

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

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

Respondents. _____/

SOUTHERN NEVADA WATER
AUTHORITY,

Appellant,

SUPREME COURT NO. 84739
District Court Case No. A816761
(Consolidated with Supreme
Court Cases 84741, 84742 and
84809)

SUPREME COURT NO. 84741
(Consolidated with Supreme
Court Cases 84739, 84742 and
84809)

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

Respondents. /

CENTER FOR BIOLOGICAL DIVERSITY,

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

SUPREME COURT NO. 84742
(Consolidated with Supreme
Court Cases 84739, 84741 and
84809)

ENERGY; THE CHURCH OF JESUS
CHRIST OF LATTER-DAY SAINTS;
MOAPA VALLEY WATER DISTRICT;
WESTERN ELITE ENVIRONMENTAL,
INC.; BEDROC LIMITED, LLC; CITY OF
NORTH LAS VEGAS; AND LAS VEGAS
VALLEY WATER DISTRICT,

Respondents. /

MUDDY VALLEY IRRIGATION
COMPANY,

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

Respondents. /

SUPREME COURT NO. 84809
(Consolidated with Supreme
Court Cases 84739, 84741 and
84742)

RESPONDENTS' JOINT SUR-REPLY

Pursuant to this Court's Order Denying Motions for Judicial Notice and to Strike and Granting Motion to File Sur-Reply, Respondents jointly submit this Sur-Reply to the Appellants' Joint Reply Brief (the "Reply").

I. Introduction.

The State Engineer has never construed his statutory authority to include the ability to combine multiple hydrographic basins into a single hydrographic basin. The orders and rulings in the NRAP 28(f) Pamphlet (the "Pamphlet") so confirm. Indeed, the Pamphlet demonstrates that the State Engineer has treated individual hydrographic basins separately, even where he believed multiple basins drew from the same water source.

Rather than acknowledge the unprecedented language and impact of Order 1309, the State Engineer conflates Order 1309 with administrative orders that simply "transcend basin boundary lines and apply to multiple administrative areas." Reply, 13. But Order 1309 cannot properly be characterized as merely an administrative order that applies to seven individual hydrographic basins because it merges those seven basins into one new, superbasin, which substantively impacts the existing water rights within those seven basins.

Order 1309 expressly *creates* a new hydrographic basin. 2 JA 390. This new basin, named the "Lower White River Flow System Hydrographic Basin", is

composed of seven previously distinct hydrographic basins. *See id.* (explaining that the seven separate basins are “hereby delineated as a single hydrographic basin”). Order 1309 further restricts existing water right holders’ groundwater pumping by establishing a “maximum quantity of groundwater that may be pumped from the Lower White River Flow System Hydrographic Basin on an average annual basis”. *Id.* Not one of the orders and rulings in the Pamphlet imposes this type of substantive restriction on existing water rights.

The Pamphlet belies the Appellants’ attempt to characterize Order 1309 as mere “joint administration”. As discussed herein, Order 1309 is fundamentally different from the administrative orders and rulings in the Pamphlet. Accordingly, the Pamphlet confirms that Order 1309 is unprecedented.

II. Prior to Order 1309, the State Engineer had Never “Jointly Administered” Separate Hydrographic Basins by Combining Them into One Single Basin.

The Appellants rely on the Pamphlet to argue that the State Engineer regularly engages in “joint administration” of multiple basins. Respondents do not dispute that the State Engineer has issued administrative rulings and orders that apply to more than one hydrographic basin. However, this matter is the first time the State Engineer has employed the term “joint administration” to mean combining multiple hydrographic basins into a single hydrographic basin.

The Appellants describe several rulings and orders as “administering”

multiple hydrographic basins “under a joint perennial yield”. *See* Pamphlet, Table of Contents (Tabs 1-13).¹ While the State Engineer assessed a combined perennial yield for more than one hydrographic basin in the referenced rulings, the State Engineer did not “administer” the individual basins as a single hydrographic basin. To the contrary, the State Engineer combined each of the separate basin’s perennial yields to determine whether there was water available for *new* water right applications pursuant to NRS 533.370. The State Engineer then decided each application by the specific basin.

For example, in Ruling 2286, the total combined perennial yield for the Susie Creek Area Hydrographic Basin (Basin 50) and the Maggie Creek Area Hydrographic Basin (Basin 51) was 6,000 afa. *See* Pamphlet, Ruling 2286, P005. Even with a combined perennial yield, the State Engineer did not combine the basins into one. Rather, the State Engineer administered the basins individually by first determining each basin’s perennial yield and then granting additional water rights in the basin where there was unappropriated water. *See id.* at P006.

These rulings demonstrate that the State Engineer has historically interpreted his statutory authority to determine water availability and manage water rights on a basin-by-basin basis even where hydrographic basins have a combined perennial

¹ These include Rulings 2286, 2524, 2792, 2865, 2922, 2947, 2955, 4479, 5988, 6031, 6139, 6322, and Order 1295 (Tabs 1-13 in the Pamphlet).

yield. Further, these rulings confirm that the State Engineer has never “jointly administered” multiple basins by combining them into a single basin as he did in Order 1309.

III. Order 1309 is Not “Joint Administration”.

The actions taken in the orders and rulings in the Pamphlet demonstrate that Order 1309 is not “administrative”—even as the Appellants characterize that term.² Order 1309 substantively alters the priorities of *existing* water rights (vested property rights) within the seven separate basins. Rulings and orders that are administrative in nature would not alter existing water rights, regardless of how many hydrographic basins are subject to the ruling or order.

To be sure, orders that designate and describe basins or areas do not alter the existing water right holders’ rights within those basins. *See* Pamphlet, Orders 708, 715, and 718; *see also* Order 1325 (available on the State Engineer’s website) (explaining that “designating a basin pursuant to NRS 534.030 does not limit established water rights nor does it restrict applications to appropriate underground water”). Similarly, orders setting preferred uses in multiple basins do not modify the existing rights within those basins. *See* Pamphlet, Orders 839, 872.

² The Appellants’ claim that the State Engineer has the authority to engage in “administrative” actions at all is without statutory authority. However, the Respondents accept the Appellants’ characterization of the orders and rulings in the Pamphlet as being “administrative” for purposes of this Sur-Reply.

Additionally, orders granting petitions for adjudication of water rights under NRS 533.090 and taking proofs do not alter the existing rights in the individual hydrographic basins. *See* Orders 1235 and 1237.

Likewise, statutorily authorized directives to water right holders in various basins do not substantively alter existing water rights. *See, e.g.,* Order 1162 (modifying the rules for well drilling “as long as the new well remains within the same hydrographic basin as the delineated block”); Order 1251 (requiring water right holders in various basins to install and maintain a totalizing meter); Order 1308 (establishing reserved groundwater quantities in hydrographic basins with unappropriated groundwater even where basins had a combined perennial yield); Order 1318 (establishing reporting requirements for meter installation and monthly meter readings). None of these “administrative” orders change or restrict existing water rights.

Order 1309, on the other hand, puts all the water right holders across seven separate basins into a newly created basin. Order 1309 then restricts those existing water right holders to an 8,000 afa pump cap. There is no statute that authorizes either of these actions. Order 1309 is, therefore, not an “administrative” order, even under the Appellants’ definition of the term. The Appellants’ characterization of Order 1309 as constituting “joint administration” does not render it so. Accordingly, the Respondents were correct in asserting that Order 1309 is unprecedented.

DATED this 16th day of May, 2023.

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CERTIFICATE OF SERVICE

I certify that on the 16th day of May 2023, I served a copy of **RESPONDENTS' JOINT SUR-REPLY** upon all counsel of record:

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