EXHIBIT 3

EXHIBIT 3

Case No. CV 20,869

Dept. No. 2

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

HAPPY CREEK, INC.,

Petitioner,

vs.

JASON KING, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES,

Respondent.

RESPONDENT'S ANSWERING BRIEF

Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717

Happy Creek's failure to maintain its water right in good standing does not amount to any type of taking.

Happy Creek ignores the fact that enforcement by priority in a prior appropriation state like Nevada is not a taking. Under the principle of prior appropriation "first in time" to appropriate water to a beneficial use established "first right" to protect that use of that water against other appropriators.[69] As the first in right, every other appropriator on the system, takes their water right subject to those who were first to place their water to beneficial use. Application of curtailment, based upon priority is not a taking.

The State Engineer has not "taken" Happy Creek's water right. The change to its priority date, under NRS 533.395(3), has had no bearing on Happy Creek's ability to use its water rights. While Happy Creek argues later priority dates diminishes the value of the water rights, mere diminishment of value does not rise to the level of a taking.[70] Happy Creek's water right still has an economical benefit associated with it, which includes the current use of the water in its ranching operation or its ability to sell the water. The State Engineer has not curtailed their water, and even if he did in the future, as long as he follows the priority system, a taking would still not occur.

Happy Creek's speculative argument that someday the State Engineer may curtail or affect Happy Creek's water rights because of a priority date does not rise to the level of any type of taking under federal or state jurisprudence. Happy Creek's attempt to shock the Court by alleging a "taking" to persuade it to inappropriately grant equitable relief is unsupported. The application of NRS 533.395(3) to Happy Creek's failure to keep its

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and best use, does not, without more, constitute a taking. *See Euclid v. Ambler Co.*, 272 U.S. 365, 397, 47 S. Ct. 114, 71 L.Ed. 303 (1926) (regulations valid although they effected a 75 percent diminution in value of property); *Hadacheck v. Los Angeles*, 239 U.S. 394, 414, 36 S. Ct. 143, 60 L.Ed. 348 (1915) (ordinance prohibiting highest and best use of land as a brickworks was valid, although it reduced the value of property from $800,000 to $60,000); *William C. Haas v. City & Cty. of San Francisco*, 605 F.2d 1117, 1121 (9th Cir. 1979) (zoning regulations were not a taking although they reduced the value of property from $2,000,000 to $100,000). *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 664, 137 P.3d 1110, 1123 (2006). A Penn Central-type regulatory taking requires compensation only if "the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole. *Yee v. Escondido*, 503 U.S. 519, 522–23 (1992).

[69] *See Application of Filippini*, 66 Nev. 17, 24, 202 P.2d 535, 538 (1949); *In re Manse Spring & Its Tributaries, Nye County*, 60 Nev. 280, 108 P.2d 311, 315 (1940).

[70] *Euclid v. Ambler Co.*, 272 U.S. 365, 397, 47 S. Ct. 114, 71 L.Ed. 303 (1926).

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water right in good standing, does not amount to any type of taking. As such, Happy Creek's request for equitable relief to protect against a potential inverse condemnation action is unsupported.

VI. CONCLUSION

Happy Creek is not entitled to equitable relief. Happy Creek did not keep its eight water rights in good standing. The State Engineer reinstated Happy Creek's eight water right permits; and appropriately applied NRS 533.395(3), which was created by the Nevada Legislature as a sanction for water right holders such as Happy Creek, by amending its priority date. The State Engineer properly applied NRS 533.395(3). This Court should uphold the State Engineer's decision and implementation of NRS 533.395(3).

AFFIRMATION

The undersigned does hereby affirm that Respondent's Answering Brief does not contain the social security number of any person.

DATED this 18th day of April, 2016.

ADAM PAUL LAXALT
Attorney General

By: _____
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EXHIBIT 2

EXHIBIT 2

Case No. 15-CV-01395
15-CV-01396
15-CV-01397
Dept. II

FILED
2016 MAR 21 PM 5:13
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT
Tanya Scheffler DEPUTY

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF LYON

***

STEVEN A. FULSTONE, individually and as Trustee of the Steven A. Fulstone 1989 Living Trust, R.N. FULSTONE COMPANY, a Nevada Corporation, CEAS COMPANY, a Nevada Corporation,

Petitioners,

vs.

JASON KING, P.E., in his official capacity As Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RECOURSES

Respondent.
_____/

AMENDED ORDER AFTER HEARING

FARMERS AGAINST CURTAILMENT ORDER, LLC,

Petitioner,

vs.

JASON KING, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES.

Respondent.
_____/

FARMERS AGAINST CURTAILMENT ORDER, LLC,

Petitioner,

vs.

JASON KING, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES,

Respondent,

And,

PERI & SONS, INC., a Nevada Corporation, DESERT PEARL FARMS, LLC, a Nevada Limited Liability Company,

Intervening Respondent.

_____/

On November 11, 2015, Petitioners STEVEN A. FULSTONE, R.N. FULSTONE COMPANY, and CEAS COMPANY, hereinafter referred to collectively as "FULSTONE," filed a Petition for Review. The Petition sought to reverse or remand Order 1267 issued by the Nevada State Engineer regarding water rights in Smith Valley. On December 9, 2015, the State Engineer, through the Nevada Attorney Generals' Office, filed a Notice of Intent to Defend.

On November 25, 2015, FARMERS AGAINST CURTAILMENT ORDER, LLC, hereinafter referred to as "FACO," filed a Petition for Judicial Review. The Petition sought to reverse or remand Order 1268 issued by the Nevada State Engineer regarding water rights in Mason Valley. On December 9, 2015, the State Engineer the State Engineer by through the Nevada Attorney General's Office filed a Notice of Intent to Defend.

The Court finds that substantial evidence existed in the record to support the State Engineer's determination that groundwater is being depleted in the Smith Valley Basin and the Mason Valley Basin. The Court finds that substantial evidence exists in the record to support the State Engineer's decision to curtail water rights in the amount sought in the orders. The Court finds that substantial evidence exists in the record to support the water model used by the State Engineer to calculate the amount of water to curtail. However, the Court does not agree that the State Engineer has legal authority to reprioritize irrigation underground water rights on the basis the rights are supplemental.

The State Engineer may designate and regulate preferred uses under NRS 534.120 (2). The statutory language when read in its whole context indicates that the Legislature gave the State Engineer the authority to designate preferred uses when the groundwater in a basin is being depleted. The language in the original statute passed in 1955 indicates to this Court that the Legislature was concerned about setting preferred uses in a time of drought.

The Statutes of Nevada, Chapter 178, Section 6 states prior to the conjunction "and":

> In the interest of public welfare, the state engineer is authorized and directed to designate preferred uses of water within the respective areas so designated by him and from which the ground water is being depleted....

The statute states after the conjunction "and":

> in acting on applications to appropriate ground water he may designate such preferred uses in different categories with respect to the particular areas involved...

Both processes are followed by the last limitation clause:

> within the following limits: domestic, municipal, quasi-municipal, industrial, irrigation, mining and stockwatering uses....

To read the statute as being controlled by the phrase "in acting on applications" would make the entire first portion surplusage. The Court would have to strike the first "designate" clause and the conjunction "and" to arrive at the reading suggested by FACO and FULSTONE.

Such a reading also goes against the context of the statute. The Statute in section 6 stated that the Legislature intended the language in section 6 of Senate Bill 104 to immediately follow section 10 of Chapter 178, Statutes of Nevada 1939. The 1955 Legislature was clearly aware of the priority system when it passed Section 6. If the 1955 Legislature had wanted to restrict the designations of preferred uses to new applications, it could have done so without including statutory language that directed the State Engineer to "designate preferred uses of water within the respective areas so designated by him and from which the ground water is being depleted."

This represents the opposite of what occurred in *Phillips v Gardner*, 469 P. 2d 42 (Ct. App. Ore. 1970). In *Phillips*, a statute designating preferred uses had been adopted in 1893. The Oregon Legislature then adopted a comprehensive priority scheme in 1909. In 1955, the Oregon Legislature passed a statute that specifically prohibited the Water Resources Board from altering priority. The Oregon Court of Appeals determined that the 1909 statute implicitly restricted the 1893 statute's application to pre-1909 rights.

Additionally, applying the limitation language to applications only leads to an absurd reading of the statute. This Court understands that the "Last Antecedent Canon of Statutory Construction" would presume such an interpretation. However, this Court will not apply the Last Antecedent Canon as the "Whole Context Canon of Statutory Construction" would apply.

The Court agrees with the State Engineer that supplemental underground water rights are not the same as primary underground water rights. Supplemental rights are conditional rights based upon the amount of surface water the underground water right holder receives in an irrigation season.

Supplemental rights also have restrictions on alienation and the place of diversion. The Court agrees that such rights may be considered as subordinate rights.

However, designation of the rights as being subordinate rights begs the question, "Subordinate to what? The most obvious answer is, "Subordinate to the surface water right." The least obvious answer is, "Subordinate to primary underground water rights." No statutory authority or case law was provided to the Court that the Legislature or State Engineer ever contemplated a priority system that subordinated supplemental underground water rights to later issued primary underground water rights. The adjective "supplemental" does not pertain to a use as defined under Nevada law. NRS 534.080 directs how priority is established for underground water rights at the application stage.

The Court did review the statutes to determine if the decision to reprioritize can be made pursuant to NRS 534.120 (1) upon a theory that the reprioritization does not create a sub-preferred use but rather it can occur on the basis it protects the welfare of the area involved. This Court finds that NRS 534.120 (2) contains specific language which limits the State Engineer's authority regarding changing the priority system. The specific language must control over the general language.

The record does not indicate that the State Engineer weighed how such reprioritization would affect the different irrigators. The assumption was that those holding surface rights will get some surface water, so they can make do without the underground water. Such a post hoc assumption is repugnant to the Legislature's previous determination that the priority system protects the welfare of Nevada. The assumption cannot apply to all irrigators as it ignores situations in which the curtailing of any water may force a farmer not to plant.

For the sake of argument, if reprioritization could occur between supplemental and primary groundwater rights, this Court cannot fathom how such an authority could be exercised on an ad hoc

basis let alone a post hoc basis. Such a reprioritization would be applicable to all basins in Nevada. It would follow that the State Engineer would have to adopt a general regulation applicable statewide.

The Court does not read NRS 534.110 (7) as conflicting with NRS 534.120 (2) if the State Engineer designates preferred uses in limited times of drought. NRS 534.110 (7) only authorizes the designation of a critical management area in "any basin in which withdrawals of groundwater consistently exceed the perennial yield of the basin." (emphasis added). At the point that determination occurs, then all appropriators must face strict priority without designated preferred uses. The fact that the Legislature felt compelled to include the domestic use indicates to this Court that the Legislature understood that preferential designations of uses had to be addressed. The two statutes can be read in harmony.

If a preferred use is properly designated pursuant to NRS 534.120, then no taking occurs of rights issued after 1955 as the holders were on statutory notice that the State Engineer had authority to designate preferred uses in times of drought. The Court would have to reexamine the issue if pre-1955 rights were involved in the curtailment. Underground water rights may also have to be treated differently depending upon whether they were recognized prior to 1947, 1939, 1915, and 1913.

In summary, the Court finds that the State Engineer did not curtail underground water rights in conformity with Nevada law. The State Engineer does not have authority under NRS Chapter 534 to change priority between supplemental underground water rights and primary underground water rights to create a sub-use within the designated use of irrigation. The State Engineer does not have authority under NRS Chapter 534 to change priority between supplemental underground water rights and primary underground water rights under a theory that it is in the welfare of the residents.

Based upon the above and good cause appearing, **IT IS HEREBY ADJUDGED, ORDERED and DECREED** that the Petitioners' requests that the Court reverse the State Engineer's Orders 1267 and 1268 are **GRANTED.**

DATED: This _____ day of March, 2016.

Hon. LEON ABERASTURI
DISTRICT COURT JUDGE

EXHIBIT 1

EXHIBIT 1

Case Nos. 15-CV-01395
15-CV-01396
15-CV-01397

Dept. No. II

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF LYON

STEVEN A. FULSTONE, individually and as Trustee of the Steven A. Fulstone 1989 Living Trust, R.N. FULSTONE COMPANY, a Nevada Corporation, CEAS COMPANY, a Nevada Corporation,

Petitioners,

vs.

JASON KING, P.E., in his official capacity as Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES,

Respondent.

FARMERS AGAINST CURTAILMENT ORDER, LLC,

Petitioner,

vs.

JASON KING, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES,

Respondent.

RESPONDENT STATE ENGINEER'S ANSWERING BRIEF

Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717

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FARMERS AGAINST CURTAILMENT ORDER, LLC,

Petitioner,

vs.

JASON KING, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES,

Respondent,

and,

PERI & SONS, INC., a Nevada Corporation, DESERT PEARL FARMS, LLC, a Nevada Limited Liability Company,

Intervening Respondent.

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unprecedented drought caused this irony to hit its limits of sustainability. Because these groundwater rights are granted in addition to and supplemental to surface-water rights, the State Engineer considers these water rights to be a subordinate water right. *Id.* The basis for the State Engineer's distinction between stand-alone and supplemental groundwater rights is based upon specific limitations and conditions imposed upon those particular water rights as well as the basis for the issuance of those rights. *Id.*

Each water right issued in the State of Nevada is subject to regulation by the State. Supplemental water rights are subject to even greater restrictions simply by the terms of the permit and right issued. Specifically, unlike primary stand-alone groundwater rights, supplemental groundwater rights are not permitted to be utilized when the surface water they supplement is available, or the quantity is restricted to the surface-water "shortfall." Supplemental groundwater rights are restricted to transfer to locations that also have a surface-water right with a same or a senior priority as the surface-water right, which the supplemental groundwater right was originally granted. Further, supplemental groundwater rights are prohibited from being converted to primary stand-alone groundwater rights. Supplemental groundwater rights are conditioned upon the State retaining "the right to regulate the use of the water herein granted at any and all times." Motion for Preliminary Injunction, Exhibit 6 at p. 1, Third Judicial District Court of the State of Nevada Case No. 15-CV-00227, at p. 4:6-10. *See also* Motion for Preliminary Injunction, Exhibit 22 at pp. 2-3, Third Judicial District Court of the State of Nevada Case No. 15-CV-00227, at p. 4:6-10; Opposition to Motion for Preliminary Injunction, Geddes Affidavit, Exhibit Q at p. 2, Third Judicial District Court of the State of Nevada Case No. 15-CV-00227. Thus, these limitations and conditions are the basis for the State Engineer's finding that these rights are subordinate to the surface-water right they supplement and may be regulated pursuant to NRS 534.120.

B. Curtailment By Preferred Use And Priority

The State Engineer interprets NRS 534.120 to authorize him to not only make rules, regulations, and orders essential for the public welfare, but to designate and regulate

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preferred uses at the time a permit is issued and subsequent to the issuance of that permit. *Id.* This interpretation and application of NRS 534.120 was set forth in 2015 when the State Engineer issued Order No. 1250 that ordered the curtailment of all supplemental groundwater rights within the Smith and Mason Valleys by 50 percent for the 2015 calendar year (hereafter referred to as the "2015 Proceedings"). *See* Third Judicial District Court of the State of Nevada Case No. 15-CV-00227 Record on Appeal at 000001-000004, filed June 5, 2015; ROA at 722 and 872. State Engineer's Order No. 1250 was challenged by the FACO Petitioners. *See* Third Judicial District Court of the State of Nevada Case No. 15-CV-00227.

Following the filing of the Petition for Judicial Review in the 2015 Proceedings, FACO moved for a Preliminary Injunction seeking to enjoin enforcement of Order No. 1250. *See* Motion for Preliminary Injunction filed March 9, 2015, in Third Judicial District Court of the State of Nevada Case No. 15-CV000227. A hearing on the Motion for Preliminary Injunction was held on March 27, 2015. *See* Minute Order dated April 27, 2015, in Third Judicial District Court of the State of Nevada Case No. 15-CV-00227. In ruling on FACO's Motion for Preliminary Injunction, this Court found:

> The State Engineer has authority under NRS 534.120(1) to make rules, regulations and orders that are essential for the public welfare. Further, the State Engineer may designate and regulate preferred uses under NRS 534.120(2). ***The Court finds that the State Engineer may make rules, regulations and orders affecting certain preferred uses, so long as the rule, regulation or order respects priority within the preferred use.***

See Order Granting Preliminary Injunction, filed May 4, 2015, in Third Judicial District Court of the State of Nevada Case No. 15-CV-00227, at p. 4:6-10 (emphasis added).

The State Engineer understood and respects this Court's decision in the 2015 Proceedings. The State Engineer responded accordingly in his new curtailment orders. Because supplemental groundwater rights are subordinate and conditional, and due to the extraordinary declines correlating with the exceptional drought, the supplemental groundwater rights were designated a non-preferred use pursuant to the State Engineer's authority under NRS 534.120(2). Based upon this non-preferred use status, supplemental groundwater rights may be curtailed by priority within that non-preferred category. ROA at 721 and 871.

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substantial evidence supports his conclusion that lowering of the groundwater levels in Smith and Mason Valleys at rates greater than four feet per year is an unreasonable lowering and contrary to his duty to protect the water resource. Therefore, the State Engineer's Order Nos. 1267 and 1268 are supported by substantial evidence and those decisions must be affirmed.

AFFIRMATION (Pursuant to NRS 239B.030)

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 26th day of February, 2016.

ADAM PAUL LAXALT
Attorney General

By: Micheline N Fairbank

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Case No. 72317

In the Supreme Court of Nevada

EUREKA COUNTY AND DIAMOND NATURAL RESOURCES PROTECTION & CONSERVATION ASSOCIATION,

PETITIONERS,

VS.

THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF EUREKA AND THE HONORABLE GARY D. FAIRMAN, DISTRICT COURT JUDGE,

RESPONDENTS,

AND

SADLER RANCH, LLC; ET AL.,

REAL PARTIES IN INTEREST.

REAL PARTY IN INTEREST SADLER RANCH, LLC'S REQUEST FOR JUDICIAL NOTICE

MEMORANDUM OF POINTS AND AUTHORITIES

Real Party in Interest, Sadler Ranch, LLC (hereinafter "Sadler Ranch"), by and through its counsel of record, Paul G. Taggart, Esq. and David H. Rigdon, Esq., of the law firm of Taggart & Taggart, Ltd., respectfully requests the Court take judicial notice of certain statements made by the State Engineer in: (1) an Answering Brief filed on February 26, 2016, in the Third Judicial District Court,

Case Nos. 15-CV-01395, 15-CV-01396, and 15-CV-01397 ("FACO Case"), and (2) an Answering Brief filed on April 18, 2017, in the Sixth Judicial District Court, Case No. CV 20,869 ("Humboldt County Case"). The Court should be aware that certain arguments made by the State Engineer in these briefs directly contradict arguments in the Nevada State Engineer's Reply ("Reply") and the Verified Petition for Writ of Prohibition or in the Alternative, Writ of Certiorari of Mandamus ("Writ Petition") to which the State Engineer has joined.

In the FACO Case Answering Brief, the State Engineer argued that NRS 534.120 authorizes him to prefer certain uses during a curtailment proceeding and exempt those uses from the curtailment.[1] The State Engineer cited to a previous ruling by the Third Judicial District Court in a related case which stated that:

> The State Engineer has authority under NRS 534.120(1) to make rules, regulations and orders that are essential for the public welfare. Further, the State Engineer may designate and regulate preferred uses under NRS 534.120(2). The Court finds that the State Engineer may make rules, regulations and order affecting certain preferred uses, so long as the rule, regulation or order respects priority within the preferred use.[2]

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[1] *See* excerpts from State Engineer's Answering Brief at 7-8, *Farmers Against Curtailment Order, LLC v. State Engineer*, Third Judicial District Court of Nevada in and for Lyon County Consolidated Case Nos. 15-CV-01395, 15-CV-01396, 15-CV-01397) attached hereto as Exhibit 1.

[2] *Id*.

The State Engineer's argument in the FACO Case directly contradicts his statements in the Reply that "[u]nlike other states that have exemptions from proceeding with strict priority, Nevada does not exempt any category of water use from curtailment" and "upon curtailment under Nevada's strict priority system, all water rights and users, including domestic wells, will be curtailed based solely on their priority date."[3] The State Engineer is well aware that the only court in Nevada to rule on the issue has upheld the State Engineer's authority under NRS 534.120(2) to prefer certain uses, like domestic wells and municipal uses, during a curtailment proceeding and thereby exempt those uses from the curtailment.[4]

[3] Nevada State Engineer Reply at 5-6.

[4] While the Sixth Judicial District Court ultimately ruled that the State Engineer's curtailment order in the FACO Case was invalid, it did so on the basis that the State Engineer attempted to treat supplemental and non-supplemental groundwater rights used for irrigation as distinct uses. The District Court found this distinction to be improper but upheld the State Engineer's determination that he could declare certain uses of groundwater to be preferred and thereby exempt them from curtailment in times of shortage ("The State Engineer may designate and regulate preferred uses under NRS 534.120(2). The statutory language when read in its whole context indicates that the Legislature gave the State Engineer the authority to designate preferred uses when the groundwater basin is being depleted.") Amended Order After Hearing at 18-21, *Farmers Against Curtailment Order, LLC v. State Engineer*, Third Judicial District Court of Nevada in and for Lyon County Consolidated Case Nos. 15-CV-01395, 15-CV-01396, 15-CV-01397) attached hereto as Exhibit 2.

In the Humboldt County Case Answering Brief, the State Engineer asserts that:

> [E]nforcement by priority in a prior appropriation state like Nevada is not a taking. Under the principle of prior appropriation "first in time" to appropriate water to a beneficial use established "first right" to protect that use of that water against other appropriators. As the first in right, every other appropriator on the system, takes their water right subject to those who were first to place their water to beneficial use. *Application of curtailment, based upon priority is not a taking*.[5]

This statement mirrors Sadler Ranch's contention that a curtailment by priority of the junior irrigators in Diamond Valley does not deprive them of a property right since those junior permits were issued subject to all senior rights in the basin.[6] This statement also contradicts argument made by Petitioners in this case that if a curtailment by priority is issued, "junior water right holders will be deprived of a property interest."[7] Since the State Engineer joined Petitioners' Writ Petition, and thereby ostensibly joined in all arguments made therein, Sadler Ranch

[5] *See* excerpts from Respondent's Answering Brief at 15, *Happy Creek, Inc. v. State Engineer*, Sixth Judicial District Court of Nevada in and for Humboldt County, Case No. CV 20,869 (April 18, 2018) attached hereto as Exhibit 3 (emphasis added).
[6] Sadler Ranch Answer at 31-34.
[7] Writ Petition at 6.

believes the Court will find the State Engineer's contrary argument to the Sixth Judicial District Court helpful in making a determination in this matter.

STANDARD OF REVIEW

"A judge or court shall take judicial notice [of a fact] if requested by a party and supplied with the necessary information."[8] A judicially noticed fact must be: (1) generally known within the jurisdiction of the court, or (2) capable of accurate and ready determination using sources whose accuracy cannot be reasonably questioned.[9] A court may take judicial notice of public records, including briefs and papers filed with other courts, to show that the proceeding occurred or that the document was filed.[10]

ARGUMENT

The Court may take judicial notice of the arguments made by the State Engineer in the FACO and Humboldt County Cases. The State Engineer's prior arguments relate directly to a central issue of law that Petitioners have raised in the instant case. In fact, Petitioners' entire case hinges on whether the issuance of a priority-based curtailment order deprives a junior priority permit holder of a

[8] NRS 47.150(2).
[9] NRS 47.130(2).
[10] *Walker v. Woodford*, 454 F.Supp.2d 1007, 1022-23 (S.D. Cal. 2006) *aff'd in part*, 393 Fed. Appx. 513 (9th Cir. 2010).

valuable property right. As noted by the State Engineer, because junior priority users "take[] their water right subject to those who were first to place their water to beneficial use" such users are not deprived of a property interest when a curtailment by priority is enforced.

Despite joining Petitioners' arguments in the instant Writ Petition, the State Engineer's statement in the Humboldt County Case actually accords with the arguments made by Sadler Ranch and the Allens in their respective Answers.[11] The fact that the State Engineer would join a Writ Petition whose arguments are in complete opposition to the State Engineer's own interpretation of Nevada water law provides even more evidence the State Engineer is actively and consciously placing the needs of the junior appropriators in Diamond Valley ahead of his statutory duty to protect senior priority water rights.

In addition, the State Engineer's argument that "there is no authority to deviate from the priority system if straight curtailment is ordered, regardless of why a water right holder thinks their specific water rights should not be curtailed" is an inaccurate representation of Nevada law and contrary to the State Engineer's

[11] *See* Sadler Ranch, LLC's Answer at 31-34; Answer of Roger B. and Judith B. Allen, Real Parties in Interest, Answer to Verified Petition for Writ of Prohibition or, in the Alternative, Writ of Certiorari or Mandamus at 2-4.

own prior interpretation of NRS 534.120(2).[12] Under NRS 534.120(2) the State Engineer is authorized to designate preferred uses in a basin. The statute expressly calls out the categories of uses that the State Engineer is allow to prefer or disfavor in a basin (domestic, municipal, quasi-municipal, industrial, irrigation, mining, and stock-watering). During a curtailment proceeding the State Engineer would be allowed to take evidence regarding why specific categories of use should not be curtailed (i.e. whether curtailment of domestic, municipal, and stock-watering uses would have deleterious effects on public health and safety) and then designate those uses as preferred uses in the basin.

The State Engineer has previously argued that NRS 534.120(2) applies within the context of a curtailment proceeding.[13] The only court in Nevada to consider that question has agreed with the State Engineer's previous interpretation.[14] Accordingly, it is disingenuous for the State Engineer to now claim that he does not possess such authority and that if he is required to order

[12] State Engineer Reply Brief at 2.
[13] Exhibit 1.
[14] Amended Order After Hearing, *Farmers Against Curtailment Order, LLC v. State Engineer*, Third Judicial District Court of Nevada in and for Lyon County Consolidated Case Nos. 15-CV-01395, 15-CV-01396, 15-CV-01397) attached hereto as Exhibit 2.

curtailment proceedings he must curtail domestic wells and municipal water users along with the irrigators who are responsible for depleting the groundwater basin and drying up Sadler Ranch's springs.[15]

Because the State Engineer and Petitioners rely on arguments that contradict representations made by the State Engineer to other courts in Nevada, the instant Writ Petition should be denied.

[15] It is estimated that actual pumping of domestic wells and municipal water rights in Diamond Valley accounts for less than 200 acre-feet of total groundwater withdrawals. This is insignificant when compared with the 70-90,000 acre-feet of annual pumping by irrigators in the southern part of Diamond Valley.

CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that this Request for Judicial Notice complies with the formatting requirements of NRAP 32(a)(4) and the type style requirements of NRAP 32(a)(6) because:

This Request for Judicial Notice has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman, 14 point font.

The undersigned does further certify that this Request for Judicial Notice complies with the page limitations of NRAP 27(d)(2) because, excluding the parts exempted by NRAP 27(d)(1)(D), it does not exceed 10 pages.

In addition, the undersigned has read this Request for Judicial Notice, and to the best of his knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. This Request for Judicial Notice complies with all applicable Nevada Rules of Appellate Procedure, including NRAP 32(c)(2) (Form of Other Papers).

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The undersigned understands that he may be subject to sanction in the event that the accompanying Request for Judicial Notice is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 6th day of June, 2017.

TAGGART & TAGGART, LTD.

By: /s/ David H. Rigdon
Paul G. Taggart, Esq.
Nevada State Bar No. 6136
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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c)(1), I hereby certify that I am an employee of TAGGART & TAGGART, LTD, and that on this date, I caused the foregoing document to be served on all parties to this action by electronic filing to:

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DATED this 6th day of June, 2017.

/s/ Sarah Hope
Employee of TAGGART & TAGGART, LTD.