IN THE SUPREME COURT OF THE STATE 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.

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Case No. 72317

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

## I. INTRODUCTION

Real Party in Interest Sadler Ranch LLC's ("Sadler") attempt to supplement its brief by seeking judicial notice of unrelated, legal arguments of the State Engineer and a decision from the Third Judicial



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District Court is improper. Sadler's request for judicial notice must be denied.

## II. ARGUMENT

### A. Judicial Notice Of Legal Arguments Made By The State Engineer And A Portion Of A Decision In Unrelated Cases In Not Appropriate

A judge or court may take judicial notice whether requested or not. NRS 47.150. Further, this Court may take judicial notice of facts that are "[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, so that the fact is not subject to reasonable dispute." *See* NRS 47.130(2)(b). "Several courts have concluded that "[a] court may take judicial notice of a document filed in another court 'not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings.'" *In re Amerco Derivative Litig.*, 127 Nev. 196, 221 n.9, 252 P.3d 681, 699 n.9 (2011) (citing *Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1388 (2d Cir. 1992); *Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir. 1991)); *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001); S*outhern Cross Overseas v. Wah Kwong Shipping*, 181 F.3d 410, 426 (3d Cir. 1999)).

As a general rule, courts should not take judicial notice of records in another and different case, even if connected in some way, unless the party seeking such notice demonstrates a valid reason for doing so. *Mack v. Estate of Mack*, 125 Nev. 80, 91, 206 P.3d 98, 106 (2009) (citing *Occhiuto v. Occhiuto*, 97 Nev. 143, 145, 625 P.2d 568, 569 (1981); *Giannopulos v. Chachas*, 50 Nev. 269, 270, 257 P. 618, 618 (1927)). In determining whether a case falls within the exception, the court must consider the closeness of the relationship between the two cases. *Id.* Additionally, the court may take judicial notice of a legal decision in a closely related case, as a legal decision is a matter of public record and is a reliable source. *Id.*

The first document Sadler has requested this Court take judicial notice of is a two-page excerpt of the State Engineer's reply brief in *Farmers Against Curtailment Action v. State Engineer* ("FACO"). FACO involved the appeal of State Engineer's Order No. 1268 (Order 1268), which was issued in Mason and Smith Valleys, pursuant to NRS 534.120(2). In Order 1268, the State Engineer designated all manners of use except irrigation from supplemental groundwater rights as preferred uses under NRS 534.120(2), then imposed a schedule for

potential curtailment of supplemental groundwater rights, by priority, based upon flow levels of the Walker River for one irrigation season. In Order 1268, the State Engineer explicitly distinguished supplemental water rights as distinctly different class of water rights. Although FACO involved a potential curtailment, that curtailment is both factually and legally distinguishable from the underlying case, as it was a discretionary decision by the State Engineer under his regulatory authority pursuant to NRS 534.120(2). However, the supplemental water right holders that were potentially subject to curtailment under Order 1268 were provided notice and an opportunity to be heard at town hall style meetings before the State Engineer issued the order.

Sadler has also asked this Court to take judicial notice of a portion of the FACO decision, a decision that went much further than argued by the State Engineer. Although a legal decision is a matter of public record and is a reliable source, the decision included is not complete and is not related in any way to either this writ proceeding or the underlying writ for curtailment of Diamond Valley.

FACO was predicated on the fact that the State Engineer first designated supplemental water rights as non-preferred uses under

NRS 534.120(2) and then issued a limited curtailment order for the one irrigation season. However, no party in this matter, or at the district court, has requested or even briefed the potential of designating a preferred use under NRS 534.120(2) as part of the requested curtailment of Diamond Valley. FACO and this case are legally and factually distinct.

Sadler has also asked this Court to take judicial notice of an excerpt of a legal argument made in unrelated cases involving cancellation of a permitted right under NRS 533.395(3). In response to Happy Creek's claims that the amended priority date set forth in NRS 533.395(3) created a taking, the State Engineer made the legal argument that the "[a]pplication of curtailment, based upon priority is not a taking."

Like FACO, no party in this matter, or at the district court, has argued that curtailment based upon priority is a taking or whether curtailment, if eventually ordered, would amount to a taking. The issue in this matter is whether or not a party is entitled to the due process right of notice and an opportunity to be heard before that curtailment decision is made.

Neither FACO nor Happy Creek involved a writ petition seeking a basin-wide, permanent curtailment pursuant to NRS 534.110(6) or whether notice must be provided to appropriators before a hearing on whether curtailment should be ordered under NRS 534.110(6). Neither FACO nor Happy Creek is either a connected or even a similar case, which would justify judicial notice of a portion of the State Engineer's legal argument or a portion of FACO's decision. Nor has Sadler provided a valid reason for doing so. Sadler is not introducing these documents to aid the Court or simplify the process, which is the underlying basis for judicial review, but rather is seeking to introduce the legal argument as a way to supplement its brief and distract from the true issue, whether all appropriators in Diamond Valley should be afforded their due process right of a notice and opportunity to be heard. Sadler's request for judicial notice is improper and must be denied.

### B. The State Engineer's Legal Arguments Are Consistent And Are Not Contradictory

The State Engineer's legal arguments are not inconsistent and contradictory, but rather are consistent with its arguments in FACO and Happy Creek. In this underling case, Sadler, through its first amended petition to curtail Diamond Valley, requested curtailment by

priority pursuant to NRS 534.110(6), a request that has been the basis for the State Engineer, Eureka County, and Diamond Natural Resource Protection & Conservation Association's (hereafter "DNRPCA"), Ruby Hill Mining Company, and Roger and Judith Allen's pleadings and legal arguments. P-APP 024; 071; 123-124; SR APP 866-885; 981-1007; 1016-1021; 1047-1077; 1088-1128; 1244-1251.

Ironically, now Sadler is seeking to introduce the legal arguments and decision in FACO for the premise that the State Engineer's statement 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" is inconsistent and contradictory with its legal arguments based upon the FACO order issued pursuant to NRS 534.120(2). However, this is the first argument or request involving preferred uses under NRS 534.120 as part of this proceeding. [1]

[1] In its reply brief, Sadler does cite to NRS 534.120(1) for the proposition that the State Engineer has the right to make rules, regulations and orders in a designated basin. SR APP 1099. However,

Although preferred uses and curtailment may be utilized together, as was done in FACO; preferred uses under NRS 534.120(2), which may be designated by the State Engineer, are separate and distinct from curtailment by priority under NRS 534.110(6). NRS 534.110(6) is not mutually exclusive with NRS 534.120(2). The State Engineer can issue an order curtailing without designating preferred uses; and the State Engineer designated a preferred use without curtailment.

The State Engineer has not declared or been asked to declare preferred use in Diamond Valley under NRS 534.120(2). Rather, the first amended petition for curtailment and the alternate writ of mandamus; order setting briefing schedule and show cause hearing were based upon curtailment by straight priority under NRS 534.110(6), which has been the basis of the underlying case and arguments by the State Engineer.

Additionally, even though the Third Judicial District Court's ruling might be persuasive, there are still various legal questions with respect to the designation of preferred uses and curtailment that need to be answered. Such as the fact that domestic wells are not included as

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Sadler did not address or request the designation of preferred uses under NRS 534.120(2).

a category of a preferred use under NRS 534.120(2). With the inclusion of domestic wells in curtailment under NRS 534.110 and the specific exclusion in NRS 534.120, the question of whether domestic wells could be declared a preferred use would need to be addressed as Nevada prescribes to expressio unius est exclusio alterius, the expression of one thing is the exclusion of another. *Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967). Sadler's request completely glosses over this issue and many others that were briefed and argued in FACO.

The State Engineer's statement is correct, the statement is not contradictory and is based upon the factual and legal issues in this case. Nevada does not specifically exempt any form of use from curtailment under NRS 534.110(6). NRS 534.110(6) has been and is the relevant statute in this case, not NRS 534.120(2).

Additionally, the State Engineer's position that curtailment by priority does not amount to a taking is consistent in both Happy Creek and FACO, and is not inconsistent with the State Engineer's position in this case. Water rights in Nevada, whether junior, senior or vested are considered real property. *See Application of Filippini*, 66 Nev. 17, 22, 202 P.2d 535, 537 (1949). As real property, they are entitled to due

process notions of notice and an opportunity to be heard before any action against that property interest is taken. *Browning v. Dixon*, 114 Nev. 213, 217, 954 P.2d 741, 743 (1998) (citing *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S. Ct. 779, 783, 58 L. Ed. 1363 (1914)). Granting a party its due process rights of notice and an opportunity to be heard, does not conflict with the argument that the final result of a potential curtailment does not amount to a taking as now argued by Sadler. A property owner still has the right for notice and an opportunity to be heard, before a decision is made. That notice and opportunity to be heard under due process, is legally distinct from whether or not the final action against a usufructuary right, in a prior appropriation state amounts to a taking. Like FACO, the legal arguments in Happy Creek are not relevant, are not from a case with a close relationship and Sadler's request for judicial notice to include them should be denied.

## III. CONCLUSION

Sadler's attempt to discredit the State Engineer is inappropriate and impertinent. Sadler sought curtailment by strict priority in Diamond Valley, the writ was issued based upon that concept and the State Engineer has appropriately responded. At no point at the district

court level or in this proceeding did the designation of preferred uses under NRS 534.120(2) ever arise. Furthermore, whether the ultimate result of a curtailment in a strict priority state amounts to a taking or not, does not diminish a property owner's right to due process. The State Engineer's arguments are not contradictory, are not inconsistent, and are not a valid basis for judicial notice of legal arguments of a decision from factually distinct and irrelevant cases. The State Engineer respectfully requests that Sadler's request for judicial notice be denied.

RESPECTFULLY SUBMITTED this 13th day of June, 2017.

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## CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 13th day of June, 2017, I served a copy of the foregoing OPPOSITION TO REAL PARTY IN INTEREST SADLER RANCH, LLC'S REQUEST FOR JUDICIAL NOTICE, by electronic service to:

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