

IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

JASON KING, P.E., NEVADA STATE
ENGINEER, et al.,

Appellant,

vs.

HAPPY CREEK, INC.,

Respondent.

No. 74266

Electronically Filed
Nov 08 2017 12:29 p.m.
Elizabeth A. Brown
Clerk of Supreme Court
**DOCKETING STATEMENT
CIVIL APPEALS**

GENERAL INFORMATION

Appellants must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. See KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District Sixth Department 2
County Humboldt Judge Steven R. Kosach
District Ct. Case No. CV 20,869

2. Attorney filing this docketing statement:

Attorney Justina A. Caviglia Telephone (775) 684-1222
Firm Office of the Attorney General
Address 100 North Carson Street
Carson City, Nevada 89701-4717

Client(s) Appellant, Jason King, P.E., Nevada State Engineer, et al.

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. Attorney(s) representing respondents(s):

Attorney Paul Taggart, Esq. Telephone (775) 882-9900
Firm Taggart & Taggart, Ltd.
Address 108 North Minnesota Street
Carson City, Nevada 89703

Client(s) Respondent, Happy Creek, Inc.

Attorney Timothy D. O'Connor, Esq. Telephone 775) 882-9900
Firm Taggart & Taggart, Ltd.
Address 108 North Minnesota Street
Carson City, Nevada 89703

Client(s) Respondent, Happy Creek, Inc.

(List additional counsel on separate sheet if necessary)

4. Nature of disposition below (check all that apply):

- | | |
|--|---|
| <input type="checkbox"/> Judgment after bench trial | <input type="checkbox"/> Dismissal: |
| <input type="checkbox"/> Judgment after jury verdict | <input type="checkbox"/> Lack of jurisdiction |
| <input type="checkbox"/> Summary judgment | <input type="checkbox"/> Failure to state a claim |
| <input type="checkbox"/> Default judgment | <input type="checkbox"/> Failure to prosecute |
| <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief | <input type="checkbox"/> Other (specify): _____ |
| <input type="checkbox"/> Grant/Denial of injunction | <input type="checkbox"/> Divorce Decree: |
| <input type="checkbox"/> Grant/Denial of declaratory relief | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input checked="" type="checkbox"/> Review of agency determination | <input type="checkbox"/> Other disposition (specify): _____ |

5. Does this appeal raise issues concerning any of the following?

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

None.

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

None.

8. Nature of the action. Briefly describe the nature of the action and the result below:

Permits 76237 through 76244 were canceled after Happy Creek failed to file either another round of applications for extension of time to place the water to beneficial use or proofs of application of water to beneficial use, before the 30-day deadline, set forth in NRS 533.410. Thereafter, Happy Creek filed eight Petitions for Review of the Canceled Permits pursuant to NRS 533.395 with the State Engineer. The State Engineer set a hearing on the eight Petitions for Review of the Canceled Permits. As a result of the hearing, the State Engineer reinstated Permits 76237 through 76244; however, the State Engineer gave the permits a new priority date of July 11, 2016, as required by NRS 533.395(3). Petitioner filed a petition for judicial review of the State Engineer's November 1, 2016, decision to reinstate the canceled water right permits, with a new priority date under NRS 533.395(3). The district court issued an order granting equitable relief to overturn the imposition of a new priority date under NRS 533.395(3).

9. Issues on appeal. State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

(a) The State Engineer appeals the District Court's decision to simply grant equitable relief, without addressing: (1) whether or not the State Engineer's decision was based upon substantial evidence; and (2) whether or not equitable relief extends to the imposition of a new priority date set forth in NRS 533.395(3).

(b) The State Engineer appeals the District Court's decision to grant equitable relief overturning the imposition of a new priority date under NRS 533.395(3), which amounts to an issue of first impression.

(c) The State Engineer appeals the District Court's decision to take testimony and evidence during oral argument on Happy Creek's petition for judicial review and request for equitable relief in violation of NRS 533.450.

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

Appellant is not aware of any pending proceeding raising the same or similar issues.

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

12. Other issues. Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☒ A substantial issue of first impression

☐ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain: The District Court's decision to grant equitable relief overturning the imposition of a new priority date under NRS 533.395(3) is an issue of first impression.

13. Assignment to the Court of Appeals or retention in the Supreme Court. Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

This matter is presumptively retained by the Supreme Court pursuant to NRAP 17(a)(9) as an administrative agency appeal involving a water determination.

14. Trial. If this action proceeded to trial, how many days did the trial last? _____

Was it a bench or jury trial? Not Applicable.

15. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

Appellant has no intention to file a motion to disqualify or have a justice recuse himself/herself from participation in this appeal.

TIMELINESS OF NOTICE OF APPEAL

16. Date of entry of written judgment or order appealed from September 25, 2017

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

17. Date written notice of entry of judgment or order was served September 28, 2017

Was service by:

☐ Delivery

☒ Mail/electronic/fax

18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date of filing _____

☐ NRCP 52(b) Date of filing _____

☐ NRCP 59 Date of filing _____

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See AA Primo Builders v. Washington, 126 Nev. ___, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion _____

(c) Date written notice of entry of order resolving tolling motion was served _____

Was service by:

☐ Delivery

☐ Mail

19. Date notice of appeal filed October 12, 2017

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

20. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other

NRAP 4(a)(1)

SUBSTANTIVE APPEALABILITY

21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a)

- | | |
|---|---------------------------------------|
| <input checked="" type="checkbox"/> NRAP 3A(b)(1) | <input type="checkbox"/> NRS 38.205 |
| <input type="checkbox"/> NRAP 3A(b)(2) | <input type="checkbox"/> NRS 233B.150 |
| <input type="checkbox"/> NRAP 3A(b)(3) | <input type="checkbox"/> NRS 703.376 |
| <input type="checkbox"/> Other (specify) _____ | |

(b) Explain how each authority provides a basis for appeal from the judgment or order:

This is an appeal from a final decision of the Sixth Judicial District Court based upon a petition for judicial review where the judgment was rendered.

22. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

HAPPY CREEK, INC., Petitioner

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

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

N/A

23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

Happy Creek, Inc. filed a petition for judicial review of the State Engineer's November 1, 2016, decision to reinstate the canceled water right permits, with a new priority date under NRS 533.395(3).

On September 25, 2017, the district court issued an order granting equitable relief .

24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

☒ Yes

☐ No

25. If you answered "No" to question 24, complete the following:

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☐ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☐ No

26. If you answered "No" to any part of question 25, explain the basis for seeking appellate review (*e.g.*, order is independently appealable under NRAP 3A(b)):

Not Applicable.

27. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

VERIFICATION

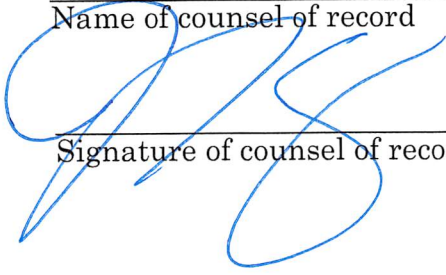
I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Jason King, P.E., State Engineer
Name of appellant

November 8, 2017
Date

Carson City, Nevada
State and county where signed

Justina A. Caviglia
Name of counsel of record


Signature of counsel of record

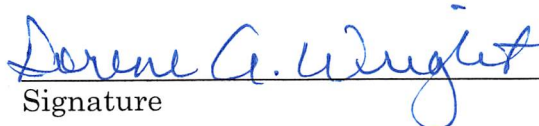
CERTIFICATE OF SERVICE

I certify that on the 8th day of November, 2017, I served a copy of this completed docketing statement upon all counsel of record:

- ☐ By personally serving it upon him/her; or
- ☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

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

Dated this 8th day of November, 2017


Signature

ATTACHMENT 1

ATTACHMENT 1

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

1 PAUL G. TAGGART, ESQ.
Nevada State Bar No. 6136
2 RACHEL L. WISE, ESQ.
Nevada State Bar No. 12303
3 TAGGART & TAGGART, LTD.
4 108 North Minnesota Street
Carson City, Nevada 89703
5 (775)882-9900 - Telephone
6 (775)883-9900 - Facsimile
Attorneys for Petitioner

RECEIVED

2016 NOV 14 PM 2:43

STATE ENGINEERS OFFICE

7
8 IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
9 IN AND FOR THE COUNTY OF HUMBOLDT

10 * * *

11
12 HAPPY CREEK, INC.)

13 Petitioner,)

14 vs.)

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

17 Respondent.)
18

CASE NO.: _____

DEPT. NO.: _____

19 **PETITION FOR JUDICIAL REVIEW**

20 COMES NOW, Petitioner, HAPPY CREEK, INC. ("Happy Creek"), by and through their
21 attorneys of record, PAUL G. TAGGART, Esq., and RACHEL L. WISE, Esq., of the law firm of
22 TAGGART & TAGGART, LTD., and hereby files this Petition requesting that this Court reverse or
23 amend the decision that changed the priority dates for Permits 76237 through 76244 to July 11, 2016.
24 That decision was issued by Malcolm J. Wilson, P.E., an employee for Jason King, P.E., Nevada State
25 Engineer ("State Engineer").¹ This Petition for Judicial Review and the accompanying Notice of
26 Appeal are filed with this Court in accordance with NRS 533.450.

27
28 ¹ Exhibit 1.

1 **I. JURISDICTIONAL STATEMENT**

2 Pursuant to NRS 533.450(1), decisions of the State Engineer are subject to judicial review “in
3 the proper court of the county in which the matters affected or a portion thereof are situated.” The real
4 property relative to this action is within Humboldt County. Therefore, the Sixth Judicial District Court
5 of the State of Nevada in and for Humboldt County is the proper venue for judicial review of the State
6 Engineer’s November 1, 2016, decision regarding cancelled permit nos. 76237 through 76244
7 (“Permits”), inclusive (“Reinstatement Letter”).

8 Pursuant to *Howell v. Ricci*, the Nevada Supreme Court held that a letter from the State
9 Engineer that: (1) affects a property interest, (2) relates to the administration of determined rights, and
10 (3) constitutes a final written determination on the issue is a decision that an aggrieved party may
11 properly challenge through a petition for judicial review.² On November 1, 2016, the State Engineer
12 issued a Reinstatement Letter to Petitioner that reinstated Petitioner’s Permits from cancellation status,
13 but changed the priority dates of all the Permits to July 11, 2016.

14 **II. BACKGROUND**

15 Petitioner, Happy Creek, holds eight water permits for irrigation of land located in the Pine
16 Forest Valley Basin in Humboldt County. The perennial yield for Pine Forest Valley Basin is 11,000.
17 Currently, 39,757.97 underground water rights in Pine Forest Valley Basin have been appropriated.
18 Happy Creek’s eight water permits were of varying priority dates. Permit No. 76240 held a priority
19 date of October 8, 1954. Permit No. 76243, held a priority date of June 5, 1963. Permit No. 76237
20 held a priority date of December 15, 1966. Permit No. 76244 held a priority date of September 18,
21 1967. Permit Nos. 76238 – 39 held a priority date of March 3, 1969. Permit No. 76242 held a priority
22 date of September 25, 1981. Permit No. 76241 held a priority date of November 6, 1990 (collectively,
23 “Permits”). Permit No. 76240 was the oldest priority permit in the basin, challenged only by vested
24 water rights.

25 The preservation of the Permits was entrusted by Happy Creek to Mr. John Milton of Desert
26 Mountain Surveying. Mr. Milton is a Nevada Professional Land Surveyor, license no. 5271. Mr.

27
28 ² *Howell v. Ricci*, 124 Nev. 1222, 1228, 197 P.3d 1044, 1048 (2008).

1 Milton is an engineer operating as an agent for Happy Creek for over a decade. Mr. Milton has
2 consistently maintained Happy Creek's water rights in good standing until the current action.

3 On May 19, 2016, the State Engineer mailed, via certified mailing, the final notice for permits
4 76237-44 to Happy Creek ("Final Notice"). This notice informed Happy Creek that a proof of
5 beneficial use and cultural map ("PBU") or a request for an extension of time ("EOT") must be filed
6 on or before April 29, 2016, or Happy Creek's Permits would be cancelled.³ This same notice was e-
7 mailed to Desert Mountain Surveying. On May 23, 2016, Happy Creek e-mailed the Final Notice to
8 John Milton, of Desert Mountain Surveying.⁴

9 On July 11, 2016, Mr. Milton petitioned the Nevada State Engineer to reinstate the Permits. On
10 July 19, 2016, the State Engineer issued the Notice of Cancellation of Permits 76237-44. On July 8,
11 2016, Mr. Milton recognized that he may have confused the Final Notice for the Permits with different
12 responsibilities with his office.⁵ The State Engineer held the reinstatement hearing on October 12,
13 2016. On November 1, 2016, the State Engineer issued his written disposition regarding the Permits
14 and their reinstatement. The State Engineer does not possess equitable powers and is required to
15 reinstate the priority date as "the date of the filing of the written petition" for reinstatement.⁶ And
16 therefore, the priority date for all eight Permits was changed to July 11, 2016.

17 **III. GROUNDS FOR PETITION**

18 **A. Water rights are unique real property**

19 Nevada has always recognized that water rights are unique real property rights.⁷ The bundle of
20 property rights includes "all rights inherent to ownership, including the inalienable right to possess,
21 use, and enjoy the property."⁸ Parts of the sticks in the bundle of Nevada water rights are the date of

22 ³ NRS 533.395, NRS 533.410.

23 ⁴ Exhibit 2.

24 ⁵ Exhibit 3.

24 ⁶ NRS 533.395(3).

25 ⁷ *Nenzel v. Rochester Silver Corp.*, 50 Nev. 352, 259 P. 632, 634 (1927) (stating, "[i]t is well settled that a water right is realty.")
26 *citing 2 Kinney on Irrigation* (2d Ed.) at 1328; *Weil, Water Rights* (2d Ed.) at 129; *Long on Irrigation*, at 132, *Indep. Asphalt*
27 *Consultants, Inc. v. Studebaker*, 126 Nev. 722, 367 P.3d 781 (2010), *Dixon v. Thatcher*, 103 Nev. 414, 416, 742 P.2d 1029,
28 1030 (1987), *See Leonard v. Stoebling*, 102 Nev. 543, 728 P.2d 1358 (1986) (view from home is unique asset; injunction issued
to preserve view); *see also Nevada Escrow Service, Inc. v. Crockett*, 91 Nev. 201, 533 P.2d 471 (1975) (denial of injunction to
stop foreclosure reversed because legal remedy inadequate), *Locken v. Locken*, 98 Nev. 369, 650 P.2d 803 (1982).

⁸ *ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 647, 173 P.3d 734, 740 (2007), *see* NEV. CONST. ART. 1, § 1 (granting the
inalienable constitutional right to "[p]rotect[]" property).

1 priority.⁹ Under the prior appropriation doctrine, water rights are acquired by diverting water and
2 applying it for a beneficial purpose; a distinctive feature of the prior appropriation doctrine is the rule
3 of priority under which relative rights of water users are ranked in the order of their seniority.¹⁰

4 **B. Equitable Relief may be afforded to the Petitioner.**

5 Nevada water law supports the contention that equity is appropriate to limit the harsh
6 consequences of Nevada law where circumstances justify protecting individual landowners from unjust
7 outcomes.¹¹ *State Engineer v. American National Insurance Co.*, *Bailey v. State of Nevada*,
8 and *Engelmann v. Westergard*, are all examples of the Nevada Supreme Court embracing the principle
9 that the district court may grant equitable relief regarding cancelled water rights.¹²

10 Similar to other petitioners who have received equitable relief from Nevada courts, Happy
11 Creek has diligently complied with the beneficial use requirements of Nevada water law.¹³ Further,
12 Happy Creek informed and instructed their agent to file the appropriate documents to protect their
13 Permits. Happy Creek is currently using the water associated with the Permits on their ranch in
14 Humboldt County. Happy Creek has never received a four year forfeiture letter, and has assigned a
15 ranch manager to place the water to beneficial use on their Humboldt County Ranch.¹⁴

16 Similar to *Great Basin Water Network v. State Eng'r*, voiding the priority dates of the Permits
17 is inequitable to the applicant.¹⁵ Just as the Nevada Supreme Court held that applicants cannot be
18 punished for the State Engineer's failure to follow his statutory duties, Happy Creek should not be
19
20

21 ⁹ *Colorado v. New Mexico*, 459 U.S. 179, 179 (1982).

22 ¹⁰ *Id.*

23 ¹¹ *United States v. Alpine Land & Reservoir Co.*, 291 F.3d 1062, 1076 (9th Cir. 2002) (applying equity to intrafirm transfers of
24 water rights when the individual land owners previously relied on the federal government's assertions regarding the necessity of
25 change applications), *Bailey v. State*, 95 Nev. 378, 594 P.2d 734, 737-39 (1979) (concluding that an underground water
permittee who had not timely filed proof of beneficial use was entitled to equitable relief from cancellation of water rights
where she had continuously worked on land during the period in question), *Town of Eureka v. Office of State Eng'r*, 108 Nev.
163, 826 P.2d 948, 951-52 (1992) (holding it appropriate to waive application of a forfeiture statute where the holder of water
rights resumed use after the statutory period of non-use).

26 ¹² *Am. Natl. Ins. Co.*, 88 Nev. at 426, 498 P.2d at 1330 (1972), *Bailey*, 95 Nev. at 382, 594 P.2d at 736-37, *Engelmann*, 98 Nev.
at 352, 647 P.2d at 388 (1982).

27 ¹³ See also *State v. Morris DeLee Revocable Trust*, 2009 WL 1491012, 281 P.3d 1221 (2009)(unpublished disposition, and this
28 cite is provided in conformity with SCR 123 as persuasive authority only).

¹⁴ NRS 534.090.

¹⁵ *Great Basin*, 126 Nev. 187, 199, 234 P.3d 912, 920 (2010).

1 punished for the failure of its agent.¹⁶ In *Great Basin*, the Nevada Supreme Court pursued the course
2 of action that was "the proper and most equitable remedy."¹⁷

3 If Pine Forest Valley Basin is curtailed, Happy Creek is subject to losing use of their once
4 senior water rights.¹⁸ Further, the State Engineer has already ordered that he will not issue any
5 additional irrigation water rights in the Pine Forrest Valley Basin.¹⁹

6 C. Other grounds.

7 Other grounds exists for the petition that Petitioner reserves the right to present in the briefs and
8 argument in this matter.

9 ///

11 ///

13 ///

15 ///

17 ///

19 ///

21 ///

23 ///

26 ¹⁶ *Id.*

27 ¹⁷ *Id.*

28 ¹⁸ See Order 831 curtailing and denying any and all applications to appropriate underground water to irrigate land within the Pine Forest Valley Basin, see also Order 711 designating portions of the Pine Forest Valley Basin.

¹⁹ *Id.*

1 **IV. CONCLUSION**


2 For the reasons explained above, and others that may be discovered during the pendency of this
3 appeal, Petitioners respectfully request this Court reinstate Happy Creek's priority date on Permits
4 76237 through 76244 to their original priority dates and to award any other relief this Court deems
5 appropriate.

6 **AFFIRMATION**
7 **Pursuant to NRS 239B.030**

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

10 DATED this 14th day of November, 2016.

11 TAGGART & TAGGART, LTD.
12 108 North Minnesota Street
13 Carson City, Nevada 89703
14 (775) 882-9900 – Telephone
(775) 883-9900 – Facsimile

15 By: 
16 PAUL G. TAGGART, ESQ.
17 Nevada State Bar No. 6136
18 RACHEL L. WISE, ESQ.
19 Nevada State Bar No. 12303
20 Attorneys for Petitioners
21
22
23
24
25
26
27
28

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:

☒ **BY HAND-DELIVERY VIA INTEROFFICE-TYPE MESSENGER**, by placing a true and correct copy of the above-identified document in an envelope, addressed as follows:

Jason King, P.E.
Nevada Division of Water Resources
901 South Stewart Street, Suite 2002
Carson City, NV 89701

DATED this 14th day of November, 2016.



Employee of TAGGART & TAGGART, LTD.

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

INDEX OF EXHIBITS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Exhibit Number

Document

1. November 1, 2016, Cancellation Letter
2. May 23, 2016 Email from Ron Fickler to John Milton
3. July 8, 2016 Email from John Milton to Phil Chambers

EXHIBIT 1

EXHIBIT 1

BRIAN SANDOVAL
Governor

STATE OF NEVADA



KAY SCHERER
Interim Director

JASON KING, P.E.
State Engineer

DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES
DIVISION OF WATER RESOURCES

901 South Stewart Street, Suite 2002
Carson City, Nevada 89701-5250
(775) 684-2800 • Fax (775) 684-2811
<http://water.nv.gov>

November 1, 2016

Happy Creek, Inc.
2489 West Main Street
Littleton, Colorado 80120-1910

Re: Cancelled Permit Nos. 76237 through 76244, inclusive

Permits 76237 through 76244, inclusive, which are currently held in the name of Happy Creek, Inc., were cancelled as of July 19, 2016. The State Engineer received your written petitions requesting a review of the cancellations at a public hearing pursuant to Nevada Revised Statutes (NRS) § 533.395(2).

Accordingly, a hearing was held on October 12, 2016, where it was ruled that the cancellations of your permits would be rescinded conditioned on the filing of Applications for Extension of Time; your Applications for Extension of Time were timely received on October 17, 2016.

The cancellations of Permits 76237 through 76244, inclusive, have been rescinded, and pursuant to NRS § 533.395(3) the priority date for these permits is set to July 11, 2016, which is the date the petitions for review of the cancellations were received in the Office of the State Engineer.

If you have any questions on this matter feel free to send me an e-mail at mjwilson@water.nv.gov or call me at (775) 684-2806.

Sincerely,

Malcolm J. Wilson, P.E.

Malcolm J. Wilson, P.E.
Hearing Officer

MJW/jm

cc: John H. Milton III, Desert Mountain Surveying, E-mail

EXHIBIT 2

EXHIBIT 2

Sarah Hope

From: Ron Fickler <RFickler@lavacacattle.com>
Sent: Monday, May 23, 2016 11:29 AM
To: John Milton
Cc: Phil A. Chambers
Subject: Happy Creek Final Notice
Attachments: scan4051.pdf

Hi John

Just wanted to make sure you received this.

Thanks Ron

**Ronald S Fickler
La Vaca Cattle Co.
2489 W Main St.
Littleton, CO 80120
303-730-2300 Office
303-730-3223 Fax
303-981-8543 Cell**

EXHIBIT 3

EXHIBIT 3

Sarah Hope

From: John Milton <john@winnemucca.net>
Sent: Friday, July 08, 2016 11:20 AM
To: 'Phil A. Chambers'
Subject: RE: Happy Creek Final Notice
Attachments: Review of Cancelled Permit 76237.pdf

Phil,

Attached is a copy of the Review of Cancelled Permit. Let me know if you want any changes or additions. I found the e-mail from Ron it came about the same time as the notice for PBU for Permits 83008,83006 and 830012. Somehow I got them confused. I can't explain how I screwed this up.
John

From: Phil A. Chambers [<mailto:pac47@qwestoffice.net>]
Sent: Thursday, July 7, 2016 10:47 AM
To: 'John Milton' <john@winnemucca.net>
Subject: FW: Happy Creek Final Notice

FYI – May 23 email from Ron Fickler.

From: Ron Fickler [<mailto:RFickler@lavacacattle.com>]
Sent: Monday, May 23, 2016 12:29 PM
To: John Milton (john@winnemucca.net)
Cc: Phil A. Chambers
Subject: Happy Creek Final Notice

Hi John

Just wanted to make sure you received this.

Thanks Ron

Ronald S Fickler
La Vaca Cattle Co.
2489 W Main St.
Littleton, CO 80120
303-730-2300 Office
303-730-3223 Fax
303-981-8543 Cell

ATTACHMENT 2

ATTACHMENT 2

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 Main Street
Carson City, Nevada 89703
(775) 883-9900 - 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
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.
100 North Main Street
Carmichael, Nevada 89701
(702) 882-9900 - Telex
(702) 882-9900 - 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.

18
19
20
21 
22
23
24
25
26
27
28
DISTRICT COURT JUDGE

ATTACHMENT 3

ATTACHMENT 3

FILED
2017 SEP 29 PM 12:15
TAMI RAE SPERO
DIST. COURT CLERK

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
7

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,)

13 vs.)

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

16 Respondent.)
17

CASE NO.: CV 20, 869

DEPT. NO.: 2

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.

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///



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

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:

☒ 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 Main Street
Carson City, Nevada 89703
(775) 883-9900 - Telephone
(775) 883-9900 - Facsimile

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

INDEX OF EXHIBITS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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 Main Street
Carson City, Nevada 89703
(775) 882-4900 ~ 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 Minnesota Street
Casper City, Nevada 89701
(775) 841-9900 - Telephone
(775) 841-9900 - 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.

18
19
20
21 
22 DISTRICT COURT JUDGE
23
24
25
26
27
28