

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

ADAM SULLIVAN, P.E., NEVADA STATE
ENGINEER, DIVISION OF WATER
RESOURCES, DEPARTMENT OF
CONSERVATION AND NATURAL
RESOURCES,

Appellant,

vs.

LINCOLN COUNTY WATER DISTRICT;
VIDLER WATER COMPANY, INC.;
COYOTE SPRINGS INVESTMENT, LLC;
NEVADA COGENERATION ASSOCIATES
NOS. 1 AND 2; APEX HOLDING
COMPANY, LLC; DRY LAKE WATER,
LLC; GEORGIA-PACIFIC GYPSUM, LLC;
REPUBLIC ENVIRONMENTAL
TECHNOLOGIES INC.; SIERRA PACIFIC
POWER COMPANY d/b/a NV ENERGY;
NEVADA POWER COMPANY d/b/a NV
ENERGY; THE CHURCH OF JESUS
CHRIST OF LATTER-DAY SAINTS;
MOAPA VALLEY WATER DISTRICT;
WESTERN ELITE ENVIRONMENTAL,
INC.; BEDROC LIMITED, LLC; CITY OF
NORTH LAS VEGAS; AND LAS VEGAS
VALLEY WATER DISTRICT,

Respondents. /

SOUTHERN NEVADA WATER
AUTHORITY,

Appellant,

SUPREME COURT NO. 84739
District Court Case No. A816761
(Consolidated with Supreme
Court Cases 84741, 84742 and
84809)

SUPREME COURT NO. 84741
(Consolidated with Supreme
Court Cases 84739, 84742 and
84809)

vs.

LINCOLN COUNTY WATER DISTRICT;
VIDLER WATER COMPANY, INC.;
COYOTE SPRINGS INVESTMENT, LLC;
NEVADA COGENERATION ASSOCIATES
NOS. 1 AND 2; APEX HOLDING
COMPANY, LLC; DRY LAKE WATER,
LLC; GEORGIA-PACIFIC GYPSUM, LLC;
REPUBLIC ENVIRONMENTAL
TECHNOLOGIES INC.; SIERRA PACIFIC
POWER COMPANY d/b/a NV ENERGY;
NEVADA POWER COMPANY d/b/a NV
ENERGY; THE CHURCH OF JESUS
CHRIST OF LATTER-DAY SAINTS;
MOAPA VALLEY WATER DISTRICT;
WESTERN ELITE ENVIRONMENTAL,
INC.; BEDROC LIMITED, LLC; CITY OF
NORTH LAS VEGAS; AND LAS VEGAS
VALLEY WATER DISTRICT,

Respondents. /

CENTER FOR BIOLOGICAL DIVERSITY,

Appellant,

vs.

LINCOLN COUNTY WATER DISTRICT;
VIDLER WATER COMPANY, INC.;
COYOTE SPRINGS INVESTMENT, LLC;
NEVADA COGENERATION ASSOCIATES
NOS. 1 AND 2; APEX HOLDING
COMPANY, LLC; DRY LAKE WATER,
LLC; GEORGIA-PACIFIC GYPSUM, LLC;
REPUBLIC ENVIRONMENTAL
TECHNOLOGIES INC.; SIERRA PACIFIC
POWER COMPANY d/b/a NV ENERGY;
NEVADA POWER COMPANY d/b/a NV

SUPREME COURT NO. 84742
(Consolidated with Supreme
Court Cases 84739, 84741 and
84809)

ENERGY; THE CHURCH OF JESUS
CHRIST OF LATTER-DAY SAINTS;
MOAPA VALLEY WATER DISTRICT;
WESTERN ELITE ENVIRONMENTAL,
INC.; BEDROC LIMITED, LLC; CITY OF
NORTH LAS VEGAS; AND LAS VEGAS
VALLEY WATER DISTRICT,

Respondents. /

MUDDY VALLEY IRRIGATION
COMPANY,

Appellant,

vs.

LINCOLN COUNTY WATER DISTRICT;
VIDLER WATER COMPANY, INC.;
COYOTE SPRINGS INVESTMENT, LLC;
NEVADA COGENERATION ASSOCIATES
NOS. 1 AND 2; APEX HOLDING
COMPANY, LLC; DRY LAKE WATER,
LLC; GEORGIA-PACIFIC GYPSUM, LLC;
REPUBLIC ENVIRONMENTAL
TECHNOLOGIES INC.; SIERRA PACIFIC
POWER COMPANY d/b/a NV ENERGY;
NEVADA POWER COMPANY d/b/a NV
ENERGY; THE CHURCH OF JESUS
CHRIST OF LATTER-DAY SAINTS;
MOAPA VALLEY WATER DISTRICT;
WESTERN ELITE ENVIRONMENTAL,
INC.; BEDROC LIMITED, LLC; CITY OF
NORTH LAS VEGAS; AND LAS VEGAS
VALLEY WATER DISTRICT,

Respondents. /

SUPREME COURT NO. 84809
(Consolidated with Supreme
Court Cases 84739, 84741 and
84742)

**RESPONDENTS' JOINT MOTION TO STRIKE APPELLANTS' RULE
28(f) PAMPHLET AND REPLY BRIEF OR ALTERNATIVELY, MOTION
FOR LEAVE TO FILE SUR-REPLY**

Respondents Coyote Springs Investments, LLC; Lincoln County Water District; Vidler Water Company, Inc; Nevada Cogeneration Associates Nos. 1 and 2; Apex Holding Company, LLC; Dry Lake Water, LLC; Georgia-Pacific Gypsum, LLC; and Republic Environmental Technologies, Inc., by and through their respective counsel of record, respectfully move this Honorable Court for its Order striking the Appellants Rule 28(f) Pamphlet (the “Pamphlet”) and striking pages 13-16 of the Appellants’ Joint Reply Brief (the “Reply”) which cite to the Pamphlet. Alternatively, the Respondents request leave to file a sur-reply that addresses the arguments raised for the first time in the Reply and Pamphlet.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Appellants’ 147-page “Rule 28(f) pamphlet” that attaches, quotes, and describes 24 State Engineer orders and rulings never cited or referenced in this appeal or in the District Court is procedural ambush. The Appellants’ attempt to introduce new arguments and documents for the first time in a reply brief must be rejected by the Court.

If the orders and rulings were relevant to this case or necessary to consider in deciding the validity of Order 1309, the Appellants would have presented them to

the District Court and to this Court with their Opening Brief. The Appellants' failure to do so demonstrates that the 24 orders and rulings are not the type of material appropriate for submittal under NRAP 28(f). Notably, the Appellants opposed the Respondents' request for this Court to take judicial notice of *one* State Engineer order—now Appellants provide this Court with *twenty-four* State Engineer orders and rulings without seeking permission.

The Appellants' Pamphlet is an improper effort to supplement the Joint Appendix with 147 pages of material outside the record on appeal. Even worse, the Appellants have presented this material for the first time in their Reply to preclude the Respondents from addressing it. The Respondents must have the opportunity to do so given that the Appellants' arguments and Pamphlet misrepresent the past practice of the State Engineer and the consequences of Order 1309.

Accordingly, the Respondents respectfully request that this Court strike the Pamphlet and pages 13-16 of the Reply brief which cite extensively to the Pamphlet. Alternatively, the Respondents respectfully request that this Court grant them leave to file a sur-reply that addresses the Appellants' arguments raised for the first time in the Reply concerning the 24 orders and rulings.

II. THE PAMPHLET AND REPLY VIOLATE NRAP 28; THEREFORE, BOTH SHOULD BE STRICKEN.

First, pursuant to NRAP 28(c), arguments raised for the first time in a reply brief are improper and deemed waived. *Khoury v. Seastrand*, 132 Nev. 520, 530,

377 P.3d 81, 88 (2016) (NRAP 28(c)). For the first time in their Reply, the Appellants cite to 24 State Engineer orders and rulings. Not only were these orders and rulings not referenced or discussed in the Appellants' Opening Brief ("AOB"), but they were also not presented to the District Court. The Appellants' failure to address these orders and rulings in the AOB or District Court has unfairly precluded the Respondents from addressing them. Accordingly, this Court should refuse to consider these new arguments. *See State ex rel. Masto v. Montero*, 124 Nev. 573, 577 n.9, 188 P.3d 47, 49 n.9 (2008) (refusing to address statutes cited for the first time in a reply brief); *Elvik v. State*, 114 Nev. 883, 888, 965 P.2d 281, 284 (1998) (explaining that arguments raised for the first time in a reply brief do not afford the respondent with the opportunity to address the contention with specificity).

Second, pursuant to NRAP 28(e)(1), "every assertion in briefs regarding matters in the record shall be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found." None of the orders and rulings in the 147-page Pamphlet are included in the Joint Appendix. Moreover, none of the orders and rulings were in the record before the District Court. The Appellants' citation to 24 orders and rulings that are outside the record on appeal violates Rule 28(e)(1). Thus, pages 13-16 of the Reply should be stricken. *See* NRAP 28(j) (providing that a brief that does not comply with the NRAP 28 may be stricken).

Third, while the Appellants characterize the Pamphlet as one submitted under NRAP 28(f), the orders and rulings in the Pamphlet are clearly not the type of documents that can be submitted to the Court under that Rule. Rather, NRAP 28(f) allows a party to reproduce the text of statutes, rules, or regulations where the interpretation or analysis of those statutes, rules, or regulations will decide the issue in the appeal. *See* NRAP 28(f) (“If the court’s determination of the issues presented requires the study of statutes, rules, regulations, etc., the relevant parts shall be reproduced in the brief or in an addendum at the end, or they may be supplied to the court in pamphlet form.”).

The issue of whether the State Engineer has statutory authority to combine multiple basins into one as he attempted to do in Order 1309 does not require this Court to study the 147-page Pamphlet. If it did, those orders and rulings would have been part of the record in the District Court, included in the Joint Appendix, and discussed in the AOB.

NRAP 28(f) does not allow an appellant to supplement the record on appeal with disputed (albeit irrelevant) documents that the respondent has never had the opportunity to address or analyze. Indeed, the Respondents completely disagree with the Appellants’ characterization of the orders and rulings in the Pamphlet. The purpose of NRAP 28(f) is to provide the Court a conveniently accessible copy of the statutes at issue in the appeal. The Rule does not allow an appellant to introduce 147

pages of exhibits to a reply brief.

Further, Appellants have opposed the Respondents' request for this Court to take judicial notice of the State Engineer's Order 1329 because "Order 1329 post-dates Order 1309 and involves an entirely different water resource—the Humboldt River." *See* Appellants' Opposition to Respondents' Joint Request for Judicial Notice, 8. Now, the Appellants attach 24 orders and rulings involving entirely different water resources, one of which "post-dates Order 1309" without even seeking permission from the Court to do so. *See* Pamphlet, 3. The hypocrisy is self-evident.

The Appellants' attempt to present matters outside the record on appeal cannot be condoned by this Court. *Ferguson v. LVMPD*, 131 Nev. 939, 949 n.4, 364 P.3d 592, 598 n.4 (2015) ("Matters outside the record on appeal may not be considered by an appellate court.") (internal quotation marks omitted). Accordingly, the Respondents respectfully request that this Court strike the Pamphlet and pages 13-16 of the Reply pursuant to NRAP 28(j). Given the blatant violations of NRAP 28, the Respondents respectfully request that this Court assess the Respondents' attorney fees associated with having to file this Motion. *See* NRAP 28(j).

III. ALTERNATIVELY, THE RESPONDENTS SEEK LEAVE TO FILE A SUR-REPLY TO ADDRESS THE PAMPHLET AND NEW ARGUMENTS IN THE REPLY

In the event the Court considers the Pamphlet and new arguments raised in

the Reply, the Respondents respectfully request that this Court grant the Respondents leave to file a sur-reply. The Appellants mischaracterize the orders and rulings in the Pamphlet. None of the orders and rulings combine multiple basins into a single hydrographic basin as Order 1309 does. The Respondents must be able to respond to the Appellants' new contentions.

As explained in the Respondents' Answering Brief ("Answering Brief"), the Appellants consistently use misleading terms like "joint administration" and "conjunctive management" rather than admitting that Order 1309 combined multiple hydrographic basins into one. Answering Brief, 18. The Appellants continue this semantic legerdemain in the Reply by contending that the "Respondents are wrong when they repeatedly claim that Order 1309 represents the first time in Nevada history that the State Engineer jointly administered multiple groundwater basins." Reply, 12. Not only does the Appellants' argument mischaracterize the Respondents' contention, but it is also based on the misleading argument that all the orders and rulings in the Pamphlet have the same effect as Order 1309. Such a contention is misleading and profoundly inaccurate.

The Appellants' new arguments in the Reply and Pamphlet are alarming given that the State Engineer's counsel admitted during oral argument that Order 1309 is the **first time** that the State Engineer has ever combined multiple basins into one. Indeed, several of the Respondents argued in the District Court that Order 1309 was

the first time the State Engineer had combined multiple basins into one consolidated basin. *See, e.g.*, 47 JA 20339, 20345 (arguing that “Order 1309 is contrary to Nevada law because the [State Engineer], for the first time in Nevada history, combined seven established hydrographic basins into one for “joint administration,” even though the Nevada statutes and historical practice require managing basins individually and separately.”); 47 JA 19322, 19332 (“The LWRFS is the first such multi-basin area designated by the State Engineer in Nevada.”)

The District Court specifically asked the State Engineer’s counsel, “if you’re talking about putting multiple already existing of the 230 some odd basins together, [Order 1309] is the first time that he’s done that for joint management, and this is the first time that there’s also the consideration of conjunctive management for managing a surface right[] and the groundwater rights?” 49 JA 22567, 22596. The State Engineer’s counsel responded, “Correct. The State Engineer has considered on an individual basis groundwater pumping’s effect on surface water sources.” *Id.* The State Engineer’s counsel also confirmed, “And the State Engineer doesn’t disagree that historically speaking it’s a basin by basin process, and I’m going to get into that.” *Id.* at 22573.

The Appellants now disavow this fact and represent to this Court that the State Engineer has taken the same action that he did in Order 1309 as he did in the 24 orders and rulings in the Pamphlet. The Appellants know that this representation is

misleading.

It is fundamentally unfair and inequitable that the Appellants present new arguments and materials for the first time in the Reply when they know how misleading they are. Accordingly, the Respondents respectfully request leave to file a sur-reply to address the new arguments and Pamphlet.

CONCLUSION

The Appellants' Pamphlet and arguments raised for the first time in the Reply must be stricken as they violate NRAP 28. In the event this Court chooses to consider the new arguments and Pamphlet, the Respondents respectfully request leave to file a sur-reply.

DATED this 23rd day of February, 2023.

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CERTIFICATE OF SERVICE

I certify that on the 23rd day of February 2023, I served a copy of **RESPONDENTS' JOINT MOTION TO STRIKE APPELLANTS' RULE 28(f) PAMPHLET AND REPLY BRIEF OR ALTERNATIVELY, MOTION FOR LEAVE TO FILE SUR-REPLY** upon all counsel of record:

 BY MAIL: I placed a true copy thereof enclosed in a sealed envelope addressed as follows:

 BY FACSIMILE: I transmitted a copy of the foregoing document this date via telecopier to the facsimile number shown below:

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DATED: This 23rd day of February, 2023.

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