

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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**SOUTHERN NEVADA WATER AUTHORITY’S RESPONSE TO
LINCOLN VIDLER’S MOTION TO DISMISS**

Appellant, SOUTHERN NEVADA WATER AUTHORITY (“SNWA”) hereby files this Response to Lincoln County Water District and Vidler Water Company, Inc.’s (“Lincoln Vidler”) Motion to Dismiss SNWA’s appeal of the Eighth Judicial District’s Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review (“District Court Order”) based on the following memorandum of points and authorities, and all papers and pleadings on file in this case.

MEMORANDUM OF POINTS AND AUTHORITIES

Lincoln Vidler’s Motion to Dismiss is meritless. SNWA participated in the proceedings below as both a petitioner (challenging a discrete finding in Order 1309), and a respondent (defending the remainder of Order 1309).¹ SNWA clearly has standing, as a respondent below, to appeal the complete vacation of Order 1309.

SNWA is responsible for assuring a sustainable water supply for millions of Nevadans. The Colorado River is the primary source of water for those Nevadans, but climate change and drought have limited that supply. To augment projected decreases in the Colorado River supply, SNWA acquired senior surface water rights in the Muddy River.² Now Muddy River surface water is being captured by groundwater pumping in the Lower White River Flow System Hydrographic Basin (“LWRFS”).³ The State Engineer issued Order 1309 to protect senior water rights in the Muddy River, including those held by SNWA, from further capture from the pumping of junior groundwater rights in the LWRFS.⁴ SNWA has standing to appeal the vacation of Order 1309 because, without Order 1309, SNWA’s Muddy River water rights (a real property right) will be adversely and substantially affected.

SNWA also has a vital interest in the survival on the Moapa dace, an endangered fish that lives exclusively in the headwaters of the Muddy River. SNWA works in cooperation with the United States Fish and Wildlife Service to maintain

¹ App. for SNWA’s Response to Lincoln Vidler’s Mot. to Dismiss (“Mot. Dismiss App.”) Vol. 1 at 30:17-18, 31:7-9; 79: fn 5, 88:5-89:9; 144:8-147:2, 170:7-9.

² Mot. Dismiss App., Vol. 1 at 15-20.

³ App. for Appellant SNWA’s Emergency Mot. for Stay (“Mot. Stay App.”) Vol. 1 at 64, Doc. No. 22-17746.

⁴ See Mot. Stay App. Vol. 1 at 65-66, Doc. No. 22-17746.

Moapa dace habitat, and SNWA owns and operates the Warm Springs Natural Area at the headwater springs of the Muddy River.⁵ A direct linkage exists between groundwater pumping in the LWRFS and the spring flow for that habitat, so increased pumping in the LWRFS will further impact the Moapa dace.⁶ If pumping increases, adverse impacts to the Moapa dace will increase and current pumping, including pumping for power plants and existing customers in Moapa, Nevada, will face curtailment. SNWA's ownership of the Warm Springs Natural Area, its stewardship of the Moapa dace, its senior decreed surface-water rights, and its interest in avoiding a water crisis in southern Nevada, represent property rights and other interests that are adversely and substantially affected by the vacation of Order 1309.

Finally, the Las Vegas Valley Water District ("LVVWD") is a member of SNWA and is the appointed general manager for the general improvement district that would provide water and sewer service to a land development in the LWRFS.⁷ SNWA certainly has a cognizable legal interest in assuring that its member, LVVWD, is not required to serve a residential development if no sustainable water rights exist for the project, or if pumping groundwater for that development would violate the Endangered Species Act by harming the Moapa dace.⁸

⁵ Mot. Stay App. Vol. 2 at 238, Doc. No. 22-17447.

⁶ See Mot. Dismiss App. Vol. 1 at 13 (water level responses show hydrological connection between groundwater pumping throughout LWRFS).

⁷ Mot. Dismiss App. Vol 1 at 11.

⁸ See Mot. Stay App. Vol 1 at 46 (State Engineer found that ESA liability for "take" of Moapa dace would extend to the State Engineer and other groundwater users in the LWRFS).

The main purpose of Order 1309 was to determine the amount of groundwater that could be sustainably pumped without adversely impacting Muddy River water rights and the Moapa dace.⁹ The District Court vacated Order 1309 and impaired the State Engineer's ability to protect SNWA's senior water rights and the Moapa dace. Therefore, SNWA is aggrieved by the District Court Order and has standing to appeal the order under NRAP 3A(a).

PROCEDURAL BACKGROUND

After an extensive administrative hearing the Nevada State Engineer issued Order 1309.¹⁰ SNWA was a party to the administrative hearing. In Order 1309 the State Engineer designated the LWRFS as a single groundwater aquifer,¹¹ and set an 8,000 acre-feet annum ("afa") pumping cap to protect senior water rights in the Muddy River and the endangered Moapa dace.¹²

SNWA, and seven other parties, filed petitions for judicial review of Order 1309.¹³ All the parties, except Lincoln Vidler, executed a stipulation for each petitioner to intervene in each petition (thereby conceding to party status and appeal

⁹ See Mot. Stay App. Vol. 1 at 65-66, Doc. No. 22-17446.

¹⁰ Mot. Stay App. Vol. 1 at 66, Doc No. 22-17446.

¹¹ Mot. Stay App. Vol. 1 at 66, Doc No. 22-17446.

¹² Mot. Stay App. Vol. 1 at 66, Doc No. 22-17446.

¹³ SNWA's Docketing Statement, Doc 22-19344; Mot. Stay App. Vol. 2 at 189:16-26, Doc No. 17447. Petitioners are Apex Holding Company, LLC and Dry Lake Water, LLC; the Center for Biological Diversity; Nevada Cogeneration Associates Nos. 1 and 2; Coyote Springs Investment, LLC; Georgia-Pacific Gypsum LLC and Republic Environmental Technologies, Inc.; and Muddy Valley Irrigation Company.

rights).¹⁴ Lincoln Vidler filed its petition in the Seventh Judicial District, but SNWA and the State Engineer filed motions to change venue of that petition to the Eighth Judicial District that were granted.¹⁵ This Court upheld the change of venue.¹⁶ The district court vacated Order 1309, and subsequently partially granted SNWA's petition.¹⁷ This appeal followed.¹⁸

STANDARD OF REVIEW

Lincoln Vidler's Motion to Dismiss challenges SNWA's standing to appeal. Motions to dismiss are subject to a rigorous standard of review. Factual allegations of the appellant are recognized as true, and all inferences are drawn in its favor.¹⁹ A party has the right to appeal if it is aggrieved by a final, appealable order.²⁰ A party is aggrieved "when either a personal right or right of property is adversely and substantially affected" by the appealable order.²¹ Even a prevailing party may appeal if the appealable order causes a substantial grievance.²² Also, an

¹⁴ Mot. Stay App. Vol. 2 at 367-383, Doc. No. 18809. On April 26, 2021, several non-petitioners were also granted intervention. Mot. Stay App. Vol. 2 at 190, Doc. No. 17447.

¹⁵ Mot. Dismiss App. Vol. 1 at 2.

¹⁶ Mot. Dismiss App. Vol. 1 at 177-85.

¹⁷ Mot. Stay App. Vol. 2 at 223:24-224:10, Doc. No. 17447.

¹⁸ Order Granting Motions to Consolidate at 4-5, Doc. No. 22-18101.

¹⁹ *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008).

²⁰ NRAP 3A(a); *Jacinto v. PennyMac Corp.*, 129 Nev. 300, 303, 300 P.3d 724, 726 (2013).

²¹ *Las Vegas Police Protective Ass'n Metro, Inc. v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark*, 122 Nev. 230, 239-40, 130 P.3d 182, 189 (2006) citing *Valley Bank of Nevada v. Ginsburg*, 110 Nev. 440, 446, 874 P.2d 729, 734 (1994).

²² *Jacinto*, 129 Nev. at 303, 300 P.3d at 726.

intervenor has all the rights a party has in an action, “including a right to appeal *independent* from that of the original parties.”²³

ARGUMENT

I. SNWA Has Standing To Appeal As A Respondent-Intervenor.

Lincoln Vidler confuses the procedural history to claim SNWA already received the relief it sought below. SNWA sought relief for the capture of its surface water rights from groundwater pumping and protection of the Moapa dace habitat. Obviously, the district court’s vacation of 1309 did not assuage that impairment. As a petitioner, SNWA sought to defeat an erroneous finding by the State Engineer that existing pumping does not capture (i.e. conflict with) its Muddy River water rights. As a respondent, SNWA sought to uphold the State Engineer’s prohibition on additional capture of Muddy River rights by groundwater pumping. Lincoln Vidler is fully aware of this distinction, as SNWA presented unique and separate arguments as a petitioner and respondent. SNWA stated in various ways that “most of Order 1309 is correct,” and “this Court should uphold the bulk of Order 1309 because the State Engineer’s conclusions regarding LWRFS hydrologic connections and water availability were all based upon much more than substantial evidence.”²⁴ This relief was not granted and SNWA is thereby aggrieved.

As a respondent, SNWA has full appeal rights. SNWA intervened in all petitions that challenged Order 1309, and those motions were granted by stipulation

²³ *Las Vegas Police Protective Ass'n Metro*, 122 Nev. at 239, 130 P.3d at 189 (emphasis added).

²⁴ Mot. Dismiss App. Vol. 1 at 30:17-18, 31:7-9; 79: fn 5, 88:5-89:9; 144:8-147:2, 170:7-9.

or order. The stipulation provided that intervention “is appropriate and warranted under both NRC 24(a) and NRC 24(b), thereby giving *standing* to [SNWA] to be an actual party in each of the matters filed.”²⁵ In Lincoln Vidler’s petition, the district court held that SNWA has “a sufficient interest in the litigation based on [its] ownership and control of decreed surface water rights in the Muddy River that were recognized by this Court in 1920.”²⁶ Therefore SNWA has standing as a respondent-intervenor to file this *independent* appeal.²⁷

Furthermore, parties are routinely recognized to have standing to defend an order or decision of the State Engineer before the Supreme Court. In *Diamond Valley National Resources Protection & Conservation Association*, 138 Nev. Ad. Op. 43 (2022), various non-prevailing petitioners (like SNWA here) defended the decision of the State Engineer at the Supreme Court. In *Great Basin Water Network v. Taylor*, 222 P.3d 665, 126 Nev. Ad. Op. 2 (2010), SNWA, as it is here, defended a State Engineer’s decision. In *In re 63805*, 129 Nev 1145 (2013), prevailing respondent-intervenors defended the State Engineer’s decision to approve water right applications. Each of these cases, and many more, make the practice clear that a respondent-intervenor is a *real party in interest* and has standing to appeal.

II. SNWA Has Standing As a Petitioner That Did Not Fully Prevail.

SNWA sought partial relief, but the district court threw the baby out with the bathwater. SNWA argued that a small portion of Order 1309 should be stricken, and

²⁵ Mot. Stay App. Vol. 4 at 384-401, Doc. No. 22-18809.

²⁶ Mot. Dismiss App. Vol. 1 at 3:1-3.

²⁷ *Las Vegas Police Protective Ass'n Metro*, 122 Nev. at 239, 130 P.3d at 189.

clearly requested in its briefing that “Order 1309 be affirmed in part and reversed and remanded in part, *solely for the purpose of vacating the State Engineer’s no conflict determination.*”²⁸ SNWA did not prevail below. As the *Jacinto* Court made clear, a successful petition that leaves an appellant without relief is appealable.²⁹ In *Jacinto*, when the district court granted the petition, but not the petitioner’s requested loan modification, this Court considered the district court’s decision to constitute a “substantial grievance.”³⁰ The same is true here. Even though the district court granted SNWA’s petition, it also threw out the only regulatory framework that could protect SNWA’s water rights.³¹

III. SNWA Is Aggrieved By The District Court Order.

SNWA has standing to appeal because the District Court Order significantly impacts SNWA’s interests. SNWA’s senior water rights are property rights that are adversely and substantially effected because Order 1309 protected those rights.³² SNWA owns or controls over 20,000 afa of senior decreed Muddy River rights, and some of these are being captured by junior groundwater pumping in the LWRFS

²⁸ Mot. Dismiss App. Vol. 1 at 170:7-9.

²⁹ *Jacinto*, 129 Nev. at 303, 300 P.3d at 726.

³⁰ *Id.*

³¹ Lincoln Vidler also cites to *Ford v. Showboat Operating Company* in support of its claim that SNWA cannot appeal because it prevailed in the district court. This case is distinguishable. In *Showboat*, the appellant was successful on a motion for summary judgment and then appealed a specific conclusion of law. *Ford v. Showboat Operating Co.*, 110 Nev 752, 756 877, P.2d 546, 549 (1994). Here, unlike the appellant in *Showboat*, SNWA is appealing, as a respondent-intervenor, the conclusions of law that served as a basis to grant petitions which SNWA opposed.

³² Mot. Stay App. Vol. 1 at 42, Doc. No. 22-17446; Mot. Stay App. Vol. 3 at 522 page 12:11-12, Doc. No. 22-17448.

every year.³³ These water rights are needed to supplement the Colorado River and supply water to the Las Vegas Valley’s residents and visitors.³⁴ Contrary to Lincoln Vidler’s false claims, loss of the 8,000 afa pumping cap set in Order 1309 will cause conditions that “threaten to conflict with Muddy River decreed rights.”³⁵ Lincoln Vidler falsely claims SNWA lacks standing because the order appealed from does not “impose any illegal obligation or burden or deny [SNWA] any equitable or legal rights.”³⁶ Water rights are real property,³⁷ and vacation of Order 1309 eliminates the 8,000 afa pumping cap that protects SNWA’s water rights. Therefore, the vacation of Order 1309 is a burden on SNWA’s property rights and denies SNWA a path to protect those rights.³⁸

Lincoln Vidler incorrectly claims SNWA’s interest in protecting the Moapa dace is not sufficient for standing.³⁹ Lincoln Vidler ignores the significant role

³³ Mot. Stay App. Vol 4 at 369, Doc. No. 22-18809; *see also*, Mot. Stay App. Vol 3 at 204, Doc. No. 22-17447.

³⁴ Mot. Stay App. Vol. 2 at 118:2-11, Doc. No. 17447.

³⁵ Mot. Stay App. Vol. 1 at 63, Doc. No. 17446.

³⁶ Lincoln Vidler Mot. to Dismiss at 7, Doc. No. 22-18309.

³⁷ *Application of Filippini*, 66 Nev. at 21–22, 202 P.2d at 537.

³⁸ *See Las Vegas Police Protective Ass’n Metro, Inc.*, *supra*, 122 Nev. at 240, 130 P.3d. at 189 (the Court held that police officer’s union was burdened by District Court Order that effects its ability and legal right to defend its members).

³⁹ Lincoln-Vidler’s Mot. to Dismiss at 6, 8, Doc. No. 22-18309. Lincoln Vidler cites to *Blanding v. City of Las Vegas* to support their assertion that a party cannot appeal on behalf of the public interest or the community in general. In *Blanding* the plaintiffs claimed taxpayer standing in a suit to stop a construction project and this Court held plaintiffs did not have standing because their injury did not differ from that of general public. Here, both as a senior water right holder and unique stakeholder in the protection of the Moapa dace, SNWA’s injuries greatly differ from the general public’s injury. *Blanding v. City of Las Vegas*, 280 P. 644, 650 (1929).

SNWA has in protecting the Moapa dace. SNWA owns and operates the 1,220 acre Warm Springs Natural Area in the headwaters of the Muddy River which encompasses 76 percent of the Moapa dace habitat.⁴⁰ Since SNWA acquired the Warm Springs Natural Area, it has completed extensive habitat restoration, constructed public trails for low-impact public use, and promoted public involvement in the protection of the Moapa dace.⁴¹ Therefore, SNWA has a unique interest in protecting the Moapa dace and has standing to appeal based on potential harm to this endangered species.

IV. SNWA's Claim Of Aggrievement Is Not Speculative.

Lincoln Vidler argues SNWA is speculating that additional pumping will harm its vested rights.⁴² Lincoln Vidler's claim that the State Engineer has other tools to protect senior water rights is unavailing.⁴³ Lincoln Vidler did not identify the tools it claims the State Engineer has at his disposal. Furthermore, the District Court Order impairs the State Engineer's statutory authority to protect SNWA's rights because it found the State Engineer is without authority to conjunctively manage groundwater and surface water.⁴⁴ Therefore, SNWA is aggrieved by the District Court Order because it impairs the State Engineer's existing authority to protect SNWA's senior water rights and the Moapa dace.

⁴⁰ Mot. Stay App. Vol. 2 at 238, Doc. No. 22-17447.

⁴¹ Mot. Stay App. Vol. 2 at 238, Doc. No. 22-17447

⁴² Lincoln Vidler Resp. to SNWA's Motion for Stay at 9, Doc. No. 22-18297.

⁴³ Lincoln Vidler's Mot. to Dismiss at 8, Doc. No. 22-18309.

⁴⁴ Mot. Stay App. Vol. 2 at 217, Doc. No. 17447.

More importantly, certain respondents have already sought to increase pumping immediately. After the district court issued its decision, Coyote Springs Investment, LLC, immediately sought water for a new subdivision and told the district court it intends to use 536 afa of additional groundwater because Order 1309 is vacated.⁴⁵ SNWA's claim of aggrievement is real, immediate, and in no way speculative.⁴⁶

CONCLUSION

For the aforementioned reasons, this Court should deny Lincoln Vidler's Motion to Dismiss.

⁴⁵ Mot. Stay App. Vol. 2 at 96:22-97:1, 144:4-10, 179:21-24, Doc. No. 22-17447.

⁴⁶ In support of its claim that SNWA does not have standing to appeal Lincoln Vidler cites to *Matter of Estate of Moon*. This case is easily distinguishable. In *Estate of Moon*, this Court held that the decedent's former attorney was not an aggrieved party, for the purposes of NRAP 3A(a), based on his possession of the decedent's files because the lower court order in no way impacted the former attorney's personal or property rights. Here, SNWA has shown how the District Court Order impacts its property rights by limiting the State Engineer's ability to protect SNWA's senior water rights. *Matter of Estate of Moon*, 501 P.3d 470 (2021).

AFFIRMATION

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

Respectfully submitted June 29, 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 document by electronic service to:

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