



Water Resources Committee Newsletter

THE ROLE OF RIPARIAN RIGHTS IN ECOLOGICAL RESTORATION

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Introduction

Environmental decisions involving water quantity and quality affect us all. After all, water in lakes, streams, and aquifers is a resource that many users must share for a multitude of purposes. And water is a substance necessary to life itself. Although some insist that the centuries-old principles of water law (such as those protective of riparian, littoral, and appropriative rights) cannot co-exist with the current demands of environmental protection and ecological restoration, a closer examination of that notion suggests that the opposite may be true. Traditional water law is compatible with protection of the environment, and protecting water rights in streams and rivers can even be an instrument for ecological protection and restoration.

Although ecosystem restoration is in a sense a newcomer to the process that is just now defining its place in this complicated legal scheme, concepts as diverse as federal reserved rights, traditional tribal rights (e.g., fishing and hunting), and federal or state rights to water to benefit wildlife, wetlands, forests, and fisheries—rights which, like those for irrigation, industrial, or domestic use—are protected by traditional water rights law

The law's effort to accommodate riparian landowners and multiple conflicting interests in flowing water goes back at least to ancient Rome, where riparian owners held recognized water rights created either by actual use or by transfer from a water rights holder DIG. 43.20.3 & 43.12.2, ROMAN WATER LAW 37, 108 (E. Ware trans., 1905). English common law further developed the tradition of protecting riparian rights and exported the riparian rights doctrine to other common law countries. Under this doctrine, all landowners adjacent to a river were entitled to reasonable use of the flowing water as an appurtenance to their land so long as they did not impair the parallel rights of downstream owners. *Attwood v. Llay Main*

Collieries, Ltd., Ch. 444, at 458 (1926). Legal jurist and scholar Justice Kent, in his commentaries on early American law, noted that the consumptive use of the riparian owner must be reasonable and that the stream must be left undiminished for the benefit of downstream riparian owners. 3 KENT, COMMENTARIES ON AMERICAN LAW 440 (1829).

Two cases now in active litigation directly examine the role of riparian rights protection in the context of ecological restoration, and both, coincidentally arise out of Florida, *Stop the Beach Renourishment* (now before the U.S. Supreme Court) and *Mildenberger* (St. Lucie River case) (now before the U.S. Court of Appeals for the Federal Circuit). Fundamental to both cases (though in different ways) is Florida's classical formulation of a broad riparian right that includes not only undiminished flows and reasonable upstream use, but also rights to water access, to accretion and avulsion, and even to water free of pollution:

Among the common-law rights of those who own land bordering on navigable waters apart from rights of alluvion and deliction are the right of access to the water from the land for navigation and other purposes expressed or implied by law, the right to a reasonable use of the water for domestic purposes, the right to the flow of the water without serious interruption by upper or lower riparian owners or others, the right to have the water kept free from pollution, the right to protect the abutting property from trespass and from injury by the improper use of the water for navigation or other purposes, the right to prevent obstruction to navigation or an unlawful use of the water or of the shore or bed that specially injures the riparian owner in the use of his property, the right to use the water in common with the public for navigation, fishing, and other purposes in which the public has an interest.

Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n, 48 So. 643, 644-45 (Fla. 1902).

Id. at 44. In remanding this case to the trial level, the North Carolina Supreme Court stated that a “riparian proprietor has a right to make all the use he can of the stream so long as he does not pollute it or . . . or does not use the same in such an unreasonable manner as to materially damage or destroy the rights of other riparian owners.” *Id.* at 47.

In Mississippi, riparian and littoral rights stem from both common law and statutes, and may be described as “rights to reasonable use, subject to the State’s interest in the lands.” *Bayview Land, Ltd. v. Mississippi*, 950 So. 2d 966, 988 (Miss. 2006). According to the Mississippi Supreme Court, operating a gaming boat on a river constitutes a “reasonable use” riparian right. *Id.* That court has also pointed to several statutes that list riparian rights. *Id.* The rights included in those statutes are: (1) “[t]he sole right of planting, cultivating in racks or other structures, and gathering oysters and erecting bathhouses and other structures in front of any land bordering on the Gulf of Mexico or Mississippi Sound or waters tributary thereto” (Miss. Code Ann. § 49-15-9 (West 2009)); (2) “the construction and maintenance of piers, boathouses and similar structures [if they] are constructed on pilings that permit a reasonably unobstructed ebb and flow of the tide[;]” and (3) the right to “reasonably alter the wetland at the end of his pier in order to allow docking of his vessels.” Miss. Code Ann. § 49-27-7 (West 2009).

Wisconsin law grants riparian landholders rights that are

[W]ell defined and, though subject to regulation, include the right to use the shoreline and have access to the waters, the right to reasonable use of the waters for domestic, agricultural and recreational purposes, and the right to construct a pier or similar structure in aid of navigation. A riparian owner is entitled to exclusive possession to the extent necessary to reach navigable water and to have reasonable access for bathing and swimming.

ABKA Ltd. P’ship v. Dep’t of Natural Res., 648 N.W.2d 854 (Wis. 2002).

Florida Law

Over the years, Florida courts and legislatures have defined riparian rights to either include the rights to boat, fish, and swim, and the right to pollution-free water. The Florida statute governing riparian rights provides:

Riparian rights are those incident to land bordering upon navigable waters. They are rights of ingress, egress, boating, bathing, and fishing and such others as may be or have been defined by law. Such rights are not of a proprietary nature. They are rights inuring to the owner of the riparian land but are not owned by him or her. They are appurtenant to and are inseparable from the riparian land. The land to which the owner holds title must extend to the ordinary high watermark of the navigable water in order that riparian rights may attach. Conveyance of title to or lease of the riparian land entitles the grantee to the riparian rights running therewith whether or not mentioned in the deed or lease of the upland.

Fla. Stat. Ann. § 253.141 (West 2009) (emphasis added).

In *Ferry Pass Inspectors’ and Shippers’ Association v. White’s River Inspectors and Shippers*, the Florida Supreme Court noted that there is “an additional right for upland property owners adjacent to a navigable waterway [to] . . . have ‘water kept free from pollution.’” 48 So. 643, 644–45 (Fla. 1909).

And in 1919, in *Brickell v. Trammell*, the Florida Supreme Court held that the riparian right also includes the right to water free from pollution:

At common law those who own land extending to ordinary high-water mark of navigable waters are riparian holders, who, by implication of law, and in addition to the rights of navigation, commerce, fishing, boating, etc., common to the public, have in general certain special rights in the use of the waters opposite their holdings; among them being the right of

access from the water to the riparian land and such other rights as are allowed by law

82 So. 221 (Fla. 1919) (citations omitted).

Conclusion

Stop the Beach Renourishment and *Mildenberger* (St. Lucie River case) are excellent opportunities for courts to underscore the importance of riparian rights protection in ecosystem restoration. A decision in *Stop the Beach Renourishment* is expected this summer and a decision in *Mildenberger* is expected by 2011. A decision protective of riparian rights would be consistent generally with the body of law that has developed as a complex web of interlocking principles aimed at accommodating interests as diverse as navigation, agriculture, heavy industry recreation, domestic use, fisheries, and wetlands—to name only a few—reflected in environmental law generally and the common and statutory law regarding riparian rights in many states.

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NEVADA SUPREME COURT DETERMINES STATE ENGINEER VIOLATED STATUTORY DUTY BY NOT RULING WITHIN ONE YEAR ON APPLICATIONS TO APPROPRIATE WATER, IRRESPECTIVE OF 2003 LEGISLATIVE AMENDMENT: *GREAT BASIN WATER NETWORK V. STATE ENGINEER*

Severin A. Carlson

I. Introduction

Pursuant to NRS 533.370(2), as it existed in 1989, the Nevada Division of Water Resources, Office of the State Engineer (state engineer) was required to approve or reject each water appropriation application within one year after the final protest date. The state engineer could postpone taking action beyond one year if he obtained a written authorization from the applicant and protestants or if there was an ongoing water supply study or court action NRS 533.370(2)(a). In 2003, the Nevada legislature amended NRS 533.370, allowing the state engineer to postpone action if the purpose for which the application is made is municipal use. NRS 533.370(2)(b) (2003).

II. Background

A. The Parties

The respondent state engineer is charged with administering the state of Nevada's water law, including but not limited to reviewing, approving, and rejecting applications to appropriate water within the state.

The respondent, Southern Nevada Water Authority (SNWA), is a cooperative agency created in 1991 to address southern Nevada's unique water needs on a regional basis. SNWA acquired from the Las Vegas Valley Water District (LVVWD) the rights to approximately 146 applications filed with the state engineer in 1989 to appropriate public water from groundwater sources throughout the state of Nevada. The applications sought to appropriate nearly 800,000 acre-feet per year, a substantial sum of water which the state engineer referred to as the largest interbasin appropriation and transfer of water ever requested in

the history of Nevada (although the quantity of water to be pumped was later reduced to 190,000 acre-feet per year). An interbasin transfer of groundwater is a transfer of groundwater for which the proposed point of diversion is in a different basin than the proposed place of beneficial use. NRS 533.007.

There are five groups of appellants. First, there are the 11 original protestants, who filed protests in 1989 and 1990, but argue that because of the 16-year delay following the filing of the applications, they did not receive adequate notice of the subsequent 2005 prehearing conference or the 2006 hearings. Second, there are the new property owners, who moved to or established themselves in affected valleys from which the water was to be appropriated, after 1989. Third, there are five property owners who either inherited or purchased their property interest from an original protestant. Fourth, there are residents of Utah who live on the Utah side of SnakeValley (one of the groundwater basins in which applications sought to appropriate water), and who argue that they never received notice of the applications in 1989 and thus did not file protests. Fifth, there are at least three national environmental and wildlife organizations that have evolved since 1989, and argue that the state engineer has effectively blocked them from protecting their interests because they did not file protests in 1989 and 1990.

B. The Facts

After the approximate 146 applications were filed with the state engineer in 1989, the state engineer published statutory notice of the applications. *Great Basin Water Network v. State Engineer*, 222 P.3d 665, 667 (2010). In response, more than 830 protests were filed with the state engineer *Id.* Although NRS 533.370(2), as it existed at the time, required the state engineer to take action on applications within one year after the close of the protest period unless he identified an ongoing water study or court action, the state engineer did not rule on the applications at issue or identify an exception that permitted postponement of the action beyond the allotted time. *Id.*

Between 1991 and 2002, IVVWD withdrew some of the 1989 applications and the state engineer held

hearings and issued rulings on several other 1989 applications. *Id.* Thirty-four of the remaining 1989 applications which sought to appropriate groundwater in the Spring, Snake, Cave, Dry Lake, and Delamar Valleys are subjects of the appellants' appeal. *Id.* In 2003, the Nevada legislature amended NRS 533.370, allowing the state engineer to postpone action if the purpose for which the application was made is municipal use.

In October 2005, the state engineer notified roughly 300 people that a prehearing conference would be held in January 2006 to discuss issues related to protest hearings on the 34 groundwater applications. *Id.* at 668. Hundreds of the certified mailings were returned undelivered, including mailings to 1 of the appellants. *Id.* At the January 2006 prehearing conference, the state engineer heard arguments that, because of the 16-year lapse between the filing of the applications and the hearings on the applications, the state engineer should re-notice the applications and reopen the protest period. *Id.*

In March 2006, the state engineer issued an order denying the request to re-notice. *Id.* The state engineer recognized the significant lapse of time between the filing of the applications and the hearings while also finding that SNWA had been dedicating substantial time to prepare for hearings on the applications; however, neither the state engineer nor SNWA offered evidence that a water study had been ordered or that the applicant and protestants authorized the state engineer to postpone taking action on the 1989 applications. *Id.* In July 2006, appellants filed a petition with the state engineer essentially requesting that he reconsider his decision not to re-notice the applications along with reopening the protest period. *Id.* The state engineer summarily denied the request. *Id.*

In August 2006, the appellants filed a petition for judicial review with the Nevada district court seeking review of the state engineer's order denying the request to re-notice the applications. *Id.* In May 2007, the district court denied the petition for judicial review. *Id.*

III. Great Basin Water Network v. State Engineer

A. The Nevada Supreme Court's Holding

The Nevada Supreme Court reversed and remanded the district court's decision and instructed the district court to undertake the necessary proceedings to adjudicate the proper remedy, namely whether SNWA is required to file new applications or whether the state engineer is required to re-notice and reopen the protest period, in light of the state engineer violating his duty to rule on applications within the one-year statutory limitation without first postponing action. *Id.* at 672.

B. Discussion

The 2003 amendment to NRS 533.370 is ambiguous—SNWA argued that the 2003 legislative amendment to NRS 533.370 empowers the state engineer to retroactively postpone action on groundwater applications made for municipal use, thus excusing the state engineer's failure to comply with NRS 533.370, as it existed prior to the 2003 amendment. *Id.* at 670. The appellants maintained that the 2003 amendment does not apply retroactively and that SNWA must file new applications or the state engineer must re-notice the applications and reopen the protest period. *Id.*

In 2003, the Nevada legislature amended NRS 533.370 to permit the state engineer to postpone action on applications made for municipal purposes. *Id.*, citing 2003 NEV. STAT., ch. 474 § 2, at 2980–81. Importantly, the legislature specified the following water appropriation applications to which the amendment applies: each application that is made on or after July 1, 2003, and each such application that is pending with the office of the state engineer on July 1, 2003. *Id.*, citing 2003 NEV. STAT., ch. 474 § 18, at 2989.

The court determined that although SNWA's applications were made for municipal use, the question remained as to whether the applications were still pending in 2003 at the time the amendment went into effect. *Id.* at 670. If the applications were in fact pending, the state engineer would have been statutorily authorized to postpone a ruling without approval from SNWA or the protestants. *Id.*

The appellants argued that the 1989 applications were not pending in 2003 because the applications had effectively lapsed one year after the protest period ended. *Id.* SNWA argued that the applications were still pending because the legislature intended that the municipal use exception apply retroactively. *Id.* The Supreme Court held that the effective date applicable to the 2003 amendment is ambiguous because it is susceptible to more than one interpretation. *Id.* at 671.

The 2003 amendment does not apply retroactively—In order to get beyond the 2003 amendment's ambiguity, the court turned to the legislative history to determine legislative intent; however, that history provided no guidance to the court regarding the retroactive effect of the amendment to pending applications. *Id.* (internal citations omitted). As such, the court considered legislative intent by construing the statute in a manner consistent with reason and public policy. *Id.* at 671. The court found that although the retroactive effect of NRS 533.370(2) evidences the legislature's intent that the statute apply to applications for municipal use that were filed prior to the enactment of the amendment, the court concluded that the appellants' interpretation of the word "pending" is the more reasonable one for four reasons. *Id.*

First, in setting a timeline for approval or rejection of groundwater applications within one year, the legislature intended to prevent a significant lapse of time before a ruling. *Id.* Additionally, the court found no language in the statute or the legislative history that indicates an intention by the legislature for the amendment to apply retroactively and without such explicit intent, the court found it would be inequitable to allow applications to linger for years without obtaining the parties' written authorization to postpone action. *Id.*

Second, the 1989 version of NRS 533.370(2) mandated that the state engineer rule on an application within one year, and the 2003 amendments do not contain a clear indication of retroactive effect. *Id.* Determining that there would be no consequence from not issuing a ruling within one year would render the statutory timeline superfluous. *Id.*

Third, a reading consistent with SNWA's interpretation of the 2003 amendment would deprive at least 1 appellants who are original protestants of their due process right to grant or withhold authorization to postpone action by the state engineer on the 1989 applications. *Id.*, citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428–29, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982).

Fourth, there is no indication that the legislature intended that the 2003 amendment apply to every groundwater appropriation ever filed in the office of the state engineer, as such an interpretation would produce absurd results. *Great Basin Water Network* at 671. Reading the statutory provisions together the court concluded, that the more reasonable interpretation of “pending” is that it refers to those applications in which the one-year period for the state engineer to take action has not yet lapsed.*Id.*

Therefore, the court concluded that the legislature intended to designate as “pending” on July 1, 2003, only those applications in which the one-year period under NRS 533.370(2) had not arrived, and that the district court erred when it found that the 2003 amendment applied retroactively to SNWA's 1989 applications. *Id.* at 671–72. As such, the state engineer's failure to rule on the 1989 applications within one year of the close of the protest period resulted in a violation of the state engineer's statutory duty. *Id.* at 672.

The district court is directed to develop the issues fully in order to determine the proper remedy for the state engineer violating his statutory duty— Finally, the court went on to address the remedy for the state engineer's failure to rule on the applications within one year of the close of the protest period. The court noted that there exists no statutory remedy for noncompliance with the time requirements under NRS 533.370. *Id.* In light of this fact, the court stated that it could not conclude that the state engineer's inaction deems the applications either approved or rejected, or whether the applications must be re-noticed or the applicants be required to file new applications.*Id.* The court opined that voiding the state engineer's ruling and preventing him from taking further action would be

inequitable to SNWA and future similarly situated applicants, while it would also be inequitable to the original and subsequent protestants to conclude that the failure results in approval of the applications over 14 years after their protests were filed.*Id.* The court remanded the case to the Nevada district court for these issues to be fully developed before being adjudicated. *Id.*

IV. Analysis

The Nevada Supreme Court's decision in *Great Basin Water Network* is important for a number of reasons, some positive and others not so positive. First, it provides a definitive interpretation of NRS 533.370 and confirms that the 2003 amendment is not retroactive, while it also provides an interpretation as to what constitutes a “pending” application before the state engineer. Second, despite providing this clarification, the decision has raised many questions as to the status of applications that are on file with the state engineer and which were filed prior to the 2003 amendment, as well as the status of water right permits and certificates that were issued more than one year after the date for filing a protest, especially since the district court has yet to fully develop the issues in *Great Basin Water Network* to determine the appropriate remedy the state engineer's violation of his statutory duty.

The respondents have sought clarification of the court's ruling, so as to narrow the scope of the court's holding in an attempt to limit the potential impact on already permitted or certificated water rights, but questions raised by the decision have also resulted in what some would call chaos in Nevada's water rights world. The Nevada legislature, which was recently convened in its 26th Special Session to address budget shortfalls, entered a declaration into the legislative journal concerning the court's recent decision and its desire for the state engineer to work with interested parties and to provide for an opportunity for input from those parties to resolve the issues presented by the court's decision, either in another special session or in the upcoming 2011 legislative session.

The broad holding in *Great Basin Water Network* suggests that applications on file with the state engineer

more than one year prior to July 1, 2003, may either have to be re-noticed or refiled, even if subsequent to July 1, 2003, those applications were approved by the state engineer. In this vein, water professionals contend that the court's determination of whether an application is still "pending" is inconsistent with the manner in which the state engineer has historically applied the one-year provision. There are likely hundreds, if not thousands, of applications (protested and un-protested) that were pending beyond the one-year provision and were subsequently approved by the state engineer, whose status is now called into question.

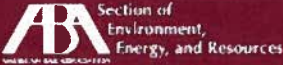
These water rights, which are now potentially called into question, raise great concerns for various water purveyors throughout the state about the manner in which they carry out their water resource plans. Additionally, the cloud that is hanging over permitted or certificated rights that may not have been ruled upon within one year could very well be collateral for loans made during the boom days in Nevada during the first part of this decade. The credit markets may view the recent decision negatively, as the collateral may be less secure if permitted water rights have to be refiled, re-noticed, and heard anew by the state engineer.

V. Conclusion

In *Great Basin Water Network*, the Nevada Supreme Court clarified that the 2003 amendment to NRS

533.370 does not apply to applications on file before July 1, 2003, that were pending for more than one year prior to that date. The court has held that an application, either filed before the 2003 amendment or one that is not for municipal use, is no longer pending with the state engineer after the one-year provision lapses, unless the postponement exception is met as contemplated by the statute. Although this decision provides some immediate clarity it calls into question numerous applications, permits, and certificates that were not postponed pursuant to the statutory exception and were granted after the one-year provision lapsed. There will certainly be more to come as a result of this case, not only from the district court, but also the Nevada Supreme Court, should it modify its decision at the request of the respondents, and also through the legislative and regulatory process in the upcoming months and next legislative session. Water rights owners and other interested parties, however should all have an interest in developing clarity with respect to this decision so as to provide for sufficient and reliable water resources for the future.

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