

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD M. SCHULZ AND KATHLEEN E. SCHULZ,  
TRUSTEES OF THE 1980 SCHULZ LIVING TRUST  
AS AMENDED; MARGARET ANN SCHULZ LOH  
AND MARTIN J. SCHULZ, TRUSTEES OF THE LMA  
1992 TRUST; AND MARTIN J. SCHULZ, TRUSTEE  
OF THE 1992 SMJ TRUST,

Appellants,

vs.

TRACY TAYLOR, NEVADA STATE ENGINEER,  
Respondent.

No. 51095

**FILED**

**MAR 27 2009**

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from a district court order granting a writ of mandamus in a water law action. First Judicial District Court, Carson City; James Todd Russell, Judge.

The district court order being challenged resolved a petition for a writ of mandamus, and motions for partial summary judgment and declaratory relief, by directing the issuance of a writ of mandamus compelling respondent Tracy Taylor, the Nevada State Engineer, to, among other things, "produce an order of determination of the relative rights to the groundwater in an area that encompasses the point of diversion of [appellants'] asserted vested groundwater rights" and then to file his determination in the same action below. In doing so, the district court defined the scope of the ordered adjudication, directing the State Engineer to additionally determine whether appellants' water rights were forfeited under NRS 534.090.

When our review of the documents before this court revealed a potential jurisdictional defect, we ordered appellants to show cause why this appeal should not be dismissed for lack of jurisdiction. Specifically, it

appeared that no final judgment had been rendered, as claims remained pending below, and that the order was not independently appealable under NRS 30.030. Appellants timely filed a response to our show cause order, arguing that the district court order is independently appealable as a declaratory judgment under NRS 30.030, that the order effectively resolved the State Engineer's "counterclaim" regarding NRS 534.090 and thus that portion of the order is appealable as a final judgment under NRAP 3A(b)(1), and that we should construe the order as an injunction appealable under NRAP 3A(b)(2). The State Engineer filed a reply to appellants' response, asserting that this court lacks jurisdiction because no final judgment has been entered and that the order is not an injunction.

After reviewing these arguments, this court subsequently entered a second show cause order on November 17, 2008, pointing out that the district court order was not an injunction, that a declaratory judgment is only appealable when it constitutes a final judgment under NRAP 3A(b)(1) or meets one of the other rules allowing an appeal, that construing an affirmative defense by the State Engineer as a "counterclaim" did not resolve the finality concerns noted in the show cause order, and that appellants had failed to address this court's questions regarding whether claims remained pending in the district court. Accordingly, this court's second show cause order again instructed appellants to address concerns that claims appeared to remain pending below.

Appellants have filed a timely response, asserting that, while a claim regarding a neighboring well does appear to be pending in the district court, they have decided to abandon that pending claim.

Additionally, appellants contend that because they failed to timely raise the neighboring well claim in the proper district court, the district court lacks jurisdiction over that pending claim. Appellants also argue again in their response that the district court order is independently appealable under NRS 30.030.

Respondent has filed a reply, asserting that appellants may not properly withdraw a claim pending in the district court by stating an intent to do so in a response to a show cause order from this court, but rather must formally withdraw the claim in district court.

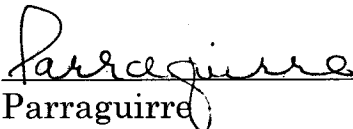
Having reviewed appellants' latest response and respondent's reply thereto, we conclude that, notwithstanding appellants' assertions of their intent to abandon the neighboring well claim, this claim remains pending in district court, and thus, there is no final judgment in this matter. See KDI Sylvan Pools v. Workman, 107 Nev. 340, 342, 810 P.2d 1217, 1219 (1991) (stating that the fact that a party may not be inclined to pursue a claim does not render the claim moot or operate as a formal dismissal of the claim). Appellants are required to seek dismissal of any pending claims in district court, as set forth in NRCP 41(a). Cf. Monroe, Ltd. v. Central Telephone Co., 91 Nev. 450, 452 n.2, 538 P.2d 152, 153 n.2 (1975) (specifying that NRCP 41(a)(2) contemplates that the plaintiff will present a voluntary motion to dismiss).

Further, even if we were to construe the district court order as, in part, a declaratory judgment, any such judgment would not be independently appealable in the absence of a final judgment. See NRS 30.090 (providing that declaratory judgments "may be reviewed as other orders, judgments and decrees"). Thus, under the applicable Nevada Rules of Appellate Procedure, a declaratory judgment is appealable only

when it constitutes a final judgment under NRAP 3A(b)(1) or meets one of the other rules allowing an appeal. See City of N. Las Vegas v. Dist. Ct., 122 Nev. 1197, 1203-04, 147 P.3d 1109, 1113-14 (2006) (interpreting a statute providing for appeals from orders granting or refusing to grant writs of mandamus as subject to the NRAP appealability rules); see also Williams v. Bromley, 622 A.2d 1171, 1172 (Me. 1993) (finding “no merit” to an argument that statutory language similar to that set forth in NRS 30.030 and NRS 30.090 provides an exception to Maine’s general rule that a party may only appeal from a final judgment).

Accordingly, as no final judgment has been entered in this matter and appellants have not pointed to a rule or statute that allows an appeal, we lack jurisdiction, and we

ORDER this appeal DISMISSED.

 \_\_\_\_\_, J.  
Parraguirre

 \_\_\_\_\_, J.  
Douglas

 \_\_\_\_\_, J.  
Pickering

cc: Hon. James Todd Russell, District Judge  
William E. Nork, Settlement Judge  
Harry W. Swainston  
Attorney General Catherine Cortez Masto/Carson City  
Carson City Clerk