

Great Basin Water Network v. State Eng'r 126 Nev. Adv. Op. No. 2 (Jan. 28, 2010)¹

ADMINISTRATIVE LAW – WATER RIGHTS

Summary

A 2003 amendment to section 533.370² of the Nevada Revised Statutes, empowering the State Engineer to postpone taking action on water appropriation applications “[for] municipal use,” applies retroactively to applications filed within one year of the 2003 amendment and does not apply to applications filed more than one year prior the amendment.

Disposition/ Outcome

The Court held that the Legislature intended to limit retroactive application of the 2003 amendment to not more than one year prior to its adoption. Therefore, water rights applications filed in 1989 are not bound by the 2003 amendment, and the State Engineer violated his duty³ by failing to rule on the 1989 applications within one year after the final date for filing a protest.

Factual and Procedural History

In 1989, the Las Vegas Valley Water Department (LVVWD) filed approximately 146 applications with the State Engineer to appropriate public water from groundwater sources throughout Nevada. After publication of statutory notice, the State Engineer received over 830 protests to the notice.

Between 1991 and 2002, the Southern Nevada Water Authority (SNWA)⁴ withdrew some of the 1989 applications,⁵ and the State Engineer held hearings and issued rulings on several other 1989 applications. In October 2005, the State Engineer sent a certified mail notification to roughly 300 people, notifying them of a prehearing conference, in January 2006, to discuss 34 of the remaining 1989 applications. Hundreds of the certified mailings were returned (undelivered), and the State Engineer did not attempt to resend the returned mailings.

At the January 2006 prehearing conference, some attendees requested that the State Engineer re-notice SNWA applications and reopen the protest period due to the 16-year lapse between the filing of the applications and the hearings on the applications. In March 2006, the State Engineer denied the request to re-notice the applications and scheduled a September 2006 hearing. In July 2006, appellants filed a petition with the State Engineer, requesting, in part, that the State Engineer re-notice SNWA’s remaining applications from 1989 and reopen the protest period. The State Engineer summarily denied the petition.

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² NEV. REV. STAT. § 533.370(2) requires the State Engineer to approve or reject all water rights applications within one year after the final date for filing a protest., subject to two exceptions. The 2003 amendment adds a third exception by which the State Engineer can postpone taking action on water rights applications past one year from the close of filing. The 2003 amendment, at issue herein, states: “The State Engineer may: Postpone action if the purpose for which the application was made is municipal use.” *Id.* § 533.370(2)(b) (2007).

³*Id.* § 533.370(2) which states in relevant part: “[T]he State Engineer shall approve or reject each application within 1 year after the final date for filing a protest.”

⁴ The successor to LVVWD regarding the water rights applications.

⁵ In 1991, the state formed the Southern Nevada Water Authority (SNWA), which acquired LVVWD’s rights to the 1989 groundwater application.

In August 2006, 54 appellants filed a petition for judicial review with the district court, seeking review of the State Engineer's order denying the request to re-notice SNWA's applications. In May 2007, the district court denied the petition for judicial review. The district court determined that the State Engineer did not abuse his discretion in denying the request relying on the 2003 legislative amendment to NRS 533.370(2). Appellants timely filed this appeal of the district court's May 2007 denial of the August 2006 petition for judicial review.

Discussion

Appellants argue that the State Engineer violated his statutory duty because he did not rule on SNWA's 1989 applications within one year after the final date for filing a protest and that the district court erred in failing to address this argument when it was raised below.

Before 2003, NRS 533.370(2) required the State Engineer take action on all applications within one year of the close of the protest period unless the State Engineer received written authorization to postpone action by the applicant and any protestants to the application or unless studies of water supplies or court actions were pending.⁶ In 2003, the legislature amended NRS 533.370(2) and added an additional exception, granting the State Engineer the authority to postpone action on applications submitted for "municipal use."⁷ Of the three exceptions available to the State Engineer, the Court held that only the 2003 exception applied to the 1989 applications, which were submitted for municipal use. Still at issue, however, was whether the legislature intended retroactive application of the 2003 amendment to NRS 533.370(2) to applications submitted in 1989.

In 2003, the Legislature specified that the 2003 amendment applied to (1) "each application . . . made on or after July 1, 2003; and (2) each such application that is pending with the office of the State Engineer on July 1, 2003."⁸ Because the 1989 applications were not filed on or after July 1, 2003, they must be "pending" to qualify for retroactive application. The court held that the legislature intended that "pending" applications be limited to applications filed not more than one year before the 2003 amendment for four reasons.

First, the legislature's inclusion of a timeline for approval evinced legislative intent that applications not linger for years. Second, the absence of any plain language in the 2003 amendment suggesting retroactive application suggests that the language mandating action within one year controls. Third, full retroactive application would deprive at least 11 appellants—who are original protestants of the 1989 application—their due process rights.⁹ Finally, full retroactive application to every groundwater application ever filed would produce absurd results.

Conclusion

The 2003 amendment to NRS 533.370(2) does not apply retroactively to application submitted more than one year prior to the 2003 amendment. Accordingly, the State Engineer violated his statutory duty by ruling on applications well beyond the one-year statutory limitation without first properly postponing action. The applications lapsed and were not "pending." Therefore, the district court erred in denying appellants' petition for judicial review. On remand,

⁶ NEV. REV. STAT. § 533.370(2)(a), (c) (2007).

⁷ 2003 Nev. Stat. 2980-81; NEV. REV. STAT. § 533.370(2)(b) (2007).

⁸ 2003 Nev. Stat. 2989 (emphasis added by the Court).

⁹ See *Logan v. Zimmerman Brush Co.*, 445 U.S. 422, 428-29 (1982).

the district court must determine whether SNWA is required to file new applications or whether the State Engineer is required to re-notice and reopen the protest period.