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; LAS VEGAS VALLEY WATER DISTRICT; SOUTHERN NEVADA WATER AUTHORITY; and CENTER FOR BIOLOGICAL DIVERSITY,

Appellants,

vs.

LINCOLN VALLEY WATER DISTRICT et al.,

Respondents.

Supreme Court No. 84739

Consolidated with Nos. 84742, 84741, and 84809

THE CENTER FOR BIOLOGICAL DIVERSITY'S REPLY IN SUPPORT OF EMERGENCY MOTION FOR STAY

Appellant, the Center for Biological Diversity, hereby replies to Coyote Springs Investment, LLC ("Coyote Springs"), Georgia-Pacific Gypsum, LLC and Republic Environmental Technologies, Inc. (together, "Georgia-Pacific"), Lincoln County Water District and Vidler Water Company (together, "Vidler"), Nevada Cogeneration Associates Nos. 1 and 2 ("Nevada Cogen") and Apex Holding Company, LLC and Dry Lake Water, LLC (together "Apex") in support of its Motion for Emergency Stay. The Center is filing a separate reply to the Church of

Jesus Christ of Latter Day Saints due to the unique nature of the Church's Opposition.

Four factors govern stay requests under NRAP 8; they are: (1) whether the object of the appeal will be defeated if the stay is denied, (2) whether the appellant will suffer irreparable or serious injury if a stay is denied, (3) whether the respondent will suffer irreparable or serious injury if the stay is granted, and (4) whether the appellant is likely to prevail on the merits. *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004) (citing NRAP 8(c)). As explained below, the Center can establish all four factors and has therefore shown that a stay is warranted.

I. The Object of the Appeal Will be Defeated if a Stay is Denied.

The object of this appeal is protection of senior water rights and the Moapa dace, both of which will suffer immediate and irreparable harm if groundwater pumping increases. Nevada Cogen argues that the "object" of the appeal must be procedural (*e.g.*, reinstatement of Order 1309); not factual (*e.g.*, protection of senior rights). This is incorrect. The "object" here is not simply to reinstate Order 1309, but to secure the *benefits* of the Order—namely a pumping cap designed to maintain springflows in the Muddy River Springs Area. *See, e.g.*, *Mikohn Gaming* Corp., 120 Nev. at 253, 80 P.3d at 39 ("The object of an appeal seeking to compel arbitration is to enforce the arbitration agreement and *attain the bargained-for benefits of arbitration*.") (emphasis added); *State v. Robles-Nieves*, 129 Nev. 537, 542, 306 P.3d 399, 403 (2013) ("The object of the State's appeal is to have the confession available *for use at trial*.") (emphasis added). Nevada Cogen cites no authority for its alternative, narrow reading of NRAP 8(c).

I. Appellants Will Suffer Irreparable Harm Without a Stay.

A stay is necessary in this case to preserve the *status quo* and prevent irreparable harm to senior water rights and the environment. Apex argues that the true "status quo" existed before Order 1309—and presumably, also before Order 1303, which first combined the Lower White River Flow System ("LWRFS") basins for joint administration, but Apex is mistaken. The *status quo* here is a factual situation in which no more than 8,000 acre-feet annually is being pumped from the LWRFS. *See* Exh. 2 at SE ROA 64 (unless otherwise indicated, all citations herein are to the Center's appendices in support of its Emergency Motion for Stay).

Any increase in pumping will irreparably disrupt this *status quo*. As the Center explained in its Emergency Motion, the results of a 2010-2012 aquifer test demonstrated that: (1) groundwater pumping anywhere in the LWRFS affects the springflows in the Muddy River Springs Area; and (2) any reductions in springflows from pumping are effectively permanent. Exh. 7 at SE ROA 34505; Exh. 8 at SE ROA 34519, 34539-40. Moreover, there are at least 30,000 acre-feet of additional water rights in the LWRFS that could be pumped without restriction if a stay is not granted. Exh. 2 at SE ROA 66; Exh 3 at SE ROA 70, Exh. 5 at SE ROA 737. Thus, the harm from increased pumping is not speculative, as Respondents claim, and the Center has shown that a stay is necessary.

Coyote Springs and Vidler argue that a 2006 Memorandum of Agreement ("MOA") and a 2008 Biological Opinion ("BiOp") issued to the federal Bureau of Land Management ("BLM") in relation to Vidler's Kane Springs water rights will adequately protect the dace, but these arguments also fail. Coyote Springs and Vidler

rely on the 2008 BiOp and other representations from the U.S. Fish and Wildlife Service to claim that there will be no harm to the dace and the springs from groundwater pumping, but the 2008 BiOp actually shows otherwise. For instance, the 2008 BiOp concludes that Vidler's Kane Springs pumping will adversely affect the dace, even to the point of causing "take" of the species. *See* Vidler's Exh. B. The BiOp also concludes that any pumping which reduces average springflows at the Warm Springs West gage to 3.0 cubic feet per second ("cfs")—just 0.2 cfs lower than current flows—may "jeopardize" the continued existence of the dace. *Id.*

And, as the Center previously explained, both the MOA and the 2008 BiOp were finalized without the benefit of the 2012 pumping test data, and thus wrongly assume that any declines in springflows from pumping are reversible. All available data—including the extra-record evidence submitted by Georgia Pacific in support of its Opposition—show that springflows have not recovered since the pumping test. Indeed, Georgia-Pacific's evidence clearly shows that since 2013 springflows measured at the Warm Springs West gage have declined from 3.40 cfs to 3.25 cfs. See Georgia-Pacific's Exh. 1 at 6.

To the extent Respondents argue that Appellants and the Court must consider each "basin" within the LWRFS separately, they argue the merits of the case and confuse a factual issue—the impacts of pumping—with the legal issue of the State Engineer's statutory authority. The impacts of increased pumping throughout the 11,000-square-mile LWRFS aquifer are not in dispute and weigh heavily in favor of a stay.

II. Respondents Will Not Suffer Irreparable Harm if a Stay is Granted.

Respondents fail to articulate a clear basis for their claims of irreparable harm. Georgia-Pacific claims Order 1309 raised "questions" which "caused respondents to re-think their business strategies," while Nevada Cogen complains that Order 1309 produces "uncertainty." But these vague allegations do not suffice to establish irreparable harm, and certainly do not outweigh the substantial harm to senior water rights and the environment that could occur without restriction in the absence of a stay.

To the extent that Respondents allege ongoing due process violations they are also incorrect—due process rights attach only when there is a depravation, and the only depravation Respondents can identify here is Order 1309's acknowledgment that Respondents' junior water rights are subject to senior rights in the same source of supply. This is no actual depravation, but rather a fundamental aspect of Nevada's water statutes and the doctrine of prior appropriation. See NRS §§ 533.085, 533.430; 534.020.

III. Appellants are Likely to Succeed on the Merits.

Many of Respondents' argument on the merits concern standing; the Center addresses these in its contemporaneously filed Opposition to Vidler's Motion to Dismiss, which is incorporated by reference as if fully set forth herein.

Respondents' remaining arguments on the merits largely re-state the District Court's conclusions regarding the State Engineer's statutory authority and due process. But as the Center explained in its Emergency Motion, the District Court erred. Defining a particular source of water supply is a factual issue—and

consequently it is absurd for Respondents and the District Court to demand explicit statutory authorization for such activity. Respondents' due process claims, as noted, depend on their erroneous characterization of prior appropriation principles as a "depravation" of their rights. And the "factors" for which Georgia-Pacific claims lack of notice are just basic principles of groundwater hydrology (e.g., that certain geographic formations are consistent with a "barrier" to groundwater flow). They are not standards of decision—like the four NRAP 8 factors discussed here—which would require advance notice.

IV. The Court Should Deny Vidler's Request for a Bond.

Vidler requests a $5,178,905 bond. However, there is no basis for this request because Vidler is not a judgment creditor and the Center is not a judgment debtor. This court has explained that the purpose of a bond on appeal "is to protect the judgment creditor's ability to collect the judgment." *Nelson v. Heer*, 121 Nev. 832, 835, 122 P.3d 1252, 1254 (2005). Here, the District Court granted only declaratory relief—it did not enter a monetary judgment against the Center or any other party. Consequently, there is no need for a bond because there is no judgment to collect.

CONCLUSION

This Court should grant the Center's Emergency Motion for Stay.

Affirmation: The undersigned do hereby affirm that the preceding document and/or attachments do not contain the social security number of any person.

Dated this 13th day of June, 2022.

/s/ Scott Lake
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CERTIFICATE OF SERVICE

I certify that I am an employee of the Center for Biological Diversity, and that on this 13th day of June, 2022 I served a true and correct copy of the foregoing by electronic service to the participants in this case who are registered with the Nevada Supreme Court's efiling system to this matter.

/s/ Scott Lake
Scott Lake