IN THE SUPREME COURT OF THE STATE OF NEVADA

MIRIAM DEMARCO; MICHAEL DEMARCO; ANGELO (TOM) DEMARCO; AND JANET DEMARCO,
Appellants,
vs.
OFFICE OF THE STATE ENGINEER OF THE STATE OF NEVADA,
Respondent.

No. 42279

FILED

DEC 0 7 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a petition for judicial review in a water law case. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

Miriam, Michael, Tom, and Janet DeMarco (The DeMarcos) appeal from a district court order denying a petition for judicial review of a decision of the State Engineer in a water law case. The parties are familiar with the facts; therefore, we have recited only those facts that are necessary to our disposition of the DeMarcos' contentions.

DISCUSSION

Standard of review

This court reviews questions of law, such as those requiring statutory construction, de novo.[1] With regard to questions of fact, this

[1]Gilman v. State, Bd. of Vet. Med. Exam'rs, 120 Nev. 263, 271, 89 P.3d 1000, 1005-06 (2004).

court limits its review to whether substantial evidence supports the State Engineer's decision.[2]

Substantial evidence

The DeMarcos argue that the State Engineer's decisions regarding the location of their property relative to the permit's place of use and the quantity of water to which they are entitled lack substantial support in the record.

Regarding location of their residence relative the permit's place of use, the DeMarcos stress language in the certificate of appropriation stating, "water is serviced to four dwellings for domestic use; 5 acres of landscaping and a swimming pool . . . . All places of use within the NW ¼ SW ¼ Section 28, T. 20 S., R. 61 E, M.D.B. & M." They reason that the location of their parcel within the 40-acre area described above compels a finding that they own rights in the well. We disagree.

We conclude that substantial evidence supports the State Engineer's conclusion that the DeMarcos' property is located outside the permitted place of use. First, the language upon which the DeMarcos rely must be considered within the greater context of documentation related to the permit, including the application and map filed by the DeMarcos' presumed predecessors in interest. The 1945 appropriation application states in part that "[w]ater [is] to be used to serve three (3) existing dwellings on one parcel which covers 3 acres, and also to serve one (1) existing dwelling on the other parcel which covers 2 acres." Second, the map indicates that these five acres do not include the DeMarco property.

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[2]Town of Eureka v. State Engineer, 108 Nev. 163, 165, 826 P.2d 948, 949 (1992).

Third, the State Engineer could reasonably conclude that language in the certificate upon which the DeMarcos rely only indicates that the places of use are located within the forty-acre area.

The DeMarcos also assert that the State Engineer erred in his determination regarding water quantity and issues of title regarding well ownership. We decline to reach these arguments for two reasons. First, as stated earlier, substantial evidence supports the State Engineer's decision regarding the location of the DeMarco parcel outside the permitted place of use. Second, as explained below, the DeMarcos' use of the well is unauthorized and compels forfeiture. These two decisions render it unnecessary for us to address quantity and title because these issues have no bearing on the outcome of this case.[3]

Notice

The DeMarcos argue that the State Engineer failed to issue them proper notice under NRS 534.090(1) that would permit them a period of one year in which to cure by applying for a change in the place of use and demonstrating beneficial use. We disagree. NRS 534.090(1) only requires such notice if there is at least 4 consecutive years, but less than 5 consecutive years, of complete or partial lack of beneficial use of water rights. The location of the DeMarcos' parcel outside the permitted place of use renders their use unauthorized, and therefore their use cannot constitute the beneficial use necessary to avoid forfeiture under the

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[3]We note that substantial evidence in the record suggests five consecutive years of non-use of all but 4.42 acre feet annually of the water rights claimed by the DeMarcos under permit No. 11409. Assuming that the DeMarcos were entitled to beneficial use of water rights under permit No. 11409, this would constitute forfeiture of the excess over 4.42 acre-feet of rights under NRS. 534.090(1).

statute. To conclude otherwise would permit one to retain water rights without complying with the forfeiture-avoidance process detailed in NRS 534.090 or with the appropriations process generally.[4]

The DeMarcos also argue that the hearing rather than the certified notice of possible forfeiture should constitute the initiation of forfeiture proceedings in this case, and that such circumstances would compel consideration of their application to cure filed shortly before the hearing. In Town of Eureka v. State Engineer, this court held that substantial use of water rights could cure a claim of forfeiture "so long as no claim or proceeding of forfeiture has begun."[5] The State Engineer determined that issuance of the certified notice of possible forfeiture initiated forfeiture proceedings, thereby precluding consideration of the DeMarcos' subsequently filed change application. Although this court need not defer to the State Engineer's decision on an issue of law, his decision is persuasive.[6]

Before receiving the certified notice of possible forfeiture, the DeMarcos received informal notice by way of a house visit from Robert Coache of the Division of Water Resources, who told them that they had approximately 30 days to file an application to correct the permit's place of use. Despite this advice, the DeMarcos failed for seven months to file what appears to be a straightforward two-page application, long after the

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[4]See, e.g., NRS 534.080(1) (stating that one may legally acquire underground water only by complying with the provisions of NRS Chapter 533).

[5]108 Nev. at 169, 826 P.2d at 952.

[6]See Town of Eureka, 108 Nev. at 165-66, 826 P.2d at 950.

State Engineer provided notice to them as putative record owners, and this court is unable to find any reasonable justification for such delay in the record. In light of these circumstances, we conclude that the State Engineer did not err in declining consideration of their application.

Based on our conclusions regarding notice, we decline to reach the DeMarcos' argument that lack thereof deprived them of due process.

Equity

This court has permitted equitable relief in limited circumstances. In both State Engineer v. American National Insurance Company[7] and Bailey v. State of Nevada,[8] this court authorized equitable relief because the applicants developed the water in accordance with the terms of their permits, save for the failure to timely file proof of beneficial use. Despite the DeMarcos' arguments to the contrary, we conclude that equitable relief is unwarranted. In short, the unauthorized nature of the DeMarcos' use compels us to distinguish their case from the equitable relief cases cited by them.[9]

CONCLUSION

We conclude that substantial evidence supports the State Engineer's decision that the DeMarcos' parcel is located outside the permitted place of use. The nature of their location renders their use unauthorized, thereby precluding their ability to claim any entitlement to

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[7]88 Nev. 424, 425-26, 498 P.2d 1329, 1330 (1972).

[8]95 Nev. 378, 385, 594 P.2d 734, 739 (1979).

[9]Due to the impropriety of granting the equitable relief in this case, we decline to reach their takings argument. Further, the record is undeveloped on this issue.

a one-year grace period in which to cure under NRS 534.090(1). Further, their failure to file a change application within the time given by the Division of Water Resources, or within any reasonable time thereafter prior to the notice of intent, compels us to reject their claim that they are entitled to consideration of their change application. Lastly, we conclude that their circumstances do not warrant equitable relief.

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

_____, C.J.
Becker

_____, J.
Rose

_____, J.
Maupin

_____, J.
Gibbons

_____, J.
Douglas

_____, J.
Hardesty

_____, J.
Parraguirre

cc: Hon. Mark R. Denton, District Judge
Lavelle & Johnson, P.C.
Attorney General George Chanos/Carson City
Clark County Clerk