

LESSONS TO BE LEARNED FROM *SERPA* AND *REDROCK*

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This paper provides the reader with a short summary of “lessons to be learned” from two cases decided by the Nevada Supreme Court over the past twenty years regarding the extent of a county’s authority and that of the State Engineer over water appropriation, use and transfer within a county’s jurisdiction. Those two cases are *Serpa v. County of Washoe*, 111 Nev. 1081, 901 P.2d 690 (1995), hereafter *Serpa*, and *Redrock Valley Ranch, LLC v. Washoe County*, 127 Nev. ___, 254 P.3d 641(2011), hereafter *RVR*. A brief summary of the issues in each case is necessary to put the lessons learned in context.

Serpa involves a property owner seeking to develop a 201 lot subdivision on 236 acres of land in East Washoe Valley. Prior to submitting his application to Washoe County, Serpa obtained approval from the State Engineer for the utilization of his water rights for the proposed purpose (subdivision). The County denied his application for a tentative subdivision map based upon a South Valleys Area Plan adopted in 1985, later amended, that contained an analysis of the hydrology of the area and which resulted in policies prohibiting development of parcels less than 5 acres in size in the East Washoe Valley area unless a new water source was provided. A Washoe County Board of Commissioners’ interpretation regarding the “new water source” language was that more dense development than the 5 acre minimum within the planning area required the importation and dedication of new water rights from outside Washoe Valley.

RVR involves a project that proposed to transmit water approximately 16 miles from one hydrologic basin (Redrock Valley) to another (Lemmon Valley) within Washoe County. The County protested *RVR*’s application before the State Engineer, but later withdrew its opposition upon *RVR* reducing the amount of water to be transferred. The State Engineer approved *RVR*’s application to change the place and manner of use of the subject water – up to certain levels (within the amount agreed to by the County) and upon certain conditions. The project required, pursuant to the Washoe County Comprehensive Plan, a special use permit for the sixteen miles of pipelines, well houses, water tank, access roads and other needed project facilities. The transmission route was, in part, adjacent to two rural single-family developments, Sierra Rancho Estates and Red Rock Estates.

In both cases, the applicant appealed the Planning Commission decision to the Board of County Commissioners. In both cases, the Board of County Commissioners upheld the Planning Commission decision. In both cases, the applicant appealed the action of the Commission to the District Court. In both cases, the District Court upheld the Commission’s decision. Finally, in both cases, the Nevada Supreme Court upheld the District Court’s decision.

In both cases, the issues on appeal to the Nevada Supreme Court were similar. First, it was argued that the decision of the District Court (and in both cases, therefore, the decision of

the Planning Commission and Board of County Commissioners) was arbitrary and capricious – another way of saying that the decision was made without basis or reason on the record before the County Commission. Second, it was argued that the County lacked authority to make a decision that, in essence, invalidated or negated a decision by the State Engineer - in other words, the County was preempted by the State Engineer’s water rights decision.

Arbitrary and Capricious. In reaching its decision in *Serpa*, the Court extensively reviewed the broad planning authority granted to the County by the State Legislature, the adoption in 1985 of the South Valleys Area Plan, the amendment of that plan following the creation of the Truckee Meadows Regional Planning Authority (TMRPA) in 1991 and the validation of that plan by said TMRPA – all in existence prior to *Serpa* submitting his application. Stating that *Serpa* bore the burden of proving that the planning and zoning enactments by the County were “...unnecessary to public health, safety and welfare” the Court found that there was substantial evidence to support the decision¹ of the County. It even went so far as to say that the County would have acted arbitrarily and capriciously if it had ignored its plan and approved the application.

In *RVR*, the appellants also argued that there was not sufficient or substantial evidence before the Commission to support its decision and was, therefore, arbitrary and capricious. Noting that a public agency may rely on public testimony in denying a special use permit, the Court concluded (citing prior cases) that there was sufficient public testimony indicating, among other things, potential adverse impacts of the project on adjacent properties and that such public testimony was adequate to support the Board’s decision.

Preemption. *Serpa* argued that the county was precluded from denying his application because the State Engineer had exclusive authority over water rights. The Court stated that there was no state law that preempted or restricted a county’s ability to impose more restrictive requirements (on the use and/or transfer of water) than the State Engineer as long as such restrictions “...were consistent with a county’s long range comprehensive plan, Nevada law and notions of public welfare.”

Similarly, the *RVR* representatives argued that the State Engineer proceedings had both preemptive and preclusive effect on the County. Citing *Serpa* the Court found that the State Engineer’s ruling neither preempted nor precluded Washoe County from denying the special use permit application. It stated that the roles of the State Engineer and County are distinct and separate, with the State Engineer charged with deciding whether to approve or not approve an application for an inter-basin transfer of groundwater and the County charged with deciding the

¹ Citing *Nova Horizon v. City Council, Reno*, 105 Nev. 92, 769 P.2d 721 (1989). “Substantial evidence” is that which a reasonable mind might accept as adequate to support a conclusion. Other decisions have made it clear that a court is not to substitute its view of the evidence for that of the local board or commission as long as the evidence permits the view as set forth in the decision.

political, social, environmental and economic matters relating to the use and/or transfer of water. The Court found that the reasons given by the County for the special use permit denial were sufficiently separate and distinct from the issues addressed by the State Engineer. RVR representatives also argued that even if the county had the authority to deny the permit, it had waived its exercise of said authority since it had withdrawn its protest against RVR's State Engineer application. The Court found that Washoe County did not agree to issue a special use permit as part of the agreement to drop its protest and that, under contract law, such an promise could not be read into the agreement.

LESSONS TO BE LEARNED

1. Without a plan containing an analysis of water resources (*Serpa*) or a plan with review processes in place (*RVR*), there is no role or opportunity for a county to consider matters beyond the purview of the State Engineer as it relates to the use and/or transfer of appropriated water.
2. A plan in place, and followed, constitutes substantial evidence in support of a county decision regarding the use of water in place or the transfer of water within the county.
3. A county is not precluded or preempted from having a plan relating to water use or water transfer with policies more limiting or restrictive than those which the State Engineer may utilize in rendering a decision on availability of water or transfer of water.
4. A county's policies relating to water use or transfer (e.g., policies addressing the social, environmental and economic impacts associated with water use and transfer), along with procedures to allow a review of same will provide a county with the opportunity – beyond any review or determination by the State Engineer – to make an independent determination on the impacts of a proposed project involving water use and/or transfer within its jurisdiction.

Note: This document was prepared by Madelyn Shipman, former Assistant District Attorney for Washoe County, and Steve Bradhurst, Executive Director of the Central Nevada Regional Water Authority.

