

**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 05:18 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

**ATTACHMENTS TO THE CENTER FOR BIOLOGICAL DIVERSITY'S  
DOCKETING STATEMENT, PART 2**

## **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

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# Attachment 7

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15 **DISTRICT COURT**  
16 **CLARK COUNTY, NEVADA**

17 \* \* \* \*

18 GEORGIA-PACIFIC GYPSUM LLC,  
19 AND REPUBLIC ENVIRONMENTAL  
20 TECHNOLOGIES, INC.

21 Petitioners,

22 vs.

23 TIM WILSON, P.E. Nevada State Engineer,  
24 DIVISION OF WATER RESOURCES, and the  
25 DEPARTMENT OF CONSERVATION AND  
26 NATURAL RESOURCES,

27 Respondent.

CASE NO.:

DEPT. NO.:

**PETITION FOR JUDICIAL REVIEW OF  
ORDER 1309**

28 1. Petitioners Georgia-Pacific Gypsum LLC (“Georgia-Pacific”) and Republic Environmental Technologies, Inc. (“Republic”) (collectively, “Petitioners”), by and through counsel Sylvia Harrison, Esq., Lucas Foletta, Esq., and Sarah Ferguson, Esq. of the law firm of McDonald Carano LLP, hereby submit this Petition for Judicial Review of Order 1309 (“Petition”) issued by Respondent Tim Wilson, P.E. Nevada State Engineer, Division of Water Resources, Department of Conservation and Natural Resources on June 15, 2020, Ex. 1 (“Order 1309”). This Petition is filed pursuant to NRS 533.450(1).

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1 **JURISDICTIONAL STATEMENT**

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

7 **FACTUAL BACKGROUND**

8 **Petitioners’ Interests Affected by Order 1309**

9 3. Both Georgia-Pacific and Republic are long-established businesses located in  
10 Garnet Valley that use and rely on certificated, proven or otherwise fully used groundwater rights  
11 to support their operations. Both Georgia-Pacific and Republic participated in the proceedings  
12 before the State Engineer that resulted in the issuance of the Order 1309.

13 4. Georgia-Pacific has gypsum wallboard, gypsum plaster and polymer extrusion  
14 manufacturing operations located twenty miles north of the City of Las Vegas, Nevada, along U.S.  
15 Highway 91, in Apex, Nevada (the “Facility”), which has been in operation for four decades. The  
16 Facility currently employs approximately 150 people. The Facility has one permitted on-site well  
17 which is the only source of water available for production and domestic water usage. The Facility  
18 is permitted to withdraw 47 million gallons per year. The majority of the permitted water is used  
19 in wallboard production with the remainder being used in the polymer extrusion process as well  
20 as the site’s domestic water uses.

21 5. Republic’s Apex Regional Landfill complex (“Apex Landfill”) is located at 13550  
22 N Highway 93, Las Vegas, Nevada and encompasses over 2,200 acres. Apex Landfill performs  
23 the critical task of providing environmentally safe and reliable daily waste disposal services for  
24 nearly 3 million residents and hundreds of businesses in the cities of Las Vegas, North Las Vegas,  
25 and Henderson, as well as Clark County. Additionally, the Apex Landfill site includes a sand and  
26 gravel operation operated by Las Vegas Paving Corp. which is Nevada’s top heavy civil  
27 construction company. To perform the daily operations, the site utilizes approximately 150  
28 million gallons of water per year from its six permitted wells. A predictable and stable water

1 supply is critical to allow Apex Landfill to continue to provide uninterrupted service for its  
2 millions of customers, as well as plan for meeting the increasing demand for future disposal  
3 capacity.

4 6. As discussed below, the State Engineer's issuance of Order 1309 will  
5 impermissibly limit Petitioners' right to appropriate water, long established under Nevada law,  
6 immediately deprives Petitioners' of the relative priority of their water rights, and will seriously  
7 jeopardize the viability of their operations and threaten the loss of the significant benefits they  
8 provide to the State and local economies. Petitioners are therefore aggrieved by the Order.

9 **Background to Issuance of Order 1309**

10 7. The general rule in Nevada is that one acquires a water right by filing an application  
11 to appropriate water with the Nevada Division of Water Resources ("DWR"). If DWR approves  
12 the application, a "Permit to Appropriate" issues. Nevada has adopted the principle of "first in  
13 time, first in right," also known as "priority." The priority of a water right is determined by the  
14 date a permit is applied for (the "Application Date"). If there is not enough water to serve all  
15 water right holders in a particular hydrographic unit, "senior" appropriators are satisfied first in  
16 order of priority: the rights of "junior" appropriators may be curtailed. The amount of  
17 groundwater available for appropriation historically has been administered in Nevada based upon  
18 "hydrographic basins," which are generally defined by topography, more or less reflecting  
19 boundaries between watersheds. The priority of groundwater rights is determined relative to the  
20 water rights holder within the individual basins.

21 8. At issue in the instant matter is the administration of several hydrographic basins  
22 which lie roughly along the southern (lower) course of the White River. The White River is a  
23 small, partially ephemeral stream in Eastern Nevada. It is part of a hydrologic system generally  
24 referred to as the Lower White River Flow System ("LWRFS"). Water resources in this area  
25 include groundwater in alluvial valley-fill sediments, the so-called Carbonate Aquifer, and the  
26 Muddy River.

27 9. Significant pumping of the Carbonate Aquifer in the LWRFS began in the 1980s  
28 and 1990s. Initial assessments of the water available in the Carbonate Aquifer suggested it would

1 provide a new abundant source of water for Southern Nevada. By 2001, the State Engineer had  
2 granted more than 40,000 acre feet of applications in the LWRFS. However, concerned over the  
3 lack of information regarding the sustainability of water resources from the Carbonate Aquifer,  
4 the State Engineer began hearings in July and August 2001 on water rights applications, leading  
5 to the issuance of Order 1169 on November 15, 2010. Order 1169 held water rights applications  
6 in abeyance in the LWRFS pending further studies and set up an ambitious test to “stress” the  
7 Carbonate Aquifer through two years of aggressive pumping, combined with examination of water  
8 levels in monitoring wells located throughout the LWRFS. The State Engineer’s conclusions from  
9 the pump test found an “unprecedented decline” in high-altitude springs, an “unprecedented  
10 decline” in water levels, and that additional pumping in the central part of Coyote Spring Valley  
11 or the Muddy River Spring Area could not occur without conflict with existing senior rights,  
12 including decreed surface water rights on the Muddy River, or potential impact to the habitat of  
13 the Moapa Dace.

#### 14 **Interim Order 1303 Proceedings**

15 10. Faced with the problem of resolving the competing interests for water resources in  
16 the over-allocated basins, then-State Engineer Jason King issued Interim Order 1303 on January  
17 11, 2019, Ex. 2. The ordering provisions in Interim Order 1303 provide in pertinent part:

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

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

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

- 25 a. The geographic boundary of the hydrologically connected groundwater and  
26 surface water systems comprising the Lower White River Flow System;  
27 b. The information obtained from the Order 1169 aquifer test and subsequent to  
28 the aquifer test and Muddy River headwater spring flow as it relates to aquifer  
recovery since the completion of the aquifer test;



- c. The long-term annual quantity of groundwater that may be pumped from the Lower White River Flow System, including the relationships between the location of pumping on discharge to the Muddy River Springs, and the capture of Muddy River flow;
- d. The effects of movement of water rights between alluvial wells and carbonate wells on deliveries of senior decreed rights to the Muddy River; and,
- e. Any other matter believed to be relevant to the State Engineer's analysis.

Interim Ord. 1303 at 13-14, Ex. 2.

11. In July and August 2019, reports and rebuttal reports were submitted discussing the four matters set forth in Interim Order 1303. On July 25, 2019, the State Engineer issued a Notice of Pre-Hearing Conference. On August 9, 2019, the State Engineer held a prehearing conference. On August 23, 2019, the State Engineer issued a Notice of Hearing (amended on August 26, 2019), which included the following summary:

On August 9, 2019, the State Engineer held a pre-hearing conference regarding the hearing on the submission of reports and evidence as solicited in Order 1303.... The State Engineer established that the purpose of the hearing on the Order 1303 reports was to provide the participants an opportunity to explain the positions and conclusions expressed in the reports and/or rebuttal reports submitted in response to the Order 1303 solicitation. 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 Lower White River Flow System basins.* On that basis, the State Engineer then addressed other related matters pertaining to the hearing on the Order 1303 reports, including addressing the date and sequence of the hearing, as set forth in this Notice of Hr'g. Not. Of Hearing and Am. Notice of Hr'g, Ex. 3 (emphasis added).

The State Engineer conducted a hearing on the reports submitted under Order 1303 between September 23, 2019 and October 4, 2019.

12. As the Hearing Officer advised during the August 9, 2019 Pre-Hearing Conference, the Hearing was to be limited to the four questions "solicited in the Order 1303 report. This larger substantive policy determination is not part of the particular proceeding. *That's part of later*

1 *proceedings....*” August 9, 2019 Pre-Ir’g. Conf. Trans. at 10:18-20, Ex.4. This was reiterated in  
2 the Hearing Officer’s opening remarks at the hearing:

3 I want to just reiterate, and we've been trying to make this clear, that this is  
4 not a contested or adversarial proceeding. *The scope of this proceeding is for the limited purpose of addressing those four issues plus the fifth.*

5 And while that fifth issue is [] not intended to expand the scope of this  
6 hearing into making policy determinations with respect to management of the  
7 Lower White River Flow System basin’s individual water rights, those different  
8 types of things, *because those are going to be decisions that would have to be made in subsequent proceedings* should they be necessary. Sept. 23, 2019 Hr’g.  
9 Trans. Excerpt at 6:4-15, Ex. 5.

9 Participants submitted closing statements due on December 3, 2019.

### 10 Order 1309

11 13. The State Engineer issued Order 1309 on June 15, 2020. *See* Ord. 1309, Ex. 1.  
12 Notably, following the submission by the participating stakeholders of closing statements at the  
13 beginning of December, 2019, the State Engineer engaged in no additional public process  
14 whatsoever and solicited no additional input regarding “future management decisions, including  
15 policy decisions, relating to the Lower White River Flow System basins.” *See* Not. Of Hearing,  
16 Ex. 3. Thus, the Order 1303 Hearing was not just the first step in the State Engineer’s decisions  
17 concerning the LWRFS basin management set forth in Order 1309, it was the *only* step.

18 The first three ordering paragraphs state as follows:

19 1. The Lower White River Flow System consisting of the Kane Springs Valley,  
20 Coyote Spring Valley, Muddy River Springs Area, California Wash, Hidden  
21 Valley, Garnet Valley, and the northwest portion of the Black Mountains Area as  
22 described in this Order, is hereby delineated as a single hydrographic basin. The  
23 Kane Springs Valley, Coyote Spring Valley, Muddy River Springs Area,  
24 California Wash, Hidden Valley, Garnet Valley and the northwest portion of the  
25 Black Mountains Area are hereby established as sub-basins within the Lower  
26 White River Flow System Hydrographic Basin.

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

3. The maximum quantity of water that may be pumped from the Lower White  
River Flow System Hydrographic Basin may be reduced if it is determined that  
pumping will adversely impact the endangered Moapa dace. Ord. 1309 at 65, Ex  
1.



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- (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; and
- (f) Arbitrary and capricious or characterized by abuse of discretion.

More specifically, and as will be articulated in more detail in Petitioners' Memorandum of Points and Authorities supporting this Petition, the Order should be set aside for the following reasons:

**The State Engineer Has Not Provided Appropriate Statutory Authority To Support Consolidation Of The LWRFS Into A Single Hydrographic Basin.**

17. The State Engineer found authority to delineate the LWRFS as a single hydrographic basin in NRS 533.024(1)(e). Ord. 1309 at 42. However, because NRS 533.024(1)(e) is a statement of policy and not a grant of authority, it does not support the action taken by the State Engineer to completely upend the priority of certificated and proven water rights whose priorities have been in place for up to nearly 39 years.

18. NRS 533.024(1)(e) declares that it is the policy of the state to “[t]o manage conjunctively the appropriation, use and administration of all waters of this State, regardless of the source of the water.” NRS 533.024(1)(e). As a statement of policy, NRS 533.024(1)(e) does not constitute a grant of authority to the State Engineer. Statements of policy from the Legislature do not serve as a basis for government action, but rather inform the interpretation of specific statutes that authorize specific action. *See e.g., Pawlik v. Deng*, 412 P.3d 68, 71 (2018) quoting *J.E. Dunn Nw., Inc. v. Corus Constr. Venture, LLC*, 127 Nev. 72, 79, 249 P.3d 501, 505 (2011) (noting that “if the statutory language is subject to two or more reasonable interpretations, the statute is ambiguous, and we then look beyond the statute to the legislative history and interpret the statute in a reasonable manner ‘in light of the policy and the spirit of the law.’”). And while such statements of policy are accorded deference, the Nevada Supreme court has specifically held that they are not binding. *See e.g., McLaughlin v. Housing Authority of the City of Las Vegas*, 227 P.2d 206, 93 (1951) (“It has often been said that the declaration of policy by the legislature, though not necessarily binding or conclusive upon the courts, is entitled to great weight, and that

1 it is neither the duty nor prerogative of the courts to interfere in such legislative finding unless it  
2 clearly appears to be erroneous and without reasonable foundation.”).

3 19. Thus, because NRS 533.024(1)(e) is a statement of policy and not a statutory grant  
4 of authority, it does not confer upon the State Engineer the authority to delineate the LWRFS as a  
5 single hydrographic basin. The authority to take that action must be rooted in a specific statutory  
6 grant. However, in this case the State Engineer failed to identify any such grant, and there is no  
7 such authority in Nevada’s water law. Consequently, it is unclear to Petitioners where authority  
8 has been granted to the State Engineer to support the consolidation of the LWRFS into a single  
9 hydrographic basin.

10 **The State Engineer’s Order Provides No Policies For Management Of LWRFS Nor Were**  
11 **Petitioners’ Provided Opportunity To Provide Comment on Such Policies, Violating**  
12 **Petitioners’ Due Process Rights**

13 20. In addition, the State Engineer’s decision in Order 1309 included no policies,  
14 regulations, or administrative procedures to address the effects of the reordering of priorities that  
15 will be the consequence of the administrative consolidation of the basin. *See* Ord. 1309, Ex. 1.

16 21. The hearing, guided by the Hearing Officer, focused on factual findings regarding  
17 the LWRFS hydrographic basin. The Hearing Officer explicitly said that there would be further  
18 proceedings to address the administration of the LWRFS. *See* August 9, 2019 Pre-Hr’g. Trans.,  
19 10:18-20, Ex. 4; Sept. 23, 2019 Hr’g. Trans. Excerpt, Ex. 5. Consequently, participants and  
20 experts did not have the opportunity to, and were actively discouraged from addressing policy  
21 issues critical to the management of the LWRFS, including, but not limited to: whether Nevada  
22 law allows the State Engineer to conjunctively manage multiple hydrographic basins in a manner  
23 that modifies the relative priority of water rights due to the administration consolidation of basins;  
24 whether the State Engineer would establish a “critical management area” pursuant to NRS 534.110  
25 and, if so, whether he would develop a groundwater management plan or defer to the stakeholders  
26 to develop one; whether Nevada law gives the State Engineer authority to designate a management  
27 area that encompasses more than one basin; whether “safe-yield” discrete management areas  
28 should be established within the proposed administrative unit; whether water rights holders enjoy  
a “property right” in the relative priority of their water rights such that impairing that right may

1 constitute a “taking”; whether unused (or only sporadically used) senior water rights take  
2 precedence over certificated or fully used junior rights, particularly where these junior rights are  
3 in continuous use to support economically significant enterprises; whether States compel  
4 quantification of federal reserved rights by a date certain; and whether the State Engineer should  
5 approach the legislature to seek different or additional management tools or authority. *See* Dec.  
6 2, 2019, Closing Arg. of Georgia Pacific and Republic Environmental Technologies, Inc., Ex. 6  
7 (outlining policy questions for consideration by the State Engineer at later proceedings,  
8 proceedings that never took place).

9 22. Then, without notice or providing additional proceedings for the participants,  
10 including Petitioners, to address these critical questions, the State Engineer issued Order 1309. In  
11 it, the State Engineer acknowledged Petitioners’ concerns:

12 Georgia-Pacific and Republic asserted that boundaries are premature  
13 without additional data and without a legally defensible policy and management  
14 tools in place. They expressed concern that creating an administrative unit at this  
15 time inherently directs policy without providing for due process. The State  
16 Engineer has considered these concerns and agrees that additional data and  
17 improved understanding of the hydrologic system is critical to the process. He also  
18 believes that the data currently available provide enough information to delineate  
19 LWRFS boundaries, and that an *effective management scheme* will provide for  
20 the flexibility to adjust boundaries based on additional information, retain the  
21 ability to address unique management issues on a sub-basin scale, and maintain  
22 partnership with water users who may be affected by management actions  
23 throughout the LWRFS. Ord. 1309 at 53, Ex. 1.

24 23. Yet, despite the far-reaching impact of the consolidation of the basin and the State  
25 Engineer’s admission that an “effective management scheme” is necessary for the administration  
26 of the LWRFS, Order 1309 included no such scheme. *Id.* It implicates, but does not meaningfully  
27 address, complex policy questions, nor were Petitioners’ given the opportunity to address these  
28 issues, as promised. This is in clear violation of Petitioners’ procedural due process rights. *See*  
*e.g., Dutchess Business Services Inc. v. Nevada State Bd. of Pharmacy*, 124 Nev. 701, 711, 191  
P.3d 1159, 1166 (2008) (“Although proceedings before administrative agencies may be subject to  
more relaxed procedural and evidentiary rules, due process guarantees of fundamental fairness

1 still apply. Administrative bodies must follow their established procedural guidelines and give  
2 notice to the defending party of ‘the issues on which decision will turn and . . . the factual material  
3 on which the agency relies for decision so that he may rebut it.’”) (internal citations omitted)  
4 quoting *Bowman Transp. v. Ark.-Best Freight System*, 419 U.S. 281, 288–89 n. 4, 95 S.Ct. 438,  
5 42 L.Ed.2d 447 (1974).

6 **The State Engineer Provided Inadequate Analysis and Factual Support for his**  
7 **Determination of the Maximum Sustainable Pumping from the LWRFS, And Therefore,**  
8 **The Factual Underpinning Of The Order Is Arbitrary, Capricious, And The Order Was**  
9 **Made Upon Unlawful, Unconstitutional Procedure.**

10 24. Order 1309 includes no clear analysis as to the basis for the 8000 afa number for  
11 the maximum sustainable yield set forth in Ordering Paragraph 2. As the Order acknowledges,  
12 “the evidence and testimony presented at the 2019 hearing did not result in a consensus among  
13 experts of the long-term annual quantity of groundwater that can be pumped. Recommendations  
14 range from zero to over 30,000 afa.... There is a near consensus that the exact amount that can  
15 be continually pumped for the long term-term cannot be absolutely determined with the data  
16 available and that to make that determination will require monitoring of spring flow, water levels,  
17 and pumping over time” Ord. 1309 at 57,Ex. 1.

18 25. The Order repeats this acknowledgement: ...“there is almost unanimous  
19 agreement among experts that data collection is needed to further refine with certainty the extent  
20 of groundwater development that can continually pumped over the long term.” Ord. 1309 at 62,  
21 Ex. 1. However, the State Engineer discounts this uncertainty and finds “that the current data are  
22 adequate to establish an approximate limit on the amounts of pumping that can occur within the  
23 system, but [further data are] essential to refine and validate this limit.” *Id.* But Order 1309 does  
24 not present the 8000 afa limitation as a temporary “approximation” subject to validation, but as  
25 an absolute limitation with immediate weighty consequences and, further, keeps the Petitioners  
26 and all other stakeholders in suspense as to what exactly those weighty consequences might be.  
27 As discussed above, the Order is devoid of any direction or guidance as to any future refinement  
28 or modification of this limitation. *See* Ord. 1309 Ex. 1.

1           26. Equally troubling is the cursory support for the 8000 afa limitation. Most of the  
2 Order consists of selective and imprecise summaries of the participants' presentations. There is  
3 no technical analysis, no detailed consideration of the weight of evidence, nor discussion of the  
4 numerous models proposed or challenged by the participants relevant to this issue. As to the  
5 basis for the sustainable supply, the Order cites a number of estimations from other participants  
6 that exceed this number, a few that are less, and then simply lands on 8000 afa, apparently based  
7 on amounts of current pumping from the carbonate aquifer and the possibility that the spring  
8 flow "may be approaching steady state." Ord. 1309 at 63, Ex. 1.

9           27. Underscoring the arbitrariness of the conclusion in Ordering Paragraph 2, the  
10 Order (Ex. 1) adds the Kane Springs Valley hydrographic basin to the joint administrative unit  
11 but fails to acknowledge the additional water resources available from the Kane Springs basin.  
12 Since Interim Order 1303 did not include the Kane Springs Valley hydrographic basin, the  
13 participants' assessment of the sustainable water resources of the LWRFS generally did not  
14 consider Kane Springs water resources and the State Engineer made no effort to collect evidence  
15 on this issue. According to the Division's Hydrographic Basin Abstract, the Kane Springs Valley  
16 Hydrographic Basin (Basin 206) has a perennial yield of 1000 afa (Nevada Division of Water  
17 Resources, Hydrographic Area Summary, <http://water.nv.gov/DisplayHydrographicGeneralReport.aspx?basin=206>  
18 (last visited July 14, 2020)); the contribution to the LWRFS may be more than 4000 afa.<sup>2</sup>  
19 Nothing in the Order indicates that the State Engineer considered this resource in determining  
20 the LWRFS limitation.

21           28. Given the immediate and far-reaching consequences of Order 1309, the public  
22 deserves a careful and considered analysis of the limitation imposed supported by substantial  
23

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24  
25 <sup>2</sup> "SNWA (2007) assessed local and regional flow in southeastern Nevada and found regional  
26 inflow to Coyote Spring Valley was 50,700AFY of which ... Kane Springs Valley contributes  
27 4,190 AFY....SNWA estimated local recharge to be 2,130 AFY..." Coyote Springs Investment,  
28 LLC *Report Submitted Pursuant to Nevada State Engineer Interim Order 1303* (July 2019) at 44  
(citing Southern Nevada Water Authority, *Water-Resources Assessment and Hydrologic Report  
for Cave, Dry Lake, and Delmar Valleys* (June 2007)).



1 evidence and not an arbitrary “guestimate,” or, in the alternative, the State Engineer should  
2 provide a process for determining a limitation that can be adequately supported by empirical  
3 evidence.

4 **The State Engineer Does Not Have Authority To Make A Ruling On The Endangered**  
5 **Species Act and Failed to Provide Adequate Notice; Therefore, The Factual Underpinning**  
6 **Of The Order Is Arbitrary, Capricious, And The Order Was Made Upon Unlawful,**  
7 **Unconstitutional Procedure.**

8 29. Ordering Paragraph 3 states “The maximum quantity of water that may be pumped  
9 from the Lower White River Flow System Hydrographic Basin may be reduced if it is determined  
10 that pumping will adversely impact the endangered Moapa dace.” Ord. 1309 at 64, Ex. 1. This  
11 portion of the Order is underpinned by the following specific findings:

12 **WHEREAS**, based upon the testimony and evidence offered in response to Interim  
13 Order 1303, it is clear that it is necessary for spring flow measured at the Warm Springs  
14 West gage to flow at a minimum rate of 3.2 cfs in order to maintain habitat for the  
15 Moapa dace.<sup>261</sup> A reduction of flow below this rate may result in a decline in the dace  
16 population. This minimum flow rate is not necessarily sufficient to support the  
17 rehabilitation of the Moapa dace.

18 **WHEREAS**, the ESA prohibits any loss of Moapa dace resulting from actions that  
19 would impair habitat necessary for its survival. Some groundwater users are signatories  
20 to an MOA that authorizes incidental take of the Moapa dace; however, the State  
21 Engineer and many other groundwater users are not covered by the terms of the  
22 MOA.<sup>263</sup> Not only would liability under the ESA for a “take” extend to groundwater  
23 users within the LWRFS, but would so extend to the State of Nevada through the  
24 Division as the government agency responsible for permitting water use.

25 **WHEREAS**, the State Engineer concludes that it is against the public interest to allow  
26 groundwater pumping from the LWRFS that will reduce spring flow in the Warm  
27 Springs area to a level that would impair habitat necessary for the survival of the Moapa  
28 dace and could result in take of the endangered species. Ord. 1309 at 45-46, Ex. 1.

29 30. In other words, Ordering Paragraph 3 is based upon the State Engineer’s  
30 unauthorized and unsupported conclusion that groundwater users, the State Engineer, and the State  
31 of Nevada would be liable for a take under the Endangered Species Act (“ESA”) if flow levels at  
32 the Warm Springs West gage to flow fall below a minimum rate of 3.2 cfs. The ESA, of course,  
33 is a federal law, administered by the U.S. Fish Wildlife Service (“USFWS”). See ESA 16 USC §  
34 1537a. The State Engineer has not provided (and could not provide) the basis for his authority to

1 determine when and under what circumstances a “take” of the Moapa dace would occur.<sup>3</sup> Notably,  
2 during the hearing, the USFWS expressly *declined* to endorse the conclusions stated in the State  
3 Engineer’s findings quoted above. Sept. 24, 2019, Hr’g Tr. Vol. II at 483:10-484:15. Ex 7.

4 31. Moreover, the State Engineer’s “factual” conclusion that “it is necessary to  
5 maintain flow at minimum rate of 3.2 cfs in order to maintain habitat for the Moapa dace” is far  
6 from “clear.” The USFWS has reached agreements with several parties for implementation of  
7 mitigation measures triggered by much lower flow rates at the Warm Springs West gage, Order  
8 1303 Hearing Documents, NSE Ex 244, MOA triggers, Ex. 8, and evidence was introduced at the  
9 Hearing of factors such as temperature and presence of predators that may be more determinative  
10 of dace success. It has certainly not been conclusively established that groundwater pumping  
11 anywhere in the LWRFS will impact Warm Springs flows, particularly pumping in the far distal  
12 locations of Petitioners’ wells.

13 32. Including these findings and order in Order 1309 is a completely *ultra vires* act;  
14 nothing empowers the State Engineer to make a determination when a “take” has occurred under  
15 the ESA.

16 33. In addition to the State Engineer’s lack of authority under the ESA, no notice was  
17 provided to the public or to the Interim Order 1303 Hearing participants that the State Engineer  
18 intended to determine the flow levels at the springs purportedly necessary to maintain the dace,  
19 that this would be a purpose of the proceeding, or that the State Engineer intended to prioritize  
20 protection of the dace over other competing uses of water resources with the LWRFS. Moreover,  
21 as discussed above, all questions of policy or procedure were off-limits during the Hearing  
22 according to the State Engineer’s and Hearing Examiner’s ground rules, and no opportunity has  
23 been afforded the participants to comment on such findings.

24 \_\_\_\_\_

25  
26 <sup>3</sup> 16 U.S.C.A. §1536, cited by the State Engineer as authority for “shared [ESA] responsibility”  
27 with the federal government, confers no authority or responsibility to States whatsoever, except  
28 in the context of consideration of *exemptions* from application of the ESA. The “shared  
responsibility” cited by the State Engineer is expressly referred to in the code as required  
cooperation between federal agencies to enforce the ESA.

1           34. As a result of the lack of notice, the State Engineer failed to gather factual evidence  
2 or develop an adequate record to support his findings. Notably, the U.S. Fish and Wildlife Service  
3 has not issued a biological opinion based on analysis of the effects on Moapa dace from  
4 groundwater pumping by users within the Garnet Valley hydrographic basin or other portions of  
5 the LWRFS beyond three specific users in Coyote Spring Valley and California Wash, and in the  
6 Muddy River Spring Area. SNWA Ex 008, SNWA 2019 Assessment of Moapa Dace. Ex. 9. The  
7 State Engineer, however, made no distinction regarding the location of groundwater pumping  
8 within the new administrative unit as it relates to his findings of potential take or curtailment. Yet  
9 his own findings require consideration of this factor:

10                   The State Engineer finds that data support the conclusion that pumping  
11 from locations within the LWRFS that are distal from the Warm Springs area can  
12 have a lesser impact on spring flow than pumping from locations more proximal  
13 to the springs. The LWRFS system has structural complexity and heterogeneity,  
14 and some areas have more immediate and more complete connections than others.  
15 ... [T]here remains some uncertainty as to the extent that distance and location  
16 relative to other capturable sources of discharge either delay, attenuate, or reduce  
17 capture from the springs. Ord. 1309 at 59.

15           35. In short, the State Engineer has no authority to determine when and whether a  
16 “take” could occur under the ESA, failed to provide due process regarding this issue and regarding  
17 factual findings affecting the dace, and arbitrarily applied those findings to all groundwater use  
18 and users within the consolidated basin, regardless of location.

19                   **The Order substantially Prejudices Petitioners’ Rights**

20           36. The defects in Order 1309 substantially prejudice Petitioners’ rights. As stated  
21 above, the delineation of the LWRFS as a single hydrographic basin will result in the relative  
22 priority of all water rights within the seven affected basins being reordered and the priorities  
23 considered in relation to of all water rights holders in the consolidated basins (as proposed by  
24 Interim Order 1303), rather than in relation only to the other users within the original separate  
25 basins. This reordering immediately deprives Petitioners’ of the secure priority position they  
26 enjoyed within the Garnet Valley Hydrographic Basin for between 32 and 39 years. This loss of  
27 priority taken together with the State Engineer’s arbitrary determination of the maximum pumping  
28

1 volume in the LWRFS will subject Georgia-Pacific's water rights and a majority of Republic's  
2 water rights to curtailment, jeopardizing the viability of their business operations and the  
3 significant benefits they provide to the State and local economies. Accordingly, that the State  
4 Engineer acted without authority, failed to afford due process, abused his discretion, acted  
5 contrary to law and arbitrarily and capriciously, substantially prejudices Petitioners' rights.

6 **RELIEF REQUESTED**

7 WHEREFORE, Petitioner requests that this Court review the Order, the underlying  
8 administrative record and other evidence, and prays for the following relief:

- 9 A. That the Order be set aside in its entirety;
- 10 B. That, in the event any portion of the Order stands, Ordering Paragraph 2 and the  
11 supporting findings be stricken:
- 12 C. That, in the event any portion of the Order stands, Ordering Paragraph 3 and the  
13 supporting findings be stricken;
- 14 D. That the Court issue such other relief as it deems necessary and proper; and
- 15 E. That the Court enter judgment in favor of Petitioners and against the State  
16 Engineer, the Division of Water Resources and the Department of Conservation and Natural  
17 Resources.

18 DATED: July 15, 2020.

19 McDONALD CARANO LLP

20 /s/ Sylvia Harrison  
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# Attachment 8



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CASE NO: A-20-818015-P  
Department 8

6 *Attorney for Nevada Cogeneration Associates Nos. 1 and 2*

7 **DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

9 NEVADA COGENERATION ASSOCIATES  
NOS. 1 AND 2,

Case No.:

Petitioner,

Dept. No.:

11 vs.

12 Tim Wilson, P.E., Nevada State  
13 Engineer, DIVISION OF WATER  
14 RESOURCES, DEPARTMENT OF  
CONSERVATION AND NATURAL  
RESOURCES,

**PETITION FOR JUDICIAL REVIEW**

15 Respondent.

16  
17 Petitioner, NEVADA COGENERATION ASSOCIATES NOS. 1 AND 2, (hereinafter  
18 collectively “NCA” and separately “NCA 1” and “NCA 2”), by and through its attorney of  
19 record, ALEX J. FLANGAS, ESQ., of the law firm of KAEMPFER CROWELL, hereby  
20 petitions the Court pursuant to NRS 533.450(1) to reverse or remand a portion of “Order  
21 #1309” issued by Respondent TIM WILSON, P.E., Nevada State Engineer, dated June 15,  
22 2020, (hereinafter the “Order #1309”).<sup>1</sup> A copy of Order #1309 is attached hereto as **Exhibit 1**.

23  
24 <sup>1</sup> Order #1309 is fully entitled, “Order Delineating the Lower White River Flow System Hydrographic Basin with the Kane Springs Valley Basin (206), Coyote Spring Valley Basin (210), a Portion of the Black Mountains Area Basin (215), Garnet Valley Basin (216), Hidden Valley Basin (217), California Wash Basin (218), and Muddy River Springs Area (aka Upper Moapa Valley) Basin (219) Established as Sub-Basins, Establishing a Maximum

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1           Among other things, Order #1309 identifies a new boundary for the recognition of an  
2 area that the Nevada State Engineer has designated as the Lower White River Flow System  
3 (“LWRFS”), which is essentially a carbonate-rock underlain area that the State Engineer  
4 contends requires “joint management” essentially as one, single *super basin*. Following the  
5 entry of Order #1309, the LWRFS is now comprised of seven previously identified, previously  
6 separate, hydrographic basins that have been determined to share a “close hydrologic  
7 connection” that now requires joint management of those basins rather than individual basin  
8 management. The LWRFS, as it is now designated following the entry of Order #1309, purports  
9 to set a new limit on the amount of groundwater pumping that will be allowed on an annual  
10 basis from the larger area that is the LRWFS without regard to the cumulative totals of the  
11 various individual basins because, in the State Engineer’s opinion following a lengthy hearing  
12 process, each of these various basins is “interconnected” hydrologically.

13           This Petition for Judicial Review is taken in the nature of an appeal pursuant to NRS  
14 533.450 and specifically challenges that portion of Order #1309 that intends to move the  
15 southern boundary of the LWRFS even further south and east to a new, arbitrarily-identified  
16 location in order to maintain the inclusion of NCA’s production water wells *within* the boundary  
17 of the LWRFS. Order #1309, by its terms, intends to maintain the inclusion of NCA’s  
18 certificated water rights and the pumping of groundwater made pursuant to those water rights as  
19 being *inside* the LWRFS boundary, rather than excluding NCA from the LWRFS entirely as  
20 was the position taken by NCA during the hearing and in the filing of NCA’s post-hearing  
21 brief/argument (and which is most consistent with the evidence adduced at the hearing).

22 //

23 //

24 \_\_\_\_\_  
Allowable Pumping in the Lower White River Flor System Within Clark and Lincoln Counties, Nevada, and  
Rescinding Interim Order 1303.” Order #1309 may also be referred to as the “Final Order.”

1 **I. JURISDICTIONAL STATEMENT**

2 Pursuant to NRS 533.450(1), “any person feeling aggrieved by any order or decision of  
3 the State Engineer ... affecting the person’s interests, when the order or decision related to the  
4 administration of determined rights or is made pursuant to NRS 533.270 to 533.455, inclusive,  
5 or NRS 533.481, 534.193, 535.200, or 536.200, may have the same reviewed by a proceeding  
6 for that purpose, insofar as may be in the nature of an appeal, which must be initiated in the  
7 proper court of the county in which the matters affected or a portion thereof are situated....”  
8 Pursuant to Subsection 2 of NRS 533.450, the proceedings in every case must be heard by the  
9 court and must be informal and summary, “but full opportunity to be heard must be had before  
10 judgment is pronounced.” Subsection 8 further explains that “[t]he practice in civil cases applies  
11 to the informal and summary character of such proceedings, as provided in this section.”<sup>2</sup>

12 The real property to which the water at issue in this Petition is appurtenant lies within  
13 Clark County, and both the points of diversion for the water rights of NCA and the places of use  
14 of those water rights is located in a hydrographic basin in Clark County. Therefore, the Eighth  
15 Judicial District Court of the State of Nevada in and for Clark County is the proper venue for  
16 judicial review of this Petition involving Order #1309.

17 \_\_\_\_\_  
18 <sup>2</sup> Notably, petitions for judicial review pursuant to NRS 533.450 taken from orders or decisions  
19 of the Nevada State Engineer are *not* governed by Chapter 233B, the Nevada Administrative  
20 Procedures Act, as many other administrative agency appeals might be. NRS 233B.039(1)(j)  
21 provides as follows: “The following agencies are entirely exempted from the requirements of  
22 this chapter: ... (j) Except as otherwise provided in NRS 533.365, the Office of the State  
23 Engineer.”

21 Consequently, it is likely that a Senior Attorney General assigned to represent the Nevada State  
22 Engineer in this matter will confer with the undersigned and submit a proposed, stipulated  
23 briefing schedule for this Court’s consideration, as that is typical in virtually every water rights  
24 petition for judicial review taken in which the undersigned has participated over the last 30 years.

24 It is likely the parties will submit timing and briefing recommendations to this Court for  
consideration and approval similar to those outlined in the Nevada Rules of Appellate Procedure  
governing civil appeals. Briefing would necessarily follow after the submission of the transcript  
of the record that is required to be made pursuant to NRS 533.450(4).



1 **II. FACTUAL BACKGROUND**

2 **1. Nevada Cogeneration’s water rights and interest in this proceeding.**

3 Nevada Cogeneration Associates Nos. 1 and 2 operate combined cycle gas-fired  
4 cogeneration facilities located near the southern boundary of the LWRFS. The points of  
5 diversion for the *permitted* and *certificated* water rights owned and utilized by NCA are located  
6 entirely within a narrow part of the Black Mountains Area in hydrographic Basin 215, which  
7 location was originally identified by the State Engineer as being very near the southern  
8 boundary of the LWRFS as that boundary existed prior to the hearings that led to the issuance of  
9 the Final Order.<sup>3</sup>

10 NCA 1 and NCA 2 began commercial operations in June 1992 and February 1993,  
11 respectively. Collectively, the two plants account for 170 MW in baseload generation capacity.  
12 NCA sells 100% of its electric output to NV Energy under the terms of a long-term Power  
13 Purchase Agreement, and both facilities supply hot exhaust gas and chilled water (via a closed  
14 loop system) to Georgia Pacific and Pacific Coast Building Products’ gypsum facilities under  
15 the terms of an Energy Purchase Agreement. *Reference: Rebuttal Report Pertaining to Interim  
16 Order 1303*, prepared on behalf of Nevada Cogeneration Associates, August 16, 2019,  
17 “Overview” at p. 1.

18 The NCA facilities have played an integral role in economic output in the region for  
19 more than 25 years. NCA’s water rights have been placed to continuous use since construction  
20 of facilities in 1992 and 1993. The continued access of their certificated water rights is critical  
21 for NCA’s sustained operations.

22 Notably, a permitted water right holder obtains a “certificate” only after that permitted  
23 holder has proven to the State Engineer that it has complied with the terms of its permit and has  
24

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<sup>3</sup> NCA holds the following water rights: Permit 55269/Certificate 17123; Permit 58031/Certificate 17124; Permit 58032/Certificate 17125, all of which have a point of diversion within the Black Mountains Area, Basin 215. NCA 1 does hold one Permit, that being Permit 76862, for the storage of effluent in Garnet Valley Basin, which is Basin 216, but that Permit was not the focus of Order #1309 as that Order relates to the inclusion of the “production wells” of NCA within the newly-identified southern boundary of the LWRFS and was not concerned with the storage permit.

1 actually put water obtained pursuant to the permit to a “beneficial use” consistent with NRS  
2 533.035. The permit holder must file *proof* of its beneficial use with the State Engineer  
3 sufficient to “perfect” the appropriation of the water right, and must do so demonstrating that it  
4 has proceeded in good faith and with reasonable diligence to perfect the appropriation; failure to  
5 do so will result in the cancellation of the permit rather than the issuance of a certificate. *NRS*  
6 *533.395(1)*. In this situation, NCA has long-since demonstrated its use of the permitted water  
7 rights, sufficiently so that it was granted certificates establishing that it had already placed the  
8 water appropriated under those permits to a beneficial use consistent with those permits.

## 2. Order 1169 Pumping Tests.

9 On March 8, 2002, a prior State Engineer, Hugh Ricci, believing there may be a  
10 hydrologic connection between hydrographic basins located in the area that is now identified as  
11 the LWRFS, issued Order 1169 holding pending groundwater applications in abeyance and  
12 requiring an aquifer test of the carbonate-rock aquifer system to better determine whether the  
13 pending applications and future appropriations could be safely developed from the carbonate-  
14 rock aquifer. The express purpose of 1169 was to determine, to the extent possible, the  
15 hydrologic connection between the basins such that groundwater pumping in one basin would  
16 have a direct effect on the level of groundwater on adjacent basins; as explained in Order #1309  
17 at p. 3, the State Engineer “did not believe that it was prudent to issue additional water rights to  
18 be pumped from the carbonate-rock aquifer until a significant portion of the then existing water  
19 rights were pumped [tested] for a substantial period of time to determine whether the pumping  
20 of those water rights would have a detrimental impact on existing water rights or the  
21 environment.”

22 Because of certain concerns of various parties involved with the flows of water that  
23 might affect a particular spring and the potential effect on an endangered species of fish, several  
24 years passed before the pump tests were actually conducted. On November 15, 2010, the Order  
1169 aquifer test began, and, pursuant to the direction of the Nevada State Engineer, the  
pumping continued from the MX-5 well for a period of slightly more than two years. That  
pumping provided both the State Engineer and the affected water right holders with data for use

1 in assessing the effects of groundwater withdrawals from the LWRFS; the tests allowed the  
2 affected water right holders in the hydrographic basins identified as potentially interconnected  
3 to obtain and provide data to their respective experts from which those experts then could  
4 prepare reports analyzing the effects and present those reports and comments to the State  
5 Engineer for consideration on how best to manage the LWRFS moving forward.

### 6 **3. Interim Rulings and the Interim Order #1303.**

7 Following the conclusion of the pump tests, the State Engineer issued additional rulings  
8 that continued to restrict the appropriation of new groundwater within the LWRFS, but allowed  
9 existing water right holders such as NCA to continue to use their water rights consistent with  
10 their existing permits and certificates. Beginning in 2018, the State Engineer conducted several  
11 public workshops to review and discuss the results of the pump tests and to review the status of  
12 groundwater use within the LWRFS. The State Engineer elicited comments from the  
13 participants at those workshops regarding how to best develop the water resources involved in  
14 the LWRFS, acknowledging the apparent close, hydrologic connection between the various  
15 basins involved in the pump tests.

16 In the summer of 2018, the State Engineer drafted and made public a proposed order  
17 directed to address several issues involved in the future management of the LWRFS, and  
18 conducted public workshops between July and the end of the year, taking “comments” verbally  
19 during those meetings and in writing following each such meeting from interested participants.  
20 The last such meeting was conducted on December 14, 2018, when the State Engineer  
21 conducted a hearing and received comments from participants regarding that proposed order.

22 Then, on January 11, 2019, the State Engineer at that time, Jason King, P.E., issued  
23 Interim Order #1303<sup>4</sup> (the “Interim Order”) which identified specific elements for which the  
24

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<sup>4</sup> The full title of Order #1303, the “Interim Order,” is “Interim Order Designating the Administration of All Water Rights Within Coyote Spring Valley Hydrographic Basin (210), a Portion of Black Mountains Area Basin (215), Garnet Valley Basin (216), Hidden Valley Basin (217), California Wash Basin (218), and Muddy River Springs Area (aka Upper Moapa Valley) Basin (219) as a Joint Administrative Unit, Holding in Abeyance Applications to Change Existing Groundwater Rights, and Establishing a Temporary Moratorium on the Review of Final Subdivision Maps.”

1 State Engineer was seeking input from the affected water right holders and interested parties.  
2 Order #1303 identified four, specific elements, and one catch-all element, about which it sought  
3 expert “reports” from the various interested parties and participants:

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

16 The State Engineer further indicated that following the submission of such expert reports, a  
17 hearing would be conducted wherein evidence would be taken by the State Engineer in  
18 connection with the reports, cross-examination would likely be allowed by the interested  
19 parties, and the State Engineer would then render a final determination on the four, specific  
20 points identified. Importantly, it was repeatedly stressed that this was only “Stage 1” of the  
21 LWRFS process – the hydrologic analysis – and that this was *not* the policy analysis that will  
22 identify which water rights are allowed by the State Engineer to be actually put to use in each  
23 individual basin; that proceeding, which will be a “Stage 2” proceeding, will follow the  
24 completion of the determinations rendered in the Final Order (#1309).

In response to Order #1303, many of the participants submitted initial reports. NCA,  
however, chose to wait and submit only a Rebuttal Report, which it did on the required deadline  
for submission of Rebuttal Reports, August 16, 2019, a bit more than a month before the  
hearings commenced in September of 2019. Parties were also required to file lists of witnesses  
and exhibits, and were required to identify objections to those witnesses and exhibits of others,  
which they did in August of 2019. The State Engineer conducted hearings concerning those

1 witness and evidentiary objections prior to commencement of the hearing, and the hearings  
2 commenced in September of 2019, lasting approximately two weeks.

3 During the hearing, the State Engineer restricted questioning significantly for time  
4 constraints, and further restricted questioning for anything that was beyond the scope of the  
5 four, specifically identified issues outlined in the conclusion of the Interim Order, #1303.

6 **The Final Order, #1309.**

7 The hearings: Hearings commenced on September 23, 2019, and were conducted for  
8 two weeks before Nevada State Engineer Tim Wilson, P.E., and members of his staff at the  
9 Division of Water Resources to consider the comments, objections and recommendations  
10 lodged by several affected and interested parties, including NCA, outlined in the initial and  
11 rebuttal expert reports. The various reports and the testimony during the two weeks of hearings  
12 focused on the four, specific elements outlined for determination in the Interim Order, #1303,  
13 and in the Addendum issued by the State Engineer on May 13, 2019 (hereinafter the  
14 “Addendum”)<sup>5</sup> clarifying the Interim Order. Importantly, the hearing officer who was managing  
15 the hearing, Deputy Administrator Micheline Fairbank, emphasized repeatedly before and  
16 during the hearings that the scope of the September, 2019, hearings and the presentations made  
17 by the various participants therein would be limited to the hydrologic examination of the four,  
18 specific elements identified in the Interim Order and in the Addendum and would *not* be  
19 extended to include policy determinations regarding which water right holders were entitled to  
20 the use of groundwater or surface water in the individual basins.<sup>6</sup>

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21 <sup>5</sup> The full title of the Addendum is “Addendum to Interim Order 1303 Designating the  
22 Administration of All Water Rights Within Coyote Spring Valley Hydrographic Basin (210), a  
23 Portion of Black Mountains Area Basin (215), Garnet Valley Basin (216), Hidden Valley Basin  
24 (217), California Wash Basin (218), and Muddy River Springs Area (aka Upper Moapa Valley)  
Basin (219) as a Joint Administrative Unit, Holding in Abeyance Applications to Change  
Existing Groundwater Rights, and Establishing a Temporary Moratorium on the Review of Final  
Subdivision Maps.”

<sup>6</sup> It was made clear to the participants that the policy determinations, including determinations of  
which water right holders have priority to use groundwater within the LWRFS once any revised  
boundary has been firmly established, will not be made until after this first phase of the  
proceedings has been completed.

1 NCA was allowed only a few hours during the two-week hearing period to make its  
2 presentation. NCA focused a significant portion of its presentation on evidence and analysis  
3 actually found in the Rebuttal Report of the Southern Nevada Water Authority (“SNWA”)  
4 which identified a specific hydrologic finding that strongly supported the factual conclusion that  
5 the production wells owned and operated by NCA in the southern portion of the Black  
6 Mountains Area, Basin 215, do *not* share a “close hydrologic connection” with the other wells  
7 located inside the LWRFS. The analysis and conclusion independently conducted and reached  
8 by SNWA found that the production wells belonging to NCA – which are the water wells from  
9 which NCA pumps its certificated water rights -- should *not* be included within the boundary of  
10 the LWRFS. *See Order #1309, Exhibit 1*, at pp. 50 and 51.

11 Prior to the September 2019 hearings, the State Engineer’s office issued rulings on  
12 objections raised by interested parties regarding the exclusion of witnesses and evidence. One  
13 such objection was raised as to the credentials of one of NCA’s expert witnesses who had  
14 worked on NCA’s Rebuttal Report, former State Engineer Hugh Ricci, P.E., who had been  
15 instrumental in beginning the entire LWRFS process by issuing Order 1169 in 2002 as the State  
16 Engineer at that time. Order 1169 held pending water right applications in abeyance until further  
17 information was obtained by stressing the aquifer; it also ordered the pump tests from which all  
18 of the conclusions now reached regarding the inter-connectivity of the various hydrographic  
19 basins included within the boundary of the LWRFS could be made. As a result of that objection,  
20 and even though former State Engineer Ricci clearly exhibited the hydrologic understanding of  
21 the LWRFS system sufficiently to exercise the requisite caution in regard to pending  
22 applications and to order the pump tests that form the basis for determinations made by the  
23 current State Engineer, Tim Wilson, P.E., to support Order #1309 (the Final Order), the hearing  
24 officers from the State Engineer’s office who were authorized on behalf of Mr. Wilson with  
ruling on Mr. Ricci’s qualifications as an expert declared – surprisingly, at least to NCA -- that  
Mr. Ricci was “not qualified” to testify as an expert in hydrology during the presentation of  
NCA’s case in chief.

1           Notably, however, though Mr. Ricci, P.E., was disqualified by the present State  
2 Engineer to testify as a hydrologist and to provide any direct testimony for NCA's case, Mr.  
3 Ricci was allowed to provide some answers to questions presented on cross examination,  
4 though not specifically on his opinions on hydrology as would relate to the four, specific areas  
5 in question raised in the Interim Order and in the Addendum. Most importantly, Mr. Ricci was  
6 not allowed to testify regarding his opinion regarding the establishment of the boundary of the  
7 LWRFS in the Black Mountains Area as it pertains to NCA's production wells, nor was he  
8 allowed to present his opinions regarding his analysis of and his consideration, if any, of  
9 SNWA's evidence and conclusions regarding whether NCA's production wells should be  
10 considered as *included within* the LWRFS boundary or excluded therefrom.<sup>7</sup> Also during the  
11 hearing it was established that Hugh Ricci, P.E., was the State Engineer who made the  
12 determinations for the purposes of the issuance of Order 1169 which basins were subject to and  
13 which were not subject to Order 1169 (which governed, essentially, inclusion in the newly  
14 identified LWRFS) *based on his understanding and his application of hydrologic principles*  
15 *affecting those basins which would in turn affect the water rights in those basins*. Despite this  
16 understanding, Mr. Ricci, P.E., was not allowed to opine as to the boundary condition affecting  
17 NCA's rights or their production wells.

18           On June 15, 2020, the current State Engineer, Tim Wilson, P.E., issued the Order #1309  
19 -- the Final Order -- addressing the four, specific hydrologic elements identified as the focus of  
20 the hearing in Order #1303 and the Addendum. In that Order at pages 50 and 51, the State  
21 Engineer concluded that NCA's production wells should be included in the boundary of the  
22 LWRFS despite the fact that "the State Engineer finds logic in NCA's position" to exclude  
23 those wells from the boundary. Heading into the hearings, NCA had criticized the prior LWRFS  
24 boundary identified as the southern boundary in the Black Mountains Area that the State  
Engineer used in Interim Order #1303 which incorporated the NCA production wells, in part  
because it was drawn as a straight line. NCA maintained a straight-line boundary was arbitrary

1 as no such hydrologic boundaries occur in nature; water does not follow a perfectly straight line  
2 on a map, but instead would follow a naturally occurring geologic structure. During the  
3 hearings, NCA provided testimony about a very nearby geologic structure and the different  
4 hydrologic response in reported NCA monitoring wells (when compared to other wells in the  
5 LWRFS) that explained why NCA's production wells were located where they were, why  
6 SNWA's experts reached their conclusion regarding NCA's production wells, and why it made  
7 hydrologic sense that NCA's wells would be *disconnected* from the remaining wells in the  
8 LWRFS.

9 Nonetheless, at page 51 of Order #1309, even though the State Engineer stated  
10 expressly that he "finds logic in NCA's position" to exclude the NCA wells from the LWRFS,  
11 the State Engineer for the first time identified a new boundary for the southern portion of the  
12 LWRFS *right in the area where NCA's production wells are located*. The State Engineer  
13 explained that this new boundary, "better honors the State Engineer's criteria by acknowledging  
14 uncertainty in the data while reflecting a recognized physical boundary in the carbonate-rock  
15 aquifer." *See Ex. 1*, at p. 51. As such, the State Engineer recognized NCA's criticism that the  
16 prior "straight-line" boundary of the LWRFS that was utilized heading into the hearings was  
17 likely arbitrary and unsupportable, but rather than accept NCA's identified, natural structure  
18 that was nearest to the production wells and conformed with the evidence actually presented at  
19 the hearing, the State Engineer simply looked on a geologic map in an attempt to identify a new,  
20 unverified physical boundary and – arbitrarily – *moved the straight-line boundary further south*  
21 to more-assuredly include NCA's production wells. The new boundary is, again, a straight line,  
22 merely relocated further south and east, with no more support than the initial straight-line  
23 boundary.

24 Moreover, the State Engineer made this move despite the fact that no testimony or  
expert witness discussion had been made, and no questions had been raised, about this new,  
arbitrary straight-line boundary during the two weeks of hearings conducted. No one even  
attempted to establish – during the hearing - a technical reason why this newly identified  
southern boundary for the LWRFS better explained the available data involving NCA's



1 production wells and the apparent disconnect with well EH-4 than the analysis provided by both  
2 NCA and SNWA – which was that the NCA wells were actually outside the LWRFS boundary.

3 Order #1309 goes further to identify “the maximum amount of groundwater that can  
4 continue to be developed over the long term in the LWRFS is 8,000 afa [acre feet annually].”  
5 As such, this could impact the certificated water rights held by NCA because if NCA’s water  
6 rights are, in fact, *within the LWRFS boundary*, then NCA’s pumping from its production wells  
7 may be impacted through potential curtailment by the State Engineer as a result of the limit on  
8 total pumping within the LWRFS that may be imposed within that 8,000 afa figure.<sup>8</sup> The final  
9 effect on NCA is, at Stage 1 of these proceedings, still uncertain, but the potential exists that  
10 NCA’s pumping could be limited because of the limits proposed by the State Engineer on the  
11 total amount of groundwater use allowed within the LWRFS identified in Order #1309.

### 11 **III. GROUNDS FOR PETITION**

12 NRS 5 33.450(3) requires, for the filing of the Petition, only that the Petition contain a  
13 “statement of the substance of the order or decision complained of, and the manner in which the  
14 same injuriously affects the petitioner’s interests ....”

15 Here, NCA has identified the “substance of the order or decision complained of”  
16 occurring at page 51 of Order #1309: the Final Order included NCA within a modified  
17 boundary of the LWRFS by replacing the recognized-as-unsupportable straight-line boundary  
18 previously utilized by the State Engineer for the southern boundary of the LWRFS (that  
19 improperly included NCA’s production wells as within the LWRFS with an arbitrary, straight  
20 line) by simply finding a somewhat nearby, unverified geologic structure that might serve as a  
21 boundary coupled with another unsupportable straight-line boundary and identifying *that* as the  
22 new, southern boundary of the LWRFS in such a fashion as to include NCA within the LWRFS.  
23 The State Engineer did so despite the fact that no evidence of the consideration of such a

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24 <sup>8</sup> NCA’s Certificated water rights indicate that NCA’s total pumping on an annual basis shall not exceed 1,665 afa. If NCA’s water rights are, indeed, within the LWRFS, then this pumping must be considered within the 8,000 afa figure established in Order #1309, and NCA’s total duty could potentially be impacted during the Stage 2 proceedings.

1 boundary was made evident to NCA for its consideration in the Interim Order (#1303) or the  
2 Addendum that formed the basis for the retention of experts and the creation of expert reports  
3 about which the two-weeks of hearings would be conducted, and despite the fact that there was  
4 no discussion of this newly identified boundary during the hearings themselves.

5 As such, NCA was not given sufficient notice and an opportunity to be heard before the  
6 State Engineer to satisfy general principles of due process and fairness in any manner sufficient  
7 to prepare and present evidence, analysis or conclusions regarding this apparently newly  
8 claimed “boundary” that the State Engineer has somehow magically divined in the interim  
between the close of the hearings and the issuance of Order #1309.

9 Additionally, the State Engineer recognized the logic in NCA’s position, yet chose to  
10 suggest that other testimony questioning SNWA’s analysis, which made no factual or scientific  
11 reference to the arbitrary boundary (or any boundary for that matter), justified a contrary  
12 conclusion despite an acknowledged lack of information and in the face of uncertainty. *See Ex.*  
13 **1**, p. 51. In Order #1309, the State Engineer does not identify an alternate theory explaining the  
14 factual and scientific findings described by both SNWA or NCA and does not point to any other  
15 expert whose testimony explained the anomalies identified by NCA’s and SNWA’s experts  
16 relative to NCA’s production wells. Instead, Order #1309 suggests that it is better to err on the  
17 side of “a more inclusive approach that places the boundary to the south of the NCA production  
18 Thrust,” without an explanation of why this is not an arbitrary determination.

19 The State Engineer’s decision to identify a boundary to include NCA in the LWRFS,  
20 knowing that the inclusion could result in the potential restriction of NCA’s use of its full  
21 allocation of water rights and despite also knowing that there is at least significant uncertainty  
22 as to whether NCA should be included, is arbitrary – not unlike the establishment of the original  
23 straight-line boundary that now appears to have been created for the same reason: to include  
24 NCA’s production wells within the LWRFS, regardless whether the evidence, analysis or logic  
compels a different conclusion.

1 And, by making NCA subject to the LWRFS, Order #1309 injuriously affects NCA in  
2 that NCA's certificated water rights could well be impacted by the limitation imposed by the  
3 overall development figure of 8,000 afa for the entirety of the LWRFS. While it is currently  
4 uncertain how the State Engineer will implement his decisions moving forward regarding who  
5 will be allowed to pump and who will not among the various stakeholders, the real possibility  
6 exists that NCA's full use of its water rights could be limited. Thus, the "injury" to NCA is real  
7 and could be substantial, and NCA is entitled under NRS 533.450(1) and (3) to have this matter  
8 considered and heard by this Court now, prior to the implementation of any Stage 2 proceedings  
9 involving the LWRFS.

9 **IV. CONCLUSION**

10 For the reasons explained above, and others that may be discovered and raised during  
11 the pendency of this appeal, NCA respectfully requests that this Court reverse the decision of the  
12 Nevada State Engineer to move the boundary to an area even further south in the Black  
13 Mountains Area to arbitrarily include NCA's production wells within the LWRFS when the  
14 evidence and analysis suggests that such wells should have been excluded. Alternatively, NCA  
15 requests that this Court remand this matter back to the Nevada State Engineer for further  
16 proceedings to allow NCA to present evidence and analysis regarding this newly identified  
17 boundary – "the boundary to the south of the NCA production wells to a geological location that  
18 coincides with the Muddy Mountain Thrust" – because NCA has not yet been afforded due  
19 process to make such presentation to the State Engineer for his consideration in this matter.

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Procedure: As explained above at footnote 2, NRS 533.450(8) notes that these proceedings are in the nature of a civil appeal, and NCA will likely request that this Court consider allowing counsel for NCA and the State Engineer to stipulate to a briefing schedule for the presentation of briefing of this appeal and the argument of this Petition for Judicial Review to the Court.

DATED: July 15, 2020.

**KAEMPFER CROWELL**

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# Attachment 9

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3 **DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

4 LAS VEGAS VALLEY WATER DISTRICT,  
5 and SOUTHERN NEVADA WATER  
6 AUTHORITY,

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

7 Petitioners,

Consolidated with Cases:

8 vs.

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

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

Respondent.

And All Consolidated Cases.

13  
14 **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PETITIONS**  
15 **FOR JUDICIAL REVIEW**

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

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

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Bita Yeager  
Eighth Judicial District Court  
Clark County, Nevada  
Department I

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The parties stipulated to permit the following Intervenors into this matter:

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

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

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

**I.**

**PROCEDURAL HISTORY**

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

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

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

<sup>2</sup> LVVWD and SNWA Petition for Judicial Review, filed June 17, 2020.

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

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

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

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

25 \_\_\_\_\_  
26 <sup>3</sup> Stipulation for Consolidation, A-20-816761-C, May 26, 2021.

27 <sup>4</sup> Bedroc and CNLV did not file briefs and did not participate in oral argument.  
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II.

FACTUAL HISTORY

A. The Carbonate Groundwater Aquifer and the Basins

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

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

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

<sup>6</sup> SE ROA 659.

<sup>7</sup> SE ROA 661.

<sup>8</sup> SE ROA 661.

1 240 miles from southern Elko County in the north to the Muddy River Springs Area in the south,  
2 was identified as early as 1966.<sup>9</sup> The area designated by Order 1309 as the LWRFS consists  
3 generally of the southern portion of the White River-Muddy River Springs flow system.<sup>10</sup>

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

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

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

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<sup>9</sup> SE ROA 11349-59.

21 <sup>10</sup> *See* SE ROA 11350.

22 <sup>11</sup> SE ROA 41943.

23 <sup>12</sup> SE ROA 660-61, 53056, 53062.

24 <sup>13</sup> SE ROA 663-664, 41959, 48680.

25 <sup>14</sup> SE ROA 73-75, 34545, 53062.

26 <sup>15</sup> SE ROA 60-61, 34545.

27 <sup>16</sup> SE ROA 46, 34545.

28 <sup>17</sup> *See* SE ROA 661.

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

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

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

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

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<sup>18</sup>SE ROA 654, 659, 699, 726, 755.  
<sup>19</sup> SE ROA 949-1069.  
<sup>20</sup> SE ROA 1070-1499.

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

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

- 8 a. Coyote Spring Valley Hydrographic Basin (“Coyote Spring Valley”), Basin No. 210, since  
9 1985;
- 10 b. Black Mountains Area Hydrographic Basin (“Black Mountains Area”), Basin No. 215, since  
11 November 22, 1989;
- 12 c. Garnet Valley Hydrographic Basin (“Garnet Valley”), Basin No. 216, since April 24, 1990;
- 13 d. Hidden Valley Hydrographic Basin (“Hidden Valley”), Basin No. 217, since October 24,  
14 1990;
- 15 e. California Wash Hydrographic Basin (“California Wash”), Basin No. 218, since August 24,  
16 1990; and
- 17 f. Muddy River Springs Area Hydrographic Basin (“Muddy River Springs Area”), Basin No.  
18 219, since July 14, 1971.<sup>21</sup>

19 Kane Springs Valley (“Kane Springs Valley”), Basin 206, which was also affected by  
20 Order No. 1309, had not been designated previously for administration.<sup>22</sup>  
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23 <sup>21</sup> See SE ROA 2-3, 71-72.

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

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**B. The Muddy River Decree**

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

**C. The Moapa Dace**

The Moapa dace (*Moapa coriacea*) is a thermophilic minnow endemic to the upper spring-fed reaches Muddy River, and has been federally listed as endangered since 1967.<sup>28</sup> Between 1933

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

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

<sup>25</sup> SE ROA 33798-806.

<sup>26</sup> SE ROA 33775.

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

<sup>28</sup> SE ROA 5.

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

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

11 **D. Order 1169**

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

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

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25 <sup>29</sup> SE ROA 47169.

26 <sup>30</sup> SE ROA 47160.

27 <sup>31</sup> SE ROA 42087.

28 <sup>32</sup> SE ROA 4, Ex. 1.

<sup>33</sup> *Id.*

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

10           Notably, Kane Springs was not included in the Order 1169 study area. In Ruling 5712, the  
11 State Engineer specifically determined Kane Springs would not be included in the Order 1169  
12 study area because there was no substantial evidence that the appropriation of a limited quantity of  
13 water in Kane Springs would have any measurable impact on the Muddy River Springs that  
14 warranted the inclusion of Kane Springs in Order 1169.<sup>37</sup> The State Engineer specifically rejected  
15 the argument that the Kane Springs rights could not be appropriated based upon senior  
16 appropriated rights in the down gradient basins.<sup>38</sup>

17           Order 1169A, issued December 21, 2012, set up a test to “stress” the Carbonate Aquifer  
18 through two years of aggressive pumping, combined with examination of water levels in monitoring  
19 wells located throughout the LWRFS.<sup>39</sup> Participants in the Aquifer test were Southern Nevada  
20 Water Authority (“SNWA”), Las Vegas Valley Water District (“LVVWD”), Moapa Valley Water  
21 District, Coyote Springs Investments, LLC (“Coyote Springs”), Moapa Band of Paiutes, and Nevada  
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23 <sup>34</sup> SE ROA 654-669.

24 <sup>35</sup> See SE ROA 659, 665.

25 <sup>36</sup> SE ROA 659-69, Ex. 8; see also SE ROA 654, Ex. 7.

26 <sup>37</sup> SE ROA 719.

27 <sup>38</sup> SE ROA 713.

28 <sup>39</sup> SE ROA 654-58, Ex. 7.

1 Power Company. Pumping included 5,300 afa in Coyote Spring Valley, 14,535 afa total carbonate  
2 pumping, and 3,840 afa alluvial pumping.<sup>40</sup> Pumping tests effects were examined at 79 monitoring  
3 wells and 11 springs and streamflow monitoring sites.<sup>41</sup> The Kane Springs basin was not included in  
4 the Order 1169 aquifer testing, and Kane Springs basin water right holders were not involved, not  
5 provided notice, and did not participate in the aquifer testing, monitoring or measurements,  
6 submission of reports, proceedings and actions taken by the State Engineer pursuant to Order 1169.<sup>42</sup>

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

15 In 2014, and based on the results of the Aquifer Test, the State Engineer issued Rulings  
16 6254–6261 on January 29, 2014 denying all the pending groundwater applications in Coyote  
17 Springs Valley, Muddy River Springs Area, California Wash, Hidden Valley, Garnet Valley, and  
18 certain portions of the Black Mountains Area.<sup>43</sup> His rationale in each ruling was the same:  
19 “because these basins share a unique and close hydrologic connection and share virtually all of the  
20 same source and supply of water, unlike other basins in Nevada, these five basins will be jointly  
21 managed.”<sup>44</sup>

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

25 <sup>41</sup> SE ROA 6, Ex. 1.

26 <sup>42</sup> SE ROA 36230 - 36231.

27 <sup>43</sup> SE ROA 726 – 948.

28 <sup>44</sup> *See e.g.*, SE ROA 479.



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

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

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

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

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

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

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34 <sup>45</sup> SE ROA 635-53, Ex. 6.

35 <sup>46</sup> SE ROA 82-83.

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- d. The effects of movement of water rights between alluvial wells and carbonate wells on deliveries of senior decreed rights to the Muddy River; and,
- e. Any other matter believed to be relevant to the State Engineer's analysis.

SE ROA 647-48, Ex. 6.

The State Engineer identified the LWRFS as including the following hydrographic basins: Coyote Spring Valley, a portion of Black Mountains Area, Garnet Valley, Hidden Valley, California Wash, and the Muddy River Springs Area.<sup>47</sup> Kane Springs continued to be excluded as part of the LWRFS multi-basin area in Interim Order 1303.<sup>48</sup>

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

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

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<sup>47</sup> SE ROA 70-88.  
<sup>48</sup> *Id.*  
<sup>49</sup> SE ROA 263, Ex. 2 (Notice); SE ROA 285, Ex. 3 (Amended Notice).  
<sup>50</sup> SE ROA 522.

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

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

7 **F. Order 1309**

8 On June 15, 2020, the State Engineer issued Order 1309.<sup>54</sup> The first three ordering  
9 paragraphs state as follows:

- 10 1. The Lower White River Flow System consisting of the Kane Springs Valley,  
11 Coyote Spring Valley, Muddy River Springs Area, California Wash, Hidden  
12 Valley, Garnet Valley, and the northwest portion of the Black Mountains Area  
13 as described in this Order, is hereby delineated as a single hydrographic basin.  
14 The Kane Springs Valley, Coyote Spring Valley, Muddy River Springs Area,  
15 California Wash, Hidden Valley, Garnet Valley and the northwest portion of  
16 the Black Mountains Area are hereby established as sub-basins within the  
17 Lower White River Flow System Hydrographic Basin.
- 18 2. The maximum quantity of groundwater that may be pumped from the Lower  
19 White River Flow System Hydrographic Basin on an average annual basis  
20 without causing further declines in Warm Springs area spring flow and flow in  
21 the Muddy River cannot exceed 8,000 afa and may be less.
- 22 3. The maximum quantity of water that may be pumped from the Lower White  
23 River Flow System Hydrographic Basin may be reduced if it is determined  
24 that pumping will adversely impact the endangered Moapa dace.

25 SE ROA 66, Ex. 1.

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

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

26 <sup>52</sup> SE ROA 52962, Transcript 7:5-7 (Sept. 23, 2019) (Hearing Officer Fairbank).

27 <sup>53</sup> See SE ROA 285, Ex. 3.

28 <sup>54</sup> SE ROA 2-69.

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

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

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<sup>55</sup> SE ROA 48-49, Ex. 1.

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

**G. Petitioners and Their Respective Water Rights or Interests**

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

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

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

8 **III.**

9 **DISCUSSION**

10 **STANDARD OF REVIEW**

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

16 **A. Questions of Law**

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

23 Any “presumption of correctness” of a decision of the State Engineer as provided by NRS  
24 533.450(10), “does not extend to ‘purely legal questions,’ such as ‘the construction of a statute,’  
25 as to which ‘the reviewing court may undertake independent review.’” *In re State Engineer*  
26 *Ruling No. 5823*, 128 Nev. 232, 238-239, 277 P.3d 449, 453 (2012) (quoting *Town of Eureka v.*  
27 *State Engineer*, 108 Nev. 163, 165, 826 P.2d 948, 949 (1992)). At no time will the State  
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1 Engineer’s interpretation of a statute control if an alternative reading is compelled by the plain  
2 language of the statute. *See Andersen Family Assoc.*, 124 Nev. at 186, 179 P.3d at 1203.

3 Although “[t]he State Engineer’s ruling on questions of law is persuasive... [it is] not  
4 entitled to deference.” *Sierra Pac. Indus. v. Wilson*, 135 Nev. Adv. Op. 13, 440 P.3e 37, 40  
5 (2019). A reviewing court is free to decide legal questions without deference to an agency  
6 determination. *See Jones v. Rosner*, 102 Nev. 215, 216-217, 719 P.2d 805, 806 (1986); *accord*  
7 *Pyramid Lake Paiute Tribe v. Ricci*, 126 Nev. 521, 525, 245 P.3d 1145, 1148 (2010) (“[w]e  
8 review purely legal questions without deference to the State Engineer’s ruling.”).

9 **B. Questions of Fact**

10 The Court’s review of the Order 1309 is “in the nature of an appeal” and limited to the  
11 record before the State Engineer. *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979). On  
12 appeal, a reviewing court must “determine whether the evidence upon which the engineer based  
13 his decision supports the order.” *State Engineer v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205  
14 (1991) (citing *State Engineer v. Curtis Park*, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985)).

15 As to questions of fact, the State Engineer’s decision must be supported by “substantial  
16 evidence in the record [.]” *Eureka Cty. v. State Engineer*, 131 Nev. 846, 850, 359 P.3d 1114, 1117  
17 (2015) (quoting *Town of Eureka*, 108 Nev. at 165, 826 P.2d at 949). Substantial evidence is “that  
18 which a reasonable mind might accept as adequate to support a conclusion.” *Bacher*, 122 Nev. at  
19 1121, 146 P.3d at 800 (finding that a reasonable person would expect quantification of water  
20 rights needed and no evidence of such quantification or calculations by the State Engineer is  
21 included in the record). The Court may not substitute its judgment for that of the State Engineer,  
22 “pass upon the credibility of the witness nor reweigh the evidence.” *Revert*, 95 Nev. at 786, 603  
23 P.2d at 264.

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

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

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

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

**CONCLUSIONS OF LAW**

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

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

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



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

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

In the instant case, the State Engineer relied on the following specific statutes as authority for combining prior independently designated basins as a superbasin newly named the LWRFS, and then conjunctively managing<sup>57</sup> this superbasin:

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

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

<sup>58</sup> SE ROA 43.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> SE ROA 44.

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

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

**1. The Prior Appropriation Doctrine**

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

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

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

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

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

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

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

24 Priority in time of a right is only as valuable as where the holder stands in relation to others  
25 in the same situation, or more specifically in this case, in the same basin. As the statutes are written,  
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28 <sup>64</sup> *United States v. State Engineer*, 117 Nev. 585, 592, 27 P.3d 51, 55 (2001)( Becker, J., concurring in part and  
dissenting in part).

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

5 **2. Joint Administration**

6 The State Engineer’s position is that the “best available science” demonstrates that the  
7 seven<sup>65</sup> named hydrographic basins are so hydrologically interconnected that science dictates they  
8 must be managed together in one superbasin. However, NRS 533.024(1)(c) is a policy declaration  
9 of the Legislature’s intent that simply “encourages” the State Engineer “to consider the best  
10 available science in rendering decisions” that concern water he has authority to manage. NRS  
11 533.024(1)(c).

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

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

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

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

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

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

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

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

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

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

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

20 **3. Conjunctive Management**

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



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

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

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

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

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

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

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

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

1 537 (1949)). Therefore, holders of water rights in Nevada are entitled to constitutional protections  
2 regarding those property rights, including procedural due process. *See id.*

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

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

21 For the reasons that follow, this Court concludes that (a) the notice and hearing procedure  
22 employed by the State Engineer failed to satisfy the requirements of due process because the notice  
23 failed to put the parties on notice that the State Engineer would decide on a management protocol for  
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25 <sup>69</sup> “[B]ecause the language in the show cause order [indicates that the district court may enter an order forcing curtailment  
26 to begin, junior water rights holders must be given an opportunity to make their case for or against the option of  
27 curtailment. Notice must be given at an appropriate stage in the proceedings to give parties meaningful input in the  
28 adjudication of their rights...Thus, junior water rights holders must be notified before the curtailment decision is made,  
even if the specific “how” and “who” of curtailment is decided in a future proceeding.” *Seventh Jud. Dist. Ct.*, 134 Nev.  
275, 280–81, 417 P.3d 1121, 1125 (2018).

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

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

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

20 <sup>71</sup> The Notice included the following summary:

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

28 <sup>72</sup> SE ROA 647-48. Ex. 6.

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

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

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

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

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

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

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

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

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

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<sup>73</sup> SE ROA 648, Ex. 6.

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

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

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

19 SE ROA 54, Ex. 1.

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

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

8 Finally, as noted above, the State Engineer did not give notice or disclose before or during  
9 the Order 1303 proceedings, the six specific criteria that he would use in evaluating the connectivity  
10 of the basins and determining the new consolidated basin boundary. Although the State Engineer  
11 asserted that he considered the evidence and testimony presented in the public hearing "on the basis  
12 of a common set of criteria that are consistent with the original characteristics conserved critical in  
13 demonstrating a close hydrologic connection requiring joint management in Rulings 6254-6261,"<sup>75</sup>  
14 a review of these rulings reveals that none of the six criteria or characteristics were previously  
15 identified, examined in the hydrological studies and subsequent hearing that followed the  
16 completion of the Order 1169 aquifer test, or expressly disclosed in Rulings 6254-6261.<sup>76</sup> These  
17 criteria were instead explicitly disclosed for the first time in Order 1309, which means the  
18 participants had no opportunity to directly address these criteria in their presentations, or critically,  
19 to address the appropriateness of these criteria.

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

27 <sup>75</sup> See SE ROA 48.

28 <sup>76</sup> SE ROA 726-948.

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

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

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

11 **IV.**  
12 **CONCLUSION**

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

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

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

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

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

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

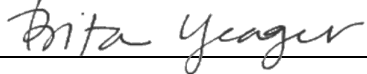
IT IS FURTHER ORDERED that the petition for review of the Nevada State Engineer’s Order No. 1309 filed by Petitioners Nevada Cogeneration Associates Nos. 1 and 2 is GRANTED.

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

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

**IT IS SO ORDERED.**

Dated this 19th day of April, 2022

  
\_\_\_\_\_

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

1 **CSERV**

2  
3 DISTRICT COURT  
CLARK COUNTY, NEVADA

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5  
6 Southern Nevada Water  
Authority, Plaintiff(s)

CASE NO: A-20-816761-C

7 vs.

DEPT. NO. Department 1

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

11  
12 **AUTOMATED CERTIFICATE OF SERVICE**

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

16 Service Date: 4/19/2022

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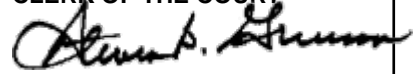
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# Attachment 10



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

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

19 LAS VEGAS VALLEY WATER DISTRICT,  
20 and SOUTHERN NEVADA WATER  
21 AUTHORITY, et al.,

Case No. A-20-816761-C

Dept. No. 1

21 Petitioners,

Consolidated with Cases:

22 vs.

A-20-817765-P

A-20-818015-P

A-20-817977-P

23 ADAM SULLIVAN, P.E., Acting  
24 Nevada State Engineer, et al.,

A-20-818069-P

A-20-817840-P

A-20-817876-P

25 Respondent.

A-21-833572-J

26 **NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW,**  
27 **AND ORDER GRANTING PETITIONS FOR JUDICIAL REVIEW**

28 ///

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**YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE** that the *Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review* was entered on the 19<sup>th</sup> day of April, 2022 in the above captioned and consolidated cases, a copy of which is attached hereto.

DATED this 19<sup>th</sup> day of April, 2022.

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**CERTIFICATE OF SERVICE**

Pursuant to NRCp 5(b), I hereby certify that I am an employee of ALLISON MacKENZIE, LTD., Attorneys at Law, and that on this date, I caused a true and correct copy of the foregoing document to be served on all parties to this action by electronic service to the participates in this case who are registered with the Eighth Judicial District Court’s Odyssey eFileNV File & Service system to this matter.

DATED this 19<sup>th</sup> day of April, 2022.

/s/ Nancy Fontenot  
NANCY FONTENOT

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**INDEX OF EXHIBITS**

<u>Exhibit No.</u>	<u>Description</u>	<u>Number of Pages</u>
"1"	Findings of Fact, Conclusions of Law, And Order Granting Petitions for Judicial Review	40

4857-5859-8684, v. 1

# **EXHIBIT “1”**

FFCO

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

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

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

Petitioners,

Consolidated with Cases:

vs.

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

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

Respondent.

And All Consolidated Cases.

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

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

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

Bitia Yeager  
Eighth Judicial District Court  
Clark County, Nevada  
Department I

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The parties stipulated to permit the following Intervenors into this matter:

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

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

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

**I.**

**PROCEDURAL HISTORY**

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

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

---

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

<sup>2</sup> LVVWD and SNWA Petition for Judicial Review, filed June 17, 2020.

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

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

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

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

25 \_\_\_\_\_  
26 <sup>3</sup> Stipulation for Consolidation, A-20-816761-C, May 26, 2021.

27 <sup>4</sup> Bedroc and CNLV did not file briefs and did not participate in oral argument.  
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II.

FACTUAL HISTORY

A. The Carbonate Groundwater Aquifer and the Basins

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

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

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

<sup>6</sup> SE ROA 659.

<sup>7</sup> SE ROA 661.

<sup>8</sup> SE ROA 661.

1 240 miles from southern Elko County in the north to the Muddy River Springs Area in the south,  
2 was identified as early as 1966.<sup>9</sup> The area designated by Order 1309 as the LWRFS consists  
3 generally of the southern portion of the White River-Muddy River Springs flow system.<sup>10</sup>

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

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

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

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20 <sup>9</sup> SE ROA 11349-59.

21 <sup>10</sup> *See* SE ROA 11350.

22 <sup>11</sup> SE ROA 41943.

23 <sup>12</sup> SE ROA 660-61, 53056, 53062.

24 <sup>13</sup> SE ROA 663-664, 41959, 48680.

25 <sup>14</sup> SE ROA 73-75, 34545, 53062.

26 <sup>15</sup> SE ROA 60-61, 34545.

27 <sup>16</sup> SE ROA 46, 34545.

28 <sup>17</sup> *See* SE ROA 661.



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

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

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

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

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<sup>18</sup>SE ROA 654, 659, 699, 726, 755.  
<sup>19</sup> SE ROA 949-1069.  
<sup>20</sup> SE ROA 1070-1499.

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

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

- 8 a. Coyote Spring Valley Hydrographic Basin (“Coyote Spring Valley”), Basin No. 210, since  
9 1985;
- 10 b. Black Mountains Area Hydrographic Basin (“Black Mountains Area”), Basin No. 215, since  
11 November 22, 1989;
- 12 c. Garnet Valley Hydrographic Basin (“Garnet Valley”), Basin No. 216, since April 24, 1990;
- 13 d. Hidden Valley Hydrographic Basin (“Hidden Valley”), Basin No. 217, since October 24,  
14 1990;
- 15 e. California Wash Hydrographic Basin (“California Wash”), Basin No. 218, since August 24,  
16 1990; and
- 17 f. Muddy River Springs Area Hydrographic Basin (“Muddy River Springs Area”), Basin No.  
18 219, since July 14, 1971.<sup>21</sup>

19 Kane Springs Valley (“Kane Springs Valley”), Basin 206, which was also affected by  
20 Order No. 1309, had not been designated previously for administration.<sup>22</sup>  
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23 <sup>21</sup> See SE ROA 2-3, 71-72.

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

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**B. The Muddy River Decree**

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

**C. The Moapa Dace**

The Moapa dace (*Moapa coriacea*) is a thermophilic minnow endemic to the upper spring-fed reaches Muddy River, and has been federally listed as endangered since 1967.<sup>28</sup> Between 1933

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

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

<sup>25</sup> SE ROA 33798-806.

<sup>26</sup> SE ROA 33775.

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

<sup>28</sup> SE ROA 5.

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

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

11 **D. Order 1169**

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

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

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25 <sup>29</sup> SE ROA 47169.

26 <sup>30</sup> SE ROA 47160.

27 <sup>31</sup> SE ROA 42087.

28 <sup>32</sup> SE ROA 4, Ex. 1.

<sup>33</sup> *Id.*

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

10           Notably, Kane Springs was not included in the Order 1169 study area. In Ruling 5712, the  
11 State Engineer specifically determined Kane Springs would not be included in the Order 1169  
12 study area because there was no substantial evidence that the appropriation of a limited quantity of  
13 water in Kane Springs would have any measurable impact on the Muddy River Springs that  
14 warranted the inclusion of Kane Springs in Order 1169.<sup>37</sup> The State Engineer specifically rejected  
15 the argument that the Kane Springs rights could not be appropriated based upon senior  
16 appropriated rights in the down gradient basins.<sup>38</sup>

17           Order 1169A, issued December 21, 2012, set up a test to “stress” the Carbonate Aquifer  
18 through two years of aggressive pumping, combined with examination of water levels in monitoring  
19 wells located throughout the LWRFS.<sup>39</sup> Participants in the Aquifer test were Southern Nevada  
20 Water Authority (“SNWA”), Las Vegas Valley Water District (“LVVWD”), Moapa Valley Water  
21 District, Coyote Springs Investments, LLC (“Coyote Springs”), Moapa Band of Paiutes, and Nevada  
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23 <sup>34</sup> SE ROA 654-669.

24 <sup>35</sup> See SE ROA 659, 665.

25 <sup>36</sup> SE ROA 659-69, Ex. 8; *see also* SE ROA 654, Ex. 7.

26 <sup>37</sup> SE ROA 719.

27 <sup>38</sup> SE ROA 713.

28 <sup>39</sup> SE ROA 654-58, Ex. 7.

1 Power Company. Pumping included 5,300 afa in Coyote Spring Valley, 14,535 afa total carbonate  
2 pumping, and 3,840 afa alluvial pumping.<sup>40</sup> Pumping tests effects were examined at 79 monitoring  
3 wells and 11 springs and streamflow monitoring sites.<sup>41</sup> The Kane Springs basin was not included in  
4 the Order 1169 aquifer testing, and Kane Springs basin water right holders were not involved, not  
5 provided notice, and did not participate in the aquifer testing, monitoring or measurements,  
6 submission of reports, proceedings and actions taken by the State Engineer pursuant to Order 1169.<sup>42</sup>

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

15 In 2014, and based on the results of the Aquifer Test, the State Engineer issued Rulings  
16 6254–6261 on January 29, 2014 denying all the pending groundwater applications in Coyote  
17 Springs Valley, Muddy River Springs Area, California Wash, Hidden Valley, Garnet Valley, and  
18 certain portions of the Black Mountains Area.<sup>43</sup> His rationale in each ruling was the same:  
19 “because these basins share a unique and close hydrologic connection and share virtually all of the  
20 same source and supply of water, unlike other basins in Nevada, these five basins will be jointly  
21 managed.”<sup>44</sup>

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

25 <sup>41</sup> SE ROA 6, Ex. 1.

26 <sup>42</sup> SE ROA 36230 - 36231.

27 <sup>43</sup> SE ROA 726 – 948.

28 <sup>44</sup> See e.g., SE ROA 479.

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

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

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

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

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

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

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34 <sup>45</sup> SE ROA 635-53, Ex. 6.

35 <sup>46</sup> SE ROA 82-83.

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

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

SE ROA 647-48, Ex. 6.

The State Engineer identified the LWRFS as including the following hydrographic basins: Coyote Spring Valley, a portion of Black Mountains Area, Garnet Valley, Hidden Valley, California Wash, and the Muddy River Springs Area.<sup>47</sup> Kane Springs continued to be excluded as part of the LWRFS multi-basin area in Interim Order 1303.<sup>48</sup>

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

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

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<sup>47</sup> SE ROA 70-88.

<sup>48</sup> *Id.*

<sup>49</sup> SE ROA 263, Ex. 2 (Notice); SE ROA 285, Ex. 3 (Amended Notice).

<sup>50</sup> SE ROA 522.



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

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

7 **F. Order 1309**

8 On June 15, 2020, the State Engineer issued Order 1309.<sup>54</sup> The first three ordering  
9 paragraphs state as follows:

- 10 1. The Lower White River Flow System consisting of the Kane Springs Valley,  
11 Coyote Spring Valley, Muddy River Springs Area, California Wash, Hidden  
12 Valley, Garnet Valley, and the northwest portion of the Black Mountains Area  
13 as described in this Order, is hereby delineated as a single hydrographic basin.  
14 The Kane Springs Valley, Coyote Spring Valley, Muddy River Springs Area,  
15 California Wash, Hidden Valley, Garnet Valley and the northwest portion of  
16 the Black Mountains Area are hereby established as sub-basins within the  
17 Lower White River Flow System Hydrographic Basin.
- 18 2. The maximum quantity of groundwater that may be pumped from the Lower  
19 White River Flow System Hydrographic Basin on an average annual basis  
20 without causing further declines in Warm Springs area spring flow and flow in  
21 the Muddy River cannot exceed 8,000 afa and may be less.
- 22 3. The maximum quantity of water that may be pumped from the Lower White  
23 River Flow System Hydrographic Basin may be reduced if it is determined  
24 that pumping will adversely impact the endangered Moapa dace.

25 SE ROA 66, Ex. 1.

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

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

26 <sup>52</sup> SE ROA 52962, Transcript 7:5-7 (Sept. 23, 2019) (Hearing Officer Fairbank).

27 <sup>53</sup> See SE ROA 285, Ex. 3.

28 <sup>54</sup> SE ROA 2-69.

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

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

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<sup>55</sup> SE ROA 48-49, Ex. 1.

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

**G. Petitioners and Their Respective Water Rights or Interests**

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

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

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

8 **III.**

9 **DISCUSSION**

10 **STANDARD OF REVIEW**

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

16 **A. Questions of Law**

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

23 Any “presumption of correctness” of a decision of the State Engineer as provided by NRS  
24 533.450(10), “does not extend to ‘purely legal questions,’ such as ‘the construction of a statute,’  
25 as to which ‘the reviewing court may undertake independent review.’” *In re State Engineer*  
26 *Ruling No. 5823*, 128 Nev. 232, 238-239, 277 P.3d 449, 453 (2012) (quoting *Town of Eureka v.*  
27 *State Engineer*, 108 Nev. 163, 165, 826 P.2d 948, 949 (1992)). At no time will the State  
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1 Engineer’s interpretation of a statute control if an alternative reading is compelled by the plain  
2 language of the statute. *See Andersen Family Assoc.*, 124 Nev. at 186, 179 P.3d at 1203.

3 Although “[t]he State Engineer’s ruling on questions of law is persuasive... [it is] not  
4 entitled to deference.” *Sierra Pac. Indus. v. Wilson*, 135 Nev. Adv. Op. 13, 440 P.3e 37, 40  
5 (2019). A reviewing court is free to decide legal questions without deference to an agency  
6 determination. *See Jones v. Rosner*, 102 Nev. 215, 216-217, 719 P.2d 805, 806 (1986); *accord*  
7 *Pyramid Lake Paiute Tribe v. Ricci*, 126 Nev. 521, 525, 245 P.3d 1145, 1148 (2010) (“[w]e  
8 review purely legal questions without deference to the State Engineer’s ruling.”).

9 **B. Questions of Fact**

10 The Court’s review of the Order 1309 is “in the nature of an appeal” and limited to the  
11 record before the State Engineer. *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979). On  
12 appeal, a reviewing court must “determine whether the evidence upon which the engineer based  
13 his decision supports the order.” *State Engineer v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205  
14 (1991) (citing *State Engineer v. Curtis Park*, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985)).

15 As to questions of fact, the State Engineer’s decision must be supported by “substantial  
16 evidence in the record [.]” *Eureka Cty. v. State Engineer*, 131 Nev. 846, 850, 359 P.3d 1114, 1117  
17 (2015) (quoting *Town of Eureka*, 108 Nev. at 165, 826 P.2d at 949). Substantial evidence is “that  
18 which a reasonable mind might accept as adequate to support a conclusion.” *Bacher*, 122 Nev. at  
19 1121, 146 P.3d at 800 (finding that a reasonable person would expect quantification of water  
20 rights needed and no evidence of such quantification or calculations by the State Engineer is  
21 included in the record). The Court may not substitute its judgment for that of the State Engineer,  
22 “pass upon the credibility of the witness nor reweigh the evidence.” *Revert*, 95 Nev. at 786, 603  
23 P.2d at 264.

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

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

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

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

**CONCLUSIONS OF LAW**

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

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

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

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

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

8 In the instant case, the State Engineer relied on the following specific statutes as authority for  
9 combining prior independently designated basins as a superbasin newly named the LWRFS, and  
10 then conjunctively managing<sup>57</sup> this superbasin:

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

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

27 <sup>58</sup> SE ROA 43.

28 <sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> SE ROA 44.

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

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

1. **The Prior Appropriation Doctrine**

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

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

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

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*



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

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

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

24 Priority in time of a right is only as valuable as where the holder stands in relation to others  
25 in the same situation, or more specifically in this case, in the same basin. As the statutes are written,  
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28 <sup>64</sup> *United States v. State Engineer*, 117 Nev. 585, 592, 27 P.3d 51, 55 (2001)( Becker, J., concurring in part and  
dissenting in part).

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

5 **2. Joint Administration**

6 The State Engineer’s position is that the “best available science” demonstrates that the  
7 seven<sup>65</sup> named hydrographic basins are so hydrologically interconnected that science dictates they  
8 must be managed together in one superbasin. However, NRS 533.024(1)(c) is a policy declaration  
9 of the Legislature’s intent that simply “encourages” the State Engineer “to consider the best  
10 available science in rendering decisions” that concern water he has authority to manage. NRS  
11 533.024(1)(c).

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

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

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

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

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

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

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

1 appropriations based on the basins already defined.

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

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

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

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

20 **3. Conjunctive Management**

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

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

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

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

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

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

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

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

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



1 537 (1949)). Therefore, holders of water rights in Nevada are entitled to constitutional protections  
2 regarding those property rights, including procedural due process. *See id.*

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

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

21 For the reasons that follow, this Court concludes that (a) the notice and hearing procedure  
22 employed by the State Engineer failed to satisfy the requirements of due process because the notice  
23 failed to put the parties on notice that the State Engineer would decide on a management protocol for  
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25 <sup>69</sup> “[B]ecause the language in the show cause order [indicates that the district court may enter an order forcing curtailment  
26 to begin, junior water rights holders must be given an opportunity to make their case for or against the option of  
27 curtailment. Notice must be given at an appropriate stage in the proceedings to give parties meaningful input in the  
28 adjudication of their rights... Thus, junior water rights holders must be notified before the curtailment decision is made,  
even if the specific “how” and “who” of curtailment is decided in a future proceeding.” *Seventh Jud. Dist. Ct.*, 134 Nev.  
275, 280–81, 417 P.3d 1121, 1125 (2018).

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

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

14 In noticing the hearing to consider the reports submitted pursuant to Order 1303, there was  
15 no mention of consideration of the prospective management of the LWRFS, *i.e.*, whether it would be  
16 appropriately managed conjunctively and as a joint administrative unit. Indeed, this was consistent  
17 with the Hearing Officer’s opening remarks at the August 8, 2019, prehearing conference in which  
18

19 \_\_\_\_\_  
<sup>70</sup> See SE ROA 262-82, Ex. 2; SE ROA 284-301, Ex. 3

20 <sup>71</sup> The Notice included the following summary:

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

28 <sup>72</sup> SE ROA 647-48. Ex. 6.

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

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

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

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

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

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

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

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

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

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<sup>73</sup> SE ROA 648, Ex. 6.

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

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

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

19 SE ROA 54, Ex. 1.

20 This language reflects a serious misunderstanding of the effect of Order 1309. Insofar as  
21 Order 1309 subjects the LWRFS to conjunctive management and joint administration, resulting in  
22 effectively reordering of priority of water rights in the LWRFS superbasin, the order effectuates a  
23 management scheme with far reaching consequences. Thus, agreeing on the one hand that an  
24 “effective management scheme” will be necessary to address challenges in the LWRFS, but  
25

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26 <sup>74</sup> These issues include, but are not limited to: whether Nevada law allows the State Engineer to conjunctively manage  
27 multiple hydrographic basins in a manner that modifies the relative priority of water rights due to the administration  
28 consolidation of basins; whether the State Engineer would establish a “critical management area” pursuant to NRS  
534.110 and, if so, whether he would develop a groundwater management plan or defer to the stakeholders to develop  
one; whether Nevada law gives the State Engineer authority to designate a management area that encompasses more than  
one basin; whether “safe-yield” discrete management areas should be established within the proposed administrative  
unit; whether water rights holders enjoy a “property right” in the relative priority of their water rights such that impairing  
that right may constitute a “taking”; whether unused (or only sporadically used) senior water rights take precedence over  
certificated or fully used junior rights, particularly where these junior rights are in continuous use to support  
economically significant enterprises; whether States compel quantification of federal reserved rights by a date certain;  
and whether the State Engineer should approach the legislature to seek different or additional management tools or  
authority. See SE ROA 52801-8, Ex. 25 (Georgia Pacific and Republic Closing Argument, outlining policy questions  
for consideration by the State Engineer at later proceedings, proceedings that never took place).

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

8 Finally, as noted above, the State Engineer did not give notice or disclose before or during  
9 the Order 1303 proceedings, the six specific criteria that he would use in evaluating the connectivity  
10 of the basins and determining the new consolidated basin boundary. Although the State Engineer  
11 asserted that he considered the evidence and testimony presented in the public hearing "on the basis  
12 of a common set of criteria that are consistent with the original characteristics conserved critical in  
13 demonstrating a close hydrologic connection requiring joint management in Rulings 6254-6261,"<sup>75</sup>  
14 a review of these rulings reveals that none of the six criteria or characteristics were previously  
15 identified, examined in the hydrological studies and subsequent hearing that followed the  
16 completion of the Order 1169 aquifer test, or expressly disclosed in Rulings 6254-6261.<sup>76</sup> These  
17 criteria were instead explicitly disclosed for the first time in Order 1309, which means the  
18 participants had no opportunity to directly address these criteria in their presentations, or critically,  
19 to address the appropriateness of these criteria.

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

27 <sup>75</sup> See SE ROA 48.

28 <sup>76</sup> SE ROA 726-948.

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

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

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

11 **IV.**  
12 **CONCLUSION**

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

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

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

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

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

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

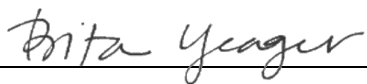
IT IS FURTHER ORDERED that the petition for review of the Nevada State Engineer’s Order No. 1309 filed by Petitioners Nevada Cogeneration Associates Nos. 1 and 2 is GRANTED.

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

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

**IT IS SO ORDERED.**

Dated this 19th day of April, 2022

  
\_\_\_\_\_

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

1 **CSERV**

2  
3 DISTRICT COURT  
CLARK COUNTY, NEVADA

4  
5  
6 Southern Nevada Water  
Authority, Plaintiff(s)

CASE NO: A-20-816761-C

7 vs.

DEPT. NO. Department 1

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

11  
12 **AUTOMATED CERTIFICATE OF SERVICE**

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

16 Service Date: 4/19/2022

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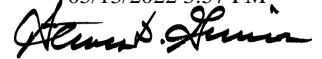
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# Attachment 11



CLERK OF THE COURT

FFCO

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

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

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

Petitioners,

Consolidated with Cases:

vs.

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

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

Respondent.

And All Consolidated Cases.

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

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

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

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

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

**IV.**  
**CONCLUSION**

To the extent that the petition for review of the Nevada State Engineer's Order No. 1309 filed by Southern Nevada Water Authority and Las Vegas Valley Water District seeks relief for violating their due process rights, IT IS HEREBY ORDERED that the petition is GRANTED IN PART. The remaining portion of the petition that support the position that the Nevada State Engineer did not exceed his statutory authority in issuing Order 1309 is DISMISSED.

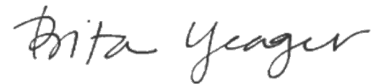
To the extent that the remaining petitions support the position that Nevada State Engineer did not exceed his statutory authority and provided due process in issuing Order 1309;

IT IS FURTHER ORDERED that the petition for review of the Nevada State Engineer's Order No. 1309 filed by Petitioner Muddy Valley Irrigation Company is DISMISSED.

IT IS FURTHER ORDERED that the petition for review of the Nevada State Engineer's Order No. 1309 filed by Petitioner The Center for Biological Diversity is DISMISSED.

**IT IS SO ORDERED.**

Dated this 13th day of May, 2022



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**EE8 27A A594 AF7E**  
**Bitia Yeager**  
**District Court Judge**

1 **CSERV**

2  
3 DISTRICT COURT  
4 CLARK COUNTY, NEVADA

5  
6 Southern Nevada Water  
7 Authority, Plaintiff(s)

CASE NO: A-20-816761-C

8 vs.

DEPT. NO. Department 1

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

12 **AUTOMATED CERTIFICATE OF SERVICE**

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

17 Service Date: 5/13/2022

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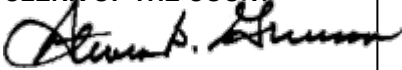
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# Attachment 12



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17 *Attorneys for LVVWD and SNWA*

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

14 LAS VEGAS VALLEY WATER DISTRICT,  
15 and SOUTHERN NEVADA WATER  
16 AUTHORITY, et al.

16 Petitioners,

17 vs.

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

21 Respondents,

Case No. A-20-816761-C  
Dept. No. 1

Consolidated with Cases:  
A-20-817765-P  
A-20-818015-P  
A-20-817977-P  
A-20-818069-P  
A-20-817840-P  
A-20-817876-P  
A-21-833572-J

**NOTICE OF ENTRY OF ADDENDUM  
AND CLARIFICATION TO COURT'S  
FINDINGS OF FACT, CONCLUSIONS OF  
LAW, AND ORDER GRANTING  
PETITIONS FOR JUDICIAL REVIEW**

26 //  
27 //  
28 //

Taggart & Taggart, Ltd.  
108 North Minnesota Street  
Carson City, Nevada 89703  
(775)882-9900 - Telephone  
(775)883-9900 - Facsimile





**CERTIFICATE OF SERVICE**

I certify that I am an employee of Taggart & Taggart, LTD, and that on this 13th day of May 2022, I served a true and correct copy of the foregoing document by electronic service to the participants in this case who are registered with the Eighth Judicial District Court’s Odyssey eFile NV File & Serve system to this matter:

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**EXHIBIT INDEX**

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<u>Exhibit</u>	<u>Description</u>	<u>Pages</u>
1.	Addendum and Clarification to Court’s Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review Filed on April 19, 2022	6



# **EXHIBIT 1**

# **EXHIBIT 1**

1 FFCO

2  
3 **DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

4 LAS VEGAS VALLEY WATER DISTRICT,  
5 and SOUTHERN NEVADA WATER  
6 AUTHORITY,

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

7 Petitioners,

Consolidated with Cases:

8 vs.

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

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

13 Respondent.

14 And All Consolidated Cases.

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

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

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

28  
Bita Yeager  
Eighth Judicial District Court  
Clark County, Nevada  
Department I

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

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

**IV.**  
**CONCLUSION**

To the extent that the petition for review of the Nevada State Engineer's Order No. 1309 filed by Southern Nevada Water Authority and Las Vegas Valley Water District seeks relief for violating their due process rights, IT IS HEREBY ORDERED that the petition is GRANTED IN PART. The remaining portion of the petition that support the position that the Nevada State Engineer did not exceed his statutory authority in issuing Order 1309 is DISMISSED.

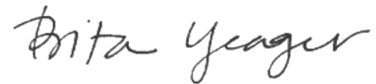
To the extent that the remaining petitions support the position that Nevada State Engineer did not exceed his statutory authority and provided due process in issuing Order 1309;

IT IS FURTHER ORDERED that the petition for review of the Nevada State Engineer's Order No. 1309 filed by Petitioner Muddy Valley Irrigation Company is DISMISSED.

IT IS FURTHER ORDERED that the petition for review of the Nevada State Engineer's Order No. 1309 filed by Petitioner The Center for Biological Diversity is DISMISSED.

**IT IS SO ORDERED.**

Dated this 13th day of May, 2022



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**EE8 27A A594 AF7E**  
**Bitia Yeager**  
**District Court Judge**

1 **CSERV**

2  
3 DISTRICT COURT  
4 CLARK COUNTY, NEVADA

5  
6 Southern Nevada Water  
7 Authority, Plaintiff(s)

8 vs.

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

CASE NO: A-20-816761-C

DEPT. NO. Department 1

12 **AUTOMATED CERTIFICATE OF SERVICE**

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

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