

IN THE SUPREME COURT OF THE STATE OF NEVADA

ADAM SULLIVAN, P.E., NEVADA
STATE ENGINEER, et al.,

Appellants,

vs.

LINCOLN VALLEY WATER
DISTRICT et al.,

Respondents.

Supreme Court No. 84739

**Consolidated with Nos. 84742,
84741, and 84809** Electronically Filed
Jun 16 2022 05:17 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

**ATTACHMENTS TO THE CENTER FOR BIOLOGICAL DIVERSITY'S
DOCKETING STATEMENT, PART 1**

CERTIFICATE OF SERVICE

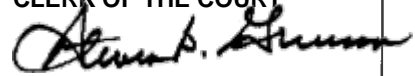
I certify that I am an employee of the Center for Biological Diversity, and that on this 16th day of June, 2022 I served a true and correct copy of the foregoing by electronic service to the participants in this case who are registered with the Nevada Supreme Court's efilings system to this matter.

/s/ Scott Lake
Scott Lake

INDEX OF EXHIBITS

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Attachment 1



CASE NO: A-20-816761-C
Department 19

1 **PTJR**
2 PAUL G. TAGGART, ESQ.
3 Nevada State Bar No. 6136
4 TIMOTHY D. O'CONNOR, ESQ.
5 Nevada State Bar No. 14098
6 TAGGART & TAGGART, LTD.
7 108 North Minnesota Street
8 Carson City, Nevada 89703
9 (775) 882-9900 – Telephone
10 (775) 883-9900 – Facsimile
11 paul@legaltnt.com
12 tim@legaltnt.com
13 STEVEN C. ANDERSON, ESQ.,
14 Nevada State Bar No. 11901
15 LAS VEGAS VALLEY WATER DISTRICT
16 1001 S. Valley View Blvd.,
17 Las Vegas, NV 89153
18 Sc.anderson@lvvwd.com
19 *Attorneys for LVVWD and SNWA*

**DISTRICT COURT
CLARK COUNTY, NEVADA**

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

16 Petitioners,

17 vs.

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

22 Respondent.

Case No.

Dept. No.

**PETITION FOR JUDICIAL REVIEW OF
ORDER 1309**

23 Petitioners SOUTHERN NEVADA WATER AUTHORITY (“SNWA”) and LAS VEGAS
24 VALLEY WATER DISTRICT (“LVVWD”), by and through its counsel, PAUL G. TAGGART, ESQ.
25 and TIMOTHY D. O’CONNOR, ESQ., of the law firm of TAGGART & TAGGART, LTD., hereby
26 files this Petition for Judicial Review of Order 1309 issued by Respondent TIM WILSON, P.E., Nevada
27 State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND
28

1 NATURAL RESOURCES on June 15, 2020, attached hereto as Exhibit 1. This Petition for Judicial
2 Review is filed pursuant to NRS 533.450(1).

3 **JURISDICTIONAL STATEMENT**

4 Under NRS 533.450(1), any order or decision of the State Engineer is subject to judicial review
5 “in the proper court of the county in which the matters affected or a portion thereof are situated.” The
6 real property to which the water at issue in this appeal is appurtenant lies within Clark County, Nevada;
7 therefore, the Eighth Judicial District Court of the State of Nevada in and for Clark County is the proper
8 venue for judicial review.

9 Further, the subject matter of the appeal involves decreed waters of the Muddy River Decree.
10 Under NRS 533.450(1), “on stream systems where a decree of court has been entered, the action must
11 be initiated in the court that entered the decree.” This court has proper jurisdiction of the Muddy River
12 Decree, *Muddy Valley Irrigation Company, et al, vs. Moapa Salt Lake Produce Company, et al*, Case
13 No. 377, which was entered in the Tenth Judicial District of the State of Nevada, in and for the County
14 of Clark in 1920.¹

15 **FACTUAL BACKGROUND**

16 **I. SNWA and LVVWD have substantial interests in the Lower White River Flow System.**

17 SNWA is a not-for-profit political subdivision of the State of Nevada consisting of seven
18 member agencies (local municipalities and political subdivisions in Clark County) and is a wholesale
19 water provider serving approximately 74 percent of Nevada’s population. SNWA’s water resource
20 portfolio includes approximately 20,000 afa of senior Muddy River decreed water rights, 9,000 afa of
21 groundwater in Coyote Spring Valley, and 2,200 afa of groundwater in Garnet and Hidden valleys.
22 SNWA conducted the Order 1169 pumping test and is one of the primary participants in the 2006
23 Memorandum of Agreement concerning the Moapa dace. Clark County designated SNWA’s largest
24 member purveyor, LVVWD, to be the operating entity for the Coyote Springs Water Resources General
25 Improvement District.

26 //

27 //

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

1 **II. Order 1169 Pumping Tests**

2 On March 8, 2002, the State Engineer issued Order 1169 to hold in abeyance all pending
3 groundwater applications filed in Coyote Spring Valley, Black Mountains Area, Garnet Valley, Hidden
4 Valley, Muddy River Springs Area, and Lower Moapa Valley. The California Wash was later added to
5 the study area, making Order 1169 apply to the entire Lower White River Flow System (“LWRFS”).
6 The purpose of Order 1169 was to require a large pumping study to determine whether pumping in the
7 LWRFS would have detrimental impacts on existing water rights or the environment.

8 In 2006, a Memorandum of Agreement (“MOA”) was signed among the Southern Nevada Water
9 Authority (“SNWA”), Coyote Springs Investments (“CSI”), the United States Fish and Wildlife Service
10 (“USFWS”), the Moapa Valley Water District (“MVWD”), and the Moapa Valley Band of Paiute
11 Indians (“MBOP”). The MOA was created to ensure water usage in the LWRFS did not interfere with
12 measurable progress toward protection and recovery of the endangered Moapa Dace and its habitat. The
13 MOA contained triggers and actions for the various parties to take if flow levels in the Muddy River
14 declined. Through the MOA, all parties recognized that pumping in Coyote Spring Valley could have
15 a detrimental impact on existing water rights and the environment.

16 The State Engineer issued Order 1169A on December 21, 2012, in which he declared that the
17 Order 1169 pump test was complete. Ultimately, the State Engineer concluded that the pumping had a
18 direct connection to the fully appropriated Muddy River which is part of the source of water for the
19 endangered Moapa Dace, and the decreed senior rights of the Muddy River. The State Engineer issued
20 Rulings 6254-6258 on January 29, 2014, in which he denied all pending water right applications in the
21 LWRFS basins. The State Engineer ruled in Rulings 6254-6258 that pumping of existing rights in the
22 1169 pump tests measurably reduced flows in headwater springs of the Muddy River. While the State
23 Engineer denied the pending applications, he took no action to limit or reduce the existing water rights.

24 **III. Public Workshops**

25 Starting in 2018, the State Engineer held several public workshops review the status of
26 groundwater use and recovery following the conclusion of the State Engineer Order 1169 pumping tests.
27 The purpose of the workshops was to update the public on development in the LWRFS, address concerns
28 relating to the effect of groundwater pumping, and to provide an opportunity to comment on how to

1 proceed in developing the water resources in the LWRFS.² In the 2018 Notice of Public Workshop, the
2 State Engineer noted that pumping only 10,200 afa of the over 50,000 afa of permitted rights during the
3 Order 1169 pumping test “yielded an unacceptable loss in spring flow and aquifer storage within the
4 LWRFS.” The State Engineer found that “only a small portion of the permitted water rights in the
5 LWRFS may be fully developed without negatively affecting the endangered Moapa Dace and its habitat
6 or the senior decreed rights on the Muddy River.”³

7 As a result of the workshops, on August 30, 2018, the State Engineer drafted a proposed order.
8 On December 14, 2018, the State Engineer held a hearing on the proposed order. The State Engineer
9 received comments on the proposed order. On January 11, 2019, the State Engineer issued Interim
10 Order 1303 as a result of the workshop and proposed order process. The State Engineer continued to
11 hold several more workshops and meetings relating to the potential development of a conjunctive
12 management plan on the LWRFS.⁴

13 **IV. Order 1303**

14 On January 11, 2019, the State Engineer issued Interim Order 1303 to obtain stakeholder input
15 on four specific factual matters: 1) the geographic boundary of the LWRFS, 2) aquifer recovery since
16 the 1169 pump test, 3) long-term annual quantity that may be pumped from the LWRFS, and 4) effects
17 of moving water rights between the carbonate and alluvial system to senior water rights on the Muddy
18 River.⁵ After factual findings were made on those questions, the State Engineer was to evaluate
19 groundwater management options for the Lower White River Flow System (“LWRFS”).⁶

20 In Order 1303, the State Engineer made sound factual findings based on the Order 1169 pumping
21 test. He found that groundwater rights within the LWRFS should be jointly managed because of a
22 “unique” and “direct hydraulic connection” among basins that encompass over 1,100 square miles. He
23

24 ² June 14, 2018, Notice of Public Workshop at 2. Available at Available at <http://water.nv.gov/news.aspx?news=LWRFS>
(Public Meetings, July 24, 2018). Last visited 6/17/2020.

25 ³ *Id.*

26 ⁴ See LWRFS Working Group Meeting Agenda for February 6, 2019, and Notice of Public Workshop on July 17, 2019, dated
June 10, 2019. Available at <http://water.nv.gov/news.aspx?news=LWRFS> (Public Meetings). Last visited 6/17/2020.

27 ⁵ Exhibit 2.

28 ⁶ Exhibit 3 at 2 (“The State Engineer directed the participants to limit the offer of evidence and testimony to the salient
conclusions, including directing the State Engineer and his staff to the relevant data, evidence and other information
supporting those conclusions. The State Engineer further noted that the hearing on the Order 1303 reports was the first step
in determining to what extent, if any, and in what manner the State Engineer would address future management decisions,
including policy decisions relating to the [LWRFS] basins.”)

1 also determined water was not available for additional applications and denied all the pending
2 applications in the LWRFS through Rulings 6254-6260. The State Engineer also found that:

- 3 1. pumping has a direct interrelationship with the flow of the decreed and
4 fully appropriated Muddy River, which are the most senior rights;
- 5 2. the Muddy River had a pre-development flow of approximately 34,000
6 acre-feet annually;
- 7 3. pumping from the test caused “sharp declines in groundwater levels and
8 flows in the Pederson and Pederson East springs,” and throughout the
LWRFS; and
- 9 4. pumping in the LWRFS must be less than occurred during the test,
otherwise pumping will conflict with senior Muddy River rights or
adversely impact the Moapa dace.⁷

10 Order 1303 was issued to solicit input from experts on discrete issues to build on these foundational
11 findings from Rulings 6254-6260 – not to “start over.”

12 On May 13, 2019, the State Engineer amended Order 1303 and modified certain deadlines for
13 filing reports. On July 25, 2019, the State Engineer issued a Notice of Pre-Hearing Conference. On
14 August 23, 2019, the State Engineer held a prehearing conference. At the prehearing conference,
15 Hearing Officer Fairbank unequivocally stated that “the purpose of the hearing is not to resolve or
16 address allegations of conflict between groundwater pumping within the LWRFS and Muddy River
17 decreed rights.”⁸ On August 23, 2019, the State Engineer issued a Notice of Hearing, and again clarified
the limited scope of the hearing.

18 In July and August 2019, reports and rebuttal reports were submitted discussing the four matters
19 set forth in Order 1303. Several parties filed objections to witnesses and evidence. Most of the
20 objections were related to the scope of the topics in the submitted evidence. On August 23, 2019, the
21 State Engineer issued an Order on Objections to Witnesses and Evidence. The State Engineer agreed
22 that “the evidence presented in the hearing is to be limited to the four issues identified in the Notice of
23 Hearing.” The State Engineer allowed all evidence to be presented, but again warned that the “scope
24 of the testimony shall be limited to the four issues identified in Order 1303” and cautioned that while
25 some evidence could be submitted outside the specific scope but that the State Engineer “may order a
26 line of questioning to cease or to remain limited to the relevant issues that are the subject of the hearing.”⁹

27 _____
28 ⁷ Exhibit 2 at 7-11.

⁸ Exhibit 4 at 12:6-15.

⁹ August 23, 2019, Order on Objections.

1 Between September 23, 2019, and October 4, 2019, the State Engineer held a hearing on the
2 reports submitted under Order 1303. As part of that hearing, SNWA offered very limited evidence of
3 conflicts with its senior water rights.¹⁰ SNWA repeatedly indicated that this evidence was limited
4 because of the prior directions of the State Engineer, and because the question of conflicts was to be
5 addressed at a latter administrative stage of the proceedings.¹¹

6 **V. Order 1309**

7 On June 15, 2020, the State Engineer issued Order 1309. In Order 1309, the State Engineer
8 determined that “reductions in flow that have occurred because of groundwater pumping in the
9 headwaters basins is not conflicting with Decreed rights.”¹²

10 **GROUNDNS FOR THE PETITION**

11 The third factual inquiry the State Engineer sought input on was: “The long-term annual quantity
12 of groundwater that may be pumped from the Lower White River Flow System, including the relationships
13 between the location of pumping on discharge to the Muddy River Springs, and the capture of Muddy River
14 flow.”¹³ The State Engineer specifically limited the evidence he would consider on this matter, stating
15 that this hearing was not to address allegations of conflict.¹⁴ During a prehearing conference, the State
16 Engineer’s staff stated that

17 the purpose of the hearing is not to resolve or address allegations of
18 conflict between groundwater pumping within the LWRFS and Muddy
19 River decreed rights. That is not the purpose of this hearing and that’s not
20 what we are going to be deciding at this point in time. The purpose of the
21 hearing is to determine what the sustainability is, what the impact is on
decreed rights, and then addressing and resolving allegations of conflict
should that be a determination that will be addressed in, at a future point
in time.¹⁵

22 Thus, the majority of the evidence submitted related to the capture of Muddy River water by junior
23 groundwater pumpers. The State Engineer agreed in Order 1309 that current pumping is capturing
24 Muddy River flows.¹⁶

25 ¹⁰ See e.g., Hr’g on Order 1303 Tr. vol. 5, 942 (Burns), SNWA Ex.7 at 7-5 to 7-6. (SNWA has suffered a loss of approximately
26 12,040 afa over the last 10 years, equating to over \$2 million in costs for replacement supplies.)

27 ¹¹ Hr’g on Order 1303 Tr. 2019-09-07 at 1049:20-1050:3(Taggart); Tr. 2019-09-27 at 1072:9-23(Pellegrino).

28 ¹² Exhibit 1 at 61.

¹³ Exhibit 2 at 13.

¹⁴ Exhibit 4 at 12:6-15.

¹⁵ Exhibit 4 at 12:6-15.

¹⁶ Exhibit 1 at 61.

1 However, the State Engineer incorrectly went beyond the scope of the hearing to determine that
2 “capture or potential capture of flows of the waters of a decreed system does not constitute a conflict.”¹⁷
3 The State Engineer stated that “there is no conflict as long as the senior water rights are served.”¹⁸ The
4 State Engineer then performed a coarse calculation to determine the consumptive use needs of the senior
5 decreed rights holders and concluded that the capture of 8,000 acre-feet of Muddy River flows by junior
6 groundwater users would not deprive the seniors of any portion of their water rights.¹⁹ The calculation
7 did not include consideration of water losses through the river system, such as losses in conveying the
8 water or losses on water reservoirs.

9 By making these findings in Order 1309, the State Engineer violated the due process rights of
10 SNWA and other senior water right owners because he indicated before the hearing that he would not
11 be making a finding on this point, and evidence on this point would not be accepted. He also acted
12 arbitrarily and capriciously because he ignored the only evidence that existed related to conflicts
13 (SNWA’s), and then applied an erroneous analysis that no party had an opportunity to review or
14 comment on. Further, the State Engineer’s method is contrary to law – particularly the Muddy River
15 Decree.

16 SNWA owns and leases substantial water rights on the Muddy River and the capture of flow by
17 junior groundwater pumping has deprived SNWA of use of its senior decreed water rights. Prior to
18 groundwater development in the LWRFS, Muddy River flows were approximately 34,000 afa, and every
19 acre-foot is apportioned in the Decree.²⁰ Since groundwater development began, Muddy River flows
20 have declined by over 3,000 afa. This is an impermissible conflict with existing rights that can only
21 continue if effective mitigation occurs for the impacts to senior water rights holders.

22 The difference between predevelopment flows and annual post-development flows represents
23 the impacts from pumping, and the conflict with SNWA’s rights, because SNWA is being deprived of
24 the full beneficial use of its senior water rights at a significant cost to the organization.²¹ The State
25 Engineer failed to consider the impacts to non-irrigation uses and failed to consider direct evidence of

26 ¹⁷ Exhibit 1 at 61

27 ¹⁸ Exhibit 1 at 60.

28 ¹⁹ Exhibit 1 at 60-61.

²⁰ Exhibit 2 at 7.

²¹ Hr’g on Order 1303 Tr. vol. 5, 942 (Burns), SNWA Ex.7 at 7-5 to 7-6. (SNWA has suffered a loss of approximately 12,040 afa over the last 10 years, equating to over \$2 million in costs for replacement supplies.)

1 conflict outside his hypothetical analysis. Current pumping has already conflicted with existing rights.
2 Continued pumping at the current levels will only continue to conflict with existing rights and harm
3 SNWA.

4 **CONCLUSION**

5 For the foregoing reasons, and for others that may be discovered and raised during the pendency
6 of this Petition for Judicial Review, LVVWD and SNWA request that the Court order the State Engineer
7 to amend Order 1309 to remove or strike findings made therein regarding conflicts with senior water
8 rights. LVVWD and SNWA do not seek relief from any other portion of Order 1309.

9 DATED this 17 day of June, 2020.

10 TAGGART & TAGGART, LTD.

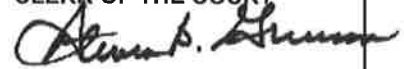
11
12 By: 

13 PAUL G. TAGGART, ESQ.
14 Nevada State Bar No. 6136
15 TIMOTHY D. O'CONNOR, ESQ.
16 Nevada State Bar No. 14098
17 108 North Minnesota Street
18 Carson City, Nevada 89703
19 paul@legaltnt.com
20 tim@legaltnt.com
21 *Attorneys for LVVWD and SNWA*

22 IN ASSOCIATION WITH:

23 STEVEN C. ANDERSON, ESQ.,
24 Nevada State Bar No. 11901
25 LAS VEGAS VALLEY WATER DISTRICT
26 1001 S. Valley View Blvd.,
27 Las Vegas, NV 89153
28 Sc.anderson@lvvwd.com

Attachment 2



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PTJR
BRADLEY J. HERREMA # 10368
BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106
TELEPHONE (702) 382-2101
FAX NUMBER (702) 382-8135
EMAIL BHERREMA@BHFS.COM

CASE NO: A-20-817765-P
Department 1

KENT R. ROBISON SBN # 1167
EMAIL KROBISON@RSSBLAW.COM
THERESE M. SHANKS SBN # 12890
TSHANKS@RSSBLAW.COM
ROBISON, SHARP, SULLIVAN & BRUST
71 Washington Street
Reno, NV 89503
TELEPHONE (775) 329-3151
FAX NUMBER (775) 329-7941

WILLIAM L. COULTHARD SBN # 3927
COULTHARD LAW
840 SOUTH RANCHO DRIVE #4-627
LAS VEGAS, NEVADA 89106
WLC@COULTHARDLAW.COM
TELEPHONE: (702) 898-9944

EMILIA K. CARGILL SBN # 6493
3100 State Route 168
P.O. Box 37010
Coyote Springs, NV 89037
TELEPHONE (725) 210-5433
EMAIL EMILIA.CARGILL@COYOTESPRINGS.COM

ATTORNEYS FOR: PETITIONER COYOTE SPRINGS INVESTMENT, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

PETITION FOR JUDICIAL REVIEW
OF NEVADA STATE ENGINEER
ORDER 1309

CASE NO.
DEPT. NO.

COYOTE SPRINGS INVESTMENT,
LLC

PETITION FOR JUDICIAL REVIEW OF
NEVADA STATE ENGINEER ORDER
1309

Petitioner,
v.

1 2019 ("Rescinded Order 1303") be terminated, *and ordered* that all other matters set
2 forth in Rescinded Order 1303 that are not specifically addressed in Order 1309 were
3 rescinded.

4 **JURISDICTION AND PARTIES**

5 3. This Court has jurisdiction to address this petition pursuant to N.R.S. 533.450(1),
6 which provides that "any person feeling aggrieved by any order or decision of the State
7 Engineer, . . . may have the same reviewed by a proceeding for that purpose, insofar as
8 may be in the nature of an appeal, which must be initiated in the proper court of the
9 county in which the matters affected or a portion thereof are situated. . . ." Coyote
10 Springs Investment LLC, master developer of the Coyote Springs Development, which
11 is subject to the State Engineer's June 15, 2020 decision, has over 21,000 acres of fee-
12 owned land for development in Lincoln County, Nevada, and holds a leasehold interest
13 to over 7,500 acres of conservation land in Lincoln County, Nevada; and over 6,800
14 acres of fee-owned land for development in Clark County, Nevada, and holds a
15 leasehold interest to over 6,200 acres of conservation land in Clark County, Nevada.

16 4. CSI is a limited liability company, formed under the laws of the State of Nevada,
17 and is the original developer of Coyote Springs Development in both Lincoln and Clark
18 Counties, Nevada.

19 5. Tim Wilson is, as of the date of this Petition, the State Engineer, Nevada Division
20 of Water Resources, is an agent of the State of Nevada, and is appointed by and
21 responsible to the Director of the State Department of Conservation and Natural
22 Resources ("Department"). NRS 532.020. The State Engineer issued the June 15,
23 2020 decision, Order 1309, which is the subject of this Petition.

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FACTS

1
2 6. From water rights purchased in 1998, CSI owns 4600 acre feet annually ("afa") of
3 certificated and permitted Nevada water rights in the Coyote Spring Valley Hydrographic
4 Basin. CSI's groundwater rights in the Coyote Spring Valley are evidenced as follows:
5 CSI owned 1500 afa under Permit 70429 (Certificate 17035) of which 1250 afa was
6 conveyed to the Clark County Coyote Springs Water Resources General Improvement
7 District ("CS-GID") to be used for the Coyote Springs Development, with the remaining
8 250 afa still owned by CSI. CSI also owned 1000 afa under Permit 74094 of which 750
9 afa were conveyed to the CS-GID to be used for the Coyote Springs Development, with
10 the remaining 250 afa still owned by CSI. CSI also owned 1600 afa under Permit 70430
11 of which 460 afa was relinquished as approved and permitted by the State Engineer
12 and accepted by the United States Fish and Wildlife Service ("USFWS") as required
13 mitigation arising from the Coyote Springs Development and for the protection of the
14 Moapa dace fish, thus leaving 1140 afa that continues to be owned by CSI. Further,
15 CSI continues to own 500 afa under Permit 74095. Thus, the total amount of water
16 permits held by CSI as of the date of this Petition is 2140 afa, and the total amount of
17 water rights held by the CS-GID is 2000 afa all of which is to be used for the Coyote
18 Springs Development¹, with 460 afa relinquished by CSI for protection of the
19 endangered Moapa dace. CSI also owns a few additional rights in the LWRFS
20 Hydrographic Basin outside of the Coyote Springs Valley. Furthermore, through a
21 purchase and option agreement dated October 17, 2005, and as amended from time to
22 time ("KS-Agreement"), CSI purchased from Lincoln County Water District ("LCWD")

23 _____
24 ¹ And pursuant to that certain Amended and Restated Coyote Springs Water and Wastewater Multi-Party
25 Agreement, dated July 7, 2015, regarding operation and management of the CS-GID, if the Coyote Springs
26 Development ceases to develop, then the water rights revert to CSI. Meaning, the CS-GID executes deeds
27 and other related instruments necessary to effectuate that reversion.

1 and Vidler Water Company ("Vidler") 246.96 acre feet of permitted water rights in Kane
2 Springs Valley and a contractual commitment from Lincoln County Water District to
3 provide CSI with 253.04 afa that CSI purchased and dedicated to Lincoln County Water
4 District (for an available total quantity of water equal to 500 afa) as evidenced by
5 Permits 72220 and 72221. Further subject to the KS-Agreement, CSI holds an option to
6 purchase from Vidler, an additional 500 afa of permitted Kane Springs Valley water
7 rights.

8 7. Directly relevant to CSI's interests, the total amount of water rights affected by
9 the State Engineer's decision is 4140 afa in Coyote Spring Valley and 1000 afa in the
10 Kane Spring Valley, in Clark and Lincoln Counties, Nevada, respectively.

11 8. The Southern Nevada Water Authority ("SNWA"), USFWS, CSI, Moapa Band of
12 Paiutes, and the Moapa Valley Water District ("MVWD") entered into a Memorandum of
13 Agreement dated April 20, 2006 and as amended from time to time (as amended, the
14 "2006 MOA") as a result of the State Engineer's Order 1169 and their respective
15 proposed development needs. The purpose of the 2006 MOA was to protect Muddy
16 River's flow rates for protection of the Moapa dace initially during the Order 1169 pump
17 test and then beyond. The 2006 MOA set forth certain rights and obligations of the
18 parties to the agreement. Among other things, CSI agreed to dedicate ten percent of its
19 initial water rights (4600 afa), which was a quantity of 460 afa, to the survival and
20 recovery of the Moapa dace pursuant to Section 3(a) of the MOA. The Biological
21 Opinion issued by USFWS described in File Nos. 84320-2008-F-0113 and 84320-2008-
22 I-0499, dated October 22, 2008] confirm CSI's obligation to dedicate this water as
23 appropriate mitigation for any take of the Moapa dace related to the development of
24 Coyote Springs community. USFWS determined that the best use of this 460 afa of
25 dedicated water would be for it to remain in the groundwater system in reliance on the
26 premise that the water makes its way in the underground system to the Muddy River

1 and the Muddy River Springs area, and thus also eventually to Lake Mead. In
2 accordance with Nevada water law, CSI recorded an Affidavit to Relinquish Water
3 Rights in Clark County and Lincoln County. The Affidavits were filed with the State
4 Engineer on May 24, 2016. These documents ensure the 460 afa will not be pumped
5 and remain in the State Engineer's count of appropriated water rights to prevent re-
6 appropriation in the future.

7 9. Since just before the year 2000, over 20 years ago, CSI commenced
8 development efforts of its property in the Coyote Spring Valley. CSI's first development
9 agreement in Clark County was dated September 2004, and since that time CSI has
10 prepared and processed permits and approvals for community infrastructure, maps and
11 plans, and recorded maps. CSI's development efforts include zoning entitlements for
12 golf course, resort, residential, multi-family, commercial, industrial, gaming enterprise,
13 among others. These efforts include recorded large parcel, parent final maps for
14 purpose of subsequent residential subdivision maps, all of which were for the
15 development of the community and master plan known as the Coyote Springs
16 Development. These efforts were engaged with many agencies, including, without
17 limitation, Clark County, Lincoln County, the Las Vegas Valley Water District
18 ("LVVWD"), Lincoln County Water District, Clark County Water Reclamation District,
19 Nellis Air Force Base, Nevada Department of Wildlife, USFWS, US Army Corp. of
20 Engineers, Bureau of Land Management, Clark County Regional Flood Control District,
21 Nevada Department of Transportation, Nevada Division of Environmental Protection,
22 Department of Air Quality, Southern Nevada Water Authority, Southern Nevada Health
23 District, and the State Engineer. CSI holds and has been issued, a variety of permits,
24 entitlements, bonds, improvements, maps and plans.

25 10. Based on those permits, entitlements, bonds, and approved plans, CSI
26 constructed significant infrastructure improvements to support the Coyote Springs

1 Development. CSI constructed a Jack Nicklaus Signature Golf Course ("Golf Course") at
2 a cost of \$40,000,000. The Golf Course was constructed to support future residential
3 development and the overall Coyote Springs Development; but for the full development
4 of Coyote Springs Development pursuant to its entitlements, the Golf Course would not
5 have been built as a stand-alone business; golf courses are built to sell homes. The
6 Golf Course was designed to also serve as natural storm water drainage for the Coyote
7 Springs Development.

8 11. The Golf Course opened in May 2008, and has operated since opening at a
9 monetary loss, and operations at a loss continue to the present. The Golf Course has
10 just over 25,000 rounds of golf played per year. Prior to COVID-19 over 60 full time
11 employees were employed; post-COVID-19, there remain just 25 personnel employed
12 in connection with the Coyote Springs Golf Club and the Coyote Springs Development.
13 Many more employees would be activated and employed if CSI were allowed to
14 proceed with its entitled and permitted development efforts.

15 12. CSI's many improvements for the Coyote Springs Development include the
16 \$40,000,000 Jack Nicklaus Signature Golf Course; a 325 acre flood control detention
17 basin (subject of a dam permit issued and renewed by the State Engineer); a
18 groundwater treatment plant permitted by Nevada Department of Environmental
19 Protection and to specifications required by the LVVWD and the CS-GID which includes
20 two 1,000,000 gallon water storage tanks designed and constructed to culinary water
21 standards; a wastewater treatment plant permitted by the Nevada Department of
22 Environmental Protection and to specifications required by the LVVWD and the CS-GID
23 and initial package treatment plant; and a 3-megawatt electrical substation and
24 appurtenant equipment operated by Lincoln County Power District.

25 13. The Coyote Springs Development drilled and operated four groundwater
26 production wells, two of which are fully equipped to LVVWD and CS-GID standards,

1 municipal water wells, all of which have been overseen, approved, and permitted by the
2 State Engineer. The two wells equipped to municipal standards were done so at a cost
3 greater than Twenty Million Dollars (\$20,000,000). Based on, and in reliance on these
4 approvals, and other approvals by the relevant government agencies, including the
5 State Engineer, CSI constructed miles of roadways, curbs, and installed associated
6 underground utilities, including water, sewer, gas and electricity in the Coyote Springs
7 Development. The total cost of construction and acquisitions for these improvements
8 and associated processing is well over Two Hundred Million Dollars (\$200,000,000).

9 14. CSI relied upon the approvals granted by the relevant agencies, some of which
10 are listed above, but most particularly the State Engineer, to proceed with these
11 construction projects. CSI, in particular has relied on the approvals of the State
12 Engineer recognizing that CSI must use its certificated and permitted water rights in the
13 Coyote Springs Development in order to support operation of the existing and operating
14 golf course and related facilities, and all of its residential subdivision development and
15 construction efforts in order to open a homebuilding center to the public and sell
16 residential homes, among other customary southern Nevada master planned
17 community commercial and public facility support amenities.

18 15. Eighteen years ago, prior State Engineer Hugh Ricci issued an order which held
19 in abeyance certain applications pending or to be filed for additional water rights in the
20 Coyote Spring Valley Basin 210 (and other basins), known as Order 1169 ("Order
21 1169"). At the time of Order 1169, various parties, including CSI, MVWD, SNWA,
22 among others, had water right applications pending for determination. The State
23 Engineer determined there was insufficient information and data concerning the deep
24 carbonate aquifer underlying the hydrographic basins in question. Based on the need
25 for additional information and data, the State Engineer exercised his authority under
26 NRS 533.368 to order a hydrological study of the basins in question. In taking this step,

1 the State Engineer studied available water to issue a permit for pending applications,
2 and in so doing the State Engineer determined that certain applicants, including CSI,
3 already had a vested interest in water rights permitted from the carbonate aquifer
4 system, thereby acknowledging the existence and validity of CSI's 4600 afa referenced
5 in paragraph 6 above. The study requested was to occur over a five-year period and
6 fifty-percent (50%) of the water rights then permitted in the Coyote Springs Valley Basin
7 were to be pumped for at least two consecutive years. The applicants, which included
8 CSI, were to pay for the studies and were to file a report with the State Engineer within
9 180 days of the end of the fifth (5th) consecutive year following commencement of the
10 test.

11 16. CSI, SNWA, MVWD, among others, thereafter performed the required pump
12 tests on the wells in the Coyote Springs Valley Basin from 2010 to 2012 and filed their
13 reports in 2013.

14 17. On January 29, 2014, State Engineer Jason King issued Ruling 6255 ("Ruling
15 6255") out of the Order 1169 pump tests. In Ruling 6255, the State Engineer ruled that
16 pumping groundwater in Coyote Spring Valley Basin for new applications would
17 decrease flows at existing springs and could impact existing water rights held by parties
18 such as CSI's then existing 4600 afa of permitted water rights. The State Engineer also
19 found that the Muddy River and Muddy River Springs were fully appropriated and
20 pumping of groundwater could, in the future, potentially reduce flows in the Muddy River
21 that might cause a conflict with existing water rights. The State Engineer decided this
22 conflict with existing rights was not in the public interest and allowing appropriation of
23 additional groundwater resources could impair protection of springs and the habitat of
24 the Moapa dace that lives in the headwaters of the Muddy River. Based on those
25 findings, the State Engineer denied the then-pending new water right applications.
26 Ruling 6255 protects existing water rights (such as CSI's then owned 4600 afa) from

1 any new appropriations by denying the pending applications on the basis that existing
2 water rights must be protected.

3 18. CSI's existing water rights in what is now designated "Lower White River Flow
4 System Hydrographic Basin" are part of the rights the State Engineer ruled must be
5 protected in Ruling 6255. CSI has historically pumped, and continues to pump,
6 between 1400 afa and 2000 afa from its wells in the Coyote Spring Valley Basin. Golf
7 Course operations use, on average, 1100 afa, and beyond that water is used to support
8 construction activity in the Coyote Springs Development. Irrigation of Golf Course
9 Operations and other landscaping areas will be replaced by grey-reclaimed water in the
10 future after residential development is underway.

11 19. Through the specific plan, development agreement, entitlement and zoning
12 process, and creation of the CS-GID, CSI adopted aggressive water conservation plans
13 that it stands ready to implement. These plans include reuse of groundwater once it
14 makes its ways through the residential infrastructure, including grey-water use on golf
15 courses, common areas, and public parks. Coyote Springs Development's water
16 conservation target is for each equivalent-residential-unit to achieve 0.36 afa. Treated
17 effluent from CSI's wastewater treatment plant will be recycled within the development
18 and any portion not reused is designed to recharge the aquifer and flow to the Muddy
19 River and ultimately to Lake Mead.

20 20. Of the 4140 afa CSI has available for immediate development of the Coyote
21 Springs Development, CSI intends to support its existing entitled residential units within
22 its subdivisions, plus related resort, commercial and industrial development. Return
23 flows from the subdivision and effluent from its treatment plants will be returned to the
24 aquifer or recycled.

25 21. As CSI processed the final governmental approvals of what would be its first
26 residential subdivision map for 575 units in "Village A" of the Coyote Spring

1 Development, on May 16, 2018, State Engineer Jason King sent a letter to LVVWD
2 regarding Coyote Spring Valley Basin Water Supply, with a copy to CSI's
3 representative, Mr. Albert Seeno III.² The State Engineer stated that the pump tests
4 from Order 1169 through the present clearly indicate that pumping at the level during
5 the two year pump test caused unprecedented declines in groundwater levels.
6 22. In the State Engineer's May 16, 2018 letter, he stated (for the first time), that any
7 groundwater to be pumped across a *five-basin area* [emphasis in original] would be
8 limited to ensure no conflict with Muddy River Springs or the Muddy River as they are
9 the most senior rights in the then-identified five-basin area. The State Engineer further
10 said that carbonate pumping will be limited to a fraction of the 40,300 acre feet already
11 appropriated in the identified five-basin area. Following that sweeping statement, the
12 State Engineer specifically addressed the purpose of the then instant letter by stating:

13 Therefore, specific to the question raised in your November 16, 2017,
14 letter, considering current pumping quantities as the estimated sustainable
15 carbonate pumping limit, pursuant to the provisions found in Nevada
16 Revised Statutes Chapter 278, 533 and 534, the State Engineer
17 cannot justify approval of any subdivision development maps based
18 on the junior priority groundwater rights currently owned by
19 CWSRGID (sic)[Coyote Springs Water Resources General
20 Improvement District] or CSI unless other water sources are
21 identified for development. (emphasis in original.)

19 This May 16, 2018 letter went on to close with a desire that the water rights holders in
20 the area plus the Nevada Division of Water Resources work together to reach a
21 resolution for the entirety of the five basin area.

22 23. Subsequently, in communications by email between Albert Seeno III with the
23 State Engineer, on May 17, 2018, the State Engineer advised that he would neither
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26 ² The May 16, 2018 letter was rescinded pursuant to a settlement agreement between CSI and the State
27 Engineer. See paragraph 26 below.

1 sign-off nor approve any subdivision map submitted by CSI if they were based on
2 water rights CSI owned or had dedicated to the CS-GID.

3 24. On May 18, 2018, in a conversation with Albert Seeno III, the State Engineer
4 advised CSI not to spend one dollar more on the Coyote Springs Development Project
5 and that processing of CSI's maps had stopped. The State Engineer stated that he
6 was going to prepare a new draft order that would supersede or dramatically modify
7 Order 1169 and Ruling 6255, in approximately 30 days. The State Engineer admitted
8 to Albert Seeno III that this was unchartered territory and further, that his office has
9 never granted rights and then just taken them away.

10 25. Following his conversation with State Engineer Jason King, on May 18, 2018,
11 Albert Seeno III emailed Jason King and asked if anyone had filed an impairment claim
12 or any type of grievance with regard to CSI's and/or CS-GID's water rights and/or the
13 pumping CSI had performed over the prior 12 years. On May 21, 2018, the State
14 Engineer responded that no one had asserted a conflict or impairment regarding CSI's
15 pumping of the CS-GID and CSI's water rights.

16 26. On June 8, 2018, CSI filed a Petition for Review of the State Engineer's May 16,
17 2018, letter challenging the State Engineer's decision to place a moratorium on
18 processing CSI's subdivision maps. After a court-ordered settlement meeting on
19 August 29, 2018,, the parties agreed to settle and dismiss the case. In that settlement
20 agreement dated August 29, 2018, the State Engineer agreed to rescind his May 16,
21 2018, letter and to process CSI's subdivision maps without prejudice.

22 27. Thereafter, the State Engineer began a public workshop process to review the
23 water available for pumping in an area that the State Engineer began calling the Lower
24 White River Flow System ("LWRFS") which includes the Coyote Spring Valley

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1 hydrographic basin³. This public process included public workshops, a working group
2 of stakeholders, and included facilitation of a meeting of the Hydrologic Review Team
3 (“HRT”) established pursuant to that certain 2006 Memorandum of Agreement among
4 some of the parties involved in the new LWRFS process.⁴

5 28. On September 7, 2018, the Office of the State Engineer issued two conditional
6 approvals of subdivision maps submitted for review by CSI. The first conditional
7 approval was for the Large Lot Coyote Springs—Village A, consisting of eight lots,
8 common area, and rights of way totaling approximately 643 acres in Clark County and
9 requiring the statutory 2.0 afa per lot, for a total of 16 afa. The second conditional
10 approval was for the Coyote Springs—Village A subdivision map, consisting of 575
11 lots, common areas and rights of way for approximately 142.71 acres in Clark County
12 and requiring an estimate demand of 408.25 afa of water annually based on .71 afa per
13 residential unit. The two subdivision maps were conditionally approved subject to a
14 showing by CSI (or its agent) that sufficient water was available without affecting senior
15 water rights in the Muddy River and the Muddy River Springs.

16 29. Following this brief public input process, the State Engineer issued a draft order
17 at a public workshop held on September 19, 2018. The September 19, 2018, draft
18 order contained a preliminary determination that there were 9,318 afa of water rights
19 with a priority date of March 31, 1983, or earlier, that could be safely pumped from five-
20 basins composing the initial-LWRFS basins without affecting the flows in the Muddy

21 _____
22 ³ The Lower White River Flow System as so named, was identified colloquially prior to January 2019, and in
23 Rescinded Order 1303 dated January 11, 2019 these same hydrographic basins were identified as a single
24 administrative unit, and then even further, in his June 15, 2020 Order#1309 the State Engineer specifically
25 named and identified the Lower White River Flow System Hydrographic Basin which is fully described in this
26 Petition.

26 ⁴ On July 24, 2018, the State Engineer held a Public Workshop and on August, 23, 2018 facilitated the
27 meeting of the HRT.

1 River and without affecting the endangered Moapa dace fish. The draft order included
2 a moratorium on processing of subdivision maps unless demonstrated to the State
3 Engineer's satisfaction that an adequate supply of water was available "in perpetuity"
4 for the subdivision proposed to be mapped.

5 30. On October 5, 2018, CSI submitted a series of comment letters to the State
6 Engineer regarding the September 19, 2018, draft order. CSI commented on the total
7 lack of technical information necessary to perform a comprehensive review of the State
8 Engineer's conclusions in the draft order. CSI requested that the State Engineer
9 provide public access to the cited 30,000 pages of documentation used to support his
10 conclusions in the draft order.

11 31. In the October 5, 2018 CSI comment letters from CSI and its qualified expert,
12 CSI also pointed out to the State Engineer that his use of the 9318 afa limit for pumping
13 in the basin was not supported by substantial evidence and that the State Engineer's
14 own data supported a figure of at least 11,400 afa that could be pumped without any
15 effect on the flows in the Muddy River or any effects on the Moapa dace. CSI also
16 criticized reliance on only three-years of pump data to establish the limitation of 9318
17 afa when data from more than three years was available.

18 32. On October 23, 2018, CSI provided additional comments on the September 19,
19 2018 draft order. CSI noted again that the State Engineer's own data supported a
20 determination that the correct amount of pumping that could be sustained in the
21 LWRFS was at least 11,400 afa and not 9,318 afa. However, even assuming that
22 9,318 afa was the correct number, CSI was still entitled to at least 1,880 afa of water
23 for its subdivisions.

24 33. On January 11, 2019, State Engineer Jason King issued Rescinded Order 1303.

25 34. On May 13, 2019 the State Engineer amended Rescinded Order 1303. In
26 Rescinded Order 1303, the State Engineer declared that Coyote Spring Valley, Muddy

1 River Springs Area, Hidden Valley, Garnet Valley, California Wash, and the
2 northwestern part of the Black Mountains Area were designated as a joint
3 administrative unit for purposes of administration of water rights, known as the Lower
4 White River Flow System or the Six-Basin Area. Rescinded Order 1303 also declared
5 a temporary moratorium on approvals regarding any final subdivision or other
6 submissions concerning development and construction submitted to the State Engineer
7 for review. According to Rescinded Order 1303, any such submittal shall be held in
8 abeyance pending the conclusion of the public process to determine the total quantity
9 of groundwater that may be developed within the Lower White River Flow System.
10 Rescinded Order 1303 did provide an exception to the moratorium, that the State
11 Engineer could review and grant approval if a showing of an adequate and sustainable
12 supply of water to meet the anticipated "life of the subdivision" was made to his
13 satisfaction.

14 35. Rescinded Order 1303 raised five questions for stakeholders to review and to
15 which they could respond with technical, scientific data: (a) the geographic boundary
16 of the LWRFS, (b) aquifer recovery subsequent to the Order 1169 aquifer test, (c) the
17 long-term annual quantity and location of groundwater that may be pumped from the
18 LWRFS, (d) the effect of movement of water rights between alluvial and carbonate
19 wells within the LWRFS and (e) any other matter believed to be relevant to the State
20 Engineer's analysis (the "Five Topics Noticed for Determination").

21 36. In issuing Order 1309, the State Engineer went well beyond the scope of issues
22 within the Rescinded Order 1303's Five Topics Noticed for Determination.

23 37. Former State Engineer Jason King retired the same day that Rescinded Order
24 1303 was issued, January 11, 2019. Thereafter, Tim Wilson was appointed as Acting
25 State Engineer; and on December 12, 2019, Tim Wilson was appointed as the full
26 State Engineer.

1 38. On June 13, 2019, CSI submitted two-maps for signature and approval subject to
2 the exception written into Rescinded Order 1303: (i) its previously described Large Lot
3 Coyote Springs—Village A, consisting of eight lots, common area, and rights of way
4 totaling approximately 643 acres in Clark County and on the face of the map requiring
5 the statutory 2.0 afa per lot, for a total of 16 afa, and (ii) its Coyote Springs—Village A
6 subdivision map, consisting of 575 lots, common areas and rights of way for
7 approximately 142.71 acres in Clark County and requiring an estimate demand of
8 408.25 afa of water annually based on .71 afa per residential unit. These maps were
9 accompanied by a cover letter describing a request approval based on an attached
10 technical report which evidenced support for approval and identifying the technical and
11 hydrogeologic analysis supporting CSI's request for 2000 afa to be approved and
12 assigned to these maps for development within the Coyote Springs master planned
13 community.

14 39. The State Engineer held several workshops and meetings regarding Rescinded
15 Order 1303, on February 6, March 22, April 23, and July 24, 2019. These meetings
16 were workshops and held in anticipation and preparation for the scheduled hearing on
17 Rescinded Order 1303 scheduled for the end of September, early October, 2019.

18 40. The State Engineer identified dates for a hearing to be held on Rescinded Order
19 1303, to allow all interested parties to submit technical reports and studies in response
20 to the five questions raised by the State Engineer in Rescinded Order 1303, and cross
21 examine the others' experts, following which the State Engineer would take under
22 advisement all of the reports and testimony and render a decision in a new order.

23 41. Expert reports by interested parties were due July 3, 2019, and rebuttal reports
24 were due on August 16, 2019. CSI filed expert scientific, geophysical, hydrologic, and
25 hydrogeologic reports, and related rebuttal reports; all of which are reflected on the
26

1 State Engineer's administrative record supporting Rescinded Order 1303 on their
2 website.

3 42. The hearing on Rescinded Order 1303 took place in Carson City, Nevada
4 between September 23, 2019, and October 4, 2019.

5 43. Following the hearing on Rescinded Order 1303, the State Engineer allowed for
6 closing reports, which were due on or before December 3, 2019.

7 44. Initial reports and expert opinions and rebuttal reports, submitted by interested
8 parties, including those that demanded that the Kane Spring Valley be included within
9 the Lower White River Flow System (thus, turning a Six-Basin area into a Seven-Basin
10 area).

11 45. In addition to CSI's hydrogeologist and other experts at Stetson Engineering,
12 CSI, LCWD, and Vidler retained an expert in the area of geophysics, Zonge
13 International, to review underground faulting in the Coyote Spring and Kane Springs
14 hydrographic basins and identify faults that could act as barriers to flow from the Kane
15 Springs and Coyote Spring valleys east to the Muddy River and the Muddy River
16 Springs area.

17 46. Other than CSI and its team of experts in the fields of geology and hydrogeology,
18 water rights, climate, biology, and geophysics, from Stetson Engineering and Zonge
19 International, more than 15 additional other stakeholders were present and participated
20 at Rescinded Order 1303 Hearing, and each stakeholder presented expert witnesses⁵
21 to their previously submitted reports. All of this testimony, and all reports and rebuttal
22 reports submitted is a part of the State Engineer's files for Rescinded Order 1303
23 Hearing, and testimony preserved by a stenographer's transcript and video taken. CSI
24

25 ⁵ More than 25 experts presented testimony. See Nevada State Engineer website for LWRFS at
26 <http://water.nv.gov/news.aspx?news=LWRFS> and the tab "hearing documents."

1 disagrees with the summarization by the State Engineer of hearing testimony in Order
2 1309.

3 47. Order 1309 specifically delineated the following decisions⁶:

4 *1. The Lower White River Flow System consisting of the Kane*
5 *Springs Valley, Coyote Spring Valley, Muddy River Springs Area, California Wash,*
6 *Hidden Valley, Garnet Valley, and the northwest portion of the Black Mountains Area as*
7 *described in this Order, is hereby delineated as a single hydrographic basin. The Kane*
8 *Springs Valley, Coyote Spring Valley, Muddy River Springs Area, California Wash,*
9 *Hidden Valley, Garnet Valley and the northwest portion of the Black Mountains Area are*
10 *hereby established as sub-basins within the Lower White River Flow System*
11 *Hydrographic Basin.*

12 *2. The maximum quantity of groundwater that may be pumped*
13 *from the Lower White River Flow System Hydrographic Basin on an average annual*
14 *basis without causing further declines in the Warm Springs area spring flow in the*
15 *Muddy River cannot exceed 8,000 afa and may be less.*

16 *3. The maximum quantity of water that may be pumped from the*
17 *Lower White River Flow System Hydrographic Basin may be reduced if it is determined*
18 *that pumping will adversely impact the endangered Moapa dace.*

19 *4. All applications for the movement of existing groundwater rights*
20 *among sub-basins of the Lower White River Flow System Hydrographic Basin will be*
21 *processed in accordance with NRS 533.370.*

22 *5. The temporary moratorium on the subdivision of final subdivision*
23 *or other submission concerning development and construction submitted to the State*
24 *Engineer for review established under Interim Order 1303 is hereby terminated.*

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⁶ Exhibit "A" at 65-66.

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6. *All other matters set forth in Interim Order 1303 that are not specifically addressed herein are hereby rescinded.*

48. Order 1309 neither delivers evidence in support of, nor analysis to support, any of the order and rulings the State Engineer made in Order 1309, Section X, Orders, items 1, 2, 3, and 4, including, without limitation, the addition of Kane Springs Valley into the newly designated Lower White River Flow System Hydrographic Basin.

49. In Order 1309, Section X, Orders, items 5 and 6, the State Engineer correctly terminates the improper, arbitrary, and capricious Rescinded Order 1303 in its entirety, including, without limitation, specifically terminating the improper moratorium instituted in Rescinded Order 1303.

50. On June 17, 2020, 371 days following written submittal of a request for review and approval for an exception pursuant to Rescinded Order 1303, and two days following issuance of Order 1309, Steve Shell, Water Resource Specialist II, signed a letter addressed to Coyote Springs Nevada at an address that the entity has not used for over ten (10) years, and recommended disapproval for water service to be provided by the CS-GID to the Coyote Springs Development ("Subdivision Map Denial Letter"). A true and correct copy of the Subdivision Map Denial Letter is attached as Exhibit "B". The request at issue was for review and approval of a final subdivision map for eight large parcels intended to be further subdivided. This denial was premised on Order 1309 and a statement that "[CSI] groundwater permits have priority dates which may exceed the threshold of allowable pumping within the definition of [Order 1309]".

51. The June 17, 2020 Subdivision Map Denial Letter received by CSI did not include analysis or review of any facts or circumstances or analysis as to why the State Engineer's office refused to process the request for map approval pursuant to the exception provided in Rescinded Order 1303. The State Engineer's office did not

1 explain why other request made under the exception to the moratorium under
2 Rescinded Order 1303 were processed and CSI's was not.

3 **PETITION FOR JUDICIAL REVIEW**

4 52. This Petition is filed on the grounds that CSI is an aggrieved party by the decision
5 of the State Engineer on June 15, 2020 and the water rights owned or optioned by CSI,
6 in which CSI has a contractual interest, and the water rights CSI dedicated to the CS-
7 GID will be injured as a result of these decisions.

8 53. The purpose of the State Engineer's hearing leading to its Order 1309 was to
9 address the Five Topics Noticed for Determination:

- 10 a. The geographic boundary of the hydrologically connected
11 groundwater and surface water systems comprising the
12 Lower White River Flow System;
- 13 b. The information obtained from the Order 1169 aquifer test
14 and subsequent to the aquifer test and Muddy River
15 headwater spring flow as it relates to aquifer recovery since
16 the completion of the aquifer test;
- 17 c. The long-term annual quantity of groundwater that may be
18 pumped from the Lower White River Flow System, including
19 the relationships between the location of pumping on
20 discharge to the Muddy River Springs, and the capture of
21 Muddy River flow;
- 22 d. The effects of movement of water rights between alluvial
23 wells and carbonate wells on deliveries of senior decreed
24 rights to the Muddy River; and,
- 25 e. Any other matter believed to be relevant to the State
26 Engineer's analysis.

27 54. The State Engineer's determinations in his June 15, 2020 order regarding the
28 geographic boundary of the LWRFS, the aquifer recovery since completion of the Order
1169 aquifer test, the long-term annual quantity of groundwater that may be pumped
from the LWRFS, and the effects of movement of water rights between alluvial wells
and carbonate wells on deliveries of senior decreed rights to the Muddy River are

1 arbitrary, capricious, an abuse of discretion and devoid of supporting facts and
2 substantial evidence.

3 55. The State Engineer's Order 1309 is arbitrary⁷ and capricious⁸ due to the lack of
4 substantial evidence supporting its determination that the seven hydrographic basins
5 have a "close" hydraulic connection and must therefore be administered as a single
6 hydrographic basin. The State Engineer concluded in Order 1309 that there may be
7 discrete, local aquifers within the LWRFS with an uncertain hydrologic connection to the
8 Warm Springs Area.⁹ The State Engineer based this opinion on his recognition that
9 "The LWRFS has structural complexity and heterogeneity, and some areas have more
10 immediate and more complete connection than others"¹⁰. One basis for his findings was
11 from Bedroc who presented evidence that their groundwater wells in Coyote Spring
12 Valley are hydraulically disconnected from the regional carbonate aquifer of the
13 LWRFS.¹¹ The evidence and findings contained in Order 1309 are not sufficient to
14 support its designation of the basins as a single hydrographic basin.

15 56. In his June 15, 2020 Order 1309, the State Engineer inconsistently applies his
16 own criteria for determining those basins that should be included in the LWRFS based
17 on a "close hydraulic connection"¹². Order 1309 outlines six criteria that the State
18 Engineer relies on to support the finding of a close hydraulic connection, including
19 geologic structure and water level observations. The State Engineer's application of
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21 ⁷ A finding is arbitrary if "it is made without consideration of or regard for facts, circumstances fixed by
22 rules or procedure." (Black's Law Dictionary, Arbitrary (10th ed. 2014).)

23 ⁸ A decision is capricious if it is "contrary to the evidence or established rules of law." (Black's Law
Dictionary, Capricious (10th ed 2014).)

24 ⁹ Exhibit "A" at 65.

25 ¹⁰ Exhibit "A" at 59.

26 ¹¹ Exhibit "A" at 39,

¹² Exhibit "A" at 47.

1 these criteria to his decision regarding the Black Mountains Area, Kane Springs Valley,
2 and Lower Meadow Wash appears subjective, and is thus arbitrary and capricious.

3 57. For example, Order 1309 excludes from the LWRFS Hydrographic Basin the
4 entire Black Mountain Area due to, among other things, the lack of contiguity of
5 carbonate-rock aquifer and difference in groundwater levels. However, the substantial
6 evidence in the State Engineer's record shows contiguous carbonate rock extends
7 across the Muddy Mountain Thrust Fault between California Wash into the Black
8 Mountains Area¹³, similar to the occurrence of contiguous carbonate rock from Kane
9 Springs Valley into Coyote Spring Valley that is offset by a boundary fault¹⁴. Additional
10 evidence indicated a 150 foot difference in groundwater level between California Wash
11 and the Black Mountains Area, similar in magnitude to the 60 foot difference in
12 groundwater level between Kane Springs Valley and Coyote Spring Valley¹⁵.

13 58. While both the Black Mountains Area-California Wash and Kane Springs Valley-
14 Coyote Spring Wash boundaries exhibit the same physical expression reflective of a low
15 permeability boundary, the State Engineer's Order 1309 includes one, but not the other,
16 in the LWRFS Hydrographic Basin based on perceived "general hydrographic pattern".¹⁶
17 The State Engineer's reliance on these subjective criteria instead of objectively applied
18 criteria is arbitrary and capricious.

19 59. Order 1309 states "the LWRFS exhibits a direct hydraulic connection that
20 demonstrates that conjunctive management and joint administration of these
21 groundwater basins is necessary and supported by the best available science"¹⁷ and at
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23 ¹³ Exhibit "A" at 15-18.

24 ¹⁴ Exhibit "A" at 19-22.

25 ¹⁵ Exhibit "A" at 52.

26 ¹⁶ Exhibit "A" at 51, 52.

27 ¹⁷ Exhibit "A" at 42.

1 the same time cites numerous documents that do not support this statement. For
2 example, the Order 1169 Aquifer Test Reports cited variously describe potential barriers
3 and flow paths within the LWRFS, while others postulate that the LWRFS is
4 hydraulically connected, and some address the entire LWRFS, while other reports only
5 address portions of the LWRFS.¹⁸ The underlying technical analyses in these cited
6 documents are admittedly unreliable and therefore Order 1309's findings regarding the
7 hydraulic connection within the LWRFS are arbitrary and capricious.

8 60. The State Engineer's determination in his June 15, 2020 order to include the
9 Kane Springs Valley Hydrographic Basin as part of the LWRFS Hydrographic Basin
10 relies on standards regarding hydrologic connections, hydraulic connections, and
11 "close" connections that were not previously known to those submitting evidence in
12 response to Rescinded Order 1303. Inclusion of the Kane Springs Valley Hydrographic
13 Basin into the LWRFS in Order 1309 was a violation of CSI's due process rights. CSI's
14 due process rights were violated because the State Engineer neither provided the
15 standards nor procedures nor analysis describing the method of making such a
16 determination. Therefore, pursuant to Nevada law, as a result, Order 1309 should be
17 voided.

18 61. Further the State Engineer's determination on June 15, 2020 in Order 1309 to
19 include the Kane Springs Valley Hydrographic Basin in the LWRFS Hydrographic Basin
20 is not supported by substantial evidence. See *Bacher v. Office of State Eng'r of State of*
21 *Nevada*, 122 Nev. 1110, 1121 (2006) ("This court has defined substantial evidence as
22 that which a reasonable mind might accept as adequate to support a conclusion.")
23 (internal quotation marks omitted). Furthermore, the State Engineer has not provided
24 "findings in sufficient detail to permit judicial review" as required. *Revert v. Ray*, 95 Nev.

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¹⁸ Exhibit "A" at 42, FN 244

1 782, 787 (1979) ("When these procedures, grounded in basic notions of fairness and
2 due process, are not followed, and the resulting administrative decision is arbitrary,
3 oppressive, or accompanied by a manifest abuse of discretion, this court will not
4 hesitate to intervene."). In his February 2, 2007 Ruling 5712, the State Engineer stated
5 that the then-available evidence supported the probability of a low-permeability structure
6 or change in lithology between Kane Springs Valley and the southern part of Coyote
7 Spring Valley and there was not substantial evidence that the appropriation of a limited
8 quantity of water in Kane Springs Valley Hydrographic Basin will have any measurable
9 impact on the Muddy River Springs. (5712, p. 21.) The State Engineer's determination
10 in his June 15, 2020 Order 1309 to include the Kane Springs Valley Hydrographic Basin
11 in the LWRFS Hydrographic Basin is not based on substantial evidence contrary to the
12 evidence supporting his determinations in Ruling 5712.

13 62. Finally, the State Engineer's determination in his June 15, 2020 order to include
14 the Kane Springs Valley Hydrographic Basin in the LWRFS Hydrographic Basin is
15 arbitrary and capricious as the substantial evidence, as viewed through the State
16 Engineer's own proposed standards regarding hydrologic connections, hydraulic
17 connections, and "close" connections that it uses in Order 1309, does not satisfy his
18 own standards for the purposes of creating a LWRFS Hydrographic Basin.

19 63. The State Engineer's June 15, 2020 Order 1309 subjectively applies criteria for
20 determining whether the Lower Meadow Valley Wash should be included in the
21 LWRFS. In Order 1309, the State Engineer finds that "while carbonate rocks may
22 underlie the Lower Meadow Valley Wash and be contiguous with carbonate rocks to the
23 south and west, data are lacking to characterize the potential hydraulic connection that
24 may exist."¹⁹ The State Engineer further acknowledges that a connection exists, but
25

26 ¹⁹ Exhibit "A" at 50.

1 determines that the Lower Meadow Valley Wash may be managed outside the LWRFS.
2 Accordingly, Order 1309's exclusion of the Lower Meadow Valley Wash from the
3 LWRFS is inconsistent with his decision to include the Kane Springs Valley, as both
4 basins are upgradient of the Muddy River Springs Area, and based on the State
5 Engineer's findings in Order 1309, both basins have a hydraulic connection to the
6 LWRFS. Additional record evidence demonstrates that groundwater from the Lower
7 Meadow Wash directly support streamflow in the Muddy River and groundwater
8 resources in the carbonate aquifer. Further, both Kane Springs Valley and Meadow
9 Valley Wash have relatively little or no groundwater development. Given the similarities
10 between the Lower Meadow Valley Wash and Kane Springs Valley, the inconsistent
11 treatment of the two in regard to their incorporation into the LWRFS is inconsistent and
12 accordingly arbitrary and capricious.

13 64. The State Engineer's determination that pumping groundwater in the Coyote
14 Springs Basin will have an adverse impact on flows in the Muddy River or on the Moapa
15 dace lacks substantial supporting record evidence and is thus arbitrary and capricious.
16 As described above, the State Engineer relied on outdated and inadequate data in
17 making these determinations. The record evidence before the State Engineer
18 demonstrates that he failed to account for factors such as the effect of faults,
19 groundwater barriers, and hydrogeologic parameters between Coyote Spring Valley
20 pumping and the Muddy River Spring Area.

21 65. The State Engineer's determination in his June 15, 2020 order that the maximum
22 quantity of groundwater that may be pumped from the LWRFS Hydrographic Basin on
23 an average annual basis without causing further declines in Warm Springs area spring
24 flow and flow in the Muddy River cannot exceed 8,000 afa is not supported by
25 substantial evidence. This is the case as the State Engineer also misinterprets the
26 evidence from the hearing following Rescinded Order 1303 regarding the effect of

1 groundwater pumping within the LWRFS on the Moapa dace. Furthermore, CSI has
2 already performed and completed its required mitigation for development of Coyote
3 Springs as required by USFWS. CSI was required to set aside 460 afa to protect the
4 endangered Moapa dace and USFWS deemed this dedication as appropriate mitigation
5 for any take of the Moapa dace related to development of the Coyote Springs
6 Development. Ignoring these significant considerations was arbitrary and capricious,
7 rendering Order 1309 unlawful.

8 66. Order 1309's use of the term "maximum quantity" of groundwater that may be
9 pumped is further confused by the Order's qualifier "on an average annual basis".²⁰ The
10 use of the "average annual basis" suggests that pumping may be less than 8,000 afa in
11 some years and more than 8,000 afa in others. Accordingly, Order 1309's pumping
12 limitations is vague and lacks direction for how the average annual basis will be used to
13 enforce the maximum quantify of groundwater that may be pumped. Order 1309 further
14 does not distinguish the quantity of pumping that can occur from each of the two
15 aquifers that compose the LWRFS, the Basin Fill and Carbonate aquifers. Accordingly,
16 Order 1309 is arbitrary and capricious as it "lacks specific standards, thereby
17 encouraging, authorizing, or even failing to prevent arbitrary and discriminatory
18 enforcement." *Silvar v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 122 Nev. 289,
19 293 (2006).

20 67. Further, the State Engineer's determination in his June 15, 2020 Order 1309 that
21 the maximum quantity of groundwater that may be pumped from the LWRFS on an
22 average annual basis without causing further declines in Warm Springs area spring flow
23 and flow in the Muddy River cannot exceed 8,000 afa is not supported by substantial
24 evidence as there is no evidence in the record regarding the effects of this quantity of
25

26 ²⁰ Exhibit "A" at 65.

1 water being pumped within the newly defined LWRFS.²¹ Absent such evidence, the
2 State Engineer refers to "Pumpage inventories for 2018 that were published after the
3 completion of the hearing report a total of 8,300 afa."²² Further, the State Engineer
4 identifies that additional inquiry and evidence is still necessary to support this
5 conclusion. Accordingly, the State Engineer's determination regarding the maximum
6 quantity of groundwater that may be pumped from the LWRFS on an average annual
7 basis is not supported by substantial record evidence.

8 68. The State Engineer's determination in his June 15, 2020 Order 1309 that the
9 maximum quantity of groundwater that may be pumped from the LWRFS on an average
10 annual basis without causing further declines in Warm Springs area spring flow and flow
11 in the Muddy River cannot exceed 8,000 afa is not supported by substantial evidence as
12 the State Engineer recognizes that there may be discrete, local aquifers within the
13 LWRFS with an uncertain hydrologic connection to the Warm Springs area and that
14 determination of the effect of moving water rights into these areas may require
15 additional scientific data and analysis.²³ However, Order 1309 does not include any
16 plan to gather such data or conduction such analysis.

17 69. The State Engineer's determination in his June 15, 2020 Order 1309 that the
18 maximum quantity of groundwater that may be pumped from the LWRFS on an average
19 annual basis without causing further declines in Warm Springs area spring flow and flow
20 in the Muddy River cannot exceed 8,000 afa is further arbitrary and capricious and
21

22 ²¹ Order 1309 states "Groundwater level recovery reached completion approximately two to three years after
23 the Order 1169 aquifer test pumping ended" and pumping at that time averaged 9,318 afa. (Exhibit "A" at
24 55.) Order 1309's determination to then to base maximum pumping on 2018 when it finds that groundwater
25 levels had recovered by 2015-2016 is arbitrary and capricious and unsupported by substantial evidence.

26 ²² Exhibit "A" at 55.

27 ²³ Exhibit "A" at 64-65.

1 violates Nevada law as Order 1309 contains no mechanism for the implementation of
2 this limitation to ensure that the Nevada doctrines of prior appropriation²⁴ and that the
3 limit and definition of a water right is its reasonable use.²⁵

4 70. The State Engineer's determination in Order 1309 regarding the movement of
5 water rights within the LWRFS is inconsistent, arbitrary, and capricious. The statement
6 in Order 1309 stating "The State Engineer also finds that any movement of water rights
7 into carbonate-rock aquifer and alluvial aquifer wells in the Muddy River Springs Area
8 that may increase the impact to Muddy River decreed rights is disfavored"²⁶ implies that
9 the some water rights in LWRFS have less impact than others. If there are water rights
10 within the LWRFS that have less impact than others, then the system cannot be
11 homogeneous and be considered as one administrative unit. Accordingly, Order 1309's
12 determination regarding the boundaries of the LWRFS are arbitrary and capricious and
13 not supported by substantial evidence.

14 71. Throughout Order 1309, the State Engineer "*recognizes*" that Order 1309 will
15 serve as an initial step toward management of the newly defined LWRFS Hydrographic
16 Basin [emphasis added]. The word "recognize" is neither a finding nor a ruling, it is
17 simply the observation of something by the State Engineer. The State Engineer also
18 identifies the need for "an effective management scheme" to "provide for the flexibility to
19 adjust boundaries based on additional information, retain the ability to address unique
20 management issues on a sub-basin scale, and maintain partnership with water users
21 who may be affected by management actions throughout the LWRFS."²⁷ However, the
22

23 ²⁴ *Steptoe Livestock Co. v. Gulley*, 53 Nev 163, 171-173, 205 P.772 (1931); *Jones v. Adams* 19 Nev. 78,
24 87, (1885).

25 ²⁵ NRS 533.035.

26 ²⁶ Exhibit "A" at 64.

27 ²⁷ Exhibit "A" at 53.

1 State Engineer's Order 1309 provides for neither a management scheme nor a plan for
2 the development of such a management scheme. Accordingly, the State Engineer's
3 Order 1309 is incomplete and as a result, his issuance of Order 1309 is both arbitrary
4 and capricious.

5 72. In his Order 1309, the State Engineer repeatedly identifies that additional
6 information is necessary to administer the newly created LWRFS Hydrographic Basin
7 the manner that he proposes – as a single hydrographic basin from which only 8,000
8 afa may be pumped. As such additional information is not part of the record underlying
9 Order 1309, the State Engineer's Order 1309 is incomplete, is not supported by
10 substantial evidence, and his issuance of Order 1309 is both arbitrary and capricious.

11 73. THEREFORE, for the foregoing reasons, and for others that may be discovered
12 and raised during the pendency of this Petition for Judicial Review, Petitioner Coyote
13 Springs Investment, LLC hereby requests that this Court reverse the decision of the
14 State Engineer made on June 15, 2020 regarding the geographic boundary of the
15 LWRFS, the aquifer recovery since completion of the Order 1169 aquifer test, the long-
16 term annual quantity of groundwater that may be pumped from the LWRFS, and the
17 effects of movement of water rights between alluvial wells and carbonate wells on
18 deliveries of senior decreed rights to the Muddy River for the reasons discussed in this
19 Petition.

20

21 Dated: July 9, 2020

Brownstein Hyatt Farber Schreck, LLP

22

BY: /s/ Bradley J. Herrema
BRADLEY J. HERREMA
Bar No. 10368
100 North City Parkway, Suite 1600
Las Vegas, NV 89106
Email: bherrema@bhfs.com
Attorneys for Coyote Springs
Investment, LLC 21256970

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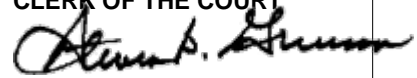
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Attachment 3



CASE NO: A-20-817840-P
Department 28

1 **Marquis Aurbach Coffing**
Christian T. Balducci, Esq.
2 Nevada Bar No. 12688
10001 Park Run Drive
3 Las Vegas, Nevada 89145
Telephone: (702) 382-0711
4 Facsimile: (702) 382-5816
cbalducci@maclaw.com
5 *Attorneys for Petitioners*
Apex Holding Company, LLC and Dry Lake
6 *Water, LLC*

7 **DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

9 APEX HOLDING COMPANY, LLC, a Nevada
limited liability company; DRY LAKE WATER,
10 LLC, a Nevada limited liability company,

Case No.:
Dept. No.:

11 Petitioners,

12 vs.

13 **PETITION FOR JUDICIAL REVIEW OF**
14 **ORDER 1309**

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

17 Respondent.
18

19
20 Petitioners, APEX HOLDING COMPANY, LLC (“APEX”), and its wholly owned
21 subsidiary, DRY LAKE WATER, LLC (“DRY LAKE”), by and through the law firm of
22 Marquis Aurbach Coffing, hereby file this Petition for Judicial Review of Order 1309 issued on
23 June 15, 2020, by Respondent, TIM WILSON, P.E., Nevada State Engineer, DIVISION OF
24 WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL
25 RESOURCES. The full text of Order 1309 is attached hereto and incorporated herein. This
26 Petition for Judicial Review of Nevada State Engineer (“NSE”) Order 1309 is filed pursuant to
27 NRS 533.450.

28 ///

1 **I. JURISDICTIONAL STATEMENT**

2 Under NRS 533.450, any order or decision of the State Engineer is subject to judicial
3 review “in the proper court of the county in which the matters affected or a portion thereof are
4 situated.” The real property to which the water at issue in this appeal is appurtenant lies within
5 Clark County, Nevada; therefore, the Eighth Judicial District Court of the State of Nevada in and
6 for Clark County is the proper venue for judicial review.

7
8 Further, the subject matter of the appeal involves decreed waters of the Muddy River
9 Decree. Under NRS 533.450(I), “on stream systems where a decree of court has been entered,
10 the action must be initiated in the court that entered the decree.” This court has proper
11 jurisdiction of the Muddy River Decree, *Muddy Valley Irrigation Company, et al, vs. Moapa Salt*
12 *Lake Produce Company, et al*, Case No. 377, which was entered in the Tenth Judicial District of
13 the State of Nevada, in and for the County of Clark in 1920.¹

14 The NSE Order 1309 was entered on June 15, 2020, based in whole or part on prior NSE
15 Orders 1169, 1169A, 1303, and the evidence and law offered at hearing upon each Order.

16 This Petition is timely filed and will be timely served as required under NRS 533.450.

17
18 Petitioners, APEX and DRY LAKE, have standing to file this Petition as APEX is one of
19 the land owners, and DRY LAKE is one of the water rights owners and beneficial users of the
20 groundwater for providing the beneficial use of water by service to those lands, which are subject
21 of, adversely impacted by, and which were a party to the proceedings which resulted in NSE
22 Order 1309, and participating in those proceedings for the purpose of developing a
23 comprehensive water management program agreed to by all water rights owners in the Garnet
24 Valley and Black Mountain aquifers, and as necessary the Lower White River Flow System

25
26
27 ¹ In 1920, the Tenth Judicial District consisted of Clark County and Lincoln County. In 1945, Clark
28 County was designated as the Eighth Judicial District.

1 (“LWRFS”).²

2 Apex and Dry Water acknowledge that another Petition concerning the same order was
3 filed on or around June 17, 2020, by LAS VEGAS VALLEY WATER DISTRICT (“LVVWD”)
4 and SOUTHERN NEVADA WATER AUTHORITY (“SNWA”). Apex and Dry Water are
5 informed and believe that other petitions challenging that same order have been or will be filed
6 as well. However, this Petition raises for judicial review different parts of NSE Order 1309 and
7 substantial different and additional matters of law and evidence than that prior Petition by
8 LVVWD and SNWA.
9

10 Other Parties to the proceedings which have resulted in NSE Order 1309 have been
11 notified of this Petition as required by law as evidenced by the certificate of service attached
12 hereto.

13 **II. FACTUAL BACKGROUND**

14 **A. SUBSTANTIAL INTERESTS IN THE LWRFS BY PETITIONERS APEX
15 AND DRY LAKE.**

16 APEX is the owner of lands in the LWRFS groundwater basin area, which is the subject
17 of NSE Order 1309, and for that reason APEX formed DRY LAKE to be the owner of water
18 rights in the Garnet Valley and Black Mountain aquifers of the LWRFS, which are critical and
19 essential for the service of water supply to those APEX lands.

20 The APEX lands were carved out of the sovereign lands of the United States of America

21 ² DRY LAKE owns 178 acre feet of Garnet Basin water rights, base permit numbers 66784 (131.16 AF) and 66785
22 (46.84 AF). These base permits have designated points of diversion in various locations within Apex Industrial Park
23 under some or all of the Permit Numbers 66784 for 156.84 AF with Priority date 3/6/1987, 66785 for 46.84 AF with
24 Priority date 8/25/2000, 72098 for 13.16 AF with Priority date 8/25/2000, 77389 for 80 AF with Priority date
25 8/25/2000, 79948 for 30 AF with Priority date 8/25/2000, 81344 for 8 AF with Priority date 8/25/2000, 84041 for 40
26 AF with Priority date 7/21/2014. Permit number 72098 for 13.17 acre feet has been moved to the Loves Well,
27 79948 for 30.00 acre feet moved to Loves Well, 81344 for 8.00 acre feet moved to Loves Well, 84041 for
28 40.00 acre feet moved to Loves Well, 77389 for 80.00 acre feet moved to Solo Mountain, and Straggler 6.83 acre feet. DRY LAKE owns 1,392.06 acre feet of Black Mountain water rights, base permit numbers 68350 (119.44 AF), 68351 (542.98 AF), 68352 (137.58 AF) and 68353 (592.06 AF). The Black Mountain water rights were successfully moved by the NSE into the Garnet Basin to three different locations within the Apex Industrial Park under Permit Numbers 88873T, 88874T, 88875T, 88876T, and 88877T for Permits No. 68350 for 119.44 Acre Feet with Priority Date 10/18/88, 68351 for 542.98 Acre Feet with Priority Date 6/21/88, 68352 for 137.58 Acre Feet with Priority Date 10/18/88 and 68353 for 592.06 Acre Feet with Priority Date 10/10/90.

1 and managed by the Bureau of Land Management (“BLM”), to fulfill the purposes of the “Apex
2 Project, Nevada Land Transfer and Authorization Act of 1989,” Public Law 101-67, 101st
3 Congress, 103 STAT 168 (“Act of Congress”).³

4 The lands owned by APEX, and by necessary implication the water rights owned by
5 DRY LAKE required to serve those lands, were impressed with a public trust, and carved out of
6 the USA public domain, and sold to APEX by the authority of the Act of Congress for the
7 specific intent and purpose of serving the crucial national security interest, and the public health,
8 safety, and welfare interests of the citizens of the United States of America, Clark County and
9 the State of Nevada.

10 The specific intent and purpose of the Act of Congress would be totally frustrated and
11 defeated without the water supply by DRY LAKE provided to APEX.

12 The Act of Congress occurred during the same contemporaneous time that the NSE
13 issued Order 1309 and the predecessor orders leading up to Order 1309, Orders 1169, 1169A,
14 1303, and other relevant proceedings, studies and hearings relating thereto, and also referred to
15 herein below.

16 The NSE, SNWA and LVVWD and other relevant governmental and private parties were
17 knowledgeable of, and at all relevant times informed participants in the process leading up to the
18 Act of Congress, acquisition of the lands by APEX, and formation of DRY LAKE and its
19 acquisition of water rights to serve APEX, and commencement of DRY LAKE service of water
20 to those APEX lands.

21 The NSE by Order 1309, and the other orders resulting in Order 1309, and to some
22 demonstrable extent SNWA, LVVWD and other relevant governmental and private parties, have
23 repeatedly taken actions which have had the deleterious effect of interfering with the intent and
24 purpose of the Act of Congress, and otherwise defeat, frustrate, delay, prevent or avoid any water
25

26
27 ³ See <https://www.govinfo.gov/content/pkg/STATUTE-103/pdf/STATUTE-103-Pg168.pdf>.

1 supply being provided to APEX by DRY LAKE.

2 The NSE has taken the proper statutory and factual action granting temporary permit
3 transfer status of Black Mountain water rights to the Garnet Valley of the LWRFS owned by
4 DRY LAKE to serve APEX and fulfill the intent and purpose of the Act of Congress. That
5 proper action by the NSE has been opposed by the SNWA and other relevant governmental and
6 private parties that own senior water rights in the LWRFS and the Muddy River Flow System
7 (“MRFS”), or which have an interest in the protection of the habitat for the Moapa Dace.
8

9 This Petition raises for consideration by the Court the following factual evidence and
10 legal issues: first, fully implementing the intent and purpose of the Act of Congress. Second, this
11 Petition also raises for the Court the factual evidence and law disputing Order 1309 evidence that
12 there is an interrelationship and tributary nature of the groundwater pumping in the LWRFS by,
13 *inter alios*, APEX and DRY LAKE with the MRFS. Third, this Petition also raises for the Court
14 the LWRFS tributary or non-tributary interconnection to the natural springs, surface water and
15 groundwater of the MRFS which would have the effect of subjecting LWRFS water rights to
16 regulation and curtailment under the laws, rules and regulations governing the Colorado River
17 Flow System pursuant to the Colorado River Compact 1922 and Boulder Canyon Project Act
18 1928, and *et. seq.* eleven or more laws, rules, treaties, regulations, or minutes (“Law of the
19 River”).⁴ Fourth, this Petition also raises to the Court the resulting facts alleged by NSE Order
20 1309 requiring a limitation on groundwater pumping and permission to maintain and utilize
21 temporary permits of transfer groundwater rights from Black Mountain Basin to Garnet Valley
22 Basin of the LWRFS, by, *inter alios*, APEX and DRY LAKE. Fifth, this Petition raises the legal
23 and factual issues arising from the NSE limiting and preventing evidence and facts at the hearing
24 resulting in NSE Order 1309. Finally, this Petition also may relate to the other factual or legal
25 positions which may be developed in the hearing conducted by the Court.
26

27 _____
28 ⁴ See, for example, <https://www.usbr.gov/lc/region/pao/lawofrvr.html>.

1 **B. ORDER 1303.**

2 On January 11, 2019, the State Engineer issued Interim Order 1303 to obtain stakeholder
3 input on four specific factual matters: 1) the geographic boundary of the LWRFS, 2) aquifer
4 recovery since the 1169 pump test, 3) long-term annual quantity that may be pumped from the
5 LWRFS, and 4) effects of moving water rights between the carbonate and alluvial system to
6 senior water rights on the Muddy River.⁵ After factual findings were made on those questions,
7 the State Engineer was to evaluate groundwater management options for the LWRFS.
8

9 On May 13, 2019, the State Engineer amended Order 1303 and modified certain
10 deadlines for filing reports. On July 25, 2019, the State Engineer issued a Notice of Pre-Hearing
11 Conference. On August 23, 2019, the State Engineer held a prehearing conference. At the
12 prehearing conference, Hearing Officer Fairbank unequivocally stated that “the purpose of the
13 hearing is not to resolve or address allegations of conflict between groundwater pumping within
14 the LWRFS and Muddy River decreed rights.”⁶ On August 23, 2019, the State Engineer issued a
15 Notice of Hearing, and again clarified the limited scope of the hearing.
16

17 In July and August 2019, reports and rebuttal reports were submitted discussing the four
18 matters set forth in Order 1303. Several parties filed objections to witnesses and evidence. Most
19 of the objections were related to the scope of the topics in the submitted evidence. On August
20 23, 2019, the State Engineer issued an Order on Objections to Witnesses and Evidence. The
21 State Engineer agreed that “the evidence presented in the hearing is to be limited to the four
22 issues identified in the Notice of Hearing.” The State Engineer allowed all evidence to be
23 presented, but again warned that the “scope of the testimony shall be limited to the four issues
24

25 ⁵ Exhibit 3 at 2 (“The State Engineer directed the participants to limit the offer of evidence and testimony
26 to the salient conclusions, including directing the State Engineer and his staff to the relevant data,
27 evidence and other information supporting those conclusions. The State Engineer further noted that the
28 hearing on the Order 1303 reports was the first step in determining to what extent, if any, and in what
manner the State Engineer would address future management decisions, including policy decisions
relating to the [LWRFS] basins.”)

⁶ Exhibit 4, at 12:6-15.

1 identified in Order 1301” and cautioned that while some evidence could be submitted outside the
2 specific scope but that the State Engineer “may order a line of questioning to cease or to remain
3 limited to the relevant issues that are the subject of the hearing.”⁷

4 **C. NSE ORDER 1309 FACTS SUPPORTING THIS PETITION.**

5 On June 15, 2020, the NSE Order 1309 determined that “reductions in flow that have occurred
6 because of groundwater pumping in the headwaters basins (i.e., LWRFS) is not conflicting with
7 the Decreed rights (i.e., the senior rights of SNWA, LVVWD and others).”⁸

8 A study by the United States Department of the Interior, Geologic Survey (“USGS”) in
9 1989, which is contemporaneous with the Act of Congress referred to above,⁹ concluded at page
10 2 of that 1989 report by the USGS as follows:

11
12 Large-scale development (sustained withdrawals) of water from the carbonate-
13 rock aquifers would result in water-level declines and cause the depletion of large
14 quantities of stored water. Ultimately, these declines would cause reductions in
15 the flow of warm-water springs that discharge from the regional aquifers. Storage
16 in other nearby aquifers also might be depleted, and water levels in those other
17 aquifers could decline. In contrast, isolated smaller ground-water developments,
18 or developments that withdraw ground water for only a short time, may result in
19 water-level declines and springflow reductions of manageable or acceptable
20 magnitude.

21 Confidence in predictions of the effects of development, however, is low; and it
22 will remain low until observations of the initial hydrologic results of development
23 are analyzed. A strategy of staging developments gradually and adequately
24 monitoring the resulting hydrologic conditions would provide information that
25 eventually could be used to improve confidence in the predictions.

26 The NSE confirmed the statement above that “Confidence in predictions of the effects of
27 development, however, is low;” unless there were additional studies, and as cited in NSE Order
28 1309 at pages 7-10 the evidence submitted by parties to the hearings and studies on Order 1303
and 1309 was conflicting and inconsistent with the finding of adverse impact of pumping in the

24 _____
25 ⁷ August 23, 2019, Order on Objections.

26 ⁸ Exhibit 1 at 61.

27 ⁹ Memorandum dated August 3, 1984, from Terry Katzer, Nevada Office Chief, Water Resources
28 Division, United States Department of Interior Geologic Survey, Carson City, Nevada to Members of the
Carbonate Terrane Study.

1 LWRFS to the natural springs, and surface water of the MRFS.

2 By its terms, the 2006 Memorandum of Agreement (“MOA”) between SNWA and other
3 parties¹⁰ and all actions, evidence and resulting NSE Order 1169 and its subsequent Orders
4 1169A, 1303, and 1309 developed by or because of such MOA, are binding only upon and
5 enforceable against the parties to the MOA, and to the NSE to the extent adopted by the NSE,
6 and are not binding upon or enforceable against APEX or DRY LAKE, *inter alios*.

7
8 There is a factual admission against interest by the NSE, SNWA and LVVWD, and the
9 other parties to the MOA, that they deliberately designed and started a study process with the
10 NSE entitled Southern Nevada Water Authority Order 1169 Report (“Study”),¹¹ which actually
11 reached a conclusion directly and immediately beneficial to the interests of senior water rights
12 owners in the LWRFS and MRFS, and the Moapa Dace, and directly and immediately
13 detrimental to the interests of APEX, DRY LAKE, and *inter alios*.

14 Some water rights owners (i.e., SNWA and LVVWD, and the other parties to the MOA)
15 with water rights interests in both the LWRFS and MRFS, entered into the MOA which resulted
16 in NSE Order 1169, and its subsequent Orders 1169A, 1303, and 1309. Then, some water rights
17 owners, which are parties to the MOA, developed the Study¹² of the LWRFS and MRFS, in such
18 a way that NSE Order 1309 now seeks to apply limitations developed by the MOA and Study to
19 all water rights owners in the LWRFS. That application of the MOA and Study to all water
20 rights owners in the LWRFS restricts all water rights owners of their beneficial use of water
21 rights in the LWRFS to, and for, the benefit and protection of the natural springs, streams and
22

23 ¹⁰ NSE Ex. 236, 2006 Memorandum of Agreement between the Southern Nevada Water Authority,
24 United States Fish and Wildlife Service, Coyote Springs Investment LLC, Moapa Band of Paiute Indians,
25 and Moapa Valley Water District, Hearings on Interim Order 1303, official records of the Division of
26 Water Resources.

27 ¹¹ NSE Ex. 245, Hearing on Interim Order 1303, official records of the Division of Water Resources.

28 ¹² See MOA Pumping Study performed by the parties to the MOA pursuant to Order 1169,
http://water.nv.gov/mapping/order1169/Order_1169_Final_Reports/SNWA%20Order%201169%20Report.pdf.

1 groundwater tributary to the MRFS. That action started by NSE Order 1169, implemented by the
2 MOA and Study, and culminated in NSE Order 1309, which exclusively benefits some water
3 rights owners, which are the parties to the MOA, and specifically and exclusively damages all
4 water rights owners in the LWRFS, all without protections of due process, equal protection, and
5 other Constitutional and legal rights accorded for all water rights owners in the LWRFS;
6 especially damaging APEX, DRY LAKE, and *inter alios*.

7
8 Some water rights owners, as parties to the MOA and Study, admit that some water rights
9 owners as Petitioners now seek court orders modifying NSE Order 1309 in such a way as to
10 grant them more rights to water in the LWRFS and MRFS, at the expense of and direct and
11 immediate damage to all water rights owners in the LWRFS; especially damaging APEX, DRY
12 LAKE, and *inter alios*.

13 APEX and DRY LAKE do not support any conclusion of fact or law, which due to the
14 MOA and Study, and all actions, evidence and resulting NSE Order 1169, and its subsequent
15 Orders 1169A, 1303, and 1309 developed by or because of such MOA and Study, which would
16 have the effect of: first, that thereby subjects the DRY LAKE water rights to the adverse
17 restriction or limitation on beneficial use of groundwater due to the alleged tributary nature of
18 such groundwater pumping in the LWRFS to the natural springs, streams and groundwater
19 tributary to the MRFS, and thus, second, because of that tributary Order 1309, finds that the
20 LWRFS is tributary to the Colorado River Flow System, and thus, third, subjects the LWRFS to
21 severe restrictions imposed by the allocation methods of water use between states by restrictions
22 and limitations pursuant to the Law of the River.¹³

24 APEX and DRY LAKE take the factual and legal position that if any restrictions or
25 limitations on the use of ground or surface water in the LWRFS is determined to be necessary for
26 meeting the requirements of the Moapa Dace or senior surface or ground water rights in the
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28 ¹³ See, for example, <https://www.usbr.gov/lc/region/pao/lawofrvr.html>.

1 MRFS or the Colorado River Flow System, it is the sole and exclusive obligation and
2 responsibility of some water rights owners, who are the parties to the MOA, Study and NSE,
3 who agreed between themselves to the exclusion of all water rights owners, that there was a
4 detrimental impact on existing water rights and the environment by pumping of groundwater in
5 the LWRFS.¹⁴

6
7 The NSE issued Order 1303, based upon the MOA, and Order 1169, which started a
8 hearing process resulting in Order 1309 before the Court today, where only four factual issues
9 (and no legal issues) could be addressed. This is based upon the factual assumption and
10 conclusion of the MOA and resulting Study pumping tests of the LWRFS that groundwater use
11 in the LWRFS was tributary to the MRFS, and, thus, the LWRFS had to be limited and restricted
12 on beneficial use of water rights to protect the Moapa Dace and the senior water rights of the
13 parties to the MOA; which is thereby detrimental to the property rights in water by all water
14 rights owners in the LWRFS; especially damaging APEX, DRY LAKE, and *inter alios*..

15 By written admission of the NSE and parties to the MOA, the limitation against APEX
16 and DRY LAKE to submit additional evidence and law other than to the four factual issues, was
17 and is arbitrary and capricious, and a denial of the protections of due process, equal protection,
18 and other Nevada Constitutional and legal rights for the APEX and DRY LAKE water rights,
19 and also, incidentally, all water rights owners in the LWRFS.

20
21 To the extent that APEX and/or DRY LAKE did or did not participate in the process by
22 the NSE and MOA parties resulting in Order 1309, APEX and/or DRY LAKE so acted to avoid
23 being complicit in, or a party to, the denial of the protections of due process, equal protection,
24 and other Constitutional and legal rights for the APEX and DRY LAKE water rights, and also,
25 incidentally, all water rights owners in the LWRFS. APEX and DRY LAKE only participated to
26 the extent necessary to be a part of any comprehensive or conjunctive use management plan

27
28 ¹⁴ Petition at lines 8-15, page 3.

1 voluntarily developed by 100% of all water rights owners of the LWRFS and MRFS as stated in
2 NSE Order 1303.¹⁵

3 The NSE and parties to the MOA knew, and have known at all relevant times, that neither
4 the NSE or MOA parties have the right, duty, power or responsibility to impose a comprehensive
5 or conjunctive use management plan or any other management plan, which thereby would erase
6 the protection of prior appropriation for all water rights owners in the LWRFS, in favor of the
7 prior rights of appropriation of some water rights owners, SNWA, and the parties to the MOA.¹⁶

8 As stated in Order 1309, all factual calculations of groundwater water usage and the
9 resulting impact of that groundwater usage on LWRFS or MRFS water rights or the Moapa Dace
10 were “estimates,” “assumptions,” “considered to be,” and other words connoting approximation
11 and guess to the extent that the range of values testified to were between 4,000 acre feet per year
12 (“AFY”) or less and 10,000 AFY or more.¹⁷

13 The NSE stated that the hearings which resulted in Order 1309 were “... not to resolve or
14 address allegations of conflict between groundwater pumping within the LWRFS and ... MRFS
15 ... decreed rights.” However, by Order 1309, the NSE then went forward and found and ordered
16 upon that finding in Order 1309 that LWRFS groundwater pumping did, in fact, capture MRFS
17 flows and therefore must be limited to 8,000 AFY, pending further investigations.¹⁸

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22 ¹⁵ Petition, lines 18-19, page 4. See, for example, the guidance of the reasoning in the contemporaneous
23 *Diamond Valley Aquifer* case striking down as arbitrary and capricious, pursuant to NRS 533.325 and
24 NRS 533.345, the NSE Order 1302, (*Bailey vs. Wilson*, Case No. CV-1902-348 consolidated with case
25 nos. CV-1902-349 and CV-1902-350, Seventh Judicial District, April 27, 2020 [*Bailey vs. Wilson*].)

26 ¹⁶ See *Bailey vs. Wilson*, and see also, *Ormsby County v. Kearny*, 37 Nev. 314, 142 P. 803, 820 (1914).

27 ¹⁷ Order 1309 at pages 57 and 61. See also, for example, the MOA Pumping Study performed by the
28 parties to the MOA pursuant to Order 1169,
29 [http://water.nv.gov/mapping/order1169/Order_1169_Final_Reports/SNWA%
30 20Order%201169%20Report.pdf](http://water.nv.gov/mapping/order1169/Order_1169_Final_Reports/SNWA%20Order%201169%20Report.pdf).

31 ¹⁸ Petition, at lines 11-24, page 6, and Order 1309.

1 Congress for the purpose of serving the crucial national interest, and the public health, safety,
2 and welfare interests of Clark County and the State of Nevada. As such, to the extent that NSE
3 Order 1309 defeats or interferes with achieving the intent and purposes of the Act of Congress,
4 NSE Order 1309 is invalid and unenforceable.

5 **D. THE NSE ORDER 1309 CONFLICTS WITH A PRIOR CONTROLLING**
6 **DECISION AND REGULATION AND IS VIOLATIVE OF NEVADA**
7 **CONSTITUTION AND LAW.**

8 The LWRFS previously has been declared as water eligible for “Intentionally Created
9 Surplus Credits” for the Colorado River System, as being not tributary to the MRFS, except by
10 importation. Thus, the findings of the tributary nature of the LWRFS to the MRFS, and thence
11 to the Colorado River Flow System in NSE Order 1309, is contrary to prior studies and
12 regulations under the Law of the River.

13 **E. THE SEO HAS NO AUTHORITY TO REGULATE OR RESTRICT**
14 **LWRFS WATER USE FOR PROTECTION OF THE MOAPA DACE AS**
15 **PARTIES TO NSE ORDER 1169 AND THE MOA VOLUNTARILY HAVE**
16 **ALREADY ADDRESSED AND RESOLVED THE ISSUE.**

17 *See*, for example the following quote from the MOA Study conducted under Order 1169:

18 “SNWA conducts biological resource monitoring and habitat restoration in
19 accordance with a 2006 Memorandum of Agreement (MOA) and associated
20 Biological Opinion to conserve the endangered Moapa dace during development
21 of its permitted groundwater rights Coyote Spring Valley. In April 2006, the
22 MOA was entered into by the following five parties: SNWA, USFWS, CSI,
23 MBPI, and MVWD, to conserve and recover the Moapa dace while developing
24 and using permitted water rights.” Paragraph N of the MOA states: “... the
25 Parties have identified certain conservation measures with the objective of making
26 measurable progress toward the conservation and recovery of the Moapa dace,
27 and have agreed to coordinate the monitoring, management, and mitigation
28 measures” As of 2013, all efforts associated with the MOA have been or are
being implemented. In addition to the trigger elevations established under the
MOA at the USGS 09415920 Warm Springs West near Moapa, Nevada (Warm
Springs West) gage, under which groundwater development by the section
3.0203.0 Order 1169 Monitoring and Related Studies Parties would be
incrementally curtailed if flows declined to specific levels, the MOA Parties
agreed to a series of conservation measures for the Moapa dace. These measures
included contributions of roughly \$1.275 million for Moapa dace habitat
restoration, the development of an ecological model of Moapa dace habitat,
installation of fish barriers, and eradication of non-native fish. To date, the
Parties have provided the identified funds; completed habitat restoration specified
under the MOA with additional restoration ongoing; substantially completed the
ecological model; installed one fish barrier with another planned; and efforts to

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eradicate non-native fish have been implemented and are continuing as needed. In 2007, SNWA purchased the 1,220-acre parcel formally known as the "Warm Springs Ranch," which was the largest tract of private property along the Muddy River and contains the majority of the historical habitat for the endangered Moapa dace. SNWA renamed the property the Warm Springs Natural Area (WSNA) and is managing it as a natural area for the benefit of native species and for the recovery of the endangered Moapa dace, as described in the WSNA Stewardship Plan dated June 2011. Stream restoration activities on the WSNA began in late 2008 and continued through 2012, resulting in improvements to habitat where the Moapa dace currently are present. The population count of the Moapa dace is a key indicator of species well-being in the headwaters of the Muddy River. Recent population counts indicate the Moapa dace population began to rise during 2010 and 2011 and nearly doubled in 2012. Thus, the MOA conservation actions have resulted in measurable progress towards conservation and recovery of the Moapa dace, during which groundwater development for beneficial use and to meet the objectives of the Order 1169 Study has occurred. Figure10 shows the population of the Moapa dace from 1994 to the present.”¹⁹

F. THE DUTIES OF THE NSE DO NOT EXTEND TO THE ACTIONS TAKEN UNDER NSE ORDER 1309, AND THEREFORE NSE ORDER 1309 IS ARBITRARY AND CAPRICIOUS AND CONTRARY TO NEVADA CONSTITUTION AND LAW.

“The mission of the Nevada Division of Water Resources (NDWR) is to conserve, protect, manage and enhance the State's water resources for Nevada's citizens through the appropriation and reallocation of the public waters. In addition, the Division is responsible for quantifying existing water rights; monitoring water use; distributing water in accordance with court decrees; reviewing water availability for new subdivisions and condominiums; reviewing the construction and operation of dams; appropriating geothermal water; licensing and regulating well drillers and water rights surveyors; reviewing flood control projects; monitoring water resource data and records; and providing technical assistance to the public and governmental agencies.”²⁰

Nothing said therein permits the NSE to make a determination of tributary connection, which would have the immediate effect of making waters of the public of Nevada and water rights of the LWRFS subject to the Law of the River, and, thus, subject to curtailment for the benefit of other states in the Colorado River Flow System.

¹⁹ See http://water.nv.gov/mapping/order1169/Order_1169_Final_Reports/SNWA%20Order%201169%20Report.pdf at Section 3.4.2, page 19.

²⁰ See <http://water.nv.gov/> and see also <https://www.leg.state.nv.us/NRS/NRS-532.html>.

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G. THE NSE ORDER 1309 WAS ISSUED ON A FLAWED FACTUAL BASIS OF THE CONNECTION BETWEEN LWRFS PUMPING AND MRFS SENIOR WATER RIGHTS, WHICH IS DIRECTLY CONTRARY TO THE FINDINGS OF THE MOA PUMPING STUDY.

“This clearly demonstrates that nearby carbonate pumping is not influencing Muddy River flows at the Moapa gage and is therefore not influencing senior Muddy River surface-water rights.” “Thus, the conclusions drawn in the previous section regarding the lack of influence of carbonate pumping on flows in the Muddy River are supported, as is the conclusion that NVE alluvial pumping is capturing water that would have otherwise constituted Muddy River water apportioned under the 1920 Muddy River decree.”

H. DUE PROCESS AND EQUAL PROTECTION, DEPRIVATION AND VIOLATION.

The SEO restricted the presentation of all forms of evidence by APEX and DRY LAKE, inter alios, including facts and law, as evidence in arriving at NSE Order 1309. NSE Order 1309 was based solely upon four factual issues, which already had presumed that the waters of the LWRFS were tributary to the MRFS.

I. VIOLATION OF THE PRECEDENTIAL RULING AGAINST THE NSE IN THE DIAMOND VALLEY CASE (BAILEY VS. WILSON).

The well-reasoned and substantial contemporaneous District Court case of *Bailey vs. Wilson* is instructive regarding the exercise of powers by the NSE. Simply, what Order 1309 does is subvert the priority of the appropriation system of Nevada, which the case of *Bailey vs. Wilson* holds as arbitrary and capricious and contrary to Nevada law. There is no law authorizing the NSE to voluntarily give to the other Colorado Basin States non-tributary waters of the LWRFS in Nevada, which belongs to the people of Nevada subject to the doctrine of prior appropriation. Instead by Order 1309, the NSE adopts the words and arguments of the Department of the Interior (USFWS, NPS, Bu Rec and etc. federal agencies), which are in charge of administering the Law of the River, and, thus, have adverse interests to the public of Nevada, who otherwise would enjoy the sole and exclusive use of the waters of the LWRFS. As *Bailey vs. Wilson* holds, the sole right, duty and responsibility of the NSE is to work toward the jointly created comprehensive and conjunctive management plan by all water rights owners in the LWRFS or have the Legislature of Nevada create the basis for the NSE to declare a Critical Management Area, pursuant to NRS 534.037.100. And even then, no law can be passed which

1 would make the LWRFS tributary to the MRFS and, thus, subject to curtailment for the benefit
2 of other states of the Colorado River Flow System under the Law of the River. The NSE cannot
3 be heard to state that Nevada would suffer liability for failure to protect the Moapa Dace because
4 the case of *Strahan vs. Coxe*, 127 F.3rd 155 (1st Circuit, 1997), cert. den. 525 U.S. 830 (1998)
5 holds that no such liability attaches due to the NSE issuing permits which withdraw water that
6 reduces the flow of springs that form the habitat of the Moapa Dace or otherwise cause harm to
7 the Moapa Dace.

8 **IV. CONCLUSION**

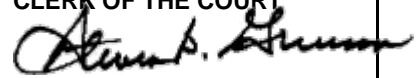
9 For the foregoing reasons, and for other reasons that may be discovered and raised during
10 the pendency of the hearing on the original Petition, this Petition for Judicial Review, and other
11 similar Petition or Cross-Petition filed in this proceeding or consolidated with this proceeding,
12 APEX and DRY LAKE request that the Court order the NSE to withdraw, amend or otherwise
13 strike findings made in NSE Order 1309, regarding the tributary connection and nature of the
14 LWRFS to the natural springs, headwaters and water supplies for, and to, the MRFS, so as to not
15 deprive APEX and DRY LAKE of its land use, water rights, duties and responsibilities to
16 comply with the national interest and interests of Clark County and the State of Nevada provided
17 for in the Act of Congress, and also seek a Court order such that APEX and DRY LAKE may
18 exercise their Black Mountain Basin and Garnet Basin groundwater rights and temporary permits
19 in the LWRFS as non-tributary groundwater to the MRFS without limitation, interference,
20 restrictions or delay, and specifically exempting those water rights from reductions due to the
21 Moapa Dace, MRFS senior water rights, or the Law of the River.

22 Dated this 10th day of July, 2020.

23 MARQUIS AURBACH COFFING

24
25 By /s/ Christian T. Balducci
26 Christian T. Balducci, Esq.
27 Nevada Bar No. 12688
28 10001 Park Run Drive
Las Vegas, Nevada 89145
*Attorneys for Petitioners Apex Holding
Company, LLC and Dry Lake Water, LLC*

Attachment 4



CASE NO: A-20-817876-P
Department 24

1 PTJR
2 Julie Cavanaugh-Bill (NV Bar No. 11533)
3 Attorney & Counselor at Law
4 CAVANAUGH-BILL LAW OFFICES, LLC
5 Henderson Bank Building
6 401 Railroad Street, Suite 307
7 Elko, Nevada 89801
8 TEL: 775-753-4357
9 FAX: 775-753-4360
10 julie@cblawoffices.org

11 Lisa T. Belenky (CA Bar No. 203225), *Pro Hac Vice to be submitted*
12 CENTER FOR BIOLOGICAL DIVERSITY
13 1212 Broadway, Suite 800
14 Oakland, CA 94612
15 TEL: 415-632-5307
16 FAX: 510-844-7150
17 lbelenky@biologicaldiversity.org

18 Douglas Wolf (NM Bar No. 7473), *Pro Hac Vice to be submitted*
19 CENTER FOR BIOLOGICAL DIVERSITY
20 3201 Zafarano Drive
21 Suite C, #149
22 Santa Fe, NM 87507
23 TEL: 202-510-5604
24 dwolf@biologicaldiversity.org

25 *Attorneys for Petitioner*

26 **DISTRICT COURT**
27 **CLARK COUNTY, NEVADA**

28 CENTER FOR BIOLOGICAL DIVERSITY,

Petitioner,

vs.

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

Respondents.

Case No. _____

Dept No. _____

**PETITION FOR JUDICIAL REVIEW OF
ORDER 1309**

1 Petitioner, the CENTER FOR BIOLOGICAL DIVERSITY, by and through its counsel,
2 Julie Cavanaugh-Bill of CAVANAUGH-BILL LAW OFFICES, LLC, hereby requests, pursuant
3 to NRS § 533.450(1), that this Court review Order 1309, issued by Respondents TIM WILSON,
4 P.E., Nevada State Engineer, and DIVISION OF WATER RESOURCES, DEPARTMENT OF
5 CONSERVATION AND NATURAL RESOURCES on June 15, 2020, and attached hereto as
6 Exhibit 1. Petitioner alleges as follows:

7 **PARTIES**

8 1. Respondent TIM WILSON, P.E. is the State Engineer of the State of Nevada,
9 Division of Water Resources, and is sued in his official capacity.

10 2. Respondent DIVISION OF WATER RESOURCES, DEPARTMENT OF
11 CONSERVATION AND NATURAL RESOURCES is a governmental division of the State of
12 Nevada.

13 3. Petitioner, the CENTER FOR BIOLOGICAL DIVERSITY (“the Center”), is a
14 national, non-profit conservation organization incorporated in California and headquartered in
15 Tucson, Arizona. The Center has over 74,000 members including members who reside in Nevada.
16 The Center has offices throughout the United States and Mexico, including in Arizona, California,
17 Florida, Hawaii, Idaho, Minnesota, Nevada, New Mexico, New York, North Carolina, Oregon,
18 Washington, Washington D.C., and La Paz, Baja California Sur, Mexico. Many of the Center’s
19 members who reside in Nevada and neighboring states live, visit, or recreate in and near areas
20 directly affected by Order 1309. In particular, the Center and its members have educational,
21 scientific, biological, aesthetic and spiritual interests in the survival and recovery of the Moapa
22 dace, a small fish endemic to the Muddy River Springs Area within the Lower White River Flow
23 System. The Moapa dace is imperiled by diminishing spring flows caused by groundwater
24 pumping in the Lower White River Flow System, and is listed as endangered under the Federal
25 Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.* To protect its interests in the survival and
26 recovery of the Moapa dace the Center submitted technical reports pursuant to Nevada State
27 Engineer Order 1303 and participated in a public hearing before the State Engineer, held between
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1 September 23, 2019 and October 4, 2019, the ultimate outcome of which was Order 1309. The
2 Center is aggrieved by the State Engineer’s decision because the interests of the Center and its
3 members in the survival and recovery of the Moapa Dace will suffer long-term harmful impacts
4 from the groundwater drawdown and springflow reductions authorized under Order 1309.

5 **JURISDICTION AND VENUE**

6 4. This Court has jurisdiction over this action pursuant to NRS § 533.450 (Orders and
7 decisions of the State Engineer subject to judicial review).

8 5. The Court has the authority to review the State Engineer’s Order, and grant the
9 relief requested, pursuant to NRS § 533.450. All requirements for judicial review have been
10 satisfied.

11 6. Venue is proper before this Court pursuant to NRS § 533.450. Clark County is a
12 “county in which the matters affected or a portion thereof are situated.” NRS § 533.450(1).
13 Therefore, the Eighth Judicial District Court of the State of Nevada in and for Clark County is the
14 proper venue for judicial review.

15 7. In addition, the subject matter of the petition involves decreed waters of the Muddy
16 River Decree. Under NRS § 533.450(1), “on stream systems where a decree of court has been
17 entered, the action must be initiated in the court that entered the decree.” This court has proper
18 jurisdiction over the Muddy River Decree, *Muddy Valley Irrigation Company et al., v. Moapa Salt*
19 *Lake Produce Company*, Case No. 377, which was entered in the Tenth Judicial District of the
20 State of Nevada, in and for Clark County, in 1920.¹

21 8. The State Engineer’s order and the matters affected by it are the subject of related
22 litigation pending before this Court. *See* Petition for Judicial Review of Order 1309, *Las Vegas*
23 *Valley Water Dist. & S. Nev. Water Auth. v. Nev. State Eng’r*, Case No. A-20-816761-C (June 17,
24 2020).

25
26 ¹ In 1920, the Tenth Judicial District consisted of Clark County and Lincoln County. In 1945, Clark
27 County was designated as the Eighth Judicial District.

1 **FACTUAL BACKGROUND**

2 **I. The Lower White River Flow System**

3 9. The Lower White River Flow System (“LWRFS”) is a geographically vast complex
4 of hydrologically connected groundwater aquifers in Southern Nevada. The groundwater in these
5 aquifers is contained within and flows through a fairly continuous layer of carbonate rock that
6 extends below several geographically distinct basins or valleys in Clark and Lincoln counties,
7 including Coyote Springs valley, the Black Mountains region, Garnet Valley, the California Wash
8 basin, Hidden Valley, Kane Springs Valley,² and the Muddy River Springs Area (“MRSA”).³

9 10. This carbonate-rock aquifer complex is “highly transmissive,” meaning that
10 pumping from anywhere within the carbonate aquifer system rapidly affects groundwater levels
11 and spring flows throughout the entire Lower White River Flow System.⁴

12 11. The interconnected, highly transmissive carbonate-rock aquifers of the Lower
13 White River Flow System ultimately discharge (*i.e.*, exit the aquifer) into the Colorado River.⁵ The
14 main points of discharge are the Muddy River Springs, located in the Muddy River Springs Area
15 within and adjacent to the Moapa National Wildlife Refuge in Clark County.⁶ The springs form
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17 ² In Order 1309, the State Engineer determined that Kane Springs Valley should be included within
18 the boundary of the Lower White River Flow System due to a “close hydraulic connection.”
19 Exhibit 1 at 52 (CBD000052) (exhibits referenced in this Petition are filed concurrently in a
20 separate Appendix, references to the bates stamped page numbers in the Appendix are provided
21 as “CBD___”). The Center agrees with and supports the State Engineer’s conclusion on this
22 issue as set forth in Order 1309.

23 ³ Exhibit 1 at 46, 51-54 (CBD000046, CBD000051-54).

24 ⁴ Exhibit 7 at 26 (CBD000170).

25 ⁵ *Id.* at 21 (CBD000165).

26 ⁶ *Id.*

1 the headwaters of the Muddy River, which then flows from the Refuge area into the Colorado
2 River at Lake Mead.⁷ Significantly smaller quantities of groundwater may discharge from the
3 Lower White River Flow System through other springs near the shore of Lake Mead, or seep
4 directly into the Colorado River through a hydrologically distinct “basin-fill” aquifer in the Muddy
5 River Springs area.⁸

6 12. The Muddy River springs are thus directly connected to the regional carbonate-rock
7 aquifers of the Lower White River Flow System.⁹ Because of this connection, flows from the
8 springs can change rapidly in direct response to changes in carbonate groundwater levels.¹⁰ Put
9 differently, groundwater withdrawals from anywhere within the carbonate aquifer complex
10 intercept, or “capture,” water that would otherwise flow from the Muddy River springs and into
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15 ⁷ See generally *id.*

16 ⁸ *Id.* at 25-26 (CBD000169-70). The “basin-fill” and carbonate aquifers in the Lower White River
17 Flow system exist within different geologic layers and are fed by different sources of water.
18 Data on the effects of groundwater pumping indicates that the basin fill aquifers in the Muddy
19 River Springs area are connected to the carbonate aquifer, while the basin fill aquifers in
20 Coyote Springs Valley to the northwest are separate from the carbonate. *Id.* at 13
21 (CBD000157). Consequently, the carbonate aquifer near the Muddy River Springs feeds water
22 into, or “recharges,” the basin fill aquifer, but there is no such connection between the
23 carbonate and basin fill in the Coyote Springs Valley. *Id.* There is no evidence that the basin
24 fill recharges the carbonate anywhere in the Lower White River Flow system. *Id.*

25 ⁹ *Id.* at 15 (CBD000159); Exhibit 8 at 29 (CBD000200).

26 ¹⁰ Exhibit 8 at 29 (CBD000200).

1 the Muddy River.¹¹ Over the long term, pumping from the carbonate aquifer captures discharge—
2 including spring flow—at nearly a one-to-one ratio.¹²

3 13. Springflows in the Muddy River Springs Area are dependent on the elevation of
4 groundwater within the carbonate aquifer; as carbonate groundwater levels decline, springflows
5 decrease, beginning with the highest-elevation springs.¹³ Over time, as groundwater levels
6 continue to decline, pumping will gradually and increasingly affect lower-elevation discharge as
7 well.¹⁴ The higher-elevation Muddy River springs are therefore more rapidly and more severely
8 affected by carbonate groundwater pumping than lower-elevation springs and other sources of
9 discharge, and the higher-elevation springs—which harbor the vast majority of Moapa dace—will
10 dry up before flows are significantly reduced in the lower-elevation springs or the Muddy River
11 system more generally.¹⁵

12 14. Springflows and groundwater levels in the Muddy River Springs Area began to
13 decline in the 1990s as carbonate groundwater pumping increased.¹⁶ From 2000 to 2010 carbonate
14 pumping rose from about 4,800 to about 7,200 acre-feet per year,¹⁷ while spring flows (as
15 measured at the Warm Springs West gauge in the Moapa National Wildlife Refuge) declined from
16 about 4.0 cubic feet per second (cfs) to as low as 3.4 cfs between the 1990s and mid-2000s.¹⁸ The

19 ¹¹ *Id.*

20 ¹² *Id.*

21 ¹³ *Id.*

22 ¹⁴ *Id.*

23 ¹⁵ *Id.*; Exhibit 4 at 24 (CBD000108).

24 ¹⁶ Exhibit 7 at 24 (CBD000168).

25 ¹⁷ *Id.* at 22 (CBD000166).

26 ¹⁸ *Id.* at 16 (CBD000160).

1 smaller, high-altitude Muddy River springs are currently flowing at little more than half of their
2 1990s average.¹⁹

3 **II. The Moapa Dace**

4 15. The Moapa dace (*Moapa coriacea*) is endemic to the Muddy River Springs Area.²⁰
5 The dace was federally listed as endangered in 1967.²¹

6 16. The Moapa dace is found only in the upper tributaries of the Muddy River.²²
7 Approximately 95 percent of the total population occurs within 1.78 miles of one major tributary
8 that flows from three high-elevation spring complexes within the Muddy River Springs area.²³

9 17. Threats to the Moapa Dace include non-native predatory fishes, habitat loss from
10 water diversions and impoundments, wildfire risk from non-native vegetation, and groundwater
11 development in the Lower White River Flow System which, as noted, decreases spring flows in
12 the Muddy River Springs area.²⁴

13 18. The Moapa Dace is vulnerable to unpredictable catastrophic events due to its
14 limited distribution and small population size.²⁵

15 **III. Order 1169 Pump Test**

16 19. The State Engineer issued Order 1169 in March 2002 after receiving several
17 applications to appropriate groundwater from the Coyote Springs Valley, Black Mountains Area,
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19

20 ¹⁹ *Id.* at 22-24 (CBD000166-68).

21 ²⁰ Exhibit 1 at 4 (CBD000004).

22 ²¹ *Id.*

23 ²² Exhibit 4 at 24 (CBD000108).

24 ²³ *Id.*

25 ²⁴ *Id.* at 15 (CBD000099).

26 ²⁵ *Id.*

1 Garnet Valley, Hidden Valley, California Wash, and Muddy River Springs Area hydrographic
2 basins.²⁶

3 20. Order 1169 held in abeyance all pending groundwater applications in the Coyote
4 Springs Valley, Black Mountains Area, Garnet Valley, Hidden Valley, Muddy River Springs Area,
5 and Lower Moapa Valley hydrographic basins pending a test of the regional carbonate aquifer
6 system.²⁷ The State Engineer explained that he did not believe it prudent to issue additional
7 groundwater rights in the regional carbonate aquifer complex until a significant portion of then-
8 existing groundwater rights were pumped for a substantial period of time to determine whether
9 development of those water rights would adversely impact senior water rights or the
10 environment.²⁸

11 21. Order 1169 required that at least 50 percent, or 8,050 acre-feet per year, of then-
12 existing water rights in Coyote Spring Valley be pumped for at least two consecutive years.²⁹ In
13 April 2002 the State Engineer added the California Wash basin to the Order 1169 pump test
14 basins.³⁰

15 22. The Order 1169 pump test began in November 2010 and concluded in December
16 2012.³¹ During the test an average of 5,290 acre-feet per year was pumped from carbonate-aquifer
17 wells in Coyote Springs Valley and a cumulative total of 14,535 acre-feet per year was pumped
18 throughout the Order 1169 study basins.³²

20 ²⁶ Exhibit 1 at 3 (CBD000003).

21 ²⁷ *Id.*

22 ²⁸ *Id.*; Exhibit 2 at 7 (CBD000075).

23 ²⁹ Exhibit 1 at 3 (CBD000003).

24 ³⁰ *Id.*

25 ³¹ *Id.* at 5 (CBD000005).

26 ³² *Id.* at 6 (CBD000006).

1 23. The Order 1169 pump test results demonstrated that there is a “unique” and “direct
2 hydraulic connection” between the regional carbonate aquifer complex and the Muddy River
3 springs, and that pumping from anywhere within the carbonate aquifer complex captures flows
4 that would otherwise ultimately discharge from the Muddy River springs.³³ The pump test caused
5 “sharp declines” in groundwater levels and flows from the highest-elevation Muddy River springs,
6 which are considered the “canary in the coalmine” regarding the impacts of pumping on
7 streamflow and Moapa dace habitat.³⁴

8 24. On January 29, 2014, after reviewing the pump test results, the State Engineer
9 found that “pumping under the Order 1169 test measurably reduced flows in headwater springs of
10 the Muddy River,” and that, “if pending water right applications were permitted and pumped in
11 addition to existing groundwater rights in Coyote Spring Valley and the other Order 1169 basins,
12 headwater spring flows would be reduced in tens of years or less to the point that there would be
13 a conflict with existing rights.”³⁵

14 25. The State Engineer also found that, “to permit the appropriation of additional
15 groundwater resources in the Coyote Spring Valley . . . would impair protection of these springs
16 and the habitat of the Moapa dace and therefore threatens to prove detrimental to the public
17 interest.”³⁶

18 26. Finally, the State Engineer concluded that “only a small portion” of existing water
19 rights, “may be fully developed without negatively affecting the endangered Moapa dace and its
20 habitat or the senior decreed rights on the Muddy River.”³⁷

22 ³³ Exhibit 3 at 7-11 (CBD000086-90); Exhibit 5 at 26 (CBD0000137).

23 ³⁴ Exhibit 3 at 7-11 (CBD000086-90); Exhibit 5 at 25 (CBD0000136).

24 ³⁵ Exhibit 5 at 26 (CBD0000137).

25 ³⁶ *Id.*

26 ³⁷ Exhibit 6 at 2 (CBD000142).

1 27. Carbonate groundwater levels have not recovered since the completion of the Order
2 1169 pump test and continue to decline despite a subsequent decrease in groundwater pumping.³⁸
3 Groundwater levels at the EH-4 monitoring well—a key location for evaluating pumping impacts
4 to the Muddy River springs—reached an all-time low point on November 9, 2018.³⁹ Groundwater
5 levels at other monitoring wells briefly recovered from the pump test but began trending downward
6 again in early 2016.⁴⁰

7 28. Spring flows have also exhibited a declining trend in recent years. Flows at the
8 Warm Springs West gauge briefly recovered after the pump test from 3.3 to 3.6 cfs, but have been
9 declining ever since.⁴¹ As of fall 2019, flows at Warm Springs West were approximately 3.2 cfs.⁴²

10 **IV. Order 1303**

11 29. On January 11, 2019, the State Engineer issued Interim Order 1303 to obtain
12 stakeholder input on four specific factual matters related to information obtained during and after
13 Order 1169 pump test: (1) the geographic boundary of the Lower White River Flow System, (2)
14 aquifer recovery since the Order 1169 pump test, (3) the long-term annual quantity of groundwater
15 that may be pumped from the Lower White River Flow System, and (4) effects on senior water
16 rights of moving water rights between the carbonate and alluvial (or basin-fill) system.⁴³

21 ³⁸ Exhibit 7 at 16 (CBD000160); Exhibit 8 at 3, 23-24 (CBD000174, CBD000194-95).

22 ³⁹ Exhibit 8 at 23 (CBD000194).

23 ⁴⁰ *Id.*

24 ⁴¹ *Id.*

25 ⁴² Exhibit 9 at 1519 (CBD000218).

26 ⁴³ Exhibit 1 at 10 (CBD000010).

1 30. On July 3, 2019, the Center submitted a technical report prepared by Dr. Tom
2 Myers,⁴⁴ outlining responses to the four Order 1303 questions.⁴⁵ On August 16, 2019, the Center
3 submitted a rebuttal report prepared by Dr. Myers, offering rebuttals to positions that other parties
4 to the Order 1303 proceedings put forward in their July reports.⁴⁶ Dr. Myers’s analysis of pumping
5 rates, groundwater levels, and springflow demonstrated that current carbonate pumping rates are
6 unsustainable, and that any pumping from the carbonate aquifer would ultimately reduce
7 springflow in the Muddy River Springs Area and harm the Moapa dace.⁴⁷

8 31. Between September 23, 2019, and October 4, 2019, the State Engineer held a
9 hearing on the stakeholder reports submitted pursuant to Order 1303. During the hearing, the
10 Center presented expert testimony from Dr. Myers explaining further the basis for his conclusion
11 that any additional carbonate pumping would reduce both groundwater levels and flows from the
12 Muddy River Springs, thus adversely affecting the Moapa dace and senior decreed water rights.

13 32. Dr. Myers’s conclusions are based on the fundamental hydrologic principle that in
14 any groundwater system the amount of discharge (water flowing out of the system) must equal the
15 amount of recharge (water flowing into the system).⁴⁸ Pumping upsets this balance by removing
16 groundwater that would otherwise exit the system as springflow or some other form of discharge.⁴⁹
17 Over time, the system may reach a new equilibrium or “steady state” in which the reduction in
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19

20 ⁴⁴ Dr. Myers holds Masters and Doctorate degrees in hydrology/hydrogeology and has over thirty-
21 seven years of experience in this field. *See generally* Exhibit 10 (CBD000219-29).

22 ⁴⁵ *See generally* Exhibit 7 (CBD000145-71)

23 ⁴⁶ *See generally* Exhibit 8 (CBD000172-201)

24 ⁴⁷ Exhibit 7 at 25 (CBD000169); Exhibit 8 at 24 (CBD000195).

25 ⁴⁸ *See* Exhibit 7 at 17 (CBD000161); Exhibit 8 at 24-27 (CBD000195-198).

26 ⁴⁹ *See* Exhibit 8 at 24-27 (CBD000195-198).

1 discharge equals the amount being pumped.⁵⁰ But unless and until this occurs pumping will
2 continue to reduce the amount of water that exits the system.⁵¹ In the context of the Lower White
3 River Flow system, the application of this principle is that carbonate groundwater pumping will
4 reduce springflows in the Muddy River Springs Area unless and until the system reaches a steady
5 state.⁵²

6 33. Dr. Myers’s reports and testimony explained that the Lower White River Flow
7 System has not reached a steady state because groundwater levels and springflows continue to
8 decline despite recent reductions in pumping and increasing annual precipitation rates.⁵³ After the
9 conclusion of the Order 1169 pump test, and especially since 2014, total pumping has decreased
10 and remained between 7,000 and 8,000 acre-feet per year—roughly equivalent to 1995-97 levels.⁵⁴
11 Precipitation, meanwhile, increased from 2014 through 2018.⁵⁵ Despite this reduction in pumping
12 and increase in precipitation, carbonate groundwater levels and springflows have steadily
13 declined.⁵⁶ As Dr. Myers explained, these decreases indicate that the system has not reached a
14 steady state, and that even with current pumping levels, “it is only a matter of time before the
15 spring flow on which the [Moapa] dace depends decreases significantly or is completely lost.”⁵⁷

16 34. Dr. Myers explained that there is very little recharge in the Lower White River Flow
17 System, meaning that very little water enters the carbonate aquifer system from precipitation and
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19 ⁵⁰ *Id.* at 27 (CBD000198).

20 ⁵¹ *Id.*

21 ⁵² *Id.*

22 ⁵³ *See* Exhibit 9 at 1513-14 (CBD000212-13).

23 ⁵⁴ Exhibit 1 at 55 (CBD000055); Exhibit 8 at 22 (CBD000193).

24 ⁵⁵ Exhibit 8 at 3 (CBD000174).

25 ⁵⁶ *Id.* at 23 (CBD000194).

26 ⁵⁷ Exhibit 7 at 25 (CBD000169); *see also* Exhibit 8 at 27-28 (CBD000198-99).

1 other sources.⁵⁸ Springflows will, therefore, not recover significantly even if pumping is stopped,
2 and any damage done to the Moapa dace and its habitat from excessive pumping rates will be long-
3 term and possibly irreversible.⁵⁹

4 35. Dr. Myers also explained that carbonate pumping impacts Muddy River flows:
5 “carbonate pumping would eventually dry the Muddy River Springs, but carbonate groundwater
6 flow also supports basin fill water through direct discharge from the carbonate to the basin fill and
7 secondary recharge of springflow into the basin fill. The long-term decline of flow in the Muddy
8 River indicates there is a limit to the amount of even basin fill groundwater that can be pumped
9 without affecting Muddy River flows. . . . Because the spring flow is directly responsible for
10 Muddy River flows, preventing any additional carbonate pumpage is also necessary for protecting
11 downstream water rights.”⁶⁰

12 36. Several other stakeholders presented hydrological analyses that agreed with Dr.
13 Myers. The Southern Nevada Water Authority, for instance, stated that “any groundwater
14 production from the carbonate system within the [Lower White River Flow System] will ultimately
15 capture discharge to the [Muddy River Springs Area].”⁶¹ Modeling presented by National Park
16 Service, meanwhile, “confirm[ed] that [groundwater] drawdown will increase and springflow
17 [will] decrease regardless of pumping rate.”⁶²

22 ⁵⁸ Exhibit 7 at 4, 17 (CBD000148, CBD000161).

23 ⁵⁹ Exhibit 8 at 28 (CBD000199).

24 ⁶⁰ Exhibit 7 at 26 (CBD000170).

25 ⁶¹ *Id.*

26 ⁶² Exhibit 8 at 27 (CBD000198).

1 **V. Order 1309**

2 37. On June 15, 2020, the State Engineer issued Order 1309, which set forth the State
3 Engineer’s conclusions regarding the four factual matters on which the State Engineer sought
4 stakeholder input.⁶³

5 38. Order 1309 acknowledged that groundwater levels in the regional carbonate aquifer
6 have “not recovered to pre-Order 1169 test levels,” and that insufficient data exist to determine
7 whether groundwater levels were approaching a “steady state.”⁶⁴ Nevertheless, the State Engineer
8 “agreed” with a minority of stakeholders who argued that water levels in the Muddy River Springs
9 Area “may be approaching steady state.”⁶⁵

10 39. In order 1309, the State Engineer also acknowledged that current pumping is
11 capturing Muddy River flows, noting that Muddy River flows in headwaters at the Moapa Gage
12 have declined by over 3,000 afy.⁶⁶ The State Engineer made a finding that “capture or potential
13 capture of the waters of a decreed system does not constitute a conflict with decreed right holders
14 if the flow of the source is sufficient to serve decreed rights.”⁶⁷ The State Engineer provided a
15 discussion of how those rights could potentially be met even with reduced headwater flows and
16 then concluded that up to 8,000 acre-feet per year could continue to be pumped from the regional
17

18 ⁶³ The Center agrees with and supports the State Engineer’s conclusions on criteria 1 (the
19 geographic boundary of the Lower White River System). The Center takes no position on the
20 State Engineer’s conclusions regarding criteria 4 (movement of water rights).

21 ⁶⁴ Exhibit 1 at 57 (CBD000057).

22 ⁶⁵ *Id.*

23 ⁶⁶ Exhibit 1 at 61 (CBD000061) (“Flow in the Muddy River at the Moapa Gage has averaged
24 approximately 30,600 afa since 2015, which is less than the predevelopment baseflow of about
25 33,900.” (Footnotes omitted).

26 ⁶⁷ *Id.* at 60 (CBD000060).

1 carbonate aquifer without impacting the fully decreed water rights in the Muddy River, stating
2 “reductions in flow that have occurred because of groundwater pumping in the headwaters basins
3 is not conflicting with Decreed rights.”⁶⁸

4 40. The state engineer’s decision does not consider the impacts of 8,000 acre-feet/yr of
5 pumping on the Moapa dace or its habitat.

6 **GROUNDS FOR THE PETITION**

7 41. The State Engineer’s determination that up to 8,000 acre-feet per year (afy) may be
8 sustainably pumped from the Lower White River Flow System is arbitrary, capricious, irrational
9 and not supported by substantial evidence.⁶⁹ As noted, the 8,000 afy figure is based on the
10 assumption that groundwater levels in the Muddy River Springs Area are approaching a “steady
11 state” after the Order 1169 pump test.⁷⁰ However, the State Engineer acknowledged that
12 insufficient data currently exist to determine whether this “steady-state” hypothesis is in fact
13 accurate.⁷¹ Moreover, the State Engineer’s determination ignored and/or arbitrarily dismissed
14 compelling expert evidence proffered by multiple other stakeholders that groundwater levels
15 continue to decline despite recent decreases in pumping, and thus indicating that the aquifer is not
16 approaching equilibrium.⁷²

17 42. The State Engineer failed to properly consider the environmental consequences of
18 groundwater pumping in the Lower White River Flow System when determining the amount of
19 groundwater that could be sustainably pumped. In Order 1309, the State Engineer acknowledged
20

21 ⁶⁸ Exhibit 1 at 61 (CBD000061).

22 ⁶⁹ *Id.*

23 ⁷⁰ *Id.* at 57 (CBD000057).

24 ⁷¹ *See id.*

25 ⁷² *See id.* at 62 (CBD000062); Exhibit 7 at 24 (CBD000168); Exhibit 8 at 25, 28 (CBD000196,
26 CBD000199).

1 that “issuing a permit to withdraw groundwater that reduces the flow” of the Muddy River Springs
2 would harm the Moapa dace and violate the ESA.⁷³ The State Engineer further determined that a
3 minimum spring flow of 3.2 cfs is necessary to maintain adequate habitat for the Moapa dace, and
4 that more than 3.2 cfs may be required to support the recovery of the species.⁷⁴ However, in
5 determining the amount of groundwater that could be sustainably pumped, the State Engineer
6 failed to adequately consider how pumping would affect Moapa dace populations and habitat.⁷⁵
7 The State engineer’s determination regarding the long-term annual quantity of water that can be
8 sustainably pumped is based on two conclusions: first, that “reductions in flow that have occurred
9 because of groundwater pumping . . . [are] not conflicting with Decreed rights,”⁷⁶ and second, that
10 “spring discharge may be approaching a steady state.”⁷⁷ As noted, the “steady-state” hypothesis is
11 not consistent with the available data, which show a continuing decline in groundwater levels and
12 springflow.⁷⁸ And neither the alleged “steady state” of the carbonate aquifer, nor the alleged
13 absence of conflicts with senior decreed rights relate to whether the level of groundwater pumping
14 ultimately selected (or any particular level of groundwater pumping) will provide sufficient flow
15 from the Muddy River springs to ensure the long-term survival and recovery of the Moapa dace.
16 Thus, the State Engineer failed to explain the basis for his conclusion that pumping at current
17 levels will adequately protect the Moapa dace, and failed to comply with Nevada water law, which
18 requires him to consider environmental impacts as a component of the public interest.

19
20
21 ⁷³ Exhibit 1 at 45 (CBD000045). The Center agrees with and supports the State Engineer’s analysis
22 of potential ESA liability.

23 ⁷⁴ *Id.*

24 ⁷⁵ *See id.* at 59-61 (CBD000059-61).

25 ⁷⁶ *Id.* at 61 (CBD000061).

26 ⁷⁷ *Id.* at 63 (CBD000063).

27 ⁷⁸ *See, e.g.*, Exhibit 7 at 24 (CBD000168); Exhibit 8 at 25, 28 (CBD000196, CBD000199).

1 43. The State Engineer also failed to properly consider the public interest because,
2 based on the evidence in the record, the 8,000 afy permitted under Order 1309 is excessive and
3 allows too much pumping to adequately protect the Moapa dace. As explained above, spring flows
4 at the Muddy River springs continue to decline, even though groundwater pumping from the
5 carbonate aquifer in the Lower White River Flow System has averaged 7,000-8,000 afy since the
6 Order 1169 pump test.⁷⁹ Allowing this level of pumping to continue will result in additional and
7 sustained spring flow declines and associated reductions in Moapa dace habitat. Even though the
8 Order requires that additional data be obtained and commits to reassessing the pumping limit in
9 the future, that approach poses unacceptable risks for the Moapa dace because declines in spring
10 flows are not easily restored. Experience from the pump test and other evidence provided at the
11 Order 1303 hearing show that even if pumping is reduced in the future, recovery of spring flows
12 can take many years or even decades.⁸⁰ Accordingly, the State Engineer’s conclusion that
13 maintaining pumping at current levels will adequately protect the Moapa dace is arbitrary,
14 capricious, irrational, and not supported by substantial evidence.

15 44. The evidence in the record also shows that groundwater development anywhere
16 within Lower White River Flow System ultimately captures a portion of fully-decreed Muddy
17 River Flow and that since groundwater development began, Muddy River flows in the headwaters
18 at the Moapa Gage have declined by over 3,000 afy.⁸¹ Therefore, the State Engineer’s conclusion
19 that pumping up to 8,000 afy from the regional carbonate aquifer does not constitute a conflict
20 with decreed right holders is unsupported.

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22 _____
23 ⁷⁹ Exhibit 1 at 55 (CBD000055).

24 ⁸⁰ See, e.g., Exhibit 7 at 23-24 (CBD000167-68); Exhibit 8 at 28 (CBD000199).

25 ⁸¹ Exhibit 1 at 61 (CBD000061) (“Flow in the Muddy River at the Moapa Gage has averaged
26 approximately 30,600 afa since 2015, which is less than the predevelopment baseflow of about
27 33,900.” (Footnotes omitted).

1 CONCLUSION

2 For the reasons stated above, and for others that may be raised during the pendency of this
3 appeal, Petitioner respectfully requests judgment as follows:

- 4 a. For an Order amending Order 1309 to remove or strike findings made therein
5 regarding the amount of water that can be sustainably pumped from the Lower
6 White River Flow System; amending Order 1309 to remove or strike the findings
7 and conclusions therein that pumping in the Lower White River Flow System will
8 not conflict with Muddy River decreed rights; directing the State Engineer to fully
9 consider the environmental consequences of groundwater pumping within the
10 Lower White River Flow System; and directing the State Engineer to prohibit all
11 carbonate groundwater pumping within the geographic boundary of the Lower
12 White River Flow System, including Kane Springs Valley, until a new sustainable
13 limit is determined by the State Engineer after remand.
- 14 b. For costs of suit and reasonable attorney’s fees; and
- 15 c. For such other and further relief as this Court deems just and equitable.

16 Respectfully Submitted this 13th day of July, 2020.

17
18
19 /s/ Julie Cavanaugh-Bill
20 Julie Cavanaugh-Bill (NV Bar No. 11533)
21 401 Railroad Street, Suite 307
22 Elko, Nevada 89801
23 775-753-4357

24 /s/ Lisa T. Belenky
25 Lisa T. Belenky (CA Bar No. 203225) (*Pro Hac Vice to be submitted*)
26 Center for Biological Diversity
27 1212 Broadway, Suite 800
28 Oakland, CA 94612
415-632-5307

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/s/ Douglas Wolf
Douglas Wolf (NM Bar No. 7473) (*Pro Hac Vice to be submitted*)
Center for Biological Diversity
3201 Zafarano Drive
Suite C, #149
Santa Fe, NM 87507
202-510-5604

Attachment 5

FILED

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LISA C. LLOYD
LINCOLN COUNTY CLERK
DEPT. 1

1 Case No. CV0702520

2 Dept. No. _____

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IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

7

IN AND FOR THE COUNTY OF LINCOLN

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LINCOLN COUNTY WATER DISTRICT,
a political subdivision of the State of Nevada,
and VIDLER WATER COMPANY, INC.,
a Nevada corporation,

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Petitioners,

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PETITION FOR JUDICIAL REVIEW
(Exempt from Arbitration: Judicial
Review of Administrative Decision)

13

vs.

14

TIM WILSON, P.E., NEVADA STATE ENGINEER,
DIVISION OF WATER RESOURCES,
DEPARTMENT OF CONSERVATION AND
NATURAL RESOURCES,

15

16

Respondent.

17

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Petitioners, LINCOLN COUNTY WATER DISTRICT, a political subdivision of the
State of Nevada, by and through its attorney, DYLAN V. FREHNER, ESQ., LINCOLN COUNTY
DISTRICT ATTORNEY, and VIDLER WATER COMPANY, INC., a Nevada corporation, by and
through its attorneys, ALLISON, MacKENZIE, LTD., petition and allege as follows:

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1. Petitioner, LINCOLN COUNTY WATER DISTRICT ("LINCOLN"), is a
political subdivision of the State of Nevada, created for the purpose of providing adequate and
efficient water service within Lincoln County, Nevada.

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2. Petitioner, VIDLER WATER COMPANY, INC. ("VIDLER"), is a Nevada
corporation authorized to conduct business in the state of Nevada.

27

28

3. Petitioners, LINCOLN and VIDLER own groundwater permits with a priority
date of February 14, 2005 and jointly own groundwater right applications filed on April 10, 2006 to

1 appropriate water in the Kane Springs Valley Hydrographic Basin (206) ("Kane Springs") for
2 municipal use purposes with a place of use in the Coyote Spring Valley Hydrographic Basin (210).
3 The permits and pending applications are more specifically described below. The Kane Springs
4 hydrographic basin and the points of diversion in the permits and applications are located entirely in
5 Lincoln County, Nevada. Petitioners, LINCOLN and VIDLER are senior water right permit holders
6 and jointly hold senior groundwater right applications in Kane Springs.

7 4. Respondent, TIM WILSON P.E., NEVADA STATE ENGINEER, DIVISION
8 OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL
9 RESOURCES ("STATE ENGINEER"), is empowered to act pursuant to the provisions of Chapters
10 533 and 534 of the Nevada Revised Statutes. The Nevada Legislature has provided that, subject to
11 existing rights, all underground waters within the boundaries of the state of Nevada are subject to
12 appropriation for beneficial use under the laws of the state and it is the charge of the STATE
13 ENGINEER to put water to beneficial use for the economic benefit of the state of Nevada. The
14 Office of the State Engineer is a creature of statute; it has no inherent power and its powers and
15 jurisdiction are limited as provided by statute.

16 5. This Petition is brought pursuant to the procedures authorized and provided in
17 NRS 533.450. Specifically, Petitioners are aggrieved by an order of the STATE ENGINEER that
18 affects Petitioners' interests and Petitioners may obtain judicial review in the proper court of the
19 county in which the matters affected are situated. Petitioners' interests and the matters affected by
20 the STATE ENGINEER's Order 1309, including the Kane Springs basin, are situated entirely in
21 Lincoln County, Nevada. Jurisdiction and venue of Petitioners' Petition for Judicial Review are
22 properly before this Court pursuant to NRS 533.450. A true and correct of Order 1309 is attached
23 hereto as **Exhibit "1"**.

24 6. A Notice of this Petition has been served on the STATE ENGINEER and all
25 persons affected by Order 1309 of the STATE ENGINEER as required by NRS 533.450(3).

26 7. The STATE ENGINEER's administration of the Lower White River Flow
27 System Basins started with Order 1169 issued in March 2002. Order 1169 required all pending
28 applications in certain basins be held in abeyance pending an aquifer test of the carbonate-rock

1 aquifer system to better determine whether the pending applications and future applications could be
2 developed from the carbonate-rock aquifer. Kane Springs was not included in Order 1169 in March
3 2002 as part of the administration of the Lower White River Flow System Basins.

4 8. On February 14, 2005, LINCOLN/VIDLER filed Applications 72218, 72219,
5 72220 and 72221 to appropriate groundwater in Kane Springs.

6 9. On August 1, 2006, LINCOLN/VIDLER and the UNITED STATES
7 DEPARTMENT OF THE INTERIOR, FISH AND WILDLIFE SERVICE (“USFWS”) entered into
8 an Amended Stipulation for Withdrawal of Protests for Applications 72218, 72219, 72220 and
9 72221 (“Amended Stipulation for Withdrawal of Protests”). The Amended Stipulation for
10 Withdrawal of Protests contains among other things, triggers acceptable to USFWS to reduce
11 Petitioners’ groundwater pumping for protection of the Moapa dace. From 2006 to date, Petitioners
12 and USFWS have performed and continue to perform under the terms of the Amended Stipulation
13 for Withdrawal of Protests.

14 10. On February 2, 2007, the STATE ENGINEER issued Ruling 5712, which
15 partially approved Applications 72218, 72219, 72220 and 72221, granting LINCOLN/VIDLER
16 1,000 acre feet annually (“afa”) of water rights in Kane Springs. In Ruling 5712, the STATE
17 ENGINEER specifically determined Kane Springs would not be included in the Order 1169 study
18 area because there was no substantial evidence that the appropriation of a limited quantity of water
19 in Kane Springs will have any measurable impact on the Muddy River Springs that warrants the
20 inclusion of Kane Springs in Order 1169. The STATE ENGINEER denied the request to hold the
21 LINCOLN/VIDLER applications in abeyance and include Kane Springs within the provisions of
22 Order 1169. The STATE ENGINEER specifically rejected the argument that the Kane Springs
23 rights could not be appropriated based upon senior appropriated rights in the down gradient basins.
24 None of the parties to the Memorandum of Understanding (“MOU”) entered into on April 20, 2006
25 by certain water right holders in the Coyote Spring Valley and California Wash hydrographic basins
26 and none of the Order 1169 study participants objected to or appealed the STATE ENGINEER’s
27 determinations that Kane Springs would not be included in Order 1169 and Petitioners could
28

1 appropriate and develop their water rights notwithstanding senior appropriated rights in the down
2 gradient basins.

3 11. LINCOLN/VIDLER filed a Petition for Judicial Review with the Seventh
4 Judicial District Court on March 1, 2007, challenging the validity of the STATE ENGINEER's
5 decision in Ruling 5712.

6 12. Following the filing of the Petition for Judicial Review, LINCOLN/VIDLER
7 met with the STATE ENGINEER on March 15, 2007, regarding their pending Applications 74147,
8 74148, 74149 and 74150. LINCOLN/VIDLER requested that they perform additional data
9 collection, testing and study in Kane Springs to support the pending applications. The STATE
10 ENGINEER informed LINCOLN/VIDLER he would consider granting to LINCOLN/VIDLER
11 additional unappropriated water rights in Kane Springs pursuant to their pending Applications
12 74147, 74148, 74149 and 74150 if LINCOLN/VIDLER collected the additional data upgradient in
13 the Kane Springs basin and performed the testing and additional study to support the pending
14 applications.

15 13. LINCOLN/VIDLER and the STATE ENGINEER thereafter stipulated to the
16 dismissal of the Petition for Judicial Review regarding Applications 72218, 72219, 72220 and 72221
17 and Ruling 5712.

18 14. The rights the STATE ENGINEER granted to LINCOLN/VIDLER in Ruling
19 5712 and now held by LINCOLN/VIDLER were and are rights vested under Nevada law.

20 15. On April 29, 2009, the Acting STATE ENGINEER issued Ruling 5987
21 summarily denying Applications 74147, 74148, 74149 and 74150 without holding a hearing or
22 contacting LINCOLN/VIDLER to get any information about the additional data collection, testing
23 and study the STATE ENGINEER stated he would review.

24 16. LINCOLN/VIDLER filed a Petition for Judicial Review with the Seventh
25 Judicial District Court on May 29, 2009 challenging the validity of the STATE ENGINEER's
26 decision in Ruling 5987.

27 17. On April 27, 2010, LINCOLN/VIDLER and the STATE ENGINEER entered
28 into a settlement agreement to resolve LINCOLN/VIDLER's Petition for Judicial Review

1 challenging Ruling 5987. The settlement agreement required, among other things, the STATE
2 ENGINEER to reinstate 74147, 74148, 74149 and 74150 with the same priority as their original
3 application date.

4 18. LINCOLN/VIDLER and the STATE ENGINEER thereafter stipulated to the
5 dismissal of the Petition for Judicial Review regarding Applications 74147, 74148, 74149 and 74150
6 and Ruling 5987.

7 19. On October 29, 2008, LINCOLN/VIDLER obtained a Biological Opinion
8 from the USFWS that pumping of groundwater pursuant to Applications 72218, 72219, 72220 and
9 72221 for their Kane Springs groundwater project was not likely to jeopardize the continued
10 existence of the endangered Moapa dace; the project could contribute to groundwater level declines
11 and spring flow reductions, however, implementation of the project's conservation actions will
12 minimize these impacts. With regard to incidental take, the Biological Opinion stated the level of
13 anticipated take is not likely to result in jeopardy to the Moapa dace based in part on the
14 implementation of the conservation measures for the project. Since 2008, Petitioners has spent
15 substantial sums, including the direct payment of \$50,000, to the USFWS as part of the project's
16 conservation measures in reliance on the Biological Opinion, Ruling 5712 and the settlement
17 agreements entered into with the STATE ENGINEER to resolve Petitioners' appeals of Rulings
18 5712 and 5987 involving Petitioners' water rights and applications in Kane Springs. None of the
19 parties to the April 20, 2006 Memorandum of Understanding and none of the Order 1169 study
20 participants objected to or appealed the Biological Opinion issued by the USFWS for the
21 LINCOLN/VIDLER groundwater applications in Kane Springs.

22 20. In reliance on the STATE ENGINEER's approval of Applications 72218,
23 72219, 72220 and 72221, Ruling 5712, the issuance of permits to Petitioners and the settlement with
24 the STATE ENGINEER, LINCOLN/VIDLER have expended significant time and money since
25 2005 in furtherance of perfecting their water rights in the Kane Springs basin in the approximate
26 sum of \$4,237,000.

27 21. In reliance upon the STATE ENGINEER's representations regarding the
28 additional data collection, testing and study, and his statements that he would consider any new data

1 and results regarding the basin, LINCOLN/VIDLER have expended significant time and money to
2 collect data, test and study the Kane Springs basin and to prepare the data and information to be
3 presented to the STATE ENGINEER to support pending Applications 74147, 74148, 74149 and
4 74150 in the approximate sum of \$543,000.

5 22. Petitioners were not and have never been an Order 1169 study participant.
6 Petitioners are not and have never been a party to the Memorandum of Understanding entered into
7 on April 20, 2006 by certain water right holders in the Coyote Spring Valley and California Wash
8 hydrographic basins whereby such parties voluntarily agreed to certain groundwater pumping
9 restrictions, among other things, to further their shared common interest in the conservation and
10 recovery of the Moapa dace and its habitat, an endangered species under the Endangered Species
11 Act.

12 23. Between 2010 and 2014, the Order 1169 basins were studied and tested, and
13 the Order 1169 study participants were involved and participated in aquifer tests, the submission of
14 reports, proceedings and actions taken by the STATE ENGINEER pursuant to Order 1169. The
15 basins that were included in the Order 1169 aquifer test were acknowledged to have a unique
16 hydrologic connection and share the same supply of water. The Kane Springs basin was not
17 included in the Order 1169 aquifer testing, monitoring or measurements and Kane Springs basin
18 water right holders, including Petitioners, were not involved and did not participate in the aquifer
19 testing, submission of reports, proceedings and actions taken by the STATE ENGINEER pursuant to
20 Order 1169 from 2010 to 2014. After the aquifer test, no Order 1169 study participants
21 recommended that Kane Springs be included in the Order 1169 study area nor did the STATE
22 ENGINEER make a determination that Kane Springs should be included in the Order 1169 study
23 area based upon the Order 1169 testing and proceedings. One study participant's report (Southern
24 Nevada Water Authority) noted there "was a lack of pumping responses north of the Kane Springs
25 Fault and west of the MX-5 and CSI wells near the eastern front of the Las Vegas Range."

26 24. On January 11, 2019, the STATE ENGINEER issued Interim Order 1303
27 designating the Lower White River Flow System ("LWRFS"), a multi-basin area known to share a
28 close hydrologic connection, as a joint administrative unit for purposes of administration of water

1 rights. Pursuant to Interim Order 1303, all water rights within the LWRFS were to be administered
2 based upon their respective dates of priority in relation to other rights within the regional
3 groundwater unit. Kane Springs was not included as part of the LWRFS multi-basin area in Interim
4 Order 1303.

5 25. After an administrative hearing, the STATE ENGINEER issued Order 1309
6 on June 15, 2020 delineating the Lower White River Flow System Hydrographic Basin to include
7 those certain hydrographic basins subject to Order 1169 and Order 1303 and for the first time
8 included the Kane Springs basin as part of the Lower White River Flow System Hydrographic
9 Basin.

10 26. In Order 1309, the STATE ENGINEER stated it was necessary for spring
11 flow measured at the Warm Springs West gage to flow at a minimum rate in order to maintain
12 habitat for the Moapa dace. The STATE ENGINEER determined in Order 1309 that liability under
13 the Endangered Species Act for a "take" would extend to groundwater users within the LWRFS and
14 would so extend to the State of Nevada through the Division of Water Resources as the government
15 agency responsible for permitting water use. The STATE ENGINEER concluded that it was against
16 the public interest to allow groundwater pumping that will reduce spring flow in the Warm Springs
17 area to a level that would impair habitat necessary for the survival of the Moapa dace and could
18 result in take of the endangered species.

19 27. In Order 1309, the STATE ENGINEER relied upon six criteria from Rulings
20 6254-6261 as the standard of general applicability for inclusion into the geographic boundary of the
21 LWRFS, thereby adopting policies in Order 1309 that the STATE ENGINEER then expanded for
22 general application.

23 28. Order 1309 is in excess of the jurisdiction and statutory authority of the
24 STATE ENGINEER because Nevada law does not authorize the STATE ENGINEER to designate a
25 multi-basin area and effectively reprioritize basin specific water rights by administering them based
26 upon their respective dates of priority in relation to other rights within the multi-basin groundwater
27 area or designate a multi-basin area via an *ad hoc* ruling. By including Kane Springs in the LWRFS
28 in Order 1309 and limiting pumping in the LWRFS to 8,000 afa, the STATE ENGINEER has made

1 exercising Petitioners' water rights impracticable for no legitimate government reason by
2 reprioritizing Petitioners' water rights holding senior status in Kane Springs to the most junior water
3 rights in the multi-basin LWRFS, destroying Petitioners' property rights, denying Petitioners all
4 viable economic use of their property and eviscerating contractual rights related to the water rights,
5 and interfering with Petitioners' investment backed expectations, all in violation of and to the
6 prejudice of Petitioners' constitutional rights.

7 29. Order 1309 is arbitrary and capricious and constitutes an abuse of discretion
8 in violation of Petitioners' rights because in the Ruling 5712 contested proceedings, the STATE
9 ENGINEER denied the request to hold the LINCOLN/VIDLER applications in abeyance and
10 include Kane Springs within the provisions of Order 1169 determining there was no substantial
11 evidence that the appropriation of the water granted to Petitioners in Kane Springs will have any
12 measurable impact on the Muddy River Springs that warranted the inclusion of Kane Springs in
13 Order 1169. The STATE ENGINEER specifically rejected the argument that Petitioners' Kane
14 Springs rights could not be appropriated based upon senior appropriated rights in the down gradient
15 basins. The STATE ENGINEER is precluded from re-adjudicating and relitigating issues already
16 determined in a contested proceeding and resolved by settlement agreements with Petitioners
17 resulting from Petitioners' appeals of Rulings 5712 and 5987. In addition, there was no evidence
18 presented in the proceedings leading up to the issuance of Order 1309 that appropriation of
19 Petitioners' water rights in Kane Springs will have any impact on the Muddy River Springs that
20 warrants inclusion of Kane Springs in the LWRFS as defined in Order 1309.

21 30. Order 1309 is arbitrary and capricious and constitutes an abuse of discretion
22 because the STATE ENGINEER failed to consider or address the Amended Settlement Agreement
23 entered into between Petitioners and USFWS and the Biological Opinion issued by the USFWS that
24 Petitioners' groundwater pumping project in Kane Springs was not likely to jeopardize the continued
25 existence of the endangered Moapa dace and the level of anticipated take is not likely to result in
26 jeopardy to the Moapa dace based in part on the implantation of the conservation measures for
27 Petitioners' project. In issuing Order 1309, the STATE ENGINEER failed to consider the unrefuted
28 expert opinion testimony in the record of the former USFWS Field Supervisor who signed the

1 Biological Opinion and helped negotiate the Amended Stipulation for Withdrawal of Protests that
2 Petitioners, as parties holding a Biological Opinion and the Amended Stipulation for Withdrawal of
3 Protests, are compliant with the Endangered Species Act. The STATE ENGINEER's determination
4 that liability under the Endangered Species Act for a "take" would extend to groundwater users
5 within the LWRFS not parties to the MOU and would so extend to the State of Nevada through the
6 Division of Water Resources as the government agency responsible for permitting water use is not
7 supported by substantial evidence or any evidence in the record, is contrary to the substantial
8 evidence of record and is contrary to law with respect to Petitioners' water rights and groundwater
9 pumping project in Kane Springs.

10 31. Order 1309 is arbitrary, capricious and constitutes an abuse of discretion
11 because it adopts, effects and defines the STATE ENGINEER's policy of general application for
12 creating a multi-area basin and inclusion into the geographic boundary of the LWRFS and
13 constitutes unlawful *ad hoc* rulemaking in violation of the STATE ENGINEER's statutory authority
14 thereby making Order 1309 void.

15 32. Petitioners were not given notice before the STATE ENGINEER applied the
16 *ad hoc* rule developed from Rulings 6255-6261 in Order 1309. LINCOLN/VIDLER were not
17 parties to those rulings and were unable to present evidence or arguments as to why the *ad hoc* rule
18 should not be applied to Petitioners and their water rights in Kane Springs because the *ad hoc* rule of
19 general applicability was announced after the hearing and after Petitioners had the opportunity to
20 present evidence on the issue before the STATE ENGINEER. Rulings from other proceedings
21 cannot be used to bind unrelated parties in later proceedings.

22 33. The STATE ENGINEER abused his discretion by failing to consider the best
23 available science presented to support the continued exclusion of Kane Springs from the boundaries
24 of the LWRFS and applying criteria or standards which intentionally ignore the best available
25 science to include Kane Springs in the boundaries of the LWRFS.

26 34. Order 1309 is arbitrary, capricious and constitutes an abuse of discretion
27 because it applies the *ad hoc* rule criteria subjectively and in an inconsistent manner.
28

1 35. Order 1309 is arbitrary, capricious, unlawful and constitutes an abuse of
2 discretion because the water right holders pumping closest to Warm Springs and impacting the
3 endangered Moapa dace are not affected by Order 1309 and are allowed to continue to pump their
4 water rights, while Petitioners' water rights, located the furthest distance from Warm Springs with
5 no evidence in the record that pumping of their water rights will impact the endangered Moapa dace,
6 are destroyed and rendered useless by Order 1309.

7 36. The STATE ENGINEER, like all administrative officers, is required to
8 provide due process of law to all parties. The STATE ENGINEER violated LINCOLN/VIDLER's
9 due process rights pursuant to both the Nevada and United States Constitutions.

10 37. Order 1309 violated LINCOLN/VIDLER's due process rights by applying the
11 criteria or standards from other contested administrative proceedings before the STATE ENGINEER
12 in which Petitioners were not parties, after the evidentiary hearing held to determine whether Kane
13 Springs and Petitioners' water rights were to be included within the boundaries of the LWRFS.
14 Petitioners received no prior notice the STATE ENGINEER would apply the criteria or standards
15 and were deprived of an opportunity to address the newly developed criteria or standards applied by
16 the STATE ENGINEER in Order 1309 to include Kane Springs and Petitioners' water rights in the
17 boundaries of the LWRFS.

18 38. In Order 1309, the STATE ENGINEER considered and relied upon evidence
19 submitted after the hearing in the parties' simultaneously submitted written closing statements for
20 which Petitioners had no opportunity to address, respond or refute, all in violation of Petitioners' due
21 process rights.

22 39. The Order 1309 proceedings violated Petitioners' due process rights because
23 certain former Division of Water Resource employees who participated in and were decision makers
24 in the STATE ENGINEER's proceedings and determinations resulting in Ruling 5712 and Order
25 1169, which excluded Kane Springs from the LWRFS and appropriated Kane Springs water rights
26 notwithstanding senior appropriated rights in the down gradient basins, testified as private
27 consultants and presented the same evidence relied upon by previous STATE ENGINEERs to
28 exclude Kane Springs from multi-basin joint administration to support the inclusion of Kane Springs

1 in the LWRFS. The STATE ENGINEER erred as a matter of law when he reweighed evidence
2 previously relied upon to exclude Kane Springs from the LWRFS and used the reweighed evidence
3 to include Kane Springs in the LWRFS, all in violation of Petitioners' due process rights.

4 40. The substantial rights of LINCOLN/VIDLER have been prejudiced because
5 Order 1309 violates constitutional and statutory provisions, is in excess of the statutory authority of
6 the STATE ENGINEER, is clearly erroneous in view of the reliable, probative and substantial
7 evidence, and is characterized by an abuse of discretion.

8 41. Order 1309 of the STATE ENGINEER is arbitrary and capricious, contrary to
9 and affected by error of law, without any rational basis, beyond the legitimate exercise of power and
10 authority of the STATE ENGINEER, all to the detriment and damage of Petitioners LINCOLN and
11 VIDLER.

12 42. The determinations in Order 1309 that 8,000 afa is the long terms annual
13 quantity of water that can be pumped and that Kane Springs should be included within the
14 boundaries of the LWRFS, among other determinations, are not supported by substantial evidence in
15 the record before the STATE ENGINEER and are without consideration of all the facts and
16 circumstances.

17 43. Petitioners LINCOLN and VIDLER have exhausted their administrative
18 remedies.

19 44. Petitioners have been required to engage the services of counsel to pursue
20 their rights, and as a proximate and necessary result of the STATE ENGINEER's illegal conduct
21 alleged above, Petitioners are entitled to reasonable attorney's fees and costs as special and
22 foreseeable damages, or in the alternative, as costs of suit.

23 45. For all the foregoing reasons, the STATE ENGINEER acted improperly as a
24 matter of law and did not and cannot conduct a fair assessment of the scientific evidence presented
25 and the facts and circumstances previously relied upon to exclude Kane Springs from the LWRFS
26 multi-basin area. The STATE ENGINEER's actions are inequitable under all the facts and
27 circumstances and the evidence presented, and equitable relief is warranted in the form of direction
28

1 by this Court to the STATE ENGINEER to exclude Kane Springs from the boundaries of the
2 LWRFS as defined in Order 1309.

3 WHEREFORF, Petitioners pray for judgment as follows:

- 4 1. That the Court vacate Order 1309;
5 2. That the Court exclude Kane Springs from the LWRFS;
6 3. That the Court restore currently held water right priorities and the perennial
7 yield determined for Kane Springs;
8 4. That the Court award Petitioners their attorney's fees and costs; and
9 5. That the Court award such other and further relief as seems just and proper in
10 the premises.

11 **AFFIRMATION**

12 The undersigned does hereby affirm that the preceding document **DOES NOT**
13 contain the social security number of any person.

14 DATED this 13th day of July, 2020.

15 KAREN A. PETERSON, ESQ.
16 Nevada State Bar No. 366
17 ALLISON MacKENZIE, LTD.
18 402 North Division Street
19 Carson City, Nevada 89703
20 Telephone: (775) 687-0202
21 Email: kpeterson@allisonmackenzie.com

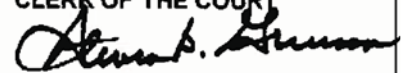
22 ~ and ~

23 LINCOLN COUNTY DISTRICT ATTORNEY
24 181 North Main Street, Suite 205
25 P.O. Box 60
26 Pioche, Nevada 89043
27 Telephone: (775) 962-8073
28 Email: dfrehner@lincolncountynv.gov

BY 
DYLAN V. FREHNER, ESQ.
Nevada State Bar No. 9020

Attorneys for Petitioners, LINCOLN COUNTY
WATER DISTRICT and VIDLER WATER
COMPANY, INC.

Attachment 6



1 **PTJR**
2 STEVEN D. KING
3 Nevada State Bar No. 4304
4 227 River Road
5 Dayton, NV 89403
6 Tel: (775) 427-5821
7 Email: kingmont@charter.net

CASE NO: A-20-817977-P
Department 2

6 ROBERT A. DOTSON
7 Nevada State Bar No. 5285
8 JUSTIN C. VANCE
9 Nevada State Bar No. 11306
10 DOTSON LAW
11 5355 Reno Corporate Drive
12 Suite #100
13 Reno, Nevada 89511
14 Tel: (775) 501-9400
15 Email: rdotson@dotsonlaw.legal
16 jvance@dotsonlaw.legal
17 Attorneys for Petitioner MVIC

13 **DISTRICT COURT**
14
15 **CLARK COUNTY, NEVADA**

16 MUDDY VALLEY IRRIGATION COMPANY,
17
18 Petitioner,
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20 vs.
21
22 TIM WILSON, P.E., Nevada State Engineer,
23 DIVISION OF WATER RESOURCES,
24 DEPARTMENT OF CONSERVATION AND
25 NATURAL RESOURCES,
26
27 Respondent.

Case No.:

Dept. No.:

**PETITION FOR JUDICIAL REVIEW
OF ORDER 1309**

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

27 **I. JURISDICTIONAL STATEMENT**

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

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

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

10 **II. FACTUAL BACKGROUND**

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

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

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

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

28

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

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

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

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

22 **III. GROUNDS FOR THE PETITION**

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

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

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

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

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

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

13 **IV. CONCLUSION**

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

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27 _____

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

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Affirmation Pursuant to NRS 239B.030

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

DATED this 14th day of July, 2020.

/s/ ROBERT A. DOTSON
STEVEN D. KING
Nevada State Bar No. 4304
227 River Road
Dayton, Nevada 89403
(775) 427-5821

ROBERT A. DOTSON
Nevada State Bar No. 5285
JUSTIN C. VANCE
Nevada State Bar No. 11306
DOTSON LAW
5355 Reno Corporate Dr., Suite 100
Reno, Nevada 89511
(775) 501-9400
Attorneys for Petitioner MVIC