

IN THE OFFICE OF THE STATE ENGINEER  
OF THE STATE OF NEVADA

IN THE MATTER OF APPLICATIONS 53947- )  
54036; 54038-54066; 54068-54092; 54105 )  
AND 54106 FILED BY LAS VEGAS VALLEY )  
WATER DISTRICT TO APPROPRIATE THE )  
PUBLIC WATERS IN THE COUNTIES OF CLARK, )  
LINCOLN, NYE AND WHITE PINE, NEVADA. )

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INTERIM RULING ON  
MOTIONS AND PROCEDURES

#3825

GENERAL

In October 1989 the Las Vegas Valley Water District filed 146 applications in 27 groundwater basins in Clark, Lincoln, Nye and White Pine Counties, Nevada. One of the applications seeks to appropriate surface water from the Virgin River in Clark County. The place of use is described as being all four counties. The applications were duly processed and noticed in the paper of general circulation in the counties where the points of diversion lie, and copies of all of the applications and maps were sent to all effected counties pursuant to 533.363. The applications were subsequently protested, and recommendations were received from each of the affected counties pursuant to 533.363.

By letter dated April 22, 1991, the Las Vegas Valley Water District withdrew from consideration (not totally withdrawn to return to public waters) 25 applications in Penoyer, Jakes, Pahranaqat, White River, Hot Creek and Lower Moapa valleys, Lower Meadow Valley Wash and a portion of Lake Valley.

On January 28, 1991, the State Engineer held a prehearing conference on Applications 54073, 54074, 54075 and 54076 to decide procedural issues which resulted in several motions and undecided issues. The United States along with several other protestants claimed that there was insufficient information available related to the scope of the project in order for them to prepare their cases for the evidentiary hearings. The State Engineer then ordered that four informational briefings be held, one in each affected county, to better inform the protestants and the public at large as to the scope of the entire project. The briefings were

held beginning April 22, 1991. Those briefings were for public information only, were not transcribed and will not be a part of the evidentiary record.

SETTLED ISSUES

Although the prehearing conference was noticed for only four of the applications, most of the attorneys of record for all protested applications were present. The following procedural issues were either stipulated to or are ordered by the State Engineer.

- A. The applicant and all protestants having standing shall make an opening statement at the beginning of each evidentiary hearing providing an outline as to how they will provide their testimony and evidence including witnesses.
- B. The order for examining witnesses shall be direct examination, cross-examination, redirect examination limited to issues on cross-examination and recross examination limited to issues on redirect.
- C. To the extent possible examination of protestants witnesses and cross-examination of applicant's witnesses shall be conducted by one counsel.
- D. Exhibits shall be filed in duplicate and shall be no larger than 11" x 17" and if larger than 8 1/2" x 11", shall be foldable. Larger pieces will be allowed for illustration but shall be duplicated to size for the record.
- E. The applicant and attorneys of record for the protestants shall exchange a list of witnesses and a summary of their testimony thirty (30) days prior to a particular evidentiary hearing. In addition, copies shall be placed in the public library in the county affected by a particular evidentiary hearing. Witnesses not identified will not be allowed without good cause.

- F. The applicant and attorneys of record for the protestants shall exchange a list of exhibits and a summary of the purpose of each exhibit sixty (60) days prior to a noticed evidentiary hearing. In addition copies shall be placed in the public library in the county affected by a particular hearing.
- G. The State Engineer will require the original and one copy of the transcript. The cost will be borne pro-rata amongst the parties presenting an evidentiary case. All other parties requiring a copy of the transcript should make arrangements with the court reporter.
- F. A separate time will be set during each hearing to receive public comment. This testimony will become a part of the record but will not be subject to cross-examination. Questions for clarification will be allowed but may be limited at the discretion of the State Engineer.

UNSETTLED ISSUES AND RULING ON MOTIONS

Although the State Engineer's rules call for the protestants to present their case first, the State Engineer has discretion in deciding the order of presentations.<sup>1</sup> In addition, the applicant agreed to present its evidence and testimony first subject to calling adverse witnesses.<sup>2</sup> Because of the breadth and scope of this project the State Engineer hereby orders that the applicant will present its evidence and testimony first to be followed by the protestants having standing.

The Counties of Lincoln, Nye and White Pine filed a motion for additional relevant information under NRS 533.363. The State Engineer hereby grants said motion and orders the applicant to supply each county with all relevant information which will be the

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<sup>1</sup>OP. Nev. Att'y Gen. No. 422 (February 11, 1947).

<sup>2</sup>See applicant's brief in reply to prehearing statements dated March 8, 1991.

basis for the applicant's evidence and testimony in a particular hearing. The State Engineer reserves the right to order additional information to be supplied or generated pursuant to NRS 533.375 or Chapter 469 enacted by the 1991 Nevada Legislature.

The State Engineer reserves the right to set the time, place, schedule and length of any particular hearing in this matter.

On January 28, 1991, the United States filed a motion for an 18 month delay in the hearing process in order for them to conduct studies of the overall impact. This motion was concurred in by many of the protestants. The State Engineer finds that twenty-two months have passed since the applications were filed and 8 months have passed since the prehearing conference. The State Engineer grants the United States' motion in part and hereby orders that the evidentiary hearings will begin in September 1992 giving the United States 18 months to conduct the studies and 60 days for the applicant to avail itself of the results. Motions for continuance will only be granted for good cause and only upon extremely unusual circumstances. All parties with standing shall have exchanged the above ordered information prior to the evidentiary hearing and be prepared to proceed without delay.

At the pre-hearing conference on January 28, 1991, the applicant submitted a brief in which it asserts that many of the protestants lack standing to participate in the administrative process. The applicant argues that protestants have no standing unless they hold an existing water right in the proposed source of supply which has been fully appropriated or one of the applicant's applications would conflict with their existing water right or they have the legal capacity to sue to vindicate the public interest.

Specifically, the applicant contends that the counties of White Pine, Nye and Lincoln have no standing or legislative authority to be parties to the hearings and "non-interest" protestants who do not hold water rights in any particular groundwater basin have no standing. According to the applicant, these protests should, therefore, be summarily overruled.

To support its argument regarding standing in these administrative proceedings, the applicant relies upon the doctrine of standing in the judicial context. The applicant claims that "person interested" within the meaning of NRS 533.365(1)<sup>3</sup> is one having the requisites of standing as the term is used in the law of parties.

Although analogies exist between the concepts of judicial standing and administrative standing, the State Engineer refuses to adopt the applicant's narrow construction of "person interested" to determine who may participate in the upcoming hearings. Standing before the courts involves both constitutional limitations on courts' jurisdiction and judge-made prudential limitations on the exercise of that jurisdiction. The State Engineer, on the other hand, is not bound by these limitations.

Standing requirements for administrative agencies are less restrictive than the law of judicial standing.<sup>4</sup> Administrative standing analysis begins with the scheme intended and devised by the legislature.<sup>4</sup>

The Nevada Legislature enacted NRS 533.365(1) which provides that "[a]ny person interested" may protest an application for the appropriation of water within 30 days of the last publication of the notice advertising the application. The Legislature also

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<sup>3</sup>NRS 533.365(1) states in full:

1. Any person interested may, within 30 days from the date of last publication, file with the state engineer a written protest against the granting of the application, setting forth with reasonable certainty the grounds of such protest, which shall be verified by the affidavit of the protestant, his agent or attorney.

<sup>4</sup>ECEE, Inc. v. Fed. Energy Regulatory Comm'n, 645 F.2d 339, 349-50 (5th Cir. 1981); Koniag, Inc., Village of Uyak v. Andrus, 580 F.2d 601, 606 (D.C. Cir.), cert. denied, 439 U.S. 1052 (1978).

established criteria for the State Engineer's approval or rejection of an application, providing as follows:

Where there is no unappropriated water in the proposed source of supply, or where its proposed use or change conflicts with existing rights, or threatens to prove detrimental to the public interest, the state engineer shall reject the application and refuse to issue the permit asked for.<sup>5</sup>

Thus, these criteria furnish the bases upon which any person interested may protest.

The applicant suggests that protestants under NRS 533.365(1) are similar to objectors under NRS 533.145. NRS 533.145 requires that, in order to object to a preliminary order of determination in an adjudication, a person must claim an interest in the stream system "under vested right or under permit from the state engineer." In contrast to the statute dealing with objectors, the Legislature did not restrict protestants to persons holding title to water rights. If the Legislature had intended to impose limitations analogous to those in NRS 533.145, it would have prescribed such limitations in the statutory provision governing protests, NRS 533.365(1).

As previously indicated, Nevada water law requires that the State Engineer consider public interest in deciding whether to approve an application to appropriate water.<sup>5</sup> Contrary to the applicant's position, the statutory scheme in no way limits those who have standing to assert the public interest to the Attorney General and certain other public agencies. If the Legislature had

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<sup>5</sup>NRS 533.370(3).

intended that only certain public officials or public agencies could raise public interest considerations in protests, it would have enacted language to this effect.

The State Engineer has consistently interpreted NRS 533.365(1) to allow virtually any existing water right holder, member of the public, or governmental entity who has timely protested an application to be heard on its concerns. The State Engineer has never restricted protestants' standing as suggested by the applicant. For example, in the federal filings case, the State Engineer accepted numerous protests by individuals and entities who based their protests solely on the ground of public interest.<sup>6</sup>

The reviewing court also accepted intervention by a number of parties who were concerned only with the public interest factor.<sup>6</sup> Various state agencies, the counties of Elko and Humboldt, and other private entities and individuals either participated in the administrative process before the State Engineer or intervened during the judicial phase.<sup>6</sup>

To further support its argument that the three counties have no standing to participate in the upcoming proceedings, the applicant notes that, pursuant to NRS 0.039, "person" does not include governments or political subdivisions of government unless expressly provided otherwise by statute or required by the context. The applicant recognizes that NRS 533.010 expands the definition of

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<sup>6</sup>See State v. Morros, 104 Nev. 709, 766 P.2d 263 (1989).

"person" as follows: "As used in this chapter, 'person' includes the United States and this state."

However, the applicant disregards the second definition of "person" provided in Nevada's water law statutes. "'Person' includes any municipal corporation, power district, political subdivision of this state or any state, or an agency of the United States Government."<sup>7</sup>

A long held principle of statutory construction is that differing provisions bearing upon the same question should be harmonized, whenever possible, so as to make the statutes consistent and to arrive at the true legislative intent in so doing.<sup>8</sup> To read NRS 533.010 and NRS 534.014 harmoniously, allowing the State Engineer to administer Nevada water law in a consistent manner, it is necessary for each definition to incorporate the items listed in the other definition of person.

The State Engineer concludes that the statutory scheme supports his long-standing interpretation of NRS 533.365(1), allowing for those who timely protest an application, based on any of the criteria in NRS 533.370(1), to participate in the administrative process. Therefore, it is hereby ordered that all

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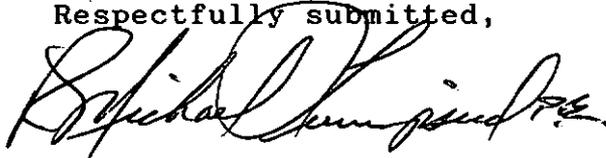
<sup>7</sup>NRS 534.014.

<sup>8</sup>See, e.g., State ex rel. Allen v. Brodigan, 34 Nev. 486, 492, 125 P. 699 (1912); City Council of Reno v. Reno Newspapers, Inc., 105 Nev. 886, 892, 784 P.2d 974 (1989).

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parties who timely protested the subject applications and paid the statutory fee have standing to make a full evidentiary presentation during all administrative hearings held in this matter.

Respectfully submitted,



R. MICHAEL TURNIPSEED, P.E.  
State Engineer

RMT/bk

Dated this 26th day of  
August, 1991.