

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 REPLY IN SUPPORT OF MOTION TO STRIKE
APPELLANTS' RULE 28(f) PAMPHLET AND REPLY BRIEF OR
ALTERNATIVELY, MOTION FOR LEAVE TO FILE SUR-REPLY**

Respondents reply in support of their Motion to Strike Appellants' Rule 28(f) Pamphlet and Reply Brief or Alternatively, Motion for Leave to File Sur-Reply (the "Motion") as follows.

The Appellants, through their counsel, owe a duty of candor to this Court. Given the dramatically inconsistent and contradictory positions taken by the Appellants' lawyers in these proceedings, candor has now surfaced as the key issue in this case.

Combining or "delineating" seven separate basins as a single hydrographic basin is not tantamount to issuing orders and rulings that address more than one basin. Determining a perennial yield for more than one basin is not synonymous with combining multiple basins or applying a "pump cap" across several basins. Likewise, rulings and orders that address the effect of groundwater pumping on surface flows are not the same as "delineating" seven basins as one basin.

Only Order 1309 "delineates" seven separate basins as one "single hydrographic basin". The Appellants know this to be true. In fact, the State Engineer's and CBD's counsel not only admitted it in the proceeding below,¹ but

¹ CBD's counsel argued, "And we've heard a lot today about how this is the first time the State Engineer has ever done something like this. And that's true." 49 JA 22345.

the State Engineer also drafted a proposed order denying certain motions for attorney fees, which stated, “Order 1309, and the defense maintained by the State Engineer, presented substantial issues of public policy and issues of first impression that are now pending on appeal at the Nevada Supreme Court.” *See Exhibit 1*. The District Court signed that order, which the State Engineer asks this Court to affirm in Case No. 85137. *See State Engineer’s Answering Brief* 18, 29 (arguing that fees are unavailable when a case involves an issue of first impression). The State Engineer cannot have it both ways.

Given that this issue was addressed multiple times in the District Court, the Appellants’ argument that the Reply “directly responds to claims raised for the first time in the answering brief” is false. *See Opp.*, 4. Moreover, the discussion in the District Court shows that the Appellants should have addressed the issue in their Opening Brief if they truly believed that Order 1309 “is nothing new”. Instead, they chose to wait until the last opportunity for briefing to submit the 147-page Pamphlet to foreclose the Respondents’ opportunity to address it. This is improper and violates NRAP 28(c).

The Appellants further argue that the Pamphlet of State Engineer orders and rulings is simply a citation of “authority.” *Opp.*, 3. But State Engineer rulings and orders are not authority to which this Court or the Respondents are bound. Therefore, these rulings and orders are not “authority” under NRAP 28(a)(10) and

improper for submission under NRAP 28(f).

While the Appellants attempt to label the Pamphlet as authority instead of materials outside the record on appeal, simply referring to the Pamphlet as authority does not render it so. The only relevant *authority* in this case are the Nevada water law statutes and this Court's precedent, neither of which authorize the State Engineer to combine or "delineate" seven hydrographic basins into a single hydrographic basin. The State Engineer cannot derive authority from his past orders and rulings. Therefore, even if the orders and rulings in the Pamphlet were the same as Order 1309 (they are not), they cannot serve as a grant of authority for the State Engineer to do anything. Similarly, they are not binding authority on this Court.

The Appellants defend their failure to address the Pamphlet in the District Court by contending that this Court "*must* consider statewide implications" while the District Court was solely focused on "the LWRFS". Opp., 3-4 (emphasis added). In other words, the Appellants argue that this Court *must* make a policy decision that was not before the District Court. This is patently improper.

First, this Court has explained that "the judicial branch may not refuse to enforce [a] statute on public policy grounds. That decision is within the sole purview of the legislative branch." *Beazer Homes Nevada, Inc. v. Eighth Jud. Dist. Ct.*, 120 Nev. 575 n.4, 578, 97 P.3d 1132 n.4, 1134 (2004). While the Appellants have made their desire to change the law abundantly clear, they must seek that change from the

Legislature, not this Court. Second, the Appellants' argument that this Court and the District Court have different "considerations" in reviewing Order 1309 is false. This Court has repeatedly acknowledged that, "[i]n reviewing an order of the State Engineer, [this Court is] bound by the same standard of review as the lower court." *Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. 521, 525, 245 P.3d 1145, 1148 (2010). The Appellants do not and cannot cite any authority for the proposition that this Court's review is different from the District Court's.

Ironically, the District Court questioned the State Engineer about the uncertainty for all water right holders in Nevada that would result if the State Engineer's interpretation of the word "basin" were accepted. The State Engineer assuaged the District Court's concern and responded, "No, Your honor. This is a very unique area of Nevada. It is unlike all of the other areas." 49 JA 22592. Counsel for CBD expressly argued, "to assuage the fears that this is setting some kind of statewide precedent, I think it's helpful to look at the factual basis behind the State Engineer's decision and talk about this very unique nature of the Lower White River Flow System." 49 JA 23109. Now, these same parties represent that Order 1309 "is nothing new" and that it has statewide implications.

The Appellants additionally argue that the Respondents seek leave to file a sur-reply to "get a second bite of the apple to discuss authority they should have disclosed and discussed in their answering brief". Opp., 7. The Appellants add that

the Respondents cannot use a sur-rely “to supply more support for a weak and unsupported argument that was made in an answering brief.” *Id.* Both arguments are puzzling.

Order 1309 *is* the first time in Nevada history that the State Engineer has combined multiple hydrographic basins into a single hydrographic basin. The orders and rulings in the Pamphlet do not change this fundamental fact. Therefore, the Respondents had no obligation to “disclose” these orders and rulings in the Answering Brief. The Respondents had no reason to anticipate that the Appellants would present the Pamphlet or arguments in the Reply—especially given the near universal understanding that Order 1309 is in fact “something new”. Thus, the Respondents should be afforded the opportunity to show this Court why those orders and rulings are distinct from Order 1309.

Accordingly, the Appellants’ Pamphlet and arguments raised for the first time in the Reply must be stricken as they violate NRAP 28. In the event this Court chooses to consider the new arguments and Pamphlet, the Respondents respectfully request leave to file a sur-reply.

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DATED this 23rd day of March, 2023.

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CERTIFICATE OF SERVICE

I certify that on the 23rd day of March 2023, I served a copy of
**RESPONDENTS' JOINT REPLY IN SUPPORT OF MOTION TO STRIKE
APPELLANTS' RULE 28(f) PAMPHLET AND REPLY BRIEF OR
ALTERNATIVELY, MOTION FOR LEAVE TO FILE SUR-REPLY** upon all
counsel of record:

_____ BY MAIL: I placed a true copy thereof enclosed in a sealed envelope
addressed as follows:

_____ BY FACSIMILE: I transmitted a copy of the foregoing document this date
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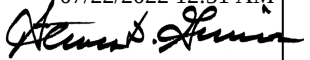
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DATED: This 23rd day of March, 2023.

/s/ Christine O'Brien
An Employee of Robison, Sharp, Sullivan & Brust

EXHIBIT “1”

EXHIBIT “1”


CLERK OF THE COURT

ORDD

**DISTRICT COURT
CLARK COUNTY, NEVADA**

LAS VEGAS VALLEY WATER
DISTRICT, and SOUTHERN NEVADA
WATER AUTHORITY,

Petitioners,

vs.

ADAM SULLIVAN, P.E., Nevada
State Engineer, DIVISION OF
WATER RESOURCES, DEPARTMENT
OF CONSERVATION AND NATURAL
RESOURCES,

Respondent.

And All Consolidated Cases.

Case No. A-20-816761-C

Dept. No. 1

Consolidated with:

A-20-817765-P

A-20-818015-P

A-20-817977-P

A-20-818069-P

A-20-817840-P

A-20-817876-P

A-21-833572-J

**ORDER DENYING COYOTE SPRINGS INVESTMENT, LLC'S AND
LINCOLN COUNTY WATER DISTRICT AND VIDLER WATER COMPANY, INC.'S
MOTIONS FOR ATTORNEY'S FEES**

This matter came before this Court pursuant to two Motions for Attorney's Fees filed by Petitioner Coyote Springs Investment, LLC ("CSI"), and Petitioners Lincoln County Water District and Vidler Water Company, Inc. (collectively "Lincoln/Vidler") on May 5, 2022, and May 10, 2022, respectively. The State Engineer filed an Omnibus Opposition to Respective Motions for Attorney's Fees on May 19, 2022. After the conclusion of briefing on the Motions, the Court held a hearing on July 5, 2022. The Court having reviewed these filings and the briefing related thereto, and holding a hearing, hereby **DENIES** CSI's and Lincoln/Vidler's Motions for Attorney's Fees as set forth in further detail below.

A. Standard for Recovering Attorney's Fees

Nevada follows the American rule that attorney's fees may not be awarded absent a statute, rule, or contract authorizing such an award. *Thomas v. City of N. Las Vegas*,

122 Nev. 82, ~~91~~, 127 P.3d 1057, 1063 (2006) (citing *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1356, 971 P.2d 383, 388 (1998); *Consumers League v. Southwest Gas*, 94 Nev. 153, 156, 576 P.2d 737, 738 (1978)). CSI and Lincoln/Vidler cite two statutory bases under which they seek to recover attorney's fees in this action: NRS 18.010(2)(a) and NRS 18.010(2)(b). First, NRS 18.010(2)(a) provides that the court may award attorney's fees to a prevailing party "when the prevailing party has not recovered more than \$20,000." Second, NRS 18.010(2)(b) provides that the court may award attorney's fees to a prevailing party:

Without regard to the recovery sought, when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party. The court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations. It is the intent of the Legislature that the court award attorney's fees pursuant to this paragraph and impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public.

NRS 533.450, under which this proceeding was commenced, expressly provides costs must be paid as in civil cases brought in the district court, except by the State Engineer and the State but is silent on fees. *See* NRS 533.450(7).

The Nevada Supreme Court has held that a money judgment is a prerequisite to recover attorney's fees under NRS 18.010(2)(a). *Thomas*, 122 Nev. at 93–94, 127 P.3d at 1065–66. Where a party does not recover a monetary judgment, they are not entitled to attorney's fees under NRS 18.010(2)(a). *Id.*

Further, the Nevada Supreme Court has also held that attorney's fees are not recoverable under NRS 18.010(2)(b) in petitions for judicial review of agency actions filed under the Administrative Procedure Act. *Zenor v. State, Dep't of Transp.*, 134 Nev. 109, 110–11, 412 P.3d 28, 30 (2018). The Court has "repeatedly refused to imply provisions not expressly included in the legislative scheme." *Id.*, 134 Nev. at 110, 412 P.3d at 30 (citing

1 *State Indus. Ins. Sys. v. Wrenn*, 104 Nev. 536, 539, 762 P.2d 884, 886 (1988)). For example,
2 in *Wrenn*, the Court refused to award attorney's fees because "the legislature has not
3 expressly authorized an award of attorney's fees in worker's compensation cases. ... [And]
4 we decline to allow a claimant recovery of attorney's fees in a worker's compensation case
5 absent express statutory authorization." 104 Nev. at 539, 762 P.2d at 886. The Nevada
6 Supreme Court has likewise declined to award attorney's fees in a water law case (albeit
7 brought under NRS 533.190(1) and NRS 533.240(3) rather than NRS 533.450) because
8 "attorney fees are not mentioned anywhere in the statute." *Rand Props., LLC v. Filippini*,
9 2016 WL 1619306, Docket No. 66933, filed April 21, 2016, *6 (unpublished disposition)
10 (holding that if fees are not expressly provided in NRS Chapter 533 they are unavailable).

11 **B. CSI and Lincoln/Vidler Are Not Entitled to Recover Attorney's Fees**

12 First, in applying NRS 18.010(2)(a), the Court finds the *Thomas* case controlling and
13 on point. This is a consolidated action involving multiple Petitions for Judicial Review filed
14 pursuant to NRS 533.450 challenging the State Engineer's Order 1309, in whole or in part.
15 By their very nature, these are not actions whereby parties did, or could, seek a monetary
16 judgment. Accordingly, although CSI and Lincoln/Vidler did "prevail" on the merits, they
17 did not seek nor did they recover a monetary judgment in this case. In fact, NRS 533.450
18 does not provide for monetary judgments but rather simply provides that an aggrieved
19 party may have a court review an order or decision of the State Engineer, in the nature of
20 an appeal, where the order or decision relates to the administration of determined rights
21 or is made pursuant to NRS 533.270 to 533.445, inclusive, or NRS 533.481, 534.193,
22 535.200 or 536.200. NRS 533.450(1). Because CSI and Lincoln/Vidler did not recover a
23 monetary judgment, they may not recover attorney's fees under NRS 18.010(2)(a).

24 Second, in applying NRS 18.010(2)(b), while the State Engineer is entirely exempted
25 from NRS Chapter 233B under NRS 233B.039(1)(i), the reasoning in *Zenor* is controlling
26 here. Like the provisions of NRS Chapter 233B in *Zenor*, NRS 533.450 is the exclusive
27 means of judicial review of a final decision or order of the State Engineer. NRS 533.450 is
28 entirely silent on attorney's fees. It is not the role of this Court to imply provisions into

1 NRS 533.450 that are not expressly included in the legislative scheme, particularly where
2 the Legislature expressly stated that costs are not recoverable from the State Engineer but
3 did not mention attorney's fees anywhere in the statute. *See Smith v. Crown Fin. Servs.*
4 *of Am.*, 111 Nev. 277, 287, 890 P.2d 769, 776 (1995) (attorney fees are not considered costs).
5 Furthermore, although it is unpublished and not controlling, the Court finds the *Rand* case
6 to be persuasive. Like *Rand*, this case deals with water law and attorney's fees are not
7 mentioned anywhere in NRS 533.450, the statute providing the authority for the Petitions
8 for Judicial Review filed in this case. Accordingly, the Court declines to allow a party to
9 recover attorney's fees under NRS 18.010(2)(b) in a judicial review proceeding under
10 NRS 533.450 absent express statutory authorization. Since NRS 533.450 does not provide
11 for attorney's fees, they are precluded and may not be awarded under NRS 18.010(2)(b)

12 Lastly, even if NRS 18.010(2)(b) did apply to NRS 533.450 (which it does not), the
13 Court finds that the State Engineer's defense of Order 1309 was not brought or maintained
14 without reasonable ground or to harass the prevailing parties. Order 1309, and the defense
15 maintained by the State Engineer, presented substantial issues of public policy and issues
16 of first impression that are now pending on appeal at the Nevada Supreme Court. The
17 Court finds that the State Engineer's defense of Order 1309 was not made without
18 reasonable grounds, nor was it frivolous or vexatious as required by NRS 18.010(2)(b).
19 Therefore, even in the event NRS 18.010(2)(b) could apply to this action, the Court finds
20 that attorney's fees would not be warranted under NRS 18.010(2)(b).

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1 Therefore, CSI and Lincoln/Vidler are not entitled to recover attorney's fees under
2 either NRS 18.010(2)(a) or NRS 18.010(2)(b) as alleged in their Motions. Accordingly, the
3 Court **DENIES** the Motions for Attorney's fees filed by CSI and Lincoln/Vidler.

4 **IT IS SO ORDERED.**

Dated this 22nd day of July, 2022

Brita Yeager

9F9 0BE E0F9 4C97
Brita Yeager
District Court Judge

16 Submitted this 18th day of July, 2022, and approved as to form and content by:

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1 **CSERV**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 Southern Nevada Water
7 Authority, Plaintiff(s)

CASE NO: A-20-816761-C

8 vs.

DEPT. NO. Department 1

9 Nevada State Engineer, Division
10 of Water Resources,
11 Defendant(s)

12 **AUTOMATED CERTIFICATE OF SERVICE**

13 This automated certificate of service was generated by the Eighth Judicial District
14 Court. The foregoing Order Denying was served via the court's electronic eFile system to all
15 recipients registered for e-Service on the above entitled case as listed below:

16 Service Date: 7/22/2022

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