

# SCOPE OF THE STATE ENGINEER'S DISCRETION WHEN ISSUING WATER PERMITS

BY DEBBIE LEONARD, ESQ.

“First in time; first in right.” This oft-repeated principle of Nevada water law is simple enough in concept: One who seeks to appropriate water cannot injure the established rights of those who have already put water from the same source to beneficial use. Known as the prior appropriation doctrine, and codified in Nevada water law, this rule necessarily guides the Nevada State Engineer when issuing water permits. Two appeals currently before the Nevada Supreme Court demonstrate that this seemingly simple concept can get complicated when applied to water appropriations in the driest state in the nation.

The first appeal challenges the State Engineer’s issuance of groundwater permits for the Mount Hope molybdenum mine in Eureka County. The second appeal seeks to uphold the State Engineer’s issuance of permits to Southern Nevada Water Authority (SNWA) to export groundwater from eastern Nevada to the Las Vegas metropolitan area. At issue in these court challenges is the scope of the State Engineer’s authority to determine the amount of water available for appropriation, and to impose conditions on new permits to prevent injury to existing rights. Specifically, can the State Engineer approve junior appropriations that will impact senior rights, so long as those impacts can be mitigated? And, to the extent that such mitigation is consistent with the protections afforded senior water users by the prior appropriation doctrine, must the State Engineer establish quantitative mitigation standards at the time the permit is issued?

## Statutory Authority

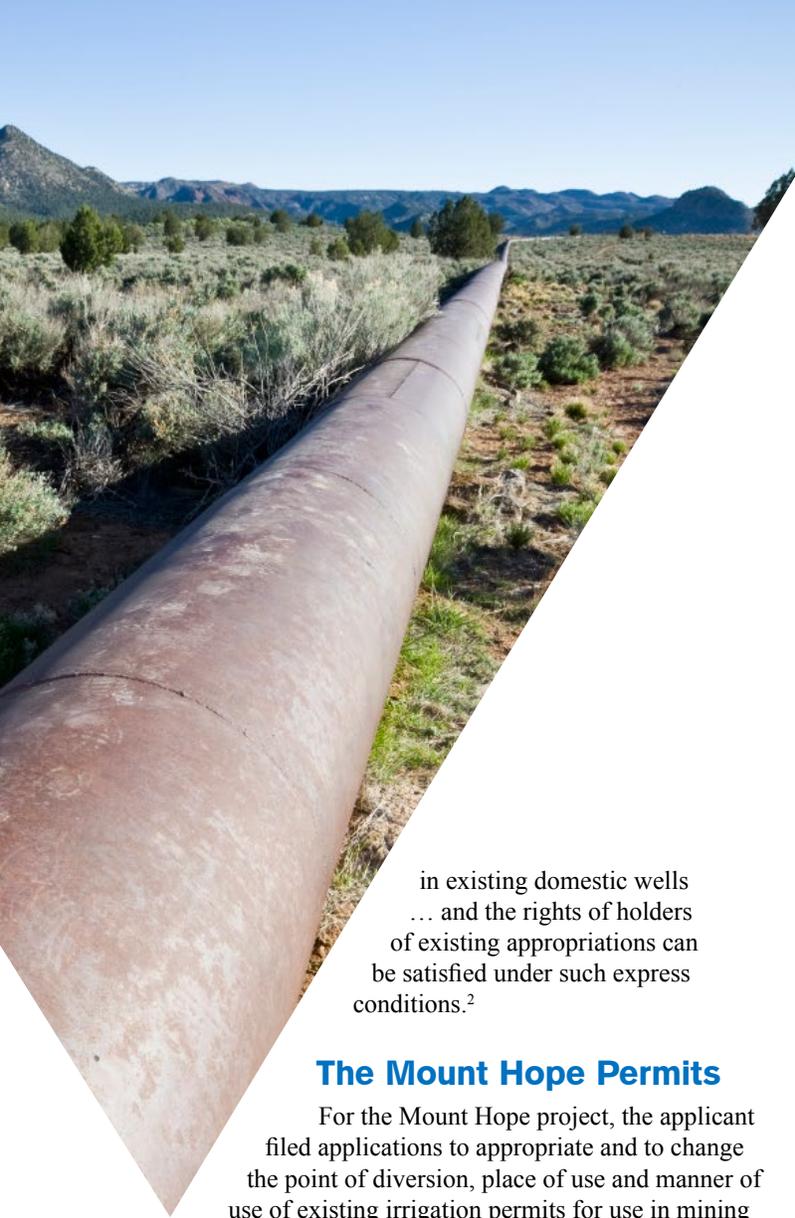
In answering these questions, the Nevada Supreme Court will likely look first to the relevant statutory authorities that guide the State Engineer in reviewing water rights applications:

[W]here 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 ... or threatens to prove detrimental to the public interest, the State Engineer shall reject the application and refuse to issue the requested permit.<sup>1</sup>

The State Engineer is authorized to impose conditions on permits:

It is a condition of each appropriation of groundwater ... that the right of the appropriator relates to a specific quantity of water and that the right must allow for a reasonable lowering of the static water level at the appropriator’s point of diversion. In determining a reasonable lowering of the static water level in a particular area, the State Engineer shall consider the economics of pumping water for the general type of crops growing and may also consider the effect of using water on the economy of the area in general.

This section does not prevent the granting of permits to applicants later in time on the ground that the diversions under the proposed later appropriations may cause the water level to be lowered at the point of diversion of a prior appropriator, so long as any protectable interests



in existing domestic wells ... and the rights of holders of existing appropriations can be satisfied under such express conditions.<sup>2</sup>

### The Mount Hope Permits

For the Mount Hope project, the applicant filed applications to appropriate and to change the point of diversion, place of use and manner of use of existing irrigation permits for use in mining operations. Evidence showed that the mine’s well field would lower the groundwater table by approximately 10 feet and likely dry up at least one already-appropriated spring. The State Engineer granted the change applications and issued the permits, subject to the condition that the permittee develop a monitoring, management and mitigation plan (3M Plan), and mitigate impacts to existing rights by providing substitute water at the permitted point of diversion of the impacted users.<sup>3</sup>

In a separate proceeding, the State Engineer approved the applicant’s 3M Plan. Eureka County and appropriators who would be affected by the mine’s groundwater pumping petitioned for judicial review of both decisions, and the district court affirmed. Both decisions were appealed to the Nevada Supreme Court and have been consolidated. Briefing is complete, and the court heard oral arguments in June.<sup>4</sup>

The appellants advance two primary arguments:

1. The State Engineer cannot grant groundwater permits later in time when the junior appropriation will impact prior surface water rights; and
2. The State Engineer did not have authority to issue a permit subject to a “future, undefined” 3M Plan. The appellants argued that they did not receive a “full and fair determination,” because there was

no mitigation plan in the record when the State Engineer approved the permit, notwithstanding the known impacts on existing water rights.

At its heart, the basis for the State Engineer’s claimed authority to issue the Mount Hope permits is the usufructuary nature of water rights. As a use right, the State Engineer argued that a water right consists only of the right to divert a certain amount of water at a certain point of diversion and put it to use at a certain place. Where substitute water in the same amount and quality can be provided at the same point of diversion, according to the State Engineer’s position, the water right is satisfied. Similarly, the State Engineer posits that where Nevada’s water statutes anticipate a reasonable drawdown of the aquifer to accommodate new appropriations, the concept of mitigation is codified in Nevada law.

### The SNWA Permits

The SNWA appeal addresses the content – not timing – of a 3M Plan. There, the State Engineer granted four permits to SNWA that allowed staged development of 61,127 acre feet of water.<sup>5</sup> Stage one allowed SNWA to pump up to 38,000 acre feet annually for eight years; stage two allowed SNWA to pump up to 50,000 acre feet annually for eight years; and stage three allowed SNWA to pump the full permitted amount of 61,127 acre feet annually. During each stage, SNWA must collect data, model the effects on the aquifer and report to the State Engineer. The permits were conditioned on compliance with the 3M Plan that had been prepared by SNWA and various federal agencies.

On judicial review, the district court reversed in part on the basis that the State Engineer’s approval of 61,127 acre feet exceeded the perennial yield of the affected groundwater basins and that the 3M Plan lacked “objective standards” as to when mitigation would go into effect.<sup>6</sup> The State Engineer had determined that “[s]electing specific [quantitative mitigation] standards before a full baseline [assessment of environmental resources] is developed would be premature [and] would not lead to sound scientific decisions.” The district court disagreed, concluding that if sufficient baseline information existed for the State Engineer to make an “informed decision” to issue the permit, setting quantitative thresholds that would trigger mitigation was not premature.

As a result, the district court remanded for the State Engineer to, among other things, “[d]efine standards, thresholds or triggers so that mitigation of unreasonable effects from pumping of water are neither arbitrary nor capricious.” On appeal, some of the protestors moved to dismiss

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SNWA and the State Engineer's appeals for lack of jurisdiction, arguing that the remand order was not appealable. At the time of this writing, the motions to dismiss remain pending and no briefs have yet been filed.<sup>7</sup>

## The Implications

Both of these appeals have potential state-wide impacts. In the Eureka County appeal, municipal water purveyors throughout the state weighed in as amici curiae in support of the State Engineer's decision.<sup>8</sup> The amici argued that "the development of new and existing municipal water resources will often impact existing water rights." Noting the historical practice of the State Engineer, the amici posited that the State

Engineer could condition a permit on the mitigation of known impacts to existing rights because an "impact" that can be mitigated is not a "conflict," as that term is used in NRS 533.370(2). Indeed, according to the amici, without this authority, the water needs of Nevadans could not be satisfied. Given the demands for a new source of supply for the Las Vegas area, the SNWA appeal will likely garner amicus support as well.

The core issue before the Nevada Supreme Court in both of these appeals is the scope of the State Engineer's authority to calculate the water available for appropriation and determine the measures needed to prevent injury to more senior water rights. The permit challengers assert legal error, while the State Engineer and permittees argue that the challenged permits were within the State Engineer's discretion. In resolving these appeals, the Nevada Supreme Court will need to delineate the contours of the State Engineer's authority under Nevada's water statutes. ■

1 NRS 533.370(2).

2 NRS 534.110(4)-(5).

3 Ruling 6127, available at <http://images.water.nv.gov/images/rulings/6127r.pdf>.

4 Case Nos. 61324, 63258.

5 Rulings 6164, 6165, 6166 and 6167, available at <http://water.nv.gov/data/stateengineer/rulingsresults.cfm>.

6 Decision in CV-1204049 (Seventh Jud. Dist. Ct. December 10, 2013).

7 Case No. 64815.

8 In the interest of full disclosure, the author notes that she represents one of the amici.



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