

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 81224

DIAMOND NATURAL RESOURCES PROTECTION & CONSERVATION
ASSOCIATION; J&T FARMS, LLC; GALLAGHER FARMS, LLC; J&T
LOMMORI; M&C HAY; CONLEY LAND & LIVESTOCK, LLC; JAMES
ETCHEVERRY; NICK ETCHEVERRY; TIM HALPIN; SANDI HALPIN;
DIAMOND VALLEY HAY COMPANY, INC.; MARK MOYLE FARMS LLC;
D.F. & E.M. PALMORE FAMILY TRUST; WILLIAM H. NORTON;
PATRICIA NORTON; SESTANOVICH HAY & CATTLE, LLC; JERRY
ANDERSON; BILL BAUMAN; AND DARLA BAUMAN, TIM WILSON,
P.E., NEVADA STATE ENGINEER, DIVISION OF WATER RESOURCES,
DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES;
EUREKA COUNTY

Appellants,

v.

DIAMOND VALLEY RANCH, LLC; AMERICAN FIRST FEDERAL, INC.;
BERG PROPERTIES CALIFORNIA, LLC; BLANCO RANCH, LLC; BETH
MILLS, TRUSTEE MARSHALL FAMILY TRUST; TIMOTHY LEE BAILEY;
CONSTANCE MARIE BAILEY; FRED BAILEY; CAROLYN BAILEY;
SADLER RANCH, LLC; IRA R. RENNER; AND MONTIRA RENNER,

Respondents.

Appeal From Order Granting Petitions for Judicial Review
Seventh Judicial District Court of Nevada Case No. CV-1902-348

**DNRPCA APPELLANTS'
OPPOSITION TO PACIFIC LEGAL FOUNDATION'S
MOTION FOR LEAVE TO FILE AMICUS BRIEF**

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Appellants DIAMOND NATURAL RESOURCES PROTECTION & CONSERVATION ASSOCIATION; J&T FARMS, LLC; GALLAGHER FARMS LLC; JEFF LOMMORI; M&C HAY; CONLEY LAND & LIVESTOCK, LLC; JAMES ETCHEVERRY; NICK ETCHEVERRY; TIM HALPIN; SANDI HALPIN; DIAMOND VALLEY HAY COMPANY, INC.; MARK MOYLE FARMS LLC; D.F. & E.M. PALMORE FAMILY TRUST; WILLIAM H. NORTON; PATRICIA NORTON; SESTANOVICH HAY & CATTLE, LLC; JERRY ANDERSON; BILL BAUMAN; AND DARLA BAUMAN (collectively, “DNRPCA Appellants”) file this Opposition to the Motion for Leave to File Brief as Amicus Curiae filed by the Pacific Legal Foundation (“PLF”).

INTRODUCTION

This case is about whether, when it enacted two entirely new statutory provisions to address the State’s ubiquitous problem of groundwater overappropriation, the Legislature intended for local stakeholders to develop a groundwater management plan such as the Diamond Valley GMP. To answer that question, the Court must interpret NRS 534.037 and NRS 534.110(7) de novo to determine whether the State Engineer’s approval of the GMP should be affirmed. As part of its review, however, the Court must apply the presumption of correctness the Legislature afforded all of the State Engineer’s decisions pursuant

to NRS 533.450(10) and determine whether the Respondents met their burden to rebut it.

Nothing presented in PLF's motion or proposed amicus brief would assist the Court with this task. PLF has no interest in the outcome of this case and does not care about Nevada's overappropriated groundwater basins or the communities that depend on them. It also has no expertise that could prove useful; to the contrary, PLF demonstrates a profound ignorance of Nevada water law and does not even purport to know anything about the statutes at issue in this case. PLF has an improper allegiance to the Respondents and seeks to interject itself into this case to perpetuate its fundamental disdain for regulatory authorities such as the State Engineer. In short, PLF is no "friend" of the Court, and its motion should be denied, accordingly.

ARGUMENT

A. PLF Has No Cognizable Interest in This Proceeding

PLF will not be affected by the Court's determination as to whether NRS 534.110(7) and NRS 534.037 authorized the Diamond Valley Groundwater Management Plan ("GMP") and therefore lacks an interest that could justify amicus status. The Rules of Appellate Procedure require a would-be amicus to identify "its interest in the case." NRAP 29(d)(3). An amicus who lacks a "recognizable interest" in the matter under consideration should not be given leave

to participate. *Herring v. F.D.I.C.*, 82 F.3d 282, 286 (9th Cir. 1995). Moreover, where the amicus has no interest in any other case that will be affected by the decision, leave to participate likewise should be denied. *N. Sec. Co. v. United States*, 191 U.S. 555, 556 (1903).

Here, PLF has expressed no cognizable interest in the outcome of this case and no interest in any other case that will be affected by the outcome of this one. In its motion (at p.3), PLF asserts only that it “is interested in this case as it relates to the proper role of inter-branch relations of government and as it impacts personal liberties and property rights.” PLF does not claim to own Nevada water rights, and no party has asserted that “personal liberties” are at issue here.

Nowhere does PLF assert that it will be affected by the State’s efforts to manage overappropriated groundwater basins. Nor does PLF care what the Legislature intended when enacting AB 419 in 2011 to add the critical management area designation and groundwater management plan provisions now found in NRS 534.037 and NRS 534.110(7). PLF seeks only to engage in an irrelevant academic exercise at the expense of Diamond Valley groundwater users whose livelihoods are at stake.

Even if PLF could somehow be deemed to have a cognizable interest, a court that lacks joint consent to the participation of an amicus “should go slow in accepting” an amicus brief. *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970).

This case is of grave import to the Appellants. It will determine whether they have a future as Diamond Valley farmers or must uproot themselves and their families after more than half a century working the land. Particularly under these circumstances, PLF's amicus participation with, at best, a tangential and tenuous interest is highly inappropriate.

B. PLF's Proposed Brief Would Not be Helpful to the Court's Resolution of This Case

PLF has not made that requisite showing that it will help the Court decide this matter. Leave to participate as an amicus should only be granted if it will assist the Court. *Dow Chem. Co. v. Mahlum*, 115 Nev. 13, 15 n.1, 973 P.2d 842, 843 n.1 (1999); *Powers v. United Servs. Auto. Ass'n*, 115 Nev. 38, 41 n.2, 979 P.2d 1286, 1288 n.2. (1999); *see also Nat'l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000) (indicating that an amicus brief should be considered if the amicus "has a unique perspective, or information, that can assist the court ... beyond what the parties are able to do"); *Long v. Coast Resorts, Inc.*, 49 F. Supp. 2d 1177, 1178 (D. Nev. 1999) (noting that an amicus brief must be "useful"). In that PLF's proposed brief offers nothing to assist the Court in interpreting the statutes at issue here and seeks to advance arguments that the parties never made, it should be rejected.

1. The Legislature Has Directed Courts to Presume the Correctness of the State Engineer's Decisions

Notably absent from PLF's motion or proposed brief is any recognition that Nevada's water law gives unique regard to the State Engineer's decision-making that is absent elsewhere. According to the Legislature, "[t]he decision of the State Engineer is *prima facie correct*." NRS 533.450(10) (emphasis added). That language has existed in Nevada's water statute since its inception. *See* 1915 Statutes of Nevada, Page 378. In light of this century-old provision, the Court has held that, "while not controlling, [the State Engineer's] interpretation of a statute is persuasive." *Office of State Eng'r v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991), *quoting State v. Morros*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988).

While PLF makes much ado about how other state courts have addressed deference to administrative agencies, it fails to acknowledge the critical distinction here: Over 100 years ago, the Nevada Legislature enshrined in Nevada law a presumption in favor of the State Engineer's decisions. *See id.* Water law is of such character, the Legislature determined, that the State Engineer's interpretation of it is presumed correct. *See id.*; *Application of Filippini*, 66 Nev. 17, 27, 202 P.2d 535, 540 (1949) ("the water law and all proceedings thereunder are special in character"). That presumption can be rebutted, but it is nevertheless a presumption that the Court must follow. *See id.*; *see also* Black's Law Dictionary (11th ed. 2019) (defining *prima facie* to mean "[s]ufficient to establish a fact or raise a

presumption unless disproved or rebutted”). PLF’s failure to even mention NRS 533.450(10) demonstrates it is ill-equipped to assist the Court.

Contrary to PLF’s assertion, this is not a situation where the judiciary is abdicating its responsibilities to the executive branch or is intruding into the province of the Legislature by placing legislative prerogatives in the hands of an agency. Rather, it is interpreting the law precisely as directed by the Legislature in NRS 533.450(10). PLF is either ignorant of this statute or willfully misguides the Court to gain amicus status in this case.¹ Under either circumstance, nothing that PLF seeks to add to the arguments has any pertinence to the important issue of law the Court must resolve here. The Court cannot, as PLF urges (at Motion p.4), simply “abolish” a presumption in favor of the State Engineer’s decision-making that has been statutorily mandated since 1915.

This case requires the Court to decide whether the State Engineer’s approval of the Diamond Valley GMP complied with the requirements of NRS 534.037 and

¹ The former appears to be more likely, as PLF’s counsel wrote in the report cited in PLF’s motion (at 4) that “[o]ne Nevada practitioner that I spoke to suggested that the Nevada Supreme Court applies deference to some agencies but not others, perhaps based on the technical nature of the regulations in question. ***But I could not find any cases even hinting at such a standard.*** See Daniel Ortner, The End of Deference: How States are Leading a (Sometimes Quiet) Revolution against Administrative Deference Doctrines (March 2020) (emphasis added), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3552321. at n.148. However, PLF cites the *Morros* case in its proposed brief, which expressly references NRS 533.450(10). In that PLF could not draw the connection between the statute and the presumption of correctness that it affords the State Engineer’s decisions, PLF clearly lacks the expertise to assist the Court here.

NRS 534.110(7). For all of PLF's horn blowing about its own supposed accomplishments in other courts, it fails to articulate any knowledge of these statutes or any other aspect of Nevada water law, much less some unique expertise that might help the Court. With AB 419 (2011), the Legislature sought to resolve one of the most vexing and wide-reaching water problems the State faces. If, as the State Engineer concluded, the Diamond Valley GMP is what the Legislature had in mind with this legislation, the Court must reverse the district court and affirm the State Engineer's decision. PLF offers nothing to assist that inquiry.

2. The Parties Never Raised the Issues That PLF Seeks to Advance in its Amicus Brief

PLF's motion should also be denied because its proposed brief exceeds the scope of this appeal. Where a proposed amicus brief raises issues beyond those presented by the parties, the motion for leave to file such brief should be denied. *F.T.C. v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 226 n.4 (2013); *Portland Fish Co. v. States S.S. Co.*, 510 F.2d 628, 634 (9th Cir. 1974), on reh'g sub nom. *Portland Fish Co. v. States Steamship Co.* (9th Cir. Dec. 24, 1974); *Potter v. Potter*, 121 Nev. 613, 615 n.1, 119 P.3d 1246, 1248 n.1 (2005). "[T]he court will not consider arguments raised only in amicus briefs." *United States v. Wahchumwah*, 710 F.3d 862, 868 n.2 (9th Cir. 2013); see also *Golden Gate Rest. Ass'n v. City & Cty. of San Francisco*, 546 F.3d 639, 653 (9th Cir. 2008) ("We need not consider arguments raised solely by an amicus, particularly when they

were not raised before the district court and when they are in tension with the strategic positions taken by the litigants.”).

At no time during the proceedings in the district court or in the briefs that have been filed in this Court did any party argue that there is some kind of “precedential split,” or a separation of powers concern, or that individual liberties are at stake. Rather, all parties have agreed that this Court is tasked with reviewing the statutory language and discerning the legislative intent behind NRS 534.037 and NRS 534.110(7). Additionally, all parties agree that issues of statutory interpretation are reviewed de novo but that the State Engineer’s interpretation of these statutes is persuasive because of the prima facie correctness of his decisions. Because PLF seeks to inject extrinsic issues into the case, the Court should deny PLF’s motion and reject its proposed brief.

C. PLF is a Friend of Respondents, Not of the Court

As is clear from the tenor of PLF’s proposed brief and the joinder filed by Sadler and Renner, PLF seeks to assist the Respondents, not the Court. “The term ‘amicus curiae’ means friend of the court, not friend of a party.” *See Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1063 (7th Cir. 1997). PLF is clearly antagonistic to the State Engineer, having as its objective to dismantle regulatory authority, not address Nevada’s statewide water issues. *See*

<https://pacificlegal.org/separation-of-powers/> (alluding to administrative agencies as “the very definition of tyranny”).

Like the Respondents, PLF’s proposed brief attacks the State Engineer, misrepresents the record, and urges the Court to exceed the allowable scope of review by considering irrelevant legislative efforts that post-date the enactment of AB 419 (PLF’s Proposed Brief at pp. 12, 19). This is highly inappropriate for an amicus, is contrary to law and underscores that PLF is not hesitant to employ the same improper tactics that the Respondents found so successful in the district court (and repeat here). “Statutes are construed by the courts with reference to the circumstances existing at the time of the passage,” not subsequent legislative efforts. *See United States v. Wise*, 370 U.S. 405, 411 (1962).

PLF’s willingness, like the Respondents, to flout this fundamental rule of statutory construction is precisely why Sadler and Renner jumped onboard PLF’s arguments. Also, like the Respondents, PLF makes the factually unsupported assertion that GMP would somehow impact vested rights (PLF’s Proposed Brief at 12). There is no evidence in the record to support that contention. *See* DNRPCA’s Opening Brief at pp. 45-52. Rather than be objective, PLF advances the Respondents’ improper strategies and amplifies the Respondents’ improper arguments. That is not the role of an amicus.

CONCLUSION

PLF has no cognizable interest in this case, seeks to inject irrelevant arguments and lacks the expertise to assist the Court. Instead, it seeks only to promote its ideological agenda and perpetuate the misrepresentations made by the Respondents. Its motion to participate as an amicus should be denied, accordingly.

AFFIRMATION

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Date: December 4, 2020

/s/ Debbie Leonard
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Leonard Law, PC, and that on December 4, 2020, a copy of the foregoing document 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. All others will be served by first-class mail.

/s/ Tricia Trevino
An employee of Leonard Law, PC