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Eureka Cty. v. Seventh Judicial Dist. Court, 407 P.3d 755 (Nev. 2017)

Sydney Donovan

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amount of 12,000 acre-feet for any combination of the water right claims.

Teton Canal argued that the removal of the Eureka Reservoir as storage under the 1890 Notice was contrary to Montana law. Teton Canal argued that the Eureka Reservoir may remain as storage according to precedent set by *Farmers.* However, the Court decided that storage cannot combine with a direct flow water right if the stored water reflects a separate right with its own priority date. Therefore, the water court properly concluded that the 1936 priority date was assigned to implied water right claims for the Eureka Reservoir, which is junior to the 1890 Notice direct flow rights.

The Court held that the water court did not err in allowing Teton Canal to store its 1890 direct flow water in the Eureka River during irrigation season. Teton Reservoir argued that temporary storage of direct flow cannot constitute beneficial use. However, Montana law allows a direct flow water user to add storage as long as the flow and volume of water used does not increase and the period of diversion does not expand. Teton Canal does not inferfere with other rights because it is still limited to 8,000 acre-feet of direct flow under the 1890 Notice. Therefore, Teton Canal could store portions of its direct flow right in the Eureka Reservoir for use later in the irrigation season.

Lastly, the water court did not err by allowing Teton Canal a year-round period of diversion for the 1890 Notice. The Court concluded that there was ample evidence to support year-round diversion prior to development of the Eureka Reservoir. The water court noted that the 1890 Notice included 8,000 acre-feet of direct flow water that Teton Canal diverts between April 20 and October 14, as well as the 95 acre-feet of water that it diverts between January 1 and December 3. Thus, the water court legitimately concluded that only the diversion attributed to the former Glendora Reservoir is year-round, which Teton Canal's shareholder meetings supports.

Accordingly, the Court affirmed the water court's ruling.

Haley McCullough

NEVADA

Eureka Cty. v. Seventh Judicial Dist. Court, 407 P.3d 755 (Nev. 2017) (holding: (i) that hearing a petition for writ mandamus was proper because addressing a due process issue promptly would favor judicial economy by clarifying notice requirements in a water rights curtailment action; (ii) that Nevada's Constitution requires procedural due process for a show cause hearing that could determine curtailment of an individual's junior water rights; and (iii) that others cannot adequately represent junior water rights holders because water rights are unique real property interests).

In September of 2011, Sadler Ranch purchased real property and water rights in Diamond Valley—an over appropriated area of Nevada. Sadler Ranch claimed that because the ranch was established in the middle of the 19th century, its Diamond Valley water rights are pre-statutory, vested, and senior. However, of the two springs on the ranch, one's flow had diminished substantially, and the other's flow had disappeared completely. In 2014, Sadler Ranch petitioned for replacement water to compensate for the loss from its springs, but the State Engineer only awarded a small portion of the amount requested. In

April 2015, Sadler Ranch responded by petitioning the Seventh Judicial District to order that the State Engineer begin the proceedings for curtailment of junior water rights in the valley. The State Engineer proposed making Diamond Valley a critical management area ("CMA"), and Sadler Ranch agreed to stay the proceedings until the area was officially designated a CMA.

However, upon realizing that the CMA designation would not alleviate its water dispute, Sadler Ranch reinstated proceedings by filing an amended petition. The ranch requested an order either: (1) requiring the State Engineer to initiate curtailment; or (2) curtailing pumping because the State Engineer intentionally and knowingly refused to follow Nevada law. The State Engineer filed a motion to dismiss. The district court granted the motion to dismiss in part, but denied in part, holding that Sadler Ranch pleaded sufficient facts to conclude that the State Engineer abused his discretion in refusing to initiate curtailment. The district court entered a writ of mandamus requiring the State Engineer to either initiate curtailment proceedings or, in the alternative, show cause as to why he had refused.

Subsequently, in a motion filed August 2016, the State Engineer argued that Sadler Ranch must give notice to all Diamond Valley water rights holders who may suffer the effects of the show cause hearing, and Eureka County joined the motion. Sadler Ranch argued against the motion because a final order of curtailment, which requires notice, could not result from the show cause hearing, and that upon a final order of curtailment, the State Engineer, who keeps the appropriators records, must properly provide notice. In October 2016, the district court denied the State Engineer's motion. The court concluded that the Constitution did not require due process until future proceedings that would determine the curtailment's details, like "how" and "who." Furthermore, the district court concluded that the dozens of interveners in the initial proceedings adequately represented any parties in interest who did not receive notice. Eureka County and the State Engineer filed a motion for reconsideration, and upon denial by the district court, Eureka County filed a writ petition to the Nevada Supreme Court.

The Court entertained the writ petition on the basis of its original jurisdiction. The Court described how judicial economy favored addressing the due process issue early in proceedings and clarifying notice requirements regarding curtailment of water rights. To compel an act required by law, the Court may use a writ of mandamus where the lower court used discretion arbitrarily or capriciously. The Court chose to approach the writ as one of mandamus because it concluded that the district court exercised discretion in an arbitrary and capricious manner when it denied the State Engineer's motion to compel notice.

The Court addressed the due process question de novo and determined that the Nevada Constitution required that all junior water rights holders receive notice prior to the show cause hearing. The Court reasoned that the language in the order for the show cause hearing indicated that the result could immediately order the initiation of curtailment proceedings. Upon such an order, the junior holders would only have the option to argue about a cut-off date, but no option to argue for no curtailment at all. The Court held that the junior holders needed notice at a meaningful time in order to meet due process requirements.

Finally, the Court addressed the question of representation. The district

court held that Sadler Ranch need not provide notice to junior holders because those individuals would have adequate representation by the multiple interveners who already entered the proceedings. The Supreme Court concluded that water rights are real property rights. Because others cannot adequately represent individuals with ownership interest in unique forms of property and because real property rights are unique, the interveners could not represent the junior holders. The Court concluded that due process required proper notification of the junior water rights holders so that they could adequately represent their own interests.

Accordingly, the Court ordered a writ of mandamus to vacate the decision of the district court and directed the district court to order appropriate notice to all junior water rights holders before conducting the show cause hearing.

Sydney Donovan

SOUTH DAKOTA

Duerre v. Hepler, 892 N.W.2d 209 (S.D. 2017) (holding that: (i) members of the general public cannot enter and use any of the water and ice on private property for recreational purposes absent legislative authorization, and (ii) the Department of Game, Fish, and Parks cannot facilitate access to the water and ice on private property for recreational purpose absent legislative authorization).

Thad Duerre, Clint Duerre, Robert Duerre and Laron Herr ("Landowners") own two non-meandered sloughs in Day County, South Dakota. The Landowners reported to the South Dakota Department of Game, Fish, and Parks ("GF&P") that the public was trespassing on their private property and using the sloughs for recreational purposes. The GF&P responded that the public could use the waters if they entered legally. Landowners sued the State, the GF&P, and the class of persons who used or intended to use the waters in circuit court for declaratory and injunctive relief. The parties filed cross-motions for summary judgment.

The Landowners asked the circuit court to declare that the public has no legal authorization to use or enter the non-meandered waters on their private property absent legislative authorization. They also asked the circuit court to declare that the State may not adopt, enforce, or encourage the public to enter or use the sloughs for recreational purpose. The Landowners sought to enjoin the State and class from using the sloughs or adopting a policy allowing members of the public to use the sloughs for recreational purpose.

The State asserted that the Landowners had no right to exclude the public from using the sloughs because all waters within South Dakota are held in trust by the State for the public. Additionally, they asserted that GF&P was authorized to allow the public to use the waters so long as they were accessed legally.

The circuit court granted a less broad version of the Landowners' declaratory relief, holding that in the absence of legislative authority, the public may not enter or use the waters or ice located on the private property for recreational use. The circuit court also entered a permanent injunction prohibiting the public from entering or using the waters or ice located on the private property for recreational purposes without permission from the Landowners and prohibiting the GF&P and others from facilitation access to enter or use the waters or ice