

1 State Engineer's administrative record supporting Rescinded Order 1303 on their
2 website.

3 42. The hearing on Rescinded Order 1303 took place in Carson City, Nevada
4 between September 23, 2019, and October 4, 2019.

5 43. Following the hearing on Rescinded Order 1303, the State Engineer allowed for
6 closing reports, which were due on or before December 3, 2019.

7 44. Initial reports and expert opinions and rebuttal reports, submitted by interested
8 parties, including those that demanded that the Kane Spring Valley be included within
9 the Lower White River Flow System (thus, turning a Six-Basin area into a Seven-Basin
10 area).

11 45. In addition to CSI's hydrogeologist and other experts at Stetson Engineering,
12 CSI, LCWD, and Vidler retained an expert in the area of geophysics, Zonge
13 International, to review underground faulting in the Coyote Spring and Kane Springs
14 hydrographic basins and identify faults that could act as barriers to flow from the Kane
15 Springs and Coyote Spring valleys east to the Muddy River and the Muddy River
16 Springs area.

17 46. Other than CSI and its team of experts in the fields of geology and hydrogeology,
18 water rights, climate, biology, and geophysics, from Stetson Engineering and Zonge
19 International, more than 15 additional other stakeholders were present and participated
20 at Rescinded Order 1303 Hearing, and each stakeholder presented expert witnesses⁵
21 to their previously submitted reports. All of this testimony, and all reports and rebuttal
22 reports submitted is a part of the State Engineer's files for Rescinded Order 1303
23 Hearing, and testimony preserved by a stenographer's transcript and video taken. CSI
24

25 ⁵ More than 25 experts presented testimony. See Nevada State Engineer website for LWRFS at
26 <http://water.nv.gov/news.aspx?news=LWRFS> and the tab "hearing documents."

disagrees with the summarization by the State Engineer of hearing testimony in Order 1309.

47. Order 1309 specifically delineated the following decisions⁶:

1. The Lower White River Flow System consisting of the Kane Springs Valley, Coyote Spring Valley, Muddy River Springs Area, California Wash, Hidden Valley, Garnet Valley, and the northwest portion of the Black Mountains Area as described in this Order, is hereby delineated as a single hydrographic basin. The Kane Springs Valley, Coyote Spring Valley, Muddy River Springs Area, California Wash, Hidden Valley, Garnet Valley and the northwest portion of the Black Mountains Area are hereby established as sub-basins within the Lower White River Flow System Hydrographic Basin.

2. The maximum quantity of groundwater that may be pumped from the Lower White River Flow System Hydrographic Basin on an average annual basis without causing further declines in the Warm Springs area spring flow in the Muddy River cannot exceed 8,000 afa and may be less.

3. The maximum quantity of water that may be pumped from the Lower White River Flow System Hydrographic Basin may be reduced if it is determined that pumping will adversely impact the endangered Moapa dace.

4. All applications for the movement of existing groundwater rights among sub-basins of the Lower White River Flow System Hydrographic Basin will be processed in accordance with NRS 533.370.

5. The temporary moratorium on the subdivision of final subdivision or other submission concerning development and construction submitted to the State Engineer for review established under Interim Order 1303 is hereby terminated.

⁶ Exhibit "A" at 65-66.

1 6. *All other matters set forth in Interim Order 1303 that are not*
2 *specifically addressed herein are hereby rescinded.*

3 48. Order 1309 neither delivers evidence in support of, nor analysis to support, any
4 of the order and rulings the State Engineer made in Order 1309, Section X, Orders,
5 items 1, 2, 3, and 4, including, without limitation, the addition of Kane Springs Valley into
6 the newly designated Lower White River Flow System Hydrographic Basin.

7 49. In Order 1309, Section X, Orders, items 5 and 6, the State Engineer correctly
8 terminates the improper, arbitrary, and capricious Rescinded Order 1303 in its entirety,
9 including, without limitation, specifically terminating the improper moratorium instituted
10 in Rescinded Order 1303.

11 50. On June 17, 2020, 371 days following written submittal of a request for review
12 and approval for an exception pursuant to Rescinded Order 1303, and two days
13 following issuance of Order 1309, Steve Shell, Water Resource Specialist II, signed a
14 letter addressed to Coyote Springs Nevada at an address that the entity has not used
15 for over ten (10) years, and recommended disapproval for water service to be provided
16 by the CS-GID to the Coyote Springs Development ("Subdivision Map Denial Letter"). A
17 true and correct copy of the Subdivision Map Denial Letter is attached as Exhibit "B".
18 The request at issue was for review and approval of a final subdivision map for eight
19 large parcels intended to be further subdivided. This denial was premised on Order
20 1309 and a statement that "[CSI] groundwater permits have priority dates which may
21 exceed the threshold of allowable pumping within the definition of [Order 1309]".

22 51. The June 17, 2020 Subdivision Map Denial Letter received by CSI did not include
23 analysis or review of any facts or circumstances or analysis as to why the State
24 Engineer's office refused to process the request for map approval pursuant to the
25 exception provided in Rescinded Order 1303. The State Engineer's office did not
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1 explain why other request made under the exception to the moratorium under
2 Rescinded Order 1303 were processed and CSI's was not.

3 PETITION FOR JUDICIAL REVIEW

4 52. This Petition is filed on the grounds that CSI is an aggrieved party by the decision
5 of the State Engineer on June 15, 2020 and the water rights owned or optioned by CSI,
6 in which CSI has a contractual interest, and the water rights CSI dedicated to the CS-
7 GID will be injured as a result of these decisions.

8 53. The purpose of the State Engineer's hearing leading to its Order 1309 was to
9 address the Five Topics Noticed for Determination:

- 10 a. The geographic boundary of the hydrologically connected
11 groundwater and surface water systems comprising the
12 Lower White River Flow System;
- 13 b. The information obtained from the Order 1169 aquifer test
14 and subsequent to the aquifer test and Muddy River
15 headwater spring flow as it relates to aquifer recovery since
16 the completion of the aquifer test;
- 17 c. The long-term annual quantity of groundwater that may be
18 pumped from the Lower White River Flow System, including
19 the relationships between the location of pumping on
20 discharge to the Muddy River Springs, and the capture of
21 Muddy River flow;
- 22 d. The effects of movement of water rights between alluvial
23 wells and carbonate wells on deliveries of senior decreed
24 rights to the Muddy River; and,
- 25 e. Any other matter believed to be relevant to the State
26 Engineer's analysis.

27 54. The State Engineer's determinations in his June 15, 2020 order regarding the
28 geographic boundary of the LWRFS, the aquifer recovery since completion of the Order
1169 aquifer test, the long-term annual quantity of groundwater that may be pumped
from the LWRFS, and the effects of movement of water rights between alluvial wells
and carbonate wells on deliveries of senior decreed rights to the Muddy River are

1 arbitrary, capricious, an abuse of discretion and devoid of supporting facts and
2 substantial evidence.

3 55. The State Engineer's Order 1309 is arbitrary⁷ and capricious⁸ due to the lack of
4 substantial evidence supporting its determination that the seven hydrographic basins
5 have a "close" hydraulic connection and must therefore be administered as a single
6 hydrographic basin. The State Engineer concluded in Order 1309 that there may be
7 discrete, local aquifers within the LWRFS with an uncertain hydrologic connection to the
8 Warm Springs Area.⁹ The State Engineer based this opinion on his recognition that
9 "The LWRFS has structural complexity and heterogeneity, and some areas have more
10 immediate and more complete connection than others"¹⁰. One basis for his findings was
11 from Bedroc who presented evidence that their groundwater wells in Coyote Spring
12 Valley are hydraulically disconnected from the regional carbonate aquifer of the
13 LWRFS.¹¹ The evidence and findings contained in Order 1309 are not sufficient to
14 support its designation of the basins as a single hydrographic basin.

15 56. In his June 15, 2020 Order 1309, the State Engineer inconsistently applies his
16 own criteria for determining those basins that should be included in the LWRFS based
17 on a "close hydraulic connection"¹². Order 1309 outlines six criteria that the State
18 Engineer relies on to support the finding of a close hydraulic connection, including
19 geologic structure and water level observations. The State Engineer's application of
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21 ⁷ A finding is arbitrary if "it is made without consideration of or regard for facts, circumstances fixed by
22 rules or procedure." (Black's Law Dictionary, Arbitrary (10th ed. 2014).)

23 ⁸ A decision is capricious if it is "contrary to the evidence or established rules of law," (Black's Law
24 Dictionary, Capricious (10th ed 2014).)

25 ⁹ Exhibit "A" at. 65.

26 ¹⁰ Exhibit "A" at 59.

27 ¹¹ Exhibit "A" at 39,

28 ¹² Exhibit "A" at 47.

1 these criteria to his decision regarding the Black Mountains Area, Kane Springs Valley,
2 and Lower Meadow Wash appears subjective, and is thus arbitrary and capricious.

3 57. For example, Order 1309 excludes from the LWRFS Hydrographic Basin the
4 entire Black Mountain Area due to, among other things, the lack of contiguity of
5 carbonate-rock aquifer and difference in groundwater levels. However, the substantial
6 evidence in the State Engineer's record shows contiguous carbonate rock extends
7 across the Muddy Mountain Thrust Fault between California Wash into the Black
8 Mountains Area¹³, similar to the occurrence of contiguous carbonate rock from Kane
9 Springs Valley into Coyote Spring Valley that is offset by a boundary fault¹⁴. Additional
10 evidence indicated a 150 foot difference in groundwater level between California Wash
11 and the Black Mountains Area, similar in magnitude to the 60 foot difference in
12 groundwater level between Kane Springs Valley and Coyote Spring Valley¹⁵.

13 58. While both the Black Mountains Area-California Wash and Kane Springs Valley-
14 Coyote Spring Wash boundaries exhibit the same physical expression reflective of a low
15 permeability boundary, the State Engineer's Order 1309 includes one, but not the other,
16 in the LWRFS Hydrographic Basin based on perceived "general hydrographic pattern".¹⁶
17 The State Engineer's reliance on these subjective criteria instead of objectively applied
18 criteria is arbitrary and capricious.

19 59. Order 1309 states "the LWRFS exhibits a direct hydraulic connection that
20 demonstrates that conjunctive management and joint administration of these
21 groundwater basins is necessary and supported by the best available science"¹⁷ and at
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23 ¹³ Exhibit "A" at 15-18.

24 ¹⁴ Exhibit "A" at 19-22.

25 ¹⁵ Exhibit "A" at 52.

26 ¹⁶ Exhibit "A" at 51, 52.

27 ¹⁷ Exhibit "A" at 42.

1 the same time cites numerous documents that do not support this statement. For
2 example, the Order 1169 Aquifer Test Reports cited variously describe potential barriers
3 and flow paths within the LWRFS, while others postulate that the LWRFS is
4 hydraulically connected, and some address the entire LWRFS, while other reports only
5 address portions of the LWRFS.¹⁸ The underlying technical analyses in these cited
6 documents are admittedly unreliable and therefore Order 1309's findings regarding the
7 hydraulic connection within the LWRFS are arbitrary and capricious.

8 60. The State Engineer's determination in his June 15, 2020 order to include the
9 Kane Springs Valley Hydrographic Basin as part of the LWRFS Hydrographic Basin
10 relies on standards regarding hydrologic connections, hydraulic connections, and
11 "close" connections that were not previously known to those submitting evidence in
12 response to Rescinded Order 1303. Inclusion of the Kane Springs Valley Hydrographic
13 Basin into the LWRFS in Order 1309 was a violation of CSI's due process rights. CSI's
14 due process rights were violated because the State Engineer neither provided the
15 standards nor procedures nor analysis describing the method of making such a
16 determination. Therefore, pursuant to Nevada law, as a result, Order 1309 should be
17 voided.

18 61. Further the State Engineer's determination on June 15, 2020 in Order 1309 to
19 include the Kane Springs Valley Hydrographic Basin in the LWRFS Hydrographic Basin
20 is not supported by substantial evidence. See *Bacher v. Office of State Eng'r of State of*
21 *Nevada*, 122 Nev. 1110, 1121 (2006) ("This court has defined substantial evidence as
22 that which a reasonable mind might accept as adequate to support a conclusion.")
23 (internal quotation marks omitted). Furthermore, the State Engineer has not provided
24 "findings in sufficient detail to permit judicial review" as required. *Revert v. Ray*, 95 Nev.

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26 ¹⁸ Exhibit "A" at 42, FN 244

1 782, 787 (1979) ("When these procedures, grounded in basic notions of fairness and
2 due process, are not followed, and the resulting administrative decision is arbitrary,
3 oppressive, or accompanied by a manifest abuse of discretion, this court will not
4 hesitate to intervene."). In his February 2, 2007 Ruling 5712, the State Engineer stated
5 that the then-available evidence supported the probability of a low-permeability structure
6 or change in lithology between Kane Springs Valley and the southern part of Coyote
7 Spring Valley and there was not substantial evidence that the appropriation of a limited
8 quantity of water in Kane Springs Valley Hydrographic Basin will have any measurable
9 impact on the Muddy River Springs. (5712, p. 21.) The State Engineer's determination
10 in his June 15, 2020 Order 1309 to include the Kane Springs Valley Hydrographic Basin
11 in the LWRFS Hydrographic Basin is not based on substantial evidence contrary to the
12 evidence supporting his determinations in Ruling 5712.

13 62. Finally, the State Engineer's determination in his June 15, 2020 order to include
14 the Kane Springs Valley Hydrographic Basin in the LWRFS Hydrographic Basin is
15 arbitrary and capricious as the substantial evidence, as viewed through the State
16 Engineer's own proposed standards regarding hydrologic connections, hydraulic
17 connections, and "close" connections that it uses in Order 1309, does not satisfy his
18 own standards for the purposes of creating a LWRFS Hydrographic Basin.

19 63. The State Engineer's June 15, 2020 Order 1309 subjectively applies criteria for
20 determining whether the Lower Meadow Valley Wash should be included in the
21 LWRFS. In Order 1309, the State Engineer finds that "while carbonate rocks may
22 underlie the Lower Meadow Valley Wash and be contiguous with carbonate rocks to the
23 south and west, data are lacking to characterize the potential hydraulic connection that
24 may exist."¹⁹ The State Engineer further acknowledges that a connection exists, but
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26 ¹⁹ Exhibit "A" at 50.

1 determines that the Lower Meadow Valley Wash may be managed outside the LWRFS.
2 Accordingly, Order 1309's exclusion of the Lower Meadow Valley Wash from the
3 LWRFS is inconsistent with his decision to include the Kane Springs Valley, as both
4 basins are upgradient of the Muddy River Springs Area, and based on the State
5 Engineer's findings in Order 1309, both basins have a hydraulic connection to the
6 LWRFS. Additional record evidence demonstrates that groundwater from the Lower
7 Meadow Wash directly support streamflow in the Muddy River and groundwater
8 resources in the carbonate aquifer. Further, both Kane Springs Valley and Meadow
9 Valley Wash have relatively little or no groundwater development. Given the similarities
10 between the Lower Meadow Valley Wash and Kane Springs Valley, the inconsistent
11 treatment of the two in regard to their incorporation into the LWRFS is inconsistent and
12 accordingly arbitrary and capricious.

13 64. The State Engineer's determination that pumping groundwater in the Coyote
14 Springs Basin will have an adverse impact on flows in the Muddy River or on the Moapa
15 dace lacks substantial supporting record evidence and is thus arbitrary and capricious.
16 As described above, the State Engineer relied on outdated and inadequate data in
17 making these determinations. The record evidence before the State Engineer
18 demonstrates that he failed to account for factors such as the effect of faults,
19 groundwater barriers, and hydrogeologic parameters between Coyote Spring Valley
20 pumping and the Muddy River Spring Area.

21 65. The State Engineer's determination in his June 15, 2020 order that the maximum
22 quantity of groundwater that may be pumped from the LWRFS Hydrographic Basin on
23 an average annual basis without causing further declines in Warm Springs area spring
24 flow and flow in the Muddy River cannot exceed 8,000 afa is not supported by
25 substantial evidence. This is the case as the State Engineer also misinterprets the
26 evidence from the hearing following Rescinded Order 1303 regarding the effect of

1 groundwater pumping within the LWRFS on the Moapa dace. Furthermore, CSI has
2 already performed and completed its required mitigation for development of Coyote
3 Springs as required by USFWS. CSI was required to set aside 460 afa to protect the
4 endangered Moapa dace and USFWS deemed this dedication as appropriate mitigation
5 for any take of the Moapa dace related to development of the Coyote Springs
6 Development. Ignoring these significant considerations was arbitrary and capricious,
7 rendering Order 1309 unlawful.

8 66. Order 1309's use of the term "maximum quantity" of groundwater that may be
9 pumped is further confused by the Order's qualifier "on an average annual basis".²⁰ The
10 use of the "average annual basis" suggests that pumping may be less than 8,000 afa in
11 some years and more than 8,000 afa in others. Accordingly, Order 1309's pumping
12 limitations is vague and lacks direction for how the average annual basis will be used to
13 enforce the maximum quantify of groundwater that may be pumped. Order 1309 further
14 does not distinguish the quantity of pumping that can occur from each of the two
15 aquifers that compose the LWRFS, the Basin Fill and Carbonate aquifers. Accordingly,
16 Order 1309 is arbitrary and capricious as it "lacks specific standards, thereby
17 encouraging, authorizing, or even failing to prevent arbitrary and discriminatory
18 enforcement." *Silvar v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 122 Nev. 289,
19 293 (2006).

20 67. Further, the State Engineer's determination in his June 15, 2020 Order 1309 that
21 the maximum quantity of groundwater that may be pumped from the LWRFS on an
22 average annual basis without causing further declines in Warm Springs area spring flow
23 and flow in the Muddy River cannot exceed 8,000 afa is not supported by substantial
24 evidence as there is no evidence in the record regarding the effects of this quantity of
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26 ²⁰ Exhibit "A" at 65.

1 water being pumped within the newly defined LWRFS.²¹ Absent such evidence, the
2 State Engineer refers to "Pumpage inventories for 2018 that were published after the
3 completion of the hearing report a total of 8,300 afa."²² Further, the State Engineer
4 identifies that additional inquiry and evidence is still necessary to support this
5 conclusion. Accordingly, the State Engineer's determination regarding the maximum
6 quantity of groundwater that may be pumped from the LWRFS on an average annual
7 basis is not supported by substantial record evidence.

8 68. The State Engineer's determination in his June 15, 2020 Order 1309 that the
9 maximum quantity of groundwater that may be pumped from the LWRFS on an average
10 annual basis without causing further declines in Warm Springs area spring flow and flow
11 in the Muddy River cannot exceed 8,000 afa is not supported by substantial evidence as
12 the State Engineer recognizes that there may be discrete, local aquifers within the
13 LWRFS with an uncertain hydrologic connection to the Warm Springs area and that
14 determination of the effect of moving water rights into these areas may require
15 additional scientific data and analysis.²³ However, Order 1309 does not include any
16 plan to gather such data or conduct such analysis.

17 69. The State Engineer's determination in his June 15, 2020 Order 1309 that the
18 maximum quantity of groundwater that may be pumped from the LWRFS on an average
19 annual basis without causing further declines in Warm Springs area spring flow and flow
20 in the Muddy River cannot exceed 8,000 afa is further arbitrary and capricious and
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22 ²¹ Order 1309 states "Groundwater level recovery reached completion approximately two to three years after
23 the Order 1169 aquifer test pumping ended" and pumping at that time averaged 9,318 afa. (Exhibit "A" at
24 55.) Order 1309's determination to then to base maximum pumping on 2018 when it finds that groundwater
25 levels had recovered by 2015-2016 is arbitrary and capricious and unsupported by substantial evidence.

26 ²² Exhibit "A" at 55.

27 ²³ Exhibit "A" at 64-65.

1 violates Nevada law as Order 1309 contains no mechanism for the implementation of
2 this limitation to ensure that the Nevada doctrines of prior appropriation²⁴ and that the
3 limit and definition of a water right is its reasonable use.²⁵

4 70. The State Engineer's determination in Order 1309 regarding the movement of
5 water rights within the LWRFS is inconsistent, arbitrary, and capricious. The statement
6 in Order 1309 stating "The State Engineer also finds that any movement of water rights
7 into carbonate-rock aquifer and alluvial aquifer wells in the Muddy River Springs Area
8 that may increase the impact to Muddy River decreed rights is disfavored"²⁶ implies that
9 the some water rights in LWRFS have less impact than others. If there are water rights
10 within the LWRFS that have less impact than others, then the system cannot be
11 homogeneous and be considered as one administrative unit. Accordingly, Order 1309's
12 determination regarding the boundaries of the LWRFS are arbitrary and capricious and
13 not supported by substantial evidence.

14 71. Throughout Order 1309, the State Engineer "*recognizes*" that Order 1309 will
15 serve as an initial step toward management of the newly defined LWRFS Hydrographic
16 Basin [emphasis added]. The word "recognize" is neither a finding nor a ruling, it is
17 simply the observation of something by the State Engineer. The State Engineer also
18 identifies the need for "an effective management scheme" to "provide for the flexibility to
19 adjust boundaries based on additional information, retain the ability to address unique
20 management issues on a sub-basin scale, and maintain partnership with water users
21 who may be affected by management actions throughout the LWRFS."²⁷ However, the
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23 ²⁴ *Steptoe Livestock Co. v. Gulley*, 53 Nev 163, 171-173, 205 P.772 (1931); *Jones v. Adams* 19 Nev. 78,
24 87, (1885).

25 ²⁵ NRS 533.035.

26 ²⁶ Exhibit "A" at 64.

27 ²⁷ Exhibit "A" at 53.

1 State Engineer's Order 1309 provides for neither a management scheme nor a plan for
2 the development of such a management scheme. Accordingly, the State Engineer's
3 Order 1309 is incomplete and as a result, his issuance of Order 1309 is both arbitrary
4 and capricious.

5 72. In his Order 1309, the State Engineer repeatedly identifies that additional
6 information is necessary to administer the newly created LWRFS Hydrographic Basin
7 the manner that he proposes – as a single hydrographic basin from which only 8,000
8 afa may be pumped. As such additional information is not part of the record underlying
9 Order 1309, the State Engineer's Order 1309 is incomplete, is not supported by
10 substantial evidence, and his issuance of Order 1309 is both arbitrary and capricious.

11 73. THEREFORE, for the foregoing reasons, and for others that may be discovered
12 and raised during the pendency of this Petition for Judicial Review, Petitioner Coyote
13 Springs Investment, LLC hereby requests that this Court reverse the decision of the
14 State Engineer made on June 15, 2020 regarding the geographic boundary of the
15 LWRFS, the aquifer recovery since completion of the Order 1169 aquifer test, the long-
16 term annual quantity of groundwater that may be pumped from the LWRFS, and the
17 effects of movement of water rights between alluvial wells and carbonate wells on
18 deliveries of senior decreed rights to the Muddy River for the reasons discussed in this
19 Petition.

20
21 Dated: July 9, 2020

Brownstein Hyatt Farber Schreck, LLP

22 BY: /s/ Bradley J. Herrema
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Brownstein Hyatt Farber Schreck, LLP, and that on the 9th day of July, 2020, I served, or caused to be served, a true and correct copy of the foregoing PETITION FOR JUDICIAL REVIEW OF NEVADA STATE ENGINEER ORDER 1309, to the following:

[X]: Via HAND DELIVERY:

Tim Wilson, P.E., State Engineer
Nevada Division of Water Resources
Department of Conservation and Natural Resources
901 South Stewart Street, Suite 2002
Carson City, NV 89701

[X]: Via U.S. Postal Service Certified Mail, Return Receipt Requested, by placing a true and correct copy of the foregoing document in an envelope, postage prepaid, and properly addressed, to the following:

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13	Don J. and Marsha L. Davis P.O. Box 400 Moapa, NV 89025	Dry Lake Water, LLC 2470 St. Rose Pkwy., Suite 107 Henderson, NV 89074
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21	S & R, Inc. 808 Shetland Road Las Vegas, NV 89107	Technichrome 4709 Compass Bow Lane Las Vegas, NV 89130
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DATED this 9th day of July, 2020.

/s/ Paula Kay
an employee of Brownstein Hyatt Farber
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