IN THE SUPREME COURT OF THE STATE OF NEVADA

SFPP, L.P.; KINDER MORGAN OPERATING LIMITED PARTNERSHIP "D"; AND KINDER MORGAN GP, INC.,
Appellants,
vs.
CITY OF RENO,
Respondent.

No. 52946

FILED

FEB 03 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court summary judgment in a contract action. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

Appellants SFPP, L.P., Kinder Morgan Operating L.P., and Kinder Morgan G.P., Inc. (collectively, Kinder Morgan), own and operate an interstate high-pressure petroleum pipeline that passes through downtown Reno. As part of the respondent City of Reno's Transportation Rail Access Corridor (ReTRAC) project for the replacement of grade-level railroad tracks through downtown Reno with below-grade tracks, the City required that Kinder Morgan relocate substantial portions of its pipeline. After Kinder Morgan agreed to relocate but declined to bear the cost, the City sued Kinder Morgan, seeking declaratory and injunctive relief to force relocation of the pipeline at Kinder Morgan's expense. Kinder Morgan countersued, alleging a cause of action for inverse condemnation against the City.

Kinder Morgan and the City entered into an agreement to settle their disputes, in which Kinder Morgan agreed to relocate its petroleum pipeline for the City's ReTRAC project and to contribute $2.4 million as its maximum contribution, and the City agreed to pay for any

additional relocation costs. Relocation costs ultimately totaled $11 million, of which the City reimbursed Kinder Morgan for $8.6 million. The settlement agreement reserved to Kinder Morgan the right to pursue governmental entities, including the City, for reimbursement of Kinder Morgan's $2.4 million contribution under applicable state statutes, including NRS 360.569.

When the City refused to reimburse Kinder Morgan for its contribution of its relocation costs, Kinder Morgan filed the underlying district court complaint. Kinder Morgan moved for summary judgment and during the subsequent oral argument, the City brought an oral cross-motion for summary judgment. The district court ultimately granted the City's oral motion for summary judgment, holding that, as a matter of law, Kinder Morgan does not qualify as a public utility or a utility under NRS 704.020 and 704.021 and is, rather, a common carrier as defined by NRS 708.020, and accordingly, does not qualify for reimbursement under NRS 350.569(3).[1]

On appeal, Kinder Morgan argues that NRS 350.569(3) requires Kinder Morgan, as a public utility, to be reimbursed for its relocation costs,[2] and that summary judgment for the City was not

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[1]The parties are familiar with the facts and we do not recount them further except as is necessary for our disposition.

[2]Kinder Morgan also argues that its status as a common carrier does not prevent it from being a public utility. We first note that the district court's order did not indicate that being a public utility and a common carrier are mutually exclusive, it simply pointed out that although Kinder Morgan was not a public utility, it was a common carrier. We also conclude that being a common carrier under NRS 704.020 does not

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appropriate. We conclude that there are no material issues of law or fact—Kinder Morgan does not qualify as a public utility. As such, Kinder Morgan cannot claim reimbursement under NRS 350.569 for the $2.4 million that it contributed in relocation costs. We therefore affirm the judgment of the district court.

Standard of review

A district court's grant or denial of summary judgment must be reviewed "de novo, without deference to the findings of the lower court." Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate and shall be rendered forthwith when the pleadings and other evidence on file demonstrate that no genuine issue of material fact remains and that the moving party is entitled to judgment as a matter of law. Id. at 731, 121 P.3d at 1031; NRCP 56. "[W]hen reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." Wood, 121 Nev. at 729, 121 P.3d at 1029.

Statutory interpretation is an issue of law that we review de novo. Beazer Homes Nevada, Inc. v. Dist. Ct., 120 Nev. 575, 579, 97 P.3d 1132, 1135 (2004). When a statute is clear on its face, we will not look beyond the statute's plain language. Id. at 579-80, 97 P.3d at 1135. However, when a statute is susceptible to more than one interpretation, it is ambiguous, and the court must look beyond its plain meaning and give

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necessarily make or preclude that entity from also being a public utility under NRS 350.569.

the statute the meaning that "'reason and public policy would indicate the legislature intended.'" Id. at 580, 97 P.3d at 1135 (quoting State, Dep't Mtr. Vehicles v. Vezeris, 102 Nev. 232, 236, 720 P.2d 1208, 1211 (1986)). Thus, when a statute is ambiguous, we may turn to legislative history to determine the Legislature's intent. City of N. Las Vegas v. Dist. Ct., 122 Nev. 1197, 1205, 147 P.3d 1109, 1115 (2006).

> Further, it is the duty of this court, when possible, to interpret provisions within a common statutory scheme "harmoniously with one another in accordance with the general purpose of those statutes" and to avoid unreasonable or absurd results, thereby giving effect to the Legislature's intent.

Southern Nev. Homebuilders v. Clark County, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (quoting Washington v. State, 117 Nev. 735, 739, 30 P.3d 1134, 1136 (2001)).

Relocation cost reimbursement under NRS 350.569(3)

In order for Kinder Morgan to obtain the $2.4 million it expended in relocation costs, the law requires it to be a considered a public utility under NRS 350.569. Kinder Morgan argues that while NRS Chapter 350 fails to include a definition, it is a public utility within the meaning of NRS 350.569 because the statute contains no restrictions on the common phrase "public utility" and, in fact, uses the inclusive and expansive word "any."

In analyzing this issue, the district court concluded that Kinder Morgan does not qualify as a public utility under NRS 704.020 or 704.021. The district court noted that "[i]f the legislature wanted to include any utility or a common carrier it could easily have included such entities in the statute." We agree.

Because the term "public utility" is susceptible to more than one interpretation, we conclude that it is ambiguous. See Davies Warehouse Co. v. Bowles, 321 U.S. 144, 147 (1944) ("Congress, in omitting to define 'public utility' as used in the Act, left to the Administrator and the courts a task of unexpected difficulty . . . . Relevant authorities and considerations are numerous and equivocal, and different plausible definitions result from a mere shift of emphasis."). Ordinarily, this court first looks to the legislative history to determine the Legislature's intent when defining an ambiguous term. See City of N. Las Vegas, 122 Nev. at 1205, 147 P.3d at 1115. Unfortunately, the legislative history of NRS 350.569 sheds no light on what the term means.

Thus, in accordance with our duty and to give the statute the meaning that "reason and public policy would indicate the legislature intended," we look to the chapters of NRS that deal with public utilities, namely NRS Chapters 703 and 704, to understand the meaning of the term "public utility" in this context.[3] Beazer Homes Nevada, 120 Nev. at

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[3]We reject Kinder Morgan's argument that this court may not look to NRS Chapter 704 for the definition of "public utility" because of Ronnow v. City of Las Vegas, 57 Nev. 332, 345-46, 65 P.2d 133, 137 (1937). We conclude that our determination in Ronnow that the definition found in NRS 704.020 is "confined to the particular classes of public utilities dealt with in the Public Service Commission Act of March 28, 1919" is not controlling. Id. at 345-46, 65 P.2d at 137; see 1919 Nev. Stat., ch. 109, at 201. We conclude that this statement is dicta because "it is 'unnecessary to a determination of the questions involved,'" Argentena Consol. Mining Co. v. Jolley Urga, 125 Nev. ___, ___, 216 P.3d 779, 785 (2009) (quoting St. James Village, Inc. v. Cunningham, 125 Nev. ___, ___, 210 P.3d 190, 193 (2009)), namely whether the City of Las Vegas, by the powers issued to it as a municipal corporation, was authorized to issue bonds to purchase or construct a municipal power distribution system to furnish electrical

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580, 97 P.3d at 1135 (quoting Vezeris, 102 Nev. at 236, 720 P.2d at 1211). NRS 704.020(3) provides:

> The provisions of [Chapter 704] and the term "public utility" apply to all railroads, express companies, car companies and all associations of persons, whether or not incorporated, that do any business as a common carrier upon or over any line of railroad within this State.

The next inquiry is whether Kinder Morgan qualifies as a public utility under NRS 704.020. In reference to this statute, the parties argue over whether Kinder Morgan "do[es] any business as a common carrier upon or over any line of railroad within this State." NRS 704.020(3) (emphasis added). We conclude that this is an issue that can be resolved by looking at the plain language of the statute. It is clear from the facts that Kinder Morgan's pipeline ran under the railroad, not upon or over it. The Legislature used the specific words of "upon or over" instead of a more general term, evidencing an intention to limit the application of this part of the statute. See Southern Nev. Homebuilders v. Clark County, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005). Consequently, NRS 704.020(3) does not apply to Kinder Morgan's underground pipeline.[4]

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energy for private uses. Ronnow, 57 Nev. at 340-41, 65 P.2d at 135. Because dicta is not controlling, we are free to use the definition of public utility in NRS 704.020 to interpret NRS 350.569. Argentena Consol., 125 Nev. at ___, 216 P.3d at 785; Kaldi v. Farmers Ins. Exch., 117 Nev. 273, 282, 21 P.3d 16, 22 (2001).

[4]Moreover, Kinder Morgan argues that under the common meaning of the term, it is a public utility. However, even under a dictionary definition, Kinder Morgan would still not qualify as a public utility

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Additionally, the legislative history of NRS 704.020 supports the conclusion that not all common carriers are public utilities. NRS 704.020's predecessor defined public utilities as:

> [T]he transportation of passengers and property . . . within the state, and to the receiving, switching, delivering, storing and hauling of such property, . . . and shall apply to . . . all associations of persons, whether incorporated or otherwise, that shall do any business as common carriers upon or over any line of railroad . . . .

1919 Nev. Stat., ch. 109, § 7, at 201. In 1963, NRS 704.020's public utility provision was altered to specifically include pipelines—it provided that the definition of public utility applied to "[a]ny common or contract carrier engaged in the transportation of passengers and property, wholly by rail, or partly by rail and partly by water, or by air, or property by pipeline." 1963 Nev. Stat., ch. 373, § 1, at 812 (emphasis added). However, in 1971, the Legislature removed the term "pipeline" from this provision and altered it to read more generally "[a]ny common or contract carrier engaged in the transportation of passengers and property, except common

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because it does not provide necessary services to the public, and the public is not entitled to use its products as a matter of right. See Black's Law Dictionary 1581-82 (8th ed. 2004); 73B C.J.S. Public Utilities § 2 (2004). Kinder Morgan ships refined petroleum fuel to parties who in turn distribute the fuel either for wholesale or retail sale. The determination of whether Kinder Morgan is a public utility ultimately boils down to whether the sale of petroleum to middlemen constitutes a public service or selling to the public. We conclude that because the public cannot access its petroleum as a matter of right, Kinder Morgan does not qualify as a public utility under the common dictionary definition. See 73B C.J.S. Public Utilities § 2 (2004).

or contract motor carriers subject to the provisions of chapter 706 of NRS." 1971 Nev. Stat., ch. 383, § 156, at 725. In 1985, NRS 350.569 was adopted. Subsequent to NRS 350.569's adoption, NRS 704.020's definition of public utilities, which included common carriers that transport passengers and property, was removed by the Legislature. See 1997 Nevada Stat., ch. 482, § 66, at 1904-05. Presently, the only reference to common carriers involves railroads. See NRS 704.020. We conclude that the Legislature's deliberate removal of common carriers from NRS 704.020 indicates that the Legislature did not intend for all common carriers to be considered public utilities.[5]

Accordingly, we conclude that Kinder Morgan is not a public utility under NRS 350.569, and that summary judgment in the City's favor was appropriate.[6]

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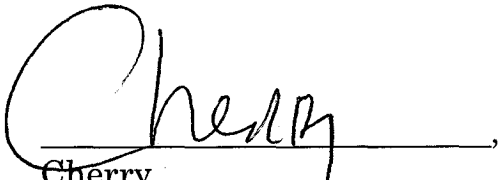
[5]While both parties argue for or against Kinder Morgan being a public utility by citing to cases from other jurisdictions, the fact that an enterprise is a public utility in one state is immaterial as to its character in another. See 73B C.J.S. Public Utilities § 2 (2004); Nevada-California Power Co. v. Borland, 245 P. 209, 211 (Cal. Ct. App. 1926).

[6]Kinder Morgan also asks this court to conclude that NRS 350.569 is applicable in this case even though no actual formal eminent domain proceedings commenced. However, because we have concluded that Kinder Morgan is not a public utility for the purposes of NRS 350.569, this contention is moot.

Based on the foregoing discussion, we

ORDER the judgment of the district court AFFIRMED.



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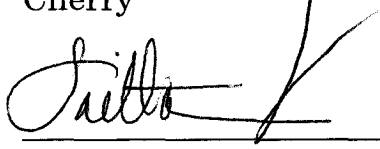

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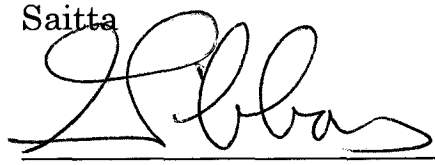

_____, J.
Gibbons

cc: Hon. Jerome Polaha, District Judge
James Georgeson, Settlement Judge
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