IN THE SUPREME COURT OF THE STATE OF NEVADA

KATHY STEELE,
Appellant,
vs.
STATE ENGINEER FOR THE STATE OF NEVADA, WATER RESOURCES DEPARTMENT,
Respondent.

No. 49411

FILED

JAN 11 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court order denying a petition for judicial review in a water rights action. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

In 1998, appellant Kathy Steele purchased four acres of land in Washoe Valley, Nevada, and began a farming and livestock operation there. Following a complaint about Steele's use of ditch water, respondent, Nevada's State Engineer, determined that neither Steele, nor her predecessors in interest, had any rights to use Browns Creek Ditch water, according to a 1976 decree that had adjudicated all users' rights to water from that ditch. Consequently, the State Engineer ordered that Steele cease and desist from appropriating water from Browns Creek Ditch. Following Steele's petition for judicial review, the district court

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ultimately denied the petition and affirmed the State Engineer's decision.[1] Steele has appealed.

Under NRS 533.450(9), the State Engineer's decision is prima facie correct, and the party attacking it bears the burden of proof. Like the district court, this court reviews the State Engineer's decision for an abuse of discretion, and we must sustain the decision if it is supported by substantial evidence.[2] We may not substitute our judgment for that of the State Engineer, pass on witnesses' credibility, or reweigh the evidence.[3] While courts may construe a prior decree adjudicating water

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[1]Although Steele also purported to petition for judicial review of a pending application to appropriate water from "an unnamed ditch," the State Engineer has not yet approved or rejected that application. See NRS 533.371 (providing grounds for rejecting an application). Consequently, the district court properly did not consider that issue, and we likewise do not consider the pending application in resolving this appeal. See NRS 533.370(2)(c) (providing that the State Engineer may refrain from acting on an application while a court action is pending); Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981) (denying petitions for writs of mandamus to compel the State Engineer to act on applications to appropriate water while court action involving the same water was pending).

[2]State Engineer v. Curtis Park, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985). Substantial evidence is "that quantity and quality of evidence which a reasonable person could accept as adequate to support a conclusion." Installation & Dismantle v. SIIS, 110 Nev. 930, 932, 879 P.2d 58, 59 (1994) (quoting State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, n.1, 779 P.2d 497, 498 n.1 (1986)).

[3]State Engineer v. Morris, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991) (citing Revert v. Ray, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979)).

rights, we cannot properly consider extrinsic evidence in doing so; we may only consider evidence received in the State Engineer's proceedings.[4]

Having reviewed the record and the parties' briefs, we conclude that substantial evidence supports the State Engineer's decision; thus, the State Engineer did not abuse his discretion in concluding that Steele had no water rights and in ordering her to cease and desist from appropriating Browns Creek Ditch water. Despite Steele's claim that she has vested rights arising from her predecessor's pre-1913 vested rights,[5] all rights to appropriate water from Browns Creek Ditch were adjudicated in the 1976 Browns Creek Decree and under that decree, Steele's predecessors were not awarded any water rights appurtenant to her property.[6]

Steele cannot now re-litigate the Browns Creek Decree. NRS 533.210(1) provides that a "decree entered by the court . . . shall be final

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[4]Kent v. Smith, 62 Nev. 30, 32, 140 P.2d 357, 358 (1943); NRS 533.450(4).

[5]See NRS 533.085(1).

[6]See Revert, 95 Nev. 782, 603 P.2d 262 (recognizing implicitly that vested water rights can be conveyed or abandoned); Application of Filippini, 66 Nev. 17, 30, 202 P.2d 535, 541 (1949) (stating that the State Engineer is not precluded from ascertaining and determining water rights obtained prior to the 1913 Nevada Water Rights Law); Humboldt Land & Cattle Co. v. Allen, 14 F.2d 650 (D. Nev. 1926) (denying injunctive relief from the State Engineer's order determining that a vested water right must be reduced to provide sufficient water to downstream users).

and shall be conclusive upon all persons and rights lawfully embraced within the adjudication[.]" Steele apparently claims that her predecessors were not given specific notice of the Browns Creek litigation, because a 1939 aerial photograph showed an irrigation ditch running through her property and NRS 533.110(2) requires the State Engineer to notify each potential claimant who can be reasonably ascertained. But the Browns Creek Decree stated that all notices required by NRS Chapter 533 had been given to claimants and had been appropriately published in the newspaper.[7] Moreover, the record shows that the State Engineer's office met with a son of one of Steele's predecessors during the investigation preceding the adjudication, and it contains no evidence that the proper notice was not, in fact, provided. Regardless, no exceptions were taken to the State Engineer's order of determination and no appeal was taken from the 1976 decree, so Steele cannot challenge them now.[8]

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[7]NRS 533.095; NRS 533.110; NRS 533.165. Service by registered or certified mail or by publication of the State Engineer's order of determination is statutorily deemed to be sufficient notice to all parties in interest. NRS 533.165(6).

[8]See e.g., G. and M. Properties v. District Court, 95 Nev. 301, 594 P.2d 714 (1979) (concluding that NRS 533.170 mandates the rejection of late-filed exceptions to the State Engineer's order of determination); Carpenter v. District Court, 59 Nev. 48, 54, 84 P.2d 489, 491 (1938) (rejecting, as being contrary to the spirit of the Nevada Water Law, the contention that "one non-contesting water claimant in a great stream system, after years of expensive litigation, could come in and throw open the stream system to another decade of litigation"); Executive Mgmt. v. Ticor Title Ins. Co., 114 Nev. 823, 834, 963 P.2d 465, 473 (1998) (recognizing that the res judicata doctrine generally precludes relitigation of an action that has been finally determined by a court).

Accordingly, as the State Engineer did not abuse his discretion, we affirm the district court's order denying Steele's petition for judicial review.[9]

It is so ORDERED.

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Douglas

cc: Hon. Patrick Flanagan, District Judge
Kathy Carlene Steele
Attorney General Catherine Cortez Masto/Carson City
Washoe District Court Clerk

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[9]We reject, as meritless, Steele's other arguments, including any allegations of unauthorized practice of law or unethical conduct by the State Engineer's personnel and counsel, the need to protect wildlife, the presence of water, the ditch and a headgate on her property, or the ability to use sources of water other than from Browns Creek Ditch.

We grant Steele's January 8, 2008 request to withdraw her December 31, 2007 motion for injunctive relief from this court.