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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,

v.

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 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

Case No. 84739 (Consolidated w/84741, 84742, and 84809)

Docket 84739 Document 2022-18320

ENVIRONMENTAL, INC.; BEDROC LIMITED, LLC; CITY OF NORTH LAS VEGAS; AND LAS VEGAS VALLEY WATER DISTRICT,

Respondents.

OPPOSITION TO SOUTHERN NEVADA WATER AUTHORITY'S EMERGENCY MOTION FOR STAY UNDER NRAP 27(e) OF DISTRICT COURT'S ORDER GRANTING PETITIONS FOR JUDICIAL REVIEW PENDING APPEAL

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Respondent The Church of Jesus Christ of Latter-Day Saints ("The Church") is a Utah Corporation. The Church, formerly known as Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints, a Utah corporation sole, has no parent corporation. There is no publicly held company that owns 10% or more of the Church's stock.

Kaempfer Crowell is the only law firm who has appeared on behalf of The Church in this case.

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BY: */s/ Severin A. Carlson*

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I. INTRODUCTION

Through its emergency motion for stay under NRAP 27(e) Southern Nevada Water Authority ("SNWA") seeks not only to stay the District Court's Order vacating the State Engineer's Order 1309, but implicitly seeks to turn Nevada's prior appropriation doctrine on its head by seeking a stay from this Court that only allows "[r]espondents that currently pump groundwater [to] continue to do so if [this] Court stays the district court's Order." SNWA Motion for Stay at 12. Not only does this request run counter to the prior appropriation doctrine, it exceeds the restrictions imposed by the State Engineer under Order 1309, which the District Court vacated in its entirety.

Under interim Order 1303, which preceded Order 1309, the State Engineer recognized the interconnectivity of the basins throughout the Lower White River Flow System ("LWRFS") and the need to further study the LWRFS's interconnectivity due to its over appropriation. APP MFS at 69–87. Given those facts, the State Engineer encouraged abstention from pumping groundwater in the LWRFS, advising holders of water rights in the LWRFS that they could cite to Order 1303 in any applications for extension of time to show beneficial use of their water rights and to prevent the working of a forfeiture on those rights. APP MFS at 84.

Relying on this Order 1303, The Church, who holds some of the most senior groundwater rights in the LWRFS, and specifically in the Muddy River Springs Area Hydrographic Basin, has refrained from pumping during the pendency of study of the LWRFS and the related administrative proceedings before the State Engineer. During this time, The Church's water rights remain in good standing with the State Engineer.

Order 1309, which built upon Order 1303, limited the amount of groundwater that can be pumped from the LWRFS to 8,000 afa or less. APP MFS at 65. Order 1309, however, does *not* touch upon which water rights holders are permitted to pump the 8,000 afa of groundwater in the LWRFS nor does Order 1309 restrict pumping to only those water rights holders currently pumping in the LWRFS, regardless of the water rights respective priority dates. Yet, this relief is what SNWA now seeks from the Court in its motion for stay. However, because SNWA's motion not only exceeds the permissible bounds of a stay of a District Court Order, but would also serve to violate the Nevada's prior appropriation doctrine, its motion should be denied.

II. ARGUMENT

A. SNWA Cannot Obtain A Stay of Current Pumping in the LWRFS

Through a stay pursuant to NRAP 8, SNWA cannot also obtain a stay of the pumping as it existed prior to the District Court entering its Order vacating

Order 1309. NRAP 8 provides parties an avenue to obtain "a ***stay of the judgment or order of***, or proceedings in, a district court pending appeal or resolution of a petition to the Supreme Court or Court of Appeals for an extraordinary writ." NRAP 8(a)(1)(A) (emphasis added).

Under this rule, SNWA seeks to stay the Order vacating State Engineer's Order 1309, effectively reinstating Order 1309 during the pendency of this appeal. Yet, SNWA asks for relief that would not only amend Order 1309, but would also run afoul of the prior appropriation doctrine.

1. Order 1309 Does Not Specify Which Rights Can Be Pumped.

Order 1309 set "[t]he maximum quantity of groundwater that may be pumped" from the LWRFS at 8,000 afa. APP MFS at 65. Order 1309 is silent as to which groundwater rights are permitted to pump. Instead, under Order 1309 and Nevada law, if a senior groundwater rights holder pumps a portion of the allotted 8,000 afa, then the State Engineer can protect the senior groundwater right through curtailment of any junior groundwater rights pumping in the LWRFS that exceed 8,000 afa, or alternatively curtail junior groundwater pumping that is shown to impair surface water flows or senior groundwater rights. *See* NRS 534.110(6) (Permitting the State Engineer to "order that withdrawals, including, without limitation, withdrawals from domestic wells, be restricted to conform to priority rights.")

SNWA argues that a stay would "prevent *new* pumping" and that "[r]espondents that currently pump groundwater can continue to do so if the Court stays the district court's Order." SNWA Motion for Stay at 12 (emphasis in original). These assertions would not follow a stay of the District Court's Order because those restrictions do not exist in Order 1309.

2. SNWA's Requested Stay Runs Afoul of the Prior Appropriation Doctrine.

SNWA's motion seeks to give preference to junior groundwater appropriators over senior groundwater appropriators under the guise of protecting senior water rights, violating the prior appropriation doctrine. Senior groundwater pumpers are senior water right holders—not "*new* pumping". Senior groundwater right holders in good standing with the State Engineer should be afforded every opportunity to continue to pump or to resume pumping of their senior groundwater rights rather than be unlawfully curtailed for the benefit of junior groundwater right holders via a motion for stay. In *Mineral County v. Lyon County*, this Court summarized Nevada's adherence to the prior appropriation doctrine. 136 Nev. 503, 509. 473 P.2d 418, 423 (2020). In *Lobdell v. Simpson*, 2 Nev. 274, 279 (1866), this Court formally recognized the prior appropriation doctrine in Nevada. Decades later, this Court affirmed the doctrine of prior appropriation as the prevailing doctrine in Nevada. *Id*, citing *Reno Smelting, Milling & Reduction Works v. Stevenson*, 20 Nev. 269, 282, 21 P. 317, 322 (1889); *see also Jones v.*

Adams, 19 Nev. 78, 84-86, 6 P. 442, 445-46 (1885).

The prior appropriation doctrine "grants '[a]n appropriative right [that] may be described as a state administrative grant that allows the use of a specific quantity of water for a specific beneficial purpose if water is available in the source free from the claims of others with earlier appropriations.' " *Mineral County*, 136 Nev. at 509, 473 P.3d at 423 (quoting *Desert Irrigation, Ltd. v. State*, 113 Nev. 1049, 1051 n.1, 944 P.2d 835, 837 n.1 (1997)). Nevada law strictly adheres to the prior appropriation doctrine "as a fundamental principal. Water rights are given 'subject to existing rights,' NRS 533.430(1), given dates of priority, NRS 533.265(2)(b), and determined based on relative rights, NRS 533.090(l)-(2)." *Id*. 513, 473 P.3d at 426.

Nevertheless, SNWA suggests that a senior groundwater right holder, such as the Church, who is not currently pumping (in light of interim Order 1303's guidance), cannot do so if the District Court's order vacating Order 1309 is stayed—regardless of the seniority of water rights pumping in the LWRFS. SNWA does this by summarily ignoring the possibility that those currently pumping may not be the most senior groundwater rights holders in the LWRFS. But, the restriction SNWA seeks to enforce through Order 1309 does not exist and would be a stark contradiction to SNWA's claimed purpose of protecting senior water rights and to the prior appropriation doctrine. Because the relief sought by

SNWA is not attainable through a stay of the District Court's Order, SNWA's motion for stay should be denied.

B. A Stay Is Not Warranted Under the Purview of NRAP 8(c)

For the same reasons outlined above, SNWA cannot meet the factors required for obtaining a stay under NRAP 8(c). In determining whether a stay is warranted, the Court is to consider:

> (1) whether the object of the appeal will be defeated if the stay is denied, (2) whether appellant will suffer irreparable or serious injury if the stay is denied, (3) whether respondent will suffer irreparable or serious injury if the stay is granted, and (4) whether appellant is likely to prevail on the merits in the appeal.

Mikohn Gaming Corp. v. McCrea, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004); NRAP 8(c). Here, SNWA cannot meet these factors because a stay of the District Court Order will not accomplish what SNWA argues in its motion.

SNWA's motion presupposes that the only water rights holders pumping the 8,000 afa under Order 1309 are the most senior groundwater rights holders—it fails to consider that many senior groundwater rights holders, such as The Church, forewent pumping of their water rights pursuant to interim Order 1303 and should be afforded an opportunity to resume pumping of their respective water rights in accordance with Nevada law. Thus, if the object of the appeal is to protect senior water rights holders, as SNWA argues, then preserving pumping as

it currently stands without regard to priority of rights, would not preserve the object of the appeal.

Further, SNWA also overstates the potential harm it will suffer absent a stay because it ignores the State Engineer's statutory powers in managing water rights, including curtailment of junior water rights, in the unlikely event that all water rights holders in the LWRFS sought to pump their water rights absent Order 1309.

On the other hand, SNWA's requested relief would harm senior water rights such as those owned by The Church because it seeks to limit pumping of the LWRFS to only those water rights holders currently pumping, without regard to the bedrock principal of Nevada's water law—prior appropriation (first in time, first in right). SNWA's request, if granted would leave no recourse to senior groundwater rights holders wanting to put their water to beneficial use, through pumping, simply because junior groundwater appropriators happened to be pumping their water rights at the time the District Court entered its Order.

III. CONCLUSION

As more fully set forth above, SNWA seeks a stay of the District Court Order vacating the State Engineer's Order 1309; yet, SNWA asks for relief not contemplated by Order 1309. SNWA ignores that Order 1309 does not restrict which water rights holders are permitted to pump in the LRWFS—it only limits the

amount of pumping to 8,000 afa. Thus, SNWA's stated goal of maintaining the status quo to preserve pumping as it currently stands is not accomplishable through a stay under NRAP 8, requiring denial of SNWA motion. Further, granting the relief SNWA seeks would have the unintended effect of harming senior groundwater rights holders that are not currently pumping in the LWRFS, but maintain the right to do so as The Church's water rights remain in good standing, violating the prior appropriation doctrine in the process. Accordingly, The Church respectfully requests that this Court deny SNWA's motion in its entirety.

Respectfully submitted this 8th day of June, 2022.

KAEMPFER CROWELL

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CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2022, service of the foregoing **OPPOSITION TO SOUTHERN NEVADA WATER AUTHORITY'S EMERGENCY MOTION FOR STAY UNDER NRAP 27(e) OF DISTRICT COURT'S ORDER GRANTING PETITIONS FOR JUDICIAL REVIEW PENDING APPEAL** was filed electronically with the Clerk of the Court, and therefore electronic service was made in accordance with the master service list as follows:

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In addition, service was made by depositing the same mailing via first class mail with the United States Postal Service as follows:

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DATED June 8, 2022

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