

IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA; AND STATE
ENGINEER, TRACY TAYLOR,
Appellants,

vs.

MORRIS DELEE REVOCABLE TRUST;
MICHAEL DELEE, AS TRUSTEE OF
THE MORRIS DELEE REVOCABLE
TRUST; AND JON DELEE, AS
TRUSTEE OF THE MORRIS DELEE
REVOCABLE TRUST,
Respondents.

No. 49410

FILED

JAN 27 2009
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting equitable relief in a water law matter. Fifth Judicial District Court, Nye County; John P. Davis, Judge.

Background

The water rights at issue in this case were originally acquired by William J. Moore (Moore) on November 24, 1953. The water rights encompass certain underground water of the Amargosa Desert Hydrographic Basin in Nye County, Nevada. The permit allowed for irrigation of 160 acres of land referred to as the Northeast Quarter. Moore's water rights were transferred to Morris DeLee (Morris), Moore's successor in interest on August 4, 1961. On January 28, 1982 Morris requested that the State Engineer assign the water rights to the Morris DeLee Revocable Trust (DeLee Trust), which was approved. The DeLees, however, did not use the water for the Northeast Quarter of their land, but they instead used it to irrigate the adjacent Northwest Quarter. For a

time, the DeLees leased the Northwest Quarter to James Owen (Owen), who used the water for irrigation there.

In 1985, the State Engineer conducted an investigation of water use in the Amargosa Valley, including the DeLees' land. At the time of the investigation, the Northwest Quarter was occupied by Owen, who was leasing the property with an option to buy from the DeLees. The investigation found that the Northwest Quarter was being irrigated illegally. The State Engineer issued an order to James Owen to cease illegally irrigating the property but took no further action. During 1988, the DeLees regained possession of the Northwest Quarter from James Owen after he defaulted on his note. The DeLees claim that they did not receive notice of the cease and desist order and were not aware of its issuance at the time of their repossession of the Northwest Quarter.

On March 16, 1992, the DeLee Trust filed an "application for permission to change the point of diversion, manner of use, and place of use for the water rights" (change application) to change the point of diversion and place of use from the Northeast Quarter to the Northwest Quarter. The DeLees claim that from 1991 to 1994 they spent "significant funds" to fix the irrigation pivot in the Northwest Quarter and to prepare the well for irrigation use. The State Engineer failed to respond to the change application within the one-year period provided by NRS 533.370(2). NRS 533.370(1)-(2) states in pertinent part that

1. Except as otherwise provided . . . the State Engineer shall approve an application submitted in proper form which contemplates the application of water to beneficial use if:

- a. The application is accompanied by the prescribed fees;

b. The proposed use or change, if within an irrigation district, does not adversely affect the cost of water for other holders of water rights in the district or lessen the efficiency of the district in its delivery or use of water;

2. Except as otherwise provided in this subsection and subsections 3 and 11 and NRS 533.365, the State Engineer shall approve or reject each application with one year after the final date for filing a protest.

On March 17, 1993, Amargosa Resources, Inc. (ARI), petitioned the State Engineer to declare certain water rights forfeited, including the water rights held by the DeLee Trust. ARI alleged that the rights were forfeited for continuous non-use spanning from 1985 through 1992. The State Engineer notified the DeLees of ARI's forfeiture petition sometime around June 16, 1993.

Michael DeLee responded by contacting the State Engineer's office to determine what the DeLee Trust could do to prevent forfeiture. Michael DeLee testified that the State Engineer's office told him that processing the change application would resolve the forfeiture issue. On February 21, 1995, the DeLee Trust filed a petition for a writ of mandamus with the Fifth Judicial District Court to compel the State Engineer to act on the change application. At the administrative forfeiture hearing, the DeLees requested that the administrative hearing on ARI's forfeiture petition be postponed pending the district court's resolution of the DeLee Trust's writ petition.

Many years later, in February 2003, the State Engineer sent notice to the DeLees that a hearing regarding the water rights forfeiture was being held on March 20, 2003. The DeLees requested two continuances from the State Engineer and a final date of May 15, 2003,

was set. Prior to the hearing, Jon DeLee met with the State Engineer regarding a possible settlement and left with the understanding that the State Engineer would postpone the hearing once more. However, the hearing proceeded as scheduled and without a representative from the DeLee family present.

After the forfeiture hearing on May 15, 2003, the State Engineer entered Ruling No. 5289 declaring the DeLee Trust's water rights forfeited. Thereafter, the DeLee Trust filed a petition for judicial review on November 5, 2003, seeking relief from the forfeiture order. At about the same time, the State Engineer filed a motion to dismiss the writ petition pursuant to NRCP 41(e), and the district court dismissed the writ petition on January 12, 2004. On March 8, 2004, the district court remanded the DeLee Trust's petition for judicial review to the State Engineer for further proceedings.

The State Engineer held a new forfeiture hearing on June 22, 2004. The DeLees presented evidence that water at the Northeast Quarter was being used for a large shop on the property that supported the DeLees' farming business and Michael DeLee also testified that he started the pump for the Northeast Quarter several times. The State Engineer rejected the use as "quasi-municipal," not the irrigation use specified by the permit.

District Court Proceedings

On April 11, 2005, the State Engineer issued Ruling 5479-A declaring the DeLee Trust's water rights forfeited. The DeLee Trust petitioned for judicial review of Ruling 5479-A. The district court ultimately ruled in the DeLee Trust's favor based on the totality of the circumstances and equitable considerations. The district court acknowledged clear and convincing evidence that the water rights were

not used for irrigation on the permitted parcel during the five years prior to the forfeiture hearing, thus supporting the State Engineer's ruling on the forfeiture. But the district court found that the DeLees' efforts to transfer the water rights via the change application were an "unambiguous" effort not to abandon the certificate rights. The district court also found it significant that, but for the intervention of ARI—a stranger to the property held by the DeLees for decades—by filing a petition, the State Engineer's hearing might well have turned out differently.

The district court was also troubled by the State Engineer's reasoning in ruling that the forfeiture occurred independently of any ruling by the State Engineer or the court, thus seeming to obviate the need for judicial review. See NRS 534.090(1) (providing that a forfeiture become final only after a ruling by the State Engineer and the owner's failure to appeal that ruling). The district court noted that the State Engineer's decision reflected a lack of objectivity in divesting such a valued right established over 50 years ago when clear and convincing evidence of the owner's unambiguous desire not to forfeit the right was presented. Specifically, the State Engineer stated in its rulings that it could not approve the change application because it was filed after the forfeiture occurred, but the change application was filed before ARI's forfeiture application and the record reflects the DeLee's understanding, based on information from the State Engineer's representatives, that the application would resolve the forfeiture issue. The district court therefore ordered the State Engineer to process the DeLee Trust's change application to change the place of use and to set aside the forfeiture. The district court based its equitable decision on the DeLees' good faith effort

to resolve the issue and on the doctrine of estoppel, because the State Engineer failed to take action on the change application until the ARI forfeiture petition was filed. This appeal followed.

Supreme Court Proceedings

At oral argument, both parties agreed that the standard of review for equitable relief is for an abuse of discretion by the district court. We have held that a district court's power to grant equitable relief is not affected by a determination of the State Engineer that a water rights permit was correctly cancelled. Bailey v. State of Nevada, 95 Nev. 378, 381-2, 594 P.2d 734, 736 (1979). We conclude that the order of the district court must be affirmed because the district court did not abuse its discretion in finding the DeLee Trust was entitled to equitable relief.¹

The State Engineer argues that the district court abused its discretion in granting the DeLee Trust equitable relief even though it found that the State Engineer's decision to cancel the DeLee Trust's water rights permit for nonuse was supported by substantial evidence. Further, the State Engineer contends that this case is not factually analogous to Bailey v. State of Nevada, 95 Nev. at 379, 594 P.2d at 735. We disagree.

In Bailey, the State Engineer sent a notice to the Baileys stating that proof of beneficial use must be received by the State Engineer within 30 days or the Bailey's water rights permit would be cancelled. Id.

¹The State Engineer also argues on appeal that equitable relief was not warranted because the State Engineer's decision was based on sufficient evidence that clear and convincing evidence of non-use existed, which warranted the forfeiture of the DeLee Trust's water rights. As we conclude that equitable relief was warranted, we need not address this issue.

at 380, 594 P.2d at 736. The notice was returned to the State Engineer marked "Unclaimed." Id. Thereafter, the State Engineer cancelled the Bailey's water rights permit, but did not send a notice of cancellation to the Baileys. Id.

The Baileys learned of the cancellation of their water rights permit shortly after it was cancelled and inquired with the office of the State Engineer what could be done about the cancellation. Id. Upon advice of the office of the State Engineer, the Baileys filed an application for a new water rights permit. Id. at 380, 594 P.2d at 736. The State Engineer denied the Baileys' application. Bailey, 95 Nev. at 380, 594 P.2d at 736. The office engineer who had advised the Baileys testified that he knew no new permits were being issued at the time he advised the Baileys to submit a new application. Id. at 381, 594 P.2d at 736.

Based on these facts, we held that the district court erred by not granting equitable relief to the Baileys. Id. at 383, 594 P.3d at 737. Further, we concluded that "it was not the intent of the Legislature to preclude judicial review of an order or decision of which the aggrieved party had no actual knowledge until after expiration . . ." of the statutory period. Id. at 382, 594 P.2d at 736-7. Moreover, we reiterated the holding of State Engineer v. American National Insurance Co., 88 Nev. 424, 426, 498 P.2d 1329, 1330 (1972), and stated "that a determination that the State Engineer has correctly cancelled a permit, under his statutory mandate, 'does not, however, affect the power of the district court to grant equitable relief to the permittee when warranted.'" Bailey, 95 Nev. at 381-2, 594 P.2d at 736 (quoting State Engineer at 426, 498 P.2d at 1330). We further concluded that the Baileys were entitled to equitable relief because they had presented evidence that they diligently tried to comply with the

use requirements set forth by the State Engineer. Id. at 385, 594 P.2d at 739.

In this case, the DeLee Trust was in a factually analogous position to that of the Baileys. Here, the State Engineer issued an order to cease illegal use of the DeLee Trust's water rights on the Northwest Quarter of the DeLees' property to James Owen and the DeLees were never notified of the order. Thereafter, the DeLee Trust filed its 1992 change application, which the State Engineer failed to act upon. The State Engineer did not notify the DeLee Trust of the possibility that their water rights may be forfeited for non-use until 1993.² Further, Michael DeLee was told by the office of the State Engineer that processing of the 1992 change application would resolve the forfeiture issue.

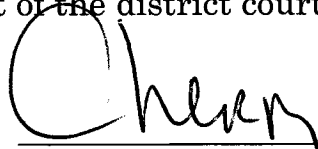
We therefore conclude that this case is factually analogous to Bailey. The DeLee Trust was not given notice of the possibility that its water rights permit was subject to forfeit until after the statutory period for nonuse had run and the DeLees presented evidence that they attempted to make beneficial use of their water. Thus, we conclude that the district court did not abuse its discretion in finding that the DeLee Trust was entitled to equitable relief even though the State Engineer had determined that the DeLee Trust's water rights permit was correctly cancelled. See Bailey, 95 Nev. at 381-2, 594 P.2d at 736 (quoting State Engineer, 88 Nev. at 426, 498 P.2d at 1330).


²NRS 534.090(1) states that determined water rights will be forfeited for nonuse if the holder of the permit fails to use the underground water for a beneficial purpose for five consecutive years.

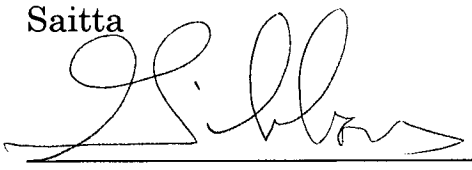
CONCLUSION

We conclude that the district court did not abuse its discretion in finding that the DeLee Trust was entitled to equitable relief. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. John P. Davis, District Judge
Bill C. Hammer, Settlement Judge
Attorney General Catherine Cortez Masto/Carson City
Santoro, Driggs, Walch, Kearney, Holley & Thompson
Nye County Clerk