IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

ADAM SULLIVAN, P.E., NEVADA STATE ENGINEER, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES; SOUTHERN NEVADA WATER AUTHORITY; CENTER FOR BIOLOGICAL DIVERSITY; AND MUDDY VALLEY IRRIGATION CO.

Appellant,

v.

LINCOLN COUNTY WATER DISTRICT; et al.,

Respondents.

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Elizabeth A. Brown
Clerk of Supreme Court

Case No. 84739

(Consolidated with 84741, 84742, 84809)

OPPOSITION TO SOUTHERN NEVADA WATER AUTHORITY'S EMERGENCY MOTION FOR STAY

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NRAP 26.1 DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the justices of the Supreme Court and the judges of the Court of Appeals may evaluate possible disqualification or recusal.

Respondent Georgia-Pacific Gypsum LLC ("Georgia-Pacific") is a wholly-owned subsidiary of Koch Industries, Inc.

Respondent Republic Environmental Technologies, Inc. ("Republic") is a wholly-owned subsidiary of Republic Services, Inc.

The following law firm has lawyers who appeared for Georgia-Pacific and Republic in the case or are expected to appear on their behalf in this Court: McDonald Carano LLP.

DATED: June 8, 2022.

MCDONALD CARANO LLP

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On April 19, 2022, and after extensive briefing and oral argument, the district court issued a well-reasoned *Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review* ("Order"). In its Order, the district court vacated Order 1309, concluding that the State Engineer did not have the statutory authority to consolidate already-established hydrographic basins into one hydrographic superbasin and that the proceedings deprived Respondents of their due-process rights. In district court, Southern Nevada Water Authority ("SNWA") challenged Order 1309 through a petition for judicial review, admitted that the State Engineer deprived it of its opportunity to be meaningfully heard, and urged the district court to reverse Order 1309 (at least in part). The district court did what SNWA initially asked it to do, yet SNWA is now *defending* Order 1309, and asks this Court to stay the district court's order vacating it. In other words, SNWA is asking this Court to condone the State Engineer's overreach of power and deprivation of constitutional rights (which SNWA admitted), and keep an unconstitutional and unlawful order in place for an undefined period of time.

This is wholly inappropriate, for at least three reasons: (1) despite exceeding the page limit for motions by 14 pages, SNWA's motion does not satisfy NRAP 8(c); (2) SNWA inappropriately attempts to present the dispositive issues on appeal

in its motion; and (3) SNWA is not an aggrieved party, and thus does not have standing to bring its appeal. Respondents Georgia-Pacific Gypsum LLC and Republic Environmental Technologies, Inc. (collectively, "GP-R") therefore request that this Court deny SNWA's Emergency Motion for Stay.

II. ARGUMENT

1. SNWA Fails to Satisfy NRAP 8(c)'s Factors.

In deciding whether to issue a stay pending resolution of an appeal, the Court considers four factors. NRAP 8(c). The party moving for a stay pending appeal "bears the burden of showing that the circumstances justify an exercise of that discretion." *Nken v. Holder*, 556 U.S. 418, 433–34, (2009). As explained below, SNWA has failed to satisfy its burden of demonstrating that a stay is warranted here.

a. The Object of the Appeal Will Not be Defeated if the Stay is Denied.

NRAP 8(c) requires this Court to evaluate "whether the object of the . . . appeal will be defeated if the stay . . . is denied." SNWA argues that the object of the appeal is "the protection of senior surface water rights and habitat for the Moapa dace." Mot. at 8. SNWA seems to suggest that the *only* method to achieve this object is through the State Engineer's prohibition on groundwater pumping beyond 8,000 afa that was contained in the unconstitutional Order 1309. This ignores the ample other mechanisms in place to limit pumping and protect senior water rights, providing protection during the pendency of the appeal.

For example, the Memorandum of Agreement ("MOA") involving the U.S. Fish and Wildlife Service and several major water users in the Lower White River Flow System ("LWRFS") requires mitigation measures at certain spring flow levels, protecting both decreed rights and the Moapa Dace, regardless of the status of Order 1309. The district court correctly noted these mechanisms in its oral ruling denying SNWA's motion for stay, explaining that are statutes that allow the State Engineer to curtail pumping, including NRS 534.110(7), which provides the State Engineer with authority to "designate as a critical management area any basin in which withdrawals of groundwater consistently exceed the perennial yield of the basin", and there is an MOA in place regarding the Moapa dace. App MFS 186:20-187:4. Thus, SNWA cannot prove that the object of their appeal will be defeated absent a stay.

b. SNWA Will Not Suffer Irreparable Harm if the Court Denies the Motion for Stay, but Respondents Will.

Under NRAP 8(c), a party moving for a stay must prove that it will suffer "irreparable or serious injury." SNWA's claim of irreparable harm is based on its assertion that increased groundwater pumping is a "threat to SNWA's water rights and the Moapa dace." (Mot. at 10.) But "simply showing ***some possibility*** of irreparable injury is insufficient." *Al Otro Lado v. Wolf*, 952 F.3d 999, 1007 (9th Cir. 2020) (internal quotation marks omitted) (emphasis added). Rather, SNWA must show "that irreparable injury is ***likely to occur*** during the period before the

appeal is likely to be decided." *Id.* (finding that the government failed to make such showing where it relies on "estimates, assumptions, and projections") (emphasis added); *see also Berryman v. Int'l Bhd. Elec. Workers*, 82 Nev. 277, 280, 416 P.2d 387, 389 (1966) (stating that in the context of an injunction, there should be a "reasonable probability that real injury will occur if the injunction does not issue").

Here, SNWA's claims are entirely speculative. SNWA provides no evidence of the likelihood of increased pumping while this matter is pending appeal Though SNWA summarily cites a subdivision map filed by CSI as proof that the threat of over pumping is "real and immediate," it fails to provide any evidence that the State Engineer is without any alternative means to limit or prevent such pumping. Mot. at 9. It also fails to cite any request of the State Engineer to authorize pumping that was not already occurring at the time Order 1309 was issued. Its sole citation to CSI's statements made during the hearing in district court is insufficient evidence to show that increased pumping will ***likely*** occur. *See* Mot. at 10-11. On the contrary, the record on appeal evidences that CSI has already agreed to *curtail* pumping at trigger levels set by the MOA (and agreed to by SNWA); the State Engineer noted that the 8,000 afa number could be higher (i.e., more pumping could occur); and any additional pumping by CSI is not likely to occur at a volume that could directly affect Muddy River flows. Most importantly, the 8,000 afa limit that SNWA tries to enforce was never approved, either implicitly or otherwise, by the district court.

Further, and as explained above, SNWA also completely fails to note that there are other mechanisms in place (beside Order 1309) that protect senior decreed rights and the Moapa Dace. What's more, since Order 1309 issued, there has been additional data indicating that spring flows in the LWRFS are recovering. *See* Request for Judicial Notice, **Exhibit 1**. For example, the Hydrologic Review Team ("HRT Report") includes an in-depth analysis of the impacts on Muddy River Springs and Muddy River flows resulting from regional groundwater pumping, and is the result of extensive data collection, monitoring, and other analytical activities during 2020. *Id.* The HRT Report concludes that both the Pederson Spring and Warm Springs West are recovering, not declining. *Id.* Further, recent research shows that the Moapa dace population has significantly rebounded since the elimination of invasive predatory species, like tilapia, from the Muddy River and tributaries where the dace populate. *See* Request for Judicial Notice, Ex. 2, the "Moapa Dace Article". In fact, the research on which the Moapa Dace Article relies is research conducted by SNWA. Thus, SNWA knows full well that other factors play into the ecological health of the Moapa Dace population and the LWRFS. This additional data directly undercuts SNWA claims regarding the current state of the LWRFS.

SNWA's claim of irreparable harm is also inconsistent with its own characterization of the implications of Order 1309. In its brief in district court, SNWA (disingenuously) argued that Order 1309 did not affect a curtailment and that

any management action potentially reducing pumping would be the subject of future regulatory proceedings. Specifically, SNWA said:

> Finally, the question of priority is only important if a curtailment action is initiated. In a curtailment situation, the State Engineer "restricts water use to conform to priority rights." This means, that junior uses that are in excess of the available supply get curtailed. Order 1309 did not initiate curtailment. Instead, Order 1309 established the factual predicate to the possibility of curtailment in the future (i.e., the State Engineer defined the extent of the aquifer and the quantity of the available supply). If the State Engineer orders a water right to be curtailed in the future, such an action would be separately appealable under NRS 533.450.

SNWA Answering Brief at 24, **Exhibit 2**. SNWA now asks this Court to protect its senior water rights by preserving Order 1309 while this matter is appealed, effectively arguing that Order 1309 itself protects its senior decreed rights. This is contrary to its earlier contention that Order 1309 merely established the "factual predicate" for future management decisions. If the Order has no legally operative implications, then it is unclear why it is so important to preserve it.

To that point, it is GP-R not SNWA that will be harmed by a stay. GP-R's due process rights have been deprived in connection with the issuance of Order 1309. Asking GP-R and all other respondents to continue to suffer the effects of that deprivation is entirely unreasonable. Order 1309 subjected respondents' existing water rights to serious questions regarding the continued viability of those rights. Those questions caused respondents to re-think their business strategies for southern

Nevada and re-assess the value of their water rights. Allowing Order 1309 to stand will perpetuate the harm that the court already found exists as a result of Order 1309.

And staying only the portion of Order 1309 that establishes an 8,000 afa pumping limit is not an option. In its Motion, SNWA unsuccessfully tries to separate the State Engineer's finding that pumping should be limited to 8,000 afa from the unconstitutional procedure through which it was rendered. Mot. at 8.[1] But this is impossible. Once the district court found that the petitioners were deprived due process, as SNWA urged it to do, the district court had no other option but to vacate the entire unconstitutional order.

c. SNWA is Not Likely to Prevail on the Merits.

Finally, this Court must analyze whether SNWA "is likely to prevail on the merits in the . . . appeal." NRAP 8(c). Although movants do not always have to show a probability of success on the merits, the movant must "present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs ***heavily*** in favor of granting the stay." *Hansen v. Eighth Jud. District Court*, 116 Nev. 650, 659, 6 P.3d 982, 987 (2000) (emphasis added). This is a high bar to meet.

[1] SNWA also tried to do this at the hearing in district court, conceding that "there's a lot of parts to 1309 that you vacated that we don't have a problem with it being vacated. I mean, that -- we're comfortable with it." 2 APP MFS 130:6-8. But Nevada caselaw precludes piecemeal appeal, and thus does not support SNWA's attempt to preserve one specific finding of Order 1309. *Ford v. Showboat Operating Co.*, 110 Nev. 752, 756, 877 P.2d 546, 549 (1994) (holding that "no court rule or statute provides for an appeal from a finding of fact or from a conclusion of law").

Despite SNWA's improper attempt to argue the merits of the appeal in its motion, it has failed to provide any argument that the balance of equities weighs heavily in its favor. Perhaps nothing more clearly illustrates how the balance of equities favors the denying the Emergency Motion for Stay than the State Engineer's (ill-considered) Partial Joinder that he filed in this appeal on June 8, 2022. He states:

> In the absence of Order 1309 . . . the State Engineer is without means to address the next management and administrative steps to identify how to balance the interests of the water right holders within the LWRFS while being protective of the water resource.

In short, notwithstanding this Court's unequivocal finding that Order 1309 was issued without authority and unconstitutionally violated due process rights, the State Engineer wishes to utilize a stay to perpetuate the harmful impact of Order 1309 by *relying* on that vacated Order to develop management and administrative steps for the LWRFS. Rather than rely on unconstitutional and ultra vires action, the State Engineer should use the tools available to him to find an alternative solution to the management of this region. If this Court grants SNWA's Emergency Motion for Stay and allows a constitutionally and statutorily unsound order to remain in place, the State Engineer will simply delay in finding a constitutional and lawful resolution, which harms all parties involved.

2. SNWA Conflates the Purpose of an Appeal with that of a Motion in an Attempt to Prematurely Argue the Merits of its Appeal.

A motion for stay is not the appropriate method through which to raise

substantive issues in the appeal. For this very reason, the Nevada Rules of Appellate Procedure provide different rules for motions and appeals. SNWA nonetheless raises its substantive arguments in its motion, and then asks this Court to make an expedited ruling. SNWA ignores the critical differences between a motion and appeal—namely, that an appeal is decided after full briefing, an opportunity to be heard, and extensive review by all justices assigned to the appeal. As GP-R argued in its Opposition to SNWA's Motion to Exceed Page Limits (which it fully incorporates by reference herein), SNWA's unmistakable misuse of the appellate process for the purpose of delay and blind sighting both the respondents and this Court should be rejected.

3. Under the Definitions in NRAP 3A(a), Appellant SNWA is Not an Aggrieved Party, and Therefore Lacks Standing.

Under NRAP 3A(a), only a "party who is aggrieved by an appealable judgment or order may appeal from that judgment or order . . . ." A party is "aggrieved" when a "judgment adversely and substantially affects either a personal right or a property right." *Roth v. Bayerische Motoren Werke Aktiengesellschaft*, 124 Nev. 1504, 238 P.3d 851 (2008). A party who has prevailed below cannot be said to be aggrieved. *Calloway v. City of Reno*, 116 Nev. 250, 271, 993 P.2d 1259, 1272 (2000) (dismissing cross-appeal for lack of jurisdiction because "the City prevailed in the district court, [so] the City is not an aggrieved party").

In its petition for judicial review, SNWA argued that the State Engineer violated due process, arbitrarily and capriciously ignored certain evidence, and applied erroneous analysis. It requested that the district court remove or strike the findings in Order 1309 regarding conflicts with senior water. SNWA received the exact relief it requested when the district court vacated Order 1309 for the very reasons SNWA presented in its petition. That the district court also struck the rest of Order 1309 does not mean that SNWA did not get the relief it requested. And as Coyote Springs Investments, LLC ("CSI") points out in its Opposition, the only reason why the district court's Order did not expressly grant SNWA's petition for judicial review is because SNWA represented that it had settled with the State Engineer. SNWA's contradictory position on appeal is disingenuous.

III. CONCLUSION

Accordingly, Respondents GP-R respectfully requests that this Court deny SNWA's Emergency Motion for Stay.

DATED: June 8, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to NRAP 27(d), I hereby certify that this response to a motion complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font, Times New Roman style. I further certify that this response to a motion complies with the page limits of NRAP 27(d)(2) because it does not exceed 10 pages.

Pursuant to NRAP 28.2, I hereby certify that I have read this response to a motion, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this response to a motion complies with all applicable Nevada Rules of Appellate Procedure. I understand that I may be subject to sanctions in the event that this motion is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: June 8, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of McDonald Carano LLP, and on June 8, 2022, a true and correct copy of the foregoing **OPPOSITION TO SOUTHERN NEVADA WATER AUTHORITY'S EMERGENCY MOTION FOR STAY** was e-filed and e-served on all registered parties to the Supreme Court's electronic filing system:

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Dated: June 8, 2022.

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EXHIBIT 1

EXHIBIT 1

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DISTRICT COURT

CLARK COUNTY, NEVADA

* * * *

LAS VEGAS VALLEY WATER DISTRICT, and SOUTHERN NEVADA WATER AUTHORITY, Petitioners, vs. TIM WILSON, P.E. State Engineer, State of Nevada, Department of Conservation and Natural Resources, Division of Water Resources, Respondent.	CASE NO.: A-20-816761-C (Lead Case) DEPT. NO.: 1 **Consolidated with:** 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-21-833571-J

REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF OPPOSITION TO LVVWD AND SNWA'S MOTION FOR STAY PENDING APPEAL

Georgia-Pacific Gypsum, LLC ("Georgia-Pacific") and Republic Environmental Technologies, Inc. ("Republic") (collectively, "Petitioners" or "GP-R"), by and through their counsel, Sylvia Harrison, Lucas Foletta, and Sarah Ferguson of McDonald Carano, LLP, hereby submit this Request for Judicial Notice in support of their concurrently filed Opposition to Las

Vegas Valley Water District's ("LVVWD") and Southern Nevada Water Authority's ("SNWA") Motion for Stay Pending Appeal ("Opposition"). Petitioners sought judicial notice of the same documents contained in this request when they filed their Answering Brief. The Court denied Petitioners' request because the documents post-dated the State Engineer's Order 1309, and the Court therefore found that they were not facts in issues under NRS 47.130(1). This reasoning does not apply here because this Court's review of LVVWD's and SNWA's Motion for a Stay is not limited to the record on appeal, but rather requires this Court to consider current and future conditions. Thus, while this Court did not find that judicial notice was appropriate in the limited context of reviewing the State Engineer's *previous* order, it can find that judicial notice is appropriate in the context of reviewing a *forward-looking* motion, for the reasons stated more fully below.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Request for Judicial Notice.

Petitioners move the Court pursuant to NRS 47.150 to take judicial notice of the following publicly available documents that are cited in Petitioner's Opposition filed concurrently herewith, incorporated by reference in the record, and germane to the issues presented in the Answering Brief:

- Screenshot of and excerpts from 2021 Annual Determination Report, prepared by Hydrologic Review Team (August 2021), publicly posted on: http://water.nv.gov/LWRFS/Annual%20HRT%20Reports/2021%20HRT%20Annual%20Determination%20Report.pdf, attached hereto as **Exhibit 1**;[1]
- Moapa Dace Numbers Tick Up Once Again, The Progress, publicly posted on https://mvprogress.com/2021/08/24/moapa-dace-numbers-tick-up-once-again/ and attached hereto as **Exhibit 2**.

II. Legal Standard.

A court must take judicial notice "if requested by a party and supplied with the necessary information." NRS 47.150(2); *Mack v. Est. of Mack*, 125 Nev. 80, 91, 206 P.3d 98, 106 (2009).

[1] Due to the large size of this report, Petitioners do not attach the entire report, but instead attach a screenshot showing the location of this file online, as well as relevant excerpts.

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Facts that are subject to judicial notice "are facts in issue or facts from which they may be inferred." NRS 47.130(1). To be judicially noticed, a 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); *see Mack*, 125 Nev. at 91, 206 P.3d at 106; *Sheriff, Clark County v. Kravetz*, 96 Nev. 919, 919, 620 P.2d 868, 869 (1980) ("[F]act, not reasonably open to dispute, should be judicially noticed."). A court may also take judicial notice of matters of law, NRS 47.140, and certain public documents. *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").

III. Arguments in Support of Request for Judicial Notice.

The above-listed documents are appropriately subject to judicial notice because all of the documents are posted publicly on the Internet and are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." NRS 47.130(2). The report excerpted in Exhibit 1 is the Annual Determination Report (referred to herein as the "HRT Report"), dated August 2021, prepared by the Hydrologic Review Team established under the Memorandum of Agreement dated April 20, 2006, which included, among others, SNWA.[2] As illustrated by the screenshot presented as the first page in Exhibit 1, the Division of Water Resources has located the HRT Report under "News" and the folder titled "LWRFS" (*See* Ex. 1 at 1), which is publicly available online. *Andolino*, 99 Nev. at 351, 662 P.2d at 633-34; *Greeson*, 59 F.2d at 531 (9th Cir. 1932).

The HRT Report includes a monitoring report prepared for the Moapa Valley Water District which presents spring flow data from 2012 through calendar year 2020 and demonstrates

[2] Other members of the Hydrologic Review Team include United States Fish and Wildlife Service ("FWS"); Coyote Springs Investment LLC ("CSI"), a Nevada limited liability company; (d) Moapa Band of Paiute Indians ("Tribe"); and (e) Moapa Valley Water District ("MVWD"), a political subdivision of the State of Nevada.

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that spring flows in the Muddy River Springs Area are generally stable relative to the levels following the Order 1169 pumping, and in some cases are increasing, not declining. The HRT Report is the result of extensive data collection, monitoring, and other analytical activities during 2020. SNWA was involved in preparing the HRT Report, yet in direct contravention of the data contained in the report it helped prepare, SNWA now attempts to argue the opposite is true in its Motion for Stay. Specifically, SNWA argues that increased pumping will cause irreparable harm to SNWA and will threaten the Moapa Dace population. (Mot. at 4-5.) The HRT Report demonstrates why SNWA's claim of future harm is misguided and unsupported, making the report directly relevant to the facts in issue here. *See Ragland v. U.S. Bank Nat'l Assn.*, 147 Cal. Rptr. 3d 41, 52 (Cal. Ct. App. 2012) (explaining that courts may take judicial notice of the existence of audit reports, websites, and blogs); *see also Sowell v. State*, No. 81586-COA, 2021 WL 978515 at *1 (Nev. App. 2021) (district court did not err in taking judicial notice of probation report).

Exhibit 2 is a news article published by Vernon Robison of The Progress, an independently-owned newspaper in northwest Clark County, titled *Moapa Dace Numbers Tick Up Once Again* ("Moapa Dace Article"). *See* Ex. 2. Citing research conducted by SNWA, US Fish and Wildlife Service ("USFWS"), and Nevada Department of Wildlife, the article concludes that the Moapa dace population has significantly rebounded since the elimination of invasive predatory species, like tilapia, from the Muddy River and tributaries where the dace populate. *Id.* As discussed in Petitioners' Opposition, SNWA ignores its own research when it suggests that Order 1309 is the *only tool* protecting the Moapa Dace population, when in fact several factors affect the health of the Moapa Dace population. As the Moapa Dace Article shows, conservation efforts *unrelated* to spring flows and *unrelated* to the unconstitutional and unlawful Order 1309 are successfully improving survival prospects for the dace population. Like the HRT Report, the article presented in Exhibit 2 supports Petitioners' argument that SNWA's claim for irreparable harm is unsupportable and simply incorrect given the recent research.

Petitioners' request is consistent with the caselaw cited above and Nevada's "flexible" application of the rule regarding judicial notice. *See Mack*, 125 Nev. at 91-92, 206 P.3d at 106 (explaining that the rule for judicial notice of records in related proceedings "is flexible in its

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application"). For these reasons, Petitioners request the Court take judicial notice of Exhibits 1 and 2 of this Motion.

AFFIRMATION

Pursuant to NRS 239B.030, the undersigned do hereby affirm that the preceding document does not contain the personal information of any person as defined in NRS 603A.040.

DATED this 9th day of May, 2022.

McDONALD CARANO LLP

/s/ Lucas Foletta

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EXHIBIT #	DESCRIPTION	NUMBER OF PAGES
1	Excerpts from 2021 Annual Determination Report (including screenshot of file on DWR website)	26
2	Moapa Dace Numbers Tick Up Once Again	4

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CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury, that I am an employee of McDonald Carano LLP and that on May 9, 2022, a true and correct copy of REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF OPPOSITION TO LVVWD AND SNWA'S MOTION FOR STAY PENDING APPEAL was electronically submitted to the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification. The parties below were also served via U.S. Mail, postage-prepaid:

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William Coulthard Coulthard Law 840 South Rancho Drive, #4-627 Las Vegas, NV 89106 *Attorneys for Coyote Springs Investments*	Emilia Cargill 3100 State Route 168 P.O. Box 37010 Coyote Springs, NV 89037 *Attorneys for Coyote Springs Investments*
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/s/Carole Davis
An Employee of McDonald Carano LLP

4854-5781-3508, v. 1

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EXHIBIT 1

EXHIBIT 1

State of Nevada
Division of Water Resources

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  - Rulings
  - Written Public Comment

2006 Memorandum of Agreement

Hydrologic Review Team

2021 Annual Determination Report

August 2021

2021 Annual Determination Report

Introduction

This Annual Determination Report, dated August 2021, was prepared by the Hydrologic Review Team (HRT) established under the Memorandum of Agreement (MOA) dated April 20, 2006, among: (a) Southern Nevada Water Authority (SNWA), a political subdivision of the State of Nevada; (b) United States Fish and Wildlife Service (FWS); (c) Coyote Springs Investment LLC (CSI), a Nevada limited liability company; (d) Moapa Band of Paiute Indians (Tribe); and (e) Moapa Valley Water District (MVWD), a political subdivision of the State of Nevada (MOA Signatories). This report was prepared in accordance with requirements set forth in Section 6(d) and 6(e) of the MOA.

2021 Annual Determination

The HRT recommends no change to the pumping restrictions set forth in the MOA at this time. Extensive data collection and analytical efforts have occurred since 2006 when the MOA was signed, including the completion of the Order 1169 Study and subsequent data collection and analyses presented during the NSE Lower White River Flow System administrative hearing in September 2019. The MOA Signatories are continuing to work to refine and share their analyses with the goal of furthering the objectives of the MOA and protecting the Moapa dace.

The MOA Signatories have also unanimously agreed that inclusion of the very lengthy Regional Baseline Pumping Report, completed by the HRT in October 2007, as an appendix to the Annual Determination Report is unnecessary, notwithstanding Section 6(e) of the MOA, because the Regional Baseline Pumping Report is a public document available upon request.

Objectives of the HRT

The objectives and responsibilities of the HRT are set forth in Section 6(b) of the MOA, which states:

> *The objectives of the HRT shall be: (1) to identify opportunities and make recommendations for the purpose of coordinating and ensuring accuracy, consistency and efficiency in monitoring, other data collection, and analytical activities performed under the Regional Monitoring Plans; (2) to establish technically sound analyses of impacts on Muddy River Springs and Muddy River flows resulting from regional groundwater pumping; (3) to assess based thereon whether the pumping restrictions, but not the Trigger Ranges, under paragraphs I(5)(c) through (g) above (or any successors thereto) should be adjusted to better reflect the extent to which regional groundwater pumping by the respective Parties causes, or is likely to cause, impacts on Muddy River Springs and Muddy River flows;*

and (4) to adopt by consensus appropriate adjustments to such restrictions, if warranted.

Purpose of Annual Determination Report

Sections 6(d) and 6(e) of the MOA state the purpose and guidelines for the Annual Determination Report:

> *d. Annual Determination. Based on the Regional Baseline Pumping Analysis, and no later than one year after preparation of that analysis and annually thereafter, the HRT shall endeavor to determine by consensus ("Annual Determination") whether the groundwater pumping restrictions, but not the Trigger Ranges, under paragraphs I(5)(c) through (g) above (or any successors thereto) should remain in place, or whether and how any of such restrictions should be adjusted ("Pumping Restriction Adjustments") to better reflect the extent to which regional groundwater pumping by the respective Parties causes, or is likely to cause, impacts on Muddy River Springs and Muddy River flows. However, no Pumping Restriction Adjustments will be made within the first five years following the Effective Date of this MOA. All Annual Determinations (including any Pumping Restriction Adjustments adopted by HRT consensus) shall be final and binding on all Parties, except that by consensus the HRT may at any time modify or vacate any Annual Determination.*
>
> *e. Annual Determination Reports. Each Annual Determination shall be set forth and explained in a written Annual Determination Report which includes as appendices the Regional Baseline Pumping Analysis, all previously submitted Annual Technical Representative's Reports, and any other data or analytical materials considered by the HRT. If the Annual Determination is not made due to lack of consensus or any other reason, the positions thereon of the HRT Representatives shall be set forth and explained in the Annual Determination Report. Furthermore, if the HRT fails to adopt Pumping Restriction Adjustments recommended in a timely submitted Annual Technical Representative's Report, the Annual Determination Report shall briefly explain why such recommendation was not adopted.*

HRT Calendar Year 2020 Activities

The MOA Signatories continue to collect and share groundwater level, spring/stream discharge, precipitation and pumping data to monitor and allow for interpretation of hydrologic changes related to groundwater pumping in fulfillment of Section 6(b) of the MOA. Data collected and available in calendar year 2020 (described in the next section) met Nevada Division of Water Resources (NDWR) water-right permit requirements and/or the provisions of the MOA.

A representative of the office of the NDWR typically attends HRT meetings. The participants share data and information and discuss trends and analyses with each other and the NDWR.

Hydrologic Monitoring Activities

Table 1 lists the frequency of groundwater level, spring/stream discharge, and precipitation data collected for monitoring sites that were available to the HRT for review and interpretation during calendar year 2020, including data collected and reported by others. The monitoring locations are depicted on Figure 1. Groundwater level data collected at these sites were submitted to NDWR and are available on the NDWR website at http://water.nv.gov/mapping/order1169/. The spring and stream discharge data collected by the U.S. Geological Survey are available at http://waterdata.usgs.gov/nv/nwis/current/?type=flow, with the exception of discharge data collected by MVWD at Jones and Baldwin springs, which are available on the NDWR website.

Additional groundwater level data not listed in Table 1 are available for review on the NDWR website for broader regional interpretations.

Much of the monitoring by the MOA signatories for specific water-right permits is part of a larger monitoring program administered by NDWR. This program was updated in 2020. Appendix A outlines the locations and frequency of monitoring required by NDWR as of 2020.

The SNWA and MVWD submitted calendar year 2020 annual monitoring reports to the NDWR which document and summarize the groundwater level, precipitation, production and streamflow data collected by these agencies. These reports are included in Appendices B and C.

Groundwater Rights and Pumping

Groundwater rights subject to curtailment under the MOA are in Coyote Spring Valley (hydrographic area [HA] 210) and California Wash (HA 218) in the volumes listed below. These volumes represent potential pumping from the regional carbonate-rock aquifer.

CSI	4,140 afy Coyote Spring Valley
SNWA	9,000 afy Coyote Spring Valley
Tribe	2,500 afy California Wash

Actual development of the rights has varied over time. In 2020, a small fraction of the permitted rights was utilized to pump groundwater from the carbonate-rock aquifer. The SNWA, MVWD, CSI, and Tribe reported production data to the NDWR quarterly. Figures 2 through 5 depict the groundwater produced by CSI, SNWA and the Tribe from the carbonate-rock aquifer in Coyote Spring Valley and California Wash. Figures 6 and 7 depict groundwater production by MVWD in Muddy River Springs Area (HA 219).

MUDDY SPRINGS AREA MONITORING REPORT
FOR JANUARY 2020 THROUGH DECEMBER 2020

Prepared for:
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April 30, 2021
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National Park Service

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INTRODUCTION

In January 1996, the Moapa Valley Water District (MVWD) submitted the Muddy Springs Area Monitoring Plan to the Nevada Division of Water Resources for approval. This plan was prepared in cooperation with the U.S. Department of Interior's National Park Service, U.S. Fish and Wildlife Service (USFWS), and Nevada Energy (formerly Nevada Power Company). In September 1997, the plan was approved by the Nevada State Engineer. In 2002, the plan was revised to change some trigger levels and monitoring frequencies. This report covers the results of monitoring for the calendar year of 2020.

The locations of monitoring sites are shown in Figures 1 and 2. Table 1 provides summary information on the baseline discharge rates for springs and baseline water levels for monitoring wells. Included in Table 1 are the trigger levels that were developed as part of the monitoring effort. Initial trigger levels were established that, if reached, would lead to the notification of each cooperating organization so that the cause of the spring discharge or water level decline could be determined along with the appropriate actions. Mitigation trigger levels were also established for each monitoring station; if these levels are reached, mitigation measures can be implemented following approval by the cooperating organizations. Pursuant to a request by the U.S. Fish and Wildlife Service, the trigger levels were modified in March 1999 to establish a less arbitrary set of action levels.

SPRING DISCHARGE AND TEMPERATURE MONITORING

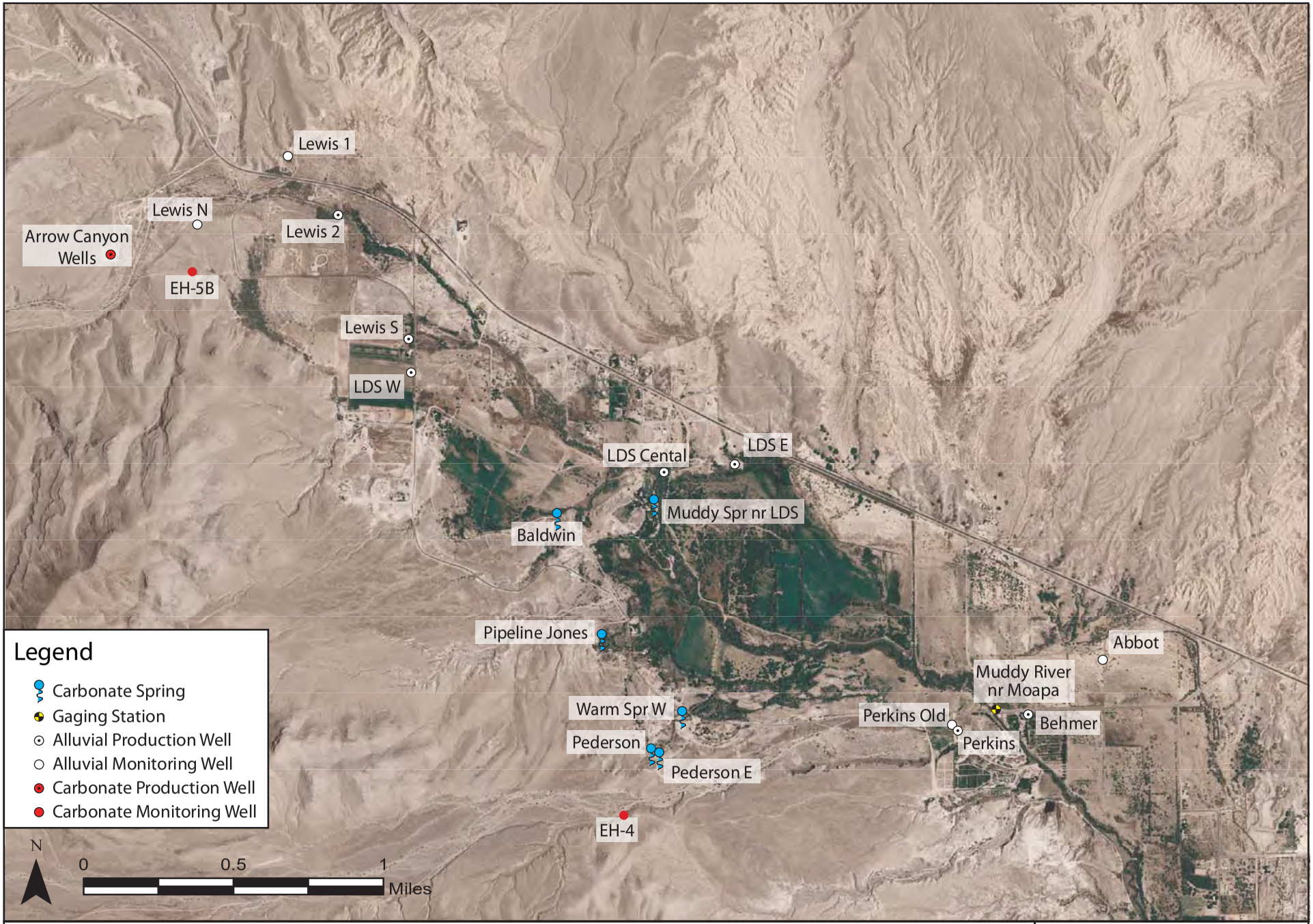
The USFWS monitors discharge at Pederson Spring and Warm Springs West and temperature at Pederson Spring. Final discharge data for Pederson Spring, Pederson East Spring, Warm Springs West and Muddy Spring at LDS were obtained from the USGS for the period of January 1, 2020 to December 31, 2020. Changes in spring discharge since the completion of the Order 1169 pumping test, December 31, 2012, are summarized in Table 2.

Pederson Spring

The Pederson Spring gage was damaged in the fire of 1994 and the reliability of the discharge records was subsequently brought into question after the disturbance caused by the mechanical removal of palm trees around the station. The gage was replaced, and other restoration activities were completed in April 2004. In addition, a gage was installed at the Pederson East Spring. Beginning in May 2004, records for this new location became available and are evaluated along with the information from springs with longer periods of record.

The long-term discharge records for Pederson Spring and Pederson East Spring are shown on Figure 3. During 2020, the daily discharge at Pederson Spring ranged from 0.07 to 0.16 and averaged 0.12 cfs. There is no discharge trigger level for Pederson Spring.

At Pederson East Spring, the discharge ranged between 0.10 to 0.16 cfs. The average for the year was 0.13 cfs. There are no trigger levels associated with this spring gage. The record for both Pederson East and Pederson Spring showed a decrease in discharges in 2012/2013. The declines in discharge at both Pederson Springs can most likely attributed to the Southern Nevada Water Authority (SNWA) pumping test of MX-5 that began in fall 2010, since MVWD diversions have changed comparatively little (see Figure 9). Discharge shows a recovery trend from the pumping test beginning in late 2013.



Muddy Springs Area Annual Monitoring Report

Figure 1: Location of Alluvial & Carbonate Wells, Carbonate Springs, and River Gage within ~2.5 Miles of the Moapa Valley National Wildlife Refuge

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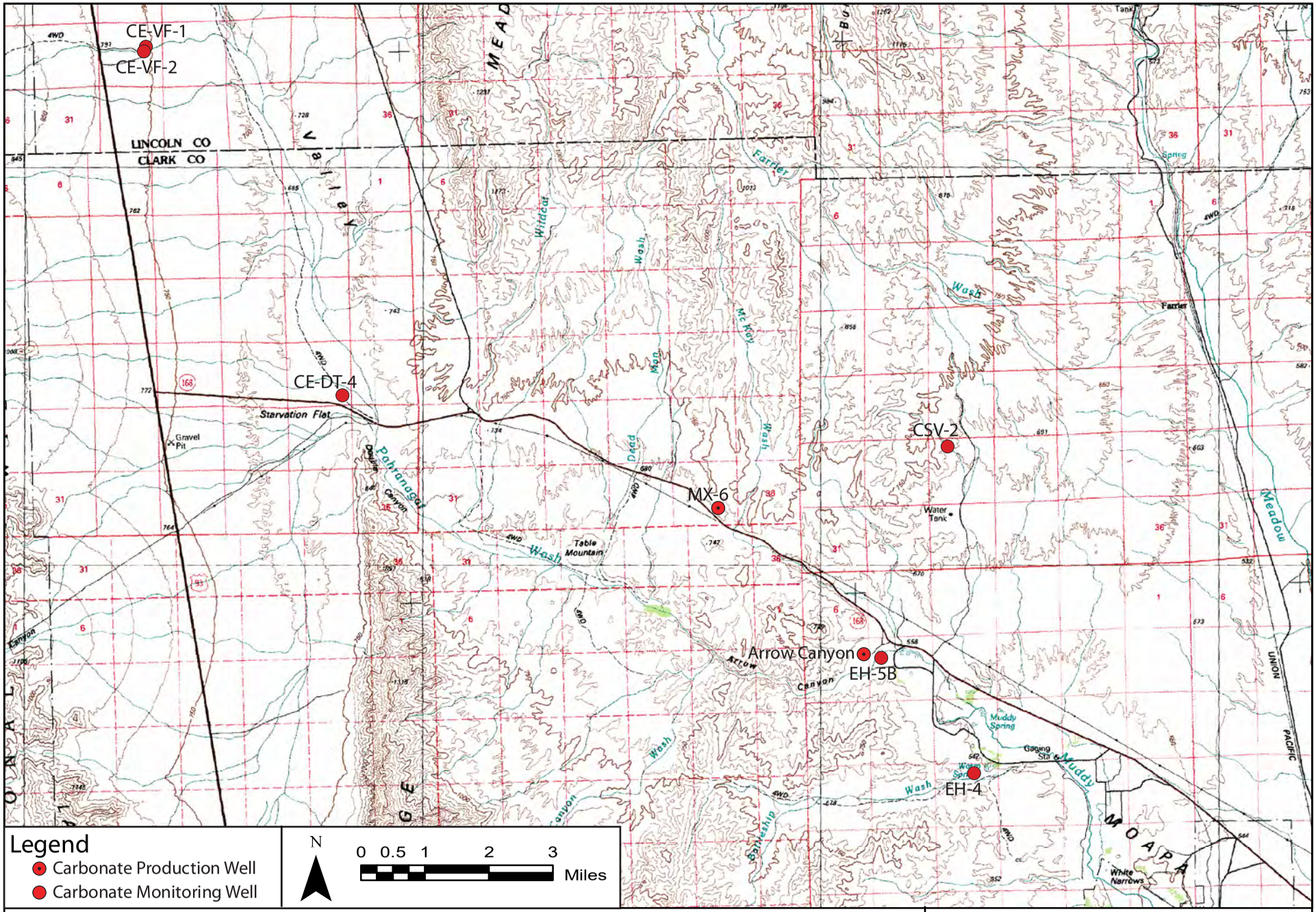

Muddy Springs Area Annual Monitoring Report

Figure 2: Location of Carbonate Production and Monitoring Wells in Muddy River and Coyote Springs Valley Area

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Table 1. Baseline conditions and trigger levels

Spring or Well or River		Source Aquifer	Baseline Conditions Discharge or Minimum Water Level (**cfs** or *ft bls*)		Upstream Diversions	Transmission Losses	Trigger Levels (cfs, degrees C, or ft below land surface)	
			30-day min	annual mean			Initial	Mitigate
Baldwin Spring	S	Carbonate	n/a	n/a	No	No	none	none
Pipeline Jones Spring	S	Carbonate	n/a	n/a	No	No	none	none
Muddy Spring	S	Carbonate	6.43	7.38	Yes	Yes	5.79 (60 days)	5.14 (30 days)
Pederson Spring	S	Carbonate	n/a	n/a	No	No	30°C (60 days)	28°C (30 days)
Warm Spring West	S	Carbonate	3.14	3.59	No	Yes	3.17 30°C (60 days)	2.94 28°C (30 days)
Muddy River at Moapa	R	n/a	28.0	42.7	Yes	Possible Seasonal	30.3 (annual)	22.4 (30-day)
EH-5B	W	Carbonate	29	n/a	n/a	n/a	34	39
EH-4	W	Carbonate	117	n/a	n/a	n/a	122	127
CSV-2	W	Carbonate	392	n/a	n/a	n/a	397	402
CE-DT-4	W	Carbonate	354	n/a	n/a	n/a	359	364
MX-6	W	Carbonate	n/a	n/a	n/a	n/a	tbd	tbd
Lewis 1 (Old)	W	Alluvial	40	n/a	n/a	n/a	43	50
Lewis 2	W	Alluvial	42	n/a	n/a	n/a	45	52
Lewis North	W	Alluvial	33	n/a	n/a	n/a	36	43
Perkins Old	W	Alluvial	29	n/a	n/a	n/a	32	39
CE-VF-1	W	Carbonate	550	n/a	n/a	n/a	553	560
CE-VF-2	W	Carbonate	612	n/a	n/a	n/a	615	622

n/a not available or not applicable
tbd - to be developed, baseline data lacking

Warm Springs West

Long-term discharge records for Warm Springs West are shown in Figure 3. The discharge at Warm Springs West varied between 3.22 and 3.47 cfs during 2020. The baseline conditions for this spring are 3.14 cfs (30 day min) and 3.59 cfs (annual mean). The mean annual discharge for the period was 3.35 cfs.

Muddy Spring

The long-term discharge records for Muddy Spring near LDS are shown in Figure 3. The discharge at Muddy Spring ranged between 6.73 and 8.25 cfs during 2020. Discharge rates during this period were all above the trigger level of 5.79 cfs. The average discharge in 2020 was 7.40 cfs.

Baldwin Spring

The District monitors monthly discharge at Baldwin Spring. During 2020, the average monthly discharge rate from the spring varied dramatically from 0.29 to 2.79 cfs and averaged 2.33 cfs. The long-term record for Baldwin Spring is shown in Figure 4. Baldwin Spring does not have a trigger level. Breaks in the record are associated with meter failures, and anomalous decreases or increases in discharge following meter replacements may represent differences in meters rather than actual changes in discharge. Due to a malfunction meter display screen, the December 2020 spring discharge was estimated from SCADA. This inconsistency in data reporting is likely responsible for the anomalously low discharge estimates in March (0.29 cfs) and April (1.34 cfs).

Pipeline Jones Spring

The District also monitored monthly discharge at Pipeline Jones Spring. The average monthly discharge rate ranged from 1.50 to 5.18 cfs with an overall average of 1.89 cfs for 2020. The March discharge estimate is likely due to malfunctioning equipment, as our records indicate the highest ever previous discharge was 2.08 cs in 1997. The Pipeline Jones Spring does not have a trigger level. The long-term record for Pipeline Jones Spring is shown in Figure 4.

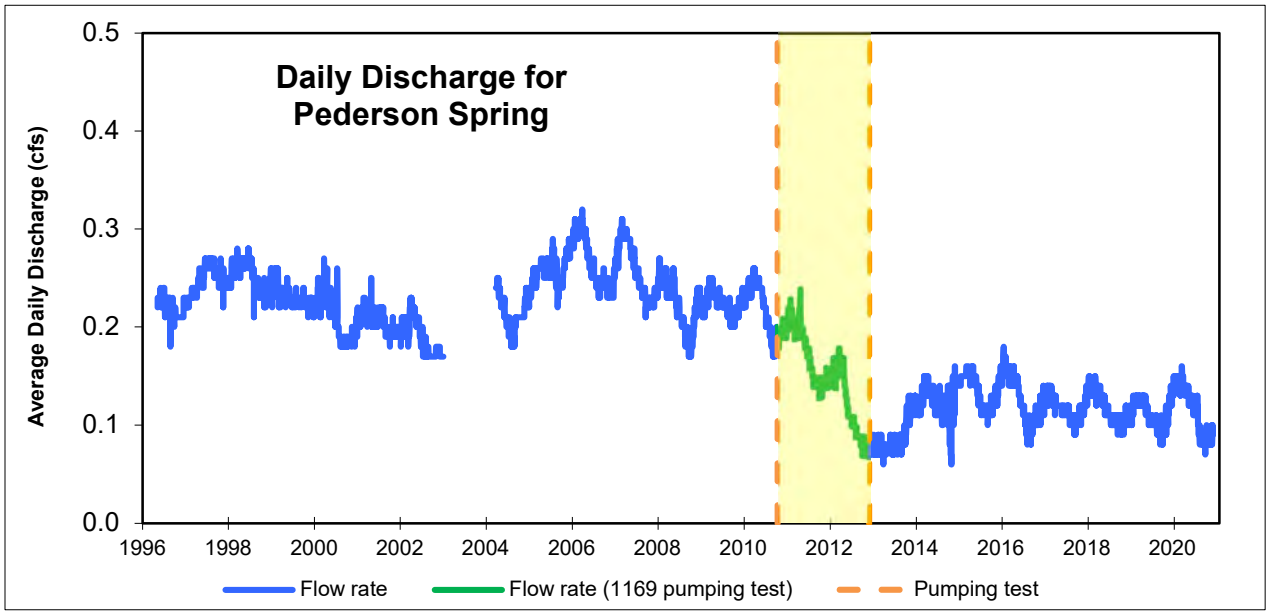
Rogers Spring and Blue Point Spring

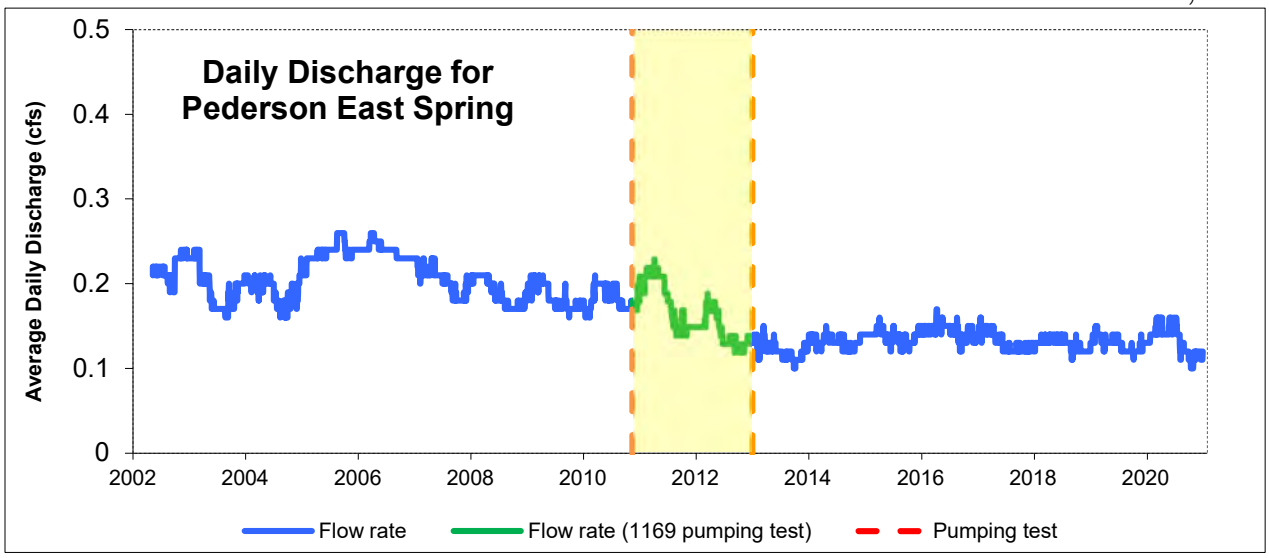
The National Park Service contracts with the USGS to monitor spring discharge rates at Rogers Spring and Blue Point Spring in Lake Mead National Recreation Area. Data for Rogers Spring were available online via the USGS Water Data for the Nation website. Rogers Spring recorded a mean discharge of 1.61 cfs in 2020, an increase in overall discharge from 1.53 cfs in 2019. Blue Point Spring showed a brief peak in discharge in early 2011 after which discharge declined below the long-term average (Appendix 3). However, since 2015, discharge was steadily increasing toward the mean. In 2020, average discharge again fell by nearly 10% to 0.50 cfs. Please refer to (Appendix 3) for the hydrograph of Blue Point Spring. Please note, mean annual discharge for Rogers and Blue Point Spring is not averaged over the traditional calendar year, but the USGS water year which runs from October to September.

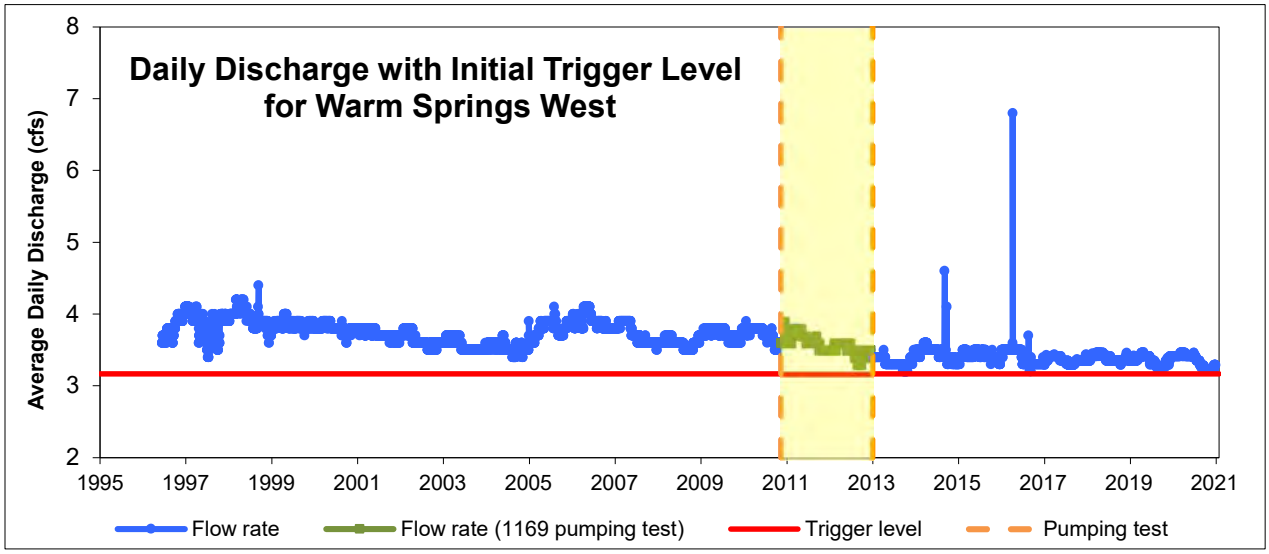
Table 2. Comparison of monthly average discharge at springs within Moapa Valley and the Muddy River since completion of Order 1169 pumping test on December 31, 2012.

Measurement Point	Source Aquifer	Average discharge (cfs)		Δ in discharge (cfs)
		January 2013	December 2020	
Baldwin Spring	Carbonate	2.63	2.61	0.02
Pipeline Jones Spring	Carbonate	1.58	1.69	0.11
Muddy Spring	Carbonate	7.70	7.74	0.04
Pederson Spring	Carbonate	0.08	0.09	0.01
Pederson East Spring	Carbonate	0.13	0.12	0.01
Warm Spring West	Carbonate	3.40	3.25	0.15
Rogers Spring	Carbonate	1.65	1.56	0.09
Blue Point Spring	Carbonate	**0.47	***0.51	0.04
Muddy River at Moapa		43.55	44.14	0.59

Red = decreased discharge; Green = increased discharge; Black = no change in discharge
*Display is not working on meter – average daily discharge estimated from SCADA
**Average data for January 2013 comes from measurements from January 29-31, 2013
***December 2020 data is currently unavailable; data shown above is from September 2020, the end of the USGS water year.




Daily Discharge for
Pederson East Spring
Average Daily Discharge (cfs)
0.5
0.4
0.3
0.2
0.1
0
2002
2004
2006
2008
2010
2012
2014
2016
2018
2020
Flow rate
Flow rate (1169 pumping test)
Pumping test


Daily Discharge with Initial Trigger Level
for Warm Springs West
Average Daily Discharge (cfs)
8
7
6
5
4
3
2
1995
1997
1999
2001
2003
2005
2007
2009
2011
2013
2015
2017
2019
2021
Flow rate
Flow rate (1169 pumping test)
Trigger level
Pumping test

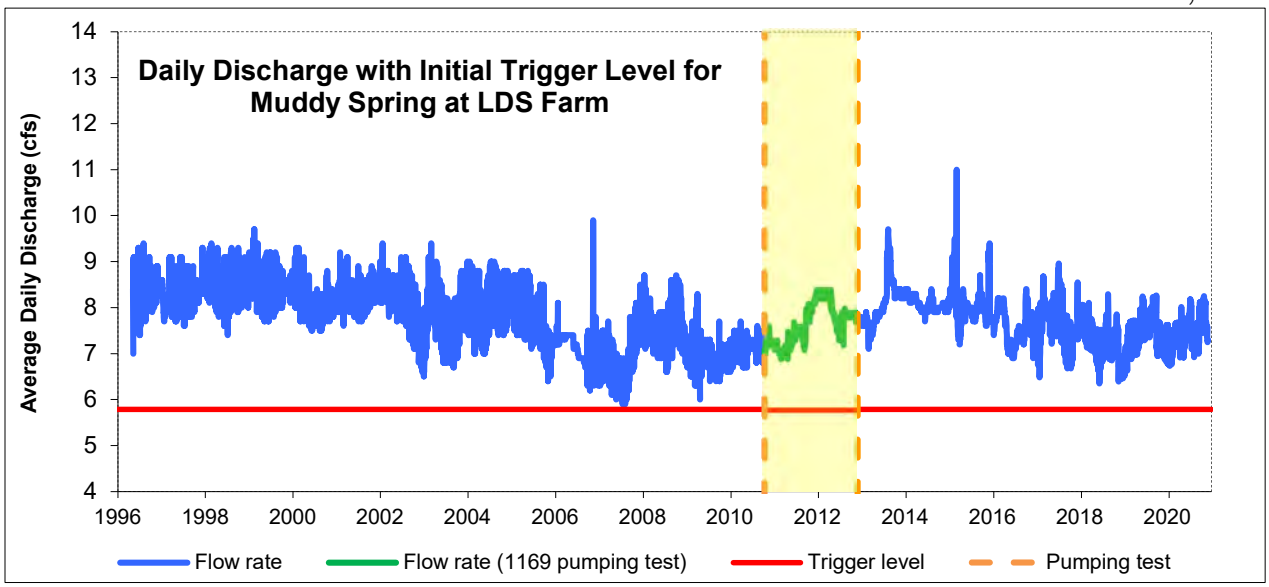
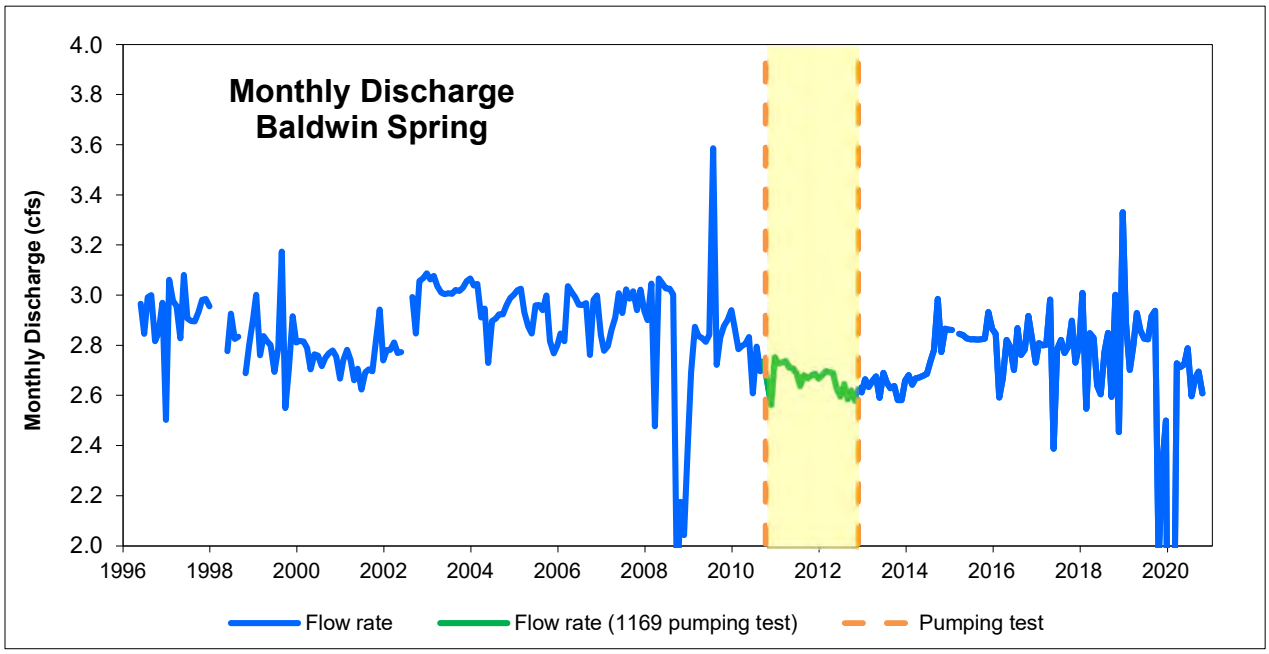


Figure 3. Daily Discharge at the Monitoring Springs.



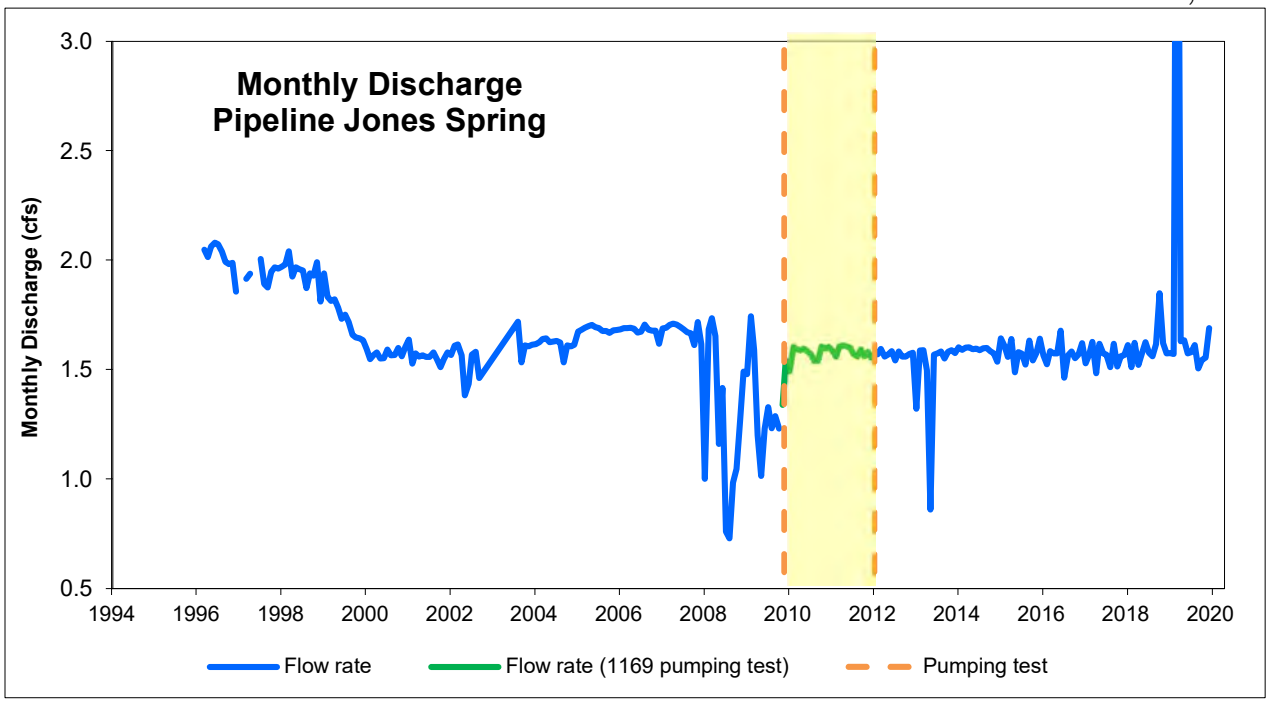


Figure 4. Discharge at Baldwin Spring and Pipeline Jones Spring

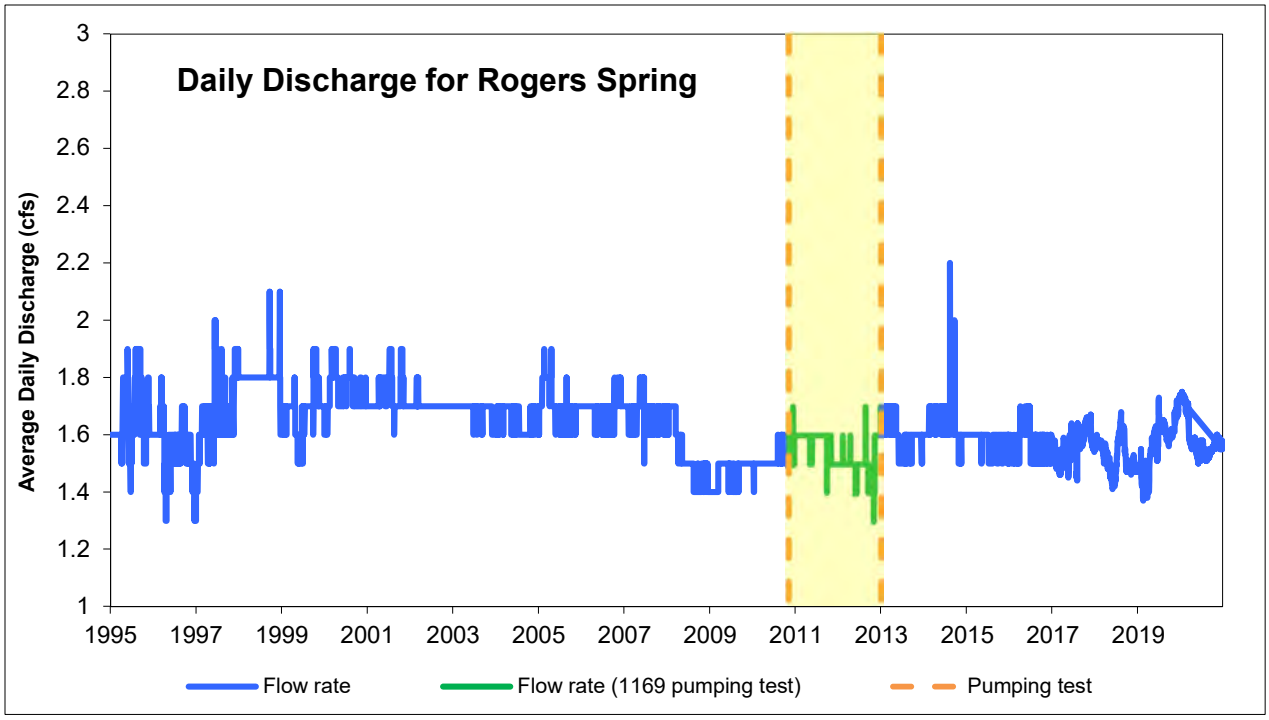


Figure 5. Discharge at Rogers Spring from the USGS website.

WATER LEVEL MONITORING

The District monitored water levels on a monthly basis at Arrow Canyon and MX-6 wells during 2020. NVE continued their extensive water level monitoring program and provided the monthly water level data for wells in the upper Muddy River Valley that are included within the Muddy Springs Area monitoring network. Water levels in Coyote Spring Valley at CE-DT-4 and in the Muddy Spring area at CSV-2 were obtained from the USGS website.

Carbonate Aquifer Monitoring

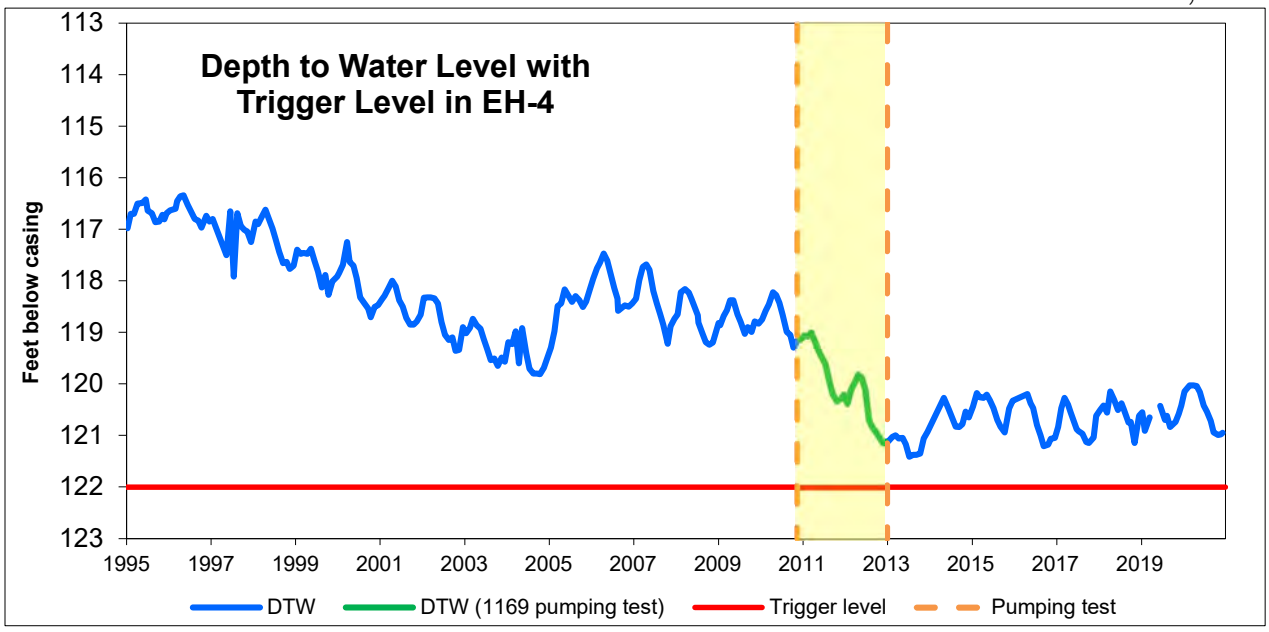
The results of monitoring of the carbonate aquifer are presented as hydrographs in Figure 6 and Table 3. Data for EH-5B and EH-4 were collected monthly by NVE, while data for CSV-2 and CE-DT-4 represent daily averages obtained from the USGS. At CE-VF-2, the USGS measured water levels approximately six times per year; the last reading available is 7/31/2009. Because of the lack of current data this well is excluded from the report.

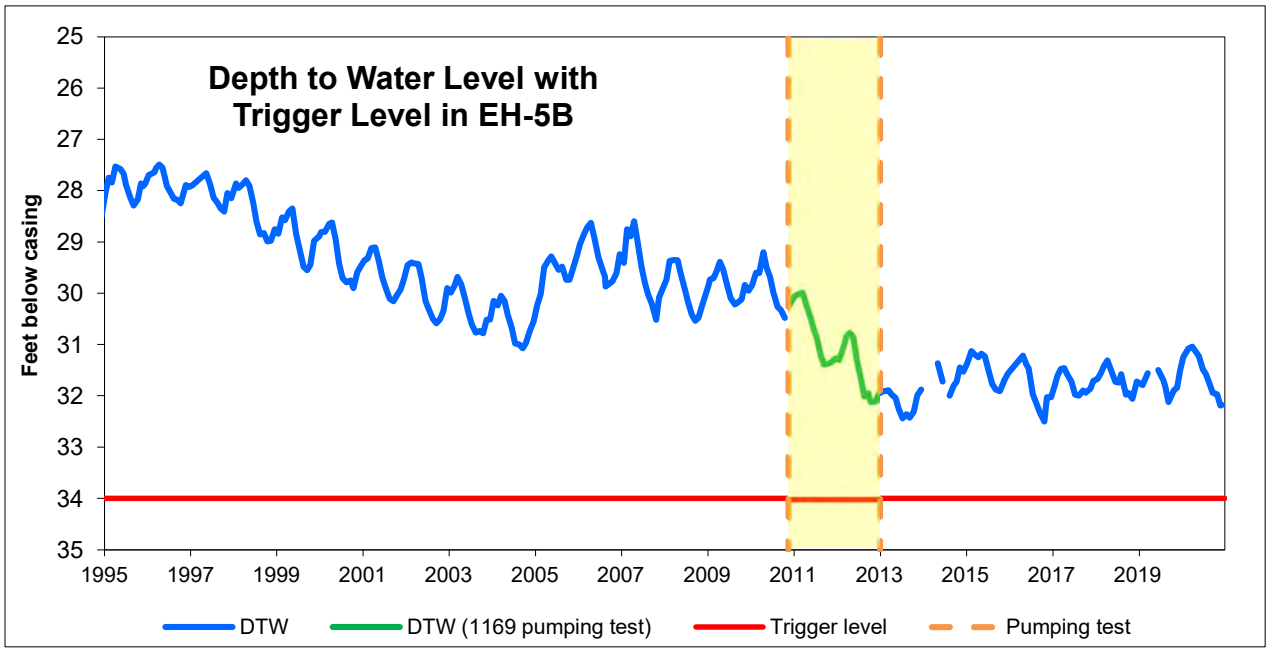
Records for all wells showed approximately 1-foot fluctuations between the minimum and maximum depth to water. All wells had water levels above the initial trigger levels. The decline in water levels since 2010/2011 can most likely be attributed to the SNWA pumping test of MX-5 that began in fall 2010. All wells are showing signs of recovery beginning in late 2013.

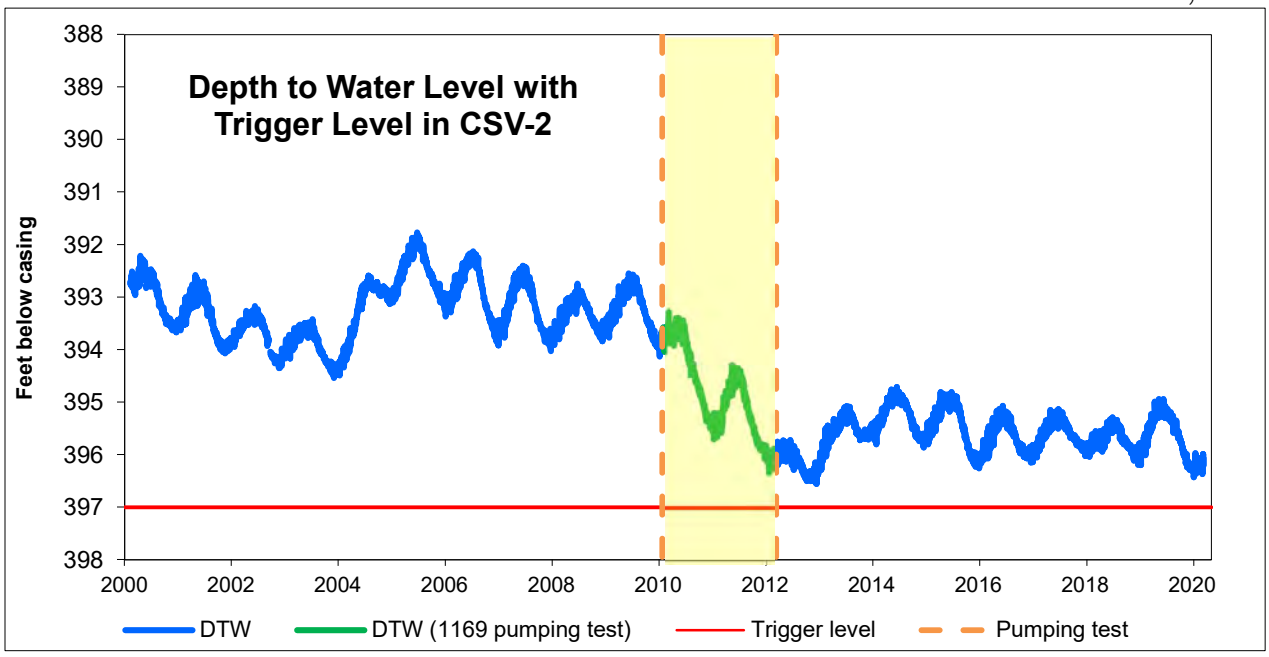
Table 3: Depth to Water Levels (ft) for Carbonate Wells in 2020.

Well	Minimum	Maximum	Annual Average	Initial Trigger
EH-5B	31.04	32.19	31.57	34
EH-4	120.03	120.99	120.50	122
CSV-2*	394.94	396.43	395.67	397
CE-DT-4*	355.69	357.11	356.51	359

*Values reported from USGS daily measurements.


Depth to Water Level with
Trigger Level in EH-4
Feet below casing
113
114
115
116
117
118
119
120
121
122
123
1995
1997
1999
2001
2003
2005
2007
2009
2011
2013
2015
2017
2019
DTW
DTW (1169 pumping test)
Trigger level
Pumping test


Depth to Water Level with
Trigger Level in EH-5B
Feet below casing
25
26
27
28
29
30
31
32
33
34
35
1995
1997
1999
2001
2003
2005
2007
2009
2011
2013
2015
2017
2019
DTW
DTW (1169 pumping test)
Trigger level
Pumping test



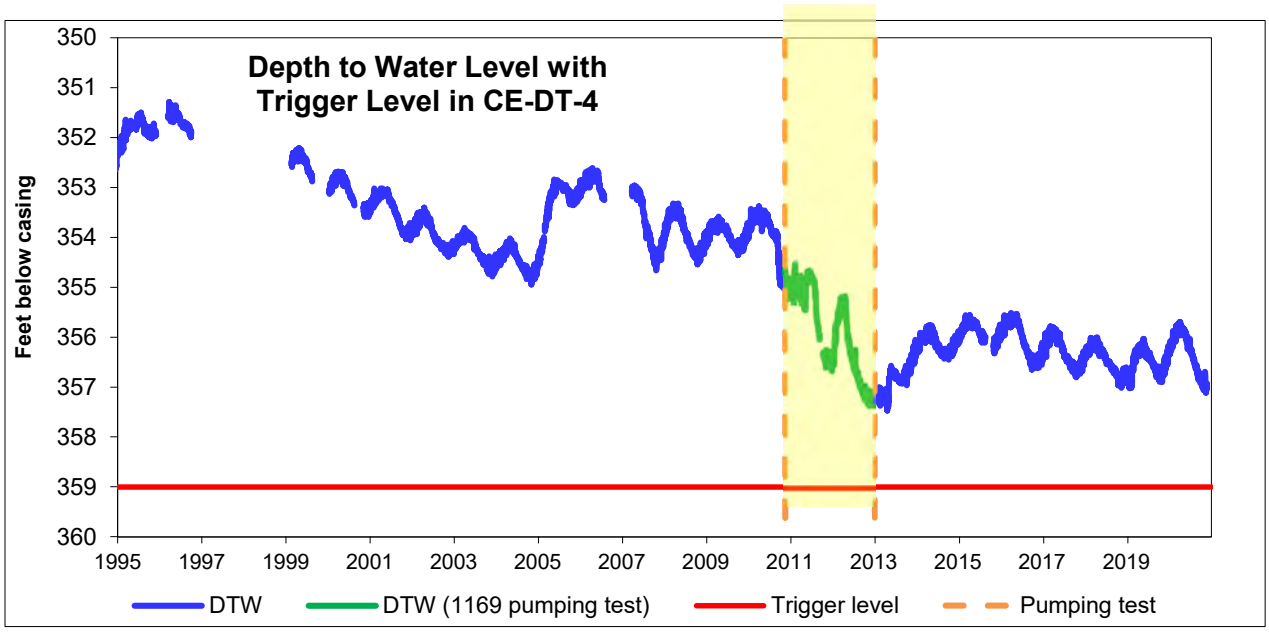


Figure 6. Hydrographs for Monitoring Wells in the Carbonate Aquifer

Alluvial Aquifer Monitoring

The results of monitoring of the alluvial aquifer are presented as hydrographs in Figure 7 and Table 4. These hydrographs are based on monthly water level measurements provided by NVE.

Lewis North showed greater seasonal fluctuations than in previous years. All water levels were above trigger levels. Lewis 1 & 2 had higher water levels than in 2013/2014 with lower magnitude fluctuations than in previous years. Perkins Old water levels are likely related to nearby Perkins production well withdrawals, which had increased from 2010 through 2013, but dropped in 2014. There has been no production from the Perkins well field since late 2017. Overall, the recovery of

the alluvial water levels is likely related to reduced pumping from the aquifer by NVE, as shown by Figure 7.

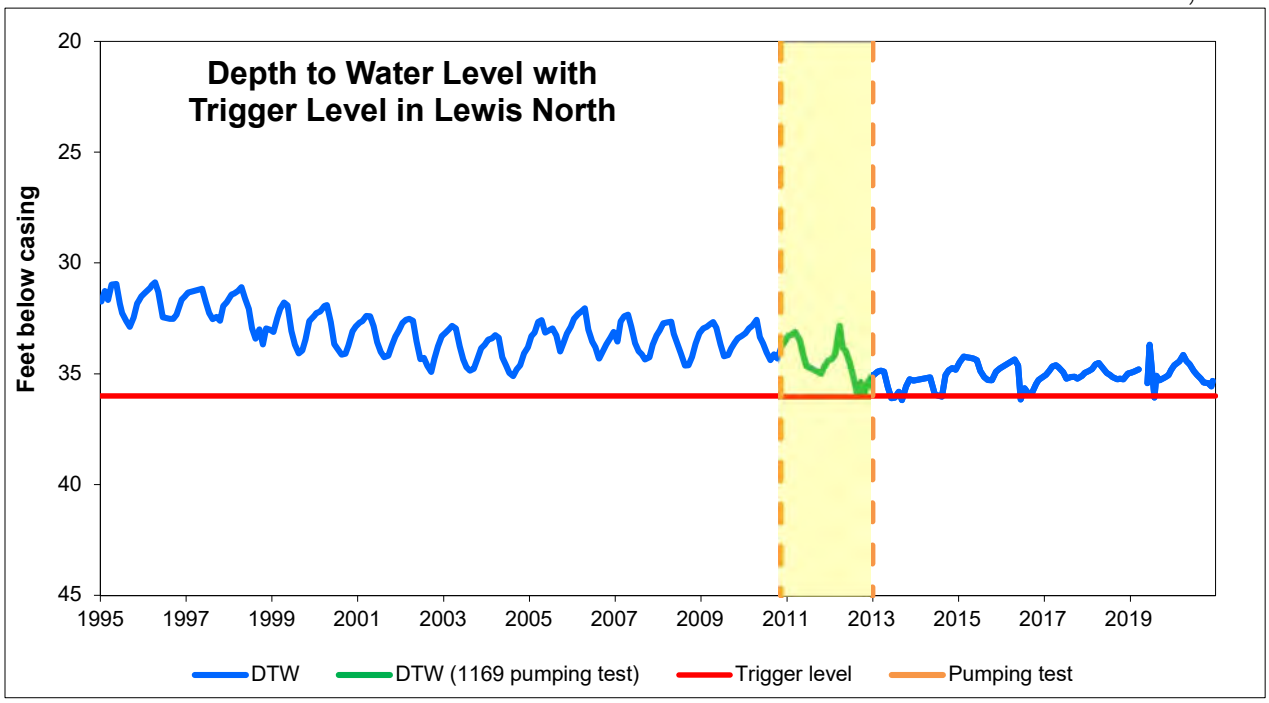
Table 4: Depth to Water Levels (ft) for Alluvial Wells in 2020.

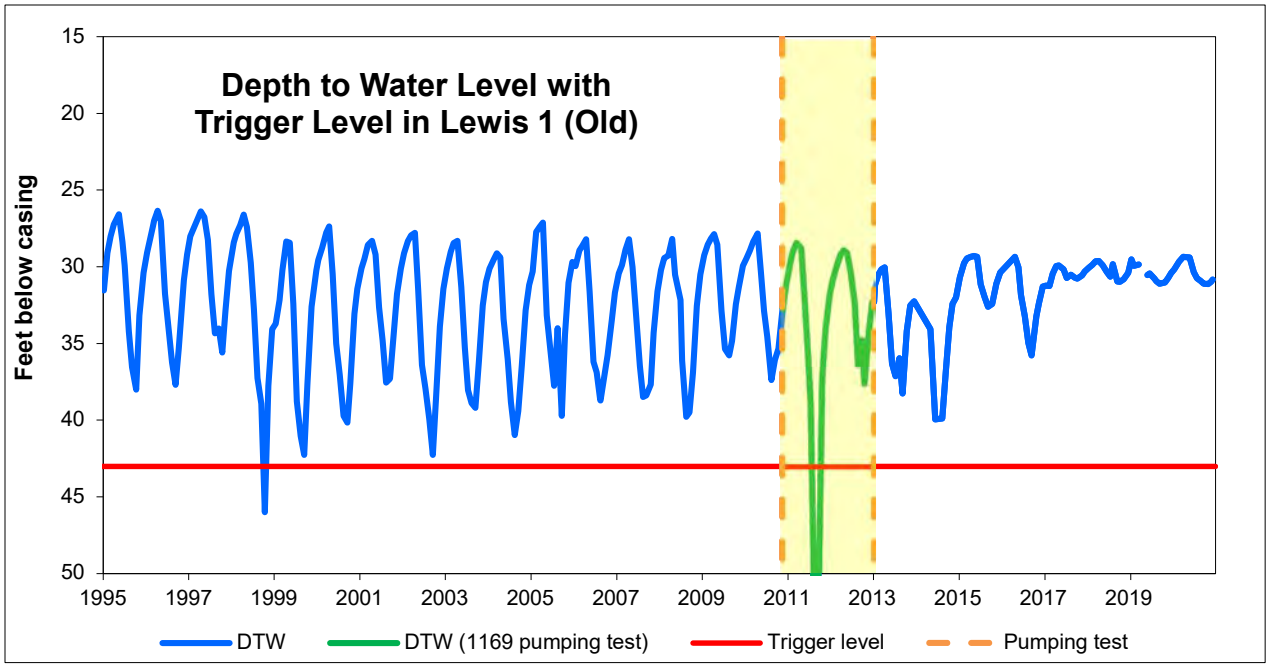
Well	Minimum	Maximum	Annual Average	Initial Trigger
Lewis N.	34.15	35.56	34.91	36
Lewis 1 (Old)	29.36	31.12	30.33	43
Lewis 2	28.15	29.91	29.16	45
Perkins Old	20.23	23.31	21.94	32

Table 5. Comparison of monthly depth to water (DTW) measurements for carbonate and alluvial wells within Moapa Valley since completion of Order 1169 pumping test on December 31, 2012.

Measurement Point	Source Aquifer	Depth to Water (ft)		Δ in depth to water (ft)
		January 2013	December 2020	
EH-5B	Carbonate	31.93	32.18	0.25
EH-4	Carbonate	121.11	120.95	0.16
CSV-2	Carbonate	396.01	*396.19	0.18
CE-DT-4	Carbonate	357.20	356.97	0.23
Lewis N.	Alluvial	35.07	35.32	0.25
Lewis 1 (Old)	Alluvial	31.74	30.84	0.90
Lewis 2	Alluvial	29.87	29.46	0.41
Perkins Old	Alluvial	39.78	21.84	17.94

Red = lower ground water level; Green = higher ground water level; Black = no change in water level
*Data only available through November 23, 2020


Depth to Water Level with
Trigger Level in Lewis North
Feet below casing
20
25
30
35
40
45
1995
1997
1999
2001
2003
2005
2007
2009
2011
2013
2015
2017
2019
DTW
DTW (1169 pumping test)
Trigger level
Pumping test


Depth to Water Level with
Trigger Level in Lewis 1 (Old)
Feet below casing
15
20
25
30
35
40
45
50
1995
1997
1999
2001
2003
2005
2007
2009
2011
2013
2015
2017
2019
DTW
DTW (1169 pumping test)
Trigger level
Pumping test

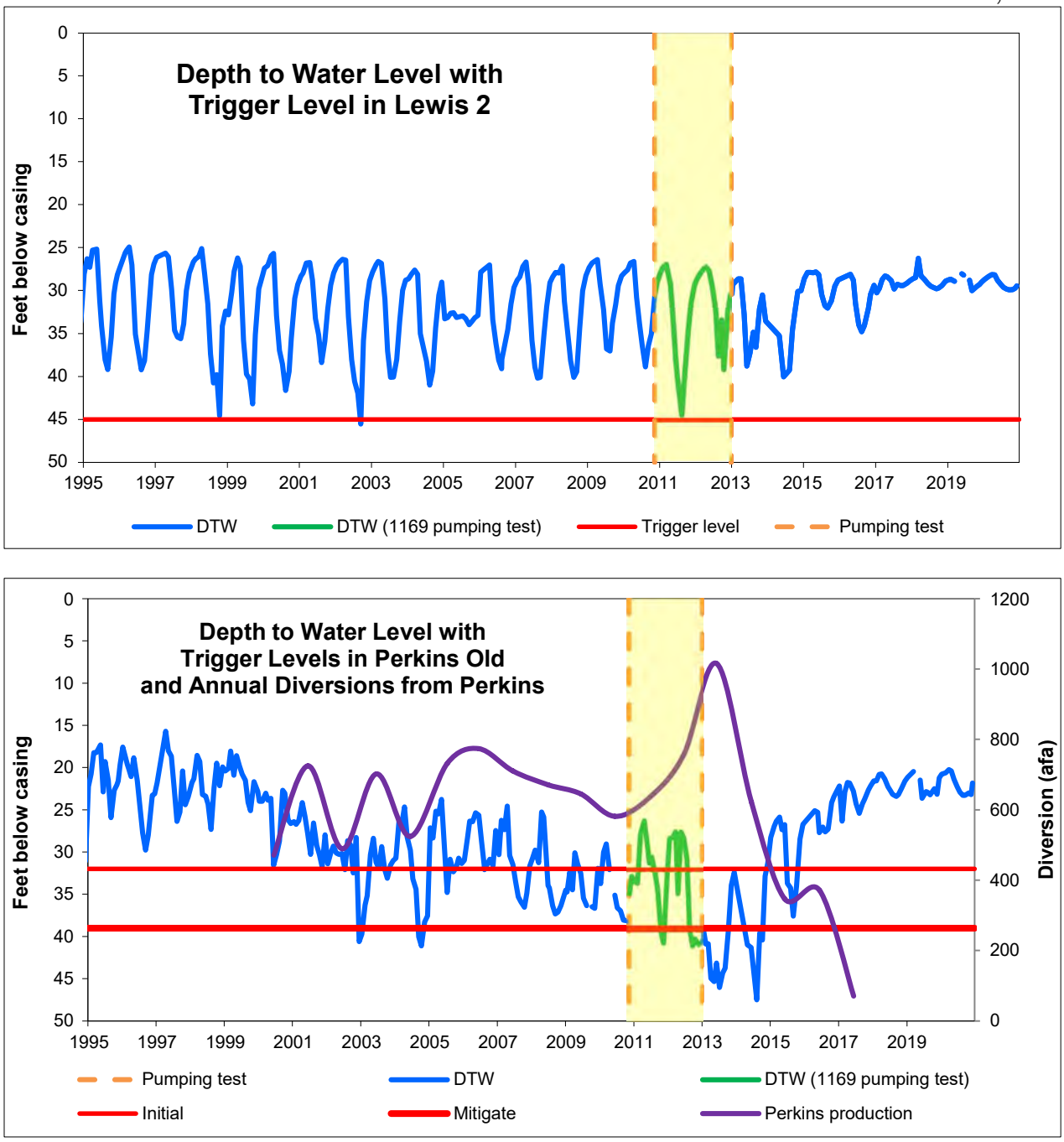


Figure 7. Hydrographs of Monthly Water Levels for Monitoring Wells in the Alluvial Aquifer

RIVER DISCHARGE MONITORING

The USGS continued monitoring the daily discharge of the Muddy River at the gage near Moapa (USGS 09416000 MUDDY RV NR MOAPA, NV). During 2020, the minimum unadjusted 30-day average discharge rate was 39.55 cfs, well above the mitigating trigger of 22.4 cfs (Figure 8). The annual average unadjusted discharge was 42.39 cfs, above the respective trigger level of 30.30 cfs. Because these discharges were already above the trigger levels, no adjustments were made.

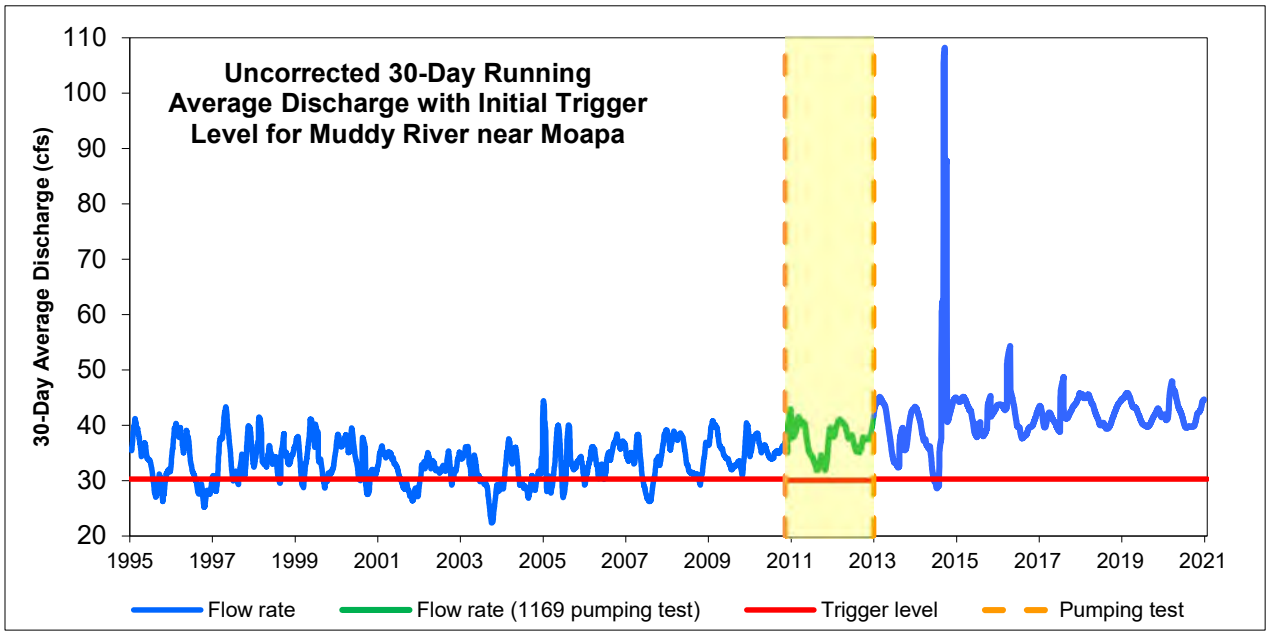


Figure 8. Thirty-day Running Average Discharge for the Muddy River near Moapa Uncorrected for Upstream Diversions

PRECIPITATION MONITORING

The District continued Sheep Range precipitation measurements in 2020, and data for 2019/2020 is shown in Table 6.

Table 6: Sheep Range precipitation data collected by the Moapa Valley Water District (in.)

2019						2020					
Elevation (ft)						Elevation (ft)					
Date	4000	5000	6000	7000	8000	Date	4000*	5000	6000	7000	8000**
4/23/2019	5.51	5.1	0	0.64	0						
8/30/2019	2.14	0	5.2								
10/2/2019	1.7	3.7	4.5	4.45	2.45	6/9/2020	0	6.67	7.29	8.68	3.19
						7/10/2020	0	0	0		
						10/15/2020	0	0	^	7.40	^
Total	9.35	8.8	9.7	5.09	2.45	**Total**	0	6.67	7.29	16.08	3.19

*Swapped out display; **Need to take bigger pack to bring old gauge back from 8000' gauge;
^Dead batteries

GROUND WATER WITHDRAWALS

Ground water withdrawals from the carbonate aquifer from the Southern Nevada Water Authority (SNWA), Coyote Springs Investment, LLC (CSI), and MVWD are shown in Figure 9. Total MVWD diversions for 2020 are shown in Table 7. Historic diversions from MVWD are shown in Table 8.

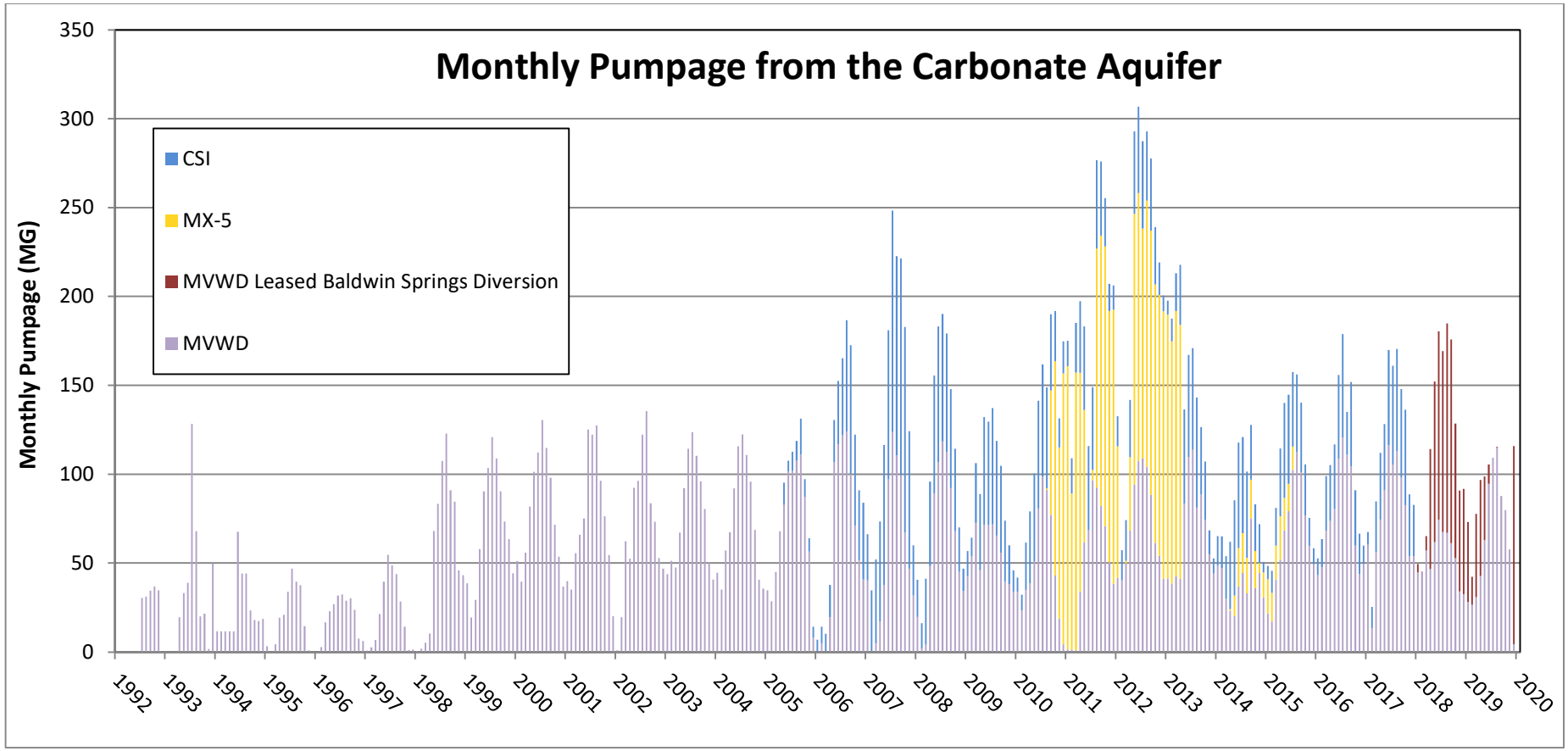


Figure 9: Carbonate pumpage (millions of gallons) from the Carbonate Aquifer in the Muddy River and Coyote Springs Valley by the District (MVWD), Coyote Springs Investment, LLC (CSI) and Southern Nevada Water Authority (MX-5). 2020 pumping data for CSI and MX-5 are not available at this time.

Table 7: Total Water Diversions by the Moapa Valley Water District in 2020.

Source	Acre Feet
Arrow Canyon Wells	2672.28
MX-6 Well	0.00
Baldwin Spring	318.57
Pipeline Jones Spring	0.00
Total Diversions	2,990.85

Table 8: Historic Diversions by the Moapa Valley Water District

Calendar Year	Permitted Withdrawals	Actual Withdrawals (Ac-ft)
1995	2.0 cfs 1,464 afy	304
1996	3.2 cfs 2,342 afy	274
1997	3.9 cfs 2,855 afy	501
1998	4.5 cfs 3,294 afy	1,969
1999	5.2 cfs 5,068 afy	2,434
2000	6.0 cfs 5,937 afy	2,777
2001	6.0 cfs 5,937 afy	2,434
2002	6.0 cfs 5,937 afy	2,264
2003	6.0 cfs 5,937 afy	2,468
2004	6.0 cfs 5,937 afy	2,505
2005	6.0 cfs 5,937 afy	2,289
2006	6.0 cfs 5,937 afy	1,971
2007	6.0 cfs 5,937 afy	1,844
2008	6.0 cfs 5,937 afy	1,888
2009	6.0 cfs 5,937 afy	2,033
2010	6.0 cfs 5,937 afy	1,815
2011	6.0 cfs 5,937 afy	1,835
2012	6.0 cfs 5,937 afy	2,460
2013	6.0 cfs 5,937 afy	2,241
2014	6.0 cfs 5,937 afy	1,442
2015	6.0 cfs 5,937 afy	2,395
2016	6.0 cfs 5,937 afy	2,798
2017	6.0 cfs 5,937 afy	2,819
2018	6.0 cfs 5,937 afy	2,781
2019	6.0 cfs 5,937 afy	2,588
2020	6.0 cfs 5,937 afy	2,991

EXHIBIT 2

EXHIBIT 2

Your hometown newspaper since 1987

Moapa Dace Numbers Tick Up Once Again

AUGUST 24, 2021 BY VROBISON — LEAVE A COMMENT

By VERNON ROBISON

The Progress

There are still plenty of fish in the stream. In fact, more than have been seen in nearly three decades, according to biologists.

The annual summer count of the endangered Moapa dace, which took place on Aug. 10-11, tallied a total of 2,444 of the finger-sized fish currently living in the Warm Springs headwaters of the Muddy River.

"It was the highest count since 1994," said Southern Nevada Water Authority (SNWA) biologist David Syzdek. "It was a 4 percent increase from the August 2020 count and an 85 percent increase over August 2019."

The count brought together scientists from Southern Nevada Water Authority, US Fish and Wildlife and Nevada Department of Wildlife. The group also received support from Coyote Springs personnel who helped to gather and record the data during the two-day count.

NDOW biologist Kevin Guadalupe (left) calls out his observations to Michael Yetter (right) during the annual summer dace count. PHOTO BY VERNON ROBISON/The Progress.

NDOW biologist Kevin Guadalupe snorkels the stream counting Moapa dace during a fish count in the Warm Springs area on Aug. 11. PHOTO BY VERNON ROBISON/The Progress.

The biologists donned wetsuits, masks and snorkels and plunged into the stream. Over the two days they methodically swam, crawled or waded through more than six miles of streams counting every fish they could see. A data-taker accompanied each snorkeler, clipboard in hand, recording the data and keeping careful notes about stream conditions.

On Wednesday, Aug. 11, NDOW biologist Kevin Guadalupe was found crawling his way up the Lower Pederson Stream at the Warm Springs Natural Area, a former ranch operation now owned by SNWA.

Guadalupe would surface every few seconds and call out the number of dace he had just observed. Right behind him, Michael Yetter, also from NDOW, was wading through the stream recording Guadalupe's observations.

Though it appeared to be entirely natural, this segment of stream was actually an artificial channel designed and built by biologists in 2008 to re-create the ideal dace habitat. The new stream segment had replaced a failed irrigation ditch that had not been able to support the dace.

That morning, Guadalupe and Yetter counted 502 dace in that segment of the stream alone. Syzdek explained that the Moapa dace are typically found in pockets of "slack water" that are immediately adjacent to faster-moving stream flows. When a food object; such as a small invertebrate or piece of algae; floats by, the dace darts into the fast water to grab the tasty morsel. Then it moves back to the slack water to await the next meal drifting by.

"That makes them fairly easy to count," Syzdek said. "The snorkeler crawls up the stream and when a dace, or school of dace, are seen, they are counted. When the snorkeler crawls further up the stream the fish will swim around the snorkeler. Due to the current, and the narrow width of the streams, the dace can't really pass the snorkeler and won't be double-counted."

The dace are counted twice each year. Once in August and again in February. "August numbers are generally higher than February due to recently hatched larval fish," Syzdek explained.

This month, the scientists counted 1,836 adult dace, 484 juveniles and 124 larvae.
"That indicates that we are likely to have good numbers for our next count in February 2022," Syzdek said.

Perhaps the best news for the scientists is that the dace seem to be expanding their habitat. They are being found in more reaches of the stream and in greater numbers. And most importantly, the fish are beginning to use the main stem of the river as a more permanent habitat.

For many years, the dace had not been seen in the main stem. Early on, it was a perilous place because it was frequented by tilapia, an invasive predator fish. Then between 1998 and 2014, a fish barrier was put in place to keep the tilapia out of the tributaries where the dace had retreated.

Eventually, scientists were able to eradicate the non-native tilapia from the main stem and the fish barriers were removed. That allowed the dace to return to the main stem of the river. But it has taken a long time for the fish to find their way back.

"While we knew that dace would occasionally move between tributaries using the river, they were not staying in this habitat and we were unsure why," Syzdek said. "However, this summer count was different."

Many of the deeper areas of the main stem actually had large, adult dace observed feeding in the current. Nearly sixty dace were counted in the three reaches of the main stem. That is a marked increase from the 24 fish counted in those reaches in the 2020 summer count. In 2019, the number found there was less than 5.

"This is exciting because we think that life in the tributaries is hard for these fish," Syzdek said. "It is close to their thermal limit and is energetically expensive. Fish in the cooler water of the main stem should grow bigger, live longer and produce more eggs."

The Warm Springs Natural Area (WSNA) will be open again for the season on Sept. 7. Visiting hours will be Tuesday through Sunday from 7 am to 3 pm.

Guided one-hour tours of the WSNA will occur on Sept. 25, Oct. 2 and Nov. 6 at 10 am, 12 pm, and 2 pm each day. Visitors can sign up for the tours at the kiosk at WSNA.

The WSNA will also be hosting a planting event for the public to help restore wildlife habitat on Saturday, Oct. 9. Lunch will be provided. Registration can be done at www.eventbrite.com/e/warm-springs-natural-area-green-up-tickets-165045528619.

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EXHIBIT 2

EXHIBIT 2

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DISTRICT COURT

CLARK COUNTY, NEVADA

LAS VEGAS VALLEY WATER DISTRICT, and SOUTHERN NEVADA WATER AUTHORITY, Petitioners, vs. ADAM SULLIVAN, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, Respondents.	Case No. A-20-816761-C Dept. No: 1 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 Hearing Requested **ANSWERING BRIEF OF PETITIONERS' LAS VEGAS VALLEY WATER DISTRICT AND SOUTHERN NEVADA WATER AUTHORITY**

Petitioners LAS VEGAS VALLEY WATER DISTRICT ("LVVWD") and SOUTHERN NEVADA WATER AUTHORITY ("SNWA") by and through their counsel of record, file their Answering Brief pursuant to EDCR 2.15.

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ISSUES PRESENTED

1. Whether the State Engineer has the authority to designate the LWRFS as an independent hydrological unit for management purposes.

2. Whether the State Engineer's decision to designate the LWRFS is supported by substantial evidence.

3. Whether the State Engineer's factual finding that 8,000 acre-feet annually ("afa" or "acre-feet") is the maximum amount of groundwater that can be sustainably pumped on an annual basis in the LWRFS is supported by substantial evidence.

STATEMENT OF THE CASE[1]

The LWRFS is an over-appropriated groundwater system in southern Nevada, north of the Las Vegas Valley. The *basins* that make up the LWRFS were formally considered separate *basins* largely on the assumption that the groundwater aquifers reflected the topographic boundaries. For decades, however, the State Engineer expressed uncertainly about that assumption, and investigated whether groundwater throughout the LWRFS is, in fact, connected as a single unit. Only large-scale pumping could yield the data needed to analyze what basins in the LWRFS are connected. The State Engineer ordered a large pumping test, rigorously reviewed the drawdown data throughout the LWRFS, and found that groundwater levels responded uniformly. Thus, the State Engineer confirmed that the LWRFS basins are not separate hydrographic units, but instead, operate as a single aquifer that underlies various topographic mountains and valleys.

[1] SNWA and LVVWD incorporate by reference their Statement of the Case from their Opening Brief.

Since the 1980s, the State Engineer's office was concerned that groundwater pumping in the LWRFS would impact senior surface water rights and the endangered Moapa dace. His office therefore evaluated the maximum volume of groundwater that can be sustainability pumped in the LWRFS. Initial estimates of water availability varied widely, and protests were filed against water development in the region. While some groundwater rights were granted, the State Engineer conditioned the approval of those groundwater permits on protecting senior rights and the Moapa dace.

In 2002, the State Engineer refused to grant new groundwater rights until he understood the impact from pumping *existing* rights, but most of the groundwater rights he already granted were not yet pumped.[2] Instead of granting new permits, the State Engineer ordered a comprehensive pumping test to obtain aquifer data necessary to understand groundwater connectivity and availability ("Aquifer Test"). The Aquifer Test, conducted in 2010-2012, revealed that pumping even less than half of the existing rights caused immediate and significant impacts to the Muddy River within two years. Based on the Aquifer Test, the State Engineer denied all pending applications for *new* groundwater rights in the LWRFS.[3]

In 2019, prompted largely by Coyote Springs Investment's ("CSI") intention to use existing groundwater rights to support large residential and commercial project in Coyote Spring Valley, the State Engineer issued Interim Order 1303.[4] Prior to issuing Order 1303, the State Engineer held several public workshops that invited stakeholders to provide input on water issues in the area. Order 1303 initiated a two-phased process

[2] ROA 665-66.

[3] ROA 75-76 (Several parties including NV Energy, CSI, LVVWD, and SNWA had applications for new groundwater rights in the LWRFS denied).

[4] ROA 70-88.

designed to ensure the State Engineer could create rules for administering water rights in the LWRFS using the best available data and science.

The first phase involved fact-finding on discrete hydrologic issues through a two-week hearing, which resulted in Order 1309. The findings of Order 1309 are the subject of this Petition. The second phase will involve development of administrative rules for managing groundwater use in the LWRFS.

In Order 1309, the State Engineer made hydrologic findings to define (1) the area where the regional aquifer is connected (the LWRFS) and (2) how much groundwater can be developed in that aquifer. The appeals currently before the Court arise from the factual findings in Order 1309, not groundwater management decisions the State Engineer will not make until Phase 2 of the administrative process. The two key factual findings addressed in this Answering Brief are the geographic extent of the hydrologically connected LWRFS, and the 8,000 afa limit on groundwater production in the LWRFS.[5]

STATEMENT OF FACTS[6]

I. History of groundwater administration in LWRFS region

Order 1309 is the culmination of decades of LWRFS investigation. In the 1980s, the State Engineer began an in-depth study of the area now known as the LWRFS with the United States Department of Interior, Geological Survey ("USGS").[7] The initial

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[5] Another determination in Order 1309 related to the impact of existing groundwater pumping on senior surface water rights in the Muddy River. SNWA and LVVWD challenged that determination in their petition for judicial review and presented their argument against that determination in their Opening Brief.

[6] SNWA and LVVWD incorporate by reference their Statement of Facts from their Opening Brief.

[7] *See* SE ROA 654-658 for a history of the studies conducted prior to 2002.

USGS studies did not have pumping data because significant groundwater development had not yet occurred in the area. Therefore, the USGS relied on groundwater budgets and other theoretical methods to estimate the amount of available supply. The estimates varied widely from a few thousand acre-feet based on local recharge, to over 50,000 acre-feet based on underground flow from upgradient basins.

A. Application 46777

In 1983, Application 46777 was filed by Nevada Power to appropriate groundwater in Coyote Spring Valley.[8] Today, CSI desires to use water rights originating from Application 46777 for CSI's proposed development. But even in 1983, the sustainability of that groundwater use was in serious question. Protests were filed against Application 46777 by the United States and Nevada's Department of Wildlife based on potential impacts to the Moapa dace. Protests were also filed by Muddy River water right owners who claimed groundwater pumping would capture river flows and impact their water rights.[9]

In 1997, Application 46777 was conditionally granted. After an evidentiary hearing, the State Engineer granted Permit 46777 with specific permit terms that preclude impacts to the Muddy River. Specifically, the State Engineer issued Ruling 4542 and stated that protests were withdrawn "on the understanding that *groundwater pumping would be stopped* should the project adversely affect the water table in the Muddy River Springs Area."[10] To protect the Muddy River and Moapa dace from pumping that Permit 46777 authorized, the State Engineer established an early warning

[8] SE ROA 47837.
[9] SE ROA 48114-48130, 47837-47840 (Ruling 4542, Permit 46777).
[10] SE ROA 48115 (emphasis added).

system. The State Engineer found that "if, at some future time, it is determined that pumping the [Permit 46777 wells] has adverse effects on the springs [and river . . .] *those effects would be detected early."*[11] Accordingly, the State Engineer issued Permit 46777 "subject to existing rights" and expressly stated the "State Engineer retains the right to regulate the use of the water herein granted *at any and all times*."[12] Similar language was included in all other groundwater permits that were issued in the LWRFS area.[13]

B. Order 1169

Joint management of the LWRFS region began with Order 1169 and continued with Rulings 6254-6261 because the region shares a close hydrologic connection, and a *joint* groundwater supply. In the early 2000s, the State Engineer had to consider additional applications for groundwater in Coyote Spring Valley and the LWRFS region. Instead of acting on those applications, he issued Order 1169 to require the Aquifer Test.[14] The State Engineer ordered that half the existing rights issued in the LWRFS be pumped and the effects of pumping be monitored.[15] Order 1169 included all the LWRFS basins, except Kane Springs Valley.[16] The Aquifer Test yielded data that proved groundwater in Coyote Spring Valley has a close hydrologic connection to groundwater

[11] SE ROA 48123 (emphasis added).
[12] SE ROA 47838.
[13] *See e.g.*, SE ROA 33952, 35507-35508, 41852.
[14] SE ROA 654-669.
[15] The State Engineer had previously issued approximately 50,465 afa in six of the LWRFS Basins, usually with strict permit terms noting that the permits are subject to reductions in pumping if harm occurs to others or the environment, and had pending applications before him requesting over 100,000 afa of additional appropriations.
[16] *See* SE ROA 992-994. The State Engineer added Kane Springs Valley to the LWRFS in Order 1309.

in adjacent valleys. The test also proved that pumping in Coyote Spring Valley directly impacts the Muddy River and Moapa dace habitat.

After the Aquifer Test, the State Engineer had data the USGS did not have in the 1980s. Rather than simple theoretical estimates, empirical data showed common groundwater level responses throughout the LWRFS region due to Aquifer Test stress imposed by pumping.[17] More importantly, monitoring wells near the Muddy River and critical Moapa dace habitat showed a direct and nearly immediate groundwater decline in response to Aquifer Test pumping.

Based on the Aquifer Test evidence, the State Engineer issued Rulings 6254-6261 in 2014. His office treated the LWRFS (except Kane Springs Valley) as one aquifer.[18] Each ruling addressed a different basin in the LWRFS and denied each pending water right application that existed in that basin. The rationale for all the rulings 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."[19] The State Engineer then set one perennial yield for all the Order 1169 basins and the Muddy River.[20]

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[17] SE ROA 41986.
[18] SE ROA 726-948.
[19] *See e.g.*, SE ROA 479.
[20] *Id*. ("The perennial yield of these basins cannot be more than the total annual supply of 50,000 acre-feet. Because the Muddy River and Muddy River springs also utilize this supply, and are the most senior water rights in the region, the perennial yield is further reduced to an amount less than 50,000 acre-feet. The State Engineer finds that the amount and location of groundwater that can be developed without capture of and conflict with senior water rights on the Muddy River and springs remains unclear, but the evidence is overwhelming that unappropriated water does not exist.").

II. Interim Ruling 1303

In 2019, the State Engineer issued Interim Order 1303 to initiate a two-phase process to develop management rules for the use of existing groundwater rights in the LWRFS.[21] The State Engineer was explicit – he had to address hydrologic factual questions with the help of stakeholders and their experts before management decisions could be made.[22] For Phase 1, the State Engineer asked all stakeholders to submit expert reports to address four specific factual matters: (1) the geographic boundary of the LWRFS, (2) aquifer recovery since the Aquifer Test, (3) the long-term annual quantity of groundwater that may be pumped from the LWRFS, and (4) the effects of moving water rights between the carbonate and alluvial systems to senior water rights on the Muddy River.[23]

Many of the stakeholders that presented evidence understood the work that had been completed since the 1980s. Many parties agreed that the State Engineer already rejected theoretical estimates (water budgets) in favor of empirical pumping and recovery data from the Aquifer Test. They acknowledged that an exceptionally flat groundwater gradient exists with a high degree of transmissivity throughout the LWRFS indicating a high degree of hydraulic connection. Importantly, most parties agreed that prior State Engineer findings were correct. They also agreed that the data shows that the aquifer has not fully recovered since the Aquifer Test. Many parties agreed that no new long-term pumping should occur, and a reduction of existing pumping is probably

[21] SE ROA 84.
[22] SE ROA 81.
[23] SE ROA 82-83. The State Engineer also include a fifth general request for "[a]ny other matter believed to be relevant to the State Engineer's analysis."

required. Thus, without mitigation, even the existing pumping of about 8,300 afa poses an imminent threat to senior water rights in the Muddy River.[24]

A decided majority of stakeholders further agreed: (1) the precise LWRFS boundary is debatable, but ultimately, a hydrologic connection exists with Kane Springs Valley; (2) the aquifer is highly transmissive and pumping from virtually all reaches of the LWRFS impacts the Muddy River and its springs; (3) pumping, not climate, is the primary factor for the declines; (4) maximum recovery has been reached and groundwater declines are once again occurring; and (5) a water user cannot pump "underflow" without capturing the source of supply for the Muddy River.

A few parties were outliers and ignored the prior findings of the State Engineer. For instance, CSI sought to turn the clock back to a time before the availability of Aquifer Test data. CSI's experts relied on water budgets, and not on the much more instructive aquifer stress and recovery data even though the State Engineer, and virtually all other experts, acknowledged water budgets are of limited value when there is actual Aquifer Test data available.[25] And despite widely accepted expert conclusions regarding the hydrologic connectivity in the LWRFS, CSI also proffered geologic evidence to *hypothesize* new barriers to flow. Based upon this evidence, CSI argued that its water rights exist in a discrete LWRFS compartment accessible for conflict-free pumping. This was vigorously disputed by many experts.[26]

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[24] SE ROA 56.
[25] SE ROA 49-50.
[26] SE ROA 22 at fn. 104.

III. Evidence presented by SNWA and LVVWD

SNWA and LVVWD are main stakeholders in the LWRFS and have a long-term responsibility for maintaining sustainable water supplies in southern Nevada. Accordingly, SNWA and LVVWD urged the State Engineer to limit LWRFS groundwater pumping to that which does not threaten the existence of the Moapa dace, does not impact senior rights, and is sustainable in the long term.

A. Boundary of LWRFS

At the administrative hearing, SNWA and LVVWD did not recommend that the State Engineer extend the boundary of the LWRFS beyond what was defined in Order 1169.[27] Rather, SNWA and LVVWD recommended adjacent basins be included in Phase 2 when groundwater management decisions could be made regarding those basins because, "regardless of the boundary, we know that the State will have to continue managing the adjacent basins to" protect the LWRFS from pumping in those basins.[28] Ultimately, the boundary must be protected from activities that could cause drawdown to propagate to the LWRFS, such as allowing a "pile-up" of "points of diversion along the boundary [of the LWRFS]."[29] The State Engineer considered this testimony, but determined based upon his previous criteria for an area's inclusion in the LWRFS management area (described in Rulings 6254-6261) that Kane Springs Valley, and a modified section of Black Mountain Area, should be added to the LWRFS Hydrographic Basin.[30]

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[27] SE ROA 34-35.
[28] SE ROA 53335 at 876:2-15.
[29] *Id*.
[30] SE ROA 48-49.

B. Hydrologic connection within the LWRFS

SNWA and LVVWD presented evidence that showed a close hydrologic connection between pumping in the LWRFS, especially in the Coyote Spring Valley sub-basin, and the Muddy River.[31] This evidence was based on hydrographs from monitoring wells and springs, which are measurements of water levels over time. Those hydrographs were compared to pumping data, and a direct response was found. SNWA and LVVWD also demonstrated that the decline in spring flows from the Aquifer Test was caused by the close hydrologic connection, not a climate phenomenon like drought.[32] The State Engineer found this evidence, and other similar evidence from the National Park Service, to be persuasive.[33]

C. Protection of Moapa dace

SNWA and LVVWD have prioritized protection of the Moapa dace for decades. Since the 1990s, habitat restoration and other conservation efforts have been completed by SNWA, the United States Fish and Wildlife Service ("USFWS") and others to increase dace populations.[34] SNWA and LVVWD's experts Zane Marshall and Robert Williams are highly experienced in the field of conservation biology and in protecting Moapa dace, and they testified regarding their involvement in the development of the 2006 Memorandum of Agreement, associated Biological Opinion, and other studies and conservation efforts for protection of Moapa dace. They testified that 3.2 cubic feet per second ("cfs") of flow at the Warm Springs West gage is necessary to protect the Moapa

[31] SE ROA 35-36; SE ROA 53340 at 899 – SE ROA 53341 at 900.
[32] SE ROA 34; SE ROA 42187-42189; SE ROA 53341 at 903:14-53343 at 909:9.
[33] SE ROA 53, 56.
[34] SE ROA 42087-89.

dace.[35] This testimony was based on extensive scientific study and documentation. The State Engineer relied on their testimony and found that "it is clear that it is necessary for spring flow measured at the Warm Springs West gage to flow at a minimum rate of 3.2 cfs in order to maintain the habitat for the Moapa dace."[36]

D. Quantity of long-term pumping that is sustainable in LWRFS

SNWA and LVVWD presented evidence that only 4,000 to 6,000 afa can be sustainably pumped from the groundwater aquifer in the LWRFS.[37] Based on the evidence presented, SNWA and LVVWD recommended that the State Engineer limit pumping to protect the Moapa dace and senior rights. Specifically, SNWA and LVVWD urged the State Engineer to limit pumping to sustainable levels, because new communities cannot rely on water that may not exist, and an unsustainable groundwater supply threatens public health and safety.

IV. Ruling 1309

After an evidentiary hearing with extensive testimony from many experts, Order 1309 was issued with four factual findings that are relevant to these appeals. First, the State Engineer delineated the LWRFS Hydrographic Basin.[38] Second, the State Engineer determined the maximum quantity of groundwater that can be pumped in the LWRFS Hydrographic Basin is 8,000 afa, or could be less.[39] Third, the State Engineer found that the 8,000 afa cap may be reduced if it is determined that pumping will impact

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[35] SE ROA 53438 at 1121:21-1122:24; SE ROA 53439 at 1127:2 – SE ROA 53440 at 1128:18.
[36] SE ROA 46.
[37] SE ROA 42014.
[38] SE ROA 66, item 1.
[39] SE ROA 66, item 2.

the endangered Moapa Dace.[40] Fourth, the State Engineer rescinded the provisions in Order 1303 that were not specifically addressed in Order 1309.[41] These appeals followed.

SUMMARY OF ARGUMENT

The State Engineer has broad authority to regulate the withdrawal of groundwater in the State of Nevada to fulfill his or her duty to protect existing rights, the public trust, and wildlife. The office has many statutory tools to carry forth the State Engineer's duties, including the power to study aquifers and determine their available supply of water for appropriation, the power to designate hydrographic areas for additional regulation, power to regulate basins, and the continuing power to manage and regulate permits issued by the office. With these tools, the State Engineer has jointly managed the basins in the LWRFS for decades. Order 1309 is simply the latest of in a forty-year of LWRFS Orders and Rulings issued by the office using the powers conferred by statute.

Based on the best available science, the State Engineer properly designated the boundary of the interconnected aquifer comprising the LWRFS. Substantial evidence supports his decision. In Order 1309, the State Engineer carefully analyzed all evidence that was presented as to the extent of the groundwater aquifer. The State Engineer's analysis was careful and detailed, and substantial evidence supports those conclusions about the LWRFS boundary.

The State Engineer presented a careful review of all evidence in Order 1309 regarding the amount of groundwater available for pumping, and a careful and detailed

[40] SE ROA 66, item 3.
[41] SE ROA 67, item 6.

analysis to support his conclusion. Substantial evidence supports that if more than 8,000 afa is withdrawn from the LWRFS aquifer, deleterious impacts will occur to existing water rights and the environment. SNWA and LVVWD, for example, presented the best available science and substantial evidence that only 6,000 afa can be pumped. The State Engineer's decision to not allow pumping to exceed 8,000 afa, which is approximately equivalent to existing pumping, is supported by the best available science and substantial evidence. The 8,000 afa limitation includes the acknowledgement that pumping may have to be reduced below 8,000 afa in the future to protect the Moapa dace and senior rights based on rigorous monitoring.

ARGUMENT

This Answering Brief refutes three challenges to Order 1309.[42] First, several Petitioners allege the State Engineer lacks statutory authority to delineate the LWRFS boundary and regulate groundwater in that area as one administrative unit. Second, some Petitioners allege the State Engineer's criteria for creating the LWRFS and his decision to designate the LWRFS are not supported by substantial evidence. Third, the same Petitioners claim the State Engineer's 8,000 afa cap on LWRFS groundwater production is not supported by substantial evidence. Each challenge lacks merit for the reasons stated below.

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[42] SNWA and LVVWD presented its challenge to another aspect of Order 1309 in its opening brief. SNWA and LVVWD support all aspects of Order 1309 accept the limited portions that are addressed in that opening brief.

I. The State Engineer Has Authority To Designate The LWRFS And To Jointly Regulate Groundwater In That Area.

The State Engineer's authority to delineate the LWRFS is well established in Nevada law.[43] While several parties claim that the State Engineer does not have authority under Nevada law to establish the LWRFS boundary,[44] those arguments are either based on a misunderstanding of the statutory authority the State Engineer relied upon in Order 1309, or an overly narrow and self-serving reading of statutory authority.

The State Engineer has authority over all water in the State (NRS 533.030(1)), limited only by the continued authority of the courts, or act of Congress (NRS 533.0245). The State Engineer has express authority to "make such reasonable rules and regulations as may be necessary for the proper and orderly execution of the powers conferred by law."[45] The State Engineer has authority to regulate the withdrawal of groundwater within the LWRFS because the LWRFS is entirely located within the State of Nevada. The State Engineer properly used the tools available to him under NRS 534.030, 534.110, and 534.120 to exercise this power to establish the extent of an area in need of special administration and set a maximum quantity of groundwater that can be pumped.

A. The State Engineer had the authority to delineate the LWRFS.

Nevada law gives the State Engineer numerous tools to administer groundwater and surface water. Those tools include the ones the State Engineer expressly relied on - NRS 532.120, NRS 534.030, NRS 534.110 and NRS 534.120.[46] Taken separately, each

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[43] NRS 532.120, 534.030, 534.110, 533.020, 534.120. *See generally,* SE ROA 43 and NRS Chapters 532-534.

[44] Apex Opening Brief at 8:6-10:2; CSI Opening Brief at 17:26-22:19; Georgia-Pacific Opening Brief at 20:27-23:4; LCWD and Vidler Opening Brief at 15:23-20:27; Nevada Co-Gen Opening Brief at 20:4-25:4.

[45] NRS 532.120.

[46] SE ROA 43-44.

power relates to a specific condition for administering groundwater use. But taken as a whole, these statutes form a mosaic of powers evidencing one primary objective – protect the public from over-pumping a groundwater basin so the basin can continue to provide water for future generations.

1. NRS 532.120

The State Engineer's office was created by NRS Chapter 532, and NRS 532.120 directs the State Engineer to adopt "such reasonable rules and regulations as may be necessary for the proper and orderly execution of the powers conferred by law." The powers "conferred by law" include NRS 534.030 which directs the State Engineer to identify whether administration of a basin is justified.

2. NRS 534.030

Based on Order 1169 and Interim Order 1303 investigations, the State Engineer properly delineated the boundary of the LWRFS based on his statutory authority provided by NRS 534.030(2). The legislature expressly provided power to the State Engineer to "designate [an area in need of administration] by basin, or portion therein, and make an official order describing the boundaries by legal subdivision as nearly as possible."[47] The State Engineer is required to hold a hearing and take testimony from the stakeholders in the area to be so designated.[48] If the State Engineer determines, after hearing and investigation, that the proposed basin needs additional administration, the State Engineer may enter a designation order for the basin.[49]

[47] NRS 534.030.
[48] NRS 534.030(2).
[49] *Id.*

Here, the State Engineer held stakeholder meetings and a formal administrative hearing to take testimony regarding the designation of the LWRFS.[50] The State Engineer specifically held the hearing to determine the geographic boundary of the LWRFS and establish the need for additional administration, as required by NRS 533.030.[51] Based on these meetings and hearings, the State Engineer designated the LWRFS Hydrographic Basin, and established 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 sub-basins.[52] As expressly permitted by NRS 534.030(2),[53] the State Engineer designated the LWRFS as an area in need of administration based on the evidence and input from public meetings and the Order 1303 evidentiary hearing.

3. NRS 534.110

The State Engineer completed a robust, long-term, and thorough "due investigation" of each basin, or portion thereof, that was later consolidated into the LWRFS, as required by NRS 534.110. The "due investigation" began with Order 1169, and continued with Interim Order 1303, wherein the State Engineer first began joint management, and then exercised the powers conferred by NRS 534.110(2). Under NRS

[50] SE ROA 12; SE ROA 33863-922.
[51] SE ROA 11.
[52] SE ROA 66, 69.
[53] NRS 534.030(2)(b) ("If the basin is found, after due investigation, to be in need of administration the State Engineer may enter an order" designating the area by basin, or portion therein, and make an official order describing the boundaries by legal subdivision as nearly as possible.).

534.110(2), the State Engineer is specifically authorized to determine the specific [sustainable] yield of an aquifer and to determine permeability characteristics.[54]

The LWRFS is, effectively, a single aquifer. An aquifer is "a geological formation or structure that stores or transmits water, or both."[55] The State Engineer found, based on extensive empirical evidence of hydrologic connection, that the LWRFS is a single aquifer with homogenous characteristics that stores and transmits groundwater. The State Engineer concluded the LWRFS is not five or seven separate aquifers, regardless of historic administrative boundary lines generally based on topography and not hydrological considerations. The State Engineer was fully authorized to rely on aquifer characteristics (specific yield and permeability) to define the LWRFS, to determine if over-pumping is occurring, and to set a quantity of available water supply.[56] Therefore, the State Engineer was clearly authorized to designate the LWRFS.

4. <u>Basin should not be narrowly defined.</u>

Several parties argue that NRS 534.030(2) does not give the State Engineer authority to designate an area that is made up of formerly independent sub-basins.[57] They rely exclusively on the fact the term *basin* is singular and not plural in statute. This argument is without merit because it is overly simplistic, ignores the larger statutory scheme in the water law, and disregards the reality of what the Aquifer Test demonstrated. NRS 534.030 does not limit the State Engineer's ability to designate an

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[54] NRS 534.110(2) ("Upon his or her own initiation, [the State Engineer may] conduct pumping tests to determine if overpumping is indicated, to determine the specific yield of the aquifers and to determine permeability characteristics").

[55] NRS 534.0105.

[56] NRS 534.110(2).

[57] Apex Opening Brief at 11-12; CSI Opening Brief at 17-19; LCWD and Vidler Opening Brief at 16-17.

area that consists of already designated basins, as he did in Order 1309.[58] Contrary to other parties' arguments, the fact that the term *basin* is used in NRS 534.030 does not mean that the State Engineer cannot combine previously designated basins.

While *basin* is not a defined term in statute, the term is used in different contexts and has different definitions. For example, in the Division of Water Resources Water Words Dictionary the word *basin* has multiple definitions including the following:

> *The U.S. Geological Survey (USGS)* and the *Nevada Division of Water Resources, Department of Conservation and Natural Resources*, have divided the state into discrete hydrologic units for water planning and management purposes. These have been identified as 232 Hydrographic Areas (256 areas and sub-areas, combined) within 14 major *Hydrographic Regions* or *Basins*.[59]

To the extent the Water Words Dictionary has any legal significance, its definition of the term "basin" does not refer to the 232 Hydrographic areas in Nevada, as opposing parties suggest, but rather to the *14 major Hydrographic regions or basins*. One of these regions, the Colorado River Basin, includes all the formerly independent sub-basins which became the LWRFS Hydrographic Basin in Order 1309.[60] The opposing parties' conclusory argument fails to consider how the term *basin* is actually used in different contexts. By contrast, the overwhelming authority in NRS 534.030(2) for designating

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[58] SE ROA 71-72 (Coyote Spring Valley, Black Mountains Area, Garnet Valley, California Wash, Hidden Valley, and Muddy River Springs Area Hydrographic Basins were all previously designated pursuant to NRS 534.030).

[59] Division of Water Resources Water Words Dictionary at 25-26. Available at http://water.nv.gov/programs/planning/dictionary/wwords-B.pdf (last visited October 12, 2021).

[60] Department of Conservation and Natural Resources, Office of the State Engineer, Division of Water Resources, *Designated Groundwater Basins of Nevada*. Available at http://water.nv.gov/mapping/maps/designated_basinmap.pdf (last visited November 5, 2021).

an area "within a basin" (the Colorado River Basin) clearly authorized designation of the LWRFS.

B. The State Engineer did not rely on NRS 533.024(1) as independent statutory authority.

Several parties argue that the State Engineer improperly relied on NRS 533.024(1) as the exclusive source of authority to designate the LWRFS.[61] This claim is also without merit. In Order 1309, the State Engineer expressly stated he was relying on many different provisions of the water statutes, not NRS 533.024(1). Also, even though NRS 533.024(1) is a legislative declaration of policy, the Supreme Court has held a "declaration of policy by the legislature, though not necessarily binding or conclusive upon the courts, is entitled to great weight."[62]

In 2017, the Nevada legislature clarified that the State Engineer's obligation to protect existing water rights included protection from impacts caused by groundwater pumping that depletes the surface water. Nevada's legislative policy in this respect is to "manage conjunctively the appropriation, use and administration of all waters regardless of the source of the water."[63] This declaration clarified that the State Engineer's express statutory powers must be used to manage all waters – groundwater and surface water – to protect existing surface water rights and the public from over-pumping groundwater.

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[61] Apex Opening Brief at 8 – 9; CSI Opening Brief at 22; Georgia Pacific Opening Brief at 20-23; LCWD and Vidler Opening Brief at 16, 18-19, 25; Nevada Co-Gen Opening Brief at 3, 10, 21-25. Notably, these same parties also rely on NRS 533.024 in other areas of their argument as requiring the State Engineer to act in other regards. See e.g. CSI Opening Brief at 20 and 54, and LCWD and Vidler Opening at 30 (relating to "best available science").

[62] *McLaughlin v. Housing Authority of the City of Las Vegas*, 68 Nev. 84, 93 227 P.3d 206, 210 (1951).

[63] SE ROA 43.

While NRS 534.030 authorized the State Engineer to designate the LWRFS, NRS 533.024(1)(e) is particularly notable in the present case because it clarifies that authority. The legislature directed the State Engineer to recognize that ground and surface water sources routinely have a hydrological connection. For example, groundwater often produces springs, and those springs contribute to river flows. Here, those are the flows relied upon by senior Muddy River surface water rights holders and the Moapa Dace in this case. Thus, groundwater and surface water cannot be viewed in isolation.

That hydrologic connection between groundwater and surface water is certainly relevant in the State Engineer's determination of whether a basin needs additional administration. The factual question of whether a hydrologic connection exists between ground and surface water is also critical to how the State Engineer executes his or her other statutory obligations to protect senior water rights from impacts that are caused by the use and development of junior water rights. In the LWRFS, the State Engineer made strongly supported factual determinations that junior groundwater pumping is impacting senior surface water rights in the Muddy River. The State Engineer is obligated to protect senior water rights by express provisions in Nevada's statutes and case law. NRS 533.024(1)(e) made that obligation clearer.

C. The State Engineer did not re-prioritize the priority dates of water rights in the formerly independent sub-basins.

Despite being conspicuously absent from the State Engineer's findings, several parties incorrectly argue the State Engineer re-prioritized all water rights in the LWRFS

basin by combining the priorities of all water rights into one list.[64] Not a single word in Order 1309 re-prioritizes the water rights in the LWRFS. The only language in Order 1303 related to this question was rescinded in Order 1309.[65] The State Engineer did not address the issue of priorities within the LWRFS in Order 1309, which included the following language, "[a]ll other matters set forth in Interim Order 1303 that are not specifically addressed herein are hereby rescinded."[66] Therefore, the State Engineer did not re-prioritize the priority of water rights in Order 1309.

The State Engineer was just as clear in Order 1309 that the relative priority of water rights in the LWRFS will be addressed in Phase 2 - the management portion of the administrative process regarding the LWRFS. The Order 1303 hearing was intended to address threshold factual issues. Management questions, such as the relative priority of LWRFS water rights, were always intended to be addressed at a later part of the administrative process. Therefore, the issue of priority of LWRFS water rights is not ripe and is irrelevant to the present appeals of Order 1309.[67]

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[64] CSI Opening Brief at 25:9-26:10; Apex Opening Brief at 10:3-11:3, LCWD and Vidler Opening Brief at 20:24-27; Georgia-Pacific Opening Brief at 20:27-21:4. Several parties claim that the State Engineer "re-prioritized" the relative priority of LWRFS groundwater rights in Order 1309. In other words, several parties believe that all water rights were combined in one priority table and parties lost their relative priority within the original sub-basins that make up the LWRFS hydrographic basin.

[65] SE ROA 82 ("All water rights within the Lower White River Flow System will be administered based upon their respective date priorities in relation to other rights within the regional groundwater unit.").

[66] SE ROA 67.

[67] The State Engineer has not taken a final action in relation to management of water rights or their relative priorities, thus this issue is not ripe as a final action appealable under NRS 533.450. *See generally*, *Mesagate Homeowners' Ass'n v. City of Fernley*, 124 Nev. 1092, 1097, 194 P.3d 1248, 1251 (2008).

D. While the State Engineer is authorized to regulate water rights in the LWRFS based on priority, in Order 1309 he did not change any priority dates or initiate curtailment of any specific water rights.

All statutory water rights are issued a "priority" date based on when the first application to appropriate the public waters of the state occurred.[68] These dates are then used to apply the principles of "first in time, first in right,"[69] as all the water rights issued by the State Engineer are permitted subject to prior senior water rights. The State Engineer did not alter the priority date of any water right in the LWRFS, nor has any party argued that their actual priority date has changed.

Also, the specific permit terms that condition the approval for all statutory water rights run counter to the claim of a right to relative priority. In prior appropriation states, a water right holder only owns their right within the prior appropriation system.[70] Under NRS 534.020 all groundwater rights in Nevada are issued subject to existing rights.[71] All statutory water rights also include specific permit terms that state their use of water is "subject to existing rights" as a condition of approval. In other words, no water right holder has a right to use their water if that use would conflict with a water right that existed at the time of its approval. A conflict occurs when a senior right holder is unable

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[68] NRS 533.355(1); NRS 534.080(3) ("Except for [domestic wells], the date of priority of all appropriations of water from an underground source mentioned in this section is the date when application is made in proper form and filed in the Office of the State Engineer pursuant to the provisions of chapter 533 of NRS.").

[69] Priority can only be lost if a water right is cancelled for failure to perfect the appropriation (place the water to the requested beneficial use in a diligent manner) and is later re-instated. NRS 533.395(3) (If the decision of the State Engineer modifies or rescinds the cancellation of a permit, the effective date of the appropriation under the permit is vacated and replaced by the date of the filing of the written petition with the State Engineer.).

[70] *Kobobel v. State Dept. of Natural Resources*, 249 P.3d 1127, 1134 (Col. 2011).

[71] NRS 533.030 also provides that all statutory water rights are issued "subject to existing rights."

to make full beneficial use of its existing rights. Thus, as long as water rights can impact the availability of water to a senior right, regardless of source or arbitrary topographic basin-boundary lines, that water right's priority is relative to those rights.[72] Order 1309 did not change these core concepts of priority and non-impairment.

All groundwater rights in the LWRFS were issued subject to existing rights, including decreed Muddy River water rights.[73] The State Engineer has the power to enforce the permit terms in those groundwater rights to protect senior water rights. Additionally, the State Engineer has a separate affirmative duty to protect vested decreed rights. And he cannot issue a permit, or take any administrative action, that impairs vested rights.[74] The water rights confirmed in the Muddy River Decree were used prior to 1913 and thus are protected against any impairment as vested rights in addition to being protected from conflicts as senior rights.

Other parties argue they should be permitted to continue to use groundwater, even though this use will harm existing rights on the source, including senior decreed rights

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[72] LCWD and Vidler's well was originally drilled in what was believed to be Coyote Spring Valley but later was determined to be Kane Springs Valley. SE ROA 54234. The USGS originally recognized that Coyote Spring Valley and Kane Springs Valley were one hydrographic basin based on similar topographic features. SE ROA 9347.

[73] For Example, CSI's water right has the specific permit term that the "permit is issued subject to existing rights" and that the "State Engineer retains the right to regulate the use of the water herein granted at any and all times." SE ROA 47838. Other water rights in the LWRFS area have similar permit terms. SE ROA 33952; SE ROA 35507-35508; SE ROA 41852.

[74] NRS 533.085 (1) is unambiguous: "Nothing contained in this chapter shall impair the vested right of any person to the use of water, nor shall the right of any person to take and use water be impaired or affected by any of the provisions of this chapter where appropriations have been initiated in accordance with law prior to March 22, 1913." NRS 533.085, and its concept on non-impairment, have been upheld by the Courts since the statute was first litigated in 1914. *See Ormsby County v. Kearney*, 37 Nev. 314, 142 P. 803 (Nev. 1914).

in the Muddy River. Obviously, such a result is prohibited by law as noted above. Therefore, even if the State Engineer had re-prioritized LWRFS water rights based on relative priority, under Nevada law and the prior appropriation system, he is obligated to do so to protect senior water rights and vested water rights.

Finally, the question of priority is only important if a curtailment action is initiated. In a curtailment situation, the State Engineer "restricts water use to conform to priority rights."[75] This means, that junior uses that are in excess of the available supply get curtailed. Order 1309 did not initiate curtailment.[76] Instead, Order 1309 established the factual predicate to the possibility of curtailment in the future (i.e., the State Engineer defined the extent of the aquifer and the quantity of the available supply). If the State Engineer orders a water right to be curtailed in the future, such an action would be separately appealable under NRS 533.450.

E. The State Engineer is legally allowed to defer management decisions to future actions.

1. *Eureka County v. State Engineer*

Lincoln County Water District ("LCWD") and Vidler Water Company ("Vidler") argue that in Order 1309, the State Engineer improperly deferred management and administration decision to the future in violation of *Eureka County v. State Engineer*.[77]

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[75] NRS 534.110(6).

[76] Notable, NRS 534.110(6) provides the State Engineer *shall* conduct investigations where the average supply may not be adequate to satisfy all rights. That is what he did in Order 1309 – he investigated the extent of the groundwater supply available to permittees and vested right owners. However, NRS 534.110(6) does not require curtailment occur at the same time of study. Instead, NRS 534.110(6) provides the State Engineer discretion to curtail use (i.e., limit withdrawals to conform to priority rights). How, or if, the State Engineer proceeds with curtailment is an issue to be heard in later proceedings at the State Engineer's discretion.

[77] LCWD and Vidler Opening Brief at 38.

This argument relies on a misreading of *Eureka County*. In *Eureka County*, the Supreme Court addressed the issue of whether the State Engineer could approve an application that would conflict with an existing right if the State Engineer conditioned his approval on a yet-to-be-developed mitigation plan.[78] The *Eureka County* Court prohibited the State Engineer from relying on future evidence (a mitigation plan to prevent a conflict) that was not available for review prior to approval of the water right application. Logically, the *Eureka County* holding was rooted in due process concerns.

Here, the State Engineer made a decision based on the evidence before him. The State Engineer did not approve an application that would result in a conflict and did not assume that such a conflict could be mitigated through some future management plan. He used specific criteria related to the scope and extent of the boundary of the management system and determined the quantity of water available for pumping. The State Engineer properly deferred other management decisions to future proceedings, which allows all parties the continued opportunity to be heard before those future decisions are made. Order 1309 was narrowly tailored to four factual inquires and related to determining the extent of a management area and the amount of available supply. The determinations of the State Engineer in Order 1309 are related to those specific issues and are not reliant on the outcome of any future proceeding or evidence.

Furthermore, the water statutes specifically contemplate management of groundwater in stages.[79] Order 1309 is the initial designation of the LWRFS under NRS 534.030. Under NRS 534.120(1), the State Engineer has the authority to make rules and

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[78] *Eureka County v. State Engineer*, 359 P.3d 1114, 1120 (2015).
[79] NRS 534.030 and 534.120.

regulations *after designation*.[80] The law expressly recognizes that management decisions can be deferred until after designation and does not require all rules and regulations to be implemented simultaneously with the designation order.

2. Due Process

In an argument similar to LCWD and Vidler, Apex Holding Company, LLC and Dry Lake Water, LLC ("Apex") contends that the due process rights of the Order 1303 Hearing participants were violated because they were not allowed to comment on management decisions.[81] This argument fails to recognize that the State Engineer has not made management decisions and expressly deferred those decisions to a later point in the administrative process.[82] The Order 1303 Hearing was intended to address specific threshold issues that were factual and a necessary predicate to any evaluation of future management decisions.

The scope of the hearing related to the delineation of the boundary of the LWRFS and the amount of groundwater that could be sustainably pumped from the LWRFS. All parties had notice of the limited issues that were being considered. The State Engineer provided all parties adequate notice of those issues through Order 1303 and the pre-hearing notice. All parties had the ability to be heard on the enumerated issues. All parties are also on notice that any future decisions will be subject to further

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[80] NRS 534.120(1) ("Within an area that has been designated by the State Engineer, as provided for in this chapter, 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.") (emphasis added).

[81] Apex Opening Brief at 12.

[82] This argument puts the "cart before the horse" and asks this court to resolve issues that have yet to be heard by the administrative agency.

administrative proceedings, with their own notices and additional opportunities to submit evidence and be heard on the later issues. Thus, no due process violations exist with regard to parties' ability comment of future management decisions.

F. The State Engineer had authority to consider the Endangered Species Act in his public interest analysis.

Georgia-Pacific Gypsum LLC, and Republic Environmental Technologies, Inc. ("Georgia-Pacific") and Apex argue the State Engineer was not authorized to consider the Endangered Species Act ("ESA") in Order 1309.[83] The parties fail to explain why the State Engineer should ignore his agency's need to comply with federal law. Not only is it obvious that the State Engineer must comply with the ESA, the State Engineer also has an express duty to protect the public interest.

The State Engineer's duty to the public interest is twofold: he has a fiduciary public trust obligation and a statutory duty to protect the public interest.[84] Public interest has been defined and interpreted by the State Engineer and the Supreme Court.[85] Pursuant to instructions from the Supreme Court, specific public interest criterion and guidelines exist within the meaning of NRS 533.370.[86] Specifically, the State Engineer

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[83] Apex Opening Brief at 13; Georgia-Pacific Opening Brief at 28.

[84] NRS 533.345; NRS 533.370(2); *Min. Cty. v. Lyon Cty.*, 136 Nev. 503, 514, 473 P.3d 418, 427 (2020) ("Nevada's water statutes constrain water allocations to those that are public uses and require the State Engineer to reject permits if they are unnecessary or detrimental to the public interest. These considerations are consistent with the public trust doctrine.").

[85] *Pyramid Lake Paiute Tribe of Indians* v. *Washoe County,* 112 Nev. 743, 918 P.2d 697 (1996). *See also,* State Engineer Ruling 3786A (October 9, 1992) available at http://images.water.nv.gov/images/rulings/3786Ar.pdf (last visited 10/14/2021);

[86] *See* State Engineer Ruling 6454 (December 26, 2018) at 11-13, available at http://images.water.nv.gov/images/rulings/6454r.pdf (last visited October 14, 2021))

must look to water law statutes and policies in the public interest analysis.[87] Importantly, the protection of wildlife and establishment and maintenance of wetlands and fisheries are statutory mandates in Nevada water law.[88] Additionally, the State Engineer has public trust obligations to responsibly manage water resources.[89] Courts have long held that protection of biodiversity and endangered species is a part of the public trust obligations of the government.[90]

The State Engineer has consistently and historically considered the ESA. Robert Williams, a former State Supervisor for the USFWS, testified that the State Engineer has historically taken ESA compliance into consideration: (1) in 1991, when the State Engineer protected in-stream flows to protect the Lahontan cutthroat trout; (2) in 1998, when the State Engineer granted the Pyramid Lake Paiute Tribe water rights to protect Lahontan cutthroat trout and cui-ui; and (3) when the State Engineer decided to limit water use to protect the Devils Hole pupfish based on federal reserved water rights.[91] Therefore, the State Engineer properly followed the law and his prior practices to consider the impact of the ESA in Order 1309.

In addition to the clear statutory authority that authorized the State Engineer to consider the ESA, the State Engineer correctly recognized that a state agency could be

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("Ruling 6454"). *See also*, State Engineer Ruling 6164 (March 22, 2012) available at http://images.water.nv.gov/images/rulings/6164r.pdf (last visited October 14, 2021) ("Ruling 6164") at 152-158.

[87] Ruling 6454 at 10-11.

[88] *See* NRS 533.023, NRS 533.367.

[89] *Min. Cty. v. Lyon Cty.*, 136 Nev. at 520, 473 P.3d at 431 ("To allow the state to otherwise allocate waters without due regard for the public trust would permit the state to evade its fiduciary duties, and this we cannot sanction.").

[90] *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978).

[91] SE ROA 53434 at 1107:14 – SE ROA 53435 at 1108:16.

held liable for "take" under the ESA.[92] As explained in testimony, violations of the take prohibitions under ESA are subject to civil and criminal penalties.[93] In addition, the Federal government can seek injunctive relief to stop an activity that threatens harm or take of a listed species or its habitat.[94] The State Engineer found that managing LWRFS pumping to maintain flows above 3.2 cfs at the Warm Springs West gage would avoid possible civil and criminal penalties for an ESA violation.[95]

Georgia-Pacific also argued that the State Engineer has no authority to determine the circumstances where a "take" would occur.[96] However, the State Engineer did not make such a finding. The State Engineer properly reviewed evidence of the minimal flows necessary to "ensure access of wildlife it customarily uses,"[97] to protect the public interest and fulfill his obligations under the public trust.[98] The State Engineer relied upon USFWS's determination of acceptable incidental take of Moapa dace as defined in multiple Biological Opinions provided as exhibits during the hearing.[99] The State

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[92] SE ROA 45-47 ("a state regulator is not exempted from the EA for takings that occur as a result of a licensee's regulated activity. States have faced the impediment of their administrative management actions being subservient to the ESA. For example, the Massachusetts Division of Marine Fisheries was subject to an injunction prohibiting it from issuing commercial fishing licenses because doing so would likely lead to the taking of an endangered species." *See Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997)).

[93] 16 U.S.C. § 1540, *Ctr.for Biological Diversity v. Holsten*, 541 F. Supp.2d 1073, 1079 (D. Minn. 2008).

[94] SE ROA 42121.

[95] SE ROA 42134.

[96] Georgia Pacific Opening Brief at 30.

[97] NRS 533.367.

[98] NRS 533.345; NRS 533.370(2); *Min. Cty. v. Lyon Cty.*, 136 Nev. at 514 , 473 P.3d at 427 ("Nevada's water statutes constrain water allocations to those that are public uses and require the State Engineer to reject permits if they are unnecessary or detrimental to the public interest. These considerations are consistent with the public trust doctrine.").

[99] SE ROA 42124-46, 47605, 47807.

Engineer properly relied on expert testimony supported by substantial evidence, a trigger established by the USFWS, and new information from the Aquifer Test to avoid exceeding that *take* and ensuring that wildlife will have access to the spring water upon which it relies.

II. The State Engineer's Decision To Designate The LWRFS Basin Was Proper.

The LWRFS sub-basins have been the subject of testing and assessment for decades. As a result, the record of available information and data is extensive. The Interim Order 1303 administrative hearing built on the existing record and allowed for stakeholder input and evaluation of the volumes of existing data. The 2010 Aquifer Test produced valuable empirical data about impacts throughout the LWRFS from pumping existing rights. The Aquifer Test yielded critical information, and drastically altered the outlook for groundwater management and availability in the LWRFS. The test revealed a uniquely close hydrologic connectivity within the LWRFS. That unique connectivity is supported by additional information obtained in the years following the Aquifer Test.[100]

As chronicled in Interim Order 1303, the State Engineer made sound factual findings regarding the high degree of hydrologic connectivity within the LWRFS based on the Aquifer Test. Those findings were confirmed during the administrative hearing and acknowledged by a substantial majority of the parties after ample opportunity for additional evidence, cross examination, and rebuttal.[101] A few outliers disregarded of

[100] SE ROA 53167 at 509:11-12; SE ROA 53453 at 1178:1-18; SE ROA 53341 at 903:2-5; SE ROA 53167 at 509:12; SE ROA 53453 at 1178:10-11.

[101] SE ROA 53060 at 266:3-11; SE ROA 53167 at 509:7-8; SE ROA 53354 at 953:6-8; SE ROA 53453 at 1178:1-18; SE ROA 53618 at 1526:23 - SE ROA 53619 at 1527:5;

the State Engineer's prior and consistent findings of hydrologic connectivity because those findings are not convenient to their business interests. They had a full opportunity to present evidence and rebut opposing evidence at the administrative hearing. For example, CSI argued that drought is the reason for observed groundwater declines and argued that its water rights in Coyote Spring Valley are isolated from the LWRFS.[102] Similarly, Georgia-Pacific and Republic, LCWD and Vidler, and Western Elite Environmental and Bedroc, argued in favor of most sub-basins being included in the LWRFS except – not coincidentally - for the areas containing their own water rights.[103] Those parties are now asking this Court to reweigh their evidence and substitute its judgment for that of the State Engineer, which is improper.[104] The State Engineer's decision is based on a well-reasoned review of substantial evidence, and is supported by the record.

A. The State Engineer's decision to delineate the LWRFS boundary is based on substantial evidence.

In Order 1309, the State Engineer found that "the geographic extent of the LWRFS is intended to represent the area that shares both a unique and close hydrologic

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SE ROA 53670 at 1645:7-10; SE ROA 53722 at 1763 to SE ROA 53723 at 1765; SE ROA 52984 at 95:14-16.

[102] SE ROA 16-19.

[103] SE ROA 19-23, 30-32, 40-42.

[104] The Court may not "substitute its judgment for that of the State Engineer." *Wilson v. Pahrump Fair Water, LLC*, 481 P.3d 853, 858 (Nev. 2021) (internal citation omitted). When reviewing a decision or order of the State Engineer, the court may not "pass upon the credibility of the witness nor reweigh the evidence." *Revert v. Ray,* 95 Nev. 782, 786, 603 P.2d 262, 264 (1979); *see also, Bacher v. State Eng'r,* 122 Nev. 1110, 1121, 146 P.3d 793,800 (2006). The Legislature has specified that "[t]he decision of the State Engineer shall be prima facie correct, and the burden of proof shall be upon the party attacking the same." NRS 533.450(10); *see also, Revert,* 95 Nev. at 786, 603 P.2d at 264.

connection and virtually all of the same source and supply of water, and *therefore will benefit from joint and conjunctive management*."[105] The State Engineer also developed a common set of criteria, that were consistent with characteristics considered in prior rulings regarding the LWRFS, to determine if the hydrologic connection between basins requires joint management.[106] These criteria account for water level, hydrographic, and hydrogeologic data to determine the extent of hydrologic connection between sub-basins in the LWRFS. Such factual determinations should not be lightly disregarded or disturbed.[107] Indeed, the State Engineer is entrusted with administering this important

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[105] SE ROA 55 (emphasis added).

[106] SE ROA 48-49. These criteria include: "(1) Water level observations whose spatial distribution indicates a relatively uniform or flat potentiometric surface are consistent with a close hydrologic connection. (2) Water level hydrographs that, in well-to-well comparisons, demonstrate a similar temporal pattern, irrespective of whether the pattern is caused by climate, pumping, or other dynamic is consistent with close hydrologic connection. (3) Water level hydrographs that demonstrate an observable decrease in drawdown, or a recovery, that corresponds to a decrease in pumping and an observable decrease in pumping, are consistent with a direct hydraulic connection and close hydrologic connection to the pumping location(s). (4) Water level observations that demonstrate a relatively steep hydraulic gradient are consistent with a poor hydraulic connection and a potential boundary. (5) Geologic structures that have caused a juxtaposition of the carbonate-rock aquifer with low permeability bedrock are consistent with a boundary. (6) When hydrologic information indicates a close hydraulic connection (based on criteria 1-5), but limited, poor quality or low resolution water level data obfuscate a determination of the extent of that connection, a boundary should be established such that it extends out to the nearest mapped feature that juxtaposes the carbonate-rock aquifer with low permeability bedrock, or in absence of that, to the basin boundary."

[107] *State Eng'r v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991); *Revert*, 95 Nev. at 786, 603 P.2d at 264. *See also, Pyramid Lake Paiute Tribe v. Washoe Cty.*, 112 Nev. at 751, 918 P.2d at 702 (Generally, the State Engineer's "factual determinations will not be disturbed" by the reviewing court on a petition for judicial review pursuant to NRS 533.450 so long as they are "supported by substantial evidence.").

and technical subject because he possesses the necessary technical qualifications and experience to understand and analyze complex issues.[108]

After evaluating the evidence and expert testimony that was presented at the Interim Order 1303 Hearing, the State Engineer delineated the LWRFS boundary in Order 1309.[109] This finding was based on previous findings made by the State Engineer in Rulings 6254-6261 and a general consensus among the experts testifying at the hearing concerning the boundary of the LWRFS.[110] In Rulings 6254-6261, the State Engineer found that the results from the Aquifer Test provided "clear proof of the close hydrologic connection of the basins that distinguishes these basins from other basins in Nevada."[111] Again, the State Engineer is particularly well-suited to assess expert testimony based on his own expertise, as required by NRS 532.030.

At the administrative hearing, there was also a general consensus among experts that pumping in the LWRFS caused corresponding drawdowns throughout the LWRFS groundwater aquifer and a decline of Muddy River spring flows.[112] Volumes of

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[108] NRS 532.030 ("No person may be appointed as State Engineer who is not a licensed professional engineer pursuant to the provisions of chapter 625 of NRS and who does not have such training in hydraulic and general engineering and such practical skill and experience as shall fit that person for the position").

[109] SE ROA 66.

[110] SE ROA 745-746.

[111] SE ROA 746.

[112] SE ROA 13-14 (Center for Biological Diversity), SE ROA 15-16 (City of North Las Vegas), SE ROA 19 (Georgia Pacific and Republic); SE ROA 27 (Moapa Valley Water District); SE ROA 28 (Muddy Valley Irrigation Company); SE ROA 29-30 (United States Department of the Interior, National Park Service); SE ROA 33-34 (NV Energy); SE ROA 34-36 (SNWA and LVVWD); SE ROA 38 (U.S. Fish and Wildlife Service); *See, e.g.*, SE ROA 53340 at 899:17 to SE ROA 53341 at 900:16 (Burns); SE ROA 53170 at 521:5-24 (Waddell); SE ROA 53056 at 251:4 to SE ROA 53057 at 252:12 (Braumiller); SE ROA 53454 at 1187:11 to SE ROA 53455 at 1188:21 (Lazarus); SE

geographic and hydrologic data were submitted to the State Engineer that evaluated the connectivity of all surrounding basins in relation to the Muddy River and each other. While the State Engineer recognized discrete aquifers may conceptually exist within the LWRFS, he found none had been proven to exist.[113]

The contrary evidence submitted by CSI and LCWD and Vidler to cleave specific areas from the LWRFS were thoroughly rebutted at the hearing.[114] Expert after expert testified for numerous parties with varying interests that important and relevant data was "conspicuously absent from [CSI's experts'] report."[115] Order 1303 plainly identifies the initial hydrologic work that was done in the LWRFS, including the significant pumping stress that provided real data, not hopeful speculation, on how various parts of the aquifer responded. That evidence, and the new groundwater level data and analysis, disproved CSI's and LCWD and Vidler's hypotheses that impermeable faults conveniently exist at select locations to insulate their wells from causing any drawdown elsewhere in the LWRFS.

ROA 53618 at 1526:23 to SE ROA 53619 at 1527:5 (Myers); SE ROA 48620; SE ROA 53352 at 945:14 to 946:16 (Burns); SE ROA 53340 at 899:17-20 (Burns). The State Engineer found this evidence more compelling than the counter evidence by CSI, LCWD and Vidler, and the Moapa Band of Paiutes.

[113] SE ROA 54.

[114] SE ROA 42178; SE ROA 42179-42180 (*see* Figure 2-4). SE ROA 53173 at 533-534; SE ROA 53173 at 534:4-7.

[115] SE ROA 42179. Evidence exists to demonstrate there is a clear hydraulic connection between CSI's wells and the rest of the LWRFS. SE ROA 42179 to SE ROA 42181. SE ROA 53173 at 534:11-12; SE ROA 53220 at 628:5-9 (making similar conclusions to those SNWA reached in notes 23-25, *supra*): SE ROA 53173 at 534:8-9; SE ROA 53220 at 629:12-16; SE ROA 53173 at 534:2-7; SE ROA 53452 at 1176:18 to 1177:3; SE ROA 53452 at 1177:1-18; SE ROA 53449 at 1165:23 to 1166:1; SE ROA 53450 at 1169:9-24; SE ROA 53463 at 1220:7-10; SE ROA 53731 at 1800:15-23; SE ROA 53722 at 1761:4-14; SE ROA 53616 at 1518:9-24.

In sum, the State Engineer was persuaded by his own judgment and a consensus view among many experts with decades of experience studying groundwater in southern Nevada who testified on behalf of parties with a wide range of interests. By rejecting the more creative opinions that were repeatedly undermined by other experts and that ignored well-established groundwater dynamics in the region, the State Engineer used his own expertise to reach a decision supported by substantial evidence. From there, the State Engineer provided well-reasoned analysis of the relevant evidence, and sufficiently articulated the basis for determining the LWRFS boundary. Given the weight of the evidence supporting his decisions and the deference the State Engineer's factual findings must receive, this Court should uphold his findings.[116]

B. The State Engineer considered all relevant evidence in delineating the LWRFS boundary.

In any contested hearing, the decisionmaker must decide between competing and conflicting arguments. Through Order 1309, the State Engineer carefully summarized the various parties' evidence and arguments and, with extensive citations to the record, explained why he was persuaded by certain evidence and unpersuaded by other evidence.[117] Certain parties argue the State Engineer ignored their evidence. But this is not the case. Considering evidence and rejecting it in favor of other evidence does not

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[116] *Pyramid Lake Paiute Tribe v. Washoe Cty.*, 112 Nev. at 751, 918 P.2d at 702 (The State Engineer's "factual determinations will not be disturbed" by the reviewing court on a petition for judicial review pursuant to NRS 533.450 so long as they are "supported by substantial evidence."). The Legislature has specified that "[t]he decision of the State Engineer shall be prima facie correct, and the burden of proof shall be upon the party attacking the same." NRS 533.450(10) *see also, Revert*, 95 Nev. at 786, 603 P.2d at 264.

[117] SE ROA 47-55, 66.

mean the testimony or evidence was ignored. It means the State Engineer, with his office's collective expertise, found the opposing evidence more reliable and persuasive.

CSI argues that the State Engineer only relied on the Aquifer Test data to the exclusion of all other evidence.[118] This argument is false. The State Engineer considered geologic mapping, water level measurement accuracy, water budget analysis, water flow paths, and groundwater modeling in Order 1309.[119] While the State Engineer was not convinced by CSI's evidence, he clearly considered it when coming to his decision define the boundary of the LWRFS. For example, the State Engineer found that "while water budget and groundwater flow path analysis [used by CSI] are useful to demonstrate a hydrologic connection, additional information is required to demonstrate the relative strength of that connection."[120] Other parties provided that additional information and demonstrated the high degree of connectivity in the LWRFS.[121] The State Engineer agreed with nearly all other participants that the "regional water budget is not the limiting measure to determine water availability."[122] Accordingly, the State Engineer properly considered and weighed all the relevant evidence, and substantial evidence supports his determination.

CSI also argues that the State Engineer ignored evidence that geologic faults may act as complete or partial barriers to groundwater flow and a close hydraulic connection

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[118] CSI Opening Brief at 29-35.
[119] SE ROA 17, 53, 52, 49-51, 60.
[120] SE ROA 49. The State Engineer further found that "availability of groundwater for pumping based on water budget should consider whether the same water is appropriated for use in upgradient and downgradient basins, and CSI did not account for this." SE ROA 58.
[121] SE ROA 13-15, 25-36, 38-39.
[122] SE ROA 59.

does not exist where heterogeneities occur within the LWRFS.[123] Contrary to CSI's claim, however, the State Engineer recognized that heterogeneities exist in the LWRFS, but concluded they do not "create hydraulically isolated compartments or subareas within the LWRFS carbonate-rock aquifer from which pumping can occur without effect on the Warm Springs area."[124]

While CSI and other parties presented evidence of new fault structures, the State Engineer considered this evidence and found the parties failed to demonstrate the faults act as a barrier to flow in any way.[125] For example, CSI and the Moapa Band of Paiute Indians argued against managing the LWRFS as a single basin, claiming that geologic barriers create isolated flow paths.[126] Other parties rebutted this hypothesis, pointing to hydraulic data obtained from observed impacts from pumping that clearly demonstrate a close connectivity.[127] Additionally, the Aquifer Test supports that impacts from pumping were widespread throughout the LWRFS and demonstrate a close hydrologic connection between the sub-basins.[128]

In contrast to CSI and the Moapa Band of Paiute Indians, SNWA and LVVWD presented expert testimony that because wells on different sides of the same faults behaved similarly, those faults did not create discrete pockets where CSI could pump water without impacting groundwater levels throughout the LWRFS.[129] The National

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[123] CSI Opening Brief at 42.
[124] SE ROA 60.
[125] SE ROA 52-54, 59-60.
[126] SE ROA 59-60.
[127] SE ROA 60. *See, e.g.,* SE ROA 42195-96, SE ROA 51543-51547. *See also*, SE ROA 28-30.
[128] SE ROA 65; SE ROA 10883-10974.
[129] SE ROA 53352 at 944:6 to SE ROA 53353 at 950:2.

Park Service ("NPS") also noted that the claim of geological barriers to flow are not only unproven but are also "inconsistent with prevailing opinions and data about the carbonate rock aquifer data."[130] NPS also found that, based on pumping and well data along the alleged barrier, "it is unlikely that the carbonate rock acts as a barrier."[131] The well drilled within the geologic structure at issue (MX-5) is very productive and impacts from its pumping are evidenced on both sides of the structure.[132] To support his finding that CSI did not prove fault structures will prevent impacts from groundwater pumping from propagating throughout the LWRFS, the State Engineer relied on this substantial evidence, which refutes CSI and other parties' geologic evidence.

The State Engineer, therefore, did exactly what he is supposed to do. He relied on the expertise of his office and the best available science to assess the credibility of the various arguments made by expert witnesses. Order 1309 thoroughly sets forth the competing evidence, analyzes it, and then explains the State Engineer's basis for reaching his findings and conclusions. Order 1309 is well reasoned, supported by substantial evidence provided by many credible experts from numerous parties, and is thus not arbitrary or capricious. The Court should therefore uphold the State Engineer's findings.[133]

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[130] SE ROA 51543

[131] SE ROA 51546.

[132] *Id*.

[133] *State Eng'r v. Morris*, 107 Nev. at 701, 819 P.2d at 205; *Revert*, 95 Nev. at 786, 603 P.2d at 264. *See also, Pyramid Lake Paiute Tribe v. Washoe Cty.*, 112 Nev. at 751, 918 P.2d at 702 (Generally, the State Engineer's "factual determinations will not be disturbed" by the reviewing court on a petition for judicial review pursuant to NRS 533.450 so long as they are "supported by substantial evidence.").

C. The criteria used by the State Engineer to delineate the LWRFS boundary are proper.

The criteria used by the State Engineer are scientific ways of demonstrating hydrologic connectivity. As explained in Order 1309, the criteria for inclusion of an area within the LWRFS are based on the characteristics considered critical in demonstrating a close hydrologic connection from Rulings 6254-6261.[134] The criteria take into account geologic data and water level observations in different contexts that provide the State Engineer with the proper tools to determine the hydrologic connection between sub-basins and whether that connection requires joint management.[135] These criteria are also consistent with prior findings in Rulings 6254-6261, and do not represent any surprise or new reasoning the parties could not anticipate.

1. The State Engineer properly considered the results from the Aquifer Test.

CSI argues that the State Engineer should not have relied on water level data from the Aquifer Test because the Aquifer Test was designed to determine how much water was available for additional appropriation, and not to test the *hydraulic* connection between certain wells or basins.[136] CSI further contends the Aquifer Test results do not provide a comprehensive view of the LWRFS hydrographic basin.[137] This argument is baseless, both logically and hydrologically. Regardless of the Aquifer Test's *original objective*, the study produced compelling data and results. The resultant data was not what was expected because many parties expected water to be available for

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[134] SE ROA 48.
[135] SE ROA 48-49.
[136] CSI Opening Brief at 30:19-35:25.
[137] *Id*.

appropriation. Instead, the Aquifer Test revealed widespread impact of groundwater pumping and an extensive hydrologic connection within the LWRFS.

Additionally, CSI is wrong in its assertion that the Aquifer Test's sole purpose was to determine how much water was available for appropriation. Order 1169 states clearly that the purpose of the test was to gain a better understanding of hydrologic connectivity of the groundwater system.[138] As the State Engineer articulated in later rulings "[one] of the goals of the Order 1169 test was to determine the perennial yield of Coyote Spring Valley."[139] The Aquifer Test was also meant to determine if pumping from groundwater rights that had already been issued "will have any detrimental impacts on existing water rights or the environment."[140] The Aquifer Test was also intended to aid in determining ideal locations for monitoring wells and to manage water rights so that groundwater pumping will not harm existing rights.[141] In short, the Aquifer Test's *actual* purpose was to better understand the groundwater system. The Aquifer Test data is indeed being used as it was originally intended, to inform a better understating of the aquifer. The State Engineer properly relied upon this data, fulfilling his direction to rely upon the best available science.[142]

2. <u>The State Engineer properly considered groundwater budgets.</u>

The State Engineer properly found that groundwater budgets are useful, but only a starting point in determining hydrologic connectivity or the amount of water available

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[138] SE ROA 664.
[139] SE ROA 780.
[140] SE ROA 665.
[141] SE ROA 664.
[142] NRS 533.024(1)(c).

to be pumped.[143] Groundwater budgets do not consider whether water is already appropriated, or whether the estimated quantity is able to be captured and developed without harm to others.[144] Instead of a hypothetical connection that results from accounting from groundwater budgets, the State Engineer properly listed five factors based on real-world data that must be considered in determining the boundary of the LWRFS.

CSI argues that the criteria used for inclusion of a basin in the LWRFS boundary is subjective and "dependent on who the [State Engineer] is."[145] CSI then argues that the only "objective" method for determining inclusion of a basin in the LWRFS is to use a groundwater budget method.[146] These arguments are a red herring and meant only to confuse the issue.

Whether or not evidence provided at a hearing meets the criteria is logically subjective, and within the discretion of the State Engineer. Such findings must be upheld by this court if they are supported by substantial evidence and are not otherwise arbitrary or capricious.[147] However, the criteria themselves are objective scientific factors and a list of evidence that must be evaluated in making a determination. The factors to be consider are 1) spatial distribution of water level observations, 2) temporal patterns of hydrographs, 3) correlation of observed water level responses to pumping stress, 4) water

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[143] SE ROA 49-50, 58-59.
[144] SE ROA 59.
[145] CSI Opening Brief at 38:2-4.
[146] CSI Opening Brief at 33:2-5.
[147] *See generally, Revert*, 95 Nev. 782, 603 P.2d 262.

level gradients, and 5) geologic structures.[148] These factors are logically relevant to determining hydrologic connectivity.[149]

CSI also argues that based on the groundwater budget method between 16,000 afa and 17,000 afa of groundwater flows through Coyote Spring Valley and bypasses the Muddy River Springs Area.[150] While Order 1169 did state that "ground water outflow from Coyote Spring Valley is believed to discharge at a rate of approximately 37,000 afa at the Muddy River Springs area and approximately 16,000 to 17,000 afa annually flows to groundwater basins further south,"[151] it did not find that development of this water would not impact the Muddy River or existing rights as CSI claims.[152] Instead, Order 1169 indicated that the estimated 16,000 afa was already appropriated in Coyote Spring Valley alone, but not yet developed (without accounting for appropriations in downgradient basins where the water naturally flows).[153]

Order 1169 specifically found that a portion of the 16,000 afa of water appropriated in Coyote Spring Valley was to be included in the Aquifer Test "to determine if the pumping of those water rights will have any detrimental impacts on

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[148] SE ROA 48-49. Note, the sixth criteria is how the State Engineer is to address uncertainty: if factors 1-5 support a connection, but data is limited, the boundary will match visible features on the land surface.

[149] LCWD and Vidler argued that the State Engineer's criteria were unauthorized ad hoc rule making that should have been done through an administrative process that involves notice and comment. LCWD and Vidler Opening Brief at 23:24-27. This argument is baseless. The State Engineer is exempt from the Nevada Administrative Procedure Act and is not required to provide notice and a comment opportunity for rules of general applicability. NRS 233B.039(1)(i).

[150] CSI Opening Brief at 31:3-32:11.

[151] SE ROA 663.

[152] CSI Opening Brief at 32:5-6.

[153] SE ROA 664.

existing water rights or the environment."[154] The results of the Aquifer Test showed that pumping just a fraction of the 16,000 afa issued in Coyote Spring Valley for only a few years "measurably reduced flows in the headwater springs of the Muddy River."[155] Obviously, if pumping just a fraction of the estimated 16,000 afa harmed existing rights, the full amount is not available for development. Lastly, CSI's argument would have the State Engineer disregard decades of additional science and findings by his office that reduced the initial estimate of 16,000 afa to 9,900 afa.[156] In other words, the State Engineer properly found that the drawdown and recovery that occurred after the Aquifer Test accurately predicts the impact of increased groundwater pumping in the LWRFS, and that 16,000 afa is not available for development in Coyote Spring Valley without harming existing rights and the environment.

D. <u>The State Engineer provided adequate due process.</u>

CSI and other parties argue that the State Engineer violated their due process rights because they were not notified of the State Engineer's criteria for determining hydrologic connection in the LWRFS before the Order 1303 Hearing.[157] This argument lacks merit. Order 1303 put all parties on notice of what factual issues would be addressed at the administrative hearing, and all parties had the opportunity to present evidence and testimony on those factual issues. The extent of hydrologic connection was one of the main issues. Parties submitted expert reports, faced questioning from the

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[154] SE ROA 665.
[155] SE ROA 782.
[156] SE ROA 779 (based on decades of additional studies, the State Engineer revised his initial estimate and determined the subsurface outflow was likely closer to 9,900 afa and not the 16,000 afa as originally estimated).
[157] CSI Opening Brief at 28:12-15, LCWD and Vidler Opening Brief at 22:13-21.

State Engineer and his office's staff, and submitted closing briefs. At no point did these parties object to the fact that they did not have enough direction on this issue.

The State Engineer is not required how to tell parties how to support their case. Instead, he properly posed a question to be answered, and relied upon submitted evidence to answer that question. For example, if the height of a building was a relevant issue at trial, the trier of fact would not have to provide the parties with an exact method of addressing the issue. Instead, each party would offer a method of measuring the building and submit evidence to support their case. The trier of fact would then be able to weigh the evidence and determine which method is most accurate and believable. By selecting a preferred method based on the arguments before it, the trier of fact does not violate any due process rights as all parties had notice and the ability to be heard on the issue.

Along those lines, requiring the State Engineer to establish specific criteria before he has reviewed all the arguments and evidence presented by the hearing participants would be illogical. The State Engineer had to wait and give each party the opportunity to present their own criteria for consideration. All parties were on notice that the SE would be making these determinations. The parties presented arguments on what they felt the criteria should be. They were provided evidence from other parties and given the opportunity to rebut that evidence and cross examine witnesses. Thus, they were provided notice and the opportunity to be heard on the issue.

Additionally, LCWD and Vidler argue that the participants' due process rights were violated because experts testified to new opinions that differed from their reports.[158]

[158] LCWD and Vidler Opening Brief at 40.

This is false, parties had the opportunity to object to expert testimony at the hearing and if they did the hearing officer evaluated the objection and found that the expert was not testifying to new opinions. Furthermore, even if this did occur, LCWD and Vidler fail to explain how these opinions prejudiced them in any way. They also had the opportunity to cross-examine these witnesses and address the same issues with their own witnesses. They also were provided the opportunity to file closing briefs, wherein such issues as this were able to be presented for review and consideration of the State Engineer. Alternatively, to the extent that LCWD and Vidler did not object at the hearing, they have waived their ability to make these objections now.

III. The State Engineer's Decision To Restrict LWRFS Groundwater Pumping To 8,000 Acre Feet, Or Less, Was Proper.

SNWA and LVVWD presented persuasive evidence that only 4,000 to 6,000 afa can be sustainably pumped from the LWRFS.[159] SNWA and LVVWD recommended that the State Engineer limit pumping to protect the Moapa dace and senior rights to an amount less than 6,000 afa. The State Engineer considered this evidence but found groundwater pumping in the LWRFS must be capped at 8,000 afa, *or maybe less*, if pumping 8,000 afa impacts the endangered Moapa dace.[160] The State Engineer relied on his conclusion that approximately 8,000 afa is currently pumped in the LWRFS, and that pumping may *be reaching* equilibrium (i.e., the level of impacts *may be* stabilizing).

[159] SE ROA 35-36.

[160] SE ROA 66, item 2-3 (emphasis added); *see also*, SE ROA 57, 63 ("the current amount of pumping in the LWRFS is a maximum amount that may need to be reduced in the future if the stabilizing trend in spring discharge does not continue").

But, he said, that 8,000 afa cap "may need to be reduced in the future if the stabilizing trend in spring discharge does not continue."[161]

SNWA and LVVWD do not completely agree that 8,000 afa is available to be pumped and stands by its evidence that no more than 6,000 afa is available. Nonetheless, SNWA and LVVWD agree that the 8,000 afa cap is a prudent starting point for limiting groundwater pumpage, particularly given the State Engineer's determination the 8,000 afa cap will be reduced in the future based on monitoring for impacts, and if impacts have not stabilized.[162]

A. The State Engineer relied on substantial evidence to find pumping should be limited to 8,000 afa or less.

The State Engineer based his 8,000 afa cap on several factors and supporting evidence. First, historic pumping data and monitoring data supports the State Engineer's determination. During the Aquifer Test, over 14,535 afa was pumped throughout the LWRFS.[163] That pumping depleted the groundwater reservoir enough to cause deleterious effects on spring flows that support senior Muddy River water rights and the Moapa dace. Since the end of the Aquifer Test, groundwater pumping reduced to between 7,000 afa and 8,000 afa.[164] Experts debated whether the impact from this level of pumping through 2019 has stabilized (i.e., reached equilibrium).[165] Thus, substantial

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[161] SE ROA 63.

[162] If pumping over 6,000 afa is allowed in the LWRFS it should be temporary in nature because the pumping may need to be reduced if impacts do not stabilize.

[163] SE ROA 56.

[164] SE ROA 56, 64.

[165] SE ROA 64. Evidence shows that even the existing pumping of 8,000 afa is causing spring flow declines, just less rapidly. *See* SE ROA 53349 at 932:21-22; SE ROA 53336 at 880:6-9; SE ROA 53169 at 519:24 to 520:4; SE ROA 53623 at 1545:16 to 1546:1; SE ROA 41876; SE ROA 53729 at 1790:6-10.

evidence supports that 8,000 afa is the upper limit on the amount of water that can be safely pumped in the LWRFS based on existing data.

In addition, the State Engineer also relied on the 3.2 cfs threshold at the Warm Springs West gage to support the 8,000 afa pumping limitation. The State Engineer recognized that "it is clear that it is necessary for spring flow measured at the Warm Springs West gage to flow a minimum rate of 3.2 cfs in order to maintain habitat for the Moapa dace."[166] Sufficient evidence exists to demonstrate that spring flow at the Warm Springs West gage is highly correlated to water levels in the LWRFS aquifer.[167] The current levels of production are causing water levels and spring flows at the Warm Springs West gage to fluctuate around 3.2 cfs. Therefore, substantial evidence exists to support that pumping 8,000 afa, or less, is necessary to maintain the 3.2 cfs flows at the Warm Springs West gage and protect the Moapa dace.

B. The State Engineer properly analyzed the evidence to support the 8,000 afa pumping limitation.

Various parties argue that the State Engineer did not develop clear analysis or cite to substantial evidence to support the pumping limitation of 8,000 afa.[168] However, the State Engineer relied upon decades of pumping data, observed flows in the Muddy River, and extensive scientific study to support his conclusion. Since empirical pumping and water level data show the pumping of approximately 8,000 afa in the LWRFS is *approaching steady state*, a reasonable mind can conclude that the amount of water

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[166] SE ROA 45.
[167] SE ROA 41986, Figure 5-9.
[168] Georgia-Pacific Opening Brief at 18:1-20:24; LCWD and Vidler Opening Brief at 36:21-38:8.

available to be sustainably pumped is approximately 8,000 afa.[169] The State Engineer properly recognized that if the system does not continue to approach equilibrium at this level of pumping, that pumping would need to be further reduced to protect existing rights and the environment.

Georgia-Pacific argues that the State Engineer wrongly applied the 8,000 afa limitation to the entire LWRFS without regard to the location of pumping.[170] This argument fails for three reasons. First, the LWRFS is a closely connected hydrologic system, and the pumping limitation should apply throughout that system. Second, the maximum quantity of water that can be pumped from a source is based on a limit of total available water from that source. Total availability is determined by whether the system can reach equilibrium, or *steady state*, given a certain amount of pumping.[171] The State Engineer found that the LWRFS is *reaching equilibrium* from the Aquifer Test and subsequent annual pumping of about 8,000 acre feet. Third, site-specific limitations were included by the State Engineer for impacts from specific points of diversion to be addressed on a case-by-case when acting on a specific application.[172] Even though the 8,000 afa limitation applies throughout the interconnected portion of the LWRFS, the

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[169] *Bacher*, 122 Nev. at 1121, 146 P.3d at 800 (quoting *State, Employee Sec. Dep't v. Hilton Hotels Corp.*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986) (An agency decision is only supported by substantial evidence if it includes evidence that a "reasonable mind might accept as adequate to support a conclusion.").

[170] Georgia-Pacific Opening Brief at 19:14-19.

[171] *Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. 521, 524, 245 P.3d 1145, 1147 (2010) (the amount of water available to be pumped from a groundwater aquifer "is the equilibrium amount or maximum amount of water that can safely be used without depleting the source.").

[172] NRS 533.370(2).

State Engineer properly acknowledged that allegations that certain areas are disconnected from the flow system can be addressed on a case-by-case basis.[173]

Similarly, LCWD and Vidler argue that the pumping cap is "discriminatory and contrary" because the pumping cap ignores the location of pumping.[174] They argue that even though their rights are junior to most rights in the LWRFS, they should be treated differently because their wells are located twenty-two miles from the Muddy River.[175] However, in making such arguments, LCWD and Vidler are confusing the three separate limitations to groundwater pumping: unappropriated water, conflicts, and public interest.[176] The cumulative quantity of water available to all appropriations is relevant under an unappropriated water analysis, which means that all appropriations must be less than or equal to the amount of available supply. The unappropriated water analysis is relevant to a *regional* conflict analysis as pumping above the amount of available supply will necessarily cause conflicts and be detrimental to the public interest.[177] In contrast, location of pumping from a specific well is relevant under a *case-by-case* analysis and not an unappropriated water analysis. Accordingly, the 8,000 afa cap is a proper regional limit, and movement of individual water rights will be considered case-by-case, and these two concepts work together and are not in conflict with each other.

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[173] SE ROA 54.

[174] LCWD and Vidler Opening Brief at 39:15-40:2.

[175] LCWD and Vidler Opening Brief at 39:15-40:2.

[176] NRS 533.370(2).

[177] As explained by the NPS, regardless of the location, pumping anywhere in the LWRFS will "eventually expand from [basins in the LWRFS] to the Muddy River Springs." SE ROA 51545. Similarly, the NPS pointed out that "the effect of distal pumping in the carbonate aquifer of the LWRFS is sufficient to cause considerable impacts on the Muddy River Springs, especially when cumulative pumping effects are considered." *Id*.

The Center for Biological Diversity ("CBD") argues that the *steady state* analysis in Order 1309 was not supported by substantial evidence.[178] SNWA and LVVWD agreed with this argument at the Interim Order 1303 hearing. The thrust of the argument was that groundwater levels continue to decline, and a new equilibrium has not been achieved. Many experts agreed with this proposition. Even though the State Engineer found the system is *appears to be reaching steady state*, he recognized the uncertainty in this determination.[179] The State Engineer recognized that continued monitoring is necessary, and that pumping may need to be further reduced in the future if water levels continue to decline.[180]

CSI also argues that that the State Engineer ignored the location of pumping wells when evaluating aquifer recovery, "such that a change in pumping rates by some wells might mask observations of recovery."[181] This is false. The State Engineer accounted for changes in pumping in all wells located within the interconnected portion of the LWRFS. He properly found that the effects of pumping, and the recovery from pumping throughout the LWRFS eventually manifests in the observed water levels.[182] The current location of wells is impliedly in the current observation of recovery.

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[178] CBD Opening Brief at 24:4-28:10.
[179] SE ROA 64.
[180] SE ROA 63.
[181] CSI Opening Brief at 47:26-28.
[182] SE ROA 63 ("The State Engineer finds that the current data are adequate to establish an approximate limit on the amount of pumping that can occur within the system, but the continued monitoring of pumping, water levels, and spring flow is essential to refine and validate this limit.").

C. The State Engineer's determination that capping pumping at 8,000 afa, with possible reductions to that cap in the future, will adequately protect the Moapa dace is supported by substantial evidence.

CBD argues that the State Engineer's cap on pumping in the LWRFS will not adequately protect the Moapa dace.[183] However, CBD's argument fails to recognize that the State Engineer conditioned the 8,000 afa limitation on further reductions if the flow rate at Warm Springs West continues to decline because the minimum flow of 3.2 cfs must be maintained to protect the existing population of the Moapa Dace. More than sufficient evidence indicates flow is necessary at a minimum rate of 3.2 cfs for the Moapa dace.[184] Mr. Marshall testified that in the last few years the flows at Warm Springs West were "bouncing [a]round 3.3 to 3.4 cfs."[185] Then in Order 1309 the State Engineer recognized that pumping at 8,000 afa has coincided with a period where spring discharge may be approaching steady state.[186] Hence, imposing a pumping limitation of 8,000 afa will keep spring flows above 3.2 cfs. But, since the State Engineer was clear that the pumping limit may be reduced further,[187] CBD's argument is without merit.

CBD also argues that even if the 8,000 afa cap protects decreed senior water rights, protecting senior rights does not, in and of itself mean that the Moapa dace will be protected. Rather than use impacts to senior water rights as a proxy for protecting the dace,[188] the State Engineer based his decision about protecting the dace on scientific evidence that was submitted regarding the needs of the fish. Also, since the State

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[183] CBD Opening Brief at 28.
[184] SE ROA 46.
[185] SE ROA 53437 at 1116:14-16.
[186] SE ROA 64.
[187] SE ROA 66.
[188] CBD Opening Brief at 30.

Engineer only has authority over water, and not environmental factors, he properly confined his review and regulation to ensure water availability for the fish.

Finally, CBD argues the State Engineer failed to properly complete a public interest analysis when he established the 8,000 afa pumping limit.[189] Yet, the State Engineer ended his review of the evidence with a conclusion that allowing groundwater pumping to reduce spring flow in the Warm Springs area to a level that would impair the habitat necessary for survival of the Moapa dace is against the public interest,[190] and could result in *take* of the endangered species (as defined by the USFWS).[191] Therefore CBD's argument is without merit.

D. Climate conditions were properly included in State Engineer's LWRFS pumping limit analysis.

Many parties tried to blame water level declines on drought. Experts vigorously debated whether changes in recent climate conditions are a material factor in groundwater level changes. For instance, SNWA and LVVWD's experts developed numerical models to explain that climate conditions are a minor factor in changes to the flows that are critical to the Moapa dace and senior surface water rights. Also, experts for USFWS, NPS, and Moapa Valley Water District ("MVWD") emphatically opined that drought and climate change are not the reason for decline in flow at the Muddy River and its headwater springs. The State Engineer properly relied on this evidence and found pumping, not drought-type climate conditions, is causing the decline in spring flows at the Muddy River.

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[189] CBD Opening Brief at 28.
[190] SE ROA 66.
[191] SE ROA 47.

The State Engineer also properly recognized he must regulate pumping, regardless of changes in climate conditions. If less water is available from rainfall on an annual basis, he must limit groundwater development to protect existing water rights and the environment.[192] The water law is clear, senior users are first in time, and thus first in right. The relationship of junior water right holders to seniors remains unchanged, regardless of negative impacts on supply. In fact, priority is only important in times of shortage – such as drought conditions. The State Engineer properly found that he must protect against impacts from pumping, regardless of climate conditions. Also, to the extent climate conditions reduce recharge to the LWRFS, the State Engineer properly concluded that pumping may have to be reduced below 8,000 afa in the future.

The State Engineer was also aware that short climate trends, like most droughts, are reflected in the long-term averages in the climate record. The sustainable yield of an aquifer system is based on these long-term climate trends. He also understands that long-term water levels are created and maintained by long-term recharge trends. The minor variability of water levels caused by climate fluctuations within the LWRFS evens out to the average observed levels over long periods of time. The changes in water levels in the LWRFS exceed what can be caused by changes in short term climate conditions. The State Engineer properly placed climate conditions in the proper context.

As substantial evidence supports the State Engineer's decision, and his decision is supported by a well-reasoned and thorough analysis that a reasonable mind would

[192] SE ROA 57 ("The State Engineer only has authority to regulate pumping, not climate, in consideration of its potential to cause conflict or to be detrimental to the public interest and must do so regardless of the relative contributing effects of climate.").

accept as supportive of his conclusion, his 8,000 afa pumping limitation should be upheld.

1. SNWA and LVVWD Evidence

SNWA and LVVWD submitted written evidence and testimony that established when "local and dominant natural or anthropogenic stress is imposed on the carbonate aquifer, its impact on water levels and spring flow can be detected on the hydrographs within short time periods, and everywhere within the interconnected carbonate aquifer."[193] Mr. Burns identified the extraordinary precipitation event of 2005 (natural), and the Order 1169 pumping test and subsequent pumping (anthropogenic), as obvious examples. To test this observation, multiple linear regression ("MLR") analysis was completed to extract the effects of groundwater pumping from other stresses, including climate.[194] The MLR analysis confirmed that groundwater production from the aquifer, not climate, is the main cause of the observed long-term declines in aquifer levels and Muddy River spring flows.[195]

2. USFWS, NPS and MVWD Evidence

Dr. Mayer, a USFWS expert, explained clearly there is "no credible evidence that drought has impacted water levels in the LWRFS."[196] Consistent with this, Dr. Waddell, a NPS expert, presented compelling evidence that groundwater levels in similarly situated climatic basins are *increasing* where there is no human stress from groundwater pumping, yet the LWRFS aquifer levels continue to decline.[197] He testified, "[i]f there

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[193] SE ROA 42188.
[194] *Id.*
[195] *Id.*
[196] SE ROA 53074, 322:15-19.
[197] SE ROA 53183 at 574:4 to SE ROA 53185 at 582:23.

are any seasonal fluctuations during the pumping test, the pressure response from the MX-5 pumping test throughout the highly confined aquifer system . . . had overridden any type of climate response."[198] Mr. Lazarus, a MVWD expert, testified that the stable groundwater levels during drought periods "contradict[] the idea that the declining water levels during the test were normalizing after 2004-2005."[199]

3. State Engineer's Conclusion Regarding Climate Conditions

Throughout Order 1309, the State Engineer thoroughly discussed climate factors and the evidence in the record he used to support his decision.[200] Unlike what LCWD and Vidler claim, the State Engineer properly supported his determination that the Aquifer Test, and the lack of recovery thereafter, proves that pumping is causing the impact to senior rights, not climate conditions.[201] The Court need not guess, as LCWD and Vidler claim, about how the State Engineer considered climate evidence. The State Engineer fully evaluated the impacts of climate on the ability of the LWRFS aquifer to recover, making his review far more sound that CSI's hypothetical calculations.[202]

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[198] SE ROA 53455 at 1190:8-12.

[199] SE ROA 53455 at 1190:24-1191:2.

[200] SE ROA 8 (citing NSE Ex. 245), SE ROA 13 (citing CBD Ex. 3, CBD Ex. 4, Transcripts of CBD's experts), SE ROA 17 (citing CSI Ex. 1, CSI Ex. 2), SE ROA 19 (Citing GP-REP Ex. 1 and Closing Arguments of Georgia Pacific); SE ROA 24 (citing MBOP Ex. 2), SE ROA 29-30 (citing NPS Ex. 2, and NPS Closing Arguments); SE ROA 35 (citing SNWA Ex. 9, SNWA Closing Arguments); SE ROA 39 (citing USFWS Ex. 5, USFWS Ex. 7, transcripts of USFWS expert); SE ROA 53 (citing LC-V Ex. 1, LLC-V Closing Arguments, CSI Closing Arguments, Transcripts, NPS Presentation slides); SE ROA 57 (citing USGS 1993 Open File Report 93-642, SNWA Ex. 7, Transcript pages, NPS Ex. 3); SE ROA 60 (citing NSE Exs. 15-21); SE ROA 61 (citing CBD Ex. 3, SNWA Ex. 7, MVIC Ex. 3, NSE Ex. 333); SE ROA 63 (citing NPS Ex. 3, Transcripts, LC-V Ex. 11, CNLV Ex. 3).

[201] LCWD and Vidler Opening Brief at 12, 26.

[202] CSI Opening Brief at 32.

Similarly, Georgia-Pacific's argument that climate controls the observed groundwater levels, and not hydrologic connectivity, ignores that the State Engineer heard this argument, found it lacking, and his determination is entitled to deference.[203] Rather than take a single sentence of Order 1309 out of context, and ignore the voluminous discussion of the State Engineer's analysis of climate impacts, this Court can readily uphold the State Engineer's determination based on his thorough review and analysis of the volumes of evidence related to climate impacts.

E. The State Engineer provided adequate due process.

Georgia-Pacific argues that the State Engineer violated parties' due process rights because the State Engineer failed to provide notice he would consider the ESA in deciding the flow requirements of the Moapa dace.[204] This argument fails because, in Interim Order 1303, the State Engineer put all parties on notice that impacts to the Moapa dace would be considered by the State Engineer.[205] The State Engineer even mentioned the flow requirement for the Moapa dace in Interim Ruling 1303. Then all parties, including Georgia-Pacific, had the opportunity to present evidence regarding the Moapa dace.[206]

CONCLUSION

For the reasons stated herein, the State Engineer's decision to designate the LWRFS, and to cap groundwater use in the LWRFS at 8,000 afa, should be affirmed.

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[203] Georgia-Pacific Opening Brief at 14.
[204] Georgia-Pacific Opening Brief at 31.
[205] SE ROA 79.
[206] Ironically, since Georgia-Pacific has not consulted with the USFWS to have its pumping authorized under the ESA *take* provisions, the State Engineer is protecting parties like Georgia-Pacific from potential liability under the ESA by capping pumping to maintain Moapa dace habitat.

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

Dated this 24th day of November 2021.

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ATTORNEY CERTIFICATE

Pursuant to NRAP 28.2, undersigned counsel certifies that:

1. I have read this entire answering brief.

2. To the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose.

3. This answering brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

4. This answering brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this answering brief has been prepared in a proportionally spaced font using Microsoft Word in 14-point Times New Roman font.

5. The page-volume limitations of NRAP 32(a)(7) have been waived in this matter.

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I understand that I may be subject to sanctions in the event that the accompanying answering brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I certify that I am an employee of Taggart & Taggart, LTD, and that on this 24th day of November 2021, I served a true and correct copy of the foregoing document by electronic service to the participants in this case who are registered with the Eighth Judicial District Court's Odyssey eFile NV File & Serve system to this matter:

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