

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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

Appellant,

vs.

HAPPY CREEK, INC.,

Respondent.

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Case No. 74266

**APPELLANT'S OPENING BRIEF**

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## **I. JURISDICTIONAL STATEMENT**

This is an appeal from the September 25, 2017, final order of the district court granting equitable relief, which was served on September 28, 2017. Joint Appendix (JT APP) at 1173. Jurisdiction is proper pursuant to NRAP 3A(a), NRAP 3A(b)(1) and NRS 533.450(9). Appellant Jason King, P.E., Nevada State Engineer, Division of Water Resources, Department of Conservation and Natural Resources (hereafter “State Engineer”) timely filed his Notice of Appeal on October 12, 2017. Accordingly, the State Engineer’s appeal is timely pursuant to NRAP 4(a)(1).

## **II. ROUTING STATEMENT**

This case is presumptively retained by the Supreme Court pursuant to NRAP 17(a)(9), as it is a case involving an appeal of a decision of the State Engineer, an administrative agency of the State of Nevada.

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### III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

- A. Was the district court's failure to make any findings with the respect to the underlying petition for judicial review challenging the State Engineer's November 1, 2016, decision in error?
- B. Did the district court abuse its discretion by restoring Respondent's priority date of their cancelled water right in contravention of NRS 533.395(3)?
- C. Whether the district court's decision to take testimony and evidence during the presentation of oral argument and in consideration of Respondent Happy Creek, Inc.'s (hereafter "Happy Creek") petition for judicial review brought pursuant to NRS 533.450, is inconsistent with the petition being "in a nature of appeal" and this Court's decision in *Revert v. Ray*, 95 Nev. 782, 603 P.2d 262 (1979), limiting judicial review to whether substantial evidence in the State Engineer's record supports the decision?

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#### **IV. STATEMENT OF THE CASE**

This appeal arises from the district court's September 25, 2017, Order, in which the district court summarily granted equitable relief by reinstating the original priority dates for water right permits, which had been canceled under NRS 533.395(3), without deciding the threshold issue of whether the State Engineer's decision was supported by substantial evidence. JT APP at 1178-1183.

#### **V. STATEMENT OF THE FACTS**

On April 29, 2009, the State Engineer granted numerous change applications filed by Happy Creek to change the place of use for eight existing water right permits (collectively referred to as the "eight water right permits" or "eight permits"). JT APP at 40-41, 64-65, 80-81, 96-97, 112-113, 128-129, 144-145, 160-161. Each of the eight permits' terms had a deadline of April 29, 2012, to file proof of the application of the water to beneficial use. JT APP at 41, 65, 81, 97, 113, 129, 145, 161. Happy Creek took advantage of NRS 533.380(3) by applying for and receiving four extensions of time, between 2012 and 2016, to place the water under the eight permits to beneficial use, with the last extension of time expiring on April 29, 2016. JT APP at 42, 66, 82, 98, 114, 130,

146, 162. Happy Creek failed to timely file an application for extension of time to place the water to beneficial use or proof of beneficial use before the April 29, 2016, deadline expired.

On May 19, 2016, the State Engineer sent Happy Creek a final notice under NRS 533.410, informing it that it had 30 days from the date of the notice to file either the proofs of beneficial use or subsequent applications for extension of time to place the water to beneficial use or face cancellation of its eight permits. JT APP at 43, 67, 83, 99, 115, 131, 147, 163. The United States Postal Service delivered the notice to Happy Creek on Monday, May 23, 2016. JT APP at 44. Despite receiving actual notice that its permits were being held for cancellation, Happy Creek failed to meet the 30-day deadline, and failed to file either another application to extend time for filing proof of beneficial use or proofs of beneficial use for any of the eight permits before the 30 days expired. Consequently, Happy Creek's eight permits were cancelled pursuant to NRS 533.410.

On July 11, 2016, Happy Creek filed eight Petitions for Review of the Cancelled Permits pursuant to NRS 533.395 before the State Engineer. JT APP at 45, 68, 84, 100, 116, 132, 148, 164. The State

Engineer set a hearing on the eight Petitions for Review of the Cancelled Permits for October 12, 2016. JT APP at 50-53, 71-72, 87-88, 103-104, 119-120, 135-136, 151-152, 167-168. At the October 2016 hearing, John H. Milton III and Glen Thied appeared before the Division of Water Resources' Hearing Officer. JT APP at 54, 73, 89, 105, 121, 137, 153, 169. Based upon the argument, evidence and testimony presented at the hearing, the State Engineer reinstated the eight cancelled permits; however, as required by NRS 533.395(3), the State Engineer assigned the permits a new priority date of July 11, 2016. *Id.*; JT APP at 60, 77, 93, 109, 125, 141, 157, 173.

On November 14, 2016, Happy Creek timely filed its petition for judicial review to the district court appealing the State Engineer's reinstatement of the eight permits, with the priority date of July 11, 2016. JT APP at 7-20. The case was assigned to a Senior Judge, who was appointed to hear the matter and oral arguments were held on January 5, 2016. JT APP at 940. After the hearing, the judge ruled from the bench and without making any factual or legal findings, granted Happy Creek equitable relief as requested in both its petition for judicial review and briefing. JT APP at 1148-1154.

## VI. SUMMARY OF THE ARGUMENT

Despite the fact that this Court previously found in *State Eng'r v. Am. Nat'l Ins. Co.*, 88 Nev. 424, 426-27, 498 P.2d 1329, 1330-31 (1972), that a district court may have the authority to grant equitable relief to overturn a decision of the State Engineer, even when he has adhered to Nevada law; that finding does not negate the fact that the State Engineer is entitled to a fair hearing before equitable relief is summarily granted. Under NRS 533.450, appeals of a decision of the State Engineer are in the nature of an appeal; however, in this case, the district court permitted the introduction of evidence and permitted testimony from an undisclosed witness during Happy Creek's oral argument and over the objection of the State Engineer. JA APP at 1153. Because Happy Creek was allowed to introduce evidence and witnesses outside of the State Engineer's record, the State Engineer was deprived of a fair appeal of his decision, which is presumptively correct. NRS 533.450(10). No discovery, depositions, or any other exchange of witnesses is provided for under NRS 533.450, as such matters are beyond the scope of an appeal. The district court's concession to allow the submission of evidence and witnesses, which

were not included in the record in front of the State Engineer, is in contravention of NRS 533.450, *Revert v. Ray*, 95 Nev. 782, 603 P.2d 262 (1979), and its progeny, and constitutes an open invitation for the district court to set aside appellate procedure under the guise of equitable relief. Even if this extrinsic evidence was offered for the purpose of Happy Creek's request for equitable relief, the district court's timing of taking such evidence during the argument on the merits of the State Engineer's decision to reinstate Happy Creek's water rights is an impermissible abuse of discretion.

Further, the district court's grant of equitable relief without first addressing the petition for judicial review, *i.e.*, whether the State Engineer's decision was based upon substantial evidence is improper. The district court also failed to address whether or not equitable relief, which this Court has only extended to the actual cancellation or forfeiture of a water right, was appropriate.

## **VII. STANDARD OF REVIEW ON APPEAL**

This Court must now determine whether a district court's authority to grant equitable relief in limited water law matters allows a petitioner to circumvent *Revert v. Ray* and its progeny, by introducing

extrinsic evidence in contravention of those cases and NRS 533.450, which states that judicial review is “in the nature of an appeal.” Because questions of law are present, de novo review of the district court’s order is proper. *See, e.g., Gunderson v. D.R. Horton, Inc.*, 130 Nev. Adv. Op. 9, 319 P.3d 606, 616 (2014) (while a district court’s decision is generally reviewed for abuse of discretion, where “as here, the decision implicates a question of law, the appropriate standard of review is de novo.”); *Milton v. State Dep’t of Prisons*, 119 Nev. 163, 164, 68 P.3d 895, 895 (2003) (where the district court applied the wrong legal standard, a pure question of law is raised, subject to de novo review).

## VIII. ARGUMENT

### A. The District Court’s Failure to Apply the Law and Decide the Merits of the Petition for Judicial Review Amounts to Clear Error

A district court’s findings of fact will not be set aside unless those findings are clearly erroneous. *Nelson v. Peckham Plaza Partnerships*, 110 Nev. 23, 25, 866 P.2d 1138, 1139 (1994) (citing *Hermann Trust v. Varco-Pruden Buildings*, 106 Nev. 564, 566, 796 P.2d 590, 591–92 (1990)). Accordingly, if the district court’s findings are supported by substantial evidence, they will be upheld. *Id.* (citing *Pandelis Constr.*

*Co. v. Jones–Viking Assoc.*, 103 Nev. 129, 130, 734 P.2d 1236, 1237 (1987)). Here, the district court did not make the most critical finding of fact: whether or not the State Engineer’s decision is supported by substantial evidence. Without this finding, the district court’s decision is not supported by substantial evidence, and is clearly erroneous.

Indeed, even in cases involving the invocation of equitable relief to overturn a decision of the State Engineer, the first finding of each and every court has been a determination that the decision by the State Engineer, either forfeiture or cancellation, was correct and supported by substantial evidence. *Bailey v. State*, 95 Nev. 378, 381-2, 594 P.2d 734, 736 (1979); *State v. Morris DeLee Revocable Tr.*, 281 P.3d 1221 (Nev. 2009) (unpublished); *Am. Nat’l*, 88 Nev. 424, 426, 498 P.2d 1329, 1330). However, the district court did not address this fundamental question. The district court did not address the merits of the petition for judicial review and merely granted equitable relief without specifically stating its findings of fact. As such, the district court’s decision is clearly erroneous.

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**B. The District Court's Failure to Make Findings and Conclusions Supporting Equity Was an Abuse of Discretion**

Furthermore, the district court did not make any findings as to whether or not equitable relief should extend to NRS 533.395(3) under the facts before it. Although this Court has allowed equitable relief in forfeiture and cancellation cases where the water right has been lost, and only in those instances when the owner was putting water to beneficial use, this Court has not automatically extended equitable relief to overturn the imposition of a statutorily established priority date under NRS 533.395(3). *Bailey*, 95 Nev. 378, 594 P.2d 734; *Am. Nat'l*, 88 Nev. 424, 498 P.2d 1329; *Engelmann v. Westergard*, 98 Nev. 348, 647 P.2d 385 (Nev. 1982).

As the district court failed to address the underlying question of whether equitable relief should extend to NRS 533.395(3), it failed to address the State Engineer's opposition to Happy Creek's request that had nothing to do with its ability to use its water. Unlike the dicta in *Benson*, relied upon by Happy Creek, there was no finding or allegation that Happy Creek would not be able to *appropriate sufficient water*. *Benson v. State Eng'r*, 131 Nev. Adv. Op. 78, 358 P.3d 221, 226 (2015).

Rather, the basis for equitable relief was Happy Creek's speculative claim that its new 2016 priority date *could* be affected if, in the future, the State Engineer curtailed the basin.

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 upmost importance to Happy Creek and the Ranch's operations.

JA APP at 1182, ll. 19-21.

The district court completely failed to address the State Engineer's opposition and arguments against extending equitable relief in this case. Unlike *Bailey, Am. Nat'l*, and *Englemann*, Happy Creek still possesses and has access to its full water rights and the State Engineer's decision has not affected Happy Creek's present ability to use its water. The only thing the State Engineer did, which is nondiscretionary, was apply NRS 533.395(3) to the reinstatement of the eight water rights, for Happy Creek's failure to comply with the requirements under Nevada law. This Court has clearly warned water right users like Happy Creek that their water rights could be affected if they fail to comply with the law:

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

*Andersen Family Associates v. Hugh Ricci, P.E.*, 124 Nev. 182, 184, 179 P.3d 1201, 1202 (2008); *and see Bailey*, 95 Nev. at 380, 594 P.2d at 736 (the permittee was notified at the outset that her permit was conditioned upon compliance with the deadlines set out in the State Engineer's endorsement of her application).

However, the district court's decision and Happy Creek's entire argument for equitable relief was based upon future speculation—speculation that it may lose its water if a potential future curtailment action occurs. As owners of permitted water rights, Happy Creek's own failure to comply with state permit requirements are what led to the imposition of NRS 533.395(3)'s consequences, the same consequences that this Court warned permitted water right holders about in *Anderson*.

A court's decision to grant equitable relief is not unlimited and must be supported by the facts and law; that is, a judge may not impose conditions or grant relief which in his or her individual opinion would

work substantial justice between the parties without regard to precedents and established principles. 27A Am. Jur. 2d Equity § 2. The very fact that the Legislature has made the direction must be cast into the scales as against the factors which without that fact would or might be of sufficient weight to turn the balance in favor of allowing utilization of equity's resources. *Aircraft & Diesel Equip. Corp. v. Hirsch*, 331 U.S. 752, 67 S. Ct. 1493, 91 L. Ed. 1796 (1947). Thus, it has been declared that equitable relief is not available where an existing administrative procedure created by statute is an adequate remedy that assures full protection of plaintiffs' due-process rights and offers complete relief. *Mercy Hosp. of Pittsburgh v. Pennsylvania Human Relations Comm'n*, 451 A.2d 1357 (Pa. 1982).

The Nevada Legislature has required that when a cancelled water right is reinstated, the priority date must be changed to reflect the date of the petition. NRS 533.395(3). Happy Creek was advised when its permits were granted that there were certain requirements to be met by

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certain dates contained within the permits.<sup>1</sup> The Legislature has set in place the requirement for the State Engineer to replace the priority date with the date of the Petition for Review of the Cancellation. Happy Creek availed itself of the full measure of relief afforded to holders of cancelled water rights. Its permits were reinstated by the State Engineer with the new priority date. The fact that it does not agree with the relief that the statute provides, is no basis to request the district court cast aside the Legislature's directive and restore the original priority date. Naturally, every permittee whose water right is cancelled would prefer to retain the original priority date rather than have the priority date changed; however, that is what Legislature has

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<sup>1</sup> Happy Creek placed great reliance on the fact that it was beneficially using the water under the permits at the time of the cancellation, and that its permits that were cancelled were formerly certificated rights that had been changed. In *Desert Irrigation, Ltd. v. State of Nevada, State Eng'r*, 113 Nev. 1049, 994 P.2d 835 (1997), this court explained that “[e]ach time an individual undertakes an appropriation, the permittee must put the water to beneficial use or risk losing their inchoate usufructuary right. (citation omitted). Not until the prospective appropriator fulfills the strict conditions imposed by our statutory scheme will a certificate issue for the new use.” The State Engineer already considered Happy Creek's beneficial use toward perfecting the permits in his decision to reinstate the permits, and Happy Creek's beneficial use merely suggests that it was doing what the law requires. Beneficial use under its permits in this case is not a basis for equitable relief beyond the relief that the Legislature has already provided for from cancellation.

required. That the application of the statutory scheme to Happy Creek's permit is harsh is not alone a basis for equitable relief.

The district court failed to address the underlying petition for judicial review and failed to make findings of fact and conclusions of law extending equitable relief to NRS 533.395(3). This Court's findings that have allowed equitable relief, when warranted, do not stand for the proposition that the district court has the *carte blanche* authority to grant equitable relief in all water right matters. Nor does it negate the district court's mandate to make findings of fact and conclusions of law that support the extension of equitable relief.

**C. The District Court Erred by Permitting Happy Creek a Trial De Novo on its Request for Equitable Relief**

NRS 533.450(1) affords judicial review "in the nature of an appeal" to "[a]ny person feeling aggrieved by any order or decision of the State Engineer . . . affecting the person's interests." NRS 533.450 has been interpreted to mean that a petitioner does not have a right to a *de novo* review or to offer additional evidence at the district court. *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979). *See also Kent v. Smith*, 62 Nev. 30, 32, 140 P.2d 357, 358 (1943). As a result, the function of the district court is to review the evidence on which the

State Engineer based his decision to ascertain whether the evidence supports the decision, and if so, the court is bound to sustain the State Engineer's decision. *State Eng'r v. Curtis Park Manor Water Users Ass'n*, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985).

However, in limited cases, this Court, in *Bailey v. State*, *State Eng'r v. Am. Nat'l Ins. Co.*, and *Engelmann v. Westergard*, has affirmed that a district court may grant equitable relief by reinstating a water right even when the State Engineer has correctly cancelled or forfeited the water right pursuant to his statutory mandate. *Bailey v. State*, 95 Nev. 378, 594 P.2d 734 (1979); *Am. Nat'l Ins. Co.*, 88 Nev. 424, 498 P.2d 1329; *Engelmann v. Westergard*, 98 Nev. 348, 647 P.2d 385 (1982). In *Bailey*, this Court held that equitable relief could be granted where the rights holder substantially complied with water law but had no knowledge of the water rights cancellation until after expiration of the 30-day appeal period. *Bailey*, 95 Nev. at 383, 594 P.2d at 737. In *Am. Nat'l*, this Court found that failure to file proof of beneficial use when rights holder made substantial use of water did not preclude equitable relief from rights cancellation. *Am. Nat'l*, 88 Nev. at 425–26, 498 P.2d at 1330. And in *Engelmann*, this Court remanded the case to

the district court to determine whether appellant exercised diligence in protecting water rights. *Engelmann*, 98 Nev. at 354, 647 P.2d at 389. In *Preferred Equities Corp. v. State Eng’r*, this Court held that equitable relief is not always permitted in water law matters. 119 Nev. 384, 389, 75 P.3d 380, 383 (2003). “[O]ne who does not put it to a beneficial use should not be allowed to hold it hostage. Because [Preferred Equities] did not use its rights, we will not grant it equitable relief.” *Id.* Throughout these cases, it was the loss of the ability to use the water, through a permitted water right, that was subject to equitable relief. Here, Happy Creek’s water rights were reinstated by the State Engineer subject to NRS 533.395(3); accordingly, this case is distinguishable from prior equity cases because Happy Creek still has the full use of its rights under all eight of its permits.

Furthermore, throughout those cases, the evidence relied upon by this Court in granting equitable relief was based on the record in front of the State Engineer—not like this case where a new record was created by the Appellee through new evidence and witness testimony at the judicial review hearing. In *Engelmann*, the State Engineer’s record reflected that Engelmann did not have actual notice that his permits

were cancelled until some two years afterward. *Engelmann*, 98 Nev. at 353, 647 P.2d at 388. Likewise, in *Bailey*, the State Engineer's record showed that Bailey was not given notice of the cancellation, thus invoking the district court's ability to grant equitable relief under *Am. Nat'l. Bailey*, 95 Nev. at 383, 594 P.2d at 737. This Court also stated that "the *record* shows that the Baileys worked on their land continuously from the time the original permit was granted until it was cancelled in the fall of 1970." *Id.* at 385, 739. In those cases, the water right holder was not permitted a trial de novo to improperly supplement the record to support a claim to equitable relief. However, that is precisely what the district court allowed Happy Creek to do during the hearing on a petition for judicial review.

At the hearing, over the objection of the State Engineer, the district court granted Happy Creek's request to introduce evidence through its Supplemental Record on Appeal, which expanded the record beyond the record of the State Engineer. JA APP at 1058, 1060, 1075, 1095-1098, 1110, 1153. Further, the district court allowed two witnesses, Mr. Daniel Bernard May and Glen Thied, to testify during

Happy Creek's argument, again over the State Engineer's objection. JA APP at 1098-1116.

Happy Creek's petition for judicial review was brought pursuant to NRS 533.450, which expressly provides that a petition brought under that statute is "in the nature of an appeal." NRS 533.450(1). Thus, the district court's approval and consideration of this extrinsic evidence offered de novo by Happy Creek was improper. *See Revert*, 95 Nev. at 786, 603 P.2d at 264; *Kent*, 62 Nev. at 32, 140 P.2d at 358.

**D. If this Court Overturns *Revert v. Ray* and Holds that a Petitioner has the Right to a De Novo Hearing, Even for Equity Purposes, Any Right to Present New Evidence Must be Fairly Applied**

The State Engineer remains firmly opposed to the actions that occurred in the lower court; assuming, *arguendo*, that allowing new evidence during a petition for judicial review is permissible—procedures required for a fair hearing should apply.

Fairness during a hearing is not one-sided, and must apply to both the petitioner and the State Engineer. *Sampson v. State*, 121 Nev. 820, 828, 122 P.3d 1255, 1260 (2005). If this Court now overrules *Revert v. Ray* and determines that a party is entitled to put on new evidence at a hearing, the Court must further define what guidelines or rules apply.

The unfair surprise of allowing Mr. May, Mr. Thied, or any other witness, to testify should not be permitted. Although this Court has already stated that a district court may grant equitable relief, when warranted, this Court has been equally clear that equitable relief is not appropriate in all situations or at all times. *See e.g., Preferred Equities*, 119 Nev. at 389, 75 P.3d at 383.

The district court requested a trial/hearing statement from each party prior to oral argument, which is required and customary in the Second Judicial District Court where the Senior District Court Judge previously served. *See* WDCR 5. Although the venue of this case is the Sixth Judicial District Court, which does not have its own local rules, and the District Court Rules that do apply have not adopted this requirement, the State Engineer's office followed the format under WDCR 5, which requires the disclosure of all potential witnesses. JA APP at 941-970. However, Happy Creek did not follow any set format, and did not disclose any witnesses in its hearing statement, which was filed four days prior to the hearing. JA APP at 971-977. Even with an additional opportunity, Happy Creek failed to disclose the identity of any witness to the State Engineer, prior to the hearing.

How can the State Engineer protect the valuable public waters of this State from an inappropriate grant of equitable relief if a petitioner is allowed to introduce new evidence and present witnesses without disclosing them to the State Engineer beforehand? NRS 533.450 and this Court's previous holdings have been very clear that appeals of decisions of the State Engineer are in the nature of an appeal and that consideration or submissions of additional evidence is not permitted. Indeed, this Court clearly stated that "[w]ith respect to a limited review 'in the nature of an appeal,' neither the district court nor this court will substitute its judgement for that of the State Engineer: we will not pass upon the credibility of the witnesses nor reweigh the evidence, but limit ourselves to a determination of whether substantial evidence in the record supports the State Engineer's decision." *Revert*, 95 Nev. at 786, 603 P.2d at 264. The lower court allowing new evidence and testimony was plainly contrary to *Revert*. *Revert* is sound and should not be overturned, and new evidence offered under the guise of equity should not be allowed to circumvent the prohibition of offering additional evidence not in the record on appeal. If the Court overturns

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*Revert*, fair hearing procedures still apply and Happy Creek's failure to disclose its witnesses deprived the State Engineer of a fair hearing.

## **IX. CONCLUSION**

Although equitable relief can place the State Engineer in an awkward and unenviable position, that awkward and unenviable position should not negate the fact that the State Engineer is also entitled to a fair hearing. The district court erred by allowing Happy Creek to introduce new evidence, including an undisclosed witness, in support of its claims for equitable relief. Petitions for judicial review of the decision of the State Engineer under NRS 533.450, regardless of whether or not equitable relief applies, are in the nature of an appeal. Equitable relief should not be allowed to circumvent the prohibition of the introduction of additional evidence not in the record on appeal. This strict standard is necessary because of the unique nature of water rights. *See Ruddell v. Sixth Jud. Dist. Ct.*, 54 Nev. 363, 367, 17 P.2d 693, 694 (1933) (holding that water law cases are "special in their character").

Furthermore, the district court erred by failing to address the underlying petition for judicial review. The district court also failed to

make any findings extending equitable relief to overcome the imposition of a new priority date. Happy Creek's request was not based upon its inability to use its water, as discussed as a possible basis to extend equitable relief by this Court in *Benson*. Rather, Happy Creek's request was based solely upon speculation. Accordingly, the State Engineer respectfully requests this Court vacate the district court's September 25, 2017, order and remand this matter to the district court for further proceedings consistent with this Court's ruling.

RESPECTFULLY SUBMITTED this 6th day of March, 2018.

ADAM PAUL LAXALT  
Attorney General

By: /s/ Justina A. Caviglia  
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## **CERTIFICATE OF COMPLIANCE**

1. I hereby certify that this opening brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this opening brief has been prepared in a proportionally spaced typeface using Microsoft Word 10 in 14 pitch Century Schoolbook.

2. I further certify that this opening brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the opening brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points or more, and contains 4,610 words.

3. Finally, I hereby certify that I have read this opening brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this opening brief complies with all applicable Nevada Rules of Appellate Procedure, in particular, NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I

may be subject to sanctions in the event that the accompanying opening brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

RESPECTFULLY SUBMITTED this 6th day of March, 2018.

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## CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 6th day of March, 2018, I served a copy of the foregoing APPELLANT'S OPENING BRIEF, by electronic service to:

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