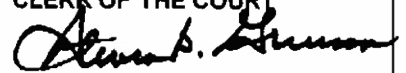


EXHIBIT 5

Electronically Filed
Jun 01 2022 05:00 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

EXHIBIT 5



1 **PTJR**

2 STEVEN D. KING

3 Nevada State Bar No. 4304

4 227 River Road

5 Dayton, NV 89403

6 Tel: (775) 427-5821

7 Email: kingmont@charter.net

CASE NO: A-20-817977-P

Department 2

8 ROBERT A. DOTSON

9 Nevada State Bar No. 5285

10 JUSTIN C. VANCE

11 Nevada State Bar No. 11306

12 DOTSON LAW

13 5355 Reno Corporate Drive

14 Suite #100

15 Reno, Nevada 89511

16 Tel: (775) 501-9400

17 Email: rdotson@dotsonlaw.legal

18 jvance@dotsonlaw.legal

19 Attorneys for Petitioner MVIC

13 **DISTRICT COURT**

14 **CLARK COUNTY, NEVADA**

15 MUDDY VALLEY IRRIGATION COMPANY,

Case No.:

16 Petitioner,

Dept. No.:

17 vs.

18 TIM WILSON, P.E., Nevada State Engineer,
19 DIVISION OF WATER RESOURCES,
20 DEPARTMENT OF CONSERVATION AND
21 NATURAL RESOURCES,

**PETITION FOR JUDICIAL REVIEW
OF ORDER 1309**

Respondent.

22 MUDDY VALLEY IRRIGATION COMPANY ("MVIC"), by and through its counsel,
23 STEVEN D. KING and DOTSON LAW, hereby files this Petition for Judicial Review of Order 1309
24 issued by Respondent TIM WILSON, P.E., Nevada State Engineer, DIVISION OF WATER
25 RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES on June
26 15, 2020. This Petition for Judicial Review is filed pursuant to NRS 533.450(1).

27 **I. JURISDICTIONAL STATEMENT**

28 NRS 533.450(1) provides that any order or decision of the State Engineer is subject to judicial
review "in the proper court of the county in which the matters affected or a portion thereof are

1 situated.” The real property to which the water at issue is appurtenant lies in Clark County, Nevada;
2 thus, the Eighth Judicial Court is the proper venue for this judicial review.

3 Additionally, the subject of this appeal involves decreed waters of the Muddy River Decree.
4 Under NRS 533.450(1), “on stream systems where a decree of court has been entered, the action must
5 be initiated in the court that entered the decree.” The Muddy River Decree, *Muddy Valley Irrigation*
6 *Company, et al. v. Moapa & Salt Lake Produce Company, et al.*, Case No. 377, was entered in the
7 Tenth Judicial District Court of the State of Nevada in and for Clark County in 1920.¹ This Decree is
8 attached hereto as **Exhibit 1**. Thus, this Court, without question, has jurisdiction over the instant
9 matter.

10 **II. FACTUAL BACKGROUND**

11 MVIC has been in existence as a Nevada corporation since 1895 for purposes which include
12 the acquisition of water rights and the construction, operation, and maintenance of their associated
13 irrigation works of diversion and distribution for MVIC’s and its shareholder’s “beneficial use” of
14 Muddy River water within the Moapa Valley.

15 Through the Muddy River Decree of 1920, it was determined that MVIC owns the majority of
16 the Muddy River decreed surface water rights and that those rights were appropriated and placed to
17 beneficial use prior to 1905 and are senior in priority to all Nevada groundwater rights within the
18 Lower White River Flow System (“LWRFS”). The Muddy River Decree states, in part:

19 [T]he Muddy Valley Irrigation Company is declared and decreed to
20 have acquired by valid appropriate and beneficial use and to be
21 entitled to divert and use upon the lands...all waters of said Muddy
22 River, its head waters, sources of supply and tributaries save and
except the several amounts and rights hereinbefore specified...

23 (See **Exhibit 1**, Muddy River Decree at 20:1-8, emphasis added.) The Muddy River Decree also
24 held that “the total aggregate volume of the several amounts and quantities of water awarded and
25 allotted...is the total available flow of said Muddy River and consumes and exhausts all of the
26 available flow of the said Muddy Valley River...” *Id.* at 22:28-23:1, emphasis added. MVIC’s
27 decreed rights were therefore entitled to protection from capture and depletion by other parties.

28
¹ In 1920, the Tenth Judicial District included both Clark and Lincoln County. In 1945, Clark County was designated as the Eighth Judicial District.

1 In 2018, the State Engineer held several public workshops to review the status of groundwater
2 use and recovery following the conclusion of State Engineer Order 1169 from 2002, requiring a large
3 study to determine whether pumping in the LWRFS would have detrimental impacts on existing
4 water rights or the environment. Following the workshops, and as a result thereof, the State Engineer
5 drafted a proposed order and held a hearing on the proposed order on December 14, 2018.

6 On January 11, 2019, the State Engineer issued Interim Order 1303 to seek input on the
7 following specific matters: (1) the geographic boundary of the LWRFS, (2) aquifer recovery since
8 the pump test, (3) long-term annual quantity that may be pumped from the LWRFS, and (4) effects of
9 moving water rights between the carbonate and alluvial system to senior water rights on the Muddy
10 River. (See **Exhibit 2**, Interim Order 1303.) After factual findings were made on those questions, the
11 State Engineer was to evaluate groundwater management options for the LWRFS. The State
12 Engineer held a number of hearings, allowed the presentation of evidence and exchange of reports,
13 and eventually issued Order 1309 on June 15, 2020. (See **Exhibit 3**, Order 1309.)

14 MVIC took the position, and continues to take the position, that the Muddy River Decree
15 prevents the depletion of groundwater if that would reduce the flow of the Muddy River, as that
16 would conflict with MVIC's senior decreed rights. However, the State Engineer appears to have
17 taken a contrary position, stating that "reductions in flow that have occurred because of groundwater
18 pumping in the headwaters basins is not conflicting with Decreed rights." (**Exhibit 3**, Order 1309 at
19 p. 61.) Importantly, in making this determination, the State Engineer tacitly acknowledged that
20 groundwater pumping is in fact reducing flow and therefore conflicting with MVIC's senior decreed
21 rights.

22 **III. GROUNDS FOR THE PETITION**

23 The third inquiry the State Engineer sought input on was "[t]he long-term annual quantity of
24 groundwater that may be pumped from the Lower White River Flow System, including the relationships
25 between the location of pumping on discharge to the Muddy River Springs, and the capture of Muddy
26 River flow." (**Exhibit 2**, Order 1303 at p. 13.) The scope of the hearing was purportedly "not to
27 resolve or address allegations of conflict between groundwater pumping within the LWRFS and
28 Muddy River decreed rights;" rather, it was to determine what the impact is on decreed rights and

1 then address that at a future point in time. (**Exhibit 4**, Transcript of Proceedings, Public Hearing,
2 Pre-Hearing Conference, Thursday, August 8, 2019 at 12:6-15.) However, despite acknowledging
3 that current pumping is capturing Muddy River flows, the State Engineer went beyond the scope of
4 the hearing to determine that “capture or potential capture of flows of the waters of a decreed system
5 does not constitute a conflict.” (**Exhibit 3**, Order 1309 at p. 61.) The State Engineer stated that
6 “there is no conflict as long as the senior water rights are served.” (*Id.* at p. 60.) The State Engineer
7 then performed a coarse calculation to determine the consumptive use needs of the senior decreed
8 rights holders and concluded that the capture of 8,000 acre-feet of Muddy River flows by junior
9 groundwater users would not deprive the senior holders of any portion of their water rights.² (*Id.* at
10 pp. 60-61.)

11 One problem with the State Engineer’s analysis is that it contradicts the stated narrow purpose
12 of the hearing. As a result of this stated purpose, much of the evidence submitted was related to the
13 capture of the Muddy River water by junior groundwater pumpers. By making the findings it did
14 without MVIC having the opportunity to present evidence on that point, the State Engineer violated
15 MVIC’s due process rights. He also acted arbitrarily and capriciously because he ignored and/or
16 precluded the only evidence that existed related to conflicts and then applied an erroneous analysis
17 that no party had an opportunity to review or comment on. This is the classic definition of a violation
18 of due process rights.

19 Additionally, Order 1309 is contrary to law – particularly the Muddy River Decree. This is
20 because determining the consumptive needs of the senior decreed rights holders is irrelevant; as
21 MVIC’s senior decreed rights are not based on their alleged calculated needs. Rather, other than the
22 limited exceptions noted in the Muddy Valley Decree, MVIC is entitled to “all waters of said Muddy
23 River, its head waters, sources of supply and tributaries.” (See **Exhibit 1**, Decree at 20:1-8.) As the
24 Decree held that “the total aggregate volume of the several amounts and quantities of water awarded
25

26 ² The State Engineer’s analysis is contrary to the Muddy River Decree, and even if not it is
27 improperly premised upon inaccurate information as it did not correctly consider transmission losses,
28 or the gross amount of water necessary to apply to reach the fields in question, or operate those and
adequately flush salts. The analysis appears faulty in the applied acreage calculations and the net
irrigation water requirement.

1 and allotted...is the total available flow of said Muddy River and consumes and exhausts all of the
2 available flow of the said Muddy Valley River..." (*id.* at 22:28-23:1, emphasis added), a holding
3 which requires that MVIC's decreed rights were therefore entitled to protection from capture and
4 depletion by other parties. Order 1309 arrives at the conclusion that if all decreed acres were planted
5 with a high-water-use crop like alfalfa, the net irrigation requirement would be 28,300 afa based upon
6 a consumptive rate of 4.7 afa. (**Exhibit 3**, Order 1309 at p. 61.) However, MVIC's alleged
7 "requirement" is irrelevant to determining whether pumping interferes with MVIC's decreed rights
8 because MVIC has rights to the "total aggregate volume" independent of its alleged requirements.³
9 (**Exhibit 1**, Decree at 22:28-23:1.) Thus, the State Engineer's conclusion that reductions in flow
10 from groundwater pumping does not conflict with MVIC's rights is erroneous, as anything that
11 depletes the aggregate volume, which the State Engineer recognized groundwater pumping does,
12 conflicts with MVIC's rights as a matter of law.

13 **IV. CONCLUSION**

14 For the reasons described herein, MVIC respectfully requests that the Court order the State
15 Engineer to amend Order 1309 and strike the findings regarding conflicts with senior water rights.

16 ///

17 ///

18 ///

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 _____
28 ³ Though the State Engineer apparently believes MVIC's requirements are limited, they in fact are not and all water is actually used. The analysis disregards the application of Nevada law, including, but not limited to, NRS 533.0245 or the actual operation diversion, delivery, and use of the water by MVIC for its shareholders and other laws and circumstances applicable to these Muddy River water rights.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Affirmation Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 14th day of July, 2020.

/s/ ROBERT A. DOTSON

STEVEN D. KING

Nevada State Bar No. 4304

227 River Road

Dayton, Nevada 89403

(775) 427-5821

ROBERT A. DOTSON

Nevada State Bar No. 5285

JUSTIN C. VANCE

Nevada State Bar No. 11306

DOTSON LAW

5355 Reno Corporate Dr., Suite 100

Reno, Nevada 89511

(775) 501-9400

Attorneys for Petitioner MVIC

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of DOTSON LAW and that on this date I caused to be served a true and correct copy of the foregoing by:

- ☒ (BY MAIL) on all parties in said action, by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. At Dotson Law, mail placed in that designated area is given the correct amount of postage and is deposited that same date in the ordinary course of business, in a United States mailbox in the City of Reno, County of Washoe, Nevada.
- ☐ By electronic service by filing the foregoing with the Clerk of Court using the Tyler Technologies E-filing system, which will electronically mail the filing to the below listed individuals registered on the Court's E-Service Master List.
- ☐ (BY PERSONAL DELIVERY) by causing a true copy thereof to be hand delivered this date to the address(es) at the address(es) set forth below.
- ☐ (BY FACSIMILE) on the parties in said action by causing a true copy thereof to be telecopied to the number indicated after the address(es) noted below.
- ☐ Email.

addressed as follows:

Robert O. Kurth, Jr.
3420 North Buffalo Dr
Las Vegas, NV 89129
Attorney for 3335 Hillside, LLC

Paulina Williams
Baker Botts, L.L.P.
98 San Jacinto Blvd, Ste 1500
Austin, TX 78701
Attorney for Georgia Pacific Corporation

Laura A. Schroeder
Therese A. Ure
10615 Double R Blvd, Ste 100
Reno, NV 89521
*Attorneys for City of North Las Vegas
and Bedroc*

Sylvia Harrison
Sarah Ferguson
McDonald Carano LLP
100 West Liberty St, 10th Floor
Reno, NV 89501
*Attorney for Georgia Pacific Corporation and
Republic Environmental Technologies, Inc.*

Bradley J. Herrema, Esq.
Brownstein Hyatt Farber Schreck
100 N. City Parkway, Ste 1600
Las Vegas, NV 89106
Attorney for Coyote Springs Investment, LLC

Severin A. Carlson
Kaempfer Crowell, Ltd.
50 W. Liberty Street, Ste 700
Reno, NV 89511
*Attorney for Church of Jesus Christ of the
Latter-Day Saints*

| | | |
|----|--|--|
| 1 | Kent R. Robison, Esq. | Karen Peterson |
| 2 | Therese M. Shanks, Esq | Allison MacKenzie, LTD. |
| 3 | Robison, Sharp, Sullivan & Brust | 402 North Division Street |
| 4 | 71 Washington Street | Carson City, NV 89703 |
| | Reno, NV 89503 | <i>Attorney for Vidler Water Company, Inc. and</i> |
| | <i>Attorney for Coyote Springs Investment, LLC</i> | <i>Lincoln County Water District</i> |
| 5 | Dylan V. Frehner, Esq. | Karen Glasgow |
| 6 | Lincoln County District Attorney | Office of the Regional Solicitor |
| 7 | P.O. Box 60 | San Francisco Field Office |
| 8 | Pioche, NV 89043 | U.S. Department of the Interior |
| 9 | <i>Attorney for Lincoln County Water District</i> | 333 Bush Street, Ste 775 |
| | | San Francisco, CA 94104 |
| | | <i>Attorney for National Park Service</i> |
| 10 | Alex Flangas | Larry Brundy |
| 11 | 50 West Liberty Street, Ste 700 | PO Box 136 |
| 12 | Reno, NV 89501 | Moapa, NV 89025 |
| | <i>Attorney for Nevada Cogeneration</i> | |
| | <i>Associates Nos. 1 and 2</i> | |
| 13 | Beth Baldwin | Casa De Warm Springs, LLC |
| 14 | Richard Berley | 1000 N. Green Valley Pkwy, #440-350 |
| 15 | Ziontz Chestnut | Henderson, NV 89074 |
| 16 | Fourth And Blanchard Building | |
| 17 | 2101 Fourth Avenue, Ste 1230 | |
| 18 | Seattle, WA 98121-2331 | |
| 19 | <i>Attorneys for Moapa Band of Paiute Indians</i> | |
| 20 | | |
| 21 | Clark County | Clark County Coyote Springs Water |
| 22 | 500 S. Grand Central Pkwy, 6th Fl. | Resources GID |
| 23 | Las Vegas, NV 89155-1111 | 1001 S. Valley View Blvd. |
| 24 | | Las Vegas, NV 89153 |
| 25 | Steven C. Anderson, Esq. | Timothy D. O'Connor, Esq. |
| 26 | Las Vegas Valley Water District | Taggart & Taggart, LTD. |
| 27 | 1001 S. Valley View Blvd | 108 North Minnesota Street |
| 28 | Las Vegas, NV 89153 | Carson City, NV 89703 |
| | <i>Attorneys for LVVWD and SNWA</i> | <i>Attorneys for LVVWD and SNWA</i> |
| | | |
| | Greg Morrison | Don J. & Marsha L. Davis |
| | 50 W. Liberty St., Ste 750 | PO Box 400 |
| | Reno, NV 89501 | Moapa, NV 89025 |
| | <i>Attorney for Moapa Valley Water District</i> | |

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Justina Caviglia
6100 Neil Road
Reno, NV 89511
*Attorney for Nevada Power Company
d/b/a NV Energy*

Kelly Kolhoss
PO Box 232
Moapa, NV 89025

Lake At Las Vegas Joint Venture, Inc.
1600 Lake Las Vegas Parkway
Henderson, NV 89011

State of Nevada Department of
Transportation
1263 S. Stewart Street
Carson City, NV 89712

State of Nevada, Dept. of Conservation
and Natural Resources
Division of State Parks
901 S. Stewart St, Ste 5005
Carson City, NV 89701

Pacific Coast Building Products, Inc.
PO Box 364329
Las Vegas, NV 89036

S & R, Inc.
808 Shetland Road
Las Vegas, NV 89107

Technichrome
4709 Compass Bow Lane
Las Vegas, NV 89130

Dry Lake Water, LLC
2470 St. Rose Pkwy, Ste 107
Henderson, NV 89074

Luke Miller
Office of the Regional Solicitor
U.S. Department of the Interior
2800 Cottage Way, Ste E1712
Sacramento, CA 95825
Attorney for US. Fish and Wildlife Service

Laker Plaza, Inc.
7181 Noon Rd.
Everson, WA 98247-9650

William O'Donnell
2780 S. Jones Blvd. Ste. 210
Las Vegas, NV 89146

Global Hydrologic Services, Inc.
Mark D. Stock
561 Keystone Avenue, #200
Reno, NV 89503-4331

Patrick Donnelly
Center for Biological Diversity
7345 S. Durango Dr.
B-107, Box 217
Las Vegas, NV 89113

Lisa Belenky
Center for Biological Diversity
1212 Broadway #800
Oakland, CA 94612

Mary K. Cloud
PO Box 31
Moapa, NV 89025

DATED this 14th day of July, 2020.

/s/ L. MORGAN BOGUMIL
L. MORGAN BOGUMIL

INDEX OF EXHIBITS

| EXHIBIT | DESCRIPTION | PAGES |
|---------|--|-------|
| 1 | Muddy River Decree | 48 |
| 2 | Interim Order 1303 | 18 |
| 3 | Order 1309 | 69 |
| 4 | Transcript of Proceedings, Public Hearing, Pre-Hearing Conference, Thursday, August 8, 2019 | 9 |