

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,)
)
Appellant,)
vs.)
)
LINCOLN COUNTY WATER DISTRICT,)
et al.,)
)
Respondents.)
)

Supreme Court No. 84739
Electronically Filed
Jan 09 2023 03:33 PM
Elizabeth A. Brown
Clerk of the Supreme Court
(Consolidated with Supreme Court
84742 and 84809)

Appeal from Eighth Judicial District Court, State of Nevada, County of Clark
The Honorable Bitia Yeager

District Court Case No. A-20-816761-C
(Consolidated with Case Nos. 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)

**RESPONDENT NEVADA COGNENERATION ASSOCIATES NOS. 1 AND
2 SEPARATE ANSWERING BRIEF REGARDING DUE PROCESS**

Francis C. Flaherty, Esq. – Nevada Bar No. 5303
Sue S. Matuska, Esq. – Nevada Bar No. 6051
DYER LAWRENCE, LLP
2805 Mountain Street
Carson City, Nevada 89703
Tel: 775-885-1896 / Fax: 775-885-8728
fflaherty@dyerlawrence.com
smatuska@dyerlawrence.com

*Attorneys for
for Respondent Nevada Cogeneration Associates Nos. 1 and 2*

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed:

1. Respondents Nevada Cogeneration Associates Nos. 1 and 2 (“NCA”) are businesses located in Clark County, Nevada. NCA may be considered affiliates, or subsidiaries, of Northern Star Generation, LLC and Panamint Capital, LLC.
2. Dyer Lawrence, LLP, by and through Francis C. Flaherty and Sue S. Matuska, is the law firm that represents NCA before this Court.
3. NCA was previously represented before the State Engineer and in the district court by Alex J. Flangas, Esq. and the law firm of Kaempfer Crowell.

DATED this 9th day of January, 2023.

DYER LAWRENCE, LLP

By: 

Francis C. Flaherty
Sue S. Matuska

*Attorneys of Record for Respondents
Nevada Cogeneration Associates
Nos. 1 and 2*

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STATUTE

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STATEMENT OF THE ISSUE

Did the hearing the State Engineer provided to NCA satisfy due process and afford NCA a full and complete opportunity to address the implications of the State Engineer's decision to subject the Lower White River Flow System to conjunctive management and joint administration?

STATEMENT OF THE CASE

This case involves consolidated petitions for judicial review based on the State Engineer's issuance of Order 1309, in which he grouped together six formerly separate hydrographic basins, and a portion of a seventh, to form a new superbasin—the Lower White River Flow System (“LWRFS”) Hydrographic Basin. In doing so, the State Engineer also established an 8,000 afa cap on groundwater pumping in the LWRFS, which he warned was subject to further reduction, stating that it was necessary to do so to prevent further declines in spring flow and the flow of the Muddy River. Thus, the State Engineer combined multiple hydrographic basins (and the groundwater rights therein) for joint administration and conjunctive management with the Muddy River and the springs comprising its headwaters.

Three of the seven petitioners were partly aligned with the State Engineer in the district court in that they did not dispute his authority to form the superbasin and conjunctively manage the groundwater rights therein with the Muddy River and its source springs, but they alleged due process violations and a lack of substantial evidence for certain legal conclusions and factual findings made by the State Engineer. The other four petitioners, including NCA, asserted that the State Engineer lacked authority and violated their due process rights and that certain factual findings were not supported by substantial evidence.

The district court vacated Order 1309 in its entirety, finding that the State Engineer lacked authority and violated the due process rights of all seven petitioners. The district court expressly declined to address any substantial evidence arguments. The State Engineer and the three petitioners partly aligned with him in the district court filed notices of appeal. This Court convened an NRAP 33 conference and determined that appellants and respondents should respectively file joint opening, answering and reply briefs on the issues of legal authority and due process. With regard to due process briefing, the Court identified a sub-issue upon which individual respondents may submit supplemental answering briefs if they chose to do so. This brief is NCA's supplemental answering brief.

STATEMENT OF THE FACTS

NCA 1 and 2 commenced commercial operations over 29 years ago and have been in continuous operation, using the full amount of their fully certificated water rights since that time. NCA sells 100% of its 170 megawatts of electric output to NVEnergy under a long-term power purchase agreement. NCA is an environmentally efficient operation in that both power plants provide their hot exhaust gases and "chilled" water to facilities that utilize that heat and water to manufacture sheetrock; thus, waste is minimized. NCA has been part of southern

Nevada's economic engine for 29 years now, and its continued use of its fully certificated water rights is critical for it to continue that way. 24 JA 10892.

On the final day of the administrative hearing before the State Engineer that resulted in Order #1309, Richard Felling was called as a witness. 44 JA 18118. Mr. Felling addressed matters enumerated by the State Engineer in Interim Order #1303, including, "[t]he geographic boundary of the hydrologically connected groundwater and surface water systems comprising the Lower White River Flow System." 2 JA 406; 44 JA 18118. On that topic, Mr. Felling stated: "I have shown on here BM-DL-2 and that's the monitoring well near [NCA's] pumping center. . . . I would not recommend that you separate that pumping center from the Lower White River Flow System unless *somebody could prove to you that it was not connected.*" 44 JA 18119 (emphasis added).

Then, in Order #1309 the State Engineer enumerated the six criteria he "considered critical in determining a close hydrologic connection requiring joint management" and thus utilized by him to determine the boundaries of the LWRFS; the sixth criterion was:

When hydrogeologic information indicate 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 the absence of that, to the basin boundary.

2 JA 372-73 (emphasis added).¹ Stated differently, where there was doubt regarding a hydrologic connection, the State Engineer extended the superbasin boundary out to the nearest geologic feature forming a barrier to groundwater flow.

Applying this criterion to NCA, the State Engineer initially stated that he “[found] logic” in support of NCA’s scientific arguments to exclude its production wells from the LWRFS, but that due to other conflicting evidence “a more inclusive approach” was required that better “honor[ed] the State Engineer’s criteria by acknowledging *the uncertainty in the data* while reflecting a physical boundary in the carbonate-rock aquifer.” 2 JA 376 (emphasis added). Thus, the State Engineer turned due process on its head, adopted Mr. Felling’s recommendation and required holders of certificated water rights, such as NCA, to prove that their fully certificated water rights (property rights) were not hydrologically connected to the LWRFS and should thus not be divested of their priority by amalgamating them into the LWRFS.

SUMMARY OF THE ARGUMENT

An *applicant* seeking new water rights may be required to demonstrate that there is unappropriated water available to secure a permit from the State Engineer.

¹ As stated in Respondents’ Joint Answering Brief, neither NCA nor any of the other Respondents had notice of what criteria the State Engineer would be utilizing to determine the geographic boundaries of the LWRFS until after the administrative hearing and submission of post-hearing briefs, which was a deprivation of due process.

But NCA was not an applicant in these proceedings, and it possesses fully certificated water rights, which are protected property rights under Nevada law. This Court has previously held that stripping water rights of their priority, where a loss of such priority may render those rights devoid of value, is a de facto loss of those water rights, and Nevada's Constitution protects against the deprivation of water rights without due process of law.

Procedural due process requires that parties receive notice and an opportunity to be heard. The opportunity to be heard must be at a meaningful time and in a meaningful manner. The factual determination that NCA's production wells are hydrologically connected to the LWRFS, which resulted in a loss of priority for NCA's water rights and thus a deprivation of NCA's property rights, was based on a presumption that NCA's production wells were hydrologically connected, and the State Engineer required NCA to disprove that hydrological connection.

This Court has previously held that when the State Engineer takes a position adversely affecting a water right, he bears the burden of proof in establishing that position. Courts in other states addressing water rights have also come to the logical and fair conclusion that the proponent of a position regarding a water right has the burden of proving that position.

In this case, NCA is not a party seeking a new right to appropriate water; therefore, no burden should have rested upon it to prove anything with regard to its use of water. The burden of proof, therefore, should have fallen on the State Engineer, and the State Engineer violated NCA's rights by shifting the burden to NCA to prove a "lack of evidence" for the State Engineer's finding.

ARGUMENT

I. Standard of Review

This Court reviews constitutional challenges, including a violation of due process rights, de novo. *Eureka Cty. v. Seventh Judicial Dist. Court*, 134 Nev. 275, 279, 417 P.3d 1121, 1124 (2018) (citing *Callie v. Bowling*, 123 Nev. 181, 183, 160 P.3d 878, 879 (2007)).

II. The State Engineer Deprived NCA of Due Process by Improperly Shifting the Burden to NCA to Demonstrate that its Production Wells were Not Hydrologically Connected to the LWRFS.

It is well understood that an *applicant* seeking to appropriate water under Nevada law may be required to demonstrate to the State Engineer in the application and/or protest hearing process that there is "unappropriated water in the proposed source of supply" to secure a permit from the State Engineer. NRS 533.370(2). It makes sense for the applicant to bear this burden because the applicant is just that—an applicant—and it is not vested with any property right and merely possesses a hope or expectation that a water right may be secured. *See*

Antelope Valley Groundwater Cases, 59 Cal. App. 5th 241, 277, 272 Cal. Rptr. 3d 517, 546-47 (2020) (consistent with general rule that plaintiff has burden of persuasion and production, a party seeking a new appropriative right must demonstrate that there is surplus water available in basin).

But NCA is not an applicant in these proceedings, and it possesses fully certificated water rights. Such water rights in Nevada are property rights, of which the owner cannot be deprived without due process of law. *Wilson v. Pahrump Fair Water, LLC*, 481 P.3d 853, 859, 137 Nev. Adv. Rep. 2, *16 (2021). And stripping water rights of their priority, where a loss of such priority may render those rights devoid of value—the very situation created when the State Engineer aggregated NCA’s water rights with those of many others in the newly created LWRFS superbasin—is a de facto loss of those water rights. *Wilson v. Happy Creek, Inc.*, 448 P.3d 1106, 1115, 135 Nev. Adv. Rep. 41, *24 (2019).

The Nevada Constitution protects against the deprivation of water rights without due process of law. *Eureka Cty.*, 134 Nev. at 279, 417 P.3d at 1124. Procedural due process requires that parties receive “notice and an opportunity to be heard” when a party is to be deprived of a property interest. The opportunity to be heard must be at a meaningful time and in a meaningful manner. *Matthews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 902 (1976); *Eureka Cty.*, 134 Nev. at

280, 417 P.3d at 1125 (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 533, 124 S. Ct. 2633 (2004)).

As to the standard for “meaningful manner,” as applied to NCA, although the standard is flexible, a process that essentially gives the government a presumption of constitutional behavior is far short of “meaningful” to the injured party. Administrative convenience or a prompt procedure may be a legitimate state end in some cases, but “the Constitution recognizes higher values than speed and efficiency.” *Stanley v. Illinois*, 405 U.S. 645, 656, 92 S. Ct. 1208, 1215 (1972). “Procedure by presumption is always cheaper and easier . . . but [may] needlessly risk running roughshod over” important interests. *Id.*

The “meaningful factual determination” that deprived NCA of its property interest was the determination of a hydrological connection, which was the predicate to the State Engineer’s determination to include NCA’s wells in the new, single hydrographic superbasin. *See University Of Nevada vs. Tarkanian*, 95 Nev. 389, 398, 594 P.2d 1159, 1164 (1979) (the finding causing the deprivation of a property interest is the meaningful factual determination). The “method” that the State Engineer utilized to make this “meaningful factual determination” as to NCA, was to presume that the hydrologic connection existed and to shift the burden to NCA to disprove it.

As demonstrated by Appellants' joint opening brief and Respondents' joint answering brief, the State Engineer's authority to form and jointly administer a new, single hydrographic superbasin and conjunctively manage it with a surface water source is anything but clear. Nor is it clear, therefore, what is the appropriate "method" for making such a factual determination. However, this Court has previously held that when the State Engineer takes a position adversely affecting a water right, he bears the burden of proof in establishing that position. *See King v. St. Clair*, 134 Nev. 137, 139, 414 P.3d 314, 316 (2018) (party asserting forfeiture or abandonment bears burden of proof by clear and convincing evidence) (citing *Town of Eureka v. Office of the State Eng'r*, 108 Nev. 163, 169, 826 P.2d 948, 952 (1991)).

In *St. Clair*, this Court affirmed the district court and held that the State Engineer incorrectly presumed abandonment based on non-use evidence alone. 134 Nev. at 140-41, 414 P.3d at 317. Moreover, the Court found that it was improper for the State Engineer to have "shift[ed] the burden to St. Clair to prove an intent *not* to abandon the water right." *Id.* at 140, 414 P.3d at 317 (emphasis added). Although *St. Clair* was not a due process case, this Court found that the State Engineer acted arbitrarily and capriciously toward the water right holder. *Id.*

Courts in other states have also come to the logical and fair conclusion that the proponent of a position regarding a water right has the burden of proof. Put

another way, the party holding the affirmative of an issue must produce the evidence to prove it; therefore, the burden of proof lies on the party who would be defeated if no evidence was given on either side. *Gallegos v. Colorado Ground Water Comm'n*, 147 P.3d 20, 2006 Colo. LEXIS 880 (Colo. 2006); *Antelope Valley*, 59 Cal. App. 5th at 278-79, 272 Cal. Rptr. 3d at 547.

In *Gallegos*, the Supreme Court of Colorado held that the Gallegos family had the burden to prove that its surface water rights were being injured by the pumping of certain groundwater rights within the surrounding basin. The court specifically stated that the party “who is the proponent of [a] position” has the “burden for proving that” position. 147 P.3d at 31, 2006 Colo. LEXIS 880, **24.

In *Antelope Valley*, the Phelan Pinion Hills Community Services District (“Phelan”) was one of thousands of parties claiming a right to draw water from an aquifer undergoing adjudication in the trial court. Under California water law, Phelan was seeking a “new appropriative right” to use groundwater, which would only be available if there was surplus groundwater. Phelan claimed that the trial court violated its rights to procedural due process when it determined that the aquifer was in “overdraft” status, while deferring until a later phase of the proceedings a determination of whether the uses by all the “paramount” users in the basin were “reasonable” and thus entitled to protection under California water law. Phelan argued that the trial court had effectively shifted the burden of proof

to it to demonstrate the existence of a surplus—a surplus created by “unreasonable uses” that should be terminated.

The appellate court rejected Phelan’s argument and, like the trial court, held that the person claiming the appropriative right had the burden of showing a “surplus” after accounting for reasonable and beneficial use by paramount right holders. The court cited to an earlier decision that followed the “general rule in this state as to the burden of proof . . . as follows: ‘The party holding the affirmative of the issue must produce the evidence to prove it; therefore, the burden of proof lies on the party who would be defeated if no evidence was given on either side.’” 59 Cal. App. 5th at 277, 272 Cal. Rptr. 3d at 547. Applying this rule, the court in *Antelope Valley Groundwater* found that Phelan had been appropriately assigned the burden of showing that a surplus existed, which included the showing that the paramount right holders’ use was unreasonable or wasteful. *Id.* at 278, 272 Cal. Rptr. 3d at 548. Therefore, the court held that the due process rights of Phelan had not been violated. *Id.* Thus, in a due process context, it is the party “holding the affirmative of the issue” or the party who is the “proponent of a position” who has the burden of proof.

In this case, NCA is not a party seeking a new right to appropriate water, and, prior to Order 1309, it was not claiming an injury. It was not an applicant of any kind in these proceedings. It possessed fully certificated water rights.

Therefore, no burden should have rested on it to prove the status of its water rights in relation to any other water rights.


Again, the “meaningful fact determination” here is whether a hydrologic connection exists, and the State Engineer is the “proponent of the position” that such a connection exists. It is the State Engineer, or perhaps any surface water right holder claiming injury due to the pumping of NCA’s production wells, who held “the affirmative of this issue,” and it is the State Engineer who should have been “defeated” if no evidence was given on this issue. The burden of proof, therefore, should have fallen on the State Engineer, and the State Engineer violated NCA’s rights by shifting the burden to NCA to prove a “lack of evidence” for the State Engineer’s finding. *See King v. St. Clair*, 134 Nev. at 140-41, 414 P.3d at 317.

CONCLUSION

The State Engineer violated NCA’s due process rights by placing the burden on NCA to prove that its production wells were not hydrologically connected to the LWRFS superbasin, rather than proving such a hydrologic connection himself or requiring other parties claiming harm due to NCA’s pumping to prove such connection and harm. Therefore, in the event this Court does not affirm the decision of the district court in its entirety, it should affirm the district court’s

decision as applied to NCA for the State Engineer's violation of NCA's due process rights.

DYER LAWRENCE, LLP

By: 
Francis C. Flaherty
Sue S. Matuska

*Attorneys for Respondents Nevada
Cogeneration Associates Nos. 1 and 2*

CERTIFICATE OF COMPLIANCE

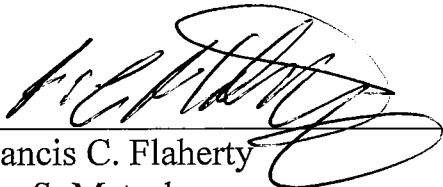
1. I hereby certify that this Answering Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 16 in and Times New Roman type.

2. I further certify that this answering brief complies with the page or type-volume limitations of NRAP 32(a)(7) and this Court's October 14, 2022 Order Modifying Caption and Setting Briefing Schedule because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 4,356 words.

3. Finally, I hereby certify that I have read this brief, 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 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. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 9th day of January, 2023.

DYER LAWRENCE, LLP

By: 
Francis C. Flaherty
Sue S. Matuska

*Attorneys for Respondents Nevada
Cogeneration Associates Nos. 1 and 2*

CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2023, service of the forgoing **RESPONDENT NEVADA COGENERATION ASSOCIATES NOS. 1 AND 2 SEPARATE ANSWERING BRIEF REGARDING DUE PROCESS** was filed electronically with the Clerk of the Court, and therefore electronic service was made in accordance with the master service list as follows:

OFFICE OF THE ATTORNEY GENERAL
JAMES N. BOLOTIN #13829
LAENA ST-JULES #15156
100 North Carson Street
Carson City, Nevada 89701-4717
Email: jbolotin@ag.nv.gov
Email: lstjules@ag.nv.gov
Attorneys for Nevada State Engineer

TAGGART & TAGGART, LTD
PAUL G. TAGGART, ESQ. #6136
THOMAS P. DUENSING, ESQ. #15213
108 North Minnesota Street
Carson City, Nevada 89703
SOUTHERN NEVADA WATER AUTHORITY
STEVEN C. ANDERSON
1001 S. Valley View Blvd.
Las Vegas, Nevada 89153
Email: sc.anderson@lvvwd.com
Attorneys for Southern Nevada Water Authority and Las Vegas Water District

ROBISON, SHARP, SULLIVAN & BRUST
KENT R. ROBISON #1167
HANNAH E. WINTSTON #14520
MICHAELA G. DAVIES #15205
71 Washington Street
Reno, Nevada 89593

Email: krobison@rsslblaw.com
Email: hwinston@rsslblaw.com
Email: mdavies@rsslblaw.com

IN ASSOCIATION WITH:

BRADLEY J. HERREMA #10368
BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, Nevada 89106
Email: bherrema@bhfs.com

WILLIAM L. COULTHARD #3927
COULTHARD LAW
840 South Ranch Drive, #4-627
Las Vegas, Nevada 89106
Email: wlc@coulthardlaw.com

EMILIA K. CARGILL #6493
3100 State Route 168
P.O. Box 37010
Coyote Springs, Nevada 89037
Email: emilia.cargill@coyotesprings.com

Attorneys for Respondent Coyote Springs Investment, LLC

MARQUIS AURBACH COFFING
CHRISTIAN T. BALDUCCI #12688
JORDAN MONTET #14743
10001 Park Run Drive
Las Vegas, Nevada 89145
Email: cbalducci@maclaw.com
Email: kwilde@maclaw.com

Attorneys for Apex Holding Company, LLC and Dry Lake Water, LLC

SCOTT LAKE #15765
Center for Biological Diversity
P.O. Box 6205
Reno, Nevada 89513
(802) 299-7495
Email: slake@biologicaldiversity.org

IN ASSOCIATION WITH:

LISA T. BELENKY (Pro Hac Vice to be submitted)
Center for Biological Diversity
1212 Broadway, Suite 800
Oakland, California 94612
Email: lbelenky@biologicaldiversity.org

Attorneys for Center for Biological Diversity

KAEMPFER CROWELL
SEVERIN A. CARLSON #9373
SIHOMARA L. GRAVES #13239
50 West Liberty Street, Suite 700
Reno, Nevada 89501
Email: scarlson@kcnvlaw.com
Email: sgraves@kcnvlaw.com
Attorneys for the Church of Jesus Christ of Latter-day Saints

DOTSON LAW
ROBERT A. DOTSON #5285
JUSTIN C. VANCE #11306
5355 Reno Corporate Drive, Suite 100
Reno, Nevada 89511
Email: rdotson@dotsonlaw.legal
Email: jvance@dotsonlaw.legal

IN ASSOCIATION WITH:

STEVEN D. KING #4304
227 River Road
Dayton, Nevada 9403
Email: kingmont@charter.net

Attorneys for Muddy Valley Irrigation Company

McDONALD CARANO LLP
SYLVIA HARRISON #4106
LUCAS FOLETTA #12154

JANE SUSSKIND #15099
SARAH FERGUSON #14515
100 W. Liberty Street, Suite 1000
Reno, Nevada 89501
Email: sharrison@mcdonaldcarano.com
Email: lfoletta@mcdonaldcarano.com
Email: sferguson@mcdonaldcarano.com

Attorneys for Georgia-Pacific Gypsum, LLC and Republic Environmental Technologies, Inc.

PARSONS BEHLE & LATIMER
GREGORY H. MORRISON #12454
50 West Liberty Street, Suite 750
Reno, Nevada 89501
Email: gmorrison@parsonsbehle.com
Attorneys for Moapa Valley Water District

NEVADA ENERGY
JUSTINA A. CAVIGLIA #9999
MICHAEL D. KNOX #8143
6100 Neil Road
Reno, Nevada 89511
Email: justina.caviglia@nvenergy.com
Email: mknox@nvenergy.com
Attorneys for Nevada Power Company dba NV Energy

SCHROEDER LAW OFFICES, P.C.
THERESE A. URE STIX #10255
LAURA A. SCHROEDER #3595
10615 Double R Blvd., Suite 100
Reno, Nevada 89521
Email: t.ure@water-law.com
Email: schroeder@water-law.com
Attorneys for City of North Las Vegas, Western Elite Environmental, Inc. and Bedroc Limited, LLC

LINCOLN COUNTY DISTRICT ATTORNEY
DYLAN V. FREHNER #9020
181 North Main Street, Suite 205

P.O. Box 60
Pioche, Nevada 89043
Email: dfrehner@lincolncountynv.gov

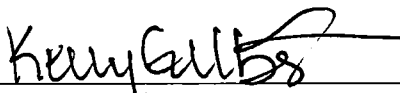
IN ASSOCIATION WITH:

SNELL & WILMER L.L.P.
WAYNE O. KLOMP #10109
50 West Liberty Street, Suite 510
Reno, Nevada 89501
Email: wklomp@greatbasinlawyer.com

Attorneys for Lincoln County Water District

ALLISON MacKENZIE, LTD.
KAREN A. PETERSON #366
402 North Division Street
Carson City, Nevada 89703
Email: kpeterson@allisonmackenzie.com
Attorneys for Vidler Water Company, Inc.

DATED this 9th day of January, 2023.



Kelly Gilbert