IN THE SUPREME COURT OF THE STATE OF NEVADA

TRUCKEE MEADOWS WATER AUTHORITY, AN AGENCY ESTABLISHED PURSUANT TO THAT CERTAIN COOPERATIVE AGREEMENT AMONG THE CITY OF RENO, THE CITY OF SPARKS, AND THE COUNTY OF WASHOE, EXECUTED DECEMBER 4, 2000, PURSUANT TO CHAPTER 277 OF NEVADA REVISED STATUTES,
Appellant,
vs.
BIG CANYON RANCH, A NEVADA PARTNERSHIP COMPRISED OF GEORGE, HERBERT AND ALLEN CAPURRO; AND SPARKS GALLERIA INVESTORS, LLC,
Respondents.

No. 44722

FILED

JUL 06 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF REVERSAL

This is an appeal from a district court order granting a writ of mandamus in a water rights case. Second Judicial District Court, Washoe County; James W. Hardesty, Judge.

Appellant Truckee Meadows Water Authority (TMWA) is charged with providing water services in Washoe County. In 2003, respondents Big Canyon Ranch and Sparks Galleria Investors (collectively Big Canyon) sought to dedicate their water rights to TMWA in order to procure water services in the Reno area.

As a result, TMWA conducted a title search of Big Canyon's water rights and discovered that Antonio Rafetto, Big Canyon's predecessor in interest, had conveyed portions of these rights to third

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parties in 1926 and 1938.[1] Because Big Canyon did not have clear title to a portion of its claimed water right, TMWA refused to provide the requested services.

Big Canyon petitioned the district court for a writ of mandamus compelling TMWA to provide water services. The district court granted the writ, concluding that the State Engineer's approval of two applications to change the point of diversion, place of use, and manner of use of all of Big Canyon's water rights–including the allegedly defective portion–effectively quieted title to the entire right. As a result, the district court concluded that TMWA had no basis for rejecting Big Canyon's dedication. For the following reasons, we reverse.

Standard of Review

A writ of mandamus may be used "to compel the performance of an act which the law requires as a duty resulting from an office, trust or station."[2] Mandamus will not issue unless it is shown that the respondent has a "clear, present legal duty to act."[3] Mandamus is not appropriate to control discretionary action unless discretion is manifestly abused or exercised arbitrarily or capriciously.[4]

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[1]Specifically, TMWA discovered that Rafetto had conveyed 8.0 acre feet to a J.M. Scott through conveyances in 1926 and 1938. Rafetto also had conveyed 29.5 acre feet to a Thomas Kinsley in 1926.

[2]NRS 34.160; see Brewery Arts Ctr. v. State Bd. Examiners, 108 Nev. 1050, 1053, 843 P.2d 369, 372 (1992).

[3]Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603, 637 P.2d 534, 536 (1981).

[4]Id. at 603-604.

Big Canyon argues that we must review the district court's decision for an abuse of discretion; however, we conclude that de novo review is appropriate. The district court based its decision on its interpretation of statutory provisions governing the approval of applications to change the point of diversion, place of use, and manner of use of existing water rights. Therefore, this is an issue of statutory construction that we review de novo.[5]

Discussion

The district court concluded that the State Engineer's acceptance of two change applications–one filed by Big Canyon's predecessor in interest in 1958 and the other filed by Big Canyon in 2000–resolved any potential defects in title. This conclusion was erroneous.

NRS Chapter 533, which governs the State Engineer's duties, prohibits the State Engineer from resolving conflicting claims of title. The State Engineer is statutorily mandated to reject a change application if its proposed use conflicts with existing rights.[6] In addition, recent amendments to Chapter 533 make clear that the State Engineer's acceptance of a change application does not serve to quiet title to the underlying right[7]:

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[5]City of Las Vegas v. Walsh, 121 Nev. ____, ____, 124 P.3d 203, 205 (2005).

[6]NRS 533.370.

[7]Sheriff v. Smith, 91 Nev. 729, 734, 542 P.2d 440, 443 (1975) (recognizing that a statutory amendment may constitute persuasive evidence of what the Legislature intended by the first statute); accord Beazer Homes Nevada, Inc. v. Dist. Ct., 120 Nev. 575, 580-81, 97 P.3d 1132, 1135-36 (2004).

> The procedures in this chapter for changing the place of diversion, manner of use or place of use of water, and for confirming a report of conveyance, are not intended to have the effect of quieting title to or changing ownership of a water right and that only a court of competent jurisdiction has the power to determine conflicting claims to ownership of a water right.[8]

In an attempt to circumvent this clear legislative direction, Big Canyon advances several theories why there is no conflicting claim to ownership of its purported water right. None of these arguments are persuasive.

First, Big Canyon argues that the permits issued by the State Engineer in 1958 and 2000 went unchallenged. Big Canyon notes that NRS 533.365 provides interested parties thirty days to protest an application to change a water right and NRS 533.450(1) gives parties thirty days to file a petition for judicial review after an application is approved. Big Canyon contends that once these periods expired the applications were final and cannot now be challenged by TMWA.

This argument, however, ignores the distinction between an underlying water right and an application to change the point of diversion, place of use, or manner of use of that right. The expiration of these statutes of limitations does not bar a challenge to a State Engineer's decision resolving conflicts of title because, as explained above, the State Engineer does not have authority to make such a decision. Instead, the statutes cited by Big Canyon only prohibit review after the limitation period of the State Engineer's acceptance of the change application.

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[8]NRS 533.024(2). Although this provision was added after this matter was decided by the district court, we cannot ignore such a clear statement of legislative intent.

Second, Big Canyon argues that there is no conflicting claim to ownership because neither Scott nor Kinsley has challenged Big Canyon's asserted rights, and, as a result, TMWA's refusal to issue a will serve commitment is based on pure speculation. However, the fact the earlier deeds to Scott and Kinsley exist clearly demonstrates there is a conflict: different parties potentially have the right to claim ownership of the same water. This case represents an actual case and controversy for TMWA because once TMWA becomes obligated to provide water services to a project, it cannot terminate that service if it later turns out the project does not have rights to the water. As a result, TMWA is not required to accept any portion of a water resource offered by an applicant not possessing clear title to the right.

Finally, Big Canyon argues there is no conflicting claim to ownership because, regardless of the earlier deeds, it is the rightful owner of all the water rights it sought to dedicate.[9] At oral argument, Big Canyon argued at length that these water rights were resolved in its favor in the 1944 final decree of the Orr Ditch Litigation.[10] However, our review of the decree indicates that it only served to adjudicate the rights of the United States and not those of private parties. Regardless, Big Canyon's claims of ownership are precisely the type that should be resolved by the district court in a quiet title action instead of being decided for the first time on appeal.

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[9]Notably, the district court's order was not premised on a finding that Big Canyon was the true owner of the water rights at issue; instead, the decision was based on an erroneous belief that the State Engineer's acceptance of the change applications quieted title.

[10]United States v. Orr Ditch Co., Equity No. A-3 (D. Nev. 1944).

Furthermore, we note that our decision is necessary to uphold elementary due process principles. If the State Engineer's acceptance of a change application were to quiet title to a water right, then aggrieved third parties should first be given notice and an opportunity to be heard.[11] When a person submits a change application to the State Engineer, however, the only notice provided is through publication.[12] Publication is not adequate constitutional notice unless interested persons whose rights are affected cannot with due diligence be ascertained and afforded actual notice.[13] There is absolutely no indication that the successors in interest of Scott and Kinsley could not have been ascertained through due diligence.

Conclusion

The State Engineer's acceptance of the 1958 and 2000 change applications did not quiet title to Big Canyon's asserted water rights. As a result, the district court erred in granting the writ. Accordingly, we

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[11]Maiola v. State, 120 Nev. 671, 675, 99 P.3d 227, 229 (2004); see Orme v. District Court, 105 Nev. 712, 715, 782 P.2d 1325, 1327 (1989).

[12]NRS 533.360(1).

[13]Mullane v. Central Hanover Tr. Co., 339 U.S. 306, 317 (1950).

ORDER the judgment of the district court REVERSED.[14]

_____, C.J.
Rose

_____, J.
Becker

_____, J.
Maupin

_____, J.
Gibbons

_____, J.
Douglas

_____, J.
Parraguirre

cc: Second Judicial District Court Dept. 9, District Judge
Terry A. Simmons, Settlement Judge
Woodburn & Wedge
Law Offices of Alan R. Smith
Parsons Behle & Latimer
Washoe District Court Clerk

[14]The Honorable James W. Hardesty, Justice, voluntarily recused himself from participation in the decision of this matter.