

IN THE SUPREME COURT OF THE STATE OF NEVADA

OLD RIVER WATER COMPANY, A
NON-PROFIT CORPORATION; AND
BERNARD PONTE,

Appellants,

vs.

R. MICHAEL TURNIPSEED, STATE
ENGINEER, STATE OF NEVADA
DEPARTMENT OF CONSERVATION
AND NATURAL RESOURCES,
DIVISION OF WATER RESOURCES, IN
THE MATTER OF STATE ENGINEER'S
RULING NO. 4743 REGARDING
APPLICATIONS 64071 AND 64072,

Respondent.

No. 36519

FILED

JUL 09 2002

JANE T. M. BLOOM
CLERK OF SUPREME COURT
BY: *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from the district court's order denying a petition for judicial review involving water rights.

Old River Water Company, a non-profit Nevada corporation, holds two water rights permits enabling it to serve up to two hundred twenty residences within an approved service area. Currently, eighty-seven residences exist in the service area. Old River maintains this service area with two wells.

In May 1998, Donald R. and Simmie D. Travis filed Applications 64071 and 64072 with the State Engineer seeking to change the point of diversion, manner of use, and place of use of a combined total of fifty acre-feet annually of water. The new proposed places of use involved the rehabilitation of a pre-existing well and the drilling of an exploratory well. Old River timely protested the applications on the grounds that the proposed diversion would interfere with its existing

groundwater rights, that it would prove detrimental to the public interest, and that title to the water was deficient.

The State Engineer repeatedly asked Old River to provide factual documentation in support of its protests. Old River submitted some information; however, its primary complaint was with the methods being used by the State Engineer to evaluate the impact of granting the applications. Shortly before the deadline set by the State Engineer for submission of evidence, Old River requested that the State Engineer authorize concurrent flow tests with all the wells operating at their "ultimate demand." However, because Old River's wells were mechanically unable to operate at ultimate demand, the tests would have to be designed to simulate Old River's use levels. Old River's expert contended that this was the best way to determine whether the new applications would interfere with Old River's rights when Old River eventually expands to service the full two hundred twenty residences.

The State Engineer, without conducting a formal hearing, issued Ruling Number 4743, concluding that granting the applications would not interfere with Old River's rights or be detrimental to the public interest. In addition, the State Engineer concluded that the title to the water was not deficient. The State Engineer found that there was no need for simulated concurrent flow testing. He indicated that he had sufficient information from analyzing the flow test conducted on the Travis exploratory well and that, using standard industry procedures, the projected impact at Old River's well was reasonable. Thereafter, the State Engineer approved the Travis applications.

Old River filed a petition for judicial review. After a hearing, the district court denied the petition. The district court concluded that: (1) Old River had a full and fair opportunity to present evidence in support of its claims to the State Engineer but failed to do so, (2) the State

Engineer did not violate Old River's due process rights, and (3) the State Engineer's decision was based on substantial evidence.

Standard of Review

NRS 533.450(9) provides that the decision of the State Engineer shall be prima facie correct and the burden of proof rests with the party attacking the decision. In reviewing an order of the State Engineer, this court is bound by the same standard of review as the lower court.¹ Under this standard, this court must determine whether the evidence upon which the engineer based his decision supports the order.² While this court reviews purely legal questions de novo, the State Engineer's interpretation of a statute, while not controlling, is persuasive.³

Old River first contends that the district court erred in concluding that substantial evidence supported the State Engineer's ruling. Old River argues that without conducting the concurrent flow tests at full demand, the State Engineer had insufficient information to assess the impact of the applications on Old River's rights. We disagree.

The State Engineer found that he had before him all well testing and well rehabilitation data compiled for the wells under Applications 64071 and 64072, and that using accepted scientific and engineering methods, he had enough information to analyze the impact of the applications on Old River's rights.

¹State Engineer v. Morris, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991).

²State Engineer v. Curtis Park, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985).

³State v. State Engineer, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988).

The State Engineer asserts that his finding is supported by substantial evidence. Further, the State Engineer contends that he entered his ruling in full compliance with Nevada law, and Old River has not challenged the “reasonableness” of his ruling.⁴ The State Engineer contends that his determination that the amount of drop in the static water level would not be so great as to interfere with Old River’s existing rights was reasonable and that Old River failed to offer any evidence to counter the State Engineer’s conclusion.

Additionally, the State Engineer argues that Old River did not provide any evidence suggesting that the State Engineer’s methods or data were inaccurate or unreliable. Instead, Old River requested that additional testing be done in order to have the best evidence available before any decision was made. The State Engineer contends this amounts to a disagreement over the methods utilized to make the determination and does not constitute evidence demonstrating that the proposed use interferes with Old River’s rights or is detrimental to the public interest. We agree.

⁴Citing NRS 534.110(4) which states:

It is a condition of each appropriation of ground water acquired under this chapter that the right of the appropriator relates to a specific quantity of water and that the right must allow for a reasonable lowering of the static water level at the appropriator’s point of diversion. In determining a reasonable lowering of the static water level in a particular area, the state engineer shall consider the economics of pumping water for the general type of crops growing and may also consider the effect of using water on the economy of the area in general.

Information in the record indicates that Old River had months to submit evidence in support of its protests to the State Engineer. Old River did question the quality of the water, and the State Engineer took action to promptly investigate Old River's concerns. Old River then waited to make a request for concurrent flow testing until just before the deadline for submission of information. The State Engineer refused to delay making a decision because he concluded he had sufficient information to render a decision, and the additional testing was unnecessary.

In reviewing the findings of the State Engineer, this court will not substitute its judgment for the judgment of the State Engineer but will limit itself to a determination of whether substantial evidence supports the State Engineer's decision.⁵ Further, under NRS 533.450(9), the decisions of the State Engineer are presumed to be correct upon judicial review.⁶

We conclude that the State Engineer's ruling was supported by substantial evidence, and the State Engineer is correct in asserting that a disagreement over the methods utilized to make the determination does not mean that the decision is not supported by substantial evidence. Accordingly, the district court did not err in concluding that substantial evidence supported the State Engineer's decision.

Old River next contends that its due process rights were violated when the State Engineer failed to conduct a formal hearing. We disagree. An interested party may have a right to an evidentiary hearing

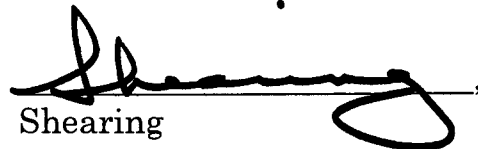
⁵State Engineer v. Morris, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991) (citing Revert v. Ray, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979)).

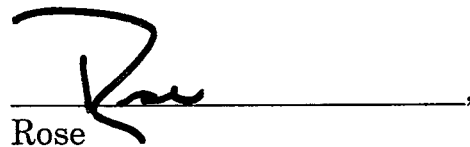
⁶Id.; see NRS 533.450.

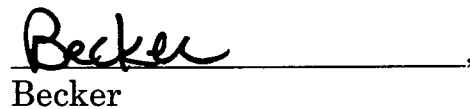
to resolve factual disputes under certain circumstances.⁷ Here, Old River does not contest the accuracy of the data relied upon by the State Engineer. Old River only asserts that the data is too limited and that full capacity concurrent flow data would be the best method to determine whether Old River's rights would be impaired by the Travis diversion. Old River offered no evidence contradicting the State Engineer. Instead, it offered an opinion that the impact could not be fully determined without the additional testing. We conclude that the denial of the request for additional testing did not violate Old River's due process rights, nor was a formal hearing necessary to determine whether additional testing should be conducted.

Having determined that Old River's contentions are without merit we,

ORDER the judgment of the district court AFFIRMED.


_____, J.
Shearing


_____, J.
Rose


_____, J.
Becker

cc: Hon. Archie E. Blake, District Judge
Mackedon & McCormick
Attorney General/Carson City
Churchill County Clerk

⁷Revert v. Ray, 95 Nev. 782, 603 P.2d 262 (1979).