

IN THE SUPREME COURT OF THE STATE OF NEVADA

ADAM SULLIVAN, P.E., NEVADA
STATE ENGINEER, DIVISION OF
WATER RESOURCES, DEPARTMENT OF
CONSERVATION AND NATURAL
RESOURCES; SOUTHERN NEVADA
WATER AUTHORITY; CENTER FOR
BIOLOGICAL DIVERSITY; and MUDDY
VALLEY IRRIGATION CO.,

Appellants,

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.

Case No.: 84739

Electronically Filed
Jul 06 2022 01:18 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Consolidated with Case Nos.:

84741
84742
84809

**MUDDY VALLEY IRRIGATION COMPANY'S RESPONSE IN
OPPOSITION TO MOTION TO DISMISS THE APPEALS OF SNWA, CBD
AND MVIC**

Appellant MUDDY VALLEY IRRIGATION COMPANY (“MVIC”), by and through its counsel, STEVEN D. KING and DOTSON LAW, hereby files this response in opposition to Lincoln County Water District’s and Vidler Water Company’s (collectively “Vidler”) Motion to Dismiss the Appeals of SNWA, CBD and MVIC, filed on June 8, 2022 (“Motion to Dismiss”). This opposition is made and based upon NRAP 27, the pleadings and papers on file herein, and the attached memorandum of Points and Authorities.

I. INTRODUCTION/PROCEDURAL BACKGROUND

Vidler’s attempt to suggest that the appeal of MVIC is improper because Order 1309 did not involve a legal right or personal right of MVIC is misplaced. The appeal is grounded upon the injury to MVIC’s rights caused by the appealed-from district court ruling. MVIC owns and controls the majority of senior decreed water in the Muddy River. The District Court order improperly restricts the authority of the Nevada State Engineer (“State Engineer”) to administer junior groundwater rights and in so doing undermines the State Engineer’s authority to protect the legal rights and property interests of MVIC. The District Court ruled that the State Engineer does not have the statutory authority to jointly administer groundwater basins and conjunctively manage groundwater and surface water. MVIC disagrees, contending such a determination to be erroneous. Also, the Addendum filed May 13, 2022, improperly dismissed the MVIC petition for judicial review. even though its due process rights and been violated and even though the same order granted virtually identical relief sought by Southern Nevada Water Authority (“SNWA”). Lastly, the District Court did not grant the relief MVIC requested which would have protected its rights. Consequently, the appeal of the district court’s ruling by MVIC is proper and should not be dismissed.

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II. STATEMENT OF UNDISPUTED MATERIAL FACTS

The notices, briefs, and presentations of MVIC in this matter demonstrate that MVIC was at all times primarily concerned with the protection of its over 100-year-old vested and decreed water rights.¹ For that reason it filed a petition for judicial review and intervened in every other petition for judicial review related to Order 1309.

Although MVIC contended that portions of Order 1309 were contrary to law and needed to be reversed it argued that other holdings of the Order were within the State Engineer's statutory authority, were based upon substantial evidence, and were required to implement Nevada's statutory scheme and protect the Decree. Consequently, in each brief MVIC requested reversal and remand, preserving some critical elements of Order 1309 that allowed for the joint and conjunctive management of the regional water source that is critical to the supply of MVIC's rights.

MVIC challenged Order 1309 on three primary grounds. First MVIC contended that the order resulted in a curtailment of MVIC's decreed water rights by acknowledging that groundwater pumping from the source (headwaters) of the Muddy River, elsewhere in the Lower White River Flow System ("LWRFS") was reducing the flow of the Muddy River from its pre-development flow levels, clear evidence of a conflict, while simultaneously finding that no conflict with the

¹ MVIC has a unique position amongst the various parties to these consolidated disputes. Not only is it undisputedly the most senior party in time, but it is also the holder of the majority of decreed water rights secured in the Muddy River Decree of 1920. *See* Judgment and Decree, *Muddy Valley Irrigation Company v. Moapa and Salt Lake Produce Company et al* (the "Muddy River Decree" or "Decree") (March 11, 1920) (Record below at SE ROA 33770-33816.)

MVIC's rights had occurred.² Second, consistent with the acknowledgment that the groundwater pumping was capturing Muddy River flows and therefore MVIC's decreed water rights, the State Engineer placed a maximum level of 8000 acre feet annually ("afa") ground water pumping in the LWRFS. As discussed below, MVIC supported the acknowledgment that there needed to be a control upon the level of pumping as it was that pumping that was intercepting its water. However, the evidence adduced at the Order 1309 evidentiary hearing did not appear to lend support for the sum of 8000 afa as the level of ground water pumping which would return the Muddy River to its predevelopment flows. Rather, at best that sum appeared to be a level of pumping that would perhaps sustain the current, infringed upon, and reduced, flow of the Muddy River. For those reasons MVIC contended that the 8000 afa maximum allowed pumping was arbitrary and capricious. In other words, the evidence, although supporting a necessary reduction in permitted ground water pumping, did not appear to create a basis to support the level arrived at by the State Engineer. The third basis raised by MVIC was the violation of its due process rights. Specifically, like many of the parties, MVIC relied upon the statements of the State Engineer that Order 1309 would not reach a conflicts analysis.³ Moreover, MVIC relied upon the State Engineer to conduct the eventual analysis so as to ensure that the senior, vested and decreed, statutorily protected,

² In this regard MVIC's position below is distinguishable from the vested water right holders in the recent case of *Diamond Vat. Res. Prot. And Conservation Ass'n v. Diamond Valley Ranch, LLC*, 138 Advance Opinion 43. (2022) because actual defined harm had been complained of and quantified by the State Engineer as an acknowledged reduction in the predevelopment flow of the Muddy River.

³ MVIC did not have any notice that a quantification of its decreed water rights could possibly occur or that the Decree could, in essence, be modified by the resulting hearing determination, Order 1309. Order 1309 went beyond the understood scope of the hearing and made the determination that "capture or potential capture of flows of the waters of a decreed system does not constitute a conflict." See Order 1309 (SE ROA 2-69) at SE ROA 61.

water rights were not infringed upon by ground water pumping by junior water right holders. This was consistent with the statutory mandate contained in NRS 533.0245. Based upon the Decree and Nevada statute MVIC's decreed rights are therefore entitled to protection from capture and depletion by other parties.⁴ MVIC sought to have Order 1309 reversed and remanded to comply with the law and protect the decreed water rights of MVIC.

The District Court did not grant the relief MVIC sought. Indeed, as movants note, the District Court dismissed MVIC's petition.⁵ The District Court vacated Order 1309, but it did not stop there. In vacating the Order 1309 the District Court made determinations which make it impossible to place MVIC in the same position it was in before Order 1309 was issued.⁶

Specifically, the District Court in vacating Order 1309:

1. Acknowledged the carbonate groundwater aquifer that the State Engineer and virtually all parties agree exists under the lands in question;⁷
2. Noted the importance of the prior appropriation doctrine;⁸
3. Analyzed the legal basis for joint administration noting the need for the State Engineer to consider available water, Chapter 533 and 534 and the

⁴ As the parties, capturing the headwaters are all be junior groundwater permits issued by the State Engineer, MVIC approached the Order 1309 hearing with the understanding and belief that the State Engineer, having issued the permits based upon certain assumptions and beliefs as to the sum of water available for appropriation must have the authority to reverse that decision upon learning those assumptions were incorrect.

⁵ See Motion at p. 3.

⁶ See Motion at p. 4.

⁷ April 19, 2022, District Court Order at pages 4:3-5:19. Indeed, she notes that "The Muddy River Springs [the headwaters for the Muddy River] are directly connected to, and discharge from, the regional carbonate aquifer." *Id* at 5:10-11.

⁸ *Id.* at pp. 21:8-23:4.

principles of prior appropriation, but made the determination that such analysis must be limited to an analysis within each basin;⁹

4. Although the District Court “acknowledges that the State Engineer can and should take into account how water use in one basin may affect the water use in an adjoining or closely related basin when determining how best to “actively manage” a basin[.]” the District Court’s Order stripped the State Engineer of much of his authority to do so.¹⁰
5. The District Court Order also determines that “nothing in Chapters 532, 533 or 534 gives the State Engineer express authority to conjunctively manage, in this proceeding, both the surface and groundwater flows he believes are occurring in the LWRFS.”¹¹ This determination and the conclusion that because there is no express authority that there is no power to act, severely limits the authority of State Engineer to regulate the groundwater pumping that is acknowledged to be reducing the flows of the fully appropriated Muddy River.

Therefore, the premise of the subject motion that the District Court’s order vacating Order 1309 does not affect any rights of MVIC is simply incorrect.¹² The District Court order leaves MVIC aggrieved in so far as the State Engineer is now handcuffed in his ability to defend the MVIC decreed water rights as is his obligation. Therefore, MVIC’s appeal is appropriate pursuant to NRAP 3A(a).

III. ARGUMENT

MVIC’s appeal is appropriate pursuant to NRAP 3A(a). There is no dispute that the District Court order which is the subject of the appeal is an appealable

⁹ *Id.* at pp. 23:5-27:20.

¹⁰ *Id.* at p. 27.

¹¹ *Id.* at 28:10-12.

¹² Motion at p. 5.

judgment. In the Motion Vidler challenges whether MVIC is an aggrieved by the District Court order. For the reasons set forth herein, MVIC has demonstrated that it is clearly aggrieved by the District Court order which is the subject of the appeal. “[A] party is aggrieved by the action of a probate court when either a personal right or right of property is adversely and substantially affected.” *Estate of Hughes v. First Nat'l Bank*, 96 Nev. 178, 180, 605 P.2d 1149, 1150 (1980) (citing to *In re Ray's Estate*, 68 Nev. 355, 233 P.2d 393(1951), *Bates v. Nevada Savings and Loan Assn.*, 85 Nev. 441, 456 P.2d 450 (1969) and *Nevada Land & Mortgage Co. v. Lamb*, 90 Nev. 247 524 P.2d 326 (1974)). Unlike the fictitious heirs in *Estate of Hughes*, MVIC is a real party with real personal and property rights that are impacted by the District Court’s action below.

It is however clear that a direct infringement upon a person or property right is not required to be an aggrieved party. Rather, “a substantial grievance also includes “the imposition of some injustice, or illegal obligation or burden, by a court, upon a party, or the denial to him of some equitable or legal right.” *See Las Vegas Police Protective Ass'n Metro., Inc. v. Eighth Judicial Dist. Court*, 122 Nev. 230, 240, 130 P.3d 182, 189 (2006). The appealed-from order affects the ability of the State Engineer to comply with his obligation to prevent junior water rights, granted and administered by his office, from intercepting MVIC’s senior water rights. Thus, like the appellant in *Las Vegas Police Protective Ass'n Metro.*, MVIC will, as a result of the subject order, have its personal and property rights affected and in particular, analogous to the appellant there, MVIC’s rights to defend its water from interception are affected. Succinctly stated, as the order prevents joint and conjunctive administration of the basins making up the headwaters to the Muddy River, even though those conflicting, junior, ground water rights exist only

due to the actions of the State Engineer, he is impaired from regulating them jointly or conjunctively to prevent the capture of MVIC's decreed water.¹³

Although the treatment of MVIC's due process issue in the Addendum is clearly incorrect and is alone a basis for appeal, that is not nearly so important nor significant as the impact caused by the limitation to the State Engineer's authority to protect MVIC's decreed water rights embedded in and supporting the District Court's incorrect interpretation of Nevada statutes. Although not nearly so simple as the District Court's error in the Addendum, which is obvious, its ruling on this point is appealable and immediately injurious to MVIC.

By any standard MVIC has had its rights affected by the ruling as it goes farther than simply vacating Order 1309; rather, it changes the circumstances as they existed before the issuance of Order 1309. Specifically, the District Court order restricts the actions of the State Engineer to manage water jointly and/or conjunctively, allowing neither to occur. Although the District Court did not dispute the factual determination of the State Engineer that the water source for the Muddy River and the ground water rights in these seven basins is a single source, it explicitly prohibited the State Engineer from jointly managing that source across basin boundaries. It did so even while acknowledging the importance of taking into consideration the impact of groundwater development in one basin upon the water users in the next. How the State Engineer is to do this is somewhat baffling given that, according to the District Court, it is apparently not within his statutory authority to either jointly, nor conjunctively, manage water.¹⁴ As such the State Engineer can no longer address, at least with his statutory powers advanced in

¹³ This appears to directly conflict with NRS 533.0245.

¹⁴ The practical application would then be that even though the surface rights in issue here may draw from sources underlying six or seven basins the State Engineer cannot act across the basin lines drawn almost fifty years after the Decree.

support of Order 1309, the conflict which was the factual predicate of Order 1309 and which arose from and was recognized in Order 1169 and even before.¹⁵

Prior to the District Court's order vacating Order 1309, MVIC had the right and expectation that, consistent with Nevada law, the State Engineer would protect its Decreed rights within and across basin lines. It had no need, nor expectation, that it would be required to bring a separate court action to prevent junior water rights from capturing its water or interfering with the Decree while pumping water administered by the State Engineer, in Nevada, pursuant to Nevada statute. It did not have an expectation that an order of the decree court would be required to support the prior appropriation doctrine and joint basin management. The ability of the State Engineer to act without the cloak of such authority is now being questioned due to this District Court order.

Similarly, prior to the District Court's order vacating Order 1309, MVIC had the right to insist that the State Engineer ensure that groundwater pumping did not interfere with its surface water rights. The principle of conjunctive management was understood and expected as an extension of the prior appropriation doctrine. That ability is now, as a consequence of the appealed-from ruling, in question. At a minimum, due to the appealed-from order, the State Engineer now, although directed to "not carry out his or her duties ...in a manner that conflicts with decreed water rights" cannot, apparently, rescind or curtail his prior awards of junior water rights as necessary to protect those to decreed rights. Even if the State Engineer is simply limited in doing so or is no longer able to do so as effectively, MVIC is immediately and continually injured by the appealed-from ruling. MVIC happens to agree with the movant that the State Engineer can still attempt to manage ground and surface water rights, but clearly the District Court order makes

¹⁵ The District Court ruling acknowledges this concern has existed since 1989. April 19, 2022, District Court Order at pp 5:15-19.

it more difficult for the State Engineer to do so in circumstances such as this where the water right users are all actually using the same water source, while in several different “basins.” The subject ruling makes it difficult for the State Engineer to administer water rights in consideration of each other and regardless of which basin the water right exists within and regardless of whether it is a surface or groundwater right. That is what is required to protect the MVIC water rights and therefore the District Court order does injure MVIC.

Further, even if for some reason this Court were to determine that MVIC is not aggrieved, ultimately an appeal is still proper in conjunction with the case of the State Engineer, which is now consolidated with this matter. MVIC intervened in every other petition below and as an “intervenor is afforded all the rights of a party to the action,” including a right to appeal independent from that of the original parties. *Las Vegas Police Protective Ass'n Metro., Inc. v. Eighth Judicial Dist. Court*, 122 Nev. 230, 239, 130 P.3d 182, 189 (2006).

Additionally, as noted supra, the District Court’s Addendum to its order, dismissing MVIC action, is clearly erroneous. Even the movant notes that SNWA and MVIC both sought appeal, in part, based upon similar due process arguments. However, the court granted SNWA’s relief and simply dismissed and MVIC’s appeal. That dismissal is improper and therefore MVIC is aggrieved by the order. Appeal is appropriate.

IV. CONCLUSION

For the reasons stated here, MVIC is an aggrieved party as defined by NRAP 3A(a) and this appeal should not be dismissed.

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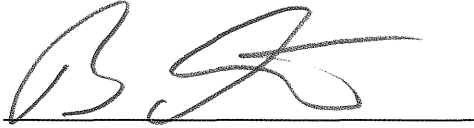
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Affirmation Pursuant to NRS 239B.030

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

Dated this 6th day of July 2022.

A handwritten signature in black ink, appearing to read 'S.D. King', written over a horizontal line.

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CERTIFICATE OF SERVICE

I certify that on this date, I served a copy of the foregoing document upon all counsel of record by:

- ☐ Mail on all parties in said action, by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. At Dotson Law, mail placed in that designated area is given the correct amount of postage and is deposited that same date in the ordinary course of business, in a United States mailbox in the City of Reno, County of Washoe, Nevada.
- ☒ By electronic service by filing the foregoing with the Clerk of Court using the E-Flex system, which will electronically mail the filing to the following individuals at the email addresses set for the below.
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Dated this 6th day of July 2022.



DENISE VOLLMER