LENA MCQUEEN

CASE NO. 25004

DEPT. NO. II

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CHURCHILL

*****

IN THE MATTER OF APPLICATION 9330 FILED TO APPROPRIATE THE WATERS OF THE TRUCKEE RIVER FOR USE WITHIN THE NEWLANDS RECLAMATION PROJECT, WASHOE, STOREY, LYON AND CHURCHILL COUNTIES, NEVADA.

TRUCKEE-CARSON IRRIGATION DISTRICT,

Petitioner,

vs.

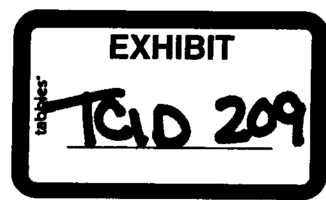
TRACY TAYLOR, State Engineer, State of Nevada, Department of Conservation and Natural Resources, Division of Water Resources,

Respondent.

______________________________/

ORDER

On June 4, 2007, the Petitioner, Truckee Carson Irrigation District, hereinafter, "TCID", filed a Petition for Review of State Engineer Ruling 4659. On September 10, 2007, the State Engineer filed an Answering Brief. TCID filed a Reply on September 25, 2007. TCID also filed a Motion to Supplement the Record and for Judicial Notice on June 4, 2007. The State Engineer filed an opposition on October 12, 2007. TCID



1 filed a second Motion to Supplement the Record and for Judicial Notice on March 26, 2008.
2 The State Engineer filed an Opposition to that motion on March 28, 2008. The Court heard
3 oral argument on all pending motions on April, 1 2008.
4
Issues Presented
5
6 TCID's Petition challenges the State Engineer's ruling number 4659 on both
7 procedural and substantive grounds. Based upon the alleged errors, TCID argued that the
8 State Engineer's ruling cannot stand, or in the alternative, the matter must be remanded for
9 additional evidence and findings.
10 As to procedural errors, TCID argued four points. First, TCID argued that the
11 State Engineer was biased against the application. Second, the State Engineer improperly
12 applied NRS 533.370(1) to TCID's application which had been filed prior to the passage of
13 the statute. Third, the matter must be remanded as the State Engineer did not take evidence
14 of the draft Truckee River Operation Agreement ("TROA") and Preliminary Settlement
15 Agreement ("PSA") between Sierra Pacific Power Company and the Pyramid Lake Tribe and
16 the final agreements should be considered as positions of the opposing parties may have
17 materially changed. Finally, TCID argued that the State Engineer failed to properly weigh all
18 benefits against all detriments as part of his determination that the application would be
19 detrimental to the public's interest.
20
21
22 As to substantive errors, TCID argued four points. First, the record does not
23 support the State Engineer's conclusion that TCID's application must be denied. Second, if
24 NRS 533.370(1) was applicable, then the record did not support the State Engineer's finding
25 that TCID lacked the ability to convey the water. Third, the State Engineer used an
26 unvalidated computer model as the basis for his determination that all of the unallocated
27
28

water was necessary to protect the Lahontan Cutthroat trout and Cui-ui fish. Finally, the record did not support the State Engineer's finding that the application would interfere with inter-state water allocation as agreed to in Public Law 101-618.

As to TCID's bias argument, the State Engineer argued two points. First, TCID's failure to overcome the presumption that the State Engineer was not biased. Second, even if TCID overcame the presumption, the rule of necessity would require the State Engineer to hear and determine the matter as no avenue to an alternative hearing process exists under Nevada law.

The State Engineer argued that NRS 533.370(1) did apply to the application and TCID was not deprived of due process as a result of the application. The State Engineer also argued that the letter form the United States Bureau of Reclamation ("BOR") provided a sufficient evidentiary basis to find that the application was speculative under this statute.

The State Engineer submitted that this Court could not remand the matter to the State Engineer for consideration of TROA. As evidence of TROA was not available at the time of the initial hearing, the State Engineer argued that the Court has no authority to remand the matter. Alternatively, the State Engineer argued that the evidence would not be material.

As to TCID's argument that the State Engineer failed to follow Nevada law as it pertains to determining the public's interest, the State Engineer argued that the State Engineer did properly weigh all of the evidence as part of his determination that the application was detrimental to the public's interest. The State Engineer submitted that the record contains substantial evidence regarding those detriments, as well as, the need to use the unallocated water to aid in the recovery of the Lahontan Cutthroat Trout and Cui-ui fish.

I. Findings of Law

A. Standard of Review

NRS 533.450(9) states that, "the decision of the state engineer shall be prima facie correct, and the burden of proof shall be upon the party attacking the same." A district court reviews the evidence to determine whether the evidence supports the decision. The reviewing court must determine whether substantial evidence exists in the record to support the decision. Town of Eureka v. State Engineer, 108 Nev. 163, 168 (1992). When reviewing the State Engineer's findings, factual determinations will not be disturbed on appeal if supported by substantial evidence. Morris, 107 Nev. at 701, 819 P.2d at 205. Moreover, as a general rule, a decision of an administrative agency will not be disturbed unless it is arbitrary and capricious. Shetakis Dist. v. State, Dep't Taxation, 108 Nev. 901, 903, 839 P.2d 1315, 1317 (1992).

The review is not de novo and a district court may not substitute its judgment for that of the state engineer. Revert v. Ray, 95 Nev. 782, 786 (1979); State Engineer v Curtis Park, 101 Nev. 30, 32 (1985). As the Nevada Supreme Court held in Ray, "neither the district court nor this court will substitute its judgment for that of the State Engineer: we will not pass upon the credibility of the witnesses nor reweigh the evidence, but limit ourselves to a determination of whether substantial evidence in the record supports the State Engineer's decision." 95 Nev. At 786.

In the recent case, Andersen Family Associates v. Hugh Ricci, P.E. 179 P.3d 120 (Nev. 2008), the Nevada Supreme Court held:

> In the context of an appeal from a district court order denying a petition for judicial review of a decision made by the State Engineer, this court has the authority to undertake an independent review of the State Engineer's statutory construction, without deference to the State Engineer's determination. Still,

> because the appropriation of water in Nevada is governed by statute and the State Engineer is authorized to regulate water appropriations, that office has the implied power to construe the state's water law provisions and great deference should be given to the State Engineer's interpretation when it is within the language of those provisions. Nonetheless, the State Engineer's "interpretation of a regulation or statute does not control if an alternative reading is compelled by the plain language of the provision.' "

B. Right to Impartial Hearing

The Supreme Court stated in Gilman v. Nevada State Bd. of Veterinary Medical Examiners 120 Nev. 263, 269 (2004),

> The United States Supreme Court has set forth standards for evaluating a tribunal's fairness under the Due Process Clause. "[A] 'fair trial in a fair tribunal is a basic requirement of due process.' This applies to administrative agencies which adjudicate as well as to courts." Not only must the tribunal harbor no actual bias against the person facing a deprivation of his property interests, but " 'justice must satisfy the appearance of justice.' " The test is: whether the [adjudicator's] situation is one "which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused."

(citations omitted). Furthermore, the Court in Gilman held:

> A presumption of honesty and integrity cloaks those who serve as adjudicators. That presumption may be overcome, however, by showing that the adjudicators have a conflict of interest, such as a financial stake in the outcome of the case. Id.

Courts apply the rule of necessity when the strict application of a rule of disqualification would leave the parties without a forum. Matter of Ross, 99 Nev. 1, (1983), citing to Atkins v. United States, 56 F.2d 1028 (Ct.Cl.1977). The rule of necessity was discussed at great length in State ex rel. Brown v. Dietrick, 191 W.Va. 169, 444 S.E.2d 47 (1994). The Dietrick court expounded on the rule of necessity as follows:

The rule of necessity is an exception to the disqualification of a judge. It allows a judge who is otherwise disqualified to handle the case to preside if there is no provision that allows another judge to hear the matter. This rule of necessity is summarized in 46 Am.Jur.2d *Judges* § 89 (1969):

The majority view is that the rule of disqualification must yield to the demands of necessity, and a judge or an officer exercising judicial functions may act in a proceeding wherein he is disqualified by interest, relationship, or the like, if his jurisdiction is exclusive and there is no legal provision for calling in a substitute, so that his refusal to act would destroy the only tribunal in which relief could be had and thus prevent a determination of the proceeding.

Continuing, the Dietrick court declared that:

The rule of necessity is an exception to the general rule precluding a disqualified judge from hearing a matter. Therefore, it is strictly construed and applied only when there is no other person having jurisdiction to handle the matter that can be brought in to hear it, as stated in 46 Am.Jur.2d *Judges* § 90 (1969):

The application of the rule permitting a disqualified judge to act where no other judge is available can be justified only by strict and imperious necessity, since the rule is an exception to the greater rule of disqualification resting on sound public policy. Under the doctrine, a disqualified judge may sit where no decision is possible if he does not sit, as in the case of an appellate court where there is no method provided by constitution or statute to have another person sit as judge of the court if a member is disqualified.
444 S.E.2d at 55-56.

C. Anti-Speculation Statute

NRS 533.370(1) states:

1. Except as otherwise provided in this section and NRS 533.345, 533.371, 533.372 and 533.503, the State Engineer shall approve an application submitted in proper form which contemplates the application of water to beneficial use if:

(a) The application is accompanied by the prescribed fees;

(b) The proposed use or change, if within an irrigation district, does not adversely affect the cost of water for other holders of water rights in the district or lessen the efficiency of the district in its delivery or use of water; and

(c) The applicant provides proof satisfactory to the State Engineer of:

> (1) His intention in good faith to construct any work necessary to apply the water to the intended beneficial use with reasonable diligence; and
> (2) His financial ability and reasonable expectation actually to construct the work and apply the water to the intended beneficial use with reasonable diligence.

In Bacher v. Office of State Engineer of State of Nevada, 122 Nev. 1110, 146 P.3d 793, 800 (2006), the Nevada Supreme Court discussed various aspects of NRS 533.370, an anti-speculation statute. However, the case provides no guidance as to the sufficiency of evidence needed to support a determination by the State Engineer that the applicant lacks the ability to convey the water.

The Colorado Courts have ruled on facts similar to the present case when applying Colorado's anti-speculation statute. In Matter of Board of County Com'rs of County of Arapahoe, 891 P.2d 952, 961 (Colo.1995), the Colorado Supreme Court held:

> The "can and will" statute should be construed to require an applicant for a conditional water right decree to establish that there is a substantial probability that within a reasonable time the facilities necessary to effect the appropriation can and will be completed with diligence, and that as a result waters will be applied to a beneficial use. Proof of such a substantial probability involves use of current information and necessarily imperfect predictions of future events and conditions.

In City of Black Hawk v. City of Central, 97 P.3d 951, 957 (Colo. 2004), the Colorado Supreme Court ruled that authority to expand facilities was an issue to be considered under Colorado's anti-speculation statute:

> Thus, whether an applicant may access property underlying a proposed conditional water storage right is one factor a court should consider in deciding whether an application for a conditional water storage right meets the can and will test. However, a party's present right and prospective ability to access the property are not conclusive in determining whether the can and will test has been met. (citations omitted).

The Colorado Supreme Court noted in City of Central that previous Colorado decisions focused upon whether the agency decision denying the application to expand the facilities was a final decision. The defendant, Central City, had argued that because it passed a resolution declaring its intent not to enter into agreements with third parties seeking to use its property to construct water storage facilities, its resolution had the same effect of denying access to property as the governmental denials of authorization in previous cases. Id. The Court refused to accept that argument as the resolution that Central City relied upon to thwart expansion was not binding upon future boards. Id.

D. Authority to Remand

NRS 233B.131(2) and (3) state:

> 2. If, before submission to the court, an application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence and any rebuttal evidence be taken before the agency upon such conditions as the court determines.
>
> 3. After receipt of any additional evidence, the agency:
> (a) May modify its findings and decision; and
> (b) Shall file the evidence and any modifications, new findings or decisions with the reviewing court

In Consolidated Municipality of Carson City v. Lepire, 112 Nev. 363, 364 (1996), the Nevada Supreme Court stated:

> Moreover, NRS 233B.135 provides that the "[j]udicial review of a final decision of an agency must be ... [c]onfined to the record." NRS 233B.131(2) requires that before a court may consider evidence beyond what was presented to the agency, there must be a showing that the "additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency." The court "may then order that the additional evidence ... be taken before the agency."

In Westergard v. Barnes, 105 Nev. 830 ,833 (1989), the Supreme Court noted that remand was the appropriate avenue to supplement the record as the district court was not acting in a fact finding role. A district court may remand a matter for the purpose of taking additional evidence if the district court makes a finding that the evidence would be material to the determination of the dispute. Nevada Industrial Commission v. Horn, 98 Nev. 469, 472 (1982).

E. Defining the Public Interest under NRS 533.370(5)

NRS 533.370(5) states:

> Except as otherwise provided in subsection 11, where there is no unappropriated water in the proposed source of supply, or where its proposed use or change conflicts with existing rights or with protectible interests in existing domestic wells as set forth in NRS 533.024, or threatens to prove detrimental to the public interest, the State Engineer shall reject the application and refuse to issue the requested permit. If a previous application for a similar use of water within the same basin has been rejected on those grounds, the new application may be denied without publication.

In Pyramid Lake Paiute Tribe of Indians v. Washoe County, 112 Nev. 743 747-48 (1996), the Nevada Supreme stated:

> The appropriation of water in Nevada is governed by statute, and the State Engineer is authorized to regulate such appropriations. NRS 533.030(1); see NRS 533.370(3). " 'An agency charged with the duty of administrating an act is impliedly clothed with power to construe it as a necessary precedent to administrative action.' " State v. State Engineer, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988) (citations omitted). Further, " 'great deference should be given to the [administrative] agency's interpretation when it is within the language of the statute.' " Id. (citations omitted). While the agency's interpretation is not controlling, it is persuasive. State Engineer v. Morris, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991).

In the Washoe County case, the Supreme Court refused to adopt a judicial definition of "public interest" as had been done by other state courts. 112 Nev. at 747-48.

The Supreme Court also inferred that the definition would have to be determined on a case by case basis. The Court concluded that, "the State Engineer adequately defined the public interest in this case and based his findings upon substantial evidence. Id. at 753 (emphasis added).

This Court notes that the State Engineer has not administratively adopted a definition for the term " public interest." The Nevada Administrative Code does not indicate that a uniform definition exists.

II. Findings of Fact and Conclusions of Law

A. Bias

The Court must conclude that TCID has failed to demonstrate through the record that the State Engineer was biased against TCID's application. Case law clearly requires that a party claiming bias must present sufficient evidence to overcome the presumption of non-bias.

TCID presented no evidence that the State Engineer had any pecuniary interest in this matter. TCID's attempt to demonstrate that improper political pressure was applied to the State Engineer also fails to overcome the presumption of non-bias. The record and evidence submitted by TCID fails to establish that the State Engineer was politically biased.

Regardless, the Court finds that the rule of necessity would apply to the instant matter. The Legislature has not created any alternative hearing process. No statutory provisions exist to replace the State Engineer.

///

///

B. NRS 533.370(1)

The record on appeal does not support the State Engineer's finding that the application must be barred under NRS 533.370(1). The Court finds, as a matter of law, that only evidence of a final decision or administrative ruling by BOR that facilities may not be expanded would suffice under NRS 533.370(1) to find that TCID does not have the ability to convey the water. The Court finds the reasoning set forth by the Colorado Supreme Court in City of Black Hawk v. City of Central, 97 P.3d 951, 957 (Colo. 2004) persuasive.

The requirement of a final decision or ruling that binds the issuing agency or government ensures that the water rights applicant has received due process. This also prevents placing the State Engineer in a position of having to divine what decision would occur without the benefit of actually knowing what evidence would be introduced and what law would be applied by the other agency or government.

No argument was presented in the briefs or at oral argument that, physically, the facilities may not be expanded to allow for the transportation of the water. The record also indicates testimony from the applicant that the current canal and reservoir could also maintain the additional water. ROA Volume II, Ex. 17, Bates Stamps 364-65, Tables 5 and 6. The record does not indicate that TCID does not have the financial means to expand the facilities. The record does not indicate that the letter represents a final decision or ruling from BOR that barred TCID from expanding the facilities to convey the water.

Based upon the finding that the BOR letter does not support the rejection of the application under NRS 533.370(1), this Court need not address TCID's contention that the statute should not have been applied to its application.

C. Remand

The Court finds that evidence of the TROA would be material to the State Engineer's determination of TCID's application. The Court also finds that the PSA also constitutes material evidence.

D. Defining Public Interest

The State Engineer specifically found, "the legislature directed him to review whether an application threatened to prove detrimental to the public interest not whether it proved beneficial to a public interest." ROA, 000015. The State Engineer then made the following findings:

1. That the diversion of the 100,000 acre-feet applied for here would be detrimental to Pyramid Lake and its fisheries. ROA Volume I Bates Stamp 00017

2. That the approval of Application 9330 would be contrary and adverse to the recovery of the Cui-ui and Section 207(a) of Public Law 101-618. ROA Volume I Bates Stamp 000017

3. It would threaten to prove detrimental to the public interest to jeopardize that interstate allocation by the granting of Application 9330. ROA Volume I Bates Stamp 00018

4. It may prove beneficial to the public interest of Churchill County to remove this water from the Truckee River system and send it to the Carson River system for endangered species that may exist there. ROA Volume I Bates Stamp 00018

5. It would threaten to prove detrimental to the public interest of protecting the threatened and endangered species in the Truckee River system to send the water to the Carson River System. ROA Volume I Bates Stamp 00018.

6. It may prove beneficial to the public interest of Churchill County to remove this water from the Truckee River System and send it to the Carson River system for water quality enhancement purposes. ROA Volume I Bates Stamp 00018.

7. It would threaten to prove detrimental to the public interest of protecting water quality in the lower Truckee River system if water was sent to the Carson River system. ROA Volume I Bates Stamp 000018.

8. The addition of water into the Newlands Project would bring benefits to that area. ROA Volume I Bates Stamp 00018.

9. A diversion of 100,000 acre feet would result in detrimental effects to the lower Truckee River, the threatened Lahontan Cutthroat Trout and the endangered Cui-ui. ROA Volume I Bates Stamp 00018-00019.

10. A denial of Application 9330 prevents the addition of the described benefits to the Newlands Project, but the denial does not remove any existing benefits from the Newlands Project area. ROA Volume I Bates Stamp 000019.

The State Engineer reiterated the above findings in his conclusion. ROA 00021. The State Engineer ultimately concluded, "after weighing the negative impacts that would be caused by the granting of Application 9330 that the approval of said application

would threaten to prove detrimental to the public interest." ROA Volume I Bates Stamp 000021.

The State Engineer's ruling clearly contradicts itself. The State Engineer clearly indicated perceived benefits to the proposed area that would receive the water and perceived detriments to the area from which the water would be removed. However, it appears to this Court that the State Engineer did not assign values to the detriments and benefits and then analyze whether the detriments outweighed the benefits. Instead, the State Engineer simply concluded that a denial would not harm the applicant.

Both parties cited, Pyramid Lake Paiute Tribe of Indians v. Washoe County, 112 Nev. 743 (1996) as setting forth how the State Engineer must analyze an application. The opinion clearly granted the State Engineer great deference in defining "public interest." Id at 747-48. The opinion also indicated that the definition may vary from case to case. The conclusion clearly stated that the holding was restricted to the instant case. "We conclude that the State Engineer adequately defined the public interest in this case ...." Id. at 753.

The facts in Washoe County clearly indicated that the State Engineer must weigh benefits against impacts. For example, the Supreme Court mentioned that the "State Engineer found that a minimal loss of wetlands would occur and that alkali flats would not "be substantially enlarged," resulting in no increase in dust hazards proving "detrimental to the public interest."" Id. at 752. The State Engineer also found in Washoe County, "that pumping groundwater would not unreasonably lower water tables." Id. These are determinations that occur after weighing benefits against impacts. These determinations required a finding of magnitude as well.

NRS 533.370(5) sets forth the standard "threatens to prove detrimental to the public interest." The Court finds that as a matter of law, the State Engineer must first define the definition of "public interest" used by the State Engineer in the instant case. Furthermore, the Court finds as a matter of law that the State Engineer must assign values to the detriments and benefits and then weigh the detriments against the benefits to determine whether TCID's application would "threaten to prove detrimental" to the public interest. The findings must state what magnitude the detriment would be to the fish.

Without the assignment of values and magnitude to each finding the Court cannot adequately determine whether the State Engineer made an appropriate determination as to whether approval or denial would indeed threaten to prove detrimental to the public interest. Additionally, the State Engineer did not clearly state in the findings that all of the water was necessary to protect the endangered fish. The Court could not discern from the findings what number level of fish existed, what levels were sought and what quantity of water was necessary to maintain existing levels.

ORDER

Based upon the foregoing findings and conclusions of law, IT IS HEREBY ORDERED:

1. The matter is remanded to the State Engineer.

2. On remand the State Engineer shall hear additional evidence regarding the TROA and PSA.

3. On remand the State Engineer shall define "public interest" for purposes of his decision.

4. On remand the State Engineer shall assign values and magnitudes to his findings of detriment and benefit and indicate how the comparison of benefits and detriments lead to his final conclusion.

5. On remand, the State Engineer shall hear additional evidence as to whether the current infrastructure can transport the additional water requested. If the State Engineer determines that the current infrastructure cannot be used to transport the additional water, then the State Engineer shall hear and consider additional evidence as to whether a substantial probability exists that TCID has the financial ability and resources to construct any improvements required to transport the water.

6. TCID's request for relief based upon alleged bias of the State Engineer is DENIED.

Dated this 15th day of October, 2008.

LEON ABERASTURI
DISTRICT JUDGE

CERTIFICATE OF SERVICE BY MAIL

The undersigned, an employee of the Third Judicial District Court, hereby certifies that I served the foregoing ORDER on the parties by depositing a copy thereof in the U.S. Mail at Fallon, Nevada, postage prepaid, as follow:

Michael J. VanZandt, Esq.
Attorney at Law
221 Main Street, 16th Floor
San Francisco, CA 94105-1936

George N. Benesch, Esq.
Attorney at Law
190 W. Huffaker Lane
Reno, NV 89511

Stephen M. Macfarlane, Esq.
U.S. Dept. of Justice, Environment
and Natural Resources Division
501 "I" Street, Ste. 9-700
Sacramento, CA 95814-2322

Michael L. Wolz, Esq.
Senior Deputy Attorney General
5420 Kietzke Lane, Ste. 202
Reno, NV 89511

Gordon DePaoli, Esq.
Attorney at Law
P.O. Box 2311
Reno, NV 89505

Don Springmeyer, Esq.
Attorney at Law
3811 W. Charleston Blvd., Ste 110
Las Vegas, NV 89102

Rusty Jardine, Deputy
Churchill County District
Attorney's Office
365 S. Maine Street
Fallon, NV 89406

William E. Carpenter, Esq.
Attorney at Law
215 W. Bridge Street, Ste. 3
Yerington, NV 89447

Steven D. King, Esq.
Attorney at Law
P.O. Box 1203
Fallon, NV 89407

Reno City Attorney's Office
P.O. Box 1900
Reno, NV 89505-1900

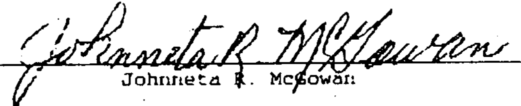
Brent T. Kolvet, Esq.
Attorney at Law
6590 S. McCarran Blvd., Ste. B
Reno, NV 89509-6112

William E. Isaeff, Esq.
Attorney at Law
P.O. Box 857
Sparks, NV 89432-0857

Paul Taggart, Esq.
Attorney at Law
108 N. Minnesota Street
Carson City, NV 89703

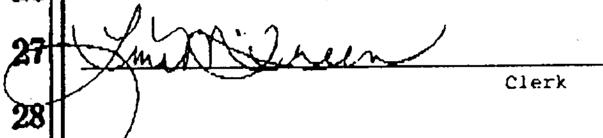
Garry Stone
Federal Water Master
290 S. Arlington Avenue, Ste. 3
Reno, NV 89501

DATED this 15th day of October, 2008.



Johnneta R. McGowan

Subscribed and sworn to this
15th day of October, 2008.



Clerk