



ORIGINAL

FILED

Case No. CV 20,869

Dept. No. 2

2017 OCT 12 PM 12:14

TAMARA SEERO
DIST. COURT CLERK
Electronically Filed
Oct 20 2017 01:58 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF HUMBOLDT

HAPPY CREEK, INC.,

Petitioner,

NOTICE OF APPEAL

vs.

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

Respondent.

Notice is hereby given that Jason King, P.E., the State Engineer, in his capacity as the Nevada State Engineer, Department of Conservation and Natural Resources, Division of Water Resources (hereafter "Nevada State Engineer"), by and through counsel, Nevada Attorney General Adam Paul Laxalt and Deputy Attorney General Justina A. Caviglia, hereby appeals to the Nevada Supreme Court from the Order entered by this Court on September 25, 2017. Notice of Entry of Order was served on October 5, 2017. A copy of said Notice of Entry of Order is attached hereto as Exhibit 1.

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

AFFIRMATION

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

DATED this 11th day of October, 2017.

ADAM PAUL LAXALT
Attorney General

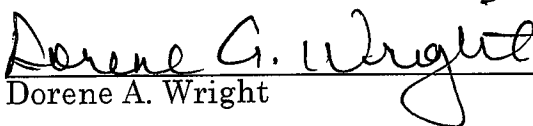
By:


JUSTINA A. CAVIGLIA
Deputy Attorney General
Nevada Bar No. 9999
100 North Carson Street
Carson City, Nevada 89701-4717
Tel: (775) 684-1222
Fax: (775) 684-1108
Email: jcaviglia@ag.nv.gov
*Attorney for Respondent,
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 11th day of October, 2017, I served a true and correct copy of the foregoing NOTICE OF APPEAL, by placing said document in the U.S. Mail, postage prepaid, addressed to:

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


Dorene A. Wright

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

INDEX OF EXHIBITS

EXHIBIT No.	EXHIBIT DESCRIPTION	NUMBER OF PAGES
1.	Notice of Entry of Order	12

EXHIBIT 1

EXHIBIT 1

Taggart & Taggart, Ltd.
108 North Minnesota Street
Carson City, Nevada 89703
(775)883-9900 - Telephone
(775)883-9900 - Facsimile

1 PAUL G. TAGGART, ESQ.
Nevada State Bar No. 6136
2 TIMOTHY D. O'CONNOR, ESQ.
Nevada State Bar No. 14098
3 TAGGART & TAGGART, LTD.
4 108 North Minnesota Street
Carson City, Nevada 89703
5 (775)882-9900 - Telephone
(775)883-9900 - Facsimile
6 Attorneys for Petitioner

OFFICE OF THE ATTORNEY GENERAL
CARSON CITY, NEVADA

OCT 05 2017

BUREAU OF GOVERNMENT AFFAIRS
GNR/BL/APPELLATE

8 IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
9 IN AND FOR THE COUNTY OF HUMBOLDT

10 * * *

11 HAPPY CREEK, INC., a Nevada Corporation,)

12 Petitioner,)

CASE NO.: CV 20, 869

13 vs.)

DEPT. NO.: 2

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

16 Respondent.)
17

18 NOTICE OF ENTRY OF ORDER

19 PLEASE TAKE NOTICE that on September 25, 2017, the above entitled Court entered its
20 Order in the above captioned matter, a copy of which is attached hereto as Exhibit 1.

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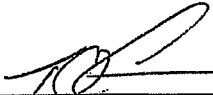

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AFFIRMATION
Pursuant to NRS 239B.030

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

DATED this 28 day of September, 2017.

TAGGART & TAGGART, LTD.
108 North Minnesota Street
Carson City, Nevada 89703
(775) 882-9900 – Telephone
(775) 883-9900 – Facsimile

By:  
PAUL G. TAGGART, ESQ.
Nevada State Bar No. 6136
TIMOTHY D. O'CONNOR, ESQ.
Nevada State Bar No. 14098
Attorneys for Petitioner

Taggart & Taggart, Ltd.
108 North Minnesota Street
Carson City, Nevada 89703
(775) 882-9900 – Telephone
(775) 883-9900 – Facsimile

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and NRS 533.450, I hereby certify that I am an employee of TAGGART & TAGGART, LTD., and that on this date I served, or caused to be served, a true and correct copy of the foregoing, as follows:

[X] By U.S. POSTAL SERVICE: I deposited for mailing in the United States Mail, with postage prepaid, an envelope containing the above-identified document, at Carson City, Nevada, in the ordinary course of business, addressed as follows:

Justina A. Caviglia, Esq.
Nevada Attorney General's Office
100 N. Carson St.
Carson City, NV 89701

DATED this 28th day of September, 2017.



Employee of TAGGART & TAGGART, LTD.

Taggart & Taggart, Ltd.
108 North Minnesota Street
Carson City, Nevada 89703
(775)883-9900 - Telephone
(775)883-9900 - Facsimile

Taggart & Taggart, Ltd.
108 Ninth Minnesota Street
Carson City, Nevada 89703
(775)882-9900 ~ Telephone
(775)883-9900 ~ Facsimile

INDEX OF EXHIBITS

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Exhibit Number
1.

Description
Order

EXHIBIT 1

EXHIBIT 1

FILED

2017 SEP 25 PM 1:32

TAMI RAE SPERO
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., a Nevada Corporation,)
Petitioner,)
vs.)
JASON KING, P.E., Nevada State)
Engineer, DIVISION OF WATER RESOURCES,)
DEPARTMENT OF CONSERVATION AND)
NATURAL RESOURCES,)
Respondent.)

ORDER

THIS MATTER having come before the Court because Petitioner, HAPPY CREEK, INC. (hereinafter "Happy Creek"), filed a Petition for Judicial Review after the State Engineer reinstated Happy Creek's water rights without the original priority dates for the water rights pursuant to Nevada Revised Statutes ("NRS") 533.395(3). Respondent, JASON KING, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES (hereinafter "State Engineer"), filed the Summary of Record on Appeal ("ROA") on December 27, 2016. Happy Creek filed its Opening Brief and a Supplemental Record on Appeal ("SROA") on March 16, 2017. The State Engineer filed his Answering Brief on April 18, 2017. Happy Creek filed its Reply Brief on May 18, 2017. Oral argument was heard by the Court on August 14, 2017. Happy Creek is represented by Paul G. Taggart, Esq., and Timothy D. O'Connor, Esq., of

Taggart & Taggart, Ltd.
108 North Minnesota Street
Carson City, Nevada 89703
(775) 882-9900 - Telephone
(775) 883-9900 - Facsimile

1 Taggart & Taggart, LTD., and the State Engineer is represented by Attorney General Adam P. Laxalt,
2 Esq. and Deputy Attorney General Justina A. Caviglia, Esq.

3 The Court, having reviewed the ROA and SROA¹, and having considered the arguments and
4 evidence² presented by the parties at the August 14, 2017, hearing, the applicable law, and all the
5 pleadings and papers on file in this matter, hereby finds that that the original priority dates of Happy
6 Creek's water rights Permits are **REINSTATED** based upon the following findings of fact and
7 conclusions of law.

8 BACKGROUND

9 I. Happy Creek Ranch

10 Happy Creek is a ranching and farming company operating in the Pine Forest groundwater
11 basin located in northern Nevada. Happy Creek Ranch ("the Ranch") has 855 acres of irrigated land,
12 with approximately 765 of those acres being irrigated by underground water rights. The alfalfa
13 produced on those 765 acres is essential to the economic viability of the Ranch. In 1994, Happy Creek
14 hired a water rights professional to manage its water rights and filings with the State Engineer's office
15 and he handled these matters until late 2016.

16 Happy Creek's eight underground water rights pertinent to this matter have original priority
17 dates ranging from the 1950s to the 1990s. These water rights have been consistently put to use on the
18 Ranch for decades, and had been certificated at least once throughout the Ranch's history. In 2007,
19 Happy Creek decided to upgrade the irrigation systems on the Ranch to center pivots to more
20 efficiently place the water to use. On advice of its water rights professional, Happy Creek filed
21 applications to change the place of use on the eight underground water rights so the upgrades to the
22 Ranch could be completed. When the change applications were filed, the water rights went from
23 certificated status to permit status (the "Permits").

24 The change in status meant that Happy Creek was now required to file Proofs of Beneficial Use
25 on the water rights to re-certificate them. From 2012 to 2016, Happy Creek diligently used a majority
26 of the water on the Ranch, and sought to collect the data necessary to file the Proofs of Beneficial Use
27

28 ¹ During the hearing, the Court overruled the State Engineer's objection to Happy Creek's SROA.

² During the hearing, the Court overruled the State Engineer's objection to Happy Creek's evidence and witnesses.

1 ("PBUs") and re-certificate the Permits. During this time, one or more of the totalizing flow meters on
2 the irrigation wells failed resulting in an incomplete data set to file the PBUs. As such, Happy Creek's
3 water rights professional filed Extensions of Time ("EOTs") annually between 2012 and 2016 to extend
4 the time to file a PBU.

5 In 2016, Happy Creek's water rights professional missed the deadline for filing a PBU or EOT
6 for the Permits. On May 19, 2016, the State Engineer mailed a final notice for the Permits to Happy
7 Creek. Happy Creek emailed the final notice to its water rights professional. The water rights
8 professional, however, failed to file a PBU or EOT for the Permits. On July 8, 2016, the water rights
9 professional realized that he had missed the deadline for filing the PBU or EOT. On July 11, 2016,
10 Happy Creek petitioned the State Engineer to reinstate the Permits. The State Engineer held a
11 reinstatement hearing for the Permits on October 12, 2016. During the hearing, Happy Creek
12 demonstrated that at least 2400 acre feet of water under the Permits were placed to beneficial use in the
13 2015 irrigation season. The Permits were reinstated; however, consistent with NRS 533.395(3), the
14 priority of each of the Permits was changed from the original priority to July 11, 2016. On November
15 18, 2016, Happy Creek appealed the State Engineer's decision to change the priority of the Permits.

16 **II. Happy Creek's Improvements to the Ranch**

17 In 2007, Happy Creek began a project to further improve the efficiency of its irrigation system.
18 Happy Creek planned the addition of three center-pivot irrigation systems which, when combined with
19 its existing two center-pivot irrigation systems, would convert most of the irrigated acres to center-
20 pivots. This improvement reduced the number of acres that had previously been flood irrigated. Happy
21 Creek's improvements included the removal of fences, the leveling of dirt ditches, the removal of the
22 risers for gated pipes that were used in the flood irrigation practices on the fields, trench work to install
23 pipelines and powerlines, and ultimately the purchase and installation of center-pivot systems. Happy
24 Creek spent over seven hundred thousand dollars (\$700,000) on the improvements on the Ranch's
25 irrigation system.

26 **III. Groundwater Availability In Pine Forest Valley**

27 The Pine Forest Valley groundwater basin is over-appropriated by 25,828.31 afa. The perennial
28 yield of Pine Forest Valley is 11,000 afa. On May 1, 1978, the State Engineer issued Order 711 and

1 designated portions of Pine Forest Valley pursuant to NRS 534.010 to NRS 534.190. On December 1,
2 1983, the State Engineer issued a curtailment order ("Order 831") to deny any future groundwater
3 applications for irrigation in the basin. In Order 831, the State Engineer noted that his office's crop and
4 pumpage inventories indicate that groundwater withdrawals in Pine Forest Valley are in excess of the
5 estimated recharge to the basin. The crop inventory for the 2015 irrigation season indicates that 22,326
6 afa of groundwater was pumped to irrigate 6,446 acres.

7 STANDARD OF REVIEW

8 Pursuant to chapters 533 and 534 of the NRS, the State Engineer has a responsibility to
9 administer the appropriation and management of Nevada's public waters. To fulfill his responsibility,
10 the State Engineer is duty-bound to apply statutory criteria in the water law when determining any
11 appropriations of water.³ A party aggrieved by a decision of the State Engineer is entitled to have the
12 decision reviewed pursuant to NRS 533.450(1). Such a review is conducted "in the nature of an
13 appeal."⁴ Before a judgment may be pronounced by the Court, a "full and fair opportunity to be heard"
14 ⁵ must be had by all parties.⁶

15 When so warranted, equitable principles have been applied in the review of appeals from
16 decisions rendered by the State Engineer.⁷ Even if the State Engineer's action is in strict compliance
17 with an applicable statute, equitable principles allow the reviewing court to reverse the State Engineer's
18 decision regardless of whether the decision is supported by substantial evidence.⁸ Because equity is a
19 consideration of the Court on review of a State Engineer decision, the parties must have an opportunity
20 to present evidence relating to the equities of the case. If no such opportunity is presented at the State
21 Engineer level, the Court retains the ability to determine questions of fact that are necessary to the
22 judgment.⁹

23 ³ See *Benson v. State Engineer*, 358 P.3d 221, 131 Nev. Adv. Op. 78 (2015).

24 ⁴ *Id.*

25 ⁵ NRS 533.450(2).

26 ⁶ During the hearing, the Court permitted Happy Creek to file a supplemental record on appeal and present testimonial evidence
regarding the equities of the case. Because the State Engineer has no equitable powers under NRS 533.395, Happy Creek was
not given a full and fair opportunity to present the equities of its case. The Court thereby afforded such an opportunity to Happy
Creek pursuant to NRS 533.450(2), over the objection of the State Engineer that the appeal must be limited to the record.

27 ⁷ *Englemann v. Westergard*, 98 Nev. 348, 331, 647 P.2d 385, 387 (1982); *Bailey v. State of Nevada*, 95 Nev. 378, 382, 594 P.2d
734, 736 (1979); *State Engineer v. American Nat'l Ins. Co.*, 88 Nev. 424, 426, 498 P.2d 1329, 1330 (1972).

28 ⁸ *Englemann* at 351, P.2d at 387.

⁹ *Id.* at 352, P.2d at 385.

DISCUSSION

I. The State Engineer's Duty Under NRS 533.395(3).

NRS 533.395(3) states that "[i]f the decision of the State Engineer modifies or rescinds the cancellation of a permit, the effective date of the appropriation under the permit is vacated and replaced by the date of the filing of the written petition with the State Engineer." Here, the State Engineer determined that there was sufficient evidence to rescind the cancellation and reinstate the permits. The evidence shows that Happy Creek has diligently put the water to beneficial use. Pursuant to NRS 533.395(3), the State Engineer was required to vacate the original priority dates of the Permits, and replace the priority dates with "the date of the filing of the written petition with the State Engineer." Both parties agree that the State Engineer was bound by NRS 533.395(3).

II. The Equities Of The Case.

The facts of this case justify equitable relief. Happy Creek has put its water rights granted under the Permits to beneficial use, and attempted in good faith to comply with all procedural requirements to ensure its water rights were protected. Happy Creek hired a water rights professional who had, for years, successfully maintained Happy Creek's water rights. However, due to human error, Happy Creek's 2016 filings concerning the Permits were not made timely to the State Engineer. This error resulted in the State Engineer replacing the original priority of Happy Creek's water rights with a priority date of 2016 as he was required to do under NRS 533.395(3). Because Pine Forest Valley is overappropriated and has been the subject of various orders limiting the water availabilities, and could be subject to curtailment based on priority in the future, the change of the priority to the Permits is of utmost importance to Happy Creek and the Ranch's operations.

The evidence in the case showed that Happy Creek had diligently used the water, and that diligence should allow for the priority to relate back to the original priority of the water rights. The evidence also showed that Happy Creek had likely spent over one million dollars (\$1,000,000) to upgrade the Ranch in order to put the water to the most beneficial use. The fact that Happy Creek's water rights professional failed to file the PBU or EOT by the deadline is recognized, but that failure was the only error made in the case. Because the value of the property and the Ranch are directly tied to the priority of the water rights, the water rights professional's mistake has resulted in a colossal harm

Taggart & Taggart, Ltd.
108 North Main Street
Casper, WY 82401
(307) 233-3300 - Telephone
(307) 233-3300 - Facsimile

1 to Happy Creek. All other steps taken by Happy Creek to use the water were correct. Here, the
2 punishment simply does not fit the crime and therefore equitable relief is allowed by the Court.

3 NRS 533.395(3), which mandates the change the priority of a water right upon rescission of a
4 cancelation, results in much too harsh of a penalty given the specific facts and circumstances of this
5 case. While the State Engineer took the correct action in following the statute, the punishment did not
6 fit the crime. The loss of priority in an overappropriated basin is too harsh a penalty when Happy
7 Creek had diligently put the water to beneficial use, and had hired a qualified water rights professional
8 to maintain the rights in good standing. Equity demands that the Permits' respective priorities be
9 reinstated to the original priorities. Therefore, the Court finds that Happy Creek has proven adequate
10 grounds for having its permits restored with their original priority date.

11 CONCLUSION

12 The Court, having reviewed the records on appeal, evidence presented by both parties, and
13 having considered the arguments of the parties, the applicable law, and all pleadings and papers on file
14 in this matter, hereby **ORDERS** that the original priority dates of Happy Creek's water rights Permits
15 be reinstated. The State Engineer shall ensure that this order is reflected in his records.

16 **IT IS SO ORDERED.**

17 DATED this 21 day of September, 2017.

18
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20
21 
22 DISTRICT COURT JUDGE
23
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27
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TAGGART & TAGGART, LTD.
108 N. MINNESOTA ST.
CARSON CITY, NV 89703



RECEIVED

OCT 05 2017

ATTORNEY GENERAL
MAILROOM

Justina A. Caviglia, Esq.
Nevada Attorney General's Office
100 North Carson Street
Carson City, NV 89701



ORIGINAL FILED

Case No. CV 20,869

2017 OCT 12 PM 12:14

Dept. No. 2

TAMI RAE SPERO
DIST. COURT CLERK
[Signature]

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.

CASE APPEAL STATEMENT

1. Name of appellant filing this case appeal statement:

Jason King, P.E., in his official capacity as the Nevada State Engineer, the Nevada Department of Conservation and Natural Resources, Division of Water Resources.

2. Identify the judge issuing the decision, judgment, or order appealed from:

The Honorable Steven R. Kosach.

3. Identify each appellant and the name and address of counsel for each appellant:

a. The appellant is Jason King, P.E., in his official capacity as the Nevada State Engineer, Nevada Department of Conservation and Natural Resources, Division of Water Resources.

///

///

b. The attorneys for Jason King, P.E., in his official capacity as the Nevada State Engineer, Nevada Department of Conservation and Natural Resources, Division of Water Resources are:

Adam Paul Laxalt, Attorney General
Justina A. Caviglia, Deputy Attorney General
Nevada Bar No. 9999
100 North Carson Street
Carson City, Nevada 89701-4717
Tel: (775) 684-1225
Fax: (775) 684-1108

4. Identify each respondent and the name and address of appellate counsel, if known, for each:

Paul G. Taggart, Esq.
Nevada Bar No. 6136
Timothy D. O'Connor, Esq.
Nevada Bar No. 14098
Taggart & Taggart, Ltd.
108 North Minnesota Street
Carson City, Nevada 89703

Mr. Taggart and Mr. O'Connor are attorneys of record for Happy Creek, Inc.

Upon information and belief, Mr. Taggart and Mr. O'Connor will represent Happy Creek, Inc. in the appeal.

5. Indicate whether any attorney identified above in response to questions 3 or 4 is not licensed to practice law in Nevada and, if so, whether the district court granted that attorney permission to appear under SCR 42 (attach a copy of any district court order granting such permission):

The attorneys identified above in response to questions 3 and 4 are licensed to practice law in Nevada.

6. Indicate whether appellant was represented by appointed or retained counsel in the district court:

Appellant was represented by the Office of the Attorney General before the district court.

///

///

1 7. Indicate whether appellant is represented by appointed or retained
2 counsel on appeal:

3 Appellant is represented by the Office of the Attorney General on appeal.

4 8. Indicate whether appellant was granted leave to proceed in forma
5 pauperis, and the date of entry of the district court order granting such
6 leave:

7 Appellant did not seek in forma pauperis status and was not granted leave to
8 proceed in forma pauperis.

9 9. Indicate the date the proceeding commenced in the district court (e.g.,
10 date complaint, indictment, information, or petition was filed):

11 A petition for judicial review of the State Engineer's November 1, 2016,
12 reinstatement of Permits 76237 through 76244 pursuant to NRS 533.395
13 was filed on November 14, 2016.

14 10. Provide a brief description of the nature of the action and result in the
15 district court, including the type of judgment or order being appealed and
16 the relief granted by the district court:

17 Permits 76237 through 76244 were cancelled after Happy Creek failed to file
18 either another round of applications for extension of time to place the water
19 to beneficial use or proofs of application of water to beneficial use, before the
20 30-day deadline, set forth in NRS 533.410. Thereafter, Happy Creek filed
21 eight Petitions for Review of the Cancelled Permits pursuant to NRS 533.395
22 with the State Engineer. The State Engineer set a hearing on the eight
23 Petitions for Review of the Cancelled Permits. As a result of the hearing, the
24 State Engineer reinstated Permits 76237 through 76244; however, the State
25 Engineer gave the permits a new priority date of July 11, 2016, as required
26 by NRS 533.395(3).

27 Petitioner filed a petition for judicial review of the State Engineer's
28 November 1, 2016, decision to reinstate the cancelled water right permits,

1 with a new priority date under NRS 533.395(3). The district court issued an
2 order granting equitable relief to overturn the imposition of a new priority
3 date under NRS 533.395(3). That decision is being appealed by the State
4 Engineer.

5 **11. Indicate whether the case has previously been the subject of an appeal to**
6 **or original writ proceeding in the Supreme Court and, if so, the caption**
7 **and Supreme Court docket number of the prior proceeding:**

8 No, this case has not been the previous subject of an appeal or writ
9 proceeding in the Supreme Court.

10 **12. Indicate whether this appeal involves child custody or visitation:**

11 This appeal does not involve child custody or visitation.

12 **13. If this is a civil case, indicate whether this appeal involves the possibility**
13 **of settlement:**

14 Based upon the nature of the appeal, this case does not involve the
15 possibility of settlement.

16 **AFFIRMATION**

17 The undersigned does hereby affirm that the preceding Case Appeal Statement
18 does not contain the social security number of any person.

19 DATED this 11th day of October, 2017.

20 ADAM PAUL LAXALT
21 Attorney General

22 By:

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

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Case #: CV-0020869

Judge: KOSACH, STEVEN

Date Filed: 11/18/16 Department: 30

Case Type: OTHJUD OTHER JUDICIAL REVIEW/APPEAL

Title/Caption: HAPPY CREEK, INC.

VS.

JASON KING, ET AL.

Defendant(s)
KING, JASON

Attorney(s)
CAVIGLIA, JUSTINA A.
ATTORNEY GENERAL

Defendant(s)
DIVISION OF WATER RESOURCES

Attorney(s)
CAVIGLIA, JUSTINA A.
ATTORNEY GENERAL

Plaintiff(s)
HAPPY CREEK, INC.

Attorney(s)
TAGGART, PAUL G.

Disp/Judgment: JRBT Date: 09/25/17

Hearings:

Date	Time	Hearing	Reference
		ORAL ARGUMENTS (MOVED PER JDG KOSACH)	CT 6/20/17
8/14/17	1:30	ORAL ARGUMENTS (2 HOURS)	CT 07/10/17

Filings:

Date	Pty	Filing	Fees
11/18/16	P	PETITION FOR JUDICIAL REVIEW	230.00
11/18/16	P	NOTICE OF APPEAL	
12/02/16	R	NOTICE OF APPEARANCE FOR RESPONDENT	
12/02/16	R	NOTICE OF INTENT TO DEFEND	
12/08/16	O	ORDER OF RECUSAL	
12/08/16	O	MEMORANDUM OF TEMPORARY ASSIGNMENT (JUDGE KOSACH)	
12/19/16	P	STIPULATION & ORDER REGARDING BRIEFING SCHEDULE	
12/28/16	R	SUMMARY OF RECORD ON APPEAL	
1/09/17	P	STIPULATION AND ORDER REGARDING BRIEFING SCHEDULE	
1/09/17	D	NOTICE OF TRANSMITTAL OF RECORD OF APPEAL	
3/02/17	P	STIPULATION AND ORDER EXTENDING BRIEFING SCHEDULE	
3/14/17	P	NOTICE OF REMOVAL OF ATTORNEY (RE; RACHEL L. WISE, ESQ)	
3/16/17	P	HAPPY CREEK'S OPENING BRIEF	
3/16/17	P	SUPPLEMENTAL RECORD ON APPEAL	
4/19/17	R	RESPONDENT'S ANSWERING BRIEF	
5/18/17	P	HAPPY CREEK'S REPLY BRIEF	
6/12/17	P	REQUEST FOR SUBMISSION & ORAL ARGUMENT	
8/07/17	P	STATE ENGINEER'S HEARING	
8/08/17	P	HAPPY CREEK, INC'S HEARING STATEMENT	
9/25/17	P	PROPOSED ORDER	
9/25/17	P	ORDER	
9/29/17	P	NOTICE OF ENTRY OF ORDER	
10/12/17	R	NOTICE OF APPEAL	
10/12/17	R	CASE APPEAL STATEMENT	

FILED

2017 SEP 25 PM 1:32

TAMI RAE SPERO
DIST. COURT CLERK

E. Family

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., a Nevada Corporation,

Petitioner,

vs.

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

Respondent.

ORDER

THIS MATTER having come before the Court because Petitioner, HAPPY CREEK, INC. (hereinafter "Happy Creek"), filed a Petition for Judicial Review after the State Engineer reinstated Happy Creek's water rights without the original priority dates for the water rights pursuant to Nevada Revised Statutes ("NRS") 533.395(3). Respondent, JASON KING, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES (hereinafter "State Engineer"), filed the Summary of Record on Appeal ("ROA") on December 27, 2016. Happy Creek filed its Opening Brief and a Supplemental Record on Appeal ("SROA") on March 16, 2017. The State Engineer filed his Answering Brief on April 18, 2017. Happy Creek filed its Reply Brief on May 18, 2017. Oral argument was heard by the Court on August 14, 2017. Happy Creek is represented by Paul G. Taggart, Esq., and Timothy D. O'Connor, Esq., of

1 Taggart & Taggart, LTD., and the State Engineer is represented by Attorney General Adam P. Laxalt,
2 Esq. and Deputy Attorney General Justina A. Caviglia, Esq.

3 The Court, having reviewed the ROA and SROA¹, and having considered the arguments and
4 evidence² presented by the parties at the August 14, 2017, hearing, the applicable law, and all the
5 pleadings and papers on file in this matter, hereby finds that that the original priority dates of Happy
6 Creek's water rights Permits are **REINSTATED** based upon the following findings of fact and
7 conclusions of law.

8 BACKGROUND

9 I. Happy Creek Ranch

10 Happy Creek is a ranching and farming company operating in the Pine Forest groundwater
11 basin located in northern Nevada. Happy Creek Ranch ("the Ranch") has 855 acres of irrigated land,
12 with approximately 765 of those acres being irrigated by underground water rights. The alfalfa
13 produced on those 765 acres is essential to the economic viability of the Ranch. In 1994, Happy Creek
14 hired a water rights professional to manage its water rights and filings with the State Engineer's office
15 and he handled those matters until late 2016.

16 Happy Creek's eight underground water rights pertinent to this matter have original priority
17 dates ranging from the 1950s to the 1990s. These water rights have been consistently put to use on the
18 Ranch for decades, and had been certificated at least once throughout the Ranch's history. In 2007,
19 Happy Creek decided to upgrade the irrigation systems on the Ranch to center pivots to more
20 efficiently place the water to use. On advice of its water rights professional, Happy Creek filed
21 applications to change the place of use on the eight underground water rights so the upgrades to the
22 Ranch could be completed. When the change applications were filed, the water rights went from
23 certificated status to permit status (the "Permits").

24 The change in status meant that Happy Creek was now required to file Proofs of Beneficial Use
25 on the water rights to re-certificate them. From 2012 to 2016, Happy Creek diligently used a majority
26 of the water on the Ranch, and sought to collect the data necessary to file the Proofs of Beneficial Use
27

28 ¹ During the hearing, the Court overruled the State Engineer's objection to Happy Creek's SROA.

² During the hearing, the Court overruled the State Engineer's objection to Happy Creek's evidence and witnesses.

1 ("PBUs") and re-certificate the Permits. During this time, one or more of the totalizing flow meters on
2 the irrigation wells failed resulting in an incomplete data set to file the PBUs. As such, Happy Creek's
3 water rights professional filed Extensions of Time ("EOTs") annually between 2012 and 2016 to extend
4 the time to file a PBU.

5 In 2016, Happy Creek's water rights professional missed the deadline for filing a PBU or EOT
6 for the Permits. On May 19, 2016, the State Engineer mailed a final notice for the Permits to Happy
7 Creek. Happy Creek emailed the final notice to its water rights professional. The water rights
8 professional, however, failed to file a PBU or EOT for the Permits. On July 8, 2016, the water rights
9 professional realized that he had missed the deadline for filing the PBU or EOT. On July 11, 2016,
10 Happy Creek petitioned the State Engineer to reinstate the Permits. The State Engineer held a
11 reinstatement hearing for the Permits on October 12, 2016. During the hearing, Happy Creek
12 demonstrated that at least 2400 acre feet of water under the Permits were placed to beneficial use in the
13 2015 irrigation season. The Permits were reinstated; however, consistent with NRS 533.395(3), the
14 priority of each of the Permits was changed from the original priority to July 11, 2016. On November
15 18, 2016, Happy Creek appealed the State Engineer's decision to change the priority of the Permits.

16 **II. Happy Creek's Improvements to the Ranch**

17 In 2007, Happy Creek began a project to further improve the efficiency of its irrigation system.
18 Happy Creek planned the addition of three center-pivot irrigation systems which, when combined with
19 its existing two center-pivot irrigation systems, would convert most of the irrigated acres to center-
20 pivots. This improvement reduced the number of acres that had previously been flood irrigated. Happy
21 Creek's improvements included the removal of fences, the leveling of dirt ditches, the removal of the
22 risers for gated pipes that were used in the flood irrigation practices on the fields, trench work to install
23 pipelines and powerlines, and ultimately the purchase and installation of center-pivot systems. Happy
24 Creek spent over seven hundred thousand dollars (\$700,000) on the improvements on the Ranch's
25 irrigation system.

26 **III. Groundwater Availability In Pine Forest Valley**

27 The Pine Forest Valley groundwater basin is over-appropriated by 25,828.31 afa. The perennial
28 yield of Pine Forest Valley is 11,000 afa. On May 1, 1978, the State Engineer issued Order 711 and

1 designated portions of Pine Forest Valley pursuant to NRS 534.010 to NRS 534.190. On December 1,
2 1983, the State Engineer issued a curtailment order ("Order 831") to deny any future groundwater
3 applications for irrigation in the basin. In Order 831, the State Engineer noted that his office's crop and
4 pumpage inventories indicate that groundwater withdrawals in Pine Forest Valley are in excess of the
5 estimated recharge to the basin. The crop inventory for the 2015 irrigation season indicates that 22,326
6 afa of groundwater was pumped to irrigate 6,446 acres.

7 STANDARD OF REVIEW

8 Pursuant to chapters 533 and 534 of the NRS, the State Engineer has a responsibility to
9 administer the appropriation and management of Nevada's public waters. To fulfill his responsibility,
10 the State Engineer is duty-bound to apply statutory criteria in the water law when determining any
11 appropriations of water.³ A party aggrieved by a decision of the State Engineer is entitled to have the
12 decision reviewed pursuant to NRS 533.450(1). Such a review is conducted "in the nature of an
13 appeal."⁴ Before a judgment may be pronounced by the Court, a "full and fair opportunity to be heard"
14 ⁵ must be had by all parties.⁶

15 When so warranted, equitable principles have been applied in the review of appeals from
16 decisions rendered by the State Engineer.⁷ Even if the State Engineer's action is in strict compliance
17 with an applicable statute, equitable principles allow the reviewing court to reverse the State Engineer's
18 decision regardless of whether the decision is supported by substantial evidence.⁸ Because equity is a
19 consideration of the Court on review of a State Engineer decision, the parties must have an opportunity
20 to present evidence relating to the equities of the case. If no such opportunity is presented at the State
21 Engineer level, the Court retains the ability to determine questions of fact that are necessary to the
22 judgment.⁹

23
24 ³ See *Benson v. State Engineer*, 358 P.3d 221, 131 Nev. Adv. Op. 78 (2015).

25 ⁴ *Id.*

26 ⁵ NRS 533.450(2).

27 ⁶ During the hearing, the Court permitted Happy Creek to file a supplemental record on appeal and present testimonial evidence
28 regarding the equities of the case. Because the State Engineer has no equitable powers under NRS 533.395, Happy Creek was
not given a full and fair opportunity to present the equities of its case. The Court thereby afforded such an opportunity to Happy
Creek pursuant to NRS 533.450(2), over the objection of the State Engineer that the appeal must be limited to the record.

⁷ *Englemann v. Westergard*, 98 Nev. 348, 331, 647 P.2d 385, 387 (1982); *Bailey v. State of Nevada*, 95 Nev. 378, 382, 594 P.2d
734, 736 (1979); *State Engineer v. American Nat'l Ins. Co.*, 88 Nev. 424, 426, 498 P.2d 1329, 1330 (1972).

⁸ *Englemann* at 351, P.2d at 387.

⁹ *Id.* at 352, P.2d at 385.

DISCUSSION

I. The State Engineer's Duty Under NRS 533.395(3).

NRS 533.395(3) states that "[i]f the decision of the State Engineer modifies or rescinds the cancellation of a permit, the effective date of the appropriation under the permit is vacated and replaced by the date of the filing of the written petition with the State Engineer." Here, the State Engineer determined that there was sufficient evidence to rescind the cancellation and reinstate the permits. The evidence shows that Happy Creek has diligently put the water to beneficial use. Pursuant to NRS 533.395(3), the State Engineer was required to vacate the original priority dates of the Permits, and replace the priority dates with "the date of the filing of the written petition with the State Engineer." Both parties agree that the State Engineer was bound by NRS 533.395(3).

II. The Equities Of The Case.

The facts of this case justify equitable relief. Happy Creek has put its water rights granted under the Permits to beneficial use, and attempted in good faith to comply with all procedural requirements to ensure its water rights were protected. Happy Creek hired a water rights professional who had, for years, successfully maintained Happy Creek's water rights. However, due to human error, Happy Creek's 2016 filings concerning the Permits were not made timely to the State Engineer. This error resulted in the State Engineer replacing the original priority of Happy Creek's water rights with a priority date of 2016 as he was required to do under NRS 533.395(3). Because Pine Forest Valley is overappropriated and has been the subject of various orders limiting the water availabilities, and could be subject to curtailment based on priority in the future, the change of the priority to the Permits is of utmost importance to Happy Creek and the Ranch's operations.

The evidence in the case showed that Happy Creek had diligently used the water, and that diligence should allow for the priority to relate back to the original priority of the water rights. The evidence also showed that Happy Creek had likely spent over one million dollars (\$1,000,000) to upgrade the Ranch in order to put the water to the most beneficial use. The fact that Happy Creek's water rights professional failed to file the PBU or EOT by the deadline is recognized, but that failure was the only error made in the case. Because the value of the property and the Ranch are directly tied to the priority of the water rights, the water rights professional's mistake has resulted in a colossal harm

Taggart & Taggart, Ltd.
108 North Main Street
Carson City, Nevada 89703
(775) 882-0900 - Telephone
(775) 883-9900 - Facsimile

1 to Happy Creek. All other steps taken by Happy Creek to use the water were correct. Here, the
2 punishment simply does not fit the crime and therefore equitable relief is allowed by the Court.

3 NRS 533.395(3), which mandates the change the priority of a water right upon rescission of a
4 cancelation, results in much too harsh of a penalty given the specific facts and circumstances of this
5 case. While the State Engineer took the correct action in following the statute, the punishment did not
6 fit the crime. The loss of priority in an overappropriated basin is too harsh a penalty when Happy
7 Creek had diligently put the water to beneficial use, and had hired a qualified water rights professional
8 to maintain the rights in good standing. Equity demands that the Permits' respective priorities be
9 reinstated to the original priorities. Therefore, the Court finds that Happy Creek has proven adequate
10 grounds for having its permits restored with their original priority date.

11 **CONCLUSION**

12 The Court, having reviewed the records on appeal, evidence presented by both parties, and
13 having considered the arguments of the parties, the applicable law, and all pleadings and papers on file
14 in this matter, hereby **ORDERS** that the original priority dates of Happy Creek's water rights Permits
15 be reinstated. The State Engineer shall ensure that this order is reflected in his records.

16 **IT IS SO ORDERED.**

17 DATED this 21 day of September, 2017.

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22 DISTRICT COURT JUDGE
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CV 20,869

Happy Creek, Inc. vs Jason King, et al

Judge: Steven Kosach

Clerk: Elisha Formby

August 14, 2017

Oral Argument Hearing

PRESENT: Daniel May and Glenn Thiede on behalf of Happy Creek Inc. present, with counsel, Paul Taggart. Justina Caviglia, present as counsel on behalf of Jason King, et al, State Engineer.

The Court stated this matter was set for oral argument.

Taggart gave opening argument and stated this ranch has been operating since 1800 and operating over 1399 acres of alpha and grain with water rights on all those, that recently those priority dates were changed on eight (8) permits for human error and those rights were reinstated to a new priority date of 2016. Taggart further explained to the Court that Happy Creek Ranch has done over \$700,000 of water efficiency upgrades for said water rights. Taggart further stated that there is believed to be an equitable remedy.

The Court asked Taggart why the certificate of rights were downgraded to permits and discussion ensued.

Taggart stated that Happy Creek hired a man by the name of John Milton to do all their water right permitting, that Milton had always been prompt in filing for the permits and/or extensions, for some reason these permits fell through the cracks and Milton missed the filing of the extension. Taggart further informed the Court that in May of 2016 the State Engineer mailed a final notice for permits to Happy Creek, informing that the Proofs of Beneficial or Extension of Time must be filed within 30 days of May 19, 2016, to avoid cancellation. These notices were also emailed to Mr. Milton. Mr. Milton did not file the required paperwork on time. It was not until July 2016 that Mr. Milton acknowledge that he missed the deadline for filing. Happy Creek then filed eight (8) petitions for review of the cancelled permits and the State held a hearing on the said petitions, at which time the permits were reinstated with a new priority date of July 11, 2016.

Taggart further explained to the Court that the new priority dates are unfair to Happy Creek, that there is equitable relief and the Court has the authority to grant that relief. That the State ignored this evidence and does not have equitable powers.

Taggart gave the Court an overview on the record on appeal.

The Court asked Taggart why they have not sought after Mr. Milton personally for these damages.

Taggart stated that Mr. Milton does not have the assets and that Milton does not carry liability insurance on his company.

The Court stated that the statute is very clear and asked counsel if they have tried to reach a resolution and discussion ensued.

Daniel May duly sworn and testified.

Direct by Taggart.

Caviglia reserved her right to cross-examine the witness until after oral arguments.

The Court concurred.

Glenn Thiede, duly sworn and testified.

Direct by Taggart.

Caviglia gave arguments and recited the statute, that a hearing was held and the water rights were reinstated with a new priority date. Caviglia stated that the statute is very clear, that the references made by Taggart are not relevant and that nothing limits Happy Creek Ranch from the statute. Caviglia further stated that Happy Creek and Mr. Milton received several notices, the deadlines were missed, that the equitable relief be denied and that Happy Creek is the client and the responsibility falls back on the client to file for extensions.

Taggart gave closing argument and stated that this was a human error and that issuance of new priority dates is unfair.

Caviglia gave closing argument.

The Court informed the parties that he is a simple man and respects the rules. That this situation was clearly a human error, that the punishment does not fit the crime, that the Court will grant the equitable relief, that the State Engineer took the correct act in following the statute, that the loss of priority in an over appropriated basin is too harsh of a punishment. The Court finds that Happy Creek has proven adequate grounds and orders that the original priority dates be reinstated for Happy Creek.

*****Exhibits admitted after Court and off the record per the Court.

Happy Creek Inc.,

vs. Jason King, et all

DEFENDANT'S/RESPONDENT'S EXHIBITS: CASE NO.

CV 20,869

	I.D.	MARKED	OFFERED	ADMITTED
A Oral Argument Presentation	A	08/14/17	08/14/17	08/14/17
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CERTIFICATION OF COPY

**STATE OF NEVADA,
COUNTY OF HUMBOLDT,**

I, TAMI RAE SPERO, the duly elected, qualifying and acting Clerk of Humboldt County, in the State of Nevada,
and Ex-Officio Clerk of the District Court, do hereby certify that the foregoing is a true , full and correct copy
of the original: **Notice of Appeal; Case Appeal Statement; District Court Docket Entries; Order; District
Court Minutes; Exhibit List;**

Happy Creek, Inc.,
Plaintiff,
vs.
Jason King, P.E., Nevada State
Engineer, Division of Water
Resources, Dept. Of Conservation
and Natural Resources,
Defendant.

CASE NO. CV 20,869

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto set
my hand and affixed
the seal of the Court at my office,
Winnemucca, Nevada, this 16th
day of October, 2017, A.D.

TAMI RAE SPERO, CLERK

By: _____

Jody Clark
DEPUTY CLERK