

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, et al.,

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.

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Case No. 84739

(consolidated with Case Nos. 84741,
84742, and 84809)

**APPELLANTS' JOINT OPPOSITION TO RESPONDENTS' MOTION TO
STRIKE APPELLANTS' RULE 28(F) PAMPHLET AND REPLY BRIEF
OR ALTERNATIVELY, MOTION FOR LEAVE TO FILE SUR-REPLY**

Appellants Adam Sullivan, P.E., in his capacity as the Nevada State Engineer, Department of Conservation and Natural Resources, Division of Water Resources (“State Engineer”), Southern Nevada Water Authority (“SNWA”), Muddy Valley Irrigation Company (“MVIC”), and Center for Biological Diversity (“CBD”) (collectively, “Appellants”), by and through their respective counsel, file this Opposition to Respondents’ Motion to Strike Appellants’ Rule 28(F) Pamphlet and Reply Brief or Alternatively, Motion For Leave To File Sur-Reply (“Motion”).

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

Respondents’ request that this Court strike Appellants’ NRAP 28(f) Pamphlet (“Pamphlet”) and portions of the reply brief should be rejected. The Pamphlet contains authorities that are directly responsive to an argument raised in the Respondents’ answering brief, are not readily available to the Court, and are critical for this Court’s understanding of the statewide implications of its ruling in this case. Since the Pamphlet is directly responsive to Respondents’ arguments, and does not introduce new arguments, Respondents’ request for a sur-reply should be denied.

II. Legal Standard

Motions to strike are used to strike a portion of a brief that is non-compliant with the rules or that contains irrelevant, immaterial, or scandalous matters.¹ A

¹ NRCP 12(f) (court may strike “insufficient defense or any redundant, immaterial,

motion to strike a portion of a reply brief should be denied if the reply brief is “limited to answering any new matter set forth in the opposing brief.”² A pamphlet filed based on NRAP 28(f) should not be stricken if it includes “statutes, rules, regulations, etc.,” that must be studied in the “determination of the issues presented.”³ Sur-replies are disfavored, and a request for a sur-reply should be denied when the matter at issue was not raised for the first time in a reply brief.⁴

III. The Motion To Strike Should Be Rejected.

A. The reply brief and NRAP 28(f) Pamphlet are directly responsive to arguments raised in the answering brief.

Respondents claimed throughout their answering brief that Order 1309 represents the “first time in history” that the State Engineer jointly administered basins or applied what they call a multi-basin “pump cap” (*i.e.*, perennial yield or maximum sustainable pumping level).⁵ The reply brief properly responded to these

impertinent, or scandalous matter.”); NRAP 28(j) (court may strike non-compliant briefs that contain “burdensome, irrelevant, immaterial or scandalous matters.”).

² NRAP 28(c).

³ NRAP 28(f).

⁴ NRAP 28(c). *Reborn v. Nev. State Educ. Ass'n NSEA*, No. 215CV02036GMNNJK, 2016 WL 3093308, at *1 n.1 (D. Nev. May 31, 2016) (unpublished opinion); *see also Key v. Shelby Cnty.*, 551 Fed.Appx. 262, 265 (6th Cir. 2014) (court denied motion for leave to file sur-reply because non-moving party did not present new evidence or arguments in its reply brief.).

⁵ *See e.g.*, Resp'ts' Joint Answering Br. at 1 (“With Order 1309, the State Engineer, for the first time in history, combined seven separate hydrographic basins into one.”), 4 (“In Order 1309, the State Engineer, for the first time in Nevada history, combined seven separate hydrographic basins into one single hydrographic basin and applied a pump cap across all of the basins”), 28 (“contrary to the practice of

arguments by countering that the “State Engineer has consistently engaged in the administration of water across basin boundaries throughout Nevada, and in the LWRFS.”⁶ Since this argument was “limited to answering any new matter set forth in the opposing brief,” it properly responded to arguments raised by Respondents.⁷

Pursuant to NRAP 28(c) and NRAP 28(a)(10), the reply brief contained citations to authority (in the form of State Engineer orders and rulings) in which multiple basins had a single combined sustainable volume of withdrawable water or were otherwise jointly administered. This authority directly *answers* arguments raised in the answering brief.⁸ The issue presented here is whether the State Engineer has statewide joint administrative power. The determination of that issue “requires a study of statutes, rules, regulations, etc.,” that involve joint administration so the Court can understand the statewide implications of its opinion in this case.

Respondents wrongly claim that if the orders and rulings in the Pamphlet are important here, they would have been provided to the district court below. The issue before the district court was idiosyncratic because the district court was considering

water management over the past 50 years”), 41 (“[T]he State Engineer consolidated seven basins into one and applied a pump cap across the whole of the previously existing seven basins. This action was unprecedented.”).

⁶ Reply Br. at 12-17.

⁷ NRAP 28(c); *see* Reply Br. at 12, citing Resp’ts’ Joint Answering Br. at 1, 4, 5, 13, 15, 17, 18, 19, 41, 55. Note, contrary to Respondents’ characterization, pages 15-16 contain cites to the record of historic joint administration of the Lower White River Flow System (“LWRFS”) since 1960.

⁸ Reply Br. at 13.

only the LWRFS. But this Court must consider statewide implications. For good reason then, statewide orders and rulings were provided for review.

The difference between *why* Appellants and Respondents cite to prior State Engineer orders and rulings is critical because the hypocrisy is not self-evident,⁹ and “a foolish consistency is the hobgoblin of little minds.”¹⁰ Appellants use the prior joint administration orders and rulings as *authority* that the State Engineer can use his statutory powers to jointly administer groundwater basins. Respondents use one order as *evidence* of what they allege is a prior inconsistent statement by the State Engineer. NRAP 28(f) allows for authorities to be provided in a pamphlet, not new evidence, and Respondents’ request for judicial notice sought to inappropriately use multiple documents as evidence.¹¹ The Pamphlet is an authoritative citation.

Finally, Respondents cite *State ex rel. Masto v. Montero*, and *Elvik v. State*, in support of their arguments.¹² However, this matter is distinguishable from those cases as the reply brief is not filed to further claims in the opening brief, but instead directly responds to claims raised for the first time in the answering brief, namely that the State Engineer never jointly managed multiple basins before Order 1309.¹³

⁹ Mot. at 5.

¹⁰ Ralph Waldo Emerson, *Self-Reliance*, Essays: First Series (1841).

¹¹ See Resp’ts’ Joint Req. for Jud. Notice at 1, 3, citing NRS 47.130(2)(b) (judicial notice statute for matters of fact).

¹² Mot. at 3.

¹³ *State ex rel. Masto v. Montero*, 124 Nev. 573, 577 n.9, 188 P.3d 47, 49 n.9 (2008) (court refused to consider citations provided for the first time in a reply brief that

B. NRAP 28(f) is applicable to rulings and orders of the State Engineer.

The Pamphlet is not a procedural ambush. Pamphlets are commonly used before the Nevada Supreme Court.¹⁴ The rulings and orders are authorities allowed under NRAP 28(f) as they are the agency-equivalent of rules and regulations.¹⁵ NRAP 28(f) allows for authorities such as “statutes, rules, regulations, etc.” to be reproduced in pamphlet form to assist this Court in accessing the relevant text of those authorities as they are not readily available in a reporter database. Thus, the rulings and orders were properly included in pamphlet form.

C. The Pamphlet does not expand the record below.

The Pamphlet does not supplement the record or present material outside the record on appeal (the “ROA”). The Pamphlet is not evidence, it is authority that is contrary to and in reply to the position of Respondents’ brief. The ROA is limited to evidence the State Engineer relied on below, but the legal *authority* the Court can

were used to further support claims raised in the Opening Brief); *Elvik v. State*, 114 Nev. 883, 888, 965 P.2d 281, 284 (1998) citing NRAP 28(c) (party raised the issue in the opening brief but did not discuss supporting evidence until the reply brief).

¹⁴ *Sicor, Inc. v. Stacy Hutchinson*, Case No. 59506, Rule 28(f) Pamphlet of Unpublished Authorities (November 23, 2011); *Bullion Monarch Mining vs. Barrick Goldstrike Mines*, Case No. 61059, Rule 28(f) Pamphlet of Legislative History (November 30, 2013); *Clark Cnty. School District v. Mary Bryan*, Case No. 73856, Appellant’s Rule 28(f) Pamphlet (January 7, 2019); *S. Nev. Water Auth. v. Seventh Jud. Dist. Ct. of State ex rel. Cnty. of White Pine*, Case No. 65775, SNWA’s NRAP Rule 28(f) Pamphlet (December 4, 2014).

¹⁵ The State Engineer is exempt from NRS 233B, and his rulings and orders act as regulations.

rely on in making its decision in any case is never limited to *evidence* in a ROA. Here, the reply brief complies with NRAP 28(a)(10)(A), as referenced in NRAP 28(c), which holds that “[a]rguments must contain citations to *authorities* or the record to support the contentions raised in the brief.”¹⁶ Unlike Respondents’ request for judicial notice, which is a factual matter that is subject to NRAP 28(e)(1), the rulings and orders cited in the reply brief were not included as evidence. Likewise, the Pamphlet does not violate NRAP 28(e)(1), as the State Engineer’s prior joint administration orders are authorities, not evidence. Therefore, Respondents’ argument regarding citations to “matters in the record” is without merit.¹⁷

IV. The Alternative Motion To File A Sur-Reply Should Be Denied.

No further briefing should be allowed here because the reply brief did not raise a new matter, and Respondents had full opportunity to address the argument.

A. Respondents had the opportunity to make their argument.

A sur-reply is not proper in this instance as the Respondents are the ones that raised the argument and failed to cite relevant authority.¹⁸ Respondents were aware of other orders and rulings like Order 1309, which is evident by their reference to Order 1329 in their briefs and motion.¹⁹ Respondents had the opportunity and

¹⁶ NRAP 28(a)(10)(A) (emphasis added).

¹⁷ Mot. at 3.

¹⁸ Resp’ts’ Joint Answering Br. at 1, 4, 5, 13, 15, 17, 18, 19, 28, 29, 40, 41, 55.

¹⁹ Mot. at 5.

obligation to research and provide citations in support of their argument, but failed to do so.²⁰ Now they improperly attempt to strike relevant authority contrary to their uncited position, or get a second bite of the apple to discuss authority they should have disclosed and discussed in their answering brief.

Respondents should not be surprised by Appellants' arguments in the reply brief. They repeated in their answering brief the incorrect mantra that Order 1309 represents the first time in Nevada history that the State Engineer engaged in joint management of multiple groundwater basins. Their opportunity to support this statement was when they made it, and they did not. Sur-replies are only available to address new arguments, not to supply more support for a weak and unsupported argument that was made in an answering brief.

The reply brief notifies this Court of applicable authority to counter the Respondents' arguments. The orders and rulings speak for themselves without the need for additional briefing. The authorities are included without any pages omitted, and therefore cannot "misrepresent the past practice of the State Engineer."²¹ As no new matter was raised in the reply brief, and Respondents had both the ability and opportunity to address the arguments, a sur-reply is not warranted.

²⁰ The Pamphlet is also consistent with the obligations of NRPC 3.3(a)(2) as well as the obligation implicit in NRAP 28. *See e.g., Smith v. Timm*, 96 Nev. 197, 201, 606 P.2d 530, 532 (1980) (expressing the obligation on appeal to cite to legal authority).

²¹ Mot. at 2, *but cf.* NRAP Rule 28(f) Pamphlet.

B. Respondents rely on a mischaracterization of the argument below.

SNWA and MVIC each argued below what they are arguing now; that Order 1309 is nothing new.²² Regardless of how this Court construes the arguments of the State Engineer’s counsel below, SNWA and MVIC are free to raise the same points they raised below and cite authorities to support that position.

Respondents again claim the State Engineer admitted in oral arguments below that Order 1309 was the first of its kind.²³ Respondents mischaracterize the arguments below and cite portions of the record they failed to cite in their answering brief to support their mischaracterization.²⁴ While the State Engineer’s counsel answered a compound question as “correct” during the district court oral arguments, he later clarified that, in the past, the State Engineer conjunctively managed basins along a common river, and treated them as a single source in conflict analysis.²⁵

²² J.A. Vol. 49 at JA_228879-22881, 22900-22903, (counsel for MVIC) (State Engineer historically has managed the LWRFS jointly since at least the 1980s, is “not a new thing,” and the so-called basin-by-basin approach leads to improper segmentation and absurd results); J.A. Vol. 49 at JA_22663-22666, 22749-22753, 22759, 22677 (counsel for SNWA) (“the last 20 years of my career, basically every case has been either conjunctive management or it's been joint management”; “this isn't the only place this is happening”; “Conjunctive management has been something that [the State Engineer] had to do since the groundwater law was enacted”; “the Court shouldn't be misled. This is not an issue of first impression”; and “to say today that we've never dealt with conjunctive management in Nevada is just wrong.”).

²³ Mot. at 6-7.

²⁴ Mot. at 6-7.

²⁵ Mot. at 7, *but cf.* J.A. Vol 49 at JA_22573 (“And other rivers and has denied applications or approved them for less than they were asked on the basis that they –

While the State Engineer agreed that he has generally employed a basin-by-basin approach in the past, his counsel later clarified that the science shows the LWRFS truly is a single source, or a single basin, and its joint administration is consistent with the so-called basin-by-basin approach.²⁶ Respondents cannot be genuinely surprised that the State Engineer would take the same position here.

C. The contents of the Pamphlet speak for themselves.

The Pamphlet does not misrepresent the past practice of the State Engineer - it includes authorities that speak for themselves. No sur-reply is needed. The Appellants did not claim these rulings and orders are exactly the same as Order 1309.²⁷ Rather, these rulings and orders are examples of similar types of actions which the Respondents claim had never been done before Order 1309. Some find that multiple basins share a source of water and therefore share a combined sustainable pumping level, and others administer the waters of Nevada through the application of statutory principles across multiple basins at once. Even Order 1329, which Respondents rely on as evidence, describes the combination of perennial yields in multiple basins that predate Order 1309.²⁸

he's still doing conjunctive management at that time because he's treating them as one source – two sources together that can affect each other.”).

²⁶ Mot. at 7, *but cf.* J.A. Vol. 49 at JA_22588-2591 (“Therefore, delineating this as a single basin and administering it accordingly is in compliance with what petitioners would call basin by basin management because it is one basin.”).

²⁷ Reply Br. at 13-14.

²⁸ Mot. at 5, *but cf.* Reply Br. at 14 n.40.

Respondents should not have a chance to unilaterally argue about the meaning of each order and ruling, as Appellants did not provide such argument and only made the documents available for Court with simple, objective summaries. Appellants did not include any misleading arguments that the orders and rulings “have the same effect as Order 1309.”²⁹ The orders and rulings speak for themselves, and the Court can determine their relevance without additional argument. Otherwise, Appellants should have the same chance Respondents seek – to argue that each of these prior joint administration order and rulings support the position that the State Engineer has the authority to jointly administer groundwater basins.

CONCLUSION

For the foregoing reasons, the Appellants respectfully requests that this Court deny Respondents’ Motion in its entirety.³⁰

²⁹ Mot. At 6.

³⁰ Respondents request attorneys’ fees under NRAP 28(j), claiming that the reply brief violates NRAP 28. However, the reply brief is in full compliance with NRAP 28(c) and 28(j) because it is “concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters” and is “limited to answering any new material set forth in the opposing brief.” Respondents have made no showing that the reply brief is divergent from these rules.

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

Dated this 16th day of March 2023.

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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 the participants in this case as follows:

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