

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 REPLY BRIEF**

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## **I. INTRODUCTION**

Contrary to the position being advanced by Respondent, Happy Creek, Inc. (hereafter “Happy Creek”), the district court’s decision is erroneous and renders a clear statutory mandate utterly meaningless. The district court erred by granting Happy Creek equitable relief in this case for three (3) distinct reasons.

First, the district court erred by granting Happy Creek equitable relief without first determining whether or not the decision of Appellant, Jason King, P.E., Nevada State Engineer, Division of Water Resources, Department of Conservation and Natural Resources (hereafter “State Engineer”), is correct and supported by substantial evidence. Binding precedent in Nevada requires that any grant of equitable relief be predicated on first addressing the merits of the petition for judicial review, followed by a determination of whether equitable relief is appropriate in the proceeding. The district court’s hasty decision to jump to the assumption that equitable relief is appropriate in this case, without reaching the threshold determination of whether or not the State Engineer’s decision was proper, is clearly erroneous. This Court should reverse the district court’s decision and

find that the State Engineer's adherence to NRS 533.395(3) by reinstating Happy Creek's permit with a later priority date is supported not only by substantial evidence, but, also, Nevada law.

Second, the district court erred by granting equity in contravention of a clear statutory mandate that a cancelled permit's original priority date be vacated, and if reinstated, reinstated with the priority date of the petition for reinstatement. The Court has previously upheld a district court's and its own grant of equitable relief where a permit to appropriate water was cancelled. *See Bailey v. State*, 95 Nev. 378, 594 P.2d 734 (1979); *see also State Eng'r v. Am. Nat'l Ins. Co.*, 88 Nev. 424, 498 P.2d 1329 (1972). However, NRS 533.395(3), which grants the State Engineer discretion to reinstate a cancelled water right permit with certain conditions, was enacted into law *after* the *Bailey* and *American National* cases, and was clearly in response to the exercise of equitable relief by the courts. The language contained within NRS 533.395(3) is unambiguous: if 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.

The district court's decision amounts to legislating from the bench, effectively making NRS 533.395(3), and the legislatively established consequence, utterly meaningless. The plain language of the statute should be upheld and the district court's failure to honor the clear legislative directive is an abuse of the district court's discretion, which supports this Court's reversal of that decision.

Lastly, the district court erred by taking extrinsic evidence, consisting of testimony and other evidence outside of the State Engineer's record, at the hearing on Happy Creek's petition for judicial review. The State Engineer's record, relied upon in making his decision to rescind the cancellation of Happy Creek's eight water right permits, is the extent of the record upon which the district court should have relied upon in rendering its decision. Pursuant to the seminal case of *Revert v. Ray*, petitions for judicial review brought pursuant to NRS 533.450 are brought "in the nature of an appeal." 95 Nev. 782, 786, 603 P.2d 262, 264 (1979). By taking into account extra-record testimony and evidence at the hearing on Happy Creek's petition for judicial review, the district court abused its discretion and inappropriately substituted its judgment for that of the State Engineer.

In doing so, the district court, in contravention to the binding authority of *Revert*, passed upon the credibility of witnesses and reweighed the evidence. Therefore, the district court's decision must be reversed.

## **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.

## **III. STATEMENT OF FACTS**

The State Engineer incorporates Section V of his Opening Brief, "STATEMENT OF THE FACTS," by reference as fully set forth herein. State Engineer's Opening Brief at 3-5.

## **IV. STANDARD OF REVIEW**

Happy Creek incorrectly states that this Court should review the district court's decision only for an abuse of discretion. *See* Happy Creek's Answering Brief at 23-24. The heart of the district court's decision on appeal implicates various questions of law, including: (1) whether a district court, reviewing a petition for judicial review pursuant to NRS 533.450, must make a preliminary determination of



whether or not the State Engineer’s decision is supported by substantial evidence in the record; (2) whether a district court has the authority to extend equitable relief in direct contravention of a statutorily established priority date under NRS 533.395(3), despite the fact that there has been no loss of water rights; and (3) whether a district court during a hearing on such a petition for judicial review may consider testimony and evidence outside of the State Engineer’s record despite the legal mandate from NRS 533.450(1) and *Revert v. Ray* that such petitions be brought “in the nature of an appeal.”

As these issues clearly implicate pure questions of law, 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).

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## **V. LEGAL ARGUMENT**

### **A. The District Court Committed Clear Error by Failing to Decide the Merits of the Petition for Judicial Review**

In their Answering Brief, Happy Creek admits that the first step that a district court should take in addressing a petition for judicial review from a decision of the State Engineer is to “consider whether the State Engineer took correct action required by statute.” Happy Creek’s Answering Brief at 42. The district court in this case never made this consideration, and instead summarily granted Happy Creek equitable relief by reinstating their permits at their original priority date in contravention of statute.

The district court found that, 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 of the State Engineer.’” Joint Appendix (“JT APP”) at 1182. However, this was not based on “proper findings” as Happy Creek alleges. Happy Creek’s Answering Brief at 31. Rather, the district court instead based this finding on the fact that “the State Engineer determined that there was sufficient evidence to rescind the

cancellation and reinstate the permits.” JT APP at 1182. While this is a true summation of the State Engineer’s decision, it was the duty of the district court to determine whether or not the State Engineer’s decision was correct and supported by substantial evidence prior to awarding equitable relief. *Bailey*, 95 Nev. 378, 381-2, 594 P.2d 734, 736 (holding that the State Engineer “fully complied” with statutory requirements before granting equitable relief); *Am. Nat’l*, 88 Nev. 424, 426, 498 P.2d 1329, 1330 (this Court granted equitable relief *after* determining that the State Engineer correctly followed a statutory mandate in cancelling a permit). The district court did not make any such finding, failing to address the merits of the petition for judicial review in any meaningful way. It was insufficient for the district court to simply restate the statutory language without fully addressing whether substantial evidence supported the State Engineer’s decision to cancel Happy Creek’s permits.

By failing to make this threshold determination, the district court failed to support its own decision by substantial evidence. Therefore, the district court’s decision is clearly erroneous and should be reversed. *Nelson v. Peckham Plaza P’ships*, 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)).

**B. The District Court Erred by Granting Equitable Relief to Overturn a Statutorily Established Priority Date Without Addressing the Underlying Petition for Judicial Review**

This Court has already addressed the issue presented here. In *Las Vegas Valley Water Dist. v. Curtis Park Manner Water Users Ass’n*, when addressing cancellation of a water right permit, the Court found that the State Engineer was obligated to cancel permits pursuant to statute. 98 Nev. 275, 277–78, 646 P.2d 549, 550 (1982). In addressing the application of equitable relief and a prior suggestion for legislative changes affording the State Engineer discretion to cancel a permit, the Court noted that “[w]ith such a change court reversal would only be appropriate in the event of an abuse of discretion.” *Id.* at 278, 646 P.2d at 550, *citing Am. Nat’l*, 88 Nev. at 427, 498 P.2d at 1331. The district court did not make a finding that the State Engineer’s reinstatement of Happy Creek’s water right permits, with the statutorily mandated 2016 priority date, was an abuse of discretion.

Rather, the district court completely failed to address the merits of Happy Creek’s underlying petition for judicial review or the State

Engineer's decision. The district court further failed to make *any* factual findings or legal conclusions supporting its decision to disregard the plain statutory language contained in NRS 533.395(3) to justify its award of equitable relief. In doing so, the district court failed to address the State Engineer's opposition and legal arguments demonstrating that extending equitable relief in this case is not legally supported by either the law or facts.

The district court's decision in this case is clearly distinguishable from previous decisions of this Court allowing equitable relief in response to a cancellation of a water right permit. As the State Engineer stated in his Opening Brief, all other instances where this Court has allowed equitable relief in water rights cases have been in forfeiture and cancellation cases where the water right has been lost despite the owner putting water to beneficial use. *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). Further, those cancellations pre-date the statutory amendments adding NRS 533.395(3), which resolved the concerns and considerations  
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supporting this Court's decisions to extend equitable relief in those cases.

Here, the district court made no finding that Happy Creek would not be able to use its water, and in fact such a finding is not possible. Unlike *Bailey*, *American National* and *Englemann*, Happy Creek still possesses and has access to its full water rights; the State Engineer's decision has not affected Happy Creek's present ability to use its water. Instead, the State Engineer merely applied NRS 533.395(3), correctly, to the reinstatement of Happy Creek's eight permits, which changed the priority date of these permits to reflect the date of the petition. This statute was amended after *Bailey* and was intended to have consequence. This Court has previously warned water rights holders that a failure to comply with the law can negatively affect those rights. *See Andersen Family Associates v. Hugh Ricci, P.E.*, 124 Nev. 182, 193, 179 P.3d 1201, 1208 (2008); *see also 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).

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Just because the district court believed that under NRS 533.395(3) “the punishment did not fit the crime,” does not give the district court authority to completely disregard a statutory mandate. *See* JT APP 1183. This is especially true when the severity of the “punishment” is completely speculative, as Happy Creek readily admits. Happy Creek’s Answering Brief at 35. Happy Creek even goes as far to say, without authority, that “the priority of a right is the most important stick in the bundle of rights, as it determined if water will actually be available for the water right holder to use.” *Id.* at 21-22.

The problem is that neither Happy Creek nor the district court ever made factual findings or conclusions finding actual harm to Happy Creek based on the new priority date. Rather, they based the need for equitable relief entirely on pure conjecture—the speculative threat of curtailment. *See* Happy Creek’s Answering Brief at 23-24; *see also* JT APP 1182. This is despite the fact that, pursuant to the records of the State Engineer, even if Happy Creek were to maintain the original priority date for these permits, six of the eight permits would *still* be affected by potential future curtailment, were that to occur. JT APP 1023.

Yet, the fact of the matter is, there is no current curtailment order in place in Pine Forest Valley that affects Happy Creek's use of water under the eight permits. Even at the junior priority, Happy Creek is presently able to access its full water rights. This Court has never authorized district courts to provide equitable relief in water law cases where, as here with Happy Creek, the petitioner retains and has access to its full water rights. Further, this Court has never authorized district courts to provide equitable relief in water law cases where there exists a clear statutory remedy, like that provided by NRS 533.395(2) and NRS 533.395(3). In fact, in a case which Happy Creek cites extensively, this Court has previously found that equitable relief is improper where a statutory remedy exists. *Benson v. State Eng'r*, 131 Nev. Adv. Op. 78, 358 P.3d 221, 228 n.7 (2015).

Happy Creek was on notice that it needed to comply with certain requirements by certain dates when its water right permits were issued. This Court provided Happy Creek with further notice of the risks associated with failing to comply with said requirements through the clear warnings issued in *Andersen* and *Bailey*. It was inappropriate for the district court to completely evade a statutory mandate by



providing Happy Creek with equitable relief based on speculative future harm and a desire to remove a legislatively mandated punishment, which in the district court's subjective opinion was disproportionate to "the crime." As mentioned in the Opening Brief, a court's authority to grant equitable relief is not unlimited and it is not appropriate for a court to grant relief which in his or her individual opinion would work substantial justice between the parties without regard to precedents and established principles. State Engineer's Opening Brief at 12-13 (*citing* 27A Am. Jur. 2d *Equity* § 2).

The district court's decision completely disregards a statutory mandate, based almost entirely on speculative harm. Happy Creek was not entitled to equitable relief simply because it believed the remedy provided by NRS 533.395 is too harsh. The Legislature intended for this statute to have meaning, including the provision at issue here: NRS 533.395(3). The district court exceeded its authority by granting equitable relief in this case, without making findings of fact and conclusions of law to support such a decision. Therefore, this Court should reverse the district court's decision.

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**C. The District Court Erred by Taking Testimony and Evidence During Oral Argument, Regardless of Whether or Not it Did So For Purposes of Equity**

Not only does the district court's decision, in effect, render NRS 533.395(3) meaningless, but it also completely disregards the language of NRS 533.450 and the binding precedent of *Revert v. Ray*. This is erroneous. Happy Creek engages in pages of mental gymnastics to try and persuade this Court otherwise; however, it is illogical to come to the specific conclusion advanced by Happy Creek. See Happy Creek's Answering Brief at 36-48.

It is well established in Nevada that NRS 533.450(1) affords any person feeling aggrieved by any order or decision of the State Engineer with judicial review "insofar as may be in the nature of an appeal." This Court has interpreted this language as meaning that parties aggrieved by a decision of the State Engineer are "not entitled to a *de novo* hearing in the district court" and that neither "the district court nor this court will substitute its judgment for that of the State Engineer." *Revert*, 95 Nev. 782, 786, 603 P.2d 262, 264. The Court further clarified its role, stating it "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." *Id.*

Happy Creek argues that "equitable evidence" is permitted pursuant to the language in NRS 533.450(2) requiring a full opportunity to be heard. Happy Creek's Answering Brief at 36. However, Happy Creek fails to provide *any* authority for this assertion, and in fact, no such authority exists. Since *Revert*, it has been the position of this Court that the role of the court is to determine whether substantial evidence in the record before the State Engineer supported his decision. Where the court finds that substantial evidence supports the State Engineer's decision, the court is bound to sustain said decision. *State Eng'r v. Curtis Park Manor Water Users Ass'n*, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985).

This Court granted equitable relief in *Bailey*, *American National* and *Engelmann*, and denied equitable relief in *Preferred Equities Corp. v. State Eng'r*, 119 Nev. 384, 389, 75 P.3d 380, 383 (2003). However, notably, these cases were all based on the loss of the ability to use the water through a permitted water right, and equitable relief was granted, or denied, based on the record in front of the State Engineer.

*See* State Engineer’s Opening Brief at 16-19. This is very different than the decision from the district court in this case, which granted equitable relief based in part on extra-record evidence presented by Happy Creek in the form of a Supplemental Record on Appeal (“SROA”) and the testimony of two witnesses. *See Id.* This is particularly problematic where here, Happy Creek was afforded the opportunity to place all the argument and evidence it believed to be relevant to the reinstatement of its cancelled water right permits before the State Engineer through its written petition at the hearing on October 12, 2016. JT APP at 45, 48-55, 60, 68, 70–74, 77, 84, 86–90, 93, 100, 102–06, 109, 116, 118–22, 125, 132, 134–38, 141, 148, 150–54, 157, 164, 166–70, 173. At that hearing, Happy Creek was afforded a full opportunity to present all relevant documents and evidence. *Id.*

There has been no decision by this Court, nor act of the Legislature, which permits a district court to take into account new evidence when conducting judicial review of the State Engineer’s decisions. Such new evidence is clearly contrary to the mandate from NRS 533.450(1) and *Revert*, which require these proceedings to be in  
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the nature of an appeal and that the State Engineer's decision is to be based upon the record before him and utilized in making his decision.

Happy Creek provides no authority of its own that would permit the district court to consider new evidence during a judicial review proceeding, whether it be for equity or any other purpose. Happy Creek cites to *Curtis Park*, based on dicta therein mentioning that the district court took testimony in that case before granting equitable relief. Happy Creek's Answering Brief at 41. However, Happy Creek fails to point out that in *Curtis Park*, the district court's decision was reversed and remanded for a plethora of different reasons including that "the district court was without authority to grant equitable relief, since an adequate remedy exists at law." *Curtis Park*, 98 Nev. at 278, 646 P.2d at 551. The Court in *Curtis Park*, citing *Revert*, further pointed out that the district court incorrectly engaged in a de novo hearing on the appropriateness of equitable relief, rather than the limited judicial review for abuse of discretion contemplated by NRS 533.450. *Id.* Just as an adequate remedy existed in *Curtis Park*, one exists here in the form of NRS 533.395(2).

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Similarly, Happy Creek attempts to support its introduction of witness testimony by citing to language in *Bailey* stating that the State Engineer “testified.” Happy Creek’s Answering Brief at 41 (*citing Bailey*, 95 Nev. 378, 594 P.3d at 739). However, it is less than clear from the Court’s opinion in *Bailey* in what context the State Engineer “testified.” That being said, it is indisputably a different situation for the State Engineer to testify about what he saw in the record (given that substantial evidence in the State Engineer’s record is the threshold determination for challenges to his decisions) than for two (2) previously undisclosed witnesses to testify, whose testimony was not factored into the State Engineer’s decision.

Happy Creek further argues that the State Engineer’s record justified equitable relief on its own, that their SROA was permitted because it helped “supplement” the record and was “comprised largely of documents that are from the State Engineer’s files but were not included by the State Engineer in the ROA,” that the district court’s consideration of new evidence was not reversible error, and that the testimony offered during oral argument was not unfair to the State Engineer. Happy Creek’s Answering Brief at 43–48. However, all of

these arguments are disputed and disproven by the State Engineer, both in his Opening Brief and in the instant Reply Brief. It is illogical to argue that the equitable relief was appropriate based on the State Engineer's record alone given that the district court *never reached the threshold determination of whether the State Engineer's decision is based on substantial evidence*. Further, there is simply no justification for the assertion that this "supplemental" evidence is necessary when all such evidence could have, and should have if deemed significant to Happy Creek, been presented in support of its petition seeking reinstatement of the cancelled permits. As previously argued, these facts alone should lead this Court to reversing the district court's decision.

These other arguments are all made in clear contravention of NRS 533.450 and *Revert*. Regardless of what form the extra-record evidence took or for what purpose it was presented, it was inappropriate for the Court to consider said evidence. Doing so allows the district court to substitute its judgment for that of the State Engineer, which is specifically prohibited by *Revert*. As previously argued, *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. State Engineer's Opening Brief at 21. Even if this Court were to overturn *Revert*, the district court deprived the State Engineer of a fair hearing by allowing Happy Creek to present witnesses without first disclosing the witnesses prior to the hearing.

## **VI. CONCLUSION**

The district court's decision to allow Happy Creek to introduce new evidence, including undisclosed witnesses, in support of its claims for equitable relief is clearly erroneous and an abuse of discretion. The district court is bound by the limited scope of judicial review set forth under NRS 533.450, which strictly limits judicial review of the State Engineer's decision to being in the "nature of an appeal." The failure of the district court to make factual and legal findings regarding whether the State Engineer's decision was supported by substantial evidence and to the application of equitable relief is not supported and should be reversed. Clearly established law in Nevada demonstrates that equitable relief should not be allowed to circumvent the clear statutory mandates regarding limitations on the reinstatement of a cancelled



permit or the prohibition against introducing extrinsic evidence not in the record on appeal. Accordingly, the State Engineer respectfully requests that the 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 21st day of May, 2018.

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Attorney General

By: /s/ James N. Bolotin  
JAMES N. BOLOTIN  
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## **CERTIFICATE OF COMPLIANCE**

1. I hereby certify that this reply 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 reply brief has been prepared in a proportionally spaced typeface using Microsoft Word 10 in 14 pitch Century Schoolbook.

2. I further certify that this reply brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the reply brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points or more, and contains 4,026 words.

3. Finally, I hereby certify that I have read this appellate reply 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 reply brief complies with all applicable Nevada Rules of Appellate Procedure, in particular, NRAP 28(e)(1), which requires every assertion in the reply 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 reply brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

RESPECTFULLY SUBMITTED this 21st day of May, 2018.

ADAM PAUL LAXALT  
Attorney General

By: /s/ James N. Bolotin  
JAMES N. BOLOTIN  
Deputy Attorney General

### **CERTIFICATE OF SERVICE**

I certify that I am an employee of the Office of the Attorney General and that on this 21st day of May, 2018, I served a copy of the foregoing APPELLANT'S REPLY BRIEF, by electronic filing to:

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