

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF APPLICATIONS
63805, 64171, 65060, 65061, 65062,
56063, 56064, 56065, 56066, 56067,
56068, 56069, 56070, 56071, 66729,
69594, 69595 AND 69596 FILED TO
APPROPRIATE THE PUBLIC WATERS
OF AN UNDERGROUND SOURCE
WITHIN THE TRACY SEGMENT
HYDROGRAPHIC BASIN (83), STOREY
COUNTY, NEVADA,

PYRAMID LAKE PAIUTE TRIBE OF
INDIANS,
Appellant,
vs.
STATE ENGINEER, STATE OF
NEVADA, DEPARTMENT OF
CONSERVATION AND NATURAL
RESOURCES, DIVISION OF WATER
RESOURCES; TRI WATER AND
SEWER COMPANY; AND TAHOE
RENO COMMERCIAL CENTER, LLC,
Respondents.

No. 57777

FILED

JAN 25 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *H. Ingels*
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

This is an appeal from a district court order resolving a petition for judicial review in a water law action. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

Between 1998 and 2003, several individuals and entities, including respondents TRI Water and Sewer Company (TRI) and Tahoe Reno Commercial Center, LLC (TRCC), filed applications to appropriate groundwater from the Tracy Segment Hydrographic Basin (Tracy Basin) with respondent State Engineer, State of Nevada, Department of

Conservation and Natural Resources, Division of Water Resources (State Engineer). Appellant Pyramid Lake Paiute Tribe of Indians (Tribe) protested some of these applications. The Tribe argued that the approval of the applications would conflict with its Truckee River surface water rights and would be detrimental to the public interest because of the hydrological connection between the Truckee River and the Tracy Basin. After several days of hearings, the State Engineer granted the majority of the applications up to the Tracy Basin's perennial yield. The Tribe then petitioned the district court for judicial review of the State Engineer's ruling, which the district court denied.

The Tribe now appeals, contending that the State Engineer's ruling was erroneous because the State Engineer failed to consider whether the approval of the applications would (1) conflict with the Tribe's existing surface water rights to the Truckee River, based on the hydrological connection between the Truckee River and the Tracy Basin, and (2) be detrimental to the public interest by adversely impacting Pyramid Lake and its fisheries.¹

The parties are familiar with the facts and procedural history of this case, and therefore, we do not recount them further except as necessary for our disposition.

¹The Tribe also suggests that the decision in Pyramid Lake Paiute Tribe of Indians v. Morton established that it has a legally protectable interest in ensuring that all other water not otherwise obligated flows in the Truckee River to Pyramid Lake. 354 F. Supp. 252 (D. D.C. 1973). Because the Tribe did not assert this interest during the district court proceedings, the Tribe waived this argument. See Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.").

Standard of Review

We presume that a decision by the State Engineer is correct and the party challenging such decision has the burden of proving that the decision was erroneous. NRS 533.450(10). When reviewing the State Engineer's decision, this court is in the same position as the district court. Pyramid Lake Paiute Tribe v. State Eng'r, 126 Nev. ___, ___, 245 P.3d 1145, 1148 (2010). Thus, our review determines whether substantial evidence supports the State Engineer's factual findings. Id. Substantial evidence is sufficient evidence that "a reasonable mind might accept as adequate to support a conclusion." Id. (quoting Bacher v. State Engineer, 122 Nev. 1110, 1121, 146 P.3d 793, 800 (2006)). However, we review purely legal questions de novo. Id.

The State Engineer's ruling complied with NRS 533.370(2)

The Tribe argues that the State Engineer's decision failed to consider whether granting new water rights within the Tracy Basin would conflict with senior surface water rights on the Truckee River and would be detrimental to the public interest. We disagree.

The State Engineer is prohibited by law from granting a permit to appropriate public waters if: (1) there is no unappropriated water at the proposed source, (2) the "proposed use or change conflicts with existing rights or protectable interests in existing domestic wells [under] NRS 533.024, or" (3) the proposed use or change "threatens to prove detrimental to the public interest." NRS 533.370(2).² Here, the

²Since the Tribe filed this appeal, the Legislature amended NRS 533.370. 2011 Nev. Stat., ch. 166, § 3, at 758. The amendment did not result in any substantive changes that would affect this appeal. See id. However, NRS 533.370(2) now contains the language that was formerly included in NRS 533.370(5). See id.

Tribe only challenges whether the State Engineer's approval of the groundwater applications conflicts with existing rights and threatens to be detrimental to the public interest.

Substantial evidence supports the State Engineer's finding that the approval of the applications up to the perennial yield will not conflict with existing water rights

The Tribe asserts that the State Engineer ignored the hydrological connection between the Tracy Basin groundwater and the Truckee River surface water. By ignoring this connection, the Tribe claims that the State Engineer's granting of the applications impairs its surface water rights on the Truckee River.³ We disagree.

Nevada is a prior appropriation state that only allows the State Engineer to grant a water right application if the appropriation does not interfere with earlier, more senior appropriations. See Desert Irrigation, Ltd. v. State of Nevada, 113 Nev. 1049, 1051 n.1, 944 P.2d 835, 837 n.1 (1997). Therefore, the State Engineer must not grant a permit to appropriate water if the proposed permit would conflict with existing water rights. NRS 533.370(2).

³The Tribe also suggests that the decision by the United States Court of Appeals for the Ninth Circuit in U.S. v. Orr Water Ditch Co., supports its arguments regarding the hydrological connection between the Tracy Basin groundwater and Truckee River surface water. 600 F.3d 1152 (9th Cir. 2010). However, the Ninth Circuit's decision related to whether a federal district court had subject matter jurisdiction over the Tribe's federal appeal from the State Engineer's ruling. Id. at 1154. While the Ninth Circuit recognized a connection between surface and groundwater, it did not reach a conclusion as to whether the State Engineer's approval of the applications impairs the Tribe's federally reserved water rights. See id. at 1158-61. Thus, we conclude that the Orr Water Ditch Co. decision does not impact our reasoning in this case.

We conclude that substantial evidence supports the State Engineer's conclusion that the approval of the applications up to the Tracy Basin's perennial yield would not conflict with existing rights. The State Engineer found that the perennial yield for the Tracy Basin should be increased to 11,500 acre-feet annually (a.f.a.) of recharge from precipitation, leaving 2,920 a.f.a. of unappropriated groundwater available. The State Engineer approved the applications at issue based on this new perennial yield. The Tribe does not dispute the State Engineer's finding of an increased perennial yield. Thus, this case does not present a situation where the State Engineer has approved new groundwater appropriations in a hydrographic basin that is already fully appropriated. See Griffin v. Westergard, 96 Nev. 627, 630-31, 615 P.2d 235, 237 (1980) (concluding that substantial evidence supported the State Engineer's ruling denying groundwater applications when the hydrographic basin was already overappropriated).

Furthermore, the Tribe's own expert failed to quantify any impacts that the approval of the applications would have on the Tribe's surface water rights to the Truckee River. Instead, the Tribe's expert only testified generally that pumping any groundwater from the Tracy Basin would necessarily impact the Truckee River based on the hydrological connection between the basin and the river. The Tribe now maintains that the State Engineer ignored this hydrological connection between the Tracy Basin groundwater and the Truckee River. However, the State Engineer's ruling specifically addressed this connection and limited the approval of the applications up to the Tracy Basin's perennial yield. As the Tribe does not have any right to the groundwater within the Tracy Basin, the Tribe also does not have priority over any of the approved applications at issue. See Pyramid Lake Paiute Tribe, 126 Nev. at ___,

245 P.3d at 1149 (rejecting the Tribe's argument that approved groundwater appropriations would affect Truckee River water rights because the Tribe had no groundwater rights in the hydrographic basin). Therefore, substantial evidence supports the State Engineer's conclusion that the approval of the applications will not affect existing water rights.

The State Engineer erred in his overly broad characterization of State Engineer Ruling No. 4683

However, we conclude that the State Engineer's findings of fact and conclusions of law mischaracterized the Tribe's rights under State Engineer Ruling No. 4683 (Ruling No. 4683). Ruling No. 4683 granted remaining unappropriated water in the Truckee River and its tributaries to the Tribe as an instream flow. The grant was subject to: (1) all other existing rights on the Truckee River and its tributaries, (2) any interstate allocation of Truckee River water, and (3) a total combined duty of 477,851 acre-feet annually.

The State Engineer set forth, in part, in Finding of Fact IV as follows:

[A]ny ground water [sic] that may discharge to the Truckee River is not part of the surface water decreed to [the Tribe] pursuant to the Orr Ditch Decree or the unappropriated surface water of the Truckee River granted to the [Tribe] in State Engineer's Ruling No. 4683.

This broad and sweeping statement is inconsistent with Ruling No. 4683, which does not suggest that groundwater hydrologically connected to the Truckee River can never be part of the Tribe's instream rights. Therefore, we conclude the State Engineer's factual finding regarding Ruling No. 4683 is clearly erroneous and we reverse and remand for correction of this error.

Substantial evidence supports the State Engineer's finding that the approval of the applications up to the perennial yield would not be detrimental to the public interest

The Tribe also argues that the State Engineer failed to consider whether granting the groundwater applications would be detrimental to the public interest by adversely impacting Pyramid Lake and its fisheries. We disagree.

The State Engineer must not grant a permit to appropriate water if the proposed use "threatens to prove detrimental to the public interest." NRS 533.370(2). In the State Engineer's ruling, the State Engineer found that none of the parties submitted substantial evidence demonstrating the impact that the applications would have on Pyramid Lake and its fisheries. The State Engineer also found that substantial evidence did not exist showing how the appropriations would adversely affect the Tribe's interest, especially when the ruling limited the approval of the applications to the Tracy Basin's perennial yield based on precipitation recharge. In light of these findings, the State Engineer ultimately concluded that granting the groundwater applications up to the perennial yield would not be detrimental to the public interest.

The record supports these findings. None of the expert testimony specifically discussed how the approval of the applications would adversely impact Pyramid Lake and its fisheries or the extent of this impact. Again, the Tribe's expert only testified generally that the approval of the applications would remove groundwater that would otherwise reach the Truckee River, thereby reducing the river's flow and adversely impacting Pyramid Lake and its fisheries. However, the State Engineer only approved the applications at issue up to the amount of the unappropriated perennial yield. With this limitation, the State Engineer intended to protect the Truckee River, Pyramid Lake, and any native fish.

See Pyramid Lake Paiute Tribe, 126 Nev. at ___, 245 P.3d at 1149 (upholding State Engineer's finding that approval of change use application would not be detrimental to the public interest when State Engineer limited pumping to the available perennial yield). Thus, substantial evidence supports the State Engineer's finding that granting the applications up to the Tracy Basin's perennial yield would not be detrimental to the public interest. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

Pickering, C.J.
Pickering

Gibbons, J.
Gibbons

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

Douglas, J.
Douglas

Cherry, J.
Cherry

Saitta, J.
Saitta

cc: Hon. Brent T. Adams, District Judge
Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP
Robertson, Johnson, Miller & Williamson/Reno
Attorney General/Carson City
Thorndal Armstrong Delk Balkenbush & Eisinger/Reno
Lewis & Roca, LLP/Reno
Brownstein Hyatt Farber Schreck, LLP/Las Vegas
Washoe District Court Clerk