Case No. CV-0830908

Dept. No. II

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF LINCOLN

CARTER-GRIFFIN, INC., et al., and CAVE VALLEY RANCH, LLC,

Petitioners,

vs.

TRACY TAYLOR, Nevada State Engineer; STATE OF NEVADA DIVISION OF WATER RESOURCES; DOES I through X; and ROE CORPORATIONS I through X, inclusive,

Respondents,

SOUTHERN NEVADA WATER AUTHORITY,

Real Party in Interest.

ORDER VACATING AND REMANDING STATE ENGINEER'S RULING

Petitioner Carter-Griffin, Inc. has requested judicial review of the Nevada State Engineer's Ruling Number 5875 issued July 9, 2008. That ruling granted a transfer of 18,755 acre feet of water annually to the Real-Party-in-Interest from the Cave, Dry Lake, and Delamar Valleys in eastern Nevada, pursuant to the Real-Party-in-Interest's applications 53987, 53988, 53989, 53990, 53991, and 53992. This matter has been fully

briefed and oral arguments held. Having examined all relevant pleadings and papers on file herein, having considered the arguments of counsel presented during the hearing, and good cause appearing, the Court now enters the following order:

I. Summary of the Case

In 1989, the Las Vegas Valley Water District ("LVVWD") filed multiple applications to transfer ground water from several rural basins in east-central and southern Nevada. Administrative Record at 7087. Thereafter, the Southern Nevada Water Authority ("SNWA") was created and acquired rights to pursue these applications. AR at 2. The petition before the Court deals with only some of those applications, specifically Cave Valley: applications 53988 and 53897; Delamar Valley: applications 53991 and 53992; and Dry Lake Valley: applications 53989 and 53990. AR at 2545-56. Through these applications, SNWA sought to acquire rights to 34,752 acre feet of water annually within the three basins. AR at 6393.

Certain applications for water rights in Spring Valley not subject to this petition were ruled upon by the State Engineer on or about April 16, 2007. AR at 6252. On January 7, 2008, SNWA entered into a stipulated agreement with several governmental agencies whereby the agencies abandoned their protests against the applications included in this matter, among others, provided that SNWA entered into a three-body board to oversee and mitigate pumping impacts on east-central and southern Nevada. AR at 2446-83.

Thereafter, in February 2008, the State Engineer held a two week hearing on the applications concerning Cave, Delamar, and Dry Lake Valleys. Multiple protestants, including but not limited to the petitioners in this case, appeared and presented evidence. *See* AR at 11544-579, 12185-87, 12170, 12248-249, 12209-219, 12676-701, 12651-670, 12704-705, 12707-12711. SNWA presented evidence regarding the perennial yields of the subject valleys. AR at 23, 1190-92, 1236-40, 1251. The protestants meanwhile also presented impact evidence, referencing a model which SNWA declined to present as evidence. AR at 1236-1240, 1524-50, 12675-702.

Approximately five months later, the State Engineer issued Ruling No. 5875 partly granting SNWA's applications regarding the Cave, Delamar, and Dry Lake Valleys. AR at 2-41. In his decision, the State Engineer changed the published perennial yields for each of the basins. AR at 9. In each case, SNWA was granted most of the newly created amounts. AR at 40. Regarding the remainder, among other things the State Engineer reserved 0.5 acre-feet per year per projected residential house, although 2 acre-feet per year is the allowable residential use. AR at 36-37; NRS 534.180.

II. Standard of Law

Upon a petition for judicial review, the Court is confined to considering the administrative record. NRS 533.450(1). The proceedings in every case must be heard by the Court, and must be informal and summary, but full opportunity to be heard must

be had before judgment is pronounced. NRS 533.450(2).

In reviewing the record, the Court must treat the State Engineer's decision as "prima facie correct, and the burden of proof shall be upon the party" challenging the decision. NRS 533.450(9). The Court may not substitute its judgment for that of the State Engineer, but is limited to determining whether there is substantial evidence in the record to support the decision. *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979). Substantial evidence is "that which a reasonable mind might accept as adequate to support a conclusion." *Bacher v. Office of the State Eng'r of Nev.*, 122 Nev. 1110, 1121, 146 P.3d 793, 800 (2006).

> [A] conclusion that substantial evidence supports the findings of the State Engineer does not, however, dispose of the . . . appeal. The applicable standard of review of the decisions of the State Engineer, limited to an inquiry as to substantial evidence, presupposes the fullness and fairness of the administrative proceedings: all interested parties must have had a "full opportunity to be heard," *see NRS 533.450(2)*; the State Engineer must clearly resolve all the crucial issues presented, *see Nolan v. State Dep't of Commerce*, *86 Nev. 428, 470 P.2d 124 (1970)* (on rehearing); the decisionmaker must prepare findings in sufficient detail to permit judicial review, *id.*; *Wright v. State Insurance Commissioner*, *449 P.2d 419 (Or. 1969)*; *see also NRS 233B.125*. When these procedures, grounded in basic notions of fairness and due process, are not followed, and the resulting administrative decision is arbitrary, oppressive, or accompanied by a manifest abuse of discretion, this court will not hesitate to intervene. *State ex rel. Johns v. Gragson*, *89 Nev. 478, 515 P.2d 65 (1973)*.

Revert, 95 Nev. at 786, 603 P.2d at 264.

The Court is free to decide purely legal questions *de novo*. *Town of Eureka v. Office of the State Eng'r of Nev.*, 108 Nev. 163, 165, 826 P.2d 948, 949 (1992). A purely legal question is one that is not dependant upon, and must necessarily be resolved without reference to, any fact in the

case. *Beavers v. Department of Motor Vehicles & Pub. Safety*, 109 Nev. 435, 436 n.1, 851 P.2d 432, 434 n.1 (1993). While the State Engineer's interpretation of law is persuasive, and the court should give it great deference when it is within the language of the applicable statutory provisions, it is not controlling. *Town of Eureka*, 108 Nev. at 165, 826 P.2d at 950; *Andersen Family Assocs. v. Ricci*, 124 Nev. Adv. Rep. 17, 179 P.3d 1201, 1203 (2008).

III. The State Engineer's Decision was Arbitrary, Oppressive, and a Manifest Abuse of Discretion.

The State Engineer acknowledged within his Ruling that all water rights previously available in the three basins at issue had already been fully distributed. The State Engineer then declared that the perennial yields available within the three basins had increased, thereby creating additional acre-feet annually ("afa") eligible for distribution.

In the process, the State Engineer reserved some of the new afa for future growth in the basins. However, no evidence was cited by the State Engineer in reaching his conclusions regarding how much water should be retained for future use within those basins. Instead, his conclusory findings were simply allowed to speak for themselves. For instance, the State Engineer uttered the following within the Ruling:

> the State Engineer does not believe that hundreds or thousands of homes will be built within the next 50 to 60 years as argued by Cave Valley Ranch. The State Engineer finds if the entire 4,692 acres of potentially developable land was parceled into 5-acre lots this would equate to 938 lots; however, he does not believe it is reasonable to think that all 938 lots will be

> developed. Therefore, the State Engineer finds that it is reasonable to consider that up to one half of these 938 lots or 469 lots has the possibility of a second-home/vacation-home being built on them in the future.
>
> Under NRS §534.180(1) the allocation of a domestic well is 2.0 acre-feet per year and while it is true that any domestic well drilled in Cave Valley will have the statutory authority to withdraw the stated 2.0 acre-feet per year, from a management perspective it is highly unlikely this would be the case. If a property is occupied 60 days per year this equates to the prorated equivalent of 0.33 acre-feet per year. To account for some permanent residences and to ensure sufficient unappropriated water is left in Cave Valley, an allocation of 0.5 of an acre-foot per year will be used for each potential lot. The State Engineer finds it is reasonable to leave 0.5 afa for each of the 469 lots for future growth and development for a total of 235 afa. the State Engineer finds water should also be left in the basin for other uses, such as stock-watering and minor commercial uses; therefore, an additional 40 afa will be left in the basin for other uses such as stock-watering and minor commercial for a total of 275 afa total being left in the basin of origin for future growth and development.

AR at 36-37.

As described by the State Engineer, these conclusions and findings were simply based upon his belief. No evidence was cited for the conclusions, let alone substantial evidence, with the State Engineer citing instead to his management perspective. Thus the State Engineer's conclusion about the proper amount of afa to be reserved within Cave Valley was his best guess as the State Engineer. This by definition was arbitrary, particularly where only 0.5 acre-feet per year per projected residential house was reserved for future growth, even though 2 acre-feet per year is the allowable residential use.

Similarly, in a prior ruling, the State Engineer declined to allow the distribution of greater amounts of water annually without significant studies being undertaken to demonstrate

that existing use was not already stressing the aquifers at issue, AR at 5794-5804, yet here, the State Engineer simply decided that the applicant's proffered models were sufficient to increase the perennial yields, with monitoring and mitigation plans referenced as sufficient in the event the State Engineer was wrong.

This solution portends a water rights manager seeking a resolution to a problem that has been pending since the applications at issue were first tendered in 1989, namely the competition for water between the urban landscape of Southern Nevada and its rural brethren. In the past, the State Engineer required specific empirical data before taking the significant step of allowing existing water to be transferred out of basin. In Ruling No. 5875 however, the State Engineer was satisfied by normative, predictive data without detailing why that change was acceptable. While this may have resolved the water management problem presented by the applications, the sudden resolution of simply 'printing more money' or mining for water by declaring that more afa was available when viewed through a new prism, without explanation as to what changed to allow the new approach, presents the essence of an arbitrary decision.

As acknowledged by the State Engineer, "in dry valleys it takes an exceedingly long time to reach equilibrium and effects will eventually spread out from the basin of origin and will affect the down-gradient basins of White River Valley and Pahranagat Valley." AR at 22. Despite this statement, the

State Engineer both changed the method by which the existing perennial yields were measured and granted the applications without a clear understanding of the consequences, simply relying upon the eventual outcome as the measure in the form of a monitoring and mitigation program. Thus, the State Engineer's ruling results in an oppressive consequence for the basins affected, with the State Engineer simply hoping for the best while committing to undo his decision if the worst occurs despite the exceedingly long time required to reach equilibrium and the effects which will eventually spread out from the basin of origin and affect the down-gradient basins. Capriciousness by the State Engineer is the reasonable conclusion.

In effect, the State Engineer's ruling that there was newly unappropriated water available for export from Cave Valley, Dry Lake Valley and Delamar Valley led to the further conclusions that the applicant's proposed use will not conflict with existing rights or protectible interests in existing domestic wells, nor threaten to prove detrimental to the public interest. Without those impediments, according to the State Engineer NRS 533.370(5) mandated the granting of the water rights applications. AR at 40. However, having acted arbitrarily, capriciously and oppressively regarding the base conclusion pertaining to the perennial yields and the further conclusions flowing therefrom, the Court finds that the required burden of proof has been met. The State Engineer abused his discretion. Accordingly, the State Engineer's

Ruling Number 5875 is VACATED AND REMANDED for further proceedings consistent with this decision.

IT IS SO ORDERED.

Dated this 15th day of October, 2009.

NORMAN C. ROBISON
SENIOR DISTRICT JUDGE