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### Summary of Preferred Equities Corp. v. State Eng'r

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# ***Preferred Equities Corp. v. State Eng’r, 75 P.3d 380 (Nev. 2003).***<sup>1</sup>

## **PROPERTY LAW – WATER RIGHTS - APPEALS**

### **Summary**

Appeal from an order of the Fifth Judicial District Court, State of Nevada, denying petition for judicial review of State Engineer Ruling No. 4499. State Engineer Ruling No. 4499 rejected Petitioner’s application to change the diversion point and usage of certain water rights that they owned. Denial of application was based on mootness; applicant no longer owned water rights in question.

### **Disposition/Outcome**

Affirmed. Nevada Supreme Court denied petitioners appeal; upholding the order from the Fifth Judicial District Court, State of Nevada denying petition for judicial review.

### **Factual and Procedural History**

In 1988, Petitioners filed an application to change the diversion point and usage of certain water rights with the State Engineers. The application was not acted upon and in 1992 the State Engineers started forfeiture proceedings on the water rights in question. In December 1996, the State Engineers Ruling 4481 concluded that since the water rights had not been utilized for more than five years Preferred Equities Corporation (PEC) forfeited the water rights.<sup>2</sup> PEC did not appeal this ruling. Then, in February 1997, the State Engineers Ruling 4499 denied PEC’s application to change the diversion point and usage rights, filed in 1988.<sup>3</sup>

In May 1997, PEC filed a petition for judicial review of Ruling 4499. The State Engineer moved for dismissal on the grounds that PEC failed to appeal Ruling 4481 within the statutory proscribed 30 days and that the petition was an impermissible attempt to review Ruling 4481. The State Engineer also argued that Ruling 4481 was correct because PEC failed to make benefit of the water rights in question. The district court found for the State Engineers and dismissed PEC’s petition with respect to Ruling 4499. PEC appeals.

### **Discussion**

Nevada State Engineer Ruling 4481 became final 30 days after rendering unless appealed by the applicant; PEC did not file an appeal in connection with Ruling 4481.<sup>4</sup> PEC seeks independent review claiming on statutory and equitable grounds that the application *tolled* the running of the five-year divestiture time period.

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<sup>1</sup> By James Davis.

<sup>2</sup> State Engineer’s Ruling 4481, 20 Dec.1996.

<sup>3</sup> State Engineer’s Ruling 4499, 25 Feb. 1997.

<sup>4</sup> PEC does not contest Ruling 4481 or contest that they failed to take benefit of the usage rights in question for 5 years.

### Mootness

PEC's water rights reverted to the State one the State Engineer concluded that PEC forfeited those rights based on NRS. 534.90(1).<sup>5</sup> The reversion became final when PEC failed to appeal the State Engineer's ruling within the statutory proscribed 30 days.<sup>6</sup> Thus, PEC's application to change the diversion point and usage rights became moot because PEC no longer owned those water rights.

### Tolling Claim

PEC claimed that its application tolled the forfeiture period by implication under NRS 533.040(2).<sup>7</sup> PEC claims that it was unable to practical use of the water in its current location and that it would have been wasteful to continue to use water while waiting for the State Engineer's decision on its application. The court found this argument compelling but against public policy of forfeiture of water rights not used beneficially for a five year period. The court

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<sup>5</sup> NEV. REV. STAT. 534.090(1) (1995). Forfeiture and abandonment of rights – (1) Except as otherwise provided in this section, *failure for 5 successive years* after April 15, 1967, on the part of the holder of any right, whether it is an adjudicated right, an unadjudicated right, or a permitted right, and further whether the right is initiated after or before March 25, 1939, to use beneficially all or any part of the underground water for the purpose for which the right is acquired or claimed, works a forfeiture of both undetermined rights and determined rights to the use of that water to the extent of the nonuse. For water rights in basins for which the state engineer keeps pumping records, if the records of the state engineer indicate at least 4 consecutive years, but less than 5 consecutive years, of nonuse of all or any part of such a water right which is governed by this chapter, the state engineer shall notify the owner of the water right, as determined in the records of the office of the state engineer, by registered or certified mail that he has 1 year after the date of the notice in which to use the water right beneficially and to provide proof of such use to the state engineer or apply for relief pursuant to subsection 2 to avoid forfeiting the water right. If, after 1 year after the date of the notice, proof of beneficial use is not sent to the state engineer, the state engineer shall, unless he has granted a request to extend the time necessary to work a forfeiture of the water right, declare the right forfeited within 30 days. Upon the forfeiture of a right to the use of ground water, the water reverts to the public and is available for further appropriation, subject to existing rights. If, upon notice by registered or certified mail to the owner of record whose right has been declared forfeited, the owner of record fails to appeal the ruling in the manner provided for in NRS 533.450, and within the time provided for therein, the forfeiture becomes final. The failure to receive a notice pursuant to this subsection does not nullify the forfeiture or extend the time necessary to work the forfeiture of a water right.

<sup>6</sup> NEV. REV. STAT. 533.450 (1977) Orders and decisions of state engineer subject to judicial review; procedure; appeals; appearance by attorney general – (1) Any person feeling himself aggrieved by any order or decision of the state engineer, acting in person or through his assistants or the water commissioner, affecting his interests, when such order or decision relates to the administration of determined rights or is made pursuant to NRS 533.270 to 533.445, inclusive, may have the same reviewed by a proceeding for that purpose, insofar as may be in the nature of an appeal, which shall be initiated in the proper court of the county in which the matters affected or a portion thereof are situated; but on stream systems where a decree of court has been entered, the action shall be initiated in the court that entered the decree. Such order or decision of the state engineer shall be and remain in full force and effect unless proceedings to review the same are commenced in the proper court within 30 days following the rendition of the order or decision in question and notice thereof is given to the state engineer as provided in subsection 3.

<sup>7</sup> NEV. REV. STAT. 533.040 (1999). Water used for beneficial purposes to remain appurtenant to place of use; exceptions – (2) If at any time it is impracticable to use water beneficially or economically at the place to which it is appurtenant, the right may be severed from the place of use and be simultaneously transferred and become appurtenant to another place of use, in the manner provided in this chapter, without losing priority of right.

also found that PEC's actions does not address their failure to file an appeal the State Engineer ruling within 30 days or file for an extension per NRS 534.090 (2)<sup>8</sup>.

### *Equitable Relief*

PEC claims equitable relief from the forfeiture. PEC contends that since forfeiture is not automatic and that the lack of beneficial use can be "cured" by putting the water to beneficial use before the beginning of the forfeiture period. PEC then contends that its application was equivalent to putting the water rights to beneficial use and the application was made before the forfeiture proceedings, thus PEC was making beneficial use of the water rights. The court disagreed and stated, "[t]he legislature has recognized that water is a limited resource in Nevada and it belongs to the public; therefore, one who does not put it to a beneficial use should not be allowed to hold it hostage."<sup>9</sup>

### **Conclusion**

The Nevada Supreme Court rejected all of the petitioner's claims. First, judicial review of State Engineer Ruling 4499 is moot because petitioner no longer had rights to the water in question after State Engineer Ruling 4481. Second, the tolling claim was rejected based on NRS 533.040(2). Lastly, equitable relief was declined because petitioner was unable to demonstrate beneficial use of the water rights and statutes concerning Nevada water rights are to be strictly construed. District Court's ruling is affirmed.

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<sup>8</sup> NEV. REV. STAT. 534.090(2) (1995). The state engineer may, upon the request of the holder of any right described in subsection 1, extend the time necessary to work a forfeiture under that subsection if the request is made before the expiration of the time necessary to work a forfeiture. The state engineer may grant, upon request and for good cause shown, any number of extensions, but a single extension must not exceed 1 year. In determining whether to grant or deny a request, the state engineer shall, among other reasons, consider: (a) Whether the holder has shown good cause for his failure to use all or any part of the water beneficially for the purpose for which his right is acquired or claimed; (b) The unavailability of water to put to a beneficial use which is beyond the control of the holder; (c) Any economic conditions or natural disasters which made the holder unable to put the water to that use; and (d) Whether the holder has demonstrated efficient ways of using the water for agricultural purposes, such as center-pivot irrigation.

The state engineer shall notify, by registered or certified mail, the owner of the water right, as determined in the records of the office of the state engineer, of whether he has granted or denied the holder's request for an extension pursuant to this subsection.

<sup>9</sup> Preferred Equities Corp. v. State Eng'r, 75 P.3d 380, 383 (Nev. 2003).