

IN THE SUPREME COURT OF THE STATE OF NEVADA

ADAM SULLIVAN, P.E., NEVADA
STATE ENGINEER, et al.

Appellants,

vs.

LINCOLN COUNTY WATER
DISTRICT, et al.

Respondents.

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Elizabeth A. Brown
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**SOUTHERN NEVADA WATER AUTHORITY’S REPLY TO NEVADA
COGEN’S RESPONSE TO ITS EMERGENCY MOTION FOR STAY**

Appellant, SOUTHERN NEVADA WATER AUTHORITY (“SNWA”) hereby files this Reply to Nevada Cogeneration Associates Nos. 1 and 2’s (“Nevada Cogen”) Response to its Emergency Motion for Stay Under NRAP 27(e) of the district court's Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review (“District Court’s Order” or “Order Vacating Order 1309”) based on the following memorandum of points and authorities, and all papers on file in case.

MEMORANDUM OF POINTS AND AUTHORITIES¹

A stay of the district court's Order Vacating Order 1309 will ensure the State Engineer can protect senior water right holders and the endangered Moapa dace during the pendency of SNWA's appeal. The 8,000 acre-feet annum ("afa") pumping cap established in Order 1309 will allow the State Engineer to prevent additional groundwater pumping that he has found will harm senior water right holders and the Moapa dace in the Lower White River Flow System ("LWRFS"). The threat of additional groundwater pumping is not speculative. Coyote Springs Investments, LLC, ("CSI") has admitted that it plans to pump an additional 536 afa during SNWA's appeal of the district court's appeal.² SNWA will be irreparably harmed if this Court does not issue a stay of the Order and SNWA has demonstrated it will be successful on the merits of its underlying appeal.

I. The Object Of The Appeal Will Be Defeated Without A Stay Of The District Court's Order.

The object of SNWA's appeal is to protect its senior water rights and the Moapa dace. Nevada Cogen claims the actual object of SNWA's appeal is the

¹ SNWA incorporates the arguments made in its Replies to the Responses to its Motion for Stay filed by Coyote Springs Investments, LLC; Georgia-Pacific Gypsum, LLC, and Republic Environmental Technologies, Inc.; Apex Holding Company, LLC and Dry Lake Water, LLC's; Lincoln County Water District and Vidler Water Company, Inc.; and the Church of Jesus Christ of Latter-Day Saints.

² Appendix for SNWA's Motion for Stay ("APP MFS") at 144 (Transcript from District Court Hearing on SNWA's Motion for Stay at 41:4-12).

reinstatement of Order 1309 or a remand in hope of a similar outcome.³ Nevada Cogen confuses the procedural object of SNWA’s appeal with the substantive object of the appeal. SNWA is appealing the district court’s Order Vacating Order 1309 because it believes the ruling limits the State Engineer’s ability to protect senior water rights and the Moapa dace. Any desired procedural outcome is only a means to ensure protection of SNWA’s interests. Furthermore, and most importantly, without Order 1309’s 8,000 afa pumping cap the State Engineer cannot protect senior water rights and the Moapa dace, thereby defeating the object of the appeal.

II. SNWA Will Be Irreparably Harmed Without A Stay Of The District Court’s Order.

SNWA will undoubtedly face irreparable harm if this Court does not grant the Motion for Stay. Nevada Cogen argues that SNWA has not presented evidence that it will suffer irreparable harm during the pendency of this appeal. This ignores the State Engineer’s finding in Order 1309 that groundwater pumping in excess of the 8,000 afa pumping cap “will cause conditions that harm the Moapa dace and threaten to conflict with Muddy River decreed rights.”⁴ CSI has admitted that it plans to pump an additional 536 afa of groundwater during SNWA’s appeal which would

³ Nevada Cogen’s Resp. to SNWA’s Mot. for Stay at 3.

⁴ APP MFS at 63 (Order 1309 at 63); APP MFS at 55, 64 (Order 1309 at 55,64) (Since 2018, existing rights in the LWRFS have been pumped at an annual rate of about 8,000 afa).

increase groundwater pumping in the LWRFS above 8,000 afa.⁵ Therefore, there is no question that without the 8,000 afa pumping cap there will be additional groundwater pumping that will harm senior water rights and the Moapa dace.

Nevada Cogen also argues that SNWA is asking this Court to grant the State Engineer authority during the pendency of its appeal which impinges of the power of the Nevada legislature.⁶ Nevada Cogen confuses this argument by claiming that SNWA is asking this Court to grant the State Engineer additional authority. In the Order Vacating Order 1309 the district court held, for the first time in the history of Nevada water law, that the State Engineer does not have authority to jointly administer groundwater basins and conjunctively manage groundwater and surface water.⁷ This holding greatly limits, if not eliminates, the State Engineer's authority to protect senior surface water rights from junior groundwater pumping. A stay of the Order Vacating Order 1309 is not a grant of additional authority to the State Engineer but rather the maintenance of the status quo to ensure the State Engineer can continue to protect senior water rights during the pendency of SNWA's appeal. Therefore, a stay of the District Court's Order is proper.

⁵ APP MFS at 144 (Transcript from District Court Hearing on SNWA's Motion for Stay at 41:4-12).

⁶ Nevada Cogen's Resp. to SNWA's Mot. for Stay at 4-5.

⁷ APP MFS at 215-16 (Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review at 27-28).

III. Nevada Cogen Will Not Suffer Irreparable Harm If This Court Grants SNWA’s Motion For Stay.

Nevada Cogen will not suffer irreparable harm if this Court stays the district court’s Order Vacating Order 1309. Nevada Cogen falsely claims that it has no assurances from the State Engineer that it can pump its water rights and that the State Engineer could cut off Nevada Cogen’s groundwater pumping if he finds that less than 8,000 afa can be pumped sustainably in the LWRFS.⁸ Under Nevada law, no water right holder has a right to use their water right to the detriment of a senior water right holder.⁹ Therefore, Nevada Cogen will not be irreparably harmed if this Court grants SNWA’s Motion for Stay.

IV. SNWA Is Likely To Prevail On The Merits Of Its Underlying Appeal.

The district court’s narrow interpretation of the State Engineer’s statutory authority in its Order Vacating Order 1309 will likely be rejected by this Court. Nevada Cogen inaccurately argues that SNWA has “cobbled together bits and pieces of different statutes” and cited to inapposite decisions by this Court to demonstrate the State Engineer’s authority to designate the LWRFS Hydrographic Basin in Order

⁸ Nevada Cogen’s Resp. to SNWA’s Mot. for Stay at 8.

⁹ See NRS 533.085, NRS 534.110(5), NRS 533.430(1) (“[e]very permit to appropriate water, and every certificate of appropriation granted under any permit by the State Engineer upon any stream or stream system under the provisions of NRS 533.087 to 533.235, inclusive, shall be, and the same is hereby declared to be, *subject to existing rights . . .*”) (emphasis added).

1309.¹⁰ SNWA's argument is simple: the State Engineer had authority to designate the LWRFS Hydrographic Basin as an area in need of additional administration under NRS 534.030. The State Engineer held the required public meetings and hearings and concluded after due investigation that the LWRFS needed additional administration. Furthermore, contrary to the district Court's finding in the Order Vacating Order 1309, no part of NRS 534.030 suggests that once an area or basin is designated that it cannot be re-designated with new basin boundaries based on the best available science. While the cases SNWA cites to do not directly address the question of the State Engineer's authority of joint administration and conjunctive management, these cases do show this Court's traditional broad interpretation of the State Engineer's authority.¹¹ Therefore, SNWA is likely to prevail on the merits of its underlying appeal.

V. Conclusion

For the aforementioned reasons, this Court should grant SNWA's Motion for Stay of the District Court's Order.

¹⁰ Nevada Cogen's Resp. to SNWA's Mot. for Stay at 9.

¹¹ See *Wilson, v. Pahrump Fair Water*, 137 Nev. 10, 15, 481 P.3d. 853, 858 (Court interpreted State Engineer authority over groundwater to be so broad that it included authority over domestic wells even though NRS 534.030(4) specifically excludes domestic wells).

AFFIRMATION

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

Respectfully submitted this 15th day of June 2022.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(b), I hereby certify that I am an employee of TAGGART & TAGGART, LTD., and that on this day, I served, or caused to be served, a true and correct copy of this Motion by electronic service to:

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DATED this 15th day of June, 2022.

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APPENDIX INDEX

<u>Exhibit</u>	<u>Description</u>	<u>Bate Stamp</u>
1.	Order 1309	APP MFS 1-68
2.	Interim Order 1303	APP MFS 69-87
3.	CSI's Opposition to LVVWD & SNWA's Motion for Stay Pending Appeal	APP MFS 68-103
4.	Transcript of Hearing regarding LVVWD & SNWA's Motion for Stay Pending Appeal	APP MFS 104-188
5.	Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review	APP MFS 189-228
6.	Addendum and Clarification to Court's Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review	APP MFS 229-234
7.	Court Minutes from May 16 th , 2022	APP MFS 235-236
8.	SNWA & LVVWD Assessment of the Moapa Dace and other Groundwater-Dependent Special Status Species in the Lower White River Flow System	APP MFS 237-239
9.	APP MFS 240-314 Intentionally Omitted	APP MFS 240-314
10.	Amended Notice of Hearing August 26 th , 2019	APP MFS 315-332
11.	Prehearing Conference on August 8 th , 2019	APP MFS 333-366
12.	CSI's Stipulation to SNWA's Intervention	APP MFS 367-383
13.	SNWA's Motion to Intervene	APP MFS 384-401