

IN THE SUPREME COURT OF THE STATE OF NEVADA

R. MICHAEL TURNIPSEED, STATE  
ENGINEER, DIVISION OF WATER  
RESOURCES, DEPARTMENT OF  
CONSERVATION AND NATURAL  
RESOURCES, STATE OF NEVADA,

Appellant,

vs.

DAYTON J. MCDONALD AND  
SUZANNE MCDONALD,

Respondents.

No. 36663

**FILED**

MAR 08 2002

JANE TTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from an order of the district court granting a petition for judicial review.

In reviewing a ruling of the State Engineer, “neither the district court nor this court will substitute its judgment for that of the State Engineer: we will not pass upon the credibility of the witnesses nor reweigh the evidence, but limit ourselves to a determination of whether substantial evidence in the record supports the State Engineer’s decision.”<sup>1</sup> Further, NRS 533.450(9) provides that decisions of the State Engineer are presumed to be correct upon judicial review, and the burden of proof is on the party attacking the same.<sup>2</sup>

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<sup>1</sup>State Engineer v. Morris, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991) (quoting Revert v. Ray, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979)).

<sup>2</sup>NRS 533.450(9).

Appellant State Engineer contends that the district court erred by granting the petition for judicial review of respondents Dayton and Suzanne McDonald (“the McDonalds”) because the water appropriated under Permit No. 13205, Certificate No. 3903, draws from a different source than the water that would be used under Application No. 63775, and because Application No. 63775 would change the current, non-consumptive use of the water to a consumptive use which would be detrimental to other existing water rights.

Under NRS 533.370(3), the State Engineer must deny an application to change the point of diversion, manner of use, and place of use of appropriated water when there is no unappropriated water in the proposed source or where the proposed use conflicts with existing rights or threatens to prove detrimental to the public interest.<sup>3</sup> Specifically, the version of NRS 533.370(3) in effect at the time of the administrative hearing in this case provided:

3. Except as otherwise provided in subsection 6, where there is no unappropriated water in the proposed source of supply, or where its proposed use or change conflicts with existing rights, or threatens to prove detrimental to the public interest, the state engineer shall reject the application and refuse to issue the requested permit. If a previous application for a similar use of water within the same basin has been rejected on those grounds, the new application may be denied without publication.<sup>4</sup>

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<sup>3</sup>NRS 533.370(3) (1999); see also State Engineer v. Morris, 107 Nev. at 701, 819 P.2d at 204.

<sup>4</sup>NRS 533.370(3) (1999). The statute was amended in 2001 via S.B. 159. The current version of NRS 533.370 provides in relevant part:

*continued on next page . . .*

We conclude that substantial evidence supports the State Engineer's decision to deny the McDonalds' change application and that the district court erred by granting the McDonalds' petition for judicial review. At the public hearing in this case, the evidence presented concerning the water sought to be appropriated under change Application No. 63775 showed that the proposed point of diversion, an 1100 foot deep well, would draw water from a deep groundwater source. However, the evidence presented concerning the source of the water previously appropriated under Permit No. 13205, Certificate No. 3903 was conflicting.

Specifically, the McDonalds' hydrology expert testified that all of the groundwater in the Truckee Meadows is treated as one. He described the groundwater as including both a shallow or near-surface system and a deeper artesian system and opined that the source of the water appropriated under Permit No. 13205, Certificate No. 3903, is a shallow aquifer. Similarly, the McDonalds' geochemistry expert opined

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*... continued*

3. Except as otherwise provided in subsection 6, where there is no unappropriated water in the proposed source of supply, or where its proposed use or change conflicts with existing rights or with protectible interests in existing domestic wells as set forth in NRS 533.024, or threatens to prove detrimental to the public interest, the state engineer shall reject the application and refuse to issue the requested permit. If a previous application for a similar use of water within the same basin has been rejected on those grounds, the new application may be denied without publication.

NRS 533.370(3) (2001) (adding indicated language).

that the source of the water appropriated under Permit No. 13205, Certificate No. 3903, is a near-surface groundwater system. In addition, evidence concerning the temperature of the water in the fish ponds suggested that the water appropriated under Permit No. 13205, Certificate No. 3903, may actually come from a deep groundwater source.

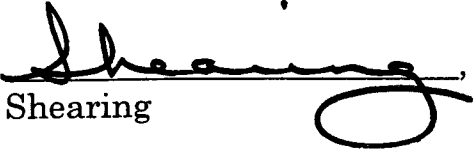
This evidence conflicted with the State Engineer's records, including survey maps and other filings by the original permittee, showing that the water beneficially used under Permit No. 13205, Certificate No. 3903, is appropriated from a subsurface drainage source. The State Engineer is authorized to regulate water appropriations and could rely on its own records in determining that Application No. 63775 sought to appropriate water from a source independent and separate from the source from which Permit No. 13205, Certificate No. 3903, appropriated water and that granting the McDonalds' change application would interfere with other water rights.


Additionally, the record supports the State Engineer's determination that the proposed use of the water under Application No. 63775 would conflict with existing rights or threaten to prove detrimental to the public interest because the use of the water under Permit No. 13205, Certificate No. 3903, was essentially a non-consumptive use and the use proposed under Application No. 63775, expanding the current diversion rate for quasi-municipal and domestic purposes, would result in a much higher consumptive use than currently existed. Specifically, the evidence before the State Engineer showed that the only consumptive use of water under Permit No. 13205, Certificate No. 3903, was a negligible amount of annual evaporation from the ponds. However, Application No. 63775 proposed to use 238.85 acre-feet of water per year for quasi-municipal and domestic uses. While the proposed amount to be annually


appropriated is the current diversion rate expanded, the record also suggests that the two amounts are quite different in terms of consumptive use given that the amount of water consumptively used under Permit No. 13205 and Certificate No. 3903 was merely .2 to .3 acre-feet annually as opposed to 238.85 acre-feet annually proposed under Application No. 63775.

Thus, we conclude that substantial evidence supports the State Engineer's decision to deny the McDonalds' change application. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court to deny the petition for judicial review and affirm the State Engineer's Ruling No. 4855.

  
\_\_\_\_\_, J.  
Shearing

  
\_\_\_\_\_, J.  
Rose

  
\_\_\_\_\_, J.  
Becker

cc: Hon. Brent T. Adams, District Judge  
Attorney General/Carson City  
Marshall Hill Cassas & de Lipkau  
Washoe County Clerk