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### Nevada State Engineer v. Happy Creek, Inc., 375 Nev. Adv. Op 41 (Sep. 12, 2019)

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## **Summary**

In water rights permit cancellation cases, the Nevada courts have long-standing and well-supported authority to grant equitable relief from the new priority date that NRS 533.395 requires the State Engineer to assign.

## **Background**

Respondent Happy Creek, Inc. (“Happy Creek”) is a ranching and farming company which operates Happy Creek Ranch (the “Ranch”) in the Pine Forest groundwater basin in northern Nevada. The Ranch contains 1399 acres of land of which 855 are irrigated acres, and 765 of those acres are irrigated using the groundwater rights at issue.

The Ranch grows alfalfa on those 765 acres of irrigated land, which is essential to the economic viability of the Ranch. The Ranch’s groundwater irrigation rights total 3063 acre feet annually. The water rights were appropriated and certificated in stages and carried original priority dates ranging from 1954 to 1990 and have put the water to productive use since its first appropriation in 1954.

In 1994, Happy Creek hired John Milton, a water rights professional, to manage its filings for water rights with the State Engineer. Milton did so without fail until 2016.

In 2007, Happy Creek started using a center-pivot irrigation system rather than its prior flood irrigation, in order to use water more efficiently. Milton advised that this change would require filing additional applications with the State Engineer to change the place of use for the Ranch’s certificated groundwater irrigation rights, pursuant to NRS 533.325.<sup>2</sup>

In 2009, at Happy Creek’s request, Milton filed the application for the change with the State Engineer. The State Engineer approved the change and set April 29, 2012 as the deadline for Happy Creek to file proofs of beneficial use (“PBUs”). The permits retained its original priority dates but the change in place of use meant that Happy Creek could lose its water rights if it failed to produce PBUs consistent with the change by the given deadline.

Happy Creek spent almost \$1 million and several years making improvements to its water system. The PBUs required meter readings for the six wells involved for a minimum of 12 consecutive months. The conversion work was completed but each year at least one of the flow meters on the wells failed. Consequently, the data required for the PBUs were incomplete.

Due to the meter failures, Milton filed extensions of time (“EOTs”) between 2012 and 2015 for Happy Creek to file its PBUs with the State Engineer, which were granted.

On May 19, 2016, the State Engineer mailed Happy Creek notice that it needed to file its PBUs or additional EOTs within 30 days to avoid losing its groundwater permits. Happy Creek received this notice on May 23, 2016 and forwarded the notice to Milton that day. However, Milton missed the email and consequently missed the June 18, 2016 deadline.

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<sup>1</sup> By Paige Silva.

<sup>2</sup> NEV. REV. STAT. § 533.325 “any person who wishes to appropriate any of the public waters, *or to change the place of diversion, manner of use or place of use of water already appropriated*, shall, before performing any work in connection with such appropriation, change in place of diversion or change in manner or place of use, apply to the State Engineer for a permit to do so” (emphasis added).

On July 8, 2016, Milton realized his mistake and filed a petition on Happy Creek's behalf to have the State Engineer review its upcoming permit cancellations under NRS 533.395(2).<sup>3</sup> On October 12, 2016, the State Engineer held a hearing to review the cancellations. The hearing was recorded but not transcribed.

Happy Creek represents (and the State Engineer does not deny) that Happy Creek's representative asked the hearing officer to rescind the cancellations and restore the water rights' original priority dates, but the hearing officer explained that he did not have the authority to restore the priority dates pursuant to NRS 533.395(3).<sup>4</sup>

The State Engineer rescinded the cancellations on the condition that Happy Creek file its PBUs or EOTs within 30 days, which Happy Creek did. On November 1, 2016, the permits were reinstated, and pursuant to NRS 533.395(3),<sup>5</sup> its priority dates were changed to July 11, 2016.

Happy Creek filed a timely notice of appeal and petitioned for judicial review, requesting equitable relief by restoring the original senior priority dates of its groundwater rights. The district court granted Happy Creek its requested relief, holding that even though NRS 533.395(3)<sup>6</sup> constrained the State Engineer to change the priority dates, equity demanded that the senior dates of the permits be restored. The district court reasoned that (1) Happy Creek spend nearly \$1 million and several years improving its irrigation system; (2) Happy creek put the water to beneficial use; (3) Happy Creek attempted in good faith to protect its water rights; (4) that the Pine Forest groundwater basin is over-appropriated and subject to priority-based curtailment in the future; and (5) that the value of the Ranch depends on the priority of Happy Creek's water rights. The district court noted that requiring Happy Creek to lose its priority dates was an unjust punishment for the human error of untimely filing.

The State Engineer appeals, challenging the district court's authority to restore Happy Creek's original priority dates.

## **Discussion**

*Water law should be interpreted to serve the broad interests of the public because water belongs to the public.*

Water belongs to the public and should be distributed fairly to serve the broad interests of the public. Although Nevada codifies the law of prior appropriation, fairness and equity is an essential underlying principle. Longstanding Nevada precedent ascertains that the courts have authority, when necessary, to grant equitable relief in water law cases beyond that which statutes allow the State Engineer to grant, especially when the certificated water rights holder exercised diligence. Furthermore, although NRS 533.410 states that water rights "shall" be canceled by the State Engineer, this language does not affect the authority of the district court to grant equitable relief.<sup>7</sup> This authority is supported by case law and is also stated in the seminal treatise, *Nevada Water Law*.<sup>8</sup>

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<sup>3</sup> NEV. REV. STAT. § 533.395(2).

<sup>4</sup> NEV. REV. STAT. § 533.395(3).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> NEV. REV. STAT. § 533.410.

<sup>8</sup> James H. Davenport, *Nevada Water Law* 85 (2003).

*The 1981 amendments to NRS 533.395 did not serve to terminate the authority of Nevada courts to grant equitable relief for permit cancellations, but instead reinforces the courts' authority to do so.*

The 1981 amendments to NRS 533.395 did not terminate the authority of the Nevada courts to grant equitable relief for permit cancellations. When the Nevada Legislature enacts a statute, it is not presumed that the Legislature intends to overturn long-standing principles. Moreover, fairness and equity should not submit to the questionable construction of a statute nor mere inferences about a statute's meaning. The 1981 amendment to NRS 533.395 provides the State Engineer additional discretion to affirm, modify, or rescind permit cancellations that he did not have prior to the amendment. However, the amendment does not give the State Engineer discretion in setting the priority date to those water rights. Instead, it *requires* the State Engineer to vacate the previous priority date and replace it with the filing date of the written petition for cancellation review.

Pursuant to NRS 533.395, the court's authority to grant equitable relief to modify priority date changes is different from its deferential review of the State Engineer's decision to affirm, modify, or rescind a cancellation. Furthermore, the 1981 amendment did not expressly limit the equitable jurisdiction of Nevada's courts in permit cancellation cases and expressly acknowledged that in addition to the State Engineer's discretionary decisions, permit cancellations would still be open to judicial proceedings.<sup>9</sup>

The canon of surplusage requires that when interpreting a statute, "if possible, every word and provision is to be given effect. None should be ignored [or] given an interpretation that causes it to duplicate another provision or have no consequence."<sup>10</sup> When the canon of surplusage is applied to NRS 533.395(4), "reviewed" and "subject of any judicial proceedings" each has meaning, which includes both abuse-of-discretion and equitable review of the State Engineer's decision to affirm, modify or rescind permit cancellations. Thus, the 1981 amendments preserved the court's authority of equitable review of permit priority date changes. Furthermore, legislative comments expressly provide that the Legislature's intention when amending the statute was to give water rights appropriators with additional safeguards and levels of review before having their rights terminated.<sup>11</sup> Accordingly, the 1981 amendment is interpreted to expand the abilities of permit holders to retain their rights and terminating the courts' authority for equitable relief would be in contrary to this objective.

In the 2015 Nevada Supreme Court decision of *Benson v. State Engineer*, the Court held that a permittee must first file a petition for review with the State Engineer before bringing a claim directly to court and properly affirmed the district court's dismissal of the matter, reasoning that a permittee must first exhaust all administrative remedies before filing with the court.<sup>12</sup> Accordingly, the State Engineer's administrative review is a mandatory prerequisite to seeking equitable relief from the courts.

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<sup>9</sup> NRS 533.395 provides that "[t]he cancellation of a permit may not *be reviewed or be the subject of any judicial proceedings* unless a written petition for review has been filed [with the State Engineer] and the cancellation has been affirmed, modified or rescinded pursuant to subsection 2." (Emphasis added). NEV. REV. STAT. § 533.395 (amended 1981).

<sup>10</sup> Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012).

<sup>11</sup> Hearing on A.B. 27 Before the Assembly Econ. Dev. and Nat. Res. Comm., 61st Leg. (Nev. March 9, 1981) (statement of Roland Westergard, Director of the Department of Conservation and Natural Resources).

<sup>12</sup> 131 Nev. 722 358 P.3d 221 (2015).

*The facts of the current case support the grant of equitable relief.*

The State Engineer contends that even if the district court can grant equitable relief under certain circumstances, it erred in doing so because the facts did not support granting equitable relief. This is a mixed question of law and fact, which is reviewed *de novo*.<sup>13</sup>

There are limits on the authority of the Nevada courts to grant equitable relief for water law matters such as when a permittee fails to seek review from the State Engineer before bringing a claim in court, or when a permittee has not put water to beneficial use.

Furthermore, equitable relief should only be granted for cases in which such relief improves (1) efficiency; (2) sustainability; (3) fairness; and (4) clarity.<sup>14</sup>

First, efficiency is a central concern of Nevada water law, so for equitable relief to be warranted, such relief should promote beneficial (unwasteful) use of water more effectively than could be achieved by statute.

Second, sustainability is of high importance to Nevada water law because of the dry nature of the soil which relies on irrigation to thrive. Through such irrigation, what may have been useless land can become useful and profitable. For equitable relief to be proper, the courts must create relief which recognizes the interests of future generations by considering that water in this state is becoming increasingly scarce.

Happy Creek, Inc. invested \$1 million and years of work to make its irrigation system both more efficient and more sustainable for future generations and adhered to Nevada water laws for decades following its 2016 lapse.

Third, an equitable remedy provided by the court must serve the principle of fairness more effectively than the statute at issue. In water law, fairness is considered through water accessibility and balancing the burdens and benefits of development. Here, the Pine Forest groundwater basin, from which Happy Creek irrigates its water, is over-appropriated. Therefore, the district court correctly determined that the loss of priority could be as harmful as cancellation and could result in Happy Creek potentially losing its rights to water altogether. Happy Creek invested of nearly \$ 1 million and years of work to improve its irrigation system and such improvements would lose significant value if Happy Creek lost its priority. Moreover, the State Engineer does not contend that reinstating Happy Creek's priority date would harm the state or public.

Finally, the court's equitable relief must provide clarity more effectively than the statute at issue. That is to say, that confusion must be reduced using the court's form of equitable relief. Here, providing the equitable remedy of restoring Happy Creek's priority date allows for clarity of the law at issue by ensuring that the language and intent of the Legislature is interpreted consistently with one another.

Therefore, the State Engineer's assertion that the court did not properly grant equitable relief in the current case is rejected and restoring Happy Creek's priority dates serves efficiency, sustainability, fairness, and clarity.

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<sup>13</sup> *Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 480, 215 P.3d 709, 717 (2009) (explaining that the Nevada Supreme Court reviews mixed questions of law and fact *de novo* when legal issues predominate).

<sup>14</sup> *See generally* Helen Ingram et al., *Water and Equity in a Changing Climate*, Water and Equity, at 271, 299.

*This case will not open the litigation floodgates because very few cases will manifest the level of injustice faced by Happy Creek.*

This case is not intended to open the floodgates to priority date appeals across Nevada because this case is unique in that it fits within the established limiting principles. Here, Happy Creek invested almost \$1 million dollars to upgrade its irrigation system to promote efficiency and sustainability, Happy Creek's permit is for water in the Pine Forest basin which is over-appropriated and water usage could very well be curtailed according to priority, Happy creek made good faith, diligent efforts to preserve its rights and adhere to procedural requirements, and Happy Creek made consistent, beneficial use of the water for decades. Moreover, Happy Creek obtained its rights half a century ago or more, so it is unlikely that there will be many cases which show the same level of injustice to warrant equitable relief of the courts.

### **Conclusion**

Given the extraordinary circumstances, the district court properly granted respondent, Happy Creek, Inc., equitable relief by restoring its original priority dates on its water rights permit.