

IN THE SUPREME COURT OF THE STATE OF NEVADA

SOUTHERN NEVADA WATER
AUTHORITY,

Appellant,

vs.

COYOTE SPRINGS INVESTMENT,
LLC, et al.

Respondents.

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**EMERGENCY MOTION FOR STAY UNDER NRAP 27(E) OF DISTRICT
COURT'S ORDER GRANTING PETITIONS FOR JUDICIAL REVIEW
PENDING APPEAL**

IMMEDIATE ACTION REQUESTED

COMES NOW, Appellant, SOUTHERN NEVADA WATER AUTHORITY (“SNWA”) by and through its counsel, PAUL G. TAGGART, ESQ. and THOMAS P. DUENSING, ESQ., of the law firm of TAGGART & TAGGART, LTD., and STEVEN C. ANDERSON ESQ., of SNWA, hereby move this Honorable Court on an emergency basis under Nevada Rule of Appellate Procedure (“NRAP”) 27(e), for a stay pursuant to NRAP 8(a) of the district court’s Order Granting Petitions for Judicial Review of State Engineer Order 1309 and Order Vacating Order 1309 (“Order Vacating Order 1309” or “Order”) pending SNWA’s appeal to the Nevada

Supreme Court. SNWA also respectfully requests a temporary stay of the Order Vacating Order 1309 pending the briefing and decision on this Motion for Stay. SNWA previously filed a Motion for Stay of the Order Vacating Order 1309 in the Eighth Judicial District, but the district court denied this motion on May 16, 2022.¹ This Motion is based upon the following points and authorities, and all pleadings and papers on file in this case.

MEMORANDUM OF POINTS AND AUTHORITIES

I. SUMMARY OF ARGUMENT

This case is about protecting existing rights, the public interest, and public health and safety by preventing the unsustainable use and development of water rights during this appeal. A stay is necessary to maintain the status quo and prevent irreparable harm while complex legal questions of first impression are resolved by this Court. Immediate action is required because developers have already submitted new subdivision maps for approval by the State Engineer and plan to pump an additional 536 acre-feet annum (“afa”) of groundwater while this appeal is pending.

This appeal requests review of the district court’s Order Vacating Order 1309. As part of Order 1309, the State Engineer established an 8,000 afa pumping limit in the area north of Las Vegas now known as the Lower White River Flow System

¹ Appendix in Support of Motion for Stay (“APP MFS”) at 235-236 (Court Minutes, May 16, 2022).

(“LWRFS”). This pumping limit is based on the State Engineer’s scientific findings and maintains the current amount of groundwater pumping in the LWRFS. While the district court vacated Order 1309 on legal and procedural grounds, the underlying facts and problems remain: *in an area that has an available groundwater supply of only about 8,000 afa the State Engineer’s office has issued over 38,000 afa of groundwater permits*. Only a fraction of the issued permits can be pumped without harming senior water rights and the endangered Moapa dace.²

Significantly, of the permitted 38,000 afa of groundwater, current pumping is at or around the 8,000 afa pumping limit.³ Thus, a stay of the district court’s Order Vacating Order 1309 would not impact current users and would maintain the status quo. However, if a stay is not issued, and pumping is allowed to exceed 8,000 afa, senior decreed water rights and the endangered Moapa dace will be harmed.

Furthermore, without the 8,000 afa pumping limit established in Order 1309, the State Engineer may be forced to approve residential development projects supported by water rights that may need to be cut off in the future because of impacts

² The term “senior water rights” refers to the decreed Muddy River surface water rights that are senior in priority to all groundwater rights in the LWRFS. The Moapa dace is a fish species that lives exclusively in the headwaters of the Muddy River and was federally listed as endangered in 1967.

³ APP MFS at 10, 63 (Order 1309 at 10, 63) (On paper, and under current permit conditions, up to the full 38,000 afa can be pumped. These “paper water rights” are important to consider as users are authorized to pump up to the full amount of the paper water rights until those paper water rights are ultimately adjusted to reflect the reality of the available supply, which is the true legal limit of the right to pump).

to senior water rights and the Moapa dace. This threat is not speculative. Since the district court issued its Order Vacating Order 1309, Coyote Spring Investments, LLC (“CSI”) requested the State Engineer approve its subdivision map and allow CSI to build its development in the LWRFS.⁴ CSI also admitted before the district court that it plans to increase groundwater pumping by 536 afa right away.⁵ Therefore, to protect senior water rights and the Moapa dace, this Court should stay the district court’s Order Vacating Order 1309 to maintain the 8,000 acre foot pumping cap while the court addresses the complex legal issues addressed by this appeal.

II. FACTS AND PROCEDURAL HISTORY

A. Background

For over three decades there has been concerns about the amount of groundwater that can be sustainably pumped in the LWRFS without impacting senior water rights and the Moapa dace.⁶ The State Engineer has held multiple administrative hearings and required parties to conduct a two-year aquifer test (“Aquifer Test”) to determine the impact of increased groundwater pumping in the

⁴ APP MFS at 95-96 (CSI Opposition to Motion for Stay at 8:28-9:2).

⁵ APP MFS at 144 (Transcript from District Court Hearing on SNWA’s Motion for Stay at 41:4-12).

⁶ APP MFS at 2 (Order 1309 at 2).

LWRFS.⁷ After the conclusion of the Aquifer Test in 2012 the State Engineer denied all pending applications to appropriate additional groundwater in the LWRFS.⁸

The Aquifer Test validated many of the stakeholders' concerns that there was insufficient water in the LWRFS to serve the existing 38,000 afa of water right permits. Stakeholders were also concerned about the sustainability of existing water rights because there were parties wanting to use existing groundwater rights to support new residential developments. Based on these concerns, the State Engineer issued Interim Order 1303 in which he formally established the LWRFS as a joint administrative unit and solicited input regarding specific issues related to the LWRFS.⁹ After a two week administrative hearing in which parties presented expert reports and testimony the State Engineer issued Order 1309 to do two things: designate the LWRFS Hydrographic Basin and set an 8,000 afa pumping limit.¹⁰ The district court only invalidated the former, but then vacated the latter.

⁷ APP MFS at 2-11 (Order 1309 at 2-11).

⁸ APP MFS at 74-75 (Order 1303 at 6-7).

⁹ APP MFS at 81-82 (Order 1303 at 13-14). The State Engineer sought input on the following issues: (1) the geographic boundary of the LWRFS, (2) aquifer recovery in the LWRFS since the Aquifer Test, (3) the long-term annual quantity of water that may be pumped in the LWRFS, and (4) the effect of moving water rights between alluvial and carbonate wells.

¹⁰ APP MFS at 65 (Order 1309 at 65). The LWRFS Hydrographic Basin consists of the previously independent groundwater basins of Kane Springs Valley, Coyote Spring Valley, Muddy River Springs Area, California Wash, Hidden Valley, Garnet Valley and the northwest portion of Black Mountains Area.

B. Petitions for Judicial Review and Order Vacating Order 1309

Many Stakeholders filed Petitions for Judicial Review of Order 1309, which were consolidated into a single action. After full briefing on the matters, and oral argument, the Court issued its Order Vacating Order 1309 on April 19, 2022.¹¹ In the Order Vacating Order 1309 the Court granted the petitions for judicial review that challenged the State Engineer’s authority to jointly administer groundwater basins and conjunctively manage groundwater and surface water.¹² Multiple appeals followed.

SNWA is appealing the district court’s Order Vacating Order 1309 and the addendum to that order to this Honorable Court. The automatic 30-day stay applicable to the district court’s Order under NRCP 62(a)(1) expired on May 19, 2022. The district court’s Order Vacating Order 1309 is now fully operative and enforceable.

¹¹ APP MFS at 189-228 (Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review, April 19, 2022, Case No. A-20-816761-C).

¹² APP MFS at 223-224 (Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review, April 19, 2022, Case No. A-20-816761-C, at 35:13-36:10); APP MFS at 229-234 (On May 13, 2022, the Court issued an Addendum and Clarification to Court’s Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review Filed on April 19, 2022 (“Addendum to Order”), in which the Court granted LVVWD and SNWA’s Petition for Judicial Review with respect to their due process claims against the State Engineer and dismissed the rest their petition).

III. STANDARD OF REVIEW

Under NRAP 8(c) the Supreme Court considers the following factors in evaluating a motion for stay pending appeal:

- (1) whether the object of the appeal or writ petition will be defeated if the stay or injunction is denied;
- (2) whether appellant/petitioner will suffer irreparable or serious injury if the stay or injunction is denied;
- (3) whether respondent/real party in interest will suffer irreparable or serious injury if the stay or injunction is granted; and
- (4) whether appellant/petitioner is likely to prevail on the merits in the appeal or writ petition.¹³

If one or two factors are especially strong in a particular case, they may outweigh other weaker factors.¹⁴ For example, “a movant does not always have to show a probability of success of the merits.”¹⁵ Instead, “[t]he movant must ‘present a substantial case on the merits when a serious legal question is involved and show the balance of equities weighs heavily in favor of granting the stay.’”¹⁶

While this Court is not directly reviewing factual and scientific decisions made by the State Engineer, when considering any factual or scientific issue as it relates to the Motion for Stay, the Court should defer to the expertise of the State

¹³ NRAP 8(c).

¹⁴ *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2008).

¹⁵ *Hansen v. Eighth Judicial District Court*, 116 Nev. 650, 659, 6 P.3d 982, 987 (2000).

¹⁶ *Hansen v. Eighth Judicial District Court*, 116 Nev. 650, 659, 6 P.3d 982, 987 (2000) (quoting *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981)).

Engineer.¹⁷ This Court has held that in reviewing factual and scientific decisions of the State Engineer “neither the district court nor this Court will substitute its judgement for that of the State Engineer.”¹⁸

IV. **ARGUMENT**

A. **The Object of the appeal will be defeated without a stay pending appeal.**

The *object of the appeal* in this case is the protection of senior surface water rights and habitat for the Moapa dace. In Order 1309, the State Engineer found that groundwater pumping should not be allowed to increase beyond 8,000 afa to protect senior water rights and the Moapa dace.¹⁹ This factual finding was not disturbed by the district court which ruled on purely procedural and legal issues. Without a stay of the district court’s Order, the State Engineer will be unable to use the 8,000 afa pumping cap to protect senior water rights and the Moapa dace during the pendency of this appeal. Therefore, the object of this appeal, the protection of senior water rights and the Moapa dace, will be defeated if the district court’s Order is not stayed.

¹⁷ *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979) (When reviewing a decision or order of the State Engineer, the court may not “pass upon the credibility of the witness nor reweigh the evidence.”). The Legislature has specified that “[t]he decision of the State Engineer shall be prima facie correct, and the burden of proof shall be upon the party attacking the same.” NRS 533.450(10); *see also Revert*, 95 Nev. at 786, 603 P.2d at 264.

¹⁸ *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979).

¹⁹ APP MFS at 63 (Order 1309 at 63).

Additionally, the object of the appeal is to prevent reliance on and development of a non-existent water supply. Maintaining the status quo prevents reliance on unsustainable water rights and prevents the loss of water supply to future homeowners. This threat is real and immediate. Promptly after the district court issued its order, CSI filed a subdivision map with the State Engineer seeking to add permanent pumping demands to the current pumping regime.²⁰ CSI also admitted during the oral argument on the Motion for Stay in the district court that they plan on using an additional 536 afa of their groundwater rights during the pendency of this appeal.²¹ Without a stay, the State Engineer may be forced to approve a subdivision map for a residential development with an unsustainable water supply.

B. SNWA will suffer irreparable injury if the stay is denied.

This Court has ruled that water rights are real property and that “[a]ny act which destroys or results in substantial change in property, either physically or in the character in which it has been held, does irreparable injury.”²² This Court has also held that the requirement for irreparable harm is relaxed when the moving

²⁰ APP MFS at 95-95 (CSI Opposition to Motion for Stay at 8:28-9:2).

²¹ APP MFS at 95-96 (CSI Opposition to Motion for Stay at 8:28-9:2); APP MFS at 144 (Transcript from District Court Hearing on SNWA’s Motion for Stay at 41:4-12).

²² *Application of Filippini*, 66 Nev. 17, 22, 202 P.2d 535, 537 (1949); *Memory Gardens of Las Vegas, Inc. v. Pet Ponderosa Memorial Gardens*, 88 Nev. 1, 4, 492 P.2d 123, 125 (1972). *See also, Dixon v. Thatcher*, 103 Nev. 414, 416, 742 P.2d 1029, 1030 (1987).

party's water supply is endangered.²³ SNWA's water resource portfolio includes 20,000 afa of senior Muddy River decreed water rights and it has an important role in protecting the Moapa dace.²⁴

In Order 1309 the State Engineer found that groundwater pumping above 8,000 afa would adversely impact senior water rights and the Moapa dace.²⁵ Without a stay of the district court's order the State Engineer will be unable to use the 8,000 afa pumping limit to prevent increased groundwater pumping from 30,000 acre feet of currently unused water permits from harming senior water rights and the Moapa dace. If pumping increases above the current amount of 8,000 afa, existing rights will be harmed and the survival of the Moapa dace will be jeopardized.²⁶ After receiving a favorable order from the district court, CSI has admitted it is actively

²³ See *Czipott v. Fleigh*, 87 Nev. 496, 498-99, 489 P.2d 681, 682-83 (1971).

²⁴ APP MFS at 238 (SNWA Assessment of Moapa Dace and other groundwater dependent species in the LWRFS at 2-2). SNWA is a steward of the environment and is heavily involved in the protection of the Moapa dace. SNWA owns and operates the Warm Springs Natural Area in the headwaters of the Muddy River which encompasses 76 percent of the Moapa dace habitat.

²⁵ APP MFS at 63 (Order 1309 at 63).

²⁶ APP MFS at 63 (Order 1309 at 63) (Increased pumping "will cause conditions that harm the Moapa dace and threaten to conflict with Muddy River decreed rights.").

seeking to increase their existing pumping by 536 afa.²⁷ The threat to SNWA’s water rights and the Moapa dace is real and immediate.²⁸

Additionally, the district court’s Order Vacating Order 1309 creates significant ambiguity regarding the State Engineer’s ability to protect senior water rights. The district court found that the State Engineer does not have legal authority to jointly administer groundwater basins and conjunctively manage groundwater and surface water.²⁹ This creates great uncertainty regarding how the State Engineer can consider the impacts of groundwater pumping on other basins and on surface water. This uncertainty makes it very difficult for the State Engineer to use his statutory tools, beyond the pumping limit established in Order 1309, to protect senior water rights and the Moapa dace.

Lastly, the State Engineer may lack jurisdiction to seek alternative means to protect existing rights during the pendency of this appeal.³⁰ This jurisdictional

²⁷ APP MFS at 95-96 (CSI Opposition to Motion for Stay at 8:28-9:2); APP MFS at 144 (Transcript from District Court Hearing on SNWA’s Motion for Stay at 41:4-12).

²⁸ See *Berryman v. International Broth. of Elec. Workers*, 82 Nev. 277, 416 P.2d 387 (1966) (“[t]here should exist the reasonable probability that real injury will occur if the injunction does not issue.”).

²⁹ APP MFS at 217 (Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review, April 19, 2022, Case No. A-20-816761-C, at 29:11-13).

³⁰ *Westside Charter Service, Inc. v. Grey Line Tours of Southern Nevada*, 99 Nev. 456, 459 664 P.2d 351, 353 (1983) (“The Court’s jurisdiction over the subject matter of an appeal must be complete and not subject to [interference] . . . by concurrent action by the administrative body.”).

uncertainty may limit any alternative action potentially available to the State Engineer to protect senior water rights and the Moapa dace during the appeal.

C. Respondents will not suffer serious or irreparable harm.

Respondents will not suffer serious or irreparable harm if this Court grants a stay because existing groundwater pumping will be allowed to continue in the LWRFS. In Order 1309 the State Engineer did not cut off any existing groundwater pumping. Instead, he established the pumping limit to prevent *new* pumping.

Respondents that currently pump groundwater can continue to do so if the Court stays the district court's Order. And importantly, any Respondents not currently pumping groundwater cannot claim any cognizable harm from the 8,000 afa pumping limit because the pumping limit was established to protect senior water rights and no water user is entitled to harm senior water rights under Nevada law.³¹ Therefore, Respondents will not be irreparably harmed by a stay of the district court's Order Vacating Order 1309.

D. SNWA is likely to succeed on the merits in its appeal.

The district court's Order is based on an overly narrow view of the State Engineer's authority that the Court will likely reverse. The district court made three

³¹ See NRS 533.085, NRS 534.110(5), NRS 533.430(1) (“[e]very permit to appropriate water, and every certificate of appropriation granted under any permit by the State Engineer upon any stream or stream system under the provisions of NRS 533.087 to 533.235, inclusive, shall be, and the same is hereby declared to be, *subject to existing rights* . . .”) (emphasis added).

findings to support its vacation of Order 1309; (1) the State Engineer did not have authority to jointly manage groundwater basins by changing the boundary lines of existing groundwater basins, (2) the State Engineer did not have authority to engage in conjunctive management of groundwater and surface water, and (3) the State Engineer violated petitioner's due process rights by failing to provide them notice or an opportunity to comment on administrative policies and by failing to provide them with notice of the criteria he used to evaluate hydrological connectivity.³²

This Court has previously recognized the broad authority of the State Engineer to manage all water in Nevada.³³ This Court has also recognized that when groundwater and surface water are hydrologically connected, they are to be considered and regulated jointly.³⁴ Lastly, the State Engineer provided the Respondents with sufficient notice and the opportunity to be heard.

³² APP MFS at 215, 217, 218-219 (Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review, April 19, 2022, Case No. A-20-816761-C, at 27:17-20, 29:12-14, 30:22-31:6).

³³ See *Wilson, v. Pahrump Fair Water*, 137 Nev. 10, 15, 481 P.3d. 853, 858 (Court interpreted State Engineer authority over groundwater to be so broad that it included authority over domestic wells even though NRS 534.030(4) specifically excludes domestic wells).

³⁴ See *Matter of Relative Rights in & to All Waters, Both Surface & Underground, Located Within Diamond Valley Hydrographic Basin 10-153, Eureka & Elko Cty.s.*, 84275, 2022 WL 1421434 (Nev. May 4, 2022) (unpublished disposition) (Court denied certification of separate surface water adjudication that was connected by groundwater to another adjudication, thereby recognizing necessity of conjunctive management).

1. The State Engineer has statutory authority to jointly administer groundwater basins.

The State Engineer is tasked with administering *all* the water within the State of Nevada.³⁵ As part of his management tools, he is authorized to designate areas for special administration, which expands his general administrative powers.³⁶ While the district court acknowledged that the State Engineer “should take into account how water use in one basin may affect the water use in an adjoining or closely related basin” it held that Nevada law “does not allow the State Engineer to combine basins for joint administration.”³⁷ This is an overly narrow view of the State Engineer’s authority, and fails to properly abide by this Court’s articulation in *Wilson v. Pahrump Fair Water* of the full breadth and purpose of established water law.

Nevada law gives the State Engineer numerous tools to administer groundwater and surface water. These statutes permit the State Engineer to designate an area or groundwater basin in need of further administration, and create “such rules, regulations and orders as are deemed essential for the welfare of the area involved.”³⁸ The State Engineer properly exercised his authority in Order 1309 by

³⁵ NRS 533.030(1).

³⁶ NRS 534.030, 534.110.

³⁷ APP MFS at 215 (Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review, April 19, 2022, Case No. A-20-816761-C, at 27:17-20).

³⁸ NRS 534.120(1).

designating the LWRFS as an area needing further administration and by establishing a pumping limit to protect existing water rights and the public interest.

The district court failed to recognize how groundwater basins in Nevada were established in the first instance. For example, the State Engineer’s office has used various maps over the years to grant water rights to appropriators. Not until 1968 did the current groundwater basin map exist. The district court failed to explain or identify the authority through which the State Engineer adopted this map or why, if the State Engineer had no authority, this map could have been created or adopted to replace previous maps. In other words, if the State Engineer had authority to modify groundwater basin boundaries to establish the current map relied on by the district court, the State Engineer has authority to modify the map when “the best available science concerning . . . underground sources of water in Nevada” established such a necessity.³⁹

a. NRS 532.120 and NRS 534.030

Under NRS 532.120 the State Engineer may adopt “such reasonable rules and regulations as may be necessary for the proper and orderly execution of the powers conferred by law.” One of his powers conferred by law, under NRS 534.030, is to “designate [an area in need of administration] by basin, or portion therein, and make an official order describing the boundaries by legal subdivision as nearly as

³⁹ NRS 534.024(1)(c).

possible.” Under NRS 534.030(2) the State Engineer is required to hold a hearing and take testimony in the area to be so designated. Then, if the State Engineer determines, after hearing and investigation, that the proposed basin needs additional administration, the State Engineer may enter a designation order for the basin.⁴⁰

Here, to comply with NRS 534.030(2), the State Engineer held stakeholder meetings and a formal administrative hearing to take testimony on expert reports to determine the geographic boundary of the LWRFS.⁴¹ Based on these meetings and hearings, and out of a concern that the area was in need of additional administration, the State Engineer designated the LWRFS Hydrographic Basin in Order 1309 as permitted by NRS 534.030(2).

And most importantly to the present case, there is no part of NRS 534.030 to suggest that once an area or basin is designated that it cannot be re-designated with new basin boundaries based on the best available science. The district court narrowly interpreted NRS 534.030(2) and held that the State Engineer cannot change the boundaries of existing groundwater basins, as they are currently described in old water study reports or prior designation orders,⁴² for the purposes of joint

⁴⁰ NRS 534.030(2).

⁴¹ APP MFS at 12 (Order 1309 at 12).

⁴² Initial studies conducted under NRS 532.170 divided the investigation of groundwater resources in the State of Nevada to topographic areas based on surface features, such as mountain ranges. Much of our current basin numbering and naming system utilized the descriptions of these initial studies. Some, but not all, of the

management.⁴³ By reading this limitation into the statute the district court was ignoring the intent of the legislature in granting the State Engineer the authority to ascertain which areas are in need of additional administration.

The district court's interpretation is also illogical and greatly limits the authority of the State Engineer. Under the district court's interpretation of NRS 534.030(2) once a groundwater basin has been described in a report under NRS 532.170 or designated under NRS 533.030 the State Engineer must maintain the boundary of that groundwater basin in perpetuity. The district court also held that the State Engineer must administer and regulate these areas in isolation. That limitation is not present in the statute and unnecessarily limits the State Engineer's authority to administer water use across the entire state.

b. Basin should not be narrowly defined.

Nothing in the water law suggests that the term *basin* in NRS 533.030(2), or any other governing statute, must be read in the singular as the district court held in its ruling. Yet the district court found that “[i]f the Legislature intended for the State Engineer to designate areas across multiple basins for ‘joint administration,’ it would

study areas have later been formally designated as areas of special administration, in whole or in part, under Orders authorized by NRS 534.030.

⁴³ APP MFS at 215 (Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review, April 19, 2022, Case No. A-20-816761-C, at 27:17-20).

have so stated.”⁴⁴ The district court’s interpretation that the Legislature did not intend for the State Engineer to jointly manage groundwater basins is allegedly supported by the fact that the “Legislature consistently refers to a singular groundwater basin throughout [NRS 534].”⁴⁵

The district court’s reliance on the use of the term *basin* in the singular is misplaced. Under the preliminary chapter to the NRS the legislature directs the reader use the following rule when interpreting statutes; “[t]he singular number includes the plural number, and the plural includes the singular.”⁴⁶ In other words, the use of a singular noun does not demonstrate legislative intent for the noun to be singular unless “expressly provided by statute or required by context.”⁴⁷ Therefore, the use of the singular *basin* in the statutes granting powers to the State Engineer is irrelevant to the interpretation of the statutes granting the State Engineer’s authority for joint management.

⁴⁴ APP MFS at 215 (Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review, April 19, 2022, Case No. A-20-816761-C, at 27:13-15).

⁴⁵ APP MFS at 214 (Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review, April 19, 2022, Case No. A-20-816761-C, at 26:16-22).

⁴⁶ NRS 0.030(1)(a).

⁴⁷ NRS 0.030(1).

2. **The State Engineer has the authority to conjunctively manage groundwater and surface water.**

The district court erred in finding that the State Engineer is not authorized to conjunctively manage groundwater and surface water. The district Court held that:

nothing in Chapter 532, 533, or 534 gives the State Engineer express authority to conjunctively manage, in this proceeding, both the surface and groundwater flows he believes are occurring in the LWRFS superbasin.⁴⁸

The district court also mistakenly believed the State Engineer relied on NRS 533.024(1)(e) as a source of authority that allows him to conjunctively manage groundwater and surface. The State Engineer had no need to rely on NRS 533.024(1)(e), a legislative policy statement encouraging the State Engineer to “manage conjunctively the appropriation, use and administration of groundwater of this State, regardless of the source of water.” The authority to conjunctively manage groundwater and surface water is inherent in the State Engineer’s existing authority to protect senior water rights.

The State Engineer has always conjunctively managed ground water and surface water.⁴⁹ This Court has recognized in multiple cases that the State Engineer

⁴⁸ APP MFS at 216 (Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review, April 19, 2022, Case No. A-20-816761-C, at 28:11-13).

⁴⁹ See *Griffin v. Westergard*, 96 Nev. 627, 615 P.2d 235 (1980) (State Engineer denied permits because “[t]he effect of granting any additional permits in the basin would either deplete the underground reservoir or the water would be replaced by infiltrating surface water from the West Walker River, which is overappropriated . .

must consider impacts to surface water by groundwater development.⁵⁰ Even if it was not called ‘conjunctive management’ at the time, that is a distinction without a difference. Under NRS 533.085(1) vested water rights cannot be impaired or affected by the provisions of that chapter. Therefore, the State Engineer cannot approve new groundwater uses that conflict with vested surface water rights. The State Engineer’s consideration of the impact of groundwater use on surface water is what is now defined as conjunctive management. Therefore, the State Engineer had authority to consider the impact of groundwater pumping on decreed Muddy River water rights when he designated the LWRFS.

Contrary to the district court’s findings, the State Engineer did not rely on NRS 533.024(1)(e) to designate the LWRFS. As previously discussed, NRS 534.030 authorized the State Engineer to designate the LWRFS. However, NRS 533.024(1)(e) is particularly notable in the present case because it clarifies that authority. The legislature directed the State Engineer to recognize that ground and

. [i]f the additional water is replaced from the West Walker River, existing surface water rights will be impaired and it will be detrimental to the public welfare.” On appeal the Nevada Supreme Court upheld the District Court’s denial of the permits.).⁵⁰ See *Eureka Cnty v. State Eng’r*, 131 Nev. 846, 849, 359 P.3d 1114, 1116 (2015) (groundwater rights must be denied if they are in hydrologic connection to a surface water source, such as a spring, and will conflict with existing rights on that source.) See also *Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. 521, 527, 245 P.3d 1145, 1149 (2010) (recognizing that perennial yield limitations of groundwater development in basins containing surface water resources are created by the State Engineer “in part to protect [river] water quality and native fish habitats.”).

surface water sources routinely have a hydrological connection. For example, groundwater often produces springs, and those springs contribute to river flows. In this case the Muddy River is fed by springs that support surface water rights holders and the Moapa Dace. In a recent case, a different district court attempted to adjudicate groundwater separately from surface water, and that decision was overturned.⁵¹ As this Court and the Legislature have recognized, groundwater and surface water cannot be viewed in isolation.

3. The State Engineer provided Respondents due process at the Order 1303 Hearing.

The district court erred when it held that the State Engineer violated some of the hearing participants' due process rights by (1) failing to put the parties on notice that he would make management decisions for the LWRFS at the conclusion of the proceeding, (2) not affording them a full and complete opportunity to comment on the State Engineer's decision to subject the LWRFS to conjunctive management and joint administration, and (3) by not disclosing the criteria he would use to evaluate

⁵¹ See *Matter of Relative Rights in & to All Waters, Both Surface & Underground, Located Within Diamond Valley Hydrographic Basin 10-153, Eureka & Elko Cty.s.*, 84275, 2022 WL 1421434 (Nev. May 4, 2022) (unpublished disposition) (because the groundwater source was hydrologically connected to the surface water sources, adjudication of groundwater under a separate proceeding from surface water was rejected.).

hydrologic connectivity of the groundwater basins before or during the Order 1303 Hearing.⁵²

This district court failed to recognize that hearing participants were put on notice, through multiple documents, of the issues to be addressed at the Order 1303 Hearing. In Interim Order 1303 the State Engineer made clear that he would address four issues at the conclusion of the Order 1303 Hearing⁵³ The State Engineer then reiterated that he would be addressing these four issues in the Notice of Hearing.⁵⁴ Contrary to the district court's findings, there were no comprehensive management decisions made in Order 1309. Order 1309 addressed factual threshold issues and it was the intent of the State Engineer to address management issues during a second phase of the LWRFS administrative process.⁵⁵

The district court also misunderstood the significance of the criteria that the State Engineer used to evaluate hydrologic connection. The district court found that the State Engineer disclosed his criteria for the first time in Order 1309 and that

⁵² APP MFS at 218-219 (Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review, April 19, 2022, Case No. A-20-816761-C, at 30:22-31:6).

⁵³ APP MFS at 81 (Interim Order 1303 at 13). (1) the geographic boundary of the hydrologically connected LWRFS, (2) aquifer recovery since the Aquifer Test, (3) the long-term annual quantity of groundwater that may be pumped from the LWRFS, and (4) the effect of moving groundwater rights between alluvial wells and carbonate wells.

⁵⁴ APP MFS at 315 (Amended Notice of Hearing at 1).

⁵⁵ APP MFS at 336 (Pre-Hearing Conference Transcript at 10:3-12:15 (Fairbank)).

hearing participants should have had the opportunity to address these criteria at the Order 1303 Hearing.⁵⁶ The Respondents were on notice that the State Engineer was soliciting information regarding the hydrologic connectivity of groundwater basins in the LWRFS, “[r]eports filed with the Office of the State Engineer should address . . . the geographic boundary of the *hydrologically connected groundwater and surface water systems*.”⁵⁷ Most importantly, the Respondents had every opportunity to present evidence on the criteria the State Engineer should have considered in evaluating hydrologic connectivity at the Order 1303 Hearing and did so.⁵⁸ The Respondents were not denied notice or the opportunity to be heard. Instead, the State Engineer gave their evidence less weight than they desired. A disagreement as to the weight of evidence is not a due process violation.

V. **Conclusion**

For the aforementioned reasons the Court should stay the district court’s Order Vacating Order 1309 during the pendency of this appeal. Furthermore, given the

⁵⁶ APP MFS at 222 (Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review, April 19, 2022, Case No. A-20-816761-C, at 34:17-20).

⁵⁷ APP MFS at 81 (Interim Order 1303 at 13) (emphasis added).

⁵⁸ APP MFS at 17, 21 (*See e.g.*, Order 1309 at 17, 21). For example, CSI and Lincoln-Vidler presented geophysical evidence, including Controlled Source Audio-frequency Magnetotellurics (“CSAMT”), evidence to show Coyote Springs Valley was not hydrologically connected with the rest of the LWRFS. Based on his expertise the State Engineer did not find CSAMT evidence convincing and did not add it to his criteria for evaluating hydrologic connectivity.

emergency nature of this Motion and the aforementioned timing concerns, SNWA respectfully requests a temporary stay pending the briefing and decision on this Motion for Stay.

AFFIRMATION

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

Respectfully submitted this 1st day of June 2022.

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the Southern Nevada Water Authority is a governmental agency and a political subdivision of the State of Nevada.

Dated this 1st day of June 2022.

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NRAP 27(e) CERTIFICATE

I, Thomas P. Duensing, as counsel for Appellant, Southern Nevada Water Authority (“SNWA”), certifies the following pursuant to NRAP 27(e):

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2. SNWA is filing their Motion for Stay on an emergency basis to ensure the Court considers and decides the motion as soon as possible. The 30-day automatic stay of the district court’s Findings of Fact, Conclusions of Law, Order Granting Petitions for Judicial Review (“Order” or “Order Vacating Order 1309) afforded by NRCP 62(a)(1), in which a judgment may not be enforced, expired on May 19, 2022. The 30-day period under NRCP 62(a)(1) began running from April 19, 2022, when SNWA was served with Notice of Entry of the District Court’s Order. Therefore, the State Engineer’s 8,000 acre-feet annum (“afa”) groundwater pumping limit in the Lower White River Flow System (“LWRFS”) established by the State Engineer in Order 1309 is no longer in effect. The State Engineer is now unable to use the groundwater pumping limit to protect senior water rights and the

endangered Moapa dace. As the State Engineer found in Order 1309 groundwater pumping that consistently exceeds 8,000 afa will harm senior water rights and the endangered Moapa dace.

3. Emergency relief under NRAP 27(e) is necessary in these circumstances to protect senior water right holders and the Moapa dace from increased groundwater pumping from permitted water users in the LWRFS. There is approximately 38,000 afa of permitted water rights in the LWRFS and around 8,000 afa of those rights are currently being pumped. Therefore, at any time, existing water right holders can increase groundwater pumping beyond 8,000 afa without authorization from the State Engineer. Furthermore, without the 8,000 afa pumping limit the State Engineer may be forced to approve subdivision maps supported by water rights that would exceed the 8,000 afa pumping limit if pumped. After the district court issued its Order vacating Order 1309, but before the Order was enforceable under NRCP 62(a)(1) Coyote Springs Investments, LLC (“CSI”) attempted to have the State Engineer approve its subdivision maps which would have allowed them to increase groundwater pumping in the LWRFS. Also, during oral argument on SNWA’s Motion for Stay in the district court CSI admitted that they planned on using an additional 536 afa of ground water during the pendency of this appeal.

4. I have made every practicable effort to notify the Supreme Court and opposing counsel of the filing of this Motion. I alerted opposing counsel to the filing of this Motion shortly before it was submitted. I also called the Clerk of the Court's Office for the Nevada Supreme Court before filing. A courtesy copy was emailed to all parties.

Executed on this 1st day of June 2022, in Carson City Nevada.

/s/ Thomas Duensing

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Nevada State Bar No. 13567

Attorney for SNWA

CERTIFICATE OF SERVICE

Pursuant to NRAP 25(b), I hereby certify that I am an employee of TAGGART & TAGGART, LTD., and that on this day, I served, or caused to be served, a true and correct copy of this Motion by electronic service to:

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DATED this 1st day of June 2022.

/s/ Thomas P. Duensing
Employee of TAGGART & TAGGART, LTD.

APPENDIX INDEX

<u>Exhibit</u>	<u>Description</u>	<u>Bate Stamp</u>
1.	Order 1309	APP MFS 1-68
2.	Interim Order 1303	APP MFS 69-87
3.	CSI's Opposition to LVVWD & SNWA's Motion for Stay Pending Appeal	APP MFS 68-103
4.	Transcript of Hearing regarding LVVWD & SNWA's Motion for Stay Pending Appeal	APP MFS 104-188
5.	Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review	APP MFS 189-228
6.	Addendum and Clarification to Court's Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review	APP MFS 229-234
7.	Court Minutes from May 16 th , 2022	APP MFS 235-236
8.	SNWA & LVVWD Assessment of the Moapa Dace and other Groundwater-Dependent Special Status Species in the Lower White River Flow System	APP MFS 237-239
9.	APP MFS 240-314 Intentionally Omitted	APP MFS 240-314
10.	Amended Notice of Hearing August 26 th , 2019	APP MFS 315-332
11.	Prehearing Conference on August 8 th , 2019	APP MFS 333-366