

IN THE SUPREME COURT OF THE STATE OF NEVADA

EUREKA COUNTY, A POLITICAL
SUBDIVISION OF THE STATE OF
NEVADA; KENNETH F. BENSON,
INDIVIDUALLY; DIAMOND CATTLE
COMPANY, LLC, A NEVADA LIMITED
LIABILITY COMPANY; AND MICHEL
AND MARGARET ANN ETCHEVERRY
FAMILY, LP, A NEVADA REGISTERED
FOREIGN LIMITED PARTNERSHIP,

Appellants,

vs.

THE STATE OF NEVADA STATE
ENGINEER; THE STATE OF NEVADA
DIVISION OF WATER RESOURCES;
AND KOBEH VALLEY RANCH, LLC, A
NEVADA LIMITED LIABILITY
COMPANY,

Respondents.

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Dist. Court Case No. CV1108-
155; CV1108-156; CV1108-157;
CV1112-164; CV1112-165;
CV1202-170

OPPOSITION TO MOTION TO CONSOLIDATE

**Appeal From the Seventh Judicial District Court of the State of Nevada
in and for Eureka County
The Honorable Daniel L. Papez, District Judge**

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The Nevada State Engineer, Jason King, P.E. and the Nevada Division of Water Resources, by and through their counsel, Nevada Attorney General Catherine Cortez Masto and Senior Deputy Attorney General Bryan L. Stockton, hereby oppose the Motion to Consolidate filed by Appellants Kenneth F. Benson, Diamond Valley Cattle Company, LLC, and Michel and Margaret Ann Etcheverry Family, LP (Benson, et al.). This Opposition is based on the attached Points and Authorities.

POINTS AND AUTHORITIES

This current case before the Court addresses issues of great importance to the administration of Nevada's water law and to water users. The delay presented by the request for consolidation hinders the development of water resources in the state. It is imperative that these issues currently before the Court be determined as quickly as possible so the State Engineer can manage the waters of the state to promote its beneficial use for the citizens of Nevada.

NRCP 42(a) provides that:

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Here, Nevada's rule is substantially similar to Federal Rule of Civil Procedure 42(a).¹ This Court has "recognized that federal decisions involving the Federal Rules of Civil Procedure provide persuasive authority when this Court examines its rules." *Nelson v. Heer*, 121 Nev. 832, 834, 122 P.3d 1252, 1253 (2005) (citations omitted). Federal courts have held that "the moving party has the burden of persuading the court that consolidation is desirable." *Prudential Ins. Co. of America v. Marine Nat. Exchange Bank*, 55 F.R.D. 436, 437 (E.D. Wis. 1972) (citations omitted). Thus, Benson, et al. must show that consolidation is in the best interest of the parties and of judicial economy and they have failed to provide persuasive argument that consolidation is warranted.

Benson, et al. argue that they are requesting consolidation in an effort to promote efficient resolution and that there are common questions of law and fact sufficient to justify consolidation. The State Engineer does not agree. The case before the Court is fully briefed and as demonstrated by the amicus participation many see the case as important and requiring resolution. Delay in moving the main case forward only delay this important decision that impacts others

¹ FRCP 42(a) Consolidation. If actions before the court involve a common question of law or fact, the court may:

- (1) join for hearing or trial any or all matters at issue in the actions;
- (2) consolidate the actions; or
- (3) issue any other orders to avoid unnecessary cost or delay.

attempting to develop the water resources in Nevada. The main question before the Court does not require consideration of the issues presented by the new appeal. The Appellants' own motion demonstrates by their itemization of the issues that they are attempting to obtain another opportunity to reargue the merits of the case presently before the Court, which should not be permitted.

The federal courts have held that "the fact that a common question of law exists does not alone justify consolidation in the absence of other factors which would promote 'trial convenience and economy in administration.'" *Id.*, citing *Schacht v. Javits*, 53 F.R.D. 321, 324–325 (S.D.N.Y. 1971). The State Engineer asserts the cases do not present a common question of law. While the issues in the appeal currently before the Court, which have been fully briefed, are related to the appeal from the recent decision by the Seventh Judicial District Court in Case Number CV 1207-178, resolution of the issues in the Seventh Judicial District Court case are not necessary prerequisites for the Court to reach a determination in this case.

This case involves an appeal of State Engineer's Ruling 6127 pursuant to which the State Engineer granted water right applications filed by Kobeh Valley Ranch, LLC by finding that there is water available for appropriation in Kobeh Valley and that with proper management, conflicts with existing rights will be avoided. The new appeal involves the approval of the Monitoring, Management,

and Mitigation Plan (3M Plan) submitted by Kobeh Valley Ranch, LLC, which will be used by the State Engineer during the development of the water resources. The use of the 3M Plan does not impact the initial decision to grant the water rights. The pending appeal predominately involves the availability of water and whether possible impacts to existing rights prevent the granting of new water rights, even if those impacts can be mitigated. The new appeal involves the management of water in the future through the use of a 3M Plan and the State Engineer's discretion in requiring and using such a plan. The issues therefore are related, but clearly do not present a common question of law.

In general, federal courts deny consolidation when “consolidation would further prevent the setting of a trial date for the action that is ready for disposition.” *Prudential Ins. Co.* 55 F.R.D. at 437–438. The current appeal is fully briefed and awaiting decision. The new appeal has just been filed and will need, at a minimum, to proceed through briefing and beyond if the case is sent to mediation. The State Engineer objects to the delay that would be caused on the resolution of the important questions before the Court in the current case and does not agree they present common questions of law.

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CONCLUSION

The State Engineer opposes the instant Motion to Consolidate. The matters are related, but not identical, and consolidation would add unnecessary and detrimental delay to a resolution on the merits of this appeal.

DATED this 23rd day of May, 2013.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(1)(c), I hereby certify that I, Sandra Geyer, am an employee of the Nevada State Attorney General and on the 4th day of February 2013, I submitted with the Nevada Supreme Court by their electronic filing system a searchable pdf copy of the State Engineer's opposition in response to the Appellant's Motion to Consolidate on file with this case. All parties associated with the case will be served by electronic means through the Supreme Courts notification system. In addition, I have also sent a copy via electronic e-mail as a courtesy to the counsel listed below:

Taggart & Taggart
Paul Taggart, Esq.
paul@legaltnt.com

Dated this 23rd day of May, 2013.

/s/ Sandra Geyer
Sandra Geyer
Office of the Attorney General