IN THE SUPREME COURT OF THE STATE OF NEVADA

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.	**Supreme Court No. 84275** District Court Case No. CV-2002009
THE STATE OF NEVADA DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, DIVISION OF WATER RESOURCES; AND ADAM SULLIVAN, P.E., STATE ENGINEER, Appellants, v. 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.

RESPONDENT SOLARLJOS, LLC'S MOTION TO EXCEED PAGE LIMIT FOR OPPOSITION TO APPELLANT STATE ENGINEER'S EMERGENCY MOTION FOR STAY

IMMEDIATE ACTION REQUESTED

Respondent SOLARLJOS, LLC ("Solarljos") by and through its undersigned counsel of record, moves to exceed the 10 page limit on responses to motions imposed by NRAP 27(d)(2). This request applies to Solarljos' Opposition to Emergency 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 and Request for Temporary Stay Pending Decision On Underlying Motion for Stay ("Opposition"). This opposition is supported by the following points and authorities. A copy of the Opposition (without exhibits) is attached as **Exhibit 1.**

POINTS AND AUTHORITIES

NRAP 27(d)(2) states "[a] motion …shall not exceed 10 pages, unless the court permits or directs otherwise." While NRAP 32(a)(7)(D) authorizes the filling of a motion to file a brief to that exceeds the applicable page limit "upon a showing of diligence and good cause." Solarljos compiles with the requirements of NRAP 32(a)(7)(D).

The State Engineer filed its Motion to Exceed Page Limit For Emergency Motion to Stay on February 25, 2022, stating that the underlying case involves a matter of statewide public importance (i.e., water-rights adjudication of the Diamond Valley) and that the issues presented in his motion required more pages than the rule allows. Neither Solarljos, nor any other Respondent objected to the State Engineer's motion, and this Court granted the same.

For the same reasons, Solarljos respectfully requests leave to exceed the page limit pursuant to NRAP 27(d)(2), as the issues presented in the State Engineer's Emergency Motion for Stay, after diligent work, could not be condensed into 10 pages. The State Engineer's Motion of Stay is 14 pages and in order to adequately and sufficiently address the issues and arguments made in that motion, Solarljos must also provide an adequate case background and response to each discussion of the factors delineated in NRAP 8(c) and in responding to the State Engineer's motion, it was necessary for Solarljos to expand further with additional legal points and

authorities that must be analyzed by this Court to make its decision. As such, the Opposition is 19 pages, not including exhibits, so Solarljos seeks leave to file 9 pages more than allowed under NRAP 27(d)(2). Like Counsel for the State Engineer, Counsel for Solarljos worked diligently with a conscientious and purposefully effort to present its Opposition in a concise manner, while also referencing the district court's order and other relevant orders or briefs concerning the district court's denial of the State Engineer's similar motion for stay.

Solarlojos respectfully submits it has demonstrated diligence and good cause to exceed the 10-page limit specified in NRAP 27(d)(2) and respectfully requests leave to do so.

Respectfully submitted this 4th day of March, 2022.

KAEMPFER CROWELL

BY: */s/ Alex J. Flangas*

ALEX J. FLANGAS
Nevada Bar No. 664
AUGUST B. HOTCHKIN
Nevada Bar No. 12780
50 W. Liberty Street, Suite 700
Reno, Nevada 89501
Telephone: (775) 852-3900
Fax: (775) 327-2011

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2022, service of the foregoing **RESPONDENT SOLARLJOS, LLC'S MOTION TO EXCEED PAGE LIMIT FOR OPPOSITION TO APPELLANT STATE ENGINEER'S EMERGENCY MOTION FOR STAY** was filed electronically with the Clerk of the Court, and therefore electronic service was made in accordance with the master service list to the following:

James N. Bolotin
Senior Deputy Attorney General
Ian Carr
Deputy Attorney General
State of Nevada
Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717
jbolotin@ag.nv.gov
icarr@ag.nv.gov

Paul Taggart
David H. Rigdon
Timothy O'Connor
Tamara C. Thiel
TAGGART & TAGGART, Ltd.
108 Minnesota Street
Carson City, NV 89703
paul@legaltnt.com
david@legaltnt.com
tim@legaltnt.com
tammy@legaltnt.com

Karen Peterson
ALLIISON MACKENZIE, Ltd.
402 N. Division Street
Carson City, NV 89703
kpeterson@allisonmackenzie.com

Theodore Beutel
EUREKA CO. DISTRICT ATTORNEY
701 South Main Street
P.O. Box 190
Eureka, NV 89316
tbeutel@eurekacountynv.gov

Therese A. Ure Stix
Laura A. Schroeder
Caitlin R. Skulan
SCHROEDER LAW OFFICES, P.C.
10615 Double R. Blvd., Suite 100
Reno, NV 89521

Gordon H. DePaoli
WOODBURN AND WEDGE
6100 Neil Road, Suite 500
Reno, NV 89511
gdepaoli@woodburnandwedge.com

t.ure@water-law.com
counsel@water-law.com

Ross E. de Lipkau
ROBERTSON, JOHNSON, MILLER & WILLIAMSON
50 West Liberty Street, Suite 600
Reno, NV 89501
ross@nvlawyers.com

Robert A. Dotson
Justin C. Vance
DOTSON LAW
5355 Reno Corporate Drive, Suite 100
Reno, NV 89511
rdotson@dotsonlaw.legal
jvance@dotsonlaw.legal

In addition, service was made by depositing the same mailing via first class mail with the United States Postal Service to the following:

Steven D. King
227 River Road
Dayton, NV 89403
kingmont@charter.net

David L. Negri, Deputy Attorney General
ENVIRONMENT AND NATURAL RESOURCES DIVISION
c/o U.S. Attorney's Office
1290 West Myrtle Street, Suite 500
Boise, ID 83702
david.negri@usdaj.gov

DATED March 4, 2022

/s/ Sharon Stice
An employee of Kaempfer Crowell

EXHIBIT INDEX

EXHIBIT	DESCRIPTION	PAGES
1	Respondent Solarljos, LLC's Opposition to Emergency Motion Under NRAP 27(e) for Stay of District Court's Corrected Order Granting Solarljos, LLLC'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 (without exhibits)	23

EXHIBIT 1

EXHIBIT 1

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

RESPONDENT SOLARLJOS, LLC'S OPPOSITION TO EMERGENCY 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 AND REQUEST FOR TEMPORARY STAY PENDING DECISION ON UNDERLYING MOTION FOR STAY

Respondent SOLARLJOS, LLC ("Solarljos") by and through its attorneys of record, Alex J. Flangas and August B. Hotchkin of the law firm Kaempfer Crowell, hereby opposes the Emergency 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 and Request for Temporary Stay Pending Decision on Underlying Motion for Stay (the "Motion") filed by Appellants, THE STATE OF NEVADA DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, DIVISION OF WATER

RESOURCES; AND ADAM SULLIVAN, P.E., STATE ENGINEER (collectively "Appellants" or "State Engineer").

This Opposition is based upon the following memorandum of points and authorities, and all pleadings and papers filed in this case.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The State Engineer's motion for emergency stay is essentially based on the following contentions: (1) that water-rights adjudication is special in character and procedure and is therefore, exempt from the Nevada Rules of Civil Procedure ("NRCP"); (2) that the State Engineer's role is more in line with a "special master or referee," which somehow exempts or immunizes the State Engineer from vested water right-claimants, such as Solarljos, from legal challenges concerning the State Engineer's determination with respect to said rights; (3) that Solarljos' successful use of the dispositive motion practice under NRCP disrupts the status quo (even though the State Engineer did not argue against the merits of the motion *nor* challenges the result now); and (4) that certification of summary judgment in Solarljos' favor under NRCP 54(b) was improper.

However, as already thoroughly outlined in the motions and other briefs advocating for Solarljos' Motion for Partial Summary Judgment, the certification of under NRCP 54(b), and the district court's orders granting the same, as well as the

arguments against the State Engineer's request to the district court for stay and the district court's findings and decision to deny that request, the State Engineer's position is completely without merit. As discussed in more detail below, the State Engineer's arguments are based on false premise and are unsupported by the facts and controlling law.

First, the State Engineer's foundational contention, which all other arguments necessarily rely upon, is that Nevada's water law adjudication proceedings governed by the Nevada Revised Statutes ("NRS"), Chapter 533, is exempted from the NRCP and prohibits the adjudication process concerning claimant's vested water rights from those procedures utilized and afforded to other civil actions. However, the State Engineer's argument is completely baseless and ignores NRS 533.170(5)'s plain language, which contradicts and undermines the State Engineer's position. That statute provides in relevant part that "[a]ll proceedings . . ., including the taking of testimony, shall be as nearly as may be in accordance with the Nevada Rules of Civil Procedure." NRS 533.170(5) (Emphasis added); *see also Jackson v. Groenendyke*, 132 Nev. 296, 300-01, 369 P.3d 362, 365 (2016) (where this Court found that the district court is authorized to conduct proceedings consistent with the NRCP that are not prohibited by statute, including water-rights adjudications under NRS Chapter 533). *Bentley v. State, Off. of State Eng'r*., 132 Nev. 946 (2016) (illustrating the use of NRCP 16 pretrial conference orders under water right adjudications pursuant to

NRS 533.170(5)). Indeed, there is no language in the statute or applicable case law whatsoever that remotely suggests that NRS 533 or the exception-adjudication process falls outside the scope and purview of the NRCP with the exception of service of proposed findings of fact and decree and costs related thereto (which is not applicable here). *Id.*; *see also and cf. In re Determination of Relative Rts. In & to Waters of Franktown Creek, Washoe Cty.*, 77 Nev. 348, 355, 364 P.2d 1069, 1072-73 (1961) (where this Court affirmed the lower court's decision to grant summary judgment in a NRS 533.170 water-rights adjudication).

Here, the district court appropriately crafted and organized the scope of the case management for the adjudication process in a manner that followed the NRCP, including but not limited to dispositive motion practice, which all parties were put on notice of per the district court's December 10, 2020 scheduling order wherein the State Engineer failed to object to the same until well over a year later. *See* Ex. "1", December 10, 2020, Order; *see also* the State Engineer's Mot. Ex. "7", p. 6, lns. 11 - 13 ("On December 10, 2020, the court entered its order establishing case procedure providing for discovery and dispositive motions. The State Engineer failed to challenge this order until February 8, 2022, when it filed a notice of appeal and his motion for stay."). "While 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. It is just as essential for courts to make findings and draw their own conclusions upon issues joined on exceptions taken to an order of the state engineer and enter a decree as final and effective as in other civil cases." *Scossa v. Church*, 43 Nev. 407, 187 P. 1004, 1005 (1920); *see also Pyramid Lake Paiute Tribe of Inidians v. Ricci*, 126 Nev. 521, 525, 245 P.3d 1145, 1148 (2010) (holding that with respect to questions of law, the State Engineer's ruling is persuasive but not controlling and therefore, the courts review purely legal questions without deference to the State Engineer's ruling).

Second, the State Engineer's argument concerning the purported limitations to the nature and scope of his role in this case is made with an implication that he was somehow prohibited or precluded from engaging in the procedural aspects that it now claims were done incorrectly. However, the State Engineer's representations in this regard are incorrect as well. There is no language in the applicable statutes or case law whatsoever that imposes such a limitation on the State Engineer and the district court has not issued any finding or ruling that restricts the State Engineer's participation, including but not limited to, engaging in motion practice. Moreover, no claimant, including Solarljos, has made any argument or voiced a position that has raised any issue with respect to the State Engineer's ability to participate in this adjudication. Any purported limitation regarding the State Engineer's role in this

case has been voluntarily *self-imposed*.[1] The district court "cannot compel any individual or entity, including the State Engineer, to be a litigant party to an adjudication proceeding. It is the parties' 'right to enforce the claim and who has a significant interest in the litigation.'" Mot., Ex. "7", p. 10, lns. 15-19 *citing Pointer v. Anderson*, 96 Nev. 941, 943, 620 P.2d 1254, 1255 (1980); NRCP 17. Thus, the State Engineer's contention that it somehow was precluded or exempted from engaging in motion practice is without merit and nothing more than a false flag.

Third, the State Engineer's concerns regarding the court's ruling in favor of summary judgment for Solarljos and the certification of the same under NRCP 54(b) with respect for preserving the status quo are unfounded. Solarljos' exception is completely and entirely different from the other claimants in the adjudication as it is the only one that has vested *groundwater* claims which the State Engineer recognized in its determination orders. Solarljos' sole challenge to the State Engineer's determination was his arbitrary and unsubstantiated reduction of the allocation from 341.71 acre-feet per annum ("AFA") to 13.2 AFA which the district court correctly found was in violation of Solarljos' due process rights and Nevada law, resulting in the State Engineer's determination being overturned. *See* generally, Ex. "2", Corrected Order Granting Solarljos' Motion for Partial

[1] As the district court pointed out in its February 24, 2022 Order, "[t]he State Engineer unilaterally decided early on in this adjudication that it would not participate to defend his order of determination." February 24, 2022 Order, p. 5, lns. 15-18, Ex. "7" of State Engineer's Motion. (Emphasis added).

Summary Judgment. Solarljos' vested water claim has no effect on and is not affected by any of the other claimants' exceptions.[2]

Moreover, the State Engineer failed to oppose Solarljos' motion for partial summary judgment which addressed this singular issue and, even if the evidentiary hearing was held (as the State Engineer purports was required) instead of summary adjudication under NRCP 56, the result would have been the same especially since the State Engineer claims its role would have been limited to only as a "special master or referee."

The State Engineer makes a very vague and overbroad argument that appears to challenge the entire protocol and procedure undertaken by the district court (e.g., pretrial discovery) in this adjudication, and only takes issue with Solarljos' certified judgment because it was it was first to the finish. However, the State Engineer never opposed Solarljos' motion for partial summary judgment on the basis of procedure or on the merits. In fact, it appears the State Engineer *still* does not challenge Solarljos' summary judgment on the merits. Notwithstanding, even if the State Engineer takes issue with the procedure in general regarding all claimants in the adjudication, those challenges do not apply to Solarljos. Solarljos did not conduct engage in any of the procedural or discovery exercises that the State Engineer (baselessly) contends are not allowed

[2] *See* Mot. Ex. "7", p. 8, lns. 1-11.

in water-right adjudications, and The State Engineer's motion for partial summary judgment was not based on any new or additional information.[3]

As such, there is no status quo that would be disrupted by the court's judgment as to Solarljos. Further, Solarljos' allocation of 341.71 AFA hardly makes or will make the impact that is exaggerated by the State Engineer.

Fourth, the State Engineer has failed to provide any legal authority to support its argument that NRCP 54(b) is not allowed in this adjudication and that certification of the district court's order granting Solarljos' motion for partial summary judgment under that Rule was somehow improper. There is absolutely nothing in NRS Chapter 533 or the case law that precludes certification.

For these reasons and those set forth in more detail below, the State Engineer cannot meet his burden for an emergency stay.

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[3] The State Engineer's supplement to its underlying motion, filed on March 1, 2022 takes issue with Eureka County's recent subpoenas for two (2) of the State Engineer's staff members, presumably, to illustrate further examples of purported procedural impropriety. However, Solarljos never subpoenaed any witnesses and its dispositive motion was not based on any evidence borne from a subpoena or other discovery vehicle during the adjudication. Moreover, it is ironic that Eureka County joined the State Engineer's appeal and its underlying motion, when Eureka County is doing the very thing the State Engineer now takes issue with.

II. ARGUMENT

A. This Court Should Not Stay the Operation of the Order Granting Partial Summary Judgment in Favor of Solarljos Pending the Diamond Valley Adjudication Appeal Because No Grounds Exist To Do So

The State Engineer argues that a stay should be implemented regarding Solarljos' judgment concerning its exception in order to preserve the status quo. However, the status quo that the State Engineer seeks to preserve has not and will not be affected by the district court's orders concerning Solarljos' vested claims.

When deciding whether to stay a matter pending an appeal, this Court's determination is made after an analysis under four (4) factors outlined in *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004). Those four (4) factors are as follows: "(1) whether the object of the appeal will be defeated if the stay is denied, (2) whether the appellant will suffer irreparable or serious injury if the stay is denied, (3) whether respondent will suffer irreparable or serious injury if the stay is granted, and (4) whether appellant is likely to prevail on the merits in the appeal." *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004). While this Court has not indicated that any one factor carries more weight than the others, it has been recognized that if one or two factors are "especially strong," such a factor or factor(s) *could* counterbalance the other weak(er) factors, it is clear that the framework and purpose of these factors are designed to act as a balancing of interests of the diametrically opposed parties. *See Id., citing Hansen v.*

Eight Jud. Dist. Ct. ex rel. City. Of Clark, 116 Nev. 650, 659, P.3d 982, 987 (2002)). Also, while the party seeking a stay does not always have to show a probability of success on the merits, he still must present a substantial case on the merits when a serious legal question is at issue, and show that the balance of equities weighs heavily in favor of granting the stay. *Fritz Hansen A/S v. Dist. Ct.*, 116 Nev 650, 657, 6 P.3d 982 (2000).

For the reasons outlined below, none of these factors support the State Engineer's request for a stay of the order for summary judgment and certification of the same in favor of Solarljos.

B. The State Engineer Cannot Show That The Object of His Appeal Will Be Defeated If His Request For Stay is Denied

The State Engineer contends that if a stay of both the judgment in favor of Solarljos and the Diamond Valley adjudication is not granted by this Court, it will defeat the State Engineer's interest in preserving the status quo. However, as the district court correctly ruled, the State Engineer failed to and cannot show any law or facts to substantiate this concern. *See generally*, Mot., Ex. "7", pp. 9-12. Critically, in the lower court proceedings, neither the State Engineer nor any of the claimants in the Diamond Valley adjudication, opposed Solarljos' motion for partial summary judgment though he had sufficient notice and opportunity to do

so.[4] This alone is fatal to the State Engineer's appeal, and consequently, his underlying motion. *See e.g., Coleman v. Tomsheck*, 489 P.3d 520 (Nev. App. 2021) (wherein the Court of Appeal held that it could not "conclude that the district court abused its discretion in granting Tomschek's motion for summary judgment as unopposed pursuant to EDCR 2.20(e)"[5]) *citing to Renown Reg'l Med. Ctr. v. Second Judicial Dist. Court*, 130 Nev. 824, 828, 335 P.3d 199, 202 (2014) (explaining that the district court has the inherent power of summary judgment); and *King v. Cartlidge*, 121 Nev. 926, 926-27, 124 P.3d 1161, 1162 (2005) (reviewing a district court's decision to grant a motion for summary judgment as unopposed for an abuse of discretion and finding that the delay in filing an opposition, alone, was sufficient grounds for the district court to deem a motion for summary judgment unopposed, and thus meritorious); *see also King v. St. Clair*, 134 Nev. 137, 141-42, 414, P.3d 314, 317-18 (2018) (where this Court declined to address the State Engineer's argument that the district court erred in granting a

[4] Additionally, the State Engineer's failure to oppose Solarljos' dispositive motion is compounded by its failure to raise any substantial objection to the district court's December 10, 2020 order wherein is expressly contemplated the utilization of dispositive motions in this case. *See* Mot. Ex. "7", p. 6, lns. 11-17 (the district court illustrated the State Engineer's dilatory conduct regarding raising objections to both the procedure and case management of the adjudication and dispositive motion practice).

[5] 7JDCR Rule 7(7) is virtually identical to the scope and purpose of EDCR 2.20(e) and provides that the absence of a memorandum of points and authorities in support of an opposition may be construed by the court as an admission that the opposition is not meritorious and is cause for granting the motion.

request to take judicial notice of legal briefs and prior State Engineer decision in unrelated matters, ruling that this "issue [was] not properly before [this Court] because the State Engineer failed to preserve it with its opposition filed five months after [the claimant's] request for judicial notice[] [and that] [t]he district court properly denied that opposition as untimely" (citing to D.C.R. 13(3) which requires written opposition to be filed within ten days of service of the other party's motion).

The State Engineer claims that the purported status quo will be disrupted if Solarljos' judgment is not stayed. However, the State Engineer fails to show any law or facts to support such an exaggeration. As the district court pointed out, the *State Engineer has allowed* egregious over pumping by junior water right holders in excess of 40 years whereby the Diamond Valley aquifer has been and continues to be over pumped in excess of 30,000 AFA (the basin's available perennial yield). Mot., Ex. "7", p. 3, lns. 3-9. In contrast, the difference in the 341.71 AFA allocation of water to Solarljos so infinitesimal that it could hardly be said to disrupt the purported status quo, it has no meaningful effect on the other vested water right claims as none of them intervened in Solarljos' exception, and none of them (with the exception of Eureka County—who also failed to oppose Solarljos' motion for partial summary judgment) appealed the district court's corrected order grating Solarljos' motion for partial summary judgment.

Additionally, as discussed in detail in the district court's order denying the State Engineer's request for stay, the State Engineer's case appeal statement shows that he is only pursuing his appeal on the propriety of discovery and use of dispositive motion in the adjudication proceeding under NRS 533.170 and whether NRCP 54(b) certification is appropriate in such a setting. However, because "[n]o apparent challenge is being made by the State Engineer regarding the substantive merits of Solarljos LLC's motion for partial summary judgment or the court's order granting the same[,]"[6] the result with respect to Solarljos' allocation of water will remain the same, whether by summary adjudication or through an evidentiary hearing. Thus, the difference with respect to the State Engineer, the other claimants, and the State of Nevada, is one without distinction and the State Engineer has failed to and cannot show that the object of his appeal will be defeated if his request for stay is not granted.

C. The State Engineer Cannot Show That He Will Suffer Irreparable Harm If A Stay Is Not Granted By This Court

The State Engineer claims that he and the State of Nevada, as a whole, will suffer serious, "potentially" irreparable, harm should a stay not be issued. Mot., p. 11. However, alleging conclusory non-specific speculative *potential* irreparable harm that the State Engineer describes here, without more, is not sufficient for this

[6] Mot., Ex. "7", p. 11, lns. 2-4 *citing* the State Engineer's Case Appeal Statement, ¶ I, pp. 4-5.

Court to grant a stay. *Cf. Mikohn Gaming Corp., supra.* (requiring the appellant to show he *will* suffer irreparable or serious injury if the stay is denied).[7]

D. Conversely, Solarljos *Will* Suffer Irreparable Harm If A Stay Is Granted By This Court

It has been held that harm to business operations, like the mining operations that Solarljos seeks to undertake with its water rights[8], which are treated like real property rights in Nevada, constitutes as irreparable harm under Nevada law. *See Eureka Cty. v. Seventh Jud. Dist. Ct. in & for Cty. of Eureka*, 134 Nev. 275, 281, 417 P.3d 1121, 1125-26 (2018) (internal citations omitted) (concluding that real property rights, including water rights, are unique forms of property); *see also e.g., Sobol v. Capital Management*, 102 Nev. 444, 446, 726 P.2d 335, 337 (1986) (holding that "acts committed without just cause which unreasonably interfere with a business or destroy its credits or profits, may do an irreparable injury."); *Dixon v. Thatcher*, 103 Nev. 414, 415, 742 P.2d 1029, 1029-30 (1987) (reasoning that, with respect to injunctive relief, irreparable harm is harm for which compensatory damages would be inadequate, such as the sale of a home at a

[7] *See* Mot., Ex. "7", pp. 11-12 (where the district court correctly reasoned that the State Engineer's claim of potential irreparable harm amounts to nothing more than speculation which is not sufficient.).

[8] In order to conduct its gold mining operations, Solarljos will need to secure investors who will not likely invest in such a business venture so long as there is a cloud of uncertainty with respect to Solarljos' water rights. Because the market value of gold fluctuates constantly, the longer Solarljos has to wait to obtain finality regarding its rights the more it will lose out on economic opportunities which it cannot recover.

trustee's sale, because real property is unique). The State Engineer's challenge against the entire scope of procedure utilized by the district court, wherein he is requesting a stay on the entire adjudication, will result in months, if not years of delay that will substantially and unfairly prejudice Solarljos.

Moreover, as stated previously, the State Engineer's appeal focuses on procedural issues surrounding Solarljos' motion for partial summary judgment and the certification of the same, but *not* the merits. However, procedural issues are not recognized as irreparable harm for which a stay is appropriate. *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).

Next, the State Engineer's contention that Solarljos will not suffer irreparable harm should a stay be granted is based on nothing but self-serving speculation and ignorance, and his reliance on the *Mikohn Gaming Corp.* case is misplaced. In *Mikohn Gaming Corp.*, this Court held that the threatened harm of increased costs and delay with respect to *litigation* and/or *discovery* do not constitute irreparable harm. However, this Court did not remotely suggest that increased costs or delay in *any* form or of any type (including harm to business operations) were not to be considered. *See Mikohn Gaming Corp.* 120 Nev. at 253, 89 P.3d at 39. While Solarljos will undoubtedly incur fees and costs to

respond to the underlying motion and the State Engineer's appeal, as explained above, this is not the irreparable harm that Solarljos is claiming it will suffer if the stay is granted.

Further, the State Engineer's bald assertion that Solarljos will not suffer irreparable harm because it can use the water pursuant to the State Engineer's Final Order of Determination in the meantime is patently absurd. The State Engineer *arbitrarily* decided to allocated only 13.2 AFA to Solarljos' vested claims, over 300 AFA less than what it is entitled to, which Solarljos successfully obtained summary judgment against. While the difference compared to the entire basin's total 30,000 AFA perennial yield is insignificant, a reduction of over 96% of Solarljos' water allocation is extremely significant to Solarljos and would result in a clear and substantial depravation of its rights, causing irreparable harm to Solarljos. *See Eureka Cty.* and *Sobol, supra.*; *see also and cf.* NRS 533.085(1) (stating that nothing contained in NRS Chapter 533 shall impair the vested right of any person to the use of water).

E. The Request for Stay Should Be Denied Because the State Engineer Will Not Likely Succeed On The Merits of His Appeal

This Court has held that "the party opposing the stay motion can defeat the motion by making a strong showing that appellate relief is unattainable. In particular, if the appeal appears frivolous or if the appellant apparently filed the stay motion purely for dilatory purposes, the court should deny the stay." *Mikohn*

Gaming Corp. 120 Nev. at 253, 89 P.3d at 40. For the reasons outlined above, the State Engineer has failed to show and cannot show that there is a likelihood he will succeed on the merits of his appeal. The State Engineer's appeal is based entirely on a dispute regarding the procedural tools utilized in this case which he *never* objected to until over a year after the district court issued its case management order, setting forth the scope of the case management procedure and specifically, contemplating dispositive motion practice. The State Engineer's egregious dilatory conduct should not be rewarded.

Additionally, and most critically, the State Engineer failed to oppose Solarljos' motion for partial summary judgment. This alone is fatal to the State Engineer's appeal as it is well-established that such a failure may be construed by the district court as an admission that the motion is meritorious. *See Coleman*, *supra.*; *see also King, supra.* Also, the State Engineer's argument that this was somehow procedurally improper (for which he provides no legal authority in support) is contradicted by Nevada law. *See In re Determination of Relative Rts. In & to Waters of Franktown Creek, Washoe Cty., supra.* The State Engineer was not precluded from filing an opposition and challenging Solarljos' dispositive motion, and his decision to limit its involvement and role was his and his alone. There is no law or facts that the State Engineer can rely on that excuses or insulates him from the consequences of that decision.

Finally, the State Engineer's overbroad generalization of and reliance on the special character of water adjudications in Nevada does not and will not avail him to a likelihood of success on the merits either. While the State Engineer's findings are indeed entitled to great respect, this does not provide the State Engineer with carte blanche special treatment and privileges over Solarljos and the other claimants. It also does not hamstring or curtail the district court's purview in these proceedings the way the State Engineer is suggesting here. Instead, it merely shifts the burden of proof on the party attacking the State Engineer's decision—which Solarljos successfully accomplished in the lower court. *See* NRS 533.450(9); *Pyramid Lake Piaute Tribe of Inidans v. Ricci*, 126 Nev. 521, 525, 245 P.3d 1145, 1147-48 (2010); *King v. St. Clair*, 134 Nev. 137, 139, 414 P.3d 314, 316 (2018) (Internal citations omitted) (affirming that the State Engineer's factual findings should be and will be overturned if they are not supported by substantial evidence); *See also, generally,* Ex. "2" Court Corrected Order (granting summary judgment for the State Engineer's failure to support its determination to reduce Solarljos' allocation of water without any substantial evidence in support thereof).

III. CONCLUSION

Based on the foregoing, the State Engineer has failed to provide any legal or factual support to show that this Court should grant a stay the order granting partial

summary judgment in favor of Solarljos' exception and the order certifying the same under NRCP 54(b) under any of the *Mikhon Gaming Corp.* factors. Therefore, his motion for stay should be denied in its entirety.

Respectfully submitted this 4th day of March, 2022.

KAEMPFER CROWELL

BY: */s/ Alex J. Flangas*

ALEX J. FLANGAS
Nevada Bar No. 664
AUGUST B. HOTCHKIN
Nevada Bar No. 12780
50 W. Liberty Street, Suite 700
Reno, Nevada 89501
Telephone: (775) 852-3900
Fax: (775) 327-2011

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2022, service of the foregoing **RESPONDENT SOLARLJOS, LLC'S OPPOSITION TO EMERGENCY 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 AND REQUEST FOR TEMPORARY STAY PENDING DECISION ON UNDERLYING MOTION FOR STAY** was filed electronically with the Clerk of the Court, and therefore electronic service was made in accordance with the master service list to the following:

James N. Bolotin
Senior Deputy Attorney General
Ian Carr
Deputy Attorney General
State of Nevada
Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717
jbolotin@ag.nv.gov
icarr@ag.nv.gov

Paul Taggart
David H. Rigdon
Timothy O'Connor
Tamara C. Thiel
TAGGART & TAGGART, Ltd.
108 Minnesota Street
Carson City, NV 89703
paul@legaltnt.com
david@legaltnt.com
tim@legaltnt.com
tammy@legaltnt.com

Karen Peterson
ALLIISON MACKENZIE, Ltd.
402 N. Division Street
Carson City, NV 89703
kpeterson@allisonmackenzie.com

Theodore Beutel
EUREKA CO. DISTRICT ATTORNEY
701 South Main Street
P.O. Box 190
Eureka, NV 89316
tbeutel@eurekacountynv.gov

Therese A. Ure Stix
Laura A. Schroeder
Caitlin R. Skulan
SCHROEDER LAW OFFICES, P.C.
10615 Double R. Blvd., Suite 100
Reno, NV 89521
t.ure@water-law.com
counsel@water-law.com

Gordon H. DePaoli
WOODBURN AND WEDGE
6100 Neil Road, Suite 500
Reno, NV 89511
gdepaoli@woodburnandwedge.com

Ross E. de Lipkau
ROBERTSON, JOHNSON, MILLER & WILLIAMSON
50 West Liberty Street, Suite 600
Reno, NV 89501
ross@nvlawyers.com

Robert A. Dotson
Justin C. Vance
DOTSON LAW
5355 Reno Corporate Drive, Suite 100
Reno, NV 89511
rdotson@dotsonlaw.legal
jvance@dotsonlaw.legal

In addition, service was made by depositing the same mailing via first class mail with the United States Postal Service to the following:

Steven D. King
227 River Road
Dayton, NV 89403
kingmont@charter.net

David L. Negri, Deptuty Attorney General
ENVIRONMENT AND NATURAL RESOURCES DIVISION
c/o U.S. Attorney's Office
1290 West Myrtle Street, Suite 500
Boise, ID 83702
david.negri@usdaj.gov

DATED March 4, 2022

/s/ Sharon Stice
An employee of Kaempfer Crowell

EXHIBIT INDEX

EXHIBIT	DESCRIPTION	PAGES
1	December 10, 2020, Order Setting Hearings for Notices of Exceptions Filed on Order of Determination to Determine Relative Water Rights; Order Establishing Case Procedure	6
2	October 27, 2021, Corrected Order Granting Solarljos, LLC's Motion for Partial Summary Judgment	19