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 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.

[Remainder of Page Left Intentionally Blank]

[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

EXHIBIT 1

EXHIBIT 1

Case No. CV-2002009

Dept No. 2

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF EUREKA

******

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 NO. 10-153, EUREKA AND ELKO COUNTIES, NEVADA

ORDER SETTING HEARINGS FOR NOTICES OF EXCEPTIONS FILED ON ORDER OF DETERMINATION TO DETERMINE RELATIVE WATER RIGHTS; ORDER ESTABLISHING CASE PROCEDURE

SEVENTH JUDICIAL DISTRICT COURT
GARY D. FAIRMAN
DISTRICT JUDGE
DEPARTMENT 2
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA

On November 10, 2020, a hearing was held to consider the notices of exceptions filed by parties in interest pursuant to the Court's Order Setting Hearing on Nevada State Engineer's Order of Determination of the Relative Rights in and to All Waters of Diamond Valley Hydrographic Basin No 10-153, Eureka and Elko Counties, Nevada, entered August 27, 2020. Proof of service and publication of the court's order setting hearing on exceptions to the order of determination pursuant to NRS 533.165(6) was filed November 2, 2020. The court finds that notice has been properly given as required by NRS 533.165(c).

The parties identified in this order, with exception of Peter J. Goicoechea and Gladys Goicoechea, filed timely notices of exception. The parties and/or their counsel were allowed by the court to either virtually appear or personally appear in court. The

following counsel appeared for the parties: Karen A. Peterson, Eureka County; David H. Rigdon, Sadler Ranch, LLC and MW Cattle, LLC; Tamara C. Thiel, Ira R. and Montira Renner; Timothy O'Connor, Daniel S. Venturacci and Amanda L. Venturacci; Gordon H. Depaoli, Wilfred and Carolyn Bailey, Trustees of the Wilfred and Carolyn Bailey Trust; David L. Negri, U.S. Dept. of Interior, BLM; Terese A. Ure Stix, James E. Bauman and Vera L. Bauman, Arc Dome Partners, LLC, Robert F. Beck and Karen Beck, and Norman and Kindy Fitzwater; Ross E. De Lipkau, Chad D. Bliss and Rosie J. Bliss; Alex J. Flangas, Solarljos, LLC. James E. Bolotin appeared representing Timothy Wilson, State Engineer. Mr. Peter J. Goicoechea appeared as a self-represented litigant.

PROCEDURE

The evidentiary hearings before the court shall be held pursuant to NRS 533.170(5). The Nevada Rules of Civil Procedure shall apply as appropriate to all proceedings including the taking of testimony. Discovery and motion practice shall be allowed as appropriate in all proceedings.

DISCOVERY

-- Discovery cut off date: May 10, 2021.

-- All discovery requests and notices shall be served on all parties. Any party not directly litigating with respect to a claimant's filed notice of exception who desires to participate in discovery in the other claimant's cases(s): (1) shall pay for the reasonable costs for telecopies, photocopies, postage or other discovery reproduction and delivery costs; (2) shall proportionately share the fees and costs for any expert's time which may be used to respond to the requested discovery participation (ie. participation in an

expert's deposition, including court reporter fees and expenses).

-- Lists of lay and expert witnesses shall be disclosed on or before January 11, 2021. The expert's report(s) shall accompany the disclosure of any expert witnesses.

MOTIONS

-- Any preliminary motions, including motions to intervene, shall be filed on or before December 18, 2020.[1]

-- All dispositive motions shall be filed on or before June 1, 2021.

HEARING DATES IN 2021

July 13, 14, 15, 20, 21, 22, 27, 28, Eureka County, notice of exceptions and United States/BLM notice of exceptions

July 29, 30, August 3, 4, 5, Related notice of exceptions to the United States/BLM notice of exceptions and the PWR 107 claims filed by Daniel S. Venturraci and Amanda L. Venturraci, James E. Bauman and Vera Bauman, Chad D. Bliss and Rosie J. Bliss, Arc Dome Partners, LLC and Robert F. Beck and Karen Beck, Norman and Kindy Fitzwater, and Peter J. Goicoechea and Gladys P. Goicoechea. (counsel shall meet and fix the exact day (s) that each party will present their respective evidence.)

August 11, 12, James E. Bauman and Vera L. Bauman and Chad D. Bliss and Rosie Bliss.

---

[1] Mr. Goicoechea advised the court that his claim involves a BLM public water reserve 107 ("PWR 107") claim. In the event Mr. Goicoechea files a motion to intervene in the notice of exception filed by the United States on November 3, 2020, the court will allow Peter Goicoechea and Gladys Goicoechea to appear and participate in the evidentiary hearing involving the PWR 107 claim.

September 27, 28, Wildfred and Carolyn Bailey, Trustees of the Wilfred and Carolyn Bailey Trust.

September 29, 30, October 1, Sadler Ranch, LLC and M.W. Cattle, LLC.

October 5, 6, 7, Daniel S. Venturacci and Amanda L. Venturacci.

November 2, 3, Ira R. and Montira Renner.

November 9, 10, 11, Solarljos, LLC.

-- Subject to court approval, by stipulation, the claimants and the State Engineer may adjust the aforementioned hearing dates.

– Pre-trial briefs[2] shall be filed by the parties 10 days prior to first day of the evidentiary hearing.

-- The parties shall provide to the court at its chambers in Ely, Nevada, a courtesy copy of all filed pleadings and exhibits. Exhibits shall be in CD format only.

– All pleadings and discovery notices shall be served by the parties via email.

– Counsel and the parties must personally appear at the hearings. Other witnesses, including expert witnesses, may appear virtually. The parties shall follow ADK IX.

Good cause appearing,

IT IS SO ORDERED.

DATED this 9th day of December, 2020.

DISTRICT JUDGE

SEVENTH JUDICIAL DISTRICT COURT
GARY D. FAIRMAN
DISTRICT JUDGE
DEPARTMENT 2
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA

[2] The court will enter a separate pre-hearing order regarding briefs, evidence, and other matters related thereto.

NO. _____
FILED

DEC 10 2020

By _____ Eureka County Clerk

Case No. CV-2002009

Dept No. 2

SEVENTH JUDICIAL DISTRICT COURT
GARY D. FAIRMAN
DISTRICT JUDGE
DEPARTMENT 2
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF EUREKA

******

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 NO. 10-153, EUREKA AND ELKO COUNTIES, NEVADA

CERTIFICATE OF SERVICE

The undersigned being an employee of the Eureka County Clerk's Office, hereby certifies that on the 10th day of December, 2020, I personally delivered a true and correct copy of the following:

Order Setting Hearings for Notices of Exceptions Filed on Order of Determination To Determine relative Water Rights; Order Establishing Case Procedure

addressed to:

SEVENTH JUDICIAL DISTRICT COURT
GARY D. FAIRMAN
DISTRICT JUDGE
DEPARTMENT 2
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA

Paul Taggart, Esq.
paul@legaltnt.com
david@legaltnt.com
tammy@legaltnt.com

Therese Ure Stix, Esq.
therese@water-law.com

Alex Flangas, Esq.
aflangas@kcnvlaw.com

Pete Goicoechea
pgoicoechea@yahoo.com

David Negri, Esq.
davidnegri@usdoj.gov

James N. Bolotin, Esq.
jbolotin@ag.nv.gov

Ross E. de Lipkau, Esq.
Ross@nvlawyers.com

Gordon H. DePaoli, Esq.
gdepaoli@woodburnwedge.com

In the following manner:

[ ] regular U.S. mail
[ ] certified U.S. mail
[ ] priority U.S. mail
[ ] hand delivery
[ ] overnight UPS
[ ] overnight Federal Express
[x] via email
[ ] copy placed in agency box located in the Eureka County Clerk's Office

A. Farris

Ashley Farris
Deputy Clerk Recorder

EXHIBIT 2

EXHIBIT 2

Case No.: CV-2002009

Dept. No.: 2

NO.
FILED

OCT 27 2021

By Eureka County Clerk

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF EUREKA

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 NO. 10-153, EUREKA AND ELKO COUNTIES, NEVADA	**CORRECTED ORDER GRANTING SOLARLJOS, LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

THIS MATTER comes before the Court on a Motion for Partial Summary Judgment filed by Solarljos, LLC (hereinafter "Petitioner" or "Solarljos") on September 3, 2021. Any written opposition was due on or before September 17, 2021. However, no oppositions were filed to Solarljos' Motion for Partial Summary Judgment and Solarljos submitted the Motion for this Court's review and decision. Therefore, there is good cause appearing for this Court to grant Solarljos' Motion for Partial Summary Judgment in its entirety:

I. FINDINGS OF FACT

This Court, having read the moving papers, pleadings, exhibits, and other documentation HEREBY FINDS THE FOLLOWING:

1. This matter arises as one of the required statutory processes of a "vested rights adjudication" conducted under NRS 533.087 through 533.265.

2. The State Engineer's office began the process of taking "proofs" of vested rights

KAEMPFER CROWELL
50 West Liberty Street, Suite 700
Reno, Nevada 89501

for the purpose of performing an adjudication of the Diamond Valley Hydrographic Basin, No 10-153, nearly 40 years ago, back in 1982 when that office issued Order 800, the *Order Initiating Proceedings*, pursuant to NRS 533.090(2) and Order 801, the *Notice of Order and Proceedings*, which was published and served on land owners in the basin as required by NRS 533.095. Several years of extension later, nothing had occurred to move that process along, and in 2015 the State Engineer issued Order 1263, a *Notice of Order and Proceedings to Determine Water Rights, both Surface and Underground*, in the matter of the determination of relative rights in and to all waters in the Diamond Valley Hydrographic Basin (10-153), Elko and Eureka Counties, Nevada. That Order effectively "reinitiated" Order 801 (one of the orders previously issued in 1982), and then on October 16, 2015, the State Engineer issued Order 1266, a *Notice of Order for Taking Proofs to Determine Water Rights*, which directed all interested parties who felt they had a claim to vested water rights in Diamond Valley to file their "Proofs" on or before May 31, 2016.

3. Solarljos was one of the parties who filed Proofs of vested water rights with the State Engineer as part of that proceeding in May of 2016, filing Claim Nos. V-10880, V-10881, and V-01882. Those Proofs were based on the use of water for a mining operation associated with the old mining town of Prospect, which had operated near the turn of the century prior to 1900. The Proofs included documentation showing the existence of the mining operation, descriptions of the mining operation by the Solicitor General following annual visits to the mine site and the town, ledger entries demonstrating the existence of water pumps as part of the equipment utilized by the mining operation, Eureka County assessment records referencing the water system for the mine and the "Harrub Well" in that valuation, and a few photographs depicting locations of hand-dug wells in that vicinity.

KAEMPFER CROWELL
50 West Liberty Street, Suite 700
Reno, Nevada 89501

4. When the State Engineer concluded the period for submission of the taking of Proofs, he analyzed those submissions and issued the Preliminary Order on August 30, 2018. The Preliminary Order stated the findings of the State Engineer regarding the submitted Proofs of vested water right claims for all of those persons and companies who had submitted Proofs by the May 31, 2016 deadline. The Preliminary Order stated which of the Proofs would be approved and how much of an allocation of water was proven as having been used (vested), and the State Engineer also indicated whether he found the water right proven up to be a surface right or groundwater right in the case of Solarljos. The State Engineer also denied some Proofs of claim outright, and those claimants therefore received no vested water.

5. In that section of the Preliminary Order addressing the claims made by Solarljos, the State Engineer approved Proof V-10880 for allocation of .472 cfs (cubic feet per second) of vested water rights to Solarljos for "mining an milling from January 1 through December 31" from the Einar Spring, which is a surface source. That diversion rate allocation for a mining and milling right is equivalent to an annual total duty of 342.71 acre feet annually ("AFA"). In making that determination, the Preliminary Order at pages 273 and 274 discussed at length the documentary proof supplied by SRK and Solarljos to support the claim, and spoke supportively of that proof, stating:

> The waters from Clark Spring were captured and put into a pipeline to the former town of Ruby Hill, according to the maps drawn by Hague, which were surveyed in 1880. ... Several historical sources refer to Prospect being developed about 1885 with a population of about 50 people with a post office being established in 1893, but do not elaborate on much else. The smelter was not constructed until 1908 along with several boarding houses. The water pipeline from Clark Spring was probably severed in the early 1880's to serve the needs of the Prospect town site or the water from adjacent springs within the complex were utilized. This suggests that the needs for water prior to 1880 was minimal. Support documentation mentioned the water for boilers and mining operations were supplied with water from springs utilizing a Knowles steam pump and a

KAEMPFER CROWELL
50 West Liberty Street, Suite 700
Reno, Nevada 89501

> Cameron steam pump whose operating capacity at normal speeds would be approximately 200 gpm (0.45 cfs) combined. These necessary pieces of machinery probably arrived in the area prior to the town of Prospect being developed. The documentation filed in support of the proof and information gleaned from the public domain would put the date of first beneficial use of the water post-1880, based on the Hague map, and prior to the development of the town of Prospect prior to 1885. Based on the filed support documentation, field investigation by the Office of the State Engineer and information obtained from sources in the public domain, the State Engineer find [sic] a basis the diversion of 0.472 cfs of water from Einar Spring source for mining and milling from January 1 through December 31 with a priority date of 1880. The State Engineer also finds a basis for the diversion of water for domestic use from January 1 through December 31.

6. However, despite granting Solarljos a .472 cfs vested claim for the Einar Spring, the Preliminary Order then denied Solarljos' vested claims V-10881 and V-10882, but did so entirely on the basis that those claims were applications for "groundwater." In making those denials, the State Engineer found only that Solarljos' Proofs failed to demonstrate that groundwater wells rather than springs, were the source of water described and for which Solarljos provided evidence.

7. However, there was no discussion in the Preliminary Order of limiting the *amount* of water granted to Solarljos based on the type of mining operation, the size of the pumps, the way in the mining operation was operated (or would have been operated), or the approximate amount of water that such a mining operation and town as Prospect would have used given Solarljos' Proofs. Instead, the State Engineer denied Proofs V-10881 and V-10882 on the sole basis that the points of diversion for those claims did not bear the necessary characteristics to be considered historic "wells." Indeed, in denying V-10882 the State Engineer also made the determination that the point of diversion was the same Einar Spring as was approved for Claim No. V-10880, and that there was no "well" at any location to support a

KAEMPFER CROWELL
50 West Liberty Street, Suite 700
Reno, Nevada 89501

separate underground source.

8. The result of the Preliminary Order, consequently, was that Solarljos was allocated vested rights in the amount of .472 cfs (342.71 AFA), but those vested water rights were limited to a single surface right source rather than also being groundwater rights with wells as their points of diversion. Thus, the State did find that Solarljos had made sufficient proof of the use of that amount of water to justify the award of the vested claim (Solarljos sought approval for .471cfs).

9. The only thing the State disagreed with Solarljos about was the limited source of the water, with the State finding that the source was solely a surface spring and not also the historic, hand-dug groundwater wells identified in V-10881 and V-10882.

10. Solarljos properly filed an objection to the Preliminary Order within the time required for filing objections under NRS 533.145 after the Preliminary Order was opened to public inspection as required by that statute.[1] Solarljos' objection to the Preliminary Order was entirely based on the only finding made in the Preliminary Order that was adverse to the position put forth by Solarljos, which was the State Engineer's finding that the sole source of the vested water used was the Einar Spring and that the groundwater well diversion locations identified by Solarlojs were not actually hand-dug "wells."

11. At the hearing on its objection, Solarljos presented arguments and evidence directed only to that point: evidence and arguments designed to demonstrate that the locations of these other points of diversion of water identified were actually hand-dug wells, that the County's assessment records noted one source as the "Harrub Well," and that a noted archeologist who had worked on the cultural analysis of Solarljos' property in connection with

[1] As indicated above, Solarljos had previously filed a Petition for Judicial Review of the Final Order, but upon filing its Objection in this case Solarljos' counsel stipulated to stay that other case, CV2003-010, pending final determination of this matter.

KAEMPFER CROWELL
50 West Liberty Street, Suite 700
Reno, Nevada 89501

the completion of Solarljos' environmental assessment necessary to satisfy BLM permitting requirements had concluded that the points of diversion sites were in fact hand-dug wells that might actually require preservation by Solarljos as part of the cultural assessment and work on the property. The intent of that proof at the hearing was to establish Solarljos right to a vested groundwater claim as well as a surface water claim. The amount of the vested claim was not at issue.

12. On January 31, 2020, the current State Engineer issued the Final Order after consideration of the various objections that had been filed and presented during the hearings conducted in early 2019. In the Final Order, the State Engineer accepted the additional arguments presented by Solarljos at the objection hearing when the State concluded that there were grounds to find that vested Proofs V-10881 and V-10882 were, in fact, groundwater sources (hand-dug wells) rather than surface springs.

13. However, the State Engineer's impromptu revisit of the analysis regarding the entire vested rights claim/proof filed by Solarljos and previously accepted as a "basis" for the finding of .472 cfs for mining and milling.

14. The Final Order's determination of a new reduction of water was made with no proof of facts or evidence in the record, yet made entirely new findings of fact, without any prior notice, that substantially depleted the prior allocation of water that had been granted to Solarljos in the Preliminary Order.

15. The Final Order suddenly and without notice of any kind to Solarljos creates an entirely different scenario of "possible" use of water by the prior mining operation and reduced the allocation of vested water from the prior allocation to less than 4% of what was previously approved, giving Solarljos only 13.2 AFA.

16. In making this determination, the State Engineer hypothesized about several

KAEMPFER CROWELL
50 West Liberty Street, Suite 700
Reno, Nevada 89501

scenarios that would have been "more likely" as to the mining operation, and made statements about the amount of water that 100 men living in a bunkhouse and working at the mine would have used.

17. However, Solarljos was not given any notice or opportunity to be heard regarding the State Engineer's analysis and conclusion regarding the comingled water amount allocated to Solarljos based on its vested rights claims.

18. Further, nearly all of these "findings" were made without citation to any sources whatsoever regarding historical factual proof or even treatises or reference materials discussing mining operations in the area or how they were operated. As such, they were baseless and speculative, and unduly prejudicial to Solarljos.

19. Solarljos filed an "exception" to the Final Order of Determination pursuant to NRS 533.170, and this Court is tasked with resolving those exceptions as to all vested claimants who filed exceptions.

20. Solarljos' exception is considered in the nature of a petition for judicial review on the *record* created before the State Engineer consisting of (a) the filing of Solarljos' "proofs" of its vested rights claims, as required under NRS 533.087 and 533.125, and (b) the evidence submitted during the hearing on Objections to the Preliminary Order of Determination, as is required by NRS 533.145 and 533.150.[2]

21. The State Engineer failed to provide any evidence to support his decision to

[2] This Court notes that Solarljos also filed a Petition for Judicial Review pursuant to NRS 533.450 in Case No. CV2003-010 within 30 days of the Final Order because Solarljos was "aggrieved" by the Final Order of the State Engineer, and NRS 533.450 states that it applies to "any order or decision of the State Engineer" and does not expressly exclude orders issued under adjudication of vested rights proceedings. However, Solarljos and the State entered into a stipulation to stay that action pending the outcome of this proceeding and confirming that Solarljos simply wanted to make sure its rights were preserved to appeal that part of the Final Order to which Solarljos objected to a district court in *some* proceeding – one time, before a court. (The Stipulation notes that Solarljos is not attempting to get two bites at the appeal "apple.")

KAEMPFER CROWELL
50 West Liberty Street, Suite 700
Reno, Nevada 89501

revisit in the Final Order his prior determination regarding the amount of water wo which Solarljos is entitled under its vested rights claims.

22. In his Preliminary Order, the State Engineer determined Solarljos vested claim to be a mining and milling use from January 1 to December 31 of .472 cfs. Solarljos raised no objection to the .472 cfs determination.

23. Based on the findings and conclusions set forth in the State Engineer's Preliminary Order, Solarljos' narrow and sole objection was the State Engineer's determination as to the source of that water, The State Engineer decided that Solarljos had failed to prove that the source was groundwater and that the points of diversion for V-10881 and V-10882 were hand-dug wells. Consequently, all of the evidence presented and discussed at the hearing on that limited objection was directed entirely and completely to Solarljos' proof that the source of the water was, in fact, groundwater wells.

24. Because no objection was raised as to the .472 cfs allocation of water, there was no basis or allowed reason for the State to revise its prior allocation of the amount of water determined to be provided to Solarljos under its original proof of vested rights claim. 25. The three proofs of claim and other supporting documentation submitted by Solarljos shows that it made claim to the same water as emanating from a spring and from groundwater, because the source of the water was a site referenced as "Einar Spring" and another as "the Harrub Well."

25. Solarljos was not requesting more water in its Objection to the Preliminary Order, but rather recognition that the source of its water was both a groundwater well and a site that had been identified as a "spring" (surface right).

II. CONCLUSIONS OF LAW

This Court hereby makes the following conclusions of law based on the material undisputed facts outlined above, the evidence submitted, and the record.

Kaempfer Crowell
50 West Liberty Street, Suite 700
Reno, Nevada 89501

A. **Summary Judgment**

Rule 56 of the Nevada Rules of Civil Procedure ("NRCP") state that "[t]he court shall grant summary judgment if the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." NRCP 56(c); *Wood v. Safeway, Inc.*, 121 Nev. 724, 729 (2005). "A genuine issue of material fact is one where the evidence is such that a reasonable [finder of fact] could return a verdict for the non-moving party." *Lee v. GNLV*, 22 P.3d 209, 211-12 (2001) (citations omitted). The party opposing summary judgment may not rely "on gossamer threads of whimsy, speculation and conjecture . . .[and] the non-moving party . . . must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine factual issue" to support his or her claim at trial or defeat a motion for summary judgment. *Wood* at 731 (internal quotes and citations omitted); *Thomas v. Bokelman*, 86 Nev. 10, 14, 462 P.2d 1020, 1023 (1970) (citations omitted).

A burden-shifting scheme is used in determining summary judgment, where "[t]he party moving for summary judgment bears the initial burden of production to show the absence of a genuine issue of material fact." *Cuzze v. Univ. and Comm. College Sys. of Nev.*, 123 Nev. 598, 602, 172 P.2d 131, 135 (2007). "The manner in which each party must satisfy its burden of production depends on which party will bear the burden of persuasion on the challenged claim at trial." *Id.*

If "the moving party [bears] the burden of persuasion, that party must present evidence that would entitle it to a judgment as a matter of law in the absence of contrary evidence." *Id.* "If such a showing is made, then the party opposing summary judgment assumes a burden of production to show the existence of a genuine issue of material fact." *Id.* "But if the nonmoving party will bear the burden of persuasion at trial, the party moving for summary judgment may satisfy the burden of production by either (1) submitting evidence that negates an essential

KAEMPFER CROWELL
50 West Liberty Street, Suite 700
Reno, Nevada 89501

element of the nonmoving party's claim, or (2) pointing out ... that there is an absence of evidence to support the nonmoving party's case." *Id.* (internal quotations omitted).

Further, regarding motions for summary judgment on claims untethered to factual support, the Nevada Supreme Court recently emphasized that:

> [W]here an action is brought with practically no evidentiary basis to support it, summary judgment can be a valuable tool to discourage protracted and meritless litigation of factually insufficient claims. In dispensing with frivolous actions through summary judgment, courts promote the important policy objectives of sound judicial economy and enhance the judiciary's capacity to effectively and efficiently adjudicate legitimate claims.

Boesiger v. Desert Appraisals, LLC, 135 Nev. 192, 198, 444 P.3d 436, 441 (2019).

B. Legal Analysis and Conclusions

1. The State Engineer Violated Solarljos' Right To Due Process.

Based on the material undisputed facts outlined above, this Court finds as a matter of law that The State Engineer did not provide sufficient or adequate notice regarding its allocation of commingled vested water right usage in the Final Order of Determination, thus depriving Solarljos of its right to due process.

NRS 533.150(4) states that the evidence taken in a proceeding conducted in accordance with an objection to a Preliminary Order of adjudication of vested rights "must be confined to the subjects enumerated in the objections and the preliminary order of determination." Due process forbids any governmental agency, including the State Engineer, from using evidence in any way that forecloses an opportunity for a vested water right claimant from being heard. *See Eureka Cnty. v. State Eng'r*, 131 Nev. 846, 855, 359 P.3d 1114, 1120 (2015) (citing *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 288, 288 n. 4, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974); *see also Eureka Cnty. v. Seventh Judicial Dist. Court (Sadler Ranch)*, 134 Nev. 275, 279, 417 P.3d 1121, 1124 (2018) ("In Nevada, water rights are regarded and

KAEMPFER CROWELL
50 West Liberty Street, Suite 700
Reno, Nevada 89501

protected as real property.") (internal quotations and citations omitted).

Moreover, it has been held by the Nevada Supreme Court that where the State Engineer issues an order "without providing notice or a hearing—[it is] an omission that, in the context of established water rights, would unquestionably be fatal." *Wilson v. Pahrump Fair Water, LLC*, 137 Nev. Adv. Op. 2, 418 P.3d 853, 858 (2021). This necessarily means that an opportunity to challenge the State Engineer's determination must be afforded to a claimant such as Solarljos before it enters its final order – which is precisely what the State Engineer failed to do here.

The record shows, and this Court finds, that Solarljos filed Proofs of vested water rights with the State Engineer as part of the proceeding in May 2016. These claims were filed for vested water rights under Claim Nos. V-10880, V-10881 and V-01882. After analyzing the claims and submissions of evidence and proof, the State Engineer entered its Preliminary Order, where it *approved* Proof V-10880 for allocation of .472 cfs of vested water rights to Solarljos (which is the equivalent of 341.71 AFA). The evidence presented and attached to these claims presented by Solarljos was also uncontroverted that claims V-10881 and V-10882 were "comingled" with the source and usage of V-10880. This was not disputed by anyone, including the State Engineer in its Preliminary Order.

However, the State Engineer limited the approval to a surface water right from the Einar Spring *rather than* approving that allocation as a groundwater right and the Preliminary Order denied Solarljos' vested claims V-10881 and V-10882 on the basis that they were applications for "groundwater." As such, the State Engineer's denial in this regard was made solely on the basis that the sources of water identified appeared to be surface sources rather than groundwater wells. As a result, Solarljos objected to the Preliminary Order solely because it believed that it had already demonstrated that the water was from a groundwater source and that the State should have found the source to be groundwater rather than surface springs. The record shows

KAEMPFER CROWELL
50 West Liberty Street, Suite 700
Reno, Nevada 89501

that further discussion conducted at the hearing on the objection merely emphasized that point, focusing entirely on the source of water – not the mining operation itself or the nature of the use involved, because those factors had apparently been presented to the satisfaction of the State Engineer as demonstrated by the discussion in the Preliminary Order and the finding in favor of Solarljos to award a diversion of .472 cfs (341.71 AFA). No discussion was had at the hearing on the objection of Solarljos – by the State[3]-- regarding the amount of water used by the old mining operation, because there was nothing in the Preliminary Order suggesting that the State Engineer's office was concerned about the amount of water it had approved under Solarljos' claims for vested water (the .472 cfs/ 341.71 AFA).

However, after the March 19, 2019 hearing (which only focused on the singular issue regarding the source of water) the State Engineer entered its Final Order on January 31, 2020, where it reversed its prior decision regarding the source, agreeing with Solarlos that claims V-10881 and V-10882 were ground water sources, and that it was comingled for the total diversion rate of .472 cfs (341.71 AFA) of water. But, the State Engineer also found, for the first time, that Solarljos' allocated usage was "a total combined duty of 13.2 afa from all sources." No party, including Solarljos, was involved in an objection proceeding that would have allowed Solarljos to present evidence that went beyond what was presented in the subjects "enumerated in the objections and preliminary order." Further, there was not a single piece of evidence presented at the hearing on Solarljos' objection that would support the myriad of findings made by the State in the Final Order – suddenly and without notice to Solarljos – regarding an entirely revised review of the Prospect mining operation that the State now "believes" occurred on the site in an entirely different fashion than it previously concluded had

[3] However, Solarljos' retained hydrologist, Tim Donahoe confirmed that the water usage approved by the state at .472 cfs was equivalent to 212 gallons per minute (i.e., 341.72 AFA) and is not unusual groundwater usage for a mining operation.

KAEMPFER CROWELL
50 West Liberty Street, Suite 700
Reno, Nevada 89501

occurred when it granted Solarljos the allocation of .472 cfs of water use (341.71 AFA) during the initial Proof review. However, no witnesses, expert or percipient, testified at the hearing contrary to what had been presented in the earlier Proof and no documentation was presented showing that Solarljos' Proof of use was being challenged or would be subject to challenge as to the amount of water used.

Notwithstanding, the record shows the State Engineer still apparently found a basis for the .472 cfs (341.71 AFA) water usage for all three claims in the Final Order, contradicting its unsupported assumption for a total duty of 13.2 AFA which does not apply to a mining operation. The State Engineer unilaterally included its additional "finding" that not only contradicted itself in both the Preliminary and Final Orders, but also to the principles of calculating water usage with respect to historic mining operations. Therefore, this Court agrees with Solarljos that the State Engineer's finding that the total duty of water usage allocated to Solarljos is 13.2 AFA was arbitrary and unsupported and, based on the foregoing, was also a violation of Solarljos' right to due process.

B. <u>The State Engineer's Final Order Regarding The Allocation of 13.2 AFA to Solarljos Was Not Supported By Substantial Evidence And Therefore, Solarljos Is Entitled To Summary Judgment as a Matter of Law</u>

A party aggrieved by an order or decision of the State Engineer is entitled to have the same reviewed in the nature of an appeal. NRS 533.450(1). This proceeding is, essentially, on the record and is in the nature of an appeal and therefore, the State Engineer's Final Order for Determination must include "findings in sufficient detail to permit judicial review" and "must clearly resolve all crucial issues presented." *Revert v. Ray*, 95 Nev. 782, 787, 603 P.2d 262, 264-265 (1975).

In order to determine that the State Engineer's findings and order are valid, this Court must determine whether substantial evidence exists in the record to support the State Engineer's

KAEMPFER CROWELL
50 West Liberty Street, Suite 700
Reno, Nevada 89501

decision. *Id.*; *see also State Engineer v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991) *Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. 521, 525, 245 P.3d 1145, 1147-48 (2010); and *Eureka Cnty. v. State Eng'r*, 131 Nev. 846, 853, 359 P.3d 1114, 1118-19 (2015); and *Wilson v. Pahrump, LLC*, 137 Nev. Adv. Op. 2, 481 P.3d 853, 858 (2021) (stating that "the State Engineer's decision must be supported by substantial record evidence.") (citing to *King v. St. Clair*, 134 Nev. 137, 139, 414 P.3d 314, 316 (2008) (stating that "factual findings of the State Engineer should only be overturned if they are not supported by substantial evidence."). "Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion." *Pyramid Lake Paiute Tribe of Indians, supra.* (internal quotations and citations omitted).

Moreover, this Court must also determine whether the State Engineer's order (or any part of its decision(s)) was arbitrary, capricious, an abuse of discretion, or whether it was otherwise affected by prejudicial legal error. *Pyramid Lake Paiute Tribe of Indians v. Washoe Cnty.*, 112 Nev. 743, 751, 918 P.2d 697, 702 (1996).

Finally, in reviewing an administrative decision by the State, this Court is required to "decide pure legal questions without deference to an agency determination" and therefore, applies a *de novo* standard of review to questions of law. *See, Felton v. Douglas Cnty.*, 134 Nev. 34, 35, 410 P.3d 991, 993-994 (2018), *see also Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. at 525, 245 P.3d at 147-48 (stating that "[w]ith respect to questions of law, however, the State Engineer's ruling is persuasive but not controlling . . . [and t]herefore, we review purely legal questions without deference to the State Engineer's ruling.")(internal citations omitted).

In its Final Order, the State Engineer agreed with Solarljos and found a basis for the total diversion rate of .472 cfs (341.71 AFA) of water from the underground sourced associated with

KAEMPFER CROWELL
50 West Liberty Street, Suite 700
Reno, Nevada 89501

claims V-10881, V-10882, and the Einar Spring source under claim V-10880 for mining and milling from January 1 through December 31 with a priority date of 1879, as well as for the diversion of water for domestic use from January 1 through December 31. However, the State Engineer inexplicably added the following sentence to the findings for each claim: "This water, being comingled with water from Claims . . . will have a total combined duty of 13.2 afa from all sources." But, the State Engineer failed to provide any evidence, let alone any substantial evidence required to support this finding. Because there is no evidence in the record to support the finding by the State Engineer, this finding was no more than a mere assumption on the State Engineer's part.

Moreover and notwithstanding, this Court agrees with Solarljos that there could never have been a factual basis to make those findings because NRS 533.150(4) would have precluded the introduction of such new evidence entirely outside of the Preliminary Order and outside of the "subjects" of Solarljos' objection – which had only to do with the source of water and not the amount of the water allocated under the Proofs. This Court agrees that if the State Engineer had alerted the parties to the possibility that the mining operation itself was in question, or that the amount of water being approved was still in question, NRS 533.150(4) would have precluded the introduction of evidence directed to that issue following the issuance of the Preliminary Order. That Preliminary Order, in Nevada's statutory scheme, carries significant precedential weight; unless there is an objection posed, it essentially becomes the final determination of the State Engineer, and that is why there are such stringent statutory limits imposed on those who want to object to the finding made in preliminary orders of adjudication. *See* NRS 533.145 through 533.160.

However, the Final Order suddenly and without notice of any kind to Solarljos creates an entirely different scenario of "possible" use of water by the prior mining operation, and

KAEMPFER CROWELL
50 West Liberty Street, Suite 700
Reno, Nevada 89501

arbitrarily reduced the allocation of vested water from the prior allocation to less than 4% of what was previously approved, giving Solarljos only 13.2 AFA. In making this determination, the State Engineer hypothesized about several scenarios that would have been "more likely" as to the mining operation, and made statements about the amount of water that 100 men living in a bunkhouse and working at the mine would have used. However, nearly all of these "findings" were made without citation to any sources whatsoever regarding historical factual proof or even treatises or reference materials discussing mining operations in the area or how they were operated. As such, the State Engineer failed to provide any evidence whatsoever, let alone "substantial evidence" required to support its finding that Solarljos' allocation of water usage is only 13.2 AFA, and therefore, its finding must be overturned and Solarljos is entitled to summary judgment as a matter of law.

NOW, THEREFORE, GOOD CAUSE APPEARING,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that Solarljos' motion for summary judgment is GRANTED in its entirety and the State Engineer's finding that Solarljos' allocation of commingled water right usage is 13.2 AFA is OVERTURNED.

IT IS HEREBY FURTHER ORDERED ADJUDGED and DECREED that Solarljos' allocation of commingled water right usage is 472 cfs, or 341.71 AFA as previously found in the State Engineer's Preliminary Order, which previously accepted by Solarljos.

DATED: OCTOBER 27, 2021

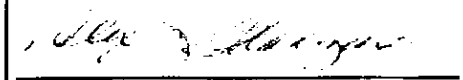
DISTRICT COURT JUDGE

KAEMPFER CROWELL
50 West Liberty Street, Suite 700
Reno, Nevada 89501

Respectfully Submitted

DATED: October 25, 2021.

KAEMPFER CROWELL



Alex Flangas, No. 664
August B. Hotchkin, No. 12780
50 West Liberty Street, Suite 700
Reno, Nevada 89501
Telephone: (775) 852-3900
Facsimile: (775-327-2011
aflangas@kcnvlaw.com
ahotchkin@kcnvlaw.com

Attorneys for Solarljos, LLC

NO._____
FILED

OCT 27 2021

By Eureka County Clerk

Case No. CV-2002009

Dept No. 2

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF EUREKA

******

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 NO. 10-153, EUREKA AND ELKO COUNTIES, NEVADA

CERTIFICATE OF SERVICE

SEVENTH JUDICIAL DISTRICT COURT
GARY D. FAIRMAN
DISTRICT JUDGE
DEPARTMENT 2
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA

RECEIVED
OCT 27 2021
Eureka County Clerk

The undersigned being an employee of the Eureka County Clerk's Office, hereby certifies that on the 27th day of October, 2021, I personally delivered a true and correct copy of the following:

Corrected Order Granting Solarijos, LLC's Motion For Partial Summary Judgment
addressed to:

Paul Taggart, Esq.
David H. Rigdon, Esq.
Timothy D. O'Connor, Esq.
Tamara Thiel, Esq.
Paul@legaltnt.com
Tim@legaltnt.com
David@legaltnt.com
Tammy@legaltnt.com

David Negri, Esq.
davidnegri@usdoj.gov

James N. Bolotin, Esq.
jbolotin@ag.nv.gov

Ross E. de Lipkau, Esq.
Ross@nvlawyers.com

SEVENTH JUDICIAL DISTRICT COURT
GARY D. FAIRMAN
DISTRICT JUDGE
DEPARTMENT 2
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA

Therese Ure Stix, Esq.
therese@water-law.com
counsel@water-law.com

Alex Flangas, Esq.
aflangas@kcnvlaw.com
August B. Hotchkin, Esq.
ahotchkin@kcnvlaw.com

Karen A. Peterson, Esq.
kpeterson@allisonmackenzie.com

Theodore Beutel, Esq.
tbeutel@eurekacountynv.gov

Gordon H. DePaoli, Esq.
gdepaoli@woodburnwedge.com

Steven D. King, Esq.
Robert A. Dotson, Esq.
Justin C. Vance, Esq.
Kingmont@charter.net
rdotson@dotsonlaw.legal
jvance@dotsonlaw.legal

In the following manner:

[ ] regular U.S. mail
[ ] certified U.S. mail
[ ] priority U.S. mail
[ ] overnight UPS
[ ] overnight Federal Express
[x] via email
[ ] hand delivery
[ ] copy placed in agency box located in the Eureka County Clerk's Office

B. Mahoney