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### Summary of Pyramid Lake Paiute Tribe v. State Engineer, 126 Nev. Adv. Op. No. 48

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## **Summary**

Appeal from order denying petition for judicial review of State Engineer's ruling in a water rights action.

## **Disposition/Outcome**

A unanimous Court affirmed the State Engineer's ruling to grant Nevada Land and Resource Company, LLC ("NLRC") a change application for its water rights in Washoe County's Dodge Flat Hydrologic Basin because substantial evidence supported the State Engineer's conclusion that the Basin contained unappropriated water and that any harm to existing water rights or the public's interest was the result of the Tribe's unpermitted use.

## **Factual and Procedural History**

In 1980, NLRC obtained permits to appropriate Dodge Flat groundwater for temporary use for a project that never materialized, but NLRC kept its water rights valid. Twenty years later, NLRC applied to change its permit to a different and permanent use. The Pyramid Lake Paiute Tribe ("the Tribe") opposed the application. After the State Engineer granted the application, the Tribe filed a petition for review in district court, but the court denied the petition.

## **Discussion**

### *Standard of Review*

The State Engineer's decision is *prima facie* correct and the burden of proof is on the party attacking the decision.<sup>2</sup> A reviewing court looks to "whether the evidence upon which the engineer based his decision supports the order."<sup>3</sup> However, questions of law are reviewed without deference to the State Engineer's ruling, although the rulings may be persuasive.<sup>4</sup>

### *Water Rights Change Applications and Federal Implied Water Rights on Reservations*

The State Engineer cannot grant a change application to appropriate public waters if: (1) there is no unappropriated water at the propose source; (2) the proposed change conflicts with existing rights or protectable interests in domestic wells under NRS 533.024; or (3) the proposed use or change "threatens to prove detrimental to the public interest."<sup>5</sup> The Tribe opposed NLRC's change application on all three grounds.

When the federal government establishes a reservation, it impliedly reserves sufficient water rights to fulfill the reservation's purpose.<sup>6</sup> The Tribe asserted an implied right under

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<sup>1</sup> By Sean W. McDonald.

<sup>2</sup> NEV. REV. STAT. § 533.450(9) (2007).

<sup>3</sup> *State Eng'r v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991) (citing *State Eng'r v. Curtis Park*, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985)).

<sup>4</sup> *Town of Eureka v. State Eng'r*, 108 Nev. 163, 165-66, 826 P.2d 948, 949-50 (1992).

<sup>5</sup> NEV. REV. STAT. § 533.370(5) (2007).

<sup>6</sup> *See Winters v. United States*, 207 U.S. 564, 577 (1908).

*Winters v. United States* to the groundwater, which it was using without a permit. In 1944, the Nevada federal district court entered the *Orr Ditch* decree, which adjudicated the water rights on the Truckee River.<sup>7</sup> In *Nevada v. United States*, the U.S. Supreme Court ruled that the *Orr Ditch* decree represented “the full ‘implied-reservation-of water’ rights that were due the Pyramid Lake Indian Reservation.”<sup>8</sup> Thus, *res judicata* barred the Tribe from asserting additional federally implied water rights.<sup>9</sup> In the present case, the Nevada Supreme Court held *res judicata* barred the Tribe from asserting an implied water rights claim for the Dodge Flat Groundwater.

The Court then turned to the issue of whether substantial evidence supported the State Engineer’s decision. The Court found that the Tribe’s own expert determined that the change use application would not interfere with the Tribe’s water rights. Accordingly, the Court found that none of the statutory criteria for denying a change application existed.

First, the Tribe had no rights to the Dodge Flat groundwater, and the State Engineer appropriately excluded the Tribe’s unauthorized use to calculate whether unappropriated water remained. Second, the State Engineer correctly concluded the change applications will not affect existing water rights, based on the Tribe’s own evidence, primarily because the Tribe had no claim to the groundwater. Third, the change did not threaten to be detrimental to the public interest, as NLRC is only authorized to pump up to the unappropriated perennial yield.<sup>10</sup> Rather, the Court said the potential threat to the public interest was due to the Tribe’s continued unauthorized use of the Dodge Flat groundwater.

## **Conclusion**

The Court found that substantial evidence supported the State Engineer’s decision that the Dodge Flat Basin contains unappropriated water and that any harm to existing water rights or the public’s interest is the result of the Tribe’s unpermitted use. Furthermore, because the Tribe’s use was without benefit of an implied right or permit and was without priority over NLRC’s permits and change application, the Court affirmed the State Engineer’s ruling.

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<sup>7</sup> See *United States v. Orr Water Ditch Co.* (Orr Ditch Decree), Equity No. A3 (D. Nev. 1944).

<sup>8</sup> *Nevada v. United States*, 463 U.S. 110, 133 (1983).

<sup>9</sup> *Id.* at 145.

<sup>10</sup> The perennial yield of a hydrological basin is the equilibrium amount or maximum amount of water that can safely be used without depleting the source.