

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

IN THE MATTER OF THE
DETERMINATION OF THE RELATIVE
RIGHTS IN AND TO ALL WATERS BOTH
SURFACE AND UNDERGROUND
LOCATED WITHIN THE DIAMOND
VALLEY, HYDROGRAPHIC BASIN 10-153,
EUREKA AND ELKO COUNTIES, NEVADA.

THE STATE OF NEVADA DEPARTMENT OF
CONSERVATION AND NATURAL
RESOURCES, DIVISION OF WATER
RESOURCES; and ADAM SULLIVAN, P.E.,
STATE ENGINEER,

Appellants,

vs.

SOLARLJOS, LLC; DANIEL S.
VENTURACCI; AMANDA L. VENTURACCI;
CHAD D. BLISS; ROSIE J. BLISS; WILFRED
BAILEY AND CAROLYN BAILEY,
TRUSTEES OF THE WILFRED AND
CAROLYN BAILEY FAMILY TRUST
DATED FEBRUARY 20, 2018; EUREKA
COUNTY; JAMES E. BAUMANN; VERA L.
BAUMANN; NORMAN C. FITZWATER;
KINDY L. FITZWATER; ARC DOME
PARTNERS, LLC; ROBERT F. BECK AND
KAREN A. BECK, TRUSTEES OF THE BECK
FAMILY TRUST DATED APRIL 1, 2005; IRA
R. RENNER; MONTIRA RENNER; SADLER
RANCH, LLC; MW CATTLE, LLC; UNITED
STATES DEPARTMENT OF INTERIOR,
BUREAU OF LAND MANAGEMENT; PETER
GOICOECHEA; and GLADY GOICOECHEA,

Respondents.

**IRA R. RENNER AND MONTIRA RENNER'S OPPOSITION TO STATE
ENGINEER'S MOTION UNDER NRAP 27(e) FOR STAY OF DISTRICT
COURT'S CORRECTED ORDER GRANTING SOLARLJOS, LLC'S
MOTION FOR PARTIAL SUMMARY JUDGMENT AND STAY OF
ADJUDICATION PROCEEDINGS PENDING APPEAL**

Respondents IRA R. RENNER and MONTIRA RENNER (hereinafter “the Renners”), by and through their counsel of record, PAUL G. TAGGART, ESQ. and TAMARA C. THIEL, ESQ., of the law firm of TAGGART & TAGGART, LTD., hereby file this Opposition to the State Engineer’s request for a stay of the adjudication proceedings pending appeal of the order in the submatter relating to the exception filed by Solarljós, LLC (“Solarljós”).¹

MEMORANDUM OF POINTS AND AUTHORITIES

The Renners hereby reference their Opposition to State Engineer’s Request for Temporary Administrative Stay filed on February 25, 2022, and incorporate the arguments made therein. The Renners also join in the opposition filed by Sadler Ranch, LLC filed concurrently with this opposition.

STANDARD OF REVIEW

This Court considers four factors when presented with a request for a stay: (1) whether the object of the appeal will be defeated if the stay is denied, (2) whether the appellant (the State Engineer) will suffer injury if the stay is denied, (3) whether the respondent will suffer injury if the stay is granted, and (4) whether the appellant is likely to prevail on the merits.² None of these considerations warrant issuance of the requested stay.

¹ Titled the “Emergency Motion Under Nrap 27(E) For Stay Of District Court’s Corrected Order Granting Solarljós, LLC’s Motion For Partial Summary Judgment And Stay Of Adjudication Proceedings Pending Appeal And Request For Temporary Stay Pending Decision On Underlying Motion For Stay” (herein referenced as the “State Engineer Motion for Stay”).

² NRAP 8(c); *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004).

All procedures before the Seventh Judicial District Court (“District Court”) in a vested right adjudication are to proceed in accordance with the Nevada Rules of Civil Procedure (“NRCPP”), including the taking of testimony.³ In a water rights case, the District Court must make its own findings and draw its own conclusions.⁴ Appeals of a final order by the decree court follow the rules of the Nevada Rule of Appellate Procedure (“NRAP”).⁵ Appeals from the final judgments of the District Court are taken to this Court “in the same manner and with the same effect as in civil cases.”⁶ The standard of review of the final order issued by District Court, is the same as in other civil cases.⁷ This Court “reviews a district court's factual findings for an abuse of discretion and will not set aside those findings unless they are clearly erroneous or not supported by substantial evidence.”⁸ This Court accords “deference to the point of view of the trial judge since he had the opportunity to weigh evidence and evaluate the credibility of witnesses.”⁹

³ NRS 533.170(5); *Jackson v. Groenendyke*, 132 Nev. 296, 300–01, 369 P.3d 362, 365 (2016).

⁴ *Jackson v. Groenendyke*, 132 Nev. 296, 299–300, 369 P.3d 362, 365 (2016) citing *Scossa v. Church*, 43 Nev. 407, 410, 187 P. 1004, 1005 (1920), NRS 533.170, and NRS 533.185.

⁵ NRS 533.200.

⁶ NRS 533.200.

⁷ *Jackson v. Groenendyke*, 132 Nev. 296, 299–300, 369 P.3d 362, 365 (2016).

⁸ *Jackson v. Groenendyke*, 132 Nev. 296, 299–300, 369 P.3d 362, 365 (2016).

⁹ *Jackson v. Groenendyke*, 132 Nev. 296, 299–300, 369 P.3d 362, 365 (2016), Citing *Harris v. Zee*, 87 Nev. 309, 311, 486 P.2d 490, 491–92 (1971).

ARGUMENT

I. Object of the Appeal

The District Court properly found the object of the appeal would not be defeated.¹⁰ The State Engineer's object of appeal is procedural only. The procedural issues that the State Engineer complains about are irrelevant or moot as to the Renners' matter. There are no discovery issues in the Renners' case. The Renners have not filed a motion for summary judgment, nor have the Renners asked for NRCP 54(b) certification. In fact, the District Court has indicated that it will not be certifying any order in the Renners' submatter.¹¹ And the Renners' hearing is the exact same type of hearing that the State Engineer is arguing was required for the Solarljøs matter.¹² Thus, the object of the appeal will not be defeated if the State Engineer's Motion for Stay is rejected.

II. Balance of the Equities

As the District Court correctly found the State Engineer's last-minute request for a stay of these proceedings is "unconscionable."¹³ The District Court properly found that the balance of the equities related to the respective claimed harms of the parties weigh in favor of denial of the stay request.¹⁴ The basis for a stay is irreparable injury and inadequacy of legal remedies.¹⁵ The State Engineer's claimed harm is procedural only. Procedural issues are not a recognized irreparable harm for

¹⁰ State Engineer Mot. for Stay at 9:17-11:11.

¹¹ State Engineer Mot. for Stay at Ex. 7, 9:1-3.

¹² State Engineer Mot. for Stay at 5.

¹³ State Engineer Mot. at Ex. 7, 7:11-16.

¹⁴ State Engineer Mot. for Stay at Ex. 7, 11:14-13:2.

¹⁵ *Amoco Prod. Co. v. Vill. of Gambell, AK*, 107 S. Ct. 1396, 1402 (1987).

which a stay may issue as procedural harm is not irreparable harm.¹⁶ As Solarljos is the only vested groundwater right, the issue of over appropriation is also moot to the other vested claimants in this case. The State Engineer's claim of harm to the public is simply irrelevant to the remaining issues before the District Court.

On the other hand, the Renners have demonstrated they will be irreparably harmed by a stay because of interference with their real property rights and business operations. Water rights are real property.¹⁷ "Any act which destroys or results in substantial change in property, either physically or in the character in which it has been held, does irreparable injury."¹⁸ Diamond Valley is greatly over-pumped by junior groundwater right holders.¹⁹ Currently, the Renners' springs are some of the last springs in the basin that still flow. The Renners have filed for mitigation rights to address ongoing and increasing impacts from junior groundwater pumping on these springs, but the State Engineer has not yet acted on those applications. The State Engineer appears to be waiting for resolution of the determination of relative rights by this Court. The Renners should not have to sit by and watch helplessly while their water sources dry up like as this adjudication is further delayed.

¹⁶ *Nevada v. United States*, 364 F. Supp. 3d 1146, 1152 (D. Nev. 2019) (procedural harm, standing alone, cannot support the necessary finding of a likelihood of irreparable harm).

¹⁷ *Application of Filippini*, 66 Nev. 17, 22, 202 P.2d 535, 537 (1949) (water rights are real property).

¹⁸ *Memory Gardens of Las Vegas, Inc. v. Pet Ponderosa Memorial Gardens*, 88 Nev. 1, 4, 492 P.2d 123, 125 (1972). *See also, Dixon v. Thatcher*, 103 Nev. 414, 416, 742 P.2d 1029, 1030 (1987).

¹⁹ State Engineer Mot. for Stay at 8:2-3.

Harm to business operations also represent an irreparable injury.²⁰ The water rights subject to this proceeding are a vital element in the business operations of the Renners. The Renners are in the ranching business. They grow hay and alfalfa, and raise livestock, as part of their business operations. These operations necessarily depend on reliable water supplies. Any reduction, loss, or threat to the water supply to the Renners' ranches cause an irreparable interference with their business and livelihoods.

III. The State Engineer's Appeal and Motion for Stay are Meritless

The State Engineer correctly notes that "the party opposing the stay motion can defeat the motion by making strong showing that the appellate relief is unattainable" and where "the appeal appears frivolous."²¹ The Renners assert that the motion is without merit and the relief requested by the State Engineer is unattainable and contrary to law. The District Court properly followed water law and NRCP.

The State Engineer seems to argue that since he has a special role in adjudication proceedings, that he should dictate the procedures that a court employs.²² The State Engineer argues that he is entitled to great respect and that water law is special in character.²³ However, while there are many "special" water

²⁰ *Sobol v. Capital Management*, 102 Nev. 444, 446, 726 P.2d 335, 337 (1986) (concluding, in the context of an injunction, that "acts committed without just cause which unreasonably interfere with a business or destroy its credit or profits, may do an irreparable injury.")

²¹ State Engineer Mot. at 12, citing *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 89 P.3d 36 (2004).

²² State Engineer Mot. at page 4-6, 13.

²³ State Engineer Motion at 13.

law statutes that apply to the proceedings of vested claims, and they expressly allow the procedure that was followed by the District Court.²⁴

This Court has already confirmed that NRCP rules apply to vested right adjudications.²⁵ In *Jackson v. Groenendyke* this Court unambiguously has held that NRCP rules apply to vested rights adjudication, including the ability to join related claims (such as easement and land use issues) and amend pleadings. This Court has long held that “[w]ile the ultimate findings of the state engineer are entitled to great respect, and in practice are not often disputed, *they do not take from the court the power to grant relief to a party whose rights the state engineer may have infringed.*”²⁶ In 2016, *Jackson v. Groenendyke* again confirmed that in a vested right adjudication proceeding “the district court must make its own findings and draw its own conclusions.”²⁷

An adjudication is not, and cannot, be treated the same as an appeal under NRS 533.450. It is an original action in the district court, and the District Court in this case properly followed the rules of procedure that statute and NRCP require. The water law has been well settled for over 100 years on this issue: the deference in a NRS 533.450 appeal do not apply to proceeding under NRS 533.160.²⁸ Any

²⁴ NRS 533.170(5). Note, while the State Engineer cites NRS 533.150 in his arguments, this statute directs how the State Engineer is to conduct the administrative proceeding, and does not limit the District Court procedures.

²⁵ *Jackson v. Groenendyke*, 132 Nev. 296, 301, 369 P.3d 362, 365–66 (2016).

²⁶ *Scossa v. Church*, 43 Nev. 407, 187 P. 1004, 1005 (1920) (emphasis added).

²⁷ *Jackson v. Groenendyke*, 132 Nev. 296, 299, 369 P.3d 362, 365 (2016)

²⁸ *Ormsby County v. Kearney*, 37 Nev. 314, 142 P. 803 (Nev. 1914). The *Ormsby* court concluded that the State Engineer’s limited power of administration of vested

reference to cases discussing the deference to the State Engineer in a NRS 533.50 appeal are irrelevant. Importantly, in 1917, the *Bergman* court spoke directly on this issue and clarified that the vested right adjudications are not true “appeals” and that the order of the State Engineer operates as a pleading, not a judgment.²⁹

Under the water law, the Legislature unambiguously provides that an order of determination has the same “legal effect of a complaint in a civil action.”³⁰ The water law statutes state clearly that “[a]ll proceedings thereunder, including the taking of testimony, shall be as nearly as maybe in accordance with the Nevada Rules of Civil Procedure.”³¹ The Legislature listed only one exception to the NRCP in this

rights under NRS 533.087 through NRS 533.320, was not unconstitutional only because “[n]othing in the act shall be deemed to impair these vested rights.” *Id.* As Chief Justice Talbot stated, “. . . the Legislature cannot invest the state engineer, or any appointive or administrative officer, with the judicial power of finally adjudicating vested rights to water.” *Id.* Justice McCarran also clarified that the power to determine relative rights to water is a power to quiet title, and the ultimate authority over the adjudication of vested rights rests in the courts. *Id.* Shortly after the *Ormsby* decision, the Legislature amended the water law again in 1915 to clarify that orders of determination issued by the State Engineer were *not* final adjudications, and that all future orders of determination must be submitted to a district court for final action. *See* Chapter 253, § 4, Nev. Laws 1915 278, 280 (Mar. 25, 1915). *See also, Bergman v. Kearney*, 241 F. 884 (D. Nev. 1917).

²⁹ *Bergman*, 241 F. at 895–96: (“The insistence that the proceedings provided in the statute as amended, are tantamount to an appeal to the district court, as authorized in the act of 1913, *is not well founded*. At no stage does the determination possess any of the characteristics of finality; it cannot be regarded as terminating between the parties’ litigation on the merits of the case. It contemplates and provides for further information and testimony in the district court, before a final decree can be entered. *It operates, not as a judgment, but as a pleading, or the findings of a referee*”) (emphasis added).

³⁰ NRS 533.160(1).

³¹ NRS 533.170(5).

proceeding, and that exception relates only to the service of a proposed order before it becomes final, which this Court also followed.³²

The District Court has diligently and correctly followed NRCP and water law statutes in this case. The District Court properly issued an order and set a time of the first day hearing, as requested by the State Engineer.³³ Parties in this case timely filed exceptions.³⁴ At the first date of hearing in 2020, the Court properly considered procedural questions, including the holding separate hearings for separate parties and issues, and issued a scheduling order.³⁵ Discovery, motion practice, and certification of final judgments are expressly allowed under NRCP, and not restricted by statute.³⁶ The District Court is properly proceeding with the hearing on the Renners' exception authorized under statute, and the taking of testimony pursuant to statute and NRCP.³⁷ The Renners' sub-matter has closely followed all the rules of civil procedure and water law, and there is no reason to delay its hearing or resolution because of an appeal of an unrelated sub-matter.

³² The only statutorily stated difference from the NRCP rules relates to the service of a proposed finding of fact and decree. NRS 533.170. The District Court properly waited the thirty days after issuing the initial order before making it final.

³³ NRS 533.165(6); Order Setting Hearing (August 31, 2020).

³⁴ NRS 533.170(1).

³⁵ Order Setting Hearings for Notices of Exceptions filed on Order of Determination to Determine Relative Water Rights; Order Establishing Case Procedure (December 10, 2020). *See* NRCP 39(b) (trial by court), NRCP 42(b) (discretion to conduct separate trials), NRS 533.170.

³⁶ *See* NRCP 7(b) (motions), NRCP 26-37 (discovery), NRCP 54(b) (certification of a judgment), NRCP 56 (summary judgment); *See also* NRS 533.170(5).

³⁷ NRS 533.170(4) and (5).

Lastly, NRCP 54(b) expressly allows for certification of a judgment as final. Nothing in statute prevents NRCP 54(b) certification. In fact, appeals of a final order by the decree court follow NRAP.³⁸ And NRAP allows for appeals of judgments certified under NRCP 54(b). Again, the Legislature only listed one exception to the rules, and that is how notice is to be given. The Legislature is aware of the civil rules of procedure, knows how to specify when the procedures should be different, and has not prevented the certification of final judgments under NRCP 54(b). Thus, the State Engineer's motion and appeal are meritless.

Additionally, as the District Court correctly held, the State Engineer's motion for stay confuses motion practice with pleadings.³⁹ The State Engineer is making the same argument in his Motion for Stay.⁴⁰ The District Court strictly followed the pleading limitation under NRS 533.170(2).⁴¹ The State Engineer's arguments in this case lack merit, and the stay should be denied.

Lastly, the State Engineer does not challenge the facts under the Solarljøs order. Instead, he attacks procedure only. The State Engineer states that a hearing was required in the Solarljøs matter. This runs contrary to the State Engineer's stance in this case that his order speaks for itself, which in essence is a request for the District Court to proceed on the pleadings. The State Engineer had an opportunity to dispute the facts in the Solarljøs order, and chose not to do so. Eureka County also had the opportunity to intervene or dispute facts, but chose not to do so.

³⁸ NRS 533.200.

³⁹ State Engineer Mot. for Stay at ex. 7, 4:19-25.

⁴⁰ State Engineer Mot. for Stay at 5.

⁴¹ State Engineer Mot. for Stay at ex. 7, 4:1-19.

By making this choice, and leaving the motion for summary judgment unopposed, they have admitted to the facts contained in the motion for summary judgment.⁴² A hearing is not required when facts are not in dispute. And certainly, this procedure has no relation to the other procedures in this case, or justify any reason to stay the remainder of the District Court proceedings in this case.

CONCLUSION

Accordingly, the Renners respectfully request the Court decline to issue the requested temporary administrative stay and instead conduct briefing on the State Engineer Motion for Stay in conformance with the applicable provisions of NRAP.

Respectfully submitted this 4th day of March 2022.

TAGGART & TAGGART, LTD.

By: /s/ Tamara C. Thiel

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⁴² *Spencer v. Klementi*, 136 Nev. 325, 466 P.3d 1241, 1249 (2020) citing DCR 13(3) (expressly authorizing a district court to construe an opposing party's failure to file a written opposition "as an admission that the motion is meritorious and a consent to granting the same"); *see also Las Vegas Fetish & Fantasy Halloween Ball, Inc. v. Ahern Rentals, Inc.*, 124 Nev. 272, 278, 182 P.3d 764, 768 (2008) (affirming the district court's treatment of the opposing party's failure to oppose a motion for attorney fees as an admission that the moving party's motion was meritorious).

CERTIFICATE OF SERVICE

Pursuant to NRAP 25(b), I 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 the foregoing document using the Nevada Supreme Court's E-Flex electronic filing system to the following parties:

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DATED this 4th day of March 2022.

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Employee of TAGGART & TAGGART, LTD.