IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD M. SCHULZ AND KATHLEEN E. SCHULZ, TRUSTEES OF 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. 53731

ORDER OF AFFIRMANCE

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

Appellants Donald, Kathleen, Margaret, and Martin Schulz sought to sell their groundwater rights to Carson City. Appellants applied to the Nevada Division of Water Resources to change the manner and place of use of their groundwater rights to effectuate the sale, but respondent, the State Engineer, did not act on their applications. Appellants filed a complaint and moved for partial summary judgment, declaratory relief, and a writ of mandamus. The district court denied summary judgment and declaratory relief, but granted the writ of mandamus and directed the State Engineer to determine appellants' water rights. In its order, the district court also found that appellants' water rights might be subject to forfeiture under NRS 534.090(1), and that NRS 534.090(1) applies retroactively and is constitutional under Town of Eureka v. State Engineer, 108 Nev. 163, 826 P.2d 948 (1992). Appellants

appealed in February 2008, but we dismissed the appeal for lack of jurisdiction due to a pending claim in district court. In April 2009, the district court dismissed that final claim, enabling appellants to file this appeal.

The parties are familiar with the facts and we do not recount them further except as necessary to our disposition.

DISCUSSION

Appellants argue that the district court erred in determining (1) that NRS 534.090(1) is retroactively applicable to its claimed groundwater rights, and (2) that NRS 534.090(1) is constitutional. We conclude that these arguments lack merit and affirm the decision of the district court.[1]

I. NRS 534.090(1) may be applied retroactively

A. Standard of review

Statutory construction is a matter of law. Valdez v. Employers Ins. Co. of Nev., 123 Nev. 170, 174, 162 P.3d 148, 151 (2007). Courts shall review the retroactive application of a statute de novo. Scott v. Boos, 215 F.3d 940, 942 (9th Cir. 2000).

B. History of NRS 534.090(1)

Under Nevada's first comprehensive water law, enacted in 1913, if the owner of water rights failed to use his water beneficially for

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[1]Appellants argue that the district court erred by (1) failing to grant equitable relief, (2) failing to consider issue preclusion, (3) failing to resolve the definitional ambiguities of NRS 534.090(1), and (4) directing the State Engineer to conduct forfeiture proceedings. Appellants also contend that NRS 534.090(1) affects an unconstitutional taking and is an unconstitutional bill of attainder. After careful review, we conclude that these arguments lack merit.

five successive years, the State could consider those rights abandoned and the owner would forfeit the rights. N.C.L. § 7897; Town of Eureka, 108 Nev. at 166, 826 P.2d at 950. In 1939, the Legislature enacted laws for the appropriation of groundwater for systems constructed after the 1913 act. N.C.L. §§ 7987-7993; Town of Eureka, 108 Nev. at 166, 826 P.2d at 950..

In 1947, the Legislature amended these prior acts, stating that five successive years of non-use of groundwater resulted in forfeiture of undetermined rights and abandonment of determined rights. N.C.L. § 1993.18a; Town of Eureka, 108 Nev. at 166, 826 P.2d at 950. This section became NRS 534.090(1). Id. In 1967, the Legislature applied the forfeiture statute to all groundwater rights in existence by adding the language "whether such right be initiated after or before March 25, 1939." 1967 Nev. Stat., ch. 383, § 3, at 1053. The Legislature also eliminated any difference between undetermined and determined rights, making all groundwater subject to forfeiture. Town of Eureka, 108 Nev. at 167, 826 P.2d at 950.

In 1981, the Legislature stated that the required five-year period of non-use must begin after the 1967 retroactivity amendment. Id. This change "express[ed] the [L]egislature's intent that the statute apply retroactively to water rights present on April 15, 1967." Id.

C. Manse Spring and Town of Eureka

We considered the forfeiture of vested water rights in the cases of In re Waters of Manse Spring, 60 Nev. 280, 108 P.2d 311 (1940), and Town of Eureka v. State Engineer, 108 Nev. 163, 826 P.2d 948 (1992). Appellants rely on Manse Spring to support their argument that NRS 534.090(1) does not apply retroactively because their claimed groundwater rights vested prior to 1913. We disagree.

In Manse Spring, we considered the earliest form of the forfeiture statute, which did not make specifications for groundwater. Id. at 285-86, 108 P.2d at 314. We held that subjecting water rights acquired before 1913 to forfeiture would impair those rights, in violation of a protective measure stating that vested rights should not be impaired by provisions of the water act. Id. at 289, 108 P.2d at 315-16. Accordingly, "rights acquired before 1913 could only be lost in accordance with the law in existence at the time of the enactment of said 1913 statute, namely, intentional abandonment." Id. at 289, 108 P.2d at 316.

Since the decision in Manse Spring, the Nevada Legislature enacted the previously mentioned amendments to the original 1913 water law. We considered the effect of these amendments in Town of Eureka. There, the State Engineer determined that the town, which sought to change the use of its water, forfeited some of the water through non-use of a predecessor under a retroactive application of NRS 534.090(1). Town of Eureka, 108 Nev. at 165, 826 P.2d at 949. Even though the town argued that its rights had vested prior to 1913, and should be protected under the rule of Manse Spring, the district court concluded that NRS 534.090(1) was constitutional and as applied retroactively, could forfeit the town's water rights. Id.

After a comprehensive review of the 1947, 1967, and 1981 amendments, we held that the Legislature expressed intent "that the statute apply retroactively to water rights present on April 15, 1967." Town of Eureka, 108 Nev. at 167, 826 P.2d at 950. We distinguished Manse Spring because that case involved non-use of prestatutory surface water rights. Id. at 168, 826 P.2d at 951. Also, contrary to the 1913 statute considered in Manse Spring, the Legislature now "has affirmatively stated that the forfeiture provision enacted in 1967 applies

to all groundwater rights, even those in existence at the time of enactment." Id.

Appellants attempt to distinguish Town of Eureka from their claimed groundwater rights because, in that case, the town held permitted groundwater rights instead of pre-1913 vested groundwater rights. However, as we explained, "[v]ested water rights are those already established either through diversion and beneficial use or through a state permit." Id. at 167, 826 P.2d at 951. NRS 534.090(1) makes no distinction between how groundwater rights became vested for the purposes of forfeiture. In 1981, the Legislature affirmatively stated that the 1967 forfeiture provision applies to all groundwater rights, regardless of when or in what manner acquired. 1981 Nev. Stat., ch. 736, § 7, at 1842. We conclude that the district court properly determined that appellants' claimed groundwater rights may be subject to forfeiture pursuant to the legislative amendments of NRS 534.090(1) and our holding in Town of Eureka, and a retroactive application of NRS 534.090(1) was not in error.

II. NRS 534.090(1) is constitutional as retroactively applied

A. Standard of review

This court reviews the constitutionality of statutes de novo. Douglas Disposal, Inc. v. Wee Haul, LLC, 123 Nev. 552, 557, 170 P.3d 508, 512 (2007). Statutes are presumed to be valid, and the burden to demonstrate unconstitutionality is on the challenger. Id. When legislative enactments do not impinge on fundamental rights or affect a suspect class, they only violate due process and equal protection if they are not rationally related to a legitimate government purpose. Arata v. Faubion, 123 Nev. 153, 159, 161 P.3d 244, 248 (2007); Tarango v. SIIS, 117 Nev. 444, 454, 25 P.3d 175, 182 (2001). Courts generally do not consider water rights to be subject to strict scrutiny. See Foothills of

Fernley, LLC v. City of Fernley, No. 3:06-CV-00411-BES-VPC, 2008 WL 819997, at *5 (D. Nev. Mar. 21, 2008) (deciding the maintenance of city's water supply is a legitimate government purpose and reviewing an equal protection challenge regarding dedication of water rights under the rational basis test); see also Kawaoka v. City of Arroyo Grande, 17 F.3d 1227, 1234-37 (9th Cir. 1994) (upholding a temporary water moratorium under the rational basis test); Matter of Yellowstone River, 832 P.2d 1210, 1217 (Mont. 1992) (holding that statutes under state's regulatory power concerning water rights must be reasonably related to legislative objectives to satisfy due process).

B. NRS 534.090(1) does not violate substantive due process

Appellants argue that a retroactive application of the forfeiture statute is not a constitutionally valid exercise of police power, denying appellants due process. We disagree.

The Due Process Clause of the Fourteenth Amendment prevents "retrospective laws from divesting vested rights." Town of Eureka, 108 Nev. at 167, 826 P.2d at 950. In Town of Eureka, we stated that the constitutionality of retroactive application of a law depended on "a balance between vested property rights and the police power of the State. Water rights are subject to regulation under the police power as is necessary for the general welfare." Id.

In Nevada, "[b]eneficial use shall be the basis, the measure and the limit of the right to the use of water." NRS 533.035. The preeminent public policy concerning water rights is beneficial use because water remains a limited resource that belongs to the public. Preferred Equities v. State Engineer, 119 Nev. 384, 389, 75 P.3d 380, 383 (2003). The State has the power to prescribe how the water may be used. Town of Eureka, 108 Nev. at 167, 826 P.2d at 950.

Appellants dispute that beneficial use is a sufficient public policy interest, given that the Legislature exempted surface water from forfeiture in 1999. NRS 533.060(2). However, beneficial use still remains the preeminent public policy concerning groundwater forfeiture. NRS 534.090(1). This change by the Legislature regarding surface water was not a repeal of beneficial use as the preeminent public policy regarding water in Nevada. See NRS 533.035; NRS 534.090(1). The statute is rationally related to the legitimate government interest of regulating a limited natural resource to its active beneficial uses and does not violate appellants' due process rights.

C. NRS 534.090(1) does not violate equal protection

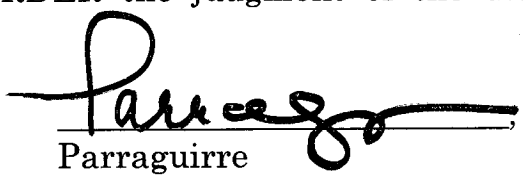
Appellants also argue that because the Legislature exempted surface water from forfeiture, NRS 534.090(1) now violates equal protection by subjecting groundwater to potential forfeiture. We disagree.

The Equal Protection Clause of the Fourteenth Amendment guarantees people equal protection of the laws. U.S. Const. amend. XIV, § 1. The two classes of similarly situated people that the law purports to treat differently are holders of a vested surface water right and holders of a vested groundwater right. See NRS 533.060(2); NRS 534.090(1).

The legislative history from Assembly Bill 380, which amended NRS 533.060(2), explains the reasons for a difference between surface water and groundwater in the forfeiture context. See Hearing on A.B. 380 Before the Assembly Natural Resources, Agricultural, and Mining Comm., 70th Leg. (Nev., March 10, 1999). The statute for groundwater has been amended several times since its implementation and contains a process for forfeiture, including notice by the State Engineer after four successive years of non-use. NRS 534.090(1)-(2). The State Engineer explained that in certain areas of Nevada, surface water

can appear and disappear at different times, subjecting the water to periods of non-use. Hearing on A.B. 380 Before the Assembly Natural Resources, Agricultural, and Mining Comm., 70th Leg. (Nev., March 10, 1999). The testimony by the State Engineer regarding the potential loss of rights due to changing surface water conditions in different regions of Nevada demonstrates the rational basis for this classification. NRS 534.090(1) does not violate equal protection.

Accordingly, we ORDER the judgment of the district court AFFIRMED.



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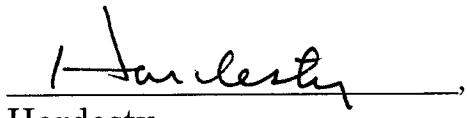

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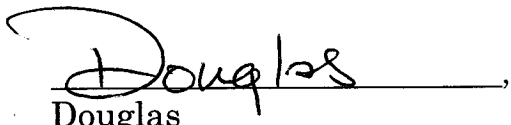

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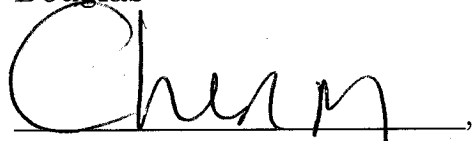

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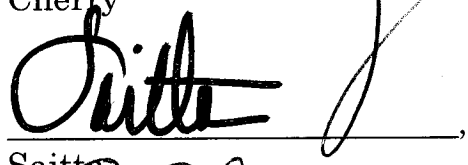

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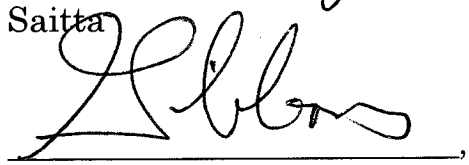

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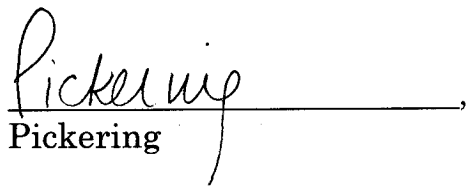

_____, J.
Pickering

cc: Hon. James Todd Russell, District Judge
Harry W. Swainston
Attorney General/Carson City
Carson City Clerk