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1 Case No. 2023-CV-00241

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6 IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF DOUGLAS

9 HARVEY'S TAHOE MANAGEMENT
10 COMPANY, LLC,

Petitioner,

11 vs.

ORDER DENYING JUDICIAL REVIEW

13 ADAM SULLIVAN, STATE ENGINEER,
14 STATE OF NEVADA, DEPARTMENT OF
15 CONSERVATION AND NATURAL
RESOURCES, DIVISION OF WATER
RESOURCES,

16 Respondent.

17 _____ /
18 THIS MATTER comes before the Court on Harvey's Tahoe
19 Management Company LLC's (Harvey's) *Petition for Judicial Review*
20 *of Nevada State Engineer Decision*. After full briefing, oral
21 arguments were heard on November 20, 2024. Good cause appearing,
22 the Court finds and orders as follows:

23 On October 19, 2023, Adam Sullivan, State Engineer, State of
24 Nevada, Department of Conservation and Natural Resources, Division
25 of Water Resources (Engineer) entered a final written decision
26 (Decision) denying Harvey's second application for extension and
27 declaring Harvey's groundwater permits 11870, 18333 and 18334
28 forfeited. Harvey's timely petitioned for judicial review

1 contending Engineer's Decision is arbitrary, capricious, an abuse
2 of discretion, and devoid of supporting facts and substantial
3 evidence. Harvey's also seeks equitable relief. Harvey's did not
4 request a stay of Engineer's Decision pending judicial. NRS
5 533.450(5).

6 The Court finds Engineer's Decision is supported by
7 substantial evidence and is neither arbitrary, capricious or an
8 abuse of discretion and, as a matter of law, equitable relief is
9 not available to Harvey's.

10 Discussion

11 In its *Petition*, Harvey's argues Engineer's Decision is
12 "arbitrary, capricious, an abuse of discretion, and devoid of
13 supporting facts and substantial evidence," *Petition*, p. 3, lines
14 18-19 (Issue One). Harvey's raises an additional and separate
15 issue in its *Opening Brief* filed three months after the *Petition*,
16 i.e. equitable relief (Issue Two). In its *Reply Brief*, Harvey's
17 makes multiple new arguments and interjects new facts supported by
18 exhibits not part of Engineer's record, prompting a *Motion to*
19 *Strike* from Engineer. While the Court would have been justified
20 in granting the *Motion to Strike* and summarily denying Harvey's
21 request for equitable relief, the Court opted to allow Harvey's to
22 be fully heard. See, *Order*, October 17, 2024.

23 The Court works hard to understand and consider Harvey's
24 morphing positions and improper conflation of Issue One and Issue
25 Two. This is most notable in Harvey's *Reply* wherein Harvey's
26 begins, "This case is an excellent example of a situation
27 warranting equitable relief," *Reply*, p. 4, line 2, after claiming
28 in its *Petition* that Engineer's Decision is "arbitrary,

1 capricious, an abuse of discretion, and devoid of supporting facts
2 and substantial evidence. *Petition*, p. 3, lines 18-19. Harvey's
3 states in its *Reply* that it does not challenge whether Engineer
4 acted upon substantial evidence, *Reply*, p. 4, lines 15-16, as if
5 to abandon Issue One, but then argues Engineer acted "arbitrarily
6 and capriciously," *Reply*, p. 14, and "abused His discretion,"
7 *Reply*, p. 15, all while pointing to "supplemental facts" that not
8 part of Engineer's record. Harvey's concludes, "Based on the
9 foregoing, Harvey's respectfully requests that the Court exercise
10 its inherent equitable authority and vacate the Forfeiture
11 Decision," *Reply*, p. 21, lines 13-14, making no mention of Issue
12 One. Unclear as to Harvey's intentions, the Court turns to
13 consideration of Issue One and Issue Two.

14 **Issue One: Is Engineer's Decision arbitrary, capricious, an**
15 **abuse of discretion and devoid of supporting facts and substantial**
16 **evidence?**

17 Judicial review of Engineer decisions "must be informal and
18 summary." NRS 533.450(2). Judicial review is limited to a
19 determination whether Engineer's decision is supported by
20 substantial evidence in the record. *Revert v. Ray*, 95 Nev. 782,
21 786, 603 P.2d 262, 264 (1979); See also, *Application of Filippini*,
22 66 Nev. 17, 27, 202 P.2d 535, 540 (1949). Substantial evidence is
23 that which "a reasonable mind would accept as adequate support for
24 the conclusion." *Wilson v. Pahrump Fair Water, LLC*, 137 Nev. 10,
25 16, 481 P.3d 853, 858 (2021), citing *King v. St. Clair*, 134 Nev.
26 137, 139, 414 P.3d 314, 316 (2018); See also, *Bacher v. Office of*
27 *State Eng'r*, 108 Nev. 1110, 1121, 146 P.3d 793, 800 (2006).
28 Engineer's Decision "is prima facie correct, and the burden of

1 proof is on the party attacking the same." NRS 533.450(10).

2 Factual determinations made by Engineer are entitled to
3 deference. See, *Pahrump Fair Water, LLC*, 137 Nev. at 16, 481 P.3d
4 at 858. Factual determinations are reviewed "for an abuse of
5 discretion and [a court] will only overturn those findings if they
6 are not supported by substantial evidence." *Sierra Pacific*
7 *Industries v. Wilson*, 135 Nev. 108, 440 P.3d 37, 40 (2019). The
8 reviewing court cannot substitute its judgment for that of
9 Engineer, pass on the credibility of witnesses, or reweigh the
10 evidence." *Revert*, 95 Nev. at 786, 603 P.2d at 264.

11 Engineer's legal determinations are persuasive, but not
12 entitled to deference. *Sierra Pacific Industries*, 135 Nev. at 108
13 (internal citation omitted); See also, by analogy, NRS
14 233B.135(3). The reviewing court may conduct an independent
15 review of Engineer's legal determinations. *Andersen Family Assoc.*
16 *v. Ricci*, 124 Nev. 182, 186, 179 P.3d 1202, 1203 (2008), citing
17 *Bacher*, 122 Nev. at 1115; *Kay v. Nunez*, 122 Nev. 1100, 1103, 146
18 P.3d 801, 804 (2006).

19 The failure of the holder of an underground water right to
20 use beneficially all or any part of the water for five successive
21 years works a forfeiture of the right. NRS 534.090(1). If the
22 records of Engineer indicate four or more consecutive years of
23 non-use, Engineer must give notice to the owner that the water
24 right will be forfeited unless proof of beneficial use is provided
25 to Engineer within one year of the notice. NRS 534.090(2)(a).
26 Upon "good cause shown," Engineer may grant any number of one-year
27 extensions. NRS 534.090(3). Applications for extensions must be
28 filed "before the expiration of the time necessary to work a

1 forfeiture." NRS 534.090(3). In determining whether to grant or
2 deny an extension, Engineer "shall, amongst other reasons,
3 consider" nine statutory factors. *Id.*

4 Here, it is undisputed that Harvey's ceased using onsite
5 wells or otherwise beneficially using its groundwater at least
6 twenty years ago. Harvey's opted to purchase water from Edgewood
7 Water Company, a holder of surface water rights.

8 In 2019, Engineer served Harvey's with NRS 534.090(2)(a)
9 notice. Harvey's applied for and was granted a one-year extension
10 giving Harvey's until May 29, 2021, to provide proof of beneficial
11 use or file another application for extension. As of June 22,
12 2021, Harvey's had neither filed proof of beneficial use nor
13 applied for another extension. Engineer served Harvey's with a
14 "30 Day Final Notice" pursuant to NRS 534.090(2)(b). Engineer
15 informed Harvey's that it had 30 days to provide proof of
16 beneficial use or apply for an extension. On June 26, 2021,
17 Harvey's applied for a second extension citing as basis near-
18 identical arguments as those made in its first application. On
19 October 19, 2023, Engineer issued its Decision therein denying
20 Harvey's second application for extension and declaring
21 forfeiture.

22 Engineer's Decision is stated in an eight-page, single-spaced
23 written document. Engineer's concludes, "There is not sufficient
24 evidence to make a finding of good cause to support approving the
25 applications for extension of time to prevent a forfeiture. The
26 facts demonstrate that [Harvey's] has not made a demonstration of
27 good faith and a reasonable diligence to resume the beneficial use
28 of water. Harvey's has demonstrated no immediate plans to put

1 the water to beneficial use in the manner that it was permitted
2 for based on the absence of drilled and equipped wells; the
3 negotiations for sale of the water rights; and water service
4 provided by the water utility. Therefore, the applications for
5 extension of time to prevent a forfeiture are hereby denied."

6 Engineer's Decision is fully supported by detailed analysis
7 of NRS 534.090(3) factors and each basis for extension raised by
8 Harvey's. Harvey's June 2020 request for extension, which was
9 granted, is near-identical to Harvey's June 2021 request wherein
10 Harvey's again blamed COVID-19 for its failure to beneficially use
11 its water and pointed to a hoped for arrangement with Edgewood
12 Water Company to put the water to use. Edgewood also made
13 ambiguous reference to discussions with unspecified third parties
14 to transfer/sell the water.

15 Notably, Harvey's made a decision to cease use of its
16 permitted groundwater at least twenty years ago in favor of
17 purchasing water from Edgewood Water Company. Per Engineer,
18 "Pumping of these rights today would be analogous to a new
19 appropriation of 73.717 afa, in a basin where committed rights
20 already exceed the maximum allowable usage." Engineer "has issued
21 rulings denying new appropriations of water rights in the basin
22 due to current water commitments within the Nevada portion of the
23 Lake Tahoe Basin exceeding the amount of water allocated to
24 Nevada."

25 Harvey's did not attempt to resume use of its water until
26 after receipt of Engineer's notice in 2019. Post-notice, Harvey's
27 did not refurbish its wells and/or re-drill. Instead, Harvey's
28 sought an agreement with Edgewood Water Company to use EWC's

1 surface water facilities, i.e., water from Lake Tahoe, to convey
2 Harvey's ground water. This would have required Harvey's to
3 obtain a permit from Engineer. NRS 533.325.

4 As of Engineer's October 19, 2023 Decision, Harvey's had not
5 reached an agreement with EWC and had not applied for a permit.
6 Engineer determined this revealed a lack of diligence on Harvey's
7 behalf. Engineer cited *Sierra Pacific Industries v. Wilson*, 135
8 Nev. 105, 440 P.3d 37 (2019) as presenting a "similar" situation.
9 In *Sierra Pacific*, the Nevada Supreme Court held that when a
10 permittee's rights are based on water appropriation by a third
11 party, the permittee must show a formal relationship with the
12 third party in order to satisfy reasonable diligence to apply the
13 water to beneficial use. *Sierra Pacific*, 135 Nev. at 110. "In
14 applying for an extension of time, the permittee must submit proof
15 and evidence of the third-party relationship." *Id.*, citing *Desert*
16 *Irrigation Ltd. v. State*, 113 Nev. 1049, 1057, 944 P.2d 835, 841
17 ("[a] mere statement of intent to put water to beneficial use,
18 uncorroborated with any actual evidence, after nearly twenty years
19 of nonuse is insufficient to justify a sixteenth...extension").

20 The Nevada Supreme Court previously applied this rule to an
21 original application for a permit under NRS 533.370. *Bacher v.*
22 *Office of State Eng'r*, 122 Nev. 1110, 146 P.3d 793 (2006). In
23 *Sierra Pacific*, The Supreme Court found that the polices for
24 obtaining an original permit under NRS 533.370 were the same as
25 those for permittee seeking an extension of time to put water to
26 beneficial use under NRS 533.380. *Sierra Pacific*, 135 Nev. at
27 110. Specifically, "[t]he concept of beneficial use is singularly
28 the most important public policy underlying the water laws of

1 Nevada and many of the western states," *Id.* at 108 (internal
2 quotation omitted), and applications pursuant to either statute
3 "require the applicant to show efforts to apply the water to the
4 intended beneficial use with reasonable diligence." *Id.* at 110
5 (internal quotation omitted). The policies behind NRS 534.090 are
6 the same as the statutes at play in *Sierra Pacific* and *Bacher*.
7 Accordingly, it was not improper for Engineer to take Harvey's
8 failure to produce proof of a formal relationship with EWC as
9 indication of a lack of diligence. Harvey's chose to quit using
10 its water approximately twenty years ago and made no attempt to
11 resume beneficial use of the water until after Engineer's May 29,
12 2019 notice. Harvey's was then granted an extension until May 29,
13 2021. Accordingly, Harvey's had two years after Engineer's notice
14 to resume beneficial use of its water, whether by agreement with
15 EWC or otherwise. Harvey's does not allege any wrongdoing by
16 Engineer during this two-year timeframe. Harvey's alleges that it
17 did not even have a "term sheet" with EWC until April 2021.
18 Harvey's did not inform Engineer of the "term sheet" in its second
19 application for extension.

20 Engineer paid considerable attention to Harvey's COVID-
21 19/economy plea. Engineer interpreted NRS 534.090(3)(c), "any
22 economic conditions or natural disasters which made the holder
23 unable to put the water to that use," a factor added by the Nevada
24 Legislature in 2017, to mean the state of the economy in a country
25 or region. Engineer distinguished economic conditions in the
26 context of NRS 534.090(3)(c) with financial ability, in the
27 context of applications to appropriate water; financial
28 investment, in the context of perfecting water rights; and

1 economic feasibility, which Engineer couched as a business
2 decision by the permit holder. The Court agrees with Engineer's
3 interpretation of NRS 534.090(3)(c). Engineer applied the facts
4 as represented in Harvey's application to the law and rendered an
5 opinion grounded in substantial and thoughtful analysis. The
6 Court cannot substitute its opinion for that of Engineer even if
7 the Court disagrees, which it does not.

8 Harvey's states on judicial review that the option of
9 repairing and/or replacing existing wells originally installed on
10 Harvey's property is "not feasible" due to "logistical
11 difficulties" and "construction work of this nature is expensive
12 and can take many months." Reply, p. 15, lines, 24-26. Harvey's
13 application for extension did not mention any of this and Harvey's
14 has not provided proof of logistical issues or costs associated
15 with this option. The option of utilizing EWC's facilities to
16 purvey Harvey's water would reduce Harvey's water rates as
17 Harvey's would be receiving its own water. Harvey's acknowledges
18 this would come "at no cost" to Harvey's in an ongoing operation
19 sense, but would require Harvey's to expend time, energy and
20 resources. Upon full consideration of NRS 534.090(3)(c), Engineer
21 concluded, "The true impact from coronavirus was that it impeded
22 Harvey's efforts to sell its water rights that it was no longer
23 using (and had replaced with water provided by [EWC]) by making
24 negotiations more difficult during the shutdowns. The State
25 Engineer finds that there were no economic conditions that
26 prevented Harvey's from resuming beneficial use of the water under
27 the subject permits." Engineer's conclusion is supported by
28 substantial evidence. Recall, Engineer gave Harvey's a one-year

1 extension based on the same arguments tendered by Harvey's in June
2 2020. It does not appear from Harvey's June 2021 application that
3 Harvey's was any closer to using its water than it was at the time
4 of Harvey's June 2020 application.

5 Harvey's argues Engineer's Decision is "arbitrary,
6 capricious, an abuse of discretion, and devoid of supporting facts
7 and substantial evidence," *Petition*, p. 3, lines 18-19. Harvey's
8 clarifies, however, that "Harvey's challenge is not to the
9 evidentiary support for the decision." *Reply*, p. 4, lines 15-16.
10 Indeed, Engineer's determination that Harvey's did not put its
11 water to beneficial use for five or more consecutive years is
12 undisputed and Engineer's conclusion that Harvey's did not
13 demonstrate reasonable diligence to resume use of its water or
14 good cause for a second extension is substantially supported.

15 Citing *Revert v. Ray*, 95 Nev. 782, 603 P.2d 262 (1979),
16 Harvey's argues the inquiry is not ended just because Engineer's
17 Decision is supported by substantial evidence. *Reply*, p. 14.
18 "Harvey's challenges the *process* the State Engineer relied on—not
19 the evidence—to arrive at his decision. The evidentiary
20 underpinnings of a decision are irrelevant when the decision
21 itself is the product of an improper procedure, and notably absent
22 from the State Engineer's Answering Brief is any explanation as to
23 why the State Engineer took so long to process a routine extension
24 request and any claim that this was not unfairly prejudicial to
25 Harvey's." *Reply*, p. 4, lines 18-23.

26 *Revert* provides, "The applicable standard of review of the
27 decision of the State Engineer, limited to an inquiry as to
28 substantial evidence, presupposes the fullness and fairness of

1 the administrative proceedings: all interested parties must have
2 had a full opportunity to be heard; the State Engineer must
3 clearly resolve all the crucial issues presented; the
4 decisionmaker must prepare findings in sufficient detail to permit
5 judicial review." *Revert*, 95 Nev. at 787 (internal quotations and
6 citations omitted).

7 Harvey's makes no argument that Engineer failed to give
8 Harvey's a full opportunity to be heard, to clearly resolve all
9 crucial issues or to prepare written findings sufficient to permit
10 judicial review. Harvey's instead complains that Engineer took
11 too long to forfeit Harvey's permits. *Reply*, p. 4, lines 19-23.
12 Harvey's acknowledges NRS Chapter 534 does not require Engineer to
13 decide an application for extension within a set timeframe. Had
14 Engineer acted quicker, Harvey's would have had lost its rights
15 that much sooner. The delay resulted in Harvey's having even more
16 time to put its water to beneficial use.

17 Harvey's filed its second request for extension on June 26,
18 2021, and Engineer entered its Decision on October 19, 2023.
19 Harvey's alleges being advised by Engineer's staff during this
20 time that Engineer was apt to grant the extension; therefore,
21 Engineer's Decision to the contrary is arbitrary and capricious.
22 *Reply*, p. 14-15. This argument fails given that Engineer's
23 Decision is supported by substantial evidence, as acknowledged by
24 Harvey's. In any event, Harvey's points to ultra-record evidence
25 in support of its claim that it was somehow prejudiced by the
26 delay and/or oral representations made by Engineer's staff. The
27 same goes for Harvey's allegation that it explored opportunities
28 with nearby ski resorts. As stated, judicial review as to Issue

1 One is limited to consideration of Engineer's record.

2 Engineer's Decision was not arbitrary, capricious, an abuse
3 of discretion, or devoid of supporting facts and substantial
4 evidence.

5 **Issue Two: Is equitable relief available to Harvey's?**

6 The court includes for consideration of equitable relief all
7 arguments couched by Harvey's as equity and all arguments wherein
8 Harvey's relies on ultra-record evidence. To these claims,
9 Engineer asserts that equitable relief is not available to
10 Harvey's as a matter of law. The Court agrees.

11 "A court's exercise of its equitable authority...differs
12 fundamentally from its deferential review of the State Engineer's
13 discretionary decision[s]." *Happy Creek*, 135 Nev. at 308. Court
14 authority to grant equitable relief in water law matters has
15 limits. Where the law affords Engineer discretion, "equitable
16 relief is not available and judicial review is for an abuse of
17 discretion." *Id.* (internal citation omitted); See also, *State*
18 *Engineer v. Am. Nat'l Ins. Co.*, 88 Nev. 424, 426-27, 498 P.2d
19 1329, 1330 (1972) ("Legislative action would be appropriate to
20 allow the State Engineer discretion in a permit cancellation under
21 NRS 533.410. With such a change court reversal would only be
22 appropriate in the event of an abuse of discretion").

23 Here, the law affords Engineer discretion to grant, for good
24 cause shown, any number of extensions. NRS 534.090(3).
25 Engineer's exercise of discretion in denying Harvey's application
26 is subject to deferential judicial review "in the nature of an
27 appeal." NRS 533.450(1); See Issue One. Based upon the
28 authorities cited above, equitable relief is not available to

1 Harvey's.

2 Other limits on equity also have relevance. For instance,
3 "[E]quitable relief is not available where water was not
4 diligently placed to beneficial use." *State Engineer v. Happy*
5 *Creek, Inc.*, 135 Nev. 301, 311, 448 P.3d 1106 (2019) (citing *State*
6 *Engineer v. Am. Nat'l Ins. Co.*, 88 Nev. 424, 425, 498 P.2d 1329,
7 1330 (1972); *Desert Irrigation, Ltd. v. State*, 113 Nev. 1049,
8 1061, 944 P.2d 835, 843 (1997). "Further limitations on the
9 availability of equitable relief in the context of water law also
10 exist—specifically, equitable relief should only be used where it
11 improves (1) efficiency; (2) sustainability; (3) fairness; and (4)
12 clarity." *Id.* at 311 (internal citation omitted).

13 Harvey's fails to address the above authorities and instead
14 points to *U.S. v. Alpine Land & Reservoir Co.*, 510 F.3d 1035 (9th
15 Cir. 2007) ("*Alpine VII*"). *Alpine VII* held, in part, that
16 equitable relief may be granted if the applicant took steps to
17 transfer water rights during the period of non-use, the attempt
18 was thwarted by the government and the balance of hardships favor
19 the applicant. *Alpine VII* at 1039. This ruling was applied in
20 the context of Nevada law's mandating forfeiture following a
21 prescribed period of non-use. Factually, an eleven-year
22 government moratorium prohibited transfers during all or a portion
23 of the period of non-use. "To completely remove the possibility
24 of equitable relief for those landowners who would otherwise
25 technically forfeit their properties through non-use, but who made
26 efforts to comply with the transfer requirements during the
27 moratorium period, would be inconsistent with equitable
28 principles. Given that the law abhors a forfeiture, equity

1 should operate in these limited situations to protect landowners."
2 *U.S. v. Alpine Land & Reservoir Company*, 291 F.3d 1062, 1077
3 (2001) ("Alpine V") (internal citation omitted).

4 The *Alpine* cases are consistent with the Nevada Supreme
5 Court's 2019 decision in *Happy Creek*. *Alpine* did not involve a
6 discretionary act by Engineer, but rather dealt with Nevada's
7 mandatory forfeiture law. Under the unique facts of *Alpine*, i.e.,
8 the government moratorium on transfers, the Ninth Circuit Court of
9 Appeals drew upon equity to avoid the harsh result of mandatory
10 forfeiture for the landowners subject to the government
11 moratorium. The unique circumstances present in *Alpine* are not
12 present here.

13 The Court finds, as a matter of law, that equitable relief is
14 not available to Harvey's. Perhaps the Nevada Supreme Court would
15 uphold equitable relief from a discretionary decision by Engineer
16 if necessary to avoid an injustice. The Court has compared the
17 facts alleged by Harvey's against facts in cases wherein equitable
18 relief was granted. Here, the alleged facts, if proven, do not
19 cry out for equitable relief. Even so, the alleged facts were not
20 proven. Harvey's request for equitable relief necessarily turns
21 on ultra-record evidence, as there was no hearing before Engineer.
22 Harvey's did not request an evidentiary hearing in its *Petition*,
23 *Opening Brief* or *Reply Brief* and at no time sought leave to
24 supplement the record. At no time did Harvey's mark exhibits or
25 move for the admission of any exhibits. The parties did not
26 conduct discovery. The only supplemental material offered by
27 Harvey's was attached to Harvey's *Reply Brief*. The additional
28 materials consist of the sworn statements of Harvey's attorneys.

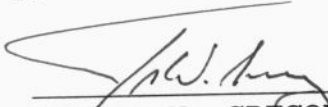
1 During a September 30, 2024 hearing on Engineer's Motion to
2 Strike, the Court inquired about the parties' preferences for
3 submitting the judicial review with or without oral argument
4 and/or with or without an evidentiary hearing. Harvey's and
5 Engineer each requested oral arguments and neither requested an
6 evidentiary hearing. The Court set the matter for oral argument
7 only. During oral argument, Harvey's made comment to the effect
8 that if the Court wants evidence, then Harvey's desires a
9 continuance. Harvey's did not move for a continuance, cite any
10 legal authority for a continuance or offer good cause for a
11 continuance. It would be an abomination of court procedure and
12 would unfairly prejudice Engineer to continue the matter for
13 evidenced taking at this juncture. Harvey's filed its Petition on
14 November 20, 2023 and oral arguments were held exactly one year
15 later, November 20, 2024. Harvey's had significant time to
16 develop its case and was the beneficiary of lenience occasioned by
17 the Court's denial of Engineer's Motion to Strike.

18 Conclusion

19 Harvey's Tahoe Management Company LLC's Petition for Judicial
20 Review of Nevada State Engineer Decision is DENIED.

21 **IT IS SO ORDERED.**

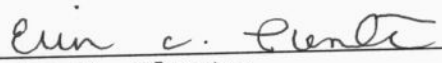
22 DATED this 21st day of January, 2025.

23
24 
25 THOMAS W. GREGORY
26 DISTRICT JUDGE
27
28

1 Copies served by mail on January 21st 2025, addressed to:

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