

**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.

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

Appellants,

vs.

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

Electronically Filed  
Mar 09 2022 11:46 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

**Supreme Court No. 84275**

District Court Case No. CV-2002009

MW CATTLE, LLC; UNITED STATES  
DEPARTMENT OF INTERIOR,  
BUREAU OF LAND MANAGEMENT;  
PETER GOICOECHEA; and GLADY  
GOICOECHEA,

Respondents.

**REPLY IN SUPPORT OF THE STATE ENGINEER’S 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**

Appellant, the State of Nevada, Department of Conservation and Natural Resources, Division of Water Resources, and Adam Sullivan, P.E., in his capacity as the Nevada State Engineer (hereafter “State Engineer”), by and through counsel, Nevada Attorney General Aaron D. Ford, Senior Deputy Attorney General James N. Bolotin, and Deputy Attorney General Ian Carr hereby files this Reply in support of his Emergency Motion requesting a stay of the district court’s corrected order granting Solarljios, LLC’s (“Solarljios”) motion for partial summary judgment (“Order Granting Partial Summary Judgment”) and requesting a stay of the adjudication proceedings as a whole pending this appeal (hereafter “Emergency Motion for Stay”). This Reply is timely<sup>1</sup> filed pursuant to the Court’s Order Granting

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<sup>1</sup> In the Court’s Order Granting Temporary Stay, the Court indicated that responses to the State Engineer’s Jurisdictional Motion and Emergency Stay Motion were due by 4 p.m. on Friday, March 4, 2022, and that “[n]o extensions of time will be granted absent extraordinary and compelling circumstances demonstrated by written motion.” *Id.*, p. 3. Solarljios filed both its Opposition to the State Engineer’s

Temporary Stay and is based upon the following points and authorities, and all pleadings and papers on file in this case.

## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. ADDITIONAL BACKGROUND ON THE STATE ENGINEER’S STAY REQUEST IN RESPONSE TO THE OPPOSITIONS**

As the Renners correctly state in their Opposition, in water rights adjudications, “the district court must make its own findings and draw its own conclusions in an appeal of the State Engineer’s final order.” *Jackson v. Groenendyke*, 132 Nev. 296, 299–300, 369 P.3d 362, 365 (2016) (citing *Scossa v. Church*, 43 Nev. 407, 410, 187 P. 1004, 1005 (1920)). The district court’s factual findings are then reviewed by this Court “for an abuse of discretion” and this Court “will not set aside those findings unless they are clearly erroneous or not supported by substantial evidence.” *Id.*, 132 Nev. at 300, 369 P.3d at 365.

However, Solarljøs’s summary of what is “essentially” in the State Engineer’s Emergency Motion for Stay is inaccurate and hyperbolic. *See* Solarljøs’s Opposition, p. 3. The State Engineer never stated that this proceeding be entirely exempted from the Nevada Rules of Civil Procedure (“NRCP”). In fact, the State Engineer directly acknowledged that the hearing on exceptions, including the taking

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Jurisdictional Motion and its Opposition to the State Engineer’s Emergency Motion for Stay after 4 p.m. on March 4, 2022, and did not seek an extension by written motion indicating extraordinary and compelling circumstances before doing so.

of testimony, “shall be as nearly as may be in accordance with the Nevada Rules of Civil Procedure.” State Engineer’s Emergency Motion for Stay, p. 5 (citing NRS 533.170(5)). Rather, pursuant to the plain language of NRS 533.170(5), the State Engineer argues that the invocation of the NRCP by the legislature applies solely to the hearing on exceptions as described in NRS 533.170(4) as being the “all proceedings thereunder” described in NRS 533.170(5). It is already established in this state that water law proceedings are “special in character, and the provisions of such law not only lay down the **method of procedure** but strictly limits it to that provided.” *Application of Filippini*, 66 Nev. 17, 27, 202 P.2d 535, 540 (1949) (emphasis added). Therefore, the plain language of NRS 533.087 through 533.320 (the adjudication statutes) controls to the extent there is a conflict between normal civil practice under the NRCP and the adjudication statutes.

Further, the State Engineer’s role being in line with a special master or referee does not immunize the Order of Determination from legal challenges. Any allegation that the State Engineer argued for this “immunization” is false. Rather, the State Engineer’s dispute is that the district court permitted, and granted, a motion for partial summary judgment filed unilaterally against the Order of Determination and then granted it seemingly solely on the basis that the State Engineer did not oppose the motion. The State Engineer’s contention is that the correct procedure would have been for the district court to hold a hearing on Solarljøs’s exceptions,

and then make its own findings and draw its own conclusions (as required under *Groenendyke*) to determine whether to affirm or modify the Order of Determination as it concerns Solarljøs when issuing its decree. *See* NRS 533.185(1). This did not happen with the Order Granting Partial Summary Judgment—as indicated by the fact the district court did not issue a decree at all, but rather signed Solarljøs’s proposed order based solely on the fact that the State Engineer, as special master, did not respond to Solarljøs’s Motion for Partial Summary Judgment. The State Engineer does not necessarily take issue with substance of the Order Granting Partial Summary Judgment, but rather the process the district court used to get there; however, this improper process necessarily affects the substance, and as the State Engineer previously noted, there also appears to be some improper citation to the NRS 533.450 standard of review despite this being an adjudication and not a petition for judicial review proceeding. State Engineer’s Jurisdictional Motion, p. 10.

Solarljøs also inaccurately alleges that the State Engineer takes issue with their “successful use of the dispositive motion practice...even though the State Engineer did not argue against the merits of the motion *nor* challenges the result now.” Solarljøs’s Opposition, p. 3. The State Engineer’s appeal is of the Order Granting Partial Summary Judgment—therefore the State Engineer clearly does challenge that result. Solarljøs’s only accurate summary of the State Engineer’s argument is that the State Engineer does indeed argue that certification of the Order

Granting Summary Judgment pursuant to NRCP 54(b) was improper, and the State Engineer has submitted and briefed a separate Jurisdictional Motion on that point.

Solarljøs argues that it did not utilize pretrial discovery itself, and therefore the State Engineer's challenges to that procedure are irrelevant to Solarljøs. Solarljøs's Opposition, p. 8. To clarify, the State Engineer challenges various procedures used by the district court—some of these procedures were utilized by some claimants more than others, which is why the State Engineer requests that the district court proceedings be stayed pending this appeal. Solarljøs may not have used the discovery procedures allowed by the district court, but Solarljøs did use the dispositive motion procedure that is challenged here.

In fact, the Opposition filed by Sadler Ranch, LLC ("Sadler"),<sup>2</sup> makes clear why the State Engineer takes issue with the procedures in this case—and the impropriety of the discovery permitted by the district court even if it was not used by Solarljøs. Sadler argues that "the State Engineer made a conscious and deliberate choice to not actively defend his Order of Determination as to shield himself and his staff from being compelled to be examined, under oath" about alleged "errors and

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<sup>2</sup> Sadler also baselessly alleges that the State Engineer "actively worked to limit the rights of the pre-statutory holders, especially those who had opposed him in previous litigation" and that this is a reason the State Engineer sought to avoid depositions of himself and his staff. Sadler Opposition, p. 9. As argued in this Reply, the State Engineer's position is that discovery propounded against him and his staff is inappropriate in adjudications—period.

inconsistencies” in the Order of Determination. Sadler Opposition, pp. 5, 9. As previously stated in this case, the State Engineer’s role is more akin to a special master or referee, who compiles and files the Order of Determination, rather than a party who is adverse to the interests of the claimants/water users. *See Pitt v. Scrugham*, 44 Nev. 418, 195 P. 1101, 1104 (1921) (“the state engineer and district courts are to act as co-ordinate agencies to effect, with the least possible expense, a speedy determination, for administrative purposes, of the relative rights of various claimants to the waters of a stream or stream system, in order to make water do its full duty; that it may not be wasted, and that it shall be employed to the fullest extent.”) (emphasis added); *see also* James H. Davenport, *Nevada Water Law* (2003) at 106–107.

In the State Engineer’s role as a special master who compiles the Order of Determination, it is wholly improper and unsupported in the statutes or relevant case law that if the State Engineer and his staff take any affirmative action to assist the district court in understanding the Order of Determination that they should then be subjected to discovery. This would have the opposite effect of the policy described in *Pitt*: in effect, making the State Engineer an adverse party, rather than a co-ordinate agency with the district court, while exponentially increasing the expense and the time required to reach a determination of vested rights.

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The State Engineer's findings, and the evidence and testimony upon which they are based, stand on their own and parties have the opportunity to file exceptions to the State Engineer's findings and present testimony to persuade the district court that the State Engineer erred in his Order of Determination. Likewise, the district court can call on the State Engineer to help its understanding of the State Engineer's conclusions. However, it is wholly improper to subject the State Engineer to discovery in these proceedings given his unique role in statutory adjudications, including the statutorily required disclosure of all the evidence and testimony upon which he relied under NRS 533.165(1), especially in light of obvious and significant deliberative process privilege issues.

It became clear very early in the proceedings that if the State Engineer took *any* affirmative action to assist the district court in understanding the State Engineer's conclusions in the Order of Determination, that the district court would allow the parties to propound discovery against the State Engineer and his staff. It was this threat of inappropriate discovery procedures that caused the State Engineer to take a passive role, participating only to the extent requested by the district court as a "co-ordinate agency." *See Pitt*, 44 Nev. at 418, 195 P. at 1104. However, a byproduct of this is that the district court has now given the Order of Determination and evidence filed therewith little weight, even going so far as to say that the evidence submitted by the State Engineer is not even part of the record of this case.



*See* Exhibit 5, p. 4 ll. 18–20.<sup>3</sup> It is unconscionable that the State Engineer and his staff would be required to go through all of the effort to follow the steps from NRS 533.087 to 533.165, resulting in the Order of Determination, only for State Engineer to face two options (1) attempt to assist the Court as a special master and then have himself and his staff be subjected to depositions and written discovery, despite the absence of such a process in the statutes or case law (not to mention the burden that would place on the State Engineer’s Office), or (2) participate in a passive role to avoid improper discovery, participating only at the request of the district court, whereby the district court then ignores the evidence and transcripts filed with the Order of Determination pursuant to NRS 533.165(1) because it is not “made part of the record.” *See* Exhibit 5, p. 4 ll. 18–20.

Thus, while Solarljøs argues that they did not utilize discovery procedures and therefore the State Engineer’s arguments related to discovery are “baseless,” it was this threat of improper discovery that informed all of the State Engineer’s decisions in this adjudication. *See* Solarljøs’s Opposition, p. 8. It is likely that had the State Engineer sought a more active role, Solarljøs would have also sought to propound discovery against the State Engineer and his staff. This relates directly to the State

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<sup>3</sup> Exhibits 1–8 refer to the Exhibits attached to the State Engineer’s Emergency Motion for Stay and the supplement thereto.

Engineer's challenge of the dispositive motion practice and the reason why the State Engineer did not respond to the motion, maintaining his special master role.

While the parties and the district court fault the State Engineer's "unilateral" decision to take a passive role, it is imperative for the State Engineer to note that in his view, it was not unilateral at all. *See id.*, p. 7 n.1. The State Engineer was provided with two options regarding his participation in the case, and chose to proceed in the manner that was the least burdensome for himself and his staff, given their extensive day-to-day responsibilities, while maintaining his proper role in these types of proceedings. The State Engineer was nonetheless troubled by the grant of partial summary judgment to Solarljøs based solely on a lack of opposition from the State Engineer, despite the district court's charge to make its own findings and draw its own conclusions in adjudications, as this Court held in *Groenendyke*. That is the basis for this appeal and the request for a stay of both the Order Granting Partial Summary Judgment and the remaining district court proceedings. While Solarljøs also uses its Opposition to take issue with the State Engineer's arguments related to the district court's NRCP 54(b) certification, the State Engineer has fully explained the merits of those arguments in his separate, fully briefed Jurisdictional Motion.

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## **II. A STAY OF BOTH THE ORDER GRANTING PARTIAL SUMMARY JUDGMENT AND THE REMAINING DISTRICT COURT PROCEEDINGS IS WARRANTED**

As to the NRAP 8(c) factors, the State Engineer reiterates and incorporates those arguments that he set forth in support of his stay request in his Emergency Motion for Stay. However, the State Engineer once again emphasizes two factors: the potential defeat of the object of his appeal and the potential irreparable harm to the State Engineer and the State of Nevada as whole, to which all water in Nevada belongs. *Bacher v. State Eng'r*, 122 Nev. 1110, 1116, 146 P.3d 793, 797 (2006). While this Court generally does not hold that one factor carries more weight than others, the Court has recognized that if one or two factors are especially strong, they may counterbalance other weak factors. *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004) (citing *Hansen v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark*, 116 Nev. 650, 659, 6 P.3d 982, 987 (2000)).

The status quo, since the issuance of the Order of Determination over two years ago, is that water has been distributed pursuant to the Order of Determination per NRS 533.230. Solarljós argues that this is not the case, but it is a matter of fact and is required by law absent a stay under NRS 533.235 (which has not occurred in this case). The object of this appeal is to ensure that the district court issues a single

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decree<sup>4</sup> at the conclusion of its proceedings, as required by NRS 533.185(1), and that the district court's decree at the conclusion of this adjudication includes the Court's own findings and conclusions that result from a proper procedure while giving appropriate weight to the Order of Determination and the evidence and transcripts filed therewith. As shown above, the State Engineer has put forth a good faith argument that the operation of the Order Granting Partial Summary Judgment, and the district court proceedings, should be stayed. The emergency nature of this request is twofold: (1) the State Engineer challenges the process utilized by the district court in issuing its Order Granting Partial Summary Judgment, and therefore challenges the Order Granting Partial Summary Judgment itself, and absent a stay Solarljøs could use water in excess of that which it is legitimately entitled to by virtue of prestatutory beneficial use. This is especially troubling in an

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<sup>4</sup> The Renners argue based on NRS 0.030 that decree can be read "decrees" as "singulars are to be deemed to include the plural." Renners' Opposition to the State Engineer's Jurisdictional Motion, pp. 1–2. This is a meritless argument as it ignores what is required by the context of the statutes. NRS 0.030(1). The context and the express language of the water statutes, and their historical application and case law holding that adjudications do not involve separable controversies, makes it clear that "the decree" is required to be a singular document stemming from the single Order of Determination that commences the proceedings in the district court, and such singular decree is required before any appeal is ripe under NRS 533.200. *See In re Water Rights in Silver Creek & Its Tributaries, in Lander Cty.*, 57 Nev. 232, 61 P.2d 987, 989 (1936) ("the character of an adjudication, under the Water Code, forbids the idea of separate controversies being involved."); *see also* James H. Davenport, *Nevada Water Law* (2003) at 110 ("An adjudication is not a separable controversy between a few claimants. All claimants or water users in a water rights adjudication proceeding under the water [statutes] are essentially adverse.").

overappropriated, overpumped basin like Diamond Valley; and (2) there are ongoing proceedings<sup>5</sup> in the district court that stem from and utilize the same challenged procedures, and absent a stay these issues could be compounded. The State Engineer maintains, therefore, that the object of his appeal would be defeated if this stay is not issued as to the Order Granting Partial Summary Judgment because of Solarljós's potential use of this resource in the interim. Further, the State Engineer continues to be concerned that these procedural issues could be compounded the longer that the district court proceedings advance under these challenged procedures.

Similarly, these same concerns regarding potential use of Diamond Valley's scarce water resources, in excess of true vested rights to do so by virtue of the district

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<sup>5</sup> One prior concern of the State Engineer was the possibility of separate "miniature decrees" for each claimant. State Engineer's Emergency Motion for Stay, p. 7. The district court has now indicated that it will not proceed in that fashion. State Engineer's Emergency Motion for Stay, p. 8 n.3 (citing Exhibit 7, pp. 8–9). However, the State Engineer maintains that this concern still exists because now there is essentially a separate decree for Solarljós while the other vested claims in Diamond Valley are still under the purview of the district court and will be included in the final decree. Additionally, the State Engineer argued that his role in the ongoing and upcoming proceedings was now in question. State Engineer's Emergency Motion for Stay, p. 9. The State Engineer emphasized this in his Notice of Supplement to his Emergency Motion for Stay, attaching Exhibit 8 that consisted of two subpoenas served on the State Engineer by Eureka County on February 28, 2022, in light of the district court's February 24, 2022, order denying the State Engineer's motion for stay pending appeal. The State Engineer indicated that he intended to file a motion to quash in the district court. *See* Notice of Supplement to Emergency Motion for Stay, p. 3 n.2. The State Engineer hereby notifies the Court that he filed a motion to quash those subpoenas in the district court and the district court granted that motion in open court during the hearing on the Bailey exceptions held on March 3, 2022, and therefore the State Engineer's staff was not required to testify.

court employing an incorrect procedure, present a serious threat of irreparable harm to the State Engineer and the public of the State of Nevada as the owner of all water in the state. *See* NRS 533.025. This threat of irreparable harm is amplified by the prospect that additional claimants could be determined to have vested rights by the district court, under this same challenged procedure, as the district court continues to hear exceptions, in an already overappropriated basin.

Conversely, Solarljøs itself argues that the water to which it alleges it is entitled, and that the district court awarded, is “infinitesimal.” Solarljøs’s Opposition, p. 13. There is no irreparable harm for Solarljøs to make use of the water rights in the amount that the State Engineer determined valid in the Order of Determination while this Court considers this appeal (or in the event that this Court does not stay the district court proceedings but grants the State Engineer’s Jurisdictional Motion, waiting for the district court’s decree to see if they are entitled to the additional water as alleged). This is especially the case where even Solarljøs considers this alleged additional water to be an “infinitesimal” volume. And again, this Court has held that delays or increased costs do not constitute irreparable harm. *See Mikohn Gaming Corp.*, 120 Nev. at 253, 89 P.3d at 39. The State Engineer maintains that he is likely to succeed on the merits, and that he makes a good faith argument for both the reason for his appeal and request for stay; however, the other factors weigh especially strongly in favor of the requested stay and therefore the

State Engineer again respectfully requests that the Court issue the requested stays. *See Id.*, 120 Nev. at 251–52, 89 P.3d at 38. These same factors supported this Court’s temporary stay of the Order Granting Partial Summary Judgment. *See Order Granting Temporary Stay.*

### III. CONCLUSION

For the foregoing reasons, the State Engineer respectfully requests that this Court grant the State Engineer’s requested stays pending appeal.

RESPECTFULLY SUBMITTED this 9th day of March, 2022.

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## CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 9th day of March, 2022, I served a copy of the foregoing REPLY IN SUPPORT OF THE STATE ENGINEER'S 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, by the Nevada Supreme Court's EFlex Electronic Filing System, addressed to:

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