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,

Appellant,

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.; and BEDROC LIMITED, LLC; CITY OF NORTH LAS VEGAS,

Respondents.

Electronically Filed
Jan 31 2023 04:59 PM
Elizabeth A. Brown
Clerk of Supreme Court

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

APPELLANTS' OPPOSITION TO RESPONDENTS' JOINT REQUEST FOR JUDICIAL NOTICE

Docket 84739 Document 2023-03065

Appellants Adam Sullivan, P.E., in his capacity as the Nevada State Engineer, Department of Conservation and Natural Resources, Division of Water Resources (hereafter "State Engineer"), Southern Nevada Water Authority, Muddy Valley Irrigation Company, and Center for Biological Diversity (collectively "Appellants"), by and through their respective counsel, hereby file this Opposition to Respondents' Joint Request for Judicial Notice. This Opposition is based on the following Memorandum of Points and Authorities and the papers on file herein.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

None of the exhibits that Respondents identify include facts that are the proper subject of judicial notice under NRS 47.130. Additionally, Respondents take statements made by the State Engineer or his employees that, when given their proper context, do not create the inconsistences that Respondents construct. Finally, the district court expressly excluded one of the exhibits from the record when some of the Respondents sought judicial notice in the district court, and Respondents have not challenged the district court's ruling on appeal. For those reasons, this Court should deny the joint request for judicial notice in its entirety.

II. LEGAL STANDARD

Generally, this Court will not consider matters not properly appearing in the record on appeal. *Carson Ready Mix, Inc. v. First Nat'l Bank of Nev.*, 97 Nev. 474,

476, 635 P.2d 276, 277 (1981). Judicial notice is a "shortcut" that does away with the need to present evidence of a fact. *Lemel v. Smith*, 64 Nev. 545, 565–66, 187 P.2d 169, 179 (1947). Judicial notice of matters of fact is limited to "facts in issue or facts from which they may be inferred." NRS 47.130. Facts subject to judicial notice under both NRS 47.130 and NRS 47.150 must be generally known or capable of accurate and ready determination by resorting to sources whose accuracy cannot reasonably be questioned so that the fact is not subject to reasonable dispute. *Mack*, 125 Nev. at 91, 206 P.3d at 106. This Court generally "will not take judicial notice of records in another and different case, even though the cases are connected." *Id*. (citing *Occhiuto*, 97 Nev. at 145, 625 P.2d at 569). But this Court recognizes an exception to the general rule which depends upon an examination of "the closeness of the relationship between the two cases." *Id*. at 91–92, 206 P.3d at 106.

III. ARGUMENT

A. Exhibit 1: Minutes of the Meeting of the Subcommittee on Pub. Lands of the Joint Interim Standing Committee on Nat. Resources, May 23, 2022

The minutes of a legislative hearing that occurred after the district court issued its order vacating Order 1309 have no bearing on any fact in issue in this case. Thus, Exhibit 1 is not the proper subject of a request for judicial notice under NRS 47.130.

Even so, if this Court reviews the remarks that Respondents rely upon to construct a purported inconsistency in positions, it will see that Deputy

Administrator Fairbank made those statements in direct response to the district court order that is the subject of this appeal.[1] The State Engineer's reliance on the Legislature as an alternative forum to address the district court's conclusions in this case—that the State Engineer lacks statutory authority for joint administration and conjunctive management—establishes no inconsistency with the State Engineer's position in this appeal.

The State Engineer is, in this appeal, challenging the district court's ruling that the statutes do not provide him with the authority to engage in joint administration and conjunctive management. But the State Engineer does not have to wait for this Court to issue a final ruling on that issue before he can turn to the Legislature to seek stronger statutory language that clarifies the existence of his authority to conjunctively manage hydrologically connected resources of surface water and groundwater. There is no inconsistency between Exhibit 1 and the State Engineer's position in this appeal.

B. Exhibit 2: Respondent Nevada State Engineer's Answering Brief, filed in *Pyramid Lake Paiute Tribe of Indians v. Ricci*, Case No. CV01-05764

This brief fits squarely within this Court's general rule that it will not take judicial notice of records from other cases. This Court has denied judicial notice of

[1] Joint Request for Judicial Notice at 2 (quoting Exhibit 1); Joint Answering Brief at 23; CSI Answering Brief at 13 n.6.

court records "even though the cases are connected." *Mack*, 125 Nev. at 91, 206 P.3d at 106 (citing *Occhiuto*, 97 Nev. at 145, 625 P.2d at 569). Here, Respondents request judicial notice of a brief the State Engineer filed in district court 20 years ago. But there is no direct connection between the facts of that case and the facts of this case that would be the proper subject of judicial notice under NRS 47.130.

Even so, there is no inconsistency. First, the legal issues in the two cases are different. The State Engineer, in the brief attached as Exhibit 2, said nothing about his authority to rely upon the best available science to delineate an aquifer that—like the LWRFS—covers a geographic area that spans multiple groundwater basins, as he did in Order 1309.[2] And what the State Engineer did say—that although surface water and ground water historically have been managed separately, he considered the hydrologic connection between surface water and groundwater when limiting imposing a limit on pumping to protect existing surface water rights and the public interest—aligns with the State Engineer's current position on the need for him to consider the existence of hydrologic connections between groundwater and surface water.[3]

[2] Exhibit 2.

[3] Exhibit 2 at 19:22–20:9; Joint Opening Brief at 46–61; *see also Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. 521, 527, 245 P.3d 1145, 1149 (2010) ("The State Engineer imposed this limitation in part to protect the Truckee River water quality and native fish habitats.").

Second, even assuming an inconsistency existed, the relevant legal landscape has changed. In particular, fourteen years after the State Engineer filed the brief Respondents cite, the Legislature stated, "It is the policy of this State . . . [t]o manage conjunctively the appropriation, use and administration of all waters of this State, *regardless of the source of the water*." 2017 Nev. Stat., ch. 517, § 1.3, at 3498 (emphasis added). The Legislature's more recent directive that the State Engineer manage all of Nevada's water, regardless of its source, undercuts Respondents' reliance on the State Engineer's past statements to establish a basin-by-basin limitation on the State Engineer's authority to manage the State's water resources that cross basin boundaries. As a result, what the State Engineer said before the Legislature's adoption of the current language of NRS 533.024(1)(e) is irrelevant and does not create an inconsistency between Exhibit 2 and the State Engineer's position in this appeal.

C. Exhibit 3: Minutes of the Meeting of the Assembly Comm. on Natural Res. Agric., and Mining, Feb. 27, 2019, 2019 Leg., 80th Sess. (Nev. 2019)

This Court recently held that unpassed legislation "has little value when interpreting a statute." *Diamond Nat. Res. Prot. & Conservation Assoc. v. Diamond Valley Ranch, LLC*, 138 Nev. Adv. Op. 43, 511 P.3d 1003, 1010 (2022) (citing *Pension Benefit Guar. Corp. v. The LTV Corp.*, 496 U.S. 633, 650, 110 S. Ct. 2668, 110 L. Ed. 2d 579 (1990)). This is because unadopted proposed legislation "leads to

conflicting inferences"—e.g., it could mean that the Legislature did not want the State Engineer to have certain authority, or it could mean that "the Legislature rejected [a] bill because it felt that the existing statutory text already allowed the State Engineer" to take the challenged action. *Id*.

The minutes Respondents present are from a committee hearing on Assembly Bill 51, which never made it out of committee and, therefore, never became law. As a result, even if these minutes contained facts that were the proper subject of judicial notice under NRS 47.130—they do not—the minutes have little value, if any, to this Court's consideration of questions of law on the State Engineer's authority to issue Order 1309.

Moreover, the then-State Engineer's statements do not contradict the State Engineer's position in this case. Through AB 51, the State Engineer sought additional express powers for actively managing water resources and mitigating conflicts among various water users. The then-State Engineer's expression of his opinion that existing statutes did not "provide the framework necessary to *effectively* implement the Legislature's policy direction" reflects that particular context, and is not the same as "conced[ing] that there is no express authority for 'conjunctive' management' in Nevada's water statutes."[4] At most, this testimony illustrates a desire for more precise statutory language, not the complete absence of authority to

[4] Request for Judicial Notice at 5.

act. There is no inconsistency between Exhibit 3 and the State Engineer's position in this appeal.

D. Exhibit 4: Order 1329

Respondents seek judicial notice of Order 1329 based on its reference to a specific portion of AB 51 that would have directed the Nevada Division of Water Resources ("DWR") to adopt conjunctive management regulations. The request is improper for multiple reasons.

First, Order 1329 post-dates Order 1309 and involves an entirely different water resource—the Humboldt River. Thus Order 1329, does not address facts that are the proper subject of a request for judicial notice under NRS 47.130.

Additionally, Order 1329's reference to AB 51 was not a statement about the State Engineer's authority, or lack thereof, to conjunctively manage water resources generally. It was a factual statement of what occurred in the 2019 Legislative Session—AB 51 not becoming law. And AB 51 was not a bill to codify the State Engineer's authority for conjunctive management, but instead would have required DWR to adopt specific regulations on the use of conjunctive management to resolve and mitigate conflicts between senior and junior priority water rights. As explained above, there is no inconsistency between the State Engineer's position on AB 51 and the State Engineer's position in this appeal.

Finally, certain Respondents sought admission of Order 1329 in the district court, and the district court rejected a request that it take judicial notice of the document. Joint Appendix Vol. 49, at JA 22430–22438. But Respondents have not challenged the district court's ruling on Order 1329 in this appeal. This Court should not allow Respondents to circumvent the deferential standard for reviewing the district court's evidentiary rulings by seeking judicial notice on appeal. *Cf. McLellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008) ("We review a district court's decision to admit or exclude evidence for an abuse of discretion.").

E. Exhibit 5: Minutes of the Meeting of the Assembly Subcommittee on Public Lands, August 22, 2022, 2022 Interim Legislature (Nev. 2022); and Exhibit 6: Summary of Recommendations, Joint Interim Standing Committee on Natural Resources and Subcommittee on Public Lands

This Court should deny the request to take judicial notice of Exhibits 5 and 6 for the same reasons as Exhibit 1. The minutes, and the summary, post-date the district court's order on Order 1309 and discuss potential future legislation to "clarify the processes and authority for conjunctive management of surface and groundwater basins." Exhibit 5 at 11; Exhibit 6 at 1. These documents do not include facts that are the proper subject of judicial notice under NRS 47.130.

Moreover, this potential, unenacted legislation has little value, if any, in interpreting the relevant statues, especially when there is not even text of a Bill Draft Request to examine. "Clarifying" the processes and authority for conjunctive

management does not mean that the State Engineer entirely lacks that authority. Thus, there is no inconsistency between Exhibits 5 and 6 and the State Engineer's position in this appeal.

IV. CONCLUSION

For the foregoing reasons, the Appellants respectfully request that the Court deny Respondents' request for judicial notice.

RESPECTFULLY SUBMITTED this 31st day of January, 2023.

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CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 31st day of January , 2023, I served a copy of the foregoing APPELLANTS' OPPOSITION TO RESPONDENTS' JOINT REQUEST FOR JUDICIAL NOTICE, by electronic service to the participants in this case who are registered with the Nevada Supreme Court's EFlex Electronic Filing System.

/s/ Dorene A. Wright