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IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

vs.

LINCOLN COUNTY WATER DISTRICT;
VIDLER WATER COMPANY, INC.;
COYOTE SPRINGS INVESTMENT, LLC;
NEVADA COGENERATION
ASSOCIATES NOS. 1 AND 2; APEX
HOLDING COMPANY, LLC; DRY LAKE
WATER, LLC; GEORGIA-PACIFIC
GYPSUM, LLC; REPUBLIC
ENVIRONMENTAL TECHNOLOGIES,
INC.; SIERRA PACIFIC POWER
COMPANY D/B/A NV ENERGY;
NEVADA POWER COMPANY D/B/A NV
ENERGY; THE CHURCH OF JESUS
CHRIST OF LATTER-DAY SAINTS;
MOAPA VALLEY WATER DISTRICT;
WESTERN ELITE ENVIRONMENTAL,
INC.; BEDROC LIMITED, LLC; CITY OF
NORTH LAS VEGAS; and LAS VEGAS
VALLEY WATER DISTRICT,

Respondents.

Electronically Filed
Jun 17 2022 03:14 p.m.
Case No. 84739 Elizabeth A. Brown
Clerk of Supreme Court
Consolidated with Case Nos.

84741
84742
84809

MUDDY VALLEY
IRRIGATION COMPANY'S
DOCKETING STATEMENT
CIVIL APPEALS

GENERAL INFORMATION

Appellants must complete this docketing statement in compliance with NRAP 14(a). The

1 purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction,
2 identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under
3 NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for
4 expedited treatment and assignment to the Court of Appeals, and compiling statistical
5 information.

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WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. *See KDI Sylvan Pools v. Workman*, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District Eighth Department 1
County Clark Judge Hon. Bita Yeager
District Court Docket No. A-20-816761-C (and consolidated actions)

2. **Attorney filing this docketing statement:**

Attorney Robert A. Dotson; Justin C. Vance Telephone (775) 501-9400
Firm Dotson Law
Address 5355 Reno Corporate Dr, Ste 100
Reno, Nevada 89511

Attorney Steven D. King Telephone (775) 427-5821
Firm _____
Address 227 River Road
Dayton, Nevada 89403

Client(s) Muddy Valley Irrigation Company ("MVIC")

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. **Attorney(s) representing respondent(s):**

Attorney See Exhibit 1 Telephone _____
Firm _____
Address _____

Client(s) _____

(List additional counsel on separate sheet if necessary)

4. **Nature of disposition below (check all that apply):**

- | | |
|--|---|
| <input type="checkbox"/> Judgment after bench trial | <input type="checkbox"/> Dismissal |
| <input type="checkbox"/> Judgment after jury verdict | <input type="checkbox"/> Lack of jurisdiction |
| <input type="checkbox"/> Summary judgment | <input type="checkbox"/> Failure to state a claim |
| <input type="checkbox"/> Default judgment | <input type="checkbox"/> Failure to prosecute |
| <input type="checkbox"/> Grant/Denial of NRCPC 60(b) relief | <input type="checkbox"/> Other (specify): _____ |
| <input type="checkbox"/> Grant/Denial of injunction | <input type="checkbox"/> Divorce decree |
| <input type="checkbox"/> Grant/Denial of declaratory relief | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input checked="" type="checkbox"/> Review of agency determination | <input type="checkbox"/> Other disposition (specify) _____ |

5. **Does this appeal raise issues concerning any of the following:** No.

- Child custody
 Venue
 Termination of parental rights

6. **Pending and prior proceedings in this court.** List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

- Case No. 81792, Lincoln County Water District, et al v. Tim Wilson, P.E., et al.
- Case No. 84739, Adam Sullivan, P.E., et al. v. Lincoln County Water District, et al.
- Case No. 84741, Southern Nevada Water Authority v. Coyote Springs Investments, LLC, et al.
- Case No. 84742, Center for Biological Diversity, et al. v. Adam Sullivan, P.E., et al.

7. **Pending and prior proceedings in other courts.** List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

- 8th Judicial District Court Case No. A-20-816761-C; Las Vegas Valley Water District and Southern Nevada Water Authority, Petitioners v. Adam Sullivan, P.E., Nevada State Engineer, Division of Water Resources, Department of Conservation and Natural Resources, Respondent.
Status: Findings of Fact, Conclusions of Law and Order Granting Petitions for Judicial Review entered 4/19/22; Appealed.
- 8th Judicial District Court Case No. A-20-817765-P; Coyote Springs Investment, LLC v. Tim Wilson, Nevada State Engineer, State of Nevada, Department of Conservation and Natural Resources, Division of Water Resources, Respondent.
Status: Findings of Fact, Conclusions of Law and Order Granting Petitions for Judicial Review entered 4/19/22.
- 8th Judicial District Court Case No. A-20-817840-P; Apex Holdings Company, LLC and Dry Lake Water, LLC, Petitioner v. Tim Wilson, P.E. Nevada State Engineer, Division of Water Resources, Department of Conservation and Natural Resources, Respondent.
Status: Findings of Fact, Conclusions of Law and Order Granting Petitions for Judicial Review entered 4/19/22.
- 8th Judicial District Court Case No. A-20-817876-P; Center for Biological Diversity, Petitioner v. Tim Wilson, P.E. Nevada State Engineer, Division of Water Resources, Department of Conservation and Natural Resources, Respondent.
Status: Findings of Fact, Conclusions of Law and Order Granting Petitions for Judicial Review entered 4/19/22; Appealed.

- 1 • 8th Judicial District Court Case No. A-20-817977-P; Muddy Valley Irrigation Company,
2 Petitioner v. Tim Wilson, P.E. Nevada State Engineer, Division of Water Resources,
3 Department of Conservation and Natural Resources, Respondent.
Status: Findings of Fact, Conclusions of Law and Order Granting Petitions for Judicial
4 Review entered 4/19/22; Appealed.
- 5 • 8th Judicial District Court Case No. A-20-818015-P; Nevada Cogeneration Associates Nos.
6 1 and 2, Petitioner v. Tim Wilson, P.E. State Engineer, State of Nevada, Department of
7 Conservation and Natural Resources, Division of Water Resources, Respondent
8 Status: Findings of Fact, Conclusions of Law and Order Granting Petitions for Judicial
9 Review entered 4/19/22.
- 10 • 8th Judicial District Court Case No. A-20-818069-P; Georgia-Pacific Gypsum LLC and
11 Republic Environmental Technologies, Inc., Petitioner v. Tim Wilson, P.E. Nevada State
12 Engineer, Division of Water Resources, and the Department of Conservation and Natural
13 Resources, Respondent.
14 Status: Findings of Fact, Conclusions of Law and Order Granting Petitions for Judicial
15 Review entered 4/19/22.
- 16 • 8th Judicial District Court Case No. A-21-833572-J; Lincoln County Water District and
17 Vidler Water Company, Petitioners v. Tim Wilson, P.E. Nevada State Engineer, Division of
18 Water Resources, Department of Conservation and Natural Resources, Respondent.
19 Status: Findings of Fact, Conclusions of Law and Order Granting Petitions for Judicial
20 Review entered 4/19/22.
- 21 • 7th Judicial District Court Case No. CV-0702520; Lincoln County Water District and
22 Vidler Water Company, Petitioners v. Tim Wilson, P.E. Nevada State Engineer, Division
23 of Water Resources, Department of Conservation and Natural Resources, Respondent.
24 Status: Order Granting Motion to Change Venue entered 8/26/20

8. **Nature of the action.** Briefly describe the nature of the action and the result below:

25 This is an appeal of a ruling of the district court upon consolidated petitions for judicial review
26 of an order, Order 1309, issued by the Nevada State Engineer. The district court granted
27 multiple petitions, undermining MVIC’s rights and “dismissed” the MVIC petition without
28 granting any of the relief sought by MVIC.

9. **Issues on appeal.** State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

29 This appeal raises the issues of the authority of the Nevada State Engineer to administer the
30 water of the State of Nevada jointly and conjunctively. Specifically, the District Court order
31 improperly restricts the authority of the Nevada State Engineer to administer junior groundwater
32 rights and in so doing undermines the State Engineer’s authority to enforce the prior
33 appropriation doctrine to protect the legal rights and property interests of senior water rights, in
34 this case MVIC. The Addendum filed May 13, 2020, improperly dismissed the MVIC action
35 even though its due process rights had been violated. Lastly, the District Court did not grant
36 the relief MVIC requested and was due under Nevada law, which would have protected its
37 rights.

10. **Pending proceedings in this court raising the same or similar issues.** If you are aware of any proceeding presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issues raised: Unknown

11. **Constitutional issues.** If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you

1 notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS
2 30.130?

- 3 N/A
4 Yes
5 No

6 If not, explain:

7 12. **Other issues.** Does this appeal involve any of the following issues?

- 8 Reversal of well-settled Nevada precedent (identify the case(s))
9 An issue arising under the United States and/or Nevada Constitutions
10 A substantial issue of first impression
11 An issue of public policy
12 An issue where en banc consideration is necessary to maintain uniformity of this court's
13 decisions.
14 A ballot question

15 If so, explain:

16 As described above, the appealed from ruling restricts the Nevada State Engineer from
17 administration and management of junior water rights, utilizing and considering joint and
18 conjunctive management necessary to protect MVIC's senior rights as well as the prior
19 appropriation doctrine.

20 13. **Assignment to the Court of Appeals or retention in the Supreme Court.** Briefly set forth
21 whether the matter is presumptively retained by the Supreme Court or assigned to the Court of
22 Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls.
23 If appellant believes that the Supreme Court should retain the case despite its presumptive
24 assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant
25 retaining the case, and include an explanation of their importance or significance:

26 MVIC understands that this matter is presumptively retained by the Supreme Court pursuant to
27 NRAP 17(a)(8) as an administrative agency case involving a water determination.

28 14. **Trial.** If this action proceeded to trial, how many days did the trial last? 4 days
Was it a bench or jury trial? Bench review of administrative order, in nature of appeal and
supported by 4 days of oral argument

15. **Judicial disqualification.** Do you intend to file a motion to disqualify or have a justice recuse
him/herself from participation in this appeal? If so, which Justice?

No.

TIMELINESS OF NOTICE OF APPEAL

16. **Date of entry of written judgment or order appealed from:**

April 19, 2022 - Findings of Fact, Conclusions of Law, and Order Granting Petitions
for Judicial Review
May 13, 2022 - Addendum and Clarification to Court's Findings of Fact, Conclusions
of Law, and Order Granting Petitions for Judicial Review Filed on
April 19, 2022

1 If no written judgment or order was filed in the district court, explain the basis for
2 seeking appellate review:

3 **17. Date written notice of entry of judgment or order served:**

4 April 19, 2022 - Notice of Entry of Findings of Fact, Conclusions of Law, and Order
5 Granting Petitions for Judicial Review
6 May 16, 2022 - Notice of Entry of Addendum and Clarification to Court's Findings of
7 Fact, Conclusions of Law, and Order Granting Petitions for
8 Judicial Review

9 Was service by:

- 10 Delivery
11 Mail/electronic/fax

12 **18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP
13 50(b), 52(b), or 59),**

14 (a) Specify the type of motion, the date and method of service of the motion, and the date of
15 filing. N/A.

- 16 NRCP 50(b) Date of filing _____
17 NRCP 52(b) Date of filing _____
18 NRCP 59 Date of filing _____

19 **NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration
20 may toll the time for filing a notice of appeal. See AA primo Builders v.
21 Washington, 126 Nev. ___, 245 P.3d 1190 (2010).**

22 (b) Date of entry of written order resolving tolling motion _____

23 (c) Date written notice of entry of order resolving tolling motion was served _____

24 Was service by:

- 25 Delivery
26 Mail

27 **19. Date notice of appeal was filed May 26, 2022**

28 If more than one party has appealed from the judgment or order, list the date each notice of
29 appeal was filed and identify by name the party filing the notice of appeal:

- 30 • The Nevada State Engineer filed a Notice of Appeal on May 13, 2022 and an Amended Notice
31 of Appeal on May 19, 2022
- 32 • The Center for Biological Diversity filed a Notice of Appeal on May 16, 2022
- 33 • Southern Nevada Water Authority filed a Notice of Appeal on May 19, 2022

34 **20. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP
35 4(a) or other:**

36 NRAP 4(a)(1)

37 ///

38 ///

SUBSTANTIVE APPEALABILITY

21. **Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:**

(a)

- | | |
|---|---------------------------------------|
| <input checked="" type="checkbox"/> NRAP 3A(b)(1) | <input type="checkbox"/> NRS 38.205 |
| <input type="checkbox"/> NRAP 3A(b)(2) | <input type="checkbox"/> NRS 233B.150 |
| <input type="checkbox"/> NRAP 3A(b)(3) | <input type="checkbox"/> NRS 703.376 |
| <input checked="" type="checkbox"/> Other (specify) <u>NRS 533.450(9)</u> | |

(b) Explain how each authority provides a basis for appeal from the judgment or order:

The appealed from Orders are final judgments entered in an action or proceeding commenced in the court in which the Order is rendered.

22. **List all parties involved in the action or consolidated actions in the district court:**

(a) Parties:

See Exhibit 1

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, e.g., formally dismissed, not served, or other:

All parties in the District Court action are believed to be parties to this appeal or those appeals with which it is now consolidated.

23. **Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims or third-party claims, and the date of formal disposition of each claim.**

MVIC, and SNWA, LVVWD and CBD, sought review of Order 1309 seeking remand to preclude an adverse conflicts analysis and restriction of junior groundwater pumping (joint and conjunctive management) at levels that protect MVIC's decreed and vested water rights from interference and violation of MVIC's due process rights. District court entered a written order granting 6 petitions for judicial review, in contravention of the relief sought by MVIC on April 19, 2022 and issued an Addendum on May 13, 2022, dismissing MVIC's petition. The respondents (i.e. petitioners who had their petitions for judicial review granted) argued that Order 1309 exceeded the State Engineer's legal authority, was not supported by substantial evidence, and violated their due process rights. The State Engineer countered all of these arguments.

24. **Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?**

- Yes
 No

25. **If you answered "No" to question 24, complete the following:**

(a) Specify the claims remaining pending below:

The Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review, filed on April 19, 2022, combined with the subsequent Addendum, filed on May 13, 2022, adjudicated and disposed of ALL petitions for judicial review of Order 1309.

1 Motions for attorneys' fees and costs remain pending at district court.

2 (b) Specify the parties remaining below:

3 (c) Did the district court certify the judgment or order appealed from as a final judgment
4 pursuant to NRCP 54(b):

5 Yes
6 No

7 (d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is
8 no just reason for delay and an express direction for the entry of judgment?

9 Yes
10 No

11 26. **If you answered "No" to any part of question 25, explain the basis for seeking appellate
12 review (e.g., order is independently appealable under NRAP 3A(b)):**

13 Not applicable.

14 27. **Attach file-stamped copies of the following documents:**

- 15 • The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- 16 • Any tolling motion(s) and order(s) resolving tolling motion(s)
- 17 • Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaim, cross-
18 claim and/or third-party claims asserted in the action or consolidated action below, even
19 if not at issue on appeal
- 20 • Any other order challenged on appeal
- 21 • Notices of entry for each attached order

22 *See Exhibit 2: Petition for Judicial Review of Order 1309 (without exhibits), Muddy Valley
23 Irrigation Company's Opening Brief, Muddy Valley Irrigation Company's Answering Brief, Muddy
24 Valley Company's Reply Brief, Findings of Fact, Conclusions of Law, and Order Granting Petitions
25 for Judicial Review, Notice of Entry of Findings of Fact, Conclusions of Law, and Order Granting
26 Petitions for Judicial Review, Addendum and Clarification to Court's Findings of Fact, Conclusions of
27 Law, and Order Granting Petitions for Judicial Review, and Notice of Entry of Addendum and
28 Clarification to Court's Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial
Review.*

VERIFICATION

*I declare under penalty of perjury that I have read this docketing statement, that the
information provided in this docketing statement is true and complete to the best of my
knowledge, information and belief, and that I have attached all required documents to this
docketing statement.*

Muddy Valley Irrigation Company
Name of Appellant

Robert A. Dotson
Justin C. Vance
Steven D. King
Name of counsel of record

June 17, 2022
Date

/s/ ROBERT A. DOTSON
Signature of counsel of record

Washoe, County, Nevada
State and county where signed

1 **CERTIFICATE OF SERVICE**

2 I certify that on this date, I served a copy of the foregoing document upon all counsel of
3 record by:

- 4 Mail on all parties in said action, by placing a true copy thereof enclosed in a sealed envelope
5 in a designated area for outgoing mail, addressed as set forth below. At Dotson Law, mail
6 placed in that designated area is given the correct amount of postage and is deposited that
7 same date in the ordinary course of business, in a United States mailbox in the City of Reno,
8 County of Washoe, Nevada.
- 9 By electronic service by filing the foregoing with the Clerk of Court using the E-Flex system,
10 which will electronically mail the filing to the following individuals at the email addresses set
11 for the below.
- 12 By email to the email addresses below.

13 Paul G. Taggart
14 Thomas P. Duensing
15 Taggart & Taggart, LTD.
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14 *and Dry Lake Water, LLC*

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14 *the Latter-Day Saints*

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20 *Attorneys for Western Elite, Bedroc and*
21 *CNLV*

20 Dated this 17th day of June, 2022.

21 /s/ L. MORGAN BOGUMIL
22 L. MORGAN BOGUMIL

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INDEX OF EXHIBITS

EXHIBIT	DESCRIPTION	PAGES
1	List of Attorneys Representing Respondents (Responsive to #3 and #22)	6
2	File-stamped copies of relevant documents (Responsive to #27)	220

EXHIBIT 1

EXHIBIT 1

Attorneys Representing Respondents:

1. **Lincoln County Water District**, represented by:

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3. **Coyote Springs Investment, LLC**, represented by:

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///

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6. **Dry Lake Water, LLC**, represented by:

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8. **Republic Environmental Technologies, Inc.**, represented by:

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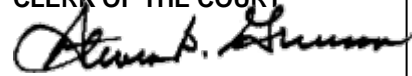
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EXHIBIT 2

EXHIBIT 2



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

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DISTRICT COURT
CLARK COUNTY, NEVADA

16 MUDDY VALLEY IRRIGATION COMPANY,
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18 Petitioner,
19
20 vs.
21 TIM WILSON, P.E., Nevada State Engineer,
22 DIVISION OF WATER RESOURCES,
23 DEPARTMENT OF CONSERVATION AND
24 NATURAL RESOURCES,
25
26 Respondent.

Case No.:

Dept. No.:

**PETITION FOR JUDICIAL REVIEW
OF ORDER 1309**

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

27 **I. JURISDICTIONAL STATEMENT**

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

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

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

10 **II. FACTUAL BACKGROUND**

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

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

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

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

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

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

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

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

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

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

13 **IV. CONCLUSION**

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

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

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Affirmation Pursuant to NRS 239B.030

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

DATED this 14th day of July, 2020.

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2 Pursuant to NRCP 5(b), I hereby certify that I am an employee of DOTSON LAW and that on
3 this date I caused to be served a true and correct copy of the foregoing by:

- 4 (BY MAIL) on all parties in said action, by placing a true copy thereof enclosed in a
5 sealed envelope in a designated area for outgoing mail, addressed as set forth below.
6 At Dotson Law, mail placed in that designated area is given the correct amount of
7 postage and is deposited that same date in the ordinary course of business, in a United
8 States mailbox in the City of Reno, County of Washoe, Nevada.
- 9 By electronic service by filing the foregoing with the Clerk of Court using the Tyler
10 Technologies E-filing system, which will electronically mail the filing to the below
11 listed individuals registered on the Court’s E-Service Master List.
- 12 (BY PERSONAL DELIVERY) by causing a true copy thereof to be hand delivered
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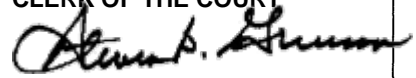
DATED this 14th day of July, 2020.

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15 **DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

17
18 LAS VEGAS VALLEY WATER DISTRICT
19 and SOUTHERN NEVADA WATER
20 AUTHORITY,

21 Petitioners,

22 vs.

23 ADAM SULLIVAN, P.E., Nevada State
24 Engineer, DIVISION OF WATER
25 RESOURCES, DEPARTMENT OF
26 CONSERVATION AND NATURAL
27 RESOURCES,

28 Respondent.

IN THE MATTER OF THE PETITION OF
COYOTE SPRINGS INVESTMENT, LLC

IN THE MATTER OF THE PETITION OF
APEX HOLDING COMPANY, LLC

Case No.: A-20-816761-C (Lead Case)
Dept. No.: 1

**MUDDY VALLEY IRRIGATION
COMPANY'S OPENING BRIEF**

Consolidated With:

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

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

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IN THE MATTER OF THE PETITION OF
CENTER FOR BIOLOGICAL DIVERSITY

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

IN THE MATTER OF THE PETITION OF
MUDDY VALLEY IRRIGATION COMPANY

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

IN THE MATTER OF THE PETITION OF
NEVADA COGENERATION ASSOCIATES
NOS. 1 AND 2

Case No.: A-20-818015-P (Sub Case)
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IN THE MATTER OF THE PETITION OF
GEORGIA-PACIFIC GYPSUM, LLC AND
REPUBLIC ENVIRONMENTAL
TECHNOLOGIES, INC.

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

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

Case No.: A-21-833572-J (Sub Case)
Dept. No 1

1 **PETITIONER MUDDY VALLEY IRRIGATION COMPANY'S**
2 **OPENING BRIEF**

3 MUDDY VALLEY IRRIGATION COMPANY (“MVIC”), by and through its
4 counsel, STEVEN D. KING and DOTSON LAW, hereby files its Opening Brief
5 following its Petition for Judicial Review of Order 1309 issued by the Nevada State
6 Engineer on June 15, 2020 pursuant to EDCR 2.15. This Opening Brief is based on all
7 papers and pleadings that are on file with this Court relating to this matter.
8

9 **NRAP RULE 26.1 DISCLOSURE**

10 The undersigned counsel of record hereby certifies that MUDDY VALLEY
11 IRRIGATION COMPANY is a Nevada Corporation. It has no parent corporations and
12 no public company owns 10% or more of its stock.

13 Dated this 27 day of August, 2021.



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 I. The State Engineer Erred in Entering Order 1309. 12

 A. Order 1309 contains prejudicial legal error in that it is
 contrary to the law, thus reflecting an error in judgment
 and/or abuse of discretion on the part of the State
 Engineer..... 13

 B. In making certain findings in Order 1309, the State
 Engineer violated MVIC’s due process rights, which
 represents an abuse of discretion and prejudicial legal
 error. 20

 1. MVIC is a “person” entitled to protection under the
 Due Process Clause. 21

 2. MVIC’s decreed water rights are property rights
 subject to due process protection. 22

 3. Order 1309 serves as an actual deprivation of
 MVIC’s property rights because it conflicts with the
 unrestricted rights provided to MVIC in the Muddy
 River Decree..... 23

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4. The State Engineer failed to provide sufficient notice as to the determinations that would be made via Order 1309, which influenced MVIC’s presentation of evidence at the hearing and resulted in its failure to be adequately “heard” on the issue of conflict prior to Order 1309 being issue..... 25

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INTRODUCTION¹

MVIC is a 125-year-old corporation that holds the majority of the decreed water rights on the Muddy River. It was the Plaintiff in the case which led to the Muddy River Decree of 1920 (sometimes hereafter “Muddy River Decree” or “Decree”). As a consequence of the judgment and decree at the conclusion of that case MVIC’s water rights should be secured and defended by the Nevada State Engineer (“NSE” or “State Engineer”). Rather than uphold his obligations to MVIC and the other water right holders under the Decree, in issuing Order 1309 the NSE has effectively ordered the curtailment of those senior rights in favor of junior water right holders. Order 1309 therefore represents an abrogation of the Decree without process and in clear violation of longstanding, foundational Nevada law and principles. In this regard Order 1309 is wrong and cannot stand. Order 1309 should be reversed to comply with the law and protect the decreed rights of MVIC.

JURISDICTIONAL STATEMENT

The review of a decision of the NSE is in the nature of an appeal and is authorized by NRS 533.450(1). Order 1309 was issued on June 15, 2020 and MVIC timely filed and served its Petition for Judicial Review on July 14, 2020.

STATEMENT OF THE ISSUES

1. Whether the Nevada State Engineer erred by determining the that the current flow of the Muddy River is sufficient to serve all decreed rights in conformance with the Muddy River Decree and that the reductions in flow that have

¹ For ease of reading this introduction is provided without citation to the record. The body of the brief will provide appropriate citations in support of the facts herein contained.

1 occurred because of groundwater pumping in the headwaters is not conflicting with
2 decreed rights.
3

4 2. Whether the Nevada State Engineer erred in determining that ground
5 water pumping of up to 8,000 acre feet annually (“afa”), can continue to occur in the
6 Lower White River Flow System Hydrographic Basin on an annual basis and to do so
7 is not a conflict with the Decree despite a reduction in the flow of the Muddy River.
8

9 STATEMENT OF THE CASE

10 Order 1169, issued by the State Engineer in 2002, required a large study to
11 determine whether pumping in the Lower White River Flow System (“LWRFS”)
12 would have a detrimental impact on existing water rights or the environment.² In
13 2018, following several public workshops to review the status of groundwater use and
14 recovery in the LWRFS, the State Engineer drafted a proposed order and held a
15 hearing on the proposed order on December 14, 2018. The State Engineer then issued
16 Interim Order 1303 to seek input on the following specific matters: (1) the geographic
17 boundary of the LWRFS, (2) aquifer recovery since the pump test, (3) long-term
18 annual quantity that may be pumped from the LWRFS, and (4) effects of moving water
19 rights between the carbonate and alluvial system to senior water rights on the Muddy
20 River.³ After factual findings were made on those questions, the State Engineer was to
21 evaluate groundwater management options for the LWRFS. The State Engineer held a
22 number of hearings, allowed the presentation of evidence and exchange of reports, and
23 eventually issued Order 1309 on June 15, 2020. This Petition for Judicial Review
24 arises out of Order 1309.⁴
25
26
27

28 ² See Order 1169 (SE ROA 659-669) (All citations to the record will be attached in a separate filing).

³ See Interim Order 1303 (SE ROA 70-88).

⁴ See Order 1309 (SE ROA 2-69).

1 While impact of Order 1309 is admittedly expansive and effects a number of
2 different parties, MVIC contends that as it pertains to MVIC, Order 1309 goes beyond
3 the stated purpose of the hearing which preceded it, which had been defined by the
4 State Engineer as explicitly not for the purpose of resolving or even addressing
5 allegations of conflict between groundwater pumping with the LWRFS and Muddy
6 River decreed rights.⁵ Through Order 1309, the State Engineer went beyond the scope
7 of the hearing as it had been defined by him and made the determination that “capture
8 or potential capture of flows of the waters of a decreed system does not constitute a
9 conflict.”⁶ This finding was in contradiction to the Decree. The finding was also a
10 violation of MVIC’s due process rights, as MVIC did not have notice that allegations
11 of conflict would be addressed, much less resolved in the hearing, and therefore MVIC
12 did not have the opportunity, indeed was affirmatively not allowed, to present evidence
13 related to the conflict issue. Although it should not have been required to do so, had it
14 known that Order 1309 would include this finding MVIC could have presented
15 evidence in support of its position and interests, which is contrary to the conclusions
16 reached by the State Engineer.
17
18
19

20 Order 1309’s conclusions are in conflict with applicable law, particularly the
21 Muddy River Decree. The Muddy River Decree provides that MVIC is entitled to “all
22 waters of said Muddy River, its head waters, sources of supply and tributaries, save
23 and except the several amounts and rights hereinbefore specified and described.”⁷
24

25 ⁵ It is respectfully submitted that based upon the statements of the NSE, MVIC did not have any
26 notice that a quantification of its decreed water rights could possibly occur or result from the
27 hearing(s) and evidence associated with Order 1309.

28 ⁶ See Order 1309 (SE ROA 2-69) at SE ROA 61.

⁷ See Judgment and Decree, *Muddy Valley Irrigation Company v. Moapa and Salt Lake Produce Company et al* (the “Muddy River Decree” or “Decree”) (March 11, 1920) (SE ROA 33770-33816). at 20:1-8 (SE ROA 33790).

1 Importantly, the Muddy River Decree, prior to that expansive language, delineates the
2 decreed rights of 13 parties to that litigation, including MVIC and the Moapa Indian
3 Reservation.⁸ Specifically, MVIC was awarded 36.2588 cfs and further entitled to
4 divert additional water pursuant to three other State Engineer's Certificates and those
5 waters appropriated through application No. 1611.⁹ In other words, MVIC received a
6 specific award of water pursuant to those quantified determinations of the Decree.¹⁰
7
8 Thus, the Decree's language is important in that it confirms water rights held by MVIC
9 in two ways. It first has a quantified determination and then further confirms that
10 MVIC gets any additional flow from the Muddy River not otherwise allocated by the
11 specific awards. Contrary to the Muddy River Decree, Order 1309 diminishes MVIC's
12 water rights based on the purported consumptive needs of the senior decreed rights
13 although MVIC's purported "needs" are irrelevant to determining whether pumping
14 interferes with its decreed rights because MVIC has rights to the specific sums
15 allocated to it and the total aggregate remaining volume of the river independent of its
16 alleged requirements and MVIC has had those decreed rights for over 100 years.
17
18 Accordingly, to the extent Order 1309 is in conflict with respect to those items, Order
19 1309 should be reversed, and the relief requested herein granted. Specifically, the
20 State Engineer should be directed to ensure that the predevelopment baseflow of
21 33,900 afa, which he recognizes in Order 1309, is not intercepted by any junior
22 rights.¹¹ This will protect and preserve MVIC's water rights and the Decree in general.
23
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⁸ See Muddy River Decree of 1920 (SE ROA 33770-33816) at SE ROA 33787-33788.

⁹ See Muddy River Decree of 1920 (SE ROA 33770-33816) at SE ROA33792, lines 1-8.

¹⁰ See Muddy River Decree of 1920 (SE ROA 33770-33816) at SE ROA33792, lines 1-8.

¹¹ See Order 1309 (SE ROA 2-69) at SE ROA 61.

1 Although it is improper and contrary to Nevada law for any modification of the
2 Decree to occur at this time, even if a modification was legal the evidence supportive
3 of the NSE conflict analysis was not allowed to be presented and therefore Order 1309
4 is unsupportable, arbitrary, and capricious and should be reversed.
5

6 FACTUAL BACKGROUND

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

13 Through the Muddy River Decree, it was determined that MVIC owns the
14 majority of the Muddy River decreed surface water rights and that those rights were
15 appropriated and placed to beneficial use prior to 1905 and are senior in priority to all
16 Nevada groundwater rights within the Lower White River Flow System ("LWRFS").¹³
17 The Muddy River Decree states, in part:
18

19 [T]he Muddy Valley Irrigation Company is declared and
20 decreed to have acquired by valid appropriate and
21 beneficial use and to be entitled to divert and use upon the
22 lands...all waters of said Muddy River, its head waters,
23 sources of supply and tributaries save and except the
several amounts and rights hereinbefore specified...¹⁴

24 The Muddy River Decree also held that "the total aggregate volume of the several
25 amounts and quantities of water awarded and allotted...is the total available flow of
26

27 ¹² See MVIC Rebuttal Report (SE ROA 39713-39717) at p. 2 (SE ROA 39715).

28 ¹³ See, generally, Muddy River Decree (SE ROA 33770-33816).

¹⁴ *Id.* at 20:1-8 (SE ROA 33790) (emphasis added).

1 said Muddy River and consumes and exhausts all of the available flow of the said
2 Muddy Valley River...¹⁵ These terms combine to legally confirm that MVIC then
3 and now has the right to and uses all of the flows of the Muddy River. MVIC's
4 decreed rights are therefore entitled to protection from capture and depletion by other
5 parties. This should have been a stalwart and uncontroverted principal employed by
6 the Nevada State Engineer in Order 1309.
7

8 Following hearings in 2001, the State Engineer issued Order 1169, which
9 required all pending groundwater applications in the LWRFS (excluding Kane
10 Springs) be held in abeyance pending an aquifer test to evaluate the impact of pending
11 groundwater applications.¹⁶ In the Order, the State Engineer expressed concern about
12 how groundwater pumping was impacting the area and found that he needed additional
13 information to determine if existing groundwater rights “will have any detrimental
14 impacts on existing water rights or the environment.”¹⁷ The most senior of the then
15 existing water rights within the LWRFS were the senior decreed surface water rights in
16 the Muddy River. The MVIC rights. Therefore, it was fair for MVIC to understand
17 that since at least 2001 the NSE was taking steps to protect its rights.
18
19

20 In 2018, the State Engineer held several public workshops to review the status of
21 groundwater use and recovery following the conclusion of Order 1169, requiring a
22 large study to determine whether pumping in the LWRFS would have detrimental
23 impacts on existing water rights or the environment. Following the workshops, and as
24 a result thereof, the State Engineer drafted a proposed order and held a hearing on the
25

26
27 ¹⁵ *Id.* at 22:28-23:1 (emphasis added).

28 ¹⁶ *See* Order 1169 (SE ROA 659-669) at SE ROA 665-666.

¹⁷ *See* Order 1169 at SE ROA 665.

1 proposed order on December 14, 2018. The State Engineer issued Interim Order 1303
2 on January 11, 2019 to obtain stakeholder input through the submission of expert
3 reports on four specifically-delineated issues: (1) the geographic boundary of the
4 LWRFS; (2) the aquifer recovery since a prior pump test emanating from prior Order
5 1169; (3) the long term annual quantity that may be pumped from the LWRFS; and (4)
6 the effects of moving water rights between the carbonate and alluvial system to senior
7 water rights on the Muddy River.¹⁸ Certain deadlines related to the filing of reports
8 were modified in the Addendum to Interim Order 1303.¹⁹ However, the State Engineer
9 did *not* ask for information regarding conflicts between junior groundwater pumping
10 and the senior decreed rights owned by MVIC.
11

12
13 On August 8, 2019, prior to the hearing which preceded the issuance of Order
14 1309, the State Engineer held a prehearing conference. At the conference, Hearing
15 Officer Fairbank set forth the purpose of the upcoming hearing and stated:
16

17 [T]he purpose of the hearing is not to resolve or address
18 allegations of conflict between groundwater pumping
19 within the LWRFS and Muddy River decreed rights. That
20 is not the purpose of this hearing and that's not what we
are going to be deciding at this point in time.

21 The purpose of the hearing is to determine what the
22 sustainability is, what the impact is on decreed rights, and
23 then addressing and resolving allegations of conflict
24 should that be a determination that will be addressed in, at
a future point in time.²⁰

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26
27 ¹⁸ See Interim Order 1303 (SE ROA 70-88) at p. 13, ¶ 2 (SE ROA 82).

28 ¹⁹ See Addendum to Interim Order 1303 (SE ROA 494-512).

²⁰ See Transcript of Proceedings, Public Hearing, Prehearing Conference, August 8, 2019 (SE ROA 519-552) at 12:6-15 (SE ROA 522) (emphasis added).

1 A Notice of Hearing was issued on August 23, 2019, which again confirmed the
2 limited purpose of the hearing.²¹ Thus, the State Engineer not only did not provide
3 notice consistent with the extent of Order 1309, but further restricted the scope of the
4 hearing as described.²²

5
6 MVIC submitted a rebuttal report on or about August 15, 2019 and a Summary
7 of Witness Testimony of its witness, Todd Robison, who is also the Chairman of the
8 Board of Directors of MVIC, indicating that the rebuttal report would serve as Mr.
9 Robison's direct testimony.²³ Several parties objected to certain witnesses and
10 evidence, including Coyote Springs Investment, LLC's ("CSI") objection to the scope
11 of testimony by Mr. Robison.²⁴ On September 16, 2019, the State Engineer overruled
12 CSI's objection as to MVIC's witness, but noted his agreement that "the evidence
13 presented in the hearing is to be limited to the four issues identified in the Notice of
14 Hearing" while also recognizing that there would be some subjective determination as
15 to what additional information the State Engineer should consider and reserving the
16 right to "order a line of questioning to cease or to remain limited to the relevant issues
17 that are the subject of the hearing."²⁵

18
19
20 Because of the State Engineer's position that "the purpose of the hearing is not
21 to resolve or address allegations of conflict between groundwater pumping within
22

23 ²¹ See Notice of Hearing (Aug. 23, 2019) (SE ROA 262-282) at p. 2 (SE ROA 263).

24 ²² It should be noted that the Decree became final over 100 years ago and likewise the time for
25 modification expired almost 100 years ago. See NRS 533.185 and NRS 533.210. Consequently,
26 there is no ability under the law to modify the decreed rights. That was not and could not have been
27 the purpose of these hearings.

28 ²³ See MVIC Summary of Witness Testimony of Mr. Todd Robison (SE ROA 39712); MVIC
Rebuttal Report (SE ROA 39713-39717).

²⁴ See Order on Objections and Witness Qualifications (Sept. 16, 2019) (SE ROA 567-572) at p. 1
(SE ROA 567).

²⁵ *Id.*

1 LWRFS and Muddy River decreed rights” and that allegations of conflict would be
2 addressed at a future point in time,²⁶ MVIC did not retain an expert related to conflicts
3 analysis and did not submit significant testimony or evidence bearing on that point.
4 Rather, MVIC’s witness report provided very little regarding the issue of conflict and
5 little oral testimony in that regard.²⁷ Indeed, MVIC saw no need and should have had
6 no need to defend its water rights as they are decreed rights and it is the obligation of
7 the State Engineer to protect those rights and ensure they are not interfered with by
8 junior claimants.²⁸ Consequently, instead of addressing the conflicts that MVIC has
9 been experiencing (which were understood to already be established in the record), it
10 took the opportunity, through the testimony of Todd Robison, to discuss its position as
11 to each of the four issues identified by the State Engineer as being the purpose of the
12 hearing.²⁹ Even so, the testimony that was submitted leaves little doubt that MVIC and
13 others have observed and could prove conflicts to its decreed rights as a consequence
14 of pumping up gradient from the MVIC points of diversion.³⁰

15
16
17
18 The State Engineer issued Order 1309 on or about June 15, 2020.³¹ In that
19 Order, despite acknowledging that current pumping is capturing Muddy River flows,
20 the State Engineer violated NRS 533.0245 by issuing an Order which conflicted with
21 the Muddy River Decree and went beyond his defined scope of the hearing to
22 determine that “capture or potential capture of flows of the waters of a decreed system
23

24
25 ²⁶ See Transcript of Proceedings, Public Hearing, Prehearing Conference, August 8, 2019 (SE ROA 519-552) at 12:6-15 (SE ROA 522).

26 ²⁷ See Testimony of Todd Robison generally, Hearing Transcript Vol. IX (SE ROA 53681-53686).

27 ²⁸ See NRS 533.0245.

28 ²⁹ See MVIC Rebuttal Report (SE ROA 39714-39717).

³⁰ See Testimony of Todd Robison, Hearing Transcript Vol. IX (SE ROA 53657-53708) at SE ROA 53681-53686.

³¹ See Order 1309 (SE ROA 2-69).

1 does not constitute a conflict.”³² The State Engineer further stated that “there is no
2 conflict as long as the senior water rights are served.”³³ Rather than accepting the
3 quantity of water rights set forth in the Muddy River Decree, the State Engineer then
4 performed an ad hoc calculation to determine the consumptive use needs of the senior
5 decreed rights holders based upon the hypothetical planting of a high water-use crop
6 like alfalfa and from that improper calculation (there being no proper calculation at this
7 point) appears to have jumped to the conclusion that the capture of up to 8,000 acre-
8 feet of Muddy River flows by junior groundwater users would not deprive the senior
9 holders of any portion of their decreed water rights.³⁴ Disagreeing with Order 1309,
10 MVIC filed a Petition for Judicial Review on July 14, 2020 pursuant to NRS 533.450
11 through which it raised the issues being briefed herein.
12

13 STANDARD OF REVIEW

14
15 A party aggrieved by an order or decision of the State Engineer is entitled to
16 have the same reviewed in the nature of an appeal.³⁵ First, the State Engineer must
17 provide affected parties with a “full opportunity to be heard.”³⁶ The State Engineer’s
18 order must include “findings in sufficient detail to permit judicial review” and “must
19 clearly resolve all crucial issues presented.”³⁷ With respect to the factual findings of
20 the Order, this Court must determine whether substantial evidence exists in the record
21 to support the State Engineer’s decision.³⁸ The reviewing court must also determine
22
23

24 _____
25 ³² *Id.* at p. 60 (SE ROA at 61).

26 ³³ *Id.*

27 ³⁴ *Id.* at pp. 60-61, 65 (SE ROA 61-62, 66).

28 ³⁵ NRS 533.450(1).

³⁶ *Revert v. Ray*, 95 Nev. 782, 787, 603 P.2d 262, 264-265 (1979), citing NRS 533.450(2).

³⁷ *Revert*, 95 Nev. at 786, 603 P.2d at 264-265.

³⁸ *Revert*, 95 Nev. at 787, 603 P.2d at 264-265; *Off. of State Eng’r v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991).

1 whether the Order was based on a consideration of the relevant factors and “whether
2 there has been a clear error of judgment.”³⁹ This Court must also determine whether
3 the State Engineer’s Order was arbitrary, capricious, an abuse of discretion, or whether
4 it was otherwise affected by prejudicial legal error.⁴⁰ If such procedures are not
5 followed and “the resulting administrative decision is arbitrary, oppressive, or
6 accompanied by a manifest abuse of discretion,” a court should not hesitate to
7 intervene and block the enforcement of the order or decision.”⁴¹ Finally, a court
8 reviewing an administrative decision is required to “decide pure legal questions
9 without deference to an agency determination” and therefore applies a de novo
10 standards of review to questions of law.⁴²

13 SUMMARY OF THE ARGUMENT

14 MVIC contends that Order 1309 contains prejudicial error and is contrary to law
15 and should therefore be modified or remanded to the State Engineer to be modified to
16 comply with the previous Order of this Court in the Muddy River Decree. As set forth
17 in NRS 533.0245, the State Engineer is prohibited from reducing the amount of
18 decreed water rights; thus, Order 1309 must be modified to ensure that all of the
19 decreed rights within the Muddy River Decree, including MVIC’s right to divert and
20 put to beneficial use any predevelopment flow from the Muddy River in excess of the
21 delineated rights in the Decree, is preserved for MVIC.⁴³ Given the State Engineer’s
22 limitation in the scope of the hearing and determinations that would be made
23
24

25 _____
26 ³⁹ See *City of Reno v. Reno Police Protective Ass’n*, 118 Nev. 889, 894, 59 P.3d 1212, 1216 (2002).

27 ⁴⁰ See *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 112 Nev. 743, 751, 918 P.2d 697,
702 (1996)

28 ⁴¹ See *Revert*, 95 Nev. at 787, 603 P.2d at 265.

⁴² See *Felton v. Douglas County*, 134 Nev. 34, 35, 410 P.3d 991, 993-994 (2018).

⁴³ Such a ruling also protects the and other senior decreed rights set forth in the Decree.

1 therefrom, the State Engineer violated MVIC's due process rights in that it was unable
2 to present evidence on conflicts. Further, MVIC requests that this Court order that in
3 any subsequent hearings and determinations related to the management of the LWRFS,
4 the State Engineer's conclusions must be internally consistent and avoid failures to
5 address acknowledged conflicts or allow pumping of ground water that will intercept
6 senior rights and thereby perpetuate those admitted conflicts.
7

8 **ARGUMENT**

9 **I. The State Engineer Erred in Entering Order 1309**

10 As will be set forth in greater detail below, the State Engineer committed
11 prejudicial legal error in making certain findings in Order 1309 in violation of the
12 Muddy River Decree and MVIC's due process rights. While the State Engineer had a
13 legal obligation to protect MVIC's senior decreed water rights and is prohibited from
14 carrying out its statutory obligations in a manner that conflicts with a decree issued by
15 a state or federal court,⁴⁴ Order 1309 is effectively a repudiation, abrogation, and
16 curtailment of MVIC's decreed rights which had been perfected as of 1905, based
17 upon the 1920 Decree. What's more, Order 1309 effectively modifies not only the
18 decreed rights of MVIC, but all parties to the 1920 Decree, without providing notice to
19 all parties that such modifications were being considered or were going to occur. As a
20 result, Order 1309 represents a gross and clear due process violation.
21
22
23

24 ///

25 ///

26 ///

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28

⁴⁴ See NRS 533.0245.

1 **A. Order 1309 contains prejudicial legal error in that it is contrary to**
2 **the law, thus reflecting an error in judgment and/or abuse of**
3 **discretion on the part of the State Engineer.**

4 Order 1309 is an affront to and conflicts with clear and unambiguous provisions
5 of the Muddy River Decree which previously fully and finally adjudicated all the water
6 rights on the Muddy River. Order 1309 should be reversed to comply with that
7 Decree.

8 Interim Order 1303 recognizes that the State Engineer previously found that the
9 pumping of groundwater in LWRFS has a direct relationship with the flow of the
10 decreed and fully appropriated Muddy River, which has the most-senior rights.⁴⁵
11 Under Nevada law, the State Engineer is to fulfill its duties in a manner which does not
12 conflict with the provisions of any prior decree.⁴⁶ However, in implementing Order
13 1309, the State Engineer has violated this provision since that Order directly
14 contradicts the 1920 Decree and operates to curtail MVIC's senior decreed rights
15 thereunder. The State Engineer himself recognized in Order 1194 that the Muddy
16 River was fully appropriated, finding: "The Muddy River Decree adjudicated the entire
17 flow of the Muddy River and its tributaries, and that there is insufficient flow in the
18 Muddy River to grant any new appropriations."⁴⁷ The Muddy River Decree was the
19 final adjudication of all Muddy River water rights and the doctrine of res judicata
20 prevents it from being relitigated a century later.⁴⁸ Accordingly, Order 1309 is
21 contrary to law and, in particular, the Muddy River Decree itself.
22
23
24

25 _____
26 ⁴⁵ See Interim Order 1303 (SE ROA 70 – 88) at p. 7 (SE ROA 76).)

27 ⁴⁶ NRS 533.0245.

28 ⁴⁷ See Order 1194 (SE ROA 46469-46472) at 46471, § 4.

⁴⁸ See *Nevada v. U.S.*, 463 U.S. 110, 131-140, 103 S. Ct. 110, 2919-2923 (1983) (Ruling that water rights recognized under the *Orr Ditch* decree could not be reallocated by the federal government because of the doctrine of res judicata).

1 In addition, Order 1309 is contrary to law because it essentially amounts to a
2 modification of the decree which is not at this point proper, since under NRS 533.210
3 the State Engineer or any other claimant affected by a decree may only apply to the
4 court for a modification within 3 years from the entry of said decree.⁴⁹ Even if it were
5 appropriate to modify the Muddy River Decree after 100 years, notice must occur as in
6 a civil case and that did not occur here.⁵⁰ In *Min. Cty. v. Lyon Cty.*, the Nevada
7 Supreme Court answered certified questions from the Ninth Circuit regarding the
8 public trust doctrine and its applicability to water law in Nevada. The court stated:
9

11 We therefore reaffirm that the public trust doctrine applies
12 in Nevada. We also clarify that it applies to rights
13 previously settled under prior appropriation and clarify
14 that the doctrine applies to all waters in the state and the
lands submerged beneath navigable waters.⁵¹

15 The court further held that the public trust doctrine is consistent with Nevada's water
16 rights statutes, including NRS 533.210 providing that decrees entered by the court
17 "*shall be final and shall be conclusive*" unless application is made within three years.⁵²
18 Again, as Order 1309 issued over 100 years after the Decree timely application did not
19 occur here. The court also affirmed that NRS 533.0245 expressly prohibits the State
20 Engineer from allocating water in a manner which conflicts with such finality.⁵³ To
21 emphasize its recognition that Nevada law does not permit reallocation of water rights
22 after the three-year statutory time frame has passed, the Court stated:
23

24
25 ⁴⁹ See NRS 533.210(1); see also *United States v. Walker River Irrigation Dist.*, 986 F.3d 1197, 1204
26 (9th Cir. 2021) (stating that under Nevada law, challenges to a decree adjudicating water rights must
be brought within three years).

27 ⁵⁰ See NRS 533.210(2).

28 ⁵¹ *Min. Cty. v. Lyon Cty.*, 136 Nev. Adv. Op. 58, 473 P.3d 418, 426 (2020)

⁵² *Id.* (emphasis added), citing NRS 533.210.

⁵³ *Id.*, citing NRS 533.0245.

1
2 Municipal, social, and economic institutions rely on the
3 finality of water rights for long-term planning and capital
4 investments. Likewise, agricultural and mining industries
5 rely on the finality of water for capital and output, which
6 derivatively impacts other businesses and influences the
7 prosperity of the state. To permit reallocation would create
8 uncertainties for future development in Nevada and
undermine the public interest in finality and thus also the
management of these resources consistent with
the public trust doctrine.⁵⁴

9 The State Engineer's actions are also a violation of the non-impairment doctrine set
10 forth in NRS 533.085, which provides:

11 Nothing contained in this chapter shall impair the vested
12 right of any person to the use of water, nor shall the right
13 of any person to take and use water be impaired or affected
14 by any of the provisions of this chapter where
15 appropriations have been initiated in accordance with law
prior to March 22, 1913.⁵⁵

16 This doctrine has been recognized and upheld by Nevada Courts and has been
17 extended to protect from changes to decreed rights.⁵⁶ Thus, the State Engineer's
18 actions to curtail MVIC's senior decreed rights, and Order 1309 itself, are simply
19 illegal as "[t]he statutory water scheme in Nevada...expressly prohibits reallocating
20 adjudicated water rights that have not been abandoned, forfeited, or otherwise lost
21 pursuant to an express statutory provision."⁵⁷ To abandon or forfeit a water right is
22

23
24 ⁵⁴ *Min. Cty. v. Lyon Cty.*, 136 Nev. Adv. Op. 58, 473 P.3d 418, 429 (2020).

25 ⁵⁵ NRS 533.085(1).

26 ⁵⁶ *See Ormsby County v. Kearney*, 37 Nev. 314, 142 P. 803 (1914); *see also Andersen Fam. Assocs.*
27 *v. Hugh Ricci, P.E.*, 124 Nev. 182, 192, 179 P.3d 1201, 1207 (2008) (“[a]lthough Carson City
28 changed the use of its vested rights, those rights remained of the same character – i.e., they remained
vested and did not become solely permitted rights just because the holder obtained a permit changing
the use of the rights.”).

⁵⁷ *Id.*

1 very unusual and almost requires a renunciation of the right. As is clear from the
2 record, far from abandoning its rights, MVIC utilizes all of the water available to it.
3

4 Additionally, the claimed consumptive needs of the senior decreed right holder
5 (MVIC) determined and relied upon by the State Engineer is irrelevant, as MVIC's
6 senior decreed rights were long ago settled and those rights are not based upon or
7 subject to modification through the NSE's current alleged calculation of its needs.
8 Rather, other than the limited exceptions noted in the Muddy River Decree, MVIC is
9 entitled to "all waters of said Muddy River, its head waters, sources of supply and
10 tributaries."⁵⁸ As the Decree held that "the total aggregate volume of the several
11 amounts and quantities of water awarded and allotted...is the total available flow of
12 said Muddy River and consumes and exhausts all of the available flow of the said
13 Muddy Valley River..."⁵⁹ the Decree creates a holding which requires that MVIC's
14 decreed rights are entitled to protection from capture and depletion by other parties.
15 Order 1309 fails to afford that protection and instead accomplishes the opposite, it
16 authorizes a deprivation of those rights. Order 1309 arrives at the conclusion that if all
17 decreed acres were planted with a high-water-use crop like alfalfa, the net irrigation
18 requirement would be 28,300 afa based upon a consumptive rate of 4.7 afa.⁶⁰ This
19 conclusion serves to improperly support an impermissible reduction from the
20 33,933.63 afa set forth in the Decree, a reduction of nearly 6,000 afa. While the State
21 Engineer is permitted in some instances to consider consumptive use of a water right,
22 such a consideration "[does] not apply to any decreed, certificated, or permitted right
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27 ⁵⁸ See Muddy River Decree of 1920 (SE ROA 33770-33816) at 20:1-8 (SE ROA 33790).

28 ⁵⁹ See Muddy River Decree of 1920 (SE ROA 33770-33816) at 22:28-23:1.

⁶⁰ See Order 1309 (SE ROA 2-69) at p. 61 (SE ROA 62).

1 to appropriate water which originates in the Virgin River or the Muddy River.”⁶¹ The
2 determination of a quantification required to meet obligations of the decree is not only
3 improper under the law, but incorrect even on the record before the State Engineer as it
4 relies upon a calculation that appears no place in the record. This conclusion of Order
5 1309 is therefore one that should be reversed.
6

7 Not only did MVIC have no opportunity to comment on or discuss the irrigation
8 requirement, but MVIC’s alleged “requirement” pursuant to such analysis is irrelevant
9 to determining whether pumping interferes with MVIC’s decreed rights because MVIC
10 has the right to the total aggregate volume independent of its alleged requirements.⁶²
11 This is consistent with Nevada statute precluding the State Engineer from
12 consideration of consumptive use with regard to any decreed right on the Muddy
13 River. Rather, the total aggregate volume described in the Decree logically must
14 equate to and be based upon the predevelopment flows of approximately 33,900 afa,
15 which the State Engineer recognizes in Order 1309 and concludes is not occurring.
16 Further, the beneficial use for MVIC in the Decree is broad, far broader than that stated
17 in Order 1309 or seemingly considered in the State Engineer’s consumptive use
18 analysis.⁶³ For example the Decree directs MVIC to divert all waters “for the various
19 purposes described in the complaint” and “in accordance with its articles and amended
20 articles of incorporation, or its by-laws or the accepted uses and practices of
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25 ⁶¹ See NRS 533.3703.

26 ⁶² Though the State Engineer apparently believes MVIC’s requirements are limited, they in fact are
27 not and all water is actually used. The analysis disregards the application of Nevada law, including,
28 but not limited to, NRS 533.0245 or the actual operation, diversion, delivery, and use of the water by
MVIC for its shareholders and other laws and circumstances applicable to these Muddy River water
rights.

⁶³ See, e.g., Muddy River Decree (SE ROA 33770-33816) at 20:13-21 (SE ROA 33790.)

1 [MVIC].”⁶⁴ The State Engineer’s reliance on solely one hypothetical manner of use
2 and the application of those assumptions of beneficial use is not only illegal as it is in
3 conflict Nevada law and the Decree, but factually incorrect given the specific and
4 broad language of the Decree. Interestingly, although the State Engineer has on
5 multiple occasions previously recognized MVIC’s full duty of water rights under the
6 Decree, he is now impermissibly limiting them in Order 1309.
7

8 It should be noted that even if a consumptive needs analysis were appropriate,
9 the State Engineer’s re-quantification was based on incorrect and/or unsupported
10 calculations. While Order 1309 states the total amount of irrigated land in the Decree
11 is 5,614 acres,⁶⁵ there is no explanation on how the State Engineer arrived at this
12 number and it is not supported by the record. The State Engineer’s calculation also
13 fails to account for any water for conveyance to the hypothetical alfalfa fields. He
14 concludes that there is no conveyance loss because “the alluvial corridor is narrow and
15 well defined so water stays within the shallow groundwater or discharges back to the
16 river.”⁶⁶ Without citing any evidence, this analysis relies on the assumption that the
17 pre-1905 irrigation of the Muddy River was 100% efficient, with no evaporation or
18 conveyance loss, an assumption which is also not supported by the record and frankly
19 an incredible one. Finally, in re-quantifying the Muddy River water rights through the
20 alfalfa hypothetical, the State Engineer effectively reduced the duty of decreed water
21 from that used in the Decree. The alfalfa hypothetical assumes and limits the rights to
22 4.7 afa/acre, which is significantly lower than those set forth in the Decree which
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27 ⁶⁴ *Id.*

28 ⁶⁵ *See* Order 1309 (SE ROA 2-69) at p. 60 (SE ROA 61).

⁶⁶ *See* Order 1309 (SE ROA 2-69) at p. 61 (SE ROA 62).

1 appear to be calculable at approximately double that sum. ⁶⁷ Regardless, the analysis
2 did not occur in the hearing and no citation to the record supports the arbitrary alfalfa
3 assumption. Consequently, this is additional evidence that the conflict analysis in
4 Order 1309 was arbitrary, capricious, and an abuse of discretion.
5

6 For the reasons set forth above, Order 1309 is contrary to Nevada law, the
7 Decree, and is internally inconsistent with itself. This order represents a textbook
8 example of an arbitrary and capricious decision representing prejudicial legal error.
9 Thus, the State Engineer's conclusion that reductions in flow from groundwater
10 pumping does not conflict with MVIC's rights is clearly erroneous, as anything that
11 depletes the aggregate volume, which the State Engineer recognized groundwater
12 pumping does, conflicts with MVIC's rights under the Decree as a matter of law.
13

14 Order 1309's conclusion that the amount of groundwater pumping to be allowed
15 at 8,000 afa is likewise unsupported by the record and should be reversed with a
16 directive as to that calculation. That conclusion could be appropriate, but as it is
17 appears to be based upon the premise in the order, it appears to be at a minimum
18 unsupported by sound conclusions and likely in excess of the sum supported by the
19 evidence. Therefore, that conclusion is also arbitrary and capricious. Because the
20 State Engineer restricted the scope of the hearing, the evidence is inadequate to support
21 this conclusion, particularly without restrictions on locations, and Order 1309 is
22 consequently internally inconsistent. Order 1309 must therefore be reversed and
23 remanded to the State Engineer or simply amended by this Court to correct the
24 conclusions as to allowed pumping so that flows in the Muddy River are protected at
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28 ⁶⁷ See Muddy River Decree (SE ROA 33770-33816) at Ex. B, p. 2 (SE ROA 33808).

1 the predevelopment level of 33,900 or the level that is determined to be the flow
2 without interference or interception of the water sources that supply the Muddy River.

3
4 **B. In making certain findings in Order 1309, the State Engineer violated**
5 **MVIC's due process rights, which represents an abuse of discretion**
6 **and prejudicial legal error.**

7 In addition to the due process violations implicit in modification of the Decree, a
8 legal impossibility 100 years after the Decree was entered, to do so without notice to
9 the water right holders under the decree represents a basic due process violation.

10 As set forth above, the State Engineer made it clear that the purpose of the
11 hearing from which Order 1309 emanated was not to resolve or address allegations of
12 conflict with the Muddy River decreed rights and that issues of conflict would be
13 addressed at a future point in time.⁶⁸ Despite this, Order 1309 contains a finding by the
14 State Engineer that “capture or potential capture of flows of the waters of a decreed
15 system does not constitute a conflict” and that “there is no conflict as long as the senior
16 water rights are served.”⁶⁹ Not only does this violate the prior appropriation doctrine,
17 but it violates due process with respect to the State Engineer’s analysis as set forth in
18 Order 1309 in that it goes well beyond the stated narrow purpose of the hearing and in
19 so doing deprived MVIC of its rights to due process.
20

21
22 The Fourteenth Amendment to the United States Constitution provides, in
23 relevant part, that “[n]o state shall...deprive any person of life, liberty, or property,
24 without due process of law...”⁷⁰ The Constitution of the State of Nevada similarly
25 provides that “[n]o person shall be deprived of life, liberty, or property, without due
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27 ⁶⁸ See Transcript of Proceedings, Public Hearing, Prehearing Conference, August 8, 2019 (SE ROA
28 519-552) at 12:6-15 (SE ROA 522) (emphasis added).

⁶⁹ *Id.* at p. 60 (SE ROA at 61).

⁷⁰ U.S. Const. amend. XIV, § 1.

1 process of law.”⁷¹ The Nevada Supreme Court has noted that the similarities between
2 the federal due process clause and Nevada’s due process clause are such that it can
3 look to federal precedent for guidance.⁷²
4

5 Procedural due process imposes restrictions on governmental actions which
6 deprive individuals of liberty or property interests.⁷³ The general rule is that
7 “individuals must receive notice and an opportunity to be heard before the Government
8 deprives them of property.”⁷⁴ “The fundamental requirement of due process is the
9 opportunity to be heard at a meaningful time and in a meaningful manner.”⁷⁵
10

11 **1. MVIC is a “person” entitled to protection under the Due**
12 **Process Clause.**

13 As stated above, MVIC is a corporation which has been in existence since 1895.
14 While both the federal and Nevada Due Process Clauses appear on their face to protect
15 a “person,” the United States Supreme Court, Nevada Supreme Court, and the Ninth
16 Circuit have all held that a corporation is a person within the meaning of the Due
17 Process Clause and are thus subject to protection under it.⁷⁶ Accordingly, MVIC is
18 entitled to due process protection.
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24 ⁷¹ Nev. Const. art. 1, § 8(2).

25 ⁷² *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortg., a Div. of Wells Fargo Bank, N.A.*, 133 Nev. 28, 30 n.3, 388 P.3d 970, 972 n.3 (2017)

26 ⁷³ *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893, 901 (1976).

27 ⁷⁴ *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48, 114 S. Ct. 492, 498 (1993)

28 ⁷⁵ *Mathews*, 424 U.S. at 333, 96 S. Ct. at 902 (internal quotations omitted).

⁷⁶ *See Doubles Ltd. v. Gragson*, 91 Nev. 301, 303, 535 P.2d 677, 679 (1975); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 244, 56 S. Ct. 444, 447 (1936); *California Diversified Promotions, Inc. v. Musick*, 505 F.2d 278, 283 (9th Cir.1974).

1 2. MVIC’s decreed water rights are property rights subject to due
2 process protection.

3 The Nevada Supreme Court recognizes water rights as a property interest that
4 have value.⁷⁷ In *Eureka County v. Seventh Judicial District Court*, the Nevada
5 Supreme Court recognized water rights as “protected real property” and specifically
6 applied due process protection to junior water rights holders whose claims would soon
7 be subjected to curtailment.⁷⁸ Here, MVIC is the owner of decreed water rights subject
8 to due process protection. The Muddy River Decree provides:
9

10 [T]he Muddy Valley Irrigation Company is declared and
11 decreed to have acquired by valid appropriate and
12 beneficial use and to be entitled to divert and use upon the
13 lands...all waters of said Muddy River, its head waters,
14 sources of supply and tributaries save and except the
several amounts and rights hereinbefore specified...⁷⁹

15 The Decree further determined the ownership of all of the waters or the Muddy River
16 holding that “the total aggregate volume of the several amounts and quantities of water
17 awarded and allotted to the parties named...is the **total available flow** of said Muddy
18 River and consumes and exhausts all of the available flow of the said Muddy Valley
19 River, its head waters, sources of supply and tributaries.”⁸⁰ Thus, MVIC is the owner
20 of decreed water rights which are subject to due process protection and those water
21 rights are acknowledged by the decree to include all of the sources supplying the
22 water.
23

24 ///

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27 ⁷⁷ See *Dermody v. City of Reno*, 113 Nev. 207, 213, 931 P.2d 1354, 1358 (1997).

28 ⁷⁸ See *Eureka Cty. v. Seventh Jud. Dist. Ct.*, 134 Nev. 275, 279, 417 P.3d 1121, 1124 (2018).

⁷⁹ See Muddy River Decree (SE ROA 33770-33816) at 20:1-8 (SE ROA 33790) (emphasis added).

⁸⁰ *Id.* at 22:28-23:1 (SE ROA 33792-33793) (emphasis added).

1 3. **Order 1309 serves as an actual deprivation of MVIC’s property**
2 **rights because it conflicts with the unrestricted rights provided**
3 **to MVIC in the Muddy River Decree.**

4 Despite acknowledging that current pumping is capturing Muddy River flows,
5 the State Engineer went beyond the stated scope of the hearing to determine that
6 “capture or potential capture of flows of the waters of a decreed system does not
7 constitute a conflict.”⁸¹ The State Engineer further stated that “there is no conflict as
8 long as the senior water rights are served.”⁸² This may be a true statement in some
9 instances and with regard to some decreed systems, but it is inconsistent with the
10 language and description of the decreed rights of MVIC as set forth in the Muddy
11 River Decree. Despite the clear language of the Muddy River Decree, providing
12 MVIC certain specifically delineated water rights and “all the waters of the Muddy
13 River, its head waters, sources of supply and tributaries, save and except the several
14 amounts and rights hereinbefore specified and described as awarded and decreed,”
15 Order 1309 undertakes an analysis regarding MVIC’s consumptive needs.⁸³ The State
16 Engineer’s rough, unvetted, analysis is based on the hypothetical planting of a high-
17 water-use crop like alfalfa to determine that “the net irrigation water requirement
18 would be 28,300 afa, based on a consumptive use rate of 4.7 afa.”⁸⁴ As noted above,
19 such an analysis here is a violation of NRS 533.3703.

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21
22 Additionally, MVIC’s decreed water rights under the Muddy River Decree are
23 not limited based upon MVIC’s consumptive needs. Rather, other than the limited
24 exceptions stated therein, the Decree made it clear that MVIC is entitled to a
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27 ⁸¹ *Id.* at p. 60 (SE ROA at 61).

⁸² *Id.*

⁸³ Compare Muddy River Decree (SE ROA 33790:5-8) to Order 1309 (SE ROA 61-62 and 66).

⁸⁴ See Order 1309 (SE ROA 2-69) at p. 61 (SE ROA 62).

1 specifically delineated and quantified diversion and “all waters of said Muddy River,
2 its head waters, sources of supply and tributaries.”⁸⁵ With respect to the amount of
3 water being allotted under the Muddy River Decree, this was not limited either. The
4 Decree specifically provides that “the total aggregate volume of the several amounts
5 and quantities of water awarded and allotted...is the total available flow of said Muddy
6 River and consumes and exhausts all of the available flow of the said Muddy Valley
7 River...”⁸⁶ In other words, the Decree grants rights to MVIC all historic
8 (predevelopment) flows not otherwise addressed in the Decree. Order 1309
9 acknowledges that the predevelopment baseflow of the river was about 33,900 and
10 that, in a departure from those levels, flow has averaged 30,600 afa since 2015.⁸⁷
11 Thus, the finding that there was no conflict with MVIC’s decreed rights by pumping
12 that is acknowledged to diminish the flows of the Muddy River constitutes a clear and
13 unequivocal deprivation of MVIC’s property rights. That deprivation is not remedied
14 so long as the allowed amount of groundwater pumped results in a Muddy River flow
15 that is equal to the recent reduced flows. Rather, allowing such pumping and reduced
16 flows perpetuates the recent deprivations of MVIC water rights. Such a determination
17 is a lack of due process and turns Nevada law on its head by ratifying acknowledged
18 conflicts of senior rights by junior ones. Nor is due process satisfied by a modification
19 of the Decree at based upon a sum of water that the NSE calculates to be the
20 consumptive need of MVIC or for that matter any other decreed right holder. The lack
21 of notice to all decreed right holders only exacerbates the impropriety and violation of
22 due process.
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27 ⁸⁵ See Muddy River Decree (SE ROA 33770-33816) at 20:1-8 (SE ROA 33790).

28 ⁸⁶ *Id.* at 22:28-23:1 (emphasis added).

⁸⁷ See Order 1309 (SE ROA 2-69) at p. 61 (SE ROA 62).

1 The State Engineer's finding that groundwater pumping of up to 8,000 afa. can
2 occur in the LWRFS but that pumping that exceeded that amount would harm the
3 Moapa dace and threaten to conflict with the Muddy River decreed rights is a finding
4 that was likewise unsupported by appropriate process. The State Engineer's conclusion
5 related to sustainable pumping appears to be tied to and dependent upon the improper
6 conclusion that so long as flows in the Muddy River do not fall below the current,
7 admittedly reduced volume, no conflict occurs.⁸⁸ That finding also on the face of the
8 order is supported in terms of the "maximum amount of groundwater that can continue
9 to be developed" at 8,000 afa, but then authorizes the sum with the qualification it
10 "may be less".⁸⁹ Not only do these statements constitute reversible error as being
11 contrary to the law, by allowing groundwater to be pumped which affects the flow of
12 the Muddy River, the methodology behind this conclusion is not apparent and given
13 the other statements it appears to be a violation of due process as the analysis reaching
14 the conclusion is inconsistent with the Decree and appears based upon an inaccurate
15 premise. Therefore, to the extent that it is this pumping the is causing a deprivation of
16 MVIC's water rights as set forth in the Muddy River Decree there is a taking of
17 MVIC's property.

21
22 4. **The State Engineer failed to provide sufficient notice as to the**
23 **determinations that would be made via Order 1309, which**
24 **influenced MVIC's presentation of evidence at the hearing and**
25 **resulted in its failure to be adequately "heard" on the issue of**
26 **conflict prior to Order 1309 being issued.**

27 Despite the fact that fact that the State Engineer clearly made a determination on
28 conflict, he just as clearly did not provide any notice that such a determination would

⁸⁸ See Order 1309 (SE ROA 2-69) at p. 61 (SE ROA 62).

⁸⁹ See Order 1309 (SE ROA 2-69), compare at p. 63 (SE ROA 64) to p. 65 (SE ROA 66).

1 be made. In fact, quite the opposite is true. As set forth above, Interim Order 1303
2 identified four specific issues that the State Engineer was seeking submissions on: (1)
3 the geographic boundary of the LWRFS; (2) the aquifer recovery since a prior pump
4 test emanating from prior Order 1169; (3) the long term annual quantity that may be
5 pumped from the LWRFS; and (4) the effects of moving water rights between the
6 carbonate and alluvial system to senior water rights on the Muddy River.⁹⁰ At the
7 prehearing conference that occurred on August 8, 2019, the purpose of the hearing was
8 stated as follows:
9
10

11 [T]he purpose of the hearing is not to resolve or address
12 allegations of conflict between groundwater pumping
13 within the LWRFS and Muddy River decreed rights. That
14 is not the purpose of this hearing and that's not what we
15 are going to be deciding at this point in time.

16 The purpose of the hearing is to determine what the
17 sustainability is, what the impact is on decreed rights, and
18 then addressing and resolving allegations of conflict
19 should that be a determination will be addressed in, at a
20 future point in time.⁹¹

21 Just so as to avoid any confusion, on the first day of the hearing itself, the
22 hearing officer stated:

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

27 ⁹⁰ See Interim Order 1303 (SE ROA 70-88) at p. 13, ¶ 2 (SE ROA 82).

28 ⁹¹ See Transcript of Proceedings, Public Hearing, Prehearing Conference, August 8, 2019 (SE ROA 519-552) at 12:6-15 (SE ROA 522) (emphasis added).

1 And while that fifth issue⁹² is we're on it is (sic) not
2 intended to expand the scope of this hearing into making
3 policy determinations with respect to management of the
4 Lower White River Flow System basin's individual water
5 rights, those different types of things, because those are
going to be decisions that would have to be made in
subsequent proceedings should they be necessary.⁹³

6 Thus, not only did MVIC, and the other parties, have no notice that a determination
7 would be made regarding allegations of conflict between groundwater pumping and
8 the Muddy River decreed rights, the notice that was provided indicated that this issue
9 would not be determined at this time.

10
11 As a result of this stated purpose, much of the evidence submitted by MVIC (as
12 well as other parties) was related to the capture of the Muddy River water by junior
13 groundwater pumpers. Some of the dialogue which occurred through the presentation
14 by Southern Nevada Water Authority (SNWA) further highlights this due process
15 issue. SNWA has the right, through ownership of shares or leases to approximately
16 10,000 acre-feet of decreed surface water on the Muddy River from MVIC,⁹⁴ thus
17 SNWA and MVIC frequently find themselves aligned on certain issues. SNWA
18 provided brief testimony on the issue of conflict, stating that “[t]here’s no quantity of
19 water that can be pumped long term without conflicting with the decree by capturing
20 Muddy River water.”⁹⁵ Yet, SNWA’s expert did not go into significant detail on this
21 issue, instead recognizing that this was the State Engineer’s stated process included
22 multiple phases, and that this hearing was only the first phase.⁹⁶ In fact, when asked
23
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25 _____
26 ⁹² The “fifth issue” refers to other matters believed to be relevant to the State Engineer’s analysis.
(See Interim Order 1303 (SE ROA 70-88) at p. 14, §2(e) (SE ROA 83).

27 ⁹³ See Hearing Transcript Vol. I (Sept. 23, 2019) (SE ROA 52960-53052) at 6:4-15 (emphasis added).

28 ⁹⁴ See Hearing Transcript Vol. V (Sept. 27, 2019) (SE ROA 53331 – 53383) at 870:8-11.

⁹⁵ See Hearing Transcript Vol. V (Sept. 27, 2019) (SE ROA 53331 – 53383) at 877:22-24.

⁹⁶ See Hearing Transcript Vol. V (Sept. 27, 2019) (SE ROA 53331 – 53383) at 878:18-20.

1 by Christy Cooper on behalf of the Division of Water Resources and State Engineer
2 for an opinion on total pumpage value, SNWA's expert stated:
3

4 So, the total amount alluvial and carbonate together that
5 could be pumped is a conflict question. We were trying to
6 avoid the conflict discussion.⁹⁷

7 By making the findings it did without MVIC having the opportunity to present
8 evidence on that point, the State Engineer violated MVIC's due process rights. He
9 also acted arbitrarily and capriciously because he ignored and/or precluded the
10 evidence that existed related to conflicts and then applied an erroneous analysis that no
11 party had an opportunity to review or comment on. Indeed, he specifically
12 acknowledged conflicts from pumping caused a reduction in Muddy River flows, but
13 then limited the evidence on conflicts before then providing a ruling on conflicts. This
14 is the classic definition of a violation of due process rights. Moreover, he did so based
15 upon a faulty premise of the water necessary to serve MVIC and the other Decreed
16 rights and then reached a pumping sum which even by that flawed analysis is the
17 maximum sum that could be pumped to not cause more deprivation to MVIC or harm
18 the dace.
19

20 MVIC desires the opportunity it did not have; that is, to present complete and
21 competent evidence and testimony on the conflict between groundwater pumping on
22 the Muddy River and the depletion of the Muddy River's flow, which impacts MVIC's
23 decreed water rights. This evidence would include the predevelopment flows and the
24 beneficial utilization of all historic flows by MVIC. This proof is not in the record due
25 to the restriction placed on Hearings leading to 1309. Order 1309 should be reversed
26 as to this holding.
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⁹⁷ See Hearing Transcript Vol. V (Sept. 27, 2019) (SE ROA 53331 – 53383) at 1072:17-20.

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CONCLUSION

For the reasons set forth above, MVIC respectfully requests that the Court reverse Order 1309 and direct the State Engineer to ensure that the Muddy River predevelopment baseflow of 33,900 afa he recognizes is not intercepted by any junior rights and that pumping in the LWRFS be likewise regulated so as to prevent interception of Muddy River water sources or interference with those predevelopment surface water flows.

Affirmation Pursuant to NRS 239B.030

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

DATED this 27 day of August, 2021.



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1 ATTORNEY CERTIFICATE

2 Pursuant to NRAP 28.2, undersigned counsel certifies that:

3 1. I have read this entire opening brief.

4 2. To the best of my knowledge, information, and belief, it is not frivolous or
5 interposed for any improper purpose.
6

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

11 4. This opening brief complies with the formatting requirements of NRAP
12 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements
13 of NRAP 32(a)(6) because this answering brief has been prepared in a proportionally
14 spaced font using Microsoft Word in 14-point Times New Roman font.
15

16 5. I further certify that this opening brief complies with the page-volume
17 limitations of NRAP 32(a)(7) because, excluding the parts exempted by NRAP
18 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, and is 29 pages
19 long and contains 7,411 words.
20

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

5 DATED this 27 day of August, 2021.

6
7
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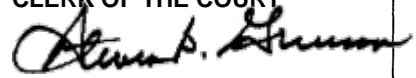
CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of DOTSON LAW and that on this date I caused to be served a true and correct copy of the foregoing by electronic service to the participants in this case who are registered with the Eight Judicial District Court's Odyssey eFileNV File & Serve system to this matter.

DATED this 27 day of August, 2021.



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15 **DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

18 LAS VEGAS VALLEY WATER
19 DISTRICT and SOUTHERN NEVADA
20 WATER AUTHORITY,

21 Petitioners,

22 vs.

23 ADAM SULLIVAN, P.E., Nevada State
24 Engineer, DIVISION OF WATER
25 RESOURCES, DEPARTMENT OF
26 CONSERVATION AND NATURAL
27 RESOURCES,

28 Respondent.

Case No.: A-20-816761-C (Lead
Case)
Dept. No.: 1

**MUDDY VALLEY IRRIGATION
COMPANY'S ANSWERING
BRIEF**

Consolidated With:

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IN THE MATTER OF THE PETITION
OF COYOTE SPRINGS INVESTMENT,
LLC

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

IN THE MATTER OF THE PETITION
OF APEX HOLDING COMPANY, LLC

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

IN THE MATTER OF THE PETITION
OF CENTER FOR BIOLOGICAL
DIVERSITY

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

IN THE MATTER OF THE PETITION
OF MUDDY VALLEY IRRIGATION
COMPANY

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

IN THE MATTER OF THE PETITION
OF NEVADA COGENERATION
ASSOCIATES NOS. 1 AND 2

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

IN THE MATTER OF THE PETITION
OF GEORGIA-PACIFIC GYPSUM,
LLC AND REPUBLIC
ENVIRONMENTAL TECHNOLOGIES,
INC.

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

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

Case No.: A-21-833572-J (Sub Case)
Dept. No 1

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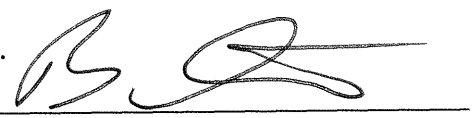
MUDDY VALLEY IRRIGATION COMPANY’S ANSWERING BRIEF

MUDDY VALLEY IRRIGATION COMPANY (“MVIC”), by and through its counsel, STEVEN D. KING and DOTSON LAW, hereby files its Answering Brief regarding judicial review of Order 1309. This Answering Brief is in response to issues raised in the opening briefs of Coyote Springs Investment, LLC (“CSI”), Lincoln County Water District (“LCWD”), Vidler Water Company (“Vidler”), Nevada Cogeneration Associates Nos. 1 and 2 (“Nevada Cogeneration”), Center for Biological Diversity (“CBD”), Apex Holding Company, LLC (“Apex”), Georgia-Pacific Gypsum, LLC (“GPG”), and Republic Environmental Technologies, Inc. (“Republic”) and is based on all papers and pleadings on file with this Court relating to this matter.

NRAP RULE 26.1 DISCLOSURE

The undersigned counsel of record hereby certifies that MUDDY VALLEY IRRIGATION COMPANY is a Nevada Corporation. It has no parent corporations, and no public company owns 10% or more of its stock.

Dated this 24 day of November, 2021.



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INTRODUCTION

MVIC has a unique position amongst the various parties to these consolidated disputes. Not only is it undisputedly the most senior party in time, but it is also the holder of the majority of decreed water rights secured in the Muddy River Decree of 1920 (sometimes hereafter “Muddy River Decree” or “Decree”).¹ This brief acknowledges and is reflective of that position.

As the Court is aware, MVIC has filed its own Petition for Judicial review and has requested remand of Order 1309 on several issues. Despite this, and upon review of the other opening briefs, MVIC recognizes that some issues addressed by these briefs impact the issues raised by MVIC and are therefore appropriately addressed. This is particularly and primarily true to the extent the positions advanced either limit or undermine the rights of MVIC and/or the application or administration of the Decree. These principals of Order 1309 and by the Nevada State Engineer (sometimes “NSE” or “State Engineer”) should be defended and should not be disturbed (or the principles retained) on remand.

STATEMENT OF THE ISSUES

1. Whether the NSE had the authority to create or administer an area as a single hydrographic basin or area consisting of the formerly independent sub-basins.

2. In the event the Court believes the NSE lacked the authority to create a single hydrographic basin, whether the NSE has the authority to conjunctively manage or jointly administer the various basins individually.

¹ See Judgment and Decree, *Muddy Valley Irrigation Company v. Moapa and Salt Lake Produce Company et al* (the “Muddy River Decree” or “Decree”) (March 11, 1920) (SE ROA 33770-33816).

1 decision.”⁸ Finally, a court reviewing an administrative decision is required to “decide
2 pure legal questions without deference to an agency determination” and therefore
3 applies a de novo standards of review to questions of law.⁹ However, while an
4 appellate court typically reviews issues pertaining to statutory construction de novo, it
5 nonetheless defers to an agency’s interpretation of its governing statutes or regulations
6 if the interpretation is within the language of the statute.¹⁰
7

8 SUMMARY OF THE ARGUMENT

9
10 MVIC contends that portions of Order 1309 are contrary to law and must be
11 reversed, but that other holdings of the Order are in fact within the NSE’s statutory
12 authority and are based upon substantial evidence. Particularly, Nevada’s statutory
13 scheme, coupled with the State of Nevada’s declared policy of conjunctive
14 management, provides the NSE with the authority to create a single basin made up of
15 various sub-basins for joint management. Furthermore, the designation of a single
16 basin was based upon substantial evidence, particularly the strong hydrological
17 connection between the sub-basins. Where the NSE errs, however, is in his finding
18 that up to 8,000 afa of water can be pumped each year. Not only was this amount not
19 based upon substantial evidence, but it violates the prior appropriation doctrine to the
20 extent it fails to protect, and even curtails, MVIC’s senior decreed rights. MVIC
21 therefore requests that this Court affirm the portion of the Order which allows for the
22 creation and ongoing management of the LWRFS as a single basin consisting of
23 various sub-basins, but reverse and remand for additional findings on the amount of
24
25

26
27 ⁸ See *Revert*, 95 Nev. at 787, 603 P.2d at 265.

28 ⁹ See *Felton v. Douglas County*, 134 Nev. 34, 35, 410 P.3d 991, 993-994 (2018).

¹⁰ *Dutchess Bus. Servs. v. Nev. State Bd. of Pharm.*, 124 Nev. 701, 709, 191 P.3d 1159, 1165 (2008).

1 water, if any, that can be pumped from the LWRFS without affecting MVIC's senior
2 rights.
3

4 ARGUMENT

5 **I. There appears to be agreement between the Petitioners as to the propriety** 6 **of the application of several legal principles which may be useful to the** 7 **Court in review of this matter.**

8 Upon review of the various opening briefs, it is clear that there are several issues
9 upon which all, or at least many, of the petitioners agree. Therefore, it may be
10 beneficial to the Court to point out some of those similarities.

11 The first issue which does not appear to be disputed by any petitioner is that
12 water rights are property rights and therefore are subject to due process considerations.
13 While the basis of the arguments claiming a violation may differ between the various
14 petitioners, and there may be a disagreement as to whether due process rights were
15 violated in particular instances, the parties do at least appear to agree that due process
16 considerations apply as a number of parties have brought such arguments.¹¹
17

18 The second issue upon which all parties appear to agree is the application of the
19 prior appropriation doctrine.¹² Indeed, the Nevada Supreme Court has recently
20 confirmed that this doctrine applies in Nevada.¹³ In essence, that doctrine provides
21 water rights are granted "subject to existing rights,"¹⁴ thus, the first person to use water
22 should, absent certain circumstances not addressed here, have the right to the
23

24
25 ¹¹ See, e.g., MVIC Opening Brief at 20:4-25-28:28; CSI Opening Brief at 27:18-28:27; Vidler/LCWD
26 Opening Brief at 21:1-24:21; Apex/Dry Lake Water Opening Brief at 12:10-13:15; SNWA/LVVWD
Opening Brief at 32:13-38:4.

27 ¹² See, e.g., SNWA Opening Brief at 25:14-27:2; CSI Opening Brief at 22:20-26:9; LCWD/Vidler
Opening Brief at 19:15-20:14.

28 ¹³ See *Mineral Cty. v. Lyon Cty.*, 473 P.3d 418, 423 (Nev. 2020).

¹⁴ *Id.* at 426.

1 continued use of that water.¹⁵ This leads to a determination of the priority of the water
2 right, typically ascribed as a date in time.¹⁶ Important to the position advocated by
3 MVIC, no party has suggested that the determination by the NSE that the rights
4 recognized in the Decree are the most senior is improper or incorrect.¹⁷

6 **II. The NSE had the authority to create a single hydrographic basin consisting**
7 **of the formerly independent sub-basins and attempts to challenge that**
8 **authority following the issuance of Order 1309 lack merit.**

9 A number of parties (including CSI, LCWD, Vidler, Nevada Cogeneration,
10 Apex Holding Company, Dry Lake Water, Georgia-Pacific, and Republic
11 Environmental Technologies) argue that Order 1309 is invalid because the NSE does
12 not have authority to create a single basin for joint administration.¹⁸ The arguments in
13 support of this assertion vary and include, but are not limited to, a lack of statutory
14 authority, a lack of evidence to support such a designation, and public policy issues.
15 However, for the reasons set forth herein, the NSE has the authority to jointly manage
16 these individual basins as a single basin, and efforts to undue the creation of this single
17 administrative area sometimes referred to as a “mega basin” or “super basin” for
18 administrative purposes lack merit.

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25 ¹⁵ See *Lobdell v. Simpson*, 2 Nev. 274, 277 (1866) (setting forth a “first in time, first in right”
principal).

26 ¹⁶ *Id.*; see also Vidler Opening Brief at 19:15-19.

27 ¹⁷ See Muddy River Decree (SE ROA 33770-33816); see also Order 1309 (SE ROA 2 – 69) at p. 63
(SE ROA 64) (recognizing that the rights on the Muddy River are the “senior decreed rights.”)

28 ¹⁸ See CSI Opening Brief at 17:25-22:19; LCWD/Vidler Opening Brief at 15:21-20:27; Nevada
Cogeneration Opening Brief at 20:1-25:4; AHC/DLW Opening Brief at 8:1-14:7; GPG/Republic
Opening Brief at 13:5-17:18.

1 A. No party has the ability to challenge the creation or use of the single
2 hydrographic basin for administrative purposes, as this basin was
3 created/recognized by the NSE well before Order 1309 was issued.

4 One thing the various parties' arguments have in common regarding the creation
5 of the LWRFS as a single basin is the mistaken belief/claim that Order 1309 created
6 the single basin.¹⁹ However, Order 1309 did not *create* the single basin. Order 1309
7 cites to Interim Order 1303 as having designated the Lower White River Flow System
8 (LWRFS) as a multi-basin area known to share a close hydrological connection and
9 thus as a joint administrative unit.²⁰ Indeed, the NSE issued Interim Order 1303 on
10 January 11, 2019, the stated purpose of which was “to *designate* a multi-basin area
11 known to share a close hydrologic connection as a joint administrative unit, which
12 shall be known as the Lower White River Flow System (“LWRFS”).²¹ Order 1303
13 went on to describe how the results of a previous aquifer test revealed that the formerly
14 individually-managed basins of Coyote Spring Valley, Muddy River Springs Area,
15 Hidden Valley, Garnet Valley, California Wash and a portion of the Black Mountains
16 area, have a “direct hydraulic connection” and therefore should be administered as a
17 joint administrative unit.²² Finally, Order 1303 states the LWRFS, consisting of the
18 aforementioned individual basins, are “herewith designated as a joint administrative
19 unit for purposes of administration of water rights.”²³ However, the knowledge that
20 this sort of joint administration would occur was not first disclosed in 2019. For
21 example, in January 2014, the NSE identified the close hydrological connection
22 between five basins, noting that they “share virtually all of the same source and supply
23
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26 ¹⁹ See, e.g., Nevada Cogeneration Brief at 21:3-8.

27 ²⁰ See Order 1309 (SE ROA 2 – 69) at SE ROA 11.

28 ²¹ See Interim Order 1303 (SE ROA 70 – 88) at p. 1 (SE ROA 70) (emphasis added).

²² *Id.* at SE ROA 79.

²³ *Id.* at SE ROA 82, ¶ 1.

1 of water” and would therefore be jointly managed.²⁴ Prior to that, in 2002, through
2 Order 1169, the NSE acknowledged the already longstanding concern that the
3 carbonate rock aquifer at issue here was not well understood, the need for further
4 study, and that “the development of carbonate water is risky and the resultant effects
5 may be disastrous for the developers and current users.”²⁵ That Order held in abeyance
6 the pending applications in the carbonate-rock aquifer system in Coyote Springs
7 Valley (Basin 210), Black Mountains Area (Basin 215), Garnet Valley (Basin 216),
8 Hidden Valley (Basin 217), Muddy River Springs Area (Basin 219), and Lower Moapa
9 Valley (Basin 220).²⁶ Thus, any claim or implication that this is a new action that was
10 not foreseen is disingenuous.
11
12

13 Order 1303 sought input on the appropriate geographic boundary of the
14 LWRFS,²⁷ and Order 1309 made a finding on the geographic boundary. It states:
15

16 **WHEREAS**, evidence and testimony support the
17 delineation of a single hydrographic basin as originally
18 defined by the State Engineer in Interim Order 1303, with
19 the adjustment of the Black Mountain Area boundary and
20 the addition of Kane Springs Valley.²⁸

21 Accordingly, Order 1309 did not *create* the so called “mega basin” or “super basin;”
22 rather, it adjusted its boundaries following the presentation of evidence.

23 CSI tries to characterize Order 1303 as having been “rescinded;”²⁹ however, this
24 is similarly not a correct characterization. Order 1309 terminated the temporary

25 ²⁴ See, e.g., Ruling 6255 (Jan. 29, 2014) (SE ROA 755 – 785) at p. 26 (SE ROA 780). See generally,
26 Rulings 6254-6261 (Jan. 29, 2014) (SE ROA 726-948).

27 ²⁵ Order 1169 (SE ROA 659-669) at SE ROA 659-660.

28 ²⁶ Order 1169 (SE ROA 665).

29 ²⁷ See Interim Order 1303 (SE ROA 70 – 88) at SE ROA 82 at ¶ 2(a).

²⁸ See Order 1309 (SE ROA 2 – 69) at p. 54 (SE ROA 55) (emphasis added).

²⁹ CSI Opening Brief at 14:13-16:19.

1 moratorium on submissions concerning development and construction which had been
2 established in Order 1303, and only rescinded other matters not specifically addressed
3 in Order 1309.³⁰ However, the designation of a single hydrographic basin was in fact
4 addressed in Order 1309 and therefore 1303 is not rescinded as to that issue.
5

6 Order 1303, creating the jointly administered hydrographic basin, was entered
7 on January 11, 2019. Any person or entity feeling aggrieved by the creation of the
8 LWRFS as a jointly administered hydrographic basin therefore was required to file a
9 petition for judicial review with 30 days of Order 1303, which was February 11,
10 2019.³¹ As no party sought such judicial review on the issue, Order 1303 “remains in
11 full force and effect” with respect to the creation of a single, jointly administered
12 hydrographic basin,³² and the only thing that can be challenged through judicial review
13 is the adjustment of the Black Mountain Area boundary and the addition of Kane
14 Springs Valley.
15

16
17 **B. The NSE has statutory authority to create a single basin for joint**
18 **administration.**

19 CSI tries to characterize the NSE’s action in creating the single basin as an effort
20 to “redefine established Nevada basins.”³³ This characterization is incorrect as none of
21 the existing single basins have been extinguished. Rather, Order 1309 recognizes the
22 continued existence of the various individual basins as “sub-basins within the Lower
23 White River Flow System Hydrographic Basin.”³⁴ Thus, there is no “redefinition” of
24
25

26 ³⁰ See Order 1309 (SE ROA 2 – 69) at p. 66, ¶¶ 5-6 (SE ROA 67).

27 ³¹ See NRS 533.450(1) (referring to “any” order or decision by the NSE).

28 ³² *Id.*

³³ CSI Opening Brief at 17:28-18:1.)

³⁴ See Order 1309 (SE ROA 2 – 69) at p. 65, ¶ 1 (SE ROA 66).

1 the existing basins, but rather the consolidation of a group of basins into a single area
2 for joint administration.
3

4 Because there is not a specific statute which spells out something to the specific
5 effect of “the State Engineer has the authority to create a mega basin consisting of
6 various sub-basins,” many of the petitioners take the position he lacks such authority.
7 Tellingly, no party has identified any statute which specifically prohibits such an
8 action either. There are a number of statutes, all within the same statutory scheme,
9 upon which the NSE relies in creating the single basin. The Nevada Supreme Court
10 “interpret[s] statutes within a statutory scheme harmoniously with one another to avoid
11 an unreasonable or absurd result.”³⁵ Here too, the entire statutory scheme of NRS 533
12 and NRS 534 must be considered jointly in order to ensure the results of the
13 interpretation are not absurd.
14

15 The Nevada Legislature has stated that it is the policy of the State of Nevada
16 “[t]o manage conjunctively the appropriation, use and administration of all waters of
17 this State, regardless of the source of the water.”³⁶ The NSE’s authority to do so is
18 only limited by any conflicting decrees, orders, or agreements.³⁷ It is in that context
19 that the scope of the NSE’s authority must be analyzed.
20

21 Some parties argue that NRS 533.024(1)(e) is merely a “policy statement”
22 which does not serve as a basis for government action.³⁸ However,
23
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25 ³⁵ *Horizons at Seven Hills Homeowners Ass'n v. Ikon Holdings, Ltd. Liab. Co.*, 132 Nev. 362, 368,
26 373 P.3d 66, 70 (2016), citing *Nev. Attorney for Injured Workers v. Nev. Self-Insurers Ass'n*, 126
27 Nev. 74, 84, 225 P.3d 1265, 1271 (2010).

27 ³⁶ NRS 533.024(1)(e).

27 ³⁷ NRS 533.0245.

28 ³⁸ Nevada Cogeneration Opening Brief at 23:7-24:2; *see also* Vidler/LCWD Opening Brief at 19:3-8;
CSI Opening Brief at 22:4-19.

1 It has often been said that the declaration of policy by the
2 legislature, though not necessarily binding or conclusive
3 upon the courts, is entitled to great weight, and that it is
4 neither the duty nor prerogative of the courts to interfere
5 in such legislative finding unless it clearly appears to be
6 erroneous and without reasonable foundation.³⁹

7 Additionally, NRS 533.024(1)(e) is not the sole basis of the NSE's authority, as
8 there are other statutes, discussed below, which provide this authority. Courts are to
9 determine the meaning of a statute's words by "examining the context and the spirit of
10 the law by looking to the statute's multiple legislative provisions as a whole."⁴⁰ Thus,
11 the statutes which follow must be examined in the context of the Legislature's
12 declaration that it is a policy of the State of Nevada to conjunctively manage "all
13 waters" of the state, regardless of their source, and thus including both surface water
14 and groundwater.⁴¹

15 NRS 534.030 discusses the NSE's work related to "designated areas," and
16 allows him to "designate the area by basin, or a portion therein, and make an official
17 order describing the boundaries..."⁴² There is nothing in NRS 534.030 which limits
18 the designation of a "basin" to a particular geographic size, shape, structure, etc.
19 Rather, it allows the NSE to designate an area as a basin.⁴³ Further, it stands to reason
20 that if the NSE can designate "a portion" of a basin and describe its boundaries that he
21 can designate multiple basins and/or parts thereof.
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25 ³⁹ *McLaughlin v. Hous. Auth. of Las Vegas*, 68 Nev. 84, 93, 227 P.2d 206, 210 (1951) (emphasis
26 added).

27 ⁴⁰ *Pawlik v. Shyang-Fenn Deng*, 134 Nev. 83, 86, 412 P.3d 68, 72 (2018), citing *Leven v. Frey*, 123
28 Nev. 399, 405, 168 P.3d 712, 716 (2007).

⁴¹ See NRS 533.024(1)(e).

⁴² NRS 534.030(1) (emphasis added).

⁴³ *Id.*

1 Additionally, the NSE has the power to prescribe all necessary regulations
2 within the terms of NRS 534.⁴⁴ NRS 534.120 provides additional broad authority and
3 specifies that much is left to the judgment of the NSE:
4

5 Within an area that has been designated by the State
6 Engineer, as provided for in this chapter, where, in the
7 judgment of the State Engineer, the groundwater basin is
8 being depleted, the State Engineer in his or her
9 administrative capacity may make such rules, regulations
and orders as are deemed essential for the welfare of the
area involved.⁴⁵

10 The NSE's actions in creating a single hydrographic basin made up of a number of
11 sub-basins fits squarely within his statutory authority, and in fact this is the authority
12 he cites.⁴⁶ He identified an area where, in his judgment, groundwater was being
13 depleted. In Order 1303, the NSE noted "significant concerns" that pumping 8,050 afa
14 from the Coyote Springs Valley would adversely impact water resources at the Muddy
15 River Springs.⁴⁷ He further observed, following the pumping test, that:

17 [T]he resulting water-level decline encompassed 1,100
18 square miles and extended from northern Coyote Springs
19 Valley through the Muddy River Springs Area, Hidden
20 Valley, Garnet Valley, California Wash, and the
northwestern part of the Black Mountains Area.⁴⁸

21 He also found that pumping in the various single basins "caused sharp declines in
22 groundwater levels and flows in the Pederson and Pederson East springs [which are]
23 considered to be sentinel springs for the overall condition of the Muddy River..."⁴⁹
24

25 _____
⁴⁴ See NRS 534.110(1).

26 ⁴⁵ NRS 534.120(1) (emphasis added).

27 ⁴⁶ See Order 1309 (SE ROA 2 – 69) at p. 43 (SE ROA 44).

28 ⁴⁷ See Interim Order 1303 (SE ROA 70 – 88) at p. 3 (SE ROA 72).

⁴⁸ *Id.* at p. 4 (SE ROA 73).

⁴⁹ *Id.* at pp. 4-5 (SE ROA 73 – 74).

1 Thus, the NSE exercised his authority under NRS 534.120(1) to designate an
2 area within which, in his judgment, he considered the groundwater was being depleted,
3 for management as a single basin due to the interconnectedness of the various sub-
4 basins. This action is particularly appropriate when considered in light of the State’s
5 stated policy of “manag[ing] conjunctively the appropriation, use and administration of
6 all waters of this State, regardless of the source of the water.”⁵⁰
7

8 Finally, it is important to note the great discretion that administrative agencies
9 have in interpreting the legislative authority that they have been delegated and the
10 deference that courts have towards these interpretations. The Nevada Supreme Court
11 has recognized that it “defer[s] to an agency’s interpretation of its governing statutes or
12 regulations if the interpretation is within the language of the statute.”⁵¹ Accordingly,
13 “courts should not substitute their own construction of a statutory provision for a
14 reasonable interpretation made by an agency.”⁵² The NSE’s interpretation of the
15 statutes described above, particularly when analyzed in the context of the stated policy
16 of conjunctive management (NRS 533.024(1)(e)) and the ability to designate areas
17 which are subject to NSE rules, regulations, and orders (NRS 534.120(1)), is squarely
18 within the language of the statutory scheme and certainly not contrary to it.
19

20 Accordingly, the Court should defer to the NSE’s interpretation that these statutes
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⁵⁰ NRS 533.024(1)(e).

25 ⁵¹ *Taylor v. State HHS*, 129 Nev. 928, 930, 314 P.3d 949, 951 (2013), citing *Dutchess Bus. Servs.,*
26 *Inc. v. Nev. State Bd. of Pharmacy*, 124 Nev. 701, 709, 191 P.3d 1159, 1165 (2008); see also *Int’l*
27 *Game Tech., Inc. v. Second Judicial Dist. Court*, 122 Nev. 132, 157, 127 P.3d 1088, 1106 (2006)
28 (“we have repeatedly recognized the authority of agencies...to interpret the language of a statute that
they are charged with administering; as long as that interpretation is reasonably consistent with the
language of the statute, it is entitled to deference in the courts.”).

⁵² *Collins Disc. Liquors & Vending v. State*, 106 Nev. 766, 768, 802 P.2d 4, 5 (1990).

1 allow the creation of a single hydrographic basin (a “designated area”) made up of
2 various sub-basins.
3

4 **C. The appropriateness of creating and/or maintaining the LWRFS as a**
5 **single basin for joint administration is supported by substantial**
6 **evidence.**

7 As noted above, Order 1309 did not *create* the LWRFS. In fact, at least as early
8 as 2002 in Order 1169 the NSE began conjunctive administration of this area.⁵³
9 Although they are Rulings as opposed to Orders, the rulings issued in January 2014 by
10 the NSE involving many of these parties provide that a five-basin area would be jointly
11 managed.⁵⁴ Regardless, the creation of the LWRFS consisting of various sub-basins is
12 supported by substantial evidence. Critically, “substantial evidence” does not mean
13 that it has been conclusively established or that there are no genuine issues of material
14 fact remaining. Rather, “substantial evidence” has been defined as “that which a
15 reasonable mind might accept as adequate to support a conclusion.”⁵⁵ Here, the NSE
16 properly relied on significant evidence to support his decision regarding a single
17 hydrographic basin made up of various sub-basins to be jointly managed.⁵⁶
18

19 First, the NSE reasonably relied upon the results of the Order 1169 aquifer test
20 to show the connection between the various sub-basins, which he found have a “direct
21 hydraulic connection.”⁵⁷ The NSE relied upon the results of this two-year test, which
22

23
24 ⁵³ In Order 1169, the NSE directed that all pending applications in six basins would be held in
abeyance until further study of the carbonate-rock aquifer system could occur. (SE ROA 665.)

25 ⁵⁴ See, e.g., Ruling 6255 (Jan. 29, 2014) (SE ROA 755 – 785) at p. 26 (SE ROA 780). See generally,
Rulings 6254-6261 (Jan. 29, 2014) (SE ROA 726-948).

26 ⁵⁵ *State Emp't Sec. Dep't v. Hilton Hotels Corp.*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986), citing
Richardson v. Perales, 402 U.S. 389 (1971).

27 ⁵⁶ As set forth above, it was Order 1303, not 1309, which resulted in the creation of the single basin;
28 thus, some of the evidence upon which the decision was based will be cited from Order 1303.

⁵⁷ See Order 1303 (SE ROA 70 – 88) at p. 10 (SE ROA 79).

1 further showed that pumping within one or more sub-basins affected the water levels in
2 neighboring sub-basins within the LWRFS and that, in fact, the resulting water-level
3 decline encompassed 1,100 square miles extending from northern Coyote Springs
4 Valley and through the other sub-basins, and that these sub-basins share the same
5 supply of water.⁵⁸ This same evidence and justification was cited in Order 1309.⁵⁹

7 CSI is critical of the NSE for purportedly relying solely on the aquifer test data
8 to the exclusion of all other evidence.⁶⁰ However, there can be no reasonable dispute
9 that the NSE took and considered evidence that goes well beyond the aquifer test data,
10 including the presentation of evidence by all parties and their experts. The fact that the
11 NSE may have placed greater weight on the aquifer test data does not mean he did not
12 consider the evidence. Interestingly, and likely due to the fact that the LWRFS had
13 already been created in Order 1303, as stated above, most of the evidence presented
14 dealt with appropriate boundaries of the LWRFS as opposed to its creation or
15 existence. Regardless, the NSE considered evidence regarding geologic mapping,⁶¹
16 poor water level measurements,⁶² water budget analysis,⁶³ flow paths,⁶⁴ and modeling
17 presented by CSI.⁶⁵ The NSE specifically addressed CSI's argument based upon
18 geophysical data mapping that there is an impermeable flow barrier that creates an
19 isolated groundwater flow path on the west side of Coyote Springs Valley such that the
20 effects of pumping on discharge at the Warm Springs area is reduced, but clearly
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24 ⁵⁸ *Id.* at pp. 4-6 (SE ROA 73-75).

25 ⁵⁹ *See* Order 1309 (SE ROA 2 – 69) at pp. 64-65 (SE ROA 65-66).

26 ⁶⁰ *See* CSI Opening Brief at 29:25-35:25.

27 ⁶¹ *See* Order 1309 (SE ROA 2 – 69) at p. 52 (SE ROA 53).

28 ⁶² *Id.* at p. 51 (SE ROA 52).

⁶³ *Id.* at pp. 48-50 (SE ROA 49-51).

⁶⁴ *Id.* at p. 59 (SE ROA 60).

⁶⁵ *Id.* at p. 16 (SE ROA 17).

1 favored the data collected from the Order 1169 aquifer test and felt that it disproved
2 CSI's hypothesis.⁶⁶

3
4 It is important to note that “[u]nder the substantial evidence standard, a
5 reviewing court must take into account [that there is] contradictory evidence in the
6 record . . . but the possibility of drawing two inconsistent conclusions from the
7 evidence does not prevent an administrative agency’s finding from being supported
8 by substantial evidence.”⁶⁷ The fact that contrary evidence was presented but rejected
9 in favor of the aquifer test data does not mean the NSE failed to consider other
10 evidence. It follows that the fact that he found the aquifer test data more persuasive
11 and rejected other arguments does not mean that the ruling is not based on substantial
12 evidence. As a reasonable mind could certainly accept the aquifer test as adequate to
13 support the NSE’s conclusion, it meets the “substantial evidence” test.

14
15
16 **D. Requiring “basin-by-basin” management rather than conjunctive**
17 **management and joint administration would create an absurd result.**

18 The suggestion by some that the NSE is restricted in his work to only consider
19 and administer the waters of Nevada on a basin-by-basin basis,⁶⁸ as if the borders of
20 each basin consists of an impermeable barrier such that the supply and use of water in
21 one basin can have no impact in an adjacent basin, is based an illogical and absurd
22 application of a legal construct while simultaneously ignoring the actual physical
23 world within which the legal construct exists; that is, that there is a clear hydrological
24 connection between some basins. It has long been recognized that “[w]here
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27 ⁶⁶ *Id.* at pp. 58-59 (SE ROA 59 – 60).

28 ⁶⁷ *Three Levels Corp. v. Conservation Comm'n of the Town of Redding*, 148 Conn. App. 91, 101, 89
A.3d 3, 12 (2014) (internal citations omitted, emphasis added).

⁶⁸ *See, e.g., Vidler/LVWD Opening Brief* at 17:27-28.

1 groundwater bodies and surface water systems are interconnected neither should be
2 viewed as independent and separate sources in water management decisions.”⁶⁹ It has
3 also been recognized that recharge in one basin can result in flow from that basin into
4 adjacent basins.⁷⁰ It therefore follows and is only logical that use in one basin can
5 cause conflicts from that use in an adjacent basin.
6

7 Since it is clear that water in one basin can flow from that basin into an adjacent
8 basin, and that use in one basin (such as pumping) can affect flows and the amount of
9 water available in an adjacent basin, to prohibit joint regulation of such activity would
10 lead to an absurd result. By way of example, the adoption of such a legal construct
11 would allow for a hypothetical use of an interfering junior right 10 miles from a 100-
12 year more senior right so long as a basin boundary exists between the two users
13 regardless of the fact that the junior use is interfering with the senior use in the
14 adjacent basin. The basin line on a map in the hypothetical is unknown to the aquifer
15 and will do nothing to protect the interference by the junior right. This hypothetical
16 demonstrates why such an interpretation is absurd and courts are directed to not
17 interpret statutes in a fashion that leads to such a conclusion.⁷¹ Yet, in this case, the
18 legal arguments advanced by some would lead to precisely that absurd result and could
19 easily result in the disastrous effects for the developers and current users that was
20 among the concerns articulated as the impetus for Order 1169.⁷²
21
22
23

24 ⁶⁹ See James H. Davenport, Nevada Water Law 142 (2003), citing *Nevada Natural Resources Status*
25 *Report*, Nevada Department of Conservation and Natural Resources, June 2001, p. 23.

26 ⁷⁰ See, e.g., Ruling 6255 at SE ROA 779 (discussing the role and quantity of interbasin flows in this
27 area and that only 2,000 afa in Coyote Spring Valley is from in-basin recharge).

28 ⁷¹ See *Horizons at Seven Hills Homeowners Ass'n v. Ikon Holdings, Ltd. Liab. Co.*, 132 Nev. 362,
368, 373 P.3d 66, 70 (2016), citing *Nev. Attorney for Injured Workers v. Nev. Self-Insurers Ass'n*, 126
Nev. 74, 84, 225 P.3d 1265, 1271 (2010).

⁷² See Order 1169 (SE ROE at 660).

1 Here, the NSE has, through Order 1309 and his prior Orders and Rulings,
2 acknowledged the facts which lead to the conclusion that the water which flowed prior
3 to groundwater pumping and was determined in the Decree is no longer flowing in the
4 same quantity.⁷³ The question to be determined is what sum of water can be pumped
5 without causing interference with the Muddy River flow, regardless of the location of
6 that pumping. The application of a legal construct which prevents the NSE from
7 addressing water use which is causing that interference, simply because it has a point
8 of diversion in another basin, is absurd. It would also violate the prior appropriation
9 doctrine and the Muddy River Decree, to the extent such a water right(s) interfere with
10 MVIC's senior decreed rights.
11

12
13 **III. The NSE's analysis of six specific factors to determine the boundary of the**
14 **LWRFS does not implicate a party's due process rights.**

15 Some parties argue that NSE's delineation of the factors he considered in
16 determining the geographic boundary of the LWRFS is a violation of their due process
17 rights.⁷⁴ However, due process requires that, in the context of a challenge to or
18 application involving water rights, one "must have a full opportunity to be heard, a
19 right that includes the ability to challenge the evidence upon which the NSE's decision
20 may be based."⁷⁵ Due process rights do not include the right to know all of the hearing
21 officer's thought processes. Through Order 1303, the NSE clearly made it known that
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24 ⁷³ See Order 1303 (SE ROA 70 – 88) at p. 7 (SE ROA 76); and Order 1309 (SE ROA 2 – 69) at p. 42
25 (SE ROA 43) (both recognizing that, prior to groundwater development, the Muddy River flowed at
26 approximately 34,000 afa., while the average flows since 2015 are approximately 30,600 afa. (See
Order 1309 at SE ROA 62.)

27 ⁷⁴ See, e.g., LCWD/Vidler Opening Brief at 22:11-24:21.

28 ⁷⁵ *Eureka Cty. v. State Eng'r of Nev.*, 131 Nev. 846, 855, 359 P.3d 1114, 1120 (2015), citing *Revert v.*
Ray, 95 Nev. 782, 787, 603 P.2d 262, 264 (1979); *Bowman Transp., Inc. v. Arkansas-Best Freight*
Sys., Inc., 419 U.S. 281, 288 n.4, 95 S. Ct. 438, 42 L. Ed. 2d 447 (1974).

1 the hearing would include, and that evidence should be presented regarding, “[t]he
2 geographic boundary of the hydrologically connected groundwater and surface water
3 systems comprising the Lower White River Flow System.”⁷⁶ Indicating in his ruling
4 what factors were important in his evaluation of the evidence presented (and there is
5 no question the parties all had notice and an opportunity to present such evidence on
6 that issue) is not reflective of a lack of due process.
7

8
9 **IV. The boundary of the LWRFS, whatever it ultimately entails, should be
based upon substantial evidence.**

10 As noted above, the LWRFS was recognized well prior to the entry of Order
11 1309. However, one of the issues for which evidence was to be presented, and which
12 would be decided in Order 1309, was the appropriate geographic boundary of the
13 LWRFS, and particularly whether it should include additional areas beyond the basins
14 previously designated. Frankly, MVIC does not advocate or take any strong position
15 on what the extent of the boundary should be beyond the five basins (plus a portion of
16 Black Mountain) originally designated prior to Order 1309. MVIC has not retained
17 experts or itself performed an analysis sufficient to cause it to come to such a
18 conclusion. However, MVIC does recognize and therefore takes the position that such
19 a determination must be made to protect its rights and the determination should be
20 based upon substantial evidence of the hydrological connection between the basins or
21 geographic and geological areas.
22
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28 _____
⁷⁶ Order 1303 (SE ROA 70 – 88) at p. 13, ¶ 2(a) (SE ROA 82).

1 **V. Even if the NSE lacks the authority to create a single hydrographic basin,**
2 **he has the authority to conjunctively manage or jointly administer the**
3 **individual basins.**

4 In 1968, the NSE's office mapped Nevada's hydrologic area, establishing 256
5 hydrographic areas within 14 major hydrographic regions and basins and a total of 232
6 individual "administrative groundwater basins."⁷⁷ Even amongst those that dispute the
7 right of the NSE to create a multi-basin area or "super basin" for administration, there
8 is no question that the NSE has the obligation to administer the State's water on *at*
9 *least* a basin by basin basis.⁷⁸ It has similarly been acknowledged for decades that
10 Nevada's water sometimes flows below the surface between basins.⁷⁹ Thus, the
11 conceptual and statutory authority to, in effect, conjunctively manage the 232 basins in
12 the state is acknowledged. This leads to the logical conclusion that these parties would
13 have no objection to an analysis of each basin (or described portion thereof), on an
14 individual basis and that such analysis could consider the inflows and outflows to and
15 from that basin or portions of the basin. In fact, as stated above, and as acknowledged
16 by virtually every party to this proceeding, it is the policy of the State of Nevada "[t]o
17 manage conjunctively the appropriation, use and administration of all waters of this
18 State, regardless of the source of the water."⁸⁰

19
20
21 The objections to the joint administration of the sub-basins are therefore form
22 over function, as the function, whether expressed collectively or described on an
23 individual basin basis, is the same. Even if this Court directs the NSE on remand to
24

25 _____
⁷⁷ See Davenport at 143-144.

26 ⁷⁸ See, e.g., LCWD/Vidler Opening Brief at 17:24-18:10; CSI Opening Brief at 2:11-18.

27 ⁷⁹ See Ruling 6255 (SE ROA 755 – 785) at p. 25 (SE ROA 779) (recognizing the subsurface inflow
28 from Coyote Springs Valley and the Lower Meadow Valley Wash into the Muddy River Springs
Area).

⁸⁰ NRS 533.024(1)(e).

1 provide a more granular analysis which explains his assessment of available and
2 utilized water on an individual basin basis, as well as his application of any
3 professional judgment to that analysis, the conclusion should be the same and would
4 result in the joint or conjunctive consideration of the waters available in the area. This
5 would be true whether the area includes five, six, or seven basins, or any parts thereof.
6 The Court's Order directing such an analysis on remand should, of course, ensure that
7 in completing his analysis, the NSE ensures that the waters appropriated in the Muddy
8 River Decree are protected from interference from groundwater pumping regardless of
9 the basin from which the pumping occurs.⁸¹

12 **VI. The NSE's decision in Order 1309 to allow up to 8,000 afa of pumping was**
13 **not based on substantial evidence.**

14 Order 1309 concluded that "the maximum amount of groundwater that may be
15 pumped from the Lower White River Flow System Hydrographic Basin...cannot
16 exceed 8,000 afa and may be less.⁸² It further ordered that this maximum quantity
17 "may be reduced if it is determined that pumping will adversely impact the endangered
18 Moapa Dace.⁸³ The phrases "and may be less" and "if it is determined" clearly show
19 that this determination was not based upon substantial evidence. Indeed, MVIC agrees
20 with many of the petitioners that it is unclear how the NSE arrived at the 8,000 afa
21 annual allowance, and to the extent the conclusion is unsupported by the record, it
22 should be remanded with a directive as to that calculation. There is a wide range of
23 views on the sum which the NSE should have concluded was available for
24 appropriators of ground water within the LWRFW. The NSE recognized that
25
26

27 ⁸¹ Muddy River Decree (SE ROA 33770-33816).

28 ⁸² Order 1309 (SE ROA 2 – 69) at p. 65, ¶ 2 (SE ROA 66) (emphasis added).

⁸³ *Id.* at p. 65, ¶ 3 (SE ROA 66).

1 consensus among the experts was not reached, and that recommendations ranged from
2 zero to over 30,000 afa.⁸⁴ But regardless, the sum arrived at by the NSE is not
3 explained nor is it mathematically supported. Rather, it appears to be an arbitrary
4 number, particularly since it carries the additional caveat that it might still be reduced
5 further. Thus, it seems to set a ceiling or maximum and the supportable sum must
6 therefore be no more than that and might well be less.
7

8 Not surprisingly, the positions taken in the Opening Briefs vary widely. CSI
9 suggests that, under the NSE's own logic, the total available water would be 14,000
10 afa.⁸⁵ Pointing to the fact that groundwater levels in the LWRFS continue to decline,
11 there is very little recharge to the system, and the Muddy River has been fully
12 appropriated by decree, the Center for Biological Diversity posits that there is no
13 additional water left to spare.⁸⁶ Regardless, while MVIC is supportive of the
14 acknowledgment of a maximum, it agrees that the 8,000 afa determination as
15 articulated in Order 1309 was not clearly based on substantial evidence and instead
16 appears to simply be an effort to "split the baby." The consensus acknowledged by the
17 NSE that the exact amount cannot be determined with the available data and will
18 require additional monitoring,⁸⁷ coupled with the recognition that 8,000 afa represents
19 a maximum and the sum actually may be less, is indicative of the lack of substantial
20 evidence upon which the determination was made.
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27 ⁸⁴ *Id.* at p. 57 (SE ROA 58).

28 ⁸⁵ CSI Opening Brief at 49:8-11.

⁸⁶ CBD Opening Brief at 25:20-24; 27:15-18.

⁸⁷ Order 1309 (SE ROA 2 – 69) at p. 57 (SE ROA 58).

1 In this regard, MVIC contends that the level and location of pumping that may
2 be determined to be allowable, if any, must be no more than 8,000 afa and must be
3 such that the activity does not interfere with the predevelopment flow of the Muddy
4 River or what would, absent groundwater pumping, be the current flow of the river.
5

6 **VII. Regardless of the determinations made on the other issues, MVIC's senior**
7 **decreed water rights must be protected.**

8 Regardless of the Court's position with respect to the various issues presented
9 throughout the briefs, MVIC agrees with other petitioners who argue that priority dates
10 should not be reassigned. CSI, Vidler, and others correctly note that a loss of priority
11 can amount to a "de facto loss of rights."⁸⁸
12

13 The Muddy River Decree of 1920 provides that MVIC is entitled to "all waters
14 of said Muddy River, its head waters, sources of supply and tributaries, save and
15 except the several amounts and rights hereinbefore specified and described."⁸⁹ MVIC
16 was specifically awarded 36.2588 cfs of water and is further entitled to divert
17 additional water pursuant to three other NSE's Certificates and those waters
18 appropriated through application No. 1611.⁹⁰ In other words, MVIC received a
19 specific award of water pursuant to those quantified determinations of the Decree.⁹¹
20 Thus, the Decree's language is important in that it confirms water rights held by MVIC
21 in two ways. It first has a quantified determination and then further confirms that
22 MVIC gets any additional flow from the Muddy River not otherwise allocated by the
23 specific awards. The NSE himself recognized in Order 1194 that the Muddy River
24
25

26
27 ⁸⁸ See, e.g., CSI Opening Brief at 23:25-23:4, citing *Wilson v. Happy Creek, Inc.*, 135 Nev. 301, 313,
448 P.3d 1106, 1115 (2019).

28 ⁸⁹ See Muddy River Decree (SE ROA 33770-33816) at 20:1-8 (SE ROA 33790).

⁹⁰ See Muddy River Decree (SE ROA 33770-33816) at SE ROA33792, lines 1-8.

⁹¹ See Muddy River Decree (SE ROA 33770-33816) at SE ROA33792, lines 1-8.

1 was fully appropriated, finding: “The Muddy River Decree adjudicated the entire flow
2 of the Muddy River and its tributaries, and that there is insufficient flow in the Muddy
3 River to grant any new appropriations.”⁹²

4
5 The NSE is statutorily prohibited from carrying out his duties in a manner which
6 conflicts with any other applicable decree or order.⁹³ Yet that is exactly what he does
7 in Order 1309. Despite acknowledging in Order 1309 that current pumping is in fact
8 capturing Muddy River flows, the Order directly conflicts with the Muddy River
9 Decree in determining that “capture or potential capture of flows of the waters of a
10 decreed system does not constitute a conflict.”⁹⁴ This determination violates Nevada
11 law, which provides:
12

13
14 Nothing contained in this chapter shall impair the vested
15 right of any person to the use of water, nor shall the right
16 of any person to take and use water be impaired or affected
17 by any of the provisions of this chapter where
18 appropriations have been initiated in accordance with law
19 prior to March 22, 1913.⁹⁵

20 Regardless of what occurs here, the prior appropriation doctrine discussed above
21 must be applied. This includes ensuring that the use of water in any of the various sub-
22 basins in the LWRFS does not affect the flows of the Muddy River which would
23 sanction the use of a junior ground water right that interferes with MVIC’s senior
24 decreed rights. Presently, Order 1309 does just that. Therefore, while agreeing with
25 the principal advanced by many of the other petitioners, MVIC notes that the

26 ⁹² See Order 1194 (SE ROA 46469-46472) at 46471, § 4.

27 ⁹³ NRS 533.0245.

28 ⁹⁴ See Order 1309 (SE ROA 2 – 69) at p. 60 (SE ROA at 61).

⁹⁵ NRS 533.085(1); see also *Mineral Cty. v. Lyon Cty.*, 473 P.3d 418, 431 (Nev. 2020) (stating that
“our state's water rights statutes forbid reallocating adjudicated water rights.”)

1 application and result of their advocated positions would seem to sanction precisely the
2 reprioritization they claim to stand against.
3

4 **CONCLUSION**

5 While the Court undoubtedly has a number of competing issues to deal with, it
6 appears that Order 1309 must be reversed and remanded on at least some issues,
7 particularly to the extent it violates the prior appropriation doctrine and interferes with
8 MVIC's senior decreed rights. However, the NSE did in fact have the authority to
9 create and determine the boundaries of the LWRFS such that the State of Nevada's
10 stated public policy of conjunctive management of all waters could be accomplished.
11 Accordingly, in that regard, the Order must stand.
12

13 **Affirmation Pursuant to NRS 239B.030**

14 The undersigned does hereby affirm that the preceding document does not
15 contain the social security number of any person.
16

17 DATED this 24 day of November, 2021.

18 

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1 ATTORNEY CERTIFICATE

2 Pursuant to NRAP 28.2, undersigned counsel certifies that:

3 1. I have read this entire answering brief.

4 2. To the best of my knowledge, information, and belief, it is not frivolous or
5 interposed for any improper purpose.
6

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

12 4. This answering brief complies with the formatting requirements of NRAP
13 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements
14 of NRAP 32(a)(6) because this answering brief has been prepared in a proportionally
15 spaced font using Microsoft Word in 14-point Times New Roman font.
16

17 5. I further certify that this answering brief complies with the page-volume
18 limitations of NRAP 32(a)(7) because, excluding the parts exempted by NRAP
19 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, and is 24 pages
20 long and contains 7,627 words.
21

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1 I understand that I may be subject to sanctions in the event that the accompanying
2 answering brief is not in conformity with the requirements of the Nevada Rules of
3 Appellate Procedure.
4

5 DATED this 29 day of November, 2021.

6
7
8 

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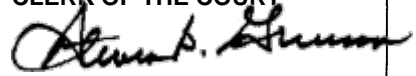
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of DOTSON LAW and that on this date I caused to be served a true and correct copy of the foregoing by electronic service to the participants in this case who are registered with the Eight Judicial District Court's Odyssey eFileNV File & Serve system to this matter.

DATED this 24 day of November, 2021.


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15 **DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

18 LAS VEGAS VALLEY WATER DISTRICT
19 and SOUTHERN NEVADA WATER
20 AUTHORITY,

21 Petitioners,

22 vs.

23 ADAM SULLIVAN, P.E., Nevada State
24 Engineer, DIVISION OF WATER
25 RESOURCES, DEPARTMENT OF
26 CONSERVATION AND NATURAL
27 RESOURCES,

28 Respondent.

IN THE MATTER OF THE PETITION OF
COYOTE SPRINGS INVESTMENT, LLC

IN THE MATTER OF THE PETITION OF
APEX HOLDING COMPANY, LLC

Case No.: A-20-816761-C (Lead Case)
Dept. No.: 1

**MUDDY VALLEY IRRIGATION
COMPANY'S REPLY BRIEF**

Consolidated With:

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

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

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IN THE MATTER OF THE PETITION OF
CENTER FOR BIOLOGICAL DIVERSITY

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

IN THE MATTER OF THE PETITION OF
MUDDY VALLEY IRRIGATION COMPANY

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

IN THE MATTER OF THE PETITION OF
NEVADA COGENERATION ASSOCIATES
NOS. 1 AND 2

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

IN THE MATTER OF THE PETITION OF
GEORGIA-PACIFIC GYPSUM, LLC AND
REPUBLIC ENVIRONMENTAL
TECHNOLOGIES, INC.

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

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

Case No.: A-21-833572-J (Sub Case)
Dept. No 1

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ARGUMENT

Throughout the briefing in this matter, it has become apparent that all parties are primarily focused on the same issues. While some parties have addressed all issues and some parties only some of the issues, the parties have generally agreed that the applicable issues are (1) the delineation of the LWRFS, including discussing the authority of the Nevada State Engineer to create it; (2) the criteria for the inclusion of the various sub-basins, including Kane Springs and Black Mountain; (3) the adequacy of due process regarding those issues involving the designation of the LWRFS; and (4) the determination that 8,000 afa can be pumped from the LWRFS. To be sure, there are various sub-issues related to each of the above-named issues, and the list is not to be considered exclusive or preclude a party from restating the issue.

Thus far, MVIC has primarily addressed the first and fourth issues mentioned above, whether in its Opening Brief or Answering Brief. It has taken no strong position regarding the second and third issues, however it has raised due process concerns related to what it views as a conflict determination in allowing the 8,000 afa to be pumped, while acknowledging that such pumping will likely not result in the return to predevelopment flows in the Muddy River. As the argument regarding the State Engineer's authority to create the LWRFS was fully addressed in MVIC's Answering Brief, this brief will focus almost solely on the fourth issue and its sub-parts; that is, the propriety of the determination by the State Engineer that 8,000 afa can be pumped from the LWRFS, as well as replying to the arguments of other parties.

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1 **I. The Nevada State Engineer committed reversible error in determining that**
2 **up to 8,000 afa could be pumped from the LWRFS while acknowledging**
3 **that the current flow is below the amount decreed.**

4 The Nevada State Engineer (“NSE”) committed prejudicial legal error in making
5 certain findings in Order 1309 in violation of the Muddy River Decree and MVIC’s
6 due process rights. Rather than protect MVIC’s senior decreed water rights as it is
7 statutorily obligated to do,¹ the NSE, through Order 1309, effectively repudiated and
8 curtailed MVIC’s decreed rights which the Muddy River Decree had previously
9 determined had been appropriated and put to beneficial use prior to March 1, 1905.²
10 The NSE did this by finding that up to 8,000 afa could be pumped from the LWRFS
11 without conflicting with those decreed rights. This was done without notice that there
12 would be a finding related to conflicts, thus violating MVIC’s due process rights, and
13 in clear violation of applicable law. The determination also was not based upon
14 substantial evidence and even conflicts with his other findings.

15
16
17 **A. The rights provided to MVIC through the Muddy River Decree are**
18 **expansive and go beyond the specific and limited allotment some**
19 **parties refer to.**

20 The NSE acknowledges the Muddy River Decree of 1920 (“the Decree”) as
21 establishing water rights to the Muddy River and does not dispute that these decreed
22 rights are the oldest and most senior rights in the LWRFS.³ The NSE further
23 recognizes that MVIC owns most of the decreed rights in the Muddy River.⁴

24
25 ¹ See NRS 533.0245.

26 ² See Judgment and Decree, *Muddy Valley Irrigation Company v. Moapa and Salt Lake Produce*
Company et al (“Muddy River Decree” or “Decree”) (March 11, 1920) (SE ROA 33770-33816) at p.
27 7, ¶ 7 (SE ROA 33777).

28 ³ See, e.g., NSE Answering Brief at 4:22-24.

⁴ NSE Answering Brief at 5:20-22. It should be noted that the NSE mistakenly refers to MVIC as
“Moapa” Valley rather than “Muddy” Valley.

1 Moreover, it does not appear that any other party has disputed these facts. However,
2 despite this recognition, it is clear after reviewing the various parties' answering briefs
3 as well as briefs by intervenors that the parties have an incorrect understanding, or at
4 least advance an incorrect interpretation, of MVIC's rights under the Muddy River
5 Decree and, as a result, fail to recognize MVIC's unique position and the impact it has
6 and continues to experience.
7

8 CSI undertakes a long and complicated analysis regarding diversion rates and
9 ultimately contends that the Decree limits the total amount of water that users can
10 divert from the River.⁵ This conclusion is inconsistent with the plain language of the
11 Decree. Lincoln County/Vidler (sometimes herein "Vidler") disputes that MVIC is
12 entitled to any additional flow from the Muddy River from what it is currently
13 receiving and seems to argue that the flow of the river can be reduced even further
14 without violation of the Decree which awarded all of the predevelopment water in the
15 river.⁶ Vidler contends that MVIC has no right to any water that is not specifically
16 delineated in and related to acreage identified in the Decree, disputing the right to put
17 to beneficial use any water not otherwise allocated by specific awards to others in the
18 Decree and suggesting that MVIC's allotment is limited to 36.2588 cfs of water as set
19 forth in the determination tables provided in the Decree.⁷
20
21

22 What the parties refuse to acknowledge is that while MVIC does in fact have a
23 specific diversion rate associated with its rights as set forth in part 1 of the Decree,⁸ the
24 Decree further provides that MVIC has the rights to and is directed to put to beneficial
25

26 _____
27 ⁵ CSI Answering Brief at 16:19-20.

28 ⁶ Lincoln County/Vidler Answering Brief to SNWA/MVIC at pp 9-16.

⁷ Lincoln County/Vidler Answering Brief to SNWA/MVIC at pp. 9-11.

⁸ See Decree (SE ROA 33770 – 33816) at SE ROA 33798.

1 use any water that exists, even if that water is in excess of the specific sum decreed to
2 MVIC. This sum of water, which is awarded to MVIC, is in addition to those specific
3 sums and would be all water flowing in the Muddy River which is in excess of the
4 quantity of water utilized through specific diversion rates of MVIC and all others
5 which existed in the river at the time of the Decree, as well as any water which might
6 not be utilized by others who hold decreed rights. In opposing the arguments of MVIC
7 the parties simply seek to discount or ignore the language of the Decree awarding these
8 rights, which is very specific and clear. It provides:

11 [T]he Muddy Valley Irrigation Company is declared and
12 decreed to have acquired by valid appropriate and
13 beneficial use and to be entitled to divert and use upon the
14 lands...all waters of said Muddy River, its head waters,
15 sources of supply and tributaries save and except the
several amounts and rights hereinbefore specified...⁹

16 The Decree goes on to confirm that “the total aggregate volume of the several amounts
17 and quantities of water awarded and allotted...is the total available flow of said Muddy
18 River and consumes and exhausts all of the available flow of the said Muddy Valley
19 River...”¹⁰ How the parties can gloss over or minimize that language as general and
20 non-specific is transparently self-serving. The “bottom line” is that MVIC is entitled
21 to its specific allotment, as well as any additional flows beyond the specific allotments
22 particularly provided for in the Decree which would have otherwise have occurred in
23 the past and the future and would and could have been put to beneficial use, in the past
24 and the future.¹¹ The premise from which the NSE was understood to be approaching

26 _____
27 ⁹ Decree (SE ROA 33770 – 33816) at 20:1-8 (SE ROA 33790) (emphasis added).

28 ¹⁰ *Id.* at 22:28-23:1 (emphasis added).

¹¹ There is no suggestion here by any party that all of water that should come to be possessed by MVIC will not be put to beneficial use, indeed it all will.

1 the Order 1309 hearing was to determine/quantify the sum of water that otherwise
2 would be flowing in the Muddy River but for its interception by pumping and a
3 determination of the pumping which could occur while allowing the river to return to
4 those flows. The predevelopment flows as they existed at the time of the Decree and
5 upon which the Decree was based (33,900 afa) are the “Decreed Flows.”¹² If there is a
6 reduction in the Decreed Flows it is axiomatic that there is a conflict with senior rights
7 and a curtailment of MVIC’s rights which needs to be addressed in the subsequent
8 conflict hearings.¹³ The appropriate conclusion should be that any pumping which
9 keeps the flow of the Muddy River from being anything less than the Decreed Flows
10 conflicts with MVIC’s decreed rights. Instead, the NSE determined that the flow has
11 been reduced by approximately 3,000 afa yet he determined what pumping could be
12 allowed so that the situation would not worsen rather than what needed to occur to
13 reestablish those flows.
14
15

16
17 **B. Consideration of Muddy River conflicts was explicitly outside the**
18 **scope of the hearing and should not have been included in Order**
19 **1309.**

20 In its Opening Brief, MVIC argues that its due process rights were violated
21 because a conflicts analysis was outside of the noticed scope of the hearing. There is
22 agreement and no party disputes that water rights are property rights subject to due
23 process protection, that MVIC is a “person” whose due process rights must be
24 protected, or the basic principles of notice and opportunity to be heard. However, the
25

26 ¹² See SNWA Report (June 2019) (SE ROA 41930 – 42072) at § 3.4.1 (SE ROA 41962) describing
27 the predevelopment flows as measured in 1946 as 33,900 afa and the average flow measured from
28 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).

¹³ See SNWA Report (June 2019) (SE ROA 41930 – 42072) at § 3.4.1 (SE ROA 41996-41997).

1 NSE and Vidler both contend that MVIC did in fact have the required notice and an
2 opportunity to present evidence on conflicts.
3

4 The NSE points out that one of the stated purposes of the hearing was to
5 determine the amount of water that could be sustainably pumped in the LWRFS
6 without conflicting with senior decreed rights, but acknowledges the hearing was not
7 intended to resolve conflicts.¹⁴ Indeed, the hearing officer stated:

8
9 [T]he purpose of the hearing is not to resolve or address
10 allegations of conflict between groundwater pumping
11 within the LWRFS and Muddy River decreed rights. That
12 is not the purpose of this hearing and that's not what we
13 are going to be deciding at this point in time.

14 The purpose of the hearing is to determine what the
15 sustainability is, what the impact is on decreed rights,¹⁵
16 and then addressing and resolving allegations of conflict
17 should that be a determination that will be addressed in, at
18 a future point in time.¹⁶

19 The NSE's statements at the Prehearing Conference assured MVIC conflicts would not
20 be discussed or, at best, create an ambiguity with respect to what the scope of the
21 hearing would be. Order 1309 makes a specific finding regarding conflicts as it states
22 that "capture or potential capture of flows of the waters of a decreed system does not
23 constitute a conflict."¹⁷ This is not only a clear conflict determination which reaches a
24 conclusion and resolves the allegation of conflict between groundwater pumping and
decreed rights, finding capture of those waters to be no conflict, but also a clearly

25 ¹⁴ NSE Answering Brief at 11:19-22, citing Transcript from Prehearing Conference at SE ROA 522.

26 ¹⁵ Although MVIC interpreted this as language indicative of an intent to protect the decreed rights,
27 some would suggest this was an indication to address conflicts. If so, that is in direct opposition to
the other statements of the NSE.

28 ¹⁶ See Transcript of Proceedings, Public Hearing, Prehearing Conference, August 8, 2019 (SE ROA
519-552) at 12:6-15 (SE ROA 522) (emphasis added).

¹⁷ See Order 1309 (SE ROA 2 – 69) at p. 60 (SE ROA at 61).

1 erroneous legal conclusion in light of the language of the Decree in place governing
2 this “system.” The NSE further stated that “there is no conflict as long as the senior
3 water rights are served.”¹⁸ This is similarly a clearly erroneous holding. Regardless of
4 the legality of the determination, it is undisputable that the NSE made a conflicts
5 determination despite having said he would not do so. Before making the blanket and
6 unsupported determination that capture of Muddy River flows governed by the Decree
7 somehow does not conflict with senior decreed rights to Muddy River flows, the NSE
8 should have specified that he would be considering that issue and might make that
9 determination. Such a notice would have allowed MVIC to address that possible
10 ruling at the hearing, which may have resulted in it retaining and presenting an expert
11 and providing testimony and evidence on that particular issue, and at the very least
12 examining witnesses and presenting its own views on that topic.
13

14
15 Lincoln County/Vidler is the other party who specifically tries to refute MVIC’s
16 due process arguments. They state that “SNWA and MVIC were properly provided
17 notice and an opportunity to participate in the Order 1309 proceedings.”¹⁹ However,
18 the issue is not whether they were provided *any* notice at all regarding the hearing and
19 had an opportunity to and even did participate; rather, it is whether they had *proper*
20 notice of the issues to be determined. In this case, *proper* notice would have been
21 notifying MVIC that a determination of whether reduction in receipt of the quantity of
22 water awarded to it under the Decree is a conflict and that such a determination was, in
23 fact, going to be made. This would have significantly altered the level of and strategy
24 surrounding MVIC’s participation. It would have changed what MVIC understood to
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28 ¹⁸ *Id.*

¹⁹ Lincoln County/Vidler Answering Brief to SNWA/MVIC at 28:18-19.

1 be at stake in the hearing. Though it participated, it did so as if conflicts were not
2 going to be addressed and with the belief that the NSE was intending to protect its
3 decreed rights in a sum equal to the amounts awarded in the Decree. As a result, it did
4 not have the opportunity to evaluate its position in that regard, determine whether to
5 retain an expert to address conflicts, or otherwise submit evidence to address that
6 supremely important issue.
7

8 Lincoln County/Vidler also argues that “SNWA and MVIC presented all
9 evidence they desired at the Order 1309 hearings” and that they in fact brought up the
10 issue of conflicts themselves.²⁰ While the apparent ability to clairvoyantly ascertain
11 MVIC’s desired evidence would be amazing, it is clear that Lincoln County/Vidler
12 really does not know what MVIC “desired” at the hearing. In reality, those desires
13 were shaped by the type of notice MVIC received and therefore the type of evidence it
14 believed needed to be presented. Unfortunately, MVIC incorrectly assumed that the
15 NSE would follow the law and limit the pumping so as to protect the Decreed Flows of
16 the Muddy River.
17

18
19 The NSE also used a consumptive use analysis to determine what MVIC’s
20 supposed “requirement” of water would be.²¹ This issue is clearly related to the
21 conflicts analysis eventually undertaken and there was absolutely no notice that the
22 NSE would be reviewing and calculating MVIC’s water use needs, let alone
23 undertaking a consumptive use analysis using hypothetical crops to determine MVIC’s
24 supposed “requirement,” and as a result MVIC did not have the opportunity to be
25
26
27

28 ²⁰ Lincoln County/Vidler Answering Brief to SNWA/MVIC at 28:22-26.

²¹ See Order 1309 (Se ROA 2-69) at p. 61 (SE ROA 62).

1 heard on that issue from a factual or a legal basis. Accordingly, due process was
2 indisputably violated in that regard as well.
3

4 **C. The determination that 8,000 afa can be pumped from the LWRFS**
5 **violates Nevada law, including the prior appropriation doctrine, and**
6 **is effectively a curtailment of MVIC's decreed rights.**

7 The NSE recognizes his “legislative prescribed duty to protect senior decreed
8 rights in the Muddy River” and contends that Order 1309 is a basic exercise of that
9 duty.²² He further claims that the determination that 8,000 afa can be pumped from the
10 LWRFS is “not legitimately challenged by SNWA and MVIC” and that MVIC instead
11 is attacking an “incidental finding” that the current flow is sufficient to serve all
12 decreed rights and that reductions in flow do not conflict with decreed rights.²³ Thus,
13 in one breath the NSE concedes that a conflict exists and then proceeds to dismiss that
14 conflict as insignificant or non-actionable. However, this “incidental” finding based
15 on a legally and factually faulty consumptive use analysis operates to reduce the
16 allotment of Muddy River decreed rights of 33,933.63 afa set forth in the Decree a
17 hundred years ago to 28,300 afa today, which is a reduction of nearly 6,000 afa.²⁴ This
18 reduction is not insignificant and there is nothing “incidental” about such an action.
19 Order 1309 acknowledges that the predevelopment baseflow of the river was about
20 33,900 afa but that flow has averaged only 30,600 afa since 2015.²⁵ Given that
21 MVIC’s water rights are based upon predevelopment flows, pumping which keeps the
22 river at anywhere less than that amount, 33,900 afa, is a curtailment. Further, as its
23 shareholder Vidler has noted in its briefing, MVIC, as the senior decreed holder of
24
25

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27 ²² NSE Answering Brief at 18:27-19:2.

²³ NSE Answering Brief at 36:19-24.

²⁴ See Order 1309 (SE ROA 2-69) at p. 61 (SE ROA 62).

²⁵ See Order 1309 (SE ROA 2-69) at p. 61 (SE ROA 62).

1 those rights and the last to be served on the river, is the only party that is bearing the
2 harm of whatever groundwater pumping is capturing. Based upon Order 1309 that
3 harm is currently approximately 3,300 afa.
4

5 With regard to the flows of the Muddy River it is important to note that no party,
6 including CSI, Vidler or the NSE, is actually arguing that the Muddy River will at
7 some point return to predevelopment flows if the pumping currently occurring and
8 allowed under Order 1309 continues. In fact, the NSE describes the “remarkably
9 consistent and widespread” detrimental effects of pumping in the LWRFS,
10 acknowledging it is the pumping rather than drought that has led to a decline in
11 groundwater flows, and further acknowledges that the groundwater has not returned to
12 pre-pumping levels but is instead reaching an equilibrium where levels are no longer
13 declining, but they are not recovering further either.²⁶ If that premise is believed by
14 the NSE it does not require a degree in hydrology to determine that continued pumping
15 at that level will not result in a return to prior flows. Indeed, a high school physics
16 course provides the adequate education to reach the conclusion that any level of
17 pumping which continues to lower water levels and fails to allow further recovery will
18 not be sufficient to correct the condition. In order to protect decreed rights the
19 pumping allowed must be such that leads to the recovery of the river to
20 predevelopment Decreed Flows. Order 1309 retreats from that as even a possibility
21 and therefore cannot stand.
22
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24

25
26 ²⁶ NSE Answering Brief at 7:25-8:25. This is consistent with the evidence in the record, including
27 evidence that over the last 27 years about 47% of the water pumped is captured from MRSA
28 discharge and the rest from aquifer storage and that once capture of aquifer storage is reduced to zero
all of the water pumped will be captured MRSA discharge. See, SNWA Report (June 2019) (SE
ROA 41930 – 42029) at § 3.4.1 (SE ROA 42003-42004).

1 1. **NRS 533.3703 prohibits the NSE from undertaking a**
2 **consumptive use analysis of MVIC’s “requirements.”**

3 The NSE contends that he used a “standard accepted method” in looking to “the
4 consumptive use rate for a high-water use crop, alfalfa, based on a full cover, well-
5 watered field.”²⁷ At the outset, it is important to note it would only be appropriate for
6 such an analysis to be done *before* a right is perfected, but these rights were perfected
7 over 100 years ago through the Decree and that analysis should not be undertaken now.
8 It is only because the NSE did in fact engage in this improper analysis that MVIC is
9 forced to address it now.
10

11 While MVIC in its Opening Brief criticized this method and noted the lack of
12 evidence upon which it is based, it is critical to point out that use of this method by the
13 NSE is illegal under Nevada law. Nevada statutes allow the NSE to consider
14 consumptive use in some instances; however, this allowance “[does] not apply to any
15 decreed, certified or permitted right to appropriate water which originates in the Virgin
16 River or the Muddy River.”²⁸ The NSE acknowledged that he used this method to
17 *estimate* the actual water needed to satisfy the vested rights in the Decree.²⁹ In doing
18 so, he clearly violated the law, making his findings that 8,000 afa can be pumped from
19 the LWRFS contrary to law and serving as a basis for remand.
20

21
22 2. **Order 1309 violates NRS 533.0245.**

23 Nevada law prohibits the NSE from carrying out his duties in a manner that
24 conflicts with any applicable portion of a decree or order issued by a state or federal
25 court.³⁰ The NSE referenced this statute in arguing that Order 1309 was within his
26

27 ²⁷ NSE Answering Brief at 37:6-10.

28 ²⁸ See NRS 533.3703(2)(b).

29 ²⁹ NSE Answering Brief at 37:6-15.

30 ³⁰ See NRS 533.0245.

1 authority to issue.³¹ He also acknowledges this statute’s application to “ensure[] that
2 the prior decrees are complied with.”³² The Nevada Supreme Court, citing this statute,
3 has acknowledged that Nevada’s water law prohibits the reallocation of adjudicated
4 water rights.³³ The Muddy River Decree is an Order through which rights were
5 decreed to MVIC. As set forth above, the allowance of pumping at a rate that will not
6 allow the Muddy River to recover to its pre-development flow of 33,900 afa is a
7 curtailment of the rights provided to MVIC under the Decree in favor of the pumping
8 that is reducing the flow. This effectively constitutes a reallocation by a different
9 name and, as Shakespeare correctly observed, changing the name of something does
10 not change its essential qualities, or as he said it, “a rose by any other name would
11 smell as sweet.”³⁴ The NSE is essentially claiming that he is not changing MVIC’s
12 water rights, just that the amount of water available from which MVIC can attempt to
13 satisfy its rights is now less than what was provided for in the Decree. Thus, Order
14 1309 is contrary to law with respect to this determination.

18 **3. Order 1309 violates NRS 533.210.**

19 No party has disputed MVIC’s contention that NRS 533.210 prohibits the rights
20 provided to MVIC in the Muddy River Decree to be altered. Rather, the arguments
21 advanced by the NSE and Lincoln County/Vidler are generally that Order 1309 does
22 not modify MVIC’s rights under the Decree. As stated above, MVIC’s decreed rights
23 were based on the Decreed Flows of 33,900 afa. The NSE has recognized that it is
24 pumping rather than other causes which has led to the decline in flow and that the flow
25

26 _____
27 ³¹ NSE Answering Brief at 30:8-14.

³² NSE Answering Brief at 34:24-26.

28 ³³ *Min. Cty. v. Lyon Cty.*, 136 Nev. Adv. Op. 58, 473 P.3d 418, 429 (2020).

³⁴ William Shakespeare, *Romeo and Juliet* act 2, sc. 2.

1 is not expected to recover to predevelopment levels.³⁵ Thus Order 1309, while perhaps
2 not intending to alter MVIC's decreed rights, has precisely that effect.
3

4 **4. Order 1309 violates the non-impairment doctrine set forth in**
5 **NRS 533.085.**

6 The NSE's determination that 8,000 afa can be pumped from the LWRFS is a
7 violation of the non-impairment doctrine, which provides:

8 Nothing contained in this chapter shall impair the vested
9 right of any person to the use of water, nor shall the right
10 of any person to take and use water be impaired or affected
11 by any of the provisions of this chapter where
12 appropriations have been initiated in accordance with law
prior to March 22, 1913.³⁶

13 This doctrine has explicitly been extended to protect against changes to decreed
14 rights.³⁷ Lincoln County/Vidler argue that this doctrine has not been violated based
15 upon their belief that Order 1309 does not modify MVIC's rights under the Decree.³⁸
16 However, as explained above, the State Engineer's actions do operate as a curtailment
17 of MVIC's senior decreed rights. Thus, the inconvenient factual truth is that Order
18 1309 itself is illegal as "[t]he statutory water scheme in Nevada...expressly prohibits
19 reallocating adjudicated water rights that have not been abandoned, forfeited, or
20 otherwise lost pursuant to an express statutory provision."³⁹
21
22
23

24 ³⁵ NSE Answering Brief at 7:25-8:25.

25 ³⁶ NRS 533.085(1).

26 ³⁷ See *Andersen Fam. Assocs. v. Hugh Ricci, P.E.*, 124 Nev. 182, 192, 179 P.3d 1201, 1207 (2008)
27 ("[a]lthough Carson City changed the use of its vested rights, those rights remained of the same
character – i.e., they remained vested and did not become solely permitted rights just because the
holder obtained a permit changing the use of the rights.").

28 ³⁸ See Lincoln County/Vidler Answering Brief to SNWA/MVIC at 8:17-19.

³⁹ *Mineral Cty.*, 136 Nev. Adv. Op. 58, 473 P.3d at 429.

1 **5. Order 1309 violates the Prior Appropriation Doctrine.**

2 The NSE and Lincoln County/Vidler seem to agree that the prior appropriation
3 doctrine means “first in time, first in right.”⁴⁰ No other party seems to dispute this
4 long-held understanding. Thus, there appears to be no dispute that “[w]ater rights are
5 given “subject to existing rights, NRS 533.430(1), given dates of priority, NRS
6 533.265(2)(b), and determined based on relative rights, NRS 533.090(1)-(2).”⁴¹ The
7 NSE further recognizes that there is nothing which limits his “duty to protect senior
8 rights.”⁴² The dispute, however, centers around the extent to which Order 1309 truly
9 protects MVIC’s senior decreed rights as set forth in the Decree rather than
10 redistributes them. For the reasons set forth above, MVIC contends that Order 1309
11 modifies its century-old rights under the Decree, thus violating the prior appropriation
12 doctrine.
13
14

15 **D. The determination that up to 8,000 afa could be pumped from the**
16 **LWRFS was not based on substantial evidence.**

17 The NSE takes inconsistent positions in supporting Order 1309 and his
18 determination that 8,000 afa can be pumped from the LWRFS. He recognizes his duty
19 to protect senior rights⁴³ and that it is pumping rather than drought that leads to a
20 decline in groundwater flows.⁴⁴ He acknowledged that current pumping is
21 approaching 8,000 afa and that this pumping appears to coincide with the system
22 reaching steady state.⁴⁵ However, he still finds that pumping up to 8,000 afa is
23 appropriate despite the fact that the Muddy River is fully appropriated and having
24

25 _____
26 ⁴⁰ NSE Answering Brief at 35:10-13, citing Lincoln County/Vidler Opening Brief at p. 19.

27 ⁴¹ *Mineral Cty.*, 136 Nev. Adv. Op. 58, 473 P.3d at 426.

28 ⁴² NSE Answering Brief at 35:17-18.

⁴³ NSE Answering Brief at 3:22-23.

⁴⁴ NSE Answering Brief at 8:22-25.

⁴⁵ See Order 1309 (SE ROA 2-69) at p. 63 (SE ROA 64).

1 determined the current flows are about 3,000 afa less than at the time of the Decree.
2 This determination is inconsistent and was clearly based on insufficient evidence.
3

4 First, the NSE tacitly recognizes that his determination was based on insufficient
5 evidence as he acknowledges that the actual amount could be less and that future
6 reductions may be necessary. He states that Order 1303, the precursor to Order 1309,
7 recognized that the “‘precise extent’ of pumping that can continue without
8 jeopardizing senior rights or the Moapa dace was not yet determined.”⁴⁶ He further
9 stated that continued monitoring of the groundwater, the springs, and the Muddy River
10 flow is “‘necessary to determine whether further reductions to the maximum pumping
11 amount are required.’”⁴⁷ Thus, ultimately the conclusion drawn by the NSE is that
12 pumping cannot exceed 8,000 afa “‘and may be less.’”⁴⁸
13

14 To be clear, MVIC does not dispute that the NSE’s determination that anything
15 *greater* than 8,000 afa cannot be pumped was correct and supported by sufficient
16 evidence. The question is what amount *less than* 8,000 afa does the evidence support
17 can be pumped. The fact that the NSE admits that the precise extent of pumping that
18 can occur is not yet known, that further monitoring must occur to determine whether
19 further reductions are required, and that the amount “‘may be less” show there was
20 insufficient evidence to make a determination that up to the 8,000 afa can be pumped
21 without jeopardizing senior rights or the habitat of the Moapa dace. One cannot meet
22 the standard of relying on substantial evidence while at the same time recognizing that
23 there is still insufficient evidence to make the determination at this point.
24
25

26
27 ⁴⁶ NSE Answering Brief at 10:2-4 (emphasis added).

28 ⁴⁷ NSE Answering Brief at 17:4-6.

⁴⁸ NSE Answering Brief at 37:24-38:1.

1 The NSE claimed, and MVIC agrees, that if a larger sum than the 8,000 afa is
2 pumped it would significantly interfere with senior decreed rights.⁴⁹ But again, there is
3 nothing identified as substantial evidence that supports a finding that pumping 8,000
4 afa does not interfere with those rights. Given the acknowledgement that pumping in
5 general gives rise to “remarkably consistent and widespread” detrimental effects
6 coupled with the recognition that Muddy River flows are already 3,300 afa below
7 predevelopment flows with no indication that they will recover to predevelopment
8 levels, it is unclear how this conclusion can be drawn and it appears that the holding is
9 nothing more than an attempt to compromise the desires of the various stakeholders.
10

11 While claiming to have relied on sufficient evidence to support the finding that
12 up to 8,000 afa could be pumped without interfering with senior decreed rights,⁵⁰ the
13 NSE does not specify in his brief what that evidence is. He simply cites to pages 58-
14 63, 41876, 41992-93, and 53733 of the record.⁵¹ However, pages 58-63, which are
15 part of Order 1309, simply describe in summary the positions taken by the various
16 parties as to how much can be pumped before the NSE states his conclusion that 8,000
17 afa is the maximum amount that can be pumped.⁵² There is no analysis to support the
18 conclusion that was made. In fact, immediately before stating that conclusion, the
19 NSE states:
20
21

22
23 **WHEREAS**, there is an almost unanimous agreement
24 among the experts that data collection is needed to further
25 refine with certainty the extent of groundwater
26 development that can be continually pumped over the long
27 term. The State Engineer finds that the current data are

28 ⁴⁹ NSE Answering Brief at 26:16-20.

⁵⁰ See NSE Answering Brief at 27:9-11.

⁵¹ *Id.*

⁵² See Order 1309 (SE ROA 2-69) at SE ROA 58-63.

1 adequate to establish an approximate limit on the amount
2 of pumping that can occur within the system, but that
3 continued monitoring of pumping, water levels, and spring
flow is essential to refine and validate this limit.⁵³

4 In other words, the “substantial evidence” which should have been relied on before
5 making this determination must still be gathered and analyzed, and therefore the
6 necessary evidence was not relied upon in reaching this determination.
7

8 The NSE eventually notes in a parenthetical that the evidence found in 41876,
9 41992-93, and 53733 is “evidence indicating that the LWRFS’s groundwater and
10 spring flow are approaching equilibrium.”⁵⁴ That is it. That is apparently the full
11 extent of the “substantial evidence” to support the finding that 8,000 afa could be
12 pumped. The reference to 41876 is a reference to NV Energy’s Order 1303 Rebuttal
13 Report, which is found at SE ROA 41875-41886. The portion the NSE seems to be
14 referring to provides:
15

16 Full recovery to the pre-test levels did not occur, and could
17 not occur, because water levels regionally were still
18 declining due to existing pumping as noted by SNWA.
19 Contrary to the arguments made by SNWA and MBOP,
20 NV Energy argues that there is significant data to support
21 the conclusion that the system is approaching steady state
22 in the Muddy River Springs Area (MRSA) and other
23 locations, and that water levels, spring flow, and the
Muddy River are *nearly* equilibrated with the current
carbonate pumping rate of 7,000 to 8,000 acre-feet
annually.⁵⁵

24 This is not substantial evidence in support of the holding, but rather evidence that full
25 recovery has not occurred, levels were still declining, but pumping 7,000 to 8,000 afa
26

27 ⁵³ See Order 1309 (SE ROA 2-69) at p. 62 (SE ROA 63).

28 ⁵⁴ NSE Answering Brief at 27:28-28:2.

⁵⁵ See NV Energy’s Order 1303 Rebuttal Report (SE ROA 41875 – 41886) at p. 2 (SE ROA 41876) (emphasis added).

1 is *almost* bringing us back to level. This evidence simply does not explain or
2 adequately support the finding that 8,000 can continue to be pumped without
3 perpetuating the loss of flow that was acknowledged by the NSE. If anything, it would
4 seem to perhaps support a finding that the sum of 7,000 afa will maintain the status
5 quo; however, maintaining the status quo is insufficient since it does not allow
6 recovery to the Decreed Flows. Indeed, the evidence does not even describe what
7 might be required to address the reduced flows.
8

9
10 41992-93 is found within SNWA’s Assessment of the Lower White River Flow
11 System Water Resource Conditions and Aquifer Response that was presented to the
12 NSE.⁵⁶ It is unclear how this provides substantial evidence to support 8,000 afa of
13 pumping as it also provides that “[r]ecover from the pumping stresses imposed during
14 the aquifer test was less than expected, and never reached pre-test levels.”⁵⁷ The
15 failure of the system to recover does not provide evidence that pumping at those levels
16 that have failed to result in recovery can continue – quite the contrary. Interestingly,
17 the SNWA experts did offer an opinion that 4,000-6,000 might be appropriate so long
18 as conflicts with senior water-right holders are addressed.⁵⁸ This was clearly not
19 adopted by the NSE and based upon the caveat it contained, even that pumping level
20 might not allow recovery of the flows.
21

22 Finally, the NSE refers to 53733, which is found within the transcript of the
23 hearing from October 4, 2019, Vol. X.⁵⁹ The referenced pages come in the midst of
24
25

26 ⁵⁶ See SNWA’s Assessment of the LWRFS Water Resource Conditions and Aquifer Response (SE
27 ROA 41930 – 42072).

28 ⁵⁷ *Id.* at SE ROA 41992 (emphasis added).

⁵⁸ See SNWA Report (June 2019) (SE ROA 41930 – 42029) at § 3.4.1 (SE ROA 41941)

⁵⁹ See Transcript of Proceedings, Vol. X (Oct. 4, 2019) (SE ROA 53709 – 53758).

1 questioning of NV Energy’s expert witness, Richard Felling, regarding what
2 constitutes a “steady state,” which he defined as a state where things are neither
3 increasing or decreasing.⁶⁰ Mr. Felling testified:
4

5 I am saying that a system appears to be reaching steady
6 state over – and over the last two or three years is roughly
7 at steady state. But that is not to say that it will continue
8 that way in the future. And that’s why I say I think we
actually need to observe the system for a bit longer.

9 *****

10 I’m saying that if we want to be certain that steady state
11 conditions are in fact occurring now and forever in to the
12 future under the current pumping regime, two or three
13 years of observations aren’t enough.⁶¹

14 This also does not lend any evidentiary support to the NSE’s conclusion that
15 8,000 afa can be pumped without interfering with senior decreed rights. If anything, it
16 simply supports the conclusion that there is not enough evidence at this time to draw
17 the conclusion that even the current water level, and with it presumably the current
18 flows of the river, can be maintained if the current pumping continues forever into the
19 future.
20

21 In sum, the NSE has been unable to point to substantial evidence he relied on to
22 support the finding that 8,000 afa can be pumped without interfering with senior
23 decreed rights. The evidence regarding “steady state” and “equilibrium does nothing
24 to support this finding. The critical thing about equilibrium is that is still does not
25 represent a recovery to pre-development flows; rather, it simply means that the water
26

27
28 ⁶⁰ *Id.* at 1803-1804 (SE ROA 53732).

⁶¹ *Id.* at 1805:1-15 (SE ROA 53733) (emphasis added).

1 levels are no longer declining. The NSE recognizes this.⁶² As the only evidence upon
2 which the NSE relies makes it clear that additional monitoring and analysis is
3 necessary before determining how much water can be pumped, substantial evidence
4 did not exist for the NSE to rely on in finding that up to 8,000 afa could be pumped
5 from the LWRFS. Rather, the evidence he cites to leads to the conclusion that the sum
6 that can be pumped must be some amount less than 8,000 afa.
7

8
9 **E. The arguments that more than 8,000 afa can be pumped without**
10 **impacting the Muddy River defy Nevada law, the Decree, and the**
11 **natural world.**

12 In their answering briefs both Vidler and CSI suggest that more than 8,000 afa
13 can be pumped without interference with the Muddy River.⁶³ This makes no sense
14 given that the evidence clearly shows that even pumping at 8,000 afa does not allow a
15 return to the Decreed Flows. In this round of briefing Vidler makes the argument in
16 the course of countering the SNWA criticism of the consumptive use hypothetical
17 applied by the NSE in Order 1309 to reach the conclusion that all of the decreed rights
18 could be served so long as the flow is 28,300 afa.⁶⁴ Vidler consumes approximately 7
19 pages to eventually come to a mathematical conclusion that all that the holders of
20 rights under the Decree need is 17,771.59 afa so therefore there is “significantly more
21 water than 8,000 afa [that] can be withdrawn from the LWRFS without impacting the
22 Muddy River.”⁶⁵ This mathematical exercise doubles down on the improper and
23 illegal analysis used by the NSE and for all of the reasons discussed above in section
24

25
26 ⁶² See NSE Answering Brief at 8:17-19.

27 ⁶³ See Lincoln County/Vidler Answering Brief at 16:17-18; CSI Brief in Intervention at 8:2-9.

28 ⁶⁴ See Vidler Answering Brief to SNWA/MVIC at pp. 11-19; Order 1309 (SE ROA 2-69) at p. 62 (SE ROA 63).

⁶⁵ See Vidler Answering Brief to SNWA/MVIC at 16:17-18.

1 “C” it is equally improper. Those arguments are incorporated herein by reference.
2
3 What is more, Vidler’s mathematical exercise fails to prove that any water would
4 actually flow from the critical headwaters of the Muddy River in the actual world if
5 pumping at the levels implied by that exercise were to be allowed. In the real world it
6 is very possible that flows would stop at some locations and no decreed right would be
7 served.

8 Vidler’s latest submission also contains a number of arguments that appear to
9 run to the issues of damage quantification and corporate governance of MVIC and
10 appear irrelevant to the issues currently before this Court. While MVIC disputes that it
11 has treated SNWA, Vidler or any shareholder different from another and further
12 disputes the mechanical contentions raised by Vidler in those sections, they have no
13 bearing on the issues to be determined and, like Vidler’s multiple misstatements of the
14 MVIC position, the corporate governance allegations appear to be included here
15 simply to distract from the genuine issues before the Court at this time.⁶⁶
16
17

18 CSI takes a slightly different approach. It seems to suggest that the quantity of
19 water in the Decree is limited to the use of the water on the lands described in the

20 ⁶⁶ Vidler misstates MVIC’s position in significant and insignificant ways. For example, Vidler states
21 that it is the position of MVIC that no ground water pumping can occur. *See* Lincoln County/Vidler
22 Answering Brief to SNWA/MVIC at 4:25; 7:14; 7:19-23; 7:25-8:2; 31:19-21. In reality, the MVIC
23 position has been and continues to be that the NSE should preserve the flows of the Muddy River, a
24 fully appropriated system and MVIC has not taken the position that no pumping can occur. (*See*
25 MVIC Opening Brief at 19:17, acknowledging the possibility that 8,000 afa *could be* appropriate;
26 MVIC Opening Brief at 19:23-20:2 (asking that allowed pumping protect the predevelopment flow
27 levels; MVIC Opening Brief at 29:6-9 (asking that pumping in the LWRFS be regulated so as to
28 prevent interference with predevelopment flows). To do that will require a limit to the pumping that
restores and then maintains those flows. The NSE must make the determination of that quantity
based upon substantial evidence. Vidler claims that MVIC has made arguments based upon acreage
statements or the requirements to farm the lands. *See for example*, Lincoln County/Vidler Answering
Brief to SNWA/MVIC at 14:1-4 and 17:19-21. In actuality, MVIC’s position is that the consumptive
use and acres is at this point irrelevant as is the use so long as it is a permitted beneficial use. The
diversion rates and the grant of additional flows define the MVIC decreed water rights.

1 Decree, implying some circumstance in support of the NSE hypothetical while
2 simultaneously criticizing it to suggest reasonableness. The implication seems to be
3 that, if the water cannot or is not used on those lands described its use is improper and
4 the result, presumably, is there is additional water not used and available for pumping
5 which allows for decreases in the flow of the Muddy River.⁶⁷ For all of the reasons
6 described herein above such an argument is inconsistent with the operation of the
7 Decree which, as recognized in *Andersen Fam. Assocs. v. Hugh Ricci, P.E.*, allows for
8 a change of the use of a right without loss of priority or character.⁶⁸ Consequently, the
9 water rights of MVIC or any other holder of Decreed rights can be diverted and used in
10 a fashion that has a greater or lesser consumption than the use one hundred years ago
11 without sacrificing the right. This is consistent with the statement of CSI that “[t]he
12 Decree therefore allows Users to grow any crop---not just alfalfa as arbitrarily
13 referenced by the NSE in Order 1309 – and it does not limit the consumptive use for a
14 User. Rather, the Decree limits the total water that Users can divert from the river.”⁶⁹
15 Although not precisely adopting the NSE consumptive use hypothesis, CSI does, like
16 Vidler, engage in a discussion of it, refashioning it for its purpose, and like Vidler and
17 the NSE the application of any such analysis is legally and factual improper here and
18 should be rejected as a means to modify the decreed rights of MVIC.
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27 ⁶⁷ See CSI Brief in Intervention at pp. 10-19.

28 ⁶⁸ See *Andersen Fam. Assocs. v. Hugh Ricci, P.E.*, 124 Nev. 182, 192, 179 P.3d 1201, 1207 (2008)
 (“[a]lthough Carson City changed the use of its vested rights, those rights remained of the same
 character – i.e., they remained vested and did not become solely permitted rights just because the
 holder obtained a permit changing the use of the rights.”)

⁶⁹ See CSI Brief in Intervention at 16:17-20.

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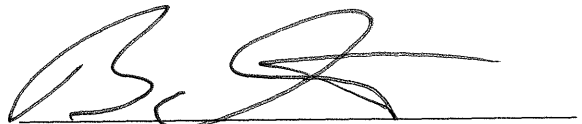
CONCLUSION

For the reasons set forth above, MVIC respectfully requests that the Court reverse and remand Order 1309 and direct the State Engineer to ensure that the Muddy River predevelopment baseflow of 33,900 afa is not intercepted by any junior right holders and that pumping in the LWRFS be likewise regulated so as to allow the flow to return to predevelopment levels and thereafter be regulated to prevent future interception of Muddy River water sources or interference with those decreed surface water flows.

Affirmation Pursuant to NRS 239B.030

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

DATED this 11 day of January, 2022.



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ATTORNEY CERTIFICATE

Pursuant to NRAP 28.2, undersigned counsel certifies that:

1. I have read this entire reply brief.

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

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

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

5. I further certify that this reply brief complies with the page-volume limitations of NRAP 32(a)(7) because, excluding the parts exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, and is 23 pages long and contains 7,198 words.

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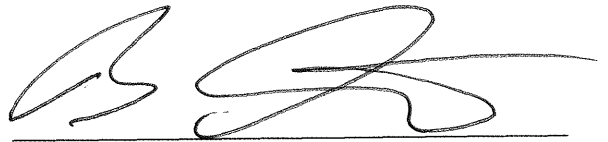
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1 I understand that I may be subject to sanctions in the event that the accompanying
2 reply brief is not in conformity with the requirements of the Nevada Rules of Appellate
3 Procedure.
4

5 DATED this 11 day of January, 2022.

6
7 

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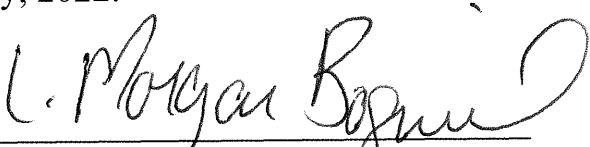
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of DOTSON LAW and that on this date I caused to be served a true and correct copy of the foregoing by electronic service to the participants in this case who are registered with the Eight Judicial District Court's Odyssey eFileNV File & Serve system to this matter.

DATED this 11 day of January, 2022.


L. MORGAN BOGUMIL

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 Intervenor 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”)¹.

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.² 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

¹ 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.

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

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

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

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

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

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

27 ⁴ 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.⁵ The valley floors in the basins of Eastern Nevada are generally composed of alluvium comprised largely of relatively young (<5 million years) unconsolidated sands, gravels, and clays. This sequence is loosely referred to as the “Alluvial Aquifer,” the aquifer for most shallow wells in the area. Most of the water in the Carbonate Aquifer is present due to infiltration of water thousands of years ago; recent recharge from present day precipitation may represent only a fraction of the water stored.

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

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

⁶ SE ROA 659.

⁷ SE ROA 661.

⁸ SE ROA 661.

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 1966.⁹ 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.¹⁰

4 The Muddy River runs through a portion of the LWRFS before cutting southeast and
5 discharging into Lake Mead.¹¹ Many warm-water springs, including the Muddy River Springs at
6 issue in this litigation, discharge from the regional carbonate groundwater aquifer.¹² 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.¹³

10 The Muddy River Springs are directly connected to, and discharge from, the regional
11 carbonate aquifer.¹⁴ 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.¹⁵ As carbonate groundwater levels decline, spring flows
14 decrease, beginning with the highest-elevation springs.¹⁶

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.¹⁷

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20 _____
21 ⁹ SE ROA 11349-59.

22 ¹⁰ See SE ROA 11350.

23 ¹¹ SE ROA 41943.

24 ¹² SE ROA 660-61, 53056, 53062.

25 ¹³ SE ROA 663-664, 41959, 48680.

26 ¹⁴ SE ROA 73-75, 34545, 53062.

27 ¹⁵ SE ROA 60-61, 34545.

28 ¹⁶ SE ROA 46, 34545.

¹⁷ 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,¹⁸ and administers and manages each basin as a discrete hydrologic unit.¹⁹ The State Engineer keeps and maintains annual pumping inventories and records on a basin-by-basin basis.²⁰

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

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

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

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

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

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

²¹ See SE ROA 2-3, 71-72.

²² The Court takes judicial notice of Kane Springs Valley Basin’s status of not being designated for administration per NRS 534.030. <http://water.nv.gov/StateEngineersOrdersList.aspx> (available online at the Division of Water Resources. “Mapping& Data” tab, under “Water Rights” tab, “State Engineer’s Orders List and Search”). Facts that are subject to judicial notice “are facts in issue or facts from which they may be inferred.” NRS 47.130(1). To be judicially noticed, a fact must be “[g]enerally known” or “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” NRS 47.130(2); *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.²³ The Muddy River Decree recognized specific water rights,²⁴ identified each water right holder on the Muddy River, and quantified each water right.²⁵ **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. . .”²⁶.** 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”).²⁷ **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 1967.²⁸ Between 1933

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

²⁴ 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.

²⁵ SE ROA 33798-806.

²⁶ SE ROA 33775.

²⁷ 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).

²⁸ SE ROA 5.

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

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

11 **D. Order 1169**

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

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

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23
24 _____
25 ²⁹ SE ROA 47169.

26 ³⁰ SE ROA 47160.

27 ³¹ SE ROA 42087.

28 ³² SE ROA 4, Ex. 1.

³³ *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”).³⁴ 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).³⁵ California Wash (Basin 218) was
9 subsequently added to this Order.³⁶

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 1169.³⁷ 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.³⁸

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.³⁹ 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
22

23 ³⁴ SE ROA 654-669.

24 ³⁵ See SE ROA 659, 665.

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

26 ³⁷ SE ROA 719.

27 ³⁸ SE ROA 713.

28 ³⁹ 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.⁴⁰ Pumping tests effects were examined at 79 monitoring
3 wells and 11 springs and streamflow monitoring sites.⁴¹ 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 1169.⁴²

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.⁴³ 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.”⁴⁴

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24 ⁴⁰ The Order uses the term acre-foot per year (afy), but for consistency with common usage, this Court uses the
equivalent term acre feet per annum.
25 ⁴¹ SE ROA 6, Ex. 1.
26 ⁴² SE ROA 36230 - 36231.
27 ⁴³ SE ROA 726 – 948.
28 ⁴⁴ See e.g., SE ROA 479.

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

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

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

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

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

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

27 ⁴⁵ SE ROA 635-53, Ex. 6.

28 ⁴⁶ 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.⁴⁷ Kane Springs continued to be excluded as part of the LWRFS multi-basin area in Interim Order 1303.⁴⁸

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.⁴⁹ 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.⁵⁰

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,

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

1 not a contested adversarial proceeding.⁵¹ 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.⁵²

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.”⁵³

7 **F. Order 1309**

8 On June 15, 2020, the State Engineer issued Order 1309.⁵⁴ 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.

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

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

27 ⁵³ See SE ROA 285, Ex. 3.

28 ⁵⁴ 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.”⁵⁵ 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.

⁵⁵ 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,⁵⁶ and modified the portion of the Black Mountains area that is in the LWRFS. Although Order 1309 did not specifically address priorities or conflict of rights, as a result of the consolidation of the basins, the relative priority of all water rights within the seven affected basins will be reordered and the priorities will be considered in relation to all water rights holders in the consolidated basins, rather than in relation only to the other users within the original separate basins.

G. Petitioners and Their Respective Water Rights or Interests

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

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

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

8 **III.**

9 **DISCUSSION**

10 **STANDARD OF REVIEW**

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

16 **A. Questions of Law**

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

23 Any “presumption of correctness” of a decision of the State Engineer as provided by NRS
24 533.450(10), “does not extend to ‘purely legal questions,’ such as ‘the construction of a statute,’
25 as to which ‘the reviewing court may undertake independent review.’” *In re State Engineer*
26 *Ruling No. 5823*, 128 Nev. 232, 238-239, 277 P.3d 449, 453 (2012) (quoting *Town of Eureka v.*
27 *State Engineer*, 108 Nev. 163, 165, 826 P.2d 948, 949 (1992)). At no time will the State
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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 managing⁵⁷ 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.”⁵⁸
- 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.”⁵⁹
- 17 • NRS 534.020, which provides that all waters of the State belong to the public and are subject
18 to all existing rights.⁶⁰
- 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.”⁶¹

22 ⁵⁷ 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 ⁵⁸ SE ROA 43.

28 ⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ 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.⁶²
- NRS 534 and specifically NRS 534.120, which allows the State Engineer to make such rules, regulations and orders as are deemed essential for the welfare of an area where the groundwater basin is being depleted.”⁶³

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

1. **The Prior Appropriation Doctrine**

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

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

⁶² *Id.*

⁶³ *Id.*

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

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

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

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

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

5 2. **Joint Administration**

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

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

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

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

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

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

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

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

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

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

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

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

20 **3. Conjunctive Management**

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

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

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

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

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

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

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

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

The Nevada Constitution protects against the deprivation of property without due process of law. Nev. Const. art. 1, § 8(5). “Procedural due process requires that parties receive notice and an opportunity to be heard.” *Eureka Cty. V. Seventh Jud. Dist. Ct.*, 134 Nev. 275, 279, 417 P.3d 1121, 1124 (2018)(internal quotation marks omitted). “In Nevada, water rights are ‘regarded and protected as real property.’” *Id.*(quoting *Application of Filippini*, 66 Nev. 17, 21-22, 202 P.2d 535,

⁶⁸ Although this Court refrains from analyzing whether or not 1309 is supported by substantial evidence, the Court notes that part of the State Engineer’s 1309 decision of limiting use to 8,000afa or less is based on the concern of adversely impacting the endangered Moapa Dace, located in the Muddy River Springs. This decision does not appear to take into account more nuanced effects of how pumping in each separate basin affects the Muddy River flows, no matter how far 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.⁶⁹

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
24

25 ⁶⁹ “[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.^{70 71} But the
10 questions posed in Order 1303 did not relate to management of the LWRFS, such as issues of
11 conjunctive or joint administration, but rather related to factual inquiries. Instead, Order 1303
12 specifically authorized stakeholders to file reports addressing four specific areas, none of which
13 related to the management of the LWRFS.⁷²

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

19 _____
⁷⁰ See SE ROA 262-82, Ex. 2; SE ROA 284-301, Ex. 3

20 ⁷¹ The Notice included the following summary:

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

28 ⁷² SE ROA 647-48. Ex. 6.

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

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

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

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

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

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

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

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

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

⁷³ SE ROA 648, Ex. 6.

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

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

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

15 SE ROA 54, Ex. 1.

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

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

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

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

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

26 _____
27 ⁷⁵ See SE ROA 48.
28 ⁷⁶ SE ROA 726-948.

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

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

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

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

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

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

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

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

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

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

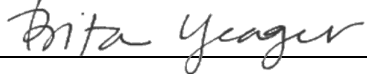
IT IS FURTHER ORDERED that the petition for review of the Nevada State Engineer’s Order No. 1309 filed by Petitioners Nevada Cogeneration Associates Nos. 1 and 2 is GRANTED.

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

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

IT IS SO ORDERED.

Dated this 19th day of April, 2022



**66B 24A E875 2549
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
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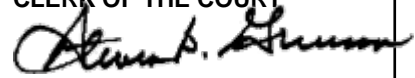
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26 COMPANY, INC.

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 19th day of April, 2022 in the above captioned and consolidated cases, a copy of which is attached hereto.

DATED this 19th 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 19th 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”)¹.

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.² 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

¹ 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.

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

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

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

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

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

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

27 ⁴ 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.⁵ The valley floors in the basins of Eastern Nevada are generally composed of alluvium comprised largely of relatively young (<5 million years) unconsolidated sands, gravels, and clays. This sequence is loosely referred to as the “Alluvial Aquifer,” the aquifer for most shallow wells in the area. Most of the water in the Carbonate Aquifer is present due to infiltration of water thousands of years ago; recent recharge from present day precipitation may represent only a fraction of the water stored.

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

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

⁶ SE ROA 659.

⁷ SE ROA 661.

⁸ SE ROA 661.

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 1966.⁹ 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.¹⁰

4 The Muddy River runs through a portion of the LWRFS before cutting southeast and
5 discharging into Lake Mead.¹¹ Many warm-water springs, including the Muddy River Springs at
6 issue in this litigation, discharge from the regional carbonate groundwater aquifer.¹² 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.¹³

10 The Muddy River Springs are directly connected to, and discharge from, the regional
11 carbonate aquifer.¹⁴ 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.¹⁵ As carbonate groundwater levels decline, spring flows
14 decrease, beginning with the highest-elevation springs.¹⁶

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.¹⁷

19
20 _____
⁹ SE ROA 11349-59.

21 ¹⁰ *See* SE ROA 11350.

22 ¹¹ SE ROA 41943.

23 ¹² SE ROA 660-61, 53056, 53062.

24 ¹³ SE ROA 663-664, 41959, 48680.

25 ¹⁴ SE ROA 73-75, 34545, 53062.

26 ¹⁵ SE ROA 60-61, 34545.

27 ¹⁶ SE ROA 46, 34545.

28 ¹⁷ *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,¹⁸ and administers and manages each basin as a discrete hydrologic unit.¹⁹ The State Engineer keeps and maintains annual pumping inventories and records on a basin-by-basin basis.²⁰

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

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

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

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

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

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

22
23 ²¹ See SE ROA 2-3, 71-72.

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

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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.²³ The Muddy River Decree recognized specific water rights,²⁴ identified each water right holder on the Muddy River, and quantified each water right.²⁵ 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. . .”²⁶. 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”).²⁷ 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 1967.²⁸ Between 1933

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

²⁴ 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.

²⁵ SE ROA 33798-806.

²⁶ SE ROA 33775.

²⁷ 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).

²⁸ SE ROA 5.

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

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

11 **D. Order 1169**

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

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

22
23
24 _____
25 ²⁹ SE ROA 47169.

26 ³⁰ SE ROA 47160.

27 ³¹ SE ROA 42087.

28 ³² SE ROA 4, Ex. 1.

³³ *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”).³⁴ 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).³⁵ California Wash (Basin 218) was
9 subsequently added to this Order.³⁶

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 1169.³⁷ 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.³⁸

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.³⁹ 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
22

23 ³⁴ SE ROA 654-669.

24 ³⁵ See SE ROA 659, 665.

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

26 ³⁷ SE ROA 719.

27 ³⁸ SE ROA 713.

28 ³⁹ 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.⁴⁰ Pumping tests effects were examined at 79 monitoring
3 wells and 11 springs and streamflow monitoring sites.⁴¹ 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 1169.⁴²

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.⁴³ 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.”⁴⁴

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

25 ⁴¹ SE ROA 6, Ex. 1.

26 ⁴² SE ROA 36230 - 36231.

27 ⁴³ SE ROA 726 – 948.

28 ⁴⁴ *See e.g.*, SE ROA 479.

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

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

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

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

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

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

27 ⁴⁵ SE ROA 635-53, Ex. 6.

28 ⁴⁶ 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.⁴⁷ Kane Springs continued to be excluded as part of the LWRFS multi-basin area in Interim Order 1303.⁴⁸

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.⁴⁹ 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.⁵⁰

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,

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

1 not a contested adversarial proceeding.⁵¹ 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.⁵²

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.”⁵³

7 **F. Order 1309**

8 On June 15, 2020, the State Engineer issued Order 1309.⁵⁴ 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.

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

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

27 ⁵³ See SE ROA 285, Ex. 3.

28 ⁵⁴ 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.”⁵⁵ 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.

⁵⁵ 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,⁵⁶ and modified the portion of the Black Mountains area that is in the LWRFS. Although Order 1309 did not specifically address priorities or conflict of rights, as a result of the consolidation of the basins, the relative priority of all water rights within the seven affected basins will be reordered and the priorities will be considered in relation to all water rights holders in the consolidated basins, rather than in relation only to the other users within the original separate basins.

G. Petitioners and Their Respective Water Rights or Interests

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

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

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

8 **III.**

9 **DISCUSSION**

10 **STANDARD OF REVIEW**

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

16 **A. Questions of Law**

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

23 Any “presumption of correctness” of a decision of the State Engineer as provided by NRS
24 533.450(10), “does not extend to ‘purely legal questions,’ such as ‘the construction of a statute,’
25 as to which ‘the reviewing court may undertake independent review.’” *In re State Engineer*
26 *Ruling No. 5823*, 128 Nev. 232, 238-239, 277 P.3d 449, 453 (2012) (quoting *Town of Eureka v.*
27 *State Engineer*, 108 Nev. 163, 165, 826 P.2d 948, 949 (1992)). At no time will the State
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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 managing⁵⁷ this superbasin:

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

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

⁵⁸ SE ROA 43.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ SE ROA 44.

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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.⁶²
- NRS 534 and specifically NRS 534.120, which allows the State Engineer to make such rules, regulations and orders as are deemed essential for the welfare of an area where the groundwater basin is being depleted.”⁶³

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

1. The Prior Appropriation Doctrine

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

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

⁶² *Id.*

⁶³ *Id.*

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

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

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

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

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

5 **2. Joint Administration**

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

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

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

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

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

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

24 Indeed, if science was the sole governing principle to dictate the Nevada State Engineer’s
25 decisions, there would be a slippery slope in the changes that could be made in the boundaries of the
26 basins and how they are managed; each time scientific advancements and discoveries were made
27 regarding how sub-surface water structures are situated or interconnected, under this theory of
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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.”⁶⁶
23 Historically, surface water and ground water have been managed separately. In fact, the term
24 “conjunctive management” was only introduced in the statutes in the 2017 session of the Nevada
25 Legislature when it added subsection 1(e) to NRS 533.024. However, as discussed previously, this
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⁶⁶ SE ROA 43.

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

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

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

21 The State Engineer’s position is that the determination of conflicts and priorities has not yet
22 occurred since that is to occur in the second step of the proceeding. However, by the very nature of
23 erasing the existing basins and putting all of the water rights holders in one superbasin, he has
24

25 _____
26 ⁶⁷ This Court rejects the State Engineer’s argument that Order 1309 did not change priorities merely because it did not
27 change priority dates. His argument conflates the meaning of *priority* as defined by the date of a water right application,
28 and the common meaning of *priority*, as defined by one’s “place in line.” While it is true that the Order does not change
priority dates, this Court finds that it *does* change the relative priorities, as petitioners who previously held the most
senior rights within their singular basin may now be relegated to more junior status within the “superbasin.”

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

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

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

18 The Nevada Constitution protects against the deprivation of property without due process of
19 law. Nev. Const. art. 1, § 8(5). “Procedural due process requires that parties receive notice and an
20 opportunity to be heard.” *Eureka Cty. V. Seventh Jud. Dist. Ct.*, 134 Nev. 275, 279, 417 P.3d 1121,
21 1124 (2018)(internal quotation marks omitted). “In Nevada, water rights are ‘regarded and
22 protected as real property.’” *Id.*(quoting *Application of Filippini*, 66 Nev. 17, 21-22, 202 P.2d 535,
23

24 ⁶⁸ Although this Court refrains from analyzing whether or not 1309 is supported by substantial evidence, the Court notes
25 that part of the State Engineer’s 1309 decision of limiting use to 8,000afa or less is based on the concern of adversely
26 impacting the endangered Moapa Dace, located in the Muddy River Springs. This decision does not appear to take into
27 account more nuanced effects of how pumping in each separate basin affects the Muddy River flows, no matter how far
28 away the basin is from the river. In other words, reprioritization of each water rights holder in relation to the other (by
prioritization date in the newly created superbasin) means that their standing (and more importantly, their potential for
curtailment) is only by date. Water use in one basin may not have the same effect as another in reducing Muddy River
flows; however, these distinguishing factors are all erased by combining all of the basins together for joint
administration.

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.⁶⁹

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
24

25 ⁶⁹ “[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.^{70 71} But the
10 questions posed in Order 1303 did not relate to management of the LWRFS, such as issues of
11 conjunctive or joint administration, but rather related to factual inquiries. Instead, Order 1303
12 specifically authorized stakeholders to file reports addressing four specific areas, none of which
13 related to the management of the LWRFS.⁷²

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

19 _____
⁷⁰ See SE ROA 262-82, Ex. 2; SE ROA 284-301, Ex. 3

20 ⁷¹ The Notice included the following summary:

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

28 ⁷² SE ROA 647-48. Ex. 6.

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

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

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

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

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

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

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

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

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

⁷³ SE ROA 648, Ex. 6.

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

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

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

19 SE ROA 54, Ex. 1.

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

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

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

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

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

27 ⁷⁵ See SE ROA 48.

28 ⁷⁶ SE ROA 726-948.

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

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

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

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

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

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

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

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

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

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

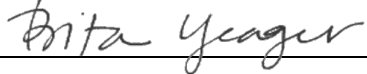
IT IS FURTHER ORDERED that the petition for review of the Nevada State Engineer’s Order No. 1309 filed by Petitioners Nevada Cogeneration Associates Nos. 1 and 2 is GRANTED.

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

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

IT IS SO ORDERED.

Dated this 19th day of April, 2022



**66B 24A E875 2549
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:

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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.

Bitia 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

Bitia Yeager

EE8 27A A594 AF7E
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

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

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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
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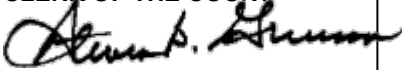
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**DISTRICT COURT
CLARK COUNTY, NEVADA**

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**

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

Dated this 16th day of May 2022.

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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.

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

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

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

Bitia Yeager

EE8 27A A594 AF7E
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 Judgment was served via the
15 court's electronic eFile system to all recipients registered for e-Service on the above entitled
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