



**DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES  
DIVISION OF WATER RESOURCES**

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## MEMORANDUM

**TO:** Commission to Study the Adjudication of Water Law Cases

**FROM:** Adam Sullivan, P.E., Acting State Engineer  
Micheline N. Fairbank, Esq., Deputy Administrator

**DATE:** June 22, 2021

**RE:** Summary and Overview of Cases Where Conflicts Between Statute, State Engineer Duties and Judicial Decisions Impact Statewide Resource Management

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Pursuant to the request of the Chair of the Commission to Study the Adjudication of Water Law Cases, Chief Justice James Hardesty, that the State Engineer provide the Commission with a description of cases and statutes in which decisions and responsibilities of the State Engineer come into conflict with judicial decisions or impact statewide water resource management issue, the Division of Water Resources provides this overview. The purpose of this overview is to provide some context of the challenges the Division sees with respect to administering Nevada's water laws in an evolving environment where there is greater contention, more ready litigation, and evolution of courts in reviewing challenges to decisions of the State Engineer.

The Division experiences various challenges reconciling its decisions with judicial decisions and policy implications. There are some circumstances where court decisions have a significant and clear impact on the daily operations of the Division. However, many judicial decisions have a more subtle impact on the Division with respect to the management of Nevada's

water resources. These areas include what seems to be a subtle shift from the substantial evidence standard of review to de novo review, deference to the State Engineer and the increasing use of equitable relief.

A foundational component of judicial review of decisions or orders of the State Engineer is whether that decision is supported by substantial evidence.<sup>1</sup> Looking at the long-standing interpretation of the judicial review statutes within Nevada's water laws, the court in *Revert* soundly rejected the appellant's request for de novo review of the State Engineer's finding of abandonment of rights to a spring source.<sup>2</sup> On appeal, the *Revert* court found that appeals of decisions of the State Engineer are not entitled to de novo review.<sup>3</sup> And while de novo review requires deference to the State Engineer's findings, such does not circumvent the requirement that "all interested parties must have a 'full opportunity to be heard.'"<sup>4</sup> This foundational aspect of judicial review has long been the standard in evaluating whether a determination by the State Engineer's decision is supported by substantial evidence.

However, over time, the Division has observed what it perceives as a slow erosion from this standard into what appears to be less of a clearly defined standard of substantial evidence to one which more and more often is imputing characteristic traits of de novo review. This erosion has come in various forms, whether it be allowing the introduction of new testimony to the introduction of and reliance on extrajudicial evidence not otherwise before the State Engineer at the time that the decision was rendered.<sup>5</sup> Where historically, extrajudicial evidence would not have been considered by the district court, but the matter remanded to the State Engineer to consider such extra judicial evidence, the State Engineer has seen an increasing trend where courts have been more inclined to allow the supplementation of the administrative record before the court,

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<sup>1</sup> See e.g. *Revert v. Rey*, 603 P.2d 262 (1979).

<sup>2</sup> *Id.* at 264.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 265.

<sup>5</sup> See, e.g. *Fulstone v. State Engineer*, 3<sup>rd</sup> Judicial District Court, Case No. 15-CV-01395 (2015); *Happy Creek, Inc. v. State Engineer*, 6<sup>th</sup> Judicial District Court of Nevada, Case No. CV 20, 869 (2017); *Rockwood Lithium, Inc. v. State Engineer*, 5<sup>th</sup> Judicial District Court of Nevada, Case No. CV-16-5062 (2017); *Pahrump Fair Water v. State Engineer*, 5<sup>th</sup> Judicial District Court of Nevada, Case No. CV38972 (2018).

often with evidence that was not the before the State Engineer at the time the decision was rendered, or even allowing the introduction of testimony of witnesses on factual matters.<sup>6</sup>

Going back into the annals of Nevada water law, the court has historically rejected the notion of considering extrinsic evidence.<sup>7</sup> In fact, where the State Engineer failed to afford a challenging party a “full opportunity to be heard” as required by NRS 533.450(2), the remedy was to remand the matter to the State Engineer to address and resolve all crucial issues.<sup>8</sup> However, there appears, at least to the State Engineer, a diminishing appetite by the courts to remand matters where there may be additional evidence and matters that must be considered to allow an interested party their full due process opportunities afforded under NRS 533.450.

The consideration of evidence by the first reviewing court presents many challenges for the State Engineer with respect to the management of Nevada’s water resources. First and foremost, the State Engineer and Division of Water Resources staff endeavor to apply Nevada’s water laws in a consistent manner. However, this is done with a recognition that while each and every water right application and condition before the office for consideration is unique and must be considered in light of the unique facts and circumstances presented in that matter, each decision also results in a decision with statewide policy implications. Where a court allows for the supplementation of an administrative record with evidence and testimony not before the State Engineer at the time of rendering a decision and then makes findings and conclusions in reliance, whether in whole or part, on that evidence, those decisions can be disruptive to statewide policy decisions of the Division. For example, where courts weigh such extrajudicial evidence in consideration of the matter before them, that consideration may unintentionally omit the consequence of such decision on resource management decisions within a particular hydrographic basin, stream or river system, or even more broad statewide implications, particularly in the overall management of Nevada’s water resources within the confines of Nevada’s water laws.

Some specific examples of such implications include circumstances where the State Engineer determined that a water right should be forfeit for the failure of the holder of the water right to apply continual beneficial use of the right. A fundamental tenet of Nevada’s water law

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<sup>6</sup> See generally *Id.*

<sup>7</sup> See, e.g., *Kent v. Smith*, 140 P.2d 357 (1943).

<sup>8</sup> *Revert*, 603 P.2d at 264-65.

is beneficial use, which is “the basis measure and limit of the right to the use of water.”<sup>9</sup> In this circumstance, the State Engineer made the determination that a water right could not be changed because the right had long been forfeited due to lack of any beneficial use. This finding was made after extensive review of all the facts and evidence presented by the applicant, the historic water usage practices at the original point of diversion and place of use, and considering historic flows of water from the water source. However, despite the applicant having an opportunity to present evidence in support of their application, before the district court volumes of additional evidence was presented in support of the equitable aspect of the applicants plea that the water right should not be forfeited and that the new holder of right be afforded an opportunity to resume use. The district court, partially in reliance on this evidence and plea of equity, remanded the case for further consideration by the State Engineer, thus not making a specific finding as to whether the State Engineer’s decision was supported by substantial evidence, but succumbing to the plea of equity, despite the diligent scientific analysis and supporting facts for the State Engineer’s determination.

Another example is where the court omitted considering the facts and evidence relied upon by the State Engineer in cancelling a water right, but jumped almost immediately to exercising the court’s equitable discretion, overriding clear statutory language that otherwise precluded the equitable relief sought.<sup>10</sup> While the State Engineer does not have the authority to grant the equitable relief awarded by the court, the implications where clear statutory language establishing a consequence for the failure of a holder of a water right to comply with its legal responsibilities creates challenges. While those challenges may not directly implicate sound water resource management, it does create disparity where the rule of the law becomes overly subjective in its application.

These examples implicate numerous policy challenges for the Division. One challenge is balancing public perception that the State Engineer does not avail himself to the statutory tools available to him to bring Nevada’s hydrographic basins into balance. Many of Nevada’s hydrographic basins have water right permits and certificates that exceed the perennial yield of the basin, and the Division has for many years explored different mechanisms to begin to address over appropriation in a responsible and reasonable manner. In opposition to those efforts, many have

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<sup>9</sup> NRS 533.035.

<sup>10</sup> See *Happy Creek v. State Engineer*, *supra*.

criticized the office for failing to avail itself to the statutory tools existing in law, such as cancellation and forfeiture. However, these cases are examples that where the State Engineer undertakes efforts to utilize those statutory tools, equity often circumvents those efforts. When equity is used as an overarching “get out of jail free” card where a holder of a water right fails to abide by their statutory obligations to diligently pursue perfection of their water right, it creates judicial barriers to the State Engineer’s diligent and good faith efforts to employ existing statutory tools to bring hydrographic basins into balance, or to make available water for new appropriators where new appropriations are precluded due to others holding those rights, but not actively or fully using their right.

Further, the growing precedence of courts’ free allowance for equitable relief presents several challenges. One is that the State Engineer is placed in a difficult position of deciding whether to appeal every adverse decision, which carries a risk of creating unfavorable statewide precedence. Another is where an individual district court decision only carries persuasive weight, appeals are perceived as attacks on individual water right users and contributes to public trust and relationship challenges. Finally, the State Engineer must balance the financial cost of an appeal.

Additional challenges the State Engineer faces with respect to balancing district court decisions with statewide policy issues relates to the deference to be afforded to the State Engineer. Over time the courts have slowly afforded less and less deference to the technical knowledge and decisions rendered by the Division. The long-standing standard of review for judicial review arising from NRS 533.450 has been that such actions are “in the nature of an appeal.”<sup>11</sup> And, where matters are in the nature of an appeal, the Supreme Court precedence is that “neither the district court nor [the Supreme Court] will substitute its judgment for that of the State Engineer.”<sup>12</sup> Where the precedence was previously that a court would “not pass upon the credibility of the witnesses nor reweigh the evidence,” as previously discussed, this deference and limited review to the substantial evidence standard has thinned, creating distinct challenges for the State Engineer in administering statewide water policies.

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<sup>11</sup> NRS 533.450(1).

<sup>12</sup> *Revert*, 603 P.2d at 264.

Some examples include scientifically based determinations relating to the effect of water development on the resource as a whole in hydrologically connected systems, and when capture of those resources rises to a measurable and tracible conflict. Other examples include the difficult role of the State Engineer to, in more recent times, weigh conflicting and competing expert analysis and opinions in rendering a decision. For example, in deciding applications for new appropriations, the State Engineer makes specific findings regarding groundwater appropriations based upon a full review of any expert reports and testimony presented by the parties, as well as the utilization of the extensive hydrologic, geologic, and engineering resources within the Division. In one specific case, the State Engineer made findings that where an extremely long and very uncertain time period in which capture of groundwater in an upgradient basin may at some distal point in the future (in this case perhaps 200 years or more), did not constitute a conflict with existing rights. In that case, the State Engineer relied upon his statutory obligation to balance the best available science, and to consider the aspect of Nevada water law that places a priority on beneficial use with the prospect of a contemporaneous use potentially conflicting with an existing right at some point in the future; however, the court found that the prospect for the capture to result in conflict, regardless of how long it would take, was violative of Nevada's water law.<sup>13</sup>

The decision in that proceeding is not consistent with how the State Engineer previously evaluated water right applications, and how existing water right entitlements have been established and relied upon by those with existing rights, and that decision has interjected uncertainty into statewide water resource management policies and practices. Further, while the decision carries persuasive precedence, it certainly is not binding on any other district court proceeding. However, when the State Engineer is charged with balancing those statewide policy directives of Title 48 of the NRS with the science, and other policy implications, it creates very real challenges to water resource management. This is certainly not to be an assertion that the State Engineer looks to disregard the findings of the district court in that matter, and as time evolves and the issues and realities of water resource management, including the effects of historic practices become more identifiable, the problems only compound. Often, the State Engineer is caught between a rock and a hard place and results often seem to only create "winners" and "losers."

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<sup>13</sup> See *White Pine County v. State Engineer*, 7<sup>th</sup> Judicial District Court of Nevada, Case No. CV-1204049 (2020).

Other examples include circumstances where the State Engineer and his technically trained staff expend extensive time and resources in making calculations and making conclusions based upon historic evidence of water use and practices, but such diligent and scientifically based decisions are disregarded and the judiciary undertakes its own independent calculations. This has at times including the consideration of extrajudicial evidence that may not be accurately reflective of those historic practices. Such decisions are not only disruptive to the weight and credibility of the office's expertise and technical resources but undermine staff morale who spend countless hours and personal investment in performing their duties in an objective and technically supported basis. It can also have an underestimated or unrealized impact on the erosion of deference to the State Engineer and the technical knowledge and skills of the staff within the Division beyond the court room, extending to statewide relationships. When the courts do not afford deference to the State Engineer, then on what basis do those challenging his decisions rely on the office and Division as the statewide nonpartial expert? With this erosion of deference to the State Engineer, the Division has seen increased acrimony to the Office by those challenging those decisions. And with that increased animosity, it presents more widespread challenges with working with the water right holders statewide on the real and fundamental water resource management issues.

The State Engineer also acknowledges that there are many instances where challenges to decisions of the Office have resulted in more well defined interpretation and application of the law or have served to hold the Division accountable to a higher decree of decision making. Perhaps, stated differently, not every "loss" is unjustified and there are also recent examples of where such decisions serve to hold the Office to a higher standard of decision making.<sup>14</sup> Additionally, through the judicial review process, the Division has and continues to recognize opportunities for improved processes to better allow for all participants and interested persons adequate due process and notice and opportunity to be heard.

While this memorandum does not constitute a comprehensive audit of all cases and circumstances in which judicial review has presented challenges for water resource management, this memorandum is intended to provide an overview of the significant areas in which the Division and State Engineer experience challenges in the fulfilment of their duties and responsibilities. To this end, the State Engineer greatly appreciates the opportunity to engage in this constructive

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<sup>14</sup> See, e.g., *King v. St. Clair*, 414 P.3d 314 (2018).

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dialogue with the commission to explore ways that the administrative and judicial review processes may be improved to best serve Nevada's water resources and the public.