

EXHIBIT 2

EXHIBIT 2



COPY FILED

2017 APR 19 PM 2:02

GENERAL SHERO
DIST. COURT CLERK

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
CARSON CITY, NEVADA

APR 24 2017

BUREAU OF GOVERNMENT AFFAIRS
GNR/BL/APPELLATE

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
I. INTRODUCTION.....	1
II. STATEMENT OF FACTS	1
III. STANDARD OF REVIEW	3
IV. HAPPY CREEK'S SUPPLEMENTAL RECORD ON APPEAL IS INAPPROPRIATE EXTRINSIC EVIDENCE THAT MUST BE DISREGARDED BY THE COURT AND STRICKEN FROM THE RECORD	5
V. ARGUMENT.....	6
A. This Court Does Not Possess the Power to Grant Equitable Relief to Overturn The Imposition of a New Priority Date Under NRS 533.395(3)	6
B. The Application of NRS 533.395 is Not a Taking	13
VI. CONCLUSION	16
AFFIRMATION.....	16
CERTIFICATE OF SERVICE	17

TABLE OF AUTHORITIES

CASES

<i>Allegretti & Co. v. County of Imperial</i> , 42 Cal. Rptr. 3d 122 (2006)	14
<i>Andersen Family Associates v. Hugh Ricci, P.E.</i> , 124 Nev. 182, 179 P.3d 1201 (2008).....	7, 10, 11, 12
<i>Application of Filippini</i> , 66 Nev. 17, 202 P.2d 535 (1949).....	15
<i>Bailey v. State</i> , 95 Nev. 378, 594 P.2d 734 (1979).....	8, 9
<i>Benson v. State Eng'r</i> , 131 Nev. Adv. Op. 78, 358 P.3d 221 (2015), <i>reh'g denied</i> (Nov. 5, 2015).....	8, 10, 11
<i>Blaine Equip. Co., Inc. v. State</i> , 122 Nev. 860, 138 P.3d 820 (2006).....	6
<i>Chevron U.S.A., Inc. v. N.R.D.C.</i> , 467 U.S. 837 (1984)	4
<i>City Council of Reno v. Reno Newspapers</i> , 105 Nev. 886, 784 P.2d 974 (1989).....	7
<i>Desert Irrigation, Ltd. v. State of Nevada, State Engineer</i> , 113 Nev. 1049, 994 P.2d 835 (1997).....	5
<i>Donoghue v. T.O.M. Co.</i> , 45 Nev. 110, 198 P. 553 (1921)	6
<i>Dugan v. Rank</i> , 372 U.S. 609 (1963)	14
<i>Engelmann v. Westergard</i> , 98 Nev. 348, 647 P.2d 385 (1982).....	8, 9
<i>Euclid v. Ambler Co.</i> , 272 U.S. 365 (1926)	15
<i>Hadacheck v. Los Angeles</i> , 239 U.S. 394 (1915)	15
<i>In re Application No. 71860 filed to Appropriate Pub. Waters of an Underground Source within Carson Desert Segment Hydrographic Basin, Churchill County</i> , 53958, 2011 WL 1744157 (2011).....	3
<i>In re Manse Spring & Its Tributaries, Nye County</i> , 60 Nev. 280, 108 P.2d 311 (1940).....	15
<i>Int'l Paper County v. United States</i> , 282 U.S. 399 (1931)	14
<i>Jones v. Rosner</i> , 102 Nev. 215, 719 P.2d 805 (1986).....	4
<i>Kelly v. TRPA</i> , 109 Nev. 638, 855 P.2d 1027 (1993).....	14
<i>Kent v. Smith</i> , 62 Nev. 30, 140 P.2d 357 (1943).....	4, 5, 6

TABLE OF AUTHORITIES

CASES

<i>Lingle v. Chevron U.S.A. Inc.</i> , 544 U.S. 528 (2005)	14
<i>McCarran Int'l Airport v. Sisolak</i> , 122 Nev. 645, 137 P.3d 1110 (2006).....	15
<i>Motor Cargo v. Public Service Comm'n</i> , 108 Nev. 335, 830 P.2d 1328 (1992).....	5
<i>Penn Central Transportation Co. v. New York City</i> , 438 U.S. 104, (1978)	14
<i>Preffered Equities Corp. v. State Eng'r, State of Nevada</i> , 119 Nev. 384, 75 P.3d 380 (2003).....	8
<i>Pyramid Lake Paiute Tribe of Indians v. Washoe County</i> , 112 Nev. 743, 918 P.2d 697 (1996).....	4
<i>Revert v. Ray</i> , 95 Nev. 782, 603 P.2d 262 (1979).....	3, 4, 5, 6
<i>State Engineer v. American Nat'l Ins. Co.</i> , 88 Nev. 424, 498 P.2d 1329 (1972).....	6, 8, 9
<i>State Engineer v. Curtis Park</i> , 101 Nev. 30, 692 P.2d 495 (1985).....	3, 5, 6
<i>State Engineer v. Morris</i> , 107 Nev. 699, 819 P.2d 203 (1991).....	4, 5, 6
<i>State v. Morris DeLee Revocable Trust</i> , 281 P.3d 1221 (Nev. 2009).....	8
<i>State v. State Engineer</i> , 104 Nev. 709, 766 P.2d 263 (1988).....	4
<i>State, Dep't of Transp. v. Cowan</i> , 120 Nev. 851, 103 P.3d 1 (2004).....	13
<i>Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency</i> , 535 U.S. 302 (2002)	14
<i>Thompson v. District Court</i> , 100 Nev. 352, 683 P.2d 17 (1984).....	7
<i>Town of Eureka v. Office of State Eng'r of State of Nev., Div. of Water Res.</i> , 108 Nev. 163, 826 P.2d 948 (1992).....	3, 4, 9
<i>United Exposition Service Co. v. SIIS</i> , 109 Nev. 421, 851 P.2d 423 (1993).....	3
<i>Washoe County v. United States</i> , 319 F.3d 1320 (2003)	14
<i>Weaver v. State, Dep't of Motor Vehicles</i> , 121 Nev. 494, 117 P.3d 193 (2005).....	3
<i>William C. Haas v. City & Cty. of San Francisco</i> , 605 F.2d 1117 (9th Cir. 1979)	15
<i>Yee v. Escondido</i> , 503 U.S. 519 (1992)	15

TABLE OF AUTHORITIES

Statutes

1981 Nev. Stat., ch. 44	9
NRS 233B.039(j)	4
NRS 532.020	3
NRS 532.110	3
NRS 533	8
NRS 533.085	11
NRS 533.085(1)	7
NRS 533.380(3)	2
NRS 533.390	8
NRS 533.395	2, 5, 6, 9, 13, 14
NRS 533.395(2)	9, 10
NRS 533.395(3)	1, 3, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16
NRS 533.410	2, 8, 9
NRS 533.450	3, 4, 5, 6
NRS 533.450(1)	3, 5
NRS 533.450(2)	3
NRS 533.450(9)	3
NRS 534.090	8, 9

CONSTITUTIONAL PROVISIONS

Nev. Const. art. 1, § 8(6); U.S. Const. amend. V	14
--	----

POINTS AND AUTHORITIES

I. INTRODUCTION

Petitioner, Happy Creek, Inc. (Happy Creek) is not entitled to equitable relief. The Nevada Supreme Court has not extended equitable relief to the change in priority date as directed by NRS 533.395(3), which the Nevada Legislature enacted, as a sanction to a water right holder for allowing their permitted water right to become cancelled. Further, Happy Creek's failed attempt to assert a "takings" claim for the purpose of persuading the Court to grant equitable relief is not supported by the law and is inappropriate. There is no basis for this Court to overturn the State Engineer's decision to reinstate Happy Creek's cancelled water right permits with new priority dates as mandated by NRS 533.395(3). As such, the State Engineer requests that Happy Creek's Petition for Judicial Review be denied.

II. STATEMENT OF FACTS

On April 29, 2009, the State Engineer granted numerous change applications filed by Happy Creek to change the place of use for eight existing water right permits:

Original Permit/Certificate	Original Priority Date	New Permit
Permit 60059, Certificate 16214	12/15/1966	Permit 76237 ¹
Permit 60060, Certificate 16215	03/03/1969	Permit 76238 ²
Permit 60061, Certificate 16216	03/03/1969	Permit 76239 ³
Permit 60063, Certificate 16217	10/08/1954	Permit 76240 ⁴
Permit 60064, Certificate 16218	11/16/1990	Permit 76241 ⁵
Permit 60065, Certificate 16219	09/28/1981	Permit 76242 ⁶
Permit 60066, Certificate 16220	06/05/1963	Permit 76243 ⁷
Permit 71784	09/18/1967	Permit 76244 ⁸

¹ SE ROA 3-4.

² SE ROA 27-28.

³ SE ROA 43-44.

⁴ SE ROA 59-60.

⁵ SE ROA 75-76.

⁶ SE ROA 91-92.

⁷ SE ROA 107-108.

⁸ SE ROA 123-124.

1 (collectively referred to as the "eight water right permits" or "eight permits"). Each of the
2 eight permits' terms set various deadlines for Happy Creek to meet, i.e., the proof of
3 completion of work was required to be filed on or before April 29, 2010, and the proof of
4 the application of the water to beneficial use was initially required to be filed on or before
5 April 29, 2012.⁹ Happy Creek took advantage of NRS 533.380(3) by applying for and
6 receiving extensions of time to place the water under the eight permits to beneficial use,
7 with the last extension of time expiring on April 29, 2016.¹⁰ However, Happy Creek did
8 not timely file another application for extension of time to place the water to beneficial
9 use or proof of beneficial use before the April 29, 2016, deadline.

10 On May 19, 2016, the State Engineer, as required by statute, sent Happy Creek a
11 final notice under NRS 533.410, informing them that it had 30 days from the date of the
12 notice to file its subsequent application for extension of time to place the water to
13 beneficial use or face cancellation of its eight permits.¹¹ The United States Postal Service
14 delivered the notice to Happy Creek on Monday, May 23, 2016, which Happy Creek
15 admitted it received.¹² Despite the notice, Happy Creek failed to meet the final deadline,
16 as Happy Creek did not file either another application to extend time for filing proof of
17 beneficial use or proofs of beneficial use for any of the eight permits before the 30 days
18 expired.

19 On July 11, 2016, Happy Creek filed eight Petitions for Review of the Cancelled
20 Permits pursuant to NRS 533.395.¹³ The petitions for review were filed prior to the notice
21 of cancellation being sent by the State Engineer on July 19, 2016¹⁴. The State Engineer
22 set a hearing on the eight Petitions for Review of the Cancelled Permits for October 12,
23 2016.¹⁵ At the October 12, 2016, hearing, John H. Milton III and Glen Thiede appeared
24 before the Division of Water Resources' Hearing Officer.¹⁶ As a result of the hearing, the

25 ⁹ SE ROA 4, 28, 44, 60, 76, 92, 108, 124.

26 ¹⁰ SE ROA 5, 29, 45, 61, 77, 93, 109, 125.

27 ¹¹ SE ROA 6, 30, 46, 62, 78, 94, 110, 126.

28 ¹² SE ROA 7; Happy Creek Opening Brief, p. 9, ll. 13-15.

¹³ SE ROA 8, 31, 47, 63, 79, 95, 111, 127.

¹⁴ SE ROA 11-12, 33, 49, 65, 81, 97, 113, 129.

¹⁵ SE ROA 13-16, 34-35, 50-51, 66-67, 82-83, 98-99, 114-115, 130-131.

¹⁶ SE ROA 17, 36, 52, 68, 84, 100, 116, 132.

1 State Engineer reinstated the eight permits; however, the State Engineer gave the
2 permits a new priority date of July 11, 2016, as required by NRS 533.395(3).¹⁷
3 Additionally, the State Engineer required Happy Creek to file applications for extensions
4 of time to prove beneficial use within 30 days of the hearing, which Happy Creek filed on
5 October 17, 2016.¹⁸ The State Engineer granted the October 17, 2016, applications
6 through April 29, 2017.¹⁹ On November 14, 2016, Happy Creek appealed the State
7 Engineer's reinstatement of the eight permits, with their new priority date of July 11,
8 2016.

9 III. STANDARD OF REVIEW

10 The State Engineer is appointed by the Director of the Nevada Department of
11 Conservation and Natural Resources and performs duties prescribed by law and by the
12 Director of the Department.²⁰ Actions to review decisions of the State Engineer under
13 NRS 533.450 are "in the nature of an appeal" and the proceedings are "informal and
14 summary."²¹ Pursuant to NRS 533.450(9), "[t]he decision of the state engineer shall be
15 prima facie correct, and the burden of proof shall be upon the party attacking the same."²²
16 On appeal, the function of the District Court, as well as the Nevada Supreme Court, is to
17 review the evidence on which the State Engineer based his decision to ascertain whether
18 the evidence supports the decision. If so, the Court is bound to sustain the State
19 Engineer's decision.²³

20 With questions of fact, the Court shall review the evidence presented to the State
21 Engineer in order to determine whether the State Engineer's decision was arbitrary or
22 capricious, and thus an abuse of the State Engineer's discretion.²⁴ Thus, the question for
23

24 ¹⁷ *Id.*; SE ROA 23, 40, 56, 72, 88, 104, 120, 136.

¹⁸ *Id.*; SE ROA 21, 38, 54, 70, 86, 102, 118, 134.

¹⁹ SE ROA 24, 41, 57, 73, 89, 105, 121, 137.

²⁰ NRS 532.020, NRS 532.110.

²¹ NRS 533.450(1) and (2); *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979).

²² NRS 533.450(9); *Town of Eureka v. Office of State Eng'r of State of Nev., Div. of Water Res.*,
108 Nev. 163, 165, 826 P.2d 948, 949 (1992).

²³ *State Engineer v. Curtis Park*, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985).

²⁴ *In re Application No. 71860 filed to Appropriate Pub. Waters of an Underground Source within
Carson Desert Segment Hydrographic Basin, Churchill County*, 53958, 2011 WL 1744157, at *2 (2011)
(citing *Weaver v. State, Dep't of Motor Vehicles*, 121 Nev. 494, 498, 117 P.3d 193, 196 (2005) (quoting *United
Exposition Service Co. v. SIIS*, 109 Nev. 421, 423, 851 P.2d 423, 424 (1993)).

1 the Court is whether the State Engineer's decision was based on substantial evidence.²⁵
2 The Nevada Supreme Court has interpreted this to mean that a petitioner does not have
3 a right to de novo review or to offer additional evidence at the district court.²⁶ The Court
4 is limited to a determination of whether substantial evidence in the record before the
5 State Engineer supports the State Engineer's decision.²⁷

6 Happy Creek incorrectly cites to the Nevada Administrative Procedure Act (APA)
7 standard of review that the role of the court is to determine if the decision was otherwise
8 affected by prejudicial legal error.²⁸ The State Engineer is specifically exempt from the
9 APA²⁹ and Happy Creek has failed to cite any case law that otherwise extends the APA or
10 this standard of review to the State Engineer. This standard of review is inapplicable in
11 this case, whose review falls under NRS 533.450.

12 While legal issues or questions may be reviewed without deference to an agency's
13 determination, the agency's conclusions of law that are closely related to the agency's
14 view of the facts are entitled to deference and will not be disturbed if they are supported
15 by substantial evidence.³⁰ Likewise, an agency's view or interpretation of its statutory
16 authority is persuasive, even if not controlling.³¹ Additionally, any review of the State
17 Engineer's interpretation of his legal authority must be made with the thought that "[a]n
18 agency charged with the duty of administering an act is impliedly clothed with power to
19 construe it as a necessary precedent to administrative action."³²

20 ///

21 ///

22 ²⁵ *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979).

23 ²⁶ *Id.* See also *Kent v. Smith*, 62 Nev. 30, 32, 140 P.2d 357, 358 (1943).

24 ²⁷ *Id.*

25 ²⁸ Opening Brief, p. 11, l. 5.

26 ²⁹ NRS 233B.039(j).

27 ³⁰ *Jones v. Rosner*, 102 Nev. 215, 217, 719 P.2d 805, 806 (1986); *Town of Eureka v. State Engineer*,
108 Nev. 163, 826 P.2d 948 (1992).

28 ³¹ *State Engineer v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991) (quoting *State v. State Engineer*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988)).

³² *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 112 Nev. 743, 747, 918 P.2d 697, 700 (1996) (citing *State v. State Engineer*, 104 Nev. at 713, 766 P.2d at 266 (1988)). See also *Chevron U.S.A., Inc. v. N.R.D.C.*, 467 U.S. 837 (1984) (deference promotes uniformity in the law because it makes various courts less likely to adopt differing readings of a statute. Instead, the view taken by a single centralized agency will usually control).

1 Furthermore, Nevada administrative agencies, and specifically the State Engineer,
2 are not bound by stare decisis.³³ The Nevada Supreme Court in *Desert Irrigation, Ltd.*
3 held "[t]he facts and circumstances of each case are to be considered on an individual
4 basis, taking into account the nature of the task and the difficulties encountered . . . Even
5 if the [agency] has failed to follow some of its prior decisions, the [agency] has not thereby
6 abused its discretion."³⁴

7 **IV. HAPPY CREEK'S SUPPLEMENTAL RECORD ON APPEAL IS**
8 **INAPPROPRIATE EXTRINSIC EVIDENCE THAT MUST BE**
9 **DISREGARDED BY THE COURT AND STRICKEN FROM THE RECORD**

10 Happy Creek improperly seeks to introduce over 600 pages of documents as
11 evidence, which is beyond the record before the State Engineer in consideration of his
12 statutory duties under NRS 533.395. NRS 533.450(1) states that actions to review
13 decisions of the State Engineer are "in the nature of an appeal." The Nevada Supreme
14 Court has interpreted NRS 533.450 to mean that a petitioner does not have a right to
15 *de novo* review or to offer additional evidence at the district court.³⁵ As a result, the
16 function of the court is to review the evidence on which the State Engineer based his
17 decision to ascertain whether the evidence supports the decision, and if so, the court is
18 bound to sustain the State Engineer's decision.³⁶ "[N]either the district court nor this
19 court will substitute its judgment for that of the State Engineer: we will not pass upon
20 the credibility of the witnesses nor reweigh the evidence, but limit ourselves to a
21 determination of whether substantial evidence in the record supports the State
22 Engineer's factual decision."³⁷

23 Here, the State Engineer considered only the evidence that was available to him
24 regarding cancellation of the eight permits, and the reinstatement of those permits after
25 Happy Creek filed its petitions for review of the cancelation. The over 600 pages

26 ³³ *Desert Irrigation, Ltd. v. State of Nevada, State Engineer*, 113 Nev. 1049, 1058, 994 P.2d 835, 841
27 (1997).

28 ³⁴ *Id.* (citing *Motor Cargo v. Public Service Comm'n*, 108 Nev. 335, 337, 830 P.2d 1328, 1330 (1992)).

³⁵ *Revert*, 95 Nev. at 786, 603 P.2d at 264 (1979). See also *Kent v. Smith*, 62 Nev. 30, 32, 140 P.2d
357, 358 (1943) (a court may construe a prior judgment, but cannot properly consider extrinsic evidence).

³⁶ *State Engineer v. Curtis Park*, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985).

³⁷ *State Engineer v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991).

1 contained in the supplemental record on appeal are improper and extrinsic documents,
2 which should not be considered by the Court in determining whether the State Engineer's
3 decision under NRS 533.395³⁸ was proper.

4 Furthermore, Happy Creek's inclusion of this improper evidence has no bearing on
5 actual issue in this case, whether this Court has authority to grant equitable relief to
6 Happy Creek overturning this legislative sanction. Happy Creek inappropriately
7 attempts to distract this Court with copious amounts of irrelevant and immaterial
8 evidence, rather than focus on the actual issues of this case—its failure to timely comply
9 with the deadlines and notices relating to the perfection of its water right permits.

10 This Court's consideration is limited to only that evidence on which the State
11 Engineer based his decision.³⁹ Accordingly, the supplemental record on appeal cannot be
12 contemplated by this Court in deciding whether the State Engineer's reinstatement of
13 Happy Creek's eight permits, with a new priority date, under NRS 533.395, was proper.⁴⁰

14 V. ARGUMENT

15 A. This Court Does Not Possess the Power to Grant Equitable Relief 16 to Overturn The Imposition of a New Priority Date Under NRS 533.395(3)

17 The Nevada Supreme Court has, in the past, affirmed the district court's use of
18 equitable power to grant relief contrary to that mandated by the language of a specific
19 statute.⁴¹ However, the cases where this power was allowed, the Nevada Supreme Court
20 reviewed the interpretation of the intent the specific statute in question, to determine
21 whether the court would have the authority to overturn a mandatory directive of the
22 legislature.⁴² The cases that have allowed equitable relief do not stand for the proposition
23

24 ³⁸ See *Revert*, 95 Nev. at 786, 603 P.2d at 264; *Kent*, 62 Nev. at 32, 140 P.2d at 358.

25 ³⁹ NRS 533.450; *Curtis Park*, 101 Nev. at 32, 692 P.2d at 497.

26 ⁴⁰ *Morris*, 107 Nev. at 701, 819 P.2d at 205.

27 ⁴¹ *Blaine Equip. Co., Inc. v. State*, 122 Nev. 860, 868, 138 P.3d 820, 825 (2006); See *Donoghue v.*
28 *T.O.M. Co.*, 45 Nev. 110, 116, 198 P. 553, 554 (1921) (stating that "[the issue] is not a question of
construction of the proviso, but one of interpretation as to whether or not Congress intended that its terms
should be so inflexible as not to permit of exceptions"); see also *State Engineer v. American Nat'l Ins. Co.*,
88 Nev. 424, 426, 498 P.2d 1329, 1330 (1972) (stating that a statute requiring the State Engineer to cancel
water permits when the permittee fails to file proof of an application of water to beneficial use "does not,
however, affect the power of the district court to grant equitable relief to the permittee when warranted").

⁴² *Id.*

1 that the Court has the carte blanche authority to grant equitable relief with respect to all
2 mandatory directives of the legislature as argued by Happy Creek. Rather the Nevada
3 Supreme Court has looked at whether the legislature's intent behind the mandatory
4 language, supports equitable relief when warranted, or whether that legislature clearly
5 intended the harsh result, as a type of sanction.

6 "When the language of a statute is plain and unambiguous, a court should give that
7 language its ordinary meaning and not go beyond it."⁴³ A statute is ambiguous if it
8 "is capable of being understood in two or more senses by reasonably well-informed
9 persons."⁴⁴

10 The controlling statute in this case, NRS 533.395(3), states: "[i]f the decision of the
11 State Engineer modifies or rescinds the cancellation of a permit, the effective date of the
12 appropriation under the permit is vacated and replaced by the date of the filing of the
13 written petition with the State Engineer."⁴⁵ The language of NRS 533.395(3) is plain and
14 unambiguous.⁴⁶ Specifically, a reasonably well-informed person would understand the
15 language to stand for the single proposition that a person who allows their water rights to
16 become cancelled, and subsequently files a petition for reinstatement with the State
17 Engineer, shall be sanctioned by having the existing priority date of their water rights
18 void, and replaced with the date the individual filed their petition to reinstate their
19 cancelled water rights. The intent of the Legislature is clear, and the Legislature clearly
20 intended that there be a punitive consequence where a water right holder allows their
21 right to be cancelled. This intended sanction cannot be overturned based upon equitable
22 relief principles.

23 ///

24
25 ⁴³ *City Council of Reno v. Reno Newspapers*, 105 Nev. 886, 891, 784 P.2d 974, 977 (1989).

26 ⁴⁴ *Thompson v. District Court*, 100 Nev. 352, 354, 683 P.2d 17, 19 (1984).

27 ⁴⁵ NRS 533.395(3).

28 ⁴⁶ The Nevada Supreme Court has already held that NRS 533.395(3) is unambiguous. *Andersen Family Associates v. Hugh Ricci, P.E.*, 124 Nev. 182, 187, 179 P.3d 1201, 1204 (2008) ("Thus, we are faced with two unambiguous statutes that are in conflict: while NRS 533.085(1) specifically exempts prestatutory water rights from impairment by Nevada's statutory water law, NRS 533.395(3) more generally provides for a loss of priority when any water permit (regardless of the underlying right) is canceled and reinstated." [emphasis added].)

1 Happy Creek is not entitled to equitable relief under *Bailey, American National*,
2 *Engelmann* or any of the other Nevada Supreme Court cases that have extended
3 equitable relief when a water right has been cancelled under NRS 533.390 or
4 NRS 533.410, or forfeited under NRS 534.090.⁴⁷ In those very limited cases, the Nevada
5 Supreme Court has held that even when the State Engineer has correctly cancelled or
6 forfeited a water right pursuant to his statutory mandate, a district court may grant
7 equitable relief by reinstating the water right, when warranted.⁴⁸ In all of those cases, it
8 was the mandatory cancellation or forfeiture that was being overturned, and in all of
9 those cases equitable relief was warranted based upon the facts of the specific cases which
10 led the court to determine that the legislature did not intend such harsh dispositions.

11 Happy Creek relies upon *American National*, as a premise that this Court has the
12 authority to grant equitable relief to overturn the loss of priority under NRS 533.395(3).
13 However, *American National* is distinguishable. In 1972 when *American National* was
14 heard, the statute provided that the permit 'shall' be cancelled by the State Engineer
15 when the permittee fails to file proof of application of water to beneficial use.⁴⁹ At that
16 time, *American National* did not have a remedy at law to address the deprivation of its
17 water right.⁵⁰ "Because Nevada law did not provide a remedy for *American National*, as
18 the State Engineer was without discretion to review a permit cancellation, equitable relief
19 through judicial review was appropriate."⁵¹ The Nevada Supreme Court affirmed the
20 lower court's decision, concluding that NRS Chapter 533 does not prohibit the district
21 court from granting equitable relief when warranted.⁵² *American National* stands for the
22 proposition that the Court could grant equitable relief where the legislature mandated
23

24
25 ⁴⁷ *Bailey v. State*, 95 Nev. 378, 594 P.2d 734 (1979); *State Eng'r v. Am. Nat. Ins. Co.*, 88 Nev. 424,
26 498 P.2d 1329 (1972); *Engelmann v. Westergard*, 98 Nev. 348, 351-52, 647 P.2d 385, 387-88 (1982).
See also *Preffered Equities Corp. v. State Eng'r, State of Nevada*, 119 Nev. 384, 75 P.3d 380 (2003); *State v.*
Morris DeLee Revocable Trust, 281 P.3d 1221 (Nev. 2009) (unpublished disposition).

27 ⁴⁸ *State Eng'r v. Am. Nat. Ins. Co.*, 88 Nev. at 426, 498 P.2d at 1330 (1972).

⁴⁹ *State Eng'r v. Am. Nat. Ins. Co.*, 88 Nev. 424, 426, 498 P.2d 1329, 1330 (1972).

⁵⁰ See *Id.*

28 ⁵¹ *Benson v. State Eng'r*, 131 Nev. Adv. Op. 78, 358 P.3d 221, 227 (2015), *reh'g denied* (Nov. 5, 2015)
(citing *Am. Nat'l Ins. Co.*, 88 Nev. at 426, 498 P.2d at 1330).

⁵² *Id.*

1 the State Engineer to cancel an entire permit when a party failed to timely file an
2 application to extend time or prove beneficial use.⁵³

3 However, as indicated by the Nevada Supreme Court, "[l]egislative action would be
4 appropriate to allow the State Engineer discretion in a permit cancellation under
5 NRS 533.410. With such a change, court reversal would only be appropriate in the event
6 of an abuse of discretion."⁵⁴ As a result of these cases, the statute was amended in 1981,
7 to substantially the same form we see today under NRS 533.395, which creates the
8 administrative ability for the State Engineer to overturn a cancellation; however, it also
9 mandates a sanction for failure to comply with the law.⁵⁵ The difference between the
10 statutes in force before 1981, when *American National* was decided, and 2016 when
11 Happy Creek's water rights were reinstated, makes *American National* inapplicable to
12 this case. Happy Creek was able to seek administrative review of the cancellation and its
13 eight water right permits were reinstated by the State Engineer, with the new priority.

14 Happy Creek's reliance on *Bailey* and *Engelmann* is inapplicable. In both *Bailey*
15 and *Engelmann*, the Nevada Supreme Court "held that where an aggrieved party had no
16 actual knowledge that his permits were cancelled until after expiration of the thirty-day
17 period within which to comply with the statute, it was not the intent of the Legislature to
18 preclude judicial review of such an order or decision."⁵⁶ Happy Creek was fully aware of
19 the cancellation, took advantage of the administrative remedy under NRS 533.395(2) and
20 obtained reinstatement of the eight water rights permits with the new priority date as
21 required by NRS 533.395(3). Neither *Bailey* nor *Engelmann* support Happy Creek's
22 contention that it is entitled to equitable relief in this instance.

23 Happy Creek still possesses its water rights, the one thing the courts reinstated
24 through equitable relief throughout the litany of these cases. The State Engineer's

25 ⁵³ This mandatory language is still seen in the forfeiture statutes of NRS 534.090, and continues to
26 allow the court to grant equitable relief when appropriate as seen in *Town of Eureka, supra*.

27 ⁵⁴ *State Eng'r v. Am. Nat. Ins. Co.*, 88 Nev. 424, 426-27, 498 P.2d 1329, 1331 (1972).

28 ⁵⁵ See 1981 Nev. Stat., ch. 44, § 3, at 114 (amending NRS 533.395 to allow the holder of a canceled
permit to petition the State Engineer to review a canceled permit at a public hearing and precluding
judicial review of a canceled permit if the permittee did not first petition for the State Engineer's review).

⁵⁶ *Engelmann v. Westergard*, 98 Nev. 348, 352, 647 P.2d 385, 388 (1982) (citing *Bailey v. State of Nevada*, 95 Nev. 378, 594 P.2d 734 (1979)).

1 decision has not affected Happy Creek's present ability to use its water, through the
2 rescission of the cancellations after a hearing, as the State Engineer has not issued a
3 curtailment or reduced the amount of water it were granted. The only thing the State
4 Engineer did, was apply NRS 533.395(3) to the reinstatement of the eight water rights,
5 resulting in the punitive loss of priority for failing to comply with the requirements under
6 Nevada law. This is not a punishment derived by the State Engineer, rather, this is a
7 specifically mandated consequence established by the Legislature. The policy behind this
8 sanction is appropriate. A water right holder, who fails to maintain their water rights,
9 does not get the benefit of keeping their earlier priority date upon reinstatement. It is
10 unfair to the other water right holders in the basin, who are diligent, to allow
11 Happy Creek or any other water right holder, who has failed to be diligent, to maintain
12 its priority dates when it did not "strictly" comply with statutes and deadlines. Because
13 Happy Creek did not diligently pursue its filings, it should not be rewarded by allowing it to
14 keep its earlier priority dates for the eight water rights.

15 As discussed, not one of the cases relied upon by Happy Creek involve the State
16 Engineer's review and reinstatement of a cancelled water right under NRS 533.395(2),
17 and not one of those cases extended equitable relief to the loss of their priority after the
18 State Engineer reinstated the water right under NRS 533.395(3). There are only two
19 cases in which the Nevada Supreme Court has even discussed NRS 533.395(3), *Benson*⁵⁷
20 and *Anderson Family*.⁵⁸ In *Benson*, the Nevada Supreme Court did not reach the merits
21 of whether or not they had the authority to grant equitable relief under NRS 533.395(3),
22 as *Benson* had failed to exhaust their administrative remedies. However, the Court did
23 provide some guidance on the issue. In discussing whether or not a new priority date was
24 an adequate remedy, the Court stated the following:

25 We are not persuaded by Benson's claim, that a water permit
26 with an appropriation date of 2013 would afford her no remedy
27 at all. Under NRS 533.395(2), following a public hearing, the
28 State Engineer could have "modified" or rescind[ed] the
cancellation" and issued Benson a water permit with an effective

⁵⁷ *Benson*, 131 Nev. Adv. Op. 78, 358 P.3d 221.

⁵⁸ *Andersen Family Associates v. Hugh Ricci, P.E.*, 124 Nev. 182, 184, 179 P.3d 1201, 1202 (2008).

1 date of 2013. NRS 533.395(2), (3). Although a water permit
2 with a 2013 appropriation date effectively places Benson near
3 the end of the line to appropriate water, this is a form of relief.
4 We recognize that it is not the remedy that Benson prefers, but
5 we do not consider administrative proceedings to be futile solely
6 because the statute prevents the petitioner from receiving his or
7 her ideal remedy through administrative proceedings. If a
8 permit with a 2013 priority date did not allow her to appropriate
9 sufficient water, seeking judicial review would have *then* been
10 permissible. See NRS 533.395(4); NRS 533.450.⁵⁹

11 Likewise, Happy Creek did not lose its water rights, nor has Happy Creek claimed that
12 the new priority date of 2016 does not allow them sufficient water, as Happy Creek is still
13 entitled to pump the same amount of water under its permits as before the cancellations.
14 Happy Creek's ability to use the water, even with a 2016 priority date, has not been
15 affected.

16 In *Anderson*, the Supreme Court was asked to determine if NRS 533.395(3) could
17 be applied to vested (pre-statutory) water rights.⁶⁰ The Court upheld the State Engineer's
18 decision that he could not apply NRS 533.395(3) to vested water rights, as NRS 533.085
19 specifically exempts pre-statutory water rights from impairment by Nevada's statutory
20 water law.⁶¹ Even though the Nevada Supreme Court did not extend NRS 533.395(3) to
21 vested water rights, it did provide the following warning to statutorily created water right
22 holder such as Happy Creek:

23 We reiterate, however, that such rights are subject to state
24 regulation, and rights holders must comply with all state permit
25 requirements. Indeed, the failure to comply with state permit
26 requirements may render valuable permitted rights useless in
27 certain circumstances.⁶²

28 Not a single case addressed whether the Court has equitable relief to reinstate a
priority date that was amended pursuant to NRS 533.395(3). Happy Creek has cited to
these cases and the fact that when the court granted equitable relief reinstating the
actual water right, the water right was reinstated with the original priority date. What
Happy Creek fails to address is the fact that NRS 533.395(3) applies to situations where
the State Engineer in his discretion has reinstated the water right cancellation, not the

⁵⁹ *Benson*, 358 P.3d at 228.

⁶⁰ *Andersen*, 124 Nev. at 186, 179 P.3d at 1203.

⁶¹ *Id.*, 124 Nev. at 193, 179 P.3d at 1208.

⁶² *Id.*

1 Court. Happy Creek has the eight water right permits. The basis for equitable relief
2 found in the progeny of Nevada Supreme Court cases on the subject, is not applicable to
3 the facts and circumstances in this case. NRS 533.395(3) was specifically introduced by
4 the Nevada Legislature to give the State Engineer some discretion in these cases, but at
5 the same time provide a specific punishment for water right holders who ignored
6 numerous notices and still allowed their permit to be cancelled.

7 Happy Creek's entire request is based upon future speculation; speculation that it
8 may lose its water if a potential future curtailment action occurs. However, even if the
9 original priority dates of its water rights were reinstated, this speculative harm is still
10 possible. Happy Creek has mischaracterized all of the eight permits as "senior
11 groundwater rights." Prior to their cancellation, the eight water rights in question
12 ranged from 1954 to 1990. Arguably, the 1954 and 1963 water rights would have a higher
13 priority in the basin. However, the more recent rights from 1990, 1981 and even 1969 are
14 not "senior" groundwater rights in this basin. Even if the eight water rights were
15 reinstated with the original priority dates, they could still be subject to a future
16 curtailment as the State Engineer is required to strictly adhere to the priority system if
17 the State Engineer orders curtailment. Furthermore, these are *not* vested or
18 pre-statutory groundwater rights. Happy creek discusses the ranch's history as if they
19 are, but to be abundantly clear—Happy Creek's water rights are *absolutely not* vested
20 water rights. As owners of permitted water rights, Happy Creek's own failure to comply
21 with state permit requirements are what led to the imposition of NRS 533.395(3)'s
22 punitive consequences, the same punitive consequences the Nevada Supreme Court
23 warned permitted water right holders about in *Anderson*.

24 Happy Creek chose to amend its previously perfected water rights through change
25 applications. Once a water right holder chooses to change a permitted water right, the
26 change required that permittee to re-perfect the water right through proof of beneficial
27 use under the conditions of the new permit. In this case, Happy Creek requested to
28 change the place of use of eight permits. With the approval of the new permits, and based

1 upon the requested change applications, Happy Creek was required to prove it has
2 beneficial uses for the water under the conditions of the new permits. Happy Creek was
3 given deadlines to file either its proofs of beneficial use or to file applications for
4 extensions of time. However, in 2016, Happy Creek failed to timely file either their proof
5 of beneficial use or another application to extend time for these eight permits, even after
6 Happy Creek received from the State Engineer a 30-day final notice, warning it of the
7 consequences for the failure to act. Despite this notice, Happy Creek failed to meet the
8 April 29, 2016, deadline, allowing the eight permits to be cancelled. While Happy Creek
9 took advantage of the available relief under NRS 533.395 by filing Petitions for Review of
10 the Cancelled Permits under NRS 533.395, which resulted in the State Engineer
11 reinstating the eight permits, the State Engineer was statutorily bound to reinstate those
12 permits with the new priority date. A sanction specially created by the Nevada
13 Legislature for circumstances such as this, and a punishment which does not permit the
14 granting of equitable relief by the court.

15 **B. The Application of NRS 533.395 is Not a Taking⁶³**

16 When a governmental entity takes property without just compensation, or
17 initiating an eminent domain action, an aggrieved party *may file a complaint* for inverse
18 condemnation.⁶⁴ Here, Happy Creek attempts to persuade the Court to grant equitable
19 relief, so that it does not have to file a future, independent inverse condemnation action,
20 against the State Engineer, State of Nevada or other state agency, for the "alleged taking"
21 of its priority date, under NRS 533.395(3). In less than a page, Happy Creek alleges that
22 the application of NRS 533.395 is a taking; however, Happy Creek's argument does not
23 describe which taking theory would apply (i.e., physical taking, regulatory taking,
24 regulatory taking per se), nor does it analyze its claim. In short, Happy Creek fails to
25 present any substantive legal argument and analysis. Rather, Happy Creek boldly

26
27 ⁶³ The State Engineer submits that any alleged taking must be separately plead as an independent
28 action, against an applicable party to properly seek relief for the "alleged" taking. Any and all arguments
made in this brief, are in response to Happy Creek's Opening Brief only. The State, the State Engineer,
and/or any other agency of the State of Nevada do not waive any defense or right it may have in a future
action.

⁶⁴ *State, Dep't of Transp. v. Cowan*, 120 Nev. 851, 854, 103 P.3d 1, 3 (2004).

1 argues, without support, that equitable relief is proper so to avoid some future claim that
2 is currently without merit.

3 Happy Creek's claim that NRS 533.395 is a taking is unsupported by federal and
4 state law. Pursuant to the Nevada and United States Constitutions, the government may
5 not take private property for *public use* unless it pays just compensation.⁶⁵ A physical
6 taking has not occurred as the State Engineer has not diverted the water for a
7 governmental consumptive use or decreased the amount of water Happy Creek has access
8 to, such as authorize any such encroachment.⁶⁶ A per se regulatory taking has not
9 occurred as Happy Creek has not suffered a permanent physical invasion of its property
10 nor has the imposition of NRS 533.395(3) deprived Happy Creek of *all* economical
11 beneficial use of its property.⁶⁷ Furthermore, a regulatory taking has not occurred, as
12 Happy Creek's water right with a 2016 priority date continues to have an economic value
13 and can continue to be used on the property.⁶⁸ The application of NRS 533.395(3) to
14

⁶⁵ Nev. Const. art. 1, § 8(6); U.S. Const. amend. V.

⁶⁶ *Washoe County v. United States*, 319 F.3d 1320, 1326 (2003), citing *Dugan v. Rank*, 372 U.S. 609, 614, 625-626, 83 S. Ct. 999, 10 L.Ed.2d 15 (1963) [government's upstream impounding of water at a dam constitutes a physical taking of water rights from downstream owners, analogizing government action to taking of airspace over land]; *Int'l Paper County v. United States*, 282 U.S. 399, 407-408, 51 S. Ct. 176, 75 L.Ed. 410 (1931) [taking found where the Secretary of War ordered a private power company to withdraw water from the petitioner's mill to increase power production for government uses]. *Allegretti & Co. v. County of Imperial*, 42 Cal. Rptr. 3d 122, 130 (2006).

⁶⁷ The Supreme Court defined "two categories of regulatory action that generally will be deemed per se takings for Fifth Amendment purposes": "(1) requires an owner to suffer a permanent physical invasion of her property or (2) completely deprives an owner of all economical beneficial use of her property. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005); *Kelly v. TRPA*, 109 Nev. 638, 648, 855 P.2d 1027, 1033 (1993) [emphasis added].

⁶⁸ "Regulatory takings challenges are governed by the standards set forth in *Penn Central Transportation Co. v. New York City*. *Lingle*, 544 U.S. at 538; see also *Kelly*, 109 Nev. at 648, 855 P.2d at 1033. In *Penn Central*, the Supreme Court created guidelines to examine whether a regulation that does not constitute a physical invasion and does not deprive the owner of all viable economic use nevertheless affects a compensable regulatory taking. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, (1978). Those three guidelines are: (1) the regulation's economic impact on the property owner, (2) the regulation's interference with investment-backed expectations, and (3) the character of the government action. *Id.* In examining whether a regulatory taking has occurred, a reviewing court must consider the property as a whole. *Id.* at 130-31, 98 S. Ct. 2646 ("Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, [the] Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole"); see also *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 331, 122 S. Ct. 1465 (2002) (district court erred by disaggregating property into a 32-month segment of time from the remainder of the property owner's fee simple estate and considering whether property owners were deprived of all economically viable use during that period). Additionally, an allegation that a regulation has diminished the property's value, or destroyed the potential for its highest

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

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

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

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

22 and best use, does not, without more, constitute a taking. See *Euclid v. Ambler Co.*, 272 U.S. 365, 397,
23 47 S. Ct. 114, 71 L.Ed. 303 (1926) (regulations valid although they effected a 75 percent diminution in value
24 of property); *Hadacheck v. Los Angeles*, 239 U.S. 394, 414, 36 S. Ct. 143, 60 L.Ed. 348 (1915) (ordinance
25 prohibiting highest and best use of land as a brickworks was valid, although it reduced the value of
26 property from \$800,000 to \$60,000); *William C. Haas v. City & Cty. of San Francisco*, 605 F.2d 1117, 1121
27 (9th Cir. 1979) (zoning regulations were not a taking although they reduced the value of property from
28 \$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).

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

4 **VI. CONCLUSION**

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

12 **AFFIRMATION**

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

15 DATED this 18th day of April, 2016.

16 ADAM PAUL LAXALT
17 Attorney General

18 By:

19 JUSTINA A. CAVIGLIA
20 Deputy Attorney General
21 Nevada Bar No. 9999
22 100 North Carson Street
23 Carson City, Nevada 89701-4717
24 Tel: (775) 684-1222
25 Fax: (775) 684-1108
26 Email: jcaviglia@ag.nv.gov
27 Attorney for Respondent,
28 Nevada State Engineer

CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on this 18th day of April, 2016, I served a true and correct copy of the foregoing RESPONDENT'S ANSWERING BRIEF, by placing said document in the U.S. Mail, postage prepaid, addressed to:

Paul G. Taggart, Esq.
Rachel L. Wise, Esq.
TAGGART & TAGGART, LTD.
108 North Minnesota Street
Carson City, Nevada 89703


Dorene A. Wright

EXHIBIT 1

EXHIBIT 1

 **COPY**

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

Dept. No. II

FILED
2016 FEB 29 AM 11:58

TANYA SCHMIDT
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

Andrea Andersen 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
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

///

///

///

1 FARMERS AGAINST CURTAILMENT
2 ORDER, LLC,

3 Petitioner,

4 vs.

5 JASON KING, P.E., Nevada State
6 Engineer, DIVISION OF WATER
7 RESOURCES, DEPARTMENT OF
8 CONSERVATION AND NATURAL
9 RESOURCES,

10 Respondent,

11 and,

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

15 Intervening Respondent.

16 ///

17 ///

18 ///

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

TABLE OF CONTENTS

1			
2	TABLE OF AUTHORITIES		ii
3	I. INTRODUCTION		4
4	II. FACTUAL SUMMARY		5
5	A. System Yield And Supplemental Groundwater Rights		5
6	B. Curtailment By Preferred Use And Priority		7
7	C. Groundwater Level Decline Standard		9
8	D. Adequate Notice And Proper Hearing		10
9	III. STANDARD OF REVIEW		12
10	IV. LEGAL DISCUSSION		13
11	A. The Court Must Not Consider Extrinsic Evidence Submitted By FACO		13
12	B. The State Engineer Has Properly Interpreted And Applied NRS 534.120		16
13	1. The State Engineer has authority to designate supplemental groundwater rights as a non-preferred use		17
14	2. The State Engineer has the statutory authority to curtail supplemental groundwater rights based upon their unique priority		20
15	C. Order Nos. 1267 And 1268 Are Supported By Substantial Evidence		22
16	D. The State Engineer Properly Exercised His Authority To Determine The Appropriate Tool To Respond To Unprecedented Conditions In Smith And Mason Valleys		24
17	E. The State Engineer Has Not Needed To Seek Additional Legislative Authority To Declare Supplemental Groundwater A Non-Preferred Use		25
18	IV. CONCLUSION		26
19	AFFIRMATION		27
20	CERTIFICATE OF SERVICE		28
21			
22			
23			
24			
25			
26			
27			
28			

TABLE OF AUTHORITIES

CASES

<i>Anderson Family Associates v. Ricci</i> , 124 Nev. 182, 179 P.3d 1201 (2008).....	13
<i>Bacher v. State Engineer</i> , 122 Nev. 1110, 146 P.3d 793 (2006).....	12, 15, 23
<i>Clark Co. Sc. Dist. v. Local Gov't</i> , 90 Nev. 332, 530 P.2d 114 (1974).....	13
<i>Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.</i> , 12-17530, 2015 WL 5451484, at *7 (9th Cir. Sept. 17, 2015).....	23
<i>Desert Irr., Ltd. v. State</i> , 113 Nev. 1049, 944 P.2d 835 (1997).....	20
<i>Desert Valley Constr. v. Hurley</i> , 120 Nev. 499, 96 P.3d 739 (2004).....	12, 15
<i>Ferry Country v. Concerned Friends of Ferry Country</i> , 123 P.3d 102 (Wash. 2005).....	23
<i>Gray Line Tours of S. Nevada v. Pub. Serv. Comm'n of Nevada</i> , 97 Nev. 200, 626 P.2d 263 (1981).....	20
<i>Kent v. Smith</i> , 62 Nev. 30, 140 P.2d 357 (1943).....	13, 16
<i>Las Vegas Valley Water Dist. v. Curtis Park Manor Water Users Ass'n</i> , 98 Nev. 275, 646 P.2d 549 (1982).....	12, 15
<i>Motor Cargo v. Pub. Serv. Comm'n of Nevada</i> , 108 Nev. 335, 830 P.2d 1328 (1992).....	20
<i>Pac. Coast Fed'n of Fishermen's Ass'ns, Inc. v. Nat'l Marine Fisheries Serv.</i> , 265 F.3d 1028 (9th Cir. 2001).....	23
<i>Pyramid Lake Paiute Tribe of Indians v. Washoe County</i> , 112 Nev. 743, 918 P.2d 697 (1996).....	25
<i>Revert v. Ray</i> , 95 Nev. 782, 603 P.2d 262 (1979).....	12, 13, 15, 16
<i>State Eng'r v. Curtis Park Manor Water Users Ass'n</i> , 101 Nev. 30, 692 P.2d 495 (1985).....	12, 13, 15, 16, 23
<i>State Eng'r v. Morris</i> , 107 Nev. 699, 819 P.2d 203 (1991).....	12, 13, 15, 16
<i>State v. Morros</i> , 104 Nev. 709, 766 P.2d 263 (1988).....	13, 25
<i>Town of Eureka v. State Eng'r</i> , 108 Nev. 163, 826 P.2d 948 (1992).....	12, 15
<i>Turnipseed v. Truckee-Carson Irrig. Dist.</i> , 116 Nev. 1024, 13 P.3d 395 (2000).....	12, 15
<i>United States v. Alpine Land & Reservoir Co.</i> , 919 F.Supp. 1470 (D. Nev. 1996).....	12, 15

///

TABLE OF AUTHORITIES

STATUTES

NRS 233B.0391(j)	12, 15
NRS 533.024	24
NRS 533.270 through NRS 533.445	12
NRS 533.370	5
NRS 533.450	12, 13, 15, 16
NRS 533.450(1)	13
NRS 533.450(10)	12, 25
NRS 534.024(1)(c)	9
NRS 534.110(6)	21, 22
NRS 534.120	4, 7, 16, 17, 18, 19, 21, 26
NRS 534.120(1)	17, 21, 22
NRS 534.120(2)	8, 17, 18, 19, 20, 21, 22

OTHER AUTHORITIES

BLACK'S LAW DICTIONARY 1233 (6th ed. 1990)	17
Senate Bill 81	25, 26

1 **RESPONDENT STATE ENGINEER'S ANSWERING BRIEF**

2 **I. INTRODUCTION**

3 As succinctly framed by Petitioners Steven A. Fulstone, R.N. Fulstone Company,
4 CEAS Company (hereafter "Fulstone Petitioners") the issues before this Court for
5 consideration are very simple: (1) Is the State Engineer's interpretation and application of
6 NRS 534.120 in Order Nos. 1267 and 1268 (hereafter collectively "Orders") proper; and
7 (2) Are the findings and conclusions made by the State Engineer in supporting the issuance of
8 the Orders supported by substantial evidence? Clearly Petitioners and the State Engineer
9 disagree as to the answers to these questions; however, the State Engineer's interpretation
10 and application of NRS 534.120 is not only consistent with the plain reading of the law, but
11 was found to be an appropriate application of the law by this Court last year. Moreover, the
12 State Engineer's determinations, necessitating the issuance of the Orders, are supported by
13 substantial evidence. This evidence, which is largely generated and interpreted by
14 independent third parties, was not only based upon well-established scientific principles, but
15 was peer reviewed to assure that the data utilized by the State Engineer was not only
16 substantially accurate, but reliable.

17 Over the past four years, the State of Nevada has experienced unprecedented drought
18 conditions, which imposed upon the State Engineer an unprecedented need to respond to
19 these conditions, particularly in Smith and Mason Valleys. Smith Valley Hydrographic Basin
20 and Mason Valley Hydrographic Basin are two of the most agriculturally productive basins in
21 the State of Nevada. They have a relatively small geographic footprint with a high density of
22 agricultural demands within those areas with substantial surface and groundwater use. While
23 these basins generally have a substantial reliance on the use of surface water from the
24 Walker River, large volumes of supplemental groundwater rights have been issued which are
25 to be used in lean water years to assist those surface-water holders to obtain a full irrigation
26 season. However, due to the unprecedented drought, supplemental groundwater pumping
27 has severely affected the aquifers, mandating unprecedented action by the State Engineer.

28 ///

1 The significant impacts to the groundwater resources, coupled with the duration and
2 severity of the drought, are circumstances and conditions that cannot be ignored or otherwise
3 left to resolve themselves as advocated by Farmers Against Curtailment Order, LLC's
4 (hereafter "FACO") counsel. The State Engineer has the duty to manage and preserve
5 Nevada's most precious natural resource – water. The responsibility of assuring protection of
6 existing water rights and the resource prompted the State Engineer to engage appropriately in
7 a science-based evaluation of the water resources in Smith and Mason Valleys. Utilizing his
8 expertise and interpretation of the law, the State Engineer issued the Orders restricting water
9 use in order to fulfill his duty to the citizens of the State of Nevada and to manage a precious
10 resource to not only provide for the present, but future generations.

11 **II. FACTUAL SUMMARY**

12 **A. System Yield And Supplemental Groundwater Rights**

13 Smith and Mason Valleys historically present the most significant surface-water
14 irrigation uses of water from the Walker River. ROA at 717 and 867. These hydrographic
15 basins are predominately irrigated with surface-water flows from the Walker River. Beginning
16 in the late 1940's, the State Engineer began issuing *supplemental* groundwater rights – rights
17 that were to be used in only those years where there wasn't enough Walker River water to
18 meet the full demand of a crop, and then, only in an amount equal to the deficiency left by the
19 lack of Walker River water. *Id.*

20 When considering the granting of applications for supplemental groundwater rights, the
21 State Engineer considered the quantity of water available within these basins in light of the
22 fact that significant quantities of surface water also recharged the groundwater basins.
23 Specifically, the State Engineer made a determination as to the available yield of the particular
24 basins and then issued groundwater permits consistent with NRS 533.370 and according to
25 the availability of unappropriated water within the basins. ROA at 718-719 and 868-869. In
26 most Nevada groundwater basins, the analysis of unappropriated water is based on a

27 ///

28 ///

1 perennial yield¹ analysis that considers the recharge and discharge. As a matter of policy, the
2 State of Nevada attempts to avoid the "mining" of a groundwater resource, that is to say that
3 the State Engineer does not issue permits which would result in the ultimate depletion of a
4 groundwater aquifer.

5 However, because of the hydrology of the Smith and Mason Valleys, which are
6 river-dominated basins where irrigation is the primary use, the State Engineer has utilized
7 what is referred to as the "system yield" approach in determining the quantity of groundwater
8 available for appropriation. ROA at 719 and 869. The system yield approach considers the
9 total supply of surface and groundwater in determining the amount available for use on an
10 annual basis. *Id.* This system yield approach substantially increases the groundwater
11 available for appropriation over the perennial yield due to the additional recharge to the
12 groundwater aquifers from infiltration of surface irrigation water along the river, ditches,
13 canals, and fields. Under *normal* conditions, there is sufficient recharge to the aquifers from
14 infiltration of surface irrigation water so that the additional system yield pumping
15 *i.e.* supplemental groundwater rights, will not deplete the groundwater aquifers. These past
16 four years were anything but *normal*.

17 In Smith and Mason Valleys, groundwater rights were permitted in amounts that are
18 greatly in excess of the perennial yield. *Id.* at 720 and 870. The groundwater rights were
19 issued under the system yield approach and most of these water rights were issued as
20 "supplemental" to surface-water rights. *Id.* Supplemental groundwater rights are typically
21 issued in river dominated basins in order to help irrigators get a full water delivery to their
22 crops in those years where surface-water flows are insufficient to meet all of their needs. *Id.*
23 Stream systems in Nevada are notoriously inconsistent, and surface-water irrigators have
24 been permitted to use groundwater to supplement those inconsistent supplies so that they can
25 more consistently utilize their farmlands. The system yield approach and significant pumping
26 of supplemental groundwater rights often go hand-in-hand. Unfortunately, the recent

27
28 ¹ "Perennial yield" is defined as the maximum quantity of natural recharge available that may be continually
withdrawn and consumed each year for an indefinite period of time without depleting the groundwater reservoir.

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

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

26 **B. Curtailment By Preferred Use And Priority**

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

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

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

16 The State Engineer has authority under NRS 534.120(1) to make
17 rules, regulations and orders that are essential for the public
18 welfare. Further, the State Engineer may designate and regulate
19 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.***

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

22 The State Engineer understood and respects this Court's decision in the
23 2015 Proceedings. The State Engineer responded accordingly in his new curtailment orders.
24 Because supplemental groundwater rights are subordinate and conditional, and due to the
25 extraordinary declines correlating with the exceptional drought, the supplemental groundwater
26 rights were designated a non-preferred use pursuant to the State Engineer's authority under
27 NRS 534.120(2). Based upon this non-preferred use status, supplemental groundwater rights
28 may be curtailed by priority within that non-preferred category. ROA at 721 and 871.

1 **C. Groundwater Level Decline Standard**

2 In the Order Granting the Preliminary Injunction of the 2015 Proceedings, the Court
3 could not make a determination as to whether substantial evidence supported the State
4 Engineer's determination of an unreasonable lowering of the groundwater levels. See Order
5 Granting Preliminary Injunction, filed May 4, 2015, in Third Judicial District Court of the State
6 of Nevada Case No. 15-CV-00227, at p. 4:20-28. Following the 2015 Proceedings, the State
7 Engineer gave careful consideration to this Court's Order granting FACO's motion for
8 preliminary injunction. In utilizing this Court's ruling and comments at the hearing on FACO's
9 motion for preliminary injunction as general guidance for this Court's evaluation of the relevant
10 issues, the State Engineer worked to develop a science-based method by which he could
11 reasonably identify what level of curtailment would be necessary to appropriately manage the
12 groundwater in Smith and Mason Valleys. *Id.* at 722-723 and 873. The State Engineer then
13 utilized this science-based methodology to make determinations on the impacts of curtailment
14 on the Smith and Mason Valley aquifers. *Id.* This information was used to determine whether
15 curtailment would accomplish the needs of the water resources as well as justify the
16 curtailment. *Id.* Therefore, in order to establish a reasonable lowering of the aquifers present
17 in Smith and Mason Valleys, the State Engineer determined that limiting further declines to
18 four feet, or less, per year was an appropriate target. ROA at 723 and 873. The State
19 Engineer made this determination based upon the findings of unreasonable damage to the
20 aquifers resulting from excessive groundwater declines as well as the average rates of
21 groundwater declines in other, heavily groundwater irrigated basins, throughout the State. *Id.*

22 Because the State Engineer is "encouraged to consider the best available science in
23 rendering decisions concerning the available surface and underground sources of water in
24 Nevada" pursuant to NRS 534.024(1)(c), the State Engineer contracted with the Desert
25 Research Institute (DRI), an independent research institution uniquely qualified in this regard,
26 to develop and conduct groundwater-flow models of the Smith and Mason Valleys. *Id.* The
27 purpose of the DRI modeling was to assist the State Engineer in determining how to best
28 manage the groundwater declines and to understand the impacts of the groundwater pumping

1 and curtailment of groundwater pumping. *Id.* In utilizing the DRI models, the State Engineer
2 calibrated its results against similar historical hydrologic conditions in the basins to assure that
3 the DRI model was scientifically sound to predict the impact of various curtailment scenarios
4 within Smith and Mason Valleys based on the surface-water/groundwater interaction. *Id.*
5 *See also* ROA at 590, 638-639, 754, 801-802.

6 The DRI modeled various scenarios with the Walker River flows ranging from
7 100 percent to 20 percent of long-term averages, including groundwater pumping averages
8 and curtailment scenarios. ROA at 723, 873, 640, and 802-803. Consistent with the doctrine
9 of prior appropriation, the State Engineer modeled curtailment of the most junior supplemental
10 water rights first, and then incrementally continued the curtailment up through the more senior
11 of those rights. ROA at 723 and 873. Within each of those scenarios, the minimum
12 curtailment necessary to achieve a groundwater decline of four feet or less was determined.
13 *Id.* Based upon this modeling utilizing actual water rights data from Smith and Mason Valleys,
14 the State Engineer was able to determine the curtailment percentages along with the
15 corresponding permit priority dates. *Id.* *See also* ROA 728-729 and 878-882. Then, applying
16 the modeling result, the State Engineer determined that the appropriate trigger to determine
17 the need for curtailment would be based upon the April 1st, the Natural Resource
18 Conservation Service (NRCS) Nevada Water Supply Outlook Report. *Id.* at 724 and 874.

19 **D. Adequate Notice And Proper Hearing**

20 In response to the Court's prior concerns that the stakeholders be afforded sufficient
21 notice and hearing prior to the issuance of a curtailment order, prior to issuing the draft
22 Orders, the State Engineer conducted public workshops before Smith and Mason Valley
23 stakeholders outlining the information that was being developed as a result of the
24 DRI modeling as well as the ongoing drought conditions. *Id.* at 002-003, 005-006, 121-122
25 and 124. Notices of these workshops were not only circulated to the County Commissioners,
26 but were also published in the Mason Valley News – Leader Courier. *Id.* at 004, 007-008,
27 123 and 125-126.

28 ///

1 Then, on October 5, 2015, and October 7, 2015, the State Engineer conducted public
2 hearings regarding the draft versions of Order Nos. 1267 and 1268. ROA at 199-200. The
3 notice of these public hearings was published in the Mason Valley News – Leader Courier.
4 ROA at 201-202. During these public hearings, the State Engineer's staff made a full
5 presentation outlining the issues and actions relating to the Orders. This included information
6 on the effects of the drought and groundwater pumping on the aquifer and existing rights, the
7 climate outlook for the upcoming winter, most up-to-date groundwater pumping figures, results
8 from the most recent DRI modeling of curtailment of only supplemental groundwater rights, an
9 explanation of the NRCS stream-flow forecasts for surface-water supply and how those
10 results would be utilized in making decisions relating to potential curtailment and an
11 explanation of the curtailment calculations and scale. *Id.* at 569-709, 733-859.

12 Moreover, during these public hearings, the State Engineer took testimony from all
13 interested parties. *Id.* at 619-709, 784-859. The State Engineer afforded each interested
14 party the opportunity to bring expert testimony to discuss the merits of the draft Orders.
15 *Id.* at 199-200. However, despite this opportunity, none of the parties presented an expert
16 during the hearings. *Id.* at 619-709, 784-859. Additionally, the State Engineer permitted the
17 submission of supplemental evidence after the hearings; however, the evidence that was
18 submitted to the State Engineer was not properly presented expert testimony pursuant to the
19 State Engineer's directive to disclose expert testimony and inclusion of a resume or
20 curriculum vitae. *Id.* at 200. None of the stakeholders impacted by the draft Orders provided
21 any expert testimony or a substantive evaluation of the scientific basis for the State Engineer's
22 decisions.

23 The State Engineer considered all comments, as well as the testimony presented
24 during the October 5th and 7th hearings. Ultimately, the State Engineer did not find the
25 comments relating to the DRI model compelling. The State Engineer found that DRI's model
26 used actual water-level measurements to calibrate to, was scientifically reasonable, and
27 provides the most accurate forecasting tool for making determinations as to the need and
28 degree of curtailment, which may be necessary in Smith and Mason Valleys. *Id.* at 716-727

1 and 866-877. After full consideration of all the evidence, testimony of stakeholders, and
2 review of the applicable laws, the State Engineer issued Order Nos. 1267 and 1268 on
3 October 28, 2015. Petitioners timely appealed these orders.

4 III. STANDARD OF REVIEW

5 Nevada Revised Statute 533.450 provides for judicial review of orders and decisions of
6 the State Engineer made under NRS 533.270 through NRS 533.445 (setting forth the
7 statutory procedure for appropriation). Under this statute, "[t]he decision of the State Engineer
8 is *prima facie* correct, and the burden of proof is upon the party attacking the same."
9 NRS 533.450(10). Decisions of the State Engineer are entitled to deference as to both their
10 factual basis and their legal conclusions. *Id.*

11 The Court's review under NRS 533.450 is limited to a determination of whether the
12 State Engineer's decision is supported by substantial evidence. *Revert v. Ray*, 95 Nev. 782,
13 786, 603 P.2d 262 (1979). Substantial evidence is "that which a reasonable mind might
14 accept as adequate to support a conclusion." *Bacher v. State Engineer*, 122 Nev. 1110, 1121,
15 146 P.3d 793, 800 (2006). Thus, in evaluating the present matter, this Court may not "pass
16 upon the credibility of the witness nor reweigh the evidence." *Id.*

17 The State Engineer is expressly excluded from the provisions of the Nevada
18 Administrative Procedures Act. See NRS 233B.0391(j). Accordingly, the Court does not
19 engage in a *de novo* review but reviews the State Engineer's decision under the abuse of
20 discretion standard. NRS 533.450. See also *Revert v. Ray*, 95 Nev. 782, 603 P.2d 262
21 (1979); *Las Vegas Valley Water Dist. v. Curtis Park Manor Water Users Ass'n*, 98 Nev. 275,
22 278, 646 P.2d 549, 550 (1982); *State Eng'r v. Curtis Park Manor Water Users Ass'n*, 101 Nev.
23 30, 32, 692 P.2d 495, 497 (1985); *State Eng'r v. Morris*, 107 Nev. 699, 701, 819 P.2d 203,
24 205 (1991); *Town of Eureka v. State Eng'r*, 108 Nev. 163, 165, 826 P.2d 948, 949 (1992);
25 *Turnipseed v. Truckee-Carson Irrig. Dist.*, 116 Nev. 1024, 1029, 13 P.3d 395, 398 (2000);
26 *Desert Valley Constr. v. Hurley*, 120 Nev. 499, 502, 96 P.3d 739, 502 (2004); *Bacher*,
27 122 Nev. at 1121, 146 P.3d at 800; *United States v. Alpine Land & Reservoir Co.*,
28 919 F.Supp. 1470, 1474 (D. Nev. 1996). However, questions of pure statutory construction,

1 may be reviewed *de novo*. *Anderson Family Associates v. Ricci*, 124 Nev. 182, 186, 179 P.3d
2 1201, 1203 (2008).

3 Decisions of the State Engineer are entitled not only to deference with respect to
4 factual determinations, but also with respect to legal conclusions. The Nevada Supreme
5 Court has explained that "an agency charged with the duty of administering an act is impliedly
6 clothed with power to construe it as a necessary precedent to administrative action," and
7 therefore "great deference should be given to the agency's interpretation when it is within the
8 language of the statute." *State v. Morros*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988) (citing
9 *Clark Co. Sc. Dist. v. Local Gov't*, 90 Nev. 332, 446, 530 P.2d 114, 117 (1974)).

10 **IV. LEGAL DISCUSSION**

11 **A. The Court Must Not Consider Extrinsic Evidence Submitted By FACO**

12 Supplementation of the record by FACO is not proper and is contrary to Nevada law as
13 interpreted by the Nevada Supreme Court. NRS 533.450(1) states that actions to review
14 decisions of the State Engineer are "in the nature of an appeal." The Nevada Supreme Court
15 has interpreted NRS 533.450 to mean that a petitioner does not have a right to *de novo*
16 review or to offer additional evidence at the district court. *Revert v. Ray*, 95 Nev. 782, 786,
17 603 P.2d 262, 264 (1979). *See also Kent v. Smith*, 62 Nev. 30, 32, 140 P.2d 357, 358 (1943)
18 (a court may construe a prior judgment, but cannot properly consider extrinsic evidence). As a
19 result, the function of the Court is to review the evidence on which the State Engineer based
20 his decision to ascertain whether the evidence supports the decision, and if so, the Court is
21 bound to sustain the State Engineer's decision. *State Engineer v. Curtis Park*, 101 Nev. 30,
22 32, 692 P.2d 495, 497 (1985). "[N]either the district court nor this court will substitute its
23 judgment for that of the State Engineer: we will not pass upon the credibility of the witnesses
24 nor reweigh the evidence, but limit ourselves to a determination of whether substantial
25 evidence in the record supports the State Engineer's decision." *State Eng'r v. Morris*,
26 107 Nev. 699, 701, 819 P.2d 203, 205 (1991). That is whether the evidence, which was
27 considered by the State Engineer, was sufficient to support the decision, not whether the State

28 ///

1 Engineer should have gone beyond the record to consider additional evidence not referenced
2 or otherwise before him.

3 FACO seeks to introduce documents by means of a Request for Judicial Notice and a
4 Supplemental Record on Appeal. First, as fully set forth in the Opposition to FACO's Request
5 for Judicial Notice and Motion to Strike Petitioner's Supplemental Record on Appeal, each of
6 these documents are documents which were available to FACO prior to the October 5th
7 and 7th hearings held by the State Engineer. FACO was afforded an opportunity to not only
8 provide percipient testimony by its member stakeholders, but also to present expert witness
9 testimony. However, FACO failed to present any of these documents to the State Engineer
10 prior to the hearings, during the hearings, or during the available supplementation time period
11 following the hearings. Moreover, prior to the filing of the State Engineer's Record on Appeal,
12 FACO's counsel was provided with a draft copy of the Summary of Record on Appeal by
13 counsel for the State Engineer. See Reply to Opposition to Limited Objection to Scheduling
14 Order, Exhibit A. FACO's counsel was invited to suggest additional documents, which were
15 believed to be appropriate for inclusion in the Record on Appeal. *Id.* However, the State
16 Engineer's counsel did not receive any response from any party to this matter.

17 If FACO believes that these documents were germane to the State Engineer's
18 consideration of FACO's arguments and positions relating to Order Nos. 1267 and 1268,
19 those documents and records should have been presented to the State Engineer for
20 consideration and contemplation prior to the finalization and issuance of the Orders. Rather,
21 FACO never reference or otherwise incorporate these documents into oral or written
22 comments relating to the Orders.

23 FACO now utilizes these documents and records to argue that the State Engineer's
24 failure to consider this evidence, which was not before him at the time he considered FACO's
25 comments and concerns relating to the Orders, supports their position that the State
26 Engineer's decisions are improper. This is not the standard and does not justify this Court's
27 consideration of this evidence for the purpose of supporting Petitioner's arguments. Contrary

28 ///

1 to Petitioner's arguments and legal reliance, the State Engineer's office is specifically
2 excluded from the Administrative Procedures Act. See NRS 233B.0391(j).

3 Nevada law, not federal, sets forth the standard of this Court's review of the record and
4 evidence. "The proceedings in every case must be heard by the court, and must be informal
5 and summary, but full opportunity to be heard must be had before judgment is pronounced."
6 NRS 533.450. This Court is not permitted to engage in a *de novo* review; rather, this Court's
7 review is under the abuse of discretion standard. *Id.* See also *Revert*, 95 Nev. at 603 P.2d
8 262; *Las Vegas Valley Water Dist.*, 98 Nev. at 278, 646 P.2d at 550; *Curtis Park*, 101 Nev.
9 at 32, 692 P.2d at 497; *Morris*, 107 Nev. at 701, 819 P.2d at 205; *Town of Eureka*, 108 Nev.
10 at 165, 826 P.2d at 949; *Turnipseed*, 116 Nev. at 1029, 13 P.3d at 398; *Desert Valley Constr.*,
11 120 Nev. at 502, 96 P.3d at 502; *Bacher*, 122 Nev. at 1121, 146 P.3d at 800; *Alpine Land &*
12 *Reservoir Co.*, 919 F.Supp. at 1474.

13 FACO cannot be permitted to sandbag the State Engineer's office by withholding the
14 documents it contends are necessary to support their arguments until after the State Engineer
15 has issued his decision and then use these documents to argue against the State Engineer's
16 decision. To permit FACO to introduce for consideration these documents and records, not
17 part of the State Engineer's Record on Appeal and otherwise considered in finalizing the
18 Orders, is wholly indecorous. FACO's illicit attempt to circumvent the established rules and
19 notion of fairness must not be tolerated. The State Engineer's decisions cannot be measured
20 against arguments and evidence, which was known to an opposing party but not presented for
21 his consideration.

22 FACO had numerous opportunities to present these documents prior to the issuance of
23 the Orders. Yet, for some inexplicable reason, FACO elected to not present the State
24 Engineer with these documents and records in advance of the final Orders, but waited until
25 the filing of its Opening Brief to spring the documents on the State Engineer. Clearly, as
26 evidenced by FACO's opposition to the State Engineer's Limited Objection to the Scheduling
27 Order, Request for Judicial Notice and Supplemental Record, FACO deems it an appropriate
28 strategy to presume that the State Engineer has reviewed an entire universe of documents

1 and records which may be at his disposal with respect to any given decision – thousands of
2 orders, rulings and decisions, scientific studies and publications, legal arguments made by
3 counsel, newspaper articles in other states, tens of thousands of permits, and legal cases
4 from other jurisdictions not involving Nevada water rights. If one were to take the fundamental
5 premise behind FACO's arguments for these additional documents, the State Engineer would
6 be under the proactive duty to scour the entire universe of all documents and records
7 maintained by his office, every water rights development at all times in every other prior
8 appropriation jurisdiction, and possible differing document in existence. This is absurd.

9 The State Engineer considered all of the evidence presented to him by the
10 stakeholders in advance of the issuance of the Orders. That information is contained in the
11 State Engineer's Record on Appeal. FACO's inappropriate attempt to supplement the record,
12 whether through judicial notice or its supplemental record on appeal, must be soundly
13 rejected. See, e.g., *Revert*, 95 Nev. at 786, 603 P.2d at 264; *Kent*, 62 Nev. at 32, 140 P.2d
14 at 358. The Court may only consider that evidence on which the State Engineer based his
15 decision. NRS 533.450; *Curtis Park*, 101 Nev. at 32, 692 P.2d at 497. This Court's review is
16 explicitly limited to determining whether substantial evidence *within the record utilized by the*
17 *State Engineer* supports his decision. *Morris*, 107 Nev. at 701, 819 P.2d at 205.

18 **B. The State Engineer Has Properly Interpreted And Applied NRS 534.120**

19 Consistent with this Court's ruling at the April 27, 2015, hearing on FACO's motion for
20 preliminary injunction, pursuant to NRS 534.120, the State Engineer has the authority to make
21 rules, regulations and orders, which are essential for the public welfare and the State
22 Engineer, may designate and regulate preferred uses. In full reliance on this Court's prior
23 affirmation of the State Engineer's interpretation and application of NRS 534.120, the State
24 Engineer proceeded with this interpretation of the law. See Order Granting Preliminary
25 Injunction, filed May 4, 2015, in Third Judicial District Court of the State of Nevada Case
26 No. 15-CV-00227, at p. 4:6-10. The plain reading of the statute supports the Court's
27 confirmation of the State Engineer's interpretation, and application, of NRS 534.120.

28 ///

1 1. The State Engineer has authority to designate supplemental
2 groundwater rights as a non-preferred use

3 The Nevada Legislature clearly and unambiguously granted the State Engineer
4 substantial discretion to respond to extraordinary circumstances within a designated
5 groundwater basin. Specifically, NRS 534.120(1) provides the State Engineer with authority
6 to respond to conditions present in a designated groundwater basin where the basin is being
7 depleted.² The statute proceeds to authorize the State Engineer to designate preferred uses.
8 Specifically, NRS 534.120(2) provides in relevant part: "In the interest of public welfare, the
9 State Engineer is authorized and directed to designate preferred uses of water within the
10 respective areas so designated by the State Engineer and from which the groundwater is
11 being depleted . . ." However, nowhere is the term "public welfare" defined. The term "public
12 welfare" has been defined by BLACK'S LAW DICTIONARY as:

13 The prosperity, well-being, or convenience of the public at large, or
14 of a whole community, as distinguished from the advantage of an
15 individual or limited class. It embraces the primary social interests
 of safety, order, morals, economic interest, and non-material and
 political interests.

16 BLACK'S LAW DICTIONARY 1233 (6th ed. 1990).

17 Further, under the plain reading of NRS 534.120(2) the State Engineer is not only
18 authorized, but **directed** to designate preferred uses where groundwater is being
19 unreasonably depleted and which threatens the public welfare. See NRS 534.120(1). This
20 provision within the statute clearly authorizes the State Engineer to designate preferred uses,
21 and non-preferred uses, as he has done within the Smith and Mason Valleys.

22 Whether NRS 534.120 is read in the conjunctive or disjunctive, the facially and plain
23 reading of the statute supports the State Engineer's reading and interpretation of this statute.
24 Specifically, NRS 534.120(2) continues to provide that in addition to authorizing and directing
25 the State Engineer to designate preferred uses of water within a basin where groundwater is
26 being depleted, the State Engineer when acting upon an application to appropriate
27

28 ² Smith and Mason Valleys were designated by the State Engineer in 1960 and 1977, respectively. ROA at 717 and 867.

1 groundwater "may designate such preferred uses in different categories with respect to the
2 particular areas involved within the following limits: (a) Domestic, municipal, quasi-municipal,
3 industrial, irrigation, mining and stock-watering uses; and (b) Any uses for which a
4 county, city, town, public water district or public water company furnishes the water."
5 NRS 534.120(2). This Court and the State Engineer have correctly interpreted
6 NRS 534.120(2) to bestow upon the State Engineer the authority to designate preferred uses
7 where groundwater is being depleted in a particular basin.

8 Petitioners' arguments regarding the reading and interpretation of NRS 534.120 are not
9 supported by the clear and unambiguous language. First, if the Legislature had intended to
10 bind the State Engineer's designation of preferred uses only when acting upon an application
11 to appropriate groundwater, the Legislature would not have created a separate clause
12 granting the State Engineer permissive authority to designate preferred uses in designated
13 categories. See NRS 534.120(2) (" . . . and in acting on application to appropriate
14 groundwater, the State Engineer *may* designate such preferred uses in different categories
15 with respect to the particular areas involved within the following limits . . .") (emphasis added).
16 Second, the first part of NRS 534.120(2) can be clearly read and interpreted as a separate
17 clause imposing a duty upon the State Engineer to designate preferred uses of water where
18 the State Engineer finds an unreasonable depletion of groundwater within the basin. See
19 NRS 534.120(2) ("In the interest of public welfare, the State Engineer is **authorized and**
20 **directed** to designate preferred uses of water within the respective areas so designated by
21 the State Engineer and from which the groundwater is being depleted . . .") (emphasis added).

22 In issuing the Orders, the State Engineer found that Smith and Mason Valley
23 Hydrographic Basins were being depleted at unreasonable rates, which mandated
24 intervention for the public welfare. ROA at 716-727 and 866-877. And, by designating
25 supplemental groundwater rights as a "non-preferred" use, the State Engineer *de facto*
26 designated all other uses within the Smith and Mason Valleys to be a preferred use, as
27 permitted and mandated by NRS 534.120(2). *Id.* The State Engineer very clearly acted as
28 the Legislature intended in times of extraordinary circumstances. And then, consistent with

1 the well-established and fundamental doctrine of prior appropriation, and as directed by this
2 Court, the State Engineer ordered that should curtailment be necessary during the 2016
3 calendar year such curtailment would be restricted to those non-preferred uses and based
4 upon the priority of those supplemental groundwater rights. *Id.*

5 FACO's reliance on other jurisdictions cases is misplaced, and at times misapplied.
6 For example, FACO's single Texas case is distinguishable based upon the plain statutory
7 reading of NRS 534.120. The Texas court interpreted a statute, which is substantially
8 different from the Nevada statute. As articulated above, NRS 534.120 when read in the
9 conjunctive clearly directs the State Engineer to designate preferred uses where a designated
10 groundwater basin is being depleted. NRS 534.120(2). The statute proceeds to additionally
11 grant the State Engineer discretion to designate preferred uses when acting on an application
12 to appropriate water. *Id.* Additionally, FACO's reference to a singular Oregon case regarding
13 the interpretation of an Oregon statute is not binding or even persuasive on this Court. The
14 Oregon statute at issue is not analogous to NRS 534.120. Finally, FACO's reference to the
15 California case involving a due process claim is inapplicable, as here, the Petitions for Judicial
16 Review are based upon an exceedance of the State Engineer's statutory authority under
17 NRS 534.120 and a dispute about whether there is substantial evidence to support the State
18 Engineer's determinations supporting the Orders.

19 Moreover, the Orders are not inconsistent with prior orders of the State Engineer, as
20 there has never been the same unprecedented conditions as which have been occurring in
21 Smith and Mason Valleys anywhere in the State of Nevada. The past four years of drought
22 have been unprecedented, the duration as well as severity of the drought conditions is
23 extraordinary. The severity and duration of the current drought conditions coupled with the
24 increased demand on the groundwater supplies available within the Smith and Mason Valleys
25 is such that has never been seen before, and accordingly demands a response by the State
26 Engineer never previously taken, including the designation of preferred uses as he is
27 permitted to do by NRS 534.120(2).

28 ///

1 The fact that the State Engineer has never previously designated preferred uses
2 outside of the groundwater application process does not negate the plain directive of the
3 Legislature when it not only authorized, but **directed** the State Engineer to designate
4 preferred uses of water in areas where the groundwater is being depleted and such depletion
5 threatens the public welfare. See NRS 534.120(2). Further, the State Engineer is not bound
6 by the doctrine of stare decisis. See, e.g., *Gray Line Tours of S. Nevada v. Pub. Serv.*
7 *Comm'n of Nevada*, 97 Nev. 200, 203, 626 P.2d 263, 265 (1981); *Motor Cargo v. Pub. Serv.*
8 *Comm'n of Nevada*, 108 Nev. 335, 337, 830 P.2d 1328, 1330 (1992); *Desert Irr., Ltd. v. State*,
9 113 Nev. 1049, 1058, 944 P.2d 835, 841 (1997). Further, the definition of "preferred use" in
10 the Nevada State Water Plan, as referenced by the FACO Petition is merely a resuscitation of
11 the provisions of NRS 534.120(2).³ Therefore, Petitioners' argument is unpersuasive.

12 **2. The State Engineer has the statutory authority to curtail**
13 **supplemental groundwater rights based upon their unique priority**

14 The State Engineer does not dispute that the foundation of Nevada water law is the
15 doctrine of prior appropriation. However, within that system of appropriation, individuals
16 whom were granted surface-water rights could apply for a subordinate water right –
17 supplemental groundwater rights. ROA at 720-722 and 870-872. When one considers what a
18 "supplemental groundwater right" is, it is subordinate to and conditioned upon the primary,
19 stand-alone surface-water right. Supplemental groundwater rights were issued based upon a
20 unique evaluation of the totality of the circumstances present where there are surface-water
21 appropriations. *Id.* Supplemental groundwater rights are not an independent stand-alone
22 right. *Id.* Rather, supplemental groundwater rights are wholly dependent on the existence of
23 a surface-water right and are entirely limited based upon that primary surface-water right. *Id.*

24 ///

25
26 ³ Further, the manner in which "preferred use" is defined in the Nevada State Water Plan Glossary of
27 Terminology specifically and clearly breaks the two clauses contained within NRS 534.120(2) into two separate
28 sentences. The definition fails to support FACO's argument; rather, it further substantiates and supports the
State Engineer's interpretation of NRS 534.120(2) by providing two mechanisms to designate preferred uses –
(1) where a groundwater basin is being unreasonably depleted; or (2) when acting on new applications to
appropriate groundwater.

1 Explained in its most basic terms, the State Engineer generally permits up to a
2 maximum of four acre-feet per acre for irrigation purposes in northern Nevada. If a water user
3 has an existing water right permit for a quantity of water to satisfy the irrigation need
4 (four acre-feet per acre), the State Engineer will not typically issue a water right permit for that
5 specified use in excess of that quantity of four acre-feet per acre. However, where the source
6 of supply of water is unreliable or less than four acre-feet per acre in some years, the State
7 Engineer may grant "supplemental groundwater" permits to permittees with existing
8 surface-water rights. Ordinarily, these permittees would not be granted additional water rights
9 for a particular piece of property with sufficient water rights permitted for a designated use,
10 here irrigation. However, it is significant to clarify that these conjunctive rights – surface-water
11 and supplemental groundwater rights have an express limitation on the quantity of water that
12 may be used from any and all sources – usually four acre-feet per acre.

13 The State Engineer has the authority to curtail groundwater pumping where the State
14 Engineer finds that the annual replenishment *may* not be adequate. NRS 534.110(6)
15 (emphasis added). However, the State Engineer is obligated to conform any curtailment to
16 priority rights. *Id.* The Orders conform to these requirements and those set forth under
17 NRS 534.120. These statutory provisions are dependent and must be considered together.
18 Specifically, the language of NRS 534.120(1), which expressly bestows upon the State
19 Engineer the authority in basins where there are unreasonable impacts upon the groundwater
20 supply, provides the broad administrative authority to "make such rules, regulations and
21 orders as are deemed essential for the welfare of the area involved." NRS 534.120. When
22 section 1 is read in conjunction with section 2, it is clear that the legislative intent is not only to
23 authorize the State Engineer to designate preferred uses of water, and consequently
24 non-preferred uses of water, but also provides the State Engineer the ability to make those
25 rules, regulations or orders that he determines are necessary and proper for the betterment of
26 public welfare. See, e.g., NRS 534.120(2).

27 Here, the State Engineer has exercised his broad authority explicitly granted in
28 NRS 534.120. The State Engineer made certain factual findings, which are supported by

1 substantial evidence, demonstrating that Smith and Mason Valleys are adversely impacted
2 basins necessitating intervention and management. ROA at 716-727 and 866-877. Given
3 these findings, coupled with the subordinate nature of supplemental groundwater rights, the
4 State Engineer appropriately designated those water rights as a non-preferred use. *Id.*
5 Simply, the second clause, specifying categories of designated uses in NRS 534.120(2) does
6 not preclude the designation of the supplemental groundwater rights as a non-preferred
7 secondary class of groundwater rights, which may then be curtailed - pursuant to priority -
8 pursuant to NRS 534.110(6). The State Engineer does in fact have statutory authority to
9 exercise his discretion and manage the groundwater resources present in Smith and Mason
10 Valleys in a manner that seeks to protect the public welfare consistent with Nevada water law.

11 Finally, Petitioners' contention, that the State Engineer's adherence to impose
12 curtailment based upon his statutory authority constitutes a takings, is incorrect. The State
13 Engineer's designation of supplemental groundwater rights as a non-preferred use does not
14 result in the transfer of a water right from one permittee to another without just compensation.
15 As articulated above, Nevada law permits the State Engineer to designate preferred uses and
16 specially provides for the curtailment of those uses pursuant to their relative priorities.
17 NRS 534.110(6), 534.120(1), 534.120(2). Here because the State Engineer is regulating and
18 curtailing supplemental groundwater rights on the basis of their relative priorities, there are no
19 takings. Not curtailing the stand-alone groundwater rights users who may have priority dates
20 "junior" to the supplemental groundwater rights does not result in the curtailment of senior
21 water right holders at the expense of junior permittees because those permittees rights are
22 separate, distinct, and managed independent of the supplemental rights - which are wholly
23 dependent upon their surface-water permit to be valid. Accordingly, there is simply no
24 takings.

25 **C. Order Nos. 1267 And 1268 Are Supported By Substantial Evidence**

26 The Court may only review the evidence relied upon by the State Engineer in rendering
27 his ruling to determine whether the evidence is substantial enough to support the decision.

28 ///

1 *Curtis Park Manor*, 101 Nev. at 32, 692 P.2d at 497. If the evidence supports the State
2 Engineer's ruling, this Court must sustain the ruling. *Id.*

3 The State Engineer relied upon substantial evidence to support the Orders. Here,
4 decades of scientific data regarding surface-water flows, groundwater levels and pumping
5 records were evaluated as a part of the State Engineer's decisions. ROA at 234-265, 266-558
6 and 904-905. Not only did this review include historical and contemporaneous data, but the
7 State Engineer utilized a scientifically based, calibrated, and tested groundwater model to
8 forecast impacts on the Smith and Mason Valleys a continuation of the unprecedented
9 drought and impacts of groundwater pumping.⁴ *Id.* at 234-235, 569-709, 733-859
10 and 904-905. The State Engineer further received and considered those comments and
11 testimony from the October 5th and 7th public hearings, as well as the supplemental
12 documentation provided to the State Engineer subsequent to the public hearings. Ultimately,
13 the State Engineer did not agree with each of the differing opinions presented to him. *Id.*
14 However, the failure of the State Engineer to agree with the conclusions reached by
15 Petitioners does not render the State Engineer's ruling arbitrary or capricious.

16 Nevada law has defined "substantial evidence" as "that which a reasonable mind might
17 accept as adequate to support a conclusion." *Bacher*, 122 Nev. at 1121, 146 P.3d at 800.
18 Order Nos. 1267 and 1268 should be sustained here because the State Engineer has
19 "articulated a rational connection between the facts found and the conclusions made." *Ctr. for*
20 *Biological Diversity v. U.S. Fish & Wildlife Serv.*, 12-17530, 2015 WL 5451484, at *7 (9th Cir.
21 Sept. 17, 2015) (citing *Pac. Coast Fed'n of Fishermen's Ass'ns, Inc. v. Nat'l Marine Fisheries*
22 *Serv.*, 265 F.3d 1028, 1034 (9th Cir. 2001)).

23 The State Engineer considered the groundwater conditions present in Smith and
24 Mason Valleys, as well as the rate of groundwater declines demonstrated by the

25
26 ⁴ Best available science requires a scientific methodology and seeks to avoid conclusions based on
27 speculation or surmise. *Accord Ferry Country v. Concerned Friends of Ferry Country*, 123 P.3d 102, 108
28 (Wash. 2005). A court uses the substantial evidence test to determine whether relief is appropriate, not whether
the best available science was used. While the difference may seem subtle, it is a distinction that is significant;
adopting the latter position requires the court to consistently substitute its judgment for that of the agency. This is
not appropriate within a system of divided government. *Id.* at 843.

1 measurements taken throughout the groundwater basin by not only the State Engineer's office
2 but also by the U.S. Geological Survey. ROA at 721-722 and 871-872. The State Engineer
3 found groundwater level declines of four to eight feet per year due to drought and excessive
4 groundwater pumping. ROA at 629-630, 722, 793-798 and 872. When these rates of
5 groundwater decline were evaluated against rates of decline throughout the State, including
6 areas with great agricultural demands, the State Engineer found that Smith and Mason
7 Valleys' rate of annual decline far exceeded those basins, and thus made the determination
8 that a maximum of four feet of decline could be tolerated within the Smith and Mason
9 Valleys. *Id.*

10 The State Engineer relied upon his scientific expertise and experience, and determined
11 that the modeling conducted by DRI was scientifically reliable and acceptable to support the
12 conclusions reached in Order Nos. 1267 and 1268. See NRS 534.110(6) ("... the State
13 Engineer **shall** conduct investigations in any basin or portion thereof where it **appears** that the
14 average annual replenishment to the groundwater supply **may not** be adequate . . .")
15 (emphasis added). Based upon that independently developed and scientifically vetted
16 modeling conducted by DRI, experts in their respective fields, the State Engineer found that
17 the data supported his conclusion that the annual replenishment to the groundwater supply
18 during a period of prolonged and continuing exceptional drought conditions may not be
19 adequate to meet the needs of the basin. ROA at 720-726 and 870-876. Accordingly, the
20 State Engineer relied upon substantial evidence to support his conclusions as set forth in
21 the Orders.

22 D. The State Engineer Properly Exercised His Authority To Determine The
23 Appropriate Tool To Respond To Unprecedented Conditions In Smith And
24 Mason Valleys

25 FACO argues that the State Engineer should have considered other tools as an
26 alternative to curtailment, yet unsurprisingly, FACO cites to not a single authority supporting
27 their argument. The State Engineer is statutorily charged with administering and managing
28 the water resources of the State of Nevada. See *generally* NRS 533.024. However, there is

1 no statutory or other requirement under the law that the State Engineer engage in an
2 evaluation of every potential alternative. *Accord Pyramid Lake Paiute Tribe of Indians v.*
3 *Washoe County*, 112 Nev. 743, 751, 918 P.2d 697, 702 (1996) ("Accordingly, we conclude
4 that the State Engineer did not commit a dereliction of duty by not including a review of
5 economic considerations and alternative projects as part of the guidelines defining the public
6 interest."

7 Here, it is rather presumptuous of FACO to assume that the State Engineer did not
8 consider other alternatives to the Orders, which undeniably could have a potentially significant
9 impact on all of the groundwater users within the Smith and Mason Valleys. Consistent with
10 his statutory duty, the State Engineer considered the circumstances present within the Smith
11 and Mason Valleys, including the conditions that resulted in the need for the unprecedented
12 response by the State Engineer. The State Engineer considered the best available science to
13 assist in evaluating the conditions, the basis for issuing the Orders, and then actual
14 substantive decisions set forth in those Orders.

15 The State Engineer relied upon his technical expertise to make decisions, which are
16 the appropriate decisions under Nevada law, which serve the best interest of the groundwater
17 resources in Smith and Mason Valleys. FACO's arguments lack merit. The State Engineer
18 considered all arguments and issues presented during the public hearings. ROA at 622-709
19 and 784-859. The State Engineer is entitled to deference as to his evaluation of the totality of
20 facts and circumstances present and the most appropriate response to meet the immediate
21 needs of the groundwater resources in Smith and Mason Valleys. NRS 533.450(10);
22 *Morros*, 104 Nev. at 713, 766 P.2d at 266. Curtailment is proper under the law, and the Court
23 must defer to decision.

24 **E. The State Engineer Has Not Needed To Seek Additional Legislative**
25 **Authority To Declare Supplemental Groundwater A Non-Preferred Use**

26 Senate Bill (SB) 81, introduced during the 2015 legislative session does not support
27 Petitioner's insinuation that the State Engineer does not have authority to designate preferred
28 uses under existing law as he has done on the Orders. It is significant to acknowledge that

1 SB 81 specifically sets forth to provide further clarification of the State Engineer's scope of
2 authority in management of critical management areas. See Senate Bill 81 ("... Existing law:
3 (1) authorizes the State Engineer to designate as a critical management area ... (2) requires
4 the State Engineer to designate as a critical management area ...") located at
5 <https://www.leg.state.nv.us/Session/78th2015/Bills/SB/SB81.pdf>, last accessed February 26,
6 2016. See also Testimony of Jason King regarding SB 81 located at
7 <http://www.leg.state.nv.us/Session/78th2015/Exhibits/Senate/GA/SGA170G.pdf>, last
8 accessed February 26, 2015. The express intent of this legislation was to provide a more
9 clear statute, which would address numerous concerns relating to the State Engineer's role in
10 managing critical management areas. See Testimony of Jason King regarding SB 81, *supra*;
11 Minutes of Senate Committee on Government Affairs, February 11, 2015, located at
12 <https://www.leg.state.nv.us/Session/78th2015/Minutes/Senate/GA/Final/170.pdf>, last
13 accessed February 26, 2016.

14 Senate Bill 81, as amended, passed through the Senate Committee on Government
15 Affairs. See Minutes of Senate Committee on Government Affairs, April 10, 2015, located at
16 <https://www.leg.state.nv.us/Session/78th2015/Minutes/Senate/GA/Final/170.pdf>, last
17 accessed on February 26, 2016. Senate Bill 81 failed to meet the legislative deadlines. See
18 <https://www.leg.state.nv.us/Session/78th2015/Reports/history.cfm?ID=129>, last accessed on
19 February 26, 2016. The fact that the legislation did not receive a full house vote does not
20 negate the State Engineer's authority set forth under NRS 534.120, which clearly provides the
21 State Engineer the authority to issue the curtailment of supplemental groundwater rights as
22 set forth in the Orders.

23 **IV. CONCLUSION**

24 The State Engineer has demonstrated that the clear reading of the plain language
25 contained within NRS 534.120 permits him to designate preferred, and non-preferred, uses
26 within a groundwater basin where he finds that there is unprecedented and unsustainable
27 depletion of the resource. Further, the law clearly permits the State Engineer to curtail those
28 non-preferred water rights by priority. Finally, the State Engineer has demonstrated that

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

6 **AFFIRMATION (Pursuant to NRS 239B.030)**

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

9 DATED this 26th day of February, 2016.

10 ADAM PAUL LAXALT
11 Attorney General

12 By: Micheline N. Fairbank
13 MICHELINE N. FAIRBANK
14 Senior Deputy Attorney General
15 Nevada Bar No. 8062
16 100 North Carson Street
17 Carson City, Nevada 89701-4717
18 Tel: (775) 684-1225
19 Fax: (775) 684-1108
20 Email: mfairbank@ag.nv.gov
21 Counsel for Respondent,
22 Nevada State Engineer
23
24
25
26
27
28

1 **CERTIFICATE OF SERVICE**

2 I certify that I am an employee of the State of Nevada, Office of the Attorney General,
3 and that on this 26th day of February, 2016, I served a true and correct copy of the foregoing
4 RESPONDENT STATE ENGINEER'S ANSWERING BRIEF, by electronic service to:

5 Paul G. Taggart, Esq.
6 David H. Rigdon, Esq.
7 Rachel L. Wise, Esq.
8 TAGGART & TAGGART, LTD.
9 108 North Minnesota Street
10 Carson City, Nevada 89703
11 Emails: paul@legaltnt.com
12 david@legaltnt.com
13 rachel@legaltnt.com
14 assistant@legaltnt.com

15 John R. Zimmerman, Esq.
16 PARSONS BEHLE & LATIMER
17 50 West Liberty Street, Suite 750
18 Reno, Nevada 89501
19 Emails: jzimmerman@parsonsbehle.com
20 rshaffer@parsonbehle.com

21 Brad M. Johnston, Esq.
22 JOHNSTON LAW OFFICES, P.C.
23 22 State Route 208
24 Yerington, Nevada 89447
25 Email: bjohnston@johnstonlawoffices.co

26
27
28

Dorene A. Wright

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

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.

Electronically Filed
Aug 03 2017 02:48 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

**REAL PARTY IN INTEREST SADLER RANCH, LLC'S
RESPONSE TO ORDER GRANTING MOTION**

On July 21, 2017, the Court entered an Order Granting Motion (“Order”) which granted Real Party in Interest, Sadler Ranch LLC’s June 6, 2017, Request for Judicial Notice. The Order required Sadler Ranch to, within 15 days from the date of the Order, file with the Clerk of the Court “complete and file-stamped copies of the documents that are the subject of the motion.”¹ In accordance with

¹ July 21, 2017 Order Granting Motion at 3.

the direction of the Court, Sadler Ranch hereby provides complete and file-stamped copies of: (1) the State Engineer's Answering Brief filed in *Farmer's Against Curtailment Order, LLC v. Jason King, P.E.* (Third Judicial District Court Consolidated Case Nos. 15-CV01395, 15-CV01396, and 15-CV01397) (attached hereto as Exhibit 1), and (2) the State Engineer's Answering Brief filed in *Happy Creek, Inc. v. Jason King, P.E.* (Sixth Judicial District Court Case No. CV 20,869) (attached hereto as Exhibit 2).

AFFIRMATION PURSUANT TO NRS 239B.030

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

DATED this 3rd day of August, 2017.

TAGGART & TAGGART, LTD.

By: /s/ David H. Rigdon
Paul G. Taggart, Esq.
Nevada State Bar No. 6136
David H. Rigdon, Esq.
Nevada State Bar No. 13567
Attorneys for Sadler Ranch, LLC

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:

Karen A. Peterson, Esq.
Willis M. Wagner, Esq.
Allison Mackenzie, Ltd.
P.O. Box 646
Carson City, NV 89701
kpeterson@allisonmackenzie.com
wwagner@allisonmackenzie.com

Justina A. Caviglia, Esq.
Nevada Attorney General's Office
100 N. Carson St.
Carson City, NV 89701
jcaviglia@ag.nv.gov

Alex J. Flangas, Esq.
Holland & Hart, LLP
5441 Kietzke Lane, Second Floor
Reno, NV 89511
aflangas@hollandhart.com

Theodore Beutel, Esq.
Eureka County District Attorney
P.O. Box 190
Eureka, NV 89316
tbeutel@eurekacounty.gov

Debbie A. Leonard, Esq.
McDonald Carano Wilson LLP
100 W. Liberty St., 10th Floor
Reno, NV 89501
dleonard@mcdonaldcarano.com

Robert W. Marshall, Esq.
Gregory H. Morrison, Esq.
Parsons Behle & Latimer
50 West Liberty St., Suite 750
Reno, NV 89501
rmarshall@parsonsbehle.com
gmorrison@parsonsbehle.com

The Honorable Gary D. Fairman
Seventh Judicial District Court,
Department 2
P.O. Box 151629
Ely, NV 89315
wlopez@whitepinecountynv.gov

DATED this 3rd day of August, 2017.

/s/ Tamara Thiel
Employee of TAGGART & TAGGART, LTD.