

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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Elizabeth A. Brown
Clerk of Supreme Court

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

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, submit Volume One of this appendix in support of SNWA’s Emergency Motion for Stay under NRAP 27(e) of District Court’s Order Granting Petition for Judicial Review Pending Appeal pursuant to NRAP 8(a)(2).

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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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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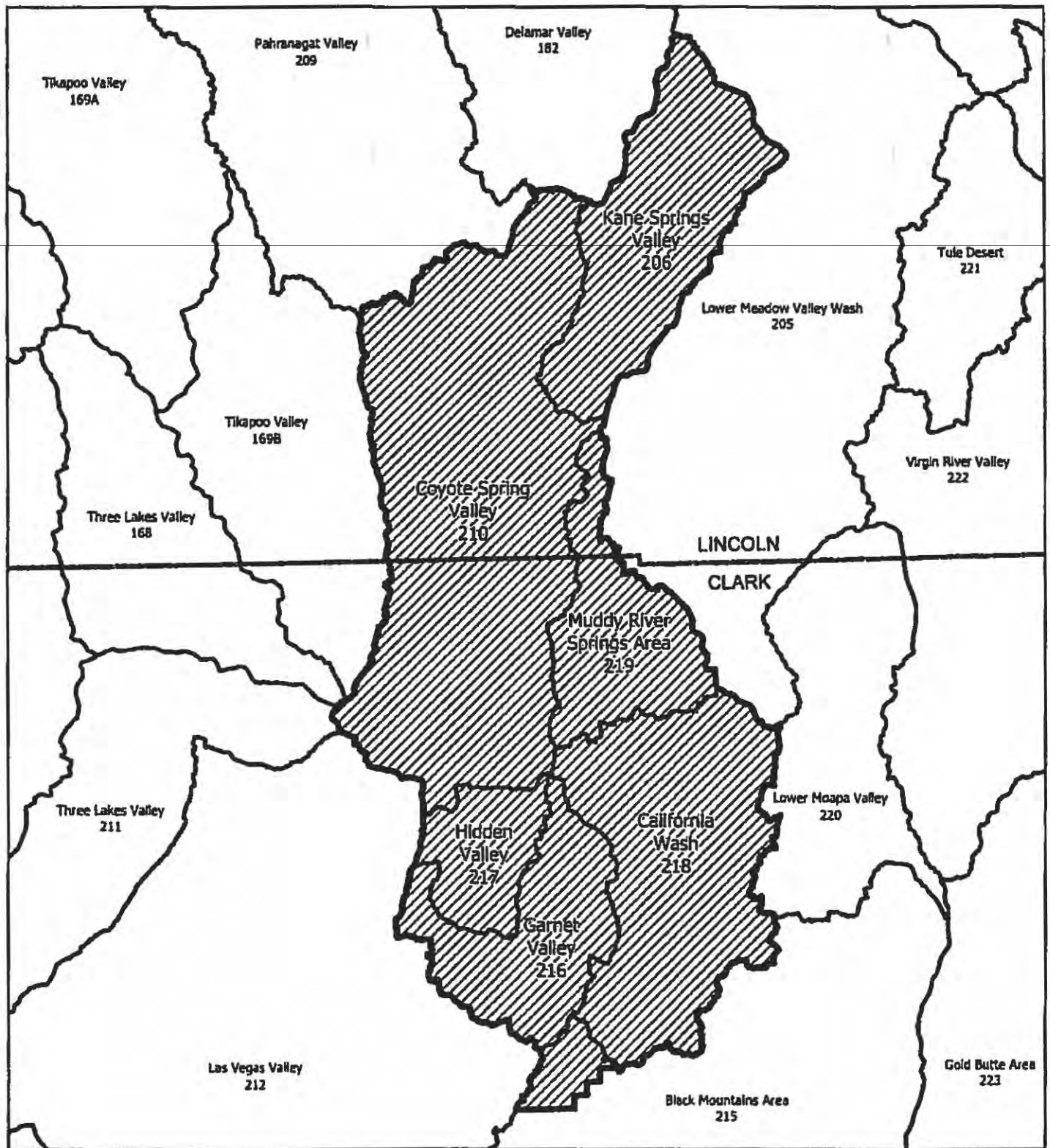
DATED this 1st day of June 2022.

/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

ATTACHMENT A






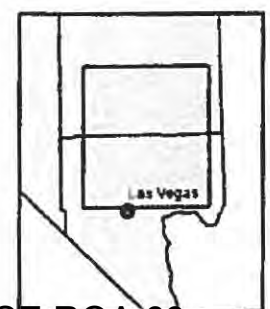
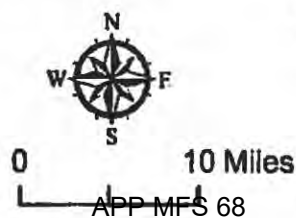
Location and Extent of LWRFS Hydrographic Basin,
Clark and Lincoln Counties, Nevada

State of Nevada
Department of Conservation and
Natural Resources
Office of the State Engineer
Division of Water Resources

Tim Wilson PE
State Engineer

June 2020

-  LWRFS Boundary
-  Hydrographic Basin Boundary
-  County Boundary



SE ROA 69

IN THE OFFICE OF THE STATE ENGINEER
OF THE STATE OF NEVADA

INTERIM ORDER

#1303

DESIGNATING THE ADMINISTRATION OF ALL WATER RIGHTS WITHIN COYOTE SPRING VALLEY HYDROGRAPHIC BASIN (210), A PORTION OF BLACK MOUNTAINS AREA BASIN (215), GARNET VALLEY BASIN (216), HIDDEN VALLEY BASIN (217), CALIFORNIA WASH BASIN (218), AND MUDDY RIVER SPRINGS AREA (AKA UPPER MOAPA VALLEY) BASIN (219) AS A JOINT ADMINISTRATIVE UNIT, HOLDING IN ABEYANCE APPLICATIONS TO CHANGE EXISTING GROUNDWATER RIGHTS, AND ESTABLISHING A TEMPORARY MORATORIUM ON THE REVIEW OF FINAL SUBDIVISION MAPS

I. PURPOSE

WHEREAS, the purpose of this Interim Order is to designate a multi-basin area known to share a close hydrologic connection as a joint administrative unit, which shall be known as the Lower White River Flow System (LWRFS).

WHEREAS, an adequate and predictable supply of groundwater within the LWRFS supports the health, safety and welfare of the area, and this Interim Order aims to protect existing senior rights and the public interest in an endangered species, recognize existing beneficial use, and limit development actions that are dependent on a supply of water that may not be available in the future.

WHEREAS, during the interim period that this Order is in effect, holders of existing rights and other interested parties are encouraged to submit reports to the Nevada Division of Water Resources (NDWR) analyzing the data available regarding sustainable groundwater development in the LWRFS, the geographic extent of the LWRFS, and considerations relating to groundwater pumping within the LWRFS and its effects on the fully decreed Muddy River. This collected and analyzed data is an essential step to optimize the beneficial use of the available water supply in the LWRFS.

WHEREAS, concurrent with this interim order, holders of existing rights and other interested parties are encouraged to participate in the public process to develop a conjunctive management plan.

I. BASIN DESIGNATIONS PURSUANT TO NRS § 534.030

WHEREAS, the Coyote Spring Valley Hydrographic Basin was designated pursuant to Nevada Revised Statute (NRS) § 534.030 by Order 905 dated August 21, 1985, which also declared municipal, power, industrial and domestic uses as preferred uses of the groundwater resource pursuant to NRS § 534.120.

WHEREAS, the Black Mountains Area Hydrographic Basin was designated pursuant to NRS § 534.030 by Order 1018 dated November 22, 1989, which also declared municipal, industrial, commercial and power generation purposes as preferred uses of the groundwater resource pursuant to NRS § 534.120, declared irrigation of land using groundwater to be a non-preferred use, and ordered that applications to appropriate groundwater for irrigation purposes would be denied.

WHEREAS, the Garnet Valley Hydrographic Basin was designated pursuant to NRS § 534.030 by Order 1025 dated April 24, 1990, which also declared municipal, quasi-municipal, industrial, commercial, mining, stockwater and wildlife purposes as preferred uses pursuant to NRS § 534.120, and declared irrigation of land using groundwater to be a non-preferred use, and ordered that applications to appropriate groundwater for irrigation purposes would be denied.

WHEREAS, the California Wash Hydrographic Basin was designated pursuant to NRS § 534.030 by Order 1026 dated April 24, 1990, which also declared municipal, quasi-municipal, industrial, commercial, mining, stockwater and wildlife purposes as preferred uses pursuant to NRS § 534.120, and declared irrigation of land using groundwater to be a non-preferred use, and ordered that applications to appropriate groundwater for irrigation purposes would be denied.

WHEREAS, the Hidden Valley Hydrographic Basin was designated pursuant to NRS § 534.030 by Order 1024 dated April 24, 1990, which also declared municipal, quasi-municipal, industrial, commercial, mining, stockwater and wildlife purposes as preferred uses pursuant to NRS § 534.120, and declared irrigation of land using groundwater to be a non-preferred use, and ordered that applications to appropriate groundwater for irrigation purposes would be denied.

WHEREAS, the Muddy River Springs Area was partially designated pursuant to NRS § 534.030 by Order 392 dated July 14, 1971, and was fully designated by Order 1023 dated April 24, 1990, which also declared municipal, quasi-municipal, industrial, commercial, mining, stockwater and wildlife purposes as preferred uses pursuant to NRS § 534.120, and declared irrigation of land using groundwater to be a non-preferred use, and ordered that applications to appropriate groundwater for irrigation purposes would be denied.

II. ORDERS 1169 AND 1169A

WHEREAS, on March 8, 2002, the State Engineer issued Order 1169 holding in abeyance carbonate-rock aquifer system groundwater applications either pending or to be filed in Coyote Spring Valley (Basin 210), Black Mountains Area (Basin 215), Garnet Valley (Basin 216), Hidden Valley (Basin 217), Muddy River Springs Area (Basin 219), and Lower Moapa Valley (Basin 220) and ordering an aquifer test of the carbonate-rock aquifer system, which was not well understood, to determine whether additional appropriations could be developed from the carbonate-rock aquifer system. The Order required that at least 50%, or 8,050 acre-feet annually (afa), of the water rights then currently permitted in Coyote Spring Valley be pumped for at least two consecutive years.

WHEREAS, on April 18, 2002, in Ruling 5115, the State Engineer added the California Wash (Basin 218) to the Order 1169 aquifer test basins.

WHEREAS, prior to the Order 1169 aquifer test beginning, there were significant concerns that pumping 8,050 afa from the Coyote Spring Valley as part of the aquifer test would adversely impact the water resources at the Muddy River Springs, and consequently the Muddy River. Ultimately, the Order 1169 study participants agreed that even if the minimum 8,050 afa was not pumped, sufficient information would be obtained to inform future decisions relating to the study basins.

WHEREAS, on November 15, 2010, the Order 1169 aquifer test began, whereby the study participants began reporting to NDWR on a quarterly basis the amounts of water being pumped from wells in the carbonate and alluvial aquifer during the pendency of the aquifer test.

WHEREAS, on December 21, 2012, the State Engineer issued Order 1169A declaring the completion of the aquifer test to be December 31, 2012, after a period of 25½ months. The

State Engineer provided the study participants the opportunity to file reports with NDWR until June 28, 2013, addressing the information gained from the aquifer test and the water available to support applications in the aquifer test basins.

WHEREAS, during the Order 1169 aquifer test, an average of 5,290 acre-feet per year was pumped from carbonate wells in Coyote Spring Valley, and a cumulative total of approximately 14,535 acre-feet per year of water was pumped throughout the LWRFS. Of this total, approximately 3,840 acre-feet per year was pumped from the Muddy River Springs Area alluvial aquifer.¹

WHEREAS, during the aquifer test, pumpage was measured and reported from 30 other wells in the Muddy River Springs Area, Garnet Valley, California Wash, Black Mountains Area, and Lower Meadow Valley Wash. Stream diversions from the Muddy River were reported, and measurements of the natural discharge of the Muddy River and several of the Muddy River's headwater springs were collected daily. Water-level data were collected from a total of 79 monitoring and pumping wells within the LWRFS. All of the data collected during the aquifer test was made available to each of the study participants and the public.

WHEREAS, during the Order 1169 aquifer test, the resulting water-level decline encompassed 1,100 square miles and extended from northern Coyote Spring Valley through the Muddy River Springs Area, Hidden Valley, Garnet Valley, California Wash, and the northwestern part of the Black Mountains Area.^{2,3} The water-level decline was estimated to be 1 to 1.6 feet in this area with minor drawdowns of 0.5 feet or less in the northern part of Coyote Spring Valley north of the Kane Springs Wash fault zone.

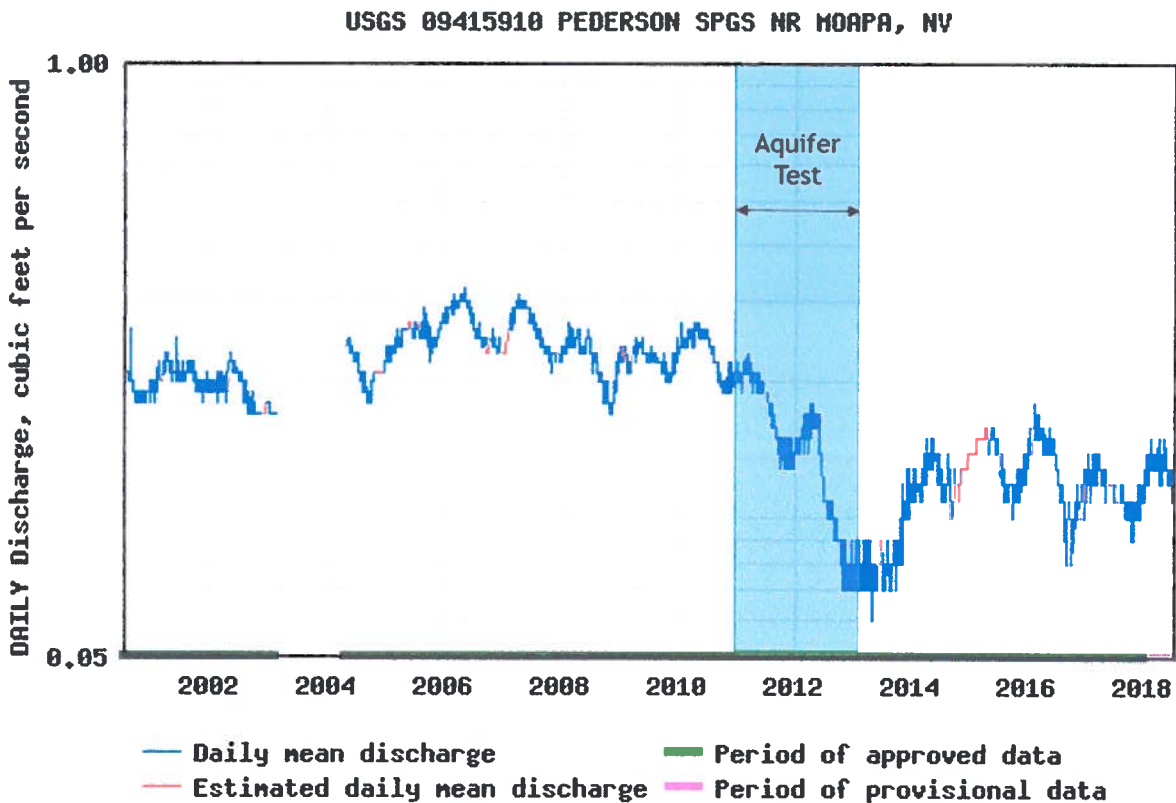
WHEREAS, results of the two-year test demonstrated that pumping 5,290 acre-feet annually from the carbonate aquifer in Coyote Spring Valley, in addition to the other carbonate pumping in Garnet Valley, Muddy River Springs Area, California Wash and the northwest part

¹ See, e.g., Ruling 6254, p. 17; Appendix B.

² See, e.g., Ruling 6254. See also U.S. Fish and Wildlife Service, U.S. Bureau of Land Management and U.S. National Park Service Order 1169A Report, *Test Impacts and Availability of Water Pursuant to Applications Pending Under Order 1169*, June 28, 2013, official records in the Office of the State Engineer.

³ There was no groundwater pumping in Hidden Valley but effects were still observed in the Hidden Valley monitor well.

of the Black Mountains Area, caused sharp declines in groundwater levels and flows in the Pederson and Pederson East springs. These two springs are considered to be sentinel springs for the overall condition of the Muddy River because they are at a higher altitude than other Muddy River source springs, and therefore are proportionally more affected by a decline in groundwater level in the carbonate aquifer.⁴ The Pederson spring flow decreased from 0.22 cubic feet per second (cfs) to 0.08 cfs and the Pederson East spring flow decreased from 0.12 cfs to 0.08 cfs. The following hydrograph at Pederson spring illustrates the decline in discharge during the aquifer test and also demonstrates that in the five years since the end of the aquifer test, spring flow has not recovered to pre-test flow rates.



⁴ See the 2006 Memorandum of Agreement among the Southern Nevada Water Authority, United States Fish and Wildlife Service, Coyote Springs Investments, Moapa Band of Paiutes, and the Moapa Valley Water District.

Additional headwater springs at lower altitude, the Baldwin and Jones springs, declined approximately 4% during the test.⁵ All of the headwater springs contribute to the decreed and fully appropriated Muddy River and are the predominant source of water that supplies the habitat of the endangered Moapa dace, a fish federally listed as an endangered species since 1967.

WHEREAS, based upon the analysis of the carbonate aquifer test, it was asserted that pumping at the Order 1169 rate at well MX-5 in Coyote Spring Valley could result in both of the high-altitude Pederson and Pederson East springs going dry in 3 years or less.⁶

WHEREAS, based upon the findings of the aquifer test, the carbonate aquifer underlying Coyote Spring Valley, Garnet Valley, Hidden Valley, Muddy River Springs Area, California Wash and the northwest part of the Black Mountains Area⁷ (the LWRFS as depicted in Appendix A) was acknowledged to have a unique hydrologic connection and share the same supply of water.⁸

III. RULINGS 6254, 6255, 6256, 6257, 6258, 6259, 6260, AND 6261

WHEREAS, on January 29, 2014, the State Engineer issued Ruling 6254 on pending applications of the Las Vegas Valley Water District (LVVWD) and Coyote Springs Investment, LLC (CSI) in the Coyote Spring Valley; Ruling 6255 on pending applications of Dry Lake Water, LLC (Dry Lake), and CSI in Coyote Spring Valley; Ruling 6256 on pending applications of Bonneville Nevada Corporation, Nevada Power Company (Nevada Power), Dry Lake, and the Southern Nevada Water Authority (SNWA) in the Garnet Valley; Ruling 6257 on pending applications of Nevada Power, Dry Lake, and SNWA in the Hidden Valley; Ruling 6258 on

⁵ U.S. Fish and Wildlife Service, U.S. Bureau of Land Management and U.S. National Park Service Order 1169A Report, *Test Impacts and Availability of Water Pursuant to Applications Pending Under Order 1169*, pp. 43-46, 50-51, June 28, 2013, official records in the Office of the State Engineer. *See also*, <http://waterdata.usgs.gov/nv/nwis/>.

⁶ *See, e.g.*, Ruling 6254. *See also* U.S. Fish and Wildlife Service, U.S. Bureau of Land Management and U.S. National Park Service Order 1169A Report, *Test Impacts and Availability of Water Pursuant to Applications Pending Under Order 1169*, p. 85, June 28, 2013, official records in the Office of the State Engineer.

⁷ That portion of the Black Mountains Area lying within the Lower White River Flow System is defined as those portions of Sections 29, 30, 31, 32, and 33, T.18S., R.64E., M.D.B.&M.; Section 13 and those portions of Sections 1, 11, 12, and 14, T.19S., R.63E., M.D.B.&M.; Sections 5, 7, 8, 16, 17, and 18 and those portions of Sections 4, 6, 9, 10, and 15, T.19S., R.64E., M.D.B.&M.

⁸ *See, e.g.*, State Engineer Ruling 6254, p. 24, official records in the Office of the State Engineer.

pending applications by LVVWD, Nevada Power, Dry Lake, and the Moapa Band of Paiute Indians in the California Wash; Ruling 6259 on pending applications by the Moapa Valley Water District in the Muddy River Springs Area; and Ruling 6260 on pending applications by Nevada Cogeneration Associates #1, Nevada Cogeneration Associates #2, and Dry Lake, in the Black Mountains Area, upholding in part the protests to said applications and denying the applications on the grounds that there was no unappropriated groundwater at the source of supply, the proposed use would conflict with existing rights, and the proposed use of the water would threaten to prove detrimental to the public interest because it would threaten the water resources upon which the endangered Moapa dace are dependent.

IV. LOWER WHITE RIVER FLOW SYSTEM

WHEREAS, the total long-term average water supply to the LWRFS, from subsurface groundwater inflow and local precipitation recharge, is not more than 50,000 acre-feet annually.⁹

WHEREAS, the Muddy River, a fully appropriated surface water source, has its headwaters in the Muddy River Springs Area and has the most senior rights in the LWRFS. Spring discharge in the Muddy River Springs Area is produced from the regional carbonate aquifer. Prior to groundwater development, the Muddy River flows at the Moapa gage were approximately 34,000 acre-feet annually.¹⁰

WHEREAS, the alluvial aquifer surrounding the Muddy River ultimately derives virtually all of its water supply from the carbonates, either through spring discharge that infiltrates into the alluvium or through subsurface hydraulic connectivity between the carbonate rocks and the alluvium.¹¹

WHEREAS, the State Engineer has determined that pumping of groundwater within the LWRFS has a direct interrelationship with the flow of the decreed and fully appropriated Muddy River, which has the most-senior rights.¹²

⁹ *Id.*

¹⁰ United States Geological Survey Surface-Water Annual Statistics for the Nation, USGS 09416000 MUDDY RV NR MOAPA, NV, accessed at https://waterdata.usgs.gov/nwis/annual/?search_site_no=09416000&agency_cd=USGS&referred_module=sw&format=sites_selection_links.

¹¹ *See, e.g.*, State Engineer Ruling 6254, p. 24, official records in the Office of the State Engineer.

¹² *Id.*

WHEREAS, since the conclusion of the Order 1169 aquifer test, the State Engineer has jointly managed the groundwater rights within LWRFS.

WHEREAS, the State Engineer, under the joint management of the LWRFS, has not distinguished pumping from wells in the Muddy River Springs Area alluvium from pumping carbonate wells within the LWRFS.

WHEREAS, within the LWRFS, there exist more than 38,000 acre-feet of groundwater appropriations. Groundwater pumping from 2007 forward is included in Appendix B and is significantly less than the total appropriations.

WHEREAS, groundwater levels within the LWRFS have been relatively flat in the five years since the end of the Order 1169 aquifer test, but groundwater levels have not recovered to pre-test levels.¹³

IV. PUMPAGE INVENTORIES

WHEREAS, annual groundwater pumpage inventories in the Coyote Spring Valley have been published by the State Engineer since 2005. In the years 2005 through 2017 pumping has ranged from 665 acre-feet to 5,606 acre-feet, averaging 2,605 acre-feet. The average pumping in Coyote Spring Valley, excluding the years 2011 and 2012 when the aquifer test was being conducted, is 2,068 acre-feet.¹⁴

WHEREAS, annual groundwater pumpage inventories in the Black Mountains Area have been published by the State Engineer since 2001. In the years 2001 through 2017 pumping in the northwest portion of the basin has ranged from 1,137 acre-feet to 1,591 acre-feet, with an average of 1,476 acre-feet.¹⁵

¹³ See, e.g., USGS water level data for Site 364650114432001 219 S13 E65 28BDBA1 USGS CSV-2. waterdata.usgs.gov/nwis.

¹⁴ See, e.g., Nevada Division of Water Resources, *Coyote Spring Valley Hydrographic Basin 13-210 Groundwater Pumpage Inventory*, 2017.

¹⁵ See, e.g., Nevada Division of Water Resources, *Black Mountains Area Hydrographic Basin 13-215 Groundwater Pumpage Inventory*, 2017.

WHEREAS, annual groundwater pumpage inventories in the Garnet Valley have been published by the State Engineer since 2001. In the years 2001 through 2017 pumping has ranged from 797 acre-feet to 2,181 acre-feet, averaging 1,358 acre-feet.¹⁶

WHEREAS, the State Engineer does not conduct annual groundwater pumpage inventories in the Hidden Valley basin because there is no groundwater pumping in the basin.

WHEREAS, annual groundwater pumpage inventories in the California Wash have been published by the State Engineer since 2016. In the years 2016 and 2017 pumping has ranged from 88 acre-feet to 252 acre-feet, averaging 170 acre-feet.¹⁷ Groundwater pumpage data have been reported by water right holders since 2009.

WHEREAS, annual groundwater pumpage inventories in the Muddy River Springs Area have been published by the State Engineer since 2016. In the years 2016 and 2017 pumping has ranged from 3,553 acre-feet to 4,048 acre-feet, with an average of 3,801 acre-feet.¹⁸ Groundwater pumpage data have been reported by water right holders since 1976.

WHEREAS, total groundwater pumpage in Coyote Spring Valley, Muddy River Springs Area (MRSA), California Wash, Hidden Valley, Garnet Valley, and the northwest portion of the Black Mountains Area in calendar years 2007 through 2017, ranged from 9,090 acre-feet to 14,766 acre-feet. Pumpage in years 2011-2012 during the aquifer test averaged 14,535 afa. Pumpage in years 2015 through 2017, when alluvial pumping in the MRSA was greatly reduced because of the Reid Gardner Generating Station closure, ranged from 9,090 afa to 9,637 afa.

V. AUTHORITY AND NECESSITY

WHEREAS, NRS § 533.024(1)(c) directs the State Engineer “to consider the best available science in rendering decisions concerning the availability of surface and underground sources of water in Nevada.”

¹⁶ See, e.g., *Nevada Division of Water Resources, Garnet Valley Hydrographic Basin 13-216 Groundwater Pumpage Inventory*, 2017.

¹⁷ See, e.g., *Nevada Division of Water Resources, California Wash Hydrographic Basin 13-218 Groundwater Pumpage Inventory*, 2017.

¹⁸ See, e.g., *Nevada Division of Water Resources, Muddy River Springs Area (AKA Upper Moapa Valley) Hydrographic Basin 13-219 Groundwater Pumpage Inventory*, 2017.

WHEREAS, NRS § 533.024(1)(e) was added in 2017 to declare the policy of the State to “manage conjunctively the appropriation, use and administration of all waters of this State regardless of the source of the water.”

WHEREAS, given that the State Engineer must use the best available science and manage conjunctively the water resources in the LWRFS, consideration of any development of long-term, permanent, uses that could ultimately be curtailed due to water availability will be examined with great caution.

WHEREAS, as demonstrated by the results of the aquifer test, Coyote Spring Valley, Muddy River Springs Area, Hidden Valley, Garnet Valley, California Wash, and the northwestern part of the Black Mountains Area have a direct hydraulic connection, and as a result must be administered as a joint administrative unit, including the administration of all water rights based upon the date of priority of such rights in relation to the priority of rights in the other basins.¹⁹

WHEREAS, the pre-development discharge of 34,000 acre-feet of the Muddy River system, which is fully appropriated, plus the more than 38,000 acre-feet of groundwater appropriations within the LWRFS greatly exceed the total water budget within the flow system.

WHEREAS, the results from the aquifer test, the data from groundwater level recovery and spring flow, and climate data indicate to the State Engineer that the quantity of water that may be pumped within the LWRFS without conflicting with senior rights on the Muddy River or adversely affecting the habitat of the Moapa dace is less than the quantity pumped during the aquifer test.

WHEREAS, the current amount of pumping corresponds to a period of time in which spring flows have remained relatively stable and have not demonstrated a continuing decline.

¹⁹ See, e.g., Southern Nevada Water Authority, *Nevada State Engineer Order 1169 and 1169A Study Report*, June 2013; Tom Meyers, Ph.D., *Technical Memorandum Comments on Carbonate Order 1169 Pump Test Data and Groundwater Flow System in Coyote Springs and Muddy River Springs Valley, Nevada*, June 25, 2013; U.S. Fish and Wildlife Service, U.S. Bureau of Land Management and U.S. National Park Service Order 1169A Report, *Test Impacts and Availability of Water Pursuant to Applications Pending Under Order 1169*, June 28, 2013; Johnson and Mifflin, *Summary of Order 1169 Testing Impacts, per Order 1169A*, June 28, 2013; Tetra Tech, *Comparison of Simulated and Observed Effects of Pumping from MX-5 Using Data Collected to the End of the Order 1169 Test, and Prediction of Recovery from the Test*, June 10, 2013, official records in the Office of the State Engineer.

WHEREAS, the precise extent of the development of existing appropriations of groundwater within the LWRFS that may occur without conflicting with the senior rights of the fully decreed Muddy River has not been determined.

WHEREAS, recognizing that there exists a need for further analysis of the historic and ongoing groundwater pumping data, the relationship of groundwater pumping within the LWRFS to spring discharge and flow of the fully decreed Muddy River, the extent of impact of climate conditions on groundwater levels and spring discharge, and the ultimate determination of the sustainable yield of the LWRFS, the State Engineer finds that input by means of reports by the stakeholders in the interpretation of the data from the aquifer test and from the years since the conclusion of the aquifer test is important to fully inform the State Engineer prior to setting a limit on the quantity of groundwater that may be developed in the LWRFS or to developing a long-term Conjunctive Management Plan for the LWRFS and Muddy River.

WHEREAS, the State Engineer finds that it is necessary to carefully monitor the effects of groundwater development within the LWRFS under current conditions, toward the goal of collaboratively (with stakeholders) evaluating the amount of groundwater that may ultimately be developed within the LWRFS without conflicting with senior decreed rights on the Muddy River or adversely affecting the public interest in maintaining the habitat of the endangered Moapa dace. The evaluation process will include public meetings, meetings of a stakeholder representative working group, and coordination with the Hydrologic Review Team (HRT) developed under the 2006 Memorandum of Agreement among the Southern Nevada Water Authority, United States Fish and Wildlife Service, Coyote Springs Investments, Moapa Band of Paiutes, and the Moapa Valley Water District. The process will provide the opportunity for the stakeholders to engage in the development of a conjunctive management plan that will be informed by the determination of the total quantity of groundwater that may be developed within the LWRFS and that will facilitate the continued use of groundwater by junior priority groundwater rights holders whom have perfected their water rights while protecting the senior decreed rights on the Muddy River.

WHEREAS, recognizing that an amount less than the full quantity of the appropriated groundwater rights within the LWRFS may be developed in a manner that will provide for a reasonably certain supply of water for future permanent uses without jeopardizing the economies of the communities reliant on the water supply within the LWRFS, the health and safety of those

whom are either presently reliant the water, existing public interests, or those who may in the future become reliant on a reliable and sustainable source of supply, the State Engineer, with the following exception, finds that it is necessary to issue a temporary moratorium on the review and decision by the Division of Water Resources regarding any final subdivision map or other construction or development submission requiring a finding that adequate water is available to support the proposed development. During the pendency of this Interim Order, the State Engineer may review and grant approval of a subdivision or other submission if a showing of an adequate and sustainable supply of water to meet the anticipated life of the subdivision, other construction or development can be made to the State Engineer's satisfaction.

WHEREAS, through continued monitoring of the LWRFS during the effective period of this Interim Order, the State Engineer seeks to maintain recent groundwater pumping amounts, while providing time for the submission of additional scientific data and analysis regarding the total quantity of water that may be sustainably withdrawn from the LWRFS over the long-term without conflicting with senior Muddy River decreed rights or jeopardizing the communities, water users, or public interests identified above.

WHEREAS, the State Engineer is empowered to make such reasonable rules and regulations as may be necessary for the proper and orderly execution of the powers conferred by law.²⁰

WHEREAS, within an area that has been designated by the State Engineer, as provided for in NRS Chapter 534, where, in the judgment of the State Engineer, the groundwater basin is being depleted, the State Engineer in his or her administrative capacity may make such rules, regulations and orders as are deemed essential for the welfare of the area involved.²¹

WHEREAS, the State Engineer finds that additional data relating to the impacts of groundwater pumping from the LWRFS coupled with the public process will allow his office to make a determination as to the appropriate long-term management of groundwater pumping that may occur in the LWRFS by existing holders of water rights without conflicting with existing senior decreed rights or adversely affecting the endangered Moapa dace.

²⁰ NRS § 532.120.

²¹ *Id.*

VI. ORDER

NOW THEREFORE, the State Engineer orders:

1. The Lower White River Flow System consisting of the Coyote Spring Valley, Muddy River Springs Area, California Wash, Hidden Valley, Garnet Valley, and the portion of the Black Mountains Area as described in this Order, is herewith designated as a joint administrative unit for purposes of administration of water rights. All water rights within the Lower White River Flow System will be administered based upon their respective date of priorities in relation to other rights within the regional groundwater unit.
2. Any stakeholder with interests that may be affected by water right development within the Lower White River Flow System may file a report in the Office of the State Engineer in Carson City, Nevada, no later than the close of business on Monday, June 3, 2019.²² Reports filed with the Office of the State Engineer should address the following matters:
 - a. The geographic boundary of the hydrologically connected groundwater and surface water systems comprising the Lower White River Flow System;
 - b. The information obtained from the Order 1169 aquifer test and subsequent to the aquifer test and Muddy River headwater spring flow as it relates to aquifer recovery since the completion of the aquifer test;
 - c. The long-term annual quantity of groundwater that may be pumped from the Lower White River Flow System, including the relationships between the location of pumping on discharge to the Muddy River Springs, and the capture of Muddy River flow;

²² For any stakeholder affected by the shut-down of the United States government beginning in December 2018, upon a request and showing of good cause to the satisfaction of the State Engineer, an extension of time may be granted to those affected parties.

- d. The effects of movement of water rights between alluvial wells and carbonate wells on deliveries of senior decreed rights to the Muddy River; and,
 - e. Any other matter believed to be relevant to the State Engineer's analysis.
- 3. Any stakeholder with interests that may be affected by water right development within the Lower White River Flow System may file with the Office of the State Engineer no later than the close of business on Thursday July 18, 2019, a rebuttal to the Reports filed on June 3, 2019.
- 4. The State Engineer will schedule an administrative hearing within the month of September 2019 to take comment on the submitted reports.
- 5. During the pendency of this Interim Order:
 - a. Permanent applications to change existing groundwater rights shall be held in abeyance pending the submission of the reports as required by Paragraph 2 of this Order and as authorized by NRS §§ 532.165(1), 533.368 and 533.370(4)(d). Temporary applications to change existing groundwater rights will be processed pursuant to NRS § 533.345.
 - b. A temporary moratorium is issued regarding any final subdivision or other submission concerning development and construction submitted to the State Engineer for review, and such submissions shall be held in abeyance pending the conclusion of the public process to determine the total quantity of groundwater that may be developed within the Lower White River Flow System. The State Engineer may review and grant approval of a subdivision or other submission if a showing of an adequate and sustainable supply of water to meet the anticipated life of the subdivision, other construction or development can be made to the State Engineer's satisfaction.

- c. Holders of water rights who maintain their water rights in good standing by filing all required applications for extension of time in conformity with the requirements of NRS §§ 533.390, 533.395 and 533.410 may cite this order in support of their applications for extension of time.
- d. Holders of water rights who file all required applications for extension of time in conformity with the requirements of NRS § 534.090 may cite this order in support of their applications for extension of time to prevent the working of a forfeiture.



JASON KING, P.E.
State Engineer

Dated at Carson City, Nevada this

11TH day of JANUARY, 2019.

Order 1303, Appendix A : LOWER WHITE RIVER FLOW SYSTEM

Coyote Spring Valley, Muddy River Springs Area, Hidden Valley, Garnet Valley, California Wash, and a portion of Black Mountains Area



Order 1303, APPENDIX B: Groundwater Pumping in the Lower White River Flow System, 2007-2017

Basin No.	219				215		210	216	218	217	Total pumping in the LWRFS
Basin Name	Muddy River Springs Area				Black Mountains Area		Coyote Spring Valley	Garnet Valley	California Wash	Hidden Valley	
Year	Carbonate pumping (reported by MVWD)	Alluvial pumping (reported by NV Energy)	All other Alluvial Pumping ¹	Total Pumping in Basin 219 ¹	Carbonate pumping in the Northwest Portion of Basin 215	Total Pumping in Basin 215					
2007	2,079	4,744	253	7,076	1,585	1,732	3,147	1,412	27 ²	0	13,247
2008	2,272	4,286	253	6,811	1,591	1,759	2,000	1,552	27 ²	0	11,981
2009	2,034	4,092	253	6,379	1,137	1,159	1,792	1,427	21 ³	0	10,756
2010	1,826	4,088	253	6,167	1,561	1,572	2,923	1,373	26 ³	0	12,050
2011	1,837	4,212	253	6,302	1,398	1,409	5,606	1,427	33 ³	0	14,766
2012	2,638	2,961	253	5,852	1,556	1,564	5,516	1,351	28 ³	0	14,303
2013	2,496	3,963	253	6,712	1,585	1,776	3,407	1,484	66 ³	0	13,254
2014	1,442	4,825	253	6,520	1,429	1,624	2,258	1,568	241 ³	0	12,016
2015	2,396	1,249	253	3,898	1,448	1,708	2,064	1,520	460	0	9,390
2016	2,795	941	312	4,048	1,434	1,641	1,722	2,181	252	0	9,637
2017	2,824	535	194	3,553	1,507	1,634	1,961	1,981	88	0	9,090

The LWRFS includes basins 210, 216, 217, 218, 219 and the northwest portion of 215.

All values in this table are from State Engineer basin pumpage inventory reports except as noted in the footnotes below:

1. Alluvial Pumping not reported by NV Energy for years 2007–2015 estimated as the average of inventoried years 2016–2017.
2. Estimated as the average of groundwater pumping in years 2009–2012.
3. Reported to the State Engineer but not published in a basin inventory report.

**IN THE OFFICE OF THE STATE ENGINEER
OF THE STATE OF NEVADA**

ADDENDUM TO INTERIM ORDER #1303

**DESIGNATING THE ADMINISTRATION OF ALL WATER RIGHTS WITHIN
COYOTE SPRING VALLEY HYDROGRAPHIC BASIN (210), A PORTION OF BLACK
MOUNTAINS AREA (BASIN 215), GARNET VALLEY (BASIN 216), HIDDEN VALLEY
(BASIN 217), CALIFORNIA WASH (BASIN 218), AND MUDDY RIVER SPRINGS
AREA (AKA UPPER MOAPA VALLEY) (BASIN 219) AS A JOINT ADMINISTRATIVE
UNIT, HOLDING IN ABEYANCE APPLICATIONS TO CHANGE EXISTING
GROUNDWATER RIGHTS, AND ESTABLISHING A TEMPORARY MORATORIUM
ON THE REVIEW OF FINAL SUBDIVISION MAPS**

WHEREAS, the purpose of this Addendum is to modify the schedule for the submission of reports and rebuttal reports of interested stakeholders analyzing the data available regarding sustainable groundwater development in the Lower White River Flow System (LWRFS), the geographic extent of the LWRFS, and considerations relating to the movement of groundwater pumping between the alluvial wells and carbonate wells and its effects on the fully decreed Muddy River.

WHEREAS, NRS § 533.024(1)(c) directs the State Engineer “to consider the best available science in rendering decisions concerning the availability of surface and underground sources of water in Nevada.”

WHEREAS, NRS § 533.024(1)(e) was added in 2017 to declare the policy of the State to “manage conjunctively the appropriation, use and administration of all waters of this State regardless of the source of the water.”

WHEREAS, based upon the recognition that a need exists for further analysis of the groundwater pumping data, the relationship of groundwater pumping within the LWRFS to spring discharge and flow of the fully decreed Muddy River, the extent of impact of climate conditions on groundwater levels and spring discharge, and the ultimate determination of the sustainable yield of the LWRFS, and the interest in the stakeholders having sufficient time to prepare reports, the State Engineer finds that it is reasonable and appropriate to modify the schedule originally established in Interim Order 1303.

WHEREAS, the State Engineer is empowered to make such reasonable rules and regulations as may be necessary for the proper and orderly execution of the powers conferred by law.¹

WHEREAS, within an area that has been designated by the State Engineer, as provided for in NRS Chapter 534, where, in the judgment of the State Engineer, the groundwater basin is being depleted, the State Engineer in his or her administrative capacity may make such rules, regulations and orders as are deemed essential for the welfare of the area involved.²

ORDER

NOW THEREFORE, the State Engineer orders:

1. The deadline for any stakeholder with interests that may be affected by water right development within the Lower White River Flow System to file a report in the Office of the State Engineer in Carson City, Nevada, is extended to no later than the close of business on Wednesday, July 3, 2019. The substance of the reports should include the same elements as established originally in Interim Order 1303.
2. Any rebuttal report to the Reports filed on July 3, 2019, to be submitted by a stakeholder with interests that may be affected by water right development within the Lower White River Flow System shall be submitted to the Office of the State Engineer no later than the close of business on Friday August 16, 2019.
3. All other matters contained in Interim Order 1303 remain unaltered.

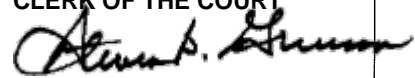

TIM WILSON, P.E.
State Engineer

Dated at Carson City, Nevada this

13th day of May, 2019.

¹ NRS § 532.120.

² *Id.*



OPPS

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**DISTRICT COURT
CLARK COUNTY, NEVADA**

LAS VEGAS VALLEY WATER DISTRICT,
and SOUTHERN NEVADA WATER
AUTHORITY

Petitioners,
v.

ADAM SULLIVAN, P.E., Acting Nevada
State Engineer, DIVISION OF WATER
RESOURCES, DEPARTMENT OF
CONSERVATION AND NATURAL
RESOURCES

Respondent.

Case No.: A-20-816761-C (Lead Case)

Dept. No.: 1

**COYOTE SPRINGS INVESTMENT, LLC'S
OPPOSITION TO LVVWD AND SNWA'S
MOTION FOR STAY PENDING APPEAL**

1 IN THE MATTER OF THE PETITION OF
2 COYOTE SPRINGS INVESTMENT, LLC /

3 IN THE MATTER OF THE PETITION OF
4 APEX HOLDING COMPANY, LLC /

5 IN THE MATTER OF THE PETITION OF
6 CENTER FOR BIOLOGICAL DIVERSITY /

8 IN THE MATTER OF THE PETITION OF
9 MUDDY VALLEY IRRIGATION COM
10 PANY /

11 IN THE MATTER OF THE PETITION OF
12 NEVADA COGENERATION ASSOCIATES
13 NOS. 1 AND 2 /

14 IN THE MATTER OF THE PETITION OF
15 GEORGIA-PACIFIC GYPSUM, LLC AND
16 REPUBLIC ENVIRONMENTAL
17 TECHNOLOGIES, INC. /

18 IN THE MATTER OF THE PETITION OF
19 LINCOLN COUNTY WATER DISTRICT
20 AND VIDLER WATER COMPANY, INC.

CONSOLIDATED WITH:
Case No.: A-20-817765-P (Sub Case)
Dept. No.: 1

Case No.: A-20-817840-P (Sub Case)
Dept. No.: 1

Case No.: A-20-817876-P (Sub Case)
Dept. No.: 1

Case No.: A-20-817977-P (Sub Case)
Dept. No.: 1

Case No.: A-20-818015-P (Sub Case)
Dept. No.: 1

Case No.: A-20-818069-P (Sub Case)
Dept. No. 1

Case No.: A-21-833572-J
Dept. No. 1

22 **COYOTE SPRINGS INVESTMENT, LLC'S OPPOSITION TO LVVWD AND SNWA'S**
23 **MOTION FOR STAY PENDING APPEAL**

24 Coyote Springs Investment, LLC, Petitioner in Case No. A-20-817765-P ("CSI"),
25 opposes LVVWD and SNWA's Motion for Stay Pending Appeal (the "Motion"). This
26 motion is based upon the pleadings on file herein, Rule 8 of the Nevada Rules of
27 Appellate Procedure, and is also supported and based upon the attached points and
28 authorities.

1 Dated this 9th day of May, 2022.

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4 Reno, Nevada 89503

5 

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17
18 **MEMORANDUM OF POINTS AND AUTHORITIES**

19 CSI opposes the Motion for Stay Pending Appeal filed in these consolidated
20 matters by the Las Vegas Valley Water District ("LVVWD") and the Southern Nevada
21 Water Authority ("SNWA") (collectively, "SNWA") and supports its opposition with the
22 following points and authorities

23 **I. INTRODUCTION**

24 Predictably, they have once again created a procedural quagmire riddled with
25 inconsistencies and contradictions.

- 26
- 27 • SNWA challenged Order No. 1309 in a superficial and meaningless way. It
28 simply wanted a seat at the table. Throughout the proceedings, SNWA

1 provided support to the State Engineer's effort to validate Order 1309 and
2 they formed an alliance with the Respondent, even though they disguised
3 their allegiance by and through a Petition for Judicial Review. Their Petition
4 is moot, and their case has been closed.

- 5 • After supporting the State Engineer in its effort to create an illegal mega-
6 basin, the State Engineer boldly pronounced that it had settled case A-20-
7 816761-C with SNWA. The settlement was either a false or an effective
8 maneuver to remove LVVWD and SNWA from these proceedings.
- 9 • SNWA and the Muddy Valley Irrigation Company ("MVIC") chose to put their
10 phony settlement "on the record" while obtaining permission to argue the
11 merits of their petitions. This was simply an effort to curry favor, while
12 challenging the positions of other petitioners. Nonetheless, it was a
13 procedure that removed LVVWD, SNWA, MVIC, and the Center for
14 Biological Diversity ("CBD") as active participants in these proceedings.
- 15 • They led all other petitioners to believe that they would be pursuing an order
16 declaring the alleged settlement as one entered into and processed in good
17 faith. That never happened. The reasons are obvious. CSI served the
18 "settling parties" with a spoilation letter. See **Exhibit 1**. The settlement
19 evidently became effective.
- 20 • After the alleged settlement was put on the record, the State Engineer,
21 LVVWD, SNWA, and CBD (who also allegedly settled) went silent.
- 22 • The Court entered its Findings of Fact, Conclusions of Law, and Order in
23 this matter on April 19, 2022. Neither LVVWD, SNWA, MVIC, nor CBD
24 received a ruling on their petitions. The Court's Order granted the petitions
25 of petitioners CSI, Vidler Water Company/Lincoln County Water District,
26 Apex Holding Company, Nevada Co-Generation Association, and Georgia
27 Pacific Gypsum.
28

- Evidently, the petitions of SNWA, MVIC, and CBD were denied, unresolved, or were dismissed. The records of the Eighth Judicial District reflect that the petitions of SNWA and CBD are “closed”. See **Exhibit 2**.
- There is no appeal pending. No party has filed a notice of appeal. Accordingly, the Motion to Stay falls into the familiar category of nonsense and improper procedural contortions.
- The procedural gymnastics, albeit improper and manipulative, being pursued by SNWA and the CBD to assist the State Engineer in its clumsy efforts to breathe life into Order 1309 should be disregarded.
- Neither LVVWD nor SNWA are “petitioners”. They have placed themselves in the position wanting out of the litigation, while still wanting to control every aspect of the litigation. The hypocrisy is self-evident.
- To date, the State Engineer has signaled no intent or desire to appeal. Accordingly, the alien and fugitive efforts of LVVWD and SNWA to allegedly protect senior surface rights and the Moapa dace habitat is futile. Neither SNWA nor LVVWD have standing to assert the rights of “senior surface water rights” when they challenged the State Engineer’s Order 1309, which has been declared void. And they are not the saviors of endangered species.
- Neither LVVWD nor SNWA have any protectable interests that have been harmed by Order 1309 being declared void.
- The gamesmanship of filing a motion to stay pending appeal when no notice of appeal has been filed, makes it glaringly obvious that procedural shenanigans are afoot, and these manipulative procedural machinations should be rejected.

///

///

1 **II. LEGAL ARGUMENT**

2 **A. The Motion is Premature as SNWA has not Appealed**

3 In a clear act of gamesmanship, SNWA moves to stay pending appeal
4 when it has not even filed a notice of appeal. SNWA represents that it will be
5 filing a notice of appeal by May 19, 2022. SNWA's representation of its future
6 litigation plans is reminiscent of its statement to this Court that it settled its issues
7 with the State Engineer and planned to file a motion for good faith settlement.
8 Such motion was never filed.

9 SNWA has prematurely filed the Motion to attempt to avoid enforcement
10 of this Court's order while simultaneously delaying the time to file the notice of
11 appeal until the last possible day in order to try and prevent CSI from utilizing its
12 water rights as long as possible. This Court should reject SNWA's improper
13 litigation tactics.

14 NRCP 62(d) applies to stays of proceedings pending appeal. Each of
15 NRCP 62(d)'s subsections includes the conditional phrase, "*If an appeal is*
16 *taken . . .*" See NRCP 62(d)(1)-(2) (emphasis added). The same is true for
17 stays concerning appeals by state agencies or its political subdivisions. See
18 NRCP 62(e) ("*When an appeal is taken . . .*") (emphasis added). SNWA cannot
19 skip the procedural step of filing an appeal simply because it does not want this
20 Court's order to take effect. The Motion must be denied.

21 **B. SNWA Lacks Standing to Appeal**

22 The Nevada Supreme Court has reiterated that it "has consistently taken
23 a restrictive view of those persons or entities that have standing to appeal as
24 parties." *Valley Bank of Nevada v. Ginsburg*, 110 Nev. 440, 446, 874 P.2d 729,
25 734 (1994). Therefore, under NRAP 3A(a), "only 'aggrieved parties' may
26 appeal." *Las Vegas Police Protective Ass'n Metro, Inc. v. Eighth Jud. Dist. Ct.*,
27

1 122 Nev. 230, 239, 130 P.3d 182, 189 (2006) (footnote omitted).

2 The Court reiterated that “[a] party is ‘aggrieved’ within the meaning of
3 NRAP 3A(a) ‘when either a personal right or right of property is adversely and
4 substantially affected’ by a district court’s ruling.” *Id.* at 239-40, 130 P.3d at 189
5 (quoting *Valley Bank*, 110 Nev. at 446, 874 P.2d at 734). Moreover, the Court
6 explained that “[a]s we recognized in the 1913 case of *Esmeralda County v.*
7 *Wildes*, a substantial grievance also includes ‘[t]he imposition of some injustice,
8 or illegal obligation or burden, by a court, upon a party, or the denial to him of
9 some equitable or legal right.’” *Id.* (quoting *Esmeralda County v. Wildes*, 36 Nev.
10 526, 535, 137 P. 400, 402 (1913)).

11 Here, SNWA not only purportedly settled with the State Engineer, but
12 SNWA’s Petition for Judicial Review was neither granted nor denied.
13 Presumably, SNWA’s Petition for Judicial Review was rendered moot by this
14 Court’s Findings of Fact and Conclusions of law given that this Court ruled that
15 the State Engineer lacked authority to issue Order 1309. However, that does not
16 mean that SNWA is an aggrieved party under NRAP 3(A)(a) because the
17 challenges raised by SNWA in its Petition for Judicial Review (due process, prior
18 appropriation, conflicts issues) are addressed by Order 1309 being declared void.

19 SNWA’s Answering Brief does not implicate any equitable or legal right.
20 Rather, SNWA’s Answering Brief is simply an attempt to support or supplement
21 the State Engineer’s Answering Brief as though the brief was done as an amicus
22 curiae. But SNWA’s desire to be the State Engineer’s co-counsel does not mean
23 that Order 1309 being declared void actually impacts or effects SNWA’s *legal or*
24 *equitable interests*.

25 SNWA’s Motion references the need to protect the Moapa dace and senior
26 rights. But SNWA has no special connection to the Moapa dace that would afford
27 it the ability to advocate for the dace or that would cause SNWA to have a legal
28 or equitable interest that is impacted by Order 1309 being declared void. SNWA’s

1 interest in protecting the dace is no greater than any member of the public.
2 Moreover, Order 1309 being declared void does not mean that senior water rights
3 holders are immediately harmed. There are several tools available to the State
4 Engineer to manage ground and surface water. Declaring Order 1309 void
5 simply means the State Engineer has to use the available tools within the bounds
6 of his statutory authority. SNWA cannot establish an equitable or legal interest
7 that will be harmed as a result of this Court's Findings of Fact and Conclusions
8 of law. Therefore, SNWA is not an aggrieved party and cannot be party to any
9 appeal. The Motion should be denied.

10 **C. Even if SNWA has Standing to Appeal, a Stay is Not Warranted**

11 "In deciding whether to issue a stay, th[e Nevada Supreme Court]
12 generally considers the following factors:

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

21 *Hansen v. Eighth Jud. Dist. Ct.*, 116 Nev. 650, 657, 6 P.3d 982, 986 (2000). These factors
22 weigh against a stay in this case.

23 **i. The Object of the Appeal Will Not be Defeated if the Stay is Denied.**

24 SNWA characterizes the object of the appeal as "the protection of senior surface
25 water rights and habitat for the Moapa dace." Motion, p. 3. SNWA argues that because
26 the State Engineer concluded in Order 1309 that pumping in excess of 8,000 afa *could*
27 conflict with Muddy River decreed rights, that, absent a stay, pumping will occur that will
28 harm SNWA's rights. However, declaring Order 1309 void does not mean that pumping
in excess of 8,000 afa will automatically occur. There is a process that water rights
holders and the State Engineer must follow. And as Order 1309 makes clear, the State

1 Engineer will only continue to halt CSI's use of its water rights. In fact, the State Engineer
2 has already refused to sign CSI's maps. See **Exhibit 3**. A stay order will only allow the
3 State Engineer additional time to delay in following his statutory mandates and duties.
4 This Court should refuse to allow Order 1309 to have any further impact on CSI's water
5 rights. Notably, the State Engineer's joinder to SNWA's Motion to Stay does not even
6 indicate an intent to appeal.

7 Order 1309 is certainly not the only mechanism to avoid any purported and
8 hypothetical harm to senior water rights holders or the dace. SNWA's hyperbolic narrative
9 to the contrary should be rejected.

10 **ii. SNWA will Not Suffer Any Injury if the Stay is Denied.**

11 Similarly, SNWA will not suffer irreparable injury without a stay because Order
12 1309 is not the sole tool available to the State Engineer to ensure that senior water rights
13 are protected. SNWA ironically contends that without Order 1309, "[i]ncreased
14 groundwater pumping will continue to capture SNWA's senior Muddy River decreed water
15 rights, thereby endangering SNWA's property and causing irreparable injury." Motion, p.
16 4. But SNWA specifically argued in its opening brief that the State Engineer was "allowing
17 junior groundwater pumpers to continue to capture senior Muddy River water rights" in
18 Order 1309. See SNWA Opening Brief, p. 26. Now, SNWA tells this Court that only
19 Order 1309 can avoid this issue. SNWA's changing positions highlight the
20 gamesmanship and improper tactics being employed to delay enforcement of this Court's
21 proper order. The Motion must be denied.

22 **iii. CSI will Suffer Irreparable and Serious Injury if the Stay is Granted.**

23 CSI has already suffered irreparable injury because its use and enjoyment of the
24 water rights it holds has been impaired and degraded by the State Engineer for years.
25 The State Engineer has taken every opportunity to contrive reasons that CSI cannot use
26 its water rights and continue with its development. This Court's Findings of Fact and
27 Conclusions of Law were the first glimpse of justice that CSI has seen in over a decade.
28 Regardless of whether this Court stays enforcement of its order, the State Engineer will

1 likely contrive yet another ploy to prevent CSI from using its water rights. Notwithstanding,
2 this Court should not allow Order 1309 to fulfil that role in the interim.

3 Order 1309 is so blatantly improper and contrary to Nevada law that it should have
4 no ability to impact CSI's significant and substantial interests in its water rights. The stay
5 should be rejected.

6 **iv. CSI is Likely to Prevail on the Merits in the Appeal.**

7 As this Court aptly determined, the State Engineer does not have authority to
8 combine multiple basins into one for "joint administration". Unlike the State Engineer and
9 SNWA, this Court actually conducted a proper statutory interpretation analysis, which
10 unequivocally demonstrates that the State Engineer did not have authority to issue Order
11 1309. Moreover, this Court acknowledged the fundamental errors in the process the
12 State Engineer afforded to the petitioners in the underlying proceedings.

13 Given that the State Engineer (and SNWA in support thereof) utterly failed to justify
14 Order 1309 with any legal authority, it is clear that CSI will prevail on appeal. This Court's
15 Findings of Fact and Conclusions of law are thorough and demonstrate how arbitrary and
16 capricious Order 1309 is. There is no reason to further delay CSI from attempting to use
17 its water rights given everything the State Engineer has put CSI through over the years.
18 The Motion should be denied.

19 **III. CONCLUSION**

20 SNWA has not met its burden to demonstrate that a stay is warranted in this case.
21 Accordingly, CSI respectfully requests that this Court deny the Motion.

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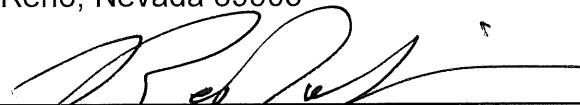
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1 **AFFIRMATION:** The undersigned does hereby affirm that the preceding
2 document and/or attachments do not contain the social security number of any person.
3

4 DATED this 9th day of May, 2022.
5

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Exhibit List

Exhibit List	Description	Pages
Exhibit 1	Spoiliation Letter	3
Exhibit 2	Eighth Judicial Court Records	1
Exhibit 3	May 2 nd Emails between Kayla and Christi Cooper	2

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Robison, Sharp, Sullivan & Brust, and that I served, or caused to be served, a true and correct copy of the foregoing **COYOTE SPRINGS INVESTMENT, LLC'S OPPOSITION TO LVVWD AND SNWA'S MOTION FOR STAY PENDING APPEAL** to be served on all parties to this action by:

_____ placing an original or true copy thereof in a sealed, postage prepaid, envelope in the

United States mail at Reno, Nevada, addressed to:

 X emailing an attached Adobe Acrobat PDF version of the document to the email addresses below/facsimile (fax) and/or E-Filing pursuant to Section IV of the District of Nevada Electronic Filing Procedures:

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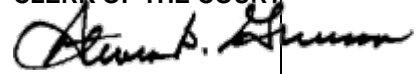
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DATED: This 9th day of May, 2022.



Ashley DeHaven
An Employee of Robison, Sharp, Sullivan & Brust



TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

SOUTHERN NEVADA WATER
AUTHORITY, ET AL.,

Plaintiffs,

vs.

NEVADA STATE ENGINEER,
DIVISION OF WATER
RESOURCES, ET AL.,

Defendants.

CASE NO. A-20-816761-C

DEPT. I

CONSOLIDATED WITH CASES:

A-20-817765-P

A-20-817840-P

A-20-817876-P

A-20-817977-P

A-20-818015-P

A-20-818069-P

A-20-833572-J

BEFORE THE HONORABLE, BITA YEAGER, DISTRICT JUDGE

MONDAY, MAY 16, 2022

TRANSCRIPT OF HEARING

**LVVWD AND SNWA'S MOTION FOR STAY PENDING APPEAL
THE CENTER FOR BIOLOGICAL DIVERSITY'S JOINDER TO LVVWD
AND SNWA'S MOTION TO STAY
STATE ENGINEER'S PARTIAL JOINDER TO LVVWD AND
SNWAS'S MOTION FOR STAY PENDING APPEAL**

SEE APPEARANCES ON PAGE 2

RECORDED BY: LISA A. LIZOTTE, COURT RECORDER

TRANSCRIBED BY: MANGELSON TRANSCRIBING

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5 For Defendant

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(Via Video Conference)

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Senior Deputy Attorney General
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13 and Dry Lake Water, LLC:

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(Via Video Conference)

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18 Associates Nos. 1 and 2:

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20 and Environmental
21 Technologies, Inc.:

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(Via Video Conference)
SYLVIA L. HARRISON, ESQ.
(Via Video Conference)

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4 (Via Video Conference)

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7 (Via Video Conference)

8 For Sierra Pacific Power Company
9 and Nevada Power Company: JUSTINA A. CAVIGLIA, ESQ.
10 (Via Video Conference)

11 For Center for Biological
12 Diversity: SCOTT LAKE, ESQ.
13 (Via Video Conference)

14 For Vidler Water Company, Inc.: KAREN A. PETERSON, ESQ.

15 For Lincoln County
16 Water District: WAYNE O. KLOMP, ESQ.
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1 Las Vegas, Nevada, Monday, May 16, 2022

2
3 [Case called at 9:37 a.m.]

4 THE COURT: This is on Southern Nevada Water Authority
5 versus Nevada State Engineer, A-20-816761-C. Let me go through
6 the roll call to get the appearances on the record.

7 So here for Las Vegas Valley Water District and Southern
8 Nevada Water Authority.

9 MR. TAGGART: Paul Taggart, Your Honor.

10 THE COURT: Okay. And then here for the Nevada State
11 Engineer.

12 MR. BOLOTIN: Good morning, Your Honor. James
13 Bolotin from the Attorney General's Office on behalf of the State
14 Engineer. And with me on BlueJeans, I have Adam Sullivan and
15 Micheline Fairbank from the Nevada Commission of Water
16 Resources.

17 THE COURT: Great, thank you.

18 Here on behalf of Apex Holding.

19 MR. BALDUCCI: Your Honor, Christian Balducci appearing
20 on behalf of Apex and Dry Lake.

21 THE COURT: Great, thank you.

22 Here on behalf of Center for Biological Diversity.

23 MR. LAKE: Scott Lake for the Center for Biological
24 Diversity, appearing by BlueJeans. I also have on BlueJeans, the
25 Center's Great Basin Director, Pat Donnelly.

1 THE COURT: Okay, great. Thank you.

2 Here for Coyote Springs Investment, LLC.

3 MR. ROBISON: Good morning, Your Honor. Kent
4 Robison, Emilia Cargill is present for Coyote Springs, and Brad
5 Herrema is on BlueJeans for CSI.

6 THE COURT: Okay. Great, thank you.

7 MR. COULTHARD: Good morning, Your Honor. Also, Bill
8 Coulthard --

9 MR. ROBISON: Oh, I'm sorry.

10 MR. COULTHARD: -- on behalf of Coyote Springs.

11 THE COURT: It's okay. Good morning, Mr. Coulthard.

12 All right. And then here on behalf of Georgia-Pacific
13 Gypsum, LLC.

14 MR. FOLETTA: Good morning, Your Honor. Lucas Foletta
15 for Georgia-Pacific. And I believe Sylvia Harrison's also on
16 BlueJeans.

17 THE COURT: Okay, great. Thank you.

18 Here on behalf of Lincoln County Water District and Vidler.

19 MR. KLOMP: Good morning, Your Honor. Wayne Klomp
20 on behalf of Lincoln County Water District. And also with me is the
21 General Manager Wayne Poulsen.

22 THE COURT: Okay. All right.

23 MS. PETERSON: Good morning, Your Honor. Karen
24 Peterson from Allison MacKenzie Law Firm here on behalf of Vidler
25 Water Company. And I also have Greg Bushner and Ryan Herd

1 [phonetic] here.

2 THE COURT: Good morning.

3 Then here on behalf of Nevada Cogeneration Associates
4 Nos. 1 and 2.

5 MR. FLAHERTY: Good morning, Your Honor. Frank
6 Flaherty on behalf of Nevada Cogeneration Associates Nos. 1 and 2.

7 THE COURT: Good morning, Mr. Flaherty.

8 Let's see. Nevada Power Company -- I don't -- do we have
9 anyone here on behalf of Nevada Power Company?

10 MS. CAVIGLIA: Good morning, Your Honor. Justina
11 Caviglia on behalf of Nevada Power and Sierra Pacific Power
12 Company.

13 THE COURT: Okay, great.

14 And then just in case, let's see, do we have anyone here
15 on behalf of Bedroc Limited, LLC and City of Northern Las Vegas?

16 MR. MUAINA: Good morning, Your Honor. Derek
17 Muaina, I'm here for Bedroc Limited, LLC.

18 THE COURT: Okay. Thank you.

19 MR. MOORE: And good morning, Your Honor. This is
20 Andy Moore. I'm here on behalf of City of North Las Vegas.

21 THE COURT: Okay. Do we need -- that was Andy Moore?

22 MR. MOORE: Yeah, Bar Number 9128.

23 THE COURT: I'm sorry, 91?

24 MR. MOORE: 28.

25 THE COURT: Thank you.

1 MR. MOORE: And I'm in the -- I'm a Deputy City Attorney
2 with the City.

3 THE COURT: Okay. And then is there anyone here on
4 behalf of Moapa Valley Water District?

5 [No heard response].

6 Okay. What about -- let's see oh there -- anyone here on
7 behalf of Sierra Pacific Power Company?

8 MR. CAVIGLIA: Good morning, Your Honor. Justina
9 Caviglia on behalf of Sierra Pacific as well.

10 THE COURT: Okay, great.

11 Anyone here on behalf of The Church of Jesus Christ of
12 Latter-Day Saints?

13 MR. CARLSON: Good morning, Your Honor. Sev Carlson
14 with Kemper Kroll here on behalf of The Church.

15 THE COURT: Okay, great.

16 And then am I missing anyone? Western Elite, I think is
17 also -- are you also --

18 MR. MUAINA: [Unintelligible].

19 THE COURT: -- representing Western Elite? Okay.

20 THE CLERK: Muddy Valley.

21 THE COURT: Muddy Valley? Did I miss Muddy Valley?

22 MR. DOTSON: Yeah. Good morning, Your Honor.

23 THE COURT: Oh, I'm sorry.

24 MR. DOTSON: Rob Dotson on behalf of Muddy Valley
25 Irrigation Company. I also have Steve King on the phone, and I

1 believe we have members of the Board and the manager.

2 THE COURT: Okay, thank you.

3 Is there anyone that I have missed that needs to state their
4 appearance?

5 Okay. So hearing none.

6 Let me first start out with some housekeeping matters. So
7 we've got the Motion for Attorney's Fees that is set and the Motions
8 to Retax that are set on separate days. I assume that everyone
9 doesn't want to come on separate days, so I was thinking that I
10 would set it for a hearing on the -- sometime around mid-June.
11 Does that work for everyone?

12 MR. ROBISON: It does for CSI, Your Honor.

13 THE COURT: Okay. So then what I will do is the Motion
14 to Retax, the Motion for Attorney's -- the two Motions for Attorney's
15 Fees, I've got one from Lincoln County/Vidler and also Coyote
16 Springs. Let me just take a look at my calendar.

17 I -- why don't I set it for June 20th, at 8:30 a.m. I'm doing
18 that a little early just because I do potentially have a trial that's
19 going, and we'll need to have that trial probably start around 10:00.

20 MR. LAKE: Your Honor, Scott for Center of Biological
21 Diversity. That date's not going to work for us. I'm going to be out-
22 of-state traveling on the 20th.

23 THE COURT: So it's on for the Motion for Attorney's fees.
24 Is that something you have an interest in and would like to attend?

25 MR. LAKE: It depends on if it's going to also include the

1 motion -- the State Engineer's Motion to Retax.

2 THE COURT: Oh, okay.

3 MR. LAKE: I think we have to be here for that.

4 THE COURT: All right. So then when are you here? Or
5 when are --

6 MR. LAKE: Any time before June 15th; any time after
7 June 22nd.

8 THE COURT: Okay. So let's see. I am out of the state on
9 that week of the 27th. I could set it for the 5th -- July 5th at 8:30.
10 How does that work for everyone?

11 MR. TAGGART: Works for us.

12 THE COURT: July 5th, does that work for everyone? 8:30?

13 MR. BOLOTIN: Your Honor --

14 THE COURT: Any issues? Yes.

15 MR. KLOMP: I don't think you're going to find a date that
16 will work for everyone. I will be not available, but I'm sure that we
17 can have someone else cover.

18 THE COURT: Okay.

19 THE COURT RECORDER: Can you state your appearance,
20 please?

21 THE COURT: Wayne.

22 MR. KLOMP: This is Wayne Klomp for Lincoln County.

23 MR. BOLOTIN: Your Honor, this is James Bolotin for the
24 State Engineer, and I was going to say the same thing. I'm not sure
25 I'll be available on July 5th, but I think someone from my office

1 should be able to; I just have to --

2 THE COURT: Okay.

3 MR. BOLOTIN: -- double check with them.

4 THE COURT: All right. If you can have someone available
5 from your office if you're not available, that would be great. Or else
6 we'll be like in November before we are able to do this. Okay. So
7 then why don't we do -- set that then for July 5th, at 8:30. I'll have
8 all of those matters on that one day.

9 And then as another housekeeping matter, I did file a
10 clarification order that dismissed the remaining petitions since I
11 wasn't very precise in that since I thought I was only reaching the
12 due process issues and all that kind of stuff and didn't reach the
13 factual issues that those did not have to be addressed. But I did do
14 that as a housekeeping matter, just so everyone is on the same
15 page regarding that.

16 So then I guess we need to figure out the process by
17 which this hearing should go. So I know Mr. Taggart, this is your
18 motion, and we have the Joinders. I didn't know if those who had
19 the Joinders also wanted to make some arguments or not. I should
20 probably set a time limit as far as how long each party should have
21 since we have quite a few oppositions. Some have a few different
22 points.

23 So I don't know if any of you have discussed this at all
24 beforehand, any ideas, so let me ask. Let me start. Mr. Taggart,
25 how long do you think it would take for you to argue your motion?

1 MR. TAGGART: 15/20 minutes.

2 THE COURT: Okay. And then as far as the Joinders, are
3 there additional points that the other parties would also like to
4 make regarding those Joinders. Let me start with you, Mr. Lake.

5 MR. LAKE: Yes, Your Honor. I think this depends
6 somewhat on Mr. Taggart's argument, but I do have a few points to
7 make. Shouldn't take any longer than five minutes.

8 THE COURT: Okay. Mr. Bolotin?

9 MR. BOLOTIN: Your Honor, about the same answer as
10 Mr. Lake. I'm not sure what we'll add after hearing Mr. Taggart and
11 Mr. Lake go, but there might be a couple points of clarification
12 regarding specifically the State Engineer's stance.

13 THE COURT: Okay. So then as far as the Oppositions, I've
14 got CSI, Apex, Lincoln, Vidler, Nevada Cogeneration, Georgia-
15 Pacific and then we had let's see it's sort of a later filing, Muddy
16 Valley. So if I give everyone max 20 minutes, do you think that
17 should do it?

18 MR. ROBISON: Well, it depends on what you mean by
19 everyone. Mr. Taggart's motion is well spelled out; we know where
20 he's coming from. The Joinders, we don't know. I think they
21 should be limited so that we can get this thing done at least by
22 11:30 or noon.

23 THE COURT: Okay. Well why don't I say this. Max 20
24 minutes each person, each party that's filed. If a previous party has
25 already made a point that covers their own point, I would ask that

1 you just limit your additions to any points that were not made. Is
2 that okay for everyone?

3 MR. ROBISON: Works for us.

4 THE COURT: All right. Great.

5 UNKNOWN SPEAKER: Yes, Your Honor.

6 THE COURT: So the floor is yours, Mr. Taggart.

7 MR. TAGGART: Thank you, Your Honor. And when I said
8 20 minutes, I meant it, but I also imagine I'd get a little bit of
9 rebuttal time at the end too.

10 THE COURT: Yes, you do get a reply.

11 MR. TAGGART: Okay. I mean, only five or ten minutes is
12 probably what I --

13 THE COURT: I trust that -- yeah.

14 MR. TAGGART: Okay. All right.

15 THE COURT: Go ahead.

16 MR. TAGGART: Well, again, good morning, Your Honor.
17 Paul Taggart on behalf of the Water Authority and the Las Vegas
18 Valley Water District. So we're here on our Motion for Stay and
19 Your Honor on April 19th, issued an order that vacated the State
20 Engineer 13 -- or State Engineer Order 1309.

21 And we are here because the problem in the area with
22 groundwater is not going away and it won't go away during the
23 appeal. And the question that Your Honor, I think hinged the order
24 on of whether authority exists for joint administration is a question
25 that the Supreme Court will consider. And if the Supreme Court

1 agrees or disagrees with Your Honor, the State Engineer still has to
2 figure out how to manage the water system.

3 And I think that a key point that we have to ask ourselves
4 is what should happen in the meantime while we wait for the
5 Supreme Court to tell us whether the State Engineer has joint
6 administrative powers. And so we would expect there to be more
7 litigation if we don't stay water development in the Lower White
8 River Flow System.

9 So essentially what we're asking for is that the status quo
10 be maintained. We're not asking for any existing groundwater
11 pumpers to be cut off and we're not -- we're just asking that
12 pumping be maintained at status quo levels. And as you may
13 recall, the State Engineer made findings in his order and I'm not
14 sure what the effect of your order is on those findings. I'm
15 assuming that Your Honor made find -- made legal conclusions
16 about statutory authority which was the basis -- and due process
17 which were the two bases for the vacation of 1309.

18 Meanwhile, there were all the factual determinations that
19 the State Engineer had made that are scientific and one of them is
20 that 8,000 acre-feet is the max amount of water that can be pumped
21 without causing more problems. And I'll just say problems, I
22 don't -- I'll try not to use the word conflicts but just more issues.

23 So I thought about this and I -- you know, as I was coming
24 here today and, you know, my client is concerned about having a
25 water -- of having to serve homes or having homes exist that don't

1 have a sustainable water supply. And I don't think anybody wants
2 there to be homes built or more water uses established during the
3 appeal period that may need to be cut off depending on how the
4 Supreme Court makes its decision and depending on how the State
5 Engineer ultimately then interprets that decision.

6 And how the State Engineer goes back to do his job of
7 determining how to -- because as you recall, there's 38,000 acre-feet
8 of permits in an area, let's call it six separate basins, that has what
9 the State Engineer has determined to be closed hydrologic
10 connection and I think that -- that's what I mean when I say
11 there's -- there were scientific factual findings that I'm not sure
12 your -- what your -- I'm not -- I don't think your order needed to go
13 to those because it said, you know, you can't erase the lines.

14 But if 8,000 acre-feet is the most that should be pumped
15 from these connected areas, then we have 38,000 acre-feet of
16 permits. And what that means is that some people can go start
17 pumping more water now.

18 THE COURT: Well -- so let me ask you, Mr. Taggart -- I
19 mean, so, you know, the finding had to do with the statutory
20 authority and the due process issue but aren't there already
21 curtailment statutes in place that the Nevada State Engineer could
22 use to address this issue?

23 MR. TAGGART: There are and that gets to our issue about
24 piecemeal litigation. I mean, the State Engineer may be wondering
25 what to do next, we wonder what to do next, where -- what the

1 State -- you know, we wonder what to ask the State Engineer to do
2 next. If I can just put it into perspective is -- so my client is
3 concerned about water development on a unsustained -- on an
4 unsustainable water supply. I mean, look at Lake Mead, right. We
5 have concerns of water shortages on the Colorado. We know
6 ground -- well we think -- the State Engineer made findings that
7 groundwater pumping captures water in the Muddy River. That
8 water that is what my client owns, and that water is delivered to Las
9 Vegas Valley and delivered to customers.

10 So when we believe that there is an issue, we ask the
11 State Engineer to do something about it. That started part of this --
12 that started this process. We didn't ask the State Engineer to
13 develop criteria and put them into his Order 1309. We didn't ask
14 the State Engineer to add Kane Springs; we told him not to. We
15 didn't ask the State Engineer to combine the priorities into one
16 group of priorities. We said wait on all of that, just make factual
17 findings.

18 So we need to come up with a way to protect against this
19 unsustainable development. And so what do we do now? If your
20 question being can the State Engineer go back and use other tools?
21 Well, yes, but what if he thinks he has joint administrative powers?
22 We had a similar case like this where if -- I'm going to play this
23 forward a little bit.

24 THE COURT: Okay.

25 MR. TAGGART: If he believes he has joint administrative

1 powers and he appeals your decision, which he has incidentally --

2 THE COURT: Yes --

3 MR. TAGGART: So --

4 THE COURT: -- I saw that there was an appeal.

5 MR. TAGGART: Okay. And so to the extent arguments
6 have been against my motion because it was filed prematurely and
7 before an appeal was filed, I think that's been -- to the extent that
8 argument had merit which I don't think it did, that's been remedied.
9 But -- so he's going to have an appeal arguing that he has joint
10 administrative powers.

11 But then if he starts a process in the meantime to curtail
12 based on individual -- six individual bases and he moves up with
13 that process and he issues that says here's the perennial yield of
14 these six separate basins, here's the priority table in these six
15 separate basins, here's the curtailment of these six separate basins,
16 that will get appealed, most likely.

17 THE COURT: Why would that get appealed?

18 MR. TAGGART: Well his decision to cut 38,000 acre-feet
19 down to 8, probably in whatever method he uses, someone will
20 appeal that decision. Someone's going to claim that he, you
21 know -- in this is basis-specific process, their rights are impacted.
22 So I'm speculating that that would end up in litigation. 1309A or
23 1335 or whatever number they're at now.

24 And then he would be in front of a District Court arguing
25 why he has basin-by-basin authority. Meanwhile, he's at the

1 Supreme Court arguing that he has joint administrative authority.

2 THE COURT: Well, but -- okay, so let's play this out. So
3 let's say he does the basin-by-basin authority now, you know, while
4 the order's vacated and then later on the Supreme Court decides
5 that he does have joint administrative authority, then wouldn't he
6 then be allowed to use the information that he has gotten from the
7 basin-by-basin authority in his joint administration?

8 MR. TAGGART: Maybe. I don't know that we can tell the
9 contours of how all of that works now without seeing that play out.
10 I mean, he'd have to have a whole other administrative hearing, I
11 think; I mean, the due process concerns are paramount. And so he
12 would have to have a whole other administrative hearing and have
13 witnesses and experts, and everything testify and go through that
14 whole process and then ultimately come up with some schedule.
15 Well first a schedule and then a table of -- and where the water
16 stops and when the music stops who gets a chair. He would figure
17 all that out and the folks who don't get chairs are most likely --
18 those are the ones I'm talking about who'd most likely challenge
19 this decision.

20 But I mean, why appeal at all on joint administration if
21 he's going to follow this other process and then later on find out
22 that he has joint administrative powers and that process that he
23 started isn't the right one. I mean, if -- I mean, one of those people
24 who doesn't have a chair, the first argument they might make is oh,
25 well look, the Supreme Court just said you have joint administrative

1 powers. That's the way you're supposed to do it. You can't do it
2 the way you did it. You have to go back and do it again.

3 So that -- I mean -- and meanwhile, how do I make sure
4 my client's water rights are protected from additional groundwater
5 pumping that might capture those water rights in the meantime?
6 We can certainly -- we asked the State Engineer -- we filed a Notice
7 of Alleged Violation and we asked the State Engineer to protect our
8 water rights. Instead of doing that, he issued Order 1309. We can
9 go back and ask him to do that. We'll have a Battle Royale,
10 everybody you can imagine who's allegedly impacting ground --
11 who's pumping groundwater; the same, you know, cast of
12 characters that we've gotten to know here would all be involved in
13 that.

14 And without knowing joint admin -- what joint
15 administrative powers the State Engineer has or doesn't have, we
16 don't know exactly what tools he should be using and I think the
17 State Engineer doesn't know what tools he can use now to manage
18 groundwater in these basins and until he does, he's -- you know, I
19 think a status quo is appropriate.

20 So that's the -- you know, we outlined -- there's obviously
21 four aspects to issuing a stay. The object of the appeal, I think
22 that's what we've just been talking about --

23 THE COURT: I agree.

24 MR. TAGGART: -- is what was the purpose of the appeal;
25 what was the purpose of 1309. And I think a lot of lawyers -- and I --

1 there's a lot of really good lawyers in our midst and you know, the
2 question of what is the object of an appeal I think is varied but I
3 think our point is that it's to protect the groundwater system and to
4 protect the surface water system and the fish. And incidentally,
5 there's an argument about my client not having standing to protect
6 the Moapa dace; that somehow, we aren't an -- we aren't an
7 environmental agency.

8 If you read our Mission Statement, conservation ethic is a
9 major part of the Southern Nevada Water Authority's Mission
10 Statement, and the Southern Nevada Water Authority owns the
11 habitat where the Moapa dace exists and spends millions of dollars
12 maintaining that habitat and making sure that that fish survives.
13 And we do that because it allows us to use water in a sustainable
14 manner.

15 And it's -- you know, years ago, decades ago, water
16 agencies in the west learned that you have to have an
17 environmental ethic if you want to be a water management agency
18 because you have to live side-by-side with the environment. And
19 so we have standing when it comes to protecting injuries to the
20 dace.

21 Also, arguments have been made that we don't have
22 standing because our petition -- so this is going to be -- this will be
23 a little procedurally wonky here but our petition that we filed
24 challenged the conflict's determination. Your Honor ruled on that
25 Friday, on May 13th. We intervened in the challenges to 1309 that

1 were filed by let's say -- let's just use CSI, for instance. So we
2 intervened in that.

3 We filed a Motion to Intervene, we established what our
4 material rights are that would be affected, which under Rule 24(a) is
5 what entitles a party to have intervention rights. And so we argued
6 that in our motion and then a stipulation was entered to allow us to
7 intervene. In our view, we've already established that we have that
8 status as an Intervenor, so we have status to file an appeal of a -- of
9 your vacation order of 1309 that vacated -- that granted CSI's
10 petition, if that makes sense. So in terms of standing, we certainly
11 have standing.

12 Now, on the question of irreparable harm, as you know
13 we have the water rights in the Muddy River that if additional
14 groundwater pumping is -- occurs, we believe that will impact those
15 water rights. And the -- an argument's been made that there's
16 other tools that exist for the -- for those rights to be protected. And
17 for instance, there's an argument that the Moapa Valley Water
18 District has a well that's close to the river and it's called Arrow
19 Canyon and that that's the main culprit of harm to the Muddy River
20 and just shut that off.

21 Well, there's a community of people in a place called
22 Moapa that live off the water that come out of that well. And that's
23 the kind of cavalier kind of approach that can't work when we're
24 dealing with existing water uses. We have to be careful about how
25 we go about managing this resource and not just saying oh well,

1 just shut off Arrow Canyon, that'll fix the problem. it won't fix the
2 problem because then you'll have -- you can't shut off people's
3 homes. You know, there's many people that live in the Moapa
4 community and you can't do that. So that's part of the problem
5 with thinking that there's other tools that the State Engineer can
6 use; they're not easy to implement.

7 We laid out -- and before I say this, I want to clarify that --
8 and I think we did in our papers but that in a Motion for Stay, the --
9 there's four factors and they're balanced. They're balanced -- you
10 know, the Court's supposed to balance those factors. So likelihood
11 of success on the merits is a fun one because that forces me to
12 come in and tell you why you're wrong.

13 THE COURT: I don't care.

14 MR. TAGGART: Okay. All right.

15 THE COURT: That's why --

16 MR. TAGGART: Well I kind of do. So I -- and I think -- but
17 I think we already told you what our position is --

18 THE COURT: Right.

19 MR. TAGGART: -- and you know that we don't -- you
20 know, we've briefed it and came up with a different conclusion than
21 you came up with.

22 THE COURT: Sure.

23 MR. TAGGART: Our point is that if there's a substantial
24 question that's submitted to the Court on an issue of first
25 impression like this, then the likelihood of success on the merits

1 prong for a Motion for Stay can be outweighed or outweighed by
2 irreparable harm and that's how that balancing works.

3 So it's very clear from the Supreme Court's case law that
4 when you present that substantial question, then you don't have to
5 show 90 percent likelihood of success on the merits, you don't have
6 to show clear error by the District Court, you then balance the
7 equities.

8 And so we think there's really a substantial question and I
9 think that we all saw how much work you went through with your
10 order to explain how you came to the determination you did, but by
11 the same token, there's a State Engineer on the other hand who's
12 been living water law for decades and has a different view. And so
13 I think it's clear there's a substantial question about the statutory
14 authority. And so -- so we think that's been established.

15 So then we go back to irreparable harm and -- well, the
16 object of the appeal that we talked about, we think that gets
17 defeated if more groundwater use starts happening during the
18 appeal period because the object of 1309 was to control
19 groundwater pumping while the State Engineer manages this
20 system. So let's -- that object that we want to maintain is the ability
21 to do that without unsustainable water uses without any irreparable
22 harm.

23 So for my client, there's clear case law, there's some
24 interesting cases that we cited to. One's got a great name because
25 it involves a pet cemetery. But these cases say that when you lose

1 water, it's de facto irreparable harm that is in the west, in the driest
2 state in the Nation, and particularly down here. In other parts of
3 Nevada, there's more water than there is in Las Vegas. Losing a
4 water right is irreparable harm. Deprivation of a water right is by,
5 you know, definition, irreparable harm.

6 So we've cited to those cases and we're saying that --
7 we're relying on what the State Engineer found; that it wasn't
8 disturbed by the Court, wasn't endorsed by the Court either but
9 this -- that pumping of groundwater affects the surface water. And
10 more pumping of groundwater will further affect the surface water.
11 That's an injury. That's what we claim.

12 And arguments have been made that we didn't
13 substantiate that with evidence. Well, that's been substantiated
14 with all the evidence that was submitted at the 1309 hearing and
15 that's what we incorporate, if you will. Instead of relitigating all
16 those issues, we're just saying look, the State Engineer was right on
17 those factual findings that only so much water can be pumped
18 before you start capturing more surface water.

19 Likewise, irreparable harm would occur if folks built
20 homes that don't have a sustainable groundwater supply. Likewise,
21 irreparable harm would happen if the habitat for the dace is further
22 impaired.

23 Now, while I'm talking about that, I'll bring up the
24 question of extra record evidence. Your Honor has understood this
25 throughout this case. Efforts have been made to present things to

1 you that weren't in the administrative record of the State Engineer.
2 And in this case the State Engineer had a hearing. I have problems
3 when the State Engineer doesn't have hearings and then we try to
4 decide what's in the record, but when he has a hearing, I think it's
5 really clear, only the evidence that was put into the record by the
6 attorneys and tested by the mettle of that process can be real
7 evidence in a case.

8 THE COURT: You're talking about the March hearing.

9 MR. TAGGART: Right. Yeah

10 THE COURT: Okay.

11 MR. TAGGART: Well yeah, I'm talking about -- yeah, the
12 State Engineer's hearing, right; the State Engineer's administrative
13 hearing.

14 So I think that the same rule applies. There's no reason
15 why in a Motion for Stay you should look at new evidence just like
16 you should -- just like your -- it was appropriate for you to not look
17 at that before, I don't think it's appropriate to look at it here. How
18 would you do that -- I mean, if you were going to do it right, we
19 would have a trial. We would put all that evidence on because
20 people are arguing oh well, now the dace populations are higher,
21 now the flows are higher and so therefore, we don't need to worry
22 about the dace. Well that's just -- in our view, that's not true. The
23 State Engineer made a determination that looked off into the future
24 about risk and that -- and so a new set of data doesn't change that
25 trend that he saw and made findings about.

1 So with respect to our irreparable harm, I think I've
2 covered that. So with respect to the irreparable harm of the other
3 parties, so anyone who's pumping water now still gets to pump
4 water under our suggestion. And that means there's no irreparable
5 harm to Georgia-Pacific, for instance. You know, they're going to
6 continue -- they're going to be able to continue to pump water.

7 It's the folks that have paper rights or -- maybe that's not
8 the right term but it's permits that haven't been pumped that are
9 the ones that wouldn't be able to pump those rights. And they're
10 going to claim that hey, I got an unused chunk of water here, it's
11 senior in priority to this chunk of water that's being used by -- you
12 know, by someone. Classic example, CSI has water that it's not
13 using that on a priority table may appear. I'm not going to concede
14 but may appear to be senior to NVWD's water that they pump out
15 of Arrow Canyon and deliver to customers every day.

16 So should NVWD's water and water use get to continue or
17 should CSI be able to pump water for new customers and then
18 NVWD doesn't get to pump water. I mean, I don't know how that --
19 I mean, I have an opinion, but we haven't gotten to that question
20 yet. But my point is claiming irreparable harm based on a potential
21 use in the future during the appeal period is speculative and it's
22 akin to lost profits or the type of damages that don't establish the
23 status of irreparable because they're speculative and because
24 they're in the future and they're not clear.

25 So I'm sure my colleague will argue that they want to

1 develop the project and if they aren't able to that's going to cost
2 them money -- that's going to cause irreparable harm. Our point is
3 that that's not defined and clear irreparable harm like an existing
4 water user losing existing water.

5 Now, as the -- as I've -- I'm not sure, I must be bumping
6 up against 20 minutes now?

7 MR. ROBISON: Way over.

8 MR. TAGGART: Come on.

9 THE COURT: I'll give you a couple --

10 MR. TAGGART: Okay.

11 THE COURT: -- a few more minutes.

12 MR. TAGGART: I mean, when I start --

13 THE COURT: And I do have --

14 MR. TAGGART: When I start spouting nonsense --

15 THE COURT: -- a question.

16 MR. TAGGART: -- you can shut me up.

17 So the last point I just want to make is that the -- what
18 we're asking you to do is stay the vacation of 1309. That relief isn't
19 exactly the relief we need but it's -- it gets us what we need but it
20 doesn't fit perfect.

21 I mean, what we could do -- I mean, we want a stay on
22 water uses -- additional water uses in these basins, that's what we
23 want. We think 1309 did that because it established a procedure
24 where the State Engineer was going to determine how to, you
25 know, figure out who gets the chairs when the music stops. He was

1 going to do that through a process. And it had a limitation, a
2 limiting power on additional water uses. That's what we want to
3 maintain.

4 If we need to file a Motion to Amend or like a Motion to
5 Alter or Amend and -- or more specifically ask for a partial stay and
6 clarify what that is, I mean, there's a lot of parts to 1309 that you
7 vacated that we don't have a problem with it being vacated. I
8 mean, that -- we're comfortable with it. It's the point of the cap.
9 And so if we need to clarify that that's all we're asking for, I'm doing
10 that now.

11 If we need to file a request for -- you know, alter or amend
12 your April 19th date order, we can do that, although that's going to
13 be due tomorrow. Or we can -- well procedurally things were a
14 little complicated by your order on Friday. I think that whether that
15 created a new appeal date or not.

16 THE COURT: I know.

17 MR. TAGGART: I mean -- but putting all that aside --

18 THE COURT: Okay.

19 MR. TAGGART: -- I think the point that we are trying --
20 that I'm trying to make is from a management perspective, the cap
21 needs to stay in place while the appeal is occurring. If there's a
22 better mechanism for us to use to ask for a stay to make that
23 happen, we can do that. I think there's some valid arguments that
24 are made by the -- by my opponents about the vacation of your
25 order, you know, is more than is necessary to just create that cap.

1 So we could tailor a request more specifically or as I'm --
2 or I can just do that here as I'm standing here now. That's really all
3 we're asking for. I mean, if you said I'm going to -- you know, I'm
4 not going to vacate my part about joint administration, you know,
5 I -- that's -- I'm not going to stay that but I -- because I don't want
6 the State Engineer doing joint administration over the next two
7 years so I'm not going to stay my decision that you don't have joint
8 administration. But I am going to stay the part where I vacated
9 1309's cap. That's what I mean when I say a partial stay.

10 THE COURT: Well yeah, but I mean, that would be really
11 going to the factual findings, wouldn't it, if I was vacating the cap
12 part? I mean, because it's really kind of all or nothing when you're
13 talking about authority and due process.

14 MR. TAGGART: Well, I think that your due process
15 findings and I -- you know, it's your decision, not -- so I'll, you know,
16 offer what I kind of glean from it --

17 THE COURT: Okay.

18 MR. TAGGART: -- is that it's the erasing of the lines and
19 creating the one priority table for all people in the area that was the
20 most troubling part to the Court. On the other hand, rec -- I read the
21 order to recognize that there can be connection between hydrologic
22 basins -- formally created hydrologic basins. I read the order to
23 mean that, you know, your science might change. We may learn
24 more through science but that can't change a set of legal rights that
25 have set up in six separate basins. If you get new science, you can't

1 just wash away legal rights. And so that's how I understood it.

2 That doesn't go to is 8,000 the right number; can 38,000
3 be pumped? I don't think anyone disputes that -- well, let me take
4 it -- maybe there are people that dispute it, but I think the vast
5 majority of folks agree that there's far more permits than there are
6 sustainable water rights or water availability in this area.

7 So it's that factual finding of 8,000 that we're asking the
8 Court to utilize to say we want to maintain the status quo during the
9 pendency of the litigation, we don't want there to be additional
10 groundwater uses that are unsustainable and have to shut those off
11 at the end of an appeal and -- or at some time in the future.

12 THE COURT: Let me ask a procedural question that may
13 sound really stupid but -- so if vacating the order, where is the
14 process as it stands now, meaning I know there was Order 1169 -- I
15 mean, it's basically -- and then we've got the interim -- well the
16 interim order of 1303 is kind of part of 1309, so --

17 MR. ROBISON: 1309 rescinded 1303.

18 THE COURT: Oh that's right. You're right. So --

19 MR. TAGGART: But the --

20 THE COURT: -- and then we're still at 1169, is that where
21 we're at?

22 MR. ROBISON: 1169 is --

23 MR. TAGGART: Well --

24 MR. ROBISON: -- still a valid order of the State Engineer
25 with the rulings that they entered on 1169.

1 THE COURT: Okay.

2 MR. ROBISON: Those are still in effect.

3 THE COURT: Okay.

4 MR. TAGGART: I think -- and we explored this, 1309 --

5 1303 has a express moratorium on subdivision maps in it

6 expressed. And 1309 then rescinded all of 1303.

7 THE COURT: Right.

8 MR. TAGGART: Well, if you vacate an order that

9 rescinded 1309 --

10 THE COURT: Oh so then --

11 MR. TAGGART: -- are you also vacating --

12 THE COURT: Oh boy.

13 MR. TAGGART: -- that recission. Now, we're not making

14 that argument yet --

15 THE COURT: No, I'm just --

16 MR. TAGGART: -- but --

17 THE COURT: I'm just trying to figure out procedurally

18 where everyone is as far as what's happening.

19 MR. TAGGART: I think that --

20 MR. ROBISON: Procedurally you've got --

21 MR. TAGGART: -- some parties --

22 MR. ROBISON: -- a multitude of statutes that you've cited

23 and analyzed very well to which the State Engineer has access

24 should anybody apply or do anything.

25 THE COURT: Okay. So let me ask -- so Mr. Taggart, is it

1 your position that since 1309 rescinded 1303 and 1309 is vacated,
2 that 1303 as the interim order is still standing?

3 MR. TAGGART: I don't really have a defined position on
4 that.

5 THE COURT: Okay.

6 MR. TAGGART: We've explored it but I -- I mean, I'll admit
7 that the argument is stronger that they're all rescinded because it
8 said interim on it and it said -- you know, I think it's a harder -- I
9 mean, we wouldn't be here asking for a stay if we could just go
10 prop up --

11 THE COURT: Oh, 1303, again --

12 MR. TAGGART: -- 1303 and --

13 MR. ROBISON: Yeah.

14 THE COURT: Okay.

15 MR. TAGGART: -- use that.

16 THE COURT: All right.

17 MR. TAGGART: We're here because we think that is
18 possible but probably is the weaker of the arguments.

19 MR. ROBISON: 1303 is so based on the mega basin and
20 on due process that 1309 and --

21 THE COURT: 9 would rescind it.

22 MR. ROBISON: -- your order made those absolutely void
23 as will be 1303 based on mega basin and inappropriate use of
24 statutes.

25 THE COURT: So really, we're still at 1169 with the

1 vacation.

2 MR. ROBISON: Correct.

3 MR. TAGGART: I think so.

4 THE COURT: All right.

5 MR. TAGGART: I mean, 1303 despite -- you know -- I
6 mean, I'm not going to agree with Mr. Robison on that. I mean,
7 1303 didn't create the mega basin yet; that happened in 1309. 1303
8 didn't have Kane Springs in it. So there's a lot of -- 1303 didn't have
9 the criteria that Your Honor looked at so there were a lot of things
10 about it.

11 But I guess the last point I want to make has to do with
12 piecemeal litigation. And so we absolutely know that if a stay is not
13 issued, we will litigate more in the interim. CSI has already asked
14 for a subdivision map to be signed. That's in front of the State
15 Engineer -- well, I don't know if it's in front of the State Engineer or
16 not. They attached some emails to their motion and so we know
17 that requests will be made to the State Engineer, requests will be
18 made to Clark County to sign a subdivision map, requests will be
19 made to my client, to grant a will serve.

20 And if we grant the will serve, we're -- I mean, how could
21 be grant the will serve with what we think we know about the water
22 system out there? But if we -- so -- but if we grant the will serve,
23 then we're authorizing homes to be built on a water supply that
24 we're concerned about. If we deny the will serve, then we're sued
25 and then we're in a whole nother -- we're in Season 5, I think of this

1 whole, you know, mega basin and we'll see where that goes. And
2 I'm trying to avoid that.

3 I mean, if -- I'm trying to say let the Supreme Court decide
4 joint administration and then if you stay the cap and you say the
5 staying of this cap from 1309 is valid, everything else no, and so
6 now go up to the Supreme Court. While we're at the Supreme
7 Court that cap stays in place, we're not litigating more about
8 people's water uses during that timeframe. Thank you, Your Honor.

9 THE COURT: Thank you.

10 All right. Let's see, do we want to go in the order that the
11 Joinders were filed or -- okay, that's fine. So I think Mr. Lake, your -
12 - you filed the first Joinder, I believe.

13 MR. LAKE: Thanks, Your Honor, yeah.

14 I have just a few additional points, it shouldn't take too
15 long. I'd actually like to pick up where Mr. Taggart left off and talk
16 about where we are procedurally and what it's going to take to get
17 to any kind of next step with respect to this problem of there being
18 far more water rights on paper than there is actual physical water.

19 In our view, vacating Order 1309 essentially brings us
20 back to a point of starting from scratch. All of the factual findings
21 that underpin 1309 are -- have been vacated along with the State
22 Engineer's legal conclusions. And, you know, all of the information
23 and the conclusions drawn from that information from the Order
24 1303 hearing have essentially -- cannot be relied on anymore.

25 So we're looking at the reinitiation of a decade or longer

1 process to determine how much water is available for pumping and
2 who gets to pump it. And, you know, when it comes to looking at
3 the equities and how they balance for a stay, there were very
4 substantial interests in this case that will certainly be affected by
5 increased pumping before any process like that can take place. One
6 of those interests is obviously Southern Nevada Authority's water
7 rights, other senior water rights like Muddy Valley Irrigation
8 Company.

9 I, you know -- our position in this litigation I think has
10 been clear throughout so I'd like to talk about the Moapa dace and
11 how impacts can manifest there. We've already seen a request
12 from Coyote Springs to pump more water, essentially; the request
13 for approving subdivision maps, which naturally -- that
14 development is going to require more pumping and likely over the
15 8,000-acre-foot cap. I think we've seen it in Lincoln/Vidler's filings
16 too, a re -- an intent to develop additional water rights in, you know,
17 the Lower White River Flow System area.

18 And while we agree with Southern Nevada Water
19 Authority that extra record evidence is not appropriate here, I don't
20 think the Court should be misled by the presentation of that
21 evidence because if you actually look at the numbers that have
22 been presented there in that Notice for Judicial Review -- or Judicial
23 Notice, I'm sorry, motion. It shows spring flows at Warm Springs
24 West hovering around that 3.2 cfs threshold and potentially
25 declining.

1 In fact, the chart that's included with that motion shows
2 an overall decline in flows at Warm Springs West at the current
3 level of pumping. So it's not hypothetical and it's not speculative
4 that impacts to the Warm Springs are the Moapa dace will occur if
5 there is more groundwater pumping from the subbasins.

6 I'd just like to say a few more words about the interests
7 involved here too. And this is an issue that's kind of an issue of first
8 impression in Nevada in some ways; in other ways it's not. I mean,
9 the -- we discussed in our briefing and the arguments here how the
10 Endangered Species Act acts as a limit on groundwater
11 development.

12 And here, it's very clear that the Endangered Species Act
13 acts as a legal limit that's roughly coextensive with the physical
14 limitations on the system that the State Engineer tried to manage
15 with the 8,000-acre-foot cap and that is as water levels decline
16 pumping, they impact an endangered species. They jeopardize the
17 existence of that species. They could potentially take that species.
18 These are very serious legal ramifications that all parties involved
19 have to be cognizant of.

20 And I think it bears mentioning once again that while
21 there are certain legal protections in place for some parties, they
22 certainly don't extend to all water users in the system. This is just
23 yet another example of how allowing manage -- allowing additional
24 development to continue and casting aside that 8,000 acre-foot cap
25 just leads to a mess that could easily result in additional litigation, it

1 can lead to the development of rights which have a legal basis,
2 which have really no basis in physics and that there's not enough
3 water to serve those rights and would simply, in a long term, result
4 in far more harm to all of the parties involved than simply
5 maintaining the current limit while legal issues are sorted out.

6 I'd also like to point out that we do join SNWA in arguing
7 for potentially a narrower decision. We don't necessarily think the
8 Court needs to completely reverse or stay its decision and vacate
9 1309, but we do think it's important that the -- as the -- you know,
10 since the Court didn't reach the factual issues and the arguments
11 that, you know, based on substantial evidence standard, you know,
12 in this case then the Court should probably take into account the
13 factual findings made there and the very real world consequences
14 that will occur if there is additional groundwater pumping.

15 Whatever form that takes, as Mr. Taggart mentioned, you
16 know, we're open to other procedural mechanisms but he -- I think
17 the important part here is that there's simply not enough water to
18 go around and allowing development to occur without any sort of
19 guiding principles or oversight in the interim between either a
20 decision from the Supreme Court, or a subsequent decision from
21 the State Engineer under different authority just risks a tremendous
22 amount of irreparable harm.

23 THE COURT: Is that --

24 MR. LAKE: That's all I have.

25 THE COURT: That's it, okay. Thank you.

1 Mr. Bolotin.

2 MR. BOLOTIN: Good morning, Your Honor. James
3 Bolotin for the State Engineer. The State Engineer filed partial
4 Joinders to SNWA's Motion for Stay, that's because the State
5 Engineer does not stand in the same shoes as SNWA and Las
6 Vegas Valley Water District and 1309 was at a sense factual findings
7 meant to be the basis of future proceedings.

8 But in the absence of 1309 and the authorities used
9 therein that establish a substantial pumping limit in the Lower
10 White River Flow System, the State Engineer's authority's in
11 question. Even curtailment, a power the State Engineer definitely
12 has under the law is in question if he can't conjunctively manage
13 between surface water and groundwater sources.

14 THE COURT: So let me --

15 MR. BOLOTIN: Based on these --

16 THE COURT: -- let me ask --

17 MR. BOLOTIN: -- outstanding --

18 THE COURT: Let me ask --

19 MR. BOLOTIN: -- questions of the --

20 THE COURT: So, Mr. Bolotin, when you're saying that,
21 you know, you have the power for curtailment, so if you don't -- you
22 know, with a vacation -- with my vacating the Order 1309, how
23 would that endanger your ability to curtail just because I've
24 determined that joint administration is not something that the
25 statute provides for?

1 MR. BOLOTIN: Well respectfully, Your Honor, in your
2 decision vacating Order 1309, I believe you also bring the question
3 whether the State Engineer has authority to engage in conjunctive
4 management --

5 THE COURT: Right.

6 MR. BOLOTIN: -- as well and curtailment in this region
7 would be based on curtailing groundwater, most likely, in the
8 interest of protecting the surface water which is what the definition
9 of conjunctive management is.

10 THE COURT: Right.

11 MR. BOLOTIN: So that's what I'd bring up when I say the
12 State Engineer has uncertainty with moving forward, even with the
13 existing tools that he clearly has explicitly in the law. And based on
14 these outstanding questions of authority, some of which are, as
15 other people have said, questions of first impression going to the
16 Nevada Supreme Court, and the uncertainty for moving forward,
17 the State Engineer agrees that a stay pending appeal is appropriate.

18 THE COURT: Okay. Thank you, Mr. Bolotin.

19 All right. So then now we are going to the Oppositions, I
20 believe; right?

21 MR. ROBISON: Thank you, Your Honor. Kent Robison for
22 Coyote Springs Investment, LLC. I want to offer the Court an
23 apology. I've got to be in the Supreme Court in Carson City, at 3:00.

24 THE COURT: Oh.

25 MR. ROBISON: After my argument, I might slip out the

1 back door and have --

2 THE COURT: No problem.

3 MR. ROBISON: -- my co-counsel answer any questions on
4 behalf of CSI.

5 THE COURT: Sure. And then you know what, if you could
6 also address the proposal for the partial stay, I know that that
7 wasn't actually --

8 MR. ROBISON: Yeah.

9 THE COURT: -- really --

10 MR. ROBISON: You know, I was going to mention that.
11 When did that come up? Speaking of due process --

12 MR. TAGGART: It's in our Reply.

13 MR. ROBISON: And now they want a partial stay to leave
14 the 8,000 acre-feet in place when you have already said in footnote
15 68, that that is not reasonable because that 8,000 feet is based upon
16 an illegal mega basin. It's based upon a statute that the State
17 Engineer created to allow it to cross hydrological basin lines.

18 What is going on in Coyote Springs Valley? That's the
19 hydrological basin in which my client does business. We know
20 we're not as affected, the surface rights as the well pumping and
21 near the Warm Springs Arrow; we know that. So what we're saying
22 in this case, Your Honor, this is the preliminary hearing, we know
23 that. If you deny the motion --

24 THE COURT: You're going to the Supreme Court --

25 MR. ROBISON: -- we know we're going --

1 THE COURT: -- yeah. No, I understand --

2 MR. ROBISON: -- to rule them out --

3 THE COURT: -- that.

4 MR. ROBISON: -- and they have to exhaust their
5 remedy --

6 THE COURT: Sure.

7 MR. ROBISON: -- and that's why we're here and we get
8 that. It's taken a peculiar course. What I -- the main point I want to
9 say, Your Honor, is that they're asking stay an order that was illegal.
10 They're asking to stay 1309, which constitutes a violation of due
11 process and it's not adherent to the statutory frame of that the State
12 Engineer works with the Legislature every two years.

13 And this Court has pointed out in its orders and in the
14 hearing, the closing arguments that there are a multitude of
15 interacting statutes that the State Engineer can regulate our
16 activities. What I want to encourage the Court to see is that there's
17 hyperbole and speculation that saturates the position of SNWA and
18 the State Engineer. They're painting false doomsday scenarios and
19 it's best illustrated by when they say oh look, Coyote Springs is out
20 there trying to develop already and here our CDC says they're going
21 to use only 1,000 acre-feet. That is preposterous.

22 We have been permitted to use 4,600 acre-feet. 460 of
23 those acre-feet have been dedicated to preserve the base habitat.
24 That's set forth in the MOU. And the MOU, Your Honor, is a part
25 of -- we have a contract with SNWA that we self-regulate based

1 upon the levels of the Muddy River, based upon the levels -- we
2 have already agreed to self-regulate. And we are not pumping
3 8,000 square feet.

4 The maps that we submitted -- it's the second time we've
5 submitted maps. The first time we submitted maps, Your Honor,
6 they said sorry, can't do business with you, 1309's in effect. Right
7 after 1309 came out, our maps were subject -- or rejected. That's
8 okay. We litigated 1309 and we said well, 1309's void, maybe we'll
9 try again. 500 acre-feet is what's involved in that map application,
10 not 8,000. We're only 536 acre-feet per year is associated with that
11 application and now it's a doomsday scenario. That's not the case.
12 We still have to go to the process.

13 Imagine this, Your Honor. If there were litigation while
14 this is on appeal, as sure as I am standing here, I know what SNWA
15 is going to do, they're going move to stay that litigation pending an
16 appeal. And we may argue that but I'm not saying we're filing any
17 petition or anything. We don't work for the State Engineer. We
18 know. But let's allow us to proceed with the situations as in Coyote
19 Springs Valley, rather than have to be contaminated with this
20 arbitrary 8,000 feet.

21 And you did address the 8,000 feet in footnote 68 of your
22 order, you handle it very well. You say I'm not necessarily buying
23 the 8,000 acre-feet, that's -- together with the six or seven basins.
24 What they have to determine is the water availability on a basin-by-
25 basin basis. We're in. We're game. We will be more than happy to

1 do that.

2 But, Your Honor, the likelihood of one house being built
3 before this appeal is decided, we'll get hit with a meteorite before
4 that happens and that's just not going to happen, Your Honor. We
5 know what the process is. We know what the curtailment statutes
6 say. We know we got to work with the State Engineer. He may
7 impose the curtailments statute on us at any time, we don't know,
8 but all of this Motion to Stay is based upon not really rational
9 hypotheticals.

10 They're talking about to you what we're going to do.
11 They're talking about what's going to happen. We're regulating the
12 Moapa dace habitat without our MOU and that's still binding and
13 effective. There's no reason to stay this. We've involved ourselves
14 with management of that water to protect the dace and to protect
15 the surface -- the senior surface rights.

16 So Your Honor, we are asking that -- to not Stay this. We
17 know that we're going to revisit this in the Supreme Court if you
18 don't. We're ready for it. We probably won't get oral argument but
19 at least maybe we can submit these transcripts in opposition to
20 their Motion to Stay that's going to be filed in the Supreme Court.

21 But if you look at the balancing of the equities, you asked
22 a very astute question, where are we procedurally? We're at 1169
23 and the rulings in 1169 says we're not going to grant any more
24 applications because it will jeopardize the water rights of the
25 existing water right holders. That's us. That's what 1169 said.

1 We're going to protect the existing issue it permits. We only have
2 4140 now that we get our water to the dace, and we have to work
3 the State Engineer to -- if we use any of that. There's not huge
4 pumping. The first phase would only be 560 -- 536 acre-feet.

5 So we're in good shape when we're with the State
6 Engineer. This does not have to lift the Stay. This is a moratorium.
7 We've been fighting this moratorium since 2017, when the Las
8 Vegas Valley Water District said we're not going to hook you up,
9 we're not going to honor our contract, we're going to leave it up to
10 the State Engineer.

11 Six months later we got a letter that says there's a
12 moratorium on all of your projects, all of the construction, and we
13 said no, we're going to take that to court, and they said okay, we'll
14 take it back, we know that's not based on science. Then we got
15 1303, which is a moratorium on construction. And it says in 1303,
16 we need more science, we need more data.

17 Well then out from that came 1309 which is void and
18 we're saying all we are is back where 1169 left us and we're ready
19 to proceed on that basis. We have to work with the State Engineer
20 on the applicability of those statutes to the Coyote Springs Valley
21 Hydroelectrical Basin. We have to do that. And we're game -- and
22 we got to bring everybody to the MOU which protects all of us.

23 We cut, if cut back. We self-curtail under the MOU if those
24 waters go down. And we know that if there's any problem with the
25 dace -- I'm doing the speculation argument. If there's a problem

1 with the dace, there's a problem with the water levels, we're going
2 to hear about it. We're going to hear about it. The vacation of 1309
3 does not have to be stayed and let us go forward with the status
4 quo and the balance and the equities, we got harmed. This is not
5 an injunction. It's not whether monetary damages eliminate the
6 harm. The harm is everywhere with respect to this shutdown.

7 We've been on moratorium since 2017, with an invalid,
8 unreasonable, unconstitutional order; 1303 and 1309. That's the
9 equities. And we're willing to work with the State Engineer and
10 abide by the statutes. I'll submit the matter, Your Honor.

11 THE COURT: Thank you. All right. Then next I think is
12 Apex?

13 MR. BALDUCCI: Yes, Your Honor.

14 THE COURT: Okay.

15 MR. BALDUCCI: I don't know whether you want me to
16 address the Court from her, or the podium, or --

17 THE COURT: However you feel comfortable.

18 THE COURT RECORDER: You need to be near a mic.

19 THE COURT: Oh yeah, sorry.

20 MR. BALDUCCI: I got yelled at in Judge Kishner's
21 courtroom last month during trial and then they just taped a
22 microphone to me.

23 THE COURT: Oh, okay.

24 MR. BALDUCCI: Which ended up -- and then I took it
25 home with me, which was another story. I brought it back, but it

1 was a big debacle.

2 What I've kind of heard the last, oh I don't know hour and
3 a half maybe, basically feels like a watered-down truncated version
4 of the week we all spent together whenever that was, it feels like
5 ages ago at this point. But that's not what a Motion for Stay is. We
6 are here effectively post-judgment. And when people go to court
7 and they have a problem, there's a winner and there's a loser, that's
8 just how it goes. Somebody's got to win, and somebody's got to
9 lose.

10 The folks that all sat over there during our closing
11 arguments for trial, whatever we want to call it, they lost and
12 they're not very happy about it. But you don't get to relitigate your
13 case in a Motion for Stay, yet that's exactly what we've heard.
14 We've heard new arguments about imposing a 8,000 acre-feet cap,
15 things of that nature.

16 Your role in this case was to evaluate the State Engineer's
17 Decision 1309. Your Honor did that. They've now lost, and they
18 want you to come and effectively be the manager of the water; to
19 make decisions about this by relying on the engineer. That's not
20 your role here. You already did your job, Your Honor, and that's
21 why I think it's important to talk about what normally happens,
22 particularly in this jurisdiction as it -- well, this district, as it relates
23 to stay motions.

24 And we've all seen them here. Normally the side that
25 loses submits a Motion for Stay and they have an order denying it

1 attached as an exhibit because they know it's going to go to the
2 Supreme Court. The judge already made their decision, they decide
3 that I lost. The judge is not going to change their mind and say I
4 win, otherwise there'd be an alter or amend or *nunc pro tunc* or
5 something. That's normally what happens.

6 So it gets kicked to the Supreme Court for them to
7 evaluate the likelihood of success and whether they have a chance
8 to win or not. You already determined that, so we don't even need
9 to get into any of this. It should just be denied. Let the Supreme
10 Court deal with it. You've made your ruling.

11 And I do want to make a point of this. I know everyone
12 keeps talking about it's an issue of first impression, it's never been
13 decided before, blah, blah, blah, yaddy, yaddy, yaddy, yada. Well,
14 there's something to say for the fact that a lack of published
15 opinions on a topic is oftentimes indicative of the fact that you can't
16 do that to begin with and everybody knows it.

17 I'm sorry for the losers here, sort of, but not really
18 because that's what happens when you hitch your wagon to an
19 administrative agency that far exceeds the scope of their authority.
20 And Your Honor identified that; that what the engineer did was
21 illegal.

22 And this brings us, again, to what a stay is about. In most
23 cases that are before us, a stay happens because there's a party
24 that goes to trial as a defendant, they lose, there's a big money
25 judgment entered against them. And the purpose of the stay is to

1 prevent the plaintiff from taking money away from that defendant,
2 in many ways rendering them financially destitute or crushed. Or
3 taking the money via execution and absconding with it to the
4 Cayman Islands or something, okay. That's what we normally see
5 for a stay motion.

6 This case is a lot different. In this case the winners had
7 their water rights. Their water rights were effectively taken away
8 when 1309 was entered. Now, via the stay request, they want to
9 undue -- basically they want to go back multiple steps. My client
10 had water rights, 1309 took some of that away. We won, we got it
11 back, and now they want to undue our win. Okay, that is such a
12 twisted, twisted sort of perverse way to use stay. It shouldn't even
13 be entertained and just kicked over to the Supreme Court to deal
14 with.

15 And that brings us to the equities here. I appreciate the
16 fact that they have water rights and they're being impacted by this.
17 But under the same token, if the stay is entered, it then impacts my
18 client's water rights. Really the equities balance themselves out here
19 because someone's going to get something and someone's going
20 to lose something, no matter what happens.

21 If a stay is not entered, assuming the argument from
22 SNWA and the Water District is right, they're saying hey, we're
23 losing stuff, so you got to enter a stay. And my response to that is
24 if you enter the stay, I'm losing stuff too, except it's stuff that I had
25 up until 1309 was entered. And that goes back to the status quo,

1 you vacated 1309, it put us back to where we had been for decades.
2 Let's just leave it there. There's no reason for you to disturb your
3 decision. If that's going to happen, let the Supreme Court do it.
4 That's why we have this process.

5 But in closing here or summation because again, I did
6 what I didn't want to do which was essentially retry the case in
7 closing, I did it anyway, let's just leave it alone. Let's just -- you
8 made your ruling, you vacated the order entirely because it's illegal,
9 it's unconstitutional, it's void. I mean, it's dead, it doesn't exist.
10 You can't take bits and pieces of it and impose it back on us.

11 I appreciate that it's part of future litigation, but we heard
12 Mr. Robison talk about the way that it's probably going to happen,
13 that's just the nature of these things. And again, that this is what
14 happens when a government agency goes so far beyond their
15 authority that everyone in the room is saying what in the world just
16 happened.

17 The reality of it is nobody should be shocked by this.
18 Everybody knew he couldn't do this, and this is what happens when
19 the government goes too far. The motion should be denied.

20 THE COURT: Thank you, Mr. Balducci.

21 All right. Next pursuant I think is Lincoln/Vidler. I don't
22 know, are you both going to take part or --

23 MS. PETERSON: I think I was going to argue --

24 THE COURT: Okay.

25 MS. PETERSON: -- Your Honor.

1 MR. KLOMP: She is --

2 THE COURT: All right. Great.

3 MR. KLOMP: -- and I'm just going to --

4 THE COURT: Support

5 MR. KLOMP: Yes.

6 THE COURT: Okay.

7 MS. PETERSON: Thank you, Your Honor. And I'm going
8 to not repeat what we put in our pleadings, I'm not going to repeat
9 what other people put in their pleadings but try to address some of
10 the arguments that you've heard today.

11 THE COURT: Sure.

12 MS. PETERSON: And first of all, we would agree that
13 Order 1303 is rescinded by the Court's Order on 1309. And then
14 with regard to this issue of not vacating our --

15 THE COURT: Partial --

16 MS. PETERSON: Not staying all the vacation of Order
17 1309, but just the cap, what we would want to point out is that if the
18 Court is even thinking of entertaining that and we didn't address it
19 because we just opposed the motion for a stay, but a bond would
20 be required by Center for Biological Diversity and Muddy Valley
21 Irrigation Company because they're private parties. And if they're
22 joining in the stay that that would be something that the Court
23 would need to consider.

24 We did provide an affidavit of Ryan Herd. He's here
25 today. We can present evidence if the Court wants it. But we

1 would -- we had an agreement to sell that water, to sell our water
2 and that agreement hasn't been able to go forward because of
3 Order 1309. And the minimum we would want for a bond -- and I'm
4 not talking about any the other Petitioners. But the minimum we
5 would want for a bond would be the value of that contract and that
6 was 4.4 million dollars.

7 So we would ask -- I mean, if the Court is going to think
8 about entertaining that, I know there are certain entities that don't
9 have to post but the other private entities do. And NRS 20.0371
10 discusses multiple appellants and then multiple bonds, and it just
11 says in the aggregate, the amount of a bond cannot exceed 50
12 million dollars for all the --

13 THE COURT: The aggregates.

14 MS. PETERSON: -- all the appellants.

15 And then there is a section about small business concerns
16 and that can be more than a million dollars, but I did want to point
17 out that there's a statute that recognizes that there may be multiple
18 appellants and there may be multiple bonds that are posted by
19 appellants.

20 And obviously the purpose of, you know, the bond is to
21 protect the prevailing party from loss, resulting from a stay of the
22 execution of the judgment. And that's *McCulloch versus Jeakins*
23 and it's 99 Nev. 122. Again, we didn't cite that, but that's the law.

24 And with regard to the Kane Springs water rights, they are
25 property rights. They are vested property rights, and we are not

1 entitled to use them if the cap is put in place; the 8,000 cap. And so
2 we are entitled to be -- to -- you know, to have a bond if there is a
3 stay that's entered with regard to that.

4 And with regard to developing our water rights, going
5 forward if there's no stay and if the cap's not in place, the Kane
6 Springs water rights, there is a stipulation with US Fish and Wildlife
7 that was part of our permits that were granted and the triggers that
8 are in those terms are the exact same triggers that are in the
9 memorandum of understanding or the memorandum of agreement,
10 I can't remember exactly what it's called but it's referenced by the
11 State Engineer and it was referenced by Mr. Robison about what
12 the parties have voluntarily agreed to, to protect the flows of the
13 river and to protect the dace. But our triggers are exactly the same.
14 We have a biological opinion that we talked about below but that
15 recognizes -- US Fish and Wildlife Service recognizes that our
16 project's not going to impact the Moapa dace; I'll just briefly say it
17 that way.

18 And then our existing permits -- and you heard about this
19 in the oral argument we previously had too. Our existing permits
20 say that we can't pump our water rights if they impact senior users.
21 So if we are going to go forward and develop our rights and start
22 pumping, if we impact senior water right holders, then we have to
23 stop pumping. And that is one of the tools -- getting into the tools
24 that are available, that is one of the tools as was argued at length
25 by some of the other water right holders before you in February;

1 that is available to protect.

2 There also are the statutes -- the curtailment statutes that
3 are -- have been referenced. And instead of applying those statutes
4 and working under the existing framework, the movants, I'm going
5 to call them, they just want a blanket injunction against all further
6 pumping, against -- over the 8,000 acre-feet in this 1500 square mile
7 area. And you know why they want that, because it's easier for
8 them. They don't have to do their job. They don't have to do their
9 work.

10 They don't have to -- under the Muddy River Decree, the
11 State Engineer's talking about this conjunctive management and
12 whether they can protect, I guess the decree right holders from
13 groundwater pumping, the State Engineer knows he can. There's a
14 Ninth Circuit case that we cited in our briefing below -- or, you
15 know, previously, that explains that under a decree -- and that was
16 a federal decree. Under a decree, if there's groundwater pumping
17 that interferes with the decree rights, the Court has jurisdiction to
18 address that harm.

19 So that remedy is available to the Muddy Valley Irrigation
20 Company but of course they have to identify the harm that's
21 impacting their rights. They have to put some work into it. They
22 have to do their job to defend their rights under the decree. And
23 the Muddy Valley Irrigation Company even says in its points and
24 authorities in the response that was filed and it's on page 3, line 24.
25 And if necessary, he will take additional actions to protect those

1 rights if it has to because you don't allow the blanket prohibition of
2 pumping over 8,000 to stay in place.

3 Likewise with the State Engineer and any other senior
4 rights that are impacted. They have the tools that are in the
5 statutes right now. They have NRS 534.1106 that allows
6 curtailment restricted by priority that the State Engineer can order if
7 he finds that the perennial yield of the basin is not satisfying all the
8 uses of a basin.

9 But again, they have to do their work. They have to look
10 at the data. They have to give notice to people if they're going to
11 start curtailing their rights. And they don't want to have to all that
12 work, they don't want to have to do their job just so that they can
13 have -- because it's easier for all of them. And we've made a big
14 deal since we've got involved in this case of what the evidence is
15 that's out there.

16 And the evidence shows that Moapa Valley Water
17 District's pumping of the ArrowCreek Well is what's impacting the
18 flows. I don't know why they don't want to look at that data. They
19 don't want to analyze it, they don't want to deal with it because
20 again, it's easier for them to allow Moapa Valley Water District to
21 pump and let Vidler not use their water rights and Lincoln not use
22 their water rights. That is backwards. That is twisted.

23 So those tools are available. They're there. We don't
24 have anything against Moapa Valley Water District, that's just what
25 the data shows. It's not even our data. It's not even our analysis.

1 It's SNWA's analysis, it's Moapa Valley's data. That's what needs to
2 happen, that's what they need to look at, that's what they can do if
3 Order 1309 isn't in place. And for some reason they don't want to
4 do that. So that's our analysis of what needs to happen going
5 forward.

6 And again, if Lincoln and Vidler develop their rights and if
7 there's any impact, they can't pump. I mean, everybody
8 understands that. Everybody knows that.

9 And the other thing that's unfair and I'm sure the Church
10 is going to talk about this or NV Energy, but they have senior rights
11 in this 8,000 group. They're not pumping their rights but yet they're
12 not allowed to pump under what the -- under the proposed cap? I
13 mean, it just doesn't make sense on a lot of different levels. And so
14 that's why, you know, we're opposed to it.

15 I did have a couple other points that I wanted to make. I
16 think -- and I am going to address the Muddy Valley Irrigation
17 Company. They filed a Reply after we filed our Opposition. We
18 didn't know that they were going to file something. And you know,
19 it's problematic because they indicate that they're going to be an
20 Intervenor if they're going to be involved in the appeal. The relief
21 they requested was the same as SNWA; that they thought their due
22 process rights were violated by the Order 1309. So we again
23 wonder whether they're aggrieved, if at all.

24 They've also indicated in -- like I just said, in their
25 response that they filed that if it's necessary, they will take

1 additional actions to protect their rights so that they know there are
2 additional actions out there that they can take to protect their rights.

3 And again, the other thing I have to point out and we
4 brought this up in our Opposition to the Motion to Intervene that
5 was filed, they are being paid by SNWA to participate in this
6 proceeding. And so I think that needs to be taken into account with
7 regard to equities and if the stay is going to be granted.

8 There was discussion about limiting the record and Your
9 Honor, I think it's disingenuous for SNWA to argue that -- and they
10 rely on CSI's evidence or information that was attached to their
11 Opposition. They argue that as evidence of future development
12 and why they need a stay but yet they don't want the Court to
13 consider anything outside the record, yet they use that information,
14 you know, to mean for purposes of promoting their issue of the
15 stay.

16 And I do believe, and I don't have the cite, I apologize,
17 *Ruiz versus Estelle*, it was cited in the *Hansen* case -- the Nevada
18 *Hansen* case and I believe that the court -- it was a Federal case --
19 did indicate that the State was allowed to put evidence in to show
20 harm on a Motion for Stay pending appeal. So I do think it is
21 appropriate for the Court to consider evidence outside the record.

22 And then with regard to -- just briefly touching on this
23 issue that there's going to be 30,000 acre-feet pumped and
24 following up on CSI a little bit. In the Request for Judicial Notice
25 that was filed by Georgia-Pacific and this hydrologic review team

1 annual determination report, on page 3 -- and it adds to what CSI
2 said, but there is voluntary curtailment under the MOA that the
3 parties have agreed to and it's 9,000 acre-feet by SNWA, it's 41000
4 acre-feet by CSI, and the Tribe has agreed not to pump 2500 acre-
5 feet in the California Wash Basin. And there's that 15,000 acre --
6 that's about 15,000 acre-feet right there out of this 30 that they're
7 concerned about is going to be pumped, they've already agreed
8 that 15,000 of that is not going to be pumped.

9 And then if you look at just adding up who else is in that
10 range between 8,000 and 38,000, SNWA has 11,205 acre-feet. the
11 Water District -- Moapa Valley Water District has about 6800 of
12 those acre-feet. The Moapa Band Indians have the 2500. Nevada
13 Power is 3500. And so the parties that are asking for the stay are
14 really asking you to stay their pumping of their water rights, which
15 no -- they've already said they're not going to pump them. So,
16 again, just another reason why the request for the stay doesn't
17 make sense.

18 And then I think Mr. Taggart testified -- or, you know, in
19 his argument today he did indicate that he's speculating the -- you
20 know, that the future pumping is going to be a problem. So again,
21 the stay is based on speculation. And that's all I have unless you
22 have any questions.

23 THE COURT: No, I don't. Thank you.

24 All right. And then let's see, I think it is Nevada
25 Cogeneration.

1 MR. FLAHERTY: Good morning, again, Your Honor.

2 THE COURT: Good morning.

3 MR. FLAHERTY: Frank Flaherty on behalf of Nevada
4 Cogeneration.

5 I want to start by talking a little bit about the *Fritz Hansen*
6 case cited by LVVWD and SNWA. That was a writ case, Your
7 Honor. It was an eight-page decision, the first six of which were
8 devoted to this comprehensive discussion of general and special
9 appearances, the Federal Rules of Civil Procedure, the Amendments
10 to Nevada -- NRCP 12.

11 In the last two pages, the Court turned to the standard for
12 a stay pending appeal or a writ. And in the last paragraph, on the
13 last page, there's a single sentence that's relied upon heavily by
14 SNWA and that says: Although when moving for a stay pending an
15 appeal or writ proceedings, a movant does not always have to
16 show a probability of success on the merits. The movant must
17 present a substantial case on the merits when a serious legal
18 question is involved and show that the balance of equities weighs
19 heavily in favor of the stay.

20 So contrary to SNWA's Reply Brief, the *Fritz Hansen* Court
21 did not state that equities weigh in favor of a stay if it is needed to
22 protect the object of the appeal and to prohibit irreparable harm to
23 the moving party. What it said that absent a showing of a
24 probability of success, which is one of the four factors under NRAP,
25 the movant can obtain a stay on a writ or appeal by substituting for

1 that factor, one, a substantial case on the merits when a serious
2 legal question is involved; and two, the balance of the equities
3 weigh heavily in favor of granting the stay.

4 SNWA's preferred interpretation of *Fritz Hansen*
5 incorrectly equates a mere claim by the movant of irreparable
6 harm -- or excuse me of the frustration of the object of the appeal
7 and an allegation of serious irreparable injury to some kind of
8 finding that there automatically should be a stay, okay. It's
9 distorting the analysis that the Court laid in *Fritz Hansen*, which was
10 indicated was very brief, okay. I don't think the Court made
11 anything clear or spent a lot of time talking about stays in *Fritz*
12 *Hansen*.

13 So this Court must evaluate each factor as part of its
14 evaluation to determine whether or not there was serious
15 irreparable injury in granting the stay and whether or not there was
16 serious irreparable injury in denying the stay.

17 Now, moving kind of to the overarching themes, Your
18 Honor, whether it was deliberate or not, with the possible exception
19 of the State Engineer and SNWA, the Court and the other parties
20 here, we're in the dark about what the ultimate objective or ultimate
21 effect of a stay will be in this case.

22 Now, from NCA's perspective, there's been repeated
23 assurances from SNWA that parties such as NCA have nothing to
24 fear because we're pumping our existing water rights. SNWA said
25 in its motion: Order 1309 did not deprive any existing groundwater

1 pumper of their existing use to rely on its own water rights and
2 because existing pumping is at or near the 8,000-acre-foot pumping
3 limit.

4 And then in its Reply, SNWA states: The stay merely
5 keeps the current limit of 8,000 afa in place. Existing pumping will
6 continue as it has since Order 1309 was issued in June 2020. The
7 stay would only prevent new pumping in excess of 8,000 acre-feet
8 from occurring during that appeal. No crown -- no current
9 groundwater use will be shut off by the stay.

10 Well, the problem with that -- that all sounds great, but the
11 problem is that that's only coming from SNWA. SNWA is not the
12 State Engineer. The only thing we've heard from the State
13 Engineer that even approaches substance is just this short blurb
14 from the State Engineer's very short Joinder. In that short blurb,
15 the State Engineer says it: Agrees a stay is appropriate during the
16 pendency of the appeal.

17 And then it says: In the absence of 1309, which
18 establishes a max amount of groundwater pumping that can be
19 sustained within the LWRFS, the State Engineer is without means to
20 address the next management and administrative steps to identify
21 how to balance the interest of groundwater right holders within the
22 LWRFS while being protective of water resources.

23 Well, at first you think well, that doesn't seem to say
24 much, but if you examine it a little bit more closely there is a little
25 bit revealed and the little bit that's revealed is alarming, okay?

1 When the State Engineer says it's without means -- they said,
2 without means for management and administrative steps, means is
3 code for authority, okay. Without means, we don't have the tools,
4 we don't have the authority.

5 And likewise, management and administrative steps and
6 balancing the interest of water right holders, those are all code for
7 joint administration and conjunctive management; what this Court
8 made clear, the State Engineer does not have the statutory
9 authority to undertake.

10 The Reply SNWA filed only amplified NCA's concern in
11 that regard because since the State Engineer is not speaking for
12 itself, we have to assume that the Water District and SNWA are --
13 that they're acting as some sort of a proxy.

14 In a response to an argument from Lincoln/Vidler, SNWA
15 said that Lincoln/Vidler had missed the point and that, here's where
16 the quote starts: The State Engineer intended to address
17 management questions after he established the initial threshold
18 facts, including the 8,000 afa pumping cap. Without a stay, he
19 cannot properly address those management questions until after
20 the Supreme Court clarifies this authority over groundwater.

21 Well, prior to that in our Opposition, NCA had expressed
22 its grave concern based on the Joinder that the State Engineer
23 viewed the stay as a license to exceed its powers, I just talked about
24 that, during the pendency of the appeal. But SNWA's amplified that
25 by saying the stay would allow the State Engineer to essentially

1 proceed forward with Phase 2, right? We've heard all -- in the
2 hearing we had back in February, well this was all about Phase 1,
3 we're going to go to Phase 2. So they're saying we need the stay
4 so we can go to Phase 2. So it was unlawful to do Phase 1, but they
5 want to go ahead and knock out Phase 2 while the appeal is
6 pending.

7 So aside from presuming success at the Supreme Court,
8 this idea operates on the flawed premise that a clarification of the
9 State Engineer's authority will somehow give the State Engineer
10 authority. I think the State -- the Supreme Court's going to agree
11 with you, Your Honor, they're lacking in authority. But even the
12 Supreme Court can't give the State Engineer the authority it's
13 lacking; only the Legislature can do that.

14 In its Opposition, NCA pointed out numerous instances
15 where SNWA alleges that the Court didn't disagree with various
16 findings of the State Engineer. Well we pointed out that this was
17 just semantics, right? They were relying on the fact that you had
18 not said explicitly that you disagreed with the State Engineer
19 regarding factual findings, therefore that somehow these factual
20 findings survive and have merit and they use those factual findings
21 to try to bootstrap themselves, you know, in a position where they
22 can show serious irreparable injury.

23 SNWA continues that approach in its Reply and says: The
24 Court did not overrule the factual findings of the State Engineer in
25 the order vacating 1309 and you should still defer to those findings

1 in analyzing the stay request and the harm question.

2 The serious problem with that approach is that numerous
3 factual findings were challenged by NCA and other Petitioners in
4 these proceedings. And this Court never reached those challenges
5 because you found that the whole exercise was in excess of
6 authority and was a deprivation of due process.

7 So SNWA is either confused or it's behaving shamelessly
8 in thinking that it can snatch a complete and utter victory, albeit
9 temporary from the jaws of defeat. So I mean, if you distill this to
10 its essence, SNWA's approach to a stay is that the party loses in
11 District Court, okay, wins while the appeal is pending. And they get
12 to do what they want until the Supreme Court confirms the loss.

13 This is kind of similar I think to the argument that Apex
14 just made, Your Honor. It's not correct; it's backwards. SNWA
15 continuously invokes the notion of status quo in its pursuit of the
16 stay, but the status quo is a slippery concept in this case. On the
17 one hand, we have the status quo -- the factual status quo on the
18 ground, who's pumping, who's not. But on the other hand we have
19 the legal status quo with regard to who's pumping and who's not.
20 Does the State Engineer have the authority across this broad super
21 basin to turn off and turn on pumping, okay? That's the question.

22 By reinstating Order 1309 during the pendency of the
23 appeal, you'd breath life back into the following statement of Order
24 1309, the one where the State Engineer says the maximum amount
25 of groundwater that can be pumped is 8,000 afa annually and may

1 be less, okay. When the State Engineer says it may be less, it is
2 reserving to itself the ability to curtail pumping again, across this
3 1500 square mile area where these factual findings are contested by
4 my client -- I don't know if you can remember, Your Honor, my
5 client, we were out in the bottom of the screen there. So the
6 problem is that presupposes the authority to engage in conjunctive
7 management. The State Engineer can't do that.

8 You should deny the stay motion, Your Honor, leaving
9 your order fully intact. This is not a case -- again, I think Apex
10 touched on this. This is not a case where someone's going to
11 collect on a million-dollar judgment. This is a case where you
12 stayed, or you arrested the *ultra vires* action of an administrative
13 agency. And by granting the stay, you'd basically be giving them a
14 license to go ahead and continue to exceed their authority. Thank
15 you.

16 THE COURT: Okay. And then I think we've got Georgia-
17 Pacific. Mr. Foletta.

18 MR. FOLETTA: Yes. Thank you, Your Honor. I will try to
19 be brief because I agree with much of what's been argued by the
20 other counsel on our side of the question.

21 I do want to address just briefly this question about record
22 evidence and its appropriateness here. I agree with Ms. Peterson, I
23 think SNWA's position is disingenuous. The -- they have based
24 their motion almost entirely on supposition about what they think
25 will happen in the future, what they might have to do if those things

1 happen, and what the consequences of those actions will be.

2 So in particular you heard this morning, Mr. Taggart talk
3 about the possibility -- those likelihood in his view of patchwork
4 litigation that results from additional management decisions the
5 State Engineer may make in the absence of 1309, resulting in
6 litigation on his client's part. Obviously, that's not record evidence.
7 Those things have not happened yet. It's a forward-looking
8 assessment about what could happen in the future.

9 And that's not totally inappropriate given the fact that stay
10 motions are forward-looking. But the moving party has to do more
11 than posit a supposition. They have to, under the Supreme Court
12 case law, show some possibility -- something beyond a possibility
13 of irreparable harm. Simply showing some possibility of
14 irreparable harm is insufficient under the -- case. And I would
15 submit that that's all they've done here.

16 Ironically, in opposing our motion and our Request for
17 Judicial Notice, they've actually opposed the use of actual
18 information about what is happening with spring flows in the
19 Moapa dace, since 1309 was issued, which does give us some
20 sense about what is happening now and what could happen in the
21 future.

22 So I don't think their Opposition to our request is
23 legitimate and I do associate with Ms. Peterson's comments about
24 their use of the CSI email. I don't -- it's not appropriate for us to
25 refer to information that's on the State Engineer's website that

1 relates to the LWRFS and I'm not sure why the use of that email is
2 appropriate. And nor is the speculation about what if
3 [indiscernible] is appropriate.

4 The -- I think what's really going on, I think what's
5 apparent when you listen to Mr. Taggart's argument is what Ms.
6 Peterson points out again well is that SNWA doesn't want to do
7 certain things that it doesn't want to do, right? It doesn't want to
8 operate under a legal framework where 1309 is in place. It doesn't
9 want to have to deal with a CSI map -- will serve, excuse me. And it
10 doesn't want to have to deal with State Engineer decisions that are
11 issued that relate to management of these basins in the absence of
12 that order.

13 What's problematic from my client's perspective about
14 that is that it doesn't implicate us at all, right? We're a Petitioner on
15 our own, we are not CSI. What CSI does is what CSI does and what
16 occurs between CSI and SNWA on the practical matter with respect
17 to will serves and development of whatever CSI wants developed is
18 between them. It doesn't implicate the concerns that we've raised
19 in our petition.

20 So to stay our -- the order that granted our Petition for
21 Judicial Review because of concerns that SNWA has about what
22 CSI may do and they request of them would, you know,
23 inappropriately, I think wrap us up into the issues that exist
24 between those two entities and would be asking us to accept a
25 perpetuation and an exacerbation of the harm that we've already

1 experienced so that SNWA can avoid taking certain actions with
2 respect to CSI. And that would be inappropriate. And it's also
3 pretty self-absorbed and it doesn't meet the standard for a stay.

4 So beyond the fact that they supported their request with
5 nothing but supposition, I do want to address this idea of a partial
6 stay. I think that would be highly problematic for a couple of
7 reasons. One is you cannot disassociate the legal findings you
8 made from the 8,000-acre-foot limitation. You just can't.

9 The authority question and the due process question in
10 particular, which is something that SNWA glosses over go -- are
11 part and parcel of the State Engineer's conclusion that 8,000 acre-
12 feet is not -- is a pumping limit that applies indiscriminately across
13 all the basins, right? It's not that 8,000 acre -- you can't just -- you
14 can't take that 8,000 acre-feet and make it relevant to a basin-by-
15 basin approach because it's a number that they derived to apply to
16 the LWRFS as a whole, which is something you said that they
17 couldn't do.

18 And so to allow a state administrative agency decision, I
19 think Mr. Flaherty pointed this out, that was the result of a due
20 process violation and excess authority to stay in place at all, in any
21 part, particularly where that -- where the part that they want to stay
22 in place is related to those legal deficiencies would be very harmful
23 to our clients.

24 I mean, I can't think of a -- I'm not aware of a case --
25 maybe it has happened but it seems to me -- I tried to find one but I

1 couldn't find one -- where a Court would stay the application of an
2 order -- stay the vacation of an order where the court -- the lower
3 court's conclusion was that the government acted on an
4 unconstitutional basis. I mean, think about that. We're saying you
5 acted in violation of the Federal Constitution, but it's okay for now,
6 for the next year while we sort out this other question, which is
7 about the State Engineer's authority which is novel.

8 Well, it might be novel, it might not be, I don't know, but
9 the due process questions are not novel, particularly in the
10 concepts of administrative law, those are easily dealt with, and I
11 think Your Honor did a perfectly adequate job of dealing with it.
12 And so I don't want to miss the forest for the trees here and think
13 that this appeal is all about the question of authority when there's
14 obviously and alternative basis for your decision which was that the
15 process itself was constitutionally flawed.

16 And that is about as harmful as one can get as -- at least
17 as harmful as the government can act. And I would submit that
18 placing the stay in place in the face of that finding would be totally
19 inappropriate.

20 The other thing about the partial stay is that, you know, I
21 read the footnote that Mr. Robison cited to by Mr. Robison to
22 suggest that, you know, you weren't -- at the very least, you're
23 clearly not affirming the validity of the evidentiary basis for the
24 8,000-acre-foot limit.

25 And it would be problematic to allow that portion of the

1 decision stay in place -- of 1309 to stay in place when you didn't
2 make a definitive -- reach a definitive conclusion on that question
3 when some of us raised that as one of the failings of the order,
4 right? So we appealed the evidentiary basis for the 8,000-acre-foot
5 limitation.

6 And in the absence of reaching it on the merits but leaving
7 it in place, at least even temporally, you would be kind of -- the
8 Court would be kind of skating the question of the legitimacy of the
9 evidentiary basis for that num -- for that limit and leaving it in place
10 and kind of depriving us in a way of the opportunity to even -- to
11 litigate that question further. I'm not proposing that you do that.
12 I'm fine with you having done the order the way you did it.

13 But let's say you had decided that there was an -- a
14 legitimate evidentiary basis for the 8,000-acre-foot limit, well we
15 would appeal that and we would probably seek a stay of any order
16 affirming that limit. We don't have that opportunity now because it
17 didn't reach the question, which is fine.

18 The point is I've tried to demonstrate that leaving that
19 8,000-acre-foot cap in place would be leaving something in place on
20 a -- essentially on an evidentiary basis, kind of disassociating it with
21 the legal failings in the order without having actually reached the
22 question of whether there's a legitimate evidentiary basis. And I
23 think that would be harmful to the parties and to the process.

24 I agree, I think with what Mr. Balducci said, you made
25 your order. Your order is your order, people need to deal with it,

1 and there's no -- doesn't appear to be any kind of concrete evidence
2 of irreparable harm that will occur in the next 12 months or
3 however long it takes to appeal it.

4 The last thing I want to point out is this -- the issue of the
5 State Engineer's Joinder to the Motion. I agree with Mr. Flaherty, of
6 all the things we've talked about, I mean, it seems to me that the
7 State Engineer's Joinder is the reason why a stay should not be
8 granted. If the State Engineer in fact intends to undertake
9 additional management decisions on the basis of the 8,000-acre-
10 foot limit that's in 1309, then I would submit to you, the Court
11 simply cannot issue a stay.

12 That not only would perpetuate the harm that is reflected
13 in 1309, but clearly would exacerbate it to the extent that the State
14 Engineer is now taking action -- additional management action on
15 the basis of an order that was unconstitutionally derived and in
16 excess of his authority. So that seems to me to be an untenable
17 possibility and it goes to the harm that we would as Petitioners
18 experience if a stay were ordered. Thank you, Your Honor. I'll
19 submit it at that.

20 THE COURT: Okay. Thank you.

21 So, you know, as far as the Muddy Valley response, that
22 really had to do more about the settlement --

23 MR. DOTSON: Well, if I may --

24 THE COURT: -- I don't know -- yeah, sure. Go ahead.

25 MR. DOTSON: And I'll be very brief.

1 THE COURT: Sure.

2 MR. DOTSON: So what Muddy Valley Irrigation Company
3 finds itself -- and just -- well, what we find ourselves doing is just
4 clarifying the record all the time and I think I have to do so now
5 because even today, I've heard statements I think literally from
6 everyone that I agree with and statements that I heard from
7 everyone that I disagree with --

8 THE COURT: That's kind of this case, right?

9 MR. DOTSON: -- on behalf of my client. Yeah.

10 THE COURT: I mean, this is --

11 MR. DOTSON: And I think that's actually a really
12 important part is that I think to your -- I'm glad I'm not in your seat.
13 I think this is really a unique case because unlike the cases that
14 most of -- well some of us deal with all of the time, when we're
15 dealing with a Motion for Stay and it's just money, that's -- it's
16 binary, it's very simple. This has a gazillion moving parts, I mean,
17 so, very difficult in that regard.

18 The record clarified Muddy Valley Irrigation Company did
19 not join in the stay. Why did we not join in the stay? Because we
20 sought to remand the decision because it held that interfering
21 taking 3,000 acre-feet for Muddy Valley Irrigation Company that has
22 five shareholders represented in the room has got to be a conflict.
23 We also felt our due process rights were violated. That's not
24 acknowledged in Friday's thing --

25 THE COURT: And my apologies --

1 MR. DOTSON: -- but --

2 THE COURT: I should have --

3 MR. DOTSON: But that was --

4 THE COURT: -- included Muddy Valley.

5 MR. DOTSON: -- something --

6 THE COURT: Okay.

7 MR. DOTSON: -- and we still think that's the case. And
8 we don't want that portion of the order -- we don't want for
9 however long this is on appeal that it's okay that 3,000 acre-feet get
10 intercepted. Those are headwaters, they're being intercepted some
11 place. I don't know where, but they should be back in the river.
12 Maybe there are being back in the river.

13 I ran in the response to the 8,000 maybe I -- I mean,
14 because it just seemed like some sort of a -- that was the only
15 portion we would support but on the other hand, counsel for
16 Lincoln County and Vidler is absolutely correct, Muddy Valley
17 Irrigation Company is concerned about the State Engineer's
18 concern that it doesn't have the means because we believe it has
19 means. We believe this Court has means. We think there's a
20 statute that requires the Engineer to protect and to create rights.

21 I'm concerned by some of the things I heard you said
22 today though, candidly, about conjunctive management and
23 whether that was fully appreciated, the impact that portion of your
24 order may have, which is why in the very beginning of my
25 response, I raised Rule 59, right? Because I think that you can do

1 anything today. This is open court; every party is present, except
2 for maybe Moapa Valley here -- I don't know if Moapa Valley is
3 actually here but I think every party has had notice and opportunity
4 to be here.

5 And so it is unique, I do think that -- and we want to make
6 it very clear, Muddy Valley Irrigation Company is waiving no rights.
7 We're not joining in the Motion for Stay. We think there's parts of it
8 would be a good idea. As I've been sitting her quietly listening,
9 maybe maintaining the status quo rather than a numeric number --
10 because the Court will recall I also -- my client did not dis -- did not
11 agree with the 8,000 as making sense. If I'm understanding what
12 people are saying today about exterior evidence that isn't a part of
13 the record, apparently 8,000 hasn't even been being pumped which
14 might explain, again, if what they're saying is accurate, that there's
15 more water in the river.

16 So those were our thoughts and I really just wanted to be
17 here on behalf of my client if you had any questions and again,
18 mostly to set the record straight as apparently we needed to.

19 THE COURT: Okay. Thank you.

20 MR. DOTSON: Thank you.

21 THE COURT: All right. Mr. Taggart.

22 MR. TAGGART: Well, if we thought that your order would
23 make this less complicated, we were wrong.

24 THE COURT: Well, I don't think there's any order that
25 would have made it --

1 MR. TAGGART: Right.

2 THE COURT: -- easier --

3 MR. TAGGART: And --

4 THE COURT: -- truthfully.

5 MR. TAGGART: -- what I would -- I have a couple points
6 that I just want to make and part of it is just, you know, some have
7 alluded that SNWA doesn't want to do the work. Well, we've done
8 everything we can. What else are we supposed to do? We asked
9 the State Engineer to do this, we asked him to protect our water
10 rights. He did it the way he decided to do it and that turned out to
11 not be sufficient for Your Honor.

12 And now what are we -- I mean, we are going to do what
13 we have to do. We're going to be forced into that.

14 THE COURT: I think what --

15 MR. TAGGART: The only question is --

16 THE COURT: -- Ms. Peterson was saying was that the
17 Nevada State Engineer didn't want to --

18 MR. TAGGART: Well, I think I heard Mr. Foletta --

19 THE COURT: Oh, okay.

20 MR. TAGGART: -- say result of the --

21 THE COURT: Oh, that might be true.

22 MR. TAGGART: -- work and --

23 THE COURT: Okay.

24 MR. TAGGART: -- we neglected to do our work. But this
25 is the thing is it's a lot easier for us to talk to you about this than it

1 is for us to talk to the Supreme Court about this. So I don't think it's
2 just a rubber stamp and we just come here, get it denied, go up to
3 the Supreme Court. We're not here because of that. I'm not
4 wasting my time or my client's time because I just think this is
5 worthless. We need to think about what's going to happen.

6 This isn't a typical civil case at all. And so those
7 illustrations don't apply here. We need to think about what occurs.
8 There are very, very complicated questions that are going to come
9 up. I mean, there's colleagues of mine in the room here. We know
10 what these questions are. Can the State Engineer do anything right
11 now?

12 I mean, when we go up to the Supreme Court there's a
13 case called *Westside Charter* that says the Supreme Court takes
14 jurisdiction over a matter that's in front of it and the district courts
15 and the administrative agencies don't have jurisdiction anymore.
16 And so if the State Engineer does anything in the Lower White River
17 Flow System while we're on appeal, will someone argue *Westside*
18 *Charter* blocks him from his jurisdiction? I mean, I've made those
19 arguments in other cases. I've had those arguments made against
20 me in other cases. So we don't know the answer to that.

21 If -- I mean, for instance, if it was a specific water right
22 application that he granted, and it went up on appeal and then it
23 went to the Supreme Court, and he wanted to take action on that
24 application, he couldn't until the Supreme Court resolved it. And so
25 that kind of situation makes this challenging. And --

1 THE COURT: Well let me ask -- because really the only
2 issue really is as far as the joint administration conjunctive
3 management portion that you're talking about, correct? Right -- I
4 mean, it's not like I've completely divested the Nevada State
5 Engineer of all his powers that are granted under the statute.

6 MR. TAGGART: Well I don't know. I mean, we -- I mean, I
7 don't know what parties are going to argue about what you did.

8 THE COURT: Okay.

9 MR. TAGGART: When I -- I think that the factual issues
10 that I am arguing about now are distinct wholly from the joint
11 administration issue. I think the question of hydrologic connection
12 is independent of statutory authority to jointly administer. We
13 thought the State Engineer was doing a two-step process; facts,
14 then policy.

15 And if you just stopped and said I think all of these basins
16 are connected hydrologically, I don't know that Your Honor would
17 have disagreed. He had factual basis for there being a hydrologic
18 connection. Now he --

19 THE COURT: Well -- I mean, here's the problem I think
20 that I see if you're talking about the facts because I think Mr. Foletta
21 is correct in that, you know, if the due process portion of it has been
22 denied, that creeps into those factual findings. I mean, do I as a
23 person, not necessarily as a judge, think there's not enough water?

24 MR. TAGGART: Uh-huh.

25 THE COURT: Absolutely. I'm not saying that as -- you

1 know, as -- in this case. But whether or not those factual findings
2 are supported by substantial evidence, I think the problem is that
3 the due process of the process itself taints -- potentially taints that.
4 And I think that's kind of what I'm trying to reconcile --

5 MR. TAGGART: Well --

6 THE COURT: -- regarding that.

7 MR. TAGGART: -- fine. And I mean, let's take -- let's -- if
8 we break it apart, we know the amount of pumping that happens.
9 That's just a factual determination. The State Engineer looks at all
10 the wells, figures out how -- then he knows where it's all located.
11 That's not in dispute. Then he knows what changes are happening
12 in the river flows. That's not -- that's just factual.

13 Now he made a connection between how changes in the
14 river flows are happening and that there's groundwater pumping
15 that's affecting it. I think we can think of that as a hydrologic
16 determination of where that pumping is and where it's impacting
17 here.

18 And then when he developed the criteria, which again, I'm
19 asking -- I'm pleading -- it's like, my client didn't ask him to develop
20 those criteria. My client didn't ask him to do the things that you
21 found fault with. But now we're stuck with not knowing the answer
22 to what to do when CSI asked for a subdivision map. 536 additional
23 acre-feet of pumping is 16 percent of the 8,000. That's a pretty
24 significant change.

25 Does that mean that someday someone in that 8,000 is

1 going to have to stop pumping. Someone who's currently pumping
2 536 acre-feet is going to have to stop pumping because during this
3 appeal, no one can stop CSI, they're going to come in and say hey,
4 I've got a map, I submitted it, I followed the statutory parameters
5 the State Engineer's on appeal -- under the 1309 case and are we
6 forced to sign that map? If -- or the State Engineer, is he forced to
7 sign that map?

8 Can he issue a moratorium? Can he issue a moratorium
9 tomorrow to say -- just like he did in 1303 and just like I thought he
10 was doing in 1309, can he do that tomorrow? I don't know. Is he
11 precluded from doing it because we have to go to the Supreme
12 Court and see or does he need different basis? Can he use Order
13 1169 to say to CSI no, your pumping impacts these, you know,
14 these water rights, I'm not going to let you do it? Does he even
15 have jurisdiction --

16 THE COURT: Well, I think we've --

17 MR. TAGGART: -- to do that anymore?

18 THE COURT: -- already established that at the very least
19 we've got 1169 in place.

20 MR. TAGGART: Uh-huh.

21 THE COURT: And I think that's still where we're at. You
22 know, there's -- I think there's the different positions or maybe not
23 so different that 1303 is vacated or 1303 is, you know, part of it. But
24 at the very least, at the very ground, we've got 1169 that I think is in
25 place.

1 MR. TAGGART: Well, but all 1169 was was a pump test
2 requirement.

3 THE COURT: Right.

4 MR. TAGGART: And it led to data that was collected and
5 that we all used now and then we used data since after the pump
6 test. That's all 1169 was. It led to the denial of pending
7 applications, right. Not the 38,000 in permits but there were more
8 above that.

9 So I know that -- I agree that that's where we're left but
10 that's really a factual, you know, part -- it kind of informs our factual
11 basis for the situation but unless we know going forward, I mean,
12 can the State Engineer even do a basin-by-basin curtailment now?

13 THE COURT: Why would he not be able to?

14 MR. TAGGART: If *Westside Charter* says the Supreme
15 Court has jurisdiction over everything that's in this basin, then --

16 THE COURT: Oh, I see what you're saying.

17 MR. TAGGART: -- he doesn't have jurisdiction to even do
18 that. I mean, I don't want to speak for the State Engineer, but --

19 THE COURT: So if he doesn't have jurisdiction then he --
20 well, I -- go ahead.

21 MR. TAGGART: I mean, I don't know -- I mean, these are
22 the questions. I guess what I'm really trying to urge us to think
23 about is that do we want to figure out a better way to get through
24 this mess here and this -- with you or are we just going to end up in
25 a bunch of lawsuits all over -- because that's what's going to

1 happen. CSI is going to ask for a will serve there, you know -- I
2 mean, whether they've asked one or not, you know -- I mean, I --
3 whatever.

4 If they do and it's denied, that's a lawsuit. If they do and
5 it's granted, that's a lawsuit. I mean, somebody will -- so there's
6 that lawsuit. If we go, are we supposed to go now to ask the State
7 Engineer to proceed with conflicts? That's another lawsuit. Until
8 we know what joint administration powers he has, our view is it's
9 not prudent to be going forward and letting additional pumping
10 start, otherwise we're not going to have to engage in all these other
11 types of battles.

12 We're going to do it; other people are going to do it. We
13 got to protect our rights. If you put a stay on, it would stop all of
14 that. If you don't put a stay on, on the 8,000-acre-foot cap, then
15 everyone's going to have to start reloading and litigating and we're
16 going to just go on to the next level.

17 So I think what I'm asking is just to get back to what the
18 State Engineer thought he was -- well, we thought the State
19 Engineer was doing which was establish a factual basis for the
20 basins and for the hydrology in the basins and then let him manage
21 that. I'm not saying he -- like Mr. Flaherty said, I'm not saying he
22 would do anything during the appeal period. He would do -- he --
23 we just had a status quo.

24 I don't know -- I can't understand what's gotten some
25 people so worked up who have water that they're pumping now .

1 And what we're saying is you get to keep pumping your water. I
2 mean, what are we -- I mean, to ignore the problem is -- well, just --
3 the status quo, those folks, NCS or Nevada Cogen, Georgia-Pacific,
4 they have water, they're pumping it, they get to keep pumping it.
5 What's the problem? What we're worried about are the people who
6 are going to pump more water that we're going to have to shut off
7 when we figure out this whole mess, two to three years down the
8 line.

9 So that's about all I have. I mean, I think, you know, this is
10 complicated. We -- you know, we've refined down now to where,
11 you know, we're asking that it be focused on the cap if there's an
12 amendment to the order that would do that; that joint
13 administration's not allowed during the appeal period but the State
14 Engineer will maintain a cap of 8,000 acre-feet of pumping in the
15 basins while he -- while the appeal is pending.

16 And then we can go to the Supreme Court, argue over
17 those issues and as soon as they're decided, we'll come back and
18 we won't end up with a bunch of new water uses that we have to --
19 now that the problem's even worse and there's more people at the
20 party with the same number of chairs, the music stops, there's
21 more people who are standing there without water for their uses.
22 So that's why we'd like you to grant that stay.

23 THE COURT: Thank you. I don't know procedurally, do I
24 allow the Joinders to also have reply time or? Anyone?

25 MR. LAKE: Your Honor, Scott Lake for Center of Biological

1 Diversity. I don't have a lot to say beyond what Mr. Taggart said. I
2 would like to respond to a few issues raised by Lincoln/Vidler which
3 were not raised prior to today.

4 THE COURT: Okay.

5 MR. FOLETTA: Your Honor, I -- this is Lucas Foletta and I
6 object.

7 THE COURT: Object as to --

8 MR. FOLETTA: The [indiscernible] joining parties to have
9 a rebuttal argument. I don't think it's appropriate. It's called a
10 Joinder. They argued their position, they didn't file a reply, so I
11 don't think it's appropriate that they have another bite at this point.

12 THE COURT: All right.

13 MR. LAKE: Your Honor, Lincoln/Vidler is specifically
14 asking for a bond against my client for the first time today and I feel
15 like it would be --

16 THE COURT: So let me -- hold on. So that would be if I
17 grant the stay, so I don't think that issue is ripe yet. If it gets to that
18 point, then we can a hearing on that. Would -- does that satisfy
19 your concerns?

20 MR. LAKE: Yes, it does, Your Honor.

21 THE COURT: Okay. All right. Okay. Well then, I will --

22 MR. BOLOTIN: Your Honor

23 THE COURT: So in looking at the stay --

24 MR. BOLOTIN: Your Honor, this is --

25 THE COURT: Yes?

1 MR. BOLOTIN: Real quick.

2 THE COURT: Yes, Mr. Bolotin?

3 MR. BOLOTIN: I would like to respond briefly to two
4 points that Mr. Foletta brought up in his Opposition that I think
5 went a little bit past where the Oppositions were based on -- one
6 thing he said about no case ever putting in place a stay that
7 reinstated a State Engineer decision. And then regarding the -- I
8 think what Mr. Foletta and Mr. Flaherty said regarding the State
9 Engineer joining because he's allegedly rearing up to move on to
10 Phase 2.

11 THE COURT: Okay. I'll allow you a short response to that
12 since that was not necessarily contained in the pleading.

13 MR. FOLETTA: And Your Honor, just to clarify I didn't say
14 that there's never been an order that reimposed a State Engineer
15 decision. I talked about I couldn't find an order where the Court
16 was staying an order that was deemed to have been
17 unconstitutional.

18 THE COURT: And that's what I thought Mr. Foletta was
19 talking about specifically. But if you have something --

20 MR. BOLOTIN: Well just on that point, Your Honor.

21 THE COURT: YEs?

22 MR. BOLOTIN: In the *Pahrump Fair Water* case, which
23 was a case that I handled for the State Engineer, the District Court
24 struck down then Order 1293A, on the basis that the State Engineer
25 exceeded his statutory authority and that he didn't provide

1 adequate due process and that the substantial evidence didn't
2 support his decision. The District Court denied the stay, but then
3 the Supreme Court granted the stay and put Order 1293A back into
4 effect throughout the Supreme Court litigation and the State
5 Engineer ultimately prevailed at the Supreme Court in that case, so
6 I just wanted to make the Court aware of that.

7 And then the State Engineer's Joinder was not designed
8 to get everybody to Phase 2 while this was going on in the
9 Supreme Court. It was just based on the uncertainty as I said in my
10 opening argument of what does he do? Does he go back and look
11 at new authority while he maybe gets Order 1309 put back in place
12 in the Supreme Court? Does he wait for all the Supreme Court to
13 be figured out? It's just not -- there's just a lot of uncertainty and
14 that's why the State Engineer thinks a stay makes sense and it's not
15 because we want to move -- the State Engineer wants to move on
16 to Phase 2 while this is all still going on.

17 THE COURT: Okay. Thank you.

18 All right. So in looking at the Motion for Stay standards,
19 let me go through the different ones.

20 So when we're talking about the object of the appeal, and
21 whether or not it would be defeated, so I don't find that -- I find that
22 there's enough already in place as far as the statutes that allowed
23 for the State Engineer to curtail. There's also the MOUs that are in
24 place regarding the Moapa dace. So I do find that there are other --
25 there's also litigation that could happen regarding the Muddy River

1 Decree, so I do find that there are other legal means that the parties
2 can protect their water rights and protect the Moapa dace. So I
3 don't find that in denying a stay that the object of the appeal here
4 would be defeated.

5 As far as the irreparable harm, also I don't find that SNWA
6 has established that their water rights, as they existed before this
7 Court vacating 1309 will be substantially changed. Also, again, I -- if
8 I'm looking at the irreparable harm that's happening and in
9 balancing the harms, I do find that there has been harms for the
10 Petitioners whose petitions were granted based on the exceeding
11 statutory authority and the due process issues that were
12 problematic in Order 1309. So I don't find that that weighs in favor
13 of granting the stay.

14 As far as whether -- sorry, that's -- hold on.

15 So that actually goes to 2 and 3, whether the Petitioner
16 would suffer irreparable harm and also the Respondent, whether
17 they would suffer irreparable harm. So.

18 And then as to 4, as far as whether or not the Petitioner is
19 likely to prevail on the merits, I appreciate the fact that this is a
20 matter of first impression for the Supreme Court; however, I think
21 the Supreme Court is probably in a better position to decide
22 whether or not a stay would be appropriate. So I'm going to deny
23 the stay at this level. Certainly, I expect that under the Rules of
24 Appellate Procedure 8(a) that the -- that there will be sought -- a
25 motion pursuing the Supreme Court. But that is my determination.

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Who would like to prepare the order?

MR. BALDUCCI: I'm probably the closest to the office or
an office right now --

THE COURT: Okay.

MR. BALDUCCI: -- given the nature of where everyone
came from, so I could probably get it prepared and circulated this
afternoon.

THE COURT: That would be great if you could prepare
and circulate that.

Is there any other clarification that you need from the
Court?

MR. BALDUCCI: No, Your Honor.

THE COURT: No, all right. Thank you all for coming in
person, I really appreciate it. And it's good to see you all again. I
appreciate the level of litigation and talent in this room. So thank
you, again.

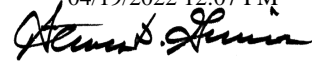
[Hearing concluded at 11:38 a.m.]

* * * * *

ATTEST: I do hereby certify that I have truly and correctly
transcribed the audio/video proceedings in the above-entitled case
to the best of my ability.



Brittany Mangelson
Independent Transcriber


CLERK OF THE COURT

FFCO

**DISTRICT COURT
CLARK COUNTY, NEVADA**

LAS VEGAS VALLEY WATER DISTRICT,
and SOUTHERN NEVADA WATER
AUTHORITY,

Petitioners,

vs.

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

Respondent.

And All Consolidated Cases.

Case No. A-20-816761-C
Dept. No. I

Consolidated with Cases:

A-20-817765-P
A-20-818015-P
A-20-817977-P
A-20-818069-P
A-20-817840-P
A-20-817876-P
A-21-833572-J

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PETITIONS
FOR JUDICIAL REVIEW**

This matter comes before this Court on consolidated petitions for judicial review of State
Engineer's Order 1309 filed by Petitioners:

- Southern Nevada Water Authority and Las Vegas Valley Water District
- Coyote Spring Investment, LLC
- Apex Holding Co. and Dry Lake Water, LLC
- The Center for Biological Diversity
- Muddy Valley Irrigation Company
- Nevada Cogeneration Associates Nos. 1 and 2
- Georgia-Pacific Gypsum LLC and Republic Environmental Technologies, Inc.
- Lincoln County Water District and Vidler Water Company.

1 The parties stipulated to permit the following Intervenor into this matter:

- 2 • Sierra Pacific Power Company d/b/a NV Energy and Nevada Power Company
- 3 d/b/a NV Energy
- 4 • Moapa Valley Water District
- 5 • The Church of Jesus Christ of Latter-Day Saints
- 6 • City of North Las Vegas
- 7 • Western Elite Environmental, Inc. and Bedroc Limited, LLC.

8 In addition, some Petitioners intervened to respond to other petitions for judicial review. The
9 Parties appeared by and through their respective counsels of record. The Court held oral argument
10 from February 14, 2022 to February 17, 2022.

11 The Court having considered the evidence, the pleadings, together with opening and closing
12 arguments presented at the hearing for these matters, and good cause appearing therefor, makes the
13 following Findings of Fact, Conclusions of Law, and Order:

14 **I.**

15 **PROCEDURAL HISTORY**

16 On June 15, 2020, the Nevada State Engineer issued Order No. 1309 as his latest
17 administrative action regarding the Lower White River Flow System (“LWRFS”)¹.

18 On June 17, 2020, the Las Vegas Valley Water District and the Southern Nevada Water
19 Authority (collectively, “SNWA”) filed a petition for judicial review of Order 1309 in the Eighth
20 Judicial District Court in Clark County, Nevada.² Subsequently, the following petitioners filed
21 petitions for judicial review in the Eighth Judicial District Court: Coyote Spring Investments, LLC
22 (“CSI”); Apex Holding Company, LLC and Dry Lake Water LLC (collectively, “Apex”); the
23 Center Biological Diversity (“CBD”); Muddy Valley Irrigation Company (“MVIC”); Nevada
24

25 ¹ SE ROA 2 – 69. The LWRFS refers to an area in southern Nevada made up of several hydrological basins that share
26 the same aquifer as their source of groundwater. The Nevada State Engineer determined that this encompasses the area
27 that includes Coyote Spring Valley, Muddy River Springs Area, California Wash, Hidden Valley, Garnet Valley, Kane
28 Springs Valley and the northwest portion of the Black Mountains Area.

² LVVWD and SNWA Petition for Judicial Review, filed June 17, 2020.

1 Cogeneration Associates Numbers 1 and 2 (“Nevada Cogen”); and Georgia-Pacific Gypsum LLC,
2 and Republic Technologies, Inc. (collectively, “Georgia-Pacific”). All petitions were consolidated
3 with SNWA’s petition.³

4 Later, Sierra Pacific Power Company d/b/a NV Energy (“Sierra Pacific”) and Nevada
5 Power Company d/b/a NV Energy (“Nevada Power” and, together with Sierra Pacific, “NV
6 Energy”), Moapa Valley Water District (“MVWD”), the Church of Jesus Christ and of Latter-Day
7 Saints (the “Church”), the City of North Las Vegas (“CNLV”), and Western Elite Environmental,
8 Inc. and Bedroc Limited (collectively, “Bedroc”) ⁴ were granted intervention status in the
9 consolidated petitions for judicial review of Order 1309.

10 On July 13, 2020, Lincoln County Water District and Vidler Water Co. (collectively,
11 “Vidler”) timely filed their Petition for Judicial Review of State Engineer Order 1309 in the
12 Seventh Judicial District Court in Lincoln County, Nevada, identified as Case No. CV-0702520.
13 On August 26, 2020, the Seventh Judicial District Court issued an Order Granting Motion to
14 Change Venue, transferring this matter to the Eighth Judicial District Court in Clark County,
15 Nevada. Vidler appealed the Order Granting Motion to Change Venue to the Nevada Supreme
16 Court, and on April 15, 2021, the Nevada Supreme Court entered its Order of Affirmation. On
17 May 27, 2021, per verbal stipulation by the parties, the Court ordered this matter consolidated into
18 Case No. A-20-816761-C. When transferred to the Eighth Judicial District Court, Vidler’s action
19 was assigned Case No. A-21-833572-J. Notwithstanding the consolidation of all of the cases, each
20 case retained its individual and distinct factual and legal issues.

21 Petitioners in all the consolidated actions filed their Opening Briefs on or about August 27,
22 2021. Respondents State Engineer, Intervenors, and Petitioners who were Respondent-Intervenors
23 filed their Answering Briefs on or about November 24, 2021. Petitioners filed their Reply Briefs on
24 or about January 11, 2022.

25
26 _____
27 ³ Stipulation for Consolidation, A-20-816761-C, May 26, 2021.

28 ⁴ Bedroc and CNLV did not file briefs and did not participate in oral argument.

II.

FACTUAL HISTORY

A. The Carbonate Groundwater Aquifer and the Basins

Much of the bedrock and mountain ranges of Eastern Nevada are formed from a sequence of sedimentary rocks laid down during the Paleozoic Era. These formations are limestones or dolomites, commonly referred to as “carbonates,” due to the chemical composition of the minerals composing the rocks. These formations have been extensively deformed through folding and faulting caused by geologic forces. This deformation has caused extensive fracture and fault systems to form in these carbonate rocks, with permeability enhanced by the gradual solution of minerals. The result is an aquifer system that over time has accumulated large volumes of water with some apparent degree of connection throughout the much of area.⁵ The valley floors in the basins of Eastern Nevada are generally composed of alluvium comprised largely of relatively young (<5 million years) unconsolidated sands, gravels, and clays. This sequence is loosely referred to as the “Alluvial Aquifer,” the aquifer for most shallow wells in the area. Most of the water in the Carbonate Aquifer is present due to infiltration of water thousands of years ago; recent recharge from present day precipitation may represent only a fraction of the water stored.

Approximately 50,000 square miles of Nevada sits atop of this geologic layer of carbonate rock, which contains significant quantities of groundwater.⁶ This carbonate-rock aquifer system contains at least two major “regional flow systems” - continuous, interconnected, and transmissive geologic features through which water flows underground roughly from north to south: the Ash Meadows-Death Valley regional flow system; and the White River-Muddy River Springs system.⁷ These flow systems connect the groundwater beneath dozens of topographic valleys across distances exceeding 200 miles.⁸ The White River-Muddy River Springs flow system, stretching approximately

⁵ State Engineer Record on Appeal (“SE ROA”) 36062-67, Ex. 14; SE ROA 661, Ex. 8.

⁶ SE ROA 659.

⁷ SE ROA 661.

⁸ SE ROA 661.

240 miles from southern Elko County in the north to the Muddy River Springs Area in the south, was identified as early as 1966.⁹ The area designated by Order 1309 as the LWRFS consists generally of the southern portion of the White River-Muddy River Springs flow system.¹⁰

The Muddy River runs through a portion of the LWRFS before cutting southeast and discharging into Lake Mead.¹¹ Many warm-water springs, including the Muddy River Springs at issue in this litigation, discharge from the regional carbonate groundwater aquifer.¹² The series of springs, collectively referred to as the “Muddy River Springs” in the Muddy River Springs Area hydrographic basin form the headwaters of the Muddy River and provide the only known habitat for the endangered Moapa dace.¹³

The Muddy River Springs are directly connected to, and discharge from, the regional carbonate aquifer.¹⁴ Because of this connection, flows from the springs are dependent on the elevation of groundwater within the carbonate aquifer, and can change rapidly in direct response to changes in carbonate groundwater levels.¹⁵ As carbonate groundwater levels decline, spring flows decrease, beginning with the highest-elevation springs.¹⁶

As early as 1989, there were concerns that sustained groundwater pumping from the carbonate-rock aquifer would result in water table declines, substantially deplete the water stored in the aquifer, and ultimately reduce or eliminate flow from the warm-water springs that discharge from the aquifer.¹⁷

⁹ SE ROA 11349-59.

¹⁰ *See* SE ROA 11350.

¹¹ SE ROA 41943.

¹² SE ROA 660-61, 53056, 53062.

¹³ SE ROA 663-664, 41959, 48680.

¹⁴ SE ROA 73-75, 34545, 53062.

¹⁵ SE ROA 60-61, 34545.

¹⁶ SE ROA 46, 34545.

¹⁷ *See* SE ROA 661.

1 The general rule in Nevada is that one acquires a water right by filing an application to
2 appropriate water with the Nevada Division of Water Resources (“DWR”). If the DWR approves
3 the application, a “Permit to Appropriate” issues. Nevada has adopted the principle of “first in
4 time, first in right,” also known as “priority.” The priority of a water right is determined by the
5 date a permit is applied for. Nevada’s water resources are managed through administrative units
6 called “hydrographic basins,” which are generally defined by topography, more or less reflecting
7 boundaries between watersheds. Nevada is divided into 232 hydrographic basins (256
8 hydrographic basins and sub-basins, combined) based upon the surface geography and subsurface
9 flow.

10 The priority of groundwater rights is determined relative to the water rights holder within
11 the individual basins. If there is not enough water to serve all water right holders in a particular
12 basin, “senior” appropriators are satisfied first in order of priority: the rights of “junior”
13 appropriators may be curtailed. Historically, The Nevada State Engineer has managed
14 hydrographic basins in a basin-by-basin manner for decades,¹⁸ and administers and manages each
15 basin as a discrete hydrologic unit.¹⁹ The State Engineer keeps and maintains annual pumping
16 inventories and records on a basin-by-basin basis.²⁰

17 This administrative structure has worked reasonably well for basins where groundwater is
18 pumped from “basin fill” aquifers or alluvium, where the annual recharge of the groundwater
19 historically has been estimated based upon known or estimated precipitation data - establishing the
20 amount of groundwater that is recharged annually and can be extracted sustainably from a basin,
21 known as the “perennial yield.” In reality, many hydrographic basins are severely over-appropriated,
22 due to inaccurate estimates, over pumping, domestic wells, changing climate conditions, etc.

23 Administration of groundwater rights is made particularly complex when the main source of
24

25
26 ¹⁸SE ROA 654, 659, 699, 726, 755.

27 ¹⁹ SE ROA 949-1069.

28 ²⁰ SE ROA 1070-1499.

1 groundwater is not “basin fill” or alluvium, but aquifers found in permeable geologic formations
2 lying beneath the younger basin fill, and which may underlie large regions that are not well defined
3 by the present-day hydrographic basins. This is the case with Nevada’s “Carbonate Aquifer.”

4 When necessary, the State Engineer may manage a basin that has been designated for
5 administration. NRS 534.030 outlines the process by which a particular basin can be designated for
6 administration by the State Engineer. In the instant case, six of the seven basins affected by Order
7 No. 1309 had already been designated for management under NRS 534.030, including:

- 8 a. Coyote Spring Valley Hydrographic Basin (“Coyote Spring Valley”), Basin No. 210, since
9 1985;
- 10 b. Black Mountains Area Hydrographic Basin (“Black Mountains Area”), Basin No. 215, since
11 November 22, 1989;
- 12 c. Garnet Valley Hydrographic Basin (“Garnet Valley”), Basin No. 216, since April 24, 1990;
- 13 d. Hidden Valley Hydrographic Basin (“Hidden Valley”), Basin No. 217, since October 24,
14 1990;
- 15 e. California Wash Hydrographic Basin (“California Wash”), Basin No. 218, since August 24,
16 1990; and
- 17 f. Muddy River Springs Area Hydrographic Basin (“Muddy River Springs Area”), Basin No.
18 219, since July 14, 1971.²¹

19 Kane Springs Valley (“Kane Springs Valley”), Basin 206, which was also affected by
20 Order No. 1309, had not been designated previously for administration.²²
21

22
23 ²¹ See SE ROA 2-3, 71-72.

24 ²² The Court takes judicial notice of Kane Springs Valley Basin’s status of not being designated for administration per
25 NRS 534.030. <http://water.nv.gov/StateEngineersOrdersList.aspx> (available online at the Division of Water Resources.
26 “Mapping& Data” tab, under “Water Rights” tab, “State Engineer’s Orders List and Search”). Facts that are subject to
27 judicial notice “are facts in issue or facts from which they may be inferred.” NRS 47.130(1). To be judicially noticed, a
28 fact must be “[g]enerally known” or “capable of accurate and ready determination by resort to sources whose accuracy
cannot reasonably be questioned.” NRS 47.130(2); *Andolino v. State*, 99 Nev. 346, 351, 662 P.2d 631, 633-34 (1983)
(courts may take judicial notice of official government publications); *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir.
1994) (courts may take judicial notice of documents obtained from administrative agencies); *Greeson v. Imperial Irr.*
Dist., 59 F.2d 529, 531 (9th Cir.1932) (courts may take judicial notice of “public documents”).

1 **B. The Muddy River Decree**

2 Over one hundred years ago, this Court issued the Muddy River Decree of 1920 (sometimes
3 referred to herein as the “Decree” or “Muddy River Decree”), which established water rights on the
4 Muddy River.²³ The Muddy River Decree recognized specific water rights,²⁴ identified each water
5 right holder on the Muddy River, and quantified each water right.²⁵ MVIC specifically owns certain
6 rights “. . . to divert, convey, and use all of said waters of said River, its head waters, sources of
7 supply and tributaries, save and except the several amounts and rights hereinbefore specified and
8 described . . . and to divert said waters, convey and distribute the same to its present stockholders,
9 and future stockholders, and other persons who may have acquired or who may acquire temporary or
10 permanent rights through said Company. . .”²⁶. The Decree appropriates all water of the Muddy
11 River at the time the Decree was entered, which was prior to any other significant development in
12 the area. The predevelopment flow averaged approximately 33,900 acre feet per annum (“afa”).²⁷
13 The rights delineated through The Muddy River Decree are the oldest and most senior rights in the
14 LWRFS.

15 **C. The Moapa Dace**

16 The Moapa dace (*Moapa coriacea*) is a thermophilic minnow endemic to the upper spring-
17 fed reaches Muddy River, and has been federally listed as endangered since 1967.²⁸ Between 1933
18

19
20 ²³ See Judgment and Decree, *Muddy Valley Irrigation Co. v. Moapa and Salt Lake Produce Co.* (the “Muddy River
Decree” or “Decree”) (March 11, 1920) (SE ROA 33770-33816).

21 ²⁴ SE ROA 33770-816. Specifically, the Muddy River Decree finds “[t]hat the aggregate volume of the several
22 amounts and quantities of water awarded and allotted to the parties . . . is the total available flow of the said Muddy
23 River and consumes and exhausts all of the available flow of the said Muddy River, its headwaters, sources of supply
and tributaries.” SE ROA 33792-33793.

24 ²⁵ SE ROA 33798-806.

25 ²⁶ SE ROA 33775.

26 ²⁷ See SNWA Report (June 2019) (SE ROA 41930 – 42072) at § 3.4.1 (SE ROA 41962) describing the predevelopment
27 flows as measured in 1946 as 33,900 afa and the average flow measured from July 1, 1913 to June 30, 1915 and October
1, 1916 to September 30, 1917 as 34,000 afa. The NSE further recognizes 33,900 afa as the predevelopment flow. See
Order 1309 (SE ROA 2-69) at p. 61 (SE ROA 62).

28 ²⁸ SE ROA 5.

1 and 1950, the Moapa dace was abundant in the Muddy River and was estimated to inhabit as many
2 as 25 individual springs and up to 10 miles of stream habitat. However, by 1983, the species only
3 occurred in springs and two miles of spring outflows. Currently, approximately 95 percent of the
4 total Moapa dace population occurs within 1.78 miles of one major tributary system that flows from
5 three high-elevation spring complexes within the Muddy River Springs Area.²⁹

6 Threats to the Moapa Dace include non-native predatory fishes, habitat loss from water
7 diversions and impoundments, wildfire risk from non-native vegetation, and reductions to surface
8 spring-flows resulting from groundwater development.³⁰ Because the Moapa dace is entirely
9 dependent on spring flow, protecting the dace necessarily involves protecting the warm spring
10 sources of the Muddy River.³¹

11 **D. Order 1169**

12 Significant pumping of the Carbonate Aquifer in the LWRFS began in the 1980s and
13 1990s. Initial assessments of the water available in the Aquifer suggested it would provide a new
14 abundant source of water for Southern Nevada. Because the prospective water resources of the
15 LWRFS carbonate appeared to be substantial, nearly 100 water right applications for over 300,000
16 acre feet were filed in State Engineer's office.³²

17 By 2001, the State Engineer had granted more than 40,000 acre feet of applications in the
18 LWRFS. The State Engineer considered additional applications for groundwater in Coyote Spring
19 Valley and adjacent hydrographic basins. However, concerned over the lack of information
20 regarding the sustainability of water resources from the Carbonate Aquifer, the State Engineer
21 began hearings in July and August 2001 on water right applications.³³

22
23
24

²⁹ SE ROA 47169.

25 ³⁰ SE ROA 47160.

26 ³¹ SE ROA 42087.

27 ³² SE ROA 4, Ex. 1.

28 ³³ *Id.*

On March 8, 2002, the State Engineer issued Order 1169 to delay consideration of new water right applications and require the pumping of existing groundwater to determine what impact increased groundwater pumping would have on senior water rights and the environment at the Muddy River (“Aquifer Test”).³⁴ Order 1169 held in abeyance all applications for the appropriation of groundwater from the carbonate-rock aquifer system located in the Coyote Spring Valley Basin (Basin 210), Black Mountains Area Basin (Basin 215), Garnet Valley Basin (Basin 216), Hidden Valley Basin (Basin 217), Muddy River Springs aka Upper Moapa Valley Basin (Basin 210), and Lower Moapa Valley Basin (Basin 220).³⁵ California Wash (Basin 218) was subsequently added to this Order.³⁶

Notably, Kane Springs was not included in the Order 1169 study area. In Ruling 5712, the State Engineer specifically determined Kane Springs would not be included in the Order 1169 study area because there was no substantial evidence that the appropriation of a limited quantity of water in Kane Springs would have any measurable impact on the Muddy River Springs that warranted the inclusion of Kane Springs in Order 1169.³⁷ The State Engineer specifically rejected the argument that the Kane Springs rights could not be appropriated based upon senior appropriated rights in the down gradient basins.³⁸

Order 1169A, issued December 21, 2012, set up a test to “stress” the Carbonate Aquifer through two years of aggressive pumping, combined with examination of water levels in monitoring wells located throughout the LWRFS.³⁹ Participants in the Aquifer test were Southern Nevada Water Authority (“SNWA”), Las Vegas Valley Water District (“LVVWD”), Moapa Valley Water District, Coyote Springs Investments, LLC (“Coyote Springs”), Moapa Band of Paiutes, and Nevada

³⁴ SE ROA 654-669.

³⁵ See SE ROA 659, 665.

³⁶ SE ROA 659-69, Ex. 8; *see also* SE ROA 654, Ex. 7.

³⁷ SE ROA 719.

³⁸ SE ROA 713.

³⁹ SE ROA 654-58, Ex. 7.

Power Company. Pumping included 5,300 afa in Coyote Spring Valley, 14,535 afa total carbonate pumping, and 3,840 afa alluvial pumping.⁴⁰ Pumping tests effects were examined at 79 monitoring wells and 11 springs and streamflow monitoring sites.⁴¹ The Kane Springs basin was not included in the Order 1169 aquifer testing, and Kane Springs basin water right holders were not involved, not provided notice, and did not participate in the aquifer testing, monitoring or measurements, submission of reports, proceedings and actions taken by the State Engineer pursuant to Order 1169.⁴²

The State Engineer's conclusions from the pump test found an "unprecedented decline" in high-altitude springs, an "unprecedented decline" in water levels, and that additional pumping in the central part of Coyote Spring Valley or the Muddy River Spring Area could not occur without conflict with existing senior rights, including decreed surface water rights on the Muddy River, or the habitat of the Moapa Dace. The State Engineer attributed observed decreases in water levels in other areas of the basins to the pumping during the Order 1169 test and concluded that the test demonstrated connectivity within the Carbonate Aquifer of the LWRFS. On this basis, the State Engineer determined that the five basin LWRFS should be jointly managed.

In 2014, and based on the results of the Aquifer Test, the State Engineer issued Rulings 6254–6261 on January 29, 2014 denying all the pending groundwater applications in Coyote Springs Valley, Muddy River Springs Area, California Wash, Hidden Valley, Garnet Valley, and certain portions of the Black Mountains Area.⁴³ His rationale in each ruling was the same: "because these basins share a unique and close hydrologic connection and share virtually all of the same source and supply of water, unlike other basins in Nevada, these five basins will be jointly managed."⁴⁴

⁴⁰ The Order uses the term acre-foot per year (afy), but for consistency with common usage, this Court uses the equivalent term acre feet per annum.

⁴¹ SE ROA 6, Ex. 1.

⁴² SE ROA 36230 - 36231.

⁴³ SE ROA 726 – 948.

⁴⁴ *See e.g.*, SE ROA 479.

1 **E. Interim Order 1303 and proceedings**

2 On January 11, 2019 -- nearly 17 years after issuing Order 1169, then-State Engineer Jason
3 King issued Interim Order 1303 to start a two-phased administrative process to resolve the
4 competing interests for water resources in the LWRFS.⁴⁵ He created the LWRFS as a joint
5 administrative unit and invited stakeholders to participate in an administrative hearing to address
6 the factual questions of what the boundary of the LWRFS should be, and what amount of
7 groundwater could be sustainably pumped in the LWRFS.⁴⁶ The LWRFS is the first multi-basin
8 area that the Nevada State Engineer has designated in state history. The ordering provisions in
9 Interim Order 1303 provide in pertinent part:

- 10 1. The Lower White River Flow System consisting of the Coyote Spring Valley,
11 Muddy River Springs Area, California Wash, Hidden Valley, Garnet Valley,
12 and the portion of the Black Mountains Area as described in this Order, is
13 herewith designated as a joint administrative unit for purposes of
14 administration of water rights. All water rights within the Lower White River
15 Flow System will be administered based upon their respective date of
16 priorities in relation to other rights within the regional groundwater unit.

17 Any stakeholder with interests that may be affected by water right
18 development within the Lower White River Flow System may file a report in
19 the Office of the State Engineer in Carson City, Nevada, no later than the
20 close of business on Monday, June 3, 2019.

21 Reports filed with the Office of the State Engineer should address the
22 following matters:

- 23 a. The geographic boundary of the hydrologically connected groundwater
24 and surface water systems comprising the Lower White River Flow
25 System;
26 b. The information obtained from the Order 1169 aquifer test and
27 subsequent to the aquifer test and Muddy River headwater spring flow as
28 it relates to aquifer recovery since the completion of the aquifer test;
29 c. The long-term annual quantity of groundwater that may be pumped
30 from the Lower White River Flow System, including the relationships
31 between the location of pumping on discharge to the Muddy River
32 Springs, and the capture of Muddy River flow;

33 ⁴⁵ SE ROA 635-53, Ex. 6.

34 ⁴⁶ SE ROA 82-83.

1 d. The effects of movement of water rights between alluvial wells and
2 carbonate wells on deliveries of senior decreed rights to the Muddy River;
and,

3 e. Any other matter believed to be relevant to the State Engineer's
4 analysis.

5 SE ROA 647-48, Ex. 6.

6 The State Engineer identified the LWRFS as including the following hydrographic basins:
7 Coyote Spring Valley, a portion of Black Mountains Area, Garnet Valley, Hidden Valley,
8 California Wash, and the Muddy River Springs Area.⁴⁷ Kane Springs continued to be excluded as
9 part of the LWRFS multi-basin area in Interim Order 1303.⁴⁸

10 In July and August 2019, reports and rebuttal reports were submitted discussing the four
11 matters set forth in Interim Order 1303. On July 25, 2019, the State Engineer issued a Notice of
12 Pre-Hearing Conference, and on August 9, 2019, the State Engineer held a prehearing conference.
13 On August 23, 2019, the State Engineer issued a Notice of Hearing (which it amended on August
14 26, 2019), noting that the hearing would be “the first step” in determining how to address future
15 management decisions, including policy decisions, relating to the LWRFS.⁴⁹ He also indicated that
16 the legal question of whether groundwater pumping in the LWRFS conflicts with senior water
17 rights would be addressed in Phase 2 of the LWRFS administrative process.⁵⁰

18 The Hearing Officer made it clear that “any other matter believed to be relevant” as
19 specified in ordering paragraph 1(e) of Order 1303 would not include discussion of the
20 administrative impacts of consolidating the basins or any policy matters affected by its decision.
21 The State Engineer conducted a hearing on the reports submitted under Order 1303 between
22 September 23, 2019, and October 4, 2019. At the start of the administrative hearing, the State
23 Engineer reminded the parties the public administrative hearing was not a “trial-type” proceeding,

24 _____
25 ⁴⁷ SE ROA 70-88.

26 ⁴⁸ *Id.*

27 ⁴⁹ SE ROA 263, Ex. 2 (Notice); SE ROA 285, Ex. 3 (Amended Notice).

28 ⁵⁰ SE ROA 522.

not a contested adversarial proceeding.⁵¹ Cross-examination was limited to between 4-17 minutes per participant depending on the length of time given to a participant to present its reports.⁵²

Following the submission by the participating stakeholders of closing statements at the beginning of December 2019, the State Engineer engaged in no additional public process and solicited no additional input regarding “future management decisions, including policy decisions, relating to the Lower White River Flow System basins.”⁵³

F. Order 1309

On June 15, 2020, the State Engineer issued Order 1309.⁵⁴ The first three ordering paragraphs state as follows:

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 Warm Springs area spring flow and 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.

SE ROA 66, Ex. 1.

The Order does not provide guidance about how the new “single hydrographic basin” will be administered and provided no clear analysis as to the basis for the 8000 afa number for the maximum sustainable yield.

⁵¹ SE ROA 52962, Transcript 6:4-6, 24 to 7:1 (Sept. 23, 2019) (Hearing Officer Fairbank).

⁵² SE ROA 52962, Transcript 7:5-7 (Sept. 23, 2019) (Hearing Officer Fairbank).

⁵³ See SE ROA 285, Ex. 3.

⁵⁴ SE ROA 2-69.

1 In its Order, the State Engineer indicated that it “considered this evidence and testimony
2 [regarding basin inclusion and basin boundary] on the basis of a common set of criteria that are
3 consistent with the original characteristics considered critical in demonstrating a close hydrologic
4 connection requiring joint management in Rulings 6254-6261.”⁵⁵ However, the State Engineer did
5 not disclose these criteria to the stakeholders before or during the Order 1303 proceedings.
6 Instead, he disclosed them for the first time in Order 1309, after the stakeholders had engaged in
7 extensive investigations, expert reporting, and factual hearing requested by Order 1303. The
8 criteria are:

- 9 1. Water level observations whose spatial distribution indicates a relatively
10 uniform or flat potentiometric surface are consistent with a close hydrologic
11 connection.
- 12 2. Water level hydrographs that, in well-to-well comparisons, demonstrate a
13 similar temporal pattern, irrespective of whether the pattern is caused by
14 climate, pumping, or other dynamic is consistent with a close hydrologic
15 connection.
- 16 3. Water level hydrographs that demonstrate an observable increase in drawdown
17 that corresponds to an increase in pumping and an observable decrease in
18 drawdown, or a recovery, that corresponds to a decrease in pumping, are
19 consistent with a direct hydraulic connection and close hydrologic connection
20 to the pumping location(s).
- 21 4. Water level observations that demonstrate a relatively steep hydraulic gradient
22 are consistent with a poor hydraulic connection and a potential boundary.
- 23 5. Geological structures that have caused a juxtaposition of the carbonate-rock
24 aquifer with low permeability bedrock are consistent with a boundary.
- 25 6. When hydrogeologic information indicate a close hydraulic connection (based
26 on criteria 1-5), but limited, poor quality, or low resolution water level data
27 obfuscate a determination of the extent of that connection, a boundary should
28 be established such that it extends out to the nearest mapped feature that
juxtaposes the carbonate-rock aquifer with low-permeability bedrock, or in the
absence of that, to the basin boundary.

⁵⁵ SE ROA 48-49, Ex. 1.

After consideration of the above criteria, the State Engineer decided to finalize what was preliminarily determined in Interim Order 1303, and consolidated several administrative units into a single hydrographic basin, designated as the “Lower White River Flow System” or “LWRFS.” The State Engineer also added the previously excluded Kane Springs Hydrographic Basin to the LWRFS,⁵⁶ and modified the portion of the Black Mountains area that is in the LWRFS. Although Order 1309 did not specifically address priorities or conflict of rights, as a result of the consolidation of the basins, the relative priority of all water rights within the seven affected basins will be reordered and the priorities will be considered in relation to all water rights holders in the consolidated basins, rather than in relation only to the other users within the original separate basins.

G. Petitioners and Their Respective Water Rights or Interests

- a. Southern Nevada Water Authority and Las Vegas Valley Water District are government agencies serving Southern Nevada’s water needs, and own water rights in Coyote Springs Valley, Hidden Valley, Garnet Valley, and a significant portion of the Muddy River decreed rights.
- b. Coyote Spring Investments, LLC is a developer who owns water rights in Coyote Spring Valley, Kane Springs Valley, and California Wash;
- c. Apex Holding Company, LLC and Dry Lake Water LLC own real estate and water rights to the area of land commonly referred to as the Apex Industrial Park, in Garnet Valley and Black Mountains Area;
- d. The Center Biological Diversity is a national nonprofit conservation organization which does not hold any water rights, but has educational, scientific, biological, aesthetic and spiritual interests in the survival and recovery of the Moapa Dace;
- e. Muddy Valley Irrigation Company is a private company that owns most of the decreed rights

⁵⁶ The Court notes that the Nevada State Engineer determined that Kane Springs should be included in this joint management area, even though the Kane Springs Basin had not been designated previously for management through the statutory process delineated in under NRS 534.030.

1 in the Muddy River;

- 2 f. Nevada Cogeneration Associates Numbers 1 and 2, who operate gas-fired facilities at the
3 south end of the LWRFS and have water rights in the Black Mountain Area;
4 g. Georgia-Pacific Gypsum LLC, and Republic Technologies, Inc. are industrial companies that
5 have water rights in the Garnet Valley Hydrographic Basin;
6 h. Lincoln County Water District and Vidler Water Co. are a public water district and a private
7 company, respectively, and own water rights in Kane Springs Valley.

8 **III.**

9 **DISCUSSION**

10 **STANDARD OF REVIEW**

11 An aggrieved party may appeal a decision of the State Engineer pursuant to NRS 533.450(1).
12 The proceedings, which are heard by the court, must be informal and summary, but must afford the
13 parties a full opportunity to be heard. NRS 533.450(2). The decision of the State Engineer is
14 considered to be prima facie correct, and the burden of proof is on the party challenging the
15 decision. NRS 533.450(10).

16 **A. Questions of Law**

17 Questions of statutory construction are questions of law which require de novo review.
18 The Nevada Supreme Court has repeatedly held courts have the authority to undertake an
19 independent review of the State Engineer's statutory construction, without deference to the State
20 Engineer's determination. *Andersen Family Assoc. v. Ricci*, 124 Nev. 182, 186, 179 P.3d 1201,
21 1203 (2008) (citing *Bacher v. State Engineer*, 122 Nev. 1110, 1115, 146 P.3d 793, 798 (2006) and
22 *Kay v. Nunez*, 122 Nev. 1100, 1103, 146 P.3d 801, 804 (2006)).

23 Any "presumption of correctness" of a decision of the State Engineer as provided by NRS
24 533.450(10), "does not extend to 'purely legal questions,' such as 'the construction of a statute,'
25 as to which 'the reviewing court may undertake independent review.'" *In re State Engineer*
26 *Ruling No. 5823*, 128 Nev. 232, 238-239, 277 P.3d 449, 453 (2012) (quoting *Town of Eureka v.*
27 *State Engineer*, 108 Nev. 163, 165, 826 P.2d 948, 949 (1992)). At no time will the State
28

Engineer's interpretation of a statute control if an alternative reading is compelled by the plain language of the statute. *See Andersen Family Assoc.*, 124 Nev. at 186, 179 P.3d at 1203.

Although "[t]he State Engineer's ruling on questions of law is persuasive... [it is] not entitled to deference." *Sierra Pac. Indus. v. Wilson*, 135 Nev. Adv. Op. 13, 440 P.3e 37, 40 (2019). A reviewing court is free to decide legal questions without deference to an agency determination. *See Jones v. Rosner*, 102 Nev. 215, 216-217, 719 P.2d 805, 806 (1986); *accord Pyramid Lake Paiute Tribe v. Ricci*, 126 Nev. 521, 525, 245 P.3d 1145, 1148 (2010) ("[w]e review purely legal questions without deference to the State Engineer's ruling.").

B. Questions of Fact

The Court's review of the Order 1309 is "in the nature of an appeal" and limited to the record before the State Engineer. *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979). On appeal, a reviewing court must "determine whether the evidence upon which the engineer based his decision supports the order." *State Engineer v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991) (citing *State Engineer v. Curtis Park*, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985)).

As to questions of fact, the State Engineer's decision must be supported by "substantial evidence in the record [.]" *Eureka Cty. v. State Engineer*, 131 Nev. 846, 850, 359 P.3d 1114, 1117 (2015) (quoting *Town of Eureka*, 108 Nev. at 165, 826 P.2d at 949). Substantial evidence is "that which a reasonable mind might accept as adequate to support a conclusion." *Bacher*, 122 Nev. at 1121, 146 P.3d at 800 (finding that a reasonable person would expect quantification of water rights needed and no evidence of such quantification or calculations by the State Engineer is included in the record). The Court may not substitute its judgment for that of the State Engineer, "pass upon the credibility of the witness nor reweigh the evidence." *Revert*, 95 Nev. at 786, 603 P.2d at 264.

Where a decision is arbitrary and capricious it is not supported by substantial evidence. *See Clark Cty. Educ. Ass'n v. Clark Cty. Sch. Dist.*, 122 Nev. 337, 339-40, 131 P.3d 5, 7 (2006) (concluding that an arbitrator's award was "supported by substantial evidence and therefore not arbitrary, capricious, or unsupported by the arbitration agreement").

In *Revert*, 95 Nev. at 787, 603 P.2d at 264–65, the Nevada Supreme Court noted:

1 The applicable standard of review of the decisions of the State Engineer, limited
2 to an inquiry as to substantial evidence, presupposes the fullness and fairness of
3 the administrative proceedings: all interested parties must have had a ‘full
4 opportunity to be heard,’ *See* NRS 533.450(2); the State Engineer must
5 clearly resolve all the crucial issues presented, *See Nolan v. State Dep’t. of*
6 *Commerce*, 86 Nev. 428, 470 P.2d 124 (1970) (on rehearing); the decisionmaker
7 must prepare findings in sufficient detail to permit judicial review, *Id.*; *Wright v.*
8 *State Insurance Commissioner*, 449 P.2d 419 (Or.1969); *See also* NRS 233B.125.
9 When these procedures, grounded in basic notions of fairness and due process, are
10 not followed, and the resulting administrative decision is arbitrary, oppressive, or
11 accompanied by a manifest abuse of discretion, this court will not hesitate to
12 intervene. *State ex rel. Johns v. Gragson*, 89 Nev. 478, 515 P.2d 65 (1973).

13 Thus, in order to survive review, Order 1309 must be statutorily authorized, resolve all
14 crucial issues presented, must include findings in detail to permit judicial review, and must be
15 based on substantial evidence.

16 CONCLUSIONS OF LAW

17 **A. The State Engineer Did Not Have the Authority to Jointly Administrate Multiple** 18 **Basins by Creating the LWRFS “Superbasin,” Nor Did He Have the Authority to** 19 **Conjunctively Manage This Superbasin.**

20 The powers of the State Engineer are limited to those set forth in the law. *See, e.g., City of*
21 *Henderson v. Kilgore*, 122 Nev. 331, 334, 131 P.3d 11, 13 (2006); *Clark Cty. School Dist. v. Clark*
22 *Cty. Classroom Teachers Ass’n*, 115 Nev. 98, 102, 977 P.2d 1008, 1011 (1999) (*en banc*) (An
23 administrative agency’s powers “are limited to those powers specifically set forth by statute.”);
24 *Clark Cty. v. State, Equal Rights Comm’n*, 107 Nev. 489, 492, 813 P.2d 1006, 1007 (1991)); *Wilson*
25 *v. Pahrump Fair Water, LLC*, 137 Nev. Adv. Op. 2, 481 P.3d 853, 856(2021) (The State Engineer’s
26 powers thereunder are limited to “only those . . . which the legislature expressly or implicitly
27 delegates.”); *Andrews v. Nevada State Bd. of Cosmetology*, 86 Nev. 207, 208, 467 P.2d 96, 97
28 (1970) (“Official powers of an administrative agency cannot be assumed by the agency, nor can they
be created by the courts in the exercise of their judicial function. The grant of authority to an agency
must be clear.”) (*internal citation omitted*).

The Nevada Supreme Court has made clear that the State Engineer is a creature of statute and
his or her actions must be within a statutory grant of authority. *Pahrump Fair Water LLC*, 481 P.3d

at 856 (explaining that “[t]he State Engineer’s powers thereunder are limited to ‘only those . . . which the legislature expressly or implicitly delegates’” (quoting *Clark Cty.*, 107 Nev. at 492, 813 P.2d at 1007)); *see also Howell v. Ricci*, 124 Nev. 1222, 1230, 197 P.3d 1044, 1050 (2008) (holding that the State engineer cannot act beyond his or her statutory authority).

The State Engineer’s authority is outlined in NRS Chapters 532, 533 and 534. Chapter 533 deals generally with “water rights,” which addresses surface water as well as groundwater, and chapter 534 is limited to groundwater, dealing specifically with “underground water and wells.”

In the instant case, the State Engineer relied on the following specific statutes as authority for combining prior independently designated basins as a superbasin newly named the LWRFS, and then conjunctively managing⁵⁷ this superbasin:

- NRS 533.024(1)(c), which is a legislative declaration “encourag[ing] the State Engineer to consider the best available science in rendering decisions concerning the available surface and underground sources of water in Nevada.”⁵⁸
- NRS 534.024(1)(e), another legislative declaration that states the policy of Nevada is “[t]o manage conjunctively the appropriation, use and administration of all waters of this State, regardless of the source of the water.”⁵⁹
- NRS 534.020, which provides that all waters of the State belong to the public and are subject to all existing rights.⁶⁰
- NRS 532.120, which allows the State Engineer to “make such reasonable rules and regulations as may be necessary for the proper and orderly execution of the powers conferred by law.”⁶¹

⁵⁷ The Nevada Water Words Dictionary, defines “Conjunctive (Water) Use” in part, as “the integrated use and management of hydrologically connected groundwater and surface water.” *Water Words Dictionary, Nevada Division of Water Planning* (2022) (available online at <http://water.nv.gov/WaterPlanDictionary.aspx>) The same dictionary separately defines “Conjunctive Management” as, “the integrated management and use of two or more water resources, such as a (groundwater) aquifer and a surface body of water.” *Id.*

⁵⁸ SE ROA 43.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ SE ROA 44.

- NRS 534.110(6), which allows the State Engineer to conduct investigations into any basin where average annual replenishment is not adequate for the needs of all water rights holders, and then subsequently restrict withdrawals to conform to priority rights.⁶²
- NRS 534 and specifically NRS 534.120, which allows the State Engineer to make such rules, regulations and orders as are deemed essential for the welfare of an area where the groundwater basin is being depleted.”⁶³

However, as further discussed below, the State Engineer’s reliance on these statutes for authority is misplaced, and his actions upend the bedrock principles of the prior appropriation doctrine.

1. **The Prior Appropriation Doctrine**

The doctrine of prior appropriation has been part of Nevada’s common law since the 1800’s, and is a fundamental principle of water law in Nevada. *See Lobdell v. Simpson*, 2 Nev. 274, 277-78 (1866). “An appropriative right ‘may be described as a state administrative grant that allows the use of a specific quantity of water for a specific beneficial purpose if water is available in the source free from the claims of others with earlier appropriations.’” *Desert Irr., Ltd. v. State*, 113 Nev. 1049, 1051 n.1, 944 P.2d 835, 837 (1997) (quoting Frank J. Trelease & George A. Gould, *Water Law Cases and Materials* 33 (4th ed. 1986)).

“Water rights are given ‘subject to existing rights,’ NRS 533.430(1), given dates of priority, NRS 533.265(2)(b), and determined based on relative rights, NRS 533.090(1)-(2).” *Mineral Cty. v. Lyon Cty.*, 136 Nev. 503, 513, 473 P.3d 418, 426 (2020). Thus, “[i]n Nevada, the doctrine of prior appropriation determines the priority of both pre-1905 vested water rights and modern statutory water law.” *Rand Properties, LLC v. Filippini*, 484 P.3d 275, Docket 78319 at 2 (Nev. 2021) (unpublished disposition). It is universally understood that the priority of a water right is its most valuable component. *See* Gregory J. Hobbs, Jr., *Priority: The Most Misunderstood Stick in the Bundle*, 32 *Env’tl. L.* 37, 43 (2002) (“Priority determines the value of a water right”).

“A priority in a water right is property in itself”; therefore, “to deprive a person of his

⁶² *Id.*

⁶³ *Id.*

1 priority is to deprive him of a most valuable property right.” *Colorado Water Conservation*
2 *Bd. v. City of Cent.*, 125 P.3d 424, 434 (Colo. 2005) (internal quotation marks omitted). “A loss of
3 priority that renders rights useless ‘certainly affects the rights’ value’ and ‘can amount to a de facto
4 loss of rights.’” *Wilson v. Happy Creek, Inc.*, 135 Nev. 301, 313, 448 P.3d 1106, 1115 (2019)
5 (quoting *Andersen Family Assocs.*, 124 Nev. at 190-1, 179 P.3d at 1201).

6 Nevada’s statutory water law reflects the importance of priority. Not only did the
7 Legislature choose not to bestow the State Engineer with discretion to alter priority rights, but it also
8 affirmatively requires the State Engineer to preserve priority rights when performing the State
9 Engineer’s statutory duties. *See, e.g.*, NRS 534.110(6) (providing that any curtailment “be restricted
10 to conform to priority rights”); NRS 534.110(7) (same); NRS 533.040(2) (“If at any time it is
11 impracticable to use water beneficially or economically at the place to which it is appurtenant, the
12 right may be severed from the place of use and be simultaneously transferred and become
13 appurtenant to another place of use, in the manner provided in this chapter, without losing priority of
14 right.”).

15 The prior appropriation doctrine in Nevada, “the driest state in the Nation”⁶⁴ becomes
16 particularly critical when, as in the instant case, there is not enough water to satisfy all of the
17 existing rights of the current water right holders, and the threat of curtailment looms ominously in
18 the near future. One of the greatest values of a senior priority right is the assurance that the holder
19 will be able to use water even during a time of water shortage because junior water right holders will
20 be curtailed first. Thus, senior right holders rely on their senior priority rights when developing
21 businesses, entitling and permitting land development, negotiating agreements, making investments,
22 obtaining permits and various approvals from State and local agencies, and generally making
23 financial and other decisions based on the relative certainty of their right.

24 Priority in time of a right is only as valuable as where the holder stands in relation to others
25 in the same situation, or more specifically in this case, in the same basin. As the statutes are written,
26

27
28 ⁶⁴ *United States v. State Engineer*, 117 Nev. 585, 592, 27 P.3d 51, 55 (2001)(Becker, J., concurring in part and
dissenting in part).

1 water right holders only compete in time for their “place in line” with other water right holders in
2 their same basin. Therefore, the year that one acquires a priority right is only as important as the
3 year that other water right holders in your basin acquired theirs. It is in this setting that State
4 Engineer has issued Order 1309.

5 **2. Joint Administration**

6 The State Engineer’s position is that the “best available science” demonstrates that the
7 seven⁶⁵ named hydrographic basins are so hydrologically interconnected that science dictates they
8 must be managed together in one superbasin. However, NRS 533.024(1)(c) is a policy declaration
9 of the Legislature’s intent that simply “encourages” the State Engineer “to consider the best
10 available science in rendering decisions” that concern water he has authority to manage. NRS
11 533.024(1)(c).

12 Statements of policy from the Legislature do not serve as a basis for government action, but
13 rather inform the interpretation of statutes that authorize specific action. *See, Pawlik v. Deng*, 134
14 Nev. 83, 85, 412 P.3d 68, 71 (2018). In *Pawlik*, the Nevada Supreme Court expressed the relevance
15 of statements of policy in terms as follows: “if the statutory language is subject to two or more
16 reasonable interpretations, the statute is ambiguous, and we then look beyond the statute to the
17 legislative history and interpret the statute in a reasonable manner ‘in light of the policy and the
18 spirit of the law.’” *Id.* (quoting *J.E. Dunn Nw., Inc. v. Corus Constr. Venture, LLC*, 127 Nev. 72, 79,
19 249 P.3d 501, 505 (2011)).

20 While such statements of policy are accorded deference in terms of statutory interpretation,
21 the Nevada Supreme Court has specifically held that they are not binding. *See McLaughlin v. Hous.*
22 *Auth. of the City of Las Vegas*, 227 P.2d 206, 93 (1951) (“It has often been said that the declaration
23 of policy by the legislature, though not necessarily binding or conclusive upon the courts, is entitled
24 to great weight, and that it is neither the duty nor prerogative of the courts to interfere in such
25 legislative finding unless it clearly appears to be erroneous and without reasonable foundation.”); *see*
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28 ⁶⁵ More accurately, the LWRFS is comprised of six hydrographic basins and a portion of a seventh.

1 also *Clean Water Coal. v. M Resort, LLC*, 127 Nev. 301, 313, 255 P.3d 247, 255 (2011) (“The State
2 acknowledges that when legislative findings are expressly included within a statute, those findings
3 should be accorded great weight in interpreting the statute, but it points out that such findings are not
4 binding and this court may, nevertheless, properly conclude that section 18 is a general law despite
5 the Legislature's declaration to the contrary.”).

6 Statements of policy set forth by the Legislature are therefore not operative statutory
7 enactments, but rather tools to be used in interpreting operative statutes—and only then where such
8 statutes are ambiguous on their face. *See Pawlik*, 134 Nev. at 85, 412 P.3d at 71; *see also Cromer v.*
9 *Wilson*, 126 Nev. 106, 109-10, 225 P.3d 788, 790 (2010) (if the plain language of a statute “is
10 susceptible of another reasonable interpretation, we must not give the statute a meaning that will
11 nullify its operation, and we look to policy and reason for guidance”).

12 This statement of policy is not, in and of itself, a grant of authority that allows the State
13 Engineer to change boundaries of established hydrographic basins as science dictates. This Court
14 certainly acknowledges that since the time the 256 hydrographic basins and sub-basins were
15 delineated, that science and technology have made great strides. While certain navigable waters and
16 topography were more easily identifiable at the time the basins were established, the complexity lies
17 in the less obvious interconnectivity and formations of sub-surface structures that were more
18 difficult to detect at that time. There is no doubt that scientific advancements allow experts to more
19 accurately assess sub-surface formations and groundwater than they have in the past, and certainly
20 technology will continue to improve accuracy in the future. However, this Court notes that the
21 Legislature specifically used the word “encourages” to describe how the Nevada State Engineer
22 should utilize the best available science. NRS 533.024(1)(c). The statute does not declare that the
23 best available science should dictate the decisions.

24 Indeed, if science was the sole governing principle to dictate the Nevada State Engineer’s
25 decisions, there would be a slippery slope in the changes that could be made in the boundaries of the
26 basins and how they are managed; each time scientific advancements and discoveries were made
27 regarding how sub-surface water structures are situated or interconnected, under this theory of
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1 authority, the Nevada State Engineer could change the boundaries of the existing basins. Each
2 boundary change would upend the priority of water right holders as they relate to the other water
3 right holders in the new, scientifically-dictated “basin.” This would lead to an absurd result as it
4 relates to the prior appropriation doctrine. Every water right holder would be insecure in their
5 priority, as their relative priority could change at any moment that science advances in determining
6 further interconnectivity of water below the surface. In the administration of water rights, the
7 certainty of those rights is particularly important and prior appropriation is “largely a product of the
8 compelling need for certainty in the holding and use of water rights.” *Mineral Cty. v. Lyon Cty.*, 136
9 Nev. at 518, 473 P.3d at 429 (quoting *Arizona v. California*, 460 U.S. 605, 620 (1983)). Science in
10 and of itself cannot alter common law and statutes. Thus, the State Engineer’s reliance on NRS
11 533.024(1)(c) for giving him authority to create a superbasin out of seven existing basins is
12 misplaced.

13 While NRS 532.120 allows the State Engineer to make reasonable rules and regulations as
14 may be necessary for proper and orderly execution, this authority is not without its limits, and is
15 only authorized for those “powers conferred by law.” Nothing in Chapters 532, 533 or 534 gives the
16 State Engineer direct authority to eliminate, modify, or redraw the boundaries of existing
17 hydrographic basins, or to consolidate multiple, already established, hydrographic basins into a
18 single hydrographic superbasin. For at least 50 years, holders of groundwater rights in Nevada have
19 understood a “hydrographic basin” to be an immutable administrative unit. This has been the case
20 regardless of whether the boundaries of the unit accurately reflected the boundaries of a particular
21 water resource. The Nevada Legislature has adopted a comprehensive scheme that provides the
22 framework for the State Engineer to administer surface water and groundwater. Moreover, the State
23 Engineer has, for decades, administered water on the basis of hydrographic basins identified,
24 described, and released to the public and relied upon by the Legislature, former State Engineers, and
25 the public. Applications to appropriate water are and have been on the basis of each hydrographic
26 basin. Protests, agreements, and resolutions of water applications have been on the basis of each
27 basin. Furthermore, statutes require that the State Engineer consider available water and
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1 appropriations based on the basins already defined.

2 It is interesting to note that in the statutes that *do* confer authority on the Nevada State
3 Engineer to manage water, they specifically mention the management as being done on a basin-by-
4 basin (or a sub-basin within a basin) basis. NRS 534.030 is the original source of authority for the
5 State Engineer’s designation of an “administrative area” by “basin.” NRS 534.030. Through NRS
6 534.030 and NRS 534.011, the State Engineer has authority to designate “any groundwater basin, or
7 portion therein” an “area of active management,” which refers to an area “[i]n which the State
8 Engineer is conducting particularly close monitoring and regulation of the water supply because of
9 heavy use of that supply.” Under the statute’s plain meaning, a *basin* is intended to be an
10 *administrative unit*, defined by boundaries described by “legal subdivision as nearly as possible.”
11 NRS 534.030(1)(b). In other words, a hydrographic basin so designated was synonymous with an
12 administrative unit—a *legal* construct, defined thereafter by a *geographic* boundary. Water rights
13 within these basins are to be administered according to the laws set forth in NRS Chapters 533 and
14 534, and the principles of prior appropriation are applied to water uses *within* each basin.

15 Moreover, the Legislature consistently refers to a singular basin throughout the statute. *See*,
16 *e.g.*, 534.030(1) (describing a petition under NRS Chapter 534 as one that requests the State
17 Engineer “to administer the provisions of this chapter as relating to designated areas, ... in any
18 particular basin or portion therein”); NRS 534.030(2) (“a groundwater basin”); NRS 534.030(2)
19 (“the basin”). In fact, in the State Engineer’s prior rulings and orders, including Order 1169, Order
20 1169A, and Rulings 5712 and 6455, the State Engineer employs a basin-by-basin management
21 approach.

22 NRS 534.110(6) sets forth the State Engineer’s ability to make basin-specific determinations
23 and provides the authority to curtail water rights where investigations into specific basins
24 demonstrate that there is insufficient groundwater to meet the needs of all permittees and all vested-
25 right claimants. NRS 534.110 plainly applies to investigations concerning administration and
26 designation of critical management areas within a basin. If the State Engineer conducts an
27 investigation as set forth in NRS 534.110(6) and determines that the annual replenishment to the
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1 groundwater supply is not adequate for the permittees and vested-right claimants, he has the
2 authority to either (1) order that withdrawals from domestic wells be restricted to conform to priority
3 rights, or (2) designate as a critical management area the basin in which withdrawals of groundwater
4 consistently exceed the perennial yield. NRS 534.110(6)-(7). It is important to note, however, that
5 the statute does not provide authority to change the boundaries of established basins, combine
6 multiple basins into one unit or superbasin, and then modify or curtail groundwater rights based
7 upon restructured priority dates in this newly created superbasin.

8 The Court acknowledges that the State Engineer can and should take into account how water
9 use in one basin may affect the water use in an adjoining or closely related basin when determining
10 how best to “actively manage” a basin. However, this is much different than how the State Engineer
11 defines “joint management”: erasing the borders of seven already established legal administrative
12 units and creating one legal superunit in the LWRFS superbasin. If the Legislature intended for the
13 State Engineer to designate areas across multiple basins for “joint administration,” it would have so
14 stated. *See Slade v. Caesars Entm’t Corp.*, 132 Nev. 374, 380-81, 373 P.3d 74, 78 (2016) (citing
15 Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 107 (2012)
16 (“The expression of one thing implies the exclusion of others.”)). Thus, under NRS 534.030, while
17 the State Engineer can administer basins individually, the statute does not allow the State Engineer
18 to combine basins for joint administration, nor do NRS 532.120, NRS 533.024, or NRS 534.110(6)
19 confer express authority on the State Engineer to do so.

20 **3. Conjunctive Management**

21 The Nevada State Engineer relies on NRS 534.024(1)(e), as the source of authority that
22 allows him to manage both surface and groundwater together through “conjunctive management.”⁶⁶
23 Historically, surface water and ground water have been managed separately. In fact, the term
24 “conjunctive management” was only introduced in the statutes in the 2017 session of the Nevada
25 Legislature when it added subsection 1(e) to NRS 533.024. However, as discussed previously, this
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28 ⁶⁶ SE ROA 43.

1 statute is a declaration of legislative intent, and as a statement of policy, it does not constitute a grant
2 of authority to the State Engineer, nor is it a water management tool in and of itself.

3 In fact, there is no authority or guidance whatsoever in the statutes as to how to go about
4 conjunctively managing water and water rights. While the Court agrees that it makes sense to take
5 into account how certain groundwater rights may affect other surface water rights when managing
6 water overall, as this Court noted previously, the powers of the State Engineer are limited to those
7 set forth in the law. While Nevada law provides certain tools for the management of water rights in,
8 for example, over appropriated basins, *e.g.*, NRS 534.110(7) (authorizing the State Engineer to
9 “designate as a critical management area any basin in which withdrawals of groundwater
10 consistently exceed the perennial yield of the basin”), nothing in Chapters 532, 533 or 534 gives the
11 State Engineer express authority to conjunctively manage, in this proceeding, both the surface and
12 groundwater flows he believes are occurring in the LWRFS superbasin.

13 This Court finds that as a result of the consolidation of the basins, the relative priority of all
14 water rights within the seven affected basins will be reordered and the priorities will be considered
15 in relation to all water rights holders in the consolidated basins, rather than in relation only to the
16 other users within the original separate basins.⁶⁷ By redefining and combining seven established
17 basins for “joint administration,” and “conjunctive management,” the State Engineer essentially
18 strips senior right holders of their priority rights by deciding that all water rights within the LWRFS
19 superbasin should be administered based upon their respective dates of priority in relation to other
20 rights “within the regional groundwater unit.”

21 The State Engineer’s position is that the determination of conflicts and priorities has not yet
22 occurred since that is to occur in the second step of the proceeding. However, by the very nature of
23 erasing the existing basins and putting all of the water rights holders in one superbasin, he has
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26 ⁶⁷ This Court rejects the State Engineer’s argument that Order 1309 did not change priorities merely because it did not
27 change priority dates. His argument conflates the meaning of *priority* as defined by the date of a water right application,
28 and the common meaning of *priority*, as defined by one’s “place in line.” While it is true that the Order does not change
priority dates, this Court finds that it *does* change the relative priorities, as petitioners who previously held the most
senior rights within their singular basin may now be relegated to more junior status within the “superbasin.”

1 already reprioritized certain rights as they relate to one another, even if their priority dates remain
2 the same.⁶⁸ As a result of creating this superbasin, water rights holders with some of the most senior
3 priority rights within their basin are now relegated to a much a lower priority position than some
4 water right holders in basins outside of their own. Such a loss of priority would potentially render
5 certain water rights valueless, given the State Engineer’s restrictions on pumping in the entire
6 LWRFS. The Court concludes that the State Engineer does not have authority to redefine Nevada
7 basins so as to reorder the priority rights of water right holders through conjunctive management
8 within those basins. Accordingly, Order 1309 stands at odds with the prior appropriation doctrine.

9 The Court determines that the question of whether the State Engineer has *authority* to change
10 the boundaries of basins that have been established for decades, or subject that newly created basin
11 to conjunctive management, or not, is a legal question, not a factual one. The State Engineer has
12 failed to identify a statute that authorizes him to alter established basin boundaries or engage in
13 conjunctive management. Based upon the plain language of the applicable statutes, the Court
14 concludes that the State Engineer acted outside the scope of his authority in entering Order 1309.

15 **B. The State Engineer Violated Petitioners’ Due Process Rights in Failing to Provide**
16 **Notice to Petitioners or an Opportunity to Comment on the Administrative Policies Inherent**
17 **in the Basin Consolidation.**

18 The Nevada Constitution protects against the deprivation of property without due process of
19 law. Nev. Const. art. 1, § 8(5). “Procedural due process requires that parties receive notice and an
20 opportunity to be heard.” *Eureka Cty. V. Seventh Jud. Dist. Ct.*, 134 Nev. 275, 279, 417 P.3d 1121,
21 1124 (2018)(internal quotation marks omitted). “In Nevada, water rights are ‘regarded and
22 protected as real property.’” *Id.*(quoting *Application of Filippini*, 66 Nev. 17, 21-22, 202 P.2d 535,
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24 ⁶⁸ Although this Court refrains from analyzing whether or not 1309 is supported by substantial evidence, the Court notes
25 that part of the State Engineer’s 1309 decision of limiting use to 8,000afa or less is based on the concern of adversely
26 impacting the endangered Moapa Dace, located in the Muddy River Springs. This decision does not appear to take into
27 account more nuanced effects of how pumping in each separate basin affects the Muddy River flows, no matter how far
28 away the basin is from the river. In other words, reprioritization of each water rights holder in relation to the other (by
prioritization date in the newly created superbasin) means that their standing (and more importantly, their potential for
curtailment) is only by date. Water use in one basin may not have the same effect as another in reducing Muddy River
flows; however, these distinguishing factors are all erased by combining all of the basins together for joint
administration.

537 (1949)). Therefore, holders of water rights in Nevada are entitled to constitutional protections regarding those property rights, including procedural due process. *See id.*

The Nevada Supreme Court has held that “[a]lthough proceedings before administrative agencies may be subject to more relaxed procedural and evidentiary rules, due process guarantees of fundamental fairness still apply.” *Dutchess Bus. Serv. ’s, Inc. v. Nev. State Bd. of Pharmacy*, 124 Nev. 701, 711, 191 P.3d 1159, 1166 (2008). In *Dutchess*, the Nevada Supreme Court noted further that “[a]dministrative bodies must follow their established procedural guidelines and give notice to the defending party of ‘the issues on which decision will turn and . . . the factual material on which the agency relies for decision so that he may rebut it.’” *Id.*

With respect to notice and hearing, the Nevada Supreme Court has held that “[i]nherent in any notice and hearing requirement are the propositions that the notice will accurately reflect the subject matter to be addressed and that the hearing will allow full consideration of it.” *Public Serv. Comm’n of Nev. v. Southwest Gas Corp.*, 99 Nev. 268, 271, 772 P.2d 624, 626 (1983). “Notice must be given at an appropriate stage in the proceedings to give parties meaningful input in the adjudication of their rights.” *Seventh Jud. Dist. Ct.*, 134 Nev. at 280-81, 417 P.3d at 1125-26 (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 533, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) (“It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner.”)). A party’s due process rights attach at the point at which a proceeding holds the *possibility* of curtailing water rights, and due process necessitates notice of that possibility to the party potentially affected.⁶⁹

For the reasons that follow, this Court concludes that (a) the notice and hearing procedure employed by the State Engineer failed to satisfy the requirements of due process because the notice failed to put the parties on notice that the State Engineer would decide on a management protocol for

⁶⁹ “[B]ecause the language in the show cause order indicates that the district court may enter an order forcing curtailment to begin, junior water rights holders must be given an opportunity to make their case for or against the option of curtailment. Notice must be given at an appropriate stage in the proceedings to give parties meaningful input in the adjudication of their rights...Thus, junior water rights holders must be notified before the curtailment decision is made, even if the specific “how” and “who” of curtailment is decided in a future proceeding.” *Seventh Jud. Dist. Ct.*, 134 Nev. 275, 280-81, 417 P.3d 1121, 1125 (2018).

1 the LWRFS at the conclusion of the proceeding; (b) the hearing itself failed to satisfy due process
2 because the parties were not afforded a full and complete opportunity to address the implications of
3 the State Engineer's decision to subject the LWRFS to conjunctive management and joint
4 administration, and (c) the State Engineer's nondisclosure, before or during the Order 1303
5 proceedings of the six criteria he would use in evaluating the connectivity of the basins and
6 determining the new consolidated basin boundary, failed to satisfy the requirements of due process.

7 Specifically, the notice of hearing and amended notice of hearing ("Notice") noticed an
8 opportunity for the parties that submitted Order 1303 reports to explain their positions and
9 conclusions with respect to the questions posed for consideration in Order 1303.^{70 71} But the
10 questions posed in Order 1303 did not relate to management of the LWRFS, such as issues of
11 conjunctive or joint administration, but rather related to factual inquiries. Instead, Order 1303
12 specifically authorized stakeholders to file reports addressing four specific areas, none of which
13 related to the management of the LWRFS.⁷²

14 In noticing the hearing to consider the reports submitted pursuant to Order 1303, there was
15 no mention of consideration of the prospective management of the LWRFS, *i.e.*, whether it would be
16 appropriately managed conjunctively and as a joint administrative unit. Indeed, this was consistent
17 with the Hearing Officer's opening remarks at the August 8, 2019, prehearing conference in which
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19 ⁷⁰ See SE ROA 262-82, Ex. 2; SE ROA 284-301, Ex. 3

20 ⁷¹ The Notice included the following summary:

21 On August 9, 2019, the State Engineer held a pre-hearing conference regarding the hearing on the
22 submission of reports and evidence as solicited in Order 1303.... The State Engineer established that
23 the purpose of the hearing on the Order 1303 reports was to provide the participants an opportunity to
24 explain the positions and conclusions expressed in the reports and/or rebuttal reports submitted in
25 response to the Order 1303 solicitation. The State Engineer directed the participants to limit the offer of
26 evidence and testimony to the salient conclusions, including directing the State Engineer and his staff
27 to the relevant data, evidence and other information supporting those conclusions. ***The State Engineer
further noted that the hearing on the Order 1303 reports was the first step in determining to what
extent, if any, and in what manner the State Engineer would address future management decisions,
including policy decisions, relating to the Lower White River Flow System basins. On that basis, the
State Engineer then addressed other related matters pertaining to the hearing on the Order 1303
reports, including addressing the date and sequence of the hearing, as set forth in this Notice of
Hearing.*** SE ROA 285, Ex. 3 (emphasis added).

28 ⁷² SE ROA 647-48. Ex. 6.

1 the State Engineer actively discouraged participants from providing input regarding that very
2 question. The hearing officer stated as follows at the August 8 prehearing conference:

3 And so, and I'm going to talk about this and we've spoken about this before, is
4 that really this is a threshold reporting aspect, that this is part of a multi-tiered
5 process in terms of determining the appropriate management strategy to the
6 Lower River Flow System.

7 This larger substantive policy determination is not part of the particular
8 proceeding. That's part of later proceedings....

9 SE ROA 522, Ex. 5 (Hr'g Tr. at 10:6-20).

10 The hearing officer gave additional consistent guidance at the outset of the September 23
11 hearing, further directing the parties not to address policy issues even in relation to the fact that
12 Order 1303 authorized stakeholders to include in their reports "[a]ny other matter believed to be
13 relevant to the State Engineer's analysis."⁷³ Specifically, the Hearing Officer directed as follows:

14 And while that fifth issue is [as set forth in Ordering Paragraph 1(e) of Order
15 1303] not intended to expand the scope of this hearing into making policy
16 determinations with respect to management of the Lower White River Flow
17 System basin's individual water rights, those different types of things, because
18 those are going to be decisions that would have to be made in subsequent
19 proceedings should they be necessary.

20 SE ROA 52962, Ex. 26 (Hr'g Tr. 6:4-15).

21 Not only did the notice not adequately notify the parties of the possibility of the
22 consideration and resolution of policy issues, but the Hearing Officer consistently
23 directed the parties to avoid the subject, compounding the due process violation.

24 Notwithstanding the Hearing Officer's admonitions and the plain language of the notice, the
25 State Engineer ultimately issued a dramatic determination regarding management of the LWRFS. In
26 doing so, the State Engineer precluded the participants from providing input that would have
27 allowed for the full consideration of the issue. Specifically, participants and experts did not have the
28 opportunity to, and were actively discouraged from addressing policy issues critical to the

⁷³ SE ROA 648, Ex. 6.

1 management of the LWRFS.⁷⁴ The refusal to consider these issues ensured that the State Engineer's
2 decision was not based on a fully developed record.

3 The State Engineer acknowledged as much in Order 1309 itself. There, the State Engineer
4 noted the fact that Georgia-Pacific and Republic raised concerns over the sufficiency of the scope of
5 the proceedings at hearing but inexplicably asserted that a to-be-determined management scheme
6 would be developed to address "management issues" in the LWRFS:

7 Georgia-Pacific and Republic asserted that boundaries are premature without
8 additional data and without a legally defensible policy and management tools in
9 place. They expressed concern that creating an administrative unit at this time
10 inherently directs policy without providing for due process. The State Engineer
11 has considered these concerns and agrees that additional data and improved
12 understanding of the hydrologic system is critical to the process. He also believes
13 that the data currently available provide enough information to delineate LWRFS
14 boundaries, and that an effective management scheme will provide for the
15 flexibility to adjust boundaries based on additional information, retain the ability
16 to address unique management issues on a sub-basin scale, and maintain
17 partnership with water users who may be affected by management actions
18 throughout the LWRFS.

19 SE ROA 54, Ex. 1.

20 This language reflects a serious misunderstanding of the effect of Order 1309. Insofar as
21 Order 1309 subjects the LWRFS to conjunctive management and joint administration, resulting in
22 effectively reordering of priority of water rights in the LWRFS superbasin, the order effectuates a
23 management scheme with far reaching consequences. Thus, agreeing on the one hand that an
24 "effective management scheme" will be necessary to address challenges in the LWRFS, but
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26 ⁷⁴ These issues include, but are not limited to: whether Nevada law allows the State Engineer to conjunctively manage
27 multiple hydrographic basins in a manner that modifies the relative priority of water rights due to the administration
28 consolidation of basins; whether the State Engineer would establish a "critical management area" pursuant to NRS
534.110 and, if so, whether he would develop a groundwater management plan or defer to the stakeholders to develop
one; whether Nevada law gives the State Engineer authority to designate a management area that encompasses more than
one basin; whether "safe-yield" discrete management areas should be established within the proposed administrative
unit; whether water rights holders enjoy a "property right" in the relative priority of their water rights such that impairing
that right may constitute a "taking"; whether unused (or only sporadically used) senior water rights take precedence over
certificated or fully used junior rights, particularly where these junior rights are in continuous use to support
economically significant enterprises; whether States compel quantification of federal reserved rights by a date certain;
and whether the State Engineer should approach the legislature to seek different or additional management tools or
authority. See SE ROA 52801-8, Ex. 25 (Georgia Pacific and Republic Closing Argument, outlining policy questions
for consideration by the State Engineer at later proceedings, proceedings that never took place).

1 contending it will be developed in the future, reveals a lack of appreciation of the implications of the
2 order to the detriment of not only the participants but all water rights holders in the LWRFS basins.
3 Without consideration of the implications of the management decision contained in the order, it
4 cannot be based on a full consideration of the issues presented. In affirmatively limiting the scope of
5 the proceeding to include a full consideration of the issues, the State Engineer violated the
6 stakeholders' due process rights. Both the notice and the hearing procedures employed failed to
7 comport with due process.

8 Finally, as noted above, the State Engineer did not give notice or disclose before or during
9 the Order 1303 proceedings, the six specific criteria that he would use in evaluating the connectivity
10 of the basins and determining the new consolidated basin boundary. Although the State Engineer
11 asserted that he considered the evidence and testimony presented in the public hearing "on the basis
12 of a common set of criteria that are consistent with the original characteristics conserved critical in
13 demonstrating a close hydrologic connection requiring joint management in Rulings 6254-6261,"⁷⁵
14 a review of these rulings reveals that none of the six criteria or characteristics were previously
15 identified, examined in the hydrological studies and subsequent hearing that followed the
16 completion of the Order 1169 aquifer test, or expressly disclosed in Rulings 6254-6261.⁷⁶ These
17 criteria were instead explicitly disclosed for the first time in Order 1309, which means the
18 participants had no opportunity to directly address these criteria in their presentations, or critically,
19 to address the appropriateness of these criteria.

20 This Court is unpersuaded by the State Engineer's argument that it could develop the criteria
21 only after it heard all the evidence at the hearing. Even if it did, this does not justify a deprivation of
22 the right to due process. In order to provide the parties due process and a meaningful opportunity to
23 present evidence on these issues, the State Engineer should have included these factors in the Notice
24 of Pre-Hearing Conference. *See Eureka Cty.*, 131 Nev. at 855, 359 P.3d at 1120; *Revert*, 95 Nev. at
25 787, 603 P.2d at 265 (criticizing the state engineer for engaging in post hoc rationalization). This
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27 ⁷⁵ See SE ROA 48.

28 ⁷⁶ SE ROA 726-948.

1 due process violation is particularly harmful to water rights holders in Kane Springs, the sole basin
2 that had not been previously designated for management under NRS 534.030, had not been included
3 in the Order 1169 aquifer test, and had not been identified as a basin to be included in the LWRFS
4 superbasin in Order 1303.

5 Accordingly, this Court concludes that revealing the criteria only after stakeholders had
6 engaged in the extensive investigations, expert reporting, and the intense factual hearing requested
7 by Order 1303 further violates the participants' due process rights.

8 As this Court has determined that the Nevada State Engineer exceeded his statutory authority
9 and violated the participants' due process rights in issuing Order 1309, it declines to reach further
10 analysis on whether his factual findings in Order 1309 were supported by substantial evidence.

11 **IV.**

12 **CONCLUSION**

13 The Court FINDS that the Nevada State Engineer exceeded his statutory authority and had
14 no authority based in statute to create the LWRFS superbasin out of multiple distinct, already
15 established hydrographic basins. The Nevada State Engineer also lacked the statutory authority to
16 conjunctively manage this LWRFS superbasin.

17 The Court ALSO FINDS that the Nevada State Engineer violated the Petitioners'
18 Constitutional right to due process by failing to provide adequate notice and a meaningful
19 opportunity to be heard.

20 As a result, Order 1309 is arbitrary, capricious, and therefore void.

21 Good cause appearing, based upon the above Findings of Fact and Conclusions of Law, the
22 Court ORDERS, ADJUDGES AND DECREES as follows:

23 IT IS HEREBY ORDERED that the petition for review of the Nevada State Engineer's
24 Order No. 1309 filed by Petitioners Lincoln County Water District and Vidler Water Company, Inc.
25 is GRANTED.

26 IT IS FURTHER ORDERED that the petition for review of the Nevada State Engineer's
27 Order No. 1309 filed by Petitioners Coyote Springs Investment, LLC is GRANTED.
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IT IS FURTHER ORDERED that the petition for review of the Nevada State Engineer's Order No. 1309 filed by Petitioners Apex Holding Company, LLC and Dry Lake Water, LLC is GRANTED.

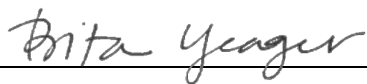
IT IS FURTHER ORDERED that the petition for review of the Nevada State Engineer's Order No. 1309 filed by Petitioners Nevada Cogeneration Associates Nos. 1 and 2 is GRANTED.

IT IS FURTHER ORDERED that the petition for review of the Nevada State Engineer's Order No. 1309 filed by Petitioners Georgia-Pacific Gypsum LLC, and Republic Environmental Technologies, Inc. is GRANTED.

IT IS FURTHER ORDERED that the State Engineer's Order 1309 is VACATED in its entirety.

IT IS SO ORDERED.

Dated this 19th day of April, 2022



**66B 24A E875 2549
Bita Yeager
District Court Judge**

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

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5
6 Southern Nevada Water
Authority, Plaintiff(s)

CASE NO: A-20-816761-C

7 vs.

DEPT. NO. Department 1

8
9 Nevada State Engineer, Division
of Water Resources,
10 Defendant(s)

11
12 **AUTOMATED CERTIFICATE OF SERVICE**

13 This automated certificate of service was generated by the Eighth Judicial District
14 Court. The foregoing Findings of Fact, Conclusions of Law and Order was served via the
15 court's electronic eFile system to all recipients registered for e-Service on the above entitled
case as listed below:

16 Service Date: 4/19/2022

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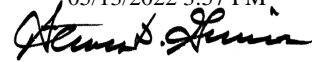
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CLERK OF THE COURT

FFCO

**DISTRICT COURT
CLARK COUNTY, NEVADA**

LAS VEGAS VALLEY WATER DISTRICT,
and SOUTHERN NEVADA WATER
AUTHORITY,

Petitioners,

vs.

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

Respondent.

And All Consolidated Cases.

Case No. A-20-816761-C
Dept. No. I

Consolidated with Cases:

A-20-817765-P
A-20-818015-P
A-20-817977-P
A-20-818069-P
A-20-817840-P
A-20-817876-P
A-21-833572-J

**ADDENDUM AND CLARIFICATION TO COURT'S FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER GRANTING PETITIONS FOR JUDICIAL
REVIEW FILED ON APRIL 19, 2022**

This matter came before this Court on consolidated petitions for judicial review of State Engineer's Order 1309 filed by Petitioners:

- Southern Nevada Water Authority and Las Vegas Valley Water District
- Coyote Spring Investment, LLC
- Apex Holding Co. and Dry Lake Water, LLC
- The Center for Biological Diversity
- Muddy Valley Irrigation Company
- Nevada Cogeneration Associates Nos. 1 and 2
- Georgia-Pacific Gypsum LLC and Republic Environmental Technologies, Inc.
- Lincoln County Water District and Vidler Water Company.

1 In the Order filed April 19, 2022, the Court determined that the Nevada State Engineer
2 exceeded his statutory authority and violated the participants' due process rights in issuing Order
3 1309, and declined to reach further analysis on whether his factual findings in Order 1309 were
4 supported by substantial evidence.

5 The Petitions filed by petitioners Southern Nevada Water Authority and Las Vegas Valley
6 Water District, Muddy Valley Irrigation Company, and The Center for Biological Diversity
7 supported the Nevada State Engineer's position that Order 1309 did not exceed the State Engineer's
8 statutory authority nor violated participant's due process rights in issuing Order 1309. However,
9 each of these three petitioners challenged the factual findings as not being supported by substantial
10 evidence.

11 IV.
12 CONCLUSION

13 To the extent that the petition for review of the Nevada State Engineer's Order No. 1309
14 filed by Southern Nevada Water Authority and Las Vegas Valley Water District seeks relief for
15 violating their due process rights, IT IS HEREBY ORDERED that the petition is GRANTED IN
16 PART. The remaining portion of the petition that support the position that the Nevada State
17 Engineer did not exceed his statuory authority in issuing Order 1309 is DISMISSED.

18 To the extent that the remaining petitions support the position that Nevada State Engineer did
19 not exceed his statutory authority and provided due process in issuing Order 1309;

20 IT IS FURTHER ORDERED that the petition for review of the Nevada State Engineer's
21 Order No. 1309 filed by Petitioner Muddy Valley Irrigation Company is DISMISSED.

22 IT IS FURTHER ORDERED that the petition for review of the Nevada State Engineer's
23 Order No. 1309 filed by Petitioner The Center for Biological Diversity is DISMISSED.

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26 IT IS SO ORDERED.

Dated this 13th day of May, 2022



EE8 27A A594 AF7E
Bita Yeager
District Court Judge

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Southern Nevada Water
Authority, Plaintiff(s)

CASE NO: A-20-816761-C

7 vs.

DEPT. NO. Department 1

8
9 Nevada State Engineer, Division
of Water Resources,
10 Defendant(s)

11
12 **AUTOMATED CERTIFICATE OF SERVICE**

13 This automated certificate of service was generated by the Eighth Judicial District
14 Court. The foregoing Findings of Fact, Conclusions of Law and Judgment was served via the
15 court's electronic eFile system to all recipients registered for e-Service on the above entitled
case as listed below:

16 Service Date: 5/13/2022

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24 Kiel Ireland kireland@ag.nv.gov

25 Justina Caviglia jcaviglia@nvenergy.com

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A-20-816761-C Southern Nevada Water Authority, Plaintiff(s)
vs.
Nevada State Engineer, Division of Water Resources, Defendant(s)

May 16, 2022 09:30 AM ALL PENDING - LVVWD AND SNWA'S MOTION FOR STAY
PENDING APPEAL...THE CENTER FOR BIOLOGICAL
DIVERSITY'S JOINDER TO LVVWD AND SNWA'S MOTION TO
STAY...STATE ENGINEERS PARTIAL JOINDER TO LVVWD
AND SNWAS MOTION FOR STAY PENDING APPEAL

HEARD BY: Yeager, Bitu

COURTROOM: RJC Courtroom 05C

COURT CLERK: Tucker, Michele

RECORDER: Lizotte, Lisa

REPORTER:

PARTIES PRESENT:

Andrew D. Moore	Attorney for Other
Bradley J Herrema	Attorney for Intervenor
Christian T. Balducci	Attorney for Intervenor
Derek K Muaina	Attorney for Other
Emilia K. Cargill	Attorney for Intervenor
Francis C Flaherty	Attorney for Intervenor
Gregory H. Morrison	Attorney for Other
James N. Bolotin	Attorney for Defendant
Justina A. Caviglia	Attorney for Intervenor, Other
Karen A. Peterson	Attorney for Intervenor
Kent R. Robison	Attorney for Intervenor
Lucas M. Foletta	Attorney for Intervenor, Other
Paul G. Taggart	Attorney for Plaintiff
Robert A. Dotson	Attorney for Intervenor
Severin A. Carlson	Attorney for Other
Sylvia L. Harrison	Attorney for Intervenor, Other
Wayne O. Klomp	Attorney for Intervenor
William L Coulthard	Attorney for Intervenor

JOURNAL ENTRIES

ALL PENDING - LVVWD AND SNWA'S MOTION FOR STAY PENDING APPEAL...THE
CENTER FOR BIOLOGICAL DIVERSITY'S JOINDER TO LVVWD AND SNWA'S MOTION TO
STAY...STATE ENGINEERS PARTIAL JOINDER TO LVVWD AND SNWA'S MOTION FOR
STAY PENDING APPEAL

Scott Lake, Esq. on behalf of Center for Biological Diversity, also present.

Court STATED the Motions for Retax and Motions for attorney fees would be rescheduled to Tuesday, July 5, 2022 at 8:30 am.

Arguments by counsel as to their respective motions as to the Motion for Stay. The COURT FINDS there is enough already in place as far as the statutes that allow for the State Engineer to curtail. There is also the MOU's that are in place regarding the Moapa Dace and there is also litigation that could happen regarding the Muddy River decree. The Court FURTHER FINDS there are other legal means that the parties can protect their water rights and protect the Moapa Dace. The Court DOES NOT FIND that in denying the Stay the object of the appeal would be defeated. The Court FURTHER DOES NOT FIND that SNWA has established that their water rights have existed before this Court vacating Order 1309 will be substantially changed. In looking at the irreparable harm and in balancing the harms the Court FINDS there has been harms for the petitioners whose petitions have been granted based on the exceeding statutory authority and the due process issues that were problematic in Order 1309. The Court DOES NOT FIND that it weighs in favor of granting the Stay. COURT ORDERED, LVVWD and SNWA's Motion for Stay Pending Appeal DENIED.

Mr. Bolton advised he would prepare the Order.

Assessment of Moapa Dace and Other Groundwater-Dependent Special Status Species in the Lower White River Flow System

PRESENTATION TO THE OFFICE OF THE NEVADA STATE ENGINEER

Prepared by



**SOUTHERN NEVADA
WATER AUTHORITY**



June 2019

The Pederson Springs Complex contains five major springs or spring groups: Pederson Spring, East Pederson Spring group, Spring 13 group, Spring 12 group, and Spring 11 (USFWS, 2006a, p. 18). Pederson Spring is the highest elevation spring in the Warm Springs Area (USFWS, 2006a, p. 18). Pederson Stream flows north through the Warm Springs West gage and then onto the WSNA. The Pederson Springs Complex and Pederson Stream are generally referred to as the Pederson Unit. The USFWS has a 3.5 cubic feet per second (cfs) spring surface water right on the Pederson Unit for non-consumptive wildlife use in the MVNWR (permit number 56668 on NDWR, 2019).

The Plummer Springs Complex contains three major springs or spring groups: Plummer West, Plummer Central, and Plummer East (USFWS, 2006a, p. 21). Plummer stream flows into the Refuge Stream at the border of WSNA. The Plummer Springs Complex and Plummer Stream are generally referred to as the Plummer Unit.

2.2 Warm Springs Natural Area

The WSNA is a 1,220-acre property acquired by SNWA in 2007. SNWA manages the property as a natural area for the recovery of Moapa dace and the benefit of native species. Since acquisition of the property, SNWA has acquired 30 additional acres of adjacent land, completed extensive habitat restoration for both Moapa dace and other groundwater-dependent special status species, constructed public trails for low-impact public use, and promoted public involvement (Section 4.2). Approximately 85 percent of the Moapa dace population is currently on the WSNA.¹

Most of the Apcar stream, lower Pederson stream, and the Refuge stream are located within the WSNA (Figure 2-1). All of these waters are occupied by Moapa dace, some of which are used for spawning and rearing (Section 3.1). SNWA re-routed and restored the lower Pederson stream closer to its historical path in 2008, so it again flows north into Apcar Stream. The Apcar and Refuge streams converge before entering the main stem of the upper Muddy River.

The WSNA includes four spring areas: Little Springs, Cardy Lamb Spring, Twin Springs, and Baldwin Springs Complex. Little Springs, which converges with Plummer Stream and provides source water for Refuge Stream, is occupied by Moapa dace and used for spawning and rearing. Cardy Lamb Spring was historically highly modified into a swimming pool with a gravel bottom, and a concrete irrigation ditch carries the water to South Fork. Currently Moapa dace cannot disperse to Cardy Lamb Spring on their own due to the design of the ditch. Portions of Twin Springs and Baldwin Springs Complex are developed and inaccessible to the Moapa dace, but they provide source waters for South Fork.

South Fork, parts of North Fork, parts of Muddy Creek, and the main stem of the upper Muddy River are also on the WSNA. These stream reaches are largely unoccupied by Moapa dace, but due to eradication of an invasive species and various restoration efforts, these areas are once again accessible to the fish (Section 3.2).

1. Based on bi-annual snorkel surveys (Section 3.3).



2.3 Church Recreational Area

The Church operates a 72-acre recreational area for church members in the Warm Springs Area. The Church recreational area encompasses Big Muddy Springs (the largest springs in the Warm Springs Area) and most of the Muddy Creek tributary (Figure 2-1). Moapa dace have begun to disperse up Muddy Creek now that it is once again accessible to them. As a result, Big Muddy Springs could be re-colonized in the future.

2.4 Other Lands

Private property encompasses stretches of the Apcar stream, the northern tip of the North Fork stream, and stretches of the main stem of the upper Muddy River (Figure 2-1). The MVWD property includes short sections of the Apcar and South Fork upper spring brooks. The Clark County and NVEnergy properties include a stretch of the main stem of the upper Muddy River.