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Preferred Equities Corp. v. State Eng'r, 75 P.3d 380 (Nev. 2003)

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fact depending on the circumstances of the specific case. Here, Edwards's dam deprived Edmonson of water for livestock. Edmonson farmed and worked on his property for over fifty years. To his knowledge, throughout those fifty years the stream never lacked sufficient water for his farm. The court found that Edwards's dam harmed Edmonson, as he needed to move his livestock from his property to another location. Furthermore, the court found that Edwards did not have exclusive title to, or control of, the stream's water, even while it was on his land. The court stated an owner of land through which a nonnavigable stream flows could not divert the stream's water to the exclusion of others. Because Edwards diverted the stream to the exclusion of Edmonson, the court found that Edwards's use of the stream unreasonable. The court also concluded Edwards's unreasonable use of the stream damaged Edmonson, and therefore the circuit court correctly awarded Edmonson injunctive relief.

Finally, Edwards argued that if Edmonson was entitled to injunctive relief, such relief barred him from collecting damages. Because evidence showed Edmonson incurred monetary damages in addition to irreparable harm, the court held he was entitled to seek both damages and injunctive relief. Since the court found no error, it affirmed the circuit court judgment.

Kyle K. Chang

NEVADA

Preferred Equities Corp. v. State Eng'r, 75 P.3d 380 (Nev. 2003)

(holding (1) an application to change water diversion point was moot due to forfeiture and failure to appeal forfeiture within thirty days; (2) application to change place and manner of use of water rights did not toll the forfeiture period; and (3) equitable relief was unavailable to water rights holder who did not make beneficial use of water rights).

In 1988, Preferred Equities Corporation ("PEC") applied to the State Engineer for a change in the diversion point and usage of PEC's water rights. The State Engineer did not immediately act on that application and, in 1992, began forfeiture proceedings on the same water rights. In 1996, concluding PEC had not utilized the water rights for a period exceeding five years, the State Engineer declared the rights in forfeit. PEC did not appeal. In February 1997, the State Engineer issued a ruling denying the 1988 application to change the diversion and usage of the forfeited rights. In May 1997, PEC sought judicial review of the February ruling. The Fifth Judicial District Court agreed with the State Engineer that PEC's appeal was an impermissible attempt to review a finally adjudicated forfeiture. The court also agreed the State Engineer's properly denied the application to change

diversion and usage because PEC failed to make use of the water rights within the prescriptive time. Dissatisfied with the district court's finding, PEC appealed to the Nevada Supreme Court.

In its decision, the court (examined three points: (1) mootness, (2) the tolling of the forfeiture period, and (3) PEC's request for equitable relief. In addressing mootness, the court found that by failing to appeal the forfeiture ruling within thirty days, PEC allowed its water rights to revert to the public. The reversion became permanent in the period between PEC's 1988 application to change the diversion point of its water rights and the State Engineer's 1997 denial of that application. Therefore, because PEC no longer owned the water rights its application to change the diversion point and usage was moot.

Next, the court examined PEC's claim of tolling the forfeiture period. PEC argued it could not have made beneficial use of the water right without changing its diversion point, thus it would have been wasteful to require PEC to continue to use the water while it waited for the State Engineer's decision. However, the court noted that under Nevada law a proper process existed for requesting an extension of the five-year prescriptive period. Moreover, PEC should have timely responded to the forfeiture ruling and argued that its application to change the diversion point and usage tolled the forfeiture proceedings. PEC did neither; thus, the court rejected its tolling claim.

Finally, regarding PEC's request for equitable relief, the court said, "[t]he preeminent public policy concern in Nevada regarding water rights is beneficial use." The court said it has consistently applied water statutes strictly. Accordingly, because PEC did not use its rights, the court refused to grant equitable relief. Thus, the Nevada Supreme Court affirmed the district court's decision.

Jeff Gillio

NORTH CAROLINA

Murphy Family Farms v. N.C. Dep't. of Env'tl. and Natural Res., 585 S.E.2d 446 (N.C. Ct. App. 2003) (holding that a violation of dissolved oxygen and fecal coliform levels over eight days of testing consisted of eight violations, and that pumping excessive sand and grit from a disposal system did not trigger the notice requirements under the waste disposal permit).

Murphy Family Farms ("Murphy") challenged an assessment of civil fines by the Water Quality Division of the North Carolina Department of Environment and Natural Resources ("DENR") for violations of its waste management system permit. Murphy requested a hearing in front of an administrative law judge ("ALJ"). The ALJ