IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 73933

SIERRA PACIFIC INDUSTRIES, a California Corporation,

Appellant,

v.

TIM WILSON, P.E., in his capacity as Nevada State Engineer; THE DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION, an agency of the State of Nevada; and IWS BASIN, LLC, a Nevada Limited Liability Company,

Respondents

Appeal From Order Denying Petition for Judicial Review
District Court Case No.: CV16-01378
Second Judicial District Court of Nevada

APPELLANT'S PETITION FOR PARTIAL REHEARING REGARDING THE COURT'S REMAND INSTRUCTIONS

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Sierra Pacific Industries

The following law firm had partners or associates who appeared on behalf of Sierra Pacific Industries and are expected to appear on its behalf in this Court:

McDonald Carano LLP

DATED this 20th day of May, 2019.

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INTRODUCTION

Sierra Pacific Industries ("SPI") seeks partial rehearing of the Court's May 2, 2019 Opinion related only to the remedy the Court ordered; namely, remand to the State Engineer. In ordering a remand, the Court's Opinion failed to apply controlling authorities that bar the State Engineer from considering additional evidence and overlooked a critical fact that obviates any need for further administrative proceedings. Remand is not an appropriate remedy for multiple reasons.

First, this Court's precedents prohibit a party who failed to meet its evidentiary burden in an administrative proceeding from getting a second bite at the apple, particularly where it employed a litigation strategy that intentionally omitted critical evidence. Second, the Court's remand instructions contravene NRS 533.380, which requires the applicant for an extension of time to submit ***with its extension application*** whatever "proof and evidence" it has to show reasonable diligence to perfect the water right. The State Engineer is statutorily barred from considering late-filed submissions. Third, remand would be futile because the State Engineer cancelled Intermountain's permits in 2018.

Because the Court correctly held that there was not substantial evidence to support the State Engineer's decision, the only proper remedy that should flow from the Court's reversal is a ruling that, as a matter of law, the extension requests

should have been denied and the Permits canceled in 2016. No further administrative proceedings on Intermountain's Permits are justified or allowed. For this reason, SPI respectfully requests a partial rehearing to vacate the remand directive in the May 2, 2019 Opinion.

ARGUMENT

A. Legal Standard for Rehearing

A petition for rehearing may be granted when the Court has overlooked or misapprehended a material fact in the record or a material question of law in the case or overlooked, misapplied or failed to consider controlling authority. NRAP 40(c)(2); *Lavi v. Eighth Jud. Dist. Ct.*, 130 Nev. 344, 346, 325 P.3d 1265, 1267 (2014), *superseded on other grounds by statute as stated in Bank of Nev. v. Petersen*, 132 Nev. Adv. Op. 64, 380 P.3d 854 (2016).

B. Under This Court's Precedents, Intermountain Is Not Entitled To A Do-Over Before The State Engineer

Controlling authorities hold that a party who fails to present substantial evidence to the State Engineer in support of an application may not try again after obtaining an adverse court decision. *Eureka Cnty v. State Eng'r*, 131 Nev. Adv. Op. 84, 359 P.3d 1114, 1120 (2015). The State Engineer's "decisions must be supported by substantial evidence ***in the record before him***…." *Id.* (emphasis added). A party "is not entitled to a second bite at the apple after previously failing

to present sufficient evidence [to the State Engineer]." *State Eng'r v. Eureka Cnty.*, 133 Nev. Adv. Op. 71, 402 P.3d 1249, 1250 (2017).

In reversing the extensions granted by the State Engineer, the concluded:

> [T]he State Engineer abused his discretion in determining, on this scant record, that Intermountain's averred option agreements satisfied the anti-speculation doctrine. Without the averred option agreements, the record does not contain sufficient detail to demonstrate reasonable diligence under NRS 533.380(3)-(4) and our decision in *Desert Irrigation, Ltd. v. State*, 113 Nev. 1049, 1057, 944 P.2d 835, 841 (1997).
>
> * * *
>
> Intermountain did not provide substantial evidence of its option agreements with third parties to allay the concerns over its speculative use.
>
> * * *
>
> It is not possible to ascertain a formal contractual relationship from the mere mention in an affidavit of an option contract, especially when the third parties are unidentified and there is no description of how the third parties will perfect the appropriation…. The State Engineer's evident conclusion that Intermountain was not violating the anti-speculation doctrine because its principal claimed in an affidavit that Intermountain had entered into unproduced option agreements was an error ….

135 Nev. Adv. Op. 13 at pp. 2, 10-11 (*citing Bacher v. State Eng'r*, 122 Nev. 1110, 1120, 146 P.3d 793, 799 (2006) for the proposition that the anti-speculation doctrine requires an "agency or contractual relationship with the party committed to put the water to beneficial use"; *Front Range Res., LLC v. Colorado Ground Water Commn'r*, 415 P.3d 807, 813 (Colo. 2018) for the proposition that "a generic option agreement was too speculative to overcome the anti-speculation

doctrine"; *Desert Irrigation, Ltd. v. State Eng'r*, 113 Nev. 1049, 1057, 944 P.2d 835, 841 (1997) for the proposition that "'actual evidence' of reasonable diligence [is required] to approve an extension request"). In light of this correct conclusion, controlling authorities make clear that no further proceedings before the State Engineer are allowed. *See State Eng'r*, 133 Nev. at _, 402 P.3d at 1250; *Eureka Cnty*, 131 Nev. at _, 359 P.3d at 1120; *Desert Irrigation*, 113 Nev. at 1057, 944 P.2d at 841.

Nevertheless, in the May 2, 2019 Opinion, the Court "remand[ed] to the State Engineer to determine whether the uncorroborated third-party agreements existed ***and to allow Intermountain to submit evidence of the agreements in support of its request***." 135 Nev. Adv. Op. 13 at p.12 (emphasis added). The Court's remand to the State Engineer so that Intermountain can have another chance to meet the substantial evidence standard is directly contrary to this Court's jurisprudence. In *Eureka Cnty.*, the Court reversed the State Engineer's issuance of permits because the applicant had failed to include its mitigation plan in the documents submitted to the State Engineer. 131 Nev. at _, 359 P.3d at 1119-20. Based on this shortcoming in the applicant's submission, the Court held that "substantial evidence does not support the State Engineer's decision … here." *Id.* at 1117. The Court explained: "[T]he 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….” *Id.*, 359 P.3d at 1117.[1]

The Court specifically did not order a remand to the State Engineer because, as clarified in the subsequent appeal, a party that fails to satisfy its evidentiary burden the first time around does not get a redo. *See State Eng’r*, 133 Nev. at _, 402 P.3d at 1250. As the Court explained:

> In *Eureka I*, we determined that the State Engineer's determination … was not based upon substantial evidence and could not stand…. At no point did we direct the district court to remand to the State Engineer for additional fact-finding. Because (1) the State Engineer relied on insufficient facts before granting [the] applications, (2) we gave no order to remand to the State Engineer, and (3) [the applicant] is not entitled to a do-over after failing to provide substantial … evidence, we conclude that the district court acted consistently with *Eureka I* [by vacating the permits].

State Eng’r, 133 Nev. at _, 402 P.3d at 1250 (internal citations omitted). Yet a “do-over” is precisely what the Court has allowed in its May 2, 2019 Opinion, creating an inconsistency in its jurisprudence. *Compare id. to* 135 Nev. Adv. Op. 13 at p.12.

[1] Although the *Eureka Cnty.* decision involved new and change applications under NRS 533.370, the same rule necessarily applies to an extension application under NRS 533.380. With both statutes, the Legislature has established the circumstances under which the State Engineer may grant applications. The different result ordered in the May 2, 2019 Opinion is doctrinally unsound. *See*, *infra*, Sect. C.

C. Statutory Authority Prohibits the State Engineer From Considering Evidence That Intermountain Failed to Submit With Its Extension Request

The Court's remand instructions also do not adhere to the Legislature's strict deadlines in NRS 533.380, which require that an extension application be:

> (a) ***Made within 30 days*** following notice by registered or certified mail that proof of the work is due as provided for in NRS 533.390 and 533.410; and
>
> (b) ***Accompanied by proof and evidence*** of the reasonable diligence with which the applicant is pursuing the perfection of the application.
>
> ➔ The State Engineer shall not grant an extension of time unless the State Engineer determines ***from the proof and evidence so submitted*** that the applicant is proceeding in good faith and with reasonable diligence to perfect the application. ***The failure to provide the proof and evidence required pursuant to this subsection is prima facie evidence that the holder is not proceeding in good faith and with reasonable diligence to perfect the application.***

NRS 533.380(3) (emphases added).

This language prohibits the State Engineer from considering late-filed evidence, and any other interpretation renders meaningless the statutory language. *See id.*; *see also State v. Am. Bankers Ins. Co.*, 106 Nev. 880, 882, 802 P.2d 1276, 1278 (1990) ("In construing statutes, 'shall' is presumptively mandatory …"). In other words, the deadline for Intermountain to submit the option agreement to the State Engineer passed years ago. *See* NRS 533.380. As a result, in addition to this

Court's precedent, the controlling statute prohibits the remand ordered in the Court's May 2, 2019 Opinion.

D. Intermountain Cannot Capitalize On Its Deliberate Decision To Omit The Option Agreement From Its Extension Request

The Court's remand to the State Engineer is particularly troubling because the absence of the option agreement from the record was a deliberate strategic move by Intermountain. The Court has refused to reward a party for "pursu[ing] a deliberate, though unsuccessful, [litigation] strategy" of not offering evidence in the administrative proceeding. *Garcia v. Scolari's Food & Drug*, 125 Nev. 48, 55, 200 P.3d 514, 519 (2009) (interpreting NRS 233B.131(2)). To that end, a remand to the agency "is generally inappropriate when a party waits to submit evidence until learning how a hearing examiner will rule or pursues one strategy at trial and then, after an adverse result, seeks to pursue another strategy with additional evidence." *Id.*, *citing McDowell v. Citibank*, 734 N.W.2d 1, 11 (S.D. 2007); *Northern Ill. Gas v. Industrial Comm'n*, 498 N.E.2d 327, 332 (1986).

> The fact that a party's attorney makes what could be characterized as a poor decision with regard to what evidence to present at an administrative proceeding will not suffice to justify remand for consideration of additional evidence, especially after an adverse decision is issued … and when the evidence sought to be presented was available at the time of the administrative hearing.

Garcia, 125 Nev. at 55, 200 P.3d at 519.

Here, Intermountain intentionally omitted the alleged option agreement described in Marshall's affidavit because the deal had already fallen apart by the time Intermountain filed its 2016 extension requests. *See* Ruling #6421, Case No. 77413 at 1JA4-6, *citing* 1JA159-161, Addendum Exhibits 1 and 2.[2] Marshall admitted this in sworn testimony before the State Engineer in June 2017 in support of Intermountain's 2017 extension requests, which is found in the Court's records in Case No. 77413 (at 1JA154-172, 2JA279-288). It was further described by the State Engineer in Ruling #6421, which granted Intermountain's 2017 extension requests, and which is the subject of another pending appeal before the Court. *See* Case No. 77413 at 1JA4-6.

Here, because the option agreement no longer existed at the time Intermountain's extension applications were due, Intermountain made the

[2] Although SPI recognizes that its reference to the record in Case No. 77413 is unorthodox in the context of this Petition for Rehearing, Ruling #6421 and the transcript of the hearing before the State Engineer are public documents of which the Court can take judicial notice, particularly in light of the close connection between the two cases. *See Occhiuto v. Occhiuto*, 97 Nev. 143, 145, 625 P.2d 568, 569 (1981); *see also Cannon v. Taylor*, 88 Nev. 89, 92, 493 P.2d 1313, 1314 (1972) ([C]ounsel has merely directed our attention to an incontrovertible fact, verifiable from records in the building where we sit. Our precedents do not require us to ignore it…."). Judicial economy warrants the Court doing so here because the Court has remanded for additional administrative proceedings that have already occurred. Additionally, in Ruling #6421, the State Engineer explained his rationale for granting extensions for use outside the permitted area, in violation of *Desert Irrigation*, 113 Nev. at 1057, 944 P.2d at 841. Addendum Ex. 1 at 1JA11-13. Although an appellate court generally limits its review to the record before it, it should not put on blinders to reality. *See Cannon*, 88 Nev. at 92, 493 P.2d at 1314.

calculated decision to only submit Marshall's affidavit rather than the agreement itself. Intermountain should not be allowed to benefit from its ultimately unsuccessful litigation strategy of omitting the defunct option agreement from its submission to the State Engineer in 2016. *See Garcia*, 125 Nev. at 55, 200 P.3d at 519. For this reason as well, a remand to the State Engineer is inappropriate.

E. Remand Would Be Futile Because Intermountain's Permits Have Since Been Cancelled

The Court's remand instructions in the May 2, 2019 Opinion also overlook that Intermountain's Permits were cancelled in 2018, such that further administrative proceedings would be an exercise in futility and a waste of resources. The Court will reverse the decision below without remanding where "remand would be futile." *Estate of Travis v. Special Administrators*, 102 Nev. 433, 435, 725 P.2d 570, 571 (1986); *see also Bhanot v. Chertoff*, 474 F.3d 71, 74 (2d Cir. 2007) (declining to remand to administrative agency where the party with the burden of proof submitted an inadequate affidavit and remand would be futile).

At oral argument, in response to the Court's question about an appropriate remedy for this case, counsel for SPI informed the Court that the State Engineer canceled Intermountain's Permits in 2018:

> Your Honor, I'm glad you raised the remedy issue because in the brief, we did ask for reversal, and for cancellation of the permits. And since that time, in 2018, the State Engineer has actually canceled these permits…. [W]e are still here right now because we want a Court ruling that as a matter of law what was submitted in 2016 is not

> sufficient…. [T]here's nothing [left] to do [before the State Engineer]. But also, that the State Engineer, by statute, can't accept belatedly filed evidence. So he could only look at the evidence that was submitted with the 2016 extension request and nothing else. And the statute is very particular about the deadlines and what could be submitted when. So I would submit, and this is similar to what happened, I think, in the *Eureka County* case recently that if the record wasn't supported by substantial evidence, then in that case, the application had to be denied. In this case, the extension had to be denied.

Trans. of 11.7.2018 Oral Argument at 10:22-11:21, Addendum Exhibit. 3.

Because the May 2, 2019 Opinion correctly establishes that Intermountain's 2016 extension requests failed to include substantial evidence to meet the statutory standard for an extension, the only appropriate remedy is for the Court to order that the Permits had to be cancelled in 2016, as a matter of law. *See State Eng'r*, 133 Nev. at _, 402 P.3d at 1250; *Eureka Cnty*, 131 Nev. at _, 359 P.3d at 1120. Any further proceedings, including those anticipated by NRS 533.395(2)-(4), would be futile because the deficiencies in Intermountain's 2016 extension requests would prevent the State Engineer from modifying or rescinding the cancellation. *See id.*; NRS 533.380(3). For this reason as well, partial rehearing of the May 2, 2019 Opinion is warranted for the Court to vacate its remand to the State Engineer. *See Estate of Travis*, 102 Nev. at 435, 725 P.2d at 571.

CONCLUSION

Because the May 2, 2019 Opinion is inconsistent with this Court's precedent, overlooks the time limits imposed in NRS 533.380 and orders what

would be futile administrative proceedings, SPI respectfully asks the Court for partial rehearing to vacate its remand directive and order the Permits cancelled with no further proceedings under NRS 533.395 or any other authority allowed.

Dated this 20th day of May, 2019.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this petition for rehearing 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 2007 in 14-point font, Times New Roman style. I further certify that this petition for rehearing complies with the type-volume limitation of NRAP 40(b)(3) because it contains 2,608 words.

Pursuant to NRAP 28.2, I hereby certify that I have read this petition, 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 petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion regarding matters in the record to be supported by a reference to the page 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 this brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 20th day of May, 2019.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano, LLP, and that on this 20th day of May, 2019, a copy of the foregoing **APPELLANT'S PETITION FOR PARTIAL REHEARING** was electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (E-Flex). Participants in the case who are registered with E-Flex as users will be served by the EFlex system and others not registered will be served via U.S. mail as follows:

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