

IN THE SUPREME COURT OF THE STATE OF NEVADA

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STATE OF NEVADA, on relation to its Division of Water Resources,  
DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, ADAM  
SULLIVAN, Nevada State Engineer,  
*Petitioner,*

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Elizabeth A. Brown  
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v.

The Eighth Judicial District Court of the State of Nevada, in and for the County of  
Clark and the Honorable Mark R. Denton,  
*Respondent,*

and

COYOTE SPRINGS INVESTMENT, LLC, COYOTE SPRINGS NEVADA,  
LLC, and COYOTE SPRINGS NURSERY, LLC,  
*Real Parties in Interest.*

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**REPLY IN SUPPORT OF EMERGENCY  
PETITION FOR WRIT OF MANDAMUS**

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## INTRODUCTION

CSI's oversized<sup>1</sup> response to the State Engineer's Emergency Petition distracts more than it informs. However, amid the myriad distractions, CSI does, in fact, get to the heart of the basis for this Petition: "[B]ecause a plaintiff who asserts a regulatory taking must prove that the government regulation has gone too far, the court must first know how far the regulation goes." AB at 30 (quoting *Pakdel v. City & Cnty. of San Francisco, California*, 141 S.Ct. 2226, 2230 (2021) (cleaned up)). While CSI asserts that "it is clear how far the State's regulations go," AB at 30, such is not the case. How far the State has gone, and how far it is authorized to go, is precisely the issue before this Court in the *Sullivan* appeal. Because this Court has yet to decide that issue of statewide importance, and because a decision deciding that issue is forthcoming, a stay is warranted, and the district court abused its discretion in denying the stay.

## SUPPLEMENTAL STATEMENT OF FACTS

In the Emergency Petition, the State Engineer noted that, on August 21, 2023, CSI had filed a Motion for Leave to File Third Amended Complaint, which was set for hearing on September 28, 2023. OB at 6, n.4. At the September 28, 2023 hearing, the district court granted CSI's Motion for Leave. On October 3, 2023, the district court signed the Order granting Plaintiff's Motion for Leave to file Third

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<sup>1</sup> Although the State Engineer believes the additional words requested by CSI are unnecessary, given the importance of this Petition and the expedited briefing schedule, the State Engineer has no objection to CSI's Motion to Exceed Word Count Limitations.

Amended Complaint. At the time of filing of this Reply, the Third Amended Complaint has not been filed.

## POINTS AND LEGAL AUTHORITIES

### I. Resolution of the *Sullivan* Appeal Will Have a Significant Impact on the District Court Proceedings.

CSI's Answering Brief focuses entirely on the fact that this Court's resolution of the *Sullivan* appeal will not be "dispositive" of any issues in the district court proceedings. See AB at 4, 5, 11–12, 21, 25–26, 31–32. First, this is not the standard, and CSI cites no authority showing otherwise. CSI's only citation to authority on this point is to *Nationstar Mortgage, LLC v. Ram LLC*, No. 2:15-CV-01776-KJD-CWH, 2017 WL 1752933, at \*2 (D. Nev. May 4, 2017), where the federal district court stated that petitions for certiorari filed with the United States Supreme Court had "the potential to be dispositive" of that case "or major discrete issues presented by it." To the extent this Court looks to *Nationstar* as persuasive authority, its guidance is not that a related appeal **will be** dispositive of issues in a case, but only that a related appeal has **the potential to be** dispositive of issues in a case.

While this Court is in the best position to know whether and how its resolution of the *Sullivan* appeal will impact the district court proceedings, based on the parties' briefing and oral argument in *Sullivan*, it appears that there is indeed a potential for the forthcoming *Sullivan* decision to impact CSI's takings claims. Indeed, CSI itself "does not dispute that the Nevada Supreme Court's ultimate decision in the appeal, **if issued prior to the May 2024 trial date**, may be relevant to issues in this case." AB at 31 (emphasis added). The condition couched within this concession is

illogical, at best—if the *Sullivan* decision may be relevant if issued prior to the current trial date, it necessarily is relevant full stop, and the case should be stayed to allow for resolution of the appeal. At worst, CSI’s conditional concession illustrates that it is seeking a rush to judgment in the district court, without allowing the legal landscape of Nevada water law to settle, so that it can hopefully recover hundreds of millions of dollars from the State for a decision of the State Engineer, the authority for which remains pending before this Court.

Indeed, one of the primary issues before the Court in *Sullivan* is whether the State Engineer can conjunctively manage groundwater rights and surface water rights among interconnected basins—an interrelationship that was the basis of the State Engineer’s fact finding in Order 1309, and which will form the foundation of the second, management phase of the administrative process. One of the primary issues in the district court case, under CSI’s purported new theory of the case<sup>2</sup>, is whether the State Engineer can, in a now-rescinded letter, manage CSI’s groundwater rights based on its effects on senior surface water rights under the Muddy River Decree. To the extent CSI still intends to argue that the September 19, 2018 draft order (never issued) and Interim Order 1303 (now rescinded to the extent not addressed in Order 1309) also effectuated a taking, those orders deal with conjunctive management of ground and surface water rights among interconnected

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<sup>2</sup> Of course, because CSI has not yet filed its Third Amended Complaint, that version of the complaint is not, as CSI claims, “the controlling, operative pleading in this matter.” AB at 27. The State Engineer addresses CSI’s arguments on the assumption that CSI will in fact file the Third Amended Complaint.

basins—the same issue squarely before this Court in the *Sullivan* appeal.

While CSI now concedes that its “taking claims are not based on Order 1309,”<sup>3</sup> AB at 27, it cannot escape the fact that the May 16, 2018 letter, the September 19, 2018 draft order, and Interim Order 1303 are all intrinsically connected in the timeline leading up to Order 1309 and deal with the exact same issues as Order 1309. What this Court determines the State Engineer’s authority is with respect to conjunctive management of ground and surface water among interconnected basins will necessarily impact and, under CSI’s proposed standard, potentially be dispositive of, the alleged taking of CSI’s water rights.

## II. The State Has Adequately Supported Its Request for a Stay.

Despite the incorporation of *Nationstar* into its Petition, CSI suggests that the State Engineer offered no legal authority, analysis, or factual support for a stay in this case. While the Petition adequately supported the request for a stay, below is a succinct summary of that analysis set out in the same framework of factors set forth by *Nationstar* (and *Landis*).

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<sup>3</sup> This is debatable, as it appears CSI has artfully pleaded to avoid using the phrase “Order 1309” in its Proposed Third Amended Complaint, and instead based its takings claims off of “The State Engineer’s May 16, 2018 letter **and subsequent regulatory actions described above**,” including Order 1309. *See, e.g.*, 2 RA 342, ¶ 158 (emphasis added). *See also* 2 RA 343, ¶ 164 (“The State, through the regulatory actions described herein [including Order 1309], beginning with the May 16, 2018 letter, committed a *Penn Central* regulatory taking of CSI’s water rights.”). However, CSI’s written concession constitutes a judicial admission binding on them as litigation proceeds. *See Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co., Inc.*, 255 P.3d 268, 276 (Nev. 2011) (“Judicial admissions are defined as deliberate, clear, unequivocal statements by a party about a concrete fact within that party’s knowledge.” (citation omitted)).

**1. The possible damage that may result from a stay.**

CSI suggests there is a “fair possibility” that a stay will cause harm to CSI. AB at 23. The primary harms it identifies, neither of which is compelling, are the incurrence of attorney’s fees and being unable to move forward with development. CSI also note that its principals are over seventy years old but offer no argument as to why the age of principals who are not parties to the case is relevant to analysis of harm.

With regard to attorney fees, CSI says that it “will incur substantially more fees for its lawyers to again refresh, get up to speed, and prepare for trial.” AB at 24. While there may be a need for some refreshing, entering a stay at this point will pause most pretrial efforts thereby avoiding the need for costly reduplication of efforts. Getting up to speed after a stay will actually be a benefit as it will allow CSI to refine its arguments in light of the *Sullivan* opinion. The greater harm here would be if no stay is ordered, the district court case goes to trial and then the *Sullivan* opinion is issued rendering the district court proceedings moot or irrelevant and requiring the parties to relitigate.

As for the purported inability of CSI to move forward with development of the master planned community, such “harm” should be viewed with skepticism. As set forth in the Proposed Third Amended Complaint, CSI started the process of developing its master planned community nearly 25 years ago in 1998. 2 RA 320, ¶ 27. To suggest that a temporary stay pending a decision in *Sullivan* is going to cause some undue harm is not convincing. While a stay may cause some further



delay in development, it does not halt it.

CSI knew or should have known when it undertook developing a master planned community in the desert that there might be some obstacles to overcome before it could proceed, particularly with respect to availability of water. It also was or should have been aware that the State Engineer had issued Ruling #4542 in 1997 on water rights CSI acquired from Nevada Power Company in the Coyote Spring Valley, which subjects those permitted rights to conditions on potential impacts to the neighboring Muddy River Springs Area Groundwater Basin. Ruling 4542 gave fair warning that, “[i]f any signs of adverse effects are identified by the State Engineer, the State Engineer may order a reduction of pumping in the area.” Ruling 4542 at 15.<sup>4</sup> That same Ruling also required annual monitoring and warned, “The State Engineer will then retain the option of reducing the pumping rate for the next year, or any other action that may be necessary to protect the public interest or to prevent conflicts with existing rights . . . ,” specifically recognizing the need for the monitoring plan that included primary objectives of protecting the Moapa Dace and the flow of the Muddy River. Ruling 4542 at 10–11, 17.

Perhaps most importantly, CSI was or should have been aware that the permits it obtained were issued subject to existing rights, including senior rights in the neighboring Muddy River Springs Area Groundwater Basin, because of the unique hydrologic characteristics of the carbonate aquifer. Ruling 4542 at 4–5, 16. Knowing all of this, CSI assumed the risk of moving forward with its project.

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<sup>4</sup> Ruling 4542 can be found at 15 SE ROA 48114–48130 in the *Sullivan* record.

It is confounding that CSI claims on the one hand that a stay would cause harm by preventing it from moving forward with development of its master planned community, while on the other hand claiming that the State has taken its water and land, such that it will never be able to develop its master planned community. CSI cannot argue both that it plans to and will be able to move forward with its master planned development and that it has had its rights taken and is entitled to just compensation. CSI alleges the latter and claims just compensation and other money damages in the Proposed Third Amended Complaint. 2 RA 358–59. Any harm from the delay a stay may cause can be rectified, if CSI is ultimately successful, through the damages it claims, including prejudgment interest.

And, any harm suffered by CSI and/or its principals is greatly outweighed by the statewide benefit of allowing the forthcoming *Sullivan* decision, which will impact the State Engineer's next phase of management, i.e., how to allocate the groundwater pumping rights in the LWRFS, to issue. Thus, the potential harms identified by CSI are not compelling with regard to this factor.

**2. Any hardship or inequity that a party may suffer if required to go forward.**

The State Engineer sets forth numerous reasons in the Petition for why it will suffer hardship or inequity if required to go forward in the district court proceedings. Rather than reiterate all of them here, the State Engineer will only emphasize a few points. At the hearing on the Motion for Leave to File Third Amended Complaint, counsel for CSI represented that it has five experts preparing reports for the takings case. It is anticipated that the State Engineer will have at least the same number of

experts to offer rebuttal opinions. As the Court is well aware, the type of specialized experts needed for a takings case like this are not inexpensive and the amount of work required will take significant time and result in high fees. If required to proceed, there is a high likelihood that the State Engineer (and CSI) will be paying experts for work that will be obviated by the *Sullivan* opinion.

CSI is one of the entities that filed the petition for judicial review at issue in *Sullivan*. It is pursuing the takings case simultaneously, knowing that the other case is pending and may result in inconsistent results. It is inequitable that CSI should be able to pursue both at the same time—claiming that the State Engineer’s Order 1309 should be overturned and CSI permitted to use its water, while at the same time claiming that the State Engineer took its water through Order 1309 and the regulatory actions preceding Order 1309.

This Court has previously written, “It is . . . settled in this state that the water law and all proceedings thereunder are special in character, and the provisions of such law not only lay down the method of procedure but strictly limits it to that provided.” *Application of Filippini*, 66 Nev. 17, 27, 202 P.2d 535, 540 (1949). As established in NRS 533.450, there is a process for seeking relief by any individual who feels aggrieved by any order or decision of the State Engineer. That is the exclusive means by which CSI can get relief. While the takings case may not be part of the process, it is inequitable to allow CSI to try and litigate in that case issues that are currently pending in the process playing out in *Sullivan*. *Sullivan* will necessarily establish law and/or facts that bear on the takings case.

**3. The orderly course of justice measured in terms of simplifying or complicating of issues, proof, and questions of law that a stay will engender.**

This factor was also set forth in the Petition. The elimination of possible inconsistent decisions and the simplifying of the issues in the takings case weigh in favor of a stay. CSI's insistence on saying that *Sullivan* will have no bearing on the takings case does not make it so. The district court is not involved in *Sullivan* (or the consolidated cases) and may not recognize the potential impact it will have—not just on CSI and its claims in the takings case, but on the other stakeholders with an interest in the outcome.

Looking at the three factors from *Nationstar* (and *Landis*), it is easy to conclude that a stay is not only warranted, but necessary. Without it, injustice results with CSI circumventing the established process for water law grievances and the State Engineer is required to expend resources on litigation that is in limbo. The best remedy is a stay which, while it may cause some discomfort, will ultimately support the established process, streamline the issues, maintain the status quo, and serve judicial economy.

**III. The Stay Can Be Tailored to Minimize Any Perceived Prejudice.**

CSI relies on using the loaded term “indefinite stay” to create a perception that if a stay is issued, it will be interminable. This is not the case. It is only indefinite inasmuch as no one, outside this Court, really knows when the *Sullivan* decision will be decided. Despite that, a decision is forthcoming. There will at some point in the future be an end to the stay. In considering this stay, the Court should not limit itself to the potential outcomes set forth by CSI in its response. Those are

not the only outcomes—there is a whole universe of potentialities that could affect what happens after the *Sullivan* decision is issued.

CSI relies on *Yong v. I.N.S.*, 208 F.3d 1116 (9th Cir. 2000) for the notion that the district court would have abused its discretion had it granted a stay pending the *Sullivan* decision. *Yong* does deal with a similar issue but is distinguishable for one very important reason: *Yong* is a habeas case that dealt with indefinite stays while someone was being detained. *Yong*, 208 F.3d at 1120 (“At the same time, habeas proceedings implicate special considerations that place unique limits on a district court's authority to stay a case in the interests of judicial economy.”). Habeas cases, with the important liberty interests inherent therein, are markedly different from takings cases, which involve purely property interests.

As noted above, CSI is a primary party in *Sullivan* and the process that is being played out pursuant to NRS 533.450. Not only is CSI pursuing that action, but it also filed an appeal on fees that this Court consolidated with *Sullivan* following the *Sullivan* oral argument. Given the multiple fronts on which CSI is proceeding, it should be readily apparent to this Court that a stay pending *Sullivan* can be narrowly tailored to the circumstances. Once a decision is issued in *Sullivan*, there will be a necessary reevaluation of positions, claims, and defenses that will bear out on strategic and procedural efforts that the parties may wish to undertake going forward. If, as CSI suggests, there will be more writs and petitions for judicial review after *Sullivan*, then that is a calculation to deal with at that time. For now, like the stay this Court issued with regard to Order 1309, a stay of the takings case preserves the

status quo until *Sullivan* is decided.

The State Engineer took and maintained the position that Order 1309 was the first part of a multi-phase process. The State Engineer has been unable to move forward because CSI and other parties have litigated so much that it has slowed down the process of getting to making determinations regarding the actual management of the LWRFS. It is ironic and hypocritical that CSI accuses the State Engineer of manufacturing delays when it is clear CSI's multi-front battle has been focused on preventing the State from getting through the administrative process.

#### **IV. Emergency Writ Relief is Proper.**

CSI fundamentally misunderstands the State Engineer's argument with respect to emergency relief, characterizing it was "vague, unsupported references to harm, judicial economy, and 'massive [undefined] discovery efforts[,]'" AB at 34, and claiming the only concrete harm identified is "having to proceed with discovery, including the depositions the State noticed, and prepare its experts," AB at 22. While CSI makes much ado about the fact that the State Engineer scheduled depositions for October 12 and 13, the scheduling of those depositions is a perfect illustration of the rock and hard place between which the State Engineer finds itself.

On August 15, 2023, following the oral argument in *Sullivan*, counsel for the State Engineer reached out to CSI's counsel regard a stay. Although initially receptive to stay, two days later CSI's counsel declined to agree to a stay and proposed a Third Amended Complaint which he believe eliminated the need for the stay. Accordingly, the State Engineer filed a motion to stay with the district court

on an order shortening time. On September 14, the district court held a hearing on the State Engineer's motion to stay, which was denied. Immediately thereafter, the State Engineer began considering whether to seek an emergency stay from this Court. The day after the district court's denial of the State Engineer's motion to stay, given the uncertainty about whether the State Engineer would be afforded relief by this Court and in preparation for either eventuality, the State Engineer reached out to counsel for CSI for deposition availability for two key witnesses. Counsel for CSI provided the October 12 and 13 dates.

Thereafter, the State Engineer determined October 10 to be an appropriate date by which to seek relief from this Court because if this Court grants the requested stay, the State Engineer would not have to proceed with rushed depositions of fact witnesses regarding uncertain claims. Specifically, at the time the October 12 and 13 deposition dates were set, CSI's Motion for Leave to File Third Amended Complaint was still pending and the contours of what CSI's claims would be were unknown. Indeed, even as of the date of filing this Reply, six calendar days before the October 12 deposition, CSI's operative complaint remains the Second Amended Complaint, even though CSI believes it to be the Third Amended Complaint, *see* AB at 27.

If this Emergency Petition is denied, the State Engineer will proceed to depositions next week with minimal time to prepare on CSI's new claims and without having had the ability to propound written discovery on the allegations in CSI's Third Amended Complaint, if that becomes the operative complaint. The

State Engineer could move these depositions to allow for more preparation time, but then the parties would be butting up against discovery deadlines (i.e., the January 16, 2024 initial expert disclosure deadline) that the State Engineer sought to extend further but were unable to given CSI's refusal to move the May 2024 trial date.

Of course, none of this changes the fact that the actual grounds for requested stay is that the parties and the district court should be afforded the opportunity to proceed to dispositive motions and trial with certainty regarding the State Engineer's authority with respect to regulation of water rights in Nevada. The emergency aspect of the requested relief is not that there are two depositions next week that the State is trying to avoid. Rather, if this Court grants a stay, it makes sense to do so before the parties proceed to oral fact witness and expert discovery that could be rendered moot by a decision in the *Sullivan* appeal. And if this Court declines to grant a stay, the parties should know sooner rather than later so that they can proceed with such discovery without waiting for a decision in the ordinary course.

Moreover, the need for emergency relief is only enhanced by the district court's recent grant of CSI's Motion for Leave to File Third Amended Complaint. The Third Amended Complaint, once it is filed, will significantly expand the issues and claims pending before the district court, while doing nothing to take the district court case out from the impact of the issues in *Sullivan*, and in fact raising the same legal issues regarding water management in Nevada as *Sullivan*.

Finally, it cannot be overstated that "water law and all proceedings thereunder are special in character," *Filippini*, 66 Nev. at 27, and thus are of great importance



to the State and its citizens. The import of the *Sullivan* appeal and the takings case before the district court are of critical importance, not only to the parties involved, but also as precedent for future water users. If granting a stay to get the issues right means additional delay for the parties, that sacrifice is justified.

## **V. Conclusion**

Emergency writ relief is warranted to afford this Court the ability to decide issues of statewide importance in the *Sullivan* appeal that bear directly on, and have the potential to be dispositive of, key issues in the district court proceedings. Judicial economy and the integrity of Nevada water law depend on getting these issues right. For these reasons, Petitioner respectfully requests that this Court grant its Petition for Writ of Mandamus and direct the district court below to stay proceedings pending this Court's resolution of the appeal in *Sullivan v. Lincoln County Water District*.

Dated this 6th day of October, 2023.

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## CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

☒ This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 pt. font and Times New Roman; or

☐ This brief has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

2. I further certify that this brief complies with the page- or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☒ Proportionately spaced, has a typeface of 14 points or more and contains 4,963 words; or

☐ Monospaced, has 10.5 or fewer characters per inch, and contains \_\_\_\_ words or \_\_\_\_ lines of text; or

☐ Does not exceed \_\_\_\_ pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a

reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 6th day of October, 2023.

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## **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing in accordance with this Court's electronic filing system and consistent with NEFCR 9 on October 6, 2023.

Participants in the case who are registered with this Court's electronic filing system will receive notice that the document has been filed and is available on the court's electronic filing system.

I further certify that any of the participants in the case that are not registered as electronic users will be mailed the foregoing document by First-Class Mail, postage prepaid.

/s/ Jeny Beesley

An employee of the Office of the Attorney General