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Great Basin Water Network v. Taylor, 234 P.3d 912 (Nev. 2010)

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Accordingly, the Supreme Court of Montana reversed the district court's decision.

Jamie Luckenbill

NEVADA

Great Basin Water Network v. Taylor, 234 P.3d 912 (Nev. 2010) (holding that a statutory amendment that allowed the State Engineer to postpone ruling on municipal-use groundwater applications for more than one year did not apply retroactively and that the proper remedy for a State Engineer's untimely ruling was to re-notice applications and reopen the protest period).

In order for the Las Vegas Valley Water Department ("LVVWD") to appropriate public water from groundwater sources, LVVWD filed roughly one hundred and forty-six applications for water rights with the State Engineer in 1989. In 1990, eight hundred and thirty parties ("protestants") filed protests with the State Engineer in response to these applications. In 1991, the Southern Nevada Water Authority ("SNWA"), a regional agency formed to address the water needs of the Las Vegas valley, acquired LVVWD's rights to the 1989 applications. Between 1991 and 2002, some of the applications were withdrawn and others were ruled on after hearings held by the State Engineer.

In 1989, Nev. Rev. Stat. § 533.370(2) required that the State Engineer decide on each water appropriation application within one year of the final protest date. The State Engineer could only postpone action beyond one year if he received written authorization from the applicant and protestant, if there was ongoing water supply studies, or if there was ongoing court action concerning the water right. In 2003, the legislature amended the statute, adding a fourth exception that allowed the State Engineer to postpone the disposition of pending applications prepared for municipal use.

In October 2005, the State Engineer attempted to notify approximately three hundred people by certified mail of a prehearing conference scheduled for January 2005, concerning the protest of SNWA's remaining groundwater applications. The postal service returned a vast majority of the notices undelivered. The State Engineer did not attempt to resend the notices. At the hearing in January of 2006, protestants requested that the State Engineer re-notice SNWA's applications and reopen the protest period. In March 2006, the State Engineer denied these requests. In August 2006, fifty-four protestants filed a petition with the Seventh Judicial District Court, White Pine County ("district court") for judicial review of the State Engineers decision to deny the request for re-notice. The district court determined that the State Engineer did not abuse his discretion because there was no statutory provision that required

additional notice and, therefore, denied the petition for review.

On appeal to the Nevada Supreme Court ("court"), the dispositive issue was whether SNWA's 1989 applications were still pending in 2003 when the legislature amended Nev. Rev. Stat. § 533.370 to allow the State Engineer to postpone the disposition of the applications for more than one year. The protestants argued that the 1989 applications were not pending in 2003 because they lapsed after the one year protest period. They further contended that the SNWA had to have filed its applications within one year of the 2003 amendment's enactment in order for the State engineer to consider them pending. In contrast, SNWA argued that because the legislature intended the 2003 amendment to apply retroactively, the 1989 applications were still pending. This argument was based on the fact that the 2003 amendment included a provision specifying that the municipal use exception applied to pending applications rather than only future applications.

The court found that because the protestant's and SNWA's arguments demonstrated the ambiguous nature of the term "pending" in the 2003 amendment, it would look beyond the statute to the legislative history in order to determine the legislature's intent. Because the court determined that the legislative history did not provide any guidance as to the 2003 amendment's retroactive effect, the court analyzed the statute in a manner consistent with reason and public policy. The court concluded that the protestants' interpretation of the statute was more reasonable for four reasons. First, the legislature's setting of a timeline requiring the disposition of applications within one year evidenced the legislature's intent to prevent a significant delay in rulings. Without evidence of the legislature's intent that the municipal use exception should apply retroactively, the practice of allowing applications to linger for long periods of time without authorization or notice from the protestor would have been inequitable. Second, the statutory timeline would be superfluous without consequences for not issuing a ruling within one year. Third, SNWA's interpretation of the 2003 amendment would deprive some of the protestants of due process. Eleven of the fifty-four protestants in this action originally protested SNWA's applications in 1989 when Nev. Rev. Stat. § 533.370 required authorization from a protestant in order to allow the State Engineer to postpone disposition of a water rights permit. Fourth, an interpretation of the statute that would allow the 2003 amendment to apply to every groundwater application ever filed would produce absurd results. Accordingly, the court determined that the legislature intended applications to be eligible for the exception only if they had not exceeded the one-year limitation at the time the 2003 amendment was enacted.

Next, because the legislature did not specify a remedy in the statute for noncompliance with the timing requirements, the court had to determine the proper remedy. The court concluded that when a party files a protest in a timely manner the proper remedy is to

require the State Engineer to re-notice the applications and reopen the protest period. The court reasoned that voiding the State Engineer's ruling and preventing him from taking further action would be inequitable to SNWA and applicants should not be punished for the State Engineer's failure to follow his statutory duty. The court further reasoned that it would be inequitable to the protestants if the State Engineer's inaction over a fourteen-year period resulted in the application's approval.

Accordingly, the court reversed the district court's order denying the petition for judicial review and remanded the matter to the district court with directions to further remand the matter to the State Engineer for further proceedings.

Toby Weiner

OREGON

Pete's Mountain Homeowners Ass'n v. Or. Water Res. Dep't, 238 P.3d 395 (Or. Ct. App. 2010) (holding that members of a local homeowner association, who owned water rights in Clackamas County, had standing to seek judicial review of the Oregon Water Resources Department's final order approving an application to amend a water company's water right permit).

Pete's Mountain Water Co., Inc. ("the water company") owned a water right permit in Clackamas County that authorized the withdrawal of groundwater for group domestic use and limited irrigation on roughly 147 acres of land. In 2004, the water company applied to the Oregon Water Resources Department ("the department") to amend its water right permit to expand the authorized place of use. Interestingly, the amendment application did not request to change the amount of homes that the water company would serve.

In late 2006 and early 2007, pursuant to chapter 537 of the Oregon Revised Statutes, Pete's Mountain Homeowners Association and a number of local residents (collectively referred to as "the homeowner association") filed comments with the department opposing the water company's application. The homeowner association alleged that approval of the application would fail to protect the public interest and neglect existing groundwater rights held by association members and local residents. Neither chapter 536 nor chapter 537 of the Oregon Revised Statutes required the department to hold a contested case hearing. Without further action, the department issued a final order approving the water company's application.

The homeowner association then filed a petition for judicial review with the Clackamas County Circuit Court. The water company subsequently intervened and moved to dismiss the petition asserting that the homeowner association lacked standing to seek review. The