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Elizabeth A. Brown
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IN THE SUPREME COURT OF THE STATE OF NEVADA

SOUTHERN NEVADA WATER
AUTHORITY,

Appellant,

vs.

COYOTE SPRINGS INVESTMENT, LLC;
APEX HOLDING COMPANY, LLC; NEVADA
COGENERATION ASSOCIATES NOS. 1 AND
2; GEORGIA-PACIFIC GYPSUM, LLC; DRY
LAKE WATER, LLC; REPUBLIC
TECHNOLOGIES, INC.; LINCOLN COUNTY
WATER DISTRICT; VIDLER WATER
COMPANY, INC.; MUDDY VALLEY
IRRIGATION COMPANY; THE CENTER FOR
BIOLOGICAL DIVERSITY; SIERRA PACIFIC
POWER COMPANY d/b/a NV ENERGY;
MOAPA VALLEY WATER DISTRICT; THE
CHURCH OF JESUS CHRIST OF LATTER-
DAY SAINTS; CITY OF NORTH LAS
VEGAS; WESTERN ELITE
ENCIRONMENTAL, INC.; BEDROC
LIMITED, LLC; AND ADAM SULLIVAN,
P.E., NEVADA STATE ENGINEER,
DIVISION OF WATER RESOURCES,
DEPARTMENT OF CONSERVATION AND
NATURAL RESOURCES,

Respondents.

Case No.: 84739,
consolidated with Nos. 84741,
84742, and 84809

**OPPOSITION TO
EMERGENCY MOTION TO
STAY UNDER NRAP 27(e)
OF DISTRICT COURT'S
ORDER GRANTING
PETITION FOR JUDICIAL
REVIEW PENDING
APPEAL**

Appeal from the Eighth Judicial
District Court, the Honorable
Presiding Bitu Yeager

MAC:16147-001 4738369_1

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 Justices of this Court may evaluate possible disqualification or recusal.

1. There are no corporations to disclose under NRAP 26.1(a) for Apex Holding Company, LLC or Dry Lake Water, LLC.

Dated this 8th day of June, 2022.

MARQUIS AURBACH

By/s/ Christian T. Balducci

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MEMORANDUM OF POINTS AND AUTHORITIES

I. RELEVANT BACKGROUND

This appellate proceeding stems from the State Engineer Order 1309. Order 1309 basically takes a number of hydrographic basins, deletes their boundary lines, and creates one mega-basin. The big problem with this is that each individualized basin had its own, pre-existing water rights holders that had relied for decades on their priority in their particular basin. When the State Engineer deleted the boundary lines, he threw all of the rights holders in the same basin, causing them to compete with rights holders they never had any idea would compete with them in terms of priority.

After nearly one week of oral argument, the district court concluded:

- “The Nevada State Engineer also lacked the statutory authority to conjunctively manage this LWRFS superbasin.” *See* APP MFS 223 at ll. 14 – 17;
- “The Court ALSO FINDS that the Nevada State Engineer violated the Petitioners’ Constitutional right to due process by failing to provide adequate notice and a meaningful opportunity to be heard.” *Id.* at ll. 17 – 20.

- “Order 1309 is arbitrary, capricious, and therefore void.” *Id.* at ll. 20 – 21.

So in summation, the district court found that Order 1309 violated constitutional rights, lacked statutory authority, was arbitrary, capricious, and void. SNWA, LVVWD, the Center for Biological Diversity, and others, now ask this Court to effectively reinstitute Order 1309 by staying the order that vacates it.

II. LEGAL ARGUMENT

The motion for stay must be denied. Order 1309 is unconstitutional, lacks statutory authority, is arbitrary, capricious, and void. Staying the district court’s order vacating that order reimposes an illegal order (Order 1309). SNWA, LVVWD, and band of other aligned parties did not present the district court with evidence of actual harm to them, and against have failed to do so before this Court.

A. MOVANTS HAVE NOT COME CLOSE TO MEETING THEIR BURDEN

The party seeking stay relief has the affirmative burden of establishing each factor, a high hurdle here where Movants cannot demonstrate even one. As a preliminary point, Apex and Dry Lake agree that there are four factors that must be proved in order to be entitled to stay relief: (1) Whether the object of the appeal or writ petition will be defeated if the stay or injunction is denied; (2) Whether appellant/petitioner will suffer irreparable or serious injury if the stay or injunction

is denied; (3) Whether the respondent/real party in interest will suffer irreparable or serious injury if the stay or injunction is granted; and (4) Whether appellant/petitioner is likely to prevail on the merits of the appeal. *See Hansen v. Dist. Ct.*, 116 Nev. 650, 657, 6 P.3d 982, 986 (2000).

1. A Stay Disturbs the Status Quo

In reviewing the NRAP 8(c) factors, the Supreme Court has recognized that the purpose of a stay is to preserve the status quo. *See Nelson v. Heer*, 121 Nev. 832, 835, 122 P.3d 1252, 1254 (2005); *see also U.S. v. State of Mich.*, 505 F. Supp. 467, 471 (W.D. Mich. 1980) (stating that the purpose of a stay is to preserve, not change, the status quo). Here, the parties have had their respective water rights for decades, if not longer, in relative priority within their respective basin. When the State Engineer entered order 1309 and conjoined seven basins into one, he disturbed relative priorities in a manner no one had ever expected. Order 1309 unquestionably upended the status quo water rights holders enjoyed for decades.

The district court's order voiding Order 1309 put things back to the way they used to be; i.e., reimposed the status quo. As discussed during the hearing/minioral argument trial in this matter, the State Engineer had no idea how he would administer the various water rights that Order 1309 threw into the same bathtub. He had no idea who was first, who was second, and who (if anyone) would be

curtailed. Order 1309 created more questions than answers. On this basis alone, stay relief should be denied.

2. The Object of the Appeal Will Not Be Defeated If Stay Relief is Denied

The object of this appeal will not be defeated if stay relief is denied. As mentioned, the State Engineer had no idea how he would conjunctively manage the seven basins he converted into one. He had no idea how he would deal with the relative priorities he jumbled. Given that Order 1309 creates more questions than answers, the inescapable conclusion regarding the object of LVVWD and SNWA's hypothetical appeal is to create further uncertainty concerning a party's water rights in an arid desert (where Tilapia apparently have taken up residence). This factor weighs heavily in favor of denying stay relief.

Moreover, as admitted by all of the Movants, the history behind Order 1309 goes on for at least a decade. A couple more years won't make a difference. Given the long history of these proceedings, this appeal will be a short sequel in a decades long water battle royale.

3. Irreparable Injury if Stay Relief is Denied

The next two factors weigh the harm the appealing party will suffer vs. the answering party in the event stay relief is entered. In support of these factors, Movants make a big deal out of their water rights being "impaired" if pumping

continues at its current rate. What they ignore is that pumping has been ongoing for the better part of the last century. A few more years will not cause the sort of irreparable harm they now cry of.

Entering a stay, however, completely eliminates the water rights of many parties, which is a vastly greater irreparable harm. These factors weigh heavily in favor of denying stay relief.

4. Likelihood of Prevailing

The district court entered a very thorough, well thought out decision after considering briefing from a number of parties (many of which were not aggrieved enough to file their own petition) and roughly a week of oral argument. These are parties, by the way, that settled during the mini oral argument trial. Yes, that's correct – many of the parties now up on appeal that have moved for a stay *settled their differences with the State Engineer before the district court!*

5. Entering a Stay Makes this Court the Arbiter of Water

The most simple reason to deny a stay is that granting one causes this Court to become the arbiter of water. Some of the Movants (LVVWD, SNWA) ask that the portion of Order 1309 limiting pumping to 8,000 afa be enforced (i.e., the order vacating Order 1309 be stayed on that limited ground); to wit, that it remains enforceable and is a valid cap on pumping. Such a determination requires this

Court to endorse the State Engineer's 8,000 pumping maximum on an emergency basis, with limited information and limited briefing. It would also require that this Court stay a portion of an order that is unconstitutional. That makes no sense. Stay relief is not warranted or appropriate here. The motions must be denied.

III. CONCLUSION

For the foregoing reasons, the motions for stay must be denied.

Dated this 8th day of June, 2022.

MARQUIS AURBACH

By/s/ Christian T. Balducci _____

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **OPPOSITION TO EMERGENCY MOTION TO STAY UNDER NRAP 27(e) OF DISTRICT COURT’S ORDER GRANTING PETITION FOR JUDICIAL REVIEW PENDING APPEAL** was filed electronically with the Nevada Supreme Court on the 8th day of June, 2022.

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I further certify that, due to the exigent nature of the requested relief, I served a copy of this document on the parties not registered for eservice by emailing a true and correct copy thereof, addressed to:

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An employee of Marquis Aurbach