

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF APPLICATION
NO. 71860 FILED TO APPROPRIATE
THE PUBLIC WATERS OF AN
UNDERGROUND SOURCE WITHIN
THE CARSON DESERT SEGMENT
HYDROGRAPHIC BASIN, CHURCHILL
COUNTY, NEVADA

No. 53958

FILED

APR 29 2011

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

ROBERT R. KENT; MURIEL S. KENT;
AND I.H. KENT CO., INC.,
Appellants,

vs.

TRACY TAYLOR, STATE ENGINEER;
AND THE STATE OF NEVADA
DEPARTMENT OF CONSERVATION
AND NATURAL RESOURCES,
DIVISION OF WATER RESOURCES,
Respondents.

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing a petition for judicial review in a water rights action. Third Judicial District Court, Churchill County; David A. Huff, Judge.

FACTUAL BACKGROUND

Since 1960, appellants Robert Kent, Muriel Kent, and I.H. Kent Co., Inc. (collectively, the Kents), used certificated groundwater rights to operate a grocery store and nursery in Fallon, Nevada. In 2004, the Kents sold their water rights to Churchill County for the development of a municipal water system, which they arranged through a purchase transfer agreement that included terms contingent upon the subsequent approval of the transfer by the State Engineer.

In 2005, Churchill County filed an application to change the point of diversion, place, and manner of use of the water. At this time, the State Engineer's records indicated that Churchill County owned the water in question. As part of the State Engineer's inquiry into the request, and pursuant to the Kents' agreement with Churchill County, Robert and Muriel Kent provided information to the State Engineer in the form of affidavits. The Kents' attorney contacted the State Engineer several times, asking for a decision on the application.

On July 1, 2005, the State Engineer approved Churchill County's application in part, but approved only ten acre feet of water for its new use, rather than the full amount of water. The State Engineer sent notice of this decision to Churchill County, which was the owner of record of the water right based upon the change of diversion application filed by Churchill County, but did not send notice to the Kents. Churchill County's district attorney sent the Kents' attorney a fax of the State Engineer's decision on August 7, 2008. While Churchill County did not protest the State Engineer's decision, the Kents filed a petition for judicial review in Washoe County, opposing the reduced amount of water.¹

The State Engineer filed a motion to dismiss or stay the briefing in the matter. The State Engineer alleged that: (1) the Kents filed the petition in the wrong court because Churchill was the location of the controversy and, thus, the applicable county for the proceeding; and (2) the district court lacked jurisdiction due to the Kents' untimely petition under NRS 533.450(1). The district court stated that it lacked jurisdiction

¹Churchill County stated its intent to participate in the matter as the applicant and as an interested party on August 25, 2008.

because the Kents should have filed their petition in Churchill County. The court also granted the State Engineer's motion and transferred the matter to Churchill County for resolution.

The State Engineer petitioned to this court for a writ of prohibition or certiorari, challenging the transfer of the matter to Churchill County. This court denied the State Engineer's petition, stating that the State Engineer could appeal the change of venue under NRAP 3A(b)(2) or renew his motion to dismiss in Churchill County based on the argument that the Kents did not file their petition for judicial review in a timely manner. Taylor v. District Court, Docket No. 52671 (Order Denying Petition for Writ of Prohibition or Certiorari, Dec. 3, 2008).

The State Engineer chose not to appeal the change of venue, and instead renewed his motion to dismiss in Churchill County. There, the district court granted the State Engineer's motion, stating that the Kents did not file their petition for judicial review within the thirty-day period of appeal under NRS 533.450(1). The Kents now appeal, arguing that the district court (1) erred in dismissing their petition for judicial review as untimely when they filed the petition within thirty days of receiving notice of the State Engineer's decision, and (2) unconstitutionally applied NRS 533.450(1) in dismissing their petition when they received no notice of the State Engineer's final decision in the matter.²

²The Kents argue that improper venue should not result in dismissal of their petition for judicial review and that substantial evidence does not support the State Engineer's decision to impose a duty on the certificated water right. Both of these arguments are not properly before the court. In its order denying the State Engineer's petition, this court stated that an appeal was the proper relief for the venue transfer issue. Taylor v.
continued on next page . . .

For the reasons set forth below, we affirm the district court's dismissal of the Kents' petition for judicial review. The parties are familiar with the facts and procedural history of the case, and we do not recount them further except as is necessary for our disposition.

DISCUSSION

Standard of review

When reviewing an administrative decision, this court's role is identical to that of the district court: to review the evidence presented to the agency in order to determine whether the agency's decision was arbitrary or capricious and was thus an abuse of the agency's discretion. Cramer v. State, DMV, 126 Nev. ___, ___, 240 P.3d 8, 10 (2010) (quotations omitted). Statutory interpretation and other question of law are reviewed de novo. Id. This court will not go beyond the plain language of a facially clear statute in order to determine legislative intent. Id.

The district court lacked jurisdiction to hear the Kents' petition pursuant to NRS 533.450(1)

The Kents argue that the district court erred in dismissing their petition for judicial review as untimely because they filed the petition within thirty days of receiving notice of the State Engineer's decision. We disagree.

... continued

District Court, Docket No. 52671 (Order Denying Petition for Writ of Prohibition or Certiorari, Dec. 3, 2008). The State Engineer chose not to appeal the transfer of the case from Washoe to Churchill County, but instead renewed his motion to dismiss in Churchill County, as this court suggested. Id. Regarding the State Engineer's underlying decision, the district court in Churchill County did not reach the merits of the State Engineer's decision because it dismissed the Kents' petition.

Water law proceedings are special in nature and strictly limited to the procedures provided by statute. Application of Filippini, 66 Nev. 17, 27, 202 P.2d 535, 540 (1949). NRS 533.450(1) governs the appeal of decisions of the State Engineer and allows an aggrieved person to file a petition for judicial review of such decisions. The aggrieved person has thirty days to commence proceedings in the proper court after the State Engineer renders a decision. NRS 533.450(1). In Nevada, when a person seeks judicial review of an administrative decision, strict compliance with the statutory requirements for review is a precondition to jurisdiction by the reviewing court. Kame v. Employment Security Dep't, 105 Nev. 22, 25, 769 P.2d 66, 68 (1989). Further, “[s]ubject matter jurisdiction is a question of law subject to de novo review.” Ogawa v. Ogawa, 125 Nev. ___, ___, 221 P.3d 699, 704 (2009).

NRS 533.450(1) permits the filing of petitions for judicial review within thirty days of receiving notice of the State Engineer’s final decision

This court considered the mandatory statutory notice requirements relating to another section of the water code in G. & M. Properties v. District Court, 95 Nev. 301, 304, 594 P.2d 714, 716 (1979). In that case, the respondents failed to file exceptions challenging the order of the State Engineer in the time required by NRS 533.170. Id. We stated that the statute’s language, which required filing a notice of exception to the order “[a]t least 5 days prior to the date set for hearing,” was plain and unambiguous. Id. at 304-05, 594 P.2d at 716 (quoting NRS 533.170(1)) (emphasis omitted). We concluded that the district court had no jurisdiction to act on the respondents’ untimely filed exceptions. Id. at 304, 306, 594 P.2d at 716-17.

Similarly, we conclude that the language of NRS 533.450(1) is plain and unambiguous. See Bacher v. State Engineer, 122 Nev. 1110, 1117, 146 P.3d 793, 798 (2006) (stating that this court will not go beyond the plain language of a facially clear statute). Pursuant to that statute, anyone aggrieved by the State Engineer's decision may file a petition for judicial review within thirty days "after the rendition of the order or decision in question." NRS 533.450(1). The statute explicitly states that the aggrieved person must file the petition within thirty days of the rendering of the State Engineer's decision, not within thirty days of receiving notice of the decision. NRS 533.450(1). While such a legislative decision may sometimes result in hardship for the parties, this court does not substitute its judgment for that of the Legislature. Caruso v. Nev. Emp. Sec. Dep't, 103 Nev. 75, 76, 734 P.2d 224, 225 (1987).

NRS 533.450(1) does not require the State Engineer to provide notice to the Kents

We further conclude that neither NRS 533.450(1) nor the facts of this case support the Kents' contention that the State Engineer should have provided them with notice of its decision.

The State Engineer noticed the applicant and current owner of the water rights, Churchill County, with its decision, and Churchill County chose not to file a petition for judicial review within the thirty-day appeal period. Churchill County did not alert the Kents of the State Engineer's decision until after the thirty-day appeal period had passed. Although the State Engineer may have been aware of the Kents' interest in the case from the information they provided and from correspondence with Kents' attorney, NRS 533.450(1) does not require the State Engineer to give notice of its decision to the Kents, who are non-applicant former owners of water rights, and who were not parties to the proceedings before

the State Engineer.³ For the same reasons, the Kents cannot claim they are aggrieved parties under NRS 533.450(1) because the decision did not affect or otherwise relate to an administration of their determined rights. See Howell v. State Engineer, 124 Nev. 1222, 1227-28, 197 P.3d 1044, 1048 (2008).

Refusing to impose a duty on the State Engineer to notice parties not on record with the State Engineer is also consistent with our previous decision that the State Engineer need not provide notice of the cancellation of water rights to owners who do not appear on record with the State Engineer. State, Dep't of Conservation v. Foley, 121 Nev. 77, 79, 109 P.3d 760, 761 (2005) (holding that Division of Water Resources was not required to provide notice of cancellation of water rights to persons who obtained water rights but did not become the holders of record with the division by reporting the ownership through a report of conveyance). Pursuant to Foley, nothing in the statutory scheme requires notice of cancellation to a person whose interest in the water right is not on file with the State Engineer. See id. at 82-83, 109 P.3d at 763. The Kents no longer owned the water, they did not file as an interested party, the State

³At oral argument, the Kents argued that the State Engineer should have been put on notice that the Kents were interested parties entitled to notice based upon its purchasing agreement that is common in all water rights transfers. However, the record on appeal does not show that this purchasing agreement was placed before the State Engineer at any time. Because the purchasing agreement was not before the State Engineer, we decline to address the Kents' argument that the agreement imposed a duty of notice on the State Engineer. See State, Bd. of Equalization v. Barta, 124 Nev. 612, 621, 188 P.3d 1092, 1098 (2008) (concluding that issues not raised to an administrative body are waived when raised for the first time before the district court on judicial review).

Engineer did not have a record of the Kents as an interested party, and the Kents merely provided information as former owners pursuant to their purchase agreement with Churchill County. See id.

Due process does not require the State Engineer to provide notice to the Kents

The Kents claim that as an interested party in Churchill County's application, their substantial rights have been affected due to their inability to appeal the State Engineer's decision through a petition for judicial review. They argue that, in order to satisfy due process, this court should interpret NRS 533.450(1) to require the State Engineer to provide notice to interested parties such as the Kents before the thirty-day period for filing a petition for judicial review ends. Under the facts of this case, we disagree.

We previously decided that the cancellation of an owner's permit to use water in the absence of receipt of notice did not violate due process when the State Engineer fully complied with the statutory directive requiring additional notice. Bailey v. State of Nevada, 95 Nev. 378, 381, 594 P.2d 734, 736 (1979); see also Engelmann v. Westergard, 98 Nev. 348, 353-54, 647 P.2d 385, 389 (1982). Again, we also decided that the Division of Water Resources does not need to provide notice of cancellation of water rights to purchasers of water rights who do not file a statutorily required report of conveyance with the State Engineer, in which the State Engineer only considers owners mentioned in the report of conveyance as interested parties in water permit decisions. Foley, 121 Nev. at 83, 109 P.3d at 763. Thus, due process does not require the State Engineer to provide notice to the Kents, who are neither applicants nor owners of the water rights in question and who do not appear as a party of interest in the records of the State Engineer. Here, the State Engineer

properly noticed Churchill County of the decision to grant the application in part, and any failure regarding notice to the Kents “cannot be attributed to any neglect of duty on the part of the State Engineer.” See Bailey, 95 Nev. at 381, 594 P.2d at 736.

Constitutional application of NRS 533.450(1)’s thirty-day appeal period

The Kents argue that the district court’s application of NRS 533.450(1) is unconstitutional in that it requires a petition for judicial review to be filed within thirty days of the State Engineer’s decision under circumstances when there is no notice to an interested party such as the Kents. We disagree.

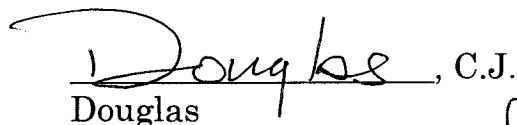
The Fourteenth Amendment to the United States Constitution provides a right to due process of law before any state can deprive a person of life, liberty, or property. U.S. Const. amend. XIV. This court extends the notice requirement of due process to administrative pleadings in order that “the parties are sufficiently apprised of the nature of the proceedings so that there is no unfair surprise.” Nevada St. Apprenticeship v. Joint Appren., 94 Nev. 763, 765, 587 P.2d 1315, 1317 (1978). The constitutionality of statutes is a question of law that we review de novo. Father & Sons v. Transp. Servs. Auth., 124 Nev. 254, 262, 182 P.3d 100, 105 (2008).

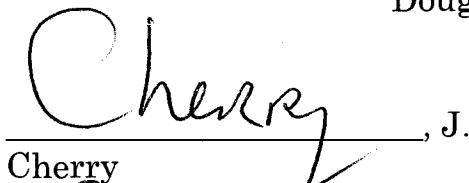
The Kents rely upon several decisions of this court in administrative cases to support the proposition that due process requires notice regarding judicial review and the Kents state that this court has a policy of deciding petitions for judicial review on the merits rather than dismissing them on technical grounds. We conclude that the Kents’ reliance on such cases is misplaced and that these cases do not announce such a policy on behalf of this court.

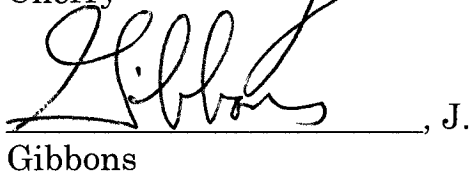
Although the Kents assert that they were interested parties entitled to notice, there is nothing in the record that would have apprised the State Engineer of a duty to give notice to the Kents, who were non-applicant former owners of water rights and not parties to the proceedings before the State Engineer. Given the jurisprudence of this court regarding due process and the cancellation of an owner's water rights, addressed above, we conclude that the district court properly applied NRS 533.450(1) to the Kents' untimely petition for judicial review of the State Engineer's decision to grant, in part, Churchill County's application. See Engelmann v. Westergard, 98 Nev. 348, 353-54, 647 P.2d 385, 389 (1982); Bailey v. State of Nevada, 95 Nev. 378, 381, 594 P.2d 734, 736 (1979). We also conclude that the district court properly determined that it lacked jurisdiction to hear the petition.

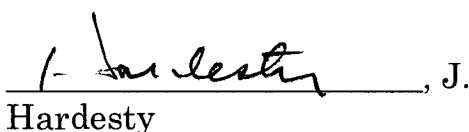
Accordingly, the district court's order dismissing the petition for judicial review is affirmed.

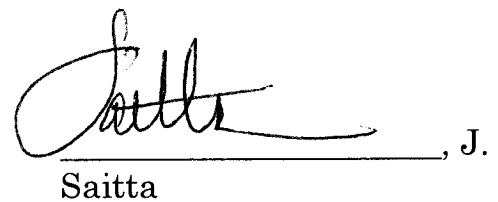
It is so ORDERED.

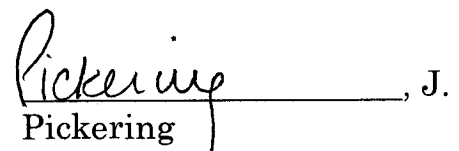
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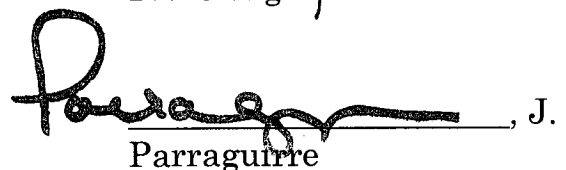
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Cherry

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Saitta

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Pickering

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Parraguirre

cc: Hon. David A. Huff, District Judge
William E. Nork, Settlement Judge
Kent Law
Attorney General/Reno
Churchill County Clerk