

Interbasin Water Transfers in Nevada

Introduction

This article provides an overview of the statutory criteria that govern interbasin transfers in the state of Nevada. Specifically this article addresses Nevada Revised Statutes (“NRS”) 533.370(5), which describes the statutory standards that must be met for the appropriation of any water, and NRS 533.370, which sets forth the criteria upon which an application for an interbasin transfer must be evaluated. Additionally, this article discusses several cases that have interpreted NRS 533.370(5) and NRS 533.370(6). Finally, this article discusses the Southern Nevada Water Authority’s (“SNWA”) Ground Water Development Project (“GWD”) in Clark, Lincoln, and White Pine Counties and several rulings by the State Engineer relevant to the GWD.

Consideration for the Appropriation of Water

Chapter 533 of the Nevada Revised Statutes “prescribes the general requirements that every applicant must meet to appropriate water” and governs the adjudication of vested water rights, as well as the appropriations of public waters. Bacher v. Office of the State Engineer of the State of Nevada, 122 Nev. __, __, 146 P.3d 793, 797 (2006). As stated in NRS 533.370(5), the State Engineer must reject an application and refuse to issue a permit if “there is no unappropriated water in the proposed source of supply, or where its proposed use or change conflicts with existing rights or with protectable interests in existing domestic wells as set forth in NRS 533.024, or threatens to prove detrimental to the public interest”

In Pyramid Lake Paiute Tribe of Indians v. Washoe County, the Supreme Court of Nevada interpreted the public interest criteria as described in NRS 533.370(5). 112 Nev. 743, 918 P.2d 697 (1996). In Pyramid Lake, Washoe County filed “inter-basin” applications to transfer water from Honey Lake to the Truckee Meadows. Id. at 744-745, 918 P.2d at 697. The Pyramid Lake Paiute Tribe of Indians and the Board of Supervisors, Lassen County, California, (“Appellants”) opposed the permits on economic and environmental grounds. Id. Despite such protests, the State Engineer granted Washoe County’s applications. Id. Appellants petitioned for judicial review, arguing the State Engineer did not consider whether the applications were detrimental to the public interest. Id. The district court agreed and remanded the case to the State Engineer. Id.

On remand, the State Engineer identified the following policy considerations in Nevada water statutes to aid in the defining of public interest:

1. An appropriation must be for a beneficial use.
2. The applicant must demonstrate the amount, source and purpose of the appropriation.
3. If the appropriation is for municipal supply, the applicant must demonstrate the approximate number of persons to be served and the approximate future requirements.
4. The right to divert ceases when the necessity for the use of water does not exist.
5. The applicant must demonstrate the magnitude of the use of water, such as the number of acres irrigated, the use to which generated hydroelectric power will be applied, or the number of animals to be watered.
6. In considering extensions of time to apply water to beneficial use, the State Engineer must determine the number of parcels and commercial or residential units which are contained or planned in the area to be developed, economic conditions which affect the availability of

the developer to complete application of the water to beneficial use and the period contemplated for completion in a development project approved by local governments or in a planned unit development.

7. For large appropriations, the State Engineer must consider whether the applicant has the financial capability to develop the water and place it to beneficial use.
8. The State Engineer may also cooperate with federal authorities in monitoring the development and use of the water resources of the State.
9. [The State Engineer] may cooperate with California authorities in monitoring the future needs and uses of water in the Lake Tahoe area and to study ways of developing water supplies so that the development of the area will not be impeded.
10. Rotation in use is authorized to bring about a more economical use of supplies.
11. The State Engineer may determine whether there is over pumping of groundwater and refuse to issue permits if there is no unappropriated water available.
12. [The State Engineer] may determine what is a reasonable lowering of the static water level in an area after taking into account the economics of pumping water for the general type of crops growing and the effect of water use on the economy of the area in general.
13. Within an area that has been designated, the State Engineer may monitor and regulate the water supply.

Id. at 746-747, 918 P.2d 699. After reviewing the aforementioned policy considerations, the State Engineer found that the importation project served the public interest. The State Engineer also found that he cannot evaluate all possible alternatives to importing water. Id. at 747, 918 P.2d 699. The State Engineer indicated he “must act on the applications before him and [he] is not in a position to interfere with the decisions and responsibilities of Washoe County.” Id. Furthermore, “[t]he State Engineer can only look at the applicant’s ability to finance the project” Id.

Appellants filed a second petition for judicial review again arguing that the State Engineer had failed to sufficiently evaluate the public interest. Id. The Nevada Supreme Court disagreed with the Appellants and ruled that the thirteen guidelines articulated by the State Engineer sufficiently defined the public interest. Id. at 748, 918 P.2d 700. The Court also agreed that the State Engineer does not have the duty or the authority “to engage in a comparative economic analysis of water delivery alternatives.” Id. at 750, 918 P.2d at 701. Instead, as evidence from legislature, it is the duty of the county to engage in a comparative economic analysis. Id. In addition, the State Engineer does not have the resources or funding to complete an economic analysis. Id. Therefore, the State Engineer has no duty to review economic considerations and alternative projects when he is considering the public interest criteria. Id. (citations omitted).

Interbasin Transfer

When determining if an application requesting an interbasin transfer of groundwater should be rejected, the Nevada State Engineer must consider the following criteria:

- (a) Whether the applicant has justified the need to import the water from another basin;
- (b) If the State Engineer determines that a plan for conservation of water is advisable for the basin into which the water is to be imported, whether the applicant has demonstrated that such a plan has been adopted and is being effectively carried out;
- (c) Whether the proposed action is environmentally sound as it relates to the basin from which the water is exported;

- (d) Whether the proposed action is an appropriate long-term use which will not unduly limit the future growth and development in the basin from which the water is exported; and
- (e) Any other factor the State Engineer determines to be relevant.

NRS 533.370(6).

Bacher v. Office of the State Engineer of the State of Nevada discussed the interbasin transfer criteria as set forth in NRS 533.370(6) and specifically focused on the need requirement. 122 Nev. at __, 146 P.3d at 793. In Bacher, the Nevada Supreme Court was confronted with the issue of whether NRS 533.370(6)(a) required that an applicant demonstrate his personal need for the water or whether an agent could apply for a water rights permit on behalf of the actual appropriator. Id. The Court held that an agent could apply for a water rights permit on behalf of the appropriator; however, this right was limited by the anti-speculation doctrine, which requires that the agent have a contractual or agency relationship with the water's appropriator. Id.

In analyzing the issue the Court first considered NRS 533.030(1), which states that water may only be appropriated if it is to put to beneficial use. Id. at __, 146 P.3d at 797. Beneficial use is defined as "the basis, the measure and the limit of the right to the use of water." Id. (quoting NRS 533.035; see also Desert Irr., Ltd. v. State of Nevada, 113 Nev. 1049, 1059, 944 P.2d 835, 842 (1997)). If beneficial use is demonstrated, as required by NRS 533.070(1), the quantity of the appropriated water is limited to an amount of water reasonably required to substantiate the established beneficial use. Bacher, 122 Nev. at __, 146 P.3d at 797.

"Reflecting the beneficial use policy, NRS 533.370(6)(a)" requires that the State Engineer "consider the need to import water from another basin when reviewing interbasin groundwater transfer applications." Id. The Nevada Supreme Court held that to establish need, evidence may be provided by a third party. Id. at 798. In reaching this conclusion, the Court reviewed Prosole v. Steamboat Canal Co., where the court stated "he who applies the water to the soil, for a beneficial purpose, is in fact the actual appropriator, although the application may be made through the agency of another." 37 Nev. 154, 162, 140 P. 720, 723 (1914). The Court also stated, "[w]hile Prosole does not interpret the "need" requirement of NRS 533.370(6)(a), it demonstrates that several decades before NRS 533.370(6) was enacted, it was considered reasonable for an applicant to satisfy certain water permit requirements through a showing of the actual appropriator's beneficial use." Bacher, 122 Nev. at __, 146 P.3d at 797.

However, the Court determined that this right is limited by the "anti-speculation doctrine." Id. The anti-speculation doctrine requires that prior to granting an application for an interbasin groundwater transfer, an agency or contractual relationship must be proven between the applicant and the party who will put the water to beneficial use. Id. This requirement prevents approval of speculative water right application without the demonstration of beneficial use. Id.

Thus, the Court concluded Vidler could demonstrate beneficial use on behalf of the appropriator; however, because the State Engineer did not make the necessary finding, the granting of Vidler Water's interbasin groundwater transfer application was not supported by substantial evidence, and was reversed. Id. at 801.

SNWA Project Description

The Las Vegas Valley is currently facing two significant problems involving its water needs. First, the Valley must secure water to meet the increasing demands created by Las Vegas' substantial and continued growth. Second, the Las Vegas Valley must secure alternate sources of water and diversify its water sources due to the declined levels of Lake Mead.

Growth: For the past five years, Las Vegas has been enduring a drought. In addition to drought, Las Vegas has experienced considerable growth and, for several decades, has been identified as one of the fastest growing metropolitan areas in the United States. The Las Vegas Valley has added almost 500,000 new residents since 2000. As a direct result of drought and continued growth, Las Vegas is faced with the issue of how to meet the increasing demand for water. While the growth rate may have slowed in the past year, additional water is needed as growth continues.

Lake Mead: Las Vegas receives ninety percent of its water supply from Lake Mead. However, currently, Lake Mead is experiencing decreasing water levels as the Lake's elevation has dropped nearly 15 feet in the last year and is 118 feet below capacity. Therefore, Las Vegas Valley must diversify its water resources to meet the demands of its growing population.

The Groundwater Project: Despite SNWA's long commitment to conservation and its substantial efforts to reduce water demands, additional water resources must be secured to meet projected demands created by continued growth. In an attempt to meet these needs and protect the Las Vegas Valley, SNWA has been actively pursuing the Groundwater Development Project in Clark, Lincoln, and White Pine Counties. The GWD will convey up to 200,000 acre-feet of groundwater per year. The groundwater will be taken from five hydrographic basins (Spring, Snake, Cave, Dry Lake, and Delamar Valleys) located in eastern Nevada. The groundwater, once secured, would then be pumped through a pipeline to serve SNWA's customers in Clark County, and also serve needs in Lincoln County.

SNWA has purchased, permitted, or applied for up to 167,000 acre-feet of groundwater rights per year in Spring, Snake, Cave, Dry Lake, and Delamar Valleys. The State Engineer has the regulatory responsibility of water right decisions in the State of Nevada and will approve or deny applications based upon Nevada law.

In April 2007, the State Engineer issued Ruling No. 5726, which permitted up to 60,000 acre feet of groundwater rights per year from the Spring Valley area, subject to a monitoring and mitigation program and an initial staged development period. On July 9, 2008, the State Engineer issued Ruling No. 5875 which permitted up to 18,755 acre feet of groundwater rights per year from Cave, Dry Lake, and Delamar Valleys. Both Ruling Nos. 5726 and 5875 will be discussed below. The State Engineer has not issued rulings on applications in Snake Valley. The current schedule for the Snake Valley hearing will also be discussed below.

Due to the fact that the majority of the project would be built across federal lands, SNWA submitted a right-of-way application to the U.S. Bureau of Land Management (BLM). The BLM has responsibility for land management and protection of federal water related resources in Nevada but does not have jurisdiction over water rights. The right-of-way would allow SNWA to construct and operate groundwater production conveyance, treatment facilities, and power conveyance facilities. The BLM is currently conducting environmental analysis for the right-of-way application.

Spring Valley, Ruling No. 5726

On April 16, 2007, the State Engineer issued Ruling No. 5726. Ruling No. 5726 involved Applications 54003 through 54021, filed by SNWA, to appropriate the underground water of the Spring Valley Hydrographic Basin in White Pine County, Nevada. In Ruling No. 5726, the State Engineer considered NRS 533.370(5). Specifically, the State Engineer found that: (1) there is unappropriated water to export from the Spring Valley basin; (2) the proposed use of the water does not conflict with existing rights (except for those rights on the Cleve Creek alluvial fan); (3) the proposed use does not conflict with protectable interest in existing domestic wells; and (4) the use of water is not detrimental to the public interest. Thus, NRS 533.370(5) mandates granting the water rights.

Additionally, the State Engineer considered the criteria for interbasin transfers as stated in NRS 533.370(6). The State Engineer found that Las Vegas has a sufficient need for the water and justified the importation of the water from the Spring Valley basin. The State Engineer also found that the amount of water requested is necessary and reasonably required for the proposed purposes and that the population projections were realistic.

Finally, the State Engineer found that Las Vegas has incorporated conservation into its water-planning efforts. Significant efforts have been made to inform the public of the current situation and the extent of conservation efforts. Las Vegas banned the creation of artificial lakes, water ordinances were adopted, and lawn watering was restricted. Also, water-conserving rates were modified, switching flat rates to increasing block rates. Additional conservation efforts include land use codes and ordinances to promote more effective use of water, water pricing, incentive programs, and water smart landscape rebate programs. The State Engineer found Las Vegas emphasizes conservation. Based on these facts, it was found that a plan for conservation is advisable and that such a plan is being effectively implemented in the Las Vegas Valley.

When considering whether the project is environmentally sound, the State Engineer first noted it is not his duty to provide an environmental impact statement for every application; instead, the State Engineer must evaluate the hydrologic environmental impact and ensure the export basin remains environmentally viable. The project is deemed environmentally sound if the use of water is sustainable over a long period of time without unreasonable impacts to the water resources and the hydrologic related natural resources that are dependent upon those resources. To make this determination, the State Engineer considered whether the extent of the pumping could draw non-potable water into a drinkable water source and the groundwater level declines from the pumpage.

The State Engineer indicated that there can be a reasonable impact on the hydrologic natural resource in the export basin and the application may still be environmentally sound. The State Engineer concluded that by requiring the collection of biological and hydrological baseline data, significant monitoring and mitigation plan, and a staged development and associated studies, significant safeguards are implemented to ensure the environmental safety of the basin of origin.

When determining whether the proposed withdrawal of water is an appropriate long-term use, the State Engineer indicated that population projections aid in the prediction of future growth but are not always accurate. As such, it was found that a certain quantity of unappropriated water must remain in the basin of origin for future long-term growth. To determine the amount, domestic, commercial, industrial, scenic or recreational future growth must be considered. In consideration of such factors, it was found that 10% of the perennial yield of the Spring Valley Hydrographic Basin as unappropriated water must be left for the future growth and development within said basin.

Based on the foregoing, the State Engineer granted removal of up to 60,000 acre feet of groundwater per year from the Spring Valley area. The removal of such water, however, is subject to a monitoring and mitigating program and an initial staged development period. In the event that pumpage impacts existing rights, conflicts with the protectable interests in existing domestic wells, threatens to prove detrimental to the public interest, or is not environmentally sound, SNWA will be required to curtail pumpage and/or mitigate the impacts to the State Engineer's satisfaction.

Cave Valley, Dry Lake Valley, and Delamar Valley, Ruling No. 5875

On July 9, 2008, the State Engineer issued Ruling No. 5875. This Ruling involved the Applications 53987 through 53992, filed by SNWA, to appropriate the underground water of Cave Valley, Dry Lake Valley, and Delamar Valley Hydrographic Basins in Lincoln County, Nevada. The State Engineer considered NRS 533.370 (5) and found that there is unappropriated water to export from the Cave Valley, Dry Lake Valley, and Delamar Valley, the proposed use of the water will not conflict with existing rights or with protectable interests in existing domestic wells, and the use of the water will not be detrimental to the public interest. Therefore, in accordance with NRS 533.370(5), the applications were granted.

Additionally, the State Engineer considered the criteria for interbasin transfers as set forth in NRS 533.370(6). The State Engineer specifically adopted and incorporated the findings in Ruling No. 5726, which held that SNWA justified the need to import water from another basin and that SNWA had adopted and implemented a conservation plan.

With respect to environmental soundness, the State Engineer reiterated the standard set forth in Ruling No. 5726. Similar to the finding in Ruling No. 5726, the State Engineer found that requiring the collection of biological and hydrological baseline data and a comprehensive monitoring and mitigation plan provided sufficient safeguards to ensure that the interbasin transfer of water from Cave Valley, Dry Lake Valley, and Delamar Valley will be environmentally sound.

In regards to the long-term use of the water and future growth and development of the basin of origin, the State Engineer reiterated the standard as stated in Ruling No. 5726. Additionally, the State Engineer found that an agreement between SNWA and Lincoln County whereby SNWA would assign water to Lincoln County to meet the future growth and development of the basin of origin, fails to satisfy NRS 533.370(6)(d).

Cave Valley Ranch, LLC, a protestant in the matter, argued that the State Engineer must consider highly speculative development ideas and that the State Engineer should reserve water for such speculative development when considering the basin of origin criteria. Specifically, Cave Valley Ranch proposed the State Engineer consider any development that can be envisioned, even if such speculative development has not been thought of yet. The State Engineer, however, expressly disagreed with Cave Valley Ranch, holding the consideration of such highly speculative development was unreasonable. Additionally, the State Engineer found that Cave Valley Ranch over-stated the potential for future growth and development. Thus, the State Engineer found that he is not to consider all possible development and growth when making a determination under NRS 533.370(6)(d).

In addition, while the Nevada Legislature did not mandate that water be left in the basin of origin, the State Engineer is required to ensure that the proposed action will not unduly limit the future growth and development in the basin of origin. As such, the State Engineer considered the use of the land and the type of crops currently grown, the population and its growth, the development of domestic lots, stock-

watering, and minor commercial uses. The State Engineer ordered that 275 acre feet of unappropriated water must be left in the Cave Valley basin, 50 acre feet must be left in Dry Lake Valley basin of origin, and 50 acre feet must be left in Delamar Valley for future growth and development. The State Engineer also found that the use of water under the Applications is an appropriate long-term use.

Based on the foregoing, the State Engineer granted 4,678 acre feet per year from the Cave Valley basin, 11,584 acre feet per year from the Dry Lake Valley basin, and 2,493 acre feet per year from the Delamar Valley basin, totaling 18,755 acre feet per year.

On August 6, 2008, Cave Valley Ranch appealed the State Engineer's ruling. Cave Valley Ranch opposed the State Engineer's interpretation of the basin of origin criteria. This appeal is currently pending in the Seventh Judicial District Court.

Snake Valley

The Snake Valley hearing will involve Applications 54022 through 54030 which were filed by SNWA to appropriate the underground water of the Snake Valley hydrographic basin located in White Pine County, Nevada. The hearing for application 54022 through 54030 began in July 2008, is scheduled to resume in September 28, 2009, and conclude on October 19, 2009. The Nevada Division of Water Resources is currently posting all rulings pertaining to this hearing. <http://water.nv.gov>.