id*. *Front Range* does not apply to the governmental entity exception. *Front Range*, 415 P.3d at 813-814 ("the governmental entity exception to the anti-speculation doctrine [is] not at issue here."). This exception supports Intermountain's project.

Intermountain's pipeline project was precipitated by local government statements and planning documents, based on projected demand for water. *See*, *supra*, FN 2. The factual predicate for granting Intermountain's water rights applications in 1999 has not changed. For example, regional water plans, including the Washoe County Regional Water Management Plan and the Western Regional Water Commission's 2011-2030 Comprehensive Regional Water Management Plan, have incorporated Intermountain's project to meet their respective demands for near and long-term development of the North Valleys area. *See* JA 649; JA 2424 (Washoe County Regional Water Management Plan

to Include the North Valley Strategy); JA 650, 653 (Intermountain's project is included in both the Western Regional Water Commission's 2011-2030 Comprehensive Regional Water Management Plan and the Truckee Meadows Water Authority "TMWA" Plan).

Further, TMWA expressly identified Intermountain's project as "water supply for Lemmon Valley and possibly Cold Springs." JA 171-173 (Table 20, Table 21, and Figure 30: Map of Proposed Importation Projects); JA 648. The Plan states "TMWA would integrate [Intermountain's project] into its water resource supply mix and would accept will serve commitments against these supplies before other supplies are fully allocated." JA 171. TMWA's projected demand has not changed. JA 78 ("since 2005, the projected demands in the long-term were not significantly different from those of the 2025 WRP"); *see also* JA 67 ("demands for Truckee Meadows water rights have increased in response to a highly competitive development market, difficulties in finding willing sellers of significant quantities of water rights").

Intermountain's project continues to be contemplated for serving as a source of water for future development in Washoe County. The State Engineer applied NRS 533.380 to measure whether progress had been

made on advancing one feature of the 22-mile proposed pipeline slated to deliver water to the northern Reno-Sparks/North Valleys area. JA 2282; JA 6. The State Engineer found Intermountain satisfied the criteria established under NRS 533.380 and did not violate the anti-speculation doctrine.

C. The Anti-Speculation Doctrine Should Not be Retroactively Applied to Intermountain's Permits and *Front Range* is, Therefore, Not Persuasive

Sierra Pacific offers *Front Range* to blur the distinction between a new appropriation under NRS 533.370 and an extension of time for an existing appropriation under NRS 533.380. Nevada has only expressly adopted the anti-speculation doctrine as articulated in *Bacher* for new appropriations and not for extensions of time. *Bacher v. State Eng'r*, 122 Nev. 1110, 146 P.3d 793 (2006); JA 19.[4] Notably, Intermountain's

[4] The State Engineer's decision at JA 19 cites to Ruling No. 6343, which states at FN 21 "[t]he State Engineer believes that an examination of the anti-speculation doctrine is not required in every extension of time, but where the reasons given in the extension suggest that non-use has occurred on speculative grounds, an examination of the doctrine is appropriate and that the language of the forfeiture statute is broad enough to allow for such consideration. *See* NRS 534.090(2) (the State Engineer shall *among other reasons* consider)." JA 19, FN 12. The extension of time statute is similarly broad. *See* NRS 533.380.

permits were approved before *Bacher* was decided, so the anti-speculation doctrine cannot be retroactively applied to those existing appropriations. JA 19; *Sandpointe Apts. v. Eighth Jud. Dist. Ct.*, 129 Nev. 813, 820, 313 P.3d 849, 853–54 (2013), *citing Landgraf v. USI Film Prods.*, 511 U.S. 244, 273 (1994) (Substantive statutes are presumed to only operate prospectively, because the "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.").[5] The State Engineer found that the applications met the NRS 530.370(1) standard at the time they were granted, pre-*Bacher*.

Front Range only triggered Colorado's anti-speculation doctrine because it involves new appropriations and changes to water rights. *Front Range*, 415 P.3d at 811 ("This court has also applied the

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[5] Even if a contract is retroactively required according to *Bacher*, the State Engineer found Intermountain had secured contracts. JA 19, referencing JA 656 ("An agreement has been reached and is in the process of being signed" with Utilities, Inc. and "Intermountain expects to have Developer agreements in hand within three to four months" for plans involving construction of nearly 10,000 houses). This substantial evidence supports the State Engineer's decision.

anti-speculation doctrine to changes of water rights.").[6] Colorado's legislature codified the anti-speculation doctrine at CRS 37-92-103(3)(a) in 2017 since it was first articulated in *Vidler*. *Colo. Water Conservation Dist. v. Vidler Tunnel Water Co.*, 197 Colo. 413, 594 P.2d 566 (1979); *see also Three Bells Ranch v. Cache La Poudre*, 758 P.2d 164 (Colo. 1988). As previously addressed, the anti-speculation doctrine was implicated in *Front Range* because the plan was found to be the equivalent of a new appropriation. *Front Range*, 415 P.3d at 811-812. *Front Range* does not apply to a reasonable diligence inquiry for an extension of time under CRS 37-92-103(3)(a). *Compare with* NRS 533.380.

III. CONCLUSION

Front Range Resources, LLC v. Colorado Groundwater Commission, 415 P.3d 807, does not support Sierra Pacific's argument.

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[6] Sierra Pacific further argues that Nevada's water law does not allow a change of use for a *conditional* permit, such as the ones held by Intermountain. This argument is not supported by Nevada law. *See* State Engineer's Answering Brief at pp. 24-25, *citing Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. Adv. Op. 48, 245 P.3d 1145 (2010); *see also* JA 282, 2359, 2370 (changes to Intermountain's permits have previously been approved). Nor is it supported by Colorado law. *See*, *e.g.*, CRS 37-92-103(5)(b) ("Includes changes of conditional water rights as well as changes of water rights."). Intermountain has not filed a change application but may do so if it wishes to change the permitted place of use to Cold Springs.

The case was expressly applied to a replacement plan which was the equivalent of a new appropriation and a change application. *Front Range* is distinguishable from the facts and circumstances in this case. The State Engineer properly considered an option contract for the design and construction of a 22-mile pipeline as one of many factors in granting Intermountain's application for extensions of time under NRS 533.380. Further, there is no legal precedent for the application of the anti-speculation doctrine to the facts of this case. Therefore, *Front Range* should not be applied by the Court in this case.

RESPECTFULLY SUBMITTED this 20th day of November, 2018.

ADAM PAUL LAXALT
Attorney General

By: /s/ Tori N. Sundheim
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Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 20th day of November, 2018, I served a copy of the foregoing RESPONDENT STATE ENGINEER'S SUPPLEMENTAL BRIEF IN RESPONSE TO APPELLANT'S NOTICE OF SUPPLEMENTAL AUTHORITIES, by electronic service to:

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