

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLEAN WATER COALITION,

Appellant,

vs.

THE STATE OF NEVADA; et al.,

Respondents.

THE M RESORT LLC, a Nevada limited
liability company; et al.,

Cross-appellants,

vs.

THE STATE OF NEVADA; et al.,

Respondents.

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Supreme Court Case No. 57649

Appeal from Eight Judicial District Court
Case No. A-10-611813-C and
Case No. A-10-611818-C

**STATE RESPONDENTS' MOTION TO EXPEDITE
THE APPEAL AND FOR EN BANC CONSIDERATION**

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1 **MOTION**

2 The State Respondents, by and through their respective counsel, hereby file this Motion to
3 Expedite the Appeal and for En Banc Consideration.¹ The State is respectfully asking the Court
4 to consider and decide this case as expeditiously as possible so that the Court's decision is
5 rendered with sufficient time remaining in the 2011 Regular Session for the Legislature to know,
6 when preparing and finalizing the State's budget, whether the \$62 million at issue in this case
7 will be transferred to the State General Fund for use in funding the operations of state
8 government.² This Motion is made pursuant to the Nevada Rules of Appellate Procedure and is
9 based upon the following Memorandum of Points and Authorities and upon all orders,
10 pleadings, documents and exhibits on file in this case.

11 **MEMORANDUM OF POINTS AND AUTHORITIES**

12 **I. Brief statement of the facts and the case.**

13 In this case, the legal issue before the Court is whether the district court correctly held that
14 section 18 of Assembly Bill No. 6 of the 26th Special Session of the Legislature (section 18 of
15 A.B. 6) is constitutional as a matter of law. Section 18 of A.B. 6 requires the Clean Water
16 Coalition (CWC) to transfer to the State of Nevada securities and cash which together total
17 \$62 million for deposit in the State General Fund for unrestricted State General Fund use. 2010
18 Nev. Stat. 26th Spec. Sess., ch. 10, § 18, at 72-73 (section 18 of A.B. 6 is reproduced in the
19 addendum to the motion). Section 18 of A.B. 6 became effective on March 12, 2010, when

20 ¹ The State Respondents are the State of Nevada; the Legislature; and the Governor, State
21 Treasurer and State Controller in their official capacities. The State Respondents will be
22 referred to collectively as the State.

² Under the Legislature's 120-day calendar for the 2011 Regular Session, budget bills must be
introduced by June 1, 2011, the 115th day of the session.

1 Governor Gibbons signed the bill into law. However, after section 18 of A.B. 6 became
2 effective, the CWC did not transfer the money to the State as required by the statute. Instead,
3 the CWC continues to retain custody of the money.

4 Governor Gibbons called the Legislature into the 26th Special Session to address an
5 immense and unprecedented shortfall in the State's budget caused by one of the worst economic
6 declines since the Great Depression. During the special session, the Legislature enacted several
7 bills, including A.B. 6, as part of a budgetary package developed by the legislative and
8 executive branches that was intended to balance the State's budget as required by Article 9,
9 Section 2 of the Nevada Constitution while minimizing, to the fullest extent possible, the impact
10 that spending reductions would have on vital public services.

11 The CWC is a political subdivision of the State of Nevada created by an interlocal
12 agreement pursuant to the Interlocal Cooperation Act. NRS 277.080 to 277.180, inclusive. The
13 member agencies of the CWC are the Clark County Water Reclamation District and the cities of
14 Henderson, Las Vegas and North Las Vegas. The member agencies provide sewer and
15 wastewater services to customers located within their respective jurisdictions. As part of their
16 operations, the member agencies operate sewage treatment facilities where wastewater is
17 collected, treated and ultimately discharged into the Las Vegas watershed so that it eventually
18 returns to Lake Mead and the Colorado River system.

19 The member agencies created the CWC to assist them in discharging and returning treated
20 wastewater to Lake Mead and the Colorado River system. In particular, the CWC is tasked with
21 the planning, design and construction of a project known as the Systems Conveyance and
22 Operations Program (SCOP). The SCOP project is a proposed pipeline project intended to

1 collect treated wastewater from the sewage treatment facilities of the member agencies and then
2 pipe it to ultimate outfall locations in Lake Mead, thereby returning it directly to the Colorado
3 River system. The SCOP project has not progressed beyond the planning and design stages.

4 To fund the SCOP project and the operations of the CWC, the member agencies collect
5 certain service and connection charges from their customers and transfer the money to the CWC.
6 In the district court, the CWC acknowledged that it possesses in excess of \$62 million from its
7 receipt and investment of the money which has been collected by its member agencies and
8 transferred to the CWC under the terms of the interlocal agreement.

9 On March 12, 2010, the day that section 18 of A.B. 6 became effective, the CWC filed an
10 action for declaratory and injunctive relief in the Eighth Judicial District Court asking for a
11 declaration that section 18 of A.B. 6 is unconstitutional and an injunction enjoining the
12 enforcement of the statute. On the same day that the CWC filed its district court action, the
13 M Resort also filed a similar action in the Eighth Judicial District Court asking for a declaration
14 that section 18 of A.B. 6 is unconstitutional and an injunction enjoining the enforcement of the
15 statute. The M Resort's constitutional claims are founded on its payment of service and
16 connection charges to the City of Henderson which were transferred to the CWC. In the district
17 court, the parties stipulated to the consolidation of the cases. The parties also stipulated to the
18 intervention of several additional businesses and organizations (the Plaintiffs-in-Intervention).
19 The Plaintiffs-in-Intervention were represented by the same counsel and asserted the same
20 constitutional claims as the M Resort.³

³ The Plaintiffs-in-Intervention and the M Resort will be referred to collectively as the M Resort.

1 On March 18, 2010, six days after the CWC and the M Resort filed their district court
2 actions, the State filed a writ petition with this Court (Case No. 55653) asking the Court to issue
3 a writ of mandamus ordering the CWC to perform its mandatory legal duty under section 18 of
4 A.B. 6 by making the transfer required by the statute. On March 23, 2010, the Court directed
5 the CWC to file an answer to the State's writ petition. However, on June 23, 2010, the Court
6 entered an order denying the State's writ petition without reaching the merits of the case, stating
7 that "[h]aving reviewed the pleadings and documents submitted, we conclude that this matter is
8 more appropriately considered in the first instance in the district court."

9 In the district court, the parties filed cross-motions for summary judgment which placed all
10 constitutional claims raised by the CWC and the M Resort before the district court for decision.
11 In addition, pursuant to the stipulation of the parties, the district court granted the cities of Reno
12 and Henderson leave to file amicus curiae briefs. After conducting a hearing on the motions and
13 receiving the arguments of counsel, the district court entered a written order which upheld the
14 constitutionality of section 18 of A.B. 6, granted the State's motion for summary judgment, and
15 denied the respective motions for summary judgment of the CWC and the M Resort. The
16 district court also granted a stay pending appeal pursuant to NRCP 62. The district court filed
17 its written order with the clerk on December 22, 2010, and the State served the parties with
18 written notice of entry of the order on December 28, 2010.

19 In addition to pleading constitutional claims, the M Resort also asserted common-law
20 claims against the State for conversion, constructive fraud, concert of action and unjust
21 enrichment. Pursuant to a stipulation and order filed on October 8, 2010, the common-law
22 claims against the State were voluntarily dismissed without prejudice in accordance with

1 NRCP 41(a). The M Resort also asserted common-law claims against the CWC for breach of
2 contract (third-party beneficiary) and for constructive trust. The common-law claims against the
3 CWC were not resolved by the district court's December 22, 2010 order, and they remain
4 pending. As a result, the parties sought a certification order from the district court directing
5 entry of judgment on the constitutional claims in accordance with NRCP 54(b).

6 On January 26, 2011, the district court entered a written order making an express
7 determination under NRCP 54(b) that there was no just reason for delay and certifying its
8 December 22, 2010 order regarding the constitutional claims as final and appealable. To
9 preserve the status quo of the disputed funds pending appeal, the district court enjoined the
10 CWC from transferring the \$62 million at issue, and it ordered the CWC to maintain the status
11 quo of the funds as they are currently invested until this litigation is finally resolved. The
12 district court also stayed any further proceedings on the M Resort's common-law claims against
13 the CWC until the constitutional claims are resolved. Finally, under NRCP 62, the district court
14 stayed any proceedings by the State to enforce the district court's December 22, 2010 order until
15 this matter is resolved on appeal.

16 After entry of the district court's NRCP 54(b) certification order, the CWC filed a notice of
17 appeal on January 27, 2011, and the M Resort filed a notice of appeal on January 28, 2011. The
18 Supreme Court Clerk docketed the appeals on January 31, 2011.

19 **II. Argument.**

20 Under NRAP 2, the Court may suspend the ordinary rules and timelines governing the
21 appellate process "[i]n the interest of expediting decision." See, e.g., Bd. of County Comm'rs v.
22 Las Vegas Disc. Golf & Tennis, Inc., 110 Nev. 567, 568-69 (1994). Expediting a decision is

1 appropriate when a case presents legal issues which raise an “urgency and necessity of
2 sufficient magnitude” to warrant the Court’s prompt consideration. We the People Nev. v.
3 Miller, 124 Nev. ---, 192 P.3d 1166, 1170 (2008) (quoting Jeep Corp. v. Dist. Ct., 98 Nev. 440,
4 443 (1982)). In prior cases, the Court has found it appropriate to expedite its consideration and
5 decision when the case presented “issues of statewide constitutional importance,” Miller v.
6 Burk, 124 Nev. ---, 188 P.3d 1112, 1118 (2008), or presented “an issue of first impression, one
7 that needs clarification and is a matter of public importance.” Nev. Mining Ass’n v. Erdoes, 117
8 Nev. 531, 536 (2001). Similarly, en banc consideration is appropriate when “the proceeding
9 involves a substantial precedential, constitutional or public policy issue.” NRAP 40A; Bass-
10 Davis v. Davis, 122 Nev. 442, 445 (2006); City of Las Vegas v. Walsh, 121 Nev. 899, 901
11 (2005); Parsons v. State, 116 Nev. 928, 930 (2000).

12 This case involves substantial precedential, constitutional and public policy issues of
13 statewide significance and first impression regarding the State’s fiscal powers and its sovereign
14 authority over its political subdivisions. The Court’s expedited resolution of this case is of
15 critical importance to the State and its citizens because the political branches of government are
16 now faced with the imminent and daunting task of solving the State’s ongoing and immense
17 budgetary shortfall within the limited 120-day time frame of the upcoming 2011 Regular
18 Session. That session begins on February 7, 2011, and must adjourn *sine die* not later than
19 midnight Pacific standard time on June 6, 2011. Nev. Const. art. 4, § 2.

20 Confronted with the harsh reality of diminished revenues which support the State General
21 Fund, the Legislature urgently needs to know, as it prepares and finalizes the State’s budget
22 before the end of the 2011 Regular Session, whether the \$62 million at issue in this case will be

1 transferred to the State General Fund for use in funding the operations of state government. If
2 the constitutionality of section 18 of A.B. 6 is not finally determined with sufficient time
3 remaining in the 2011 Regular Session, the Legislature may be faced with making additional
4 budget cuts which could have a devastating impact on the State's ability to provide essential
5 services to the public in a timely and effective manner, thereby harming the public's health,
6 safety and welfare.

7 The Court's expedited resolution of this case will also benefit the CWC's member
8 agencies in planning for the future of the CWC as an interlocal agency. In particular, at its
9 public meeting on September 28, 2010, the Management Board of the CWC took action to
10 commence the process of planning for the CWC's dissolution. However, any eventual
11 dissolution of the CWC cannot be completed until this litigation is finally resolved. As a result,
12 unless this case is expedited by the Court, the member agencies may not have the option of fully
13 dissolving the CWC for a considerable period of time, regardless of whether the CWC continues
14 to be needed to serve the public purposes for which it was created. Thus, the Court's expedited
15 resolution of this case will allow the member agencies to determine the future of the CWC more
16 quickly, which will inure to the public's benefit.

17 Finally, the Court's expedited resolution of this case will not unduly burden or prejudice
18 the parties or cause any unreasonable hardship in prosecuting the appeals. Although the legal
19 issues in this case are complex, the parties have already briefed those issues in a detailed and
20 comprehensive manner in the district court. Therefore, the parties should be able to draft and
21 submit briefs and prepare for oral argument on an extremely expedited schedule without
22 experiencing any undue burden or prejudice or any unreasonable hardship.

1 **CONCLUSION**

2 This case involves substantial precedential, constitutional and public policy issues of
3 statewide significance and first impression which urgently need resolution by the Court.
4 Because of the urgency, importance and magnitude of the legal issues presented by this case, the
5 State is respectfully asking the Court to: (1) grant its Motion to Expedite the Appeal and for En
6 Banc Consideration; and (2) consider and decide this case as expeditiously as possible so that
7 the Court's decision is rendered with sufficient time remaining in the 2011 Regular Session for
8 the Legislature to know, when preparing and finalizing the State's budget, whether the
9 \$62 million at issue in this case will be transferred to the State General Fund for use in funding
10 the operations of state government.

11 DATED: This 31st day of January, 2011.

12 Respectfully submitted,

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ADDENDUM

Section 18 of A.B. 6 (2010 Nev. Stat. 26th Spec. Sess., ch. 10, § 18, at 72-73):

Sec. 18. 1. The Legislature finds and declares that:

(a) The transfer of money from the Clean Water Coalition to the State General Fund is necessary to ensure that the government of this State is able to continue to operate effectively and to serve the residents, businesses and governmental entities of this State;

(b) The transfer of money from the Clean Water Coalition to the State General Fund will promote the general welfare of this State; and

(c) A general law cannot be made applicable to the provisions of this section because of special circumstances.

2. On March 12, 2010, or such other day as is mutually agreed upon by the Clean Water Coalition and the State Treasurer, the Clean Water Coalition shall transfer to the State of Nevada securities and cash which together total \$62,000,000, for deposit in the State General Fund for unrestricted State General Fund use.

3. For the purposes of subsection 2, the dollar amount of value assigned to each of the securities that is transferred must be the market value of the securities on the last business day before the day of the transfer as determined by the State Treasurer's Securities Custodian.

4. All securities transferred to the State of Nevada pursuant to subsection 2 must be approved in advance by the State Treasurer and must constitute appropriate investments of the State of Nevada in accordance with law.

5. The State Treasurer may take any action the State Treasurer determines necessary to ensure that the transfer of the securities and cash required by the provisions of this section is carried out in an appropriate and timely manner.

6. The provisions of this section must not be applied to modify, directly or indirectly, any pledged revenues or securities in such a manner as to impair adversely any outstanding obligations of the Clean Water Coalition, including, without limitation, bonds, medium-term financing, letters of credit and any other financing obligations, until all such obligations have been discharged in full or provision for their payment and redemption has been fully made.

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