

Case No. 84739

IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed  
Nov 08 2022 04:38 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

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

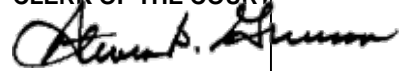
Appellants,

vs.

LINCOLN COUNTY WATER  
DISTRICT, et al.

**JOINT APPENDIX**

**VOLUME 47 OF 49**



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DISTRICT COURT  
CLARK COUNTY, NEVADA

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SOUTHERN NEVADA WATER  
AUTHORITY,

CASE NO.: A-20-816761-C

9

Plaintiff,

DEPT. XIX

10

vs.

11

NEVADA STATE ENGINEER,  
DIVISION OF WATER  
RESOURCES,

12

13

Defendant.

14

BEFORE THE HONORABLE WILLIAM D. KEPHART, DISTRICT COURT JUDGE  
TUESDAY, NOVEMBER 17, 2020

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16

**RECORDER'S TRANSCRIPT OF HEARING RE:  
ALL PENDING MOTIONS**

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APPEARANCES (SEE PAGE 2):

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RECORDED BY: CHRISTINE ERICKSON, COURT RECORDER

1 APPEARANCES VIA BLUEJEANS VIDEOCONFERENCING:

2 For the Plaintiff: PAUL G. TAGGART, ESQ.

3 For the Defendant  
4 Nevada State Engineer,  
5 Division of Water Resources: JAMES N. BOLOTIN, ESQ.  
6 Senior Deputy Attorney General  
LAENA ST. JULES, ESQ.  
Deputy Attorney General

7 Nevada Cogeneration  
8 Associates Nos. 1 and 2: RICHARD G. CAMPBELL, ESQ.

9 Center for Biological Diversity: JULIE CAVANAUGH-BILL, ESQ.

10 Coyote Springs  
11 Investment, LLC: KENT R. ROBISON, ESQ.  
BRADLEY J. HERREMA, ESQ.  
12 EMILIA K. CARGILL, ESQ.  
13 WILLIAM L. COULTHARD, ESQ.

14 Muddy Valley Irrigation  
15 Company: ROBERT A. DOTSON, ESQ.  
STEVEN E. KROLL, ESQ.

16 Republic Environmental  
17 Technologies, Inc.: SYLVIA L. HARRISON, ESQ.

18 Dry Lake Water, LLC: KATHLEEN A. WILDE, ESQ.

19 Western Elite Environmental,  
20 Inc.: THERESE A. URE, ESQ.

21 Moapa Valley Water District: GREGORY H. MORRISON, ESQ.

22 Nevada Power Company: JUSTINA A. CAVIGLIA, ESQ.

23 The Church of Jesus Christ  
24 Of Latter-day Saints: SEVERIN A. CARLSON, ESQ.

25

1 Las Vegas, Nevada; Tuesday, November 17, 2020

2  
3 [Proceeding commenced at 10:38 a.m.]

4 THE COURT: Southern Nevada Water Authority versus  
5 Nevada State Engineer, Division of Water Resources in A816761.

6 This is on today. It was a status check on the record on  
7 appeal; I see that that's been filed, and a status check on setting  
8 motions to intervene. So, can you -- everybody, I know there's a  
9 number of you. Can you all identify yourselves so I can make sure the  
10 record's clear on this?

11 MR. BOLOTIN: Good morning, Your Honor. Senior Deputy  
12 Attorney General, James Bolotin, on behalf of the State Engineer, and  
13 with me on the line I have Laena St. Jules who's also a Deputy Attorney  
14 General at my office, and we have Micheline Fairbank and Melissa  
15 Flatley from the Nevada Division of Water Resources.

16 Thank you.

17 THE COURT: Okay.

18 MR. ROBISON: Good morning, Your Honor. Kent Robison  
19 for Coyote Springs Investment, together with Emilia Cargill and Brad  
20 Herrema, all online.

21 MR. TAGGART: Good morning, Your Honor. Paul Taggart  
22 on behalf of Southern Nevada Water Authority and Las Vegas Valley  
23 Water.

24 MS. HARRISON: Good morning, Your Honor. Cynthia  
25 Harrison on behalf of Republic Environmental Technologies, Inc. and

1 Georgia-Pacific Gympsum LLC.

2 THE COURT: Okay.

3 MS. CAVANAUGH-BILL: Good morning, Your Honor. Julie  
4 Cavanaugh-Bill and Lisa Belenky on behalf of the Center for Biological  
5 Diversity.

6 THE COURT: Okay. Anyone else?

7 MR. MORRISON: Your Honor, this is Greg Morrison on  
8 behalf of Moapa Valley Water District.

9 THE COURT: Okay. Good morning.

10 Anyone else?

11 MR. CABELL: Good morning, this is Rick Campbell.

12 MS. CAVIGLIA: Good morning, Your Honor --

13 MR. CABELL: Good morning, Your Honor, this is Rick  
14 Campbell on behalf of Nevada Cogeneration Associates.

15 THE COURT: Okay.

16 MS. CAVIGLIA: Good morning, Your Honor. This is Justina  
17 Caviglia on behalf of NV Energy.

18 MS. URE: Good morning, Your Honor --

19 MR. DOTSON: Good morning, this --

20 MS. URE: -- this is Therese A. Ure on behalf of City of North  
21 Las Vegas and Western Elite and Bedroc.

22 MR. DOTSON: Good morning, Your Honor. This is Rob  
23 Dotson. I have, also on the line, is Steve King, my co-counsel, on behalf  
24 of Muddy Valley Irrigation Company.

25 MS. WILDE: Good morning, Your Honor. Kathleen Wilde on

1 behalf of Apex Holding Company and Dry Lake Water.

2 MR. CARLSON: And good morning, Your Honor. Severin  
3 Carlson on behalf of the proposed intervenor, the Church of Jesus Christ  
4 of Latter-day Saints.

5 THE COURT: Is that it?

6 All right. Good morning everybody --

7 MR. COULTHARD: Good morning, Your Honor. Bill --

8 THE COURT: Oh. Guess not.

9 MR. COULTHARD: Good morning, Your Honor. Sorry. Bill  
10 Coulthard also appearing on behalf of Coyote Springs.

11 THE COURT: Okay. All right.

12 MR. COULTHARD: Thank you, Your Honor.

13 THE COURT: Okay. So, we have it on today -- it's on my  
14 calendar, status check: record on appeal, and I see that the record was  
15 filed with the -- November the 10<sup>th</sup> or the 12<sup>th</sup>, in that area. And then we  
16 have setting motions to intervene.

17 Are the parties asking the Court today to make a ruling as to  
18 individuals asking to intervene? You're not -- you're not, are you?

19 Anyone?

20 MR. TAGGART: Your Honor, this is -- this is Paul Taggart.  
21 We were asked to blind brief the question of what scope intervenors  
22 should have in the case --

23 THE COURT: Right.

24 MR. TAGGART: -- in the event their intervention was granted.

25 THE COURT: Right.

1 MR. TAGGART: And a -- that effort was completed and a  
2 significant number of briefs were filed. I think that -- and obviously, all  
3 the parties have their positions.

4 Our position is that the Court does not need to rule on  
5 anything with respect to the scope of intervention. We do not oppose  
6 the granting of the motions to intervene that are submitted to the Court  
7 for a -- for decision. But the briefing on the intervention, I think revealed  
8 that there really is -- if any disagreement, a very slight disagreement  
9 among the parties on what the intervenors participation can be in this  
10 case. And specifically, intervenors can raise issues that are already  
11 raised by petitioners. Petitioners are jurisdictionally proper because  
12 their petitions were filed within the jurisdictional time frame. Any issues  
13 that they raise should be available for intervenors to weigh in on.

14 The only question, I think -- and I think maybe the State  
15 Engineer's brief point is that -- is if an intervenor might want to raise an  
16 issue that was not raised by any of the individual petitioners. It's our  
17 position that at this point, that's really a bit of an academic exercise. I  
18 don't know that anyone can point to an actual issue that would be raised  
19 that would be -- that would fall into that category. It seemed to me the  
20 most practical approach would be to grant the motion to intervene. And  
21 when briefing occurs, at that time, if we do see an issue raised by an  
22 intervenor that a party believes is improper, they can file a motion to  
23 strike or the appropriate motion at that time. But given that, I don't think  
24 we can really point to any specific issue like that. I mean, essentially  
25 we've raised all the issues. All the petitions have raised so many issues

1 that are available for consideration by the Court that it's hard to imagine  
2 what new issue could be raised by an intervenor that might be  
3 considered outside the scope of their rights. And therefore, we just think  
4 it's proper to grant the motion to intervene and then leave it up to the,  
5 you know, the parties when the -- when the actual briefs are filed.

6 And just to help speed this long along, I'll just weigh in on --  
7 you're also -- you're also provided with a briefing schedule by CSI.

8 THE COURT: Mm-hmm.

9 MR. TAGGART: We just want to remind you that there is a  
10 pending case in the Supreme Court on the change of venue. That order  
11 that was granted in Lincoln County for a 8<sup>th</sup> petition judicial review to be  
12 changed to venue in 8<sup>th</sup> JD from 7<sup>th</sup> JD, that's in front of the Supreme  
13 Court.

14 The clerk of the 7<sup>th</sup> JD has provided that record to the  
15 Supreme Court. There was a delay in that occurring, but the Supreme  
16 Court now has that matter in front of it and everything it needs to decide  
17 on that is in its files. And we suggest that we delay -- we set this out for  
18 90 days and have another status conference until this -- and hopefully  
19 the Supreme Court in that 90 days will tell us whether Lincoln County  
20 belongs in this case or not, and then we can establish a briefing  
21 schedule at that time.

22 So, I think what I -- what I'm suggesting is that the Court really  
23 just needs to grant the motion to intervene today and then reset this for  
24 status conference in 90 days for us to consider the briefing schedule  
25 issues and anything else at that time.



1 THE COURT: Okay.

2 MR. TAGGART: Thank you, Your Honor.

3 MR. ROBISON: Your Honor, this is Kent Robison for Coyote  
4 Springs. Good morning, again.

5 Before the Court -- our motions to intervene by, I think, seven  
6 parties, though everybody briefed it, I don't see any opposition  
7 expressed by any party to the motions to intervene --

8 THE COURT: Okay.

9 MR. ROBISON: -- and therefore, there's probably no reason  
10 to delay entry of order allowing the intervenor to intervene.

11 THE COURT: Okay.

12 MR. ROBISON: Then the next issue you asked us to brief the  
13 scope of what the intervenor's role would be in the consolidated actions.  
14 And I think there's pretty much consensus on that as well. I called  
15 counsel for each of the moving parties to see what their take was and  
16 that's why we submitted a schedule for briefing.

17 The petitioners are also intervenors in each other's case, so  
18 we have a pretty complicated matrix of intervention. All the petitioners  
19 have intervened in each other's cases and then we have the intervenors  
20 coming into consolidated actions.

21 So our proposal is that we get busy briefing. Give us a 90 day  
22 for the petitioner to file opening briefs and then allow the same amount  
23 of time for the respondents, State Engineer, to file its responsive brief  
24 and then 30 days after that, the intervenors can file their brief.

25 And they -- their primary interest is obviously to protect their

1 sake with respect to Engineer Order 1309 and then reply briefs to be  
2 filed after that.

3 THE COURT: Okay.

4 MR. ROBISON: But the scope of the intervention, Your  
5 Honor, the only difference is some of the intervenors -- and they can  
6 speak for themselves, want to be treated as real parties in interest with  
7 all the rights of a party. There is authority to support that position and  
8 others have said that they can only take the role of a respondent. But  
9 even as respondent, they're certainly entitled to protect their interest in  
10 the Engineer's order.

11 So, we would ask Your Honor that the Court not stay. The  
12 State Engineer and notice has provided, as we have, the Lincoln County  
13 parties Vidler Water and Lincoln County Water District with a record on  
14 appeal. And the Nevada Supreme Court has waived briefing on the  
15 venue issue which tells us that this is going to be an expedited appeal.

16 If they lose their appeal, I don't think anybody involved in this  
17 hearing denies or disputes the fact that Vidler and Lincoln County Water  
18 District will be consolidated in these consolidated actions in Clark  
19 County. They have the record; they can start their briefing. We can't  
20 order them to do so, but if they're consolidated with us, they should  
21 present some real serious strong issues as to why they should not  
22 adhere to the briefing schedule that we composed and we hope that the  
23 Court adopts that.

24 THE COURT: Here's the issue that I have --

25 MR. ROBISON: Thank you.

1 THE COURT: Here's the issue that I have with that, Mr.  
2 Robison. The concern I have is that if I order the briefing schedule now  
3 to go statutorily and get started on it, the problem is is that if there is a  
4 case that is -- if the other case, Supreme Court decides that it's going to  
5 be consolidated with this case, then that's going to cause a, I think, a  
6 request for some type of additional relief to allow those parties to enter  
7 into their challenges and their briefing on this as well.

8 And so, my thoughts are consistent with Mr. Taggart that I --  
9 my thoughts were before I came in is that I was going to grant the  
10 motions to intervene, and I'm going to grant them with full understanding  
11 that the individuals intervening can and will be able to argue similar to a  
12 party in interest.

13 I -- when I first looked at this, I thought that it'd be simple for  
14 them to be able to just communicate with other parties, and say, hey, I  
15 want you to put in my objections or my concerns as well, but I'm not of  
16 that opinion now. I think that they should have the opportunity to  
17 intervene fully as if they are interested parties.

18 I am going to -- I mean, I haven't heard from anyone else. I  
19 will if they think that they have some objection to this, but my thoughts  
20 were to continue this -- status check for 90 days. Give the parties an  
21 opportunity to see where we're at with whether or not there's going to be  
22 a -- the case consolidated. We can start anew as to everybody's  
23 thoughts -- but, I mean, you guys have kind of jump on this where you  
24 can start doing your paperwork now. But I think, I know statutorily,  
25 there's these dates but I think I want to continue this out in 90 days.

1 Chances are, guys, because of the new election, you're going  
2 to have a different judge anyhow. I'm sorry about that, but you're going  
3 to have to reeducate somebody new, and I apologize to you for that.

4 And I think you guys have worked -- it's extremely hard. This  
5 is going to be a real interesting case and I'm sorry that I'm not going to  
6 be able to be involved in it any further, but that's what I'm going to do.

7 Is there anyone that wants to make a record as to why they  
8 think that I shouldn't be doing this other than what Mr. Robison just put  
9 on the record?

10 MR. ROBISON: Your Honor, this is Kent Robison. I'm going  
11 to just ask one question. In the event the Supreme Court does come  
12 down with an order affirming the District Court Order change in venue,  
13 can we then leave the door open to apply, at that time, for a briefing  
14 schedule?

15 THE COURT: You can. Yes. Absolutely, Mr. Robison. But I  
16 just --

17 MR. ROBISON: Thank you, Your Honor.

18 THE COURT: -- right now, I need to put this back on just to  
19 keep it going. I don't want anything to fall through the cracks, but -- so,  
20 anyone else? Does anyone else -- there's like 20 of you. Does anyone  
21 else have anything to say?

22 MR. BOLOTIN: Your Honor, this is James Bolotin on behalf of  
23 the State Engineer. I agree with the plan. I agree with pushing things  
24 out to wait to see if the Lincoln County, Vidler case --

25 THE COURT: Okay.

1 MR. BOLOTIN: -- gets affirmed and sent down to us. And I  
2 would just -- I also wanted to put an objection on the record to Coyote  
3 Springs briefing schedule as it is sitting here sufficient that it should  
4 operate when it does happen like a normal appeal and intervenors  
5 should file briefs at the time as the State Engineer as a respondent and  
6 not have a --

7 THE COURT: Right.

8 MR. BOLOTIN: -- separate window to respond to the State  
9 Engineers brief because the State Engineer would have no ability to  
10 respond to anything that the intervenors say.

11 THE COURT: I got you. Okay. Anyone else?

12 All right. So here's the date. I am going to grant the motion at  
13 this point for --for the intervenors. I'm going to give you full realm of the  
14 intervention so you can -- you'll be treated as a party for purposes of this  
15 hearing, and I'm going to set it out 90 days. Here's the status check.

16 THE COURT CLERK: It's going to be February 23<sup>rd</sup> at 9:00  
17 a.m.

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THE COURT: Thanks, guys. It's been interesting. You guys have a good -- good rest of the week, okay?

UNIDENTIFIED SPEAKER: Thank you, Your Honor.

[Proceeding concluded at 10:41 a.m.]

\*\*\*\*\*

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

  
\_\_\_\_\_  
Brittany Amoroso  
Court Recorder/Transcriber

1 **ORDR**

2 **DISTRICT COURT**

3 **CLARK COUNTY, NEVADA**

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

8 **Petitioner,**

9 **vs.**

10 **TIM WILSON, P.E., Nevada State**  
11 **Engineer, ) DIVISION OF WATER**  
12 **RESOURCES, ) DEPARTMENT OF**  
13 **CONSERVATION NATURAL**  
14 **RESOURCES,**

15 **Respondent.**

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

**Consolidated with Cases:**

**A-20-817765-P**

**A-20-818015-P**

**A-20-817977-P**

**A-20-818069-P**

**A-20-817840-P**

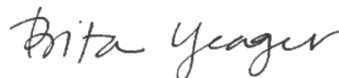
**A-20-817876-P**

16 **ORDER GRANTING MOTIONS TO INTERVENE**

17 This case coming on for hearing on November 17, 2020 on Motions to Intervene before the  
18 Honorable William D. Kephart. The Court being fully advised in the premises, orders as follows:

19 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that the Motions to Intervene is  
20 GRANTED.

Dated this 26th day of February, 2021



21  
22 **6D8 3D7 8641 92B1**  
23 **Bita Yeager**  
24 **District Court Judge**

25  
26  
27 **BITA YEAGER**  
28 **DISTRICT JUDGE**  
**DEPARTMENT 1**

1 CSERV

2 DISTRICT COURT  
3 CLARK COUNTY, NEVADA

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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 Order Granting Motion was served via the court's electronic eFile  
15 system to all recipients registered for e-Service on the above entitled case as listed below:

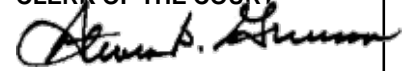
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18 WATER DISTRICT and VIDLER WATER  
19 COMPANY, INC.

20 **DISTRICT COURT**  
21 **CLARK COUNTY, NEVADA**

22 LAS VEGAS VALLEY WATER DISTRICT,  
23 and SOUTHERN NEVADA WATER  
24 AUTHORITY, et al.,

Case No. A-20-816761-C

Dept. No. 1

25 Petitioners,

Consolidated with Cases:

26 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

27 ADAM SULLIVAN, P.E., Acting  
28 Nevada State Engineer, et al.,

Respondent.

**NOTICE OF ENTRY OF LINCOLN COUNTY WATER DISTRICT, VIDLER WATER  
COMPANY, INC. AND CENTER FOR BIOLOGICAL DIVERSITY  
STIPULATION AND ORDER REGARDING INTERVENTION  
AND BRIEFING SCHEDULE**

**YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE** that the *Lincoln County  
Water District, Vidler Water Company, Inc. and Center For Biological Diversity Stipulation and*

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1 **Order Regarding Intervention and Briefing Schedule** was entered on the 24<sup>th</sup> day of June, 2021, a  
2 copy of which is attached hereto.

3 DATED this 25<sup>th</sup> day of June, 2021.

4 LINCOLN COUNTY DISTRICT ATTORNEY  
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24 *Attorneys for Vidler Water Company, Inc.*

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1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I hereby certify that I am an employee of ALLISON MacKENZIE,  
3 LTD., and that I served, or caused to be served, a true and correct copy of the foregoing document to  
be served on all parties to this action by:

4 \_\_\_\_\_ placing a true copy thereof in a sealed, postage prepaid, envelope in the United States  
mail at Carson City, Nevada, addressed to:

5   ✓   emailing an attached PDF version of the document to the email addresses below and/or  
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[gmorrison@parsonsbehle.com](mailto:gmorrison@parsonsbehle.com)

Dated this 25<sup>th</sup> day of June, 2021.

/s/ Nancy Fontenot  
NANCY FONTENOT

4848-3037-0544, v. 1

*Alison Mackenzie*  
CLERK OF THE COURT

1 **SAO**

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3 Nevada State Bar No. 9020  
4 **LINCOLN COUNTY DISTRICT ATTORNEY**  
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9 Email: [dfrehner@lincolncountynv.gov](mailto:dfrehner@lincolncountynv.gov)

6 KAREN A. PETERSON, ESQ.  
7 Nevada State Bar No. 0366  
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12 Email: [kpeterson@allisonmackenzie.com](mailto:kpeterson@allisonmackenzie.com)

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

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

16 LINCOLN COUNTY WATER DISTRICT, a  
17 political subdivision of the State of Nevada,  
18 and VIDLER WATER COMPANY, INC., a  
19 Nevada Corporation,

19 Petitioners,

20 vs.

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

24 Respondent.

Case No. A-21-833572-J

Dept. No. 1

**LINCOLN COUNTY WATER  
DISTRICT, VIDLER WATER  
COMPANY, INC. AND CENTER  
FOR BIOLOGICAL DIVERSITY  
STIPULATION AND ORDER  
REGARDING INTERVENTION  
AND BRIEFING SCHEDULE**

25 ///

26 ///

27 ///

28 ///

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1 CENTER FOR BIOLOGICAL DIVERSITY,

Case No. A-20-817876-P

2 Petitioner,

Dept. No. 1

3 vs.

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

8 Respondent.

9 \_\_\_\_\_/

10 On June 15, 2020, Tim Wilson, P.E., Nevada State Engineer<sup>1</sup>, on behalf of the Division of  
11 Water Resources, Department of Conservation and Natural Resources, issued Order 1309. Lincoln  
12 County Water District (“LCWD”) and Vidler Water Company, Inc. (“Vidler”) timely filed their  
13 Petition for Judicial Review pursuant to NRS 533.450 challenging State Engineer Order 1309 in the  
14 Seventh Judicial District Court, In and For the County of Lincoln, State of Nevada, identified as Case  
15 No. CV-0702520. LCWD and Vidler’s Petition for Judicial Review was transferred to the Clark  
16 County District Court for adjudication in the above captioned matter, Case No. A-21-833572-J.

17 Pursuant to NRS 533.450, Order 1309 was also timely challenged by the Center for Biological  
18 Diversity in a Petition for Judicial Review filed with the District Court of Clark County, Nevada, Case  
19 No. A-20-817876-P.

20 LCWD and Vidler’s action, Case No. A-21-833572-J has been consolidated with Case No. A-  
21 20-816761-C and related actions, including A-20-817876-P.

22 LCWD, Vidler and the Center for Biological Diversity stipulate and agree as follows:

23 **Stipulation to Intervention.**

24 1. LCWD and Vidler shall be granted the right to intervene in Case No. A-20-817876-P,  
25 and the Center for Biological Diversity shall be granted the right to intervene in Case No. A-21-  
26 833572-J.

27 \_\_\_\_\_

28 <sup>1</sup> Tim Wilson, P.E. retired as the Nevada State Engineer effective November 30, 2020. Adam Sullivan, P.E. is the Acting Nevada State Engineer and has been automatically substituted pursuant to NRCP 25(d).



1           2.       As an Intervenor in each respective case, LCWD, Vidler and the Center for Biological  
2 Diversity may file an answering brief in each other’s respective case. Leave from the Court will be  
3 required, as set forth below, if LCWD, Vidler and/or the Center for Biological Diversity seek to file a  
4 reply brief as an Intervenor or sur-reply brief in response to an Intervenor’s reply brief.

5                   **Briefing Schedule.**

6           3.       Petitioners’ opening briefs shall be due **August 27, 2021.**

7           4.       The answering briefs of Petitioners/Intervenors shall be due 90 days after the date the  
8 opening briefs are due, or **November 24, 2021.**

9           5.       Petitioners’ reply briefs shall be due 45 days after the date answering briefs are due, or  
10 **January 7, 2022.**

11           6.       As Intervenors, LCWD, Vidler or the Center for Biological Diversity, may only file  
12 reply briefs in each other’s cases with leave from the Court based on a showing that their unique  
13 interests are impacted by arguments made in the other’s answering briefs. Said Intervenor reply briefs  
14 shall be due 45 days after the date the answering briefs are filed, or **January 7, 2022.**

15           7.       Petitioners in each action may only file sur-reply briefs with leave from the Court based  
16 on a showing that their unique interests are impacted by arguments made in an Intervenor’s reply brief  
17 filed with leave of Court.

18                   The parties agree this Stipulation and Order shall be filed in consolidated Case No. A-20-  
19 817876-P and Case No. A-21-833572-J and the parties request the Court issue an order approving this  
20 Stipulation as appropriate.

21           **Affirmation:** The undersigned do hereby affirm that the preceding document and/or  
22 attachments do not contain the social security number of any person.

23 ///

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25 ///

26 ///

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28 ///

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LINCOLN COUNTY DISTRICT ATTORNEY  
181 North Main Street, Suite 205  
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Dated this 23<sup>rd</sup> day of June, 2021.

/s/ Dylan V. Frehner  
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*Attorneys for Lincoln County Water District*

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Dated this 23<sup>rd</sup> day of June, 2021.

/s/ Karen A. Peterson  
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*Attorneys for Vidler Water Company, Inc.*

CENTER FOR BIOLOGICAL DIVERSITY  
P.O. Box 6205  
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Dated this 23<sup>rd</sup> day of June, 2021.

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**ORDER**

Based on the foregoing Stipulation of the parties and good cause appearing therefore,

**IT IS SO ORDERED.**

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2021.  
**Dated this 24th day of June, 2021**

*Bitia Yeager*

\_\_\_\_\_  
DISTRICT JUDGE

**F28 54E AE9E CB7D  
Bitia Yeager  
District Court Judge**

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1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I hereby certify that I am an employee of ALLISON MacKENZIE,  
3 LTD., and that I served, or caused to be served, a true and correct copy of the foregoing document to  
be served on all parties to this action by:

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4820-9500-1326, v. 1

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**CSERV**

DISTRICT COURT  
CLARK COUNTY, NEVADA

Lincoln County Water District,  
Petitioner(s)

vs.

Tim Wilson, Respondent(s)

CASE NO: A-21-833572-J

DEPT. NO. Department 1

**AUTOMATED CERTIFICATE OF SERVICE**

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

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Karen Peterson	kpeterson@allisonmackenzie.com

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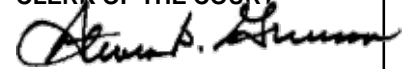
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18 WATER DISTRICT and VIDLER WATER  
19 COMPANY, INC.

20 **DISTRICT COURT**  
21 **CLARK COUNTY, NEVADA**

22 LAS VEGAS VALLEY WATER DISTRICT,  
23 and SOUTHERN NEVADA WATER  
24 AUTHORITY, et al.,

Case No. A-20-816761-C

Dept. No. 1

25 Petitioners,

Consolidated with Cases:

26 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

27 ADAM SULLIVAN, P.E., Acting  
28 Nevada State Engineer, et al.,

Respondent.

29 **NOTICE OF ENTRY OF LINCOLN COUNTY WATER DISTRICT, VIDLER WATER**  
30 **COMPANY, INC. AND CITY OF NORTH LAS VEGAS, WESTERN ELITE**  
31 **ENVIRONMENTAL, INC. AND BEDROC LIMITED, LLC**  
32 **STIPULATION AND ORDER REGARDING INTERVENTION**  
33 **AND BRIEFING SCHEDULE**

34 **YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE** that the *Lincoln County*  
35 *Water District, Vidler Water Company, Inc. and City of North Las Vegas, Western Elite*

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1 *Environmental, Inc. and Bedroc Limited, LLC Stipulation and Order Regarding Intervention and*  
2 *Briefing Schedule* was entered on the 24<sup>th</sup> day of June, 2021, a copy of which is attached hereto.

3 DATED this 25<sup>th</sup> day of June, 2021.

4 LINCOLN COUNTY DISTRICT ATTORNEY  
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24 *Attorneys for Vidler Water Company, Inc.*

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1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I hereby certify that I am an employee of ALLISON MacKENZIE,  
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be served on all parties to this action by:

4 \_\_\_\_\_ placing a true copy thereof in a sealed, postage prepaid, envelope in the United States  
mail at Carson City, Nevada, addressed to:

5   ✓   emailing an attached PDF version of the document to the email addresses below and/or  
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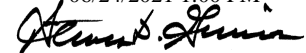
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Dated this 25<sup>th</sup> day of June, 2021.

*/s/ Nancy Fontenot*  
\_\_\_\_\_  
NANCY FONTENOT

4812-2556-2352, v. 1



CLERK OF THE COURT

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2 DYLAN V. FREHNER, ESQ.  
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11 Attorneys for Petitioners, LINCOLN COUNTY  
12 WATER DISTRICT and VIDLER WATER  
13 COMPANY, INC.

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

16 LINCOLN COUNTY WATER DISTRICT, a  
17 political subdivision of the State of Nevada,  
18 and VIDLER WATER COMPANY, INC., a  
19 Nevada Corporation,

19 Petitioners,

20 vs.

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

24 Respondent.

Case No. A-21-833572-J

Dept. No. 1

**LINCOLN COUNTY WATER  
DISTRICT, VIDLER WATER  
COMPANY, INC. AND CITY OF  
NORTH LAS VEGAS, WESTERN  
ELITE ENVIRONMENTAL, INC.  
AND BEDROC LIMITED, LLC  
STIPULATION AND ORDER  
REGARDING INTERVENTION  
AND BRIEFING SCHEDULE**

25 On June 15, 2020, Tim Wilson, P.E., Nevada State Engineer<sup>1</sup>, on behalf of the Division of  
26 Water Resources, Department of Conservation and Natural Resources, issued Order 1309. Petitioners,  
27  
28

<sup>1</sup> Tim Wilson, P.E. retired as the Nevada State Engineer effective November 30, 2020. Adam Sullivan, P.E. is the Acting Nevada State Engineer and has been automatically substituted pursuant to NRCP 25(d).

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1 Lincoln County Water District (“LCWD”) and Vidler Water Company, Inc. (“Vidler”) (collectively  
2 “Petitioners”), timely filed their Petition for Judicial Review pursuant to NRS 533.450 challenging  
3 State Engineer Order 1309 in the Seventh Judicial District Court, In and For the County of Lincoln,  
4 State of Nevada, identified as Case No. CV-0702520. LCWD and Vidler’s Petition for Judicial  
5 Review was transferred to the Clark County District Court for adjudication in the above captioned  
6 matter, Case No. A-21-833572-J.

7 The City of North Las Vegas, Western Elite Environmental, Inc. and Bedroc Limited, LLC  
8 desire to intervene in LCWD and Vidler’s action, Case No. A-21-833572-J.

9 LCWD, Vidler and the City of North Las Vegas, Western Elite Environmental, Inc. and Bedroc  
10 Limited, LLC stipulate and agree as follows:

11 **Stipulation to Intervention.**

12 1. The City of North Las Vegas, Western Elite Environmental, Inc. and Bedroc Limited,  
13 LLC shall be granted the right to intervene in Case No. A-21-833572-J.

14 2. As an Intervenor in LCWD/Vidler’s case, the City of North Las Vegas, Western Elite  
15 Environmental, Inc. and Bedroc Limited, LLC may file an answering brief in LCWD/Vidler’s case.  
16 Leave from the Court will be required, as set forth below, if LCWD, Vidler and/or the City of North  
17 Las Vegas, Western Elite Environmental, Inc. and Bedroc Limited, LLC seek to file a reply brief as  
18 an Intervenor or sur-reply brief in response to an Intervenor’s reply brief.

19 **Briefing Schedule.**

20 3. Petitioners’ opening briefs shall be due **August 27, 2021.**

21 4. The answering briefs of Petitioners/Intervenors shall be due 90 days after the date the  
22 opening briefs are due, or **November 24, 2021.**

23 5. Petitioners’ reply briefs shall be due 45 days after the date answering briefs are due, or  
24 **January 7, 2022.**

25 6. As Intervenors, the City of North Las Vegas, Western Elite Environmental, Inc. and  
26 Bedroc Limited, LLC may only file a reply brief in LCWD/Vidler’s case with leave from the Court  
27 based on a showing that their unique interests are impacted by arguments made in another’s answering  
28

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1 brief. Said Intervenor reply briefs shall be due 45 days after the date the answering briefs are filed, or  
2 **January 7, 2022.**

3 7. Petitioners may only file a sur-reply brief with leave from the Court based on a showing  
4 that their unique interests are impacted by arguments made in an Intervenor's reply brief filed with  
5 leave of Court.

6 The parties agree this Stipulation and Order shall be filed in consolidated Case No. A-20-  
7 816761-C and Case No. A-21-833572-J and the parties request the Court issue an order approving this  
8 Stipulation as appropriate.

9 **Affirmation:** The undersigned do hereby affirm that the preceding document and/or  
10 attachments do not contain the social security number of any person.

LINCOLN COUNTY DISTRICT ATTORNEY  
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11 Dated this 23<sup>rd</sup> day of June, 2021.

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24 Dated this 23<sup>rd</sup> day of June, 2021.

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Dated this 22<sup>nd</sup> day of June, 2021.

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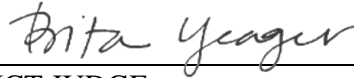
*Attorneys for City of North Las Vegas, Western Elite  
Environmental, Inc. and Bedroc Limited, LLC*

**ORDER**

Based on the foregoing Stipulation of the parties and good cause appearing therefore,

**IT IS SO ORDERED.**

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2021.  
~~\_\_\_\_\_~~ **Dated this 24th day of June, 2021**



\_\_\_\_\_  
DISTRICT JUDGE

**3D9 9BD 9CEF 6106  
Bita Yeager  
District Court Judge**

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1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I hereby certify that I am an employee of ALLISON MacKENZIE,  
3 LTD., and that I served, or caused to be served, a true and correct copy of the foregoing document to  
be served on all parties to this action by:

4 \_\_\_\_\_ placing a true copy thereof in a sealed, postage prepaid, envelope in the United States  
5 mail at Carson City, Nevada, addressed to:

6   ✓   emailing an attached PDF version of the document to the email addresses below and/or  
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Dated this 23<sup>rd</sup> day of June, 2021.

*/s/ Nancy Fontenot*  
NANCY FONTENOT

4817-9120-1519, v. 1

1 **CSERV**

2  
3 DISTRICT COURT  
CLARK COUNTY, NEVADA

4  
5  
6 Lincoln County Water District,  
Petitioner(s)

CASE NO: A-21-833572-J

7  
8 vs.

DEPT. NO. Department 1

9 Tim Wilson, Respondent(s)

10  
11 **AUTOMATED CERTIFICATE OF SERVICE**

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

14 Service Date: 6/24/2021

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16 Lara Taylor	ljtaylor@swlaw.com
17 Docket Docket	docket_las@swlaw.com
18 Karen Peterson	kpeterson@allisonmackenzie.com

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20 If indicated below, a copy of the above mentioned filings were also served by mail  
21 via United States Postal Service, postage prepaid, to the parties listed below at their last  
22 known addresses on 6/25/2021

23 Christian Balducci	Marquis Aurbach Coffing Attn: Christian Balducci 10001 Park Run Drive Las Vegas, NV, 89145
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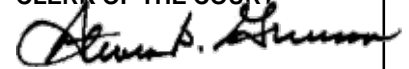
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James Bolotin

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19 COMPANY, INC.

20 **DISTRICT COURT**  
21 **CLARK COUNTY, NEVADA**

22 LAS VEGAS VALLEY WATER DISTRICT,  
23 and SOUTHERN NEVADA WATER  
24 AUTHORITY, et al.,

Case No. A-20-816761-C

Dept. No. 1

25 Petitioners,

Consolidated with Cases:

26 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

27 ADAM SULLIVAN, P.E., Acting  
28 Nevada State Engineer, et al.,

Respondent.

29 **NOTICE OF ENTRY OF LINCOLN COUNTY WATER DISTRICT, VIDLER WATER**  
30 **COMPANY, INC. AND GEORGIA-PACIFIC GYPSUM LLC AND REPUBLIC**  
31 **ENVIRONMENTAL TECHNOLOGIES, INC.**  
32 **STIPULATION AND ORDER REGARDING INTERVENTION**  
33 **AND BRIEFING SCHEDULE**

34 **YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE** that the *Lincoln County*  
35 *Water District, Vidler Water Company, Inc. and Georgia-Pacific Gypsum LLC and Republic*

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1 *Environmental Technologies, Inc. Stipulation and Order Regarding Intervention and Briefing*  
2 *Schedule* was entered on the 24<sup>th</sup> day of June, 2021, a copy of which is attached hereto.

3 DATED this 25<sup>th</sup> day of June, 2021.

4 LINCOLN COUNTY DISTRICT ATTORNEY  
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1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I hereby certify that I am an employee of ALLISON MacKENZIE,  
3 LTD., and that I served, or caused to be served, a true and correct copy of the foregoing document to  
be served on all parties to this action by:

4 \_\_\_\_\_ placing a true copy thereof in a sealed, postage prepaid, envelope in the United States  
5 mail at Carson City, Nevada, addressed to:

6   ✓   emailing an attached PDF version of the document to the email addresses below and/or  
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Dated this 25<sup>th</sup> day of June, 2021.

/s/ Nancy Fontenot  
NANCY FONTENOT

4845-4817-2528, v. 1

*Alison Mackenzie*  
CLERK OF THE COURT

1 **SAO**

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

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

16 LINCOLN COUNTY WATER DISTRICT, a  
17 political subdivision of the State of Nevada,  
18 and VIDLER WATER COMPANY, INC., a  
19 Nevada Corporation,

19 Petitioners,

20 vs.

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

24 Respondent.

Case No. A-21-833572-J

Dept. No. 1

**LINCOLN COUNTY WATER  
DISTRICT, VIDLER WATER  
COMPANY, INC. AND GEORGIA-  
PACIFIC GYPSUM LLC AND  
REPUBLIC ENVIRONMENTAL  
TECHNOLOGIES, INC.  
STIPULATION AND ORDER  
REGARDING INTERVENTION  
AND BRIEFING SCHEDULE**

25 ///

26 ///

27 ///

28 ///

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1 GEORGIA-PACIFIC GYPSUM LLC,  
2 and REPUBLIC ENVIRONMENTAL  
3 TECHNOLOGIES, INC.,

Case No. A-20-818069-P

Dept. No. 1

4  
5 Petitioners,

6 vs.

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

11 Respondent.  
12  
13 \_\_\_\_\_/

14 On June 15, 2020, Tim Wilson, P.E., Nevada State Engineer<sup>1</sup>, on behalf of the Division of  
15 Water Resources, Department of Conservation and Natural Resources, issued Order 1309. Petitioners,  
16 Lincoln County Water District (“LCWD”) and Vidler Water Company, Inc. (“Vidler”) timely filed  
17 their Petition for Judicial Review pursuant to NRS 533.450 challenging State Engineer Order 1309 in  
18 the Seventh Judicial District Court, In and For the County of Lincoln, State of Nevada, identified as  
19 Case No. CV-0702520. LCWD and Vidler’s Petition for Judicial Review was transferred to the Clark  
20 County District Court for adjudication in the above captioned matter, Case No. A-21-833572-J.

21 Pursuant to NRS 533.450, Order 1309 was also timely challenged by Petitioners, Georgia-  
22 Pacific Gypsum LLC and Republic Environmental Technologies, Inc. in a Petition for Judicial Review  
23 filed with the District Court of Clark County, Nevada, Case No. A-20-818069-P.

24 LCWD and Vidler’s action, Case No. A-21-833572-J has been consolidated with Case No. A-  
25 20-816761-C and related actions, including A-20-818069-P.

26 LCWD, Vidler and Georgia-Pacific Gypsum LLC and Republic Environmental Technologies,  
27 Inc. stipulate and agree as follows:

28 ///

///

///

<sup>1</sup> Tim Wilson, P.E. retired as the Nevada State Engineer effective November 30, 2020. Adam Sullivan, P.E. is the Acting Nevada State Engineer and has been automatically substituted pursuant to NRCP 25(d).

1                   **Stipulation to Intervention.**

2                   1.       LCWD and Vidler shall be granted the right to intervene in Case No. A-20-818069-P,  
3 and Georgia-Pacific Gypsum LLC and Republic Environmental Technologies, Inc. shall be granted  
4 the right to intervene in Case No. A-21-833572-J.

5                   2.       As an Intervenor in each respective case, LCWD, Vidler and Georgia-Pacific Gypsum  
6 LLC and Republic Environmental Technologies, Inc. may file an answering brief in each other's  
7 respective case. Leave from the Court will be required, as set forth below, if LCWD, Vidler and/or  
8 Georgia-Pacific Gypsum LLC and Republic Environmental Technologies, Inc. seek to file a reply  
9 brief as an Intervenor or sur-reply brief in response to an Intervenor's reply brief.

10                   **Briefing Schedule.**

11                   3.       Petitioners' opening briefs shall be due **August 27, 2021.**

12                   4.       The answering briefs of Petitioners/Intervenors shall be due 90 days after the date the  
13 opening briefs are due, or **November 24, 2021.**

14                   5.       Petitioners' reply briefs shall be due 45 days after the date answering briefs are due, or  
15 **January 7, 2022.**

16                   6.       As Intervenors, LCWD, Vidler or Georgia-Pacific Gypsum LLC and Republic  
17 Environmental Technologies, Inc., may only file reply briefs in each other's cases with leave from the  
18 Court based on a showing that their unique interests are impacted by arguments made in the other's  
19 answering briefs. Said Intervenor reply briefs shall be due 45 days after the date the answering briefs  
20 are filed, or **January 7, 2022.**

21                   7.       Petitioners in each action may only file sur-reply briefs with leave from the Court based  
22 on a showing that their unique interests are impacted by arguments made in an Intervenor's reply brief  
23 filed with leave of Court.

24                   The parties agree this Stipulation and Order shall be filed in consolidated Case No. A-20-  
25 818069-P and Case No. A-21-833572-J and the parties request the Court issue an order approving this  
26 Stipulation as appropriate.

27 ///

28 ///

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1 **Affirmation:** The undersigned do hereby affirm that the preceding document and/or  
2 attachments do not contain the social security number of any person.

3 LINCOLN COUNTY DISTRICT ATTORNEY  
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6 Pioche, Nevada 89043

7 Dated this 23<sup>rd</sup> day of June, 2021.

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21 Dated this 23<sup>rd</sup> day of June, 2021.

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29 Dated this 23<sup>rd</sup> day of June, 2021.

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38 and Republic Environmental Technologies, Inc.*

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**ORDER**

Based on the foregoing Stipulation of the parties and good cause appearing therefore,

**IT IS SO ORDERED.**

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2021.  
**Dated this 24th day of June, 2021**

*Bitia Yeager*

\_\_\_\_\_  
DISTRICT JUDGE

**19B 559 575A 299F  
Bitia Yeager  
District Court Judge**

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1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I hereby certify that I am an employee of ALLISON MacKENZIE,  
3 LTD., and that I served, or caused to be served, a true and correct copy of the foregoing document to  
be served on all parties to this action by:

4 \_\_\_\_\_ placing a true copy thereof in a sealed, postage prepaid, envelope in the United States  
5 mail at Carson City, Nevada, addressed to:

6   ✓   emailing an attached PDF version of the document to the email addresses below and/or  
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Dated this 23<sup>rd</sup> day of June, 2021.

/s/ Nancy Fontenot  
NANCY FONTENOT

4848-8102-8079, v. 1

1  
2 **CSERV**

3 DISTRICT COURT  
4 CLARK COUNTY, NEVADA

5  
6 Lincoln County Water District,  
7 Petitioner(s)

CASE NO: A-21-833572-J

8 vs.

DEPT. NO. Department 1

9 Tim Wilson, Respondent(s)

10  
11 **AUTOMATED CERTIFICATE OF SERVICE**

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

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18 Docket Docket docket\_las@swlaw.com

19 Karen Peterson kpeterson@allisonmackenzie.com

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21 If indicated below, a copy of the above mentioned filings were also served by mail  
22 via United States Postal Service, postage prepaid, to the parties listed below at their last  
23 known addresses on 6/25/2021

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27 Las Vegas, NV, 89145  
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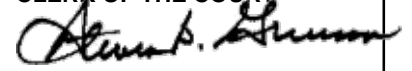
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19 COMPANY, INC.

20 **DISTRICT COURT**  
21 **CLARK COUNTY, NEVADA**

22 LAS VEGAS VALLEY WATER DISTRICT,  
23 and SOUTHERN NEVADA WATER  
24 AUTHORITY, et al.,

Case No. A-20-816761-C

Dept. No. 1

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

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

Respondent.

**NOTICE OF ENTRY OF LINCOLN COUNTY WATER DISTRICT, VIDLER WATER  
COMPANY, INC. AND THE CHURCH OF LATTER-DAY SAINTS  
STIPULATION AND ORDER REGARDING INTERVENTION  
AND BRIEFING SCHEDULE**

**YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE** that the *Lincoln County  
Water District, Vidler Water Company, Inc. and The Church of Latter-day Saints Stipulation and*

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1 **Order Regarding Intervention and Briefing Schedule** was entered on the 24<sup>th</sup> day of June, 2021, a  
2 copy of which is attached hereto.

3 DATED this 25<sup>th</sup> day of June, 2021.

4 LINCOLN COUNTY DISTRICT ATTORNEY  
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1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I hereby certify that I am an employee of ALLISON MacKENZIE,  
3 LTD., and that I served, or caused to be served, a true and correct copy of the foregoing document to  
be served on all parties to this action by:

4 \_\_\_\_\_ placing a true copy thereof in a sealed, postage prepaid, envelope in the United States  
mail at Carson City, Nevada, addressed to:

5   ✓   emailing an attached PDF version of the document to the email addresses below and/or  
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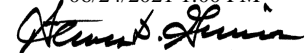
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GREGORY H. MORRISON  
[gmorrison@parsonsbehle.com](mailto:gmorrison@parsonsbehle.com)

Dated this 25<sup>th</sup> day of June, 2021.

*/s/ Nancy Fontenot*  
NANCY FONTENOT

4832-8378-6224, v. 1



CLERK OF THE COURT

1 **SAO**

2 DYLAN V. FREHNER, ESQ.  
3 Nevada State Bar No. 9020  
4 **LINCOLN COUNTY DISTRICT ATTORNEY**  
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11 Attorneys for Petitioners, LINCOLN COUNTY  
12 WATER DISTRICT and VIDLER WATER  
13 COMPANY, INC.

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

16 LINCOLN COUNTY WATER DISTRICT, a  
17 political subdivision of the State of Nevada,  
18 and VIDLER WATER COMPANY, INC., a  
19 Nevada Corporation,

19 Petitioners,

20 vs.

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

24 Respondent.

Case No. A-21-833572-J

Dept. No. 1

**LINCOLN COUNTY WATER  
DISTRICT, VIDLER WATER  
COMPANY, INC. AND THE  
CHURCH OF LATTER-DAY  
SAINTS STIPULATION AND  
ORDER REGARDING  
INTERVENTION AND  
BRIEFING SCHEDULE**

25 On June 15, 2020, Tim Wilson, P.E., Nevada State Engineer<sup>1</sup>, on behalf of the Division of  
26 Water Resources, Department of Conservation and Natural Resources, issued Order 1309. Petitioners,  
27  
28

<sup>1</sup> Tim Wilson, P.E. retired as the Nevada State Engineer effective November 30, 2020. Adam Sullivan, P.E. is the Acting Nevada State Engineer and has been automatically substituted pursuant to NRCP 25(d).

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1 Lincoln County Water District (“LCWD”) and Vidler Water Company, Inc. (“Vidler”) (collectively  
2 “Petitioners”), timely filed their Petition for Judicial Review pursuant to NRS 533.450 challenging  
3 State Engineer Order 1309 in the Seventh Judicial District Court, In and For the County of Lincoln,  
4 State of Nevada, identified as Case No. CV-0702520. LCWD and Vidler’s Petition for Judicial  
5 Review was transferred to the Clark County District Court for adjudication in the above captioned  
6 matter, Case No. A-21-833572-J.

7 The Church of Jesus Christ of Latter-day Saints filed a motion to intervene in LCWD and  
8 Vidler’s action in the Seventh Judicial District Court, which is now pending in Case No. A-21-833572-  
9 J.

10 LCWD, Vidler and The Church of Jesus Christ of Latter-day Saints desire to resolve The  
11 Church of Jesus Christ of Latter-day Saints’ motion to intervene upon the following terms and stipulate  
12 and agree as follows:

13 **Stipulation to Intervention.**

14 1. The Church of Jesus Christ of Latter-day Saints shall be granted the right to intervene  
15 in Case No. A-21-833572-J.

16 2. As an Intervenor in LCWD/Vidler’s case, The Church of Jesus Christ of Latter-day  
17 Saints may file an answering brief in LCWD/Vidler’s case. Leave from the Court will be required, as  
18 set forth below, if LCWD, Vidler and/or The Church of Jesus Christ of Latter-day Saints seek to file  
19 a reply brief as an Intervenor or sur-reply brief in response to an Intervenor’s reply brief.

20 **Briefing Schedule.**

21 3. Petitioners’ opening briefs shall be due **August 27, 2021.**

22 4. The answering briefs of Petitioners/Intervenors shall be due 90 days after the date the  
23 opening briefs are due, or **November 24, 2021.**

24 5. Petitioners’ reply briefs shall be due 45 days after the date answering briefs are due, or  
25 **January 7, 2022.**

26 6. As an Intervenor, The Church of Jesus Christ of Latter-day Saints may only file a reply  
27 brief in LCWD/Vidler’s case with leave from the Court based on a showing that its unique interests  
28

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1 are impacted by arguments made in another’s answering brief. Said Intervenor reply briefs shall be  
2 due 45 days after the date the answering briefs are filed, or **January 7, 2022**.

3 7. Petitioners may only file a sur-reply brief with leave from the Court based on a showing  
4 that their unique interests are impacted by arguments made in an Intervenor’s reply brief filed with  
5 leave of Court.

6 The parties agree this Stipulation and Order shall be filed in consolidated Case No. A-20-  
7 816761-C and Case No. A-21-833572-J and the parties request the Court issue an order approving this  
8 Stipulation as appropriate.

9 **Affirmation:** The undersigned do hereby affirm that the preceding document and/or  
10 attachments do not contain the social security number of any person.

LINCOLN COUNTY DISTRICT ATTORNEY  
181 North Main Street, Suite 205  
P.O. Box 60  
Pioche, Nevada 89043

11 Dated this 23<sup>rd</sup> day of June, 2021.

12 /s/ Dylan V. Frehner  
13 DYLAN V. FREHNER #9020  
14 Email: [dfrehner@lincolncountynv.gov](mailto:dfrehner@lincolncountynv.gov)

15 **IN ASSOCIATION WITH:**  
16 WAYNE O. KLOMP #10109  
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*Attorneys for Lincoln County Water District*

21 ALLISON MacKENZIE, LTD.  
22 402 North Division Street  
23 Carson City, Nevada 89703

24 Dated this 23<sup>rd</sup> day of June, 2021.

25 /s/ Karen A. Peterson  
26 KAREN A. PETERSON #366  
27 Email: [kpeterson@allisonmackenzie.com](mailto:kpeterson@allisonmackenzie.com)

*Attorneys for Vidler Water Company, Inc.*

28 ///  
///  
///

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KAEMPFER CROWELL  
50 West Liberty Street, Suite 700  
Reno, Nevada 89501

Dated this 23<sup>rd</sup> day of June, 2021.

/s/ Severin A. Carlson  
SEVERIN A. CARLSON #9373  
SIHOMARA L. GRAVES #13239  
Email: [scarlson@kcnvlaw.com](mailto:scarlson@kcnvlaw.com)

*Attorneys for The Church of Jesus Christ of  
Latter-day Saints*

**ORDER**

Based on the foregoing Stipulation of the parties and good cause appearing therefore,

**IT IS SO ORDERED.**

DATED this \_\_\_\_\_ day of \_\_\_\_\_ ~~2021~~ **Dated this 24<sup>th</sup> day of June, 2021**

*Brita Yeager*

\_\_\_\_\_  
DISTRICT JUDGE

**E1A 812 C925 9B85  
Brita Yeager  
District Court Judge**



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1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I hereby certify that I am an employee of ALLISON MacKENZIE,  
3 LTD., and that I served, or caused to be served, a true and correct copy of the foregoing document to  
be served on all parties to this action by:

4 \_\_\_\_\_ placing a true copy thereof in a sealed, postage prepaid, envelope in the United States  
mail at Carson City, Nevada, addressed to:

5   ✓   emailing an attached PDF version of the document to the email addresses below and/or  
6 E-Filing pursuant to Section IV of the District of Nevada Electronic Filing Procedures:

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GREGORY H. MORRISON  
[gmorrison@parsonsbehle.com](mailto:gmorrison@parsonsbehle.com)

Dated this 23<sup>rd</sup> day of June, 2021.

/s/ Nancy Fontenot  
NANCY FONTENOT

4847-1846-9103, v. 1

1 **CSERV**

2  
3 DISTRICT COURT  
CLARK COUNTY, NEVADA

4  
5  
6 Lincoln County Water District,  
Petitioner(s)

CASE NO: A-21-833572-J

7  
8 vs.

DEPT. NO. Department 1

9 Tim Wilson, Respondent(s)

10  
11 **AUTOMATED CERTIFICATE OF SERVICE**

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

14 Service Date: 6/24/2021

15 Wayne Klomp

wklomp@swlaw.com

16 Lara Taylor

ljtaylor@swlaw.com

17 Docket Docket

docket\_las@swlaw.com

18 Karen Peterson

kpeterson@allisonmackenzie.com

19  
20 If indicated below, a copy of the above mentioned filings were also served by mail  
21 via United States Postal Service, postage prepaid, to the parties listed below at their last  
22 known addresses on 6/25/2021

23 Christian Balducci

Marquis Aurbach Coffing  
Attn: Christian Balducci  
10001 Park Run Drive  
Las Vegas, NV, 89145

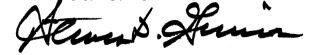
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James Bolotin

Bureau of Litigation - Public Safety Division  
Adam Paul Laxalt  
100 N. Carson St.  
Carson City, NV, 89701

Steven King

1525 Rancho Rd  
Fernley, NV, 89408-0000



CLERK OF THE COURT

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3 Nevada State Bar No. 9020  
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12 Nevada State Bar No. 0366  
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18 Attorneys for Petitioners, LINCOLN COUNTY  
19 WATER DISTRICT and VIDLER WATER  
20 COMPANY, INC.

21 **DISTRICT COURT**  
22 **CLARK COUNTY, NEVADA**

23 LAS VEGAS VALLEY WATER DISTRICT,  
24 and SOUTHERN NEVADA WATER  
25 AUTHORITY, et al.,

Case No. A-20-816761-C

Dept. No. 1

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

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

Respondent.

\_\_\_\_\_ /

26 **LINCOLN COUNTY WATER DISTRICT, VIDLER WATER COMPANY, INC.**  
27 **AND MOAPA VALLEY WATER DISTRICT**  
28 **STIPULATION AND ORDER REGARDING INTERVENTION**  
**AND BRIEFING SCHEDULE**

///

///

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1 On June 15, 2020, Tim Wilson, P.E., Nevada State Engineer<sup>1</sup>, on behalf of the Division of  
2 Water Resources, Department of Conservation and Natural Resources, issued Order 1309. Petitioners,  
3 Lincoln County Water District (“LCWD”) and Vidler Water Company, Inc. (“Vidler”) (collectively  
4 “Petitioners”), timely filed their Petition for Judicial Review pursuant to NRS 533.450 challenging  
5 State Engineer Order 1309 in the Seventh Judicial District Court, In and For the County of Lincoln,  
6 State of Nevada, identified as Case No. CV-0702520. LCWD and Vidler’s Petition for Judicial  
7 Review was transferred to the Clark County District Court for adjudication in the above captioned  
8 matter, Case No. A-21-833572-J.

9 Moapa Valley Water District filed a motion to intervene in LCWD and Vidler’s action in the  
10 Seventh Judicial District Court, and is now pending in Case No. A-21-833572-J.

11 LCWD, Vidler and Moapa Valley Water District desire to resolve Moapa Valley Water  
12 District’s motion to intervene upon the following terms and stipulate and agree as follows:

13 **Stipulation to Intervention.**

- 14 1. Moapa Valley Water District shall be granted the right to intervene in Case No. A-21-  
15 833572-J.
- 16 2. As an Intervenor in LCWD/Vidler’s case, Moapa Valley Water District may file an  
17 answering brief in LCWD/Vidler’s case. Leave from the Court will be required, as set forth below, if  
18 LCWD, Vidler and/or Moapa Valley Water District seek to file a reply brief as an Intervenor or sur-  
19 reply brief in response to an Intervenor’s reply brief.

20 **Briefing Schedule.**

- 21 3. Petitioners’ opening briefs shall be due **August 27, 2021.**
- 22 4. The answering briefs of Petitioners/Intervenors shall be due 90 days after the date the  
23 opening briefs are due, or **November 24, 2021.**
- 24 5. Petitioners’ reply briefs shall be due 45 days after the date answering briefs are due, or  
25 **January 7, 2022.**
- 26  
27  
28

---

<sup>1</sup> Tim Wilson, P.E. retired as the Nevada State Engineer effective November 30, 2020. Adam Sullivan, P.E. is the Acting Nevada State Engineer and has been automatically substituted pursuant to NRCP 25(d).

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Telephone: (775) 687-0202 Fax: (775) 882-7918  
E-Mail Address: law@allisonmackenzie.com

1 6. As an Intervenor, Moapa Valley Water District may only file a reply brief in  
2 LCWD/Vidler's case with leave from the Court based on a showing that its unique interests are  
3 impacted by arguments made in another's answering brief. Said Intervenor reply briefs shall be due  
4 45 days after the date the answering briefs are filed, or **January 7, 2022**.

5 7. Petitioners may only file a sur-reply brief with leave from the Court based on a showing  
6 that their unique interests are impacted by arguments made in an Intervenor's reply brief filed with  
7 leave of Court.

8 The parties agree this Stipulation and Order shall be filed in consolidated Case No. A-20-  
9 816761-C and Case No. A-21-833572-J and the parties request the Court issue an order approving this  
10 Stipulation as appropriate.

11 **Affirmation:** The undersigned do hereby affirm that the preceding document and/or  
12 attachments do not contain the social security number of any person.

13 LINCOLN COUNTY DISTRICT ATTORNEY  
14 181 North Main Street, Suite 205  
15 P.O. Box 60  
16 Pioche, Nevada 89043

17 Dated this 25<sup>th</sup> day of June, 2021.

18 /s/ Dylan V. Frehner  
19 DYLAN V. FREHNER #9020  
20 Email: [dfrehner@lincolncountynv.gov](mailto:dfrehner@lincolncountynv.gov)

21 **IN ASSOCIATION WITH:**  
22 WAYNE O. KLOMP #10109  
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27 *Attorneys for Lincoln County Water District*

28 ALLISON MacKENZIE, LTD.  
402 North Division Street  
Carson City, Nevada 89703

Dated this 25<sup>th</sup> day of June, 2021.

/s/ Karen A. Peterson  
KAREN A. PETERSON #366  
Email: [kpeterson@allisonmackenzie.com](mailto:kpeterson@allisonmackenzie.com)

*Attorneys for Vidler Water Company, Inc.*

///  
28

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PARSONS BEHLE & LATIMER  
50 West Liberty Street, Suite 750  
Reno, Nevada 89501

Dated this 25<sup>th</sup> day of June, 2021.

/s/ Gregory H. Morrison  
GREGORY H. MORRISON #12454  
Email: [GMorrison@parsonsbehle.com](mailto:GMorrison@parsonsbehle.com)

*Attorneys for Moapa Valley Water District*

**ORDER**

Based on the foregoing Stipulation of the parties and good cause appearing therefore,

**IT IS SO ORDERED.**

DATED this \_\_\_\_\_ day of \_\_\_\_\_ ~~Dated this~~ <sup>2021</sup> 25<sup>th</sup> day of June, 2021

*Brita Yeager*

\_\_\_\_\_  
DISTRICT JUDGE

Respectfully submitted by:

LINCOLN COUNTY DISTRICT ATTORNEY  
181 North Main Street, Suite 205  
P.O. Box 60  
Pioche, Nevada 89043

**389 AF9 1220 CB94**  
**Brita Yeager**  
**District Court Judge**

/s/ Dylan V. Frehner  
DYLAN V. FREHNER #9020  
Email: [dfrehner@lincolncountynv.gov](mailto:dfrehner@lincolncountynv.gov)

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*Attorneys for Lincoln County Water District*

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/s/ Karen A. Peterson  
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Email: [kpeterson@allisonmackenzie.com](mailto:kpeterson@allisonmackenzie.com)

*Attorneys for Vidler Water Company, Inc.*

4822-5172-7856, v. 1



# Nancy Fontenot

---

**Subject:** FW: Order 1309

---

**From:** Greg Morrison <[GMorrison@parsonsbehle.com](mailto:GMorrison@parsonsbehle.com)>  
**Sent:** Wednesday, June 23, 2021 5:20 PM  
**To:** Karen Peterson <[kpeterson@allisonmackenzie.com](mailto:kpeterson@allisonmackenzie.com)>  
**Cc:** [dfrehner@lincolncountynv.gov](mailto:dfrehner@lincolncountynv.gov); [wklomp@swlaw.com](mailto:wklomp@swlaw.com)  
**Subject:** RE: Order 1309

Karen,

Apologies for the delayed response. This stipulation looks fine. I can authorize you to e-sign, or I can sign and scan back to you. Which do you prefer?



A Professional  
Law Corporation

**Greg Morrison • Attorney at Law**  
**Parsons Behle & Latimer**  
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**CONFIDENTIALITY NOTICE:** This electronic mail message and any attachment(s) are confidential and may also contain privileged attorney-client information or work product. The message is intended only for the use of the addressee. If you are not the intended recipient, or the person responsible to deliver it to the intended recipient, you may not use, distribute, or copy this communication. If you have received the message in error, please immediately notify us by reply electronic mail or by telephone at 801.532.1234, and

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**CSERV**

DISTRICT COURT  
CLARK COUNTY, NEVADA

Southern Nevada Water  
Authority, Plaintiff(s)

vs.

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

CASE NO: A-20-816761-C

DEPT. NO. Department 1

**AUTOMATED CERTIFICATE OF SERVICE**

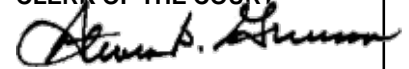
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18 WATER DISTRICT and VIDLER WATER  
19 COMPANY, INC.

20 **DISTRICT COURT**  
21 **CLARK COUNTY, NEVADA**

22 LAS VEGAS VALLEY WATER DISTRICT,  
23 and SOUTHERN NEVADA WATER  
24 AUTHORITY, et al.,

Case No. A-20-816761-C

Dept. No. 1

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

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

Respondent.

**NOTICE OF ENTRY OF LINCOLN COUNTY WATER DISTRICT, VIDLER WATER  
COMPANY, INC. AND NEVADA COGENERATION ASSOCIATES NOS. 1 AND 2  
STIPULATION AND ORDER REGARDING INTERVENTION  
AND BRIEFING SCHEDULE**

**YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE** that the *Lincoln County  
Water District, Vidler Water Company, Inc. and Nevada Cogeneration Associates Nos. 1 and 2*

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1 *Stipulation and Order Regarding Intervention and Briefing Schedule* was entered on the 25<sup>th</sup> day of  
2 June, 2021, a copy of which is attached hereto.

3 DATED this 29<sup>th</sup> day of June, 2021.

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1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I hereby certify that I am an employee of ALLISON MacKENZIE,  
3 LTD., and that I served, or caused to be served, a true and correct copy of the foregoing document to  
be served on all parties to this action by:

4 \_\_\_\_\_ placing a true copy thereof in a sealed, postage prepaid, envelope in the United States  
mail at Carson City, Nevada, addressed to:

5   ✓   emailing an attached PDF version of the document to the email addresses below and/or  
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Dated this 29<sup>th</sup> day of June, 2021.

*/s/ Nancy Fontenot*  
NANCY FONTENOT

4819-8199-0640, v. 1



*Alison Mackenzie*  
CLERK OF THE COURT

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13 COMPANY, INC.

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

16 LAS VEGAS VALLEY WATER DISTRICT,  
17 and SOUTHERN NEVADA WATER  
18 AUTHORITY, et al.,

Case No. A-20-816761-C

Dept. No. 1

18 Petitioners,

Consolidated with Cases:

19 vs.

A-20-817765-P

A-20-818015-P

A-20-817977-P

20 ADAM SULLIVAN, P.E., Acting  
21 Nevada State Engineer, et al.,

A-20-818069-P

A-20-817840-P

A-20-817876-P

22 Respondent.

A-21-833572-J

23 **LINCOLN COUNTY WATER DISTRICT, VIDLER WATER COMPANY, INC.**  
24 **AND NEVADA COGENERATION ASSOCIATES NOS. 1 AND 2**  
25 **STIPULATION AND ORDER REGARDING INTERVENTION**  
26 **AND BRIEFING SCHEDULE**

26 ///

27 ///

28 ///

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1 On June 15, 2020, Tim Wilson, P.E., Nevada State Engineer<sup>1</sup>, on behalf of the Division of  
2 Water Resources, Department of Conservation and Natural Resources, issued Order 1309.  
3 Petitioners, Lincoln County Water District (“LCWD”) and Vidler Water Company, Inc. (“Vidler”)  
4 timely filed their Petition for Judicial Review pursuant to NRS 533.450 challenging State Engineer  
5 Order 1309 in the Seventh Judicial District Court, In and For the County of Lincoln, State of  
6 Nevada, identified as Case No. CV-0702520. LCWD and Vidler’s Petition for Judicial Review was  
7 transferred to the Clark County District Court for adjudication in the above captioned matter, Case  
8 No. A-21-833572-J.

9 Pursuant to NRS 533.450, Order 1309 was also timely challenged by Petitioner, Nevada  
10 Cogeneration Associates Nos. 1 and 2 in a Petition for Judicial Review filed with the District Court  
11 of Clark County, Nevada, Case No. A-20-818015-P.

12 LCWD and Vidler’s action, Case No. A-21-833572-J has been consolidated with Case No.  
13 A-20-816761-C and related actions, including A-20-818015-P.

14 LCWD, Vidler and Nevada Cogeneration Associates Nos. 1 and 2 stipulate and agree as  
15 follows:

16 **Stipulation to Intervention.**

17 1. LCWD and Vidler shall be granted the right to intervene in Case No. A-20-818015-P,  
18 and Nevada Cogeneration Associates Nos. 1 and 2 shall be granted the right to intervene in Case No.  
19 A-21-833572-J.

20 2. As an Intervenor in each respective case, LCWD, Vidler and Nevada Cogeneration  
21 Associates Nos. 1 and 2 may file an answering brief in each other’s respective case. Leave from the  
22 Court will be required, as set forth below, if LCWD, Vidler and/or Nevada Cogeneration Associates  
23 Nos. 1 and 2 seek to file a reply brief as an Intervenor or sur-reply brief in response to an  
24 Intervenor’s reply brief.

25 **Briefing Schedule.**

26 3. Petitioners’ opening briefs shall be due 90 days from the May 27, 2021 status  
27 conference, or **August 27, 2021.**

28 \_\_\_\_\_  
<sup>1</sup> Tim Wilson, P.E. retired as the Nevada State Engineer effective November 30, 2020. Adam Sullivan, P.E. is the  
Acting Nevada State Engineer and has been automatically substituted pursuant to NRCP 25(d).

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1 4. The answering briefs of Petitioners/Intervenors shall be due 90 days after the date the  
2 opening briefs are due, or **November 24, 2021**.

3 5. Petitioners' reply briefs shall be due 45 days after the date answering briefs are due,  
4 or **January 7, 2022**.

5 6. As Intervenors, LCWD, Vidler or Nevada Cogeneration Associates Nos. 1 and 2, may  
6 only file reply briefs in each other's cases with leave from the Court based on a showing that their  
7 unique interests are impacted by arguments made in the other's answering briefs. Said Intervenor  
8 reply briefs shall be due 45 days after the date the answering briefs are filed, or **January 7, 2022**.

9 7. Petitioners in each action may only file sur-reply briefs with leave from the Court  
10 based on a showing that their unique interests are impacted by arguments made in an Intervenor's  
11 reply brief filed with leave of Court.

12 The parties agree this Stipulation and Order shall be filed in consolidated Case No. A-20-  
13 818015-P and Case No. A-21-833572-J and the parties request the Court issue an order approving  
14 this Stipulation as appropriate.

15 **Affirmation:** The undersigned do hereby affirm that the preceding document and/or  
16 attachments do not contain the social security number of any person.

LINCOLN COUNTY DISTRICT ATTORNEY  
181 North Main Street, Suite 205  
P.O. Box 60  
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19 Dated this 25<sup>th</sup> day of June, 2021.

20 /s/ Dylan V. Frehner  
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12 Dated this 25<sup>th</sup> day of June, 2021.

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16 *Attorneys for Nevada Cogeneration Associates*  
17 *Nos. 1 and 2*

18 **ORDER**

19 Based on the foregoing Stipulation of the parties and good cause appearing therefore,

20 **IT IS SO ORDERED.**

21 DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2021.  
22 **Dated this 25th day of June, 2021**

23 *Bita Yeager*  
24 DISTRICT JUDGE

25 **5D8 E58 FB67 B046**  
26 **Bita Yeager**  
27 **District Court Judge**

28 Respectfully submitted by:

29 LINCOLN COUNTY DISTRICT ATTORNEY  
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16 4814-7820-6448, v. 1

## Nancy Fontenot

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**Subject:** FW: Stipulation to Intervene - RE: Order 1309

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**From:** Alex Flangas <[AFlangas@kcnvlaw.com](mailto:AFlangas@kcnvlaw.com)>  
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**Cc:** Sharon Stice <[SStice@kcnvlaw.com](mailto:SStice@kcnvlaw.com)>  
**Subject:** Stipulation to Intervene - RE: Order 1309

Karen:

I modified the Stipulation to correct the dates pursuant to the Court's minutes. Otherwise, it is unchanged and is acceptable and may be filed. Since it was set up for Nancy to serve it, I did not file it. You have my authority to include my e-signature and file ASAP. Thanks.



AJF

***Alex J. Flangas***

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**CSERV**

DISTRICT COURT  
CLARK COUNTY, NEVADA

Southern Nevada Water  
Authority, Plaintiff(s)  
  
vs.  
  
Nevada State Engineer, Division  
of Water Resources,  
Defendant(s)

CASE NO: A-20-816761-C  
  
DEPT. NO. Department 1

**AUTOMATED CERTIFICATE OF SERVICE**

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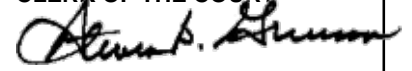
Service Date: 6/25/2021

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19 COMPANY, INC.

20 **DISTRICT COURT**  
21 **CLARK COUNTY, NEVADA**

22 LAS VEGAS VALLEY WATER DISTRICT,  
23 and SOUTHERN NEVADA WATER  
24 AUTHORITY, et al.,

Case No. A-20-816761-C

Dept. No. 1

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

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

Respondent.

**NOTICE OF ENTRY OF LINCOLN COUNTY WATER DISTRICT, VIDLER WATER  
COMPANY, INC., STATE ENGINEER AND APEX HOLDING COMPANY, LLC  
AND DRY LAKE WATER, LLC  
STIPULATION AND ORDER REGARDING INTERVENTION  
AND BRIEFING SCHEDULE**

**YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE** that the *Lincoln County  
Water District, Vidler Water Company, Inc., State Engineer and Apex Holding Company, LLC and*

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1 *Dry Lake Water, LLC Stipulation and Order Regarding Intervention and Briefing Schedule* was  
2 entered on the 1<sup>st</sup> day of July, 2021, a copy of which is attached hereto.

3 DATED this 1<sup>st</sup> day of July, 2021.

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1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I hereby certify that I am an employee of ALLISON MacKENZIE,  
3 LTD., and that I served, or caused to be served, a true and correct copy of the foregoing document to  
be served on all parties to this action by:

4 \_\_\_\_\_ placing a true copy thereof in a sealed, postage prepaid, envelope in the United States  
mail at Carson City, Nevada, addressed to:

5   ✓   emailing an attached PDF version of the document to the email addresses below and/or  
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Dated this 1<sup>st</sup> day of July, 2021.

/s/ Nancy Fontenot  
NANCY FONTENOT

4841-3277-7200, v. 1

*Andrew J. Smith*  
CLERK OF THE COURT

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13 COMPANY, INC.

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

16 LAS VEGAS VALLEY WATER DISTRICT,  
17 and SOUTHERN NEVADA WATER  
18 AUTHORITY, et al.,

Case No. A-20-816761-C

Dept. No. 1

18 Petitioners,

Consolidated with Cases:

19 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

20 ADAM SULLIVAN, P.E., Acting  
21 Nevada State Engineer, et al.,

22 Respondent.

23 **LINCOLN COUNTY WATER DISTRICT, VIDLER WATER COMPANY, INC.,**  
24 **STATE ENGINEER AND APEX HOLDING COMPANY, LLC AND**  
25 **DRY LAKE WATER, LLC**  
26 **STIPULATION AND ORDER REGARDING INTERVENTION**  
27 **AND BRIEFING SCHEDULE**

26 ///

27 ///

28 ///

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1 On June 15, 2020, Tim Wilson, P.E., Nevada State Engineer<sup>1</sup>, on behalf of the Division of  
2 Water Resources, Department of Conservation and Natural Resources, issued Order 1309. Petitioners,  
3 Lincoln County Water District (“LCWD”) and Vidler Water Company, Inc. (“Vidler”) timely filed  
4 their Petition for Judicial Review pursuant to NRS 533.450 challenging State Engineer Order 1309 in  
5 the Seventh Judicial District Court, In and For the County of Lincoln, State of Nevada, identified as  
6 Case No. CV-0702520. Apex Holding Company, LLC and Dry Lake Water, LLC filed a Notice of  
7 Intent to Participate in Case No. CV-0702520. LCWD and Vidler’s Petition for Judicial Review was  
8 transferred to the Clark County District Court for adjudication in the above captioned matter, Case  
9 No. A-21-833572-J.

10 Pursuant to NRS 533.450, Order 1309 was also timely challenged by Petitioners, Apex  
11 Holding Company, LLC and Dry Lake Water, LLC in a Petition for Judicial Review filed with the  
12 District Court of Clark County, Nevada, Case No. A-20-817840-P.

13 LCWD and Vidler’s action, Case No. A-21-833572-J has been consolidated with Case No. A-  
14 20-816761-C and related actions, including A-20-817840-P.

15 Adam Sullivan, P.E., Acting Nevada State Engineer (“State Engineer”) is a Respondent in  
16 Case No. A-21-833572-J and Case No. A-20-817840-P.

17 LCWD, Vidler, Apex Holding Company, LLC and Dry Lake Water, LLC and State Engineer  
18 stipulate and agree as follows:

19 **Stipulation to Intervention.**

20 1. LCWD and Vidler shall be granted the right to intervene in Case No. A-20-817840-P,  
21 and Apex Holding Company, LLC and Dry Lake Water, LLC shall be granted the right to intervene  
22 in Case No. A-21-833572-J.

23 2. As an Intervenor in each respective case, LCWD, Vidler and Apex Holding Company,  
24 LLC and Dry Lake Water, LLC may file an answering brief in each other’s respective case. Leave  
25 from the Court will be required, as set forth below, if LCWD, Vidler and/or Apex Holding Company,  
26  
27

28 \_\_\_\_\_  
<sup>1</sup> Tim Wilson, P.E. retired as the Nevada State Engineer effective November 30, 2020. Adam Sullivan, P.E. is the Acting Nevada State Engineer and has been automatically substituted pursuant to NRCP 25(d).

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1 LLC and Dry Lake Water, LLC seek to file a reply brief as an Intervenor or sur-reply brief in response  
2 to an Intervenor's reply brief.

3 **Briefing Schedule.**

4 3. Petitioners' opening briefs shall be due **August 27, 2021.**

5 4. The answering briefs of Petitioners/Intervenors and Respondent shall be due 90 days  
6 after the date the opening briefs are due, or **November 24, 2021.**

7 5. Petitioners' reply briefs shall be due 45 days after the date answering briefs are due, or  
8 **January 7, 2022.**

9 6. As Intervenors, LCWD, Vidler or Apex Holding Company, LLC and Dry Lake Water,  
10 LLC, may only file reply briefs in each other's cases with leave from the Court based on a showing  
11 that their unique interests are impacted by arguments made in the other's answering briefs. Said  
12 Intervenor reply briefs shall be due 45 days after the date the answering briefs are filed, or **January**  
13 **7, 2022.**

14 7. Petitioners in each action may only file sur-reply briefs with leave from the Court based  
15 on a showing that their unique interests are impacted by arguments made in an Intervenor's reply brief  
16 filed with leave of Court.

17 The parties agree this Stipulation and Order shall be filed in consolidated Case No. A-20-  
18 817840-P and Case No. A-21-833572-J and the parties request the Court issue an order approving this  
19 Stipulation as appropriate.

20 **Affirmation:** The undersigned do hereby affirm that the preceding document and/or  
21 attachments do not contain the social security number of any person.

22 LINCOLN COUNTY DISTRICT ATTORNEY  
23 181 North Main Street, Suite 205  
24 P.O. Box 60  
25 Pioche, Nevada 89043

26 Dated this 1<sup>st</sup> day of July, 2021.

27 /s/ Dylan V. Frehner  
28 DYLAN V. FREHNER #9020  
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Dated this 1<sup>st</sup> day of July, 2021.

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and Dry Lake Water, LLC*

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**ORDER**

Based on the foregoing Stipulation of the parties and good cause appearing therefore,

**IT IS SO ORDERED.**

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2021  
**Dated this 1st day of July, 2021**

*Bitia Yeager*

\_\_\_\_\_  
DISTRICT JUDGE

**CCA E41 4C29 DEFA  
Bitia Yeager  
District Court Judge**

Respectfully submitted by:

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*Attorneys for Vidler Water Company, Inc.*

4848-0405-7840, v. 1

## Nancy Fontenot

---

**Subject:** FW: [External] LCWD.Vidler / Draft Stipulation with Apex Holding Company & Dry Lake Water

**From:** "Christian T. Balducci" <[ctb@maclaw.com](mailto:ctb@maclaw.com)>  
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**Cc:** "Dorene A. Wright" <[DWright@ag.nv.gov](mailto:DWright@ag.nv.gov)>  
**Subject:** Re: [External] LCWD.Vidler / Draft Stipulation with Apex Holding Company & Dry Lake Water

I approve

-ctb

Sent from [Outlook](#) on MyPhone

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**From:** James N. Bolotin <[JBolotin@ag.nv.gov](mailto:JBolotin@ag.nv.gov)>  
**Sent:** Wednesday, June 30, 2021 2:20:55 PM  
**To:** Karen Peterson <[kpeterson@allisonmackenzie.com](mailto:kpeterson@allisonmackenzie.com)>; Christian T. Balducci <[ctb@maclaw.com](mailto:ctb@maclaw.com)>  
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**Subject:** RE: [External] LCWD.Vidler / Draft Stipulation with Apex Holding Company & Dry Lake Water

Karen and Christian,

The State Engineer approves of this stipulation and you may sign on my behalf.

Best,  
James

James Bolotin, Esq.  
Senior Deputy Attorney General  
State of Nevada  
Bureau of Government Affairs  
Government and Natural Resources Division  
(775) 684-1231

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**CSERV**

DISTRICT COURT  
CLARK COUNTY, NEVADA

Southern Nevada Water  
Authority, Plaintiff(s)  
  
vs.  
  
Nevada State Engineer, Division  
of Water Resources,  
Defendant(s)

CASE NO: A-20-816761-C  
  
DEPT. NO. Department 1

**AUTOMATED CERTIFICATE OF SERVICE**

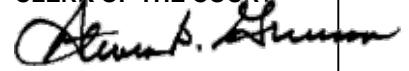
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1 **RTRAN**

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4 DISTRICT COURT  
5 CLARK COUNTY, NEVADA  
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7 SOUTHERN NEVADA WATER )  
8 AUTHORITY, ET AL., )

9 Plaintiffs, )

10 vs. )

11 NEVADA STATE ENGINEER, )  
12 DIVISION OF WATER )  
13 RESOURCES, ET AL., )

14 Defendants. )

CASE NO. A-20-816761-C  
DEPT. NO. 1  
CONSOLIDATED WITH CASES:  
A-20-817765-P  
A-20-817840-P  
A-20-817876-P  
A-20-817977-P  
A-20-818015-P  
A-20-818069-P  
A-20-833572-J

15  
16 BEFORE THE HONORABLE BITA YEAGER, DISTRICT JUDGE  
17 THURSDAY, JULY 1, 2021 AT 11:00 A.M.

18 **RECORDER'S TRANSCRIPT RE:**  
19 **STATUS CHECK: ON FULLY BRIEFED MOTIONS**  
20

21  
22  
23  
24  
25 Recorded by: LISA A. LIZOTTE, COURT RECORDER

1 APPEARANCES BY VIDEOCONFERENCE:

2

3 FOR PLAINTIFF LVVWD AND SNWA: PAUL G. TAGGART, ESQ.

4 FOR DEFENDANT COYOTE SPRINGS  
5 INVESTMENT, LLC:

KENT R. ROBISON, ESQ.  
EMILIA K. CARGILL, ESQ.

6

7 FOR DEFENDANT NEVADA STATE  
8 ENGINEER, DIVISION OF WATER  
9 RESOURCES:

JAMES N. BOLOTIN, ESQ.  
(Senior Deputy Attorney General)

9

10 FOR DEFENDANT APEX HOLDING  
11 COMPANY, LLC AND DRY LAKE  
12 WATER, LLC:

KATHLEEN A. WILDE, ESQ.

11

12 FOR DEFENDANT MUDDY VALLEY  
13 IRRIGATION COMPANY:

ROBERT A. DOTSON, ESQ.  
STEVEN D. KING, ESQ.

13

14 FOR DEFENDANT NEVADA  
15 COGENERATION ASSOCIATES  
16 NOS. 1 AND 2:

ALEX J. FLANGAS, ESQ.

16

17 FOR DEFENDANT GEORGIA-PACIFIC  
18 GYPSUM LLC AND REPUBLIC

17

18 ENVIRONMENTAL TECHNOLOGIES, INC.: SYLVIA L. HARRISON, ESQ.  
LUCAS M. FOLETTA, ESQ.

18

19

20 FOR CITY OF NORTH LAS VEGAS AND  
21 WESTERN ELITE ENVIRONMENTAL, INC.  
22 AND BEDROC LIMITED, LLC:

THERESE A. URE STIX, ESQ.

21

22 FOR THE CHURCH OF JESUS CHRIST  
23 OF LATTER-DAY SAINTS:

SEVERIN A. CARLSON, ESQ.

23

24 FOR MOAPA VALLEY WATER DISTRICT:

GREGORY H. MORRISON, ESQ.

24

25 FOR SIERRA PACIFIC POWER COMPANY  
AND NEVADA POWER COMPANY:

JUSTINA A. CAVIGLIA, ESQ.



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FOR CENTER FOR BIOLOGICAL  
DIVERSITY:

LISA T. BELENKY, ESQ.  
(Pro Hac Vice)  
SCOTT LAKE, ESQ.\*

FOR VIDLER WATER COMPANY, INC:

KAREN A. PETERSON, ESQ.

FOR LINCOLN COUNTY WATER  
DISTRICT:

WAYNE O. KLOMP, ESQ.

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(THURSDAY, JULY 1, 2021 AT 11:00 A.M.)

THE COURT: Doing roll call, I will name the party and then ask if you could state your presence for the record. So for the Las Vegas Valley Water District and Southern Nevada Water Authority?

MR. TAGGART: Yes. This is Paul Taggart. Can you hear me?

THE COURT: Yes, I can.

MR. TAGGART: Yeah. I'm having a hard time getting through on the video and so I'm also on my phone. I'm not sure whether it's me or something on the other end, but anyway I'm here on the phone.

THE COURT: Okay. Great. Thank you.

MR. TAGGART: Good morning.

THE COURT: All right. Good morning. And then for the State Engineer?

MR. BOLOTIN: Good morning, Your Honor. Senior Deputy Attorney General James Bolotin on behalf of the Respondent State Engineer.

THE COURT: Okay. Great. Thank you. For Vidler?

MS. PETERSON: Good morning, Your Honor. This is Karen Peterson from Allison, MacKenzie law firm and I also have Dorothy Timian-Palmer and Steve Hartman from Vidler Water Company here with me.

THE COURT: Great. Thank you. Nevada Cogeneration Associates Nos. 1 and 2?

MR. FLANGAS: Alex Flangas, Your Honor, on behalf of NCA 1 and 2.

THE COURT: Great. Thank you. Muddy Valley?

1 MR. DODSON: Robert Dodson as well as I have -- or also on the  
2 call is Steve King on behalf of Muddy Valley Irrigation Company.

3 THE COURT: Great. Thank you. Center for Biological Diversity?

4 MS. BELENKY: Yes. This is Lisa Belenky on the call and also  
5 Scott Lake who is new counsel in this matter is also on the call today.

6 THE COURT: Okay. Thank you. Republic Environmental  
7 Technologies?

8 MS. HARRISON: Good morning, Your Honor. This is Sylvia  
9 Harrison on behalf of Republic and also Georgia-Pacific. Also appearing today  
10 with me is Lucas Foletta from our office in Reno.

11 THE COURT: Okay. Great. Thank you. Dry Lake Water, LLC?

12 MS. WILDE: Good morning, Your Honor. Kathleen Wilde  
13 appearing on behalf of Dry Lake as well as Apex.

14 THE COURT: Okay. Great. Thank you. Bedroc Limited, LLC?

15 MS. URE STIX: Good morning, Your Honor. This is Therese Ure  
16 Stix appearing on behalf of Bedroc and Western Elite as well as City of North Las  
17 Vegas.

18 THE COURT: Okay. Moapa Valley Water District?

19 MR. MORRISON: Good morning, Your Honor. This is Greg  
20 Morrison appearing on behalf of Moapa Valley Water District. I'm also having  
21 some difficulty logging into the meeting, so I'm participating on my phone.

22 THE COURT: Okay. Thank you. Coyote Springs?

23 MR. ROBISON: Good morning, Your Honor. Kent Robison and  
24 Emilia Cargill for Coyote Springs Investment, LLC.

25

1 THE COURT: Okay. Great. And then Sierra Pacific Power  
2 Company?

3 MS. CAVIGLIA: Good morning, Your Honor. Justina Caviglia on  
4 behalf of Sierra Pacific Power Company and Nevada Power Company.

5 THE COURT: Thank you. Church of Jesus Christ of Latter-day  
6 Saints?

7 MR. CARLSON: Good morning, Your Honor. Sev Carlson on  
8 behalf of the Church of Jesus Christ of Latter-day Saints.

9 THE COURT: Okay. Thank you. Good morning, everyone. Have I  
10 missed any parties that are making their appearances today?

11 MR. KLOMP: Good morning, Your Honor. This is Wayne Klomp on  
12 behalf of Lincoln County Water District.

13 THE COURT: Oh, thank you. Okay. Anyone else that I've missed?  
14 Okay. So, then, what I would like to do, I'd like to start out by just talking about  
15 the scheduling with everything and then after that I will hear the argument on the  
16 motions to intervene, so that way the parties that aren't involved in the motions to  
17 intervene don't necessarily have to stay on if they don't want to.

18 So currently what I have -- and I should also say thank you for  
19 all of the stipulations regarding the interventions that have been done so far. I  
20 really appreciate that. So, so far I've got the opening brief due August 27th,  
21 2021, response due November 24th, 2021 and the reply due on January 7th,  
22 2021.

23 (Court conferring with Clerk.)

24 THE COURT: 2022. Sorry. 2022. That's correct. Thank you. So I  
25 will ask that the parties provide courtesy copies to the Court because it will be a

1 lot easier for me to highlight, and, you know, make notes and that kind of thing as  
2 I prepare. And I don't want to scare anyone with my lack of knowledge of the  
3 scientific background regarding the 1169 Pumping Test, but it is apparent to me  
4 that some of the arguments or many of the arguments have to do with -- or I  
5 guess the arguments are intertwined with the basis or the scientific basis on the  
6 1169 Pumping Test, so is there anything in addition to the exhibits that would be  
7 attached that would be able to help the Court understand the scientific basis and  
8 the process by which that pumping test is done?

9 MR. ROBISON: We intend to brief that. This is Kent Robison for  
10 CSI. That will definitely be part of our brief.

11 THE COURT: Okay. All right.

12 MR. BOLOTIN: And, Your Honor, this is James Bolotin on behalf of  
13 the State Engineer, and just -- I do think it's the best way to go about it is stick to  
14 the record on appeal since it's supposed to be appellate in nature and just --

15 THE COURT: Sure.

16 MR. BOLOTIN: -- the parties will brief their understanding and  
17 hopefully educate Your Honor on the background and the long history that's led  
18 us to this point.

19 THE COURT: And that would be very helpful, and especially if you  
20 could also make sure that any water terminology such as afa or that kind of thing  
21 is explained. I mean I made some assumptions in reading the pleadings, but it  
22 would be very helpful if you're making references to like the -- I don't know, there  
23 was something about like a carbonite well or something along those lines, that is  
24 actually explained so that I understand what that means. Okay.

25

1                   So, then, I will also like to figure out with the parties about how  
2 the hearing will proceed. So I know that there are different interests that are  
3 being brought through the petitions and I will probably have to have a good idea  
4 of how much time that the parties think it will take to fully have the hearing, so  
5 what I was thinking about doing is maybe setting a status check after the reply  
6 brief so that that can be determined.

7                   You know, hopefully the parties would be getting together with  
8 each other to figure out approximately how much time it would take to have the  
9 hearing and the order in which the arguments would go, so I'd like to hear the  
10 thoughts from the parties about if that would be the best way to organize the  
11 hearing or if there are other suggestions that the parties might have.

12                  MR. FLANGAS: Your Honor, this is Alex Flangas. I have a quick  
13 question on the briefing if I can clarify some things so that we all have an  
14 understanding. We have stipulations in place for the most part regarding  
15 intervention in -- allowed intervention, if you will, in each other's petitions, and,  
16 therefore, the idea that petitioners will have opening briefs is not a question. The  
17 question is what are answering briefs? Is that an answering brief in each petition  
18 that you choose to answer in or is it a single answering brief that needs to  
19 respond to each of the petitions that you choose to intervene in that you decide  
20 to file an answer to?

21                  Because there are multiple petitions, and that's obviously the  
22 reason that there's an extended period of time between the opening and  
23 answering brief period, but I don't think it's ever been clarified to my  
24 understanding whether we are filing one answering brief or we are filing multiple  
25 answering briefs directed to each petition.

1 THE COURT: That's a good question. So and I know that there are  
2 many parties that want to intervene in each other's filings, so --

3 MR. TAGGART: Your Honor, this is Paul Taggart, good morning --

4 THE COURT: Yes, good morning.

5 MR. TAGGART: -- on behalf of the Water District. I mean it's a  
6 great question. The status check that you suggested might be a good place to  
7 discuss that when we see the petition. When we see the opening briefs filed,  
8 maybe we set a status, you know, right after -- or close to or either after the  
9 opening briefs are filed, but we've had a few cases like this with all of these  
10 different petitions and parties and so forth and sometimes it makes sense to --  
11 like for my client, for instance, we might -- like Mr. Flangas said, we might write  
12 an answer in seven or eight separate petitions or I guess it would be six or seven  
13 because one of them is ours and we might, then, bind all of that into one  
14 document with seven tabs and then you would have one of -- you know, one  
15 thing.

16 Then sometimes we -- you know, sometimes a lot of the  
17 petitioners will be raising the same issue, and a lot of the -- that can be  
18 addressed in one brief. Like there might be an issue that's raised by three or four  
19 petitioners and that might be addressed in a single brief instead of four separate  
20 briefs, and so I've had to -- you know, the pain of trying to decide what's easier,  
21 and sometimes it really depends on how it looks when you see the opening  
22 briefs, but, anyway, that's all I can say or offer about that.

23 And I also think your suggestion about how we would argue it,  
24 you know, a good suggestion that we do that at the status conference. I think Mr.  
25 Bolotin has some ideas about how to schedule, you know, in terms of how to do

1 that. I mean we have one case like this, you know, where a lot of the petitioners  
2 got up and argued for a couple days and then everyone got up and argued  
3 answering for a couple days, and then everybody got up and argued a reply for a  
4 day or something like that or you go through each -- or you go, okay, petition  
5 number one, I'm going to listen to the petitioner and I'm going to listen to the  
6 answering -- you know, to the respondents and then I'm going to listen to the  
7 petitioner in rebuttal, now I'm going to go out and listen to petition number two  
8 and you could go that way.

9                   But a lot of times, again, the same issue might be coming up in  
10 multiple petitions, and it might start to get repetitive or some attorneys might feel  
11 like, hey, I want a bite at that issue that's being raised in petition number one. So  
12 it's kind of hard to say until we see the briefs, but I think it's worth us thinking  
13 about how to do this the most expeditiously.

14                   THE COURT: Sure. So, you know, we have the opening brief --

15                   MR. ROBISON: Your Honor, this is Kent Robison.

16                   THE COURT: Oh, yes. Go ahead.

17                   MR. ROBISON: I'm sorry, Your Honor. There's been a lot of  
18 dialogue among the parties, and unfortunately I got the impression that this was  
19 resolved, that we would be filing our petitions on August 27<sup>th</sup>, we would be filing if  
20 necessary petitioners' responses to other petitioners' arguments against a  
21 particular petitioner and more importantly the State's response to each and every  
22 petition, and then the reply is the final word to reply to the State's position and  
23 each other's attack on the respective petitioners. I kind of thought that was  
24 resolved. I might be mistaken.



1 THE COURT: Well, I think maybe – I think maybe the point may be  
2 that as far as replies – well, replies to the other petitioners or the interventions  
3 and the other petitioners, there may be joinders instead of everyone filing if there  
4 are, you know, similar interests, so it might be helpful –

5 I mean what I would say is if, you know, we still have those  
6 dates but then have a status check so that we can figure out who would be  
7 actually, you know, filing the responses, especially when you're talking about the  
8 interventions and who would be joining in those, that may – that may make it  
9 easier for me because then I won't be reading duplicate arguments that really  
10 could have been done with just one pleading with joinders.

11 MR. ROBISON: I certainly agree with the status check. I just might  
12 have been mistaken as to your timing on that. It seems the timing for that status  
13 check would be shortly after initial briefs are filed on August 27<sup>th</sup>.

14 THE COURT: Correct. So I was talking about a different status  
15 check after everything was done, but I think Mr. Taggart brings up a good point in  
16 talking to Mr. Flangas's question, so I think it would be prudent to have a status  
17 check immediately – well, when I say immediately, you know, with enough time  
18 for the parties to assess the other petitions – the other briefs that are filed and  
19 make a determination as far as which briefs that they would like to respond to.  
20 How much time do the parties think you would need? Would a week suffice if we  
21 had a status check in a week after the opening briefs are due?

22 MR. BOLOTIN: Your Honor, this is James Bolotin on behalf of the  
23 State Engineer. I think a week or two would work, but I just wanted to build off of  
24 something that Mr. Taggart said. He mentioned – I don't know if we'd ever had a  
25 case with this many people but we have had other cases with different petitioners

1 and petitioners who respond to other petitioners, and I think the basic premise of  
2 Mr. Flangas's question was does Your Honor want one big brief from each party  
3 at each stage or to allow multiple briefs on each thing?

4 And I know in the case that Mr. Taggart references, his client  
5 filed multiple briefs and the State Engineer filed one big brief and I think it ended  
6 up working out still, but I think that is something that could be clarified at a status  
7 conference maybe two weeks after the opening briefs are filed, and just –

8 THE COURT: Sure. Sure. So you're saying –

9 MR. BOLOTIN: -- and just for reference –

10 THE COURT: So when you're talking about one big brief, saying,  
11 for example, Coyote Springs is filing the brief and these are within this brief the  
12 responses to all the other opening briefs? Is that what you mean?

13 MR. BOLOTIN: Yeah. That's what I mean or like Mr. Taggart  
14 mentioned there's crossover between certain petitioners' arguments, and so the  
15 State Engineer's brief, for example, would have one section responding to both  
16 of those petitions if they have significant overlap. But it's up to you, Your Honor,  
17 because during the last hearing we talked about the NRAP word limit of 14,000  
18 words, and I don't know if Your Honor wants seven-14,000 word briefs from a  
19 single party or if you want to extend it a little bit, but then we could have one big  
20 brief that's more than 14,000 words but not seven-14,000 word briefs from each  
21 party.

22 THE COURT: Great. Yeah. That would be a nightmare. Okay.

23 MR. BOLOTIN: And then to follow up on a note that you just had  
24 before, Your Honor, NRAP 28, I think, goes to what you were mentioning about  
25 in cases where there's multiple appellants or respondents including consolidated

1 cases parties can join or reference other people's briefs, and I do think that might  
2 streamline.

3 THE COURT: Sure. So I'm certainly not opposed to having – or  
4 extending the word limit and having bigger briefs. I think organizationally for me  
5 that might be easier to keep track of everything, but I think maybe if we set that  
6 status check to firm that up that might be helpful. So one week or two weeks  
7 after the opening brief which is there a preference from the parties?

8 MR. ROBISON: Kent Robison.

9 MR. FLANGAS: One is going to be awfully short, Your Honor.

10 THE COURT: Okay.

11 MR. FLANGAS: One week is going to be really short.

12 THE COURT: Okay. That's fine.

13 MR. ROBISON: Shorter is better. Closer to August 7<sup>th</sup> is better,  
14 Your Honor, in our opinion.

15 THE COURT: Oh, so, Mr. Robison, are you saying that you would  
16 prefer one week from the August 27<sup>th</sup> day?

17 MR. ROBISON: Yeah. If you can have – yes, Your Honor. If you  
18 can have a status check within a week of August 27<sup>th</sup>, we'll have much more  
19 clarity and more time with respect to the November 24<sup>th</sup> deadline.

20 THE COURT: Okay. Is there anyone that disagrees with that  
21 statement?

22 MR. FLANGAS: Well – this is Alex Flangas, Your Honor. If I'm  
23 going to read – if I'm going to read and understand eight opening briefs in a week  
24 –

25 THE COURT: I think it might be nine at this point.

1 MR. FLANGAS: -- I don't see the problem in waiting two weeks to  
2 have a status check. I'm not going to be briefing in the first week. I think that's  
3 rushed. I mean certainly we don't change -- we don't change the end date.  
4 We're still briefing until the November 24<sup>th</sup> date. The only question is whether  
5 we're doing it in multiple briefs or we're doing it in a single brief. I don't see any  
6 reason to have it in a week. We can do it in two weeks, and we're still simply  
7 deciding whether we're going to try to put it into a single or multiple, and it might  
8 be that it's going to be a combination of those as Mr. Taggart put it.

9 It might be that multiple issues show up in several briefs, it  
10 might be that one brief has five or six different points. And if we try to force all  
11 those into one brief we're going to be using multiple words, but to digest all of  
12 those in one week I hope nobody has anything to do that week because --

13 MS. HARRISON: Your Honor, this is Sylvia Harrison. I agree with  
14 Mr. Flangas. I think two weeks is better. I'd also note that unfortunately there's  
15 very little commonality among the parties with respect to the positions they have  
16 advanced at least in the initial filings, and there's not going to be I don't think a lot  
17 of efficiency gained by simply assuming that there's going to be a lot of joinders.

18 THE COURT: Okay.

19 MS. HARRISON: I think there are multiple issues being raised by  
20 multiple parties, so it's going to be complex no matter what.

21 THE COURT: Okay.

22 MS. HARRISON: But I prefer two weeks as well.

23 THE COURT: All right. So, then, what I will do, then, I will set it  
24 then for two weeks, same time, special setting at 11:00, a status check, so that's  
25 after the opening brief of August 27<sup>th</sup>, so that would be --

1 THE CLERK: September 9th.

2 THE COURT: -- September 9th.

3 MR. BOLOTIN: Your Honor, if I could just -- I think that's fine and I  
4 would like to just plant a seed and we'll see, but one thing that's happened in the  
5 past is we've ended up ordering argument based on the issue that's raised as  
6 opposed to the party. When we see the briefs we could see what all the issues  
7 are, all the different bases for challenging 1309. I know that -- like I said before, if  
8 -- and this might be something -- I mean this will be something we talk about at  
9 that status conference, so I'm just kind of planting the seed for us all to think  
10 about, is whether we order it by petition or whether we order it by issue.

11 The reason issue made sense in a large case like this was  
12 some attorneys didn't want an issue that they had an argument about, and  
13 neither did the Court to be argued about in a separate petition from their own,  
14 and so we all just decided, okay, if there's an issue where someone wants -- you  
15 know, whoever is challenging the 8,000 acre-foot number as the cap, you know,  
16 that's an issue we're going to argue about on Monday at 10:00 o'clock.

17 And so whoever has got an opening argument about why the  
18 8,000 acre-foot cap is wrong come and make your argument, and the State will  
19 respond to why -- you know, why he believes it's right and then anyone who  
20 thinks it's wrong can do that. So that when I say by issue, sometimes that can  
21 make sense too because then the Court just has to think about that one issue  
22 one time, and so anyway, I put that out there just as something for folks to think  
23 about.

24 THE COURT: Okay. Thank you. And --

25 MS. BELENKY: Excuse me, Your Honor?

1 THE COURT: Yes.

2 MS. BELENKY: Your Honor –

3 THE COURT: And who is this speaking?

4 MS. BELENKY: -- this is Lisa Belenky. This is Lisa Belenky with  
5 the Center for Biological Diversity. I just wanted to ask one more practical  
6 question about the opening briefs. Do you want excerpts of record for each of  
7 the opening briefs as a separate document or do you want to utilize the main  
8 record –

9 THE COURT: No, no. I want you to put the excerpts in there  
10 because I mentioned a few times ago that it's like a 48,000 page document that's  
11 very difficult to navigate through because it's in big chunks and I can't – you  
12 know, doing it on the computer is – and I appreciate – I know that there was a  
13 drive that was given to me, but I think it would be – unfortunately I'm still a paper  
14 person. I'm not quite so IT friendly, so it would be much easier for me to be able  
15 to make notes and things like that on actual paper.

16 MS. BELENKY: Okay. Thank you for clarifying.

17 THE COURT: Okay. Thank you. And then I also want the parties  
18 to think about this as well. I mean I know we're talking about sometime next  
19 year, but in issuing my findings I would – I would like for the parties – well, first I  
20 was thinking about doing it in the form of findings of fact and conclusions of law  
21 and wanted to hear if the parties have any dispute with that format for the  
22 findings and the order. Is there any dispute with that format?

23 MR. ROBISON: I think that's a great idea. This is Kent Robison,  
24 Your Honor. That's a great idea to have findings and conclusions.

25

1 THE COURT: Okay. So, then, with that I would probably like to ask  
2 the parties to submit proposed findings of fact, conclusions of law so that way as  
3 I'm preparing for the hearings I can look at those and then, you know, based on  
4 the argument I can make – you know, I can start to structure what my ultimate  
5 order would be. Okay.

6 MR. BOLOTIN: Your Honor, this is James Bolotin on behalf of the  
7 State Engineer. I think that's – I second Mr. Robison's thought. I think that's a  
8 great idea. I'm happy to submit a proposed order of some form. I was just  
9 wondering if Your Honor wanted us to also follow that up with a Word doc copy  
10 so that –

11 THE COURT: Yes, please. Yeah.

12 MR. BOLOTIN: To the Clerk?

13 THE COURT: Yes. So in Word that would be really helpful  
14 because then as I'm structuring the findings of fact, conclusions of law I can  
15 actually cut and paste and add and that kind of thing which would make my job a  
16 whole lot easier.

17 MR. ROBISON: Again, Kent Robison, Your Honor. Does that  
18 include a proposed judgment?

19 THE COURT: Yes.

20 MR. ROBISON: Thank you.

21 MS. BELENKY: Would they want that submitted with the opening  
22 brief or –

23 THE COURT: Oh, no, no, no, no. I'm talking way, way, way out.

24 MS. BELENKY: Way later. Okay.

25

1 THE COURT: Like I said, I wanted to have a status check after the  
2 reply briefs are done so that we can discuss that, figure out timing for the  
3 hearings. I want the parties to actually confer with each other to figure out how  
4 many days that they think that it would take and then, you know, we'll also be  
5 discussing the issue of whether or not the arguments will be done by issue or by  
6 petition and how that will be structured. And then I would also ask the parties  
7 how long it would take to prepare any proposed findings and judgments that can  
8 be submitted to the Court because I want to be able to have at least enough time  
9 to review those prior to the actual hearings.

10 MR. BOLOTIN: Your Honor –

11 MR. ROBISON: Do you want a – Kent Robison. Excuse me,  
12 James – a specific date on your schedule for submission of findings of fact,  
13 conclusion of law, proposed judgment which might be a week or two before  
14 arguments? Do you want a specific date on this schedule?

15 THE COURT: Well, so I guess – I guess my first question would be  
16 do the parties feel they have a good enough grasp on how much time it would –  
17 you know, we would need to do the arguments at this point or would that be  
18 better to discuss maybe either after the response or the replies are done so that  
19 way we kind of get a feeling for what all of the issues are and that kind of a thing?

20 MR. BOLOTIN: Your Honor, this is James Bolotin. If I – correct me  
21 if I misunderstood, but I think Mr. Taggart suggested in addition to the  
22 (indiscernible) status conference we have a status conference pretty quickly after  
23 all briefing is done –

24 THE COURT: Correct.  
25



1 MR. BOLOTIN: -- and we can iron this out because I think today  
2 there's probably pretty divergent thoughts on how much time everybody needs,  
3 and it might be a good idea to wire some kind of a conference call meet and  
4 confer before that time as well so we can talk to each other, see how far apart we  
5 are and then bring it to Your Honor for the scheduling.

6 THE COURT: And that was my intention to have another, you  
7 know, status check after all the briefings are due so that we can have this  
8 discussion. I didn't intend to set the hearing dates today or, you know, make any  
9 hard deadlines because I think that really is dependent on what's actually filed  
10 and what the parties feel they need to do to protect their interests in their filings  
11 as well.

12 MR. TAGGART: Your Honor, Paul Taggart again for the District.  
13 That all makes sense. I just, I'm not familiar -- I assume your calendar is already  
14 crazy a year out from now, so probably the sooner the better we block out some  
15 time on it. I would like to avoid coming down to -- I mean I love Las Vegas, but  
16 coming down and doing, you know, three days here, two days there, three days  
17 here and breaking it up over a month as opposed to having a block of time, but I  
18 know how hard that's going to be on your schedule. So I think the sooner we  
19 block out some time we can decide how we want to use that time later but getting  
20 it on your calendar I think is important.

21 THE COURT: Okay. Well, then, let me ask, how many days -- do  
22 the parties have an idea of how many days they think it would take for argument?

23 MR. BOLOTIN: Your Honor, this is James Bolotin on behalf of the  
24 State Engineer. I think Mr. Taggart alluded to a brainstorming conversation we  
25 had some time ago, and my thought was about a week to try and keep it as close

1 to an appellate matter as it would be in front of the Supreme Court as we can  
2 where everybody gets a section for opening, answering, reply, but then as Mr.  
3 Taggart raised today we might break it up by separate issue in which case I'm  
4 not sure how that would work. But my only thought is at the Supreme Court  
5 everybody gets only 15 to 30 minutes in appellate arguments, and my original  
6 thought was everybody would get an hour at each stage but I'm open to  
7 suggestions. I was just originally thinking of a four to five day kind of like a trial  
8 setting.

9 THE COURT: So let me ask, is there anyone that disagrees that  
10 five full calendar days would be sufficient to cover all of the argument?

11 MS. PETERSON: Your Honor, this is Karen Peterson. I think we  
12 might need more time than that.

13 THE COURT: How much more time do you think you would need?

14 MS. PETERSON: Maybe another three days, maybe another week.

15 MR. BOLOTIN: I agree with Ms. Peterson. I think two weeks to be  
16 safe. I mean the hearing before the State Engineer was two weeks or maybe  
17 three, I can't remember now, but it was super abbreviated. We had a clock on us  
18 during cross-exam, that sort of thing, but, you know, I'd say two weeks is safe but  
19 somewhere between one and two.

20 THE COURT: All right. So, then, why don't I block out two weeks. I  
21 mean I'll basically treat this like a trial where I will – you know, I will have  
22 someone else hear my calendars during those two weeks so that way it can be  
23 blocked out full calendar days for those two weeks. So, then, as far as timing,  
24 when we're talking about the replies being filed on January 7th, you know, with  
25 giving enough time to prepare the findings of fact, conclusions of law, for the

1 Court to be able to review everything, how much time after that January 7th date  
2 do you think we would need to set the hearing for?

3 MR. TAGGART: I'm going to say something that I know Mr.  
4 Robison will disagree with because I think he's going to say one week.

5 THE COURT: He's going to say three years ago.

6 MR. ROBISON: Yeah. Three years ago but maybe two days.

7 THE COURT: And please understand I have to review everything,  
8 so it's going to take me a lot longer than just a couple of days to prepare.

9 MR. ROBISON: I'm holding my breath waiting for Mr. Taggart to  
10 recommend two weeks.

11 MR. TAGGART: Well, I'm going to say -- I think this is a page out of  
12 your book, Kent, but we already will know our case --

13 MR. ROBISON: That's right.

14 MR. TAGGART: When we file our briefs we should be able to argue  
15 in my opinion but Your Honor needs time, so that's really, I think, what would  
16 control. I mean four, six weeks, two months maybe. It depends on Your Honor  
17 and how, you know, hard this is going to be or how much time it's going to take to  
18 go through everything.

19 THE COURT: Sure. So I will tell the parties that my plan is to  
20 review everything as they come in, but then I was planning on setting aside time  
21 prior to the hearings to really just focus on, you know, re-reviewing everything  
22 and reviewing the proposed findings of facts and that kind of thing. So I think if  
23 we're looking at somewhere in the area of like four to five weeks, that would  
24 probably be sufficient for me to prepare. So I guess with that said, then, let's  
25

1 block out -- let me look and see if it's in my criminal stack or my civil stack. I  
2 probably want to put it in my civil stack.

3 (Court conferring with Clerk.)

4 THE COURT: Okay. So why don't we do it in my civil stack, two  
5 weeks block it out. So one of the weeks is a short week, so we would be looking  
6 at nine days. Do you think that we can get it done in nine days?

7 MR. ROBISON: Yes.

8 THE COURT: Okay. So why don't we do that short week and the  
9 week after or whatever.

10 (Court conferring with Clerk.)

11 THE COURT: So we're looking at February 14th through the 25th.  
12 Does that work with everyone? Are there any conflicts?

13 MR. ROBISON: CSI says yes, Your Honor, that works.

14 MR. CARLSON: This is Sev Carlson. That works, Your Honor.

15 MS. URE STIX: Your Honor, this is Therese Ure Stix, and I do have  
16 another trial scheduled for that second week but I'm hoping it will settle, so I don't  
17 know if you want to go ahead and schedule it and I can hope for the best or try to  
18 get it rescheduled at that time.

19 THE COURT: Sure. I mean and the other -- the other option is if  
20 your issue -- if we're going to hear it by issue, and, you know, we can see if  
21 amongst the parties we can come to an agreement of having you argue in the  
22 week that you're free.

23 MS. URE STIX: Okay. Thank you.

24 THE COURT: Is there anyone else that has a problem or a conflict  
25 with those weeks?

1 MS. PETERSON: Your Honor, we have -- this is Karen Peterson.  
2 We have some proceedings going on in Eureka County, and I am not quite sure  
3 when those have been reset to. Mr. Bolotin may know.

4 MR. BOLOTIN: Hi, Your Honor. I was just looking at my calendar  
5 right now, and I don't think any of them have been reset in February based on my  
6 record, but they do pick up again on March 14th. But that's what I have in my  
7 calendar but there has been a lot of moving dates over there, but on my calendar  
8 I have the week of February 14th and 21st clear.

9 THE COURT: Okay. All right. So, then, I will -- is there anyone  
10 else that has any conflicts with those dates? All right. Hearing none, then that  
11 will be the dates that I will schedule out or block out for the hearing. I'll start it at  
12 9:00. So it will be 9:00 to 5:00 with a break for lunch.

13 MR. BOLOTIN: And, Your Honor, this is James Bolotin real quick.  
14 Do we also want to schedule like January -- the second week of January that  
15 status conference to iron this out?

16 THE COURT: Yeah, that's fine. So we can set that for --

17 MR. BOLOTIN: Or was it two weeks? Did we say two weeks?  
18 Sorry. I might have messed that up.

19 THE COURT: That's fine. So we can do -- let's see. So it would be  
20 on January 20th and I'll do that at 11:00 a.m. again. That's just to figure out how  
21 we're doing the argument, you know, that kind of thing, and I will ask the parties  
22 to really try as much as they can to confer with each other with maybe a  
23 proposed hearing schedule so that way we can talk about it not starting from  
24 scratch on January 20th.

25

1 MR. TAGGART: Your Honor, are you comfortable with doing these  
2 status conferences by BlueJeans even out past COVID, like I'm thinking of that  
3 January 20th date? I mean is this something you're thinking of doing going  
4 forward or how should we plan travel?

5 THE COURT: So I don't -- I mean I will leave that up to you. So I  
6 don't have a problem with doing BlueJeans. I know especially for something like  
7 a status conference or anything like that, that it's much more beneficial to just do  
8 it from BlueJeans for those of you that have to travel, so I will leave that to your  
9 discretion as to whether or not you would like to appear in person or by  
10 BlueJeans. Okay. Are there any other housekeeping matters regarding what  
11 we've talked about? Okay. Hearing none, then I will -

12 MS. PETERSON: Your Honor --

13 THE COURT: Yes, Ms. Peterson?

14 MS. PETERSON: I'm sorry. This is Karen Peterson. I do have  
15 another housekeeping matter just before people may leave that I wanted to bring  
16 to your attention. In some of the stipulations that we had filed last week we did  
17 not include the State Engineer as a party to the stipulation and I apologize for  
18 that. I've apologized to the State Engineer for that and also if he could, you  
19 know, apologize to his clients, and I do believe the State Engineer is willing to  
20 consent on the record to an agreement to those stipulations, and so I just wanted  
21 to take care of that before maybe people left.

22 THE COURT: Sure. Okay. So, Mr. Bolotin, what is your position?

23 MR. BOLOTIN: Yes, Your Honor. I spoke about this with Ms.  
24 Peterson and I have forwarded her apology to my client. We figured it out. I've  
25 signed the most recent stipulations that she's submitted and I don't -- the State

1 Engineer doesn't have issues with the language in the ones that left the State  
2 Engineer off, and we really appreciate because as we are the only respondent  
3 we think we do need to be included in those types of stipulations moving forward.  
4 But based on our conversation and how the rest of the stipulations have been  
5 handled, we accept Your Honor's orders and the language of those other  
6 stipulations regarding intervention and I think the four or five petitions that we  
7 were left off of -- I mean stipulations.

8 THE COURT: Okay. All right. Thank you. All right. So, then, are  
9 there any other housekeeping matters by any other parties before we move to  
10 the argument?

11 MS. CARLSON: So, Your Honor, this is Sev Carlson. Just a quick  
12 question. If we have oral arguments scheduled for February 14th starting on that  
13 date and we have the status check after the reply briefs on January 20th, do we  
14 want to set a target date for the findings of fact, conclusions of law and  
15 judgment?

16 THE COURT: Sure. Would a week after that -- let's see. Where  
17 am I. Yeah. So would a week after that January 20th date, so we're talking  
18 about January 27th be enough time for the parties to be able to prepare those  
19 proposed findings?

20 MR. ROBISON: Fine by CSI.

21 THE COURT: Okay. I guess I should ask, does anyone have an  
22 objection to preparing it by the 27th and submitting them to the Court? All right.  
23 Hearing none, then the 27th will be the target date for the findings -- the  
24 proposed findings of fact and conclusions of law and judgment. All right. Are  
25 there any other housekeeping matters?

1 MR. TAGGART: Just one quickly. When the Lincoln, Vidler case  
2 came down from --

3 THE COURT: And who is speaking?

4 MR. TAGGART: I'm sorry, this is Paul Taggart for the District.

5 THE COURT: Thank you, Mr. Taggart.

6 MR. TAGGART: When the Lincoln, Vidler case came down from  
7 the Seventh JD there were some errors in the way it was logged into the system,  
8 and I just wanted to ask if anyone knows whether any of that got fixed or is Ms.  
9 Peterson still listed as counsel for the Water District?

10 MR. ROBISON: Well, a conflict of interest.

11 THE COURT: I was not aware.

12 MR. KLOMP: I didn't realize that was a mistake.

13 MR. TAGGART: Well, maybe I spoke too soon. Why don't we do  
14 what we're about to do and then afterwards we can talk about that. Ms. Peterson  
15 and I might be able to figure out if it's --

16 THE COURT: Sure. And that might be an error from our Clerk's  
17 office, so we'll try and figure that out as well, so we'll take a look at it afterwards.  
18 Okay. So that being said, then those who do not want to stay on because they're  
19 not participating in the argument can leave if they'd like, and so I'm going to go  
20 now on to the motions to intervene that were left over from the Lincoln, Vidler  
21 case that came down.

22 And just as a couple of housekeeping matters, I know that  
23 there were stipulations that were done after there were some pleadings that were  
24 filed, so I just want to make sure it looks like -- hold on. The Moapa Valley Water  
25 District's motion to intervene was disposed of by stipulation; is that correct?



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MS. PETERSON: Yes.

THE COURT RECORDER: Who said that?

THE COURT: Oh, that was Ms. Peterson. Sorry. And since there's still so many of you on, I will ask that you actually state your name when you speak. Also on the Coyote Springs motion to intervene I did not see any oppositions, I only saw non-oppositions, so at this point in time is this ripe to grant?

MR. ROBISON: Yes, Your Honor.

MS. PETERSON: Your Honor, this is Karen Peterson. We did submit late yesterday a signed stipulation for Coyote Springs Investment intervention –

THE COURT: Oh, okay.

MS. PETERSON: -- and there's also two other pending.

THE COURT: Oh, okay. Great. So then since the stipulation has been proposed, and I will find it and sign it when – in my order app, then at this point in time, then, Coyote Springs is – that motion to intervene will be rendered moot, so that will – I'll take that off calendar. So I think the only ones that we have left to argue are Southern Nevada Water District, Las Vegas Valley Water District and Muddy Valley; is that correct?

MR. TAGGART: Yes.

MR. DOTSON: Yes. I believe that's correct.

THE COURT: Okay.

MR. DOTSON: This is Rob Dotson.

1 THE COURT: Okay. So, then, why don't I start out – let's see –  
2 well, okay. Then why don't I start out with the Las Vegas Valley Water District  
3 and the Southern Nevada Water Authority's motion to intervene –

4 MR. ROBISON: Your Honor –

5 THE COURT: Oh, yes.

6 MR. ROBISON: -- this is Kent Robison for CSI, Your Honor. I want  
7 to note that we had filed an opposition to SNWA's motion to intervene in Vidler's  
8 case. We would ask that that opposition be withdrawn.

9 THE COURT: Okay. Thank you. That will be – that will be the  
10 order.

11 MR. ROBISON: Thank you.

12 THE COURT: Thank you. All right. So I've read the pleadings. Is  
13 there anything that either party would like to particularly emphasize regarding  
14 their pleadings? I'll start with Las Vegas Valley Water District and Southern  
15 Nevada Water Authority.

16 MR. TAGGART: Okay. Thank you, Your Honor. Again, Paul  
17 Taggart for the Water District and the Water Authority. So as you know,  
18 stipulations have been entered to have other parties intervene into the Lincoln,  
19 Vidler case. Also prior to Lincoln, Vidler coming down to this Court or that case  
20 coming down to this Court, all the parties in the seven original petitions jointly  
21 agreed to intervene in each other's case.

22 So we resolved the intervention issues by stipulation, and  
23 yesterday I did get – you know, we did talk a little bit about how to resolve this,  
24 but the point is that it's pretty obvious we think that we have intervention rights.  
25 We, the Water District and Las Vegas Valley Water District – or the Water

1 Authority, we have – we own water rights, surface water rights in the Muddy  
2 River that are used to bring down to Lake Mead and then we treat that water and  
3 deliver it to customers in the Las Vegas Valley.

4                   So we have water rights in the Muddy River that we do that  
5 with as part of our Colorado River Water Portfolio, and those are the water rights  
6 that are impacted in our view by the ground water pumping in the Lower White  
7 River Flow System. And we're also a party to an MOA, a memorandum of  
8 agreement between a series of parties on how to protect the Moapa Dace. The  
9 Water Authority owns property where the Dace – some of the main Dace habitat,  
10 we're engaged in significant activities to enhance Dace habitat and we're in  
11 partnership with U.S. Fish and Wildlife Service in maintaining that habitat for that  
12 fish. And so the ground water pumping that is at issue in this case directly  
13 implicates those two concerns.

14                   We're also – we also serve, the Water District does, as the  
15 general manager of the DID (phonetic) for the Coyote Springs development and  
16 so we also have an interest there. And so we laid all of that out in our brief. It's  
17 pretty clear that we have an interest that's affected. Now, I think what's key to  
18 remember is that Lincoln, Vidler's – and I hope it's okay for me – Lincoln County  
19 and Vidler Water Company, their petition is not just focused on the Kane Springs  
20 issue, whether to include or not include Kane Springs in the Lower White River  
21 Flow System. They address issues that affect all the parties to the Lower White  
22 River Flow System and who have an interest in the 1309 ruling.

23                   For instance, they've argued that the entire order should be  
24 vacated. It's that it's not – the State Engineer is not authorized to create a multi-  
25 basin area, that his decision about the Endangered Species Act, they challenge

1 that question. They challenge whether closing arguments were properly relied  
2 upon by the State Engineer. They challenge the 8,000 acre-foot cap that State  
3 Engineer put on the Lower White River Flow System.

4                   So we have a stake in how all of those issues are resolved, so  
5 we certainly have – you know, have a stake in the matter and we have our own  
6 petition as well, and so that – you know, that is – we think it’s pretty obvious that  
7 we have the right to be an intervenor, and without belaboring the point I think –  
8 and I can add to, you know, this if you need me to but we certainly covered it all  
9 in our briefs. And, you know, we are different from the Muddy Valley Irrigation  
10 Company, and the Muddy Valley Irrigation Company owns water rights by a  
11 decree that was issued on the Muddy River Decree by in our view this Court --  
12 that, you know, in the 1920’s.

13                   And so MVIC is a stakeholder because they own water rights.  
14 We own water rights through MVIC as well. MVIC doesn’t own ICS credits or  
15 intentionally create surplus credits, the water rights that we use for delivering  
16 water to Las Vegas Valley, but they have a lot of other members. They represent  
17 a lot of other water rights, I’ll let Mr. Dotson speak to that, but there’s a different  
18 interest that they are involved in and we are involved in. So I expressed our  
19 involvement and the purpose for it, and so unless you have any other questions  
20 I’ll just leave it at that.

21                   THE COURT: All right. Thank you, Mr. Taggart. Mr. Dotson?

22                   MR. DOTSON: Your Honor, do you expect me to speak to my  
23 motion first as well? I just want to make sure –

24                   THE COURT: I guess I should ask Ms. Peterson. I guess I should  
25 ask Ms. Peterson. Would you like to address these separately or together?

1 MR. DOTSON: Or together, yeah.

2 MS. PETERSON: Your Honor, this is Karen Peterson. I was going  
3 to address them together, so if –

4 THE COURT: Okay. That's fine.

5 MS. PETERSON: -- Mr. Dotson doesn't mind going first and you  
6 don't –

7 MR. DOTSON: No.

8 MS. PETERSON: -- that would speed things up, I think.

9 THE COURT: No, that's fine. Go ahead, Mr. Dotson.

10 MR. DOTSON: That's fine, and I'll – thank you, Your Honor. This is  
11 Robert Dotson on Muddy Valley --- on behalf of Muddy Valley Irrigation  
12 Company. And I don't want to repeat anything Mr. Taggart has said, but I do  
13 want to emphasize who my client is because I think at the heart of the opposition  
14 is that issue. So the irrigation company is a company that was formed over 125  
15 years ago. It holds water rights in the Muddy Valley River in excess of 30,000  
16 acre-feet annually, and the decree's language is very interesting in this regard.

17 The decree, which you'll become familiar with through our  
18 briefing and in this case in general, indicates, as decrees do, who owns the water  
19 that's being decreed, and instead of naming a specific amount for my client --  
20 and I'm going to read this language -- it has decreed to my client the total  
21 aggregate volume of the (indiscernible) amounts and quantities of water awarded  
22 and allotted, the total available flow of the Muddy River, and it consumes and  
23 exhausts all of the available flow of the Muddy River after the above -- that was a  
24 different quote from what I intended actually – after everyone else's water is  
25 taken.

1                   In other words, my client gets all that is left and that amount  
2 has a historical flow, and consequently to the extent that there's a determination  
3 that any flow is lost, that is flow that is lost to my client. Now, who is my client?  
4 My client, as I mentioned, is a corporation that's existed for over 125 years. It  
5 has 250 approximately shareholders and of which SNWA is one, Vidler is one,  
6 Coyote Springs Investment is one, and there's approximately 140 some others  
7 that I've been hired to represent.

8                   And its interests, therefore, my client's interests are individual  
9 and they're discreet and they're significant because of the amount of water rights  
10 that they have and the significant impact or lack of any impact depending upon  
11 the determination that could exist. Ms. Peterson also has raised on behalf of her  
12 client the question of the reimbursement of Muddy Valley Irrigation Company by  
13 SNWA and I want to address that directly.

14                   There is a reimbursement agreement that is in existence, it's  
15 alluded to and it's made from the attached in the opposition, but that does not  
16 change my professional responsibility and it doesn't change the rights of a party  
17 to be heard. Were that the case then if you had two individuals in a lawsuit who  
18 had similar interests, the Courts would require those parties to only participate  
19 together and that's not the way it works.

20                   Indeed – in fact, Mr. Robison just alluded to the conflict of  
21 interest in a joke. It's very possible that there will be a conflict of interest  
22 between the – that could exist, and, so, therefore, between the position of SNWA  
23 and the position of Muddy Valley that's why we have separate counsel, and that's  
24 why my client has the right to be separately represented in this case. With  
25 regard to the interests in this particular proceeding, to the extent that – as I

1 described, to the extent that any of the flows from the Muddy Valley River are  
2 impacted, that affects my client and it affects their shareholders.

3 THE COURT: Okay. Thank you. Ms. Peterson?

4 MS. PETERSON: Thank you, Your Honor. This is Karen Peterson  
5 representing Vidler Water Company, and I'll also be making the argument on  
6 behalf of Lincoln County Water District because we did both oppose the motion  
7 in our – both motions, I guess, to intervene in the Seventh Judicial District. And  
8 again, just – I know you said, Your Honor, that you've read all the pleadings.  
9 With regard to the SNWA motion, we did oppose that because at the time when  
10 the motion was filed SNWA seemed to be centered on making arguments as to  
11 why it was allowed to intervene in the Lincoln, Vidler case based upon being able  
12 to intervene in the CSI case previously and all those cases which didn't seem to  
13 have anything to do with Lincoln and Vidler, and so that's why we opposed the  
14 motion in the Seventh Judicial District Court.

15 There was no mention of intentionally created surplus or any  
16 rights associated with that in their motion. We also opposed the Muddy Valley  
17 Irrigation Company motion to intervene because they appeared to want to  
18 expand the scope of our petition, the Lincoln, Vidler petition to assert their own  
19 claims, and then also we were opposed based upon SNWA paying for Muddy  
20 Valley Irrigation Company to appear in this litigation to further SNWA's interests  
21 in Muddy River water rights, and that's exactly the language that's in the SNWA  
22 agenda item, getting approval for the reimbursement agreement, is the  
23 agreement was entered into to further SNWA's interests in the Muddy River  
24 water rights, and that was attached to our opposition filed against the Muddy  
25 Valley Irrigation Company motion to intervene.

1                   And also notwithstanding that Muddy Valley Irrigation  
2 Company was taking a position that's contrary to Vidler's interests because  
3 Vidler also owns Muddy River (indiscernible), as Mr. Dotson pointed out, so –  
4 and both refused to provide the common interest agreement for joint  
5 representation – or joint prosecution and defenses that was attached to the  
6 reimbursement agreement, and the reimbursement agreement, the only thing  
7 that we have and have been provided with regard to their arrangement shows  
8 that they're working together – this is stated repeatedly throughout their  
9 agreement, that they're working together for their common interests, common  
10 interests, common interests, common interests.

11                   Under NRCP 24 intervention is now allowed if existing parties  
12 adequately represent somebody's interest, so if you granted SNWA's motion to  
13 intervene Muddy Valley wouldn't have the right to intervene because based upon  
14 their common interests it would already be adequately represented by SNWA  
15 and vice versa. However, we are willing to agree to allow intervention to both  
16 SNWA and Muddy Valley Irrigation Company in the action if we are allowed to  
17 intervene in their petitions and they file one brief.

18                   We feel because they have a common interest and SNWA is  
19 paying for Muddy Valley Irrigation Company's participation in this litigation, that  
20 they should – we're agreeable to them intervening – being allowed to intervene in  
21 the Lincoln, Vidler action if they file one answering brief because of their common  
22 interests. And, you know, we have serious concerns about SNWA being allowed  
23 effectively to file two answering briefs because it is paying for Muddy Valley  
24 Irrigation Company's participation in this litigation, and actually we have a  
25 probably overarching concern about intervention being used by proposed



1 intervenors to support each other's cases. We don't think the intervention  
2 statutes were meant to be used that way.

3                   So and we've set that forth – that was set forth in our papers,  
4 but, again, we are willing -- we think that's fair they would both be allowed to  
5 intervene in the action, but they should only be allowed to file one answering brief  
6 against the Lincoln, Vidler.

7                   THE COURT: Okay. Thank you. Any further argument from Mr.  
8 Taggart -- or, Mr. Dotson, I'll start with Mr. Taggart.

9                   MR. TAGGART: Yes. Just I'll be as brief as I can, Your Honor.  
10 Just to be clear, what this all is about is ground water pumping that in our view  
11 depletes surface water flows in the Muddy River. If that wasn't already clear, it's  
12 the ground water pumping the Lower White River Flow System, that when it  
13 occurs in our view, in our expert's view captures Muddy River flows, and those  
14 are senior water rights that need to be protected and so that's it in a nutshell.

15                   This argument that's being raised now was not raised in the  
16 opposition by Lincoln County and Vidler, but, you know, everything that's been  
17 said is – has a simple explanation. When you want to have a common interest  
18 joint defense agreement in litigation you execute a common interest agreement,  
19 and Your Honor may not be aware but there's other litigation filed by CSI and  
20 Lincoln and Vidler in federal court with discovery, you know, in various stages.  
21 It's stayed in some cases, it's not in others, and so my client is particularly  
22 sensitive to having conversations with another party that might not be privileged.

23                   So very common for joint defense agreements to be executed.  
24 That's all this is. This notion of common – you know, that's why I use the  
25 terminology common interest in an agreement is to – is to justify that privilege

1 that applies to the discussions when it involves that common interest. The – yes.  
2 Requests were made for certain documents, and then my client asserted  
3 privilege under the public records law. That was not challenged by Vidler or  
4 Lincoln County, and so there’s nothing – there’s nothing remarkable about the  
5 fact that that document was not turned over.

6           We’re willing – I mean Vidler and Lincoln County have not filed  
7 a motion to intervene in our petition for judicial review, and, you know, I think it  
8 could be construed that those motions were expected by July 17, but, you know,  
9 we believe that this intervention business, I mean I’ve had about enough of it. So  
10 we’re willing to let, you know, Vidler and Lincoln come into and intervene into our  
11 case without filing a motion, we’ll stipulate right now, but we’re not going to agree  
12 to sharing a brief or having to coordinate a brief with MVIC, they have a different  
13 interest than we do, so that’s not fair.

14           And, you know, I think it’s borderline offensive to think that  
15 SNWA could buy MVIC’s, you know, voice. That’s not what’s going on here, and  
16 so I’ll let Mr. Dotson speak more to that. But anyway, I think the simple thing,  
17 you know, allow us to intervene with no restrictions into the Lincoln and Vidler  
18 matter, we’ll agree by stipulation that they can intervene in our petition and we  
19 won’t go through the exercise of forcing them to file motions and forcing Your  
20 Honor to read those motions and then having other argument about this. We can  
21 just resolve all the intervention right now.

22           THE COURT: Okay. Thank you. Mr. Dotson?

23           MR. DOTSON: Thank you, Your Honor. MVIC will not agree to  
24 share its voice, share its time in this proceeding. If, in fact, the -- this isn’t even  
25 that I’m being directly paid. If, in fact, the -- that was a basis to restrict any party,

1 then the approximately thousand cases that I handled in the first 20 years of my  
2 career where I was insurance defense counsel, they would have all been  
3 improper because in every one of those cases I was paid by an insurance  
4 company directly, not even was it the fact that my client was being reimbursed.

5           Nowadays when I do mostly corporate work, very oftentimes  
6 the corporation will reimburse the director that I might be representing, and it  
7 doesn't mean that that director doesn't get to speak or that he somehow -- or he  
8 or she has somehow limited rights of intervention or rights of any kind. And, so,  
9 yes, it is offensive. My client -- I have discussed this with my client. My client is  
10 not willing -- not waiving the privilege, is not willing to share time, and I'm not  
11 even sure how it would work ethically on my behalf.

12           What if Mr. Taggart and I can't agree on how we should  
13 address Kane Springs. What, would you put in the two different positions? It's  
14 just -- that's not reasonable, and with regard to every other -- with regard to the  
15 other tests of intervention, clearly I think as the record exhibits here it is without  
16 question that the significant interests of my client are adequate, and it is  
17 important that they be adequately represented through separate representation  
18 and that their intervention be allowed with -- in this subcase. Thank you, Your  
19 Honor.

20           THE COURT: Okay. Thank you. So in reviewing NRS 533.450  
21 and under NRCP 24(a)(2), I wanted to point out a few things because I actually  
22 also looked at the affirmance of the appeal. So I know that although Lincoln,  
23 Vidler's petition contesting inclusion of Kane Springs in Order 1309, I want to  
24 point out that in that affirmance on the appeal from the Seventh District Court that  
25 grants the motion to change venue, that they pointed out first that 1309 found

1 that a number of the groundwater basins in Lincoln and Clark Counties were  
2 previously managed separately including Kane Springs, but they are inextricably  
3 connected to the Lower White River Flow System such that they must be  
4 managed conjunctively to avoid the detrimental effects of the senior water rights  
5 on the Muddy River and the habitat of the Moapa Dace.

6           Second, the State Engineer determined that Kane Springs is  
7 part of the Lower White River Flow System which must be collectively managed,  
8 and this order by the State Engineer is for present purposes presumed correct.  
9 So with that in mind, the rights to intervene are based on the assumption that  
10 Kane Springs is inextricably connected to the Lower White River Flow System  
11 which includes the Muddy River.

12           So in looking at that as to Southern Nevada Water District,  
13 SNWA and LVVWD, I do find that they have those interests because SNWA is a  
14 senior water rights holder in the Muddy River, so any decision that's made  
15 regarding Kane Springs will impact those rights. LVVWD, in its capacity as a  
16 general manager of the Lower White River Flow System, also maintains a  
17 sufficient interest from the petition from a logistical standpoint. As to the citing  
18 *American Home Assurance Company*, that case establishes that as long as the  
19 interest is certain that it is legitimate regardless of whether or not harm to that  
20 interest is potential.

21           So then in reviewing those interests, I do find that the water  
22 rights are unique property rights that cannot be adequately represented by  
23 anyone else other than the holder, so I do not find Lincoln, Vidler's argument that  
24 those similar interests are adequately represented by having both parties join  
25 persuasive.

1                   So in both cases, so in Southern Nevada Water Authority and  
2 Las Vegas Valley Water District, I am going to grant the motion to intervene. I do  
3 find that it is appropriate under Subsections 24A and B of the NRCP. Also as to  
4 Muddy Valley Irrigation Company, I am going to grant the motion to intervene as  
5 well, and I don't know if the parties need any more regarding the decision in  
6 order for any appellate purposes or anything along those lines.

7                   MR. TAGGART: We can submit a proposed order if we need to.  
8 I'm looking through my files to see whether we already did because I think we  
9 already did, but we can provide you with a proposed order if that is helpful.

10                  THE COURT: That would be helpful. And so just to clarify, I do find  
11 that all the conditions are met under NRCP 24 for both the -- let's see, under  
12 Subsections A and B, and also in looking at the four requirements, I do find that  
13 those four requirements are met, meaning that both entities have shown that  
14 there's a sufficient interest in the litigation subject matter, that they would suffer  
15 an impairment of its ability to protect that interest if it doesn't intervene, that the  
16 interest is not adequately represented by the existing parties and there wasn't an  
17 opposition or any argument regarding the application being timely, so that, I  
18 think, is already determined. So that will be my order.

19                  (Whereupon, counsel thanked the Court.)

20                  THE COURT: All right. Thank you. Are there any other  
21 housekeeping matters that need to be taken care of at this point in time?

22                  MS. PETERSON: Your Honor, this is Karen Peterson.

23                  THE COURT: Yes.

24                  MS. PETERSON: Did you want us to file our motion to intervene  
25 into the SNWA action and the Muddy Valley Irrigation Company action or I know

1 we had a stipulation from SNWA, but I don't know if we have one from Muddy  
2 Valley Irrigation Company?

3 THE COURT: Okay. Well, let's ask.

4 MR. DOTSON: Isn't irony a funny thing.

5 THE COURT: Mr. Dotson, what is your position?

6 MR. DOTSON: No. I'm joking because life's too short, I believe, for  
7 there not to be some (indiscernible). No. We have no objection to the  
8 intervention of the County and our shareholder in our petition for judicial review.

9 THE COURT: Okay. And I think Mr. Taggart already said as much;  
10 is that correct?

11 MR. TAGGART: That's absolutely correct, and if we need to put  
12 that in writing and submit it we can do that. Ms. Peterson and I can work on that  
13 or we can just do it on the record right here, right now.

14 MR. DOTSON: Yeah. This is Mr. Dotson. I think since we've done  
15 it on the record unless the Court would like a stipulation and order between --

16 THE COURT: I don't need any more extra work for anyone. I think  
17 this case in and of itself is enough extra work.

18 MR. DOTSON: I agree. Thank you.

19 THE COURT: Okay. So, then, that will be noted on the record that  
20 they are stipulating and --

21 MR. KLOMP: Your Honor --

22 THE COURT: Yes.

23 MR. KLOMP: -- if I could, this is Wayne Klomp for the Lincoln  
24 County Water District. I just want to point out that the State Engineer might want  
25 to also join that stipulation just for the record.

1 THE COURT: All right. Thank you. Okay. Mr. Bolotin, would you  
2 like to speak on that or --

3 MR. BOLOTIN: Yeah. Thank you, Your Honor. Thank you, Mr.  
4 Klomp. I think that's correct. The State Engineer, once again, does not oppose  
5 any intervention, that the position the State Engineer has taken in regards to all  
6 entities who participated in the administrative process leading to Order 1309, and  
7 we, once again, don't object to any of the intervention between these three  
8 entities, three to four entities right now.

9 THE COURT: Great. Thank you. All right. Anything else? All  
10 right. Hearing none, thank you, everyone, and we will see you at the next  
11 hearing.

12 (Whereupon, counsel thanked the Court.)

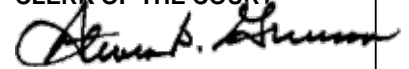
13 (Whereupon, the proceedings concluded.)

14 \* \* \* \* \*

15  
16 ATTEST: I do hereby certify that I have truly and correctly transcribed the  
17 audio/visual proceedings in the above-entitled case to the best of my  
18 ability.

19  —

20 LISA A. LIZOTTE  
21 Court Recorder  
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25



1 NEOJ

2 DISTRICT COURT  
3 CLARK COUNTY, NEVADA

4 LAS VEGAS VALLEY WATER DISTRICT,  
5 and SOUTHERN NEVADA WATER  
6 AUTHORITY, COYOTE SPRINGS  
7 INVESTMENT, LLC, APEX HOLDING  
8 COMPANY, LLC, CENTER FOR BIOLOGICAL  
9 DIVERSITY, MUDDY VALLEY IRRIGATION  
10 COMPANY, NEVADA COGENERATION  
11 ASSOCIATES NOS. 1 AND 2, LINCOLN  
12 COUNTY WATER DISTRICT, VIDLER  
13 WATER COMPANY, GEORGIA-PACIFIC  
14 GYPSUM, LLC and REPUBLIC  
15 ENVIRONMENTAL TECHNOLOGIES, INC.

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

11 Petitioners,

12 vs.

13 ADAM SULLIVAN, P.E., Acting Nevada State  
14 Engineer, DIVISION OF WATER RESOURCES,  
15 DEPARTMENT OF CONSERVATION AND  
16 NATURAL RESOURCES,

17 Respondents,

18 CITY OF NORTH LAS VEGAS, THE CHURCH  
19 OF JESUS CHRIST OF LATTER-DAY SAINTS,  
20 MOAPA VALLEY WATER DISTRICT, NV  
21 ENERGY, WESTERN ELITE  
22 ENVIRONMENTAL, INC. and BEDROC  
23 LIMITED, LLC,

24 Intervenors.

25 **NOTICE OF ENTRY OF ORDER**

26 PLEASE TAKE NOTICE that an ORDER GRANTING MOTIONS TO INTERVENE was  
27 entered in the above-entitled matter on July 9, 2021. A copy of said Order is attached hereto as Exhibit

28 1.

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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 14th day of July 2021.

TAGGART & TAGGART, LTD.

By: /s/ Paul G. Taggart

PAUL G. TAGGART, ESQ.

Nevada State Bar No. 6136

TIMOTHY D. O'CONNOR, ESQ.

Nevada State Bar No. 14098

THOMAS P. DUENSING, ESQ.

Nevada State Bar No. 15213

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Carson City, Nevada 89703

**IN ASSOCIATION WITH:**

STEVEN C. ANDERSON, ESQ.,

Nevada State Bar No. 11901

LAS VEGAS VALLEY WATER DISTRICT

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Southern Nevada Water Authority*

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**INDEX OF EXHIBITS**

No.	Description	Pages
1	Order Granting Motions to Intervene	9

Taggart & Taggart, Ltd.  
108 North Minnesota Street  
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**EXHIBIT 1**

**EXHIBIT 1**

1 **ORDER**

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

4 LAS VEGAS VALLEY WATER DISTRICT,  
5 and SOUTHERN NEVADA WATER  
6 AUTHORITY, COYOTE SPRINGS  
7 INVESTMENT, LLC, APEX HOLDING  
8 COMPANY, LLC, CENTER FOR BIOLOGICAL  
9 DIVERSITY, MUDDY VALLEY IRRIGATION  
10 COMPANY, NEVADA COGENERATION  
11 ASSOCIATES NOS. 1 AND 2, LINCOLN  
12 COUNTY WATER DISTRICT, VIDLER  
13 WATER COMPANY, GEORGIA-PACIFIC  
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Case No. A-20-816761-C  
Dept. No. 1

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A-20-817765-P  
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11 Petitioners,

12 vs.

13  
14 ADAM SULLIVAN, P.E., Acting Nevada State  
15 Engineer, DIVISION OF WATER RESOURCES,  
16 DEPARTMENT OF CONSERVATION AND  
17 NATURAL RESOURCES,

18 Respondents,

19 CITY OF NORTH LAS VEGAS, THE CHURCH  
20 OF JESUS CHRIST OF LATTER-DAY SAINTS,  
21 MOAPA VALLEY WATER DISTRICT, NV  
22 ENERGY, WESTERN ELITE  
23 ENVIRONMENTAL, INC. and BEDROC  
24 LIMITED, LLC,

25 Intervenors.

26 **ORDER GRANTING MOTIONS TO INTERVENE**

27 On July 27, 2020, the LAS VEGAS VALLEY WATER DISTRICT and SOUTHERN  
28 NEVADA WATER AUTHORITY (collectively “SNWA”), by and through their counsel, PAUL G.  
TAGGART, ESQ. and TIMOTHY D. O’CONNOR, ESQ., of the law firm of TAGGART &  
TAGGART, LTD., and STEVEN C. ANDERSON, ESQ. of SNWA, filed a Motion to Intervene in

1 LINCOLN COUNTY WATER DISTRICT and VIDLER WATER COMPANY’s (collectively  
2 “Lincoln/Vidler”) Petition for Judicial Review of the Nevada State Engineer’s Order 1309 filed in the  
3 Seventh Judicial District of Nevada. On August 24, 2020, the MUDDY VALLEY IRRIGATION  
4 COMPANY (“MVIC”), by and through their counsel, ROBERT A. DOTSON, ESQ., of the law firm  
5 DOTSON LAW, and STEVEN D. KING, ESQ. filed a Motion to Intervene in Lincoln/Vidler’s petition  
6 in the Seventh Judicial District of Nevada. SNWA and MVIC’s motions to intervene were opposed by  
7 Lincoln/Vidler and fully briefed in the Seventh Judicial District.

8 In April 2021 Lincoln/Vidler’s petition was transferred from the Seventh Judicial District to the  
9 Eighth Judicial District in Clark County, Nevada. On May 27, 2021, Lincoln/Vidler’s petition was  
10 consolidated with the previously consolidated petitions for judicial review of Order 1309 that were  
11 already pending in the Eighth Judicial District. On July 1, 2021, this Court heard oral arguments on  
12 SNWA and MVIC’s motions to intervene.

13 On April 15, 2021, the Nevada Supreme Court issued an order affirming the Seventh Judicial  
14 District’s order transferring Lincoln/Vidler’s petition to the Eighth Judicial District. The Supreme  
15 Court recognized that in Order 1309 the State Engineer found that groundwater basins in Lincoln and  
16 Clark counties, including Kane Springs, “are inextricably connected” to an extent that they must be  
17 managed conjunctively to avoid harm to senior water rights on the Muddy River and the Moapa dace  
18 and the State Engineer’s Order is presumed correct until the conclusion of the judicial review process.<sup>1</sup>  
19 The Court further found “resolution of the appellants’ petition presumably impacts the rights of other  
20 appropriators in the LWRFS because the scope of each LWRFS stakeholder’s rights appears, on this  
21 record, interconnected with the others.”<sup>2</sup>

22 Based on the Nevada Supreme Court’s findings in its Order of Affirmance as to the State  
23 Engineer’s findings regarding the interconnected nature of the Lower White River Flow System  
24 (“LWRFS”) basins and the need for collective management of those basins, both SNWA and MVIC  
25 are entitled to intervention under NRCP 24(a) and 24(b). SNWA and MVIC have satisfied all the  
26 factors established by the Nevada Supreme Court in *American Home Assurance Company v. Eighth*  
27

---

28 <sup>1</sup> Order of Affirmance at 2, 3 April 15, 2021, NSC Case No. 87192.

<sup>2</sup> Order of Affirmance at 6-7, April 15, 2021, NSC Case No. 87192.

1 *Judicial District* to determine if a party is entitled to intervention under NRCP 26(a).<sup>3</sup> Both SNWA  
2 and MVIC have a sufficient interest in the litigation based on their ownership and control of decreed  
3 senior surface water rights in the Muddy River that were recognized by this Court in 1920. SNWA  
4 and MVIC's decreed water rights could be impacted by a decision regarding the issues and water rights  
5 at issue in Lincoln/Vidler's petition. Furthermore, SNWA and MVIC's interest are not adequately  
6 represented by a current party in Lincoln/Vidler's petition, and no party has argued that SNWA and  
7 MVIC's motions are untimely. Therefore, the intervention is proper.

8 The Court, hereby ORDERS the following and finds as follows:

9 SNWA and MVIC motions to intervene in Lincoln/Vidler's petition for judicial review of Order  
10 1309, Case No. A-21-833572-J, are granted.

11 **IT IS SO ORDERED.**

Dated this 9th day of July, 2021

*Bitita Yeager*

5B8 2E2 C4A2 1F8F  
Bitita Yeager  
District Court Judge

14 Respectfully submitted by:

15 TAGGART & TAGGART, LTD.

17 By: /s/ Paul G. Taggart  
18 PAUL G. TAGGART, ESQ.  
Nevada State Bar No. 6136  
19 TIMOTHY D. O'CONNOR, ESQ.  
Nevada State Bar No. 14098  
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25 LAS VEGAS VALLEY WATER DISTRICT  
1001 S. Valley View Blvd.,  
26 Las Vegas, NV 89153  
*Attorneys for Las Vegas Valley Water District  
27 and Southern Nevada Water Authority*

28 <sup>3</sup> *American Home Assur. Co. v. Eighth Judicial Dist. Court ex rel. County of Clark*, 122 Nev. 1229, 147 P.3d. 1120 (2006).

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34 *Attorneys for Lincoln County Water District*

## Emily Woods

---

**From:** Robert Dotson <rdotson@dotsonlaw.legal>  
**Sent:** Friday, July 9, 2021 3:20 PM  
**To:** Emily Woods  
**Cc:** Paul Taggart; Tom Duensing  
**Subject:** RE: Proposed Order on Intervention in 1309 Litigation

You have my authority to submit.

Rob  
Robert A. Dotson  
Dotson Law  
5355 Reno Corporate Dr.  
Suite # 100  
Reno, NV 89511  
Office: (775) 501-9400  
rdotson@dotsonlaw.legal

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---

**From:** Emily Woods <Emily@legaltnt.com>  
**Sent:** Friday, July 9, 2021 1:25 PM  
**To:** Robert Dotson <rdotson@dotsonlaw.legal>  
**Cc:** Paul Taggart <Paul@legaltnt.com>; Tom Duensing <Tom@legaltnt.com>  
**Subject:** RE: Proposed Order on Intervention in 1309 Litigation

Hi Rob,

Are we authorized to e-sign the attached proposed order on your behalf?

Thank you,

*Emily Woods*

Paralegal  
TAGGART & TAGGART, LTD.  
108 North Minnesota Street  
Carson City, Nevada 89703  
[\(775\) 882-9900](tel:(775)882-9900) - Telephone  
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The foregoing applies even if this notice is embedded in a message that is forwarded or attached. Thank you.

---

**From:** Karen Peterson <[kpeterson@allisonmackenzie.com](mailto:kpeterson@allisonmackenzie.com)>  
**Sent:** Friday, July 9, 2021 12:14 PM  
**To:** Paul Taggart <[Paul@legaltnt.com](mailto:Paul@legaltnt.com)>; Dylan Frehner <[dfrehner@lincolncountynv.gov](mailto:dfrehner@lincolncountynv.gov)>; [wayne@greatbasinlawyer.com](mailto:wayne@greatbasinlawyer.com)  
**Cc:** Robert Dotson <[rdotson@dotsonlaw.legal](mailto:rdotson@dotsonlaw.legal)>; Tom Duensing <[Tom@legaltnt.com](mailto:Tom@legaltnt.com)>  
**Subject:** RE: Proposed Order on Intervention in 1309 Litigation

Paul,  
LCWD is agreeable to the order with the edits I proposed. You can e-sign for me and Dylan. Wayne will file a notice of change of address with the court next week.

Thank you.

Karen A. Peterson, Esq.  
Allison MacKenzie, Ltd.  
402 N. Division Street  
P.O. Box 646  
Carson City, NV 89702  
(775) 687-0202 telephone  
(775) 882-7918 fax  
email: [kpeterson@allisonmackenzie.com](mailto:kpeterson@allisonmackenzie.com)



---

**From:** Paul Taggart <[Paul@legaltnt.com](mailto:Paul@legaltnt.com)>  
**Sent:** Friday, July 9, 2021 11:49 AM  
**To:** Karen Peterson <[kpeterson@allisonmackenzie.com](mailto:kpeterson@allisonmackenzie.com)>; Dylan Frehner <[dfrehner@lincolncountynv.gov](mailto:dfrehner@lincolncountynv.gov)>; [wayne@greatbasinlawyer.com](mailto:wayne@greatbasinlawyer.com)  
**Cc:** Robert Dotson <[rdotson@dotsonlaw.legal](mailto:rdotson@dotsonlaw.legal)>; Tom Duensing <[Tom@legaltnt.com](mailto:Tom@legaltnt.com)>  
**Subject:** RE: Proposed Order on Intervention in 1309 Litigation

Karen: Your edits are fine with me. We will make those changes and send to the Court at around 5 today. Thanks again.

*Paul G. Taggart*  
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TAGGART & TAGGART, LTD.  
108 North Minnesota Street  
Carson City, Nevada 89703  
[\(775\) 882-9900](tel:(775)882-9900) - Telephone  
[\(775\) 883-9900](tel:(775)883-9900) - Facsimile

---

**From:** Karen Peterson <[kpeterson@allisonmackenzie.com](mailto:kpeterson@allisonmackenzie.com)>  
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**Subject:** RE: Proposed Order on Intervention in 1309 Litigation

1 CSERV

2 DISTRICT COURT  
3 CLARK COUNTY, NEVADA

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5  
6 Southern Nevada Water  
Authority, Plaintiff(s)

CASE NO: A-20-816761-C

7 vs.

DEPT. NO. Department 1

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

11  
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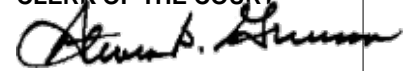
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DISTRICT COURT  
CLARK COUNTY, NEVADA

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

Petitioners,

vs.

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

Respondent.

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

Consolidated with:

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

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

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

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

IN THE MATTER OF THE PETITION OF  
CENTER FOR BIOLOGICAL DIVERSITY

Case No.: A-20-817976-P (Sub Case)  
Dept. No. I

IN THE MATTER OF THE PETITION OF  
MUDDY VALLEY IRRIGATION COMPANY

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

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

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

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. I

**PETITIONERS APEX HOLDING COMPANY, LLC  
AND DRY LAKE WATER, LLC'S OPENING BRIEF**

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

The consolidated cases before the Court are the latest iteration in a decades’ long controversy that centers on carbonate-rock aquifers in eastern and southern Nevada. In this iteration, the State Engineer took seven, different, independently-designated basins and conjoined them into a “Super-Basin” for purposes of administrative management to help conserve an endangered fish known as the Moapa dace. As a result of consolidating the basins, the relative priority of all water rights within the seven affected basins will be reordered and considered in relation to all holders in the “Super-Basin,” rather than in relation only to the other users within the original separate basins. From a practical perspective, this means the holder of a water right in Garnet Valley now competes for priority with a holder in Coyote Springs even though the two never competed previously.

The main issue with all of this is that the State Engineer had zero authority to do this. He should have gone to the Legislature to get authority. He didn’t. In addition, he also didn’t allow Apex, Dry Lake, or any other interested party to be heard on issues regarding policy and management. Now, senior rights holders are junior by decades and will be subject to extreme curtailment or total elimination of their water rights. The Court should grant this appeal and vacate State Engineer Order 1309. If the Court does not vacate 1309 entirely and rests upon the due process violations set forth below, the Court should order the State Engineer to follow the proper procedure as required by the Nevada Administrative Code.

**II. STATEMENT OF FACTS**

Collectively, Apex Holding Company, LLC and Dry Lake Water, LLC own the real property and water rights to the area of land here in Las Vegas more commonly referred to as the Apex Industrial Park. This Court may have heard of it. It bears a level of infamy because the Apex Industrial Park was the intended home of supposed-Tesla competitor Faraday Future. With the correct infrastructure, the Apex Industrial Site could rival Northern Nevada’s Tahoe Reno Industrial Complex. Given the nature of Order 1309, the prospects of such development anytime in the imminent future are now much bleaker.

1           **A.       HISTORY OF THE APEX LANDS.**

2           Although created in the wake of the PEPCON (Pacific Engineering & Production Co.)  
3 explosion in Henderson in May 1988, which killed two workers and injured 350 people, the  
4 Apex Industrial Site currently holds the best hope to diversify the City of North Las Vegas and  
5 surrounding southern Nevada economies. The 18,000-acre Apex Industrial Park at the far north  
6 end of the Las Vegas Valley could be a catalyst for diversifying Southern Nevada’s economy.  
7 *See, e.g., Apex Industrial Park Offers Promise to Diversify Economy, Expert Says*, NEVADA  
8 PUBLIC RADIO, [https://knpr.org/knpr/2017-02/apex-industrial-park-offers-promise-diversify-](https://knpr.org/knpr/2017-02/apex-industrial-park-offers-promise-diversify-economy-experts-say)  
9 [economy-experts-say](https://knpr.org/knpr/2017-02/apex-industrial-park-offers-promise-diversify-economy-experts-say) (D. Puppel February 16, 2017) (last visited August 27, 2021). A study  
10 cited by the Urban Land Institute calls Apex “the largest industrial and manufacturing location  
11 available and accessible to California and the Southwest markets.” *Id.*

12           The Apex Industrial Site was created through Congressional mandate via Apex Project,  
13 Nevada Land Transfer and Authorization Act of 1989, Public Law 101-67, 101st Congress, 103  
14 STAT 168 sec. 2(a)(1) (“**Apex Act of Congress**”).<sup>1</sup> Clark County recognized the need for  
15 industrial-zoned land outside residential neighborhoods. Congress carved the land for the Apex  
16 Industrial Site out of the sovereign lands of the United States of America, managed by the  
17 Bureau of Land Management (“**BLM**”), to fulfill the purposes of the Apex Project, Nevada Land  
18 Transfer and Authorization Act of 1989. *Id(a)*.

19           **B.       THE FORMERLY INDEPENDENT HYDROGRAPHIC BASINS IN**  
20 **QUESTION.**

21           The State Engineer designed, and since actively managed, the following hydrographic  
22 basins at issue in this petition for judicial review:

- 23           •       Coyote Spring Valley Hydrographic Basin (“**Coyote Spring Valley**”), Basin 210,  
24 since August 21, 1985, Ex 1. – SE ROA 2;<sup>2</sup>

25 \_\_\_\_\_  
26 <sup>1</sup> See <https://www.govinfo.gov/content/pkg/STATUTE-103/pdf/STATUTE-103-Pg168.pdf>.

27 <sup>2</sup> Citations herein are Exhibit # (Ex.) – Record Pin Cite at (more specific information at what is being  
28 cited, such as “Transcript pg. #, ll. # - #”). For the Court’s convenience, all record citations herein are  
also included in the accompanying Notice of Record Citations.

- 1           •       Black Mountains Area Hydrographic Basin (“**Black Mountains Area**”), Basin  
2 215, since November 22, 1989, *id.*;
- 3           •       Garnet Valley Hydrographic Basin (“**Garnet Valley**”), Basin 216, since April 24,  
4 1990, *id.*;
- 5           •       Hidden Valley Hydrographic Basin (“**Hidden Valley**”), Basin 217, since  
6 April 24, 1990, *id.*;
- 7           •       California Wash Hydrographic Basin (“**California Wash**”), Basin 218, since  
8 April 24, 1990, *id.*; and
- 9           •       Muddy River Springs Area Hydrographic Basin (“**Muddy River Springs Area**”),  
10 Basin 219, since July 14, 1971, *id.*; and lastly,
- 11          •       Kane Springs Valley (“**Kane Springs Valley**”), Basin 206.

12           **C.     APEX AND DRY LAKE ACQUISITION.**

13           Later in time, Apex acquired title to certain Apex Industrial Site properties and, in  
14 particular, a vast chunk of acreage of the Apex Industrial Site (“**the Apex Parcels**”). To develop  
15 the Apex Industrial Site, Apex formed Dry Lake to be the owner of certain water rights in the  
16 Garnet Valley and Black Mountain aquifers of the Lower White River Flow System (“**LWRFS**”  
17 or sometimes referred to herein as “**Lower White River Flow System**”).<sup>3</sup>

18           The lands owned by Apex, and by necessary implication the water rights owned by Dry  
19 Lake, required to serve those lands, are necessarily tied together and vested by the authority of  
20 the Act of Congress for the specific intent and purpose of diversifying the economy of the State  
21 of Nevada.

22           **D.     ORDER 1303.**

23           On January 11, 2019, the State Engineer issued Interim Order 1303 to obtain stakeholder  
24 input on four specific factual matters: (1) the geographic boundary of the LWRFS, (2) aquifer  
25 recovery since the 1169 pump test, (3) long-term annual quantity that may be pumped from the

26 \_\_\_\_\_  
27 <sup>3</sup> In Garnet Valley, Dry Lake holds permits 68351 (6/21/1988), 81344 (8/25/2000), 72098 (same), 79948  
28 (same), 66785 (same), 77839 (same), and 84041 (7/1/2014). In Black Mountains area, Dry Lake holds  
permits 66784 (3/6/1987), 68350 (10/18/1988), 68352 (same), and 68353 (12/10/1990).

1 LWRFS, and (4) effects of moving water rights between the carbonate and alluvial system to  
2 senior water rights on the Muddy River. *See* Ex 2 - SE ROA 82 – 83. After factual findings were  
3 made on those questions, the State Engineer was to evaluate groundwater management options  
4 for the LWRFS.

5 On May 13, 2019, the State Engineer amended Order 1303 and modified certain  
6 deadlines for filing reports. On July 25, 2019, the State Engineer issued a Notice of Pre-Hearing  
7 Conference. On or around August 8, 2019, the State Engineer held a prehearing conference. *See*,  
8 *e.g.*, Ex. 59 - SE ROA 519 (cover page of transcript). At the prehearing conference, Hearing  
9 Officer Fairbank unequivocally stated that “the purpose of the hearing is not to resolve or  
10 address allegations of conflict between groundwater pumping within the LWRFS and Muddy  
11 River decreed rights.” *See* Ex. 59 - SE ROA 522 at Transcript pg. 12, ll. 6-15. On August 23,  
12 2019, the State Engineer issued a Notice of Hearing, and again clarified the limited scope of the  
13 hearing. *See* Ex. 22 - SE ROA 262.

14 In July and August 2019, reports and rebuttal reports were submitted discussing the four  
15 matters set forth in Order 1303. Several parties filed objections to witnesses and evidence. Most  
16 of the objections were related to the scope of the topics in the submitted evidence. On August 23,  
17 2019, the State Engineer issued an Order on Objections to Witnesses and Evidence. The State  
18 Engineer agreed that “the evidence presented in the hearing is to be limited to the four issues  
19 identified in the Notice of Hearing.” *See* Ex. 63 - SE ROA 567. Oddly, Hearing Officer Fairbank  
20 took the position at the pre-hearing conference that “larger substantive policy determinations  
21 [are] not part of this particular proceeding. That’s part of later proceedings, but this is what has  
22 to occur in order to inform those future policy determinations and decision.” *See* Ex. 59 – SE  
23 ROA 522 at Transcript pg. 10, ll. 18 – 22.

24 **E. ORDER 1309.**

25 The State Engineer entered Order 1309 on June 15, 2020. *See* Ex. 1 – SE ROA 67.

26 **1. Historical Background Set Forth in Order 1309.**

27 Order 1309 begins by recounting the history of the basins in question and lays out the  
28 historical background. Particularly germane is when the United States Fish and Wildlife Service

1 expressed concern that groundwater withdrawals from Coyote Springs Valley and California  
2 Wash may reduce the spring flow in the tributary thermal springs in the upper Muddy River.  
3 This area served (and still serves) as the primary habitat of the Moapa dace, an endangered fish.  
4 Ex. 1 – SE ROA 5.

5 To address these concerns, the Southern Nevada Water Authority (“SNWA”), the United  
6 States Fish and Wildlife Service, Coyote Springs Investments, the Moapa Band of Paiute Indians  
7 (“**the Tribe**”), and the Moapa Valley Water District entered into a certain Memorandum of  
8 Agreement (“**the MOA**”). *See* Ex. 301 – SE ROA 9921. Neither Apex nor Dry Lake were, or  
9 are, a party to the MOA. Directly flowing from the MOA are the underpinnings of Order 1309—  
10 those being, Order 1169 and its subsequent Orders 1169A, and 1303.

## 11 2. Order 1309.

12 After taking into consideration the evidence (and lack thereof) and arguments of all the  
13 parties in the administrative proceeding below, the State Engineer entered Order 1309, which  
14 orders that:

15 • Kane Springs Valley Basin, Coyote Springs Valley, Muddy River Springs Area,  
16 California Wash, Hidden Valley, Garnet Valley, and the northwest portion of the Black  
17 Mountains Area are now delineated as one large “Super-Basin;” thus disregarding their prior  
18 status as independent basins, Ex 1 – SE ROA 66 ¶1;

19 • Kane Springs Valley Basin, Coyote Springs Valley, Muddy River Springs Area,  
20 California Wash, Hidden Valley, Garnet Valley, and the northwest portion of the Black  
21 Mountains Area are now each considered to be a “sub-basin, *id.*;”

22 • Naming this “Super-Basin” as the “Lower White River Flow System  
23 Hydrographic Basin,” *id.* ¶2;

24 • Setting forth a maximum pumping of 8,000 afa (acre feet per annum), *id.*, even  
25 though the amount previously appropriated from the Super-Basin was 39,731.83 afa.

26 For everything Order 1309 says, it is notable as to what it does *not* say. It provides no  
27 guidance as to how this new “Super-Basin” will be administered. It has no analysis as to the  
28 basis for this 8,000 afa. *Id.*



1                   **3.        Authority for Order 1309.**

2                   Having set forth the authority for 1309, it is important to understand the authority the  
3 State Engineer relied upon in effectively stripping over 30 years of water rights holders of their  
4 water. The State Engineer cites to the following statutes as authority for combining prior  
5 independently designated basins as a “Super-Basin:”

6                   •        NRS 533.024(1)(c), which is a legislative declaration “encourage[ing] the State  
7 Engineer to consider the best available science in rendering decisions concerning the available  
8 surface and underground sources of water in Nevada.” Ex. 1 – SE ROA 43 at IV.

9                   •        NRS 534.024(1)(e), another legislative declaration that states the policy of  
10 Nevada is “[t]o manage conjunctively the appropriation, use and administration of all waters of  
11 this State, regardless of the source of the water.” *Id.*

12                   •        NRS 532.120, which allows the State Engineer to “make” reasonable rules and  
13 regulations as necessary for the orderly execution of his/her statutory powers.

14                   •        NRS 534.110(6), which allows the Engineer to conduct investigations into any  
15 basin where average annual replenishment is not adequate for the needs of all water rights  
16 holders.

17                   •        Collectively under NRS 534.110(6) and NRS 534.120, to designate a basin that  
18 does not have adequate replenishment as a “Critical Management Area.”

19                   According to the State Engineer, he can be liable under 16 U.S.C. § 1531 et seq. (the  
20 Endangered Species Act) and its progeny for exacting a “taking” of an endangered species. *See*  
21 Ex. 1 – SE ROA 44 – 45. He relied on this proposition as part of his authority to enter Order  
22 1309. *Id.*<sup>4</sup> Thus, one of the purposes of Order 1309 was to reduce or eliminate exposure to an  
23 unfiled, unthreatened Endangered Species Act lawsuit.

24  
25  
26                   \_\_\_\_\_  
27 <sup>4</sup> In a feigned attempt to justify this authority, the Engineer compared the act of his issuance of water  
28 permits to the issuance of commercial fishing licenses, an action the Massachusetts Division of Marine  
Fishers was enjoined from doing due to the likelihood that it could lead to the “taking” of an endangered  
species. *Id.* at 45 n.252 (citing *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997)).

1                   **4.     The Net Effect.**

2                   As a result of consolidating the basins, the relative priority of all water rights within the  
3 seven affected basins are reordered, and the priorities are now considered in relation to all water  
4 rights holders in the “Super-Basin,” rather than in relation to the other users within the original  
5 separate basins. As it relates to Apex and Dry Lake, Dry Lake is one of the oldest permit holders  
6 in Garnet Valley stemming back to 1987 and one of the oldest in the Black Mountains Area  
7 (1988). These permits, however, are mere infants once compared to Bedroc’s priority date of  
8 1919 in Coyote Springs.

9                   The effect of Order 1309 is that all rights holders vesting after 1983 are in dire straits,  
10 subject to extreme curtailment (presumably given that the Engineer didn’t even discuss this in  
11 Order 1309). As all of Apex and Dry Lake’s water rights have priority dates **after** 1983, Order  
12 1309 effectively causes Apex and Dry Lake to be “dry” and without water.

13                   **III.    STANDARD OF REVIEW**

14                   NRS 533.450(1) allows an aggrieved party to review an order or decision by the State  
15 Engineer. “With questions of fact, the reviewing court must limit itself to a determination of  
16 whether substantial evidence in the record supports the State Engineer’s decision.” *Town of*  
17 *Eureka v. Off. of State Eng’r*, 108 Nev. 163, 165, 826 P.2d 948, 949 (1992). However, “[t]he  
18 district court is free to decide purely legal questions ... without deference to the agency’s  
19 decision.” *Id.* The proceedings are “in the nature of an appeal” and are “informal and summary.”  
20 NRS 533.450(1, 2); *see also Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979).

21                   **IV.    LEGAL ARGUMENT**

22                   The question presented here is not whether the Engineer pushed the boundaries of his  
23 authority or engaged in a tortured interpretation of his statutory authority. Instead, the question is  
24 whether the Engineer had any authority whatsoever to conjoin previously designated basins into  
25 a “Super-Basin” and then administratively manage the same. Because there is zero authority for  
26 what the State Engineer did, this appeal should be granted and Order 1309 vacated.

1           A.     **THE STATE ENGINEER LACKS AUTHORITY TO**  
2           **ADMINISTRATIVELY CONJOIN PREVIOUSLY DESIGNATED BASINS**  
3           **INTO A SUPER-BASIN AND THEN MANAGE THE**  
4           **ADMINISTRATIVELY JOINED SUPER-BASIN.**

5           1.     **The Primary Statute Cited by the State Engineer to Support His**  
6           **Decision Does Not Grant Him Authority to Combine the LWRFS into**  
7           **a Single, Hydrographic basin.**

8           Order 1309 conjoins seven separate LWRFS basins into one, singular hydrographic  
9           basin. The Engineer claims his authority to combine these waters and commingle their attached  
10          priority interests is wholly derived from a singular statute—NRS 533.024(1)(e). This statute,  
11          however, is not a grant of authority for the State Engineer. Not even close.

12          That statute is a statement of Legislative policy that merely sets forth the basic “policy”  
13          of this state with respect to administering the state’s water resources. Specifically,  
14          NRS 533.024(1)(e) states that “[i]t is the policy of this State ... [t]o manage conjunctively the  
15          appropriation, use and administration of all waters of this State, regardless of the source of the  
16          water.” NRS 533.024. On its face, this declaration sets forth the purposes and policies of  
17          Chapter 533. It does not in any way grant the State Engineer sweeping powers to reorganize this  
18          state’s water and disrupt citizens’ priority interests.

19          This is clear by its title, which is “Legislative Declaration.” Such statements of policy  
20          from the Legislature do not authorize specific government action but rather serve to inform the  
21          interpretation of statutory schemes that authorize specific action. *See, e.g., Pawlik v. Deng*, 134  
22          Nev. 83, 85-86, 412 P.3d 68, 71 (2018) (quoting *J.E. Dunn Nw., Inc. v. Corus Constr. Venture,*  
23          *LLC*, 127 Nev. 72, 79, 249 P.3d 501, 505 (2011) (explaining that “if the statutory language is  
24          subject to two or more reasonable interpretations, the statute is ambiguous, and we then look  
25          beyond the statute to the legislative history and interpret the statute in a reasonable manner ‘in  
26          light of the policy and the spirit of the law.’”)). Indeed, statements of policy have never  
27          authorized government action. There is no reason to change that rule now.

28          While it is true that NRS 533.024(1)(c) “encourage[s] the State Engineer to consider the  
29          best available science in rendering decisions concerning the available surface and underground  
30          sources of water in Nevada,” it says nothing of authorizing the State Engineer’s decisions, nor

1 does it speak of preventing a court from finding the State Engineer’s decisions improper. This  
2 policy “encouraging” the State Engineer to be careful in “rendering decisions” regarding this  
3 state’s water supply is entirely different from vesting the State Engineer with authority to  
4 implement actions such as those found in Order 1309.

5 In fact, the Nevada Supreme Court has specifically held that such statements of  
6 Legislative policy as found in NRS 533.024 are neither binding nor conclusive upon the courts,  
7 and, thus, it would be unreasonable to interpret NRS 533.024’s declaration as granting the State  
8 Engineer authority to undertake the instant action. *See e.g., McLaughlin v. Housing Authority of*  
9 *the City of Las Vegas*, 68 Nev. 84, 93, 227 P.2d 206, 210 (1951) (“It has often been said that the  
10 declaration of policy by the legislature, though not necessarily binding or conclusive upon the  
11 courts, is entitled to great weight, and that it is neither the duty nor prerogative of the courts to  
12 interfere in such legislative finding unless it clearly appears to be erroneous and without  
13 reasonable foundation.”).

14 Legislative policy is clearly different from substantive policy in that substantive policy  
15 includes definitions of terms within the statute. “Manage conjunctively” is not a defined term  
16 within the NRS, nor is “conjunctive management.” In fact, neither is the term “super-basin.”  
17 “Sub-basin” appears no more than twice, but only with respect to water recharge or storage  
18 projects (neither of which are at issue here). *See, e.g., NRS 534.250; and see NRS 534.260.* Had  
19 the Nevada Legislature truly authorized the Engineer to act on Legislative policy, it would have  
20 provided specific direction and intent to the agency (which it did not do). It is also important to  
21 note that the Legislative Policy of conjunctive management being used as authority by the  
22 Engineer was only added in 2017 Legislative Session, and these proceedings span far longer than  
23 the last four years. Had the Legislature intended to provide binding authority to the agency, the  
24 specific direction could have been added at the time the new Legislative Policy was added. It  
25 was not.

26 In sum, as a statement of Legislative policy, this statute does not grant the State Engineer  
27 authority to undertake any action he wants (as he did in Order 1309), nor does the statute shield  
28 the State Engineer’s decision from the judgment of this court. A statement of Legislative policy

1 does not remove the obligation to act within existing statutory guidelines and issue a magic wand  
2 the State Engineer can use with unfettered discretion.

3 **2. Order 1309 Offends Public Policy and Traditional Notions of Justice**  
4 **by Interfering with the Priority Interests of Countless Ex Parte Rights**  
5  **Holders.**

6 If Order 1309 withstands this Court's scrutiny, it will not only substantially affect Dry  
7 Lake and Apex's rights, but it will vitally affect the rights of countless water rights holders. The  
8 water in each of the separate basins at issue has attached thereto a careful priority of rights which  
9 were previously granted to rights holders at varying points in time under the doctrine of prior  
10 appropriation. Thus, each basin includes a distinct combination of senior or junior priority  
11 interests in the water, depending on when the rights of each basin were allocated. The combining  
12 of the seven basins into one, singular "Super-Basin" thus disrupts the careful chronology of  
13 priority interests, reorganizing the priority timeline and displacing the position of various rights  
14 holders as water attached to "more senior" rights would now become comingled with water  
15 attached to "more junior" rights. Such a restructuring of the timeline of rights results in demoting  
16 rights holders from their valuable positions in the timeline, as rights that were once "senior" in  
17 one basin now become subject to far older rights from another basin. That is beyond unfair.

18 Although case law scarcely addresses the combining of separate bodies of water and the  
19 resulting reorganization of the timeline of rights, the Nevada Supreme Court has offered helpful  
20 perspective in this area when it was asked to review a water rights holder's complaint against a  
21 State Engineer who sought to redirect water in which the holder had a priority interest. The  
22 Court, holding that it lacked jurisdiction to permit the State Engineer to divert or change the  
23 place of water which was attached to rights held by various parties, explained:

24 parties not now before the court have interests which would be vitally affected by  
25 a judgment affirming or disaffirming the order; such parties can only be given a  
26 chance to be heard in a new action, whose pleadings and proceedings present that  
27 issue.

28 *Kent v. Smith*, 62 Nev. 30, 40, 140 P.2d 357, 361 (1943).

1           However, the scarcity of case law on the topic cannot be ignored. The lack of opinions is  
2 likely reflective of the truth that the State Engineer does not have the authority to conjoin  
3 previously designated basins for administrative management.

4           **3.    The Careful Omission of this Particular Action in Nevada's**  
5           **Comprehensive Water Rights Statutes Supports a Conclusion that the**  
6           **State Engineer's Proposed Action is Improper.**

7           Nevada's first water law was passed in 1866, and our statutory scheme is one of the most  
8 comprehensive in the Western States. Given the scarcity of water in our state, it only makes  
9 sense that our Legislature would have developed such a scheme which is enumerated in NRS  
10 Chapter 532, 533, and 534 et seq. Thus, in addition to what our statutes say, it is worthwhile to  
11 note what the statute *omits*. NRS 534.030 is the statute which grants authority for the State  
12 Engineer to take certain hydrographic areas and formally designate the same as a basin. It does  
13 not, however, provide authority for the Engineer to take multiple designated basins and  
14 magically conjoin them into a "Super-Basin" for administrative management.

15           This is not an insignificant point from a perspective of statutory construction. After all,  
16 the Legislature makes policy choices through the statutes that it enacts and the words that it  
17 chooses. *See, e.g., N. Lake Tahoe Fire Prot. Dist. v. Washoe Cnty. Bd. Of Cnty. Comm'rs*, 129  
18 Nev. 682, 688, 310 P.3d 583, 588 (2013) (noting that the Legislature makes policy and value  
19 choices by enacting laws and that the court's role is to construe and apply those laws). When the  
20 Legislature omits language from a statute that lists certain entities or parties, courts must assume  
21 that the choice was deliberate. *See, e.g., State v. Javier C.*, 128 Nev. 536, 541, 289 P.3d 1194,  
22 1197 (2012). This is the rule of expression unius est exclusion alterius, a canon of statutory  
23 construction which Nevada follows: "Nevada follows the maxim '*expressio unius est exclusio*  
24 *alterius*,' the expression of one thing is the exclusion of another"). *Id.*; ANTONIN SCALIA &  
25 BRYAN A. GARNER, *Reading Law: The Interpretation of Legal Texts* 93 ("Nothing is to be added  
26 to what the text states or reasonably implies (*casus omissus pro omissis habendus est*). That is, a  
27 matter not covered is to be treated as not covered.").

28           Here, the Legislature chose to prohibit the State Engineer from combining pre-designated  
basins into a critical management area "Super-Basin" by not providing authority for the Engineer

1 to do so. Since we should not look past the face of a clear and unambiguous statute such as  
2 NRS 534.030, the analysis must end there.

3 However, one need not veer into uncharted territory to come up with the reasons why our  
4 Legislature made such a decision. The purchase of a water right, just like the purchase of any  
5 other item of property, comes with it certain expectations. Namely, that the basin you are buying  
6 into has certain prior appropriations you should consider. Naturally, a purchaser of a water right  
7 in Garnet Valley would have had no occasion to peek into the records of Kane Valley to assess  
8 priority. In this particular instance, our Legislature was wise; it's just that our State Engineer  
9 voluntarily chose to act without any authority.

10 4. **Apex and Dry Lake's Due Process Rights were Violated Because the**  
11 **State Engineer Provided No Opportunity to Comment on Policies for**  
12 **the Management of the "Super-Basin."**

13 At the pre-conference hearing, the State Engineer said that "the evidence presented in the  
14 hearing is to be limited to the four issues identified in the Notice of Hearing." *See* Ex. 63 - SE  
15 ROA 567. The hearing officer then took the position that "larger substantive policy  
16 determinations [are] not part of this particular proceeding. That's part of later proceedings, but  
17 this is what has to occur in order to inform those future policy determinations and decision." *See*  
18 Ex. 59 - SE ROA 522 at Transcript pg. 10, ll. 18 - 22. The State Engineer then went ahead and  
19 consolidated seven basins into one without allowing any comment or discussion about the  
20 policies or management of this new "Super-Basin." Order 1309 then goes on to state that the  
21 "effective" management scheme is important for the administration of the waters, but provides  
22 absolutely zero information about this scheme. Such a scheme implicates complex policy  
23 questions about the administration of these waters.

24 Apex and Dry Lake were afforded zero opportunity to weigh in on this "yet to be seen"  
25 scheme, thereby violating their procedural due process rights. *See, e.g., Dutchess Business*  
26 *Services Inc. v. Nevada State Bd. Of Pharmacy*, 124 Nev. 701, 711, 191 P.3d 1159, 1166 (2008)  
27 ("Although proceedings before administrative agencies may be subject to more relaxed  
28 procedural and evidentiary rules, due process guarantees of fundamental fairness still apply.  
Administrative bodies must follow their established procedural guidelines and give notice to the

1 defending party of ‘the issues on which the decision will turn and ... the factual material on  
2 which the agency relies for decision so that he may rebut it.’”) (internal citations omitted)  
3 (quoting *Bowman Transp. v. Ark-Best Freight System*, 419 U.S. 281, 288-89 n.4 (1974).

4 Due process required that Apex and Dry Lake receive notice of a hearing for policy  
5 issues. Due process required that Apex and Dry Lake have the ability to provide input and  
6 comment on policy. Due process required that Apex and Dry Lake receive notice of, and provide  
7 input on, the supposed management of the “Super-Basin.” Neither Apex nor Dry Lake received  
8 any such notice nor the ability to provide input or comment.

9 This violation is made egregious by the fact that the hearing master acknowledged the  
10 “large” nature of the policy decisions in play. *See, e.g.,* Ex. 59 – SE ROA 522 at Transcript  
11 pg. 10, ll. 18 – 22 (stating “larger substantive policy determinations [are] not part of this  
12 particular proceeding. That’s part of later proceedings, but this is what has to occur in order to  
13 inform those future policy determinations and decision.”). The hearing master promised policy  
14 would be a “part of later proceedings,” and then never held them. This is a text book example of  
15 an administrative agency violating procedural due process rights.

16  
17 **5. Conjoining the Basins Because of the Endangered Species Act is  
18 Illusory, Unfounded, and Lacks Authority.**

19 One of the most concerning elements of the State Engineer’s Order is this fabricated  
20 notion that the failure to control pumping of water to benefit the land of the state of Nevada will  
21 somehow have him exposed to liability for “taking” the Moapa dace or perhaps its habitat. *See,*  
22 *e.g., Cote H. v. Eighth Jud. Dist. Ct.*, 124 Nev. 36, 38 n.1, 175 P.3d 906, 907 n.1 (2008)  
23 (discussing ripeness in generalities). The Order is entirely unclear as to what it believes this so-  
24 called “taking” is; perhaps because the United States Fish and Wildlife Service expressly  
25 declined to endorse the Engineer’s position. *See* Ex. 996 – SE ROA 53140 at Transcript pg. 483,  
26 ll. 10 – SE ROA 53141 at pg. 484, ll. 15.

27 The State Engineer is taking one potential future “taking” that may or may not ever  
28 happen and substituting it for a very real and unlawful taking of water rights held by permittees  
whose only offense is relying on existing Nevada water law for decades.



1 Plain and simple, the only taking that is occurring via Order 1309 is the taking of Apex  
2 and Dry Lake's rights. "In Nevada, water rights are regarded and protected as real property."  
3 *Eureka City v. Seventh Jud. Dist. Ct.*, 134 Nev. 275, 279, 417 P.3d 1121, 1124 (2018) (internal  
4 quotations omitted). State agencies are prohibited from taking property from a private party for  
5 public use. *See* Nev. Const. Art. 1 Sec. 8(6); U.S. Const. Amend. V. The State Engineer's  
6 conduct is not allowable as an unconstitutional taking. Taken together, Order 1309 should be  
7 vacated/set aside.

8 **V. CONCLUSION**

9 The Nevada State Engineer is bound to faithfully execute the water laws of the State of  
10 Nevada, and his authority to manage the State's water resources is limited in time and scope to  
11 the specific mandate issued by Nevada Legislature. The State Engineer's ability to promulgate  
12 rules and orders must be reasonable and authorized by the underlying mandate and case law.  
13 Order 1309 was issued without the required authority and is an abuse of the Engineer's  
14 discretion. For the foregoing reasons, this appeal should be granted, and Order 1309 should be  
15 vacated/set aside. If the Court does not vacate 1309 entirely and rests upon the due process  
16 violations set forth herein, the Court should order the State Engineer to follow the proper  
17 procedure as required by the Nevada Administrative Code.

18 Dated this 27th day of August, 2021.

19 MARQUIS AURBACH COFFING

20  
21  
22 By /s/ Christian T. Balducci  
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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **PETITIONERS APEX HOLDING COMPANY, LLC AND DRY LAKE WATER, LLC'S OPENING BRIEF** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 27th day of August, 2021. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:<sup>5</sup>

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<sup>5</sup> Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

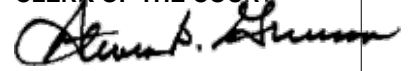
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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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

Petitioners,

vs.

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

Respondent.

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

Consolidated with:

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

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

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

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

IN THE MATTER OF THE PETITION OF  
CENTER FOR BIOLOGICAL DIVERSITY

Case No.: A-20-817976-P (Sub Case)  
Dept. No. I

IN THE MATTER OF THE PETITION OF  
MUDDY VALLEY IRRIGATION COMPANY

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

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

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

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. I

**PETITIONER APEX HOLDING COMPANY, LLC AND DRY LAKE WATER, LLC'S  
NOTICE OF RECORD CITATIONS**

For the convenience of the Court, Apex Holding Company, LLC and Dry Lake Water,  
LLC, by and through the law firm of Marquis Aurbach Coffing, attaches hereto the following

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documents found within the Record which are cited to within their Opening Brief filed on August 27, 2021. The documents are referenced by the Exhibit Numbers that are assigned within the State Engineer’s Record for ease of reference, and are in order as they are presented in the Opening Brief:

EXHIBIT	DESCRIPTION
1	Order 1309
2	Interim Order 1303
59	August 8, 2019 Hearing Excerpt
22	Excerpt of Notice of Hearing
63	Order on Evidence Excerpt
301	Memorandum of Agreement Excerpt
996	September 24, 2019 Hearing Excerpt (from Volume II)

Dated this 27th day of August, 2021.

MARQUIS AURBACH COFFING

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **PETITIONER APEX HOLDING COMPANY, LLC AND DRY LAKE WATER, LLC'S NOTICE OF RECORD CITATIONS** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 27th day of August, 2021. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:<sup>1</sup>

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**Exhibit 1**  
**Order 1309**



**Document (Order 1309) Located at JA Vol. 2 at  
JA\_326 through JA\_393**

**Exhibit 2**  
**Interim Order 1303**

**Document (Order 1303) Located at JA Vol. 2 at JA 394  
through JA 410**

**Document (Addendum to Order 1303) Located at JA Vol. 2 at  
JA\_411  
through JA 412**

**Exhibit 59**

**Excerpt of August 8, 2019 Transcript**

**Document (August 8, 2019 Transcript Excerpt) Located at JA Vol. 2  
at JA\_703 and JA\_706**

**Exhibit 22**

**Excerpt of Notice of Hearing**

**IN THE OFFICE OF THE STATE ENGINEER  
OF THE STATE OF NEVADA**

IN THE MATTER OF THE ADMINISTRATION )  
AND MANAGEMENT OF THE LOWER WHITE )  
RIVER FLOW SYSTEM WITHIN COYOTE )  
SPRING VALLEY HYDROGRAPHIC BASIN )  
(210), A PORTION OF BLACK MOUNTAINS )  
AREA HYDROGRAPHIC BASIN (215), GARNET )  
VALLEY HYDROGRAPHIC BASIN (216), )  
HIDDEN VALLEY HYDROGRAPHIC BASIN )  
(217), CALIFORNIA WASH HYDROGRAPHIC )  
BASIN (218), AND MUDDY RIVER SPRINGS )  
AREA (AKA UPPER MOAPA VALLEY) )  
HYDROGRAPHIC BASIN (219), LINCOLN AND )  
CLARK COUNTIES, NEVADA. )

**NOTICE OF HEARING**

**I. PROCEDURAL BACKGROUND**

The State Engineer issued Interim Order 1303 on January 11, 2019, whereby the State Engineer designated the Lower White River Flow System, consisting of the Coyote Spring Valley, Muddy River Springs Area, California Wash, Hidden Valley, Garnet Valley, and a portion of the Black Mountain Area as a joint administrative unit for the purpose of administering water rights, and among other interim matters, solicited reports to be filed with the Office of the State Engineer addressing: (1) the geographic boundary of the hydrologically connected groundwater and surface-water system comprising the Lower White River Flow System; (b) the information obtained from the State Engineer’s Order 1169 aquifer test and subsequent to the aquifer test and Muddy River headwater spring flow as it relates to aquifer recovery since the completion of the aquifer test; (c) the long-term annual quantity of groundwater that may be pumped from the Lower White River Flow System, including the relationships between the location of pumping on discharge to the Muddy River Springs, and the capture of Muddy River Flow; (d) the effects of movement of water rights between alluvial wells and carbonate wells on deliveries of senior decreed rights to the Muddy River; and, (e) any other matter believed to be relevant to the State Engineer’s analysis. The deadline for the filing of reports was initially set for June 3, 2019, and rebuttal reports were permitted to be filed no later than July 18, 2019. The State Engineer further ordered that an administrative hearing would be held in the month of September 2019. The State Engineer issued an addendum to Interim Order 1303 on May 13, 2019, whereby the State Engineer extended the deadline for any interested stakeholder to submit a report to July 3, 2019, and rebuttal reports to August 16, 2019.<sup>1</sup>

Initial reports in response to the Order 1303 solicitation were filed with the Office of the State Engineer by the Center for Biological Diversity; City of North Las Vegas; Coyote Springs Investment, LLC; Dry Lake Water, LLC; Georgia Pacific Corporation and Republic

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<sup>1</sup> See Interim Order 1303, and addendum, official records in the Office of the State Engineer.



**Exhibit 63**

**Excerpt of Order Re Evidence**

**Document (Notice of Hearing Excerpt) Located at JA Vol. 2 at  
JA\_464**

**Exhibit 301**  
**Memorandum of Agreement**

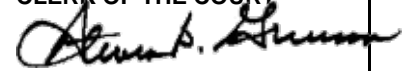
**Document (Memorandum of Agreement Excerpt) Located at JA  
Vol. 5 at JA\_9921**

**Exhibit 996**

**Excerpt of September 24, 2019 Transcript (from Volume II)**

**Document (September 23, 2019 Hearing Transcript Excerpts)**

**Located at JA Vol. 44 at JA\_17537 and JA\_17538**



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14 **IN THE EIGHTH JUDICIAL DISTRICT COURT**  
15 **IN AND FOR THE COUNTY OF CLARK, STATE OF NEVADA**

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

19 Petitioners,

20 vs.

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

26 Respondent.

Case No. A-20-816761-C

Dept. 1

Consolidated with Cases:

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

27 CENTER FOR BIOLOGICAL DIVERSITY,

28 Petitioner,

vs.

ADAM SULLIVAN, P.E., Nevada State  
Engineer, DIVISION OF WATER  
RESOURCES, DEPARTMENT OF  
CONSERVATION AND NATURAL  
RESOURCES,

Respondent.

Case No. A-20-817876-P

Dept. 1

Hearing Requested

**PETITIONER'S OPENING BRIEF**

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1 **INTRODUCTION**

2 Nevada is the Nation’s driest state, making the management and conservation of water  
3 resources a matter of utmost public concern. As the climate warms and the State’s population  
4 continues to grow, the deep regional aquifers of Southeastern Nevada face increasing demands on  
5 their limited groundwater resources. Not only do these waters support communities and agriculture  
6 throughout the region, but they also play a critical role in sustaining the State’s irreplaceable  
7 biodiversity. Spring systems fed by deep-water aquifers—such as the Muddy River Springs at  
8 issue in this litigation—provide habitat for species such as the endangered Moapa dace fish that  
9 exist nowhere else on Earth.

10 Nearly two decades ago, the Nevada State Engineer recognized that increasing demands  
11 on the Southeastern Nevada’s groundwater resources were unsustainable, and set out to determine  
12 how much water could be developed without harming senior water users and groundwater-  
13 dependent ecosystems. Specifically, the State Engineer sought to limit groundwater pumping in  
14 order to protect senior water users on the Muddy River as well as the Moapa dace, the entire global  
15 population of which is found near the river’s headwater springs.

16 Growing concern about impacts from groundwater development led the State Engineer in  
17 2019 to designate for joint administration the Lower White River Flow System (“LWRFS”), a  
18 seven-basin area in Southeastern Nevada that, due to a remarkable degree of hydrologic  
19 connectivity among its constituent basins, requires conjunctive management. Most of the  
20 groundwater in the LWRFS discharges from the Muddy River’s headwater springs. After  
21 designating the LWRFS, State Engineer then sought to determine, through stakeholder input and a  
22 public hearing, how much groundwater could be sustainably pumped throughout the system.

23 This process culminated on June 15, 2020 with the State Engineer’s Order 1309. Among  
24 other findings, Order 1309 recognized two important characteristics of the LWRFS that serve as  
25 limiting factors on groundwater development. First, Order 1309 recognized that Kane Springs  
26 Valley should be included in the LWRFS and jointly managed with the other basins, based on clear  
27 evidence of a hydrologic connection between Kane Springs Valley and adjacent Coyote Spring  
28 Valley. Put simply, Order 1309 acknowledged that Kane Springs and the other LWRFS basins

1 share a common supply of water. Second, the State Engineer recognized that the State's obligation  
2 under the federal Endangered Species Act ("ESA") to protect the Moapa dace is a primary limiting  
3 factor on groundwater development in the LWRFS. The State Engineer acknowledged that  
4 groundwater pumping in the LWRFS reduces springflows in the Muddy River's headwaters and  
5 could therefore violate the ESA by causing unlawful "take" of the dace.

6 However, Order 1309 ultimately fails to protect the Muddy River, the Muddy River  
7 springs, the Moapa dace, and the public's interest therein from the impacts of groundwater  
8 development. Specifically, the Order fails to cap groundwater pumping at a level sufficient to  
9 protect the Moapa dace and maintain flows in the Muddy River. Throughout the administrative  
10 proceedings leading up to Order 1309, substantial evidence was presented showing that  
11 groundwater pumping at then-current levels was depleting groundwater resources, lowering the  
12 Muddy River, and reducing the springflows on which the Moapa dace depend. Order 1309,  
13 however, allows this level of pumping to continue indefinitely, based on an unsupported  
14 assumption that the LWRFS aquifer is approaching a "steady state."

15 The Center for Biological Diversity therefore seeks judicial review of Order 1309 on the  
16 grounds that the State Engineer's conclusions therein are arbitrary, capricious, and not supported  
17 by substantial evidence.

18 **PARTIES AND JURISDICTION**

19 Petitioner, the Center for Biological Diversity ("the Center"), is a national, non-profit  
20 conservation organization incorporated in California and headquartered in Tucson, Arizona. The  
21 Center has over 84,000 members including members who reside in Nevada. The Center has staff  
22 and offices throughout the United States, including in Nevada. Many of the Center's members who  
23 reside in Nevada and neighboring states live, visit, or recreate in and near areas directly affected  
24 by Order 1309. In particular, the Center and its members have educational, scientific, biological,  
25 aesthetic and spiritual interests in the survival and recovery of the Moapa dace. As noted, the  
26 Moapa dace is imperiled by diminishing spring flows caused by groundwater pumping in the  
27 LWRFS, and is listed as endangered under the Federal Endangered Species Act, 16 U.S.C. §§  
28 1531-1544. To protect its interests in the survival and recovery of the Moapa dace, the Center

1 submitted technical reports pursuant to Nevada State Engineer Order 1303 and participated in a  
2 public hearing before the State Engineer, held between September 23, 2019 and October 4, 2019,  
3 the ultimate outcome of which was Order 1309. The Center is aggrieved by the State Engineer's  
4 decision because the interests of the Center and its members in the survival and recovery of the  
5 Moapa Dace will suffer long-term harmful impacts from the groundwater drawdown and  
6 springflow reductions authorized under Order 1309. An order from this court granting the relief  
7 requested herein would redress this injury to the Center and its members.

8 Respondent Adam Sullivan, P.E. is the State Engineer of the State of Nevada. Mr. Sullivan  
9 is the successor to Tim Wilson, P.E., the previous Nevada State Engineer who issued Order 1309.  
10 Respondent Division of Water Resources, Department of Conservation and Natural Resources is  
11 a governmental division of the State of Nevada charged with managing and conserving the State's  
12 water resources.

13 This Court has jurisdiction over this action pursuant to NRS § 533.450 (Orders and  
14 decisions of the State Engineer subject to judicial review). The Court has the authority to review  
15 the State Engineer's Order, and grant the relief requested, pursuant to NRS § 533.450. All  
16 requirements for judicial review have been satisfied.

### 17 **STATUTORY BACKGROUND**

18 Nevada water law operates on the basis of prior appropriation, or "first in time, first in  
19 right." *See Reno Smelting, Milling and Reduction Works v. Stevenson*, 20 Nev. 269, 280-82, 21 P.  
20 317, 321-22 (1889); *see also Application of Filippini In re Waters of Duff Creek*, 66 Nev. 17, 22,  
21 202 P.2d 535, 537-38 (1949). However, this basic principle has been altered and supplemented by  
22 statute since it was first declared by the Nevada Supreme Court in *Reno Smelting*. In 1907, the  
23 Nevada legislature declared that all natural watercourses and natural lakes and the waters thereof,  
24 which were not held in private ownership, belong to the state and are subject to appropriation for  
25 beneficial uses. *See NRS § 533.025; Desert Irrigation, Ltd. v. State of Nevada*, 113 Nev. 1049,  
26 1059, 844 P.2d 835, 842 (1997).

27 Accordingly, a water right is characterized as a usufructuary right. Even those holding  
28 certificated, vested, or perfected water rights do not own or acquire title to water; they merely

1 enjoy the right to beneficial use. *Desert Irrigation*, 113 Nev. at 1059, 844 P.2d at 842 (citing NRS  
2 § 533.030). An appropriative right “may be described as a state administrative grant that allows  
3 the use of a specific quality of water for a specific beneficial purpose if water is available in the  
4 source free from the claims of others with earlier applications.” *Id.*

5 “Any person who wishes to appropriate any of the public waters, or to change the place of  
6 diversion, manner of use or place of use of water already appropriated,” must apply to the State  
7 Engineer for a permit to do so. NRS § 533.325. Upon receiving such an application, the State  
8 Engineer must give public notice of the details of the application. NRS § 533.360(1). Applications  
9 may be protested in writing by any person. NRS § 533.365. The State Engineer may hold hearings  
10 and require the filing of such evidence he deems appropriate. *Id.* A “full and fair hearing” is  
11 required. *Revert v. Ray*, 95 Nev. 782, 787-88, 603 P.2d 262, 265 (1979). The decision of the State  
12 Engineer following any such hearing must be in writing and include findings of fact, conclusions  
13 of law, and a statement of the underlying facts supporting the findings of fact, in sufficient detail  
14 to permit judicial review. *Id.*

15 An application to appropriate water must be denied, among other reasons, upon findings  
16 that existing surface water rights will be impaired, that the permit would be detrimental to the  
17 public interest, or if there is no water available from the proposed source of supply without  
18 exceeding the perennial yield or safe yield of that source. NRS § 533.370; *Pyramid Lake Paiute*  
19 *Tribe of Indians v. Washoe County*, 112 Nev 743, 747-48, 918 P.2d 697, 700 (1996)).

20 It is State policy to “manage conjunctively the appropriation, use, and administration of all  
21 waters of this state regardless of the source of the water.” NRS § 533.024(1)(e). In doing so, the  
22 State Engineer must “consider the best available science in rendering decisions concerning the  
23 availability of surface and underground sources of water in Nevada.” NRS § 533.024(1)(c).

24 Water rights are also “subject to regulation for the public welfare.” *Mineral Cty. v. Lyon*  
25 *Cty.*, 136 Nev. Adv. Rep. 58, 473 P.3d 418, 430 (Nev. 2020). “Pursuant to NRS § 533.370(3), the  
26 State Engineer must determine whether a proposed appropriation is detrimental to the public  
27 interest before issuing a water appropriation permit.” *Pyramid Lake Paiute Tribe*, 112 Nev. at 748,  
28 918 P.2d at 700. This requires the State Engineer to consider, among other things, “environmental

1 impact.” *Pyramid Lake Paiute Tribe*, 112 Nev. at 752, 918 P.2d at 702 (1996); *Mineral Cty.*, 473  
2 P.3d at 427. The environmental component of the “public interest” inquiry is separate from impacts  
3 to existing or senior water rights. *See Pyramid Lake Paiute Tribe*, 112 Nev. at 752, 918 P.2d at  
4 702. By requiring the State Engineer to consider the public interest in allocating water rights, the  
5 Nevada water statutes “satisfy[y] ‘the state’s special obligation to maintain the [public] trust [in  
6 water] for the use and enjoyment of present and future generations.” *Mineral Cty.*, 473 P.3d at 428.

7 As part of his obligation to consider the public interest, the State Engineer must also  
8 consider his obligations under the federal Endangered Species Act (“ESA”). “The plain intent of  
9 Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction,  
10 whatever the cost.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184, 98 S. Ct. 2279, 2297 (1978). To  
11 receive the protections of the ESA, a species must first be listed by the Secretary of the Interior  
12 (“Secretary”) as “endangered” or “threatened.” *See* 16 U.S.C. § 1533. An “endangered species” is  
13 “any species which is in danger of extinction throughout all or a significant portion of its range.”  
14 *Id.* § 1532(6). A “threatened” species is “any species which is likely to become an endangered  
15 species within the foreseeable future throughout all or a significant portion of its range.” *Id.* §  
16 1532(20).

17 Section 9 of the ESA prohibits all “persons” from “taking” any endangered fish or wildlife  
18 species. *Id.* § 1538(a)(1). “Take” encompasses a broad spectrum of conduct; it is defined as “to  
19 harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in  
20 any such conduct.” 16 U.S.C. § 1532(19). “Harm” has further been defined in regulation to mean  
21 “an act which actually kills or injures wildlife [including] significant habitat modification or  
22 degradation where it actually kills or injures wildlife by significantly impairing essential  
23 behavioral patterns, including breeding, feeding, or sheltering.” 50 C.F.R. § 17.3. The term  
24 “person,” is broadly defined to include:

25 [A]n individual, corporation, partnership, trust, association, or any other private  
26 entity; or any officer, employee, agent, department, or instrumentality of the  
27 Federal Government, of any State, municipality, or political subdivision of a State,  
or of any foreign government; any State, municipality, or political subdivision of a  
State; or any entity subject to the jurisdiction of the United States.

28 16 U.S.C. § 1532(13).

1 Courts have repeatedly held that government regulations authorizing third parties to engage  
2 in harmful actions can constitute an illegal taking under Section 9 of the ESA. *See Strahan v. Coxe*,  
3 127 F.3d 155, 158, 163-64 (1st Cir. 1997), cert. denied, 525 U.S. 830 (1998) (state agency caused  
4 takings of the endangered right whale because it “licensed commercial fishing operations to use  
5 gillnets and lobster pots in specifically the manner that is likely to result in violation of [the  
6 ESA]”); *Defenders of Wildlife v. Administrator, Env’tl. Protection Agency*, 882 F.2d 1294, 1300-  
7 01 (8th Cir. 1989) (federal agency caused takes of endangered black-footed ferret through its  
8 “decision to register pesticides” even though other persons actually distributed or used the  
9 pesticides); *Loggerhead Turtle v. County Council of Volusia County*, 148 F.3d 1231, 1253 (11th  
10 Cir. 1998) (county’s inadequate regulation of beachfront artificial light sources may constitute a  
11 taking of turtles in violation of the ESA). Courts have found that habitat modification conducted  
12 or carried out by a State agency, which injures or kills listed species, may amount to an unlawful  
13 taking. *See, e.g., Palila v. Hawaii Dep’t of Land & Natural Res.*, 471 F. Supp. 985, 999 (D. Haw.  
14 1979), *aff’d*, 639 F.2d 495 (9th Cir. 1981). And at least one court has expressly held that State  
15 water rights do not prevail over the restrictions on habitat modification set forth in the ESA. *United*  
16 *States v. Glenn-Colusa Irrigation District*, 788 F. Supp. 1126, 1134 (E.D. Cal. 1992). This holding,  
17 combined with the “proximate cause” view of causation expressed in cases such as *Cascadia*  
18 *Wildlands v. Kitzhaber*, 911 F. Supp. 2d 1075 (D. Or. 2012), and *Strahan*, 127 F.3d 155, indicates  
19 that States may incur liability under the ESA based on the issuance of water rights.

20 Thus, a significant portion of the “public interest” that must be considered in the State  
21 Engineer’s analysis involves consideration of whether the issuance or development of water rights  
22 would cause “take” of endangered species.

### 23 STANDARD OF REVIEW

24 Any party “aggrieved” by an order of the State Engineer may have the order reviewed by  
25 the district court. NRS § 533.450(1); *Town of Eureka v. State Engineer*, 108 Nev. 163, 165, 826  
26 P.2d 948, 949 (1992). The statutes specify that any such review is “in the nature of an appeal.”  
27 *Revert*, 95 Nev. at 786, 603 P.2d at 264. While the State Engineer’s decision is “prima facie  
28 correct,” it is not binding, and will be reversed if it is arbitrary, capricious, or not supported by



1 substantial evidence. *State Engineer v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991);  
2 *Pyramid Lake Paiute Tribe*, 112 Nev. at 751, 918 P.2d at 702.

3 The question on review is whether the whether the evidence in the record supports the State  
4 Engineer’s decision. *Revert*, 95 Nev. at 786, 603 P.2d at 264; *State Engineer v. Curtis Park Manor*  
5 *Water Users Association*, 101 Nev. 30, 32 692 P.2d 495, 497 (1985).

6 The State Engineer’s interpretation of applicable law is persuasive, but not controlling.  
7 *Pyramid Lake Paiute Tribe*, 112 Nev. at 751, 918 P.2d at 702. A court is free to decide purely legal  
8 questions without deference to the State Engineer’s decision. *Town of Eureka*, 108 Nev. 165-66,  
9 826 P.2d 949-50.

### 10 PROCEDURAL BACKGROUND

11 On March 8, 2002, the State Engineer issued Order 1169, which held in abeyance all  
12 pending groundwater rights applications in the following hydrographic basins: Coyote Spring  
13 Valley, the Black Mountains Area, Garnet Valley, Hidden Valley, the Muddy River Springs Area,  
14 and the Lower Moapa Valley. SE ROA 4. The State Engineer found that it would not be prudent  
15 to issue additional rights to groundwater in these basins until a test could be performed to determine  
16 whether development of the pending applications would adversely impact existing water rights or  
17 the environment. *Id.* To evaluate the likely impact of the pending applications, the State Engineer  
18 ordered that at least 50 percent of then-existing groundwater rights in Coyote Spring Valley, or a  
19 total volume of 8,050 acre-feet annually (“afa”), be pumped for at least two consecutive years.<sup>1</sup> *Id.*

20 On April 18, 2002, the State Engineer issued Ruling 5115, which added a seventh  
21 hydrographic basin—California Wash—to the Order 1169 study area. *Id.*

22 Following the issuance of Orders 1169 and Ruling 5115, the U.S. Fish and Wildlife Service  
23 (“FWS”) expressed concern that current rates of groundwater pumping, coupled with the  
24 additional volumes required by Order 1169 and Ruling 1551, would reduce springflows in the  
25

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26  
27 <sup>1</sup> An acre-foot is a unit of volume equal to the volume of a sheet of water one acre in area and one  
28 foot in depth; it is equal to 43,560 cubic feet.

1 Muddy River Springs Area (“MRSA”) and adversely impact the endangered Moapa dace (*Moapa*  
2 *corciacea*). Due to these concerns, on April 20, 2006, the Southern Nevada Water Authority  
3 (“SNWA”), FWS, Coyote Springs Investment, LLC (“CSI”), the Moapa Band of Paiute Indians  
4 (“MBOP”) and the Moapa Valley Water District (“MVWD”) entered into a Memorandum of  
5 Agreement (“MOA”). SE ROA 5. The MOA includes voluntary measures intended to protect the  
6 Moapa dace from the impacts of increased groundwater pumping. *Id.*

7 The pumping test required under Order 1169 began on November 15, 2010. SE ROA 6.  
8 On December 21, 2012, the State Engineer issued Order 1169A, declaring that the pumping test  
9 would be complete on December 31, 2012, and inviting stakeholders to file reports with the  
10 Division of Water Resources (“DWR”) to present information gained from the test and estimate  
11 the groundwater available to support additional development. SE ROA 6.

12 On January 25, 2014, after reviewing the pumping test results and stakeholder reports, the  
13 State Engineer issued Rulings 6254-6261, which set forth the State Engineer’s factual findings  
14 regarding the pumping test results. *See* SE ROA 726-948. The Orders also denied all pending water  
15 rights applications in the six-basin area on the grounds that: there is no unappropriated  
16 groundwater in the area; the applications would conflict with senior rights; and the proposed  
17 groundwater withdrawals would threaten the water resources on which the Moapa dace depend.  
18 *See generally id.*

19 On January 11, 2019, the State Engineer issued Interim Order 1303, designating the  
20 LWRFS, a multi-basin joint administrative unit which, during the Order 1169 pumping test, was  
21 shown to share a close hydrologic connection among its subsurface carbonate-rock aquifers. SE  
22 ROA 11. The Interim Order defined the LWRFS to include: Coyote Spring Valley, the Muddy  
23 River Springs Area (“MRSA”), California Wash, Hidden Valley, Garnet Valley, and a portion of  
24 the Black Mountains Area. *Id.* Under Interim Order 1303, all water rights within the LWRFS were  
25 to be administered jointly based on their respective dates of priority. *Id.* Interim Order 1303 also  
26 invited stakeholders with interests in water right development in the LWRFS to file reports with  
27 the Office of the State Engineer addressing five specific matters: (1) the geographic boundary of  
28 the LWRFS; (2) aquifer recovery following the Order 1169 pumping test; (3) the long-term annual

1 quantity and location of groundwater that may be pumped from the LWRFS; (4) the effect of  
2 moving groundwater rights between the shallow “alluvial” aquifers and deeper carbonate-rock  
3 aquifers in the LWRFS; and (5) any other matter relevant to the State Engineer’s analysis. *Id.*

4 Pursuant to Interim Order 1303, the State Engineer scheduled a public hearing in Carson  
5 City, Nevada between September 23, 2019 and October 4, 2019. SE ROA 12. The purposes of the  
6 hearing were to afford stakeholders who submitted reports in response to Interim Order 1303 an  
7 opportunity to provide testimony regarding the five topics listed in the Interim Order and to test  
8 the conclusions offered by the stakeholder participants through cross-examination. *Id.* Participants  
9 in the hearing were: CSI, FWS, the National Park Service (“NPS”) MBOP, SNWA, the Las Vegas  
10 Valley Water District (“LVVWD”), MVWD, Lincoln County Water District and Vidler Water  
11 Company (“Lincoln/Vidler”), the City of North Las Vegas (“CNLV”), the Center, Georgia Pacific  
12 Corporation and Republic Environmental Technologies, Inc. (“Georgia Pacific”), Nevada  
13 Cogeneration Associates Nos. 1 and 2 (“NCA”) the Muddy Valley Irrigation Company (“MVIC”),  
14 Western Elite Environmental, Inc. and Bedroc Limited, LLC (“Bedroc”), the Church of Jesus  
15 Christ of Latter-Day Saints, Technichrome, Apex Holding Company, LLC and Dry Lake Water,  
16 LLC (“Apex”), and NV Energy. *Id.* Following the conclusion of the Interim Order 1303 hearing,  
17 stakeholder participants were permitted to submit written closing arguments. SE ROA 12.

18 On June 15, 2020, the State Engineer issued Order 1309. SE ROA 2-67. Order 1309  
19 responded to the stakeholder reports, testimony, and closing arguments submitted pursuant to  
20 Order 1303 and set forth the State Engineer’s factual findings regarding the five issues for which  
21 the State Engineer had requested stakeholder input. In Order 1309, the State Engineer found: (1)  
22 the LWRFS consists of Kane Springs Valley, Coyote Spring Valley, the Muddy River Springs  
23 Area, California Wash, Hidden Valley, Garnet Valley, and the northwest portion of the Black  
24 Mountains Area; (2) the LWRFS carbonate aquifer has not recovered from the Order 1169  
25 pumping test but may be approaching a “steady state”; (3) the maximum quantity of groundwater  
26 that may be pumped from the LWRFS is not more than 8,000 afa and may be less; and (4) the high  
27 degree of hydrological connectivity among the LWRFS basis will be the “principle factor” in  
28 determining the movement of water rights. SE ROA 47-67.

## FACTUAL BACKGROUND

### I. The Moapa Dace

The Moapa dace (*Moapa coriacea*) is endemic to the upper spring-fed reaches Muddy River. SE ROA 5. It is the only member of the genus *Moapa* and is found nowhere else on Earth. SE ROA 47159-60. The dace is thermophilic, meaning it requires warm waters, and reaches its greatest extent at temperatures between 82.4 and 86.0° F. SE ROA 47160. Approximately 95 percent of the total population occurs within 1.78 miles of one major tributary system that flows from three high-elevation spring complexes within the MRSA. SE ROA 47169. Reproduction occurs year-round and is confined to the upper portions of these spring-fed tributaries. SE ROA 47160.

The dace was federally listed as endangered under the Endangered Species Preservation Act of 1966 on March 11, 1967, and has been protected under the ESA since its passage in 1973. SE ROA 5. FWS—the federal agency responsible for administering the ESA—has assigned the species its highest recovery priority because of (1) its unique biology and taxonomy; (2) the high degree of threat to its continued existence; and (3) the high potential for its recovery. SE ROA 5.

Between 1933 and 1950, the Moapa dace was abundant in the Muddy River and was estimated to inhabit as many as 25 individual springs and up to 10 miles of stream habitat. SE ROA 47169. However, by 1983, the species only occurred in springs and two miles of spring outflows. *Id.* Dace populations steadily declined from the mid-1980s to the mid-2000s. Between 1984 and 1987, FWS’s Seattle National Fisheries Research Center extensively surveyed Moapa dace habitats and estimated the adult Moapa dace population to be between 2,600 and 2,800 individuals. SE ROA 47167. In January 2001, a total of 934 Moapa dace were recorded by a consortium of agencies, including the Nevada Department of Wildlife, the U.S. Geological Survey, SNWA, and FWS. SE ROA 47167. In February 2002 and 2003, annual surveys identified approximately 1,085 and 907 individuals, respectively. SE ROA 47167. While dace numbers had increased to about 1,500 by September 2019, the species is still far from meeting FWS’s population-recovery criteria of 6,000 individuals. SE ROA 53119.

1 Threats to the Moapa Dace include non-native predatory fishes, habitat loss from water  
2 diversions and impoundments, wildfire risk from non-native vegetation, and groundwater  
3 development in the LWRFS which, as explained herein, decreases spring flows in the MRSA. SE  
4 ROA 47160. Springflow from the Muddy River springs is a limiting factor on the dace’s recovery,  
5 and reductions in springflow from groundwater pumping may result in “take” of the species. *See*  
6 SE ROA 53117. The Moapa dace is also vulnerable to unpredictable catastrophic events due to its  
7 limited distribution and small population size. SE ROA 47160.

8 As noted, several parties to this litigation, including SNWA, CSI, and MVWD, as well as  
9 MBOP, entered into an MOA with FWS in 2006 designed to maintain springflows for the benefit  
10 of the dace through the Order 1169 pumping test. *See* SE ROA 53437. The MOA contains a variety  
11 of “monitoring, management and conservation measures,” which can loosely be grouped into two  
12 categories—measures designed to preserve springflows and measures designed to restore and  
13 improve Moapa dace habitat. *See* SE ROA 47157-59. Most relevant to the current proceedings,  
14 the MOA contains a series of springflow “triggers” requiring action from the signatories (including  
15 some pumping reductions) at certain flow levels. SE ROA 47158-59. The highest of these—3.2  
16 cubic feet per second (“cfs”)—is the minimum needed to maintain the current dace population of  
17 approximately 1,500 individuals.<sup>2</sup> SE ROA 53120, 53449. It is likely not a sufficient level to  
18 recover the dace to a point at which ESA protection is no longer needed. SE ROA 53120, 53449.

19 While the MOA provides some stop-gap protection for the dace, it does not insulate its  
20 signatories or the State Engineer’s office from liability for take under Section 9 of the ESA. The  
21 terms of the MOA were based on the information available before the Order 1169 pumping test,  
22 and therefore appear to underestimate impacts to springflows from groundwater pumping. *See* SE  
23 ROA 53448-49. And although FWS engaged in a “formal consultation” process with the MOA  
24

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25  
26 <sup>2</sup> Like afa, cfs is a measurement of water volume over time. One cfs is equal to 724 afa. The MOA  
27 triggers refer to streamflows as measured at the Warm Springs West gage on the Moapa  
28 National Wildlife Refuge.

1 signatories that analyzed the impacts of the MOA in a biological opinion, neither the MOA nor  
2 the biological opinion exempt the signatories from ESA liability for any taking of the Moapa dace  
3 caused by groundwater pumping. *See Ctr. for Biological Diversity v. United States Fish & Wildlife*  
4 *Serv.*, 807 F.3d 1031, 1041-42 (9th Cir. 2015).

5 **II. Groundwater Over-Appropriation in the LWRFS and the Order 1169 Pumping**  
6 **Test.**

7 In the early 2000s—and possibly even before that—demand for groundwater in  
8 Southeastern Nevada exceeded supply. *See* SE ROA 10890. By early 2002, the State Engineer had  
9 received several applications to appropriate groundwater from Coyote Spring Valley, the Black  
10 Mountains Area, Garnet Valley, Hidden Valley, California Wash, and the Muddy River Springs  
11 Area. SE ROA 665. Order 1169 held all of these applications in abeyance until the amount of  
12 available water in the regional carbonate aquifer system could be ascertained. *Id.* The Order  
13 reflected the State Engineer’s concern that insufficient groundwater supplies existed to satisfy the  
14 new applications, or possibly even the full amount of then-existing groundwater rights in the  
15 affected basins. *See* SE ROA 663-665.

16 In Order 1169, the State Engineer explained that “a large portion of the State of Nevada  
17 consisting of approximately 50,000 square miles” sits atop a geologic layer of carbonate rock (e.g.,  
18 limestone or dolomite), which contains “significant, but undetermined quantities of groundwater.”  
19 SE ROA 659. This carbonate-rock layer is continuous enough to transmit groundwater “over  
20 distances exceeding 200 miles” via “two major regional flow systems” running from north to  
21 south—the Ash Meadows-Death Valley system and the White River-Muddy River Springs system.  
22 SE ROA 661. The southern portion of the White River-Muddy River Springs system comprises  
23 the LWRFS. Many warm-water springs, including the Muddy River Springs at issue in this  
24 litigation, discharge from these regional carbonate-aquifer flow systems. SE ROA 660-61, 53056,  
25 53062.

26 In 2002, when Order 1169 was issued, the hydrologic and geologic properties of the  
27 carbonate aquifer systems were not well understood. *See* SE ROA 660. Order 1169 acknowledged  
28 that carbonate water development was “risky,” and that “[l]arge-scale development (sustained

1 withdrawals) of water from the carbonate-rock aquifers” would likely deplete the regional aquifer  
2 and reduce springflows on the surface, a result that would be “disastrous,” for both senior water  
3 users and the environment. SE ROA 660-61.

4 At the time the State Engineer issued Order 1169, numerous permits to appropriate  
5 groundwater had already been granted in the LWRFS, authorizing in total the direct withdrawal of  
6 50,465 afa. SE ROA 664. However, only a fraction of this water had actually been developed and  
7 most of the carbonate water permitted to be pumped remained in the ground. *Id.*

8 The State Engineer explained in Order 1169 that he did not believe it prudent to issue  
9 additional groundwater rights in the LWRFS until a significant portion of then-existing rights were  
10 pumped for a substantial period of time to determine how development of those water rights would  
11 affect senior water users and the environment. SE ROA 665. Based on a review of several different  
12 models and analyses, the State Engineer projected that the development of significant carbonate  
13 groundwater resources in the area would adversely impact the Muddy River Springs, which form  
14 the source of the fully decreed Muddy River and provide all of the known habitat for the Moapa  
15 dace. SE ROA 663-664.

16 In order to ascertain the hydrologic and geologic properties of the LWRFS, Order 1169  
17 required that at least 50 percent of existing groundwater rights in Coyote Spring Valley, or 8,050  
18 afa, be pumped and the carbonate aquifer impacts monitored for at least two consecutive years. SE  
19 ROA 661.

20 The Order 1169 pumping test began in November 2010 and concluded in December 2012.  
21 SE ROA 6. During the test an average of 5,290 afa was pumped from Coyote Spring Valley—  
22 significantly less water than called for in the State Engineer’s Order and less than half of the  
23 groundwater rights already granted—and a cumulative total of 14,535 afa was pumped throughout  
24 the Order 1169 study basins. SE ROA 7; 737-38. The pumping test results demonstrated that there  
25 is a “unique” and “direct” hydraulic connection between the regional carbonate aquifer complex  
26 and the Muddy River Springs, and that groundwater pumping from anywhere within the  
27 interconnected carbonate aquifer system captures water that would otherwise discharge from the  
28 Muddy River Springs into the Muddy River. SE ROA 8-12; 751.

1 Groundwater levels throughout the six-basin, 1,100 square-mile study area declined in  
2 near-unison during the pumping test, demonstrating that the effects of pumping at any particular  
3 point will radiate quickly throughout the entire system. SE ROA 7, 34537. Typically, groundwater  
4 around a pumped well forms what is called a “cone of depression”—a localized area in which  
5 groundwater elevations slope gradually downward towards the point at which water is extracted.  
6 See SE ROA 11501, 50135. The size and shape of the cone of depression depend to a large degree  
7 on the ease with which water moves through the geologic structures, a property referred to by  
8 hydrologists as “transmissivity.” *Id.*; see also SE ROA 34501. Where transmissivity is low, the  
9 cone of depression will be narrow and steep; where transmissivity is high, it will be wide and  
10 shallow. SE ROA 34501, 50135 During the Order 1169 pumping test, declining groundwater  
11 levels formed more of a flat surface than a slope, revealing exceptionally high transmissivity  
12 throughout the system. SE ROA 47-48, 34537. As explained by the Center’s hydrological expert,  
13 Dr. Tom Myers, “almost all [technical] reports” filed with the State Engineer in the administrative  
14 proceeding below described a water table “that was more like the lowering of a lake than a cone  
15 of depression.” *Id.* “[T]he aquifer responded as if it were pond[,] with water level changes  
16 transmitted quickly throughout.” SE ROA 34503. Water levels “dropped about 2 feet” throughout  
17 the entire study area, with some limited exceptions. *Id.*; see also SE ROA 7.

18 Equally dramatic were the impacts on springflow. As noted, the Muddy River Springs are  
19 directly connected to, and discharge from, the regional carbonate aquifer. SE ROA 73-75, 34545,  
20 53062. Because of this connection, flows from the springs are dependent on the elevation of  
21 groundwater within the carbonate aquifer, can change rapidly in direct response to changes in  
22 carbonate groundwater levels. SE ROA 60-61, 34545. As carbonate groundwater levels decline,  
23 springflows decrease, beginning with the highest-elevation springs. SE ROA 46, 34545. Put  
24 differently, groundwater withdrawals from anywhere within the carbonate aquifer complex  
25 intercept, or “capture,” water that would otherwise flow from the Muddy River Springs and into  
26 the Muddy River. SE ROA 60-61. As Dr. Myers explained, pumping from the carbonate aquifer  
27 captures discharge—including springflows—at nearly a one-to-one ratio over the long-term. SE  
28 ROA 34545.



1           The pumping test caused “sharp declines” in groundwater levels and flows from the  
2 highest-elevation Muddy River Springs, which are considered the “canary in the coalmine”  
3 regarding the impacts of groundwater pumping on Muddy River flows and Moapa dace habitat.  
4 SE ROA 8-12, 751. The flow rate at the highest-elevation Pederson Spring declined about 63  
5 percent during the test, and the nearby Pederson East spring declined about 45 percent. SE ROA  
6 34505. The U.S. Department of the Interior estimated that the Pederson spring would have run dry  
7 in 1.5 years, and the Pederson East in 2.5 to 3 years had pumping continued at the same levels. SE  
8 ROA 10889. Lower-elevation springs also showed declines in flow, indicating that the effects of  
9 pumping were propagating throughout the spring system within a relatively short period of time.  
10 SE ROA 10889, 34506. Flows at the Warm Springs West gauge on the Moapa National Wildlife  
11 Refuge declined by about 9 percent during the test. SE ROA 10889, 34505. These impacts to  
12 springflows, combined with the exceptionally even drawdown of groundwater levels throughout  
13 system, confirm that pumping anywhere within the carbonate system will capture water that would  
14 otherwise discharge from the springs and into the river.

15           The results of the Order 1169 pumping test confirmed the State Engineer’s earlier  
16 projections that an increasing amount of carbonate pumping within the LWRFS would adversely  
17 affect the Muddy River Springs, the Moapa dace, and senior decreed water rights. *See* SE ROA  
18 34507. The pumping test results also suggest that carbonate groundwater in the LWRFS is  
19 essentially a finite, nonrenewable resource. Southern Nevada is generally very dry, meaning  
20 average recharge—or the amount of water added to the aquifer from precipitation and other  
21 sources—is very low. SE ROA 34493. In addition, there appears to be a “steady state inflow” to  
22 the carbonate groundwater system. SE ROA 34506. In some groundwater systems, pumping from  
23 a well will create a negative pressure gradient, which draws additional water toward the well from  
24 more distant sources. *See id.* Here, however, due to the system’s unique geology, the amount of  
25 inflow to the system likely remains constant regardless of how much water is extracted. *Id.*; *see*  
26 *also* SE ROA 10889. Finally, and most importantly, the water stored in the carbonate aquifer  
27 system accumulated over an extremely long period of time. SE ROA 54953. Mean ages of  
28 groundwater in the system range from 1600 to 34,000 years, with the oldest waters exceeding

1 100,000 years old. SE ROA 49533. “[I]f depleted, [this water] would be replenished very slowly  
2 or not at all.” SE ROA 54953.

3 Carbonate groundwater levels have not recovered since the completion of the Order 1169  
4 pumping test and continued to decline through 2019 despite a subsequent decrease in groundwater  
5 pumping. SE ROA 34505, 34519, 34539-40. Groundwater levels at the EH-4 monitoring well—a  
6 key location for evaluating pumping impacts to the Muddy River springs—reached an all-time low  
7 point on November 9, 2018. SE ROA 34539.

8 This lack of recovery over an eight-year period strongly indicates that the depletion of the  
9 carbonate aquifer from the pumping test was essentially permanent—a new baseline from which  
10 minimal recovery will occur, even in the absence of groundwater pumping. SE ROA 34506. To  
11 put this in hydrological terms, the pumping test drew from “storage” rather than “discharge.” *Id.*  
12 Within any groundwater system, there is some amount of flow out of the system, known as  
13 “discharge,” as well as flow into the system, known as “recharge.” *See* SE ROA 36948. The total  
14 amount of water in the system, however, is generally much greater than either recharge or  
15 discharge. This greater amount of water is called “storage.” Thus, a groundwater system may be  
16 compared to a large lake or reservoir. Streams flowing into the reservoir represent recharge,  
17 streams flowing out represent discharge, and the water stored within the reservoir represents  
18 storage.

19 Groundwater pumping can draw from, or “capture,” discharge, storage, or both. *See* SE  
20 ROA 36948. When pumping captures discharge, the system remains in relative equilibrium. *See*  
21 generally SE ROA 11268-76. When pumping captures storage, however, groundwater levels  
22 decline, just as the water levels in a reservoir decline in response to overuse or drought. SE ROA  
23 53618. Capture of storage represents a long-term or permanent depletion of the groundwater  
24 resource, sometimes referred to as “groundwater mining.” *Id.*; *see also* SE ROA 50133.

25 In the case of the Order 1169 pumping test, an estimated 80 to 90 percent of the  
26 groundwater pumped came from storage. SE ROA 10889, 34506. This indicates that continued  
27 pumping at levels observed during the pumping test would have continued to decrease springflow  
28 as pumping continued to remove water from storage and lowered carbonate groundwater levels,

1 which, as noted, have a direct relationship to springflow. Even after the cessation of pumping,  
2 springflows would be expected to continue declining until the system reaches a new steady state,  
3 because water would be diverted from spring discharge to replenish the storage that was removed  
4 by pumping. SE ROA 34506.

5 To summarize, the pumping test results demonstrated that any amount of carbonate  
6 pumping removes water from the MRSA, at nearly a one-to-one ratio. SE ROA 34513, 34545.  
7 Because of the limited recharge and steady-state inflow to the system, carbonate pumping in the  
8 LWRFS is not sustainable over the long term, and any further withdrawals from the carbonate  
9 aquifer will impact both the Moapa dace and senior decreed water rights on the Muddy River.

### 10 **III. Orders 6254-6261**

11 On January 25, 2014, after reviewing the pumping test results and stakeholder reports, the  
12 State Engineer issued Rulings 6254-6261, which set forth the State Engineer's factual findings  
13 regarding the pumping test results. The State Engineer found that "pumping under the Order 1169  
14 test measurably reduced flows in headwater springs of the Muddy River," and that, "if pending  
15 water right applications were permitted and pumped in addition to existing groundwater rights in  
16 Coyote Spring Valley and the other Order 1169 basins, headwater spring flows would be reduced  
17 in tens of years or less to the point that there would be a conflict with existing rights." SE ROA  
18 751. The State Engineer also found that, "to permit the appropriation of additional groundwater  
19 resources in the Coyote Spring Valley . . . would impair protection of these springs and the habitat  
20 of the Moapa dace and therefore threatens to prove detrimental to the public interest." *Id.* Finally,  
21 the State Engineer concluded that only a small portion of existing water rights may be fully  
22 developed without negatively affecting the Moapa dace and its habitat or the senior decreed rights  
23 on the Muddy River. *See id.*

24 The Orders denied all pending water rights applications in the LWRFS on the grounds that:  
25 there is no unappropriated groundwater in the system; the applications would conflict with senior  
26 rights; and the proposed groundwater withdrawals would "threaten the water resources on which  
27 the Moapa dace are dependent." *See* SE ROA 726-948.

1 **IV. Interim Order 1303**

2 Rulings 6254-6261 dealt only with pending applications for new water rights. There was  
3 further evidence from the pumping test that a significant portion of existing rights could not be  
4 developed without adversely impacting senior rights and the Muddy River Springs. The State  
5 Engineer noted that “the pre-development discharge or 34,000 [afa] of the Muddy River system,  
6 which is fully appropriated, plus the more than 38,000 [afa] of groundwater appropriations within  
7 the LWRFS greatly exceed the total water budget within the flow system.” SE ROA 79. However,  
8 the “precise extent of the development of existing [water rights] within the LWRFS that may occur  
9 without conflicting with the senior rights of the fully decreed Muddy River [had] not been  
10 determined.” SE ROA 80.

11 The State Engineer therefore issued Interim Order 1303 in January 2019. The Order  
12 recognized that:

13 [T]here exist[ed] a need for further analysis of the historic and ongoing  
14 groundwater pumping data, the relationship of groundwater pumping within the  
15 LWRFS to spring discharge and flow of the fully decreed Muddy River, the extent  
16 of impact of climate conditions on groundwater levels and spring discharge, and  
17 the ultimate determination of the sustainable yield of the LWRFS.

18 SE ROA 80. Order 1303 solicited additional stakeholder reports and called for public meetings to  
19 determine “the appropriate long-term management of groundwater pumping that may occur in the  
20 LWRFS by existing holders of water rights without conflicting with existing decreed rights or  
21 adversely affecting the endangered Moapa dace.” SE ROA 81. The State Engineer sought  
22 stakeholder input on five specific matters:

- 23 (1) The geographic boundary of the hydrologically connected groundwater and  
24 surface flow water systems comprising the Lower White River flow  
25 System;
- 26 (2) The information obtained from the Order 1169 aquifer test and subsequent  
27 to the aquifer test and Muddy River headwater spring flow as it relates to  
28 aquifer recovery since the completion of the aquifer test;
- (3) 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  
capture of Muddy River flow;
- (4) The effects of movement of water rights between alluvial wells and  
carbonate wells on deliveries of senior decreed rights to the Muddy River;  
and,

1 (5) Any other matter believed to be relevant to the State Engineer’s analysis.

2 SE ROA 82-83. Stakeholders with “interests that may be affected” by groundwater development  
3 in the LWRFS were invited to file reports on these five matters, and a public hearing was  
4 scheduled. SE ROA 83.

5 Throughout the Interim Order 1303 proceedings, the Center presented expert reports and  
6 testimony from Dr. Tom Myers explaining that Kane Springs Valley should be included in the  
7 LWRFS, and that any additional carbonate pumping would reduce both groundwater levels and  
8 flows from the Muddy River Springs, affecting both the Moapa dace and senior decreed water  
9 rights.

10 Dr. Myers explained that Kane Springs Valley should be included in the LWRFS because  
11 the “hydraulic gradient”—or difference in elevation of the carbonate aquifer—is “very low”  
12 between Kane Springs Valley and adjoining portions of Coyote Spring Valley. SE ROA 34508.  
13 Because of this very low hydraulic gradient, any pumping in Kane Springs Valley that reduces  
14 carbonate groundwater levels would decrease the rate of inter-basin groundwater flow to Coyote  
15 Spring Valley “in a time frame measured in less than a few years.” *Id.* Additionally, “because of  
16 the very low perennial yield in Kane Springs Valley and the lack of inflow to the valley from  
17 upgradient valleys,” pumping in Kane Springs Valley could potentially decrease groundwater  
18 levels such that inter-basin groundwater flows reverse, causing water to flow backward from  
19 Coyote Spring Valley into Kane Springs Valley. *Id.* If this were to happen, effects would spread  
20 rapidly throughout the LWRFS carbonate aquifer system due to its high transmissivity, reducing  
21 springflows and impacting senior water rights. *Id.*; *see also* SE ROA 34533-38 (technical  
22 memorandum rebutting Lincoln/Vidler’s argument that Kane Springs Valley should be excluded  
23 from the LWRFS).

24 Dr. Myers also explained that the LWRFS carbonate aquifers did not reach a steady state  
25 between the conclusion of the Order 1169 pumping test and the Order 1303 hearing in September  
26 2019, and that due to the unique properties of the LWRFS carbonate aquifer system, any  
27 groundwater pumping within the system will ultimately reduce groundwater levels and  
28 springflows in the MRSA. Dr. Myers’s conclusions in this regard are based on the fundamental

1 hydrologic principle that in any groundwater system the amount of discharge (water flowing out  
2 of the system) must equal the amount of recharge (water flowing into the system). SE ROA 34541-  
3 43. Pumping upsets this balance by removing groundwater that would otherwise exit the system  
4 as springflow or some other form of discharge. SE ROA 34541-43. Over time, the system may  
5 reach a new equilibrium or “steady state” in which the reduction in discharge equals the amount  
6 being pumped. SE ROA 34543. But unless and until this occurs pumping will continue to reduce  
7 the amount of water that exits the system. SE ROA 34543. In the context of the Lower White River  
8 Flow system, the application of this principle is that carbonate groundwater pumping will reduce  
9 springflows in the MRSA unless and until the system reaches a steady state. SE ROA 34543. Put  
10 differently, if the system is not in a steady state, springflows and water levels will continue to  
11 decline.

12 Dr. Myers’s reports and testimony explained that the Lower White River Flow System has  
13 not reached a steady state because groundwater levels and springflows continue to decline despite  
14 recent reductions in pumping and increasing annual precipitation rates. SE ROA 53615. After the  
15 conclusion of the Order 1169 pumping test, and especially since 2014, total carbonate pumping  
16 has decreased and remained between 7,000 and 8,000 acre-feet per year—roughly equivalent to  
17 1995-97 levels. SE ROA 56, 34538. Annual precipitation, meanwhile, increased from 2014  
18 through 2018. SE ROA 34519. Despite this reduction in pumping and increase in precipitation,  
19 carbonate groundwater levels and springflows steadily declined through 2019. SE ROA 34519. As  
20 Dr. Myers explained, these decreases indicate that the system has not reached a steady state, and  
21 that even with current pumping levels, “it is only a matter of time before the spring flow on which  
22 the [Moapa] dace depends decreases significantly or is completely lost.” SE ROA 34514, 34543-  
23 44.

24 Dr. Myers explained that there is very little recharge in the LWRFS, meaning that very  
25 little water enters the carbonate aquifer system from precipitation and other sources. SE ROA  
26 34520, 34533. Springflows will, therefore, not recover significantly even if pumping is stopped,  
27 and any damage done to the Moapa dace and its habitat from excessive pumping rates will be long-  
28 term and possibly irreversible. SE ROA 34544.

1 Dr. Myers also explained how carbonate pumping impacts Muddy River flows:

2 [C]arbonate pumping would eventually dry the Muddy River Springs, but  
3 carbonate groundwater flow also supports basin fill water through direct discharge  
4 from the carbonate to the basin fill and secondary recharge of springflow into the  
5 basin fill. . . . Because [discharge from the carbonate aquifer] is directly  
6 responsible for Muddy River flows, preventing any additional carbonate pumpage  
7 is also necessary for protecting downstream water rights.

8 SE ROA 34515.

9 Several of the other parties to the Order 1303 proceedings agreed with Dr. Myers. As  
10 summarized by the State Engineer, “numerous participants advocated to include Kane Springs  
11 Valley in the LWRFS basins.” SE ROA 52. The State Engineer found these parties to be  
12 “persuasive,” noting that “while attenuated, the general hydrographic pattern observed in southern  
13 Kane Springs Valley reflects a response to the Order 1169 pumping, consistent with a close  
14 hydraulic connection with the LWRFS.” SE ROA 53.

15 Several of the stakeholders also concurred with Dr. Myers regarding aquifer recovery  
16 following the Order 1169 pumping test, the lack of evidence for the aquifer being at “steady state,”  
17 and the need to reduce pumping in order to maintain springflows and serve senior decreed rights.  
18 For example, the Southern Nevada Water Authority (“SNWA”) and the Las Vegas Valley Water  
19 District (“LVVWD”) concluded in their report that carbonate groundwater pumping ultimately  
20 captured Muddy River flow at a one-to-one ratio, regardless of where that pumping was located  
21 within the system. SE ROA 42013. SNWA and LVVWD also agreed with Dr. Myers regarding  
22 the lack of full recovery from the pumping test and continuing declines in groundwater levels and  
23 springflows. Most critically, they acknowledged that since 2016, water levels in both the carbonate  
24 aquifer and the springs have continued to decline. SE ROA 41995. They attributed these declines  
25 to “carbonate groundwater production” and further observed that declines have continued even  
26 though “winter-season precipitation during 2017 and 2019 was above average.” SE ROA 41995.

27 The National Park Service (“NPS”) also concurred in this analysis. As summarized by the  
28 State Engineer, “NPS reviewed the available data,” and concluded that “the decades long decline  
of groundwater levels is not attributable to climate, but rather that the groundwater pumping within  
the LWRFS is the contributing factor.” SE ROA 30. NPS’s analysis showed that it will take many

1 years, if not decades for the LWRFS carbonate-rock aquifer to reach equilibrium, particularly at  
2 the current groundwater pumping rates. SE ROA 51449, 51464-65, 52887-88.

3 Other parties argued against the idea that groundwater levels and springflows were  
4 continuing to decline, but failed to identify evidence showing that the aquifer was approaching  
5 equilibrium or a “steady-state.” For example, while FWS expressed an opinion that the aquifer  
6 may be approaching equilibrium, it did so in the context of a “conceptual model” of the aquifer  
7 system. FWS also did not “directly opine their view on [aquifer] recovery.” SE ROA 38. And, in  
8 hearing testimony, FWS acknowledged that the data it relied on showed a continuing downward  
9 trend in water levels after the Order 1169 pumping test. SE ROA 53119.

10 NV Energy repeatedly stated that the system was approaching equilibrium at current  
11 pumping rates. *See* SE ROA 52912-17. However, NV Energy also acknowledged that “water  
12 levels regionally were still declining due to existing pumping,” SE ROA 41876, and in testimony  
13 explained that “[w]e need more time to observe the system to really be certain that we are in fact  
14 reaching equilibrium in the Muddy River Springs area.” SE ROA 53723. NV Energy further  
15 admitted that “pumping from the carbonate aquifer anywhere in the Lower White River Flow  
16 System will capture Muddy River Flows,” SE ROA 53729, and that it was “possible” for the first  
17 MOA trigger of 3.2 cfs to be reached with “current pumping.” SE ROA 53728. Ultimately, NV  
18 Energy’s position on groundwater recovery was characterized primarily by uncertainty. Its expert  
19 witness stated: “I don’t think that [our] data disagree with SNWA’s conclusion all that much. But  
20 I do think that we need a little more time to know for sure.” SE ROA 53729. NV Energy also failed  
21 to consider precipitation as a factor in groundwater and springflow levels. As noted, groundwater  
22 levels and springflow have continued to decline despite multiple above-average precipitation  
23 years. SE ROA 53347.

24 Similar to NV Energy, the Moapa Valley Water District (“MVWD”) argued that the  
25 LWRFS is “at or near steady-state conditions.” SE ROA 26-27. But MVWD also “acknowledge[d]  
26 that ‘actual safe pumpage’” e.g., the sustainable level of pumping “is less than current pumping  
27 rates.” SE ROA 27. And, like the other parties arguing in favor of the “steady-state” hypothesis,  
28



1 MVWD acknowledged that “additional data [are] required to verify” the current “state” or  
2 “condition” of the carbonate aquifer. SE ROA 53459.

3 **V. Order 1309**

4 On June 15, 2020, the State Engineer issued Order 1309, which set forth the State  
5 Engineer’s conclusions regarding the four factual matters on which the State Engineer sought  
6 stakeholder input through the hearing process. The State Engineer agreed with the Center and other  
7 stakeholders that Kane Springs Valley should be included in the LWRFS. SE ROA 66. However,  
8 the State Engineer’s conclusions regarding aquifer recovery from the Order 1169 pumping test and  
9 the amount of water that may be pumped from the LWRFS diverged from the evidence presented  
10 during the Order 1303 proceedings.

11 While Order 1309 acknowledged that groundwater levels in the regional carbonate aquifer  
12 have “not recovered to pre-Order 1169 test levels,” and that insufficient data exist to determine  
13 whether groundwater levels were approaching a “steady state,” SE ROA 58, the State Engineer  
14 nevertheless “agreed” with a minority of stakeholders who argued that water levels in the MRSA  
15 “may be approaching steady state.” SE ROA 58.

16 The State Engineer also acknowledged that current pumping is capturing Muddy River  
17 flows, noting that Muddy River flows in the river’s headwaters at the Moapa Gage have declined  
18 by over 3,000 afa. SE ROA 62. However, the State Engineer made a finding that “capture or  
19 potential capture of the waters of a decreed system does not constitute a conflict with decreed right  
20 holders if the flow of the source is sufficient to serve decreed rights.” SE ROA 61. The State  
21 Engineer provided a discussion of how those rights could potentially be met even with reduced  
22 headwater flows and then concluded that up to 8,000 acre-feet per year could continue to be  
23 pumped from the regional carbonate aquifer without impacting the fully decreed water rights in  
24 the Muddy River, stating “reductions in flow that have occurred because of groundwater pumping  
25 in the headwaters basins [are] not conflicting with Decreed rights.” SE ROA 62. In basing his  
26 decision on the hypothetical ability to satisfy senior rights, the State Engineer failed to consider  
27 whether 8,000 afa of pumping—or any level of pumping—was sufficient to maintain springflows  
28 at 3.2 cfs and thus prevent impacts to, or unlawful “take” of, the Moapa Dace.

**ARGUMENT**

**I. The State Engineer’s Conclusion That Carbonate Pumping Can Continue at 8,000 afa is Based on a “Steady-State” Hypothesis Which is Not Supported by Substantial Evidence.**

The State Engineer’s decision on the maximum allowable quantity of groundwater pumping in Order 1309 is based on the assumption that the LWRFS is approaching an hydrological “steady state” after the impacts of the Order 1169 pumping test. *See* SE ROA 58. However, there is very little data in the record supporting the State Engineer’s “steady-state” hypothesis. Rather, the available data indicates that groundwater levels and springflows in the LWRFS continued to decline between 2016 and 2019, despite above-average precipitation and slight reductions in pumping. SE ROA 34519, 41995, 51449, 51464-65, 52887-88. This shows that the system is not in fact in a “steady state,” but rather that groundwater pumping continues to have negative impacts on springflows and senior decreed rights. Because the available evidence demonstrates a groundwater decline rather than equilibrium, and because those arguing in favor of equilibrium acknowledged that the evidence was not sufficient to support that conclusion, the State Engineer’s decision is not supported by substantial evidence.

This court must determine in its review if “substantial evidence supports the State Engineer’s decision.” *Pyramid Lake Paiute Tribe*, 112 Nev. at 751, 918 P.2d at 702. Substantial evidence is “that which ‘a reasonable mind might accept as adequate to support a conclusion.’” *Bacher v. Office of the State Eng’r of Nev.*, 122 Nev. 1110, 1121, 146 P.3d 793, 800 (2006). Put differently, the court must determine “whether the evidence upon which the engineer based his decision supports the order.” *Morris*, 107 Nev. at 701, 819 P.2d at 205.

In Order 1309, the State Engineer determined that carbonate aquifer levels and spring flows “may be approaching steady state.” SE ROA 64. Based on this determination, the State Engineer found that the “maximum amount of groundwater that can continue to be developed over the long term in the LWRFS is 8,000 afa.” *Id.* But the State Engineer acknowledged that this determination was not supported by evidence. Specifically, the State Engineer explained that the apparent stabilizing “trend” was “of insufficient duration to make this determination . . . and continued

1 monitoring is necessary to determine if this trend continues or if water levels continue to decline.”  
2 SE ROA 58.

3 In fact, there was very little evidence of any kind of a stabilizing trend, and the  
4 overwhelming weight of evidence in the Order 1303 proceedings showed that, contrary to the State  
5 Engineer’s determination, carbonate pumping at levels less than 8,000 afa were continuing to  
6 decrease groundwater elevations and springflows despite above-average precipitation in the years  
7 leading up to the Order 1303 hearing. SE ROA 34519, 41995, 51449, 51464-65, 52887-88. As the  
8 Center explained in its reports and testimony, data from streamflow gages and monitoring wells  
9 since 2015 show a slight but steady declining trend in groundwater levels. SE ROA 53615. This  
10 means the system is not in equilibrium, and discharge rates will continue to decline until such a  
11 state is reached. *See* SE ROA 34543.

12 Declines have continued since 2015 despite wetter-than-average climactic conditions, and  
13 despite a slight reduction in pumping. SE ROA 34519, 41995, 51449, 51464-65, 52887-88. Thus,  
14 the apparent “leveling” of aquifer data must be read in context. As the Department of the Interior’s  
15 expert witnesses explained during the Order 1303 hearing, the carbonate aquifer appears to exhibit  
16 a response to wet conditions but not dry conditions. SE ROA 53071; 53183. So in the absence of  
17 stresses such as pumping, water levels would be expected to increase in wet years and stay  
18 relatively steady in dry years. Additionally, if the system reached equilibrium at a certain rate of  
19 pumping, springflows would increase in response to declines in pumping, as formerly “captured”  
20 discharge was re-routed from the wells back to the springs. That has not occurred. Between 2016  
21 and 2018, carbonate groundwater production in the LWRFS declined from 7,800 afa to 7,344 afa,  
22 SE ROA 53347, yet water levels continued to decline. This demonstrates that pumping continues  
23 to remove water from storage, that the system is not in equilibrium, and that additional pumping  
24 at current rates will continue to reduce groundwater levels and spring flows.

25 It must be emphasized here that the “steady-state” conclusion is a characterization, not a  
26 conclusion drawn from data. Even if water levels had appeared to stabilize between 2016 and 2018,  
27 there would not be enough data to declare the system “stable.” More observation would be needed.  
28 All of the parties who argued in favor of the “steady state” acknowledged this. *See* SE ROA 53723

1 (NV Energy explaining that “[w]e need more time to observe the system to really be certain that  
2 we are in fact reaching equilibrium in the Muddy River Springs area”); SE ROA 39261 (MVWD  
3 stating that “additional data is required to verify the steady-state “conclusion”); SE ROA 53118  
4 (FWS acknowledging continuing declines in groundwater levels and stating that “there are too  
5 many outstanding questions right now to predict the sustain[able] level of total pumping”). While  
6 the “steady-state” hypothesis presents a useful conceptual framework for parties seeking to  
7 continue current levels of groundwater production, it cannot be said that it truly reflects the data  
8 that was presented to the State Engineer in the proceedings below.

9       Being unable to definitively state that the aquifer was in or approaching a steady state,  
10 proponents of the “steady-state” hypothesis argued in favor of a “wait-and-see” approach, under  
11 which current levels of pumping would continue and water levels would be monitored for future  
12 changes. *See, e.g.*, SE ROA, 39261 (MVWD) 53723 (NV Energy), 53118 (FWS). The State  
13 Engineer ultimately adopted this approach. *See* SE ROA 63. Although the State Engineer found  
14 “the evidence and testimony projecting continual future decline in springflow at the current rate of  
15 pumping” to be “compelling,” he ultimately ruled that “the maximum amount of groundwater that  
16 can continue to be developed over the long term in the LWRFS is 8,000 afa.” SE ROA 64. He  
17 added, however, that this “approximate limit” would need to be “refine[d] and validate[d]” through  
18 “continued monitoring of pumping, water levels, and spring flow.” SE ROA 63.

19       There are two problems with this conclusion in light of the data presented below. First, the  
20 system was not in a steady state, as Dr. Myers’s analysis showed. The system cannot be in a steady  
21 state if springflows are declining. SE ROA 34543. Any additional production at “current” rates  
22 will continue to reduce springflows and impact senior decreed water rights. SE ROA 34514,  
23 34543-44. Second, the State Engineer’s “wait and see” approach ignores the unique nature of the  
24 carbonate aquifer system in the LWRFS, and the nature of the likely impacts on the Moapa dace  
25 and senior water rights should water level declines continue into the future.

26       As discussed above, the carbonate aquifer system of the LWRFS is extraordinarily  
27 connected and transmissive. At the same time, recharge throughout the system is extremely low,  
28 and likely does not occur in years of below-average precipitation. SE ROA 34493; 53071; 53183.

1 Because of these properties, any withdrawals of groundwater result in effectively permanent  
2 impacts that propagate quickly throughout the system. SE ROA 7, 34537, 54953. Nearly all of the  
3 parties to the proceedings below recognized these properties, and concluded based on the pumping  
4 test data that withdrawals from the carbonate aquifer capture springflows in the MRSA on nearly  
5 a one-to-one basis. *See* SE ROA 34545 (Center), 42013 (SNWA & LVVWD); 53729 (NV Energy)  
6 SE ROA 53221-22 (NPS). Consequently, any reductions in carbonate groundwater levels will have  
7 nearly immediate, and potentially irreversible impacts on Moapa dace habitat and senior decreed  
8 water rights.

9 In a different aquifer system, the declines in groundwater levels like those observed from  
10 2015 through 2019 might not be a source of concern. For instance, in a less transmissive system,  
11 impacts would be more localized, and thus could be more easily managed by controlling the  
12 location of pumping. In a system with greater recharge, groundwater and surface flow reductions  
13 would be less permanent. And in a system where surface discharge was not fully appropriated, or  
14 did not provide essential habitat for an endangered species, some loss of surface flow could be  
15 tolerated and managed. But the LWRFS is different. As noted, there is very little recharge to the  
16 system, the entire flow of the Muddy River has been appropriated by decree, and any reduction in  
17 springflow in the MRSA will impact the survival and recovery of the Moapa Dace. SE ROA 53443.  
18 Simply put, there is no additional water to spare in this system.

19 For all of these reasons, the State Engineer's adoption of the "steady-state" hypothesis,  
20 despite "compelling" evidence of continued declines, and his determination that 8,000 afa could  
21 be sustainably pumped, were arbitrary, capricious, and not supported by substantial evidence. At  
22 the time the State Engineer made this decision, springflows at the Warm Springs West gage were  
23 approaching 3.2 cfs, which was established as the minimum volume necessary to avoid adverse  
24 impacts to Moapa dace habitat. SE ROA 46, 53617. As the State Engineer acknowledged in Order  
25 1309, this level of flow "is not necessarily sufficient to support the rehabilitation of the Moapa  
26 dace." SE ROA 46. And because carbonate pumping captures spring flows at nearly one-to-one  
27 ratio, any reduction in springflow constitutes an infringement of senior water rights. For both of  
28 these reasons, 8,000 afa is not a "safe" or "sustainable" level of pumping.

1 While the State Engineer’s decision is entitled to deference, it is not binding, and must be  
2 reversed if it is arbitrary, capricious, or not supported by substantial evidence. *Morris*, 107 Nev. at  
3 701, 819 P.2d at 205. It is this court’s duty to determine “whether the evidence upon which the  
4 engineer based his decision supports the order.” *Id.* In this case, it does not. Based on the evidence  
5 presented, a the long-term withdrawal of 8,000 afa from the Lower White River Flow System will  
6 cause significant and potentially irreversible impacts to senior decreed water rights and the  
7 endangered Moapa dace. Pumping at such a level will also prevent attainment of FWS’s recovery  
8 goals for the dace, as springflow is currently the limiting factor on dace abundance. SE ROA  
9 53436. This court should therefore reverse the State Engineer’s determination that 8,000 afa may  
10 be sustainably pumped from the Lower White River Flow System.

11 **II. The State Engineer’s Decision to Allow 8,000 afa of Carbonate Pumping to Continue**  
12 **Failed to Consider the Environmental Factors Including Survival of the Moapa Dace.**

13 As noted, the State Engineer determined in Order 1309 that pumping at the “current” level  
14 of roughly 8,000 afa was sustainable based on his determination that “the current flow in the  
15 Muddy River is sufficient to serve all decreed rights,” and that “reductions in flow that have  
16 occurred because of groundwater pumping in the headwaters basins is not conflicting with Decreed  
17 rights.” SE ROA at 62. And as discussed above, the State Engineer’s determination that 8,000 afa  
18 represented a “safe” level of pumping was based on the assumption that the carbonate aquifer was  
19 at or approaching a “steady state.”

20 But neither the alleged “steady state” of the carbonate aquifer, nor the alleged absence of  
21 conflicts with senior decreed rights relate to whether the level of groundwater pumping ultimately  
22 selected (or any particular level of groundwater pumping) will provide sufficient flow from the  
23 Muddy River Springs (at least 3.2 cfs) to ensure the long-term survival and recovery of the Moapa  
24 dace. Thus, the State Engineer failed to explain the basis for his conclusion that pumping at current  
25 levels will adequately protect the Moapa dace, and failed to comply with Nevada water law, which  
26 requires him to consider environmental impacts as a component of the public interest.

27 The Nevada Legislature has declared that “[t]he water of all sources of water supply within  
28 the boundaries of the State whether above or beneath the surface of the ground, belongs to the

1 public.” *Mineral Cty.*, 473 P.3d at 425 (quoting NRS § 533.025). This provision “recognize[s] that  
2 the public land and water of this state do not belong to the state to use for any purpose, but only  
3 for those purposes that comport with the public’s interest in the particular property, exemplifying  
4 the fiduciary principles at the heart of the public trust doctrine.” *Lawrence v. Clark County*, 127  
5 Nev. 390, 400, 254 P.3d 606, 613 (2011).

6 “[W]ater rights are subject to regulation for the public welfare and are characterized by  
7 relative, nonownership rights.” *Mineral Cty.*, 473 P.3d at 430. “Pursuant to NRS § 533.370(3), the  
8 State Engineer must determine whether a proposed appropriation is detrimental to the public  
9 interest before issuing a water appropriation permit.” *Pyramid Lake Paiute Tribe*, 112 Nev. at 748,  
10 918 P.2d at 700.

11 This requires the State Engineer to consider, among other things, “environmental impact.”  
12 *Id.* And “the State Engineer . . . must reject any permit applications detrimental to the public  
13 interest.” *Mineral Cty.*, 473 P.3d at 427 (citing NRS 533.370(2)-(3)). The Nevada Supreme Court  
14 has recognized that the State Engineer’s duty in this regard serves to implement the public trust  
15 doctrine, which “operates simultaneously with the doctrine of prior appropriation” and “forms the  
16 outer boundaries of permissible government action with respect to public trust resources.” *Mineral  
17 County v. State, Dep’t of Conservation*, 117 Nev. 235, 247, 20 P.3d 800, 808 (2001) (Rose, J.,  
18 concurring) (internal footnotes omitted) (internal citations omitted). Put differently, NRS §  
19 533.370 and other water statutes “satisf[y] ‘the state’s special obligation to maintain the trust for  
20 the use and enjoyment of present and future generations.” *Mineral Cty.*, 473 P.3d at 428.

21 Here, the State Engineer’s obligation to consider the public interest includes consideration  
22 of the State’s responsibility to avoid “take” of a federally listed endangered species. Habitat  
23 modification conducted, carried out, or authorized by a state agency may amount to an unlawful  
24 “taking” under the ESA. *Palila*, 471 F. Supp. At 999; *Strahan*, 127 F.3d at 163-64.

25 The State Engineer agreed with this basic framework in Order 1309:

26 Based on *Strahan* and similar decisions, the act of issuing a permit to withdraw  
27 groundwater that reduces the flow of the springs that form the habitat of the Moapa  
28 dace and were to result in harm to the Moapa dace exposes the Division, the State  
Engineer and the State of Nevada to liability under the ESA.

1 SE ROA 46. The State Engineer further determined that “a minimum [springflow] rate of 3.2 cfs”  
2 is necessary “in order to maintain habitat for the Moapa dace. A reduction of flow below this rate  
3 may result in a decline in the dace population.” SE ROA 46. However, the State Engineer failed  
4 to consider what level of groundwater pumping in the LWRFS would provide adequate springflow  
5 to ensure the survival and recovery of the Moapa dace, and thus failed to adequately consider the  
6 public interest.

7 As noted, the State Engineer’s decision in Order 1309 was based on two primary factors:  
8 the supposed “steady-state” of the carbonate aquifer and a lack of identifiable impacts to senior  
9 decreed rights. SE ROA 58-61. But as discussed above, the State Engineer’s “steady-state”  
10 hypothesis is inconsistent with the evidence in the record, which shows continuing declines in  
11 springflows at current pumping rates. If springflows are declining, the system cannot be in a steady  
12 state. And if the system is not in a steady state, there will continue to be adverse impacts to the  
13 Moapa dace’s habitat.

14 Nor are impacts to senior decreed rights, as evaluated by the State Engineer in Order 1309,  
15 an adequate proxy for impacts to Moapa dace habitat. The State Engineer’s conclusion with respect  
16 to senior decreed rights is based on “whether senior decreed rights are being served,” not whether  
17 groundwater pumping is causing declines in springflow or the overall amount of water in the  
18 Muddy River. SE ROA 61. As the State Engineer explained in Order 1309, he does not believe  
19 that “capture or potential capture of the waters of a decreed system . . . constitute[s] a conflict with  
20 decreed right holders” as long as “the flow of the source is sufficient to serve decreed rights.” SE  
21 ROA 61. Thus, under the State Engineer’s decision, springflows could continue to decline  
22 unabated so long as senior water users are being served on a season-by-season basis. Indeed, this  
23 is already occurring. “[T]he sum of diversion rates” under the decree “greatly exceeds” the current  
24 flow of the river, “but all users are still being served through a rotation schedule managed by the  
25 water master.” SE ROA 61. Meanwhile, springflows continue to decline in response to  
26 groundwater pumping throughout the system. SE ROA 34519, 41995, 51449, 51464-65, 52887-  
27 88.



1           Moreover, impacts to senior rights can be mitigated far more easily than impacts to the  
2 Moapa dace. The current rotation schedule for senior users is one example of a mitigation strategy  
3 that protects senior rights without accounting for impacts to springflows. Other examples discussed  
4 during the Order 1303 hearing include supplementation from out-of-basin sources and cash  
5 payments. *See, e.g.*, SE ROA 53400 (discussing mitigation options for senior rights). For a variety  
6 of reasons, the impacts to the dace from declining springflows cannot be mitigated through  
7 irrigation management in the MRSA, monetary payments, or the provision of alternative water  
8 sources.

9           The survival and recovery of the dace is entirely dependent on the unique conditions  
10 created by discharge from the carbonate aquifer in the MRSA. For instance, the dace is  
11 thermophilic, requiring water temperatures between 82.4 and 86.0° F. SE ROA 47160.  
12 Reproduction occurs only at the high end of this range. *Id.* Consequently, the dace is confined to  
13 the upper reaches of the Muddy River’s tributary streams, in close proximity to streams where  
14 warm carbonate groundwater flows to the surface. *See id.* Reductions in springflows from the  
15 carbonate source will cause the streams to cool more rapidly as they travel downstream, thereby  
16 decreasing the available spawning habitat. SE ROA 47197. The dace is also dependent on unique  
17 “hydraulic conditions” near the springs that “create a diversity of habitat.” SE ROA 47194. Any  
18 further reductions in springflow will alter these conditions and imperil the dace.

19           “Perhaps the most prominent impact that could occur,” according to FWS, “is the reduction  
20 in the overall volume of water that will be available to the species.” *Id.* Research has demonstrated  
21 that “Moapa dace size is scaled to water volume.” *Id.* “[L]arger water volumes provide the habitat  
22 necessary for increased food production and subsequently larger fish, therefore greater fecundity.  
23 Hence, more numerous, larger eggs provide a better opportunity for the long-term survival of the  
24 species.” *Id.* Conversely, lower volumes of water mean smaller dace, fewer eggs, and a reduced  
25 chance of survival.

26           The State Engineer did not consider any of these factors in Order 1309. And under the State  
27 Engineer’s reasoning, all of the impacts described above could occur even if senior decreed rights  
28 remain fully served. In sum, there is no guarantee that by protecting senior decreed rights, Order

1 1309 protects the Moapa dace. For these reasons, the 8,000 afa figure selected by the State  
2 Engineer does not adequately account for the public’s interest in the survival and recovery of the  
3 Moapa dace, or the State’s responsibility under the ESA to avoid “take” of an endangered species.

4 This deficiency is further exacerbated by the “wait and see” approach adopted in Order  
5 1309. The State Engineer has stated that “continued monitoring of pumping, water levels, and  
6 spring flow is essential to refine and validate” the 8000 afa limit. SE ROA 63. But this, too, ignores  
7 substantial evidence presented at the Order 1303 hearing that any reductions in springflow from  
8 carbonate groundwater pumping are likely to be of long duration or even permanent. The response  
9 throughout the system to the Order 1169 pumping test indicates that most of the water pumped is  
10 being removed from storage, and thus reducing the overall amount of water in the system. Because  
11 of the extremely low rate of recharge in southern Nevada, the system has not recovered from those  
12 losses. As the Center explained in its report to the State Engineer below, Carbonate groundwater  
13 levels have not recovered since the completion of the Order 1169 pumping test and continue to  
14 decline despite a subsequent decrease in groundwater pumping. SE ROA 34505, 34519, 34539-  
15 40. Groundwater levels at the EH-4 well reached an all-time low point on November 9, 2018. SE  
16 ROA 34539. Spring flows have also exhibited a declining trend in recent years. As of fall 2019,  
17 flows at Warm Springs West were approximately 3.2 cfs, demonstrating a prolonged lack or  
18 recovery. SE ROA 53617.

19 In sum, substantial evidence indicates that current rates of groundwater pumping present  
20 an imminent and serious threat to the Moapa dace. The State Engineer’s decision to ignore this  
21 evidence and authorize the pumping of up to 8,000 afa runs contrary to his acknowledgement in  
22 Order 1309 that the State of Nevada could face liability for “take” under ESA Section 9 for  
23 authorizing groundwater withdrawals that reduce springflows in the MRSA. *See* SE ROA 46. After  
24 the completion of various habitat restoration actions under the 2006 MOA, springflow is now the  
25 limiting factor on dace abundance, and “impacts to the flows in the upper streams are the major,  
26 primary threat to the existence of the Moapa dace.” SE ROA 53436. Consequently, any pumping  
27 that reduces springflows may cause unlawful “take” of the Moapa dace. SE ROA 53443.

1 The State Engineer therefore failed to consider the public interest because he ignored  
2 substantial evidence that pumping at the “current” level of 8,000 afa would have ongoing, adverse  
3 impacts on springflows and potentially result in unpermitted “take” of the Moapa dace. Nevada  
4 law holds that while the decision of the State Engineer is “prima facie correct,” it is not binding,  
5 and must be reversed if it is arbitrary, capricious, or not supported by substantial evidence. *Morris*,  
6 107 Nev. at 701, 819 P.2d at 205 (1991); *Pyramid Lake Paiute Tribe*, 112 Nev. at 751, 918 P.2d  
7 at 702. And according to the U.S. Supreme Court, a decision by an administrative agency is  
8 “arbitrary and capricious” if:

9 [T]he agency has relied on factors which [the legislature] has not intended it to  
10 consider, entirely failed to consider an important aspect of the problem, offered an  
11 explanation for its decision that runs counter to the evidence before the agency, or  
is so implausible that it could not be ascribed to a difference in view or the product  
of agency expertise.

12 *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856,  
13 2867 (1983).

14 Here, the State Engineer clearly failed to consider an “important aspect of the problem,”  
15 namely, impacts to the Moapa dace’s survival and recovery from declining springflows at the  
16 “current” level of groundwater pumping. The State Engineer also failed to consider the low  
17 likelihood of aquifer recovery following drawdown, and the ways in which managing impacts to  
18 senior decreed rights will not necessarily protect the dace over the long-term. For all of these  
19 reasons, the State Engineer’s decision is arbitrary and capricious, and must be reversed.

## 20 CONCLUSION

21 For all of the reasons discussed herein, the State Engineer’s conclusions in Order 1309  
22 regarding aquifer recovery following the Order 1169 pumping test and the amount of groundwater  
23 that can be sustainably pumped from the LWRFS are arbitrary, capricious, and not supported by  
24 substantial evidence. *Morris*, 107 Nev. at 701, 819 P.2d at 205 (1991); *Pyramid Lake Paiute Tribe*,  
25 112 Nev. at 751, 918 P.2d at 702.

26 The Center respectfully requests that this Court enter an order amending Order 1309 to  
27 remove or strike findings made therein regarding the amount of water that can be sustainably  
28 pumped from the Lower White River Flow System; directing the State Engineer to fully consider

1 the environmental consequences of groundwater pumping within the Lower White River Flow  
2 System, including on the endangered Moapa dace; and directing the State Engineer to prohibit all  
3 carbonate groundwater pumping within the geographic boundary of the Lower White River Flow  
4 System, including Kane Springs Valley, until a new sustainable limit is determined by the State  
5 Engineer after remand.

6  
7 **Affirmation:** The undersigned do hereby affirm that the preceding document and/or  
8 attachments do not contain the social security number of any person.

9 Dated this 27th day of August, 2021.

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**CERTIFICATE OF SERVICE**

1 I certify that I am an employee of the Center for Biological Diversity, and that on this 27th  
2 day of August 2021, I served a true and correct copy of the foregoing by electronic service to the  
3 participants in this case who are registered with the Eighth Judicial District Court’s Odyssey  
4 eFileNV File & Serve system to this matter.  
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**Excerpt/Exhibit 14**

**U.S. Geological Survey, Distribution of Carbonate-Rock  
Aquifers in Southern Nevada and the Potential for Their  
Development, Summary of Findings, 1985-88 (Selected  
Pages)**

Record on Appeal (ROA) Nos. 54946, 54953

Distribution of Carbonate-Rock Aquifers  
in Southern Nevada and the Potential  
for their Development

Summary of Findings, 1985-88

PROGRAM FOR THE STUDY AND TESTING OF CARBONATE-ROCK AQUIFERS  
IN EASTERN AND SOUTHERN NEVADA

*Summary Report No. 1*



This report is based on work by the  
U.S. GEOLOGICAL SURVEY, DEPARTMENT OF THE INTERIOR  
and the  
DESERT RESEARCH INSTITUTE, UNIVERSITY OF NEVADA SYSTEM

Prepared in cooperation with the  
STATE OF NEVADA  
and the  
LAS VEGAS VALLEY WATER DISTRICT

The sources of ground-water flow in the aquifers of southern Nevada are (1) recharge from precipitation in the mountains and (2) regional inflow from carbonate-rock aquifers farther north. The total contribution from these sources to all the aquifers of southern Nevada--both carbonate and noncarbonate--is about 160,000 acre-feet per year. About 80 percent (130,000 acre-feet per year) passes beneath the central corridor; this includes nearly all flow in the major regional systems. At present, the fraction of the recharge that enters the carbonate-rock aquifers cannot be estimated because the controlling processes are poorly understood and because the available data are insufficient to describe these processes.

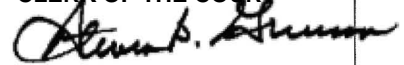
Some of the total flow beneath the area discharges through the basin-fill sedimentary aquifers that partly fill valleys, some flows from carbonate-rock aquifers at warm-water springs, and the rest flows out of Nevada into adjacent states (mostly to California) through the carbonate-rock aquifers. Discharge from the springs plus the outflow from Nevada through the carbonate rocks total about 77,000 acre-feet per year. The total rate of flow through the regional carbonate-rock aquifers of southern Nevada is equal to this 77,000 acre-feet per year plus some unknown quantity of ground water that leaks up into basin-fill aquifers.

A much larger quantity of water--on the order of 800 million acre-feet--is stored in the carbonate-rock aquifers. This is because the aquifers underlie about 10,000 square miles and probably are, on the average, about 12,000 feet thick in the central corridor. On the order of 6 million acre-feet of water, the quantity stored in the upper 100 feet of the aquifers, might be economically accessible. However, this volume is equivalent to decades or centuries of recharge; if depleted, it would be replenished very slowly or not at all.

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

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





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18 **DISTRICT COURT**

19 **CLARK COUNTY, NEVADA**

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

22 Petitioners,

23 v.

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

27 Respondent.  
28 \_\_\_\_\_ /

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

Case No.: A-20-816761-C (Lead Case)  
Dept. No.: 19

**COYOTE SPRINGS INVESTMENT, LLC'S  
OPENING BRIEF ON PETITION FOR  
JUDICIAL REVIEW**

**DATE OF HEARING: February 14, 2022  
TIME OF HEARING: 9:00 a.m.**

**CONSOLIDATED WITH:**

Case No.: A-20-817765-P  
Case No.: A-20-817840-P  
Case No.: A-20-817876-P  
Case No.: A-20-817977-P  
Case No.: A-20-818015-P  
Case No.: A-20-818069-P  
Case No.: A-21-833572-J

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### III. SUMMARY OF ARGUMENT

1  
2 For years, the Nevada State Engineer (“NSE”) has struggled to make  
3 definitive decisions about groundwater production in what the NSE refers to as one  
4 hydrographic “unit”.<sup>1</sup> The NSE’s confusion confirms that Order 1309 is an  
5 arbitrary determination. In nearly every Order or Ruling that has been issued by  
6 the NSE since 2002, the NSE concedes that his decisions therein require more  
7 technical data and scientific analysis.  
8

9  
10 Order 1309 is primarily predicated on an interpretation of the Order 1169  
11 Pump Tests. The NSE Rulings based on the 1169 Pump Tests confirm that more  
12 technical and scientific research is needed. Without receiving additional technical  
13 and scientific data, the NSE arbitrarily placed a moratorium on construction and  
14 development within the Mega Basin in 2018. Then, in September of 2018, the  
15 NSE issued a Draft Order confirming, again, that the NSE had insufficient  
16 technical and scientific data upon which he could enter a final order. Then, the  
17 NSE issued Interim Order 1303, which, once again, confirmed that the NSE did  
18 not have sufficient technical information upon which to base a final order. Order  
19 1309 is based on the 1169 Pump Test results, which have been repeatedly  
20 characterized by the NSE as insufficient results in need of additional, more precise  
21 scientific technical data.  
22  
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26

27 The NSE’s concession that Order 1309 is based primarily on the 1169 Pump  
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<sup>1</sup> For terms that are not otherwise defined herein, CSI provides a glossary of commonly used water terms as **Exhibit 1**.



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Tests is an admission that Order 1309 is an arbitrary and capricious determination that is neither based on substantial evidence nor the best science available.

Nevada’s water law is built on the doctrine of prior appropriation, or “first in time, first in right”. Thus, those water right holders who were “first in time” have senior water rights with priority status to exercise those water rights before junior water rights holders with lower priority status-- especially in times of a water shortage. Water rights are issued and given a priority status relative to the other water rights and corresponding priority dates in each individual basin. In fact, Nevada’s statutory water law requires that all decisions regarding appropriation and regulation of water rights are made on a basin-by-basin determination. Therefore, for over the past century, all determinations regarding the issuance and management of water rights have been made based on considerations of each unique basin.

Notwithstanding, in Order 1309, the NSE entirely disregards the established statutory regulation of individual basins and attempts to redefine seven Nevada hydrographic basins—that were established as distinct hydrographic basins for 100 years ago—and combine them into one “unit” for “joint administration”. *See Exhibit 2* (Order 1309). Worse, the NSE purports to reassign the priority status of each of the water rights based on this new, combined basin. As a result, senior water right holders, such as CSI, have been relegated to a junior position and directed to yield to other water right holders that are in a different basin.

1           This same principle was recently addressed by the Honorable Judge Fairman  
2 related to a critical management plan in Diamond Valley in Case No. CV-1902-  
3 348 in the Seventh Judicial District Court in Eureka County (the “Diamond Valley  
4 Case”). See **Exhibit 3** (Findings of Fact, Conclusions of Law, Order Granting  
5 Petitions for Judicial Review). Judge Fairman struck down the NSE approved  
6 plan, which required senior water right holders to relinquish a portion of their  
7 rights to allow more junior water right holders to continue pumping. See *id.* at pp.  
8 4-10, 25-27. Judge Fairman explained that the plan’s attempt to “reduce[] the  
9 amount of water it allocates to senior rights’ holders... effectively ignor[es] 150  
10 years of the principle of ‘first in time, first in right’ which has allowed a senior  
11 right holder to beneficially use all of water allocated in its right before any junior  
12 right holder can use its water right.” *Id.* at pp. 26-27 (footnote omitted) (quoting  
13 *Ormsby County v. Kearny*, 37 Nev. 314, 142 P. 803, 820).  
14  
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19           As confirmed by Judge Fairman, the NSE can act only when a specific  
20 statute authorizes the action. Relevant to this case, there is no Nevada statute that  
21 authorizes the NSE to redefine or combine hydrographic basins in Nevada. There  
22 is no Nevada water statute that allows the NSE to conduct “joint administration”  
23 across several basins. There is no Nevada law that allows the NSE to delineate,  
24 regulate, or manage basins in any manner other than on a basin-by-basin basis.  
25 Finally, there is no Nevada statute that allows the NSE to take water rights from a  
26 water right holder in one basin and reallocate such water rights to other water right  
27  
28

1 holders in *different* basins. The absence of statutory authorization for these  
2 mandates renders Order 1309 void as it is contrary to law and entirely beyond the  
3 scope of the NSE’s authority.  
4

5 However, even if the NSE had statutory authority to enter Order 1309 (he  
6 does not), the factual determinations in Order 1309 are not supported by substantial  
7 evidence. Rather, the NSE primarily based Order 1309 on pump tests that were  
8 conducted to determine whether additional or unappropriated water not previously  
9 assigned was available in the Coyote Spring Valley Hydrographic Basin (Basin  
10 210) (“CSV”) and five other nearby basins. *See Exhibit 4* (Order 1169).  
11

12 Notwithstanding, the NSE now relies almost exclusively on those pump test (the  
13 “1169 Pump Test”) results to diminish the senior water right holders’ interests  
14 across seven basins. It is difficult to imagine a better example of an arbitrary and  
15 capricious decision.  
16

17 Accordingly, as discussed more fully herein, Order 1309 must be declared  
18 void as it is contrary to law. However, even if this Court determines that the NSE  
19 had statutory authorization to enter Order 1309, it still cannot stand because it is  
20 not supported by substantial evidence and is therefore, arbitrary and capricious.  
21

#### 22 **IV. STATEMENT OF ISSUES**

23 1. Whether Order 1309 is void for being contrary to law because the NSE acted  
24 far beyond and exceeded the scope of his statutory authority, and it violates CSI’s  
25 constitutional rights.  
26

27 2. If the NSE has authority to create and jointly “administer” the Mega Basin,  
28 whether the NSE’s determination regarding the boundary of the Mega Basin is

1 arbitrary and capricious because it is not based on substantial evidence nor the best  
2 science available.

3 3. If the NSE has authority to create and jointly “administer” the Mega Basin,  
4 whether the NSE’s determination concerning aquifer recovery subsequent to the  
5 1169 Pump Test is arbitrary and capricious because it is not based on substantial  
6 evidence nor the best science available.

7 4. If the NSE has authority to create and jointly “administer” the Mega Basin,  
8 whether the NSE’s decision that only 8,000 acre feet annually can be pumped from  
9 the mega basin is arbitrary and capricious because it is not based on substantial  
10 evidence nor the best science available.

11 5. If the NSE is found to have authority to create and jointly “administer” the  
12 Mega Basin, whether the NSE’s determination concerning aquifer recovery  
13 subsequent to the 1169 Pump Test is arbitrary and capricious because it is not  
14 based on substantial evidence nor the best science available.

15 6. If the NSE has authority to create and jointly “administer” the Mega Basin,  
16 whether the NSE’s determination of the effect of movement of water between  
17 alluvial and carbonate wells within the Mega Basin is arbitrary and capricious  
18 because it is not based on substantial evidence nor the best science available.

19 7. If the NSE has authority to create and jointly “administer” the Mega Basin,  
20 whether 1309 is arbitrary and capricious because it does not set forth a  
21 management plan.

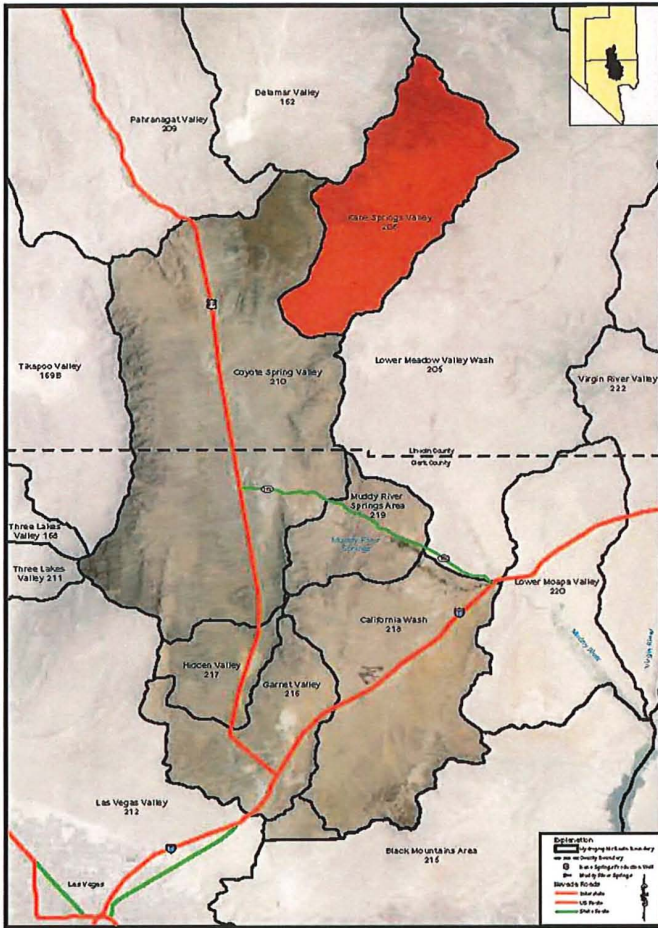
22 **V. STATEMENT OF THE CASE**

23 **1. The “Mega Basin”**

24 This case arises from Order 1309, wherein the NSE purports to combine  
25 seven basins into one Mega Basin, which includes Kane Springs Valley  
26 Hydrographic Basin (“KSV”), even though KSV was not one of the basins  
27 involved in the 1169 Pump Tests.<sup>2</sup> The basins impacted by Order 1309 are shown

28 <sup>2</sup> Order 1309 is the first time the NSE has included KSV in the area he has referred to as the Lower White River Flow System (“LWRFS”). Not only has the NSE given this area of basins different labels, but the NSE has also varied in what basins should be included in this “joint administration”. For example, in the NSE’s May 16, 2018 Letter, the NSE referred to the area as the “five-basin area”. Notwithstanding, in the

1 in dark brown and red on the following map:



**Exhibit 5** (Figure 2-1. Location Map of the Mega Basin (KSV shown in red; what was previously referred to as the LWRFS include the basins shown in dark brown)).

2. **CSI Holds Senior Water Rights in CSV and KSV.**

A. **CSI Has Relied on Its Senior Water Rights in Planning and Developing the Community.**

CSI is the developer of the master planned community Coyote Springs (the “Community”). The Community spans two counties and over 42,000 acres, including entitlements to build 49,600 residential units in Clark County and 110,000 residential units in Lincoln County. CSI has certificated and permitted

\_\_\_\_\_  
NSE’s September 18, 2018 “draft order”, he included six basins in the area and referred to it as the LWRFS. Therefore, when discussing the NSE’s previous orders and letters that apply to the area composing the “Mega Basin”, CSI will specify by footnote the basins included by the NSE at that particular time.

1 water rights in the amount of 4,140 afa in the CSV. CSI also holds 246.96 afa of  
2 permitted water rights in the KSV in Lincoln County, Nevada.<sup>3</sup>

3  
4 For over nineteen (19) years, CSI has relied on its senior water right status  
5 in developing the Community, which has involved, among other things, CSI  
6 working with numerous state and federal agencies to obtain all necessary  
7 approvals, rights-of-ways, permits, maps, and plans for the Community.  
8 Additionally, CSI has constructed streets and installed underground utilities,  
9 including water, sewer, and electricity in the Community.<sup>4</sup>

10  
11  
12 Moreover, in 2006, CSI worked with several agencies to create the Clark  
13 County - Coyote Springs Water Resources General Improvement District (“GID”)  
14 under NRS Chapter 318. The GID is the water and wastewater utility for the  
15 Community. CSI conveyed 2,000 afa of water rights to the GID to be used solely  
16 for the development of the Community. CSI’s development, construction, and  
17 substantial investment in this infrastructure has been pursued in reliance on its  
18 senior water rights. After completing massive infrastructure and utilities, CSI was  
19 ready to begin constructing residential homes within the Community. Order 1309  
20 has stalled further development of the Community.

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27 <sup>3</sup> Moreover, through an agreement with Lincoln County Water District (“LCWD”) and Vidler Water  
28 Company (“Vidler”), LCWD is obligated to provide CSI 253.04 afa of water. Further, CSI has an option  
to purchase an additional 500 afa of permitted water rights from Vidler. These 1,000 afa of water rights  
are permitted for use in the Community.

<sup>4</sup> The total cost of construction and acquisition for these improvements is well over \$200,000,000, and  
through all this the Community remains debt-free.

1           **B.     CSI Has Incorporated Water Conservation Measures in**  
2           **Developing the Community.**

3           CSI has been mindful of including meaningful conservation measures in its  
4 development plans for the Community. For example, recycled water will  
5 eventually be used to irrigate the existing golf course, common-area landscaping,  
6 and public parks. Any remaining recycled water will be conserved and used to  
7 help recharge the underlying aquifer.  
8

9  
10          Further, in 2006, CSI entered a memorandum of agreement (the “MOA”)  
11 with Moapa Valley Water District (“MVWD”), United States Fish and Wildlife  
12 Service (“FWS”), Southern Nevada Water Authority (“SNWA”), and the Moapa  
13 Band of Paiutes (the “Paiutes”), which adopted mitigation policies to support the  
14 Moapa dace, a protected species, while CSI continued developing the Community.  
15  
16          See **Exhibit 6** (MOA). The MOA anticipated, but did not authorize, possible  
17 future groundwater withdrawals of up to 16,100 afa of NSE-approved groundwater  
18 rights in the CSV. *See id.* at pp. 142-43.  
19  
20

21          The MOA detailed mitigation measures each party would take to reduce  
22 potential adverse effects to the Moapa dace or its habitat. *Id.* at p. 55. These  
23 measures included, among other things, financial payments by SNWA and CSI,  
24 and CSI’s dedication of 460 afa of its water rights to remain in the deep aquifer.  
25  
26          CSI’s financial obligations have been satisfied and CSI relinquished 460 afa of  
27 water. The parties continue to work together to preserve and protect the Moapa  
28 dace.

1       **3. In 2001, the NSE Enters Order 1169 to Investigate the Amount of**  
2       **Water Available for New Water Rights in Basins in the LWRFS.**

3           In 2001, several parties filed applications for new and additional  
4       groundwater rights in the CSV, Black Mountains Area Hydrographic Basin (Basin  
5       215), Garnet Valley Hydrographic Basin (Basin 216), Hidden Valley (north)  
6       Hydrographic Basin (Basin 217), Muddy River Springs Area a.k.a. Upper Moapa  
7       Valley Hydrographic Basin (Basin 219), and Lower Moapa Valley Hydrographic  
8       Basin (Basin 220). *See Exhibit 4.* In response, the NSE issued Order 1169 on  
9       March 8, 2002, explaining that the applications would be “held in abeyance” due to  
10      insufficient information to determine if additional water was available for  
11      appropriation under these new applications. *Id.*

12           Among the parties submitting applications for additional water were SNWA,  
13      MVWD, and CSI. At or about the time of Order 1169, SNWA owned 9,000 afa in  
14      CSV (having purchased much of it from CSI), MVWD owned no water in CSV,  
15      and CSI owned 4,600 afa in CSV. *Id.*

16           In Order 1169, the NSE described the thick layers (nearly 10,000 feet in  
17      many areas) of the dense carbonate-rock aquifer system that underlies Southern  
18      Nevada, north and east to White Pine County and the Utah border. *Id.* at pp. 1-2.  
19      The NSE acknowledged significant research had already been done but explained  
20      that several complicated factors needed to be addressed to better understand the  
21      availability of additional water in these basins. *Id.* Thus, the NSE ordered the  
22      applicants to conduct a study covering a five-year period of time during which at

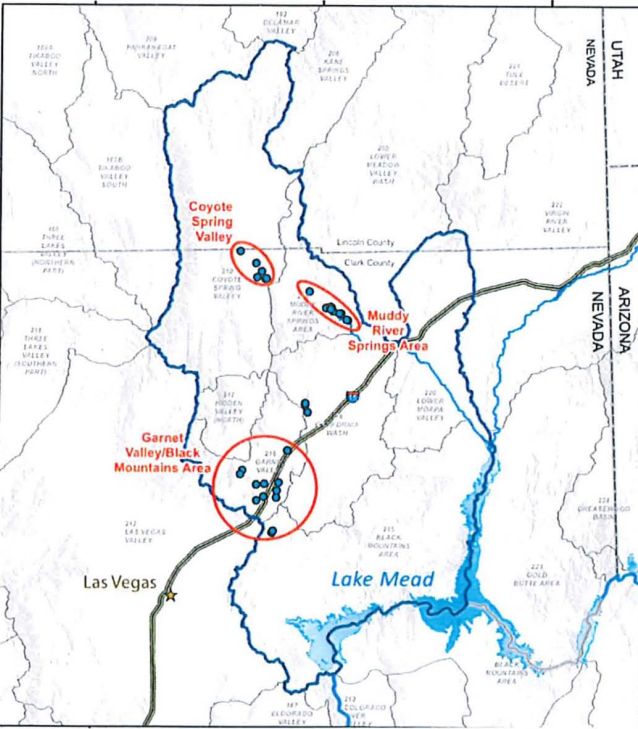


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least 50% of the water rights then-permitted in CSV be pumped for at least two consecutive years. *Id.* at pp. 7-8.

The 1169 Pump Test was designed to try to quantify the availability of unallocated groundwater for *additional* appropriation, not to determine whether existing water rights, such as CSI’s permitted rights, should be curtailed. The NSE expressly excluded KSV from participation in the 1169 Pump Tests because the physical characteristics of the aquifers in KSV showed no hydraulic connection with the remaining basins. **Exhibit 7** (Ruling 5712), p. 21 (the NSE explaining that “marked difference in head supports the probability of a low-permeability structure or change in lithology between [KSV] and the southern part of [CSV]”).

The applicants engaged in the 1169 Pump Tests from 2010 to 2012.



**Exhibit 9** (The 1169 Pump Test wells are circled in red); **Exhibit 23** (SNWA Expert Report), p. 28

The participants submitted their pump test results in 2013. *See Exhibit 8*

1 (Order 1169A).

2 **4. Following the 1169 Pump Tests, the NSE Entered Ruling 6255, which**  
3 **Protected Senior Water Rights in CSV.**

4 In January 2014, the NSE issued Ruling 6255, which denied *pending*  
5 applications in CSV. *See Exhibit 10* (Ruling 6255). Relying on the 1169 Pump  
6 Test results, the NSE found that granting additional water rights in CSV could  
7 cause a decline in down gradient water levels that would conflict with senior water  
8 rights. *See id.* Thus, Ruling 6255 protected *existing* water right holders, such as  
9 CSI.  
10

11 **5. After Protecting CSI's Senior Rights in Ruling 6255, the NSE Issues**  
12 **Several Incorrect, Inconsistent, and Unsupported Letters and Orders**  
13 **that Have Severely Delayed CSI's Development of the Community.**

14 **A. The NSE Prohibits CSI From Processing Its Subdivision Maps.**

15 In a May 16, 2018 letter, the NSE indicated for the first time that the amount  
16 of groundwater pumping that would be allowed in the Mega Basin<sup>5</sup> would be  
17 limited to a fraction of the already appropriated 40,300 afa. *See Exhibit 11* (Jason  
18 King, NSE, Letter to LVVWD). The NSE explained:  
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20

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

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<sup>5</sup> At this time, the NSE referred to this area as a "five-basin area", which he identified as including CSV, MRSA, California Wash Basin, Hidden Valley Basin, and Garnet Valley Basin.

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*Id.* at p. 3 (emphasis in original).

Following this letter, the NSE and LVVWD refused to approve any subdivision maps within the Community, thereby halting all residential construction, development, and sales in the Community.

**B. CSI Challenges the May 16, 2018 Letter, and the NSE Withdraws It, Agreeing to Process CSI’s Maps in Good Faith.**

CSI filed a Petition for Review of the NSE’s May 16, 2018, letter with this Court to challenge the unlawful moratorium on the processing of CSI’s subdivision maps. *See Exhibit 12* (CSI’s Petition for Judicial Review of May 16, 2018, Letter). In August 2018, the parties settled and dismissed the case. **Exhibit 13** (Settlement Agreement between CSI and Jason King, NSE). In that settlement, the NSE agreed to rescind his May 16, 2018, letter and to process “*in good faith any and all maps, or any other issues as requested by CSI, and/or its agents or affiliates, in accordance with the State Engineer’s ordinary course of business....*”

*Id.* at p. 1:4. It now appears that this promise was false and misleading.

**C. One Month After the Settlement, the NSE Issues the September 2018 Tentative Draft Order, Again Prohibiting the Processing of CSI’s Maps.**

After withdrawing the May 16, 2018, letter, the NSE held public workshops to review the water available for pumping in the Mega Basin.<sup>6</sup> During a September 18, 2018, public workshop, the NSE distributed a draft order for comment. *See*

<sup>6</sup> At this point, KSV was not included in the Mega Basin.

1 **Exhibit 14** (the “Draft Order”). The Draft Order contained a preliminary  
2 determination that there were 9,318 afa of water rights within a *six*-basin area<sup>7</sup>  
3 holding a priority date on or before March 31, 1983 that could be safely pumped  
4 from the area without affecting Muddy River flows and the Moapa Dace. The  
5 Draft Order reinstated the moratorium halting CSI’s subdivision map processing  
6 unless demonstrated to the NSE’s satisfaction that an adequate supply of water was  
7 available “*in perpetuity*” for the subdivision.  
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11 On October 5, 2018, CSI sent the NSE a series of comment letters regarding  
12 the Draft Order. *See Exhibit 15* (CSI October 5, 2018 Comment Letters). CSI  
13 noted the utter lack of technical information in the Draft Order. *Id.* Given that the  
14 NSE represented that there were 30,000 pages of documents to support the Draft  
15 Order, CSI requested the NSE to release that data to the public. *See id.*<sup>8</sup>  
16

17  
18 CSI further pointed out that there was no evidence to support the NSE’s  
19 determination that only 9,318 afa could be pumped from the Mega Basin.<sup>9</sup> *Id.* To  
20 the contrary, CSI informed the NSE that the NSE’s own data supported a quantity  
21 of at least 11,400 afa that could be pumped without effect on the flows in the  
22 Muddy River and without effect on the Moapa dace. *See id.* CSI additionally  
23 criticized the NSE’s reliance on the 1169 Pump Test results given the availability  
24 of substantial evidence beyond those results.  
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<sup>7</sup> September 18, 2018 draft order identified six (6) basins for the first time: CSV, a portion of the Black Mountain Area basin 215, Garnet Valley basin 216, Hidden Valley basin 217, California Wash basin 218, and the MRSA.

<sup>8</sup> This did not occur until after the Draft Order was vitiated.

<sup>9</sup> At this point, the Mega Basin did not include KSV.

1           Notably, CSI explained to the NSE that even if the NSE were correct that  
2 9,318 afa was the maximum amount available for pumping, the moratorium on  
3 map processing was invalid because CSI's water rights fell within the priority date  
4 grouping in the Draft Order. As such, even under the Draft Order, CSI should  
5 have been allowed to pump at least 1,880 afa of water. Indeed, this 1,880 afa was  
6 sufficient to support phase one of the Community, so there was no need to halt CSI  
7 from processing its maps.  
8

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11           **D.    The NSE Ignores CSI's Comments and Enters Interim**  
12           **Order 1303, Officially Placing a Moratorium on Processing**  
13           **CSI's Maps.**

14           On January 11, 2019, the NSE issued Interim Order 1303 (referred to herein  
15 as "Rescinded 1303").<sup>10</sup> *See Exhibit 16* (Interim Order 1303). In Rescinded 1303,  
16 the NSE designated CSV, MRSA, Hidden Valley, Garnet Valley, California Wash,  
17 and a portion of the Black Mountains Area as a joint administrative unit. *See id.* at  
18 p. 13. Rescinded 1303 also imposed a temporary moratorium on approvals for  
19 subdivisions pending yet another public process to determine the total quantity of  
20 groundwater available in the Mega Basin.<sup>11</sup> *See id.*  
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23           Rescinded 1303 provided an exception for subdivision approvals upon a  
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26           <sup>10</sup> The NSE at the time was Jason King. The same day Jason King entered Interim Order 1303, he  
27 retired. CSI, within the past week learned that Mr. Jason King, former NSE who issued many of the  
28 instrumental documents, rulings, and orders in this matter, is now, through an entity of which he is the  
managing member (Holds Water LLC), a consultant to LVVWD. Mr. King, former NSE, was retained on  
May 13, 2020, to provide professional services on matters he oversaw and ruled upon within the LWRFS  
and Mega-Basins, all of which are central to this case.

<sup>11</sup> The NSE did not include KSV in the Mega Basin at this time.

1 showing that there was a sustainable supply of water to meet the anticipated needs  
2 for the “life of the subdivision.” *Id.* at p. 14, ¶5(b). This exception was illusory  
3 because there is not a definition of the phrase “life of the subdivision” in  
4 Rescinded 1303 nor any Nevada statute. Furthermore, the NSE never addressed  
5 the fact that *even under the NSE’s analysis*, there was more than sufficient water in  
6 the Mega Basin to support CSI’s subdivision plans.  
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8  
9 Given that Rescinded 1303 suffered from the same defects as the NSE’s  
10 May 26, 2018, letter and the Draft Order, CSI again filed a Petition for Judicial  
11 Review to challenge it. *See Exhibit 17* (CSI’s Petition for Judicial Review of  
12 Rescinded 1303). The adjudication of CSI’s petition was significantly delayed due  
13 to procedural motion practice. To avoid further delay, the parties stayed the case  
14 to proceed with a hearing on the issues identified in Rescinded 1303, which  
15 included:  
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- 19 a. The geographic boundary of the hydrologically connected  
20 groundwater and surface water systems comprising the Lower White River  
21 Flow System;
- 22 b. The information obtained from the Order 1169 aquifer test and  
23 subsequent to the aquifer test and Muddy River headwater spring flow as it  
24 relates to aquifer recovery since the completion of the aquifer test;
- 25 c. The long-term annual quantity of groundwater that may be  
26 pumped from the Lower White River Flow System, including the  
27 relationships between the location of pumping on discharge to the Muddy  
28 River Springs, and the capture of Muddy River flow;
- 29 d. The effects of movement of water rights between alluvial wells  
30 and carbonate wells on deliveries of senior decreed rights to the Muddy  
31 River; and,
- 32 e. Any other matter believed to be relevant to the State Engineer’s  
33 analysis.

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See **Exhibit 16**, p. 13. The NSE ordered the parties to participate in a two-week evidentiary hearing related to these issues (the “1303 Hearing”).

**E. The NSE Ignores the Evidence Presented at the 1303 Hearing, Rescinds Interim Order 1303, and Enters Order 1309, Which is Inconsistent with the NSE’s Prior Orders, Rulings, and Letters.**

The 1303 Hearing was conducted for two weeks in the fall of 2019. The hearing consisted of expert testimony presented by the participants CSI, FWS, National Park Service (“NPS”), the Paiutes, SNWA and LVVWD, MVWD, Lincoln County Water District and Vidler Water Company, the City of North Las Vegas, the Center for Biological Diversity (“CBD”), Georgia Pacific Corporation and Republic, Nevada Cogeneration Associates Nos. 1 and 2, Muddy Valley Irrigation Company (MVIC), Western Elite Environmental, Inc. and Bedroc Limited, LLC (collectively “Bedroc”), and NV Energy. The State Engineer issued Order 1309 on June 15, 2020. See **Exhibit 2**. This Petition for Judicial Review followed.

**VI. ARGUMENT**

As set forth below, Order 1309 is void because it is contrary to law. The NSE does not have statutory authority to enter Order 1309. Moreover, Order 1309 violates the prior appropriation doctrine and CSI’s constitutional rights. Notwithstanding these fatal defects, the NSE did not comply with the statutes upon which Order 1309 relies, nor is Order 1309 supported by substantial evidence. Accordingly, CSI respectfully requests that this Court grant judicial review and

1 declare Order 1309 void.

2 **1. Order 1309 is Void As it is Contrary to Law**

3 **A. Standard of Review**

4  
5 “The Legislature has established a comprehensive statutory scheme  
6 regulating the procedures for acquiring, changing, and losing water rights in  
7 Nevada.” *Mineral Cty. v. Lyon Cty.*, 136 Nev. Adv. Op. 58, 473 P.3d 418, 426  
8 (2020). “The State Engineer’s powers thereunder are limited to ‘only those . . .  
9 which the legislature expressly or implicitly delegates.’” *Wilson v. Pahrump Fair*  
10 *Water, LLC*, 137 Nev. Adv. Op. 2, 481 P.3d 853, 856 (2021) (quoting *Clark Cty. v.*  
11 *State, Equal Rights Comm’n*, 107 Nev. 489, 492, 813 P.2d 1006, 1007 (1991));  
12 *Howell v. Ricci*, 124 Nev. 1222, 1230, 197 P.3d 1044, 1050 (2008) (explaining that  
13 the NSE cannot act beyond the scope of applicable statutory authority).  
14  
15  
16

17 “[T]he scope of the State Engineer’s authority... is a question of statutory  
18 interpretation, subject to de novo review.” *Pahrump Fair Water, LLC*, 137 Nev.  
19 Adv. Op. 2, 481 P.3d at 856; *Bacher v. Off. of State Eng’r of State of Nevada*, 122  
20 Nev. 1110, 1117, 146 P.3d 793, 798 (2006) (“The district court may decide purely  
21 legal questions without deference to an agency’s determination.”).  
22  
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24 **B. The NSE Does Not Have Authority to Create a Mega Basin for**  
25 **“Joint Administration”.**

26 The NSE relies on NRS 534.030, NRS 534.110(6), NRS 534.120, and NRS  
27 534.024(1)(e) as providing authority for Order 1309. *See Exhibit 2*, p. 43. As  
28 discussed below, none of these statutes provide the NSE with authority to redefine



1 established Nevada basins for “joint administration”. To determine whether the  
2 NSE has statutory authority to enter Order 1309, “the plain meaning of the relevant  
3 text guides the answer.” *Pahrump Fair Water, LLC*, 137 Nev. Adv. Op. 2, 481  
4 P.3d at 856 (citing *Coast Hotels & Casinos, Inc. v. Nev. State Labor Comm’n*, 117  
5 Nev. 835, 840, 34 P.3d 546, 550 (2001)); *Doolin v. Dep’t of Corr.*, 134 Nev. 809,  
6 811, 440 P.3d 53, 55 (Nev. App. 2018) (“To ascertain the Legislature’s intent, we  
7 first focus our inquiry on the statute’s plain language, avoid[ing] statutory  
8 interpretation that renders language meaningless or superfluous.”) (alteration in  
9 original) (internal quotation marks omitted).

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13 **i. NRS 534.030 Does Not Authorize the State Engineer to**  
14 **Combine Multiple Basins for “Joint Administration”.**

15 NRS 534.030 does not provide the NSE with authority to combine multiple  
16 basins into one “unit” for “joint administration”. Rather, under NRS 534.030 and  
17 NRS 534.011, the NSE has authority to designate “**a** groundwater basin” an “area  
18 of active management”, which refers to an area “[i]n which the [NSE] is  
19 conducting particularly close monitoring and regulation of the water supply  
20 because of heavy use of that supply”. (Emphasis added.) Thus, under NRS  
21 534.030, the NSE can administer basins individually, but the statute does not allow  
22 the NSE to combine basins for joint administration.

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26 Here, the Legislature has specifically provided that if the NSE designates an  
27 area of active management, such designation must be “by basin, or portion  
28 therein”. NRS 534.030(1)(b). If the Legislature intended for the NSE to designate

1 areas across multiple basins for “joint administration”, it would have so stated. *See*  
2 *Slade v. Caesars Entm’t Corp.*, 132 Nev. 374, 380-81, 373 P.3d 74, 78 (2016)  
3  
4 (citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of*  
5 *Legal Texts* 107 (2012) (“The expression of one thing implies the exclusion of  
6 others.”)).  
7

8 Moreover, the Legislature consistently refers to a singular basin throughout  
9 the statute. *See, e.g.*, 534.030(1) (describing a petition under NRS Chapter 534 as  
10 one that requests the NSE “to administer the provisions of this chapter as relating  
11 to designated areas, ... *in any particular basin or portion therein*”) (emphasis  
12 added); NRS 534.030(2) (“a groundwater basin”); NRS 534.030(2) (“the basin”).  
13 Therefore, the plain language of the statute makes clear that the Legislature  
14 intended for the NSE, where justified, to designate areas of active management by  
15 the basin or by a portion of the basin therein. NRS 534.030 does not allow the  
16 NSE to designate multiple basins as areas of active management as the NSE  
17 attempts to do in Order 1309 (and as he attempted in Rescinded 1303).  
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22 **ii. NRS 534.110(6) Does Not Authorize the NSE to Combine**  
23 **Multiple Basins into One “Unit” and Reassign Established**  
24 **Priority Rights Based On the “Unit” as a Whole.**

25 The NSE further relies on NRS 534.110(6) as providing authority for Order  
26 1309. The NSE’s reliance on NRS 534.110(6) is misplaced. NRS 534.110(6)  
27 provides, in relevant part:  
28

the State Engineer shall conduct investigations in *any basin or portion thereof* where it appears that the average annual replenishment to the

1 groundwater supply may not be adequate for the needs of all permittees and  
2 all vested-right claimants, and if the findings of the State Engineer so indicate,  
3 except as otherwise provided in subsection 9, the State Engineer may order  
4 that withdrawals, including, without limitation, withdrawals from domestic  
wells, be restricted to conform to priority rights.

5 (Emphasis added.) This provision again confirms the Legislature’s intent for the  
6 NSE to make basin-specific determinations. Thus, under subsection 6, the NSE  
7 has discretion to curtail water rights where investigations into specific basins  
8 demonstrate that there is insufficient groundwater to meet “the needs of all  
9 permittees and all vested-right claimants”. NRS 534.110(6) does not provide the  
10 NSE with authority to combine multiple basins into one “unit” and then modify or  
11 curtail groundwater rights based upon priority dates in this combined “Mega  
12 Basin”, as the NSE has attempted to do in Order 1309.

16 Notably, even if the NSE had authority under NRS 534.110(6) to curtail  
17 water rights across multiple basins, the NSE still has to follow the statutory  
18 procedure to impose such curtailment, which requires the NSE to conduct  
19 investigations into a basin where it “appears that the average annual replenishment  
20 to the groundwater supply may not be adequate for the needs of all permittees and  
21 all vested-right claimants.” Only *if* the investigation confirms that the annual  
22 replenishment is insufficient to meet such needs is the NSE authorized to conduct  
23 curtailment. *See* NRS 534.110(6). The NSE certainly did not follow the  
24 procedural steps in NRS 534.110(6) in this case. Indeed, the NSE has never  
25 conducted an investigation in KSV to determine whether the “average annual  
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1 replenishment to the groundwater supply may not be adequate for the needs of all  
2 permittees and all vested-right claimants.” See NRS 534.110(6). Therefore, even  
3 if NRS 534.110(6) were applicable, the NSE did not follow the statute’s required  
4 procedure to conduct any curtailment in KSV.  
5

6  
7 **iii. NRS 534.120 Does Not Authorize the NSE to Designate**  
8 **Areas of Active Management Across Multiple Basins for**  
9 **“Joint Administration”.**

10 The NSE additionally cites NRS 534.120 as supplying authority for Order  
11 1309’s proposed Joint Administration and this newly created Mega Basin.  
12 However, NRS 534.120 does not authorize the NSE to designate areas of active  
13 management across multiple basins. Rather, NRS 534.120 provides that “[w]ithin  
14 **an area** that has been designated by the NSE, as [an area of active management],  
15 where, in the judgment of the NSE, the groundwater basin is being depleted, the  
16 NSE in his or her administrative capacity may make such rules, regulations and  
17 orders as are deemed essential for the welfare of the area involved.”  
18

19 The plain language of the statute explicitly permits the NSE to make rules,  
20 regulations and orders **within** the area that has been designated an area of active  
21 management, which designation, as explained above, is only appropriate for an  
22 individual basin, not across multiple basins jointly administered. If the Legislature  
23 intended for such “rules, regulations and orders” to apply jointly to multiple basins  
24 or even multiple areas of active management, the Legislature would have so stated.  
25  
26 See *Slade*, 132 Nev. at 380-81, 373 P.3d at 78. Therefore, the NSE does not have  
27  
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1 authority under NRS 534.120 to combine multiple basins for “joint  
2 administration”.

3  
4 **iv. NRS 533.024(1)(e) is a Legislative Declaration that Does Not**  
5 **Provide the NSE to Change Basin Boundaries for “Joint**  
6 **Administration”.**

7 The NSE additionally cites NRS 533.024(1)(e) for authority supporting  
8 Order 1309 to change multiple basin boundaries, create a Mega Basin, and order  
9 Joint Administration of such newly created Mega Basin. NRS 533.024(1)(e)  
10 provides, in relevant part, that “It is the policy of this State... To manage  
11 conjunctively the appropriation, use and administration of all waters of this State,  
12 regardless of the source of the water.” The plain language of this statute does not  
13 provide the NSE authority to combine multiple basins for “joint administration”.  
14 Indeed, NRS 533.024 does not provide the NSE with authority to do anything.  
15 Rather, it is merely a Legislative declaration as to water policy in this State. NRS  
16 533.024 provides no support for the radical NSE decisions outlined in Order 1309.

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19 **C. Order 1309 Violates the Prior Appropriation Doctrine.**

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21 **i. The Prior Appropriation Doctrine, which is the Foundation**  
22 **of Nevada’s Water Law Statutes, Determines the Priority of**  
23 **a Water Right.**

24 “Like most western states, Nevada is a prior appropriation state.” *Min. Cty.*  
25 *v. Lyon Cty.*, 136 Nev. Adv. Op. 58, 473 P.3d 418, 423 (2020). The doctrine of  
26 prior appropriation has been part of Nevada’s common law since the 1800’s. *See*  
27 *Lobdell v. Simpson*, 2 Nev. 274, 277–78 (1866).  
28

1 As recently explained by the Nevada Supreme Court, “Nevada’s water  
2 statutes embrace prior appropriation as a fundamental principle. Water rights are  
3 given ‘*subject to existing rights*,’ NRS 533.430(1), given dates of priority, NRS  
4 533.265(2)(b), and determined based on relative rights, NRS 533.090(1)-(2).” *Min.*  
5 *Cty.*, 136 Nev. Adv. Op. at 426, 473 P.3d at 426 (emphasis added). Thus, “[i]n  
6 Nevada, the doctrine of prior appropriation determines the priority of both pre-  
7 1905 vested water rights and modern statutory water law.” *Rand Properties, LLC*  
8 *v. Filippini*, Docket No. 78319 (Order Affirming in Part and Reversing in Part,  
9 April 9, 2021).

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13 **ii. Losing the Priority of a Water Right is Akin to Losing the**  
14 **Water Right.**

15 It is universally understood that the priority of a water right is its most  
16 valuable component. See Gregory J. Hobbs, Jr., *Priority: The Most Misunderstood*  
17 *Stick in the Bundle*, 32 *Envtl. L.* 37, 43 (2002) (“Priority determines the value of a  
18 water right”). In fact, courts have explained that “[a] priority in a water right is  
19 property in itself”; therefore, “to deprive a person of his priority is to deprive him  
20 of a most valuable property right.” *Colorado Water Conservation Bd. v. City of*  
21 *Cent.*, 125 P.3d 424, 434 (Colo. 2005) (internal quotation marks omitted).

22  
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25 The Nevada Supreme Court agrees and has reiterated that “a loss of priority  
26 that renders rights useless ‘certainly affects the rights’ value’ and ‘can amount to a  
27 de facto loss of rights.’” *Wilson v. Happy Creek, Inc.*, 135 Nev. 301, 313, 448 P.3d  
28 1106, 1115 (2019) (quoting *Andersen Family Assocs. v. State Eng’r.* 124 Nev. 182,

1 190, 191, 179 P.3d 1201 (2008); *see also* Gregory J. Hobbs, Jr., *Priority: The Most*  
2 *Misunderstood Stick in the Bundle*, 32 *Envtl. L.* 37, 43 (2002) (“The priority of a  
3 water right is ... its most important ... feature.”).

4  
5 Nevada’s statutory water law reflects the importance of priority. Not only  
6 did the Legislature choose not to afford the NSE with discretion to alter priority  
7 rights, but it also affirmatively requires the NSE to preserve priority rights when  
8 performing the NSE’s statutory duties. *See, e.g.*, NRS 534.110(6) (providing that  
9 any curtailment “be restricted to conform to priority rights”); NRS 534.110(7)  
10 (same); NRS 533.040(2) (“If at any time it is impracticable to use water  
11 beneficially or economically at the place to which it is appurtenant, the right may  
12 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*  
14 *losing priority of right.*”).

15  
16 As Judge Fairman emphasized in the Diamond Valley Case, the prior  
17 appropriation doctrine, which determines the priority date of a water right,  
18 “becomes critically important during times of water scarcity, whether temporary,  
19 or as a result of prolonged drought.” **Exhibit 3**, p. 26:8-10. Indeed, one of the  
20 greatest values of a senior priority date is the assurance that the holder will be able  
21 to use water even during a time of water shortage because junior water right  
22 holders will be curtailed first. *See id.* at pp. 26:5-8.

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28 Thus, senior right holders, like CSI, rely on their senior priority rights when

1 entitling and permitting development agreements, plans, making investments, and  
2 obtaining permits, maps, and various approvals from State and local agencies. *See*  
3 *id.* at pp. 26:10-14 (“With the security attached to a senior priority right to  
4 beneficially use all of the water associated with the right also comes obvious  
5 financial value not only to the current water right holder, but to any future owner  
6 of that senior right.”).

9 **iii. The NSE’s Attempt to Reassign Priority Dates Violates**  
10 **Nevada Law.**

11 In redefining and combining seven disparate basins for “joint  
12 administration”, the NSE stripped senior right holders of their priority rights by  
13 ordering that all water rights within the Mega Basin should be administered based  
14 upon their respective dates of priority in relation to other rights “within the  
15 regional groundwater unit.” *See Exhibit 2*, p. 10. But for Order 1309, CSI’s  
16 priority in CSV is second only to certain vested alluvial water rights held by  
17 Bedroc. Moreover, but for Order 1309 arbitrarily and capriciously re-ordering the  
18 hierarchy of priority, CSI’s priority in KSV is, along with Vidler and LCWD, the  
19 most senior.  
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24 Following Order 1309, CSI’s senior rights have a lower priority than water  
25 right holders in basins outside of CSV and KSV. Such loss of priority would  
26 render CSI’s water rights valueless in CSV and KSV given the NSE’s severe  
27 restrictions on pumping in the entire Mega Basin. *See Exhibit 3*, p. 26:13-14  
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(“The loss or reduction of any water associated with the senior right can



1 significantly harm the holder.”). The NSE has no authority to strip CSI’s water  
2 rights of their established priorities by arbitrarily and capriciously re-ordering  
3 priority dates in a manner akin to tossing all the water rights into a hat, pulling  
4 them out one at a time, and assigning priority rights based on the order in which  
5 they were pulled (except, of course, with a politically motivated guarantee that  
6 certain water rights holders will be assigned the highest priority). Order 1309 is  
7 clearly void.  
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11 **D. Order 1309 is Contrary to Law Because it Violates CSI’s**  
12 **Constitutional Rights.**

13 “In Nevada, water rights are ‘regarded and protected as real property.’”  
14 *Eureka Cty. v. Seventh Jud. Dist. Ct.*, 134 Nev. 275, 279, 417 P.3d 1121, 1124  
15 (2018) (quoting *Application of Filippini*, 66 Nev. 17, 21-22, 202 P.2d 535, 537  
16 (1949)). Therefore, holders of water rights in Nevada are entitled to constitutional  
17 protections regarding those property rights.  
18

19  
20 **i. Order 1309 Violates the Takings Clause of the Nevada and**  
21 **United States Constitutions.**

22 Under Nevada and federal law, a state agency is prohibited from taking  
23 property from a private party for public use. Nev. Const. art. 1, §8(6) (“Private  
24 property shall not be taken for public use without just compensation having first  
25 been made”); U.S. CONST. AMEND. V (“nor shall private property be taken for  
26 public use, without just compensation.”). Nev. Const. art. 1, § 8(5). Moreover, the  
27 Nevada Constitution prohibits a state agency from taking property from a private  
28 party and transferring it to another private party. Nev. Const. art. I, §22.

1           Yet that is exactly what the NSE has done in Order 1309. Under Order  
2 1309, the NSE takes CSI's senior water rights without compensation and  
3 effectively redistributed them to water rights holders in other basins by elevating  
4 the other water rights' priorities above CSI's. In so doing, the NSE stripped CSI of  
5 the benefit and value that it had as a senior rights holder, which ensured that CSI  
6 would have water even in the event of a potential future groundwater shortage.  
7  
8 The NSE has no authority to enter an order that redistributes established water  
9 rights by removing them of their respective priorities. Moreover, even if the NSE  
10 had such authority, no compensation was provided for the taking of these valuable  
11 real property rights. By taking these water rights, the NSE destroyed any viable  
12 economic use of the Community. Accordingly, Order 1309 constitutes a taking in  
13 violation of Nevada and federal law.  
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17                           **ii. Order 1309 is Contrary to Law Because the NSE Did Not**  
18                           **Afford CSI Due Process in Taking its Priority Rights.**

19           The Nevada Constitution protects against the deprivation of property without  
20 due process of law. Nev. Const. art. 1, § 8(5). "Procedural due process requires  
21 that parties receive notice and an opportunity to be heard." *Eureka Cty.*, 134 Nev.  
22 at 279, 417 P.3d at 1124 (internal quotation marks omitted).  
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25           In the NSE's Notice of Pre-Hearing Conference, he set forth five specific  
26 topics to be addressed at the hearing on Rescinded 1303. *See Exhibit 18* (Notice  
27 of Pre-hearing Conference), p. 1. The first topic was "the geographic boundary of  
28 the hydrologically connected groundwater and surface-water systems comprising

1 the LWRFS”. *Id.* The NSE did not provide the parties with notice that the  
2 evidence presented would be used to curtail *senior water rights*, which is a clear  
3 violation of CSI’s due process rights. *Eureka Cty.*, 134 Nev. at 280-81, 417 P.3d at  
4 1125-26 (“Notice must be given at an appropriate stage in the proceedings to give  
5 parties meaningful input in the adjudication of their rights.”) (citing *Hamdi v.*  
6 *Rumsfeld*, 542 U.S. 507, 533, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) (“It is  
7 equally fundamental that the right to notice and an opportunity to be heard must be  
8 granted at a meaningful time and in a meaningful manner.”)).  
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12 Moreover, the NSE clearly engaged in *ad hoc* decision making. To establish  
13 that KSV should be included in the Mega Basin, the NSE applied a set of factors  
14 that he did not give the parties notice of prior to the hearing. *See Exhibit 2*, p. 47-  
15 48 (setting forth six factors that were not included in the Notice of Pre-Hearing  
16 Conference); *see also Exhibit 18*. Further, the issues of whether to include KSV  
17 and the established water rights therein into the Mega Basin are not found in the  
18 Notice of Pre-Hearing Conference. In order to provide the parties due process and  
19 a meaningful opportunity to present evidence on these issues, the NSE should have  
20 included these factors in the Notice of Pre-Hearing Conference. *See Eureka Cty.*,  
21 131 Nev. at 855, 359 P.3d at 1120; *Revert v. Ray*, 95 Nev. 782, 787, 603 P.2d 262,  
22 265 (1979) (criticizing the state engineer for engaging in post hoc rationalization).  
23 Accordingly, Order 1309 is void as a matter of law.  
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**2. If the NSE has Authority to Create and Jointly “Administer” the “Mega Basin”, Order 1309 is Not Based on Substantial Evidence.**

**A. Standard of Review**

This Court reviews the NSE’s factual findings for abuse of discretion. *United States v. Alpine Land & Reservoir Co.*, 919 F. Supp. 1470, 1474 (D. Nev. 1996), citing *Office of State Engineer, Division of Water Resources v. Curtis Park Manor Water Users Ass’n*, 101 Nev. 30, 692 P.2d 495, 497 (1985). An abuse of discretion exists where the State Engineer’s decision is arbitrary or capricious. An order is arbitrary or capricious where it is “baseless” or where there is “an apparent absence of any grounds or reason for the decision,” *City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994) (quoting *Tighe v. Von Goerken*, 108 Nev. 440, 442-43, 833 P.2d 1135, 1136 (1992)).

The NSE’s findings must be supported by substantial evidence, which is “evidence that a reasonable mind might accept as adequate to support a conclusion.” *Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. 521, 525, 245 P.3d 1145, 1148 (2010) (internal quotations omitted). Moreover, in “rendering decisions concerning the available surface and underground sources of water in Nevada”, the NSE should rely on the best available science. NRS 533.024(1)(c).

**B. The Fundamental Flaw Underlying Order 1309 is NSE’s Impractical and Unreasonable Reliance on the 1169 Pump Test to the Exclusion of All Other Evidence.**

As a preliminary note, the overarching problem with Order 1309 is the NSE’s overemphasis and unreasonable reliance on the 1169 Pump Test results.

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1 Not only does the NSE's narrow focus on the 1169 Pump Test results demonstrate  
2 that Order 1309 is not based on substantial evidence, but it also makes clear that  
3 the NSE did not heed the Legislature's instruction to use the best available science  
4 for its decision making. *See* NRS 533.024(1)(c).  
5

6 The 1169 Pump Tests were conducted over a two-year period, which  
7 occurred at the end of a drought. *See* **Exhibit 19** (CSI expert report). Moreover,  
8 the 1169 Pump Tests were conducted using 30 wells simultaneously without  
9 coordination over 1,100 square miles. *See* **Exhibit 9**. The 1169 Pump Tests did  
10 not include wells in KSV. *See* **Exhibit 7**. The NSE's heavy reliance on two years  
11 of information that is not representative of the average conditions of the area to the  
12 exclusion of decades of research shows that the NSE did not base his decisions on  
13 the best available science but instead, made arbitrary choices that no reasonable  
14 mind could accept as reasonable.  
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19 **i. The Pump Tests Were Designed to Determine How Much**  
20 **Water Was Available for *Additional* Appropriation for New**  
21 **Water Applications.**

22 The NSE ignores that the 1169 Pump Tests were designed and implemented  
23 to determine how much *more* water was available to support the applications for  
24 new water rights—not to provide a comprehensive assessment of hydraulic  
25 connection and water availability across the entire Mega Basin. *See* **Exhibit 4**.  
26 The NSE's attempt to use the results to make such a determination now makes  
27 clear that Order 1309 is not supported by substantial evidence nor the best science  
28

1 available. *See Ricci*, 126 Nev. at 525, 245 P.3d at 1148.

2 **ii. The 1169 Pump Tests Were Not Designed to Test the**  
3 **Hydraulic Connection Between Certain Wells or Basins.**

4 There was no mechanism involved in the 1169 Pump Tests that would allow  
5 the parties to identify specific relationships among any of the wells or basins. *See*  
6 **Exhibit 19**, p. 7-8, 57-58. Therefore, the results cannot distinctly pertain to any  
7 individual well or basin. The NSE (and other parties) have incorrectly interpreted  
8 the results as though all 30 wells have a “like” or similar effect on groundwater  
9 levels, spring flow, and surface flow in the MRSA. *See id.* They do not. *See id.*

10 The math is the simplest way to explain the technical derailment from the  
11 almost 50 years of scientific knowledge collected prior to the 1169 Pump Test. If  
12 14,000 acre-feet of pumping during the 1169 Pump Test only resulted in a 500  
13 acre-foot decrease in spring flow and did not have a measurable decrease in  
14 streamflow of the Muddy River, then it is not possible that all pumping in the  
15 NSE’s “Mega Basin” (which did not even occur in the 1169 Pump Tests because  
16 KSV was not included in Order 1169) affects the MRSA. Certainly, as described  
17 in the scientific literature previously recognized in Order 1169, there are other  
18 areas of groundwater discharge (*i.e.* Blue Point Springs, Rogers Springs, Lower  
19 Moapa Valley, Colorado River) that are not connected to springs and surface flow  
20 in the MRSA. *See Exhibit 4*, p. 4 n. 12.

21 Within southeastern Nevada, groundwater in the carbonate aquifer flows in a  
22 general north to south direction. *See Exhibit 19*, p. 54-55. This water flows in  
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1 fractures and cavities located along subsurface geologic structures. *Id.* at p. 15. As  
2 indicated by the NSE in Order 1169, between 16,000 and 17,000 afa flows from  
3 northern basins through CSV, *bypassing* the MRSA. *See Exhibit 4*, pp. 5-6.  
4 Because this water bypasses the MRSA, it neither contributes to nor impact the  
5 water levels in the MRSA. *See id.* The 1169 Pump Test results cannot account for  
6 nor reflect this 16,000-17,000 afa of water that bypasses the MRSA and therefore,  
7 cannot provide a comprehensive understanding of the water availability in the  
8 Mega Basin.  
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12 **iii. The 1169 Pump Test Results Do Not Provide a**  
13 **Comprehensive View of the Water System in the Mega**  
14 **Basin.**

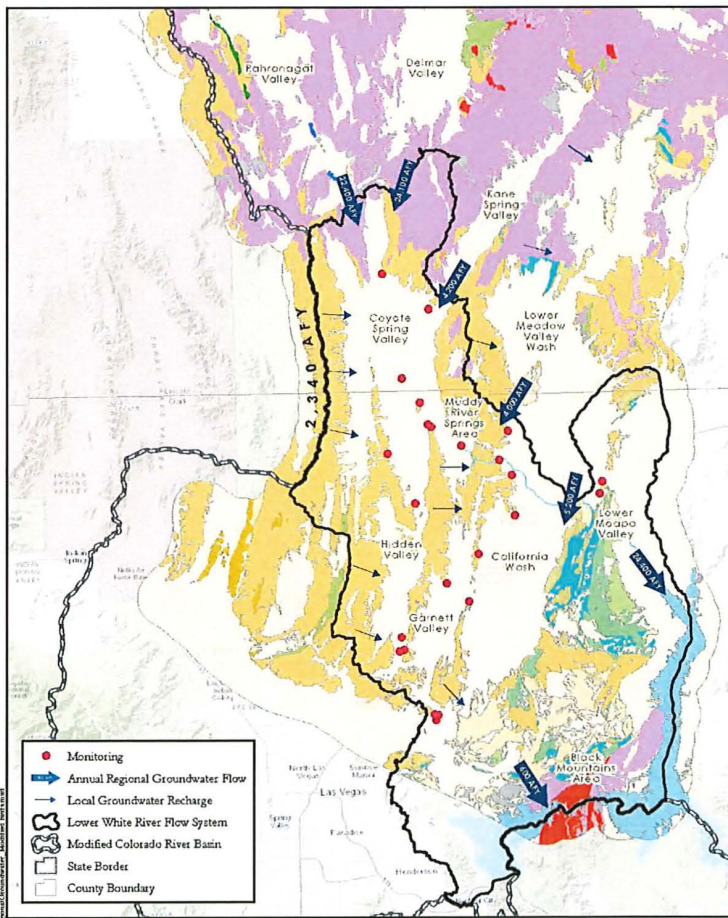
15 The NSE views the 1169 Pump Test results as showing a cause-and-effect  
16 relationship demonstrating hydraulic connection between all of the basins in the  
17 Mega Basin. However, the 1169 Pump Test results do not reflect the collection of  
18 substantial research referenced in Order 1169 that discussed flow paths,  
19 geochemical isotope studies, and field investigations showing the occurrence and  
20 movement of groundwater through southeastern Nevada. *See Exhibit 19*, pp. 2-4.  
21 Given that the pump test results show only a two-year snapshot during a dry  
22 period, the results cannot reflect climate factors, such as the period of wetness  
23 occurring from 2004-2005. *See id.* at pp. 4-5. Moreover, the results neither allow  
24 for consideration of how the structural barriers involved in this complex area of  
25 land impact pumping, nor identification of the specific relationship between basins.  
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*Id.* at pp. 25-26.

A groundwater budget would have allowed the NSE to consider objective data rather than arbitrarily choosing one party's subjective interpretation of the pump test results over another's. A groundwater budget is an inventory or accounting of inflows and outflows, including recharge, spring flow, evapotranspiration, groundwater pumping, and other factors that are part of the water balance of a basin or group of basins.

The following map depicts a part of the water budget that includes local and regional groundwater inflow and outflow under pre-development conditions.



**Exhibit 19**, p. 46.

These values are based on geologic and geochemical analyses carried out by



1 multiple parties over decades of investigations. *See Exhibit 19*, §4.2. When these  
2 inflows and outflows are combined with natural and anthropogenic stresses such as  
3 evapotranspiration, spring flow, and pumping, an estimate of water available for  
4 development can be made.

5  
6 NDWR and the NSE have used groundwater budgets throughout the State to  
7 assess water resources and determine safe yield. In fact, the Legislature requires  
8 the NSE to “prepare a water budget and calculate and maintain an inventory of  
9 water” for each basin in the State of Nevada. *See NRS 532.167*. Ironically, the  
10 NSE even recognized the importance of a water budget to fully understand the  
11 hydrology of the Mega Basin as a whole. *See Exhibit 2*, p. 58. Notwithstanding,  
12 the NSE refused to rely on the water budgets for individual basins like KSV or  
13 CSV and refused to consider a water budget for the entire Mega Basin in Order  
14 1309.

15  
16 Instead, the NSE chose to rely only on a cause-and-effect analysis that the  
17 NSE perceived as resulting from the 1169 Pump Test, which, notably, was  
18 interpreted differently by multiple parties. At best, the two-year aquifer test  
19 represents a narrow glimpse of a groundwater system that cycles between wet and  
20 dry hydrologic conditions over a period of decades. At worst, the pump test results  
21 are applied to an unrepeatable and unverifiable analytical analysis (SerieSEE)  
22 relied upon by the NSE (*see Exhibit 20* pp. 324-28, 342-46, 372-76 (Excerpts of  
23 Transcript of Sue Braumiller’s Testimony at the 1303 Hearing describing the  
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1 SerieSEE)), which suggests that all pumping in an 1,100 square-mile area affects  
2 one set of springs in the MRSA.

3  
4 The 1169 Pump Test is of limited value in analyzing or determining the  
5 Mega Basin's boundaries or the availability of water therein without taking the  
6 next step suggested in Order 1169 - the development of a groundwater flow model.  
7  
8 Comparing the voluminous research referenced in Order 1169, which the NSE  
9 drafted in 2002, with the data relied upon by the NSE in drafting Order 1309 in  
10 2020, demonstrates that the NSE ignored millions of dollars in scientific studies,  
11 developed by the USGS, NDWR, and others. The NSE disregarded this significant  
12 body of work in favor of certain parties' (with specific interests and goals)  
13 interpretations of the pump test results when multiple parties presented differing  
14 interpretations.  
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16  
17 Accordingly, the 1169 Pump Test results constitute only an insignificant  
18 fraction of the total available research on the water system in the Mega Basin. The  
19 NSE's reliance on the 1169 Pump Test results has rendered Order 1309  
20 unsupported by substantial evidence, arbitrary, and capricious. *See Bacher v. Off.*  
21 *of State Eng'r of State of Nevada*, 122 Nev. 1110, 1122-23, 146 P.3d 793, 801  
22 (2006).  
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25  
26 **C. NSE's Determination of Geographic Boundaries of the Mega**  
27 **Basin is Not Supported by Substantial Evidence.**

28 The NSE concluded that "the available information requires Kane Springs  
Valley be included within the geographic boundary of the LWRFS." **Exhibit 2**, p.

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53. As discussed in detail herein, the NSE’s conclusion is not supported by substantial evidence.

**i. NSE’s Conclusion that KSV has a Close Hydraulic Connection with the Other Basins is Not Supported by Substantial Evidence.**

The primary reason the NSE includes KSV in the Mega Basin is due to a subjective characterization of the hydraulic connection between KSV and CSV being “close”. To determine that KSV has a “close hydraulic connection” with the remainder of the Mega Basin, the NSE relied upon the results of the 1169 Pump Test and found what he perceived to be a “cause and effect” relationship between pumping in the LWRFS and KSV. **Exhibit 2**, p. 52 (explaining that “while attenuated, the general hydrographic pattern observed in southern [KSV] reflects a response to Order 1169 pumping, consistent with a close hydraulic connection with the LWRFS.”). As noted above, the 1169 Pump Test results cannot be used to determine the hydraulic connection between KSV and the LWRFS because the tests were not designed to show the individual relationship between particular basins or wells. Therefore, there is no way to determine what amount of pumping from which wells impacted the MRSA.

Moreover, the NSE applied certain criteria to the 1169 Pump Test results and then labeled the degree of connection on a scale from “weak connection” to “close connection”. *See Exhibit 2*, p. 47-49. The NSE’s criteria and method of determining the “closeness” of a hydraulic connection are completely subjective

1 and result in arbitrary assignment of degree of “closeness” that cannot be  
2 replicated with any scientific certainty.

3  
4 To be sure, one need only review the NSE’s own discussion of hydraulic  
5 connection in Order 1309. The NSE sets forth a set of criteria that he believes are  
6 important in assessing the “closeness” of a hydraulic connection. *See id.* at pp. 47-  
7 48. But the NSE applied these criteria to the 1169 Pump Test results, which the  
8 NSE has already determined show a cause and effect result in the Mega Basin  
9 (particularly, in CSV) had on KSV during the 1169 Pump Tests (which were not  
10 even designed to test for hydraulic connectivity). *See id.*; *see also id.* at p. 47 n.  
11 265.

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15 Ironically, even the NSE recognizes the slippery slope that this subjective  
16 methodology for hydraulic connection creates. In rejecting NPS’ proposal that all  
17 adjacent hydrographic areas “where a hydraulic interconnection exists, whether  
18 weak or strong, be included in the [Mega Basin]”, the NSE explains that “there  
19 must be reasonable and technically defensible limits to the geographic boundary.  
20 Otherwise, if management were to be based on the entire spectrum of weak to  
21 strong hydraulic interconnection, then exclusion of an area from the [Mega Basin]  
22 would require absolute isolation from the [Mega Basin]”. *Id.* at p. 49. But given  
23 the subjectivity of the NSE’s labeling method to describe the varying hydraulic  
24 connections (i.e. close, weak, strong, direct), there are no “reasonable” or  
25 “technically defensible limits” to the geographic boundary. Under the NSE’s  
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1 standards, every basin could be combined into one for management across the  
2 entire state of Nevada. The determination of the boundary of the Mega Basin  
3 should not be subjective nor dependent on who the NSE is.  
4

5 Even more problematic, the NSE indicates that additional data is required to  
6 demonstrate the relative strength of the hydraulic connections in the Mega Basin.  
7 **Exhibit 2**, page 48. This is an admission that the NSE's determination of  
8 hydraulic connection is not based on substantial evidence. *See Bacher*, 122 Nev.  
9 at 1122-23, 146 P.3d at 801 (holding that a determination by the NSE is not  
10 supported by substantial evidence where it lacks specific calculations and  
11 supporting evidence).  
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15 But worse, even though the NSE makes a decision while acknowledging that  
16 he does not have sufficient information to make that decision, the NSE chooses not  
17 to consider (1) a groundwater budget to determine the inventory of water, (2) a  
18 groundwater model to consider the flow paths of the water (which includes 16,000-  
19 17,000 afa of water that bypasses the MRSA),<sup>12</sup> or (3) evidence concerning  
20 seasonal variability or the impact that extended periods of drought over widespread  
21 areas would have on water levels throughout the region.  
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25 <sup>12</sup> For example, numerical groundwater models can assess the relative connection, if any, between  
26 pumping from specific wells in the MRSA and spring and surface flows in the MRSA. *See Exhibit 19*  
27 (CSI Expert Report), pp. 31-41. Therefore, a groundwater model can be used to identify the flow paths of  
28 groundwater that bypass the MRSA and those that contribute to the spring and surface flows therein. *See*  
*id.*; *see also Exhibit 8* (Order 1169A), pp. 2 (acknowledging that the NSE specifically ordered SNWA to  
submit such groundwater models for the basins involved in the 1169 Pump Tests). Despite knowing that  
16,000-17,000 afa bypasses the MRSA, (*see Exhibit 4* (Order 1169), pp. 5-6, the NSE chose not to use a  
numerical groundwater model to assess these flows and instead, relied only on the 1169 Pump Test results  
which cannot track this 16,000-17,000 afa. Thus, the NSE's determinations are not based on substantial  
evidence.

1 Most glaringly, the NSE's conclusory determination that the 1169 Pump  
2 Test results show a cause-and-effect relationship between pumping and water  
3 levels in KSV and the balance of the LWRFS is entirely arbitrary because it does  
4 not reflect the fact that there were multiple pumping zones located throughout the  
5 six basins, including pumping in 1) CSV, 2) MRSA, and 3) Garnet Valley and the  
6 Black Mountains Area. During the 1169 Pump Test, an average of 5,290 afa was  
7 pumped from CSV wells, and a cumulative reported total of 14,535 afa was  
8 pumped in the Order 1169 study basins. **Exhibit 2**, page 5. In total, more than 30  
9 wells were pumping at uncoordinated rates and schedules throughout six basins  
10 during the 1169 Pump Test. The NSE's conclusion does not identify or distinguish  
11 the results based on the distinct wells and unique relationships between the  
12 different wells.  
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17 While the largest volume of pumping occurred within CSV (5,290 afa)  
18 during the 1169 Pump Test, approximately 2,000 afa of carbonate pumping and  
19 3,840 afa of alluvial pumping was occurring within the MRSA. *See id.* at p. 55;  
20 *see also* **Exhibit 23** (SNWA Expert Report), p. 55. Different pumping rates affect  
21 groundwater levels differently when measured at a fixed observation point; a  
22 higher pumping rate results in greater drawdown given the same physical  
23 parameters. *See* **Exhibit 19**, pp. 10-14. If the distance between the pumping well  
24 and observation point varies, then the effect of the pumping on that observation  
25 point also varies. Because CSV is 11.5 miles from the Pederson Spring complex  
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1 (the observation point) and MRSA pumping is only 2.5 miles from the observation  
2 point, the assessment of relative impact is more complicated. *Id.*  
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4 Evidence was provided at the 1303 Hearing to show that the pumping well at  
5 a lower pumping rate, located 2.5 miles away from the observation point, had a  
6 greater impact (i.e. decrease in groundwater level) than a pumping well with a  
7 higher pumping rate, located 11.5 miles from the observation point. *Id.* This  
8 evidence was ignored by the NSE in favor of unverified and unrepeatable  
9 analytical analysis by the FWS known as the SeriesSEE analysis. *See Exhibit 2*, p.  
10 16, p. 50; *see also Exhibit 20* (Excerpts of Transcript of Sue Braumiller's  
11 Testimony at the 1303 Hearing), pp. 324-28, 342-46, 372-76.  
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15 The NSE's focus on the 1169 Pump Test results, to the exclusion of all other  
16 evidence, to determine the degree of hydrologic connection is highly unusual. It is  
17 common sense that scientific determinations should be based on a consideration of  
18 all relevant factors. Clearly, in rendering Order 1309 the NSE did not rely on the  
19 best available science.  
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21 Finally, the NSE's analysis of hydrologic connection is internally  
22 inconsistent for the different basins he considers for inclusion in the Mega Basin.  
23 As a result, Order 1309 is arbitrary in that certain basins with higher degrees of  
24 hydrologic connection are excluded from the Mega Basin, while those with lower  
25 degrees of hydrologic connection, such as KSV, are included in the Mega Basin.  
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27 For example, the Lower Meadow Valley Wash abuts the MRSA and has  
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1 undisputed flows into the MRSA and into the Muddy River. *See Exhibit 21*  
2 (Ruling 6254); *see also Exhibit 19*, Appendix C. Nevertheless, the Lower  
3 Meadow Valley Wash was excluded from the Mega Basin without any  
4 explanation, let alone any scientific, geologic, or hydrologic evidence to support its  
5 exclusion.  
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8 **ii. NSE’s Determination of the Geologic and Structural**  
9 **Boundaries of the Mega Basin is Not Supported by**  
10 **Substantial Evidence.**

11 One of the factors the NSE considered in concluding that KSV should be  
12 included in the Mega Basin is whether the boundary between KSV and the  
13 remainder of the Mega Basin is separated by faults or geographic features that  
14 inhibit groundwater flow. Specifically, the rock underlying the Mega Basin is  
15 carbonate-rock. *See Exhibit 4*, p. 1. In contrast, the northern portion of KSV  
16 consists of non-carbonate rock or low permeability bedrock. The NSE explains in  
17 Order 1309 that the “occurrence of the carbonate-rock aquifer in the southern Kane  
18 Springs Valley indicates that there is no known geologic feature at or near the  
19 southern Kane Springs Valley border that serves to juxtapose the carbonate-rock  
20 aquifer within the LWRFS with low permeability rocks in Kane Springs Valley.”  
21 **Exhibit 2**, p. 52. However, the NSE admits that he does not know whether there is  
22 a boundary between KSV and the remaining basins:  
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27 “[W]hile geologic mapping indicates that the carbonate-rock aquifer  
28 does not extend across the northern portion of the Kane Springs  
Valley, there is insufficient information available to determine  
whether the non-carbonate bedrock interpreted to underlie the



1 northern part of the Kane Springs Valley represents low-permeability  
2 bedrock that would define a hydraulic boundary to the carbonate-  
3 rock aquifer.” *Id.*

4 Therefore, the NSE admits that this decision is not based on substantial  
5 evidence. *See City of Reno v. Reno Police Protective Ass’n*, 118 Nev. 889, 899, 59  
6 P.3d 1212, 1219 (2002) (“If the Agency’s decision lacks substantial evidentiary  
7 support, the decision is unsustainable as being arbitrary or capricious.”).

8  
9 In making this determination, the NSE completely disregarded the new  
10 geologic data Vidler and CSI obtained from field investigations conducted in 2019.  
11 *See Exhibit 2*, pp. 51-53. These data demonstrated that geologic faults may act as  
12 complete or partial barriers to groundwater flow and that a “close” hydraulic  
13 connection does not exist where heterogeneities (*i.e.* faults) occur within the Mega  
14 Basin. *See Exhibit 19*. Specifically, the geophysical investigation of northern  
15 CSV mapped the location of the Kane Springs Wash fault zone that explained a  
16 5.5-foot change in groundwater elevation between two nearby monitoring wells.  
17 *See Exhibit 22* (LCWD and Vidler’s Expert Report). Similarly, CSI mapped a  
18 series of faults parallel to Highway 93 within the Mega Basin that explained why  
19 changes in groundwater levels occur across faults and why multiple flow paths  
20 exist within the Mega Basin. *See Exhibit 19*. Although the NSE called for new  
21 data in response to Order 1303, and although Vidler, LCWD and CSI provided  
22 new data, the NSE largely ignored the new data in favor of the decades-old  
23 limited-use 1169 Pump Test results.  
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1 Further, the NSE does not explain how the 1169 Pump Test Results (which  
2 were not conducted in KSV) support a departure from the NSE’s conclusions in  
3 Ruling 5712 that KSV should not be included in the Mega Basin. Indeed, in  
4 Ruling 5712, the NSE relied on the carbonate water levels near the boundary  
5 between KSV and CSV were 1,875 feet in elevation, and in southern CSV and  
6 throughout most of the other basins in the Mega Basin, the carbonate water levels  
7 are mostly between 1,800 and 1,825 feet to determine that this “marked difference  
8 in head supports the probability of a low-permeability structure or change in  
9 lithology between [KSV] and the southern part of [CSV]”. **Exhibit 19**, p. 21.  
10  
11

12 The 1169 Pump Test results do not refute these facts. The NSE’s decision to  
13 include KSV in the Mega Basin is arbitrary as he dismisses the difference in  
14 hydraulic head that the NSE found to be conclusive evidence that KSV should not  
15 be included in the Mega Basin in Ruling 5712. Thus, the 1169 Pump Test results  
16 neither provide nor constitute substantial evidence to support the NSE’s  
17 conclusion. *See Clements v. Airport Auth. of Washoe Cty.*, 111 Nev. 717, 722, 896  
18 P.2d 458, 461 (1995) (“Substantial evidence is that quantity and *quality* of  
19 evidence which a reasonable [person] could accept as adequate to support a  
20 conclusion.”) (internal quotation marks omitted) (emphasis added).  
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26 Notably, subsequent studies have confirmed that the NSE’s conclusions in  
27 Ruling 5712 were correct. For example, SNWA’s Order 1169 Report stated that  
28 there was a lack of pumping response north of the Kane Springs Fault, **Exhibit 23**

1 (SNWA Order 1169 Report, page 57), indicating that there is a low degree of  
2 hydraulic connectivity between KSV and CSV. Subsequent data presented by  
3 Vidler in 2019 additionally showed distinct differences in hydraulic gradients and  
4 groundwater elevations between KSV and CSV. *See Exhibit 22.* Furthermore,  
5 geophysical mapping performed by Vidler in response to Rescinded 1303 mapped  
6 a geologic fault explaining the difference in groundwater levels observed in nearby  
7 monitoring wells. *See id.* The hydrologic and geophysical data collected by Vidler  
8 and CSI in 2019 represent best available science that was ignored by the NSE in  
9 Order 1309 in preference of the 1169 Pump Test results.  
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13           Additionally, the NSE's set forth in Order 1309 do not provide an objective  
14 measure for determining when joint management should be implemented. The  
15 NSE's fourth criteria ("Criteria No. 4") is "Water level observations that  
16 demonstrate a relatively steep hydraulic gradient are consistent with a poor  
17 hydraulic connection and a potential boundary." **Exhibit 2**, p. 48. But the NSE,  
18 again, applies this Criteria No. 4 in a subjective, results driven manner. For  
19 example, the NSE admits that he "recognizes these differences" in groundwater  
20 levels, gradients, and climatic factors, but simply dismisses these facts in  
21 preference of the 1169 Pump Test results without any explanation as to why a  
22 gradient generated from a 60-foot difference in groundwater levels does not  
23 exclude KSV from the Mega Basin - when compared to a 0.5-foot change in water  
24 level over two years during the Order 1169 Pump Test supports including KSV in  
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1 the Mega Basin. *See id.* at pp. 24, 52.

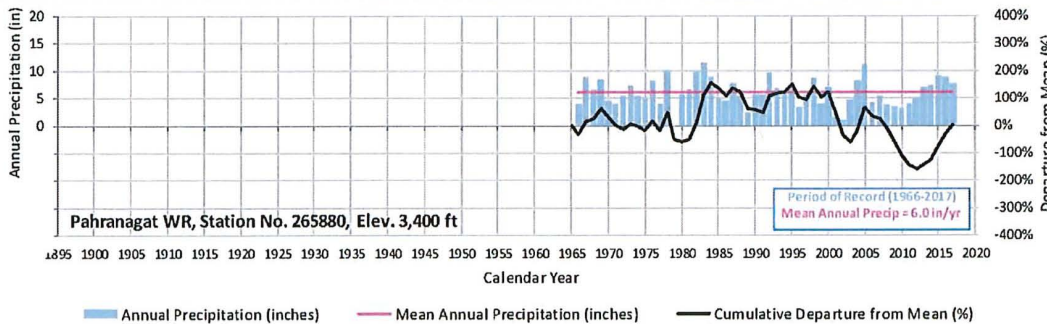
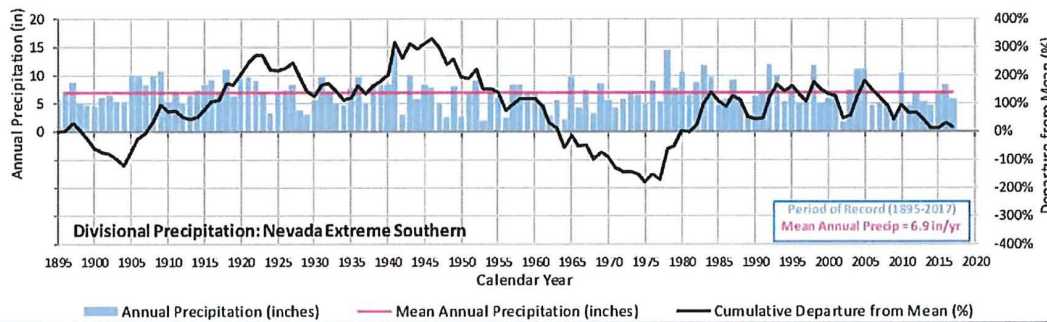
2 Of the six criteria listed by the NSE, none are focused on geologic structures  
3 alone. Instead, the NSE picks from the vast record to support its predetermined  
4 decision (e.g., to include KSV); instead of analyzing all of the facts, data, and best  
5 science available to reach an accurate conclusion. For instance, Criterion No. 5  
6 suggests exclusion from the Mega Basin would require a juxtaposition of  
7 carbonate-rock aquifer with low permeability bedrock, but there are other types of  
8 geologic structures with similar properties. For example, faults can create  
9 impermeable boundaries between rocks of similar compositions (i.e. carbonate  
10 rock against carbonate rock) that result in steep hydraulic gradients (**Exhibit 19**  
11 (Section 3.3 “Impact of Structural Features and Faults on Groundwater Flow”).  
12 Thus, newly mapped faults, such as those at the mouth of Kane Springs Valley  
13 constitute a basin boundary (**Exhibit 22**), they are excluded from consideration  
14 since the fault does not include “low permeability bedrock”. The specificity of  
15 Criterion No. 5 suggests that NSE’s criteria are predetermined to include Kane  
16 Springs Valley in the Mega Basin.  
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23 **D. NSE’s Determination of the Aquifer Recovery Subsequent to the**  
24 **Order 1169 Pump Test is Not Supported by Substantial Evidence.**

25 The NSE identified aquifer recovery subsequent to the 1169 Pump Test as  
26 one of the topics for the 1303 Hearing. In the context of Order 1309, aquifer  
27 recovery simply refers to whether groundwater levels, after the cessation of 1169  
28 Pump Test, returned to the same elevations observed prior to the commencement

1 of the test.

2 The NSE concludes in Order 1309 that aquifer recovery following the 1169  
3 Pump Test has not returned to pre-test levels. **Exhibit 2**, p. 55. The NSE's  
4 conclusion improperly assumes, without any supporting evidence, that aquifer  
5 recovery *should* reach pre-1169 levels. But, as explained above, the 1169 Pump  
6 Test was only conducted for two years, and that two-year period occurred at the  
7 end of a dry period. See **Exhibit 19**. The graph below shows the varying  
8 precipitation levels for the past several decades for the area underlying the Mega  
9 Basin:  
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25 See **Exhibit 19**, p. 6.

26 Despite acknowledging that water levels are impacted by climate, the NSE  
27 decided to exclude climatic factors from his determination of aquifer recovery  
28 without valid justification. Therefore, the NSE's decision neither accounts for nor

1 addresses the impact of the wetter cycles experienced in the late 1990's and again  
2 from 2004-2005 prior to the drier period that began in 2006 and continued to occur  
3 through the 2011-2012 period when the 1169 Pump Test occurred. *See Exhibit*  
4 **19**, pp. 3-7. These wetter periods demonstrate that the NSE's focus on water levels  
5 occurring prior to the 1169 Pump Test as the sole measurement of what aquifer  
6 recovery *should* be is arbitrary and capricious.  
7

8  
9       Indeed, under the NSE's logic, the measurement of aquifer recovery, and  
10 therefore, the positive or negative attribute assigned to it by the NSE, is  
11 conclusively determined by the groundwater levels in 2010 when the pump tests  
12 began. As a result, if the pump tests had been conducted in 2004-2007 (a wetter  
13 cycle), then the measurement of aquifer recovery would be vastly different. The  
14 NSE's focus on information related to a two-year period of time to the exclusion of  
15 decades of research on the many factors impacting groundwater levels is arbitrary  
16 and capricious.  
17

18  
19       A general fallacy exists in the argument that pre- and post- 1169 Pump Test  
20 levels should be the same to suggest that aquifer recovery is complete. For  
21 example, drought conditions contribute to an overall decline in groundwater levels,  
22 so one would expect groundwater levels to be less after two years regardless of  
23 pumping. Additionally, the location of pumping by specific wells also affects  
24 aquifer recovery, such that a change in pumping rates by some wells might mask  
25 observations of recovery. Because the best scientific analysis was not used to  
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1 assess aquifer recovery, it cannot be used as a metric for quantifying sustainable  
2 yield. Without analytically accounting for hydrologic and geologic variables, as  
3 well as the proximity of pumping wells to the Warm Springs area, the NSE cannot  
4 state whether groundwater levels would have remained constant at pumping levels  
5 of 14,000 afa, 4,000 afa, or 8,000 afa as stated in Order 1309.  
6  
7

8 **E. NSE’s Conclusion that Only 8,000 afa Can be Pumped from the**  
9 **Mega Basin Not Supported by Substantial Evidence.**

10 In Order 1309, the NSE arbitrarily determines that only 8,000 afa of water  
11 can be pumped across the entire Mega Basin. *See Exhibit 2*, p. 63. However, no  
12 participant in the hearing provided evidence to support this figure, nor even argued  
13 that 8,000 afa was the appropriate amount of water to be pumped in the Mega  
14 Basin. Rather, each participant argued that the evidence supported a different  
15 amount. *See, e.g., id.* at pp. 13-14, 17, 31, 38, 57 (describing the amounts  
16 suggested by each party).  
17  
18

19 The NSE randomly selected 8,000 afa because in the years following the  
20 1169 Pump Tests, 7,000-8,000 afa of water was pumped in the MRSA without  
21 showing a decline in groundwater levels or spring flows. *See id.* at 55, 63. But  
22 7,000-8,000 afa is a wide range. The NSE fails to explain why 8,000 afa of water  
23 is the “maximum amount of groundwater that can continue to be developed over  
24 the long term in the [Mega Basin]” as opposed to any other number within that  
25 range, such as 7,000 afa or 7,500 afa. *Id.* at pp. 62-63.  
26  
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Worse, simply because 7,000-8,000 afa was randomly pumped following the

1 1169 Pump Test without a decline in water levels does not mean that this amount is  
2 determinative. For example, if 4,000 afa was the amount that had been pumped  
3 following the 1169 Pump Tests, there would be no decline in groundwater levels  
4 because there was no decline when 7,000-8,000 afa was pumped. But if pumping  
5 stopped at 4,000 afa, then it would not be known that 7,000-8,000 afa could be  
6 pumped without causing a decline in water levels. On the other hand, if the  
7 amount pumped following the 1169 Pump Tests was 14,000 afa without decline,  
8 then, under the NSE's logic, the total availability of water would be 14,000 afa.  
9

12 Given that the 7,000-8,000 afa is the amount that just happened to be  
13 pumped after the 1169 Pump Test concluded, the NSE's selection of the number  
14 8,000 afa is completely random and arbitrary. *See Bacher*, 122 Nev. at 1122-23,  
15 146 P.3d at 801 (finding that the NSE's allocation of 415 afa of water was not  
16 supported by substantial evidence where the NSE did not provide a specific  
17 breakdown of the amount of water needed for each of the applicant's projects nor  
18 an explanation of how the 415 afa met the applicant's needs).  
19

22 Similarly, the NSE does not support with any evidence, let alone substantial  
23 evidence, his determination that pumping in excess of 8,000 afa "will cause  
24 conditions that harm the Moapa dace and threaten to conflict with Muddy River  
25 decreed rights." *Id.* This conclusion is based on pumping from 30 wells across  
26 1,100 square miles of land. There is no basis to conclude that all pumping from  
27 these 30 wells equally affects the Muddy River. To the contrary, pumping from  
28



1 particular wells may have a bigger impact on water levels in certain areas while  
2 affecting water levels in other areas less, a fact acknowledged but disregarded by  
3 the NSE. Without consideration of how individual wells impact the Muddy River,  
4 the NSE's conclusion that 8,000 afa is the maximum amount of water that can be  
5 pumped across seven basins is arbitrary and capricious.  
6  
7

8 **F. NSE's Conclusion Regarding the Effect of Movement of Water**  
9 **Between Alluvial and Carbonate Wells Within the Mega Basin is**  
10 **Not Supported by Substantial Evidence.**

11 Order 1309 states that there was strong consensus among the parties that  
12 alluvial aquifer pumping in the MRSA affects Muddy River discharge but  
13 misrepresents the evidence that all carbonate aquifer pumping throughout the  
14 Mega Basin affects spring flow. **Exhibit 2**, p. 64. Order 1309 further conflates the  
15 issue by suggesting that "the relative degree of hydrologic connectedness in the  
16 LWRFS will be a principal factor in determining the impact of movement of water  
17 rights". *Id.* at p. 65. In another section of Order 1309, it states: "the Order 1169  
18 aquifer test demonstrated that impacts from the test along with concurrent pumping  
19 was widespread within the LWRFS encompassing 1,100 square miles and  
20 supported the conclusion of a close hydrologic connection among the basins." *Id.*  
21 at p. 64. Therefore, Order 1309 is internally inconsistent. On the one hand, the  
22 NSE includes KSV in the Mega Basin because he finds that all pumping affects  
23 spring flow, but on the other hand, the NSE indicates that some locations affect  
24 spring flow less than others. These internal inconsistencies are not adequate to  
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1 support the NSE's decision. *See Clements v. Airport Auth. of Washoe Cty.*, 111  
2 Nev. 717, 722, 896 P.2d 458, 461 (1995) ("Substantial evidence is that quantity  
3 and quality of evidence which a reasonable [person] could accept as adequate to  
4 support a conclusion.") (internal quotation marks omitted).  
5

6 Order 1309's assessment of the impact of carbonate pumping throughout the  
7 Mega Basin on spring flow in the MRSA is misleading since it does not rely on the  
8 best science available. Much of this is due to the avoidance of adopting a water  
9 budget and numerical groundwater model that could be used to quantify the  
10 impacts of carbonate pumping on both the springs and streamflow in the MRSA.  
11 For example, the total carbonate and alluvial pumping during the 2011-2012 1169  
12 Pump Test was close to 14,535 afa, resulting in approximately a 300 acre-foot drop  
13 in streamflow at the Warm Springs West gage and a 150 acre-foot in streamflow at  
14 the Pederson Springs complex. At the same time, there was no impact to flow at  
15 the Big Muddy Spring and no perceivable impact to the flow of the Muddy River  
16 at Moapa. Given the large amount of pumping and relatively small amount of  
17 impact, common sense suggests that there are other factors affecting the flow and  
18 movement of groundwater in the carbonate rock aquifer.  
19

20 The greatest factor affecting the flow and movement of groundwater in the  
21 Mega Basin are heterogeneities associated with geologic faults and structures that  
22 create multiple flow paths. *See Exhibit 19*, p. 25, 54-55. While Order 1309  
23 recognizes that these structures exist, it ignores their impact on the movement of  
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1 groundwater through the Mega Basin aquifer system. Evidence presented during  
2 the Order 1303 hearing that indicates flow is controlled by geologic structure and  
3 heterogeneities in the aquifer that include:  
4

- 5 1. 2019 CSAMT Geophysical Survey conducted by CSI.
- 6 2. 2019 CSAMT Geophysical Survey conducted by Vidler.
- 7 3. Differences in groundwater level responses across geologic  
8 boundaries.
- 9 4. Water budget identified in Order 1169.
- 10 5. Proposed water budget provided by CSI.
- 11 6. Analytical analysis of pumping impact on springs.
- 12 7. Supporting published data by USGS, Desert Research Institute  
13 (“DRI”), SNWA, and others.

14  
15  
16  
17 *See Exhibit 24* (CSI Closing Statement); **Exhibit 25** (Vidler Closing  
18 Statement). The data listed above represents the best available science that would  
19 allow the NSE to assess groundwater movement and occurrence in the Mega  
20 Basin. It is not difficult to understand that 14,535 acre-feet of pumping during the  
21 1169 Pump Test, of which 5,290 acre-feet occurred in CSV, only resulted in a 300  
22 acre-foot to 450-acre-foot impact on spring flow in the MRSA because there are  
23 other factors controlling the flow of groundwater in the carbonate aquifer. *See*  
24 **Exhibit 19**, p. 47-52. These other factors include the geologic faults and structures  
25 that may act as either a barrier or conduit to groundwater flow and support  
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1 previous interpretations that indicate not all groundwater in an 1,100 square mile  
2 basin flows to the MRSA. *See id.* at pp. 47-48.

3  
4 Local recharge to the Mega Basin that occurs from the Sheep Range located  
5 along the west side of CSV is an example of the impact of geologic structure. *See*  
6 **Exhibit 26** (Excerpts of Transcript of CSI's expert (Steve Reich) testimony  
7 presented at the 1303 Hearing), pp. 20-23. Both Bedroc (with alluvial rights in  
8 CSV) and CSI presented evidence that this recharge, local to CSV, is not part of  
9 the regional flow system that supports the water resources in the MRSA. *See id.*;  
10 *see also* **Exhibit 19**, pp. 31-42. While the NSE appears to recognize that pumping  
11 by Bedroc has little hydraulic connectivity to the MRSA, the NSE fails to address  
12 how local recharge affects regional groundwater flow. The same mechanisms  
13 controlling recharge in northern CSV also occur in central CSV and KSV. *See id.*  
14 Faults identified by recent geophysical studies performed in 2019 by CSI and  
15 Vidler, as well as offsets in groundwater levels, provide the best available science  
16 that show not all water flows to the MRSA. *See id.*; *see also* **Exhibit 22**. Again, it  
17 is inconsistent that the NSE acknowledges multiple flow paths in one area, but not  
18 in another.

19  
20 Order 1309 does not distinguish between the groundwater available in the  
21 alluvial aquifer compared to that of the deeper carbonate aquifer, nor does it  
22 distinguish between local recharge and regional recharge. Moreover, the NSE  
23 ignores the evidence demonstrating that the water in the MRSA has a different  
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1 geochemical make up as shown by the isotope studies. See **Exhibit 19**, p. 25.  
2 Instead, it suggests that there may be discrete, local aquifers within the Mega Basin  
3 with an uncertain hydrologic connection to the MRSA. **Exhibit 2**, p. 65.

4  
5 This reference in Order 1309 demonstrates that the NSE understands the  
6 following but chose to ignore it: 1) not all pumping in the Mega Basin affects the  
7 MRSA; 2) multiple flow paths exist due to faults and geologic boundaries; and 3)  
8 some portions of CSV are distinct from other portions. The NSE's choice to  
9 ignore these facts and focus only on the 1169 Pump Test results is purely results  
10 driven and therefore, arbitrary and capricious.  
11  
12

#### 13 **VIII. CONCLUSION AND REMEDY SOUGHT**

14  
15 Based on the foregoing, it is clear that the NSE lacked authority to issue  
16 Order 1309. Moreover, Order 1309 violates CSI's constitutional rights because it  
17 constitutes a taking without due compensation. Further, Order 1309 violates CSI's  
18 due process rights because the NSE employed *post hoc* rulemaking for which CSI  
19 was never given notice. Accordingly, CSI respectfully requests that this Court  
20 grant CSI's Petition for Judicial Review and enter an Order declaring Order 1309  
21 void.  
22  
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24 Alternatively, CSI requests that this Court grant CSI's Petition for Judicial  
25 Review and enter an Order determining that Order 1309 is neither supported by  
26 substantial evidence nor the best available science, and as such, is arbitrary,  
27 capricious, and must be reversed. Accordingly, CSI requests that if this Court  
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determines the NSE had authority to issue Order 1309, that this Court enter an Order declaring Order 1309 arbitrary and capricious.

**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 27<sup>th</sup> day of August, 2021.

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**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Robison, Sharp, Sullivan & Brust, and that I served, or caused to be served, a true and correct copy of the foregoing **COYOTE SPRINGS INVESTMENT, LLC'S OPENING BRIEF ON PETITION FOR JUDICIAL REVIEW** to be served on all parties to this action by:

\_\_\_\_\_ placing an original or true copy thereof in a sealed, postage prepaid, envelope in the United States mail at Reno, Nevada, addressed to:

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1 \_\_X\_ by Federal Express/UPS or other overnight delivery addressed to:

2 Clark County District Court  
3 Attn: Honorable Bita Yeager – District Court, Dept. 1  
4 Court Administration – 2<sup>nd</sup> Floor  
5 200 Lewis Avenue  
6 Las Vegas, NV 89101

7 DATED: This 27th day of August, 2021.

8 

9 V. Jayne Ferretto  
10 An Employee of Robison, Sharp, Sullivan & Brust

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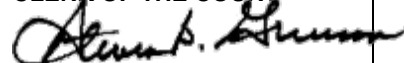
**EXHIBIT LIST**

**COYOTE SPRINGS INVESTMENT, LLC'S OPENING BRIEF  
ON PETITION FOR JUDICIAL REVIEW**

(Case No. A-20-816761-C (Lead Case))

<b>EXHIBIT NO.</b>	<b>DATE</b>	<b>DESCRIPTION</b>	<b>PAGES</b>
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9		The 1169 Pump Test wells are circled in red.	1
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26	09/23/2019	Excerpts of Transcripts of CSI's Expert (Steve Reich) Testimony Presented at the 1303 Hearing	24



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*Attorneys for Petitioner Coyote Springs Investment, LLC*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

20 LAS VEGAS VALLEY WATER DISTRICT,  
21 and SOUTHERN NEVADA WATER  
22 AUTHORITY

23 Petitioners,

24 v.

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

Respondent.

Case No.: A-20-816761-C (Lead Case)  
Dept. No.: 19

**EXHIBITS IN SUPPORT OF**  
**COYOTE SPRINGS INVESTMENT, LLC'S**  
**OPENING BRIEF ON PETITION FOR**  
**JUDICIAL REVIEW**

**DATE OF HEARING: February 14, 2022**  
**TIME OF HEARING: 9:00 a.m.**

**CONSOLIDATED WITH:**

Case No.: A-20-817765-P  
Case No.: A-20-817840-P  
Case No.: A-20-817876-P  
Case No.: A-20-817977-P  
Case No.: A-20-818015-P  
Case No.: A-20-818069-P  
Case No.: A-21-833572-J

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

# **EXHIBIT 1**

**DOCUMENT NOT IN ROA – STRICKEN PER COURT ORDER**

# **EXHIBIT 2**



**Document (Order 1309) Located at JA Vol. 2 at  
JA\_326 through JA\_393**

# **EXHIBIT 3**

**DOCUMENT NOT IN ROA – STRICKEN PER COURT ORDER**

# **EXHIBIT 4**

**Document (Order 1169) Located at JA Vol. 3 at JA\_824  
through JA 834**

# **EXHIBIT 5**

**Document (LWRFS Map SE ROA 36242) Located at JA Vol. 18 at  
JA\_7976**

# **EXHIBIT 6**



**Document (Memorandum of Agreement) Located at JA Vol. 5 at  
JA\_2928 to JA\_2953**

## FIRST AMENDMENT TO MEMORANDUM OF AGREEMENT

This First Amendment to Memorandum of Agreement ("First Amendment") is dated as of December 10, 2014, and entered into by and between Southern Nevada Water Authority, a political subdivision of the State of Nevada ("SNWA"), United States Fish and Wildlife Service ("FWS"), Coyote Springs Investment LLC, a Nevada limited liability company ("CSI"), the Moapa Band of Paiutes ("Tribe"), and the Moapa Valley Water District, a political subdivision of the State of Nevada ("MVWD"). For convenience, SNWA, FWS, CSI, the Tribe, and MVWD may be referred to individually as a "Party" and collectively, as the "Parties."

### RECITALS

- a. The Parties agreed upon, executed, and delivered to one another, that certain Memorandum of Agreement dated January 27, 2006 (the "MOA").
- b. Based on circumstances unrelated to the MOA, CSI desires to modify the annual payment amount, payment term and payment due date. The total payment and purpose of the funding remains as stated in the MOA.
- c. FWS does not object to these changes in payment terms as it does not affect the total funding amount or the purpose for which the funding is to be provided.
- d. CSI also desires to change its address for notices related to the MOA.

**NOW THEREFORE**, for good and valuable consideration, the receipt of which is acknowledged, the Parties agree as follows:

1. Section 4(e) of the MOA is amended and restated in its entirety to read as follows:
  - e. CSI agrees to provide FWS with the amount of Two Hundred Thousand Dollars (\$200,000) for the restoration of Moapa dace habitat outside the boundaries of the Moapa National Wildlife Refuge along the Apar Stream, or at such other locations as CSI and FWS, in consultation with the other Parties, agree. This funding amount will be paid over a five year period commencing with a \$40,000 payment due on or before December 31, 2014, and continuing with a \$40,000 payment on or before December 31<sup>st</sup> of each of the succeeding four years of 2015, 2016, 2017, and 2018, for a total amount of \$200,000 paid.

2. Section VII(1) is hereby amended to change CSI's notice address to the following:

If to CSI: Attn: Legal Department  
4021 Port Chicago Highway  
Concord, CA 94520

With a copy to: Attn: Legal Department  
3100 SR 168  
PO Box 37010  
Coyote Springs, NV 89037


3. Except as expressly modified by this First Amendment, the MOA shall remain unmodified and in full force and effect.
4. This instrument may be executed in one or more counterparts, each of which when taken together shall constitute one and the same instrument.

THIS FIRST AMENDMENT was executed as of the day and year first written above.

**MOAPA VALLEY WATER DISTRICT**, a political subdivision of the State of Nevada

By:   
Name: Joseph DAVIS  
Its: GENERAL MANAGER

**UNITED STATES FISH AND WILDLIFE SERVICE**

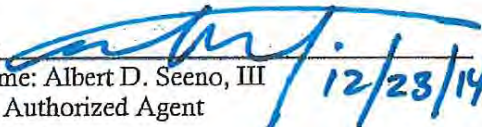
By:  01/08/2015  
Name: Mike Senn  
Its: ~~Assistant~~ Field Supervisor, Southern Nevada Field Office

(Signatures continue to next page)

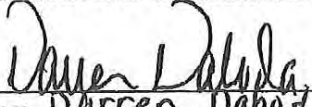
SOUTHERN NEVADA WATER AUTHORITY, a political subdivision of the State of Nevada

By:   
Name: John S. Entsminger  
Its: General Manager

COYOTE SPRINGS INVESTMENT LLC, a Nevada limited liability company

By:   
Name: Albert D. Seeno, III / 12/23/14.  
Its: Authorized Agent

MOAPA BAND OF PAIUTES

By:   
Name: Darren Dabo  
Its: Chairman

## SECOND AMENDMENT TO MEMORANDUM OF AGREEMENT

This Second Amendment to Memorandum of Agreement ("Second Amendment") is dated as of January 7, 2016, and entered into by and among Southern Nevada Water Authority, a political subdivision of the State of Nevada ("SNWA"), United States Fish and Wildlife Service ("FWS"), Coyote Springs Investment LLC, a Nevada limited liability company ("CSI"), the Moapa Band of Paiutes ("Tribe"), and the Moapa Valley Water District, a political subdivision of the State of Nevada ("MVWD"). For convenience, SNWA, FWS, CSI, the Tribe and MVWD may be referred to individually as a "Party" and collectively, as the "Parties".

### Recitals

- a. The Parties agreed upon, executed and delivered to one another that certain Memorandum of Agreement dated ~~January 27, 2006~~ **April 20, 2006** ("Agreement").
- b. The Parties agreed upon, executed and delivered to one another that certain First Amendment to Memorandum of Agreement dated December 10, 2014 ("First Amendment"). The Agreement and the First Amendment are collectively referred to herein as the "MOA".
- c. The Parties to the MOA desire to modify the language of Section 3 of the MOA to accurately reflect the manner in which water rights are being dedicated to the survival and recovery of the Moapa dace.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. Section 3(a) of the MOA is hereby amended and restated in its entirety to read as follows:
  - a. To provide for the dedication of a portion of the CSI water rights to support the survival and recovery of the Moapa dace and its habitat, CSI agrees to record an Affidavit To Relinquish Water Rights in the amount of 460 afa with the Clark County Recorder and the Lincoln County Recorder, and to file copies of the recorded affidavits with the Nevada State Engineer. Upon approval of the State Engineer, the 460 afa being relinquished will revert to its source but continue to be counted as an appropriated water right.
2. Section 3(b) of the MOA is hereby amended and restated in its entirety to read as follows:
  - b. In addition, CSI agrees to record an Affidavit To Relinquish Water Rights in an amount equal to five percent (5%) of the quantity of water above the amount of 4,600 afa that CSI is entitled to and physically able to use, from

CDS/csi/muddy\_recov/release  
092515/2<sup>nd</sup>\_amend\_MOA.doc/3

**ORIGINAL**  
STAMPED IN RED

time to time, within its Coyote Springs Master Planned Community development project located within the Coyote Spring Valley Basin (the "Community"). An Affidavit shall be recorded and filed in the manner as set forth in Section 3(a) above at the time each increment of additional water rights is transported to the basin and put to use within the Community.

3. A new Section 3(c) is hereby added to the MOA which reads as follows:
  - c. In the event any relinquishment provided in accordance with Sections 3(a) or 3(b) above is declared null and void in any administrative or judicial proceeding the subject water rights shall be restored to CSI and then CSI and FWS shall, in cooperation with the Nevada State Engineer, develop an acceptable means of dedicating the subject water rights specifically described in Sections 3(a) and 3(b) for the survival and recovery of the Moapa dace.
4. Except as expressly modified by this Second Amendment, the MOA shall remain unmodified and in full force and effect.
5. This instrument may be executed in one or more counterparts, each of which when taken together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the Parties have caused this Second Amendment to be executed as of the date first written above.

**MOAPA VALLEY WATER DISTRICT,**  
a political subdivision of the State of Nevada

By: \_\_\_\_\_  
Joseph Davis, General Manager

**ORIGINAL**  
STAMPED IN RED

**UNITED STATES FISH AND WILDLIFE SERVICE**

By: Michael J. Senn 01/08/16  
Michael J. Senn, Field Supervisor, Southern Nevada Fish and Wildlife Office

time to time, within its Coyote Springs Master Planned Community development project located within the Coyote Spring Valley Basin (the "Community"). An Affidavit shall be recorded and filed in the manner as set forth in Section 3(a) above at the time each increment of additional water rights is transported to the basin and put to use within the Community.

3. A new Section 3(c) is hereby added to the MOA which reads as follows:
  - c. In the event any relinquishment provided in accordance with Sections 3(a) or 3(b) above is declared null and void in any administrative or judicial proceeding the subject water rights shall be restored to CSI and then CSI and FWS shall, in cooperation with the Nevada State Engineer, develop an acceptable means of dedicating the subject water rights specifically described in Sections 3(a) and 3(b) for the survival and recovery of the Moapa dace.
4. Except as expressly modified by this Second Amendment, the MOA shall remain unmodified and in full force and effect.
5. This instrument may be executed in one or more counterparts, each of which when taken together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the Parties have caused this Second Amendment to be executed as of the date first written above.

**MOAPA VALLEY WATER DISTRICT,  
a political subdivision of the State of Nevada**

By:   
Joseph Davis, General Manager

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**UNITED STATES FISH AND WILDLIFE SERVICE**

By: \_\_\_\_\_  
Michael J. Senn, Field Supervisor, Southern Nevada Fish and Wildlife Office

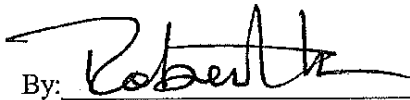
**SOUTHERN NEVADA WATER AUTHORITY,  
a political subdivision of the State of Nevada**

By: \_\_\_\_\_  
John J. Entsminger, General Manager

**COYOTE SPRINGS INVESTMENT LLC,  
a Nevada limited liability company**

By: \_\_\_\_\_  
Albert D. Seeno, III, Authorized Agent

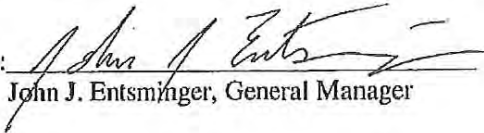
**MOAPA BAND OF PAIUTES**

By:  \_\_\_\_\_  
~~Darren Daboda, Chairman~~  
Robert Tom

**ORIGINAL**  
STAMPED IN RED



**SOUTHERN NEVADA WATER AUTHORITY,  
a political subdivision of the State of Nevada**

By:   
John J. Entsminger, General Manager

**COYOTE SPRINGS INVESTMENT LLC,  
a Nevada limited liability company**

By:   
Albert D. Seeno, III, Authorized Agent

**MOAPA BAND OF PAIUTES**

By: \_\_\_\_\_  
Darren Daboda, Chairman

**SOUTHERN NEVADA WATER AUTHORITY,  
a political subdivision of the State of Nevada**

By: \_\_\_\_\_  
John J. Entsminger, General Manager

**COYOTE SPRINGS INVESTMENT LLC,  
a Nevada limited liability company**

By: \_\_\_\_\_  
Albert D. Seeno, III, Authorized Agent

**ORIGINAL**  
STAMPED IN RED

**MOAPA BAND OF PAIUTES**

By: \_\_\_\_\_  
Darren Daboda, Chairman

# **EXHIBIT 7**

**Document (Ruling 5712) Located at JA Vol. 3 at JA\_864 to JA\_886**

# **EXHIBIT 8**

**Document (Order 1169A) Located at JA Vol. 3 at JA\_819 to JA\_823**

# **EXHIBIT 9**

**Document (LWRFS Map SE ROA 36163) Located at JA Vol. 17 at  
JA\_7901**



# **EXHIBIT 10**

**Document (Ruling 6255) Located at JA Vol. 3 at JA\_920 to JA\_950**

# **EXHIBIT 11**

**Document (May 16, 2018 Letter) Located at JA Vol. 32 at JA\_14899  
to JA\_14901**

# **EXHIBIT 12**

# **EXHIBIT 13**

**DOCUMENT NOT IN ROA – STRICKEN PER COURT ORDER**

# **EXHIBIT 14**



**DOCUMENT NOT IN ROA – STRICKEN PER COURT ORDER**

# **EXHIBIT 15**

**DOCUMENT NOT IN ROA – STRICKEN PER COURT ORDER**

# **EXHIBIT 16**

**Document (Order 1303) Located at JA Vol. 2 at JA 394  
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**Document (Addendum to Order 1303) Located at JA Vol. 2 at  
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# **EXHIBIT 17**

**DOCUMENT NOT IN ROA – STRICKEN PER COURT ORDER**



# **EXHIBIT 18**

**Document (Notice of Pre-Hearing Conference) Located at JA Vol. 2  
at JA\_394 to JA\_412**

# **EXHIBIT 19**

**Document (CSI Expert Report) Located at JA Vol. 16 at JA\_7536 to  
JA\_7648**

# **EXHIBIT 20**

**Document (September 24, 2019 Transcript Excerpts) Located at JA  
Vol. 44 at JA\_17450 to JA\_17452, JA\_17472 to JA\_17473, JA\_17476  
to JA\_17477, JA\_17484 to JA\_17486**

# **EXHIBIT 21**

**Document (Ruling 6254) Located at JA Vol. 3 at JA\_891 to JA\_919**



# **EXHIBIT 22**

**Document (Vilder Report) Located at JA Vol. 18 at JA\_7927 to  
JA\_8079**

# **EXHIBIT 23**



SOUTHERN NEVADA WATER AUTHORITY

100 City Parkway, Suite 700 • Las Vegas, NV 89106  
MAILING ADDRESS: P.O. Box 99956 • Las Vegas, NV 89193-9956  
(702) 862-3400 • snwa.com

June 27, 2013

Jason King, P.E., State Engineer  
Nevada Department of Conservation  
and Natural Resources  
Division of Water Resources  
901 South Stewart Street, Suite 2002  
Carson City, Nevada 89701

Dear Mr. King:

SUBJECT: SUBMITTAL OF NEVADA STATE ENGINEER ORDERS 1169 AND 1169A  
STUDY REPORT

The Southern Nevada Water Authority (SNWA) and Las Vegas Valley Water District (LVVWD) hereby submit the subject report to the Nevada State Engineer (NSE) for consideration regarding NSE Orders 1169 and 1169A. As outlined in NSE Order 1169A, the pumping test was deemed complete as of December 31, 2012. Pursuant to Order 1169A, any Order 1169 study participant may file a report with the NSE addressing information obtained during the study/pumping test, impacts of pumping, and availability of water pursuant to pending applications held in abeyance by Order 1169.

SNWA and LVVWD have worked diligently and cooperatively with the NSE, Moapa Valley Water District, Coyote Springs Investments LLC, U.S. Fish and Wildlife Service, and other study participants to ensure the pumping test under Order 1169 met the objectives of the NSE. SNWA and LVVWD have maintained an extensive groundwater and surface-water monitoring network with the first monitoring report submitted to the NSE in 1999. All data associated with Orders 1169 and 1169A collected by SNWA and LVVWD have been submitted to the NSE.

SNWA and LVVWD appreciate your careful consideration of the data collected under the Orders 1169 and 1169A study. If you have any questions regarding this report, please contact Andrew Burns at (702) 862-3772 or Jeffrey Johnson at (702) 862-3748.

Sincerely,

Zane L. Marshall  
Director, Water & Environmental Resources

Enclosure

ZLM:JJ:lmv

c: Richard A. Felling, Chief, Hydrology Section, Nevada Division of Water Resources  
John Guillory, Supervising Engineer, Division of Water Resources

SNWA MEMBER AGENCIES

Big Bend Water District • Boulder City • Clark County Water Reclamation District • City of Henderson • City of Las Vegas • City of North Las Vegas • Las Vegas Valley Water District

**Document (SNWA Report) Located at JA Vol. 27 at JA\_11813 to  
JA\_11955**

# **EXHIBIT 24**

**Document (CSI Closing) Located at JA Vol. 43 at JA\_17176 to  
JA\_17197**

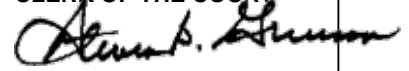
# **EXHIBIT 25**



**Document (Vidler Closing Statements) Located at JA Vol. 43 at  
JA\_17208 to JA\_17231**

# **EXHIBIT 26**

**Document (September 23, 2019 Transcript Excerpts) Located at JA  
Vol. 44 at JA\_17357 to JA\_17364**



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7  
8 *Attorneys for Georgia-Pacific Gypsum LLC  
and Republic Environmental Technologies, Inc.*

9  
10 **DISTRICT COURT**  
11 **CLARK COUNTY, NEVADA**

12 \* \* \* \*

13 GEORGIA-PACIFIC GYPSUM LLC,  
14 AND REPUBLIC ENVIRONMENTAL  
TECHNOLOGIES, INC.

15 Petitioners,

16 vs.

17 TIM WILSON, P.E. Nevada State Engineer,  
18 DIVISION OF WATER RESOURCES, and the  
DEPARTMENT OF CONSERVATION AND  
19 NATURAL RESOURCES,

20 Respondent.

CASE NO.: A-20-816761-C (Lead Case)

DEPT. NO.: 1

**Consolidated with:**

- A-20-817765-P
- A-20-818015-P
- A-20-817977-P
- A-20-818069-P
- A-20-817840-P
- A-20-817876-P
- A-21-833571-J

**OPENING BRIEF IN SUPPORT OF  
PETITION FOR JUDICIAL  
REVIEW OF ORDER 1309**

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27 *Attorneys for Georgia-Pacific Gypsum LLC  
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126 Nev. 187, 234 P.3d 912 (2010) ..... 2

*Howell v. Ricci*,  
124 Nev. 1222, 197 P.3d 1044 (2008) ..... 24

*Id. a*,  
t 273, 772 P.2d ..... 32

*In re Nev. State Eng’r Ruling No.*,  
5823, 128 Nev. 232, 277 P.3d 448 (2012) ..... 4

*J.E. Dunn Nw., Inc. v. Corus Constr. Venture, LLC*,  
127 Nev. 72, 249 P.3d 501 (2011) ..... 25

*Jones v. Rosner*,  
102 Nev. 215, 719 P.2d 805 (1986) ..... 3

1	<i>McLaughlin v. Hous. Auth. of the City of Las Vegas,</i>	
2	227 P.2d 206 (1951).....	25
3	<i>Pawlik v. Deng,</i>	
4	134 Nev. 83, 412 P.3d 68 (2018).....	25, 26
5	<i>Public Serv. Comm’n of Nev. v. Southwest Gas Corp.,</i>	
6	99 Nev. 268, 772 P.2d 624 (1983).....	28, 32
7	<i>Town of Eureka v. Office of State Eng’r of State of Nev., Div. of Water,</i>	
8	<i>Res.</i> , 108 Nev. 163, 826 P.2d 948 (1992).....	2, 4
9	<i>Wilson v. Pahrump Fair Water, LLC,</i>	
10	137 Nev., Adv. Op. 2, 481 P.3d 853, (2021).....	3, 4, 23
11	Statutes	
12	16 U.S.C.A. §1536.....	35
13	16 USC § 1537a.....	34
14	NRS 233B.038.....	32
15	NRS 239B.030.....	38
16	NRS 533.024.....	22
17	NRS 533.024(1)(e).....	23, 24
18	NRS 533.110(7).....	33
19	NRS 533.370.....	14
20	NRS 533.450(1).....	1
21	NRS 534.110.....	30
22	NRS 534.110(7).....	27
23	Rules	
24	NRAP 28(e).....	39
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1 **INTRODUCTION:**

2 Petitioners Georgia-Pacific Gypsum LLC (“Georgia-Pacific”) and Republic  
3 Environmental Technologies, Inc. (“Republic”) (collectively, “Petitioners”), by and through  
4 counsel Sylvia Harrison, Esq., Lucas Foletta, Esq., and Sarah Ferguson, Esq. of the law firm of  
5 McDonald Carano LLP, hereby submit this Opening Brief (Points and Authorities) in support  
6 of their Petition for Judicial Review filed on July 15, 2021 of Order 1309 issued by Respondent  
7 Tim Wilson, P.E. Nevada State Engineer, Division of Water Resources, Department of  
8 Conservation and Natural Resources on June 15, 2020 (ROA 2-69, Ex. 1).<sup>1</sup>

9 **I. JURISDICTIONAL STATEMENT**

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

16 **II. STANDARD OF REVIEW**

17 An aggrieved party may appeal a decision of the State Engineer pursuant to NRS  
18 533.450(1). NRS 533.450(1). As to questions of fact, the State Engineer’s decision must be  
19 supported by “substantial evidence in the record[.]” *Eureka Cty. v. State Eng’r of Nev.*, 131  
20 Nev. 846, 850, 359 P.3d 1114, 1117 (2015) (quoting *Town of Eureka v. Office of State Eng’r of*  
21 *State of Nev., Div. of Water Res.*, 108 Nev. 163, 165, 826 P.2d 948, 949 (1992)). Where a  
22 decision is arbitrary and capricious it is not supported by substantial evidence. *See Clark*  
23 *County Educ. Ass’n v. Clark Cty. Sch. Dist.*, 122 Nev. 337, 339-40, 131 P.3d 5, 7 (2006)  
24 (concluding that an arbitrator’s award was “supported by substantial evidence and therefore not  
25 arbitrary, capricious, or unsupported by the arbitration agreement”).

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26  
27 <sup>1</sup> Each citation to the record includes both a citation to the bates range from the Record on  
28 Appeal (“ROA”) and a citation to the exhibit number from the Appendix of Exhibits, filed  
concurrently with this brief.



1 As to questions of law, the State Engineer’s decision cannot be contrary to law or in  
2 excess of the State Engineer’s statutory authority. *E.g., Great Basin Water Network v. State*  
3 *Eng’r*, 126 Nev. 187, 198-99, 234 P.3d 912, 919-20 (2010) (concluding the State Engineer  
4 violated his duty by failing to act on water appropriation applications within one year of the  
5 closing of the protest period as required by statute and remanding to the district court to remand  
6 to the State Engineer to re-notice the applications and reopen the related protest period); *Wilson*  
7 *v. Pahrump Fair Water, LLC*, 137 Nev., Adv. Op. 2, 481 P.3d 853, 856, (2021) (explaining that  
8 “[t]he State Engineer’s powers thereunder are limited to ‘only those . . . which the legislature  
9 expressly or implicitly delegates’”) (quoting *Clark Cty. v. State, Equal Rights Comm’n*, 107  
10 Nev. 489, 492, 813 P.2d 1006, 1007 (1991)). In determining the existence of reversible legal  
11 error, the district court “decide[s] ‘pure legal questions without deference to an agency  
12 determination.’” *City of Reno v. Bldg. & Const. Trades Council of N. Nev.*, 127 Nev. 114, 119,  
13 251 P.3d 718, 721 (2011) (quoting *Jones v. Rosner*, 102 Nev. 215, 217, 719 P.2d 805, 806  
14 (1986)); *see also In re Nev. State Eng’r Ruling No. 5823*, 128 Nev. 232, 238-39, 277 P.3d 448,  
15 453 (2012) (noting that a presumption of correctness does not extend to “purely legal  
16 questions”). Thus, a reviewing court may “undertake independent review of the construction of  
17 a statute” in determining the existence of legal error. *Town of Eureka*, 108 Nev. at 165, 826  
18 P.2d at 949; *see also In re Nev. State Eng’r Ruling No. 5823*, 128 Nev. at 238-39, 277 P.3d at  
19 453 (stating that when there are “purely legal questions, such as the construction of a statute . . .  
20 the reviewing court may undertake independent review”) (internal quotations omitted). As to  
21 the scope of the State Engineer’s authority, that “is a question of statutory interpretation,  
22 subject to de novo review.” *Pahrump Fair Water*, 137 Nev., Adv. Op. 2, 481 P.3d at 856.

23 As demonstrated below, Order 1309 is neither supported by substantial evidence nor  
24 supported by law.

25 **III. ISSUES PRESENTED**

26 1. Whether the State Engineer did not have on substantial evidence in ordering the  
27 consolidation of Kane Springs Valley, Coyote Spring Valley, Muddy River Springs Area,  
28 California Wash, Hidden Valley, Garnet Valley, and the northwest portion of the Black

1 Mountains Area hydrographic basins into the single hydrographic basin of the Lower White  
2 River Flow System.

3 2. Whether the State Engineer failed to rely on substantial evidence in determining the  
4 maximum sustainable quantity of groundwater that could be pumped from the LWRFS.

5 3. Whether the State Engineer exceeded his authority in consolidating the hydrographic  
6 basins thus reordering the priority of holders of Petitioners' water rights.

7 4. Whether the State Engineer violated Petitioners' due process rights in failing to provide  
8 notice to Petitioners or an opportunity to comment on the administrative policies inherent in the  
9 basin consolidation.

10 5. Whether the State Engineer engaged in *ad hoc* rulemaking in consolidating the basins.

11 6. Whether the State Engineer exceeded his authority in making a ruling on the federal  
12 Endangered Species Act.

#### 13 **IV. STATEMENT OF FACTS**

14 Pursuant to Order 1309, the Nevada State Engineer consolidated several administrative units  
15 ("hydrographic basins") consisting of the Kane Springs Valley, Coyote Spring Valley, Muddy  
16 River Springs Area, California Wash, Hidden Valley, Garnet Valley, and the northwest portion  
17 of the Black Mountains Area into a single hydrographic basin, designated as "The Lower White  
18 River Flow System" or "LWRFS." As discussed below, the Order is not supported by  
19 substantial evidence, was made without authority, is contrary to law, and significantly impairs  
20 Petitioners interests.

#### 21 **Petitioners' Interests Affected by Order 1309**

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

26 Georgia-Pacific has gypsum wallboard, gypsum plaster and polymer extrusion  
27 manufacturing operations located twenty miles north of the City of Las Vegas, Nevada, along  
28 U.S. Highway 91, in Apex, Nevada (the "Facility"), which has been in operation for four

1 decades. This facility is a very important asset for Georgia Pacific and employs approximately  
2 156 employees.

3 The wallboard operation consists of crushers, screens, calciners, aggregate dryers,  
4 impeller mills, mixers, storage bins, conveyors, and a board dryer to manufacture wallboard.  
5 The plaster operation produces two grades of plaster designated as alpha and beta and consists  
6 of crushers, screens, calcining units, and packaging equipment. The polypropylene resin mat  
7 operation consists of a vacuum loader, hopper dryer, pigment feeder, resin extruder and die  
8 head, water tank cooling and forming system, cutter/slitter, and winder. The Facility currently  
9 employs approximately 150 people.

10 This Facility has one permitted on-site well which is the only source of water available  
11 for production and domestic water usage. The facility is permitted to withdraw 47 million  
12 gallons per year. The majority of the permitted water is used in wallboard production with the  
13 remainder being used in the polymer extrusion process as well as the site's domestic water  
14 uses.

15 Republic's Apex Regional Landfill complex ("Apex Landfill") is located at 13550 N  
16 Highway 93, Las Vegas, Nevada and encompasses over 2,200 acres. Apex Landfill performs  
17 the critical task of providing environmentally safe and reliable daily waste disposal services for  
18 nearly 3 million residents and hundreds of businesses in the cities of Las Vegas, North Las  
19 Vegas, and Henderson, as well as Clark County. Additionally, the Apex Landfill site includes a  
20 sand and gravel operation operated by Las Vegas Paving Corp. which is Nevada's top heavy  
21 civil construction company. To ensure the highest quality of service for its customers, Apex  
22 Landfill operates twenty-four hours per day, seven days per week, fifty-two weeks per year.  
23 Republic safely disposes of over 8,000 tons of waste per day at Apex Landfill through its  
24 resources of 478 trucks, more than 1200 employees and 2 transfer stations.

25 To perform the daily operations, the site utilizes approximately 150 million gallons of  
26 water per year from its six permitted wells. A predictable and stable water supply is critical to  
27 allow Apex Landfill to continue to provide uninterrupted service for its millions of customers,  
28 as well as plan for meeting the increasing demand for future disposal capacity.

1 As discussed below, the State Engineer’s issuance of Order 1309 will impermissibly  
2 limit Petitioners’ right to appropriate water, long established under Nevada law, immediately  
3 deprives Petitioners’ of the relative priority of their water rights, and will seriously jeopardize  
4 the viability of their operations and threaten the loss of the significant benefits they provide to  
5 the State and local economies.

### 6 **Background to Issuance of Order 1309**

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

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

25 Administration of groundwater rights is made particularly complex when the main  
26 source of groundwater is not “basin fill” or alluvium, but aquifers found in permeable geologic  
27 formations lying beneath the younger basin fill, and which may underlie large regions that are  
28 not well defined by the present-day hydrographic basins. This is the case with Nevada’s

1 “Carbonate Aquifer.”

## 2 **The “Carbonate Aquifer”**

3 Much of the bedrock and mountain ranges of Eastern Nevada are formed from a  
4 sequence of sedimentary rocks laid down during the Paleozoic Era (spanning a period roughly  
5 542 million years ago to 251 million years ago). Many of these formations are limestones or  
6 dolomites, commonly referred to as “carbonates,” due to the chemical composition of the  
7 minerals composing the rocks. While limestone and dolomite are not particularly permeable,  
8 these formations have been extensively deformed through folding and faulting caused by  
9 geologic forces. This deformation has caused extensive fracture and fault systems to form in  
10 these carbonate rocks, with permeability enhanced by the gradual solution of minerals. The  
11 result is an aquifer system that over time has accumulated large volumes of water with some  
12 apparent degree of connection throughout the much of area. *See generally* ROA 36062-67, Ex.  
13 14; ROA 661, Ex. 8.

14 The valley floors in the basins of Eastern Nevada are generally composed of alluvium  
15 comprised largely of relatively young (<5 million years) unconsolidated sands, gravels, and  
16 clays. This sequence is loosely referred to as the “Alluvial Aquifer,” the aquifer for most  
17 shallow wells in the area.

18 Most of the water in the Carbonate Aquifer is present due to infiltration of water  
19 thousands of years ago; recent recharge from present day precipitation may represent only a  
20 fraction of the water stored.

21 Significant pumping of the Carbonate Aquifer in the LWRFS began in the 1980s and  
22 1990s. Initial assessments of the water available in the Aquifer suggested it would provide a  
23 new abundant source of water for Southern Nevada. Because the prospective water resources  
24 of the LWRFS carbonate appeared to be substantial, nearly 100 water right applications for  
25 over 300,000 acre feet were filed in SE’s office. ROA 4, Ex. 1. By 2001, the State Engineer  
26 had granted more than 40,000 acre feet of applications in the LWRFS. These applications were  
27 apparently granted based more on optimism than science. Concerned over the lack of  
28 information regarding the sustainability of water resources from the Carbonate Aquifer, the

1 State Engineer began hearings in July and August 2001 on water right applications. *Id.* On  
2 March 8, 2002, the State Engineer issued Order 1169, holding applications in abeyance in the  
3 LWRFS pending further studies. *Id.*; *see also* ROA 659-69, Ex. 8 (Order 1169). The Order  
4 applied to Hydrographic Basins 210, 215, 216, 217, 219, and 220. ROA 664-65, Ex. 8. Basin  
5 218 was subsequently added to this order. ROA 659-69, Ex. 8; *see also* ROA 654, Ex. 7.

### 6 **Order 1169A**

7 Order 1169A, issued December 21, 2012 (ROA 654-58, Ex. 7), set up an ambitious test  
8 to “stress” the Carbonate Aquifer through two years of aggressive pumping, combined with  
9 examination of water levels in monitoring wells located throughout the LWRFS. Participants in  
10 the Aquifer test were Southern Nevada Water Authority (“SNWA”)/Las Vegas Valley Water  
11 District (“LVVWD”), Moapa Valley Water District, Coyote Springs Investments, LLC, Moapa  
12 Band of Paiutes, and Nevada Power Company. Pumping included 5,300 acre feet per annum  
13 (“afa”) in Coyote Spring Valley, 14,535 afa total carbonate pumping, and 3,840 afa alluvial  
14 pumping.<sup>2</sup> ROA 6, Ex. 1. Pumping tests effects were examined at 79 monitoring wells and 11  
15 springs and streamflow monitoring sites. *Id.*

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

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27 <sup>2</sup> The Order uses the term acre-foot per year (afy), but for consistency with common usage,  
28 Petitioners use the equivalent term acre feet per annum.

1 **Interim Order 1303 Proceedings**

2 Faced with the problem of resolving the competing interests for water resources in the  
3 LWRFS, then-State Engineer Jason King issued Interim Order 1303 on January 11, 2019.  
4 ROA 635-53, Ex. 6. The ordering provisions in Interim Order 1303 provide in pertinent part:

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

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

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

13 a. The geographic boundary of the hydrologically connected  
14 groundwater and surface water systems comprising the Lower White River  
Flow System;

15 b. The information obtained from the Order 1169 aquifer test and  
16 subsequent to the aquifer test and Muddy River headwater spring flow as it  
relates to aquifer recovery since the completion of the aquifer test;

17 c. The long-term annual quantity of groundwater that may be pumped  
18 from the Lower White River Flow System, including the relationships  
between the location of pumping on discharge to the Muddy River Springs,  
19 and the capture of Muddy River flow;

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

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

23 ROA 647-48, Ex. 6.

24 In July and August 2019, reports and rebuttal reports were submitted discussing the four  
25 matters set forth in Interim Order 1303. On July 25, 2019, the State Engineer issued a Notice  
26 of Pre-Hearing Conference. ROA 513-18, Ex. 4. On August 9, 2019, the State Engineer held a  
27 prehearing conference. ROA 519-22, Ex. 5. On August 23, 2019, the State Engineer issued a  
28 Notice of Hearing (which it amended on August 26, 2019), noting that the hearing would be

1 “the first step” in determining how to address future management decisions, including policy  
2 decisions, relating to the LWRFS. ROA 263, Ex. 2 (Notice); ROA 285, Ex. 3 (Amended  
3 Notice). The Hearing Officer also made it clear that “any other matter believed to be relevant”  
4 as specified in ordering paragraph 1(e) of Order 1303 would not include any discussion of the  
5 administrative impacts of consolidating the basins or of any policy matters affected by this  
6 decision – as described more fully below in Section V(D).

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

### 9 **Order 1309**

10 The State Engineer issued Order 1309 on June 15, 2020. *See generally* ROA 2-69, Ex.  
11 1. Notably, following the submission by the participating stakeholders of closing statements at  
12 the beginning of December 2019, the State Engineer engaged in no additional public process  
13 whatsoever and solicited no additional input regarding “future management decisions,  
14 including policy decisions, relating to the Lower White River Flow System basins.” *See* ROA  
15 285, Ex. 3. Thus, the Order 1303 Hearing was not just the first step in the State Engineer’s  
16 decisions concerning the LWRFS basin management set forth in Order 1309, it was the only  
17 step.

18 The first three ordering paragraphs state as follows:

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

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

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

ROA 66, Ex. 1.



1 The Order provides no guidance whatsoever as to how the new “single hydrographic basin”  
2 will be administered and no clear analysis as to the basis for the 8000 afa number for the  
3 maximum sustainable yield.

4 As a result of the consolidation of the basins, the relative priority of all water rights  
5 within the seven affected basins will be reordered and the priorities considered in relation to all  
6 water rights holders in the consolidated basins, rather than in relation only to the other users  
7 within the original separate basins. Petitioners’ water rights are some of the earliest priority  
8 rights relative to other users within the Garnet Valley hydrographic basin – a priority that  
9 would have protected their right to use water for the foreseeable life of their facilities. Order  
10 1309 results in the immediate loss of Petitioners’ priority relative to other water users in the  
11 consolidated administrative basins and significantly affects their security in this critical  
12 resource. Taken together with the arbitrary determination of the maximum pumping volume  
13 ordered in Paragraph 2, the reordering of priorities will subject any water rights with a priority  
14 date of March 31, 1983 or later to possible curtailment, based upon the volume of prior  
15 “senior” rights. This cutoff date would subject the Georgia Pacific water right (with a priority  
16 date of October 28, 1986) to curtailment, as well as all of Republic’s rights, other than two  
17 1981 priority permits. The detrimental impact on Republic and Georgia Pacific of the Order’s  
18 reordering priorities is illustrated by the following summary of the relevant water rights  
19 appropriations, as reflected in the State Engineer’s 2017 spreadsheet of water rights by priority  
20 with pumpage inventory. ROA 35556-58, Ex. 11.

21 The first permitted water appropriation from Garnet Valley was filed by Technichrome  
22 in July 1959 for 3 acre feet, followed by a filing in July 1967 for 133.8 acre feet by Chemical  
23 Lime Company. This was followed by a permit for 74.57 with a priority date of July 30, 1980,  
24 and a permit for 100 acre feet with a priority date of October 20, 1981. Republic  
25 Environmental Technologies, Inc. filed applications on that same day for a for a total of 194  
26 acre feet. Two other applications were filed on that same day for an additional 14 acre feet.  
27 No other permits were issued for Garnet Valley until Georgia Pacific’s permit for 144 acre feet  
28 with a priority date of October 28, 1986, followed by an appropriation in March, 1987 for 156

1 acre feet, and then Republic’s nine permits dated October 3, 1988. The cumulative duty for  
2 the basin was approximately 700 acre feet at that time – the new Republic permits added  
3 approximately 275 acre feet. Thus, by 1988, Republic and Georgia Pacific had established  
4 among the most senior water rights in the Garnet Valley hydrographic basin, with  
5 approximately 380 acre feet held by others. *See* ROA 35556-58, Ex. 11.

6 The magnitude of the effect of the application of the reordering of priorities resulting  
7 from Order 1309 is thrown into focus by the fact that between 1981 (Republic’s first priority  
8 date) and 1986 (Georgia Pacific’s priority date), the State Engineer issued permits for  
9 appropriations totaling more than 17,000 acre feet, primarily to Coyote Springs Investment  
10 LLC and SNWA, virtually all from groundwater with diversion points in the Coyote Springs  
11 hydrographic basin. The cumulative duty from the combined LWRFS basins in 1981 was  
12 about 7300 acre feet. By 1986, it was more than 24,500 acre feet. *See* ROA 35556-58, Ex. 11.

13 In short, Order 1309 not only deprives Georgia Pacific and Republic of the value of  
14 their priority dates, it relegates their rights to a position junior to more than 17,000 acre feet of  
15 now-senior rights – more than twice the 8000 acre feet that the Order 1309 concludes can be  
16 sustainably pumped from the combined LWRFS.

### 17 **Subsequent Events**

18 The perverse effects of Order 1309 on priorities are underscored by the following recent  
19 developments. In the fall of 2020, Nevada Power Company dba NV Energy filed applications  
20 with the Division of Water Resources to change the place of diversion of 1515.38 afa of water  
21 rights currently having sources in shallow alluvial aquifers in the Muddy River Springs Area to  
22 deep wells sourced in the carbonate aquifer in Garnet Valley (the “NPC Applications”). The  
23 water was formerly utilized for the now de-commissioned Reid Gardner coal plant. Georgia  
24 Pacific and Republic filed protests of these applications on the basis that in previous rulings,  
25 including the most recent “pre-Order 1309” Ruling 6256 (ironically ruling on a Nevada Power  
26 application among others), the State Engineer had determined that there was no unappropriated  
27 water in Garnet Valley Basin, and accordingly, the Applications should be denied. *See* ROA  
28 813-14, Ex. 9. The proposed new wells are located near Petitioners’ wells and new pumping

1 could affect their water supply. The NPC rights have priority dates considerably senior to those  
2 of Republic and Georgia Pacific, and Petitioners argued that if the NPC Applications were  
3 granted, they should therefore be treated as new appropriations under NRS 533.370 with a new  
4 priority date. *See* Request for Judicial Notice, Exs. 3-15.<sup>3</sup>

5 The Southern Nevada Water Authority (“SNWA”) filed protests on very similar  
6 grounds, arguing that the rights should be retired and that further pumping from the carbonate  
7 aquifer would exacerbate the overdraft of the carbonate aquifer within the LWRFS. The City of  
8 North Las Vegas (“CNLV”) also protested the applications. Request for Judicial Notice, Ex.  
9 15. NPC responded to the protests, arguing that under Order 1309, Garnet Valley was now part  
10 of the LWRFS administrative basin, that the sustainable yield was therefore 8000 afa, and that  
11 the transfer could not be considered an “interbasin” transfer as Order 1309 had determined the  
12 combined basins to be “the same source of supply.” Request for Judicial Notice, Ex. 16. To  
13 date, the State Engineer has taken no action on the applications. It seems apparent that but for  
14 the effect of Order 1309, the NPC Applications would have been summarily denied. *Id.*

15 On July 15, 2021, the Southern Nevada Water Authority Board unanimously approved  
16 an agreement entered into among SNWA, the City of North Las Vegas, and NV Energy.  
17 Pursuant to the July 15, 2021 agreement, SNWA and CNLV will withdraw their protests to the  
18 NPC Applications, and instead will cooperate in furthering the applications. If the NPC  
19 Applications are approved, NV Energy will make some of the water rights available to CNLV  
20 to provide it senior water rights to serve its Apex area customers. The parties to the agreement  
21 intend to develop a Garnet Valley Groundwater Management Plan that will set a “sustainable  
22 yield” for long-term pumping, limited to 2000 afa for *all water rights holders*. Neither of  
23 Petitioners has been contacted or consulted regarding this agreement. Ironically, the agreement  
24 relies on Order 1309 for the grounds that would allow approval of the NPC Applications, but  
25 treats Garnet Valley as a separate basin with a limited sustainable yield. Motion, SNWA

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26  
27 <sup>3</sup> Petitioners concurrently filed a Request for Judicial Notice in support of this brief, requesting  
28 that this Court take judicial notice of several public documents. Petitioners attached these  
documents to their Request for Judicial Notice, and cite these exhibits herein.

1 Agreement. If the agreement is implemented as planned, Petitioners' water rights would not  
2 only be junior to water rights within the LWRFS, but suddenly junior to an additional 1515 afa  
3 within the Garnet Valley "subbasin" while the sustainable yield would be only 2000 afa.

#### 4 **V. ARGUMENT**

##### 5 **A. The State Engineer Did Not Have Substantial Evidence in Ordering the** 6 **Consolidation of the LWRFS Hydrographic Basins into a single Hydrographic** 7 **Basin and Therefore Order Is Arbitrary, Capricious, and an Abuse of Discretion.**

8 The questions posed for stakeholder input in the Order 1303 proceedings presumed  
9 the findings in Interim Order 1303 were correct in seeking to establish a new consolidated  
10 hydrographic basin. The State Engineer did not directly solicit input as to the hydrologic  
11 connection among the basins, and only requested input as to the boundary of this proposed  
12 basin. At no time during the Order 1303 proceedings did the State Engineer disclose the  
13 criteria he would use in evaluating the connectivity of the basins and determining the new  
14 consolidated basin boundary. Remarkably, these criteria are explicitly disclosed for the first  
15 time in Order 1309. No opportunity was afforded the participants to directly address these  
16 criteria in their presentations, or critically, to address the appropriateness of these criteria.  
17 Revealing these criteria only after stakeholders had engaged in the extensive investigations,  
18 expert reporting, and the intense factual hearing pursuant requested by Order 1303 is an  
19 egregious violation of the participants' due process rights. Moreover, as discussed below, the  
20 criteria themselves are logically flawed, inconsistently applied and disregard other significant  
21 scientific data. Following are the criteria as presented in the Order:

22 The State Engineer has considered this evidence and testimony [regarding basin  
23 inclusion and basin boundary] on the basis of a common set of criteria that are  
24 consistent with the original characteristics considered critical in demonstrating a  
25 close hydrologic connection requiring joint management in Rulings 6254-6261  
26 and more specifically, include the following:

- 27 1) Water level observations whose spatial distribution indicates a  
28 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.

1 3) Water level hydrographs that demonstrate an observable increase  
2 in drawdown that corresponds to an increase in pumping and an  
3 observable decrease in drawdown, or a recovery, that corresponds to  
4 a decrease in pumping, are consistent with a direct hydraulic  
5 connection and close hydrologic connection to the pumping  
6 location(s).

7 4) Water level observations that demonstrate a relatively steep  
8 hydraulic gradient are consistent with a poor hydraulic connection  
9 and a potential boundary.

10 5) Geological structures that have caused a juxtaposition of the  
11 carbonate-rock aquifer with low permeability bedrock are consistent  
12 with a boundary.

13 6) When hydrogeologic information indicate a close hydraulic  
14 connection (based on criteria 1-5), but limited, poor quality, or low  
15 resolution water level data obfuscate a determination of the extent of  
16 that connection, a boundary should be established such that it  
17 extends out to the nearest mapped feature that juxtaposes the  
18 carbonate-rock aquifer with low-permeability bedrock, or in the  
19 absence of that, to the basin boundary.

20 ROA 48-49, Ex. 1.

21 Beginning with criterion number 1, each of these criteria is based simply upon  
22 “consistency,” overlooking the obvious need to consider their probative value. It is a  
23 fundamental principle of logic that mere consistency of an observation with a hypothesis does  
24 not prove the hypothesis: “consistency” does not eliminate other possibilities. Number 2 is  
25 illogical. The criterion indicates groundwater may respond to “climate, pumping, or some  
26 other dynamic.” Water levels in hydrologically separated basins could respond with a  
27 “similar temporal pattern” as a result of climate or as a result of similar pumping volumes in  
28 proximity to the separate wells. The causes of these patterns would have nothing whatsoever  
to do with a hydrologic connection. A similar criticism applies to number 3. Similar  
drawdown and recovery of water levels in discrete separate basins could occur without any  
connection between the basins, for example based upon regional climatic signals. As to  
number 4, a steep hydraulic gradient could be created in the “cone of depression” resulting  
from a significant volume of groundwater being pumped from a single location. Wells in the  
vicinity of the cone of depression could have very different groundwater levels reflecting a  
steep hydraulic gradient because they have a good hydraulic connection, not a “poor” one.  
This is a phenomenon observed throughout Nevada in the case of mine dewatering, for

1 example. With respect to number 5, the record illustrates cases where carbonate aquifer is  
2 juxtaposed against lower permeability rock, creating not a basin boundary, but a preferential  
3 groundwater flow path *within* a basin. See e.g., ROA 35628, 35634, 35638, Ex. 13.

4 Not only are these criteria logically flawed, the State Engineer glosses over the  
5 challenges of developing reliable data to support them. With the exception of criterion  
6 number 5, each of these criteria depend on the accurate measure of groundwater levels, yet the  
7 Order ignores testimony regarding factors that could affect this accuracy. For example, Dr.  
8 Peter Mock, representing Vidler Water Company and Lincoln County Water District (“LC-  
9 V”), testified on the challenges posed by attempting to measure one-foot incremental changes  
10 at water levels more than a thousand feet below ground surface, particularly where different  
11 measuring devices were used at different times during the Order 1169 pump test. He noted  
12 that water levels obtained from transducers could differ from those measured by sounders by  
13 as much as a foot. In short, “working at the edges” [of the area covered by the 1169 pump  
14 test] the data are unreliable. ROA 53564, Ex. 28 (Hr’g Tr. at 1410:2-1411:23).<sup>4</sup> Dwight  
15 Smith, testifying for the City of North Las Vegas, noted the importance of factoring in  
16 barometric pressure, which can result in seasonal water level fluctuations, and noted these had  
17 not been taken into consideration. ROA 53574-75, Ex. 28 (Hr’g Tr. at 1452:18-1455:13).  
18 Given the small magnitude of water level changes being examined in the LWRFS, these small  
19 deviations could have a significant impact on the correct interpretation of hydrologic  
20 connectivity. The Order does not address these issues.

21 Correctly interpreting water level fluctuations also depends on accurate pumping data.  
22 The significance of inaccurate records was dramatically underscored by Mr. Smith’s criticism  
23 of the model SNWA used to argue the existence of “one to one” connectivity throughout the  
24 LWRFS. Mr. Smith demonstrated that the input data SNWA used to calibrate its multi-  
25 linear regression model of pumping trends was based on highly inaccurate historical  
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27 <sup>4</sup> To ensure accurate citations, citations to the Hearing Transcripts include an additional citation  
28 to the original transcript page and line numbers.

1 pumping records from Garnet Valley. This error invalidated SNWA’s analysis and the  
2 reported correlation. The error not only caused a false relationship to Garnet Valley  
3 pumping, but also impacted all the other reported correlations, or lack thereof, for all  
4 simulated pumping centers in the SNWA model. ROA 52183-87, Ex. 24; ROA 53573, Ex.  
5 28 (Hr’g Tr. at 1446:2-1448:20).

6 The application of criteria numbers 5 and 6 obviously depends on a correct  
7 interpretation of geology. Except where there is a surface expression, the complex geology of  
8 the LWRFS bedrock can be inferred only from geologic mapping or explored through remote  
9 sensing (geophysical) methods.<sup>5</sup> Some participants undertook extensive sophisticated  
10 geophysical studies specifically in response to Order 1303, including, for example, LC-V  
11 (ROA 36220-29, Ex. 15) and Coyote Springs Investment, LLC (ROA 35563, Ex. 12), or relied  
12 on prior geophysical studies, like the U.S. National Park Service (ROA 51894-95, Ex. 22).  
13 While the Order notes these studies in its summary of the participants’ presentations, the Order  
14 is devoid of any explicit discussion or examination of the merits or weight of evidence gathered  
15 through these tools. All of the geologic interpretations in the Order are simply conclusory  
16 findings, without any underlying analysis. Based upon the conclusions reached, these new  
17 studies may have been entirely disregarded and the State Engineer’s conclusions based only on  
18 inferences drawn from surface maps.

19 Not only are his criteria poorly developed and applied, the State Engineer ignored other  
20 significant factors which many participants employed in evaluating inter-basin connectivity,  
21 including groundwater temperature and chemical signatures. These factors were considered by  
22 each of the Moapa Band of Paiute Indians (ROA 38157-63, Ex. 16; ROA 38927-29, Ex. 17;  
23 ROA 38979-82, Ex. 18), U.S. National Park Service (ROA 51948-49, Ex. 23), and U.S. Fish

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24 <sup>5</sup> For example, a major study undertaken in cooperation with SNWA of the White River Flow  
25 System emphasized the importance of these geophysical methods: “However, geologic maps  
26 that focus on mineral or groundwater resources need more accurate assessments of the  
27 subsurface geology via geophysical methods and well data. The SNWA contracted for new  
28 gravity surveys, new AMT profiles, and analysis of available aeromagnetic data with the USGS  
office in Menlo Park, California. These data were used to prepare the geologic cross sections of  
this report.” ROA 35957, Ex. 14.

1 and Wildlife Service (“USFWS”) (ROA 49533, Ex. 21), among others. The importance of  
2 these factors is underscored by the State Engineer’s decision to omit the Lower Meadow Valley  
3 Wash from the administrative unit. The USFWS presented evidence based upon water  
4 chemistry and temperature that strongly suggested deep geologic formations underlying the  
5 Lower Meadow Valley Wash (“LMVW”) could be a significant source of water feeding Big  
6 Muddy Spring, which supplies approximately 30% of the flow of the Muddy River. ROA  
7 53120-23, Ex. 27 (Hr’g Tr. at 403:9-414:2). If this hypothesis were proven, it would be a  
8 compelling argument for the inclusion of LMVW into the LWRFS unit. However, the State  
9 Engineer justifies its exclusion by finding “that *data do not exist to apply his criteria*, and  
10 therefore [LMVW]... cannot be considered for inclusion into the LWRFS.” ROA 55, Ex. 1  
11 (emphasis added). In other words, by arbitrarily omitting temperature and chemistry from his  
12 criteria, the State Engineer was able to ignore these factors.<sup>6</sup>

13 Groundwater temperature, chemical signatures and water age are well-established factors in  
14 the study of groundwater flow paths. Indeed, multiple studies considering these factors have  
15 been conducted within the LWRFS with results having direct application to the matters  
16 addressed in Order 1303. *See e.g.*, ROA 51948-53, Ex. 23, ROA 49218-25, Ex. 20, ROA  
17 49533, Ex. 21. The State Engineer’s decision to ignore these criteria is inexplicable<sup>7</sup> – the very  
18 definition of arbitrary and capricious.

19 **B. The State Engineer Failed to Rely on Substantial Evidence in Determining**  
20 **the Maximum Sustainable Quantity of Groundwater that could be pumped from**

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21 <sup>6</sup> Remarkably, excluding the LMVW is further justified by criteria not among those enumerated  
22 in the Order:

23 Regarding the hydraulic connection between the Lower Meadow Valley Wash  
24 alluvial aquifer and the LWRFS, the State Engineer agrees with USFWS that a  
25 connection exists, but finds that any *impacts related to water development* in the  
26 Lower Meadow Valley Wash alluvial aquifer *are localized*, and *unrelated to the*  
27 *carbonate rock aquifer*, and can be *appropriately managed outside the LWRFS*  
28 joint management process.

ROA 51, Ex. 1 (emphasis added).

<sup>7</sup> . . . unless these criteria were only developed “after the fact” to support the State Engineer’s  
predetermined preferred outcome.



1                   **The LWRFS and Therefore the Order is Arbitrary, Capricious and an Abuse of**  
2   **Discretion**

3                   With respect to the critical question of the maximum sustainable yield, Order 1309  
4 includes no clear analysis as to the basis for the 8000 acre feet per annum (“afa”) number set  
5 forth in Ordering Paragraph 2. Indeed, the Order acknowledges “the evidence and testimony  
6 presented at the 2019 hearing did not result in a consensus among experts of the long-term  
7 annual quantity of groundwater that can be pumped. Recommendations range from zero to  
8 over 30,000 afa.... There is a near consensus that the exact amount that can be continually  
9 pumped for the long term-term *cannot be absolutely determined with the data available and*  
10 *that to make that determination will require monitoring of spring flow, water levels, and*  
11 *pumping over time.”* ROA 58, Ex. 1 (emphasis added). Further, “...there is almost unanimous  
12 agreement among experts that data collection is needed to further refine with certainty the  
13 extent of groundwater development that can continually pumped over the long term.” ROA 63,  
14 Ex. 1. However, the State Engineer discounts this uncertainty and finds “that the current data  
15 are adequate to establish an approximate limit on the amounts of pumping that can occur within  
16 the system, but [further data are] essential to refine and validate this limit.” *Id.* But the Order  
17 does not present actual data to support the “approximate” limit of 8000 afa. Rather, the Order  
18 cites a number of estimations from other participants that exceed this number, a few that are  
19 less, and then simply lands on 8000 afa, apparently based on amounts of current pumping from  
20 the carbonate aquifer and the possibility that the spring flow “may be approaching steady  
21 state.” ROA 64, Ex. 1.

22                   Moreover, Order 1309 does not present the 8000 afa limitation as a temporary  
23 “approximation” subject to validation, but as an absolute limitation with immediate weighty  
24 consequences and, further, keeps the Petitioners and all other stakeholders in suspense as to  
25 what exactly those weighty consequences might be. As discussed above, the Order is devoid of  
26 any direction or guidance as to any future refinement or modification of this limitation. *Id.*

27                   Underscoring the arbitrariness of the conclusion in Ordering Paragraph 2, the Order  
28 adds the Kane Springs Valley hydrographic basin to the joint administrative unit but fails to

1 acknowledge the additional water resources available from the Kane Springs basin. Since  
2 Interim Order 1303 did not include the Kane Springs Valley hydrographic basin, the  
3 participants' assessment of the sustainable water resources of the LWRFS generally did not  
4 quantify Kane Springs water resources and the State Engineer made no effort to collect  
5 evidence on this issue. According to the Division's Hydrographic Basin Abstract as set forth  
6 prior to issuance of the Order, the Kane Springs Valley Hydrographic Basin (Basin 206) has a  
7 perennial yield of 1000 afa; the contribution to the LWRFS may be more than 4000 afa.<sup>8</sup>  
8 Nothing in the Order indicates that the State Engineer considered this resource in determining  
9 the LWRFS limitation.

10         Given the immediate and far-reaching consequences of Order 1309, the public deserves  
11 a careful and considered analysis of the limitation imposed supported by substantial evidence  
12 and not an arbitrary "guestimate," or, in the alternative, the State Engineer should provide a  
13 process for determining a limitation that can be adequately supported by empirical evidence.

14         Perhaps even more arbitrary and capricious is the Order's application of this 8000 afa  
15 limit across the entire LWRFS without regard to the location of pumping. Just as the Order  
16 emphasizes the uncertainty associated with the determination of the sustainable pumping limit,  
17 the Order emphasizes the uncertainty of the relative effect of the location of groundwater  
18 extractions (ROA 60, Ex. 1), and notably, makes *no finding* that the location of pumping is  
19 irrelevant.

20         Determining the amount and behavior of groundwater in the deep subsurface of a  
21 complex geologic system is not simple, as clearly recognized by Order 1303 and the procedures  
22 established by the State Engineer ostensibly to gather evidence over a course of months  
23 culminating in a two-week hearing. Stakeholders presented expert interpretations of  
24 groundwater levels detected in monitoring and production wells, extrapolations of surface

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26 <sup>8</sup> "SNWA (2007) assessed local and regional flow in southeastern Nevada and found regional  
27 inflow to Coyote Spring Valley was 50,700 AFY, of which . . . Kane Springs Valley  
28 contributes 4,190 AFY. . . SNWA (2007) estimated local recharge to be 2,130 AFY." ROA  
35648, Ex. 13 (citing Southern Nevada Water Authority, *Water-Resources Assessment and  
Hydrologic Report for Cave, Dry Lake, and Delmar Valleys* (June 2007)).

1 geology to interpret the subsurface character of the Carbonate Aquifer, results of sophisticated  
2 remote sensing techniques to infer geologic structures that might control groundwater flow,  
3 highly detailed studies of groundwater chemistry, and complex hydrologic models to advance  
4 their positions. Yet, despite the thousands of pages of exhibits and expert testimony, Order  
5 1309 is virtually devoid of any independent examination of the relative merits and validity of  
6 any of this information. Most of the Order consists of selective and imprecise summaries of the  
7 participants' presentations. There is no technical analysis, no detailed consideration of the  
8 weight of evidence, nor discussion or evaluation of the numerous models proposed or  
9 challenged by the participants relevant to the factual questions posed. Indeed, most of the  
10 Order reads as if the Office of the State Engineer simply took a poll of the participants'  
11 positions.

12 Pursuant to NRS 533.024, the Legislature has declared that:

13 1. It is the policy of this State:

14 (c) To encourage the State Engineer to consider the *best available science* in  
15 rendering decisions concerning the available surface and underground sources of  
water in Nevada." (emphasis added)

16 Far from using the "best available science," the State Engineer in Order 1309 has  
17 adopted a limited set of illogical criteria which cannot be consistently applied nor supported by  
18 reliable data. He has arbitrarily ignored scientific information that would help identify and  
19 define groundwater flow paths critical to an understanding of the LWRFS. He has discounted  
20 sophisticated new geophysical studies specifically undertaken to create a better understanding  
21 of the geology of the LWRFS, apparently in favor of simplistic interpretations of geologic  
22 maps. Although the Order is replete with findings as to "the weight of the evidence," these  
23 findings are virtually unsupported as to what evidence was "weighed" and why some evidence  
24 weighed more than other evidence.

25 **C. The State Engineer Exceeded His Authority in Deciding to Engage in**  
26 **Conjunctive Management and Joint Administration of the Hydrographic Basins**  
**that Make Up The LWRFS.**

27 The State Engineer relied on a single statute, NRS 533.024(1)(e), in determining to  
28 subject the LWRFS to "conjunctive management and joint administration" of the various

1 groundwater basins that make up the LWRFS and re-ordering the priority of the rights therein  
2 on that basis. ROA 43, Ex. 1. Because NRS 533.024(1)(e) is not a grant of authority, the State  
3 Engineer’s reliance on it to upend the priority of certificated and proven water rights whose  
4 priorities have been in place for nearly 39 years was misplaced.

5         The Nevada Supreme Court has made it clear that the State Engineer is a creature of  
6 statute and his or her actions must be within a statutory grant of authority. *Pahrump Fair*  
7 *Water*, 137 Nev., Adv. Op. 2, 481 P.3d at 856 (explaining that “[t]he State Engineer’s powers  
8 thereunder are limited to ‘only those . . . which the legislature expressly or implicitly  
9 delegates’” (quoting *Clark Cty.*, 107 Nev. at 492, 813 P.2d at 1007)); *see also Howell v. Ricci*,  
10 124 Nev. 1222, 1230, 197 P.3d 1044, 1050 (2008) (holding that the State engineer cannot act  
11 beyond his or her statutory authority). In deciding to subject the LWRFS to conjunctive  
12 management and joint administration, however, the State Engineer failed to identify a specified  
13 statutory grant of authority upon which to make that determination, citing merely to a statutory  
14 statement of policy.

15         For this reason, the State Engineer erred in relying on NRS 533.024(1)(e) as the sole  
16 basis upon which to base his decision as to how to manage the LWRFS and re-order rights in  
17 the various LWRFS groundwater basins. The statute confers no authority to the State Engineer  
18 whatsoever—let alone to re-order the priority of water rights. The statute is not a water  
19 management tool in and of itself; it is merely a declaration of the Legislature’s intent that,  
20 insofar as the State Engineer exercises existing management authority, he or she should do so  
21 consistent with the policy of the state to “[t]o manage conjunctively the appropriation, use and  
22 administration of all waters of this State, regardless of the source of the water.” NRS  
23 533.024(1)(e). As a statement of policy, NRS 533.024(1)(e) does not constitute a grant of  
24 authority to the State Engineer; Statements of policy from the Legislature do not serve as a  
25 basis for government action, but rather inform the interpretation of statutes that authorize  
26 specific action. *See, e.g., Pawlik v. Deng*, 134 Nev. 83, 85, 412 P.3d 68, 71 (2018).

27         In *Pawlik*, the Nevada Supreme Court expressed the relevance of statements of policy in  
28 terms as follows: “if the statutory language is subject to two or more reasonable interpretations,

1 the statute is ambiguous, and we then look beyond the statute to the legislative history and  
2 interpret the statute in a reasonable manner ‘in light of the policy and the spirit of the law.’” *Id.*  
3 (quoting *J.E. Dunn Nw., Inc. v. Corus Constr. Venture, LLC*, 127 Nev. 72, 79, 249 P.3d 501,  
4 505 (2011)). And while such statements of policy are accorded deference in terms of statutory  
5 interpretation, the Nevada Supreme court has specifically held that they are not binding. *See*  
6 *McLaughlin v. Hous. Auth. of the City of Las Vegas*, 227 P.2d 206, 93 (1951) (“It has often  
7 been said that the declaration of policy by the legislature, though not necessarily binding or  
8 conclusive upon the courts, is entitled to great weight, and that it is neither the duty nor  
9 prerogative of the courts to interfere in such legislative finding unless it clearly appears to be  
10 erroneous and without reasonable foundation.”); *see also Clean Water Coal. v. M Resort, Ltd.*  
11 *Liab. Co.*, 127 Nev. 301, 313, 255 P.3d 247, 255 (2011) (“The State acknowledges that when  
12 legislative findings are expressly included within a statute, those findings should be accorded  
13 great weight in interpreting the statute, but it points out that such findings are not binding and  
14 this court may, nevertheless, properly conclude that section 18 is a general law despite the  
15 Legislature's declaration to the contrary.”). Thus, statements of policy set forth by the  
16 Legislature are not operative statutory enactments, but rather tools to be used in interpreting  
17 operative statutes—and only then where such statutes are ambiguous on their face. *See Pawlik*,  
18 134 Nev. at 85, 412 P.3d at 71; *see also Cromer v. Wilson*, 126 Nev. 106, 109-10, 225 P.3d  
19 788, 790 (2010) (if the plain language of a statute “is susceptible of another reasonable  
20 interpretation, we must not give the statute a meaning that will nullify its operation, and we  
21 look to policy and reason for guidance”).

22 Here, the State Engineer identified no such underlying source of authority to make the  
23 decision he did. Nor is there any such authority. While Nevada law provides certain tools for  
24 the management of water rights in, for example, over appropriated basins, *e.g.*, NRS 534.110(7)  
25 (authorizing the State Engineer to “designate as a critical management area any basin in which  
26 withdrawals of groundwater consistently exceed the perennial yield of the basin”), there is  
27 nothing in the law that authorizes the re-prioritization of water rights on the basis of  
28 conjunctive management or joint administration. Indeed, the fact that the State Engineer had to

1 resort to a vague statement of policy to support his decision to dramatically depart from  
2 traditional water management tools in making his LWRFS is evidence of the extremity of his  
3 departure from statutory water management tools. Thus, the State Engineer exceeded his  
4 authority in subjecting the LWRFS to conjunctive management and joint administration.

5 **D. The State Engineer Violated Petitioners' Due Process Rights in Failing to**  
6 **Provide Notice to Petitioners or an Opportunity to Comment on the**  
7 **Administrative Policies Inherent in the Basin Consolidation.**

8 The notice and hearing procedure employed by the State Engineer failed to satisfy the  
9 requirements of due process because the notice failed to put the parties on notice that the State  
10 Engineer would decide on a management protocol for the LWRFS at the conclusion of the  
11 proceeding. Additionally, the hearing itself failed to satisfy due process because the parties  
12 were not afforded a full and complete opportunity to address the implications of the State  
13 Engineer's decision to subject the LWRFS to conjunctive management and joint  
14 administration.

15 The Nevada Supreme Court has held that “[a]lthough proceedings before administrative  
16 agencies may be subject to more relaxed procedural and evidentiary rules, due process  
17 guarantees of fundamental fairness still apply.” *Dutchess Bus. Serv.’s, Inc. v. Nev. State Bd. of*  
18 *Pharmacy*, 124 Nev. 701, 711, 191 P.3d 1159, 1166 (2008). In *Dutchess*, the Nevada Supreme  
19 Court noted further that “[a]dministrative bodies must follow their established procedural  
20 guidelines and give notice to the defending party of ‘the issues on which decision will turn and  
21 . . . the factual material on which the agency relies for decision so that he may rebut it.’” *Id.*  
22 With respect to notice and hearing, the Nevada Supreme Court has held that “[i]nherent in any  
23 notice and hearing requirement are the propositions that the notice will accurately reflect the  
24 subject matter to be addressed and that the hearing will allow full consideration of it.” *Public*  
25 *Serv. Comm’n of Nev. v. Southwest Gas Corp.*, 99 Nev. 268, 271, 772 P.2d 624, 626 (1983).

26 As stated above, the notice of hearing and amended notice of hearing (“Notice”) noticed  
27 an opportunity for the parties that submitted Order 1303 reports to explain their positions and  
28 conclusions with respect to the questions posed for consideration in Order 1303. *See* ROA  
262-82, Ex. 2; ROA 284-301, Ex. 3. Specifically, the notice as amended included the

1 following summary:

2 On August 9, 2019, the State Engineer held a pre-hearing conference regarding the  
3 hearing on the submission of reports and evidence as solicited in Order 1303.... The  
4 State Engineer established that the purpose of the hearing on the Order 1303 reports was  
5 to provide the participants an opportunity to explain the positions and conclusions  
6 expressed in the reports and/or rebuttal reports submitted in response to the Order 1303  
7 solicitation. The State Engineer directed the participants to limit the offer of evidence  
8 and testimony to the salient conclusions, including directing the State Engineer and his  
9 staff to the relevant data, evidence and other information supporting those conclusions.  
10 ***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.***

11 ROA 285, Ex. 3 (emphasis added).

12 The questions posed in Order 1303 did not relate to how to management the LWRFS—  
13 conjunctive or joint administration—but rather related to factual inquiries. As stated above,  
14 Order 1303 specifically authorized stakeholders to file reports addressing four specific areas  
15 none of which related to the management of the LWRFS. ROA 647-48. Ex. 6. Thus, in  
16 noticing the hearing to consider the reports submitted pursuant to Order 1303, there was no  
17 mention of consideration of the prospective management of the LWRFS—*i.e.*, whether it  
18 would be appropriately managed conjunctively and as a joint administrative unit.

19 Indeed, this was consistent with the Hearing Officer’s opening remarks at the August 8,  
20 2019, prehearing conference in which the State Engineer actively put participants off of  
21 providing input regarding that very question. The hearing officer stated as follows at the  
22 August 8 prehearing conference:

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

26 ***This larger substantive policy determination is not part of the particular proceeding.  
27 That’s part of later proceedings....”***

28 ROA 522, Ex. 5 (Hr’g Tr. at 10:6-20) (emphasis added).

1 The hearing officer gave additional consistent guidance at the outset of the September  
2 23 hearing, further directing the parties not to address policy issues even in relation to the fact  
3 that Order 1303 authorized stakeholders to include in their reports “[a]ny other matter believed  
4 to be relevant to the State Engineer's analysis.” ROA 648, Ex. 6. Specifically, the Hearing  
5 Officer directed as follows:

6 And while that fifth issue is [as set forth in Ordering Paragraph 1(e) of Order 1303] not  
7 intended to expand the scope of this hearing into making policy determinations with  
8 respect to management of the Lower White River Flow System basin’s individual water  
9 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.  
ROA 52962, Ex. 26 (Hr’g Tr. 6:4-15) (emphasis added).

10 Thus, not only did the notice not adequately notify the parties of the possibility of the  
11 consideration and resolution of policy issues, but the Hearing Officer consistently directed the  
12 parties to avoid the subject, compounding the due process violation; notwithstanding the  
13 Hearing Officer’s admonitions and the plain language of the notice, the State Engineer  
14 ultimately issued a dramatic determination regarding management of the LWRFS. In doing so,  
15 the State Engineer precluded the participants from providing input that would have allowed for  
16 the full consideration of the issue.

17 Participants and experts did not have the opportunity to, and were actively discouraged  
18 from addressing policy issues critical to the management of the LWRFS, including, but not  
19 limited to: whether Nevada law allows the State Engineer to conjunctively manage multiple  
20 hydrographic basins in a manner that modifies the relative priority of water rights due to the  
21 administration consolidation of basins; whether the State Engineer would establish a “critical  
22 management area” pursuant to NRS 534.110 and, if so, whether he would develop a  
23 groundwater management plan or defer to the stakeholders to develop one; whether Nevada  
24 law gives the State Engineer authority to designate a management area that encompasses more  
25 than one basin; whether “safe-yield” discrete management areas should be established within  
26 the proposed administrative unit; whether water rights holders enjoy a “property right” in the  
27 relative priority of their water rights such that impairing that right may constitute a “taking”;  
28 whether unused (or only sporadically used) senior water rights take precedence over



1 certificated or fully used junior rights, particularly where these junior rights are in continuous  
2 use to support economically significant enterprises; whether States compel quantification of  
3 federal reserved rights by a date certain; and whether the State Engineer should approach the  
4 legislature to seek different or additional management tools or authority. *See* ROA 52801-10,  
5 Ex. 25 (Georgia Pacific and Republic Closing Argument, outlining policy questions for  
6 consideration by the State Engineer at later proceedings, proceedings that never took place).  
7 The refusal to consider these issues ensured that the State Engineer’s decision was not based on  
8 a fully developed record.

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

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

26 ROA 54, Ex. 1 (emphasis added).

27         This language reflects a serious misjudgment of the effect of Order 1309. Insofar as  
28 Order 1309 subjects the LWRFS to conjunctive management and joint administration, resulting  
in reordering of priority of water rights in the LWRFS, the order effectuates a management  
scheme with far reaching consequences. Thus, agreeing on the one hand that an “effective  
management scheme” will be necessary to address challenges in the LWRFS, but contending it  
will be developed in the future, reveals a lack of awareness of the implications of the order to  
the detriment of not only the participants but all water rights holders in the LWRFS basins.

1 Without consideration of the implications of the management decision contained in the order, it  
2 cannot be based on a fully consideration of the issues presented. In affirmatively limiting the  
3 scope of the proceeding to include a full consideration of the issues, the State Engineer clearly  
4 violated due process. Both the notice and the hearing procedures employed failed to comport  
5 with due process.

6 **E. In Subjecting the LWRFS to Conjunctive Management and Joint**  
7 **Administration, the State Engineer Engaged in Ad Hoc Rulemaking.**

8 The decision to subject the LWRFS to conjunctive management and joint  
9 administration constituted ad hoc rulemaking because it imposed a standard of general  
10 applicability to the LWRFS and water rights therein with far-reaching consequences such that  
11 it could only legitimately be made in a rulemaking.

12 The Nevada Administrative Procedure Act defines a regulation as an “agency rule,  
13 standard, directive or statement of general applicability which effectuates or interprets law or  
14 policy, or describes the organization, procedure[,] or practice requirements of any agency.”  
15 NRS 233B.038. The Nevada Supreme Court has distinguished interpretive rulings from  
16 regulations by evaluating the significance and breadth of the policy concern at issue. In  
17 *Public Service Commn v. Southwest Gas Corp.*, the Public Utilities Commission used a utility  
18 rate increase case as a forum for imposing a new rate design affecting the manner in which  
19 public utilities charged various categories of customers. 99 Nev. at 270-71, 772 P.2d at 625.  
20 The Nevada Supreme Court held that the commission engaged in rulemaking despite the fact  
21 that the order specifically applied to Southwest Gas, because it “is of such major policy  
22 concern and of such significance to all utilities and consumers that it cannot be characterized  
23 as a simple adjudication in a contested case . . . .” *Id.* at 273, 772 P.2d at 627.

24 The State Engineer’s decision to subject the LWRFS to conjunctive management and  
25 joint administration is clearly a decision of “major policy concern.” Not only did the decision  
26 re-prioritize the water rights across multiple hydrographic basins, but it will necessarily result  
27 in complex and controversial management decisions going forward. To this point, since  
28 issuing Order 1309, the State Engineer has held one workshop and tentatively scheduled three

1 others to “work toward community and stakeholder derived solutions” to the management  
2 challenges in the LWRFS. The State Engineer has identified a number of potential options for  
3 addressing the management challenges including the most severe water management tools in  
4 Nevada law, “Reduction of active groundwater rights through relinquishments, cancellation,  
5 forfeiture, abandonment” and potentially establishing a “Critical Management Area  
6 Designation pursuant to NRS 533.110(7).” Request for Judicial Notice, Ex. 17. Thus, there  
7 can be no question of the significant and far-reaching consequences of the decision.

8 What’s more, the conjunctive and joint management of the LWRFS will be unique.  
9 The State Engineer has never managed multiple basins purported to be overprescribed by way  
10 of a determination that the basins be managed conjunctively or through joint administration.  
11 That the State Engineer has already acknowledged that a new “effective management scheme”  
12 is needed to address future challenges is evidence of the unique character of the regulatory  
13 approach providing further support for the conclusion that the State Engineer engaged in  
14 rulemaking. Subjecting the LWRFS to conjunctive management and joint administration  
15 should be done, if at all, in the context of a rulemaking, not a proceeding styled as a factual  
16 inquiry into the nature of the LWRFS in connection with which the parties were prevented  
17 from fully addressing the consequences of the determination.

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

22 Ordering Paragraph 3 states “The maximum quantity of water that may be pumped from  
23 the Lower White River Flow System Hydrographic Basin may be reduced if it is determined  
24 that pumping will adversely impact the endangered Moapa dace.” ROA 66, Ex. 1. This portion  
25 of the Order is underpinned by the following specific findings:

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

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

8       **WHEREAS**, the State Engineer concludes that it is against the public interest to allow  
9 groundwater pumping from the LWRFS that will reduce spring flow in the Warm  
10 Springs area to a level that would impair habitat necessary for the survival of the Moapa  
11 dace and could result in take of the endangered species.

12 ROA 46-47, Ex. 1.

13       In other words, Ordering Paragraph 3 is based upon the State Engineer's unauthorized  
14 and unsupported conclusion that groundwater users, the State Engineer, and the State of  
15 Nevada would be liable for a take under the Endangered Species Act ("ESA") if flow levels at  
16 the Warm Springs West gage to flow fall below a minimum rate of 3.2 cubic feet per second  
17 ("cfs"). The ESA, of course, is a federal law, administered by the U.S. Fish Wildlife Service  
18 ("USFWS"). *See* ESA 16 USC § 1537a. The State Engineer has not provided (and could not  
19 provide) the basis for his authority to determine when and under what circumstances a "take"  
20 of the Moapa dace would occur.<sup>9</sup> Notably, during the hearing, the USFWS expressly *declined*  
21 to endorse the conclusions stated in the State Engineer's findings quoted above. ROA 53140-  
22 41, Ex. 27 (Hr'g Tr. at 483:10-484:15).

23       Moreover, the State Engineer's "factual" conclusion that "it is necessary to maintain  
24 flow at minimum rate of 3.2 cfs in order to maintain habitat for the Moapa dace" is far from  
25 "clear." The USFWS has reached agreements with several parties for implementation of  
26 mitigation measures triggered by much lower flow rates at the Warm Springs West gage (*see*  
27 *e.g.*, ROA 10089, Ex. 10), and evidence was introduced at the Hearing of factors such as

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28 <sup>9</sup> 16 U.S.C.A. §1536, cited by the State Engineer as authority for "shared [ESA]  
responsibility" with the federal government, confers no authority or responsibility to States  
whatsoever, except in the context of consideration of *exemptions* from application of the  
ESA. The "shared responsibility" cited by the State Engineer is expressly referred to in the  
code as required cooperation between federal agencies to enforce the ESA.

1 temperature and presence of predators that may be more determinative of dace success. It has  
2 certainly not been conclusively established that groundwater pumping anywhere in the LWRFS  
3 will impact Warm Springs flows, particularly pumping in the far distal locations of Petitioners'  
4 wells. Including these findings and order in Order 1309 is a completely *ultra vires* act; nothing  
5 empowers the State Engineer to make a determination when a "take" has occurred under the  
6 ESA.

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

15 As a result of the lack of notice, the State Engineer failed to gather factual evidence or  
16 develop an adequate record to support his findings. Notably, the USFWS has not issued a  
17 biological opinion based on analysis of the effects on Moapa dace from groundwater pumping  
18 by users within the Garnet Valley hydrographic basin or other portions of the LWRFS beyond  
19 three specific users in Coyote Spring Valley and California Wash, and in the Muddy River  
20 Spring Area. ROA 42073-77, Ex. 19. The State Engineer, however, made no distinction  
21 regarding the location of groundwater pumping within the new administrative unit as it relates  
22 to his findings of potential take or curtailment. Yet his own findings require consideration of  
23 this factor:

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

ROA 60, Ex. 1.

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

5 **IV. CONCLUSION**

6 As set forth above, in issuing Order 1309, the State Engineer failed to rely on  
7 substantial evidence, and issuing the Order was arbitrary, capricious, and an abuse of  
8 discretion. The State Engineer lacked authority for the consolidation of the hydrographic  
9 basins, violated Petitioners’ due process rights, and engaged in ad hoc rule-making. The State  
10 Engineer had no cognizable authority to determine groundwater pumping within the LWRFS  
11 would violate the Endangered Species Act. Accordingly, Petitioners respectfully request the  
12 Court grant the following relief:

13 A. That the Order be set aside in its entirety;

14 B. That, in the event Ordering Paragraph 1 stands, the State Engineer should be  
15 precluded from reordering the priority of water rights except in relation to their original  
16 hydrographic basin, unless and until a fair and defensible administrative procedure can be  
17 developed that protects the expectation of Petitioners in the security of their water rights;

18 C. That in the event any portion of the Order stands, Ordering Paragraph 2 and the  
19 related findings be stricken;

20 D. That in the event any portion of the Order stands, Ordering Paragraph 3 and the  
21 related findings be stricken;

22 E. That the Court issue such other relief as it deems necessary and proper; and

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1 F. That the Court enter judgment in favor of Petitioners and against the State  
2 Engineer, the Division of Water Resources and the Department of Conservation and Natural  
3 Resources.

4 DATED this 27th day of August, 2021.

5 MCDONALD CARANO LLP

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**AFFIRMATION**

(Pursuant to NRS 239B.030)

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

/s/Lucas Foletta

Date: August 27, 2021

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1 **CERTIFICATE OF COMPLIANCE**

2 I hereby certify that I have read this **PETITIONER’S OPENING BRIEF IN**  
3 **SUPPORT OF PETITION FOR JUDICIAL REVIEW OF ORDER 1309** and to the best of  
4 my knowledge, information and belief, it is not frivolous or interposed for any improper  
5 purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate  
6 Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding  
7 matters in the record to be supported by appropriate references to the record on appeal. I  
8 understand that I may be subject to sanctions in the event that the accompanying brief is not in  
9 conformity with the requirements of Nevada Rules of Appellate Procedure.

10 DATED this 27th day of August, 2021.

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**CERTIFICATE OF SERVICE**

I hereby certify, under penalty of perjury, that I am an employee of McDonald Carano LLP and that on August 27, 2021, a true and correct copy of **OPENING BRIEF IN SUPPORT OF PETITION FOR JUDICIAL REVIEW OF ORDER 1309** was electronically submitted to the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification. The parties below were also served via U.S. Mail, postage-prepaid:

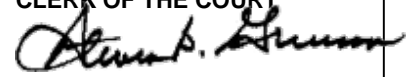
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/s/Carole Davis  
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4840-7532-6199, v. 4



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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 TIM WILSON, P.E. State Engineer, State of  
24 Nevada, Department of Conservation and Natural  
25 Resources, Division of Water Resources,

26 Respondent.

27 CASE NO.: A-20-816761-C (Lead Case)

28 DEPT. NO.: 1

**Consolidated with:**

A-20-817765-P  
A-20-818015-P  
A-20-817977-P  
A-20-818069-P  
A-20-817840-P  
A-20-817876-P  
A-21-833571-J

29 **APPENDIX OF EXHIBITS TO GEORGIA-PACIFIC GYPSUM, LLC AND REPUBLIC**  
30 **ENVIRONMENTAL TECHNOLOGIES, INC.'S OPENING BRIEF IN SUPPORT OF**  
31 **PETITION FOR JUDICIAL REVIEW OF ORDER 1309**

32 Georgia-Pacific Gypsum, LLC (“Georgia-Pacific”) and Republic Environmental  
33 Technologies, Inc. (“Republic”) hereby submit the Appendix of Exhibits (“Appendix”) in support  
34 of their *Opening Brief in Support of Petition for Judicial Review of Order 1309* (“Opening Brief”).

<b>Exhibit</b>	<b>Exhibit Description<sup>1</sup></b>	<b>ROA Bates No.<sup>2</sup></b>
1	Order 1309	2-69
2	Notice of Hearing	262-282
3	Amended Notice of Hearing	284-301
4	Notice of Pre-Hearing Conference	513-518
5	Transcript of Proceedings – Pre-Hearing Conference	519-522
6	NSE Ex 1 – Interim Order 1303	635-653
7	NSE Ex 2 – Order 1169A	654-658
8	NSE Ex 3 – Order 1169	659-669
9	NSE Ex 16 – Ruling 6256	786, 813-814
10	NSE Ex 244 – 2006 Memorandum of Agreement Trigger Levels agreed to by the SNWA, Moapa Valley Water District, CSI, and MBOP	10089
11	CNLV Ex 26 – LWRFS water rights by priority with 2017 pumpage	35556-35558
12	CSI’s Disclosure of Witnesses and Exhibits	35560-35568
13	CSI Ex 1 – CSI Order 1303 Report	35628, 35634, 35638, 35648

<sup>1</sup> Commonly used acronyms include the following:  
 “CNLV” refers to City of North Las Vegas.  
 “CSI” refers to Coyote Springs Investment, LLC.  
 “LC-V” refers to Lincoln County Water District and Vidler Water Company, Inc.  
 “LVVWD” refers to Las Vegas Valley Water District.  
 “LWRFS” refers to The Lower White River Flow System.  
 “MBOP” refers to Moapa Band of Paiute Indians.  
 “NSE” refers to Nevada State Engineer.  
 “SNWA” refers to Southern Nevada Water Authority.  
 “USFWS” refers to United States Fish and Wildlife Service.  
 “USNPS” refers to United States National Park Service.

<sup>2</sup> For consistency, Petitions have retained the bates number from the Record on Appeal (“ROA”) and cite to those page numbers throughout the Opening Brief. Petitioners include only selected excerpts from the ROA, so there are gaps in pages numbers of the Appendix. However, Petitions have ordered the exhibits in the same order they appear in the ROA to ensure consecutive pagination in the Appendix.

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Exhibit	Exhibit Description	ROA Bates No.
14	CSI Ex 14 – Rowley, P.D., Dixon, G.L., Mankinen, E.A., Pari, K.T., McPhee D.K., et al., 2017, <i>Geology and Geophysics of White Pine and Lincoln Counties, Nevada, and Adjacent Parts of Nevada and Utah: The Geologic Framework of Regional Groundwater Flow Systems</i> , Nevada Bureau of Mines and Geology Report 56	35957, 36062-36068
15	LC-V Ex 1 – LWRFS Report	36193-36195, 36220-36229
16	MBOP Ex 28b – Sass, J.H., A.H. Lachenbruch, W.W. Dusley, Jr., S.S. Priest and R.J. Munroe, 1987, <i>Temperature, thermal conductivity, and heat flow near Yucca Mountain, Nevada: Some tectonic and hydrologic implications</i> , U.S. Geological Survey Open File Report	38157-38163
17	MBOP Ex 38 – Thomas, J.M., S.C. Calhoun and W.B. Apambire, 2001, <i>A deuterium mass-balance interpretation of groundwater sources and flows in southeastern Nevada Desert Research Institute</i>	38927-38929
18	MBOP Ex 39 – Thomas, J.M. and T.M. Mihevc, 2011, <i>Evaluation of Groundwater Origins, Flow Paths, and Ages in East-Central and Southeastern Nevada</i>	38979-38981
19	SNWA Ex 8 – Assessment of Moapa Dace and Other Groundwater-Dependent Special Status Species in the LWRFS	42073-42077
20	USFWS Ex 40 – Synoptic Discharge, Water-Property, and pH Measurements for Muddy River Springs Area and Muddy River, Nevada	49218-49225
21	USFWS Ex 44 – A Deuterium-Calibrated Groundwater Flow Model of a Regional Carbonate-Alluvial System	49533
22	USNPS Ex 6 – Principal Facts for Gravity Stations in the Vicinity of Coyote Spring Valley, Nevada, With Initial Gravity Modeling Results	51894-51895
23	USNPS Ex 12 – Investigation of the Origin of Springs in the Lake Mead National Recreation Area	51948-51953
24	Testimony of Dwight L. Smith on behalf of CNLV	52163, 52183-52187

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Exhibit	Exhibit Description	ROA Bates No.
25	Closing Argument of Georgia Pacific Corporation and Republic Environmental Technologies, Inc.	52801-52810
26	Hearing Transcript Vol. I - 09/23/2019	52960-52962
27	Hearing Transcript Vol. II(b) – 09/24/2019	53114-53115, 53120-53123, 53140-53141
28	Hearing Transcript Vol. VII - 10/01/2019	53553-54, 53564, 53573-75

DATED this 27th day of August, 2021.

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**CERTIFICATE OF SERVICE**

I hereby certify, under penalty of perjury, that I am an employee of McDonald Carano LLP and that on August 27, 2021, a true and correct copy of APPENDIX OF EXHIBITS TO GEORGIA-PACIFIC GYPSUM, LLC AND REPUBLIC ENVIRONMENTAL TECHNOLOGIES, INC.'S OPENING BRIEF IN SUPPORT OF PETITION FOR JUDICIAL REVIEW OF ORDER 1309 was electronically submitted to the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification. The parties below were also served via U.S. Mail, postage-prepaid:

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/s/Carole Davis  
An Employee of McDonald Carano LLP

4835-0327-9096, v. 1

# EXHIBIT 1

**Document (Order 1309) Located at JA Vol. 2 at  
JA\_326 through JA\_393**

## EXHIBIT 2

**Document (Notice of Hearing) Located at JA Vol. 2 at JA\_464 to  
JA\_484**

## EXHIBIT 3

**Document (Amended Notice of Hearing) Located at JA Vol. 2**  
**at JA\_486 through JA\_503**

## EXHIBIT 4



**Document (Notice of Pre-Hearing Conference) Located at JA Vol. 2  
at JA\_394 to JA\_412**

## EXHIBIT 5

**Document (August 8, 2019 Transcripts) Located at JA Vol. 2 at  
JA\_703 through JA\_736**

## EXHIBIT 6

**Document (Addendum to Order 1303) Located at JA Vol. 2 at  
JA\_411  
through JA 412**

**Document (Order 1303) Located at JA Vol. 2 at JA 394  
through JA 410**

## EXHIBIT 7

**Document (Order 1169A) Located at JA Vol. 3 at JA\_819 to JA\_823**



## EXHIBIT 8

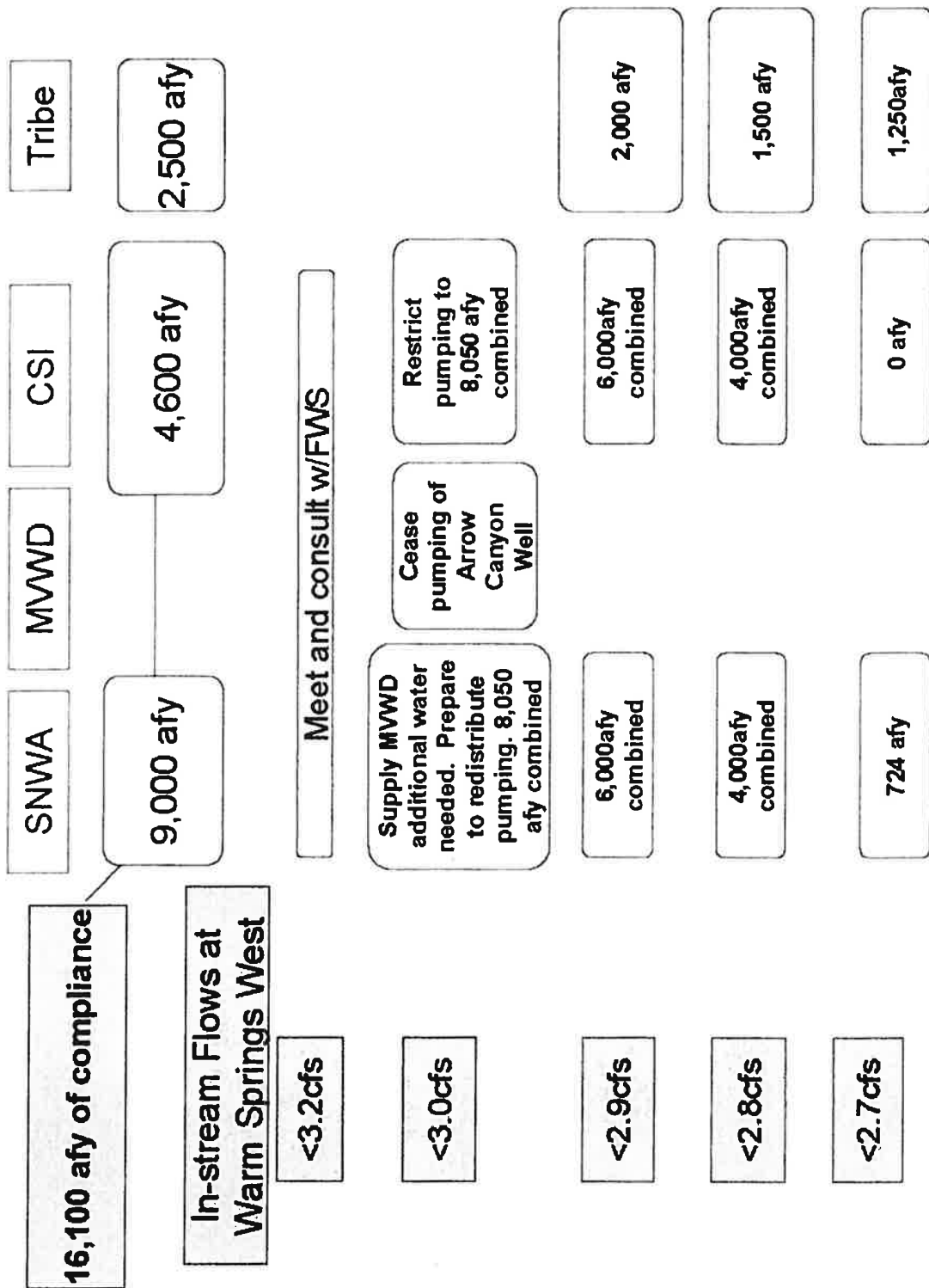
**Document (Order 1169) Located at JA Vol. 3 at JA\_824  
through JA 834**

## EXHIBIT 9

**Document (Ruling 6256) Located at JA Vol. 3 at JA\_951 to JA\_980**

## EXHIBIT 10

# Memorandum of Agreement Triggers



## EXHIBIT 11

LWRFS GROUNDWATER RIGHTS BY PRIORITY

Basin	Permit	Priority Date	MOU	Annual Duty	Cumulative Duty	Owner of Record	Site ID	2017 Pumpage	Cumulative Pumpage
Coyote Spring Valley	*85249	10/22/1919	COM	109.8	109.80	BEOROC LIMITED LLC	210 S11 E62 24DB 1	109.8	109.8
Coyote Spring Valley	*85250	10/22/1919	COM	233.2	343.00	BEOROC LIMITED LLC	210 S11 E62 24BA 2	449.17	859.97
Muddy River Springs Area	*50733	8/13/1947	IND	70.0	413.00	UDS	219 S14 E65 16AACD1	0	559.57
Muddy River Springs Area	*50723	8/13/1947	IND	88	501.00	UDS	219 S14 E65 15B9CA1	88	647.97
Muddy River Springs Area	*50729	8/13/1947	IND	120	621.00	UDS	219 S14 E65 09CCBC1	65.15	702.72
Muddy River Springs Area	*50728	8/13/1947	IND	158	779.00	UDS	219 S14 E65 09CCBC1	65.15	702.72
Muddy River Springs Area	*50731	8/13/1947	IND	586	1365.00	UDS	219 S14 E65 15B9CA1	98.44	799.16
Muddy River Springs Area	*50732	8/13/1947	IND	930	2295.00	UDS	219 S14 E65 16AACD1	0	799.16
Muddy River Springs Area	*29296	2/4/1948	IND	300	2595.00	NEVADA POWER COMPANY	219 S14 E65 23B9BB1	88.26	887.42
Muddy River Springs Area	38871	2/4/1948	IRR	75	2670.00	EGEDPAR, ASGAR	219 S14 E65 23B9BB1	11.1	899.32
Muddy River Springs Area	*86209	4/20/1948	COM	14.01	2684.01	3335HILLSIDE LLC	219 S14 E65 22AADB1	14.01	912.53
Muddy River Springs Area	*82096	4/20/1948	COM	1,903	2685.91	CLOUD, MARY K	219 S14 E65 26AADB1	2.29	912.53
Muddy River Springs Area	*82097	4/20/1948	COM	2,891	2688.80	CLOUD, MARY K	219 S14 E65 26AADB1	2.29	914.82
Muddy River Springs Area	*77381	4/20/1948	COM	6,069	2694.87	WILLIAM O'DONNELL	219 S14 E65 09CAC1	0	914.82
Muddy River Springs Area	*77382	4/20/1948	COM	9,221	2704.09	WILLIAM O'DONNELL	219 S14 E65 09CAC1	0	914.82
Muddy River Springs Area	*71026	5/20/1948	IRR	3,993	2708.09	PARSON, BILLY & LINDA	219 S14 E65 09DDCB1	13.27	928.09
Muddy River Springs Area	*71344	5/20/1948	IRR	6,067	2714.15	PARSON, BILLY & LINDA	219 S14 E65 09DDCB1	13.27	928.09
Muddy River Springs Area	59257	5/20/1948	IRR	15	2729.15	BRUNDY, LARRY	219 S14 E65 23BC 1	9.54	937.63
Muddy River Springs Area	63504	5/20/1948	IRR	15	2744.15	KOLHOSS, KELLY	219 S14 E65 23BC 1	9.54	947.17
Muddy River Springs Area	59256	5/20/1948	IRR	28.875	2773.03	WHITMORE, DAN	219 S14 E65 23BC 1	18.37	965.54
Muddy River Springs Area	59253	5/20/1948	IRR	43.875	2816.90	WHITMORE, DAN	219 S14 E65 23BC 1	27.96	993.5
Muddy River Springs Area	*24186	8/14/1948	IND	310	3126.90	NEVADA POWER COMPANY	219 S14 E65 08AB 1	0	993.5
Muddy River Springs Area	*64840	10/7/1948	IRR	19.8	3146.70	CLARK COUNTY	219 S14 E65 23B9CC1	0.04	993.54
Muddy River Springs Area	*50851	10/7/1948	IRR	30	3176.70	CLARK COUNTY	219 S14 E65 23B9CC1	0.04	993.54
Muddy River Springs Area	*50275	10/7/1948	IND	32.88	3209.58	NEVADA POWER COMPANY	219 S14 E65 22AAB2	55	1048.54
Muddy River Springs Area	*22633	12/20/1948	IND	297.5	3507.08	NEVADA POWER COMPANY	219 S14 E65 08AC 2	0	1048.54
Muddy River Springs Area	*50724	10/4/1949	IND	162.55	3669.63	UDS	219 S14 E65 09CCBC1	2.09	1050.63
Muddy River Springs Area	*22636	6/19/1952	IND	260	3929.63	NEVADA POWER COMPANY	219 S14 E65 08DB 2	134.08	1184.71
Muddy River Springs Area	*22632	6/19/1952	IND	315	4244.63	NEVADA POWER COMPANY	219 S14 E65 08DB1	1	1184.71
Muddy River Springs Area	*22635	12/18/1958	IND	25	4272.63	NEVADA POWER COMPANY	219 S14 E65 08ADBD1	16.11	1200.82
Garnet Valley	83553	7/24/1959	IND	3	4328.03	TECHNICHOME	219 S14 E65 22AAB2	1	1200.82
Muddy River Springs Area	*50934	11/20/1959	IND	55.4	4328.03	NEVADA POWER COMPANY	219 S14 E65 22AAB2	1	1201.82
Muddy River Springs Area	18437	11/20/1959	IRR	20.15	4348.18	COVOTIE SPRINGS INVESTMENT LLC	219 S14 E65 09DDB1	1	1201.82
Muddy River Springs Area	21466	8/15/1963	IRR	183.2	4531.38	CASA DE WARMI SPRINGS LLC	219 S14 E65 08DB1	1	1201.82
Muddy River Springs Area	*50730	4/28/1965	IND	25	4556.38	UDS	219 S14 E65 09CCBC1	1	1201.82
Muddy River Springs Area	*50725	4/28/1965	IND	65	4621.38	UDS	219 S14 E65 09CCBC1	1	1201.82
Muddy River Springs Area	*50727	4/28/1965	IND	60	4681.38	UDS	219 S14 E65 09CCBC1	1	1201.82
Muddy River Springs Area	*50726	4/28/1965	IND	65	4746.38	UDS	219 S14 E65 09CCBC1	0.18	1202
Muddy River Springs Area	27216	8/25/1965	COM	1,381,005	4747.77	UNITED STATES OF AMERICA	219 S14 E65 16B9CA1	0.18	1220.81
Muddy River Springs Area	22738	8/25/1965	COM	18.81	4766.58	DAVIS, DON L & MARSHA L.	219 S14 E65 22AAA1	18.81	1220.81
Muddy River Springs Area	*22949	2/2/1966	IND	433	5199.58	NEVADA POWER COMPANY	219 S14 E65 08ADB1	1	1220.81
Muddy River Springs Area	*22950	2/2/1966	IND	0	5199.58	NEVADA POWER COMPANY	219 S14 E65 08AC 2	1	1220.81
Muddy River Springs Area	*22951	2/2/1966	IND	0	5199.58	NEVADA POWER COMPANY	219 S14 E65 08DB 2	1	1220.81
Muddy River Springs Area	*22952	2/2/1966	IND	0	5199.58	NEVADA POWER COMPANY	219 S14 E65 08DB1	1	1220.81
Muddy River Springs Area	*24185	2/2/1966	IND	0	5199.58	NEVADA POWER COMPANY	219 S14 E65 08AB 1	1	1220.81
Garnet Valley	*64880	7/24/1967	MM	133.81	5333.39	CHEMICAL LIME COMPANY	219 S14 E65 23CA1	117.17	1337.98
Muddy River Springs Area	*25310	10/9/1969	IND	160	5493.39	NEVADA POWER COMPANY	219 S14 E65 08ADB1	1	1337.98
California West	26371	11/18/1969	IRR	90	5583.39	MOAPA VALLEY WATER COMPANY	219 S14 E65 25CAC1	1	1337.98
Muddy River Springs Area	*50272	7/17/1970	IND	99.51	5682.90	NEVADA POWER COMPANY	219 S14 E65 22AAB2	1	1337.98
Muddy River Springs Area	*50273	7/17/1970	IND	289.91	5972.81	NEVADA POWER COMPANY	219 S14 E65 22AAB2	1	1337.98
Muddy River Springs Area	*85156	7/17/1970	IND	322.17	6294.98	NEVADA POWER COMPANY	219 S14 E65 08DB1	1	1337.98

\*1CD, additive duty  
 \*\*1CD, supplemental duty



Basin	Permit	Priority Date	MOU	Annual Duty	Cumulative Duty	Owner of Record	Site ID	2017 Pumpage	Cumulative Pumpage
Muddy River Springs Area	*29298	7/1/1970	IND	327.5	662.48	NEVADA POWER COMPANY	219 S14 E65 23BBB81		1337.98
Muddy River Springs Area	*79068	7/1/1970	IND	432.7	705.18	NEVADA POWER COMPANY	219 S14 E65 22AA892		1337.98
Garnet Valley	*74999	7/20/1981	IND	74.57	7129.75	NEVADA POWER COMPANY	216 S17 E64 21CB801	74.57	1412.55
Garnet Valley	*63261	10/20/1981	COM	100	7229.75	CHEMICAL LIQUE COMPANY OF ARIZONA	216 S18 E64 14AAB01	56.61	1468.16
Garnet Valley	*83715	10/20/1981	IND	37	7266.75	REPUBLIC ENVIRONMENTAL TECHNOLOGIES INC	216 S18 E64 19ABB91	209.3	1468.16
Garnet Valley	*83714	10/20/1981	IND	157	7423.75	REPUBLIC ENVIRONMENTAL TECHNOLOGIES INC	216 S18 E64 19CDD01	2.71	1677.46
Garnet Valley	63348	10/20/1981	COM	4	7427.75	WESTERN MINING & MINERALS, INC.	216 S18 E63 13CAA11	10.02	1680.17
Garnet Valley	77745	10/20/1981	COM	10.02	7437.77	NORTH LAS VEGAS CITY	216 S18 E63 16BBD11	10.02	1680.19
Coyote Spring Valley	*74095	3/31/1983	MUN	500	7937.77	COYOTE SPRINGS INVESTMENT, LLC	210 S13 E63 05ABC11	172.78	1682.97
Coyote Spring Valley	*74094	3/31/1983	MUN	1000	8937.77	CLARK COUNTY COYOTE SPRINGS WATER RESOURCES GID	210 S13 E63 10DCC11		1682.97
Coyote Spring Valley	*70430	3/31/1983	MUN	1140	10077.77	COYOTE SPRINGS INVESTMENT, LLC	210 S13 E63 22DCA11	1226.64	1682.97
Coyote Spring Valley	*70429	3/31/1983	WLD	460	12037.77	CLARK COUNTY COYOTE SPRINGS WATER RESOURCES GID	210 S13 E63 23BA811		3089.61
Coyote Spring Valley	*77292	5/19/1983	MUN	400	12437.77	SNWA	210 S13 E63 26AAA11	0	3089.61
Muddy River Springs Area	*46932	9/27/1985	MUN	1000.13451	13437.92	MOAPA VALLEY WATER DISTRICT	210 S13 E64 35DCA01		3089.61
Garnet Valley	**77293	9/27/1985	MUN	4000	17437.92	SNWA	210 S13 E64 26AAA11	217.38	3089.61
Garnet Valley	**66962T	9/27/1985	MUN	0	17437.92	SNWA	216 S18 E63 15AAC01		3306.99
Garnet Valley	**66959T	9/27/1985	MUN	0	17437.92	SNWA	216 S18 E63 15AAC01		3306.99
Garnet Valley	**86960T	9/27/1985	MUN	0	17437.92	SNWA	216 S18 E63 05DACC1		3306.99
Coyote Spring Valley	77164	12/30/1985	IND	2500	19937.92	NEVADA POWER COMPANY	210 S13 E63 26AAB01	3306.99	3306.99
Coyote Spring Valley	*77294	1/27/1986	MUN	100	20037.92	SNWA	210 S13 E63 26AAA11		3306.99
Coyote Spring Valley	*77295	1/27/1986	MUN	0	20037.92	SNWA	210 S13 E63 26AAA11		3306.99
Coyote Spring Valley	*77296	1/27/1986	MUN	0	20037.92	SNWA	210 S13 E63 26AAA11		3306.99
Muddy River Springs Area	**52520	4/14/1986	MUN	0	20037.92	MOAPA VALLEY WATER DISTRICT	219 S14 E65 07DAD11	1447.93	4754.92
Coyote Spring Valley	*77297	7/15/1986	MUN	4500	24537.92	SNWA	210 S13 E63 26AAA11		4754.92
Coyote Spring Valley	*77298	7/15/1986	MUN	0	24537.92	SNWA	210 S13 E63 26AAA11		4754.92
Coyote Spring Valley	*77299	7/15/1986	MUN	0	24537.92	SNWA	210 S13 E63 26AAA11		4754.92
Coyote Spring Valley	**77300	7/15/1986	MUN	0	24537.92	SNWA	210 S13 E63 26AAA11		4754.92
Coyote Spring Valley	**77301	7/15/1986	MUN	0	24537.92	SNWA	210 S13 E63 26AAA11		4754.92
Coyote Spring Valley	**77302	7/15/1986	MUN	0	24537.92	SNWA	210 S13 E63 26AAA11		4754.92
Coyote Spring Valley	**77303	7/15/1986	MUN	0	24537.92	SNWA	210 S13 E63 26AAA11		4754.92
Coyote Spring Valley	**77304	7/15/1986	MUN	0	24537.92	SNWA	210 S13 E63 26AAA11		4754.92
Coyote Spring Valley	**77305	7/15/1986	MUN	0	24537.92	SNWA	210 S13 E63 26AAA11		4754.92
Coyote Spring Valley	*77306	7/15/1986	MUN	0	24537.92	SNWA	210 S13 E63 26AAA11		4754.92
Garnet Valley	56855	10/28/1986	IND	144.146233	24682.07	GEORGIA PACIFIC CORPORATION	216 S18 E63 34ADAB1	94.27	4878.16
Garnet Valley	**50559	2/2/1987	IND	0	24682.07	NEVADA POWER COMPANY	218 S15 E66 05CDB01	26.97	4878.16
California Wash	50558	2/2/1987	ENV	28.970416	24711.04	NEVADA POWER COMPANY	218 S15 E66 05CAAC1		4878.16
California Wash	50560	2/2/1987	ENV	28.970416	24740.01	NEVADA POWER COMPANY	218 S15 E66 05CAAC2		4878.16
Garnet Valley	66584	3/6/1987	DM	156.84	24896.85	DRY LAKE WATER, LLC	216 S18 E64 19ACD01		4878.16
Black Mountains Area	*68351	6/21/1988	DM	542.98	25439.83	DRY LAKE WATER, LLC	215 S19 E63 13AAD01		4878.16
Garnet Valley	*83707	10/3/1988	IND	0.11	25440.05	REPUBLIC ENVIRONMENTAL TECHNOLOGIES INC	216 S18 E64 18ACD81		4878.16
Garnet Valley	*83709	10/3/1988	IND	0.11	25440.16	REPUBLIC ENVIRONMENTAL TECHNOLOGIES INC	216 S18 E64 07DDCB1		4878.16
Garnet Valley	*83710	10/3/1988	IND	0.11	25440.27	REPUBLIC ENVIRONMENTAL TECHNOLOGIES INC	216 S18 E64 20BABA1		4878.16
Garnet Valley	*83712	10/3/1988	IND	3.7	25443.86	REPUBLIC ENVIRONMENTAL TECHNOLOGIES INC	216 S18 E64 19ABB81		4878.16
Garnet Valley	*83713	10/3/1988	IND	23.8	25467.66	REPUBLIC ENVIRONMENTAL TECHNOLOGIES INC	216 S18 E64 19ABB91		4878.16
Garnet Valley	*83714	10/3/1988	IND	40.78	25508.44	REPUBLIC ENVIRONMENTAL TECHNOLOGIES INC	216 S18 E64 19ABB91	271.07	4878.16
Garnet Valley	*83717	10/3/1988	IND	68.39	25576.83	REPUBLIC ENVIRONMENTAL TECHNOLOGIES INC	216 S18 E64 07DDCC1	67.99	5149.23
Garnet Valley	*83708	10/3/1988	IND	68.5	25645.33	REPUBLIC ENVIRONMENTAL TECHNOLOGIES INC	216 S18 E64 18ACD81		5217.22
Garnet Valley	*83716	10/3/1988	IND	119.44	25713.83	REPUBLIC ENVIRONMENTAL TECHNOLOGIES INC	216 S18 E64 18ACD81		5217.22
Black Mountains Area	*68350	10/18/1988	DM	137.55	25833.27	DRY LAKE WATER, LLC	215 S19 E63 13AAD01		5217.22
Black Mountains Area	*68352	10/18/1988	DM	137.55	25970.82	DRY LAKE WATER, LLC	215 S19 E63 13AAD01		5217.22
California Wash	75198	4/4/1989	MUN	25	25995.82	COYOTE SPRINGS INVESTMENT LLC	218 S14 E65 25CAC11		5217.22

\*TCD, additive duty  
\*\*TCD, supplemental duty

Basin	Permit	Priority Date	MOU	Annual Duty	Cumulative Duty	Owner of Record	Site ID	2017 Pumpage	Cumulative Pumpage
California Wash	**70257	10/17/1989	MUN	2500	28495.82	MOPA BAND OF PAUTE INDIANS	218 S16 E64 15ADDA1	12.82	5230.04
California Wash	**70258	10/17/1989	MUN	0	28495.82	MOPA BAND OF PAUTE INDIANS	218 S16 E64 15AAA1		5230.04
California Wash	**70259	10/17/1989	MUN	0	28495.82	MOPA BAND OF PAUTE INDIANS	218 S16 E64 15AAD1		5230.04
Garnet Valley	**79002	10/17/1989	MUN	0	28495.82	SNWA	216 S18 E63 05DACC1		5230.04
Garnet Valley	**79003	10/17/1989	MUN	0	28495.82	SNWA	216 S17 E64 21CBBD1		5230.04
Garnet Valley	**79004	10/17/1989	MUN	0	28495.82	SNWA	216 S18 E63 15AACD1	233.33	5463.37
Garnet Valley	**79005	10/17/1989	MUN	0	28495.82	SNWA	216 S18 E63 15AACD1	230.34	5693.71
Garnet Valley	**66967	10/17/1989	MUN	0	28495.82	SNWA	216 S17 E63 32CCB1		5693.71
Garnet Valley	**66968	10/17/1989	MUN	0	28495.82	SNWA	216 S18 E63 15AACD1		5693.71
Garnet Valley	**83490	10/17/1989	MUN	0	28495.82	SNWA	216 S17 E64 21CBBD1	17.9	5693.71
Garnet Valley	**86970	10/17/1989	MUN	0	28495.82	SNWA	216 S18 E63 05DACC1		5711.21
Garnet Valley	**79001	10/17/1989	MUN	0	28495.82	SNWA	216 S18 E63 05AADB1		5711.21
Garnet Valley	**68822	10/17/1989	MUN	2200	28495.82	SNWA	216 S18 E63 05AADB1	350	6061.21
Garnet Valley	**55269	10/30/1989	IND	96	30796.82	SNWA	216 S18 E63 02ABDC1		6061.21
Black Mountains Area	**58031	10/30/1989	IND	824	31620.82	NEVADA COGENERATION ASSOCIATES #1	215 S19 E63 13DDB1	33.05	6094.26
Black Mountains Area	**58032	9/13/1990	IND	745	32365.82	NEVADA COGENERATION ASSOCIATES #1	215 S19 E63 13DAAB1	834.72	6928.98
Muddy River Springs Area	**55450	11/9/1990	MUN	2171.906564	34537.72	MOPA VALLEY WATER DISTRICT	215 S19 E63 13DACA1	639.54	7568.52
Black Mountains Area	**68353	12/10/1990	GM	592.06	35129.78	DRY LAKE WATER, LLC	215 S14 E65 07ADDA1	1013.76	8582.28
California Wash	57441E	4/16/1992	ENV	32.591718	35162.37	NDOT	218 S18 E66 02ACB1		8582.28
Muddy River Springs Area	**58269	10/27/1992	MUN	1085.94	36248.31	MOPA VALLEY WATER DISTRICT	219 S14 E65 07ADDA1	361.78	8944.07
Muddy River Springs Area	**66043	10/27/1992	MUN	2533.9	38782.21	MOPA VALLEY WATER DISTRICT	219 S14 E65 07ADDA2		8944.07
Muddy River Springs Area	61427	7/26/1995	COM	1.350316	38783.57	S & R, INC.	219 S14 E65 08CDB1	8	8952.07
Garnet Valley	**81344	8/25/2000	GM	8	38791.57	DRY LAKE WATER, LLC	216 S18 E63 13CDB1	13	8965.07
Garnet Valley	**72098	8/25/2000	GM	13.16	38804.73	DRY LAKE WATER, LLC	216 S18 E63 13CDB1	8.97	8974.04
Garnet Valley	**79948	8/25/2000	GM	0	38804.73	DRY LAKE WATER, LLC	216 S18 E63 13CDB1		8974.04
Garnet Valley	**66785	8/25/2000	GM	0	38804.73	DRY LAKE WATER, LLC	216 S17 E63 32AAB1		8974.04
Garnet Valley	**77389	8/25/2000	GM	0	38804.73	DRY LAKE WATER, LLC	216 S18 E63 39DBA1		8974.04
Muddy River Springs Area	**75161E	12/6/2006	ENV	905.81	39710.54	NEVADA POWER COMPANY	219 S14 E65 23BBB1		8974.04
California Wash	**76643	1/18/2008	MUN	0	39710.54	MOPA BAND OF PAUTE INDIANS	218 S16 E64 23BCAA1	30.06	9004.1
Coyote Spring Valley	**77291	8/13/2008	MUN	0	39710.54	SNWA	210 S13 E63 23BAAB1		9004.1
Garnet Valley	**79009	11/2/2009	MUN	0	39710.54	SNWA	216 S18 E63 15AACD1		9004.1
Garnet Valley	**79008	11/2/2009	MUN	0	39710.54	SNWA	216 S17 E64 21CBBD1		9004.1
Garnet Valley	**79010	11/2/2009	MUN	0	39710.54	SNWA	216 S18 E63 15AACD1		9004.1
Garnet Valley	**79007	11/2/2009	MUN	0	39710.54	SNWA	216 S18 E63 05DACC1		9004.1
Garnet Valley	**79006	11/2/2009	MUN	0	39710.54	SNWA	216 S18 E63 05AADB1		9004.1
Garnet Valley	**66965	11/2/2009	MUN	0	39710.54	SNWA	216 S17 E64 21CBBD1		9004.1
Garnet Valley	**66964	11/2/2009	MUN	0	39710.54	SNWA	216 S18 E63 15AACD1		9004.1
Garnet Valley	**66963	11/2/2009	MUN	0	39710.54	SNWA	216 S18 E63 05DACC1		9004.1
Muddy River Springs Area	**80843	5/9/2011	IND	0	39710.54	NEVADA POWER COMPANY	219 S14 E65 08ADB1		9004.1
Muddy River Springs Area	**80844	5/9/2011	IND	0	39710.54	NEVADA POWER COMPANY	219 S14 E65 08AC1		9004.1
Muddy River Springs Area	**80845	5/9/2011	IND	0	39710.54	NEVADA POWER COMPANY	219 S14 E65 08AB 1		9004.1
Muddy River Springs Area	**80846	5/9/2011	IND	0	39710.54	NEVADA POWER COMPANY	219 S14 E65 08DB 2		9004.1
Muddy River Springs Area	**71766	7/1/2014	IRR	21.29	39731.83	333SHILLSIDE, LLC	219 S14 E65 22AADB1	24.2	9028.3
Garnet Valley	**84041	7/1/2014	GM	0	39731.83	DRY LAKE WATER, LLC	216 S18 E63 13CDB1		9028.3

Pumpage amount from same POD and within same TCD applied to most senior right first

\*TCD, additive duty  
\*\*TCD, supplemental duty

## EXHIBIT 12

**Document (CSI Disclosures) Located at JA Vol. 16 at JA\_7496 to  
JA\_7535**

## EXHIBIT 13

**Document (CSI Expert Report) Located at JA Vol. 16 at JA\_7536 to  
JA\_7648**

## EXHIBIT 14

**Document (Nevada Bureau of Mines and Geology Report 56)**

**Located at JA Vol. 14 at JA\_6944 to JA\_7086**



## EXHIBIT 15

**Document (Vilder Report) Located at JA Vol. 18 at JA\_7927 to  
JA\_8079**

## EXHIBIT 16

**Document (Open File Report 87-649) Located at JA Vol. 20 at  
JA\_9439 to JA\_9562**

## EXHIBIT 17

**Document (Publication 41169) Located at JA Vol. 22 at JA\_10209 to  
JA\_10260**

# EXHIBIT 18

**Document (Publication 41253) Located at JA Vol. 22 at JA\_10261 to  
JA\_10327**



# EXHIBIT 19

**Document (Assessment of Moapa Dace) Located at JA Vol. 28 at  
JA\_11956 to JA\_12047**

# EXHIBIT 20

**Prepared in cooperation with the National Park Service  
and the U.S. Fish and Wildlife Service**

**Synoptic Discharge, Water-Property,  
and pH Measurements for Muddy River  
Springs Area and Muddy River, Nevada,  
February 7, 2001**

Scientific Investigations Report 2006-5237

**U.S. Department of the Interior  
U.S. Geological Survey**

SE ROA 49218

SE ROA 49219

JA\_19294

# **Synoptic Discharge, Water-Property, and pH Measurements for Muddy River Springs Area and Muddy River, Nevada, February 7, 2001**

By David A. Beck and Jon W. Wilson

Prepared in cooperation with the National Park Service  
and the U.S. Fish and Wildlife Service

Scientific Investigations Report 2006-5237

**U.S. Department of the Interior  
U.S. Geological Survey**

SE ROA 49220

**U.S. Department of the Interior**  
DIRK KEMPTHORNE, Secretary

**U.S. Geological Survey**  
Mark D. Myers, Director

U.S. Geological Survey, Carson City, Nevada: 2006

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Suggested citation:  
Beck, D.A., and Wilson, J.W., 2006, Synoptic discharge, water-property, and pH measurements for Muddy River Springs area and Muddy River, Nevada, February 7, 2001: U.S. Geological Survey Scientific Investigations Report 2006-5237, 12 p. Available at <<http://pubs.water.usgs.gov/sir2006-5237>>.

SE ROA 49221

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## Conversion Factors and Datums

<b>Multiply</b>	<b>By</b>	<b>To obtain</b>
cubic foot per second (ft <sup>3</sup> /s)	0.02832	cubic meter per second (m <sup>3</sup> /s)
foot (ft)	0.3048	meter (m)
inch (in.)	25.4	millimeter (mm)
mile (mi)	1.609	kilometer (km)
mile per hour (mi/h)	1.609	kilometer per hour (km/h)
square mile (mi <sup>2</sup> )	2.590	square kilometer (km <sup>2</sup> )

Temperature: Degrees Celsius (°C) can be converted to degrees Fahrenheit (°F) by using the formula  $^{\circ}\text{F} = (1.8 \times ^{\circ}\text{C}) + 32$ .

Discharge or flow: The rate that matter passes through a cross section of a stream channel or other water body per unit of time. The term commonly refers to the volume of water (including, unless otherwise stated, any sediment or other constituents suspended or dissolved in the water) that passes a cross section in a stream channel, flume, weir, canal, pipeline, etc., within a given period of time (cubic feet per second).

Specific conductance is given in microsiemens per centimeter at 25 degrees Celsius ( $\mu\text{S}/\text{cm}$  at 25°C).

Sea level: In this report, "sea level" refers to the National Geodetic Vertical Datum of 1988 (NGVD of 1988, formerly called "Sea-level Datum of 1988"), which is derived from a general adjustment of the first-order leveling networks of the United States and Canada.

Horizontal coordinate information is referenced to the North American Datum of 1983 (NAD83) unless otherwise stated.

# Synoptic Discharge, Water-Property, and pH Measurements for Muddy River Springs Area and Muddy River, Nevada, February 7, 2001

By David A. Beck and Jon W. Wilson

## Abstract

On February 7, 2001, synoptic discharge measurements at selected sites along the Muddy River in Nevada, indicated three trends in discharge resulting from contributions of spring discharge, influences of diversionary flow, and contributions from shallow ground water. Effects from diversionary and tributary flow were local in nature and resulted in a net gain of 2.6 cubic feet per second throughout the measured reach. The minor increase in discharge may be the result of contributions from ground-water flow and measurement error. Comparison of 1963 and 2001 discharge measurements within the Muddy River Springs area indicated that discharge rates and trends from these source waters were similar. Along the mainstem of the Muddy River, water-temperature measurements indicated a net decrease of 8.8 degrees Celsius. Water samples collected and analyzed for specific conductance indicated a net increase of 390 microsiemens per centimeter at 25 degrees Celsius, whereas pH measurements remained relatively constant.

## Introduction

This report contains an examination of discharge, water property, and pH data collected in the Muddy River Springs area and Muddy River on February 7, 2001. Muddy River originates from numerous seeps and springs at the northwest corner of Moapa Valley, and flows in a southeast direction discharging into Lake Mead (fig. 1). The Muddy River Springs area is defined as the terminal discharge point of the White River ground-water flow system (Eakin, 1966), which is part of the Regional Carbonate-Rock Province that encompasses about 100,000 mi<sup>2</sup> of eastern Nevada, western Utah, and parts of southeastern Idaho and California (Harrill and others, 1983; fig. 1). The riparian habitat within the Muddy River area contains diverse wildlife, including the endangered Moapa dace (*Moapa coriacea*).

The Nevada State Engineer's Office is considering applications to develop ground-water resources near the Muddy River and its source waters. Resource managers are concerned

about the potential effects of these proposed withdrawals on the Moapa Valley National Wildlife Refuge and other riparian ecosystems and spring-discharge areas adjacent to the river.

This study is limited to the Muddy River Springs area (fig. 2) and to the upper 18-mile reach of the Muddy River ending just south of Overton, Nev. (fig. 3). For the purposes of this report, site names in the text have been abbreviated, but are listed in tables 1 and 2. All references to the Muddy River Springs area are defined as that part of the valley upstream of the U.S. Geological Survey (USGS) surface-water gaging station, MR Moapa (site 09416000). References to the Muddy River indicate the river between MR Moapa (site 09416000) and the Southern Nevada Water Authority (SNWA) surface-water gaging station, MR at Lewis Ave. (site 09419507).

This investigation was developed, in cooperation with the National Park Service and the U.S. Fish and Wildlife Service, to provide measured discharge, water temperature, specific conductance, and pH at multiple sites within the Muddy River Springs area and the Muddy River.

## Acknowledgments

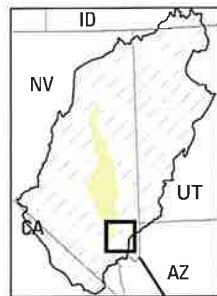
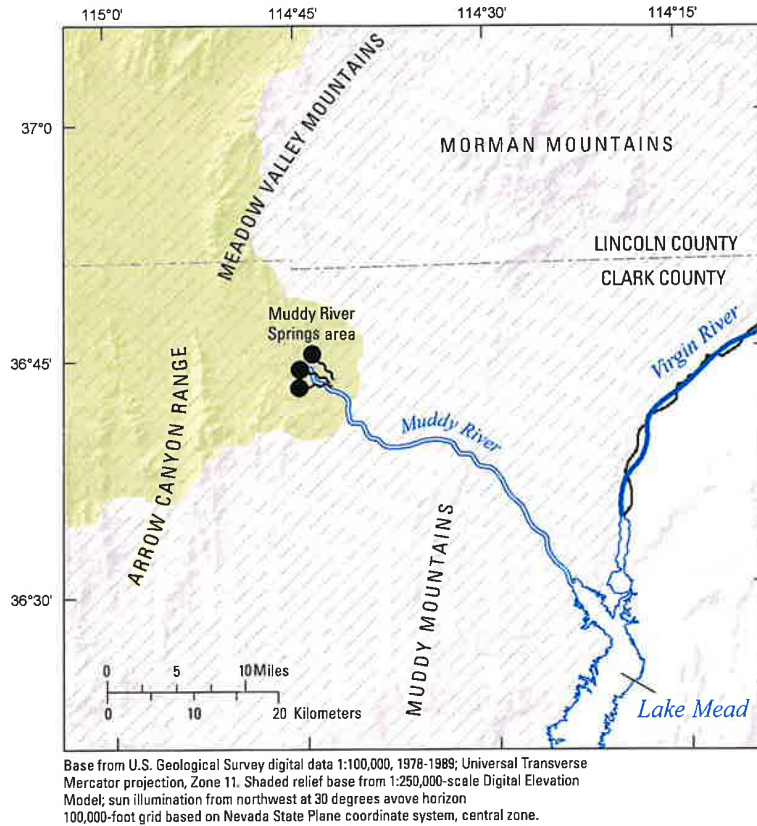
The authors acknowledge the Bureau of Indian Affairs, the Nature Conservancy, Southern Nevada Water Authority, Nevada Division of Water Resources, Moapa Valley Water District, Nevada Power Company, and the Moapa Band of Paiutes-Tribal for their participation in this effort.

## Purpose and Scope




The purpose of this report is to present synoptic measurements collected within the Muddy Springs area and along the Muddy River, and to characterize changes in discharge within these areas. Data collected on February 7, 2001, include measurements of discharge, water temperature, and specific conductance from 15 sites within the Muddy River Springs area; measurements of discharge, water temperature, specific conductance, and pH from 14 sites along the Muddy River; and discharge measurements from 1 municipal and 4 agricultural diversions.

SE ROA 49224

2 Synoptic discharge, water-property, and pH measurements Muddy River Springs area and Muddy River, Nev., 2001



**EXPLANATION**

-  White River Ground-Water Flow System
-  Regional Carbonate-Rock Province
-  Location of springs (Note: Tail indicates general direction of flow)

**Figure 1.** Location of study area.

Discharge, water-property, and pH data were collected during a period of minimal evapotranspiration, and municipal and agricultural diversions. An evaluation of changes in these data helps to: (1) assess surface-water and ground-water interaction and (2) account for losses or gains of river discharge within the spring and river areas.

**Description of Study Area**

The location of the study area is considered the terminal drainage area of the White River ground-water flow system (Eakin, 1966), located within the Regional Carbonate-Rock

Province (fig. 1). The Muddy River Springs area and the Muddy River are bounded by the Meadow Valley Mountains to the north, the Mormon Mountains to the northeast, the Muddy Mountains to the south, and Arrow Canyon Range to the west (fig. 1).

The Muddy River originates from a system of spring tributaries described by Eakin (1964), which are clustered along the northeast slope of Arrow Canyon Range (fig. 2). These tributaries generally consist of warm-water springs and seeps that emanate from alluvial deposits, occurring near surface exposures of carbonate rocks. These springs and seeps discharge into the mainstem of the Muddy River through three spring tributaries that include South Fork Muddy River, Muddy Springs Tributary, and Refuge Stream

SE ROA 49225

# EXHIBIT 21

**Document (A Deuterium-Calibrated Groundwater Flow Model of a  
Regional Carbonate-Alluvial System) Located at JA Vol. 33 at  
JA\_15392 to JA\_15423**

# EXHIBIT 22

**Document (SE ROA 51894 - 515895) Located at JA Vol. 43 at  
JA\_17025 to JA\_17026**

# EXHIBIT 23



**Document (SE ROA 51948, 51849, 51953) Located at JA Vol. 43 at  
JA\_17053, JA\_17054, and JA\_17058**

# EXHIBIT 24

Testimony of  
Dwight L. Smith, PE, PG

On Behalf of the City of North Las Vegas

Table A-1  
Data Used in MLR

Year	Well E11-4 Water Level (ft. AMSL)	Black Mountains Area Production (af)	California Wash Production (af)	Coyote Spring Valley Production (af)	Garnet Valley Production (af)	Muddy River Springs Area Production (af)
1992	1,817.09	0	0	0	0	0
1993	1,817.54	0	0	0	0	1,100
1994	1,817.03	0	0	0	0	894
1995	1,817.23	0	0	0	0	878
1996	1,817.26	1,613	0	0	145	705
1997	1,817.07	1,570	0	0	126	808
1998	1,816.70	1,408	0	0	131	2,036
1999	1,816.09	1,560	0	0	639	2,570
2000	1,815.79	1,663	0	0	500	2,908
2001	1,815.34	1,568	0	0	732	2,743
2002	1,815.12	1,744	0	0	607	2,573
2003	1,814.73	1,709	0	0	917	2,616
2004	1,814.42	1,710	0	0	678	2,718
2005	1,815.43	1,640	0	250	902	2,557
2006	1,815.91	1,569	0	1,277	1,050	2,906
2007	1,815.62	1,565	0	2,781	1,141	2,070
2008	1,815.24	1,591	0	1,060	1,538	2,272
2009	1,815.17	1,568	15	1,413	1,510	2,034
2010	1,814.93	1,561	10	2,672	1,257	1,826
2011	1,814.31	1,398	20	5,331	1,250	1,837
2012	1,813.45	1,256	21	6,101	1,253	2,638
2013	1,812.78	1,265	50	2,922	1,237	2,496
2014	1,813.27	1,430	266	1,643	1,191	1,442
2015	1,813.46	1,448	411	1,164	1,305	2,365
2016	1,813.26	1,434	200	1,117	2,242	2,768
2017	1,813.25	1,507	43	1,390	1,861	2,519
2018	1,813.40	1,623	24	1,967	1,751	1,970

INACCURATE

Base Table from  
SNWA Ex. No 009  
21

Table A-1  
Data Used in MLR

Year	Well EH-4 Water Level (ft AMSL)	Black Mountains Area Production (af)	California Wash Production (af)	Coyote Spring Valley Production (af)	Garnet Valley Production (af)	Muddy River Springs Area Production (af)
1992	1,817.08	0	0	0	0	0
1993	1,817.54	0	0	0	0	1,100
1994	1,817.03	0	0	0	0	894
1995	1,817.23	0	0	0	0	878
1996	1,817.28	1,613	0	0	145	705
1997	1,817.07	1,579	0	0	120	808
1998	1,816.70	1,408	0	0	131	2,039
1999	1,816.08	1,569	0	0	530	2,579
2000	1,815.79	1,693	0	0	509	2,909
2001	1,815.34	1,588	0	0	732	2,743
2002	1,815.12	1,744	0	0	997	2,573
2003	1,814.73	1,709	0	0	817	2,816
2004	1,814.42	1,710	0	0	878	2,718
2005	1,815.43	1,640	0	259	992	2,557
2006	1,815.91	1,566	0	1,277	1,080	2,666
2007	1,815.62	1,585	0	2,781	1,141	2,070
2008	1,815.24	1,591	0	1,080	1,538	2,272
2009	1,815.17	1,568	15	1,413	1,510	2,034
2010	1,814.93	1,561	19	2,672	1,257	1,826
2011	1,814.31	1,398	26	5,331	1,250	1,877
2012	1,813.45	1,556	21	5,101	1,253	2,138
2013	1,812.78	1,585	59	2,062	1,237	2,496
2014	1,813.27	1,430	288	1,043	1,191	1,442
2015	1,813.48	1,448	411	1,494	1,365	2,365
2016	1,813.26	1,434	200	1,117	2,242	2,798
2017	1,813.25	1,507	43	1,369	1,661	2,810
2018	1,813.40	1,623	24	1,907	1,751	1,970

NOT CONSISTENT with NDWR Pumping Inventories

Base Table from SNWA EX-2 No 009

## MLR Analysis is INVALID Due to Erroneous Input of Historical Pumping for the Garnet Valley Pumping Explanatory Variable

- Significant pumping was present in Garnet Valley throughout the 1990s and did not ramp up from zero as input in the MLR analysis.
- The input pattern of pumping artificially creates a higher association between Garnet Valley pumping and EH-4 water level variations, which in turn affects the associations assigned to the other explanatory variables. The erroneous Garnet Valley pumping input **INVALIDATES** the analysis for **ALL** pumping center outcomes.

## Other MLR Analysis Deficiencies

- Additionally, 2001 to 2017 annual pumping totals for Garnet Valley used in the MLR are NOT consistent with the NDWR pumping inventories for any year, which is not explained, and appears to be due to incomplete accounting of pumping from all water rights in each year.
- A climate variable should have been included - PDSI Zone 3 for example – and reviewed as a potential explanatory variable, in accordance with D.R. Helsel and R.M. Hirsch (2002) (step wise evaluation to evaluate the significance of a variable; SNWA Ex. 013, p. 310). To not include a climate variable has pre-judged the outcome, and the assumption that error represents the climate explanatory variable is neither sound science nor in keeping with the statistical methods cited Helsel and Hirsch (2002) – see p. 313, explain as much variance in y as possible (minimize bias) by including all relevant variables.

# Post Order 1169 Water Level Trends

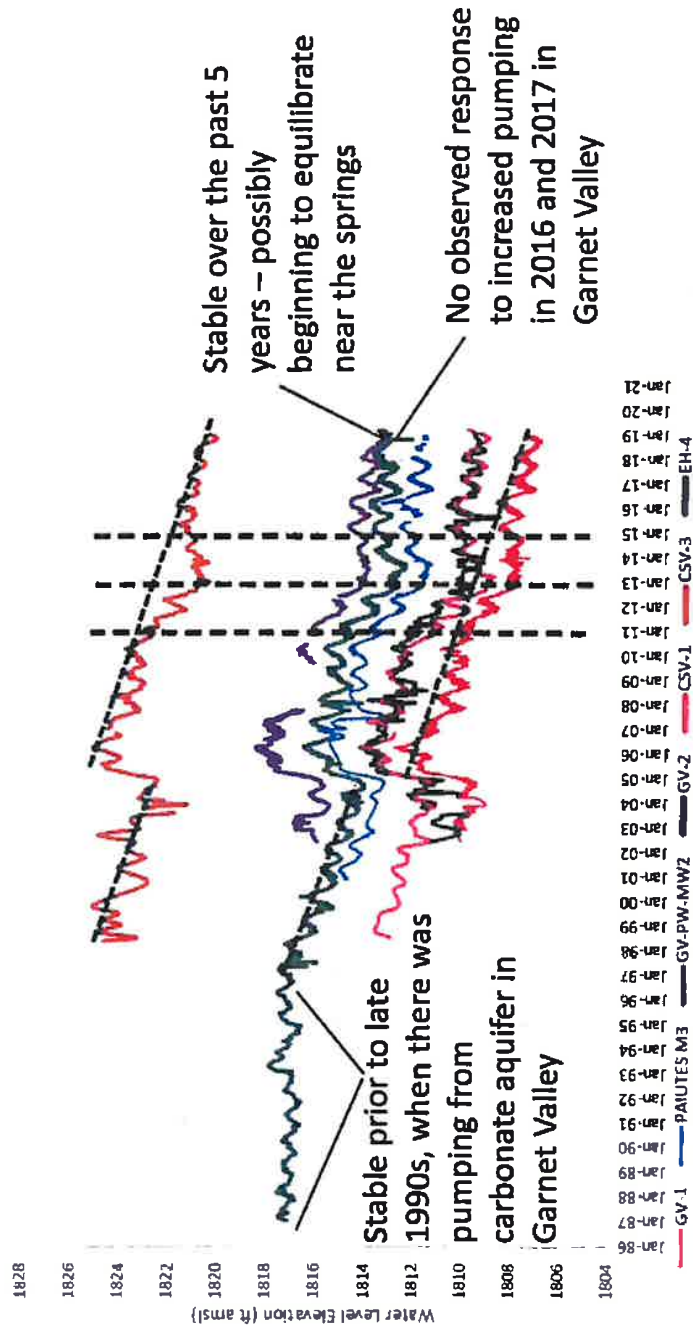


Figure 24 – Hydrograph Comparison of Garnet Valley Water Level Trends with other LWRFS Locations



# EXHIBIT 25

**Document (Closing Arguments of Georgia Pacific) Located at JA  
Vol. 43 at JA\_17198 to JA\_17207**

# EXHIBIT 26

**Document (September 23, 2019 Transcript Excerpts) Located at JA  
Vol. 44 at JA\_17357 to JA\_17359**

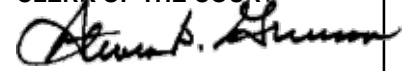
# EXHIBIT 27

**Document (September 24, 2019 Transcript Excerpts) Located at JA  
Vol. 44 at JA\_17511 to JA\_17512, JA\_17517 to JA\_17520, and  
JA\_17537 to JA\_17538**

# EXHIBIT 28

**Document (October 1, 2019 Transcript Excerpts) Located at JA Vol. 44 at JA\_17950 to JA\_17951, JA\_17961, and JA\_17670 to JA\_17972**





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28 **CLARK COUNTY, NEVADA**

29 LAS VEGAS VALLEY WATER DISTRICT,  
30 and SOUTHERN NEVADA WATER  
31 AUTHORITY, et al.,

Case No. A-20-816761-C

Dept. No. 1

32 Petitioners,

Consolidated with Cases:

33 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

34 ADAM SULLIVAN, P.E., Acting  
35 Nevada State Engineer, et al.,

36 Respondent.

37 **LINCOLN COUNTY WATER DISTRICT AND**  
38 **VIDLER WATER COMPANY, INC.'S OPENING BRIEF**

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1 **NRAP 26.1 DISCLOSURE**

2 The undersigned counsel of record certify that the following are persons and entities as  
3 described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the  
4 Court may evaluate possible disqualification or recusal.

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

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

10 3. All parent corporations and publicly-held companies owning 10 percent or more of any  
11 of Petitioners' stock:

12 Vidler Water Company, Inc.'s parent company is Vidler Water Resources, Inc. There  
13 is no publicly held company that owns 10% or more of Vidler Water Company, Inc.'s stock.

14 4. Names of all law firms whose attorneys have appeared for Petitioners in this case:  
15 Lincoln County District Attorney, Snell & Wilmer, L.L.P., Great Basin Law and  
16 Allison MacKenzie, Ltd. Snell & Wilmer, L.L.P. has been substituted out of this case and no longer  
17 represents any of the Petitioners.

18 5. If any litigant is using a pseudonym, the litigant's true name:  
19 Not applicable.

20 DATED this 27<sup>th</sup> day of August, 2021.

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Attorneys for Petitioner **VIDLER WATER  
COMPANY, INC.**

1 Petitioners, LINCOLN COUNTY WATER DISTRICT (“LINCOLN”) and VIDLER WATER  
2 COMPANY, INC. (“VIDLER”), submit their Opening Brief in support of their Petition for Judicial  
3 Review in accordance with the Court’s minute order issued May 27, 2021.

4 I.

5 **INTRODUCTION**

6 This case arises from a Petition for Judicial Review (“Petition”) filed by Petitioners  
7 LINCOLN/VIDLER challenging the lawfulness and propriety of Order 1309 (“Order”) issued by the  
8 State Engineer on June 15, 2020. Without substantial evidence or accurate analysis, Order 1309  
9 improperly included the Kane Springs Valley Hydrographic Basin (“Kane Springs”) in the Lower  
10 White River Flow System (“LWRFS”) after many years of purposeful exclusion from the LWRFS.

11 For decades the State Engineer has followed Nevada law by determining and managing water  
12 appropriations in each individual hydrographic basin. Based on the doctrine of “prior appropriation,”  
13 water users could and did determine their seniority based on the other permitted water rights in that  
14 specific basin. This is and remains the law in Nevada.

15 Pursuant to Nevada water law, Petitioners’<sup>1</sup> water rights are the most senior vested municipal  
16 rights granted by the State Engineer in the Kane Springs basin. Contrary to Nevada water law, the  
17 State Engineer issued Order 1309 and included Kane Springs in the LWRFS, an ever-changing, multi-  
18 basin area designated by the State Engineer for the joint management and administration of water  
19 rights within the multi-basin area. The LWRFS is the first such multi-basin area designated by the  
20 State Engineer in Nevada. The State Engineer’s inclusion of Kane Springs in the LWRFS has  
21 effectively reprioritized Petitioners’ senior water rights to the most junior rights in the multi-basin  
22 LWRFS. The State Engineer has no authority under Nevada law to administer and manage a multi-  
23 basin area nor to reprioritize Petitioners’ senior water rights to the most junior water rights in the multi-  
24 basin LWRFS. Further, the State Engineer violated Petitioners’ due process rights when he included  
25 Kane Springs in the LWRFS based upon a new six factor criteria which was only adopted *after* the  
26

27 \_\_\_\_\_  
28 <sup>1</sup> A portion of Petitioners’ water rights are now owned by Coyote Springs Investment, LLC (“CSI”). CSI has filed its own  
challenge to Order 1309. Petitioners’ references to water rights granted or owned by them is not intended to ignore the  
current ownership of the water rights. CSI’s arguments supporting its challenge of Order 1309 are contained in its Opening  
Brief.

1 hearing was held leading up to Order 1309 and *after* Petitioners had presented their evidence in  
2 response to Interim Order 1303.

3 In Order 1309, the 2020 State Engineer reversed determinations made by the 2007 State  
4 Engineer in Ruling 5712 which specifically excluded Kane Springs from the multi-basin Order 1169  
5 test pump proceedings, the predecessor to the LWRFS. In issuing Ruling 5712, the 2007 State  
6 Engineer granted 1,000 acre feet annually (“afa”) of senior water rights to LINCOLN/VIDLER in  
7 Kane Springs. The State Engineer specifically determined that LINCOLN/VIDLER’s Kane Springs  
8 water rights would not be included in the multi-basin Order 1169 test pump proceedings. The State  
9 Engineer further determined that the pumping of the 1,000 afa in Kane Springs would have no impact  
10 on Muddy River senior water rights or the Moapa dace. One State Engineer cannot reverse a decision  
11 of a prior State Engineer which impacts the priority of vested rights.

12 The State Engineer did not rely upon substantial evidence, which is evidence upon which a  
13 reasonable person might accept as adequate to support a conclusion, to support the reversal of his  
14 predecessor’s previous determination to exclude Kane Springs from the LWRFS. Instead, the State  
15 Engineer applied his newly adopted six factor criteria and freely admitted in Order 1309 that the  
16 evidence he relied upon and applied to his new criteria was “muted, lagged, obscured by climate  
17 response, or compromised by low-resolution data” and “attenuated”. Further, the State Engineer  
18 acknowledged there would be further hydrologic study necessary to determine the degree to which  
19 water use in Kane Springs would impact water resources in the LWRFS, thereby admitting there was  
20 no evidence of record to show how pumping in Kane Springs would affect any water resources in the  
21 LWRFS.

22 The State Engineer cannot reprioritize Petitioner’s water rights for the protection of an  
23 endangered species. The Nevada Supreme Court has recently held that the statutory water scheme in  
24 Nevada expressly prohibits re-allocating water rights established under the doctrine of prior  
25 appropriation and that public interest type considerations such as the protection of the Moapa dace and  
26 senior Muddy River rights are determined in the application approval process.

1 As shown in this brief, the State Engineer committed numerous errors in issuing Order 1309.  
2 Order 1309's findings as to Kane Springs must be vacated. Kane Springs should continue to be  
3 administered in accordance with the basin specific statutory scheme set out by the Legislature.

4 **II.**

5 **STATEMENT OF THE ISSUES**

6 1. Whether the State Engineer has statutory authority to create a super basin such as the  
7 LWRFS, to manage water rights granted in individual basins collectively and effectively modify the  
8 priority of vested rights.

9 2. Whether the State Engineer's determination to include Kane Springs in the super basin  
10 based upon newly created criteria violated LINCOLN/VIDLER's due process rights, was not  
11 supported by substantial evidence, and whether the decision was arbitrary and capricious.

12 3. Whether the State Engineer's determination that only 8,000 afa can be pumped from  
13 the LWRFS was supported by substantial evidence and whether the pumping limit was arbitrary and  
14 capricious.

15 4. Whether the State Engineer's determination that Kane Springs can be managed more  
16 effectively in the super basin is inconsistent with the State Engineer's other findings in Order 1309,  
17 was not based upon substantial evidence, and whether that determination was arbitrary and capricious.

18 **III.**

19 **STATEMENT OF THE CASE**

20 LINCOLN/VIDLER have only been involved in the LWRFS proceedings since 2019 although  
21 the Order 1169 proceedings started seventeen years earlier in 2002. LINCOLN/VIDLER were not  
22 involved in the Order 1169 aquifer test proceedings which started in March 2002, and they were  
23 purposefully excluded from all of the proceedings that led to Interim Order 1303. ROA at 4-11. From  
24 2002 to 2020, every State Engineer determined that Kane Springs should not be included in the multi-  
25 basin LWRFS or the multi-basin Order 1169 aquifer test.

26 On January 11, 2019, the State Engineer issued Interim Order 1303. In Interim Order 1303,  
27 the State Engineer designated for joint administration six (6) individual hydrographic basins as the  
28 LWRFS, including the Coyote Spring Valley, Muddy River Springs Area, California Wash, Hidden

1 Valley, Garnet Valley, and a portion of the Black Mountains Area. ROA at 82. Pursuant to the Interim  
2 Order, the LWRFS hydrographic basins shared a close hydrologic connection and were to be  
3 administered based upon their respective dates of priority in relation to other rights within the LWRFS  
4 as a regional groundwater unit. ROA at 82. Interim Order 1303 recognized the need for further  
5 analysis of the LWRFS because there were 72,000 acre feet of water rights issued (34,000 acre feet of  
6 surface water rights from the Muddy River system and 38,000 acre feet of underground water rights)  
7 and not more than 50,000 acre feet of water available in the six (6) basin LWRFS. ROA at 76-77.  
8 The State Engineer invited stakeholders in the LWRFS (not initially including Petitioners) to submit  
9 reports to the State Engineer addressing the following four specific areas: 1) the geographic boundary  
10 of the LWRFS, 2) aquifer recovery subsequent to the Order 1169 aquifer test, 3) the long-term annual  
11 quantity and location of groundwater that may be pumped from the LWRFS, and 4) the effect of  
12 movement of water rights between the alluvial and carbonate wells in the LWRFS and any other matter  
13 believed to be relevant to the State Engineer’s analysis. ROA at 82-83. The reports were intended to  
14 aid in the fact-finding goals of the Division and “make a determination as to the appropriate long-term  
15 management of groundwater pumping that may occur in the LWRFS by existing holders of water  
16 rights without conflicting with existing senior decreed rights or adversely affecting the endangered  
17 Moapa dace.” ROA at 81. A public hearing was held in Carson City between September 23, 2019,  
18 and October 4, 2019. ROA at 12. The purposes of the hearing were to afford stakeholder participants  
19 who submitted reports pursuant to the solicitation in Interim Order 1303 an opportunity to provide  
20 testimony on the scientific data collected and analyzed regarding the topics in Interim Order 1303 and  
21 to test the conclusions offered by other stakeholder participants. ROA at 12.

22 Although LINCOLN/VIDLER were not LWRFS stakeholders or Order 1169 study  
23 participants, in 2018 Southern Nevada Water Authority (“SNWA”) had belatedly requested that the  
24 State Engineer consider whether Kane Springs should be included in the boundaries of the LWRFS.  
25 ROA at 36206-36207. There is no evidence in the record that the State Engineer ever notified  
26 LINCOLN/VIDLER he was considering changing his determinations made in Ruling 5712 excluding  
27 Kane Springs from the LWRFS area, that he was reconsidering the Order 1169 pump test results or  
28 that he was going to adopt new criteria for determining inclusion in the LWRFS. Because they had

1 no choice but to protect their senior vested rights, LINCOLN/VIDLER performed new geophysical  
2 work, submitted reports to the State Engineer and participated in the public hearing showing the State  
3 Engineer that Kane Springs should not be included within the LWRFS. ROA at 36193-36496 and see  
4 specifically ROA at 36231. *See also generally* Hearing Transcripts at ROA 52960-53758 (not  
5 reproduced in LINCOLN/VIDLER’s Record on Appeal).

6 On June 15, 2020, then State Engineer, Tim Wilson, issued Order 1309 including Kane Springs  
7 in the LWRFS for the first time. LINCOLN/VIDLER timely filed their petition for judicial review of  
8 the Order 1309 pursuant to NRS 533.450 challenging the determinations of the State Engineer.

9 **IV.**

10 **STATEMENT OF RELEVANT FACTS**

11 **A. LINCOLN/VIDLER WATER RIGHTS, RULING 5712, RULING 5987 AND**  
12 **BIOLOGICAL OPINION.**

13 Petitioners, LINCOLN and VIDLER own groundwater permits with a priority date of February  
14 14, 2005, and jointly own groundwater right applications filed on April 10, 2006 to appropriate water  
15 in the Kane Springs for municipal use purposes with a place of use in the Coyote Spring Valley  
16 Hydrographic Basin (210) (“Coyote Springs Valley”). ROA at 699-700. The Kane Springs  
17 hydrographic basin and the points of diversion in the permits and applications are located entirely in  
18 Lincoln County, Nevada. ROA at 699-700. Petitioners, LINCOLN and VIDLER are senior water  
19 right permit holders and jointly hold senior groundwater right applications in Kane Springs. ROA at  
20 716, 992-994, 1063.

21 On February 14, 2005, LINCOLN/VIDLER filed Applications 72218, 72219, 72220 and  
22 72221 to appropriate groundwater in Kane Springs. ROA at 699-700. On August 1, 2006,  
23 LINCOLN/VIDLER and the United States Department of the Interior, Fish and Wildlife Service  
24 (“USFWS”) entered into an Amended Stipulation for Withdrawal of Protests for Applications 72218,  
25 72219, 72220 and 72221 (“Amended Stipulation for Withdrawal of Protests”). ROA at 36689-36700.  
26 The Amended Stipulation for Withdrawal of Protests contains among other things, triggers acceptable  
27 to USFWS to reduce Petitioners’ groundwater pumping for protection of the Moapa dace. ROA at  
28 36698-36699. USFWS agreed to groundwater pumping from Kane Springs subject to certain

1 conditions notwithstanding the Order 1169 proceedings including the direct payment of \$50,000 to  
2 USFWS for the restoration of the Moapa dace habitat. ROA at 36696-36700. The Stipulation for  
3 Withdrawal of Protests addressed USFWS’ concerns to include Kane Springs in the Order 1169  
4 proceedings with regard to LINCOLN/VIDLER’S applications. ROA at 36689. USFWS’ request to  
5 include Kane Springs in the Order 1169 proceedings was specifically withdrawn with prejudice based  
6 upon the conditions governing LINCOLN/VIDLER’s pumping in the Amended Stipulation for  
7 Withdrawal of Protests. ROA at 36689. From 2006 to date, Petitioners and USFWS have performed  
8 and continue to perform under the terms of the Amended Stipulation for Withdrawal of Protests. *See*  
9 Affidavit of Dorothy Timian Palmer filed August 6, 2020 in support of Opposition to Motion to  
10 Change Venue at ¶18.

11 On February 2, 2007, the State Engineer issued Ruling 5712, which partially approved  
12 Applications 72218, 72219, 72220 and 72221, granting LINCOLN/VIDLER 1,000 afa of water rights  
13 in Kane Springs. ROA at 699-721. In Ruling 5712, the State Engineer specifically determined Kane  
14 Springs would not be included in the Order 1169 study area because there was no substantial evidence  
15 that the appropriation of a limited quantity of water in Kane Springs will have any measurable impact  
16 on the Muddy River Springs that warrants the inclusion of Kane Springs in Order 1169. ROA at 719.  
17 The State Engineer denied the request to hold the LINCOLN/VIDLER applications in abeyance and  
18 refused to include Kane Springs within the LWRFS study area and subject to the provisions of Order  
19 1169. ROA at 719. The State Engineer specifically rejected the argument that the Kane Springs rights  
20 could not be appropriated based upon senior appropriated rights in the down gradient basins. ROA at  
21 713. The State Engineer found that the groundwater elevations in Kane Springs were significantly  
22 higher (between 50 and 75 feet higher) than the groundwater elevations in the Coyote Springs basin  
23 to the south and this elevation difference was strong support for a low permeable structure or change  
24 in lithology (barrier to flow) between Kane Springs and the southern part of Coyote Spring Valley.  
25 ROA at 719. Neither the parties to the Memorandum of Understanding<sup>2</sup> (“MOU”) entered into on  
26 April 20, 2006 by certain water right holders in the Coyote Spring Valley and California Wash  
27

28 <sup>2</sup> The parties to the Memorandum of Understanding are the Southern Nevada Water Authority (“SNWA”) United States  
Fish and Wildlife Service (“USFWS”), CSI, the Moapa Band of Paiute Indians and the Moapa Valley Water District. ROA  
at 9921-9946.



1 hydrographic basins nor any of the Order 1169 study participants objected to or appealed the State  
2 Engineer's determinations that: (1) Kane Springs would not be included in Order 1169, and (2)  
3 Petitioners could appropriate and develop their water rights notwithstanding appropriated water rights  
4 in the down-gradient basins. NPS was a protestant in the Kane Springs application proceedings and  
5 requested that Kane Springs be included in the Order 1169 study. ROA at 700-701, 718. The NPS  
6 did not appeal the State Engineer's determination to exclude Kane Springs from the Order 1169 study.

7 Although Ruling 5712 granted some senior rights to Petitioners, they filed a Petition for  
8 Judicial Review with the Seventh Judicial District Court on March 1, 2007, challenging portions of  
9 the State Engineer's decision in Ruling 5712. Following the filing of the Petition for Judicial Review,  
10 LINCOLN/VIDLER met with the State Engineer on March 15, 2007, regarding their pending  
11 Applications 74147, 74148, 74149 and 74150. LINCOLN/VIDLER requested that they perform  
12 additional data collection, testing and study in Kane Springs to support the pending applications. The  
13 State Engineer informed LINCOLN/VIDLER he would consider granting LINCOLN/VIDLER  
14 additional unappropriated water rights in Kane Springs pursuant to their pending Applications 74147,  
15 74148, 74149 and 74150 if LINCOLN/VIDLER collected the additional data upgradient in the Kane  
16 Springs basin and performed the testing and additional study to support the pending applications.  
17 Based upon the above agreement, LINCOLN/VIDLER and the State Engineer thereafter stipulated to  
18 the dismissal of the Petition for Judicial Review regarding Applications 72218, 72219, 72220 and  
19 72221 and Ruling 5712.

20 On April 29, 2009, the Acting State Engineer issued Ruling 5987 summarily denying  
21 Applications 74147, 74148, 74149 and 74150 without holding a hearing or contacting  
22 LINCOLN/VIDLER to get any information about the additional data collection, testing and study the  
23 State Engineer stated he would review. ROA at 722-725. LINCOLN/VIDLER filed a Petition for  
24 Judicial Review with the Seventh Judicial District Court on May 29, 2009 challenging the validity of  
25 the State Engineer's decision in Ruling 5987.

26 On April 27, 2010, LINCOLN/VIDLER and the State Engineer entered into a settlement  
27 agreement to resolve LINCOLN/VIDLER's Petition for Judicial Review challenging Ruling 5987.  
28 See ROA at 33678-33679. The settlement agreement required, among other things, the State Engineer

1 to reinstate 74147, 74148, 74149 and 74150 with the same priority as their original application date.  
2 ROA at 33678-33679. LINCOLN/VIDLER and the State Engineer thereafter stipulated to the  
3 dismissal of the Petition for Judicial Review regarding Applications 74147, 74148, 74149, and 74150  
4 and Ruling 5987.

5 On October 29, 2008, LINCOLN/VIDLER obtained a Biological Opinion from the USFWS  
6 that pumping of groundwater pursuant to Applications 72218, 72219, 72220, and 72221 in Kane  
7 Springs was not likely to jeopardize the continued existence of the endangered Moapa dace. ROA at  
8 49906-49973. Further, the Biological Opinion found that the project could contribute to groundwater  
9 level declines and spring flow reductions however, implementation of the project's conservation  
10 actions will minimize these impacts. ROA at 49942. With regard to incidental take, the Biological  
11 Opinion stated the level of anticipated take is not likely to result in jeopardy to the Moapa dace based  
12 in part on the implementation of the conservation measures for the project. ROA at 49944-49945.  
13 Since 2008, Petitioners have spent substantial sums, including the direct payment of \$50,000, to the  
14 USFWS as part of the project's conservation measures in reliance on the Biological Opinion, Ruling  
15 5712, and the various settlement agreements entered into with the State Engineer to resolve  
16 Petitioners' appeals of Rulings 5712 and 5987 involving Petitioners' water rights and applications in  
17 Kane Springs. ROA at 36689-36700. None of the parties to the April 20, 2006 Memorandum of  
18 Understanding and none of the Order 1169 study participants objected to or appealed the Biological  
19 Opinion issued by the USFWS for the LINCOLN/VIDLER groundwater applications in Kane Springs.

20 As alleged in their Petition for Judicial Review, in reliance on the State Engineer's approval of  
21 Applications 72218, 72219, 72220 and 72221, Ruling 5712, the issuance of permits to Petitioners and  
22 the settlement with the State Engineer, LINCOLN/VIDLER have expended significant time and  
23 money since 2005 in furtherance of perfecting their water rights in the Kane Springs basin in the  
24 approximate sum of \$4,237,000. LINCOLN/VIDLER Petition for Judicial Review at ¶ 20. In  
25 addition, in reliance upon the State Engineer's representations regarding the additional data collection,  
26 testing and study, and his statements that he would consider any new data and results regarding the  
27 basin, and the settlement agreement that set forth a methodology for the parties to follow in  
28 establishing additional water that could be appropriated in Kane Springs, LINCOLN/VIDLER have

1 expended significant time and money to collect data, test and study the Kane Springs basin and to  
2 prepare the data and information to be presented to the State Engineer to support pending Applications  
3 74147, 74148, 74149 and 74150 in the approximate sum of \$543,000. LINCOLN/VIDLER Petition  
4 for Judicial Review at ¶ 21.

5 The Kane Springs monitoring well KMW-1 located in southern Kane Springs is approximately  
6 22 miles as the crow flies from the Muddy River Springs Area. ROA at 36243 (well location map).  
7 To put this distance in perspective, approximately 22 miles as the crow flies from the Clark County  
8 Courthouse is the Boulder City High School.

9 **B. MUDDY RIVER DECREE.**

10 The Muddy River adjudication proceedings involved water rights, including headwaters and  
11 tributaries, to the Muddy River in Clark County, Nevada. See ROA at 33770, 33771, 33786, 33815.  
12 The Muddy River adjudication proceedings did not involve waters in Lincoln County or Kane Springs.

13 The headwaters and tributaries of the Muddy River were described in those proceedings as  
14 only the springs and waters developed by the claimants and as adjudicated in the Decree. ROA at  
15 33796, 33812. The appropriators and the appropriation sources which are tributary to the Muddy  
16 River are named in the Decree. ROA at 33799-33801, 33809. The tributaries recognized in the Decree  
17 were: Bloedel Spring, Big Spring, Jones Spring, High Springs, Rock Cabin Spring, Cox Spring and  
18 Baldwin Spring.<sup>3</sup> ROA at 33799-33801, 33809. The appropriators with tributary sources are:  
19 Bloedel, Moapa & Salt Lake Produce Co., Isaiah Cox and Anna Cox, George Baldwin, Sadie George,  
20 Joseph Perkins, D.H. Livingston and Richard Smith and G.S. Holmes and Julie May Knox. ROA at  
21 33799-33801, 33809. The Muddy Valley Irrigation Company is not listed as an appropriator in the  
22 Muddy River Decree *with tributary sources*. ROA at 33801-33806. The only basin mentioned in the  
23 Muddy River Decree adjudication proceedings as contributing water to the Muddy River during an  
24 extreme storm event was Meadow Valley Wash, not any basins or waters in Lincoln County. See

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28 <sup>3</sup> LINCOLN/VIDLER believe Bloedel Spring is now known as the Pederson Spring Complex and Plummer Spring  
Complex, Rock Cabin Spring is known as Stone Cabin Spring complex, and today, Baldwin Spring is called the Baldwin  
Spring Complex composed of Cardy Lamb Spring, Twin Springs, and Baldwin Springs.

1 Addendum, Answer of Defendants G.S. Holmes and Julia May Knox, ¶ V, p. 9:18-20, from the Muddy  
2 River adjudication.<sup>4</sup>

3 Contrary to the State Engineer’s findings, Petitioners’ groundwater rights are not headwaters  
4 or tributaries to the Muddy River, a river system entirely within Clark County which was adjudicated  
5 as surface water rights pursuant to the Muddy River Decree.

6 **C. ORDER 1169 AQUIFER TEST.**

7 As previously stated, Petitioners were not and have never been an Order 1169 study participant  
8 since the Order 1169 proceedings were instituted by the State Engineer in March, 2002. ROA at 654-  
9 669. Petitioners are not and have never been a party to the Memorandum of Understanding entered  
10 into on April 20, 2006, by certain water right holders in the Coyote Spring Valley and California Wash  
11 hydrographic basins whereby such parties voluntarily agreed to certain groundwater pumping  
12 restrictions, among other things, to further their shared common interest in the conservation and  
13 recovery of the Moapa dace and its habitat, an endangered species under the Endangered Species Act.  
14 ROA at 9921-9946.

15 Between 2010 and 2014, the Order 1169 basins were studied and tested, and the Order 1169  
16 study participants were involved and participated in aquifer tests, the submission of reports,  
17 proceedings and actions taken by the State Engineer pursuant to Order 1169. ROA at 4-11. The basins  
18 that were included in the Order 1169 aquifer test were acknowledged to have a unique hydrologic  
19 connection and share the same supply of water. ROA at 75. The Kane Springs basin was not included  
20 in the Order 1169 aquifer testing, monitoring or measurements and Kane Springs basin water right  
21 holders, including Petitioners, were not involved and did not participate in the aquifer testing,  
22 submission of reports, proceedings and actions taken by the State Engineer pursuant to Order 1169  
23 from 2010 to 2014. ROA at 36230-36231. After the aquifer test, no Order 1169 study participants  
24 recommended that Kane Springs be included in the Order 1169 study area nor did the State Engineer  
25 make a determination that Kane Springs should be included in the Order 1169 study area based upon  
26 the Order 1169 testing and proceedings. ROA at 654-658. In fact, SNWA had been ordered to submit  
27

28 \_\_\_\_\_  
<sup>4</sup> The Court may take judicial notice of public records from another case that are a reliable source. *Mack v. Estate of Mack*,  
125 Nev. 80, 91, 206 P.3d 98, 106 (2009).

1 model simulations results showing predicted effects of pumping both existing rights and current  
2 applications in numerous basins, including Kane Springs, after the Order 1169 aquifer test. ROA at  
3 655, 666. Based upon the information already provided after the Order 1169 aquifer test, the State  
4 Engineer rescinded the requirement that SNWA update Exhibit 54, its model – which would have  
5 modeled predicted effects of pumping in Kane Springs. ROA at 655, 666. One study participant’s  
6 report (Southern Nevada Water Authority) noted in response to Order 1169 pumping: “However, the  
7 presence of boundaries and spatial variations in hydraulic connectivity affect the carbonate’s response  
8 depending on location. For example, **no discernible responses were observed north of the Kane  
9 Springs Fault and west of the MX-5 and CSI wells near the eastern front of the Las Vegas  
10 Range.**” ROA at 41949. The entire Kane Springs basin is located north of the Kane Springs Fault  
11 and Petitioners’ wells are located north of the Kane Springs Fault. ROA at 36258.

12 As a result of the Order 1169 aquifer test, the State Engineer issued Rulings 6254-6261 on  
13 January 29, 2014 denying all the pending groundwater applications in Coyote Spring Valley, Muddy  
14 River Springs Area, California Wash, Hidden Valley, Garnet Valley, and certain portions of the Black  
15 Mountain Area. ROA at 726-948 (not reproduced in LINCOLN/VIDLER’s Record on Appeal).  
16 LINCOLN/VIDLER were not parties to any of the proceedings involving Rulings 6255-6261.

17 **D. INTERIM ORDER 1303 AND ORDER 1309.**

18 On January 11, 2019—nearly 17 years after issuing Order 1169—the State Engineer issued  
19 Interim Order 1303 designating the LWRFS, a multi-basin area known to share a close hydrologic  
20 connection, as a joint administrative unit for purposes of administration of water rights. ROA at 70-  
21 88. Pursuant to Interim Order 1303, all water rights within the LWRFS were to be administered based  
22 upon their respective dates of priority in relation to other rights within the regional groundwater unit.  
23 ROA at 82. Thus, after the 17 years of testing and proceedings, Kane Springs was not included as part  
24 of the LWRFS multi-basin area in Interim Order 1303. More detail from Interim Order 1303 was set  
25 forth above.

26 ///  
27 ///  
28 ///

1 After a public administrative hearing (which was not a trial type proceeding according to the  
2 State Engineer)<sup>5</sup>, the State Engineer issued Order 1309 on June 15, 2020 delineating the Lower White  
3 River Flow System Hydrographic Basin to include not only those certain hydrographic basins subject  
4 to Order 1169 and Order 1303, but for the first time included Kane Springs as part of the Lower White  
5 River Flow System Hydrographic Basin. ROA at 52-54. In Order 1309, the State Engineer stated it  
6 was necessary for spring flow measured at the Warm Springs West gage (in the Muddy River Springs  
7 Area) to flow at a minimum rate in order to maintain habitat for the Moapa dace. ROA at 46. The  
8 State Engineer determined in Order 1309 that liability under the Endangered Species Act for a “take”  
9 would extend to groundwater users within the LWRFS and would so extend to the State of Nevada  
10 through the Division of Water Resources as the government agency responsible for permitting water  
11 use. ROA at 47. The State Engineer concluded that it was against the public interest to allow  
12 groundwater pumping that will reduce spring flow in the Warm Springs area to a level that would  
13 impair habitat necessary for the survival of the Moapa dace and could result in take of the endangered  
14 species. ROA at 47.

15 In Order 1309, the State Engineer pronounced six criteria purportedly from Rulings 6254-6261  
16 issued by the State Engineer on January 29, 2014 based upon the Order 1169 aquifer test as the  
17 standard of general applicability for inclusion into the geographic boundary of the LWRFS. ROA at  
18 48-49. These criteria were not disclosed before the proceedings leading to Order 1309, but were  
19 disclosed for the first time in the publication of Order 1309.

20 The State Engineer recognized the evidence regarding hydrographic response pattern in wells  
21 located in the southern edge of Kane Springs was different compared to that exhibited by wells in the  
22 LWRFS. ROA at 53. The Kane Springs well’s hydrographic response pattern was “muted, lagged,  
23 obscured by climate response or compromised by low-resolution data”.<sup>6</sup> ROA at 53. The State  
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25 <sup>5</sup> At the start of the administrative hearing, the State Engineer reminded the parties the public administrative hearing was  
26 not a “trial-type” proceeding, not a contested adversarial proceeding. ROA at 52962. [09-23-19 Tr. 6:4-6, 24 to 7:1  
(Hearing Officer Fairbank)]. Cross-examination was limited to between 4-17 minutes per participant depending on the  
27 length of time given to a participant to present its reports. ROA at 52962 [09-23-19 Tr. 7:5-7 (Hearing Officer Fairbank)].

28 <sup>6</sup> Muted, lagged, obscured by climate response refers to not being able to tell what the actual response is due to the over-  
arching response in the hydrographs due to a climate event, i.e., the intense precipitation event of 2005. ROA at 53, n.285  
citing to ROA at 52816-52817 (LC-V Closing, pp. 5-6); 36211-36212 (LC-V Ex. 1, pp. 3-3 – 3-4); and 52783-52784 (CSI  
Closing, pp. 5-6). LINCOLN/VIDLER believe the State Engineer was referring to the one (1) foot error in the data from  
CSVM-4 as the “compromised by low resolution data”. ROA at 53.

1 Engineer stated he “recognizes these differences.” ROA at 53. In addition, the State Engineer  
2 recognized that the physically measured evidence continued to show that the groundwater elevation  
3 in Kane Springs was 60 feet higher than the groundwater level in Coyote Springs “consistent with a  
4 zone of lower permeability.” ROA at 53. However, now in 2020, the State Engineer found the  
5 evidence and testimony supporting a similarity in hydrographic patterns and response as provided by  
6 expert witnesses like that of the NPS to be persuasive. ROA at 53. The State Engineer concluded:  
7 “Namely, that while attenuated<sup>7</sup>, the general hydrographic pattern observed in southern Kane Spring  
8 Valley reflects a response to Order 1169 pumping, consistent with a close hydraulic connection with  
9 the LWRFS.” ROA at 53.

10 The State Engineer also arbitrarily limited pumping in the LWRFS to 8,000 afa without support  
11 of any evidence in the record. ROA at 64. The State Engineer determined that including Kane Springs  
12 in the LWRFS provides the opportunity for conducting additional hydrologic study “to determine the  
13 degree to which water use would impact water resources in the LWRFS and to allow continued  
14 participation by holder of water rights in future management decisions. Thus, these sub-basins, and  
15 any other portions of the LWRFS that may benefit from additional hydrological study, can be managed  
16 more effectively and fairly within the LWRFS.” ROA at 55. Again, these determinations by the State  
17 Engineer that Kane Springs may “benefit from additional hydrologic study” and “can be managed  
18 more effectively and fairly within the LWRFS” were made without citing to any evidence in the  
19 record. There was no management plan for the LWRFS put forth by the State Engineer in Order 1309.

20  
21 **V.**

22 **STANDARD OF REVIEW**

23 Questions of statutory construction presented in this appeal are questions of law which require  
24 de novo review by this Court. The Nevada Supreme Court has repeatedly held courts have the  
25 authority to undertake an independent review of the State Engineer’s statutory construction, without  
26 deference to the State Engineer’s determination. *Andersen Family Associates v. Ricci*, 124 Nev. 182,  
27  
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<sup>7</sup> “Attenuated” means “having been reduced in force, effect, or value.” *See generally*, Merriam Webster’s Collegiate Dictionary, 74 (10<sup>th</sup> ed. 1994).

1 186, 179 P.3d 1201, 1203 (2008) (citing *Bacher v. State Engineer*, 122 Nev. 1110, 1115, 146 P.3d  
2 793, 798 (2006) and *Kay v. Nunez*, 122 Nev. 1100, 1103, 146 P.3d 801, 804 (2006).

3 Any “presumption of correctness” of a decision of the State Engineer as provided by NRS  
4 533.450(10), “does not extend to ‘purely legal questions,’ such as ‘the construction of a statute,’ as to  
5 which ‘the reviewing court may undertake independent review.’” *In re State Engineer Ruling No.*  
6 *5823*, 128 Nev. 232, 238-239, 277 P.3d 449, 453 (2012) (quoting *Town of Eureka v. State Engineer*,  
7 108 Nev. 163, 165, 826 P.2d 948, 949 (1992)). At no time will the State Engineer’s interpretation of  
8 a statute control if an alternative reading is compelled by the plain language of the statute. *See*  
9 *Andersen Family Associates*, 124 Nev. at 186, 179 P.3d at 1203.

10 The questions presented here are legal questions, including whether the State Engineer  
11 exceeded his authority: in creating a multi-basin administrative unit and including Kane Springs in the  
12 LWRFS; in relying on future hydrologic study to determine the degree that Petitioners’ water use  
13 would impact the Muddy River and the Moapa dace; and in reliance on a future, undetermined  
14 management plan. Therefore, this Court should undertake independent review without deference to  
15 the State Engineer’s Order. *See Jones v. Rosner*, 102 Nev. 215, 216-217, 719 P.2d 805, 806 (1986)  
16 (reviewing court is free to decide legal questions without deference to an agency determination);  
17 *accord Pyramid Lake Paiute Tribe v. Ricci*, 126 Nev. 521, 525, 245 P.3d 1145, 1148 (2010) (“[w]e  
18 review purely legal questions without deference to the State Engineer’s ruling.”). Accordingly,  
19 LINCOLN/VIDLER’s Opening Brief highlights the errors made in statutory authority and  
20 construction by the State Engineer in Order 1309.

21 The Court’s review of the Order 1309 is “in the nature of an appeal” and limited to the record  
22 before the State Engineer. *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979). On appeal, a  
23 reviewing court must “determine whether the evidence upon which the engineer based his decision  
24 supports the order.” *State Engineer v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991) (citing  
25 *State Engineer v. Curtis Park*, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985)). The Court determines  
26 only whether the State Engineer’s decision is supported by substantial evidence in the record. *Revert*,  
27 95 Nev. at 786, 603 P.2d at 264. Substantial evidence is “that which a reasonable mind might accept  
28 as adequate to support a conclusion.” *Bacher v. State Engineer*, 122 Nev. 1110, 1121, 146 P.3d 793,



1 800 (2006) (a reasonable person would expect quantification of water rights needed and no evidence  
2 of such quantification or calculations by the State Engineer is included in the record). The Court may  
3 not substitute its judgment for that of the State Engineer, “pass upon the credibility of the witness or  
4 reweigh the evidence.” *Id.*

5 In *Revert v. Ray*, 95 Nev. 782, 787, 603 P.2d 262, 264–65 (1979), the Nevada Supreme Court  
6 noted:

7 “The applicable standard of review of the decisions of the State Engineer, limited to an  
8 inquiry as to substantial evidence, **presupposes the fullness and fairness of the**  
9 **administrative proceedings: all interested parties must have had a ‘full opportunity**  
10 **to be heard,’** See NRS 533.450(2); **the State Engineer must clearly resolve all the**  
11 **crucial issues presented,** See *Nolan v. State Dep’t. of Commerce*, 86 Nev. 428, 470 P.2d  
12 124 (1970) (on rehearing); **the decisionmaker must prepare findings in sufficient detail**  
13 **to permit judicial review,** *Id.*; *Wright v. State Insurance Commissioner*, 449 P.2d 419  
14 (Or.1969); See also NRS 233B.125. **When these procedures, grounded in basic notions**  
15 **of fairness and due process, are not followed, and the resulting administrative**  
16 **decision is arbitrary, oppressive, or accompanied by a manifest abuse of discretion,**  
17 **this court will not hesitate to intervene.** *State ex rel. Johns v. Gragson*, 89 Nev. 478, 515  
18 P.2d 65 (1973).” (Emphasis added).

14 In addition to the errors of law made by the State Engineer, the State Engineer’s determinations in  
15 Order 1309 are not supported by substantial evidence, did not resolve all crucial issues presented nor  
16 did the State Engineer prepare findings in sufficient detail to permit judicial review. For all these  
17 reasons, this Court should not hesitate to intervene and Order 1309 as it relates to Kane Springs must  
18 be vacated by the Court.

## 19 VI.

### 20 ARGUMENT

#### 21 A. THE STATE ENGINEER HAS NO STATUTORY AUTHORITY TO CREATE 22 A SUPER BASIN TO MANAGE INDIVIDUAL BASINS COLLECTIVELY 23 AND MODIFY THE PRIORITY OF VESTED WATER RIGHTS.

24 The powers of the State Engineer, like other state administrative agencies, are limited to those  
25 set forth in the law. See *City of Henderson v. Kilgore*, 122 Nev. 331, 334, 131 P.3d 11, 13 (2006);  
26 *Clark Cty. School Dist. v. Clark Cty. Classroom Teachers Ass’n*, 115 Nev. 98, 102, 977 P.2d 1008,  
27 1011 (1999) (*en banc*) (An administrative agency’s powers “are limited to those powers specifically  
28 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*, 481 P.3d 853, 856, 137 Nev. Adv. Op. 2 (2021)

1 (The State Engineer’s powers thereunder are limited to “only those ... which the legislature expressly  
2 or implicitly delegates.”); *Andrews v. Nevada State Board of Cosmetology*, 86 Nev. 207, 208, 467 P.2d  
3 96, 97 (1970) (“Official powers of an administrative agency cannot be assumed by the agency, nor  
4 can they be created by the courts in the exercise of their judicial function. The grant of authority to an  
5 agency must be clear.”) (*internal citation omitted*).

6 The State Engineer has no jurisdiction or powers over issues not within his statutory authority.  
7 See NRS 532.110 (“[t]he State Engineer shall perform such duties as are or may be prescribed by  
8 law”). The Nevada Legislature has enacted a comprehensive statutory scheme outlined in NRS  
9 Chapters 532, 533 and 534 that regulates the procedures by which water rights may be acquired,  
10 changed, or lost. See *Wilson*, 481 P.3d at 859, 137 Nev. Adv. Op. at \*3 (citing *Mineral Cty. v. Lyon*  
11 *Cty.*, 473 P.3d 418, 426, 136 Nev. Adv. Op. 58 (2020)).

12 The State Engineer cites NRS 532.120, NRS 533.024(1), NRS 533.024(1)(e), NRS 534.020,  
13 NRS 534.030, NRS 534.110 and NRS 534.110(6) and NRS 534.120 as authority and necessity for  
14 Order 1309. ROA at 43-44. There is nothing contained in those statutory provisions – either expressly  
15 or implicitly – that authorizes the State Engineer to manage multiple individual basins collectively as  
16 one administrative unit and reprioritize the seniority of vested rights. The comprehensive statutory  
17 scheme enacted by the Nevada Legislature allows the State Engineer to manage and take action in a  
18 groundwater basin or any portion thereof, as deemed essential for the welfare of the area involved. In  
19 NRS Chapter 534, the term “basin” is used sixty-nine (69) times. See NRS 534.025, NRS 534.030,  
20 NRS 534.035, NRS 534.037, NRS 534.040, NRS 534.050, NRS 534.070, NRS 534.090, NRS  
21 534.110, NRS 534.120, NRS 534.180, NRS 534.185, NRS 534.250, NRS 534.260, NRS 534.350. In  
22 NRS Chapter 534, the term “basins” is used five (5) times. See NRS 534.030(5), NRS 534.050, NRS  
23 534.100; NRS 534.350. None of the references to “basins” authorizes administration and management  
24 of a multi-basin unit or super-basin.

25 For example, NRS 534.110(6) cited in Order 1309 as authority states the State Engineer shall  
26 conduct investigations “in any *basin* or portion thereof . . . .” NRS 534.120 cited in Order 1309 as  
27 authority states “[w]ithin an area that has been designated by the State Engineer, as provided for in  
28 this chapter, where, in the judgment of the State Engineer, the groundwater *basin* is being depleted . .

1 . .” Both statutes use the word “basin” to describe the powers and authority of the State Engineer.  
2 The same is true for the powers and authorities granted to the State Engineer in the rest of the statutory  
3 scheme set up by the Legislature for basin administration and management: NRS 534.030 (“in any  
4 particular basin or portion therein, the State Engineer shall . . . .”); NRS 534.035 (“In each area  
5 designated as a groundwater basin by the State Engineer pursuant to the provisions of NRS 534.030,”);  
6 NRS 534.037 (“In a basin that has been designated as a critical management area by the State Engineer  
7 pursuant to subsection 7 of NRS 534.110,”); NRS 534.040 (“Upon the initiation of the administration  
8 of this chapter in any particular basin, and where the investigations of the State Engineer have shown  
9 the necessity for the supervision over the waters of that basin,”); NRS 534.050 (“every person desiring  
10 to sink or bore a well in any basin or portion therein in the State designated by the State Engineer, as  
11 provided for in this chapter,”); NRS 534.110(7) (“(a) May designate as a critical management area any  
12 basin in which withdrawals of groundwater consistently exceed the perennial yield of the basin. (b)  
13 Shall designate as a critical management area any basin in which withdrawals of groundwater  
14 consistently exceed the perennial yield of the basin upon receipt of a petition for such a designation  
15 which is signed by a majority of the holders of certificates or permits to appropriate water in the basin  
16 that are on file in the Office of the State Engineer.”); and NRS 534.110(8) (“In any basin or portion  
17 thereof in the State designated by the State Engineer, the State Engineer may restrict drilling of wells  
18 in any portion thereof if the State Engineer determines that additional wells would cause an undue  
19 interference with existing wells.”). NRS 533.007 provides an “‘Interbasin transfer of groundwater’  
20 means a transfer of groundwater for which the proposed point of diversion is in a different basin than  
21 the proposed place of beneficial use.” The Legislature has determined certain factors must be met for  
22 approval of an interbasin transfer of groundwater as provided in NRS 533.370(3) and NRS 533.364.  
23 All the factors in NRS 533.370(3) and NRS 533.364 are based upon analysis of the basin into which  
24 the water is to be imported or from which the water is to be exported. It is a basin-to-basin analysis  
25 required by law to be performed before water can be transferred between basins—specifically  
26 recognizing the basin-by-basin management scheme adopted by the Legislature.

27 All administration and management powers granted to the State Engineer in NRS Chapter 534  
28 are based upon basin-by-basin management and not a multi-basin or a super basin joint administrative

1 unit. This is critical because of the prior appropriation doctrine and the priority of underground water  
2 rights as set by NRS 534.080(3): “. . . the date of priority of all appropriations of water from an  
3 underground source mentioned in this section is the date when application is made in proper form and  
4 filed in the Office of the State Engineer pursuant to the provisions of chapter 533 of NRS.” The point  
5 of diversion for each application filed with the State Engineer is located in a hydrographic basin and  
6 the application has priority in that basin based upon the date it was filed. As set forth in the State  
7 Engineer’s Exhibits 22-37, he administers and manages each basin as a discrete hydrologic unit. ROA  
8 at 949-1069. The same holds true for annual pumping inventories – the records are kept and  
9 maintained by the State Engineer basin by basin. See State Engineer Exhibits 38-88. ROA at 1070-  
10 1499 (not reproduced in Petitioners’ Record on Appeal).

11 The Water Words Dictionary on the State Engineer’s website defines “basins” as follows:

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

17 *Water Words Dictionary by Letter, B at 25-26.*

18 As set forth in the definition above, there are 232 discrete hydrologic units for water planning  
19 and management purposes. One of those discrete hydrologic units is Kane Springs (206). The caption  
20 of Order 1309 itself sets forth the seven (7) specific discrete hydrologic units recognized by the USGS  
21 and the State Engineer. Even the State Engineer’s records introduced as evidence in the Order 1309  
22 proceedings recognize the perennial yield of each basin, the water rights permitted and certificated in  
23 each basin by priority date along with the current owners of the water right and orders designating  
24 and/or limiting use of water in a specific basin. ROA at 949-1069 (State Engineer’s Exhibits 22-37).

25 Neither the statement of policy nor the legislative history of NRS 533.024(1)(e) provides  
26 support for the State Engineer’s action in Order 1309. The policy of the state is for conjunctive  
27 management<sup>8</sup> of water sources; there is nothing in the conjunctive management policy that authorizes  
28 the creation of super basins or changing water right priorities nor any indication that the conjunctive

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<sup>8</sup> The State Engineer’s *Water Words Dictionary by Letter, C* at 61 defines “conjunctive management” as: “The integrated management and use of two or more water resources, such as a (groundwater) aquifer and a surface body water.”

1 management of water sources supersedes NRS 534.110 and NRS 534.120 that provide for basin-by-  
2 basin groundwater administration and management in Nevada.

3 Indeed, legislative statements of policy or purpose cannot serve as the basis for government  
4 action because they do not provide the adequate guidelines to form the basis of agency action. *See*,  
5 *e.g.*, 1 American Land Planning Law § 32.6 (2020 update) (“a broad statement of legislative purpose  
6 does not provide adequate guidelines . . .”). “Although discretionary power may be delegated by the  
7 Legislature to a permitting authority, it is essential that reasonable guidelines be provided.” 51  
8 Am.Jur.2d, Licenses & Permits § 51 (2021 Supp.).

9 In its statement of policy, the Nevada Legislature has not provided adequate or reasonable  
10 guidelines for either conjunctive management of water resources or the creation of super-basins. *See*  
11 NRS 533.024(1)(e). There are no guidelines or standards to govern the State Engineer and nothing to  
12 notify owners of previously appropriated water rights. Rather, the comprehensive statutory scheme  
13 identifies guidelines, protocols, and standards for appropriating and managing water resources basin-  
14 by-basin based on prior appropriation.

15 Prior appropriation has been the basis of Nevada’s water law since statehood. This doctrine  
16 applies a “first in time, first in right” principle to all appropriations of water. *Lobdell v. Simpson*, 2  
17 Nev. 274, 277 (1866). Every vested or permitted water right is assigned a priority date and the priority  
18 date is an essential component of the water right that cannot be stripped away without damaging the  
19 right itself. *Wilson v. Happy Creek, Inc.*, 135 Nev. 301, 312, 448 P.3d 1106, 1115 (2019). “[T]o  
20 deprive a person of his priority is to deprive him of a most valuable property right.” *Whitmore v.*  
21 *Murray City*, 154 P.2d 748, 751 (Utah 1944). Courts have viewed “a priority in a water right [as]  
22 property in itself.” *Colo. Water Conservation Bd. v. City of Central*, 125 P.3d 424, 434 (Colo. 2005),  
23 *Nichols v. McIntosh*, 34 P. 278, 280 (Colo. 1893). The Nevada Supreme Court has stated that “a loss  
24 of priority that renders rights useless ‘certainly affects the rights’ value’ and ‘can amount to a de facto  
25 loss of rights.’” *Andersen Family Assocs.*, 124 Nev. at 190-91, 179 P.3d at 1206; *see also Happy*  
26 *Creek, Inc.*, 135 Nev. at 312, 448 P.3d at 1115. *Eureka Cty. v. Seventh Jud. Dist. Ct. in & for Cty. of*  
27 *Eureka*, 134 Nev. 275, 281, 417 P.3d 1121, 1126 (2018) (recognizing that existing water rights are  
28 vested property rights subject to constitutional due process protections).

1 The Nevada Supreme Court determined the state’s water statutes recognize the importance of  
2 finality in water rights and therefore do not permit reallocation of adjudicated water rights. *Min. Cty.*  
3 *v. Lyon Cty.*, 136 Nev. Adv. Op. 58, 473 P.3d 418, 429 (2020). The Nevada Supreme Court stated:

4 **The statutory water scheme in Nevada therefore expressly prohibits reallocating**  
5 **adjudicated water rights that have not been abandoned, forfeited, or otherwise lost**  
6 **pursuant to an express statutory provision.**

7 **We note that such recognition of finality is vital in arid states like Nevada.** In *Arizona*  
8 *v. California*, the United States Supreme Court recognized that “[c]ertainty of rights is  
9 particularly important with respect to water rights in the Western United States,” and “[t]he  
10 doctrine of prior appropriation . . . is itself largely a product of the compelling need for  
11 certainty in the holding and use of water rights.” 460 U.S. 605, 620, 103 S.Ct. 1382, 75  
12 L.Ed.2d 318 (1983); see *United States v. Alpine Land & Reservoir, Co.*, 984 F.2d 1047,  
13 1050 (9th Cir. 1993) (“Participants in water adjudications are entitled to rely on the finality  
14 of decrees as much as, if not more than, parties to other types of civil judgments.”).  
15 **Municipal, social, and economic institutions rely on the finality of water rights for**  
16 **long-term planning and capital investments.** Likewise, agricultural and mining  
17 industries rely on the finality of water for capital and output, which derivatively impacts  
18 other businesses and influences the prosperity of the state. **To permit reallocation would**  
19 **create uncertainties for future** development in Nevada and undermine the public interest  
20 in finality and thus also the management of these resources consistent with the public trust  
21 doctrine. (Emphasis added.)

22 *Id.*

23 LINCOLN/VIDLER’s water rights in the Kane Springs basin had senior status as reflected in  
24 State Engineer’s Exhibit 23. ROA at 992-994. The State Engineer’s own Exhibit 31 reflects that the  
25 perennial yield of Kane Springs is 1,000 acre feet as determined in Ruling 5712 and Ruling 5712  
26 recognized in granting Petitioners’ applications that no water had been appropriated in Kane Springs.  
27 ROA at 716, 1063. LINCOLN/VIDLER’s water rights had a priority of February 14, 2005. ROA at  
28 699-700. On the other hand, State Engineer Exhibits 224 and 227 show underground water rights by  
priority based upon the LWRFS super basin created by the State Engineer. ROA at 8215-8227, 8511-  
8513. Pursuant to Order 1309, LINCOLN/VIDLER’s water rights are reprioritized from the most  
senior rights in Kane Springs to close to the last water rights in priority in the LWRFS with their  
February 14, 2005 priority date. ROA at 8217, 8513.

Because the State Engineer has no authority to administer and manage groundwater basins  
collectively in Nevada and reprioritize vested water rights, Order 1309 must be vacated and Kane  
Springs must continue to be administered and managed by the State Engineer in accordance with the  
basin specific statutory scheme established and required by the Legislature.

///

1           **B. THE STATE ENGINEER’S DETERMINATION TO INCLUDE KANE**  
2           **SPRINGS IN THE SUPER BASIN VIOLATED LINCOLN/VIDLER’S DUE**  
3           **PROCESS RIGHTS, CONSTITUTES UNLAWFUL AD HOC RULEMAKING,**  
4           **AND UNAUTHORIZED DELEGATION OF THE POWER TO LEGISLATE.**

5           In Order 1309, without notice or an opportunity to be heard, the State Engineer created six  
6           criteria to govern inclusion into the LWRFS. ROA at 48-49. Without notice or an opportunity to be  
7           heard the State Engineer admitted he considered the evidence and testimony presented in the public  
8           hearing “on the basis of a common set of criteria that are consistent with the original characteristics  
9           considered critical in demonstrating a close hydrologic connection requiring joint management in  
10          Rulings 6254-6261” issued on January 29, 2014. See ROA at 48. The State Engineer incorrectly  
11          stated each of these characteristics were previously identified and examined in the hydrological studies  
12          and subsequent hearing that followed the completion of the Order 1169 aquifer test and were the  
13          foundational basis for the State Engineer’s determinations in Rulings 6254-6261. ROA at 47. The  
14          new six factor criteria created by the State Engineer in Order 1309 are:

15           1) Water level observations whose spatial distribution indicates a relatively uniform or  
16           flat potentiometric surface and consistent with a close hydrologic connection.

17           2) Water level hydrographs that, in well-to-well comparisons, demonstrate a similar  
18           temporal pattern, irrespective of whether the pattern is caused by climate, pumping, or other dynamic  
19           is consistent with a close hydrologic connection.

20           3) Water level hydrographs that demonstrate an observable increase in drawdown that  
21           corresponds to an increase in pumping and an observable decrease in drawdown, or a recovery, that  
22           corresponds to a decrease in pumping, are consistent with a direct hydraulic connection and close  
23           hydrologic connection to the pumping location(s).

24           4) Water level observations that demonstrate a relatively steep hydraulic gradient are  
25           consistent with a poor hydraulic connection and a potential boundary.

26           5) Geological structures that have caused a juxtaposition of the carbonate-rock aquifer  
27           with low permeability bedrock are consistent with a boundary.

28           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

1 the extent of that connection, a boundary should be established such that it extends out to the nearest  
2 mapped feature that juxtaposes the carbonate-rock aquifer with low-permeability bedrock, or in the  
3 absence of that, to the basin boundary.

4 ROA 48-49.

5 The State Engineer developed and implemented these six criteria without notice in violation  
6 of Petitioners' due process rights and constituted unlawful *ad hoc* rulemaking. Further because the  
7 complete statutory scheme does not include—or authorize the creation of—the six criteria, their  
8 creation amounts to an unlawful usurpation of legislative power prohibited by the Nevada  
9 Constitution. Finally, even if the six criteria were appropriate and lawful, the State Engineer failed to  
10 properly analyze the criteria or apply the available facts and information in his analysis.

11 **1. Determining the six criteria used to include basins in the super basin after the**  
12 **introduction of evidence and after the hearing violates LINCOLN/VIDLER's due**  
13 **process rights and constitutes unlawful *ad hoc* rulemaking.**

14 In Order 1309, the State Engineer admitted he developed the six “new” criteria from Rulings  
15 6254-6261 based upon the Order 1169 aquifer test as the standard of general applicability for inclusion  
16 into the geographic boundary of the LWRFS. ROA at 48-49. The State Engineer should have  
17 articulated that standard in Interim Order 1303 if that was the standard he was going to apply to the  
18 reports submitted by the parties in response to Order 1303 and prior to the public administrative  
19 hearing. LINCOLN/VIDLER were not parties to Rulings 6255-6261 based upon the Order 1169  
20 aquifer test. LINCOLN/VIDLER note that criteria 4, 5, and 6 were not contained in Rulings 6254-  
21 6261.<sup>9</sup> Criteria 4 would not apply to Rulings 6254-6261 and was specifically relied upon by the State  
22 Engineer in Ruling 5712 to exclude Kane Springs from the LWRFS area. It appears criteria 5 and 6  
23 were created after the submission of evidence and after the hearing to include Kane Springs into the  
24 LWRFS. The State Engineer's Order 1309 violates due process because it adopted a standard to be  
25 applied to LINCOLN/VIDLER's water rights in Kane Springs after the presentation of evidence and  
26 after the hearing. LINCOLN/VIDLER never had an opportunity to address the State Engineer's six  
27

28 \_\_\_\_\_  
<sup>9</sup> It is not clear that criteria 2 was explicitly discussed in Rulings 6254-6261.



1 criteria and show why Kane Springs should not be included in the LWRFS and/or comply with the  
2 criteria requirement such as new criteria 6.

3 Due process requires that all interested parties must have notice and a full opportunity to be  
4 heard. *See* NRS 533.450(2); *Revert v. Ray*, 95 Nev. 782, 787, 603 P.2d 262, 264–65 (1979). Vested  
5 water rights are property rights and notice of the criteria that will be used to make a decision must be  
6 provided to water right holders prior to the hearing so they have a meaningful opportunity to address  
7 the criteria used by the State Engineer to make his decision. The United States Supreme Court has  
8 noted: “A party is entitled, of course, to know the issues on which decision will turn and to be apprised  
9 of the factual material on which the agency relies for decision so that he may rebut it.” *Bowman*  
10 *Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 288 n. 4 (1974) cited with approval in  
11 *Eureka Cnty. v. State Engineer*, 131 Nev. 846, 855, 359 P.3d 1114, 1120 (2015). The Nevada Supreme  
12 Court quoted *Bowman Transp., Inc.*: “[T]he Due Process Clause forbids an agency to use evidence in  
13 a way that forecloses an opportunity to offer a contrary presentation.” *Id.*

14 In *Eureka Cty. v. Seventh Jud. Dist. Ct. in & for Cty. of Eureka*, 134 Nev. 275, 280, 417 P.3d  
15 1121, 1125 (2018), the Nevada Supreme Court recognized that notice must be given at an appropriate  
16 stage in the proceedings to give parties meaningful input in the adjudication of their rights citing  
17 *Hamdi v. Rumsfeld*, 542 U.S. 507, 533, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) (“It is equally  
18 fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful  
19 time and in a meaningful manner.” (*quoting Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (other quotation  
20 marks and citations omitted))).

21 The State Engineer only articulated his LWRFS criteria in Order 1309 after the presentation of  
22 evidence and the hearing. This violated LINCOLN/VIDLER’s due process rights because they were  
23 given no notice of or any opportunity to address the State Engineer’s criteria.

24 Further, the State Engineer’s adoption of the six factor criteria constitutes improper *ad hoc*  
25 rulemaking. Because the State Engineer articulated a rule of general applicability in Order 1309, and  
26 there was no notice and an opportunity to comment on the proposed rule, the State Engineer’s Order  
27 1309 adopting the criteria is void.  
28

1 For example, in one case the Labor Commissioner determined a job classification existed. *S.*  
2 *Nev. Operating Eng'rs Contract Compliance Tr. v. Johnson*, 121 Nev. 523, 530, 119 P.3d 720, 726  
3 (2005). This determination was made after evidence had already been presented and prior to the  
4 existence of that job classification. *Id.* The court determined this was *ad hoc* rule making and refused  
5 to uphold this conduct. *Id.* at 531, 119 P.3d at 726.

6 Similarly, the Nevada Supreme Court has also held that, because an administrative agency  
7 order was prospective and general in nature, the intent to adopt a new rate design should properly be  
8 done by the rule making process rather than by a purely judicial method of evolving rules on a case-  
9 by-case basis. *Pub. Serv. Comm'n of Nevada v. Sw. Gas Corp.*, 99 Nev. 268, 273, 662 P.2d 624, 627  
10 (1983). Therefore, the administrative agency order was declared void by the court and of no effect.  
11 *Id.*

12 LINCOLN/VIDLER's due process rights were violated by the State Engineer by his  
13 announcement of the new six criteria used to judge whether a basin would be included in the LWRFS  
14 after the evidence was submitted and the hearing held in the Order 1309 proceedings. Order 1309  
15 should be declared void and of no effect by the Court.

16 Finally, there was no determination made by the State Engineer that the six factor criteria he  
17 adopted for joint administration and management protects the flows of the Muddy River, protects the  
18 Moapa dace or keeps the flows of the Muddy River at 3.2 cfs, the trigger the State Engineer determined  
19 was appropriate to protect the Moapa dace. In fact, the State Engineer specifically determined that  
20 more hydrologic study would be necessary to determine the degree to which water use in Kane Springs  
21 would impact water resources in the LWRFS. ROA at 55.

22 **2. Creation of the six criteria amounts to unlawful usurpation of legislative power**  
23 **and violates the Nevada Constitution's separation of powers.**

24 The Nevada Legislature may not delegate its powers to legislate. Nev. Const. art. 3 § 1.  
25 Although the legislature may not delegate this authority, it may delegate the power to determine the  
26 facts or state of things upon which the law makes its own operations depend." *Sheriff v. Luqman*, 101  
27 Nev. 149, 153, 697 P.2d 107, 110 (1985). It has long been the law that the Legislature must "clearly  
28 indicate the legal principles which are to control" the executive agency, thereby leaving nothing but

1 “to carry out the purposes of the act in the manner prescribed . . . .” *Ex rel. Ginocchio v. Shaughnessy*,  
2 47 Nev. 129, 135 (1923).

3 “Thus, the legislature can make the application or operation of a statute complete within itself  
4 dependent upon the existence of certain facts or conditions, the ascertainment of which is left to the  
5 administrative agency. . . . In doing so, the legislature vests the agency with mere fact finding authority  
6 and not the authority to legislate.” *Sheriff*, 101 Nev. at 153, 697 P.2d at 110. To be complete, a  
7 legislative enactment must specify what standards the agency is to employ and “be sufficient to guide  
8 the agency with respect to the purpose of the law and power authorized. Sufficient legislative  
9 standards are required in order to assure that the agency will neither act capriciously nor arbitrarily.”  
10 *Id.* at 154, 697 P.2d at 110.

11 Here, the State Engineer relies upon a legislative policy statement to authorize the creation of  
12 a super-basin, reallocate permitted water resources, and jointly manage seven, previously independent  
13 basins. ROA at 43 (relying on NRS 533.024(1)(e)). But the comprehensive statutory scheme dictates  
14 regulation based on prior appropriation in individual basins. For example, the Legislature has not  
15 adopted any legislation for the following: (1) Standards or guides governing reprioritizing water  
16 resources in combined basins; (2) Criteria for combining basins for joint administration; (3) Guidance  
17 on existing procedures for allocating water rights in individual basins; and (4) Authorizations or  
18 statutory changes for movement of the point of diversion within a newly-formed super basin. Indeed,  
19 even the illegitimate criteria used by the State Engineer fails to address any of the significant issues  
20 above. And no standards have been created (or at least no guidelines have been disclosed) for the  
21 management of any super basin including the LWRFS.

22 The obligation to create standards for creating and managing super basins is a legislative  
23 function that the Legislature must undertake in order to guide the State Engineer with the application  
24 of facts in the manner prescribed to give effect to the legislation. There is no question that this did not  
25 occur here. In addition to constituting impermissible *ad hoc* rule-making, the State Engineer’s creation  
26 of the six criteria amounts to usurpation of the legislative function.

27 ///

28 ///

1           **3. The State Engineer failed to analyze the six criteria he developed post hearing in**  
2           **determining Kane Springs should be included in the “super basin.”**

3           Despite articulating the six criteria after the fact, the State Engineer failed to apply the six  
4 criteria to determine the Kane Springs basin had a close hydrologic connection to the LWRFS  
5 requiring joint management. Order 1309 addresses Kane Springs in one paragraph. ROA at 52-54.  
6 Nowhere in that paragraph does the State Engineer address all six criteria or determine whether all six  
7 criteria demonstrate a close hydrologic connection requiring joint management. In fact, the Kane  
8 Springs data for criteria 1 and 4<sup>10</sup> regarding water level observations support no close hydrologic  
9 connection between Kane Springs and the other basins in the LWRFS. The State Engineer  
10 acknowledges this with regard to criteria 4 by noting that water level observations in Kane Springs are  
11 60 feet higher (6 stories higher) than the other basins consistent with a zone of lower permeability,  
12 i.e., a potential boundary. ROA at 53. The State Engineer did not analyze criteria 1 in his Kane  
13 Springs analysis. Indeed, this water level evidence acknowledged by the State Engineer shows, not a  
14 relatively uniform and flat potentiometric surface, but a marked difference in water level elevations  
15 that is consistent with a low permeable structure that impedes water flow between Kane Springs and  
16 Coyote Springs; hardly the close hydrologic connection required by criteria 1.

17           The State Engineer did give recognition to criteria 2<sup>11</sup>, but noted that analysis of the  
18 hydrographic response pattern for Kane Springs was “muted, lagged, obscured by climate response,  
19 or compromised by low-resolution data” compared to the other LWRFS basins. ROA at 53. The State  
20 Engineer stated he recognized these differences but found the testimony supporting a similarity in  
21 hydrographic patterns and response “persuasive.” ROA at 53. Despite this finding, the State Engineer  
22 did not explain why he found the testimony persuasive and cited to 30 pages of testimony and 5  
23 presentation slides but does not say what was in that testimony or slides that was persuasive. ROA at  
24 53, n. 286 found at ROA at 53170-53178 (Tr. 524-55) and 52310-52314 (NPS presentation slides 23-

25  
26  
27 <sup>10</sup> Criteria 1 and 4 are: 1) Water level observations whose spatial distribution indicates a relatively uniform or flat  
potentiometric surface and consistent with a close hydrologic connection; and 4) Water level observations that demonstrate  
a relatively steep hydraulic gradient are consistent with a poor hydraulic connection and a potential boundary.

28 <sup>11</sup> Criteria 2 is: 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.

1 27). Most of the 30 pages of testimony and 5 presentation slides do not relate to hydrographic patterns  
2 and response and fail to support the State Engineer’s position. The decisionmaker must prepare  
3 findings in sufficient detail to permit judicial review. *Revert v. Ray*, 95 Nev. 782, 787, 603 P.2d 262,  
4 264–65 (1979). The State Engineer’s findings contain no details of the evidence he found persuasive  
5 to permit judicial review. Instead, Petitioners and this Court are left to guess what the State Engineer  
6 found “persuasive” or even upon which evidence he actually relied, if any.

7 The State Engineer failed to analyze criteria 3<sup>12</sup> other than to say a response to Order 1169  
8 pumping was “attenuated.” “Attenuated” means “having been reduced in force, effect, or value.” The  
9 State Engineer failed to cite any evidence of record or any quantification of a Kane Springs response  
10 (observable increase or decrease) as required by criteria 3 to Order 1169 pumping to support his  
11 statement or his determination of the general hydrographic pattern observed in southern Kane Springs  
12 reflects a response to Order 1169 pumping consistent with a close hydraulic connection.  
13 LINCOLN/VIDLER maintain that the State Engineer cited no evidence or quantity to support his  
14 determination because there is no such reliable evidence in the record in the Order 1309 proceedings.  
15 Without this evidence or quantification, there is not substantial evidence supporting the State  
16 Engineer’s determination. *See Bacher v. State Engineer*, 122 Nev. 1110, 1121, 146 P.3d 793, 800  
17 (2006) (reasonable person would expect quantification of water rights needed and no evidence of such  
18 quantification or calculations by the State Engineer in the record).

19 The State Engineer also failed to analyze criteria 5.<sup>13</sup> ROA at 52-54. LINCOLN/VIDLER’s  
20 new geophysical data submitted as evidence in the hearing before the State Engineer shows a fault  
21 consistent with a barrier under criteria 5. ROA at 36220-36229, 36255-36263. This evidence was  
22 ignored by the State Engineer in the Kane Springs section of Order 1309. Further, the Kane Springs  
23 Wash Fault zone is the nearest mapped feature to Petitioners’ wells that juxtaposes the carbonate-rock  
24  
25  
26

27 <sup>12</sup> Criteria 3 is 3) Water level hydrographs that demonstrate an observable increase in drawdown that corresponds to an  
28 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).

<sup>13</sup> Criteria 5 is 5) Geological structures that have caused a juxtaposition of the carbonate-rock aquifer with low permeability  
bedrock are consistent with a boundary.

1 aquifer with low-permeability bedrock consistent with a boundary and was not discussed by the State  
2 Engineer. ROA at 73, 36258.<sup>14</sup>

3 Newly created criteria 6 requires a mapped feature or to the basin boundary to establish the  
4 boundary for inclusion in the LWRFS when limited, poor quality or low resolution water level data  
5 obfuscate a determination of the extent of the “close hydraulic connection.” ROA at 49. The State  
6 Engineer admits the hydrographic pattern data he had in the record for Kane Springs was “muted,  
7 lagged, obscured by climate response, or compromised by low-resolution data” and “attenuated” and  
8 thus cannot be used to determine the extent of the “close hydraulic connection.” ROA at 49, 53.  
9 Accordingly, the State Engineer created an additional new rule—criteria 6—requiring a mapped  
10 feature. LINCOLN/VIDLER presented geophysical data as the best available science showing the  
11 “geological structures that have caused a juxtaposition of the carbonate-rock aquifer with low  
12 permeability bedrock” consistent with a boundary. But because the State Engineer did not want to  
13 accept LINCOLN/VIDLER’S geophysical data confirming the State Engineer’s determination in  
14 Ruling 5712 that the water level data in Kane Springs showed the probability of a low-permeability  
15 structure or change in lithology between Kane Springs and the southern part of Coyote Spring Valley,  
16 the State Engineer ignored LINCOLN/VIDLER’s geophysical data, did not analyze his new criteria 5  
17 in the Kane Springs portion of Order 1309 and created new criteria 6. This concrete evidence (ignored  
18 in Order 1309) demonstrates a poor hydraulic connection and a boundary between Kane Springs and  
19 the remainder of the LWRFS as stated in factors 4 and 5.

20 Because he did not articulate his new criteria prior to the submission and evidence and before  
21 the hearing, the State Engineer knew there was no mapping in the record that complied with his newly  
22 created criteria 6 and thus, based upon his new criteria 6, Kane Springs would have to be included in  
23 the LWRFS. LINCOLN/VIDLER should have been given the opportunity to provide mapping to the  
24 State Engineer at the hearing to comply with a standard that had been articulated before the hearing.  
25 Because the State Engineer violated Petitioners’ due process rights and then failed to address the  
26 evidence presented by LINCOLN/VIDLER which supported excluding Kane Springs from the  
27 LWRFS under his unlawful criteria, Order 1309 should be vacated, and Kane Springs should continue  
28

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<sup>14</sup> The State Engineer recognized this mapped feature in Interim Order 1303. ROA at 73.

1 to be administered and managed as a separate basin under the statutory scheme adopted by the  
2 Legislature.

3 **4. The evidence relied upon—for the few factors the State Engineer did analyze—**  
4 **does not support the inclusion of Kane Springs in the super basin, nor is the State**  
5 **Engineer’s determination supported by substantial evidence.**

6 The evidence relied upon by the State Engineer does not support his determination. In Order  
7 1309, the State Engineer cites to the expert testimony of the NPS supporting a similarity in  
8 hydrographic response pattern exhibited in wells located in the southern edge of Kane Springs Valley.  
9 ROA at 53, n. 286 citing to NPS testimony and presentation slides which are found at ROA at 53170-  
10 53178 (Tr. 524-55) and 52310-52314 (NPS presentation slides 23-27). First, as set forth above, the  
11 State Engineer cited to 30 pages of testimony and 5 slides in support of his determination. However,  
12 he failed to cite to the specific information in the 30 pages of testimony and 5 slides that was  
13 “persuasive” to support a similarity in hydrographic patterns. Most of the witness’ testimony is not  
14 discussing hydrographs or hydrographic patterns but rather is unintelligible. It is not clear if the  
15 witness is discussing the slides, what he may be pointing to on the slides or frankly, what he is  
16 discussing. Thus, the State Engineer’s Order 1309 does not provide findings in sufficient detail to  
17 permit judicial review, that is, if it is supported by substantial evidence and the State Engineer’s  
18 reasoning for his conclusion as required by *Revert v. Ray*, 95 Nev. 782, 787, 603 P.2d 262, 264–65  
19 (1979) and *Eureka Cnty v. State Eng’r*, 131 Nev. 846, 856, 359 P.3d 1114, 1120–21 (2015). The  
20 Nevada Supreme Court stated:

21 Furthermore, the State Engineer’s decision to grant an application must be sufficiently  
22 explained and supported to allow for judicial review. *Id.*, at 787, 603 P.2d at 265; *see also*  
23 *Port of Jacksonville Mar. Ad Hoc Comm., Inc. v. U.S. Coast Guard*, 788 F.2d 705, 708  
(11th Cir.1986) (even under deferential substantial evidence review, courts must not  
merely “rubber stamp” agency action: they must determine that the “agency articulated a  
rational connection between the facts presented” and the decision) (internal quotation  
omitted).

24 *Eureka Cnty.*, 131 Nev. at 856, 359 P.3d at 1120-21.

25 Significantly, the NPS witness failed to consider there was a one (1) foot measurement error  
26 in the SNWA data (as explained below) that he (and the State Engineer) relied upon to support even  
27 the muted, lagged, and attenuated response in well data. ROA at 53360 [9-27-19 Tr. 978:2-10 (Burns  
28 Testimony)]. This error was pointed out by LINCOLN/VIDLER after the NPS witness testified. This

1 is extremely significant because the NPS witness (and the State Engineer) relied on a purported six  
2 inch to one foot decline in water levels in Kane Springs basin during the Order 1169 pump test. ROA  
3 at 53170 [09-25-19 Tr. 524:8-17 (Waddell Testimony)] ROA at 53359-53360 [09-27-19 Tr. 974:18-  
4 978:10 (Burns Testimony)]. But where the measurement was off by one foot, a six-inch or one foot  
5 difference in decline is within the error and thus erased and cannot be relied upon to demonstrate a  
6 “close hydraulic connection.” ROA at 53173 [9-25-19 R. 535:20-24 – 536:1-6 (Waddell Testimony)].

7 There was much testimony and reliance on water levels from monitor well CSV-4<sup>15</sup> to show  
8 a similar hydrographic pattern between that well (and Kane Springs Valley) and wells in the LWRFS.  
9 ROA at 53170 [09-25-19 Tr. 524:8-24 (Waddell Testimony)]. However, SNWA had previously  
10 identified issues with measurements collected from this well as documented in its Order 1169 Report:  
11 “CSV-4 may be showing a slight response with December 2012 water levels approximately 1 ft  
12 lower than September 2010 water levels, but the transducer in CSV-4 had a high failure rate due to  
13 the high water temperature in the well, so fluctuations of a foot or less should not be used to infer an  
14 absolute response.” ROA at 10141 (first paragraph). SNWA witness Andrew Burns responded to  
15 questioning about this:

16 Q. “And has anybody that you’ve heard testify earlier this week indicated in any of  
17 their hydrographs that they’ve accounted for this transducer error failure of a foot or  
18 so?”

19 A. “Not that I heard.”

20 Q. “All right. And the drawdowns that were – or the impacts, I guess, or the effects that  
21 everybody’s been talking about this week with regard to CSV-4 are in that one-foot  
22 range; aren’t they?”

23 A. “Yes.”

24 ROA at 53360 [9-27-19 Tr. 978:2-10 (Burns Testimony)]. Thus, the experts contending there was a  
25 6 inch or one foot decline in water levels in CSV-4 in response to Order 1169 test pumping are  
26 incorrect because the data used by these witnesses from CSV-4 was unreliable. No expert except  
27

28 <sup>15</sup> CSV-4 is located north of the Kane Springs Fault, approximately 2.5 miles from the southern Kane Springs basin  
boundary. ROA at 36243. CSV-4 is approximately 13.4 miles away or more than 70,700 feet (13.4 miles x 5,280  
feet/mile) from the Order 1169 test pumping well MX-5. ROA at 36243.



1 LINCOLN/VIDLER’s experts took this error into consideration in commenting on the hydrographic  
2 patterns. Thus, a reasonable mind would not accept as adequate this citation to the record to support  
3 the State Engineer’s conclusion that there is a close hydraulic connection between northern Coyote  
4 Springs and the LWRFS. *See Bacher v. State Engineer*, 122 Nev. 1110, 1121, 146 P.3d 793, 800  
5 (2006).

6 The inclusion of Kane Springs in the LWRFS is based upon its purported connectedness with  
7 northern Coyote Spring Valley. ROA at 53170 [09-25-19 Tr. at 524:8-9 (Waddell Testimony)]. A  
8 careful review of the NPS testimony and slides shows the NPS witness testified the hydrographic  
9 pattern between CSVM-4 in northern Coyote Spring Valley was “greatly attenuated” compared to the  
10 others in the LWRFS. ROA at 53170 [09-25-19 Tr. at 524:9-11 (Waddell Testimony)]. The NPS  
11 witness refused to opine that northern Coyote Spring Valley was “well connected” with the rest of the  
12 LWRFS, and testified this area was merely “connected.” ROA at 53170 [09-25-19 Tr. at 524:18-19  
13 (Waddell Testimony)]; ROA 53171 [09-25-19 Tr. at 528:2-4 (Waddell Testimony)] (“CSVM-4, the  
14 one just southwest of Kane Springs Valley, I say is connected. It is on the eastern side of the structural  
15 block.”). The State Engineer’s reliance on this testimony for his conclusion “that while attenuated,  
16 the general hydrographic pattern observed in southern Kane Springs reflects a response to Order 1169  
17 pumping, consistent with a close hydraulic connection with the LWRFS” misstates the witness’  
18 testimony. First, the NPS witness testified as to northern Coyote Spring Valley, not Kane Springs.  
19 Second, the NPS witness testified the hydrographic pattern in northern Coyote Spring Valley was  
20 “greatly attenuated” not just attenuated, compared to others in the LWRFS. Finally, the NPS  
21 specifically declined to opine that northern Coyote Spring Valley was closely or well-connected with  
22 the rest of the LWRFS by stating northern Coyote Spring Valley was merely “connected.” Thus, the  
23 NPS witness’ testimony cited by the State Engineer to support his conclusion, does not in fact support  
24 the State Engineer’s determination to include Kane Springs in the LWRFS and certainly fails to  
25 amount to the “substantial evidence” required by law.

26 The State Engineer’s criteria 6 specifically acknowledges that a determination of the extent of  
27 the hydraulic connection is not known when there is limited, poor quality or low-resolution water level  
28 data because it obfuscates such a determination. ROA at 49. The State Engineer acknowledged and

1 recognized the hydrographic response pattern for wells located in southern Kane Springs is different  
2 compared to the wells in the LWRFS, “being muted, lagged, obscured by climate response or  
3 compromised by low-resolution data.” ROA at 53. The State Engineer recognized that additional  
4 hydrologic study was necessary in Kane Springs “to determine the degree to which water use would  
5 impact water resources in the LWRFS.” ROA at 55. Based upon the State Engineer’s own findings  
6 and criteria, the extent of any hydraulic connection between Kane Springs and the rest of the LWRFS  
7 is not known, nor the degree to which water use in Kane Springs would impact water resources, if any,  
8 in the LWRFS. Substantial evidence does not support the State Engineer’s determination to include  
9 Kane Springs in the LWRFS because a reasonable mind would not accept these findings as adequate  
10 to support that determination.

11 The NPS witness did testify that he liked the CSAMT, the geophysics, that  
12 LINCOLN/VIDLER submitted, and the geophysics provided useful information. ROA at 53172-  
13 53173 [09-25-19 Tr. at 532: 19-24, 533: 1-8, 536:7-11 (Waddell Testimony)]. The NPS witness  
14 agreed with LINCOLN/VIDLER’s interpretation of the geology provided by the geophysics ROA  
15 53174 [09-25-19 Tr. at 537:5-8 (Waddell Testimony)] and did not necessarily disagree that there is a  
16 fault in the southern Kane Springs area. ROA 53174 [09-25-19 Tr. at 537:24, 538:1 (Waddell  
17 Testimony)] (“And I don’t necessarily disagree that there’s a fault in this area.”), ROA 53174 [09-25-  
18 19 Tr. at 539:20-21 (Waddell Testimony)] (“So, you know, there’s likely to be faulting in that area.  
19 We don’t know specifically where it is.”). The NPS witness testified “these faults are likely to be  
20 impediments to flow. So, we’re basically in agreement with CSI that there’s faulting in this area and  
21 that those faults may impede flow through Kane Spring Valley into Coyote Spring Valley.” ROA at  
22 53174 [09-25-19 Tr. at 540:5-10 (Waddell Testimony)]. The NPS witness agreed the gradients (water  
23 level elevations) show the area to the north between CSVM-4 and KMW-1 was less permeable and  
24 was less transmissive referencing the State Engineer’s Ruling 5712 as to whether Kane Springs should  
25 be included. ROA at 53174-53175 [09-25-19 Tr. at 540:13-15, 17, 19-22, 541:2-20, 542:5-12  
26 (Waddell Testimony)]. The NPS witness testified: “So Vidler’s argument is that the lower hydraulic  
27 gradients in the northern part of Coyote Spring Valley are indicative of lower transmissivities in the  
28 northern part of the valley. And I agree with that one on that. Something has resulted in lower

1 permeability and lower transmissivity in the northern part of the Coyote Spring Valley than what we  
2 find in the central and southern part.” ROA at 53175 [09-25-19 Tr. at 544:18-24 (Waddell  
3 Testimony)].

4 The State Engineer also concluded there was insufficient information available to define a  
5 hydraulic boundary to the carbonate rock aquifer in southern Kane Springs citing to a SNWA general  
6 exhibit describing structural controls to flows based upon geology such as volcanic rocks and calderas.  
7 ROA at 53, n. 289. This statement by the State Engineer ignores the determination made by his  
8 predecessor in Ruling 5712 that the marked difference in head (water levels between Kane Springs  
9 and southern Coyote Springs Valley and throughout most of the other basins covered under Order  
10 1169) supports the probability of a low-permeability structure or change in lithology between Kane  
11 Springs and the southern part of Coyote Spring Valley. ROA at 719. The geophysics data submitted  
12 by LINCOLN/VIDLER in the Order 1303 hearing confirmed this previous finding by the State  
13 Engineer. ROA at 36202, 36227-36228. The NPS witness stated he agreed there was a fault shown  
14 in the southern Kane Springs area based upon the geophysics. ROA at 53174 [09-25-19 Tr. at 537:5-  
15 15, 538:1, 22-24, 539:8-21, 540:5-10 (Waddell Testimony)]. The State Engineer ignored the  
16 geophysics and failed to address this crucial evidence which supported his predecessor’s Ruling 5712  
17 contrary to the holding of *Revert v. Ray*, 95 Nev. 782, 787, 603 P.2d 262, 264–65 (1979) (the State  
18 Engineer must clearly resolve all crucial issues presented) and the direction provided by NRS  
19 533.024(1)(c) for the State Engineer “to consider the best available science in rendering decisions  
20 concerning the availability of surface and underground sources of water in Nevada.”) ROA at 53. For  
21 all these reasons, the State Engineer’s determination to include Kane Springs in the LWRFS should  
22 be vacated.

23 **5. Order 1309 improperly reweighed the Order 1169 pump test results to include**  
24 **Kane Springs in the super-basin.**

25 In Interim Order 1303, the State Engineer noted the resulting water level decline during the  
26 Order 1169 pump test encompassed 1,100 square miles and extended from northern Coyote Spring  
27 Valley through the Muddy River Springs Area, Hidden Valley, Garnet Valley, California Wash, and  
28 the northwestern part of the Black Mountains Area. ROA at 73. The State Engineer cited to Ruling

1 6254 and the federal agencies' Order 1169 report in support of these findings and noted there was no  
2 groundwater pumping in Hidden Valley, but effects were still observed in the Hidden Valley monitor  
3 well. ROA at 73, n. 2, 3. The water level decline was estimated to be 1 to 1.6 feet in this area with  
4 minor drawdowns of 0.5 feet or less in the northern part of Coyote Spring Valley north of the Kane  
5 Springs Wash fault zone. ROA at 73. Notably absent from these findings is any indication or  
6 quantification of any resulting water level decline during the Order 1169 pump test in Kane Springs  
7 or KMW-1. Order 1303 stated: "The State Engineer finds that input by means of reports by the  
8 stakeholders in the interpretation of the data from the aquifer test and from the years since the  
9 conclusion of the aquifer test is important to fully inform the State Engineer prior to setting a limit on  
10 the quantity of groundwater that may be developed in the LWRFS or to developing a long-term  
11 Conjunctive Management Plan for the LWRFS and Muddy River. ROA at 80. The State Engineer  
12 noted since the conclusion of the Order 1169 aquifer test, he had jointly managed the groundwater  
13 rights within the LWRFS. ROA at 77.

14 In Order 1309, the State Engineer changed his finding above regarding the resulting water level  
15 decline during the 1169 aquifer test in the 1,100 square miles and included southern Kane Springs.  
16 ROA at 7. The only new citation to authority by the State Engineer in Order 1309 to support this  
17 change was USFWS Exhibit 5. ROA at 7, n. 21 citing to USFWS Ex. 5, pp. 21, 67 found at ROA at  
18 48694, 48740. USFWS is the entity that stipulated before the State Engineer in 2007 to allow Kane  
19 Springs pumping notwithstanding the Order 1169 aquifer test. ROA at 36689-36700. The USFWS  
20 stated the reason for now including Kane Springs with a resulting water level decline during the Order  
21 1169 aquifer test was a purported similar hydrograph response in KMW-1 to CSVM-4 in Coyote  
22 Springs Valley. ROA at 48694. Nowhere is that data interpretation contained in the 2013 Order 1169  
23 report of the federal agencies stating the results of the Order 1169 aquifer test. ROA at 10888-10889,  
24 10969. The 2013 Order 1169 report of the federal agencies limits the response of the Order 1169  
25 aquifer test to responses in Coyote Spring Valley, Muddy River Springs Area, Hidden Valley, Garden  
26 Valley and California Wash, and does not include any analysis of Kane Springs. ROA at 10888-  
27 10889, 10969. There was no water level hydrograph analysis for CSVM-4 even though Coyote  
28 Springs Valley was part of the aquifer test. ROA at 10896. The USFWS did provide distance

1 drawdown graphs that show the changes over time (each line represents a different time) of water  
2 levels at distances from the pumping well that used data from well CSVM-4, however as stated  
3 previously that data is all but unreliable. There are documented issues with the transducer, data  
4 measurement device, where it was either off or failed altogether and had to be replaced over 10 times  
5 during the 1169 aquifer test. ROA at 1700-1714, 10141. This doesn't include the many times the  
6 transducers failed and had to be replaced before the testing. The State Engineer improperly relied  
7 upon a new interpretation of the same 2013 data he had previously accepted to exclude Kane Springs  
8 from the LWRFS.

9 In addition, CSVM-4 is the well with the 1-foot data error. ROA at 10141, 53360 [9-27-19 Tr.  
10 978:2-10 (Burns Testimony)]. This data error was not taken into account by the USFWS hydrologist  
11 in making her opinion. ROA at 53360 [9-27-19 Tr. 978:2-10 (Burns Testimony)]. In fact, this witness  
12 testified in response to questioning by LINCOLN/VIDLER that she was not recommending that Kane  
13 Springs be included in the LWRFS at this time. ROA at 53136 [9-24-19 Tr. 464:8-10, 16-19  
14 (Braumiller Testimony)]. The State Engineer's reliance on USFWS Exhibit 5 to include Kane Springs  
15 was directly contrary to his previous acceptance of the Order 1169 aquifer test results to exclude Kane  
16 Springs and not based upon substantial evidence to the extent it relied upon the admitted unreliable  
17 CSVM-4 water level measurements.

18 C. **THE STATE ENGINEER'S DETERMINATION THAT 8,000 AFA IS THE**  
19 **MAXIMUM AMOUNT OF GROUNDWATER THAT CAN BE DEVELOPED**  
20 **FROM THE SUPER BASIN WAS NOT SUPPORTED BY SUBSTANTIAL**  
21 **EVIDENCE AND WAS ARBITRARY AND CAPRICIOUS.**

22 The State Engineer determined that 8,000 afa is the maximum amount of groundwater that can  
23 continue to be developed over the long term in the LWRFS. ROA at 64. This determination was  
24 based upon the State Engineer's statement that pumping from wells in the LWRFS has gradually  
25 declined since completion of the Order 1169 aquifer test, pumping was approaching 8,000 afa and this  
26 coincided with the period of time when spring discharge may be approaching steady state. ROA at  
27 64. The State Engineer cited no evidence of record to support these statements. His determination is  
28 inconsistent with his previous statement that distributed pumping since the completion of the aquifer  
test in excess of 8,000 afa has correlated with a stabilization of spring discharge. ROA at 60, with no

1 citation to the record. The evidence he did cite in this section of the Order describes parties'  
2 recommendations of what pumping level may be acceptable which ranged from 0 afa to 30,000 afa as  
3 noted by the State Engineer. ROA at 58. The only evidence cited in the section which mentions  
4 7,000-8,000 afa pumping and stabilization of spring discharge misstates the party's opinion in the  
5 report. The NV Energy report cited in footnote 326 of Order 1309 (ROA at 63, n. 326) does not  
6 conclude that only 7,000-8,000 afa can continue to be pumped. ROA at 41882. The report uses the  
7 7,000-8,000 afa pumping amount to determine there is no 1:1 depletion ratio from groundwater  
8 pumping to impacts to the Muddy River. ROA at 41882. That paragraph of the NV Energy report  
9 concludes that groundwater pumping in certain areas of the LWRFS will have less impacts on the  
10 Muddy River than other areas of pumping. ROA at 41882.

11 There is no substantial evidence in the record cited by the State Engineer in this section of the  
12 Order to support the State Engineer's conclusion that 8,000 afa is the maximum amount of water that  
13 can continue to be developed over the long term in the LWRFS. Without citation to the substantial  
14 evidence that supports his conclusion, the State Engineer's Order does not comply with the  
15 requirements of *Revert v. Ray*, 95 Nev. 782, 787, 603 P.2d 262, 264-65 (1979) (the State Engineer  
16 must prepare findings in sufficient detail to permit judicial review) and *Eureka Cnty v. State Eng'r*,  
17 131 Nev. 846, 856, 359 P.3d 1114, 1120-21 (2015) (even under deferential substantial evidence  
18 review, courts must not merely "rubber stamp" agency action: they must determine that the "agency  
19 articulated a rational connection between the facts presented" and the decision). Accordingly, Order  
20 1309 must be vacated.

21 The State Engineer admitted it is not known if pumping in Kane Springs will impact water  
22 resources in the LWRFS. ROA at 55 (Additional hydrologic study is necessary in Kane Springs to  
23 determine the degree to which water use in Kane Springs would impact the LWRFS.) In Order 1309,  
24 the State Engineer made no determination that pumping 1,000 afa in Kane Springs will impact the  
25 Muddy River or the Moapa dace and he ignored and overruled his predecessor's determination in  
26 Ruling 5712 that Kane Springs would not be included in the Order 1169 proceedings and pumping  
27 this amount of water from Kane Springs will not impact the Muddy River Springs. ROA at 719.  
28 Without knowing if there would be impacts from Kane Springs pumping, the State Engineer decreased

1 the pumping cap in the LWRFS to 8,000 afa, yet he increased the area of the LWRFS by including  
2 Kane Springs. ROA at 54, 55, 64. The State Engineer did this notwithstanding the Amended  
3 Stipulation for Withdrawal of Protests which governs LINCOLN/VIDLER's water rights and sets  
4 triggers to protect the Moapa dace, the same triggers acknowledged by the State Engineer in Order  
5 1309 to protect the Moapa dace. Cf. ROA at 46, 36698-36699; see also ROA at 53085 [09-24-19 Tr.  
6 364:1-18 (Mayer Testimony)]. The State Engineer ignored that LINCOLN/VIDLER obtained a  
7 Biological Opinion from the USFWS that Petitioners' groundwater pumping project in Kane Springs  
8 was not likely to jeopardize the continued existence of the endangered Moapa dace and the level of  
9 anticipated take is not likely to result in jeopardy to the Moapa dace based in part on the implantation  
10 of the conservation measures for Petitioners' project. ROA at 49942, 49944-49945. In issuing Order  
11 1309, the State Engineer failed to consider the unrefuted expert opinion testimony in the record of the  
12 former USFWS Field Supervisor who signed the Biological Opinion and helped negotiate the  
13 Amended Stipulation for Withdrawal of Protests that Petitioners, as parties holding a Biological  
14 Opinion and the Amended Stipulation for Withdrawal of Protests, are compliant with the Endangered  
15 Species Act. ROA at 53442 [09-30-19 Tr. 1138:10-23, 1139:7-16 (Williams Testimony)] ROA at  
16 53443 [09-30-19 Tr. 1141:9-11 (Williams Testimony)].<sup>16</sup> The Nevada Supreme Court has repeatedly  
17 held the State Engineer has no jurisdiction over issues not within his statutory authority, for example,  
18 protection of the Moapa dace in excess of that required by the USFWS, the agency responsible for  
19 protection of the Moapa dace. *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 112 Nev.  
20 743, 749-750, 918 P.2d 697, 701 (1996) (County directed by Legislature to select among competing  
21 methods of water augmentation and develop master plan; State Engineer had no express authority to  
22 engage in a comparative economic analysis of water delivery alternatives); *Helms v. State*  
23 *Environmental Protection Division*, 109 Nev. 310, 314, 849 P.2d 279, 282 (1993) (Nevada Department  
24 of Environmental Protection (NDEP) did not have a duty to independently review a function that was

25  
26

27 <sup>16</sup> The hydrologist testifying for the USFWS in the Order 1309 proceedings did not know the USFWS entered into the  
28 Amended Stipulation for Withdrawal of Protests with LINCOLN/VIDLER. ROA at 53088 [09-24-19 Tr. 376:17-24 –  
377:1-5 (Braumiller Testimony)]. The biologist testifying for the USFWS did not know there was a Biological Opinion  
issued to LINCOLN/VIDLER for the Kane Springs applications. ROA at 53085-53086 [09-24-19 Tr. 366:22-24 – 368:1-  
14 (Schwemm Testimony)].

1 statutorily reserved to county government, thereby allowing the NDEP to *presume* the county’s  
2 approval was valid).

3 The State Engineer’s determination to include Kane Springs into the LWRFS and to limit the  
4 collective pumping in the LWRFS to 8,000 to purportedly protect the Muddy River and the Moapa  
5 dace is not supported by substantial evidence or any evidence. The State Engineer’s determination as  
6 to Kane Springs is not even logical based upon the Amended Stipulation to Withdraw Protests  
7 executed by the USFWS and the Biological Opinion issued to LINCOLN/VIDLER by the USFWS  
8 which protect the Muddy River and the Moapa dace to the satisfaction of the USFWS.

9 **D. THE STATE ENGINEER’S DETERMINATIONS REGARDING THE**  
10 **MANAGEMENT OF THE SUPER BASIN ARE INCONSISTENT WITH HIS**  
11 **OTHER FINDINGS. ARE NOT BASED UPON SUBSTANTIAL EVIDENCE**  
12 **AND ARE ARBITRARY AND CAPRICIOUS.**

13 The State Engineer’s Order 1309 improperly leaves to future determinations how the LWRFS  
14 will be administered and managed in violation of *Eureka County v. State Engineer*, 131 Nev. 846, 856,  
15 359 P.3d 1114, 1120-21(2015) (State Engineer may not defer the determination of what mitigation  
16 would encompass to a later date). Here, the State Engineer determined that Kane Springs “can be  
17 managed more effectively and fairly within the LWRFS.” ROA at 55. Not only does the failure to  
18 address management violate the law, but there is also no citation to the record which supports this  
19 conclusion. The State Engineer stated that “an effective management scheme will provide for the  
20 flexibility to adjust boundaries based on additional information, retain the ability to address unique  
21 management issues on a sub-basin scale, and maintain partnership with water users who may be  
22 affected by management actions through the LWRFS.” ROA at 54. There is no citation to the record  
23 which supports this conclusion. The State Engineer further stated: “Water development both inside  
24 and outside of the perimeter of the LWRFS will continue to be evaluated on the best available data  
25 and may become subject to or excluded from the constraints or regulations of the LWRFS.” ROA at  
26 55. However, there are no management standards or criteria provided in Order 1309.<sup>17</sup> There is no  
27 determination of what administration and management would encompass nor any determination of

28 \_\_\_\_\_  
<sup>17</sup> As noted above, one of the purposes of the Order 1309 proceedings per State Engineer Order 1303 was to develop a long-term Conjunctive Management Plan for the LWRFS and Muddy River. ROA at 80.



1 what will be required in future hydrologic studies to be excluded from the constraints or regulations  
2 of the LWRFS. There is no determination of what may be required for future water development  
3 inside and outside the LWRFS boundaries. The State Engineer states: “the relative degree of  
4 hydrologic connectedness in the LWRFS will be the principle factor in determining the impact of  
5 movement of water rights.” ROA at 65- 66. He also recognized there may be discrete, local aquifers  
6 within the LWRFS with an uncertain hydrologic connection to the Warm Springs area and that the  
7 effect of moving water rights into these areas may require additional scientific data and analysis. ROA  
8 at 66. However, nowhere in the Order does the State Engineer determine what the additional scientific  
9 data and analysis should comprise or what data or analysis is necessary for approval to move water  
10 rights. There is no evidence in the record that pumping from Kane Springs will impact anything in  
11 the LWRFS, yet Kane Springs was arbitrarily included in the LWRFS. The State Engineer has  
12 unlawfully deferred what his management standards or criteria are to a future determination, all in  
13 violation of LINCOLN/VIDLER’s due process rights. *Eureka Cnty v. State Eng’r*, 131 Nev. at 856,  
14 359 P.3d at 1120–21.

15 Finally, the State Engineer’s pumping cap is discriminatory and contrary to his determinations  
16 made in Order 1309 stating the impacts from the Order 1169 pumping. The water rights with the most  
17 seniority in the 8,000 afa pumping cap are located closest to the Muddy River and the Muddy River  
18 Springs Area and Moapa dace habitat. For example, the USFWS witness testified that pumping from  
19 the Arrow Canyon well, one of the wells closest to the Muddy River, impacts Pederson Springs  
20 because it lowers the groundwater level. ROA at 53136 [09-24-19 Tr. 465:4-11 (Mayer Testimony)].  
21 The Arrow Canyon well is allowed to be pumped under the State Engineer’s 8,000 afa pumping cap  
22 causing impacts to the Pederson Springs, yet Kane Springs rights, located 22 miles away and the most  
23 senior in the Kane Springs basin are not allowed to be pumped under Order 1309. This is contrary to  
24 the State Engineer’s own finding in Order 1309 that pumping within close proximity to the Muddy  
25 River could result in capture of the Muddy River and any movement of water rights in carbonate-rock  
26 aquifer and alluvial aquifer wells in the Muddy River Springs Area that may increase the impact to  
27 Muddy River decreed rights is disfavored. ROA at 65. Further, under Order 1309, senior water right  
28 holders in the LWRFS can try to move their points of diversion to Kane Springs which is the basin

1 furthest away from the Muddy River and Muddy River Springs area and pump, but  
2 LINCOLN/VIDLER cannot pump their senior Kane Springs rights. ROA at 64-66.

3 **E. OTHER DUE PROCESS VIOLATIONS.**

4 There were numerous other due process violations that occurred during the Order 1309  
5 administrative hearing process. For example, the Hearing Officer indicated during the prehearing  
6 conference that the experts would be held to the opinions they expressed in their reports. ROA at 528  
7 [Prehearing Conference Transcript 08-8-19 35:6-24 – 36:1-8]. However throughout the hearing,  
8 experts were allowed to express new opinions that were contrary to their reports or based upon  
9 testimony they heard at the hearing. See ROA at 53463 [09-30-19 Tr. 1223:3-18 (Lazarus  
10 Testimony)]; ROA at 53722, 53727, 53729 [10-4-19 Tr. 1761:20-24, 1782:6-20, 1787:7-9, 20-24,  
11 1789:11-19 (Felling Testimony)]. Certain participants included new opinions and evidence in their  
12 closing statements which did not allow for review and cross-examination by other parties. ROA at  
13 52883-52888, 52889-52911. LINCOLN/VIDLER filed a motion to strike that information.  
14 LINCOLN/VIDLER’s motion and associated pleadings in response were not included in the record  
15 on appeal and not decided by the State Engineer.<sup>18</sup> Finally, parties were given limited opportunity to  
16 present their information and cross-examination was limited based on the time allotted for the  
17 presentation because of the limited hearing time allowed by the State Engineer. ROA at 521  
18 [Prehearing Conference Tr. pp. 7-9], ROA at 526 [Prehearing Conference Tr. p. 27:11-19] see also  
19 footnote 5 *supra*.<sup>19</sup> These procedures certainly violated LINCOLN/Vidler’s due process rights  
20 because the hearing procedures were not fair as required by *Revert v. Ray, supra*.

21 **VII.**

22 **CONCLUSION**

23 For over one hundred years, groundwater has been appropriated on a basin-by-basin system as  
24 established by the Legislature – each groundwater basin is considered a separate “source of water”  
25

26 <sup>18</sup> LINCOLN/VIDLER provide these documents as part of the Addendum.

27 <sup>19</sup> In the last week or so, LINCOLN/VIDLER have discovered that Jason King, former State Engineer who issued many  
28 of the orders and rulings that led up to and signed Interim Order 1303 (ROA at 84) and who presided over the Order 1169  
aquifer test, entered into a contract with LVVWD (one of the SNWA members which has prepared evidence in this matter.  
See ROA at 41930) to provide consulting services regarding the LWRFS. Mr. King is providing professional consulting  
services on matters he made decisions on which are pending on appeal before this Court. This is in addition to SNWA’s  
professional services contract with MVIC to pay MVIC’s attorney’s fees for representing SNWA’s interests in this case.

1 from which water can be appropriated, and water within that basin is administered in accordance with  
2 the priorities established in that basin. In Order 1309, the State Engineer has disregarded this  
3 legislative directive and the Supreme Court’s directive that appropriated water cannot be reallocated  
4 and reprioritized. *Mineral Cty.* The State Engineer has combined seven separate groundwater basins  
5 into one “super-basin” and reallocated and reprioritized all water rights within this super-basin as  
6 though the vested water rights of each appropriation within the individual basins had been granted in  
7 a hypothetical single basin. The result is that LINCOLN/VIDLER’s most senior water rights in Kane  
8 Springs were reallocated and reprioritized to make them the most junior water rights in the newly  
9 created super-basin. On June 14, 2020, LINCOLN/VIDLER had the most senior and most valuable  
10 water rights in Kane Springs. On June 15, 2020, LINCOLN/VIDLER had the most junior water rights  
11 in the new LWRFS super-basin. These most senior water rights were rendered unusable because the  
12 State Engineer restricted pumping in this super-basin to 8,000 acre feet annually. Because at least  
13 36,000 afa of water rights had earlier priority dates in other basins, these rights automatically became  
14 senior to LINCOLN/VIDLER’s rights.

15 This disregard of legislative and Supreme Court directives was made worse because the State  
16 Engineer disregarded almost two decades of prior State Engineer’s Rulings and Orders that had  
17 expressly and specifically excluded Kane Springs from the LWRFS study area. From 2002, when the  
18 LWRFS study area was created, until Order 1309 on June 15, 2020, the State Engineer intentionally  
19 excluded Kane Springs from the LWRFS. Indeed, when the State Engineer granted  
20 LINCOLN/VIDLER’s appropriation in Kane Springs, the State Engineer specifically rejected  
21 arguments that Kane Springs should be included in the LWRFS, that the appropriation would harm  
22 the Moapa dace habitat, and that the appropriation would harm prior appropriators in the Muddy River.  
23 This decision was largely based on the fact that the State Engineer found that a low permeability  
24 structure separated Kane Springs from the Coyote Springs Valley to the south.

25 In an attempt to prop up the decision, the State Engineer belatedly created a six-factor test to  
26 determine whether a basin should be included in the LWRFS, but even so the State Engineer badly  
27 mis-applied his own factors to justify including Kane Springs. In Order 1309, the State Engineer  
28 disregarded the Legislature, the Supreme Court, and prior State Engineers by creating a six-factor test

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1 to determine whether Kane Springs should be included in the LWRFS super-basin: a test he created  
2 without notice and articulated for the first time in Order 1309; a test he failed to apply; a test that had  
3 he applied properly would lead to the exclusion of Kane Springs from the LWRFS super-basin.

4 Instead, the State Engineer relied on evidence that was, in his own words, “muted,” “lagged,”  
5 “obscured,” “compromised,” and “attenuated” to include Kane Springs in the LWRFS super-basin.  
6 Indeed, the entirety of his decision to include Kane Springs was based on an alleged drawdown of six  
7 inches in a well that was 22 miles from the alleged area of impact. And this drawdown was based on  
8 data from a well that had faulty readings, so that “fluctuation of a foot or less should not be used to  
9 infer an absolute response.” In other words, drawdowns in the well below 12 inches were unreliable  
10 and should not be used as evidence to compare the drawdowns in other wells – which is exactly what  
11 the State Engineer did. This is hardly substantial evidence.

12 For all these reasons, Order 1309’s findings as to Kane Springs should be vacated. Kane  
13 Springs should continue to be administered in accordance with the specific statutory scheme set out  
14 by the Legislature.

15 DATED this 27<sup>th</sup> day of August, 2021.

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*Attorneys for Vidler Water Company, Inc.*

1 **CERTIFICATE OF COMPLIANCE**

2 We hereby certify that we have read the foregoing Opening Brief and to the best of our  
3 knowledge, information and belief, it is not frivolous or interposed for any improper purpose. We  
4 further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in  
5 particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to  
6 be supported by appropriate references to the record on appeal. We further certify that this brief is  
7 proportionately spaced, has a typeface of 12 points or more, and contains 16,927 words. We  
8 understand that we may be subject to sanctions in the event that the accompanying brief is not in  
9 conformity with the requirements of Nevada Rules of Appellate Procedure.

10 DATED this 27<sup>th</sup> day of August, 2021.

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WATER DISTRICT**

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1 **CERTIFICATE OF SERVICE**

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

7 I hereby certify that I caused a true and correct copy of the foregoing document to be served  
8 via FedEx as follow:

9 Clark County District Court  
10 Attn: Hon. Bita Yeager – District. Ct. Dept. 1  
11 Court Administration – 2<sup>nd</sup> Floor  
12 200 Lewis Avenue  
13 Las Vegas, NV 89101

14 DATED this 27<sup>th</sup> day of August, 2021.

15 /s/ Nancy Fontenot  
16 NANCY FONTENOT

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19 4824-9822-7960, v. 1  
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# **ADDENDUM**

Due service of the foregoing

accepted by copy thereof this

1916

*Wm. J. Brown*  
of  
*Wm. J. Brown*  
Attorney for Plaintiff

ORIGINAL

No.

IN THE  
**Fifth Judicial District Court**  
OF THE  
**State of Nevada**  
CLERK  
IN AND FOR LINCOLN COUNTY  
CLERK

Muddy Valley Irrigation Company  
et al.,

Plaintiff

vs.

MOAPA AND EAST LAKE PRODUCE COMPANY  
a Corporation, et al.,

Defendant

ANSWER OF DEFENDANTS G. S. HOLLAND  
AND JULIA MAY KNOX,

Filed *24 May* 1916

*Wm. J. Brown*  
Clerk

By \_\_\_\_\_  
Deputy Clerk

**J. E. McNamee & Leo A. McNamee,**  
Attorneys for Defendants.

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IN THE TENTH JUDICIAL DISTRICT COURT OF THE STATE  
OF NEVADA, IN AND FOR THE COUNTY OF CLARK.

---c0o---

MUDDY VALLEY IRRIGATION COMPANY, a corporation, NEVADA LAND & LIVESTOCK COMPANY, a corporation, and SAMUEL H. WELLS,

Plaintiffs,

-vs-

MOAPA AND SALT LAKE PRODUCE COMPANY, a corporation, GEORGE BALDWIN and BALDWIN, his wife, JOHN H. MITCHELL, ISSIAH COX and Cox, his wife, JOSEPH PERKINS and PERKINS, his wife, D. H. LIVINGSTON and RICHARD SMITH, G. S. HOLMES, FRED L. FOSTER and JOHN DOE KNOX, RICHARD ROE and MARY DOE, the three last named persons being and representing the heirs at law, next of kin and successors in interest of Frank Knox, deceased,

Defendants.

ANSWER OF DEFENDANTS

G. S. HOLMES AND  
JULIA MAY KNOX.

Come now the defendants G. S. Holmes and Julia May Knox, sued as John Doe Knox, Richard Roe and Mary Doe, two of the above named defendants, and answering for themselves and not for the other defendants, admit, deny, and aver as follows:

-I-

Aver that they have not sufficient knowledge or information upon which to base a belief as to the allegations contained in paragraph I of said complaint, and they therefore deny said paragraph I and each and every allegation thereof.

-II-

Aver that they have not sufficient knowledge or information upon which to base a belief as to the allegations contained in paragraph II. of said complaint, and they therefore deny said paragraph II. and each and every allegation thereof.

-III-

1           Aver that they have not sufficient knowledge or inform-  
2           ation to enable them to answer the allegations contained in Para-  
3           graph III. of said complaint, and they therefore deny said Para-  
4           graph III, and each and every allegation thereof.  
5

6                           -IV-

7           Aver that they have not sufficient knowledge or inform-  
8           ation upon which to base a belief as to the allegations of Para-  
9           graph IV. of said complaint, and they therefore deny said Para-  
10          graph IV. and each and every allegation thereof.  
11

12                           -V-

13          Admit Paragraph V. of said complaint.  
14

15                           -VI-

16          Answering Paragraph VI. of said complaint, these defend-  
17          ants deny that Fred L. Foster has any interest whatsoever in the  
18          land and premises described in said Paragraph VI. or any interest  
19          whatever in said suit or controversy, and allege the fact to be  
20          that the said Frank Knox died during the year 1915, and that prior  
21          to his death he conveyed to the defendant Julia May Knox, all of  
22          his right, title and interest in and to the land described in Para-  
23          graph VI. known as the Wiser Ranch, and that said defendant is now  
24          the owner and in the possession of the same.

25                           -VII-

26          Aver that these defendants have not sufficient knowledge  
27          or information upon which to base a belief as to the allegations  
28          of Paragraph VII. of said complaint, and they therefore deny the  
29          same and each and every allegation thereof, save and except, they  
30          admit that the ranches and lands owned and claimed by the defend-  
31          ants, other than these defendants, are situate above and westerly  
32          of said Wiser Ranch.

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-XI-

These defendants deny Paragraph XI. of said complaint, and each and every allegation therein contained, save and except they admit that there has been diverted, appropriated and applied to a beneficial use, on said Muddy River below the Wiser Ranch, not to exceed thirty-two cubic feet per second of the waters thereof; but as to whether said waters were so diverted, appropriated and used by said plaintiffs or not, these defendants have not sufficient knowledge or information upon which to base a belief, and they therefore, on information and belief, deny that said or any appropriation or application to a beneficial use of any of the waters of said Muddy River below the Wiser Ranch, was made by said plaintiffs or either of them.

-XII-

Answering Paragraph XII. of said complaint, these defendants deny said Paragraph XII. and each and every allegation therein contained; and they deny that at the time of the alleged applications to appropriate water, as set forth in said Paragraph XII., there was flowing in said Muddy River any unappropriated waters, except during the Winter season, or any water whatsoever than waters the right to which had become vested in prior appropriators on said stream.

-XIII-

Answering Paragraph XIII. of said complaint, these defendants deny each and every allegation in said Paragraph contained.

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-XIV-

Answering Paragraph XIV. of said complaint these defendants aver that they have not sufficient <sup>knowledge</sup> information or belief to enable them to answer the same, and basing their answer on that ground, deny each and every allegation therein contained.

-XV-

Answering Paragraph XV. of said complaint, these defendants deny each and every allegation thereof, except that they admit that they diverted water and applied the same to a beneficial use on their lands situate on the Muddy River, during the years 1913, 1914 and 1915; but they allege the fact to be that the amount of water so diverted by these defendants during the said years and applied to a beneficial use on their lands situate on the Muddy River, was water that had been appropriated for many years prior thereto by their grantors and predecessors in interest, and applied to a beneficial use thereon, and was appurtenant to said land, and that these defendants and their predecessors had and now have a vested right thereto.

-XVI-

Aver that they have not sufficient <sup>knowledge</sup> information or belief to enable them to answer the allegations contained in Paragraph XVI. of said complaint, and they therefore deny the same, and each and all of the allegations thereof, except that they admit that there is no source of water supply from which water may be obtained for lands situate on the Muddy River below the Wiser Ranch, other than the Muddy River.

-XVII-

Answering Paragraph XVII. of said complaint, these de-

1 defendants admit that since June 1913, and during the years 1914  
2 and 1915, they have increased the area of land cultivated and  
3 irrigated by them, but deny that said acts were wrongful, or an  
4 excessive diversion and use of the waters of the Muddy River, and  
5 upon their information and belief aver the facts to be, that they  
6 did not, during the years 1913, 1914 and 1915, increase the area  
7 of land cultivated and irrigated by their predecessors in inter-  
8 est on the lands claimed by them and set forth in said complaint  
9 and in this answer, but only cultivated and applied to a benefi-  
10 cial use the amount of water theretofore appropriated and applied  
11 to a beneficial use on said lands by their grantors and predecess-  
12 ors in interest, which said waters and the amounts so diverted,  
13 were and are appurtenant to said land, and the use of said waters  
14 is a right vested in these defendants; and they deny that such  
15 use of said waters by the defendants is an irreparable injury and  
16 damage, or any injury or damage to said plaintiffs, as alleged in  
17 said Paragraph XVII., or at all.

18  
19 -XVIII-

20 Answering Paragraph XVIII. of said complaint, these de-  
21 fendants admit that they assert and claim a right to divert and  
22 use the waters of said Muddy River to the extent used during the  
23 years 1913, 1914 and 1915, but they deny each and every other  
24 allegation in said Paragraph contained.

25  
26 FOR A FURTHER AND SEPARATE ANSWER TO PLAINTIFFS' COM-  
27 PLAINT AND AS A DEFENSE THERETO, THESE DEFENDANTS ALLEGE:

28 -I-

29 That the said defendants G. S. Holmes and Julia May  
30 Knox, are the owners of, in the possession of, and entitled to  
31 the possession of the following described parcels of land situ-

32

-6-



1 ate in the Muddy River Valley, in the County of Clark, State  
2 of Nevada, and particularly described as follows:

3 The South half ( $S\frac{1}{2}$ ) of the North-west quarter ( $NW\frac{1}{4}$ )  
4 of the South-west quarter ( $SW\frac{1}{4}$ ); the South half ( $S\frac{1}{2}$ ) of the  
5 South-west quarter ( $SW\frac{1}{4}$ ) and the South half ( $S\frac{1}{2}$ ) of the South-  
6 east quarter ( $SE\frac{1}{4}$ ), all in Section One (1); also the North-east  
7 quarter ( $NE\frac{1}{4}$ ), and the North-east quarter ( $NE\frac{1}{4}$ ) of the South-  
8 east quarter ( $SE\frac{1}{4}$ ), and the North-east quarter ( $NE\frac{1}{4}$ ) of the  
9 North-west quarter ( $NW\frac{1}{4}$ ) of Section Twelve (12), Township Fif-  
10 teen (15) South, Range Sixty-six (66) East, Mount Diablo Base &  
11 Meridian; also the South-west quarter ( $SW\frac{1}{4}$ ) of the North-west  
12 quarter ( $NW\frac{1}{4}$ ) and the North-east quarter ( $NE\frac{1}{4}$ ) of the South-west  
13 quarter ( $SW\frac{1}{4}$ ), and the fractional one-half of the South-west  
14 quarter ( $SW\frac{1}{4}$ ) of Section Seven (7), Township Fifteen (15) south,  
15 Range sixty-seven (67) East, Mount Diablo Base & Meridian.

16 And that the said defendants and their several grantors  
17 and predecessors in interest, have so been the owners of and in  
18 the quiet, actual, peaceable and continuous possession of said  
19 described lands, for a long time last past, to-wit, since the  
20 year 1887, or thereabouts.

21  
22 -II-

23 That the climate where said lands are situate is dry  
24 and arid, and that it is necessary to irrigate said lands in  
25 order to produce or raise crops thereon, and without irrigation  
26 said lands would not produce crops and are entirely worthless;  
27 that said land is only valuable as meadow land and for cultiva-  
28 tion and agriculture, and that in order to cultivate the same  
29 it is necessary that the defendants have sufficient water for  
30 the irrigation thereof, and that without sufficient water, no  
31 crop of any character will grow thereon.

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-III-

That more than two hundred acres of said land has been, continuously since the year 1890, by said defendants and their grantors and predecessors in interest as aforesaid, irrigated and rendered of great value, by the diversion, appropriation and application to a beneficial use thereon of five cubic feet per second of the waters of the stream known as the Muddy River, flowing in a southeasterly direction through said Muddy River in its natural channel, and that said five cubic feet per second of the waters thereof is necessary for the use of said defendants in the irrigation of their said lands as aforesaid, and for their domestic uses and the watering of their livestock.

-IV-

That the grantors and predecessors in interest of the said defendants did, to-wit, prior to the year 1890, construct dams and flumes in, on and upon the Muddy River, above the lands herein described, with a water ditch of sufficient capacity to carry five cubic feet per second, connecting said dam with the lands of defendants herein described, with sufficient laterals to irrigate the same; and thereafter from year to year during the irrigating season, the said defendants and their grantors and predecessors in interest, at all times kept said dams and flumes in good repair and said ditch cleaned out, and by means thereof diverted from the said Muddy River through said flumes and irrigating ditch, and appropriated and applied to a beneficial use in the irrigation of said lands and the growing thereon of grass, pasture, alfalfa, wheat, melons, fruit, corn and garden truck above described, and for domestic purposes and the watering of their live stock, five cubic feet per second of the waters of said stream, which amount of water is now and at all times heretofore has been, necessary in the irrigation of the

1 crops of these defendants, in, on and upon the said lands above  
2 described, and domestic uses and the watering of their livestock,  
3 and that at the time of the said diversion, appropriation and ap-  
4 plication to a beneficial use, no other person or persons had ac-  
5 quired any rights to said five cubic feet per second of said wat-  
6 er, and the said water was flowing in said Muddy River unappropri-  
7 ated and unused, and was appropriated by the grantors of the  
8 defendants.

9  
10 -v-

11 That during the summer of 1896, a cloudburst and rain-  
12 fall in the Pahranaagat Wash caused an enormous flood to pass down  
13 through the Muddy River Valley and over and across the lands of  
14 these defendants; that the Muddy River Valley where the lands of  
15 these defendants is situated, is narrow, and the soil porous, and  
16 by reason of the character of said soil, the floods of 1896 caus-  
17 ed a ditch or channel of considerable size to be cut through the  
18 entire length of defendants' said lands; that thereafter on the  
19 1st day of January, 1910, excessive rains and snowfalls in the  
20 Clover Valley Mountains and in the Meadow Valley Wash, a tribu-  
21 tary to said Muddy River, produced and caused a great volume of  
22 water to rush suddenly down said Meadow Valley Wash and in and  
23 upon the Muddy River, at a point along the North boundary of said  
24 defendants' land, and cut and washed out a gorge or channel extend-  
25 ing from the Northerly end of said lands to the Southeastern ex-  
26 tremity thereof, of an average width of forty feet more or less,  
27 and of an average depth of about twenty feet, more or less, ex-  
28 tending through the whole length of said defendants' land. That  
29 subsequent to the year 1910 there has been divers and sundry other  
30 floods, increasing the width and depth of said channel through the  
31 defendants' land. That the fields of said defendants now and for  
32 many years long prior thereto, were and are situated on either

-9-

1 side of said channel, and extend up to the very brink or edge  
2 thereof. That on the Westerly side of said channel, for a dis-  
3 tance of more than half a mile, and at distances varying from  
4 three hundred feet to eight hundred feet, along the defendants  
5 lands situate South and West of said channel, there are divers  
6 and sundry springs and swamps and marshy lands, from which there  
7 arise and flow both surface and subterranean ~~at~~ underground  
8 seepage water, and that the same subirrigates and finds its way  
9 into the main channel of said River by reason of the depth of  
10 the channel or gorge caused by said washouts; that of the said  
11 five cubic feet per second of water diverted and applied by the  
12 defendants and their predecessors, on their lands on either side  
13 of said channel as herein before set forth, subsequent to the time  
14 of the cutting of said channel by said floods, as these defendants  
15 are informed and believe and therefore allege the fact to be,  
16 two cubic feet per second thereof. during the course of its ap-  
17 plication in the irrigation of said lands, subirrigates and perco-  
18 lates through the soil and into the main channel, and into the  
19 River, and flows on to the users below.

20  
21 VI.

22 That the said plaintiffs and each of them, and the  
23 stockholders thereof, claim and assert an interest in the waters  
24 of said Muddy River, and assert rights to divert and apply to a  
25 beneficial use the waters of said Muddy River on certain lands  
26 claimed by them situate below the lands of these defendants, which  
27 are adverse to the rights of these defendants. That the rights  
28 of said plaintiffs, if any they have, to divert and use the wat-  
29 ers of said River in excess of thirty-two cubic feet per second  
30 upon the lands claimed by said plaintiffs, or upon any lands, are  
31 inferior to and subsequent in time to, and subordinate to, the  
32 rights of these defendants; and as these defendants are advised  
and believe and therefore allege the fact to be, are inferior to,

1 subsequent in time to, and subordinate to, the rights of all  
2 of the other defendants sued in this complaint.

3  
4 FOR A FURTHER AND SEPARATE ANSWER TO SAID COMPLAINT  
5 AND AS A DEFENSE THERETO, these defendants allege that at all  
6 times since the year 1890 until the service of the injunction  
7 herein, the said defendants and their grantors and predecessors  
8 in interest, diverted, appropriated and applied to a beneficial  
9 use, in and upon their lands herein described, during the irri-  
10 gating season of each year, five cubic feet per second of the  
11 waters of said Muddy River, and that such diversion, appropri-  
12 ation and application to a beneficial use of said waters as afore-  
13 said, was at all times under a claim of right, was open, notori-  
14 ous, peaceable, uninterrupted, continuous, and with the acquies-  
15 cence of said plaintiffs and their grantors and predecessors in  
16 interest, and was adverse to said plaintiffs and to each of them,  
17 and to their respective stockholders, and to any of their rights  
18 or alleged rights, and to all the world, and that the cause of ac-  
19 tion alleged in said complaint did not accrue against these de-  
20 fendants or either of them, or against their rights as herein  
21 set forth to the use of waters from the Muddy River, within  
22 twelve years next before the commencement of this action.

23 WHEREFORE, the said defendants having fully answered,  
24 pray--

25 (1) That the temporary injunction or restraining order  
26 heretofore issued by said Court against these defendants be dis-  
27 solved.

28 (2) That upon a final hearing of this cause, a judg-  
29 ment and decree of this Court be entered herein adjudging and  
30 decreeing that the said defendants are entitled to divert, con-  
31 vey and distribute through their ditch and laterals, upon the  
32 lands of the said defendants herein described, five cubic feet

1 per second of the waters of said Muddy River for the irrigation  
2 of the lands of said defendants, and for domestic purposes, and  
3 the watering of their livestock, during all seasons of the year;  
4 and that the plaintiffs and each of them, their agents, servants  
5 and employees, be perpetually enjoined from interfering with the  
6 defendants in the use and enjoyment of said quantity of water in  
7 and upon their lands hereinabove described, and that said defend-  
8 ants have such further and different relief as to the Court may  
9 seem just, proper and equitable, and that all of the rights of  
10 the water users of said Muddy River, whether plaintiffs or de-  
11 fendants herein, be adjudicated and determined; and that the  
12 defendants have judgment against the plaintiffs for their costs  
13 and disbursements herein expended.

14 J. R. McManis  
15  
16 and Les G. McManis  
17 Attorneys for said defendants.  
18  
19  
20

21 STATE OF Utah  
22 COUNTY OF Dalton

23 Julia May Knox being first duly  
24 sworn, deposes and says, that she is one of the defendants in  
25 the above entitled action; that she has read over the foregoing  
26 answer and knows the contents thereof, and that the same is  
27 true of her own knowledge, except as to the matters therein  
28 stated upon her information and belief, and as to those matters  
29 she believes it to be true.

26 X Julia May Knox X  
27 Subscribed and sworn to before me  
28 this eight day of May 1916.  
29 My Commission Expires March 16, 1919  
30 Edwin H. ...  
31 Notary Public in and for said  
32 County and State.

1 IN THE OFFICE OF THE STATE ENGINEER  
2 OF THE STATE OF NEVADA

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5 IN THE MATTER OF THE ADMINISTRATION  
6 AND MANAGEMENT OF THE LOWER WHITE  
7 RIVER FLOW SYSTEM WITHIN COYOTE  
8 SPRING VALLEY HYDROGRAPHIC BASIN  
9 (210), A PORTION OF BLACK MOUNTAINS  
10 AREA HYDROGRAPHIC BASIN (215), GARNET  
11 VALLEY HYDROGRAPHIC BASIN (216),  
12 HIDDEN VALLEY HYDROGRAPHIC BASIN  
13 (217), CALIFORNIA WASH HYDROGRAPHIC  
14 BASIN (218), AND MUDDY RIVER SPRINGS  
15 AREA (AKA UPPER MOAPA VALLEY)  
16 HYDROGRAPHIC BASIN (219).

17  
18 **LINCOLN COUNTY WATER DISTRICT AND VIDLER WATER COMPANY, INC.'s**  
19 **MOTION TO STRIKE PORTIONS OF NEVADA COGENERATION ASSOCIATES' AND**  
20 **NATIONAL PARK SERVICES' POST-HEARING BRIEFS**

21 LINCOLN COUNTY WATER DISTRICT ("LINCOLN COUNTY") and VIDLER WATER  
22 COMPANY, INC. ("VIDLER"), by and through their attorneys, DYLAN V. FREHNER, ESQ. the  
23 LINCOLN COUNTY DISTRICT ATTORNEY and KAREN A. PETERSON, ESQ. of the law firm  
24 of ALLISON MacKENZIE, LTD., hereby move to strike certain portions of the post hearing brief of  
25 Nevada Cogeneration Associates Nos. 1 and 2 ("NCA") and the closing statement of the National Park  
26 Service ("NPS") submitted to the Office of the State Engineer on or about December 2-3, 2019.<sup>1</sup>

27  
28 **A. INTRODUCTION**

At the conclusion of the hearing in the above-referenced matter, the Hearing Officer indicated the State Engineer would accept written closing statements, not to exceed 20 pages, from the participants. *See* Transcript of Proceedings, Public Hearing on Order 1303, Friday October 4, 2019 at 1820-1821. NCA submitted a post hearing brief and NPS submitted a closing statement. In its December 3, 2019 post-hearing brief, NCA provides an "additional review and analysis of regional carbonate groundwater level response and pumping in the Black Mountain Area (BMA) basin from

<sup>1</sup> NAC 533.142 provides the procedure for motions requesting an order from the State Engineer concerning a matter subject to a protest hearing.

1 Nevada Cogeneration Associates (NCA) wells.” (NCA’s post hearing brief, p. 7). The NCA post  
2 hearing brief acknowledges Mr. Dixon performed his analysis following the conclusion of the hearing  
3 and the post hearing analysis is provided in NCA’s post hearing brief. *Id.* at 6-7. Similarly, in NPS’  
4 December 2, 2019 closing statement, it provided further analysis of groundwater temperature data.  
5 (NPS closing statement at 2<sup>2</sup>). NPS states this analysis was a “subsequent examination of the  
6 temperature data.” *Id.* NPS and NCA proffer the new analysis and expert opinions, purportedly as  
7 evidence for the State Engineer’s consideration, in closing statements after the close of the evidentiary  
8 hearing. NPS and NCA already had ample opportunity to present such evidence and opinions. This  
9 attempt to supplement the record with evidence is improper and deprives LINCOLN  
10 COUNTY/VIDLER of the opportunity to respond to or cross examine the new analysis and opinions  
11 provided after the close of the evidentiary hearing.

12 Specifically, LINCOLN COUNTY/VIDLER request the following be stricken from NCA’s  
13 post-hearing brief: 1) Sections entitled “Background” and “Order 1303—BMA Pumping and Effects  
14 Conclusions” on p. 7 of NCA’s post-hearing brief; 2) Section entitled “Follow-Up Review of NCA  
15 Pumping and Groundwater Levels” on pgs. 7-9 of NCA’s post-hearing brief; 3) Section entitled  
16 “Results of Follow-Up Review” on pgs. 9-10 of NCA’s post-hearing brief; 4) Section entitled  
17 “Conclusions” on p. 10 of NCA’s post-hearing brief; 5) The first 3 sentences in the Section entitled  
18 “Conclusion as to the boundary in the Black Mountains Area” on p. 10; and 6) the following exhibits:  
19 Figure 2; Figure 3; Figure 4; Figure 5; Map 1; and Map 2 and any references contained therein.  
20 LINCOLN COUNTY/VIDLER also request that the first two full paragraphs on p. 2 after the bullet  
21 point of NPS’ closing statement be stricken from the record.

22 In Interim Order (IO) #1303, the State Engineer requested reports and rebuttal reports be  
23 submitted to address: (a) the geographic boundary of the hydrologically connected groundwater and  
24 surface water systems comprising the Lower White River Flow System (LWRFS), (b) an analysis  
25 regarding aquifer recovery since the completion of the Order 1169 aquifer test, (c) the long-term  
26 annual quantity of groundwater that may be pumped from the LWRFS and how that would affect the  
27

28 <sup>2</sup> There are no page numbers in the NPS Closing Statement document. This motion excludes the NPS cover letter for purposes of identifying the pages of the NPS’ closing statement.



1 hydrology of the Muddy River Springs Area (MRSA), (d) the effects of movement of water rights  
2 between alluvial wells and carbonate wells on deliveries of senior decreed rights to the Muddy River  
3 and, (e) any other matter believed to be relevant to the State Engineer's analysis. (NSE Ex. 1 Order  
4 1303, at 13-14).

5 On August 8, 2019, the State Engineer held a pre-hearing conference. At the pre-hearing  
6 conference, the Hearing Officer specifically stated that opinions not expressed in the participants'  
7 reports or rebuttal reports would not be allowed. Transcript of Proceedings, Pre-Hearing Conference,  
8 Thursday August 8, 2019 at 35. The Amended Notice of Hearing stated that "the purpose of the  
9 hearing on the Order 1303 reports was to provide the participants an opportunity to explain the  
10 positions and conclusions expressed in the reports and/or rebuttal reports submitted in response to the  
11 Order 1303 solicitation." See Amended Notice of Hearing at 2.

12 In the body of its closing statement, NPS provided new analysis by Dr. Richard Waddell  
13 regarding certain groundwater temperature data from Garnet Valley to bolster its position and to  
14 attempt to answer questions that Dr. Waddell failed to answer during the hearing. (NPS closing  
15 statement at 2). NPS did not provide this information or analysis during the evidentiary hearing.

16 In its post-hearing brief, NCA provided what NCA described as "additional analysis" by  
17 NCA's lead hydrologist, Jay Dixon. Mr. Dixon performed a "more thorough review of information"  
18 assessing exactly what was discussed at the hearing involving the Black Mountain Area. (NCA post  
19 hearing brief at 6-7). Mr. Dixon signed his report as a professional engineer to comply with NAC  
20 625.612 - another acknowledgement the objected to information is additional, new analysis and  
21 opinion. At no time during the report or rebuttal report exchange period or during the hearing  
22 proceedings did NCA provide this analysis or opinions to the State Engineer or other participants in  
23 this proceeding.

24 **B. ARGUMENT**

- 25 **1. NCA and NPS improperly provided new analysis and opinions purportedly as**  
26 **evidence in their closing statements which should be stricken.**

27 In the context of protest hearings, the Nevada Supreme Court has held that those participating  
28 in protest hearings "must have a full opportunity to be heard, a right that includes the ability to

1 challenge the evidence upon which the State Engineer's decision may be based." *Eureka County v.*  
2 *State Engineer*, 131 Nev. 846, 855, 359 P.3d 1114, 1120 (2015) citing *Revert v. Ray*, 95 Nev. 782,  
3 787, 603 P.2d 262, 264 (1979).<sup>3</sup> The Court cited to *Bowman Transp., Inc. v. Arkansas-Best Freight*  
4 *Sys., Inc.*, 419 U.S. 281, 288 n.4, 95 S. Ct. 438 (1974) as follows: "The Due Process Clause forbids an  
5 agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation." *Id.*

6 The new analysis and opinions of Mr. Dixon, NCA's lead hydrologist and by Dr. Waddell in  
7 their closing statements deny all participants the opportunity to challenge the evidence prior to the  
8 State Engineer considering it. If NCA or NPS are permitted to supply this additional analysis and  
9 opinion as evidence in a post-hearing brief or statement for consideration by the State Engineer in his  
10 decision-making, the State Engineer will effectively deny other participants their due process rights to  
11 challenge the proffered evidence.

12 **2. The additional information provided by NCA and NPS is argument and therefore**  
13 **should be disregarded by the State Engineer.**

14 NAC 533.180 which governs protest hearings conducted by the State Engineer states that the  
15 objective of hearings is to "develop a record upon which the State Engineer may rely to make a sound  
16 decision." The purpose of the post-hearing briefs or statements is not to add to the record nor is it to  
17 provide additional information or expert opinions. Rather, it is to provide a summary of the evidence  
18 that was presented at the hearing. NCA and NPS provided additional information that should be  
19 stricken from the record as consideration of such information would violate the other participants' due  
20 process rights to rebut and cross-examine such information presented for the State Engineer's  
21 consideration.

22 However, if the State Engineer chooses not to strike the information provided by NCA and  
23 NPS in their post-hearing brief and closing statement, the State Engineer should disregard such  
24 information because it is not evidence that has been properly introduced and admitted at the hearing.

25 ///

26 ///

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<sup>3</sup> While this proceeding was not a protest hearing, the same due process protections are required in the Order 1303 proceedings.

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1           **C.    CONCLUSION**

2           NCA and NPS provided new analysis and opinions in an attempt to bolster their positions in  
3 this proceeding. The submission of this information in closing statements does not allow for rebuttal  
4 or cross-examination of the additional analysis and opinions and the State Engineer should properly  
5 strike any and all references to this new information, analysis and opinions from the closing statement  
6 provided by NPS and the post-hearing brief provided by NCA so that it is not part of the record of this  
7 proceeding.

8           In the alternative, the State Engineer should disregard the information proffered by NCA and  
9 NPS as it consists of argument and not evidence developed during the hearing. The information should  
10 not have been provided as part of the post-hearing brief or closing statement which were meant to be  
11 a summary of evidence provided *during* the hearing.

12           The attempt by certain participants to circumvent the hearing rules and procedures grounded  
13 in notions of due process and fair play should not be countenanced by the State Engineer and  
14 LINCOLN COUNTY/VIDLER's Motion to Strike should be granted.

15           DATED this 20<sup>th</sup> day of December, 2019.

16           LINCOLN COUNTY DISTRICT ATTORNEY  
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18           P.O. Box 60  
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22           ~ and ~

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28           BY:

  
KAREN A. PETERSON, ESQ.  
Nevada State Bar No. 0366

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

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee of ALLISON MacKENZIE, LTD., Attorneys at Law,  
3 and on this date, I caused the foregoing document to be served on the following via Hand Delivery  
4 and/or Electronic Transmission as follows:

5 **Via Hand Delivery:**

6 Micheline N. Fairbank  
7 Deputy Administrator  
8 Nevada State Engineer's Office  
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10 Carson City, NV 89701

11 **Via Electronic Transmission:**

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22 dvosmer@republicservices.com; dwight.smith@interflowhydro.com; edna@comcast.net;  
23 emilia.cargill@coyotesprings.com; fan4philly@gmail.com; gary.karst@nps.gov;  
24 gbushner@vidlerwater.com; glen.knowles@fws.gov; gmorrison@parsonsbehle.com;  
25 golden@apexindustrialpark.com; golds@nevcogen.com; greatsam@usfds.com;  
26 greg.walch@lvvwd.com; hartthethird@gmail.com; Howard.Forepaugh@nsgen.com;  
27 ircady@yahoo.com; JCaviglia@nvenergy.com; jeff.phillips@lasvegaspaving.com;  
28 jim.watrus@snwa.com; joe@moapawater.com; Karen.glasgow@sol.doi.gov; kbrown@vvh2o.com;  
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DATED this 20<sup>th</sup> day of December, 2019.

  
NANCY FONTENOT

4850-5086-0271, v. 1

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**IN THE OFFICE OF THE STATE ENGINEER  
OF THE STATE OF NEVADA**

IN THE MATTER OF THE ADMINISTRATION AND MANAGEMENT OF THE LOWER WHITE RIVER FLOWSYSTEM WITHIN COYOTE SPRING VALLEY HYDROGRAPHIC BASIN (210), A PORTION OF THE BLACK MOUNTAINS AREA HYDROGRAPHIC BASIN (215), GARNET VALLEY HYDROGRAPHIC BASIN (216), HIDDEN VALLEY HYDROGRAPHIC BASIN (217), CALIFORNIA WASH HYDROGRAPHIC BASIN (218), AND MUDDY RIVER SPRINGS AREA (AKA UPPER MOAPA VALLEY) HYDROGRAPHIC BASIN (219).

**RESPONSE OF NEVADA COGENERATION ASSOCIATES Nos. 1 & 2 ("NCA")  
TO THE MOTION TO STRIKE FILED BY  
LINCOLN COUNTY WATER DISTRICT AND VIDLER WATER COMPANY**

NCA provides this Response to that portion of the Motion to Strike filed by Lincoln County Water District and Vidler Water Company (collectively, "Lincoln/Vidler") directed to the Post-hearing brief submitted by NCA in regard to the hearings involving the Lower White River Flow System ("LWRFS"). Hereinafter, the "Post-hearing brief of NCA" will be designated as the "NCA Brief" for clarity.

**Discussion**

**Introduction:** With one, minor, exception, *all* of Lincoln/Vidler's objections are directed to the *entirety* of Jay Dixon's contribution to the NCA Brief, which NCA provided in a form that was highlighted so that the State Engineer would easily distinguish between the discussion points of legal counsel and those of NCA's consultant.<sup>1</sup> Lincoln/Vidler apparently

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<sup>1</sup> As is known to the State Engineer and his staff, Jay Dixon of Dixon Hydrologic participated in the hearings involving Interim Order #1303 regarding the LWRFS as an expert for both NCA and for Bedroc, two of the stakeholders who made presentations during the hearing.

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1 does not have a problem with the undersigned stating the same things, perhaps simply because  
2 the undersigned is a lawyer rather than a hydrologist who is doing the speaking. NCA's counsel  
3 also raised the point at the pretrial conference that this proceeding might benefit from allowing  
4 the experts to directly question the other experts, but faced opposition to that proposal from the  
5 other lawyers -- despite the fact that it has repeatedly been emphasized that these hearings were  
6 *not* an adversarial/protest hearing, but rather this process was intended to advise the State  
7 Engineer on the positions of the Stakeholders and on the underlying hydrology of the Lower  
8 White River Flow System ("LWRFS").

9         What lawyers do in "briefs" is summarize, *analyze* and *apply their understanding of the*  
10 *principals involved* (whether those principals are scientific, legal, or factual/observations) to the  
11 facts presented during a trial or hearing. There is clearly "analysis" applied in the discussion  
12 section of any brief, and lawyers utilize what we all learned long ago in law school, a process  
13 that has been enshrined by the acronym "IRAC," which stands for "Issue, Rule, Application or  
14 Analysis, and Conclusion." We are taught to identify the Issue, state the Rule, Apply the rule or  
15 *Analyze the rule's application to the facts*, and draw the Conclusion following that analysis.  
16 This is what the State Engineer is likely to find in all of the post-hearing briefs presented by the  
17 lawyers for the various parties if they are well-trained and follow their training. They should all  
18 identify their specific issues, identify the rules that apply to their issue, "analyze" the facts  
19 presented and how the rules supposedly work for them in this particular circumstance, and draw  
20 conclusions for the State Engineer from those facts.

21         In NCA's brief, the undersigned did exactly that, and interestingly received no objection  
22 to his words. But nothing in the procedures for these post-hearing briefs prevents NCA's  
23 consultants from participating and performing *the exact, same function* as legal counsel. Mr.  
24 Dixon did in his section of the brief exactly what the lawyers do -- he highlighted for the State

1 Engineer some of the facts that were already in the record but which may not have been  
2 examined by the State Engineer as closely as other facts, reiterated the “rules” – which were the  
3 hydrologic principles he discussed at the hearing to help identify conditions that would explain  
4 why the wells acted as they did, which would support whether the boundary should be moved –  
5 and then applied the facts to the rules, explaining the same thing that he had already discussed  
6 in his testimony at the hearing. The fact that Mr. Dixon is a “hydrologist” rather than a lawyer  
7 has no bearing whatsoever; he employed the same process, using facts already in the record and  
8 simply analyzed those facts to explain how those facts further support NCA’s position that the  
9 boundary should be adjusted to exclude the NCA production wells.

10 No “rule” of procedure before the State Engineer prevents NCA from having *both* the  
11 undersigned and his consultant participate in presenting that “IRAC-styled” analysis for the  
12 State Engineer’s consideration. Indeed, the undersigned and NCA simply felt that a discussion  
13 of the facts presented at the hearing by a hydrology expert in a “non-adversarial process”  
14 designed to advise the State Engineer as to what the facts and circumstances are surrounding the  
15 LWRFS might actually be more beneficial to the State Engineer than just arguments of legal  
16 counsel; Mr. Dixon speaks the same language and uses similar verbiage as other engineers. The  
17 process is the same whether spoken by Mr. Dixon or by the undersigned.

18 **1. Mr. Dixon’s Contribution to the NCA Brief Did Not Provide New Evidence**  
19 **Outside of What Was Already In the Record**

20 Lincoln/Vidler’s first objection to the NCA Brief is their contention that the review and  
21 discussion portion of the Brief in which Jay Dixon participated, beginning at the top of page 7  
22 of the Brief, allegedly contains “evidence” that is new and was not presented during the hearing.  
23 This contention is without merit. It was made clear in NCA’s Brief that Mr. Dixon simply  
24 provided his analysis and explanation of evidence already in the record.

At the hearing, Mr. Dixon participated in NCA’s PowerPoint presentation. He testified



1 as a witness on behalf of NCA and discussed – in large part – evidence and information in the  
2 record which supports the contention that NCA’s production wells located near the currently-  
3 drawn southern boundary of the LWRFS “geographic boundary” area should be considered as  
4 *outside that boundary*, thus requiring the boundary to be re-drawn to exclude those production  
5 wells. At pages 5 and 6 of NCA’s Brief – *sections to which Lincoln/Vidler did not pose any*  
6 *objection* – NCA highlighted some of the testimony provided by Mr. Dixon that went  
7 specifically to the boundary issue. That testimony identified that the NCA wells had been  
8 intentionally located *in the fault* that was identified by Marty Mifflin. *See* NCA Brief at p. 6,  
9 cited in the first full paragraph, and at footnote 13. That discussion in NCA’s Brief explained  
10 that Mr. Dixon and his colleagues went beyond what SNWA looked at, and it reiterated that Mr.  
11 Dixon provided more information at the hearing than what SNWA had considered as being a  
12 *basis* for why those NCA production wells had a minimal effect, if any, on the water levels and  
13 spring flow in the Muddy River Springs Area and demonstrated a different effect than did the  
14 other monitoring wells in that vicinity, such as BM-DL-2.

15 As was explained in detail in the NCA Brief itself at the bottom of p. 6 and top of p. 7,  
16 the discussion portion contributed by Mr. Dixon was culled from information taken expressly  
17 from the pumping files of NCA – files that were part of the record of the State Engineer in this  
18 matter:

19 Indeed, SNWA’s Figure A-3 showed no influence from BMA pumping of  
20 production wells, which Mr. Dixon explained would be consistent with the vastly  
21 different P-values. However, Mr. Dixon did note that there was “noise”  
associated with the well data for EBM-3 (the NCA well), and noted that it would  
be helpful to have additional work done to analyze the data more thoroughly.

22 Following the conclusion of the hearing, Mr. Dixon did precisely that –  
23 he analyzed *the existing monitoring record back to 1992, and performed a more*  
*thorough review of information already in the State’s record. Notably, nothing*  
24 *herein is added to the record that was not made available to the Nevada State*  
*Engineer during the hearing, but is rather a more thorough review of the*  
*materials from the NCA Permit files that are part of the record, using the data*

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1 provided therein and assessing exactly what was discussed at the hearing  
2 involving the Black Mountains Area and the differing effects noted from the  
3 production wells in that area as compared to nearly all the other wells reported  
4 upon and analyzed by SNWA and others....  
5 NCA Brief, at p. 6 and 7 (emphasis added).  
6 Lincoln/Vidler claims that Mr. Dixon supplied additional “evidence” because, following  
7 the hearing, Mr. Dixon performed an additional review and analysis of NCA’s permit files.  
8 But, during the hearing, Mr. Dixon discussed the long record of information in his responses to  
9 questions posed by Jon Benedict of the State Engineer’s office. Mr. Dixon referred to that  
10 information as, “a 25-year test at NCA. Particularly those two northern most wells they’ve been  
11 pumping. They use all of their water rights every year.”<sup>2</sup> At its core, Mr. Dixon’s contribution to  
12 the NCA Brief was simply that he went back to the State Engineer’s NCA permit files – *which*  
13 *are a part of the record before the State Engineer in this proceeding* (as are all of the permit  
14 files of the various stakeholders and water right holders in the various basins affected) – and he  
15 reviewed and assembled the pumping data into a more usable form for the State Engineer’s  
16 consideration. At the hearing, Mr. Dixon discussed the fact that it would be helpful to eliminate  
17 some of the “noise” associated with the pumping data associated with EBM-3, one of the NCA  
18 wells Mr. Dixon discussed at length during his testimony, but again reiterated that there was as  
19 “long period of record. . . .”<sup>3</sup>

**2. The Figures Are Simply a Compilation of Fact in the Record Presented As An Engineer Would Describe Them, Rather Than As a Lawyer Would**

20 Lincoln/Vidler further objects to various “Figures” or exhibits utilized by Mr. Dixon to  
21 explain his section of the brief, but that is merely an objection to form over substance. Lawyers  
22 use words primarily in their arguments; they are our stock in trade, as we are known for being  
23 wordsmiths. Recently, however, with the advent of digital processing and electronic filing,

24 <sup>2</sup>See Transcript Vol. IX., Oct. 3, 2019, p. 1674, lines 12-15.

<sup>3</sup> *Id.* at p. 1675, line 2.

1 some lawyers are actually embedding their briefs with photos, links, graphs, and even video  
2 (when allowed) to enhance their presentations to courts.<sup>4</sup> Engineers are often less wordy than  
3 lawyers, but instead resort to using graphs or diagrams to make their points and to summarize  
4 their conclusions. Here, Mr. Dixon simply communicated his version of the same IRAC  
5 principal utilized by lawyers through the use of figures then explained his analysis rather than  
6 using words, but he did not go beyond the traditional IRAC concept to get there. Had the  
7 undersigned presented the graphs, maps and such as demonstrative exhibits (no differently than  
8 did Mr. Dixon), there likely would have been no objection; saving words (precious, when given  
9 a page limit), was key to the decision to have Mr. Dixon say it as an engineer would.

10 **3. Lincoln/Vidler’s Citations to Protest Hearing Cases is Inapplicable in This**  
11 **Context.**

12 The lone citations provided by Lincoln/Vidler as support for their objection and motion  
13 to strike are cases discussing due process in the context of adversarial protest hearings. *See,*  
14 *Lincoln/Vidler Motion at p. 4, citing e.g., Eureka County v. State Engineer, 131 Nev. 846, 359*  
15 *P.3d 1114 (2015); Revert v. Ray, 95 Nev. 782, 603 P.2d 262 (1979), or general trial cases. See,*  
16 *e.g., Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281 (1974).*

17 The present matter is neither an adversarial court proceeding between contesting parties  
18 nor a protested water rights application/permit proceeding. Instead, as was made abundantly  
19 clear on numerous occasions by Deputy Administrator Micheline Fairbank both before and  
20 during the hearing, this is a non-adversarial process designed to provide the State Engineer and  
21 his staff with information about the hydrology of the LWRFS and directed to assist with the

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22 <sup>4</sup> *See* [http://www.counselpress.com/page\\_blog\\_single.cfm?bid=38](http://www.counselpress.com/page_blog_single.cfm?bid=38) “E-filing a short video clip  
23 directly to the PACER CM/ECF system with CP eBrief technology,” published Feb. 14, 2014,  
24 John C. Kruesi, Esq. ; *see also, Experiential Legal Writing: Analysis, Process, and Documents,*  
Diana R. Donahoe, Wolters Kluwer Law & Business (2015), p. 106 (ideas for embedding  
multimedia within briefs including pictures, animations, simulations, video, diagrams and maps,  
and links).

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1 specific areas limited to the context of Interim Order #1303 – but not as to the policy aspects at  
2 this stage. This entire process was intended to give the State Engineer and his staff some  
3 additional understanding from the Stakeholders’ points of view as to the hydrology of the  
4 LWRFS so that the State Engineer could determine if the boundary needed adjustment, how the  
5 system is adapting since the Order 1169 aquifer test and whether it has recovered wells,, the  
6 long-term quantity of groundwater that may be pumped from the LWRFS and the relationships  
7 between location of pumping on discharge to the Muddy River Springs and capture of Muddy  
8 River flow, and the hydrologic effects of movement of water rights between alluvial wells and  
9 carbonate wells on deliveries of senior decreed rights to the Muddy River. Information  
10 presented and discussed – whether by a lawyer or by a consultant – is what is key here.

11 Notably, Mr. Dixon did not drill any new wells. Mr. Dixon did not take any new  
12 measurements of existing wells, nor did Mr. Dixon commission any new studies of the LWRFS  
13 to be performed by any outside entity that, itself, drilled new wells or pumped water from areas  
14 that had not yet been tested. No new data *beyond what is already in the record* was obtained  
15 from outside sources and supplied in NCA’s Brief. Mr. Dixon transparently described both the  
16 process and sources of data for his analysis, the results of which can be duplicated by the State  
17 Engineer or any other stakeholder. The objection of Lincoln/Vidler does not identify evidence  
18 that was outside the record; rather, Lincoln/Vidler objects to the fact that the *existing record*  
19 *data* was better explained by Mr. Dixon in the NCA Brief than had been previously explained.  
20 Well, that is the purpose – in every case in which the undersigned has been involved – of using  
21 post-hearing briefs, to allow the advocate to *present the information in a clear, concise manner*  
22 *that is summarized and explained*, hopefully in a manner that clarifies and crystalizes the  
23 testimony of many witnesses and many documents previously presented over many days.  
24

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1           **4. The Stamp of Mr. Dixon Is Consistent With The Requirements of NAC 625.611.**

2           Lastly, Lincoln/Vidler objects to Mr. Dixon's portion of the NCA Brief suggesting that  
3 because Mr. Dixon applied his professional engineer's stamp to the document, it must mean he  
4 supplied "new" evidence or a "new" report. Again, Lincoln/Vidler has misconstrued the  
5 purpose and intent of the stamp, the purpose and intent of the NAC requirement, and the  
6 rationale for its application in this instance.

7           During the hearing, Mr. Dixon utilized a laser pointer while discussing Slides Nos. 7, 8,  
8 9, 15, and 17, and he expressly testified about the geology of the area demonstrated in those  
9 slides in discussing the "boundary" issue.<sup>5</sup> Essentially, Mr. Dixon outlined where the boundary  
10 should likely be using that pointer and describing the conditions, but he did not put a map on  
11 paper showing – in demonstrative form – what he was saying as to where that boundary would  
12 be located if the State Engineer followed his testimony about the strike-slip fault and the  
13 intentional location of the NCA production wells in that fault by Marty Mifflin. One thing that  
14 is likely, however, is that a hydrologic boundary is not typically a perfectly straight line as is  
15 currently the boundary in the southern portion of the LWRFS where these wells are located.  
16 Consequently, Mr. Dixon -- as part of NCA's Brief, added a demonstrative exhibit to show what  
17 his testimony demonstrated, and that was a map following the geologic features to which he had  
18 testified at pages 1618-1627.

19           NAC 625.611 requires an engineer to apply his or her professional stamp whenever a  
20 map is submitted to a "public authority." Though the attachments to NCA's Brief were  
21 demonstrative only (much in the way they could have been *embedded* as media in a legal brief),  
22 the inclusion of such a map suggested to Mr. Dixon that it would require him to apply his stamp  
23 in order to comply with NAC 625.611. Notably, nothing in that NAC provision exempts a map  
24

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<sup>5</sup> Trans. IX, Oct. 3, 2019, at pp. 1618-1627.

1 used for “demonstrative” purposes versus a map supplied for permitting or other purposes; in an  
2 abundance of caution, it simply seemed prudent to have Mr. Dixon “stamp” the NCA document  
3 to avoid any suggestion that he had improperly supplied a “map” without a stamp.

#### 4 CONCLUSION

5 The NCA Brief does not contain new evidence, and Mr. Dixon did not conduct  
6 additional expert analysis beyond the type of “analysis” in which lawyers engage each and  
7 every time they prepare arguments for their post-hearing briefs. The objection made here by  
8 Lincoln/Vidler is to the person, not to the substance – and there is no basis under which to  
9 uphold that objection. Nothing prohibits Mr. Dixon from participating as a contributor to the  
10 post-hearing brief of NCA, and his input was simply a summarization of the information from  
11 NCA’s permit files that *anyone* could have gleaned had they taken the time to do the deep dive  
12 that Mr. Dixon performed and worked their way through that record.

13 The entire Order 1303 administrative process was intended to give the State Engineer  
14 and his staff an additional understanding from the Stakeholders’ points of view as to the  
15 hydrology of the LWRFS so that the State Engineer could determine if the boundary needed  
16 adjustment, how the system is adapting since the Order 1169 aquifer test and whether it has  
17 recovered, the long-term quantity of groundwater that may be pumped from the LWRFS and the  
18 relationships between location of pumping on discharge to the Muddy River Springs and  
19 capture of Muddy River flow, and the hydrologic effects of movement of water rights between  
20 alluvial wells and carbonate wells on deliveries of senior decreed rights to the Muddy River.  
21 Mr. Dixon transparently described both the process and source of data for his analysis, the  
22 results of which can be duplicated by the State Engineer or any other stakeholder. When this  
23 entire Order 1303 administrative process has been completed, the State Engineer will be the  
24 sole person responsible for making the ultimate decision regarding management of the LWRFS,

1 protection of the LWRFS resources and the protection of water rights for the stakeholders  
2 within the LWRFS. The State Engineer has broad discretion as to what data, standards and  
3 methodologies are used to make these decisions. Mr. Dixon's analysis is one of many tools the  
4 State Engineer has at his discretion in the decision making process.

5 Finally, it should be remembered that the "record" before the State Engineer is not  
6 simply what was discussed at the hearing, but rather is all that information the State Engineer  
7 identified as being part of the record, and the permit files of NCA are certainly fair game for  
8 NCA to point out to the State Engineer for consideration when making a determination  
9 regarding the establishment of the boundaries of the LWRFS. The simple fact that an engineer  
10 pointed out those files and what was contained therein rather than a lawyer, however, is not a  
11 violation of anyone's "due process."

12 The motion of Lincoln/Vidler should be denied.

13 DATED January 7, 2020.

14 KAEMPFER CROWELL

15 BY:



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16 Alex J. Flangas  
17 Nevada Bar No.  
18 50 West Liberty Street, Suite 900  
19 Reno, NV 89501  
20 *Attorneys for*  
21 *Nevada Cogeneration Associates Nos. 1 and 2*

**CERTIFICATE OF SERVICE**

I hereby certify that I am an employee of KEMPFER CROWELL, and on January 7, 2020, I caused the foregoing **RESPONSE OF NEVADA COGENERATION ASSOCIATES Nos. 1 & 2 ("NCA") TO THE MOTION TO STRIKE FILED BY LINCOLN COUNTY WATER DISTRICT AND VIDLER WATER COMPANY** to be served via electronic transmission as follows:

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Additionally, a copy of this document was delivered via facsimile to the Division of Water Resources this same day.

DATED January 7, 2020.

  
Employee of Kaempfer Crowell

KAEMPFER CROWELL  
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RECEIVED

IN THE OFFICE OF THE STATE ENGINEER  
OF THE STATE OF NEVADA

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STATE ENGINEER'S OFFICE

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IN THE MATTER OF THE ADMINISTRATION AND MANAGEMENT OF THE LOWER WHITE RIVER FLOW SYSTEM WITHIN COYOTE SPRING VALLEY HYDROGRAPHIC BASIN (210), A PORTION OF BLACK MOUNTAINS AREA HYDROGRAPHIC BASIN (215), GARNET VALLEY HYDROGRAPHIC BASIN (216), HIDDEN VALLEY HYDROGRAPHIC BASIN (217), CALIFORNIA WASH HYDROGRAPHIC BASIN (218), AND MUDDY RIVER SPRINGS AREA (AKA UPPER MOAPA VALLEY) HYDROGRAPHIC BASIN (219).

REPLY IN SUPPORT OF LINCOLN COUNTY WATER DISTRICT AND VIDLER WATER COMPANY, INC. MOTION TO STRIKE

LINCOLN COUNTY WATER DISTRICT ("LINCOLN COUNTY") and VIDLER WATER COMPANY, INC. ("VIDLER") and collectively "LINCOLN COUNTY/VIDLER", by and through their attorneys, DYLAN V. FREHNER, ESQ. the LINCOLN COUNTY DISTRICT ATTORNEY and KAREN A. PETERSON, ESQ. of the law firm of ALLISON MacKENZIE, LTD., hereby submit their Reply in Support of their Motion to Strike certain portions of the post hearing brief<sup>1</sup> of Nevada Cogeneration Associates Nos. 1 and 2 ("NCA").<sup>2</sup>

NCA argues in its Response to the Motion to Strike ("Response"), that Mr. Dixon's portion of NCA's post hearing brief is no different than argument by NCA counsel's in a brief and Mr. Dixon's contribution to the NCA post hearing brief did not provide new evidence. Both contentions are incorrect, and the State Engineer should grant LINCOLN COUNTY/VIDLER's Motion to Strike.

<sup>1</sup> Nevada Cogeneration Associates Nos. 1 and 2 titled its brief submitted on December 3, 2019 to the State Engineer in this proceeding as "Post-hearing brief of Nevada Cogeneration Associates Nos. 1 and 2" so it is not clear why NCA now wants to refer to its post hearing brief as "'NCA Brief' for clarity". See NCA Response at 1.

<sup>2</sup> The National Park Service ("NPS") did not submit an Opposition to the Motion to Strike filed by LINCOLN/VIDLER requesting that the first two full paragraphs on page 2 after the bullet of NPS' Closing Statement be stricken from the record.

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1 It is undisputed NCA provided new analysis and explanation of evidence described and  
2 presented by Mr. Dixon, as an engineer<sup>3</sup>, outside of the hearing in NCA's post hearing brief. See NCA  
3 Response at 3, 5-6; NCA Post Hearing Brief at 6-7. That new analysis and explanation of evidence  
4 constitute new opinions and thus, new evidence that NCA is improperly attempting to include in this  
5 proceeding long after the hearing has concluded. To argue that what Mr. Dixon did is the same as  
6 what lawyers do in a post hearing brief is disingenuous. Mr. Dixon was supposed to perform his  
7 analysis and explanation prior to the hearing and include his analysis, explanation, opinions, figures  
8 and maps in his rebuttal report. He could have then testified at the hearing as to his new and further  
9 analysis, explanation, opinions, figures and maps and been subject to cross-examination concerning  
10 his further analysis, explanation, opinions, figures and maps during the hearing. If he or NCA's  
11 counsel then cited in NCA's post hearing brief to Mr. Dixon's hearing testimony or exhibits introduced  
12 into evidence concerning Mr. Dixon's analysis, explanation, opinions, figures and maps,  
13 LINCOLN/VIDLER would not be objecting. NCA tried to include slides at the hearing with opinions  
14 outside the scope of its rebuttal report and the Hearing Officer excluded that information. Transcript  
15 of Proceedings, Public Hearing, Hearing on Order 1303, Volume IX, P.M. Session, Thursday October  
16 3, 2019 at pp. 1610-1611. NCA is trying the same thing again in its post hearing brief. In addition,  
17 the fact Mr. Dixon felt compelled as a professional engineer to sign NCA's post hearing brief to  
18 comply with the professional requirements contained in NAC 625.612 for a "report, study, test result,  
19 certification or calculation" submitted to a public authority only underscores that NCA's post hearing  
20 brief contains improper outside the record analysis and opinions and is not argument. Obviously, Mr.  
21 Dixon did not believe he adequately addressed his client's interests prior to the close of the hearing  
22 and now seeks to supplement the hearing record with additional analysis, explanation, opinions,  
23 figures and maps post hearing. NCA's attempt to introduce new analysis, explanation, opinions,  
24 figures and maps that should have been presenting during the hearing and which prejudices the due  
25 process rights of all the participants in the Lower White River Flow System proceeding should not be  
26 allowed by the State Engineer. Accordingly, LINCOLN/VIDLER request their Motion to Strike be  
27 granted.

28 \_\_\_\_\_  
<sup>3</sup> Mr. Dixon was qualified for this proceeding as an expert in hydrology and water rights. NCA Witness List, p. 2.

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DATED this 17<sup>th</sup> day of January, 2020.

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee of ALLISON MacKENZIE, LTD., Attorneys at Law,  
3 and on this date, I caused the foregoing document to be served on the following via Hand Delivery  
4 and/or Electronic Transmission as follows:

5 **Via Hand Delivery:**

6  
7 Micheline N. Fairbank  
8 Deputy Administrator  
9 Nevada State Engineer's Office  
10 901 S. Stewart Street, Suite 2002  
11 Carson City, NV 89701

12 **Via Electronic Transmission:**

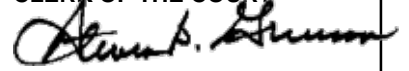
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**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

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

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

Petitioners,  
vs.

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

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

**RECORD ON APPEAL CITED IN LINCOLN COUNTY WATER DISTRICT AND  
VIDLER WATER COMPANY, INC.'S OPENING BRIEF**

///

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1 Petitioners, LINCOLN COUNTY WATER DISTRICT (“LINCOLN”) and VIDLER WATER  
2 COMPANY, INC. (“VIDLER”), by and through their counsel, DYLAN V. FREHNER, LINCOLN  
3 COUNTY DISTRICT ATTORNEY, WAYNE O. KLOMP of GREAT BASIN LAW, and KAREN  
4 A. PETERSON of ALLISON MacKENZIE, LTD., submit their Record on Appeal cited in their  
5 Opening Brief in support of their Petition for Judicial Review.

6 The attached documents constitute excerpts from the Record on Appeal cited in  
7 LINCOLN/VIDLER’s Opening Brief in support of their Petition for Judicial Review.

DESCRIPTION	SE ROA NO.
Volume 1	2 – 10969
Volume 2	33671 – 36496
Volume 3	36689 – 53729

8  
9  
10  
11 **AFFIRMATION**

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

14 DATED this 27<sup>th</sup> day of August, 2021.

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1 **CERTIFICATE OF SERVICE**

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

7 I hereby certify that I caused a true and correct copy of the foregoing document to be served  
8 via FedEx as follow:

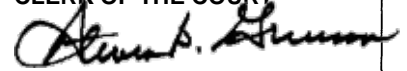
9 Clark County District Court  
10 Attn: Hon. Bita Yeager – District. Ct. Dept. 1  
11 Court Administration – 2<sup>nd</sup> Floor  
12 200 Lewis Avenue  
13 Las Vegas, NV 89101

14 DATED this 27<sup>th</sup> day of August, 2021.

15 /s/ Nancy Fontenot  
16 NANCY FONTENOT

17 4836-5486-7960, v. 1

**SEE Lincoln/Vidler Master ROA List with Reply Appendix**



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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 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
IN THE MATTER OF THE PETITION OF MUDDY VALLEY IRRIGATION COMPANY
IN THE MATTER OF THE PETITION OF NEVADA COGENERATION ASSOCIATES NOS. 1 AND 2
IN THE MATTER OF THE PETITION OF GEORGIA-PACIFIC GYPSUM, LLC AND REPUBLIC ENVIRONMENTAL TECHNOLOGIES, INC.
IN THE MATTER OF THE PETITION OF LINCOLN COUNTY WATER DISTRICT AND VIDLER WATER COMPANY, INC.

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

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

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

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

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.



14  
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    represents an abuse of discretion and prejudicial legal  
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8 **Other Authorities**

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**INTRODUCTION<sup>1</sup>**

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

---

<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>  
25  
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28 <sup>2</sup> See Order 1169 (SE ROA 659-669) (All citations to the record will be attached in a separate filing).

<sup>3</sup> See Interim Order 1303 (SE ROA 70-88).

<sup>4</sup> 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.<sup>5</sup> 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.”<sup>6</sup> 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.”<sup>7</sup>  
24

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

<sup>6</sup> See Order 1309 (SE ROA 2-69) at SE ROA 61.

<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> In other words, MVIC received a  
6 specific award of water pursuant to those quantified determinations of the Decree.<sup>10</sup>  
7 Thus, the Decree's language is important in that it confirms water rights held by MVIC  
8 in two ways. It first has a quantified determination and then further confirms that  
9 MVIC gets any additional flow from the Muddy River not otherwise allocated by the  
10 specific awards. Contrary to the Muddy River Decree, Order 1309 diminishes MVIC's  
11 water rights based on the purported consumptive needs of the senior decreed rights  
12 although MVIC's purported "needs" are irrelevant to determining whether pumping  
13 interferes with its decreed rights because MVIC has rights to the specific sums  
14 allocated to it and the total aggregate remaining volume of the river independent of its  
15 alleged requirements and MVIC has had those decreed rights for over 100 years.  
16 Accordingly, to the extent Order 1309 is in conflict with respect to those items, Order  
17 1309 should be reversed, and the relief requested herein granted. Specifically, the  
18 State Engineer should be directed to ensure that the predevelopment baseflow of  
19 33,900 afa, which he recognizes in Order 1309, is not intercepted by any junior  
20 rights.<sup>11</sup> This will protect and preserve MVIC's water rights and the Decree in general.  
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27 <sup>8</sup> See Muddy River Decree of 1920 (SE ROA 33770-33816) at SE ROA 33787-33788.

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

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

<sup>11</sup> 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.<sup>12</sup>

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").<sup>13</sup>  
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...<sup>14</sup>

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 <sup>12</sup> See MVIC Rebuttal Report (SE ROA 39713-39717) at p. 2 (SE ROA 39715).

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

<sup>14</sup> *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...<sup>15</sup> 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.<sup>16</sup> 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.”<sup>17</sup> 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         In 2018, the State Engineer held several public workshops to review the status of  
20 groundwater use and recovery following the conclusion of Order 1169, requiring a  
21 large study to determine whether pumping in the LWRFS would have detrimental  
22 impacts on existing water rights or the environment. Following the workshops, and as  
23 a result thereof, the State Engineer drafted a proposed order and held a hearing on the  
24  
25

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

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

<sup>17</sup> *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.<sup>18</sup> Certain deadlines related to the filing of reports  
8 were modified in the Addendum to Interim Order 1303.<sup>19</sup> 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  
21 are going to be deciding at this point in time.

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

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

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

<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup>

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.<sup>23</sup> 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.<sup>24</sup> 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."<sup>25</sup>

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

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

24 <sup>22</sup> 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 <sup>23</sup> See MVIC Summary of Witness Testimony of Mr. Todd Robison (SE ROA 39712); MVIC  
Rebuttal Report (SE ROA 39713-39717).

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

<sup>25</sup> *Id.*

1 LWRFS and Muddy River decreed rights” and that allegations of conflict would be  
2 addressed at a future point in time,<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup>

15  
16  
17  
18 The State Engineer issued Order 1309 on or about June 15, 2020.<sup>31</sup> 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 <sup>26</sup> See Transcript of Proceedings, Public Hearing, Prehearing Conference, August 8, 2019 (SE ROA  
25 519-552) at 12:6-15 (SE ROA 522).

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

27 <sup>28</sup> See NRS 533.0245.

28 <sup>29</sup> See MVIC Rebuttal Report (SE ROA 39714-39717).

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

31 <sup>31</sup> See Order 1309 (SE ROA 2-69).

1 does not constitute a conflict.”<sup>32</sup> The State Engineer further stated that “there is no  
2 conflict as long as the senior water rights are served.”<sup>33</sup> 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.<sup>34</sup> 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.

### 14 STANDARD OF REVIEW

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.<sup>35</sup> First, the State Engineer must  
17 provide affected parties with a “full opportunity to be heard.”<sup>36</sup> 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.”<sup>37</sup> 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.<sup>38</sup> The reviewing court must also determine  
22  
23

24 <sup>32</sup> *Id.* at p. 60 (SE ROA at 61).

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

26 <sup>34</sup> *Id.* at pp. 60-61, 65 (SE ROA 61-62, 66).

27 <sup>35</sup> NRS 533.450(1).

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

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

<sup>38</sup> *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.”<sup>39</sup> 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.<sup>40</sup> 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.”<sup>41</sup> 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.<sup>42</sup>

### 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.<sup>43</sup> Given the State Engineer’s  
22 limitation in the scope of the hearing and determinations that would be made  
23  
24

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

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

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

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

<sup>43</sup> 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,<sup>44</sup> 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  
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<sup>44</sup> 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.<sup>45</sup>  
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.<sup>46</sup> 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."<sup>47</sup> 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.<sup>48</sup> Accordingly, Order 1309 is  
21 contrary to law and, in particular, the Muddy River Decree itself.  
22  
23  
24

25 \_\_\_\_\_  
26 <sup>45</sup> See Interim Order 1303 (SE ROA 70 – 88) at p. 7 (SE ROA 76).)

27 <sup>46</sup> NRS 533.0245.

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

<sup>48</sup> 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.<sup>49</sup> 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.<sup>50</sup> 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.<sup>51</sup>

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.<sup>52</sup>  
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.<sup>53</sup> 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 <sup>49</sup> 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 <sup>50</sup> See NRS 533.210(2).

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

<sup>52</sup> *Id.* (emphasis added), citing NRS 533.210.

<sup>53</sup> *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  
9 undermine the public interest in finality and thus also the  
10 management of these resources consistent with  
11 the public trust doctrine.<sup>54</sup>

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

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.<sup>55</sup>

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

26 <sup>54</sup> *Min. Cty. v. Lyon Cty.*, 136 Nev. Adv. Op. 58, 473 P.3d 418, 429 (2020).

27 <sup>55</sup> NRS 533.085(1).

28 <sup>56</sup> *See Ormsby County v. Kearney*, 37 Nev. 314, 142 P. 803 (1914); *see also 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.”).

<sup>57</sup> *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."<sup>58</sup> 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..."<sup>59</sup> 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.<sup>60</sup> 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  
23  
24  
25  
26

27 <sup>58</sup> See Muddy River Decree of 1920 (SE ROA 33770-33816) at 20:1-8 (SE ROA 33790).

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

<sup>60</sup> 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.”<sup>61</sup> 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.<sup>62</sup>  
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.<sup>63</sup> 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  
21  
22  
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25 <sup>61</sup> See NRS 533.3703.

26 <sup>62</sup> 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.

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

1 [MVIC].”<sup>64</sup> 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,<sup>65</sup> 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.”<sup>66</sup> 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 <sup>64</sup> *Id.*

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

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

1 appear to be calculable at approximately double that sum. <sup>67</sup> 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  
25  
26  
27

28 <sup>67</sup> 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.<sup>68</sup> 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.”<sup>69</sup> 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...”<sup>70</sup> The Constitution of the State of Nevada similarly  
25 provides that “[n]o person shall be deprived of life, liberty, or property, without due  
26

27 <sup>68</sup> 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).

<sup>69</sup> *Id.* at p. 60 (SE ROA at 61).

<sup>70</sup> U.S. Const. amend. XIV, § 1.

1 process of law.”<sup>71</sup> 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.<sup>72</sup>  
4

5 Procedural due process imposes restrictions on governmental actions which  
6 deprive individuals of liberty or property interests.<sup>73</sup> The general rule is that  
7 “individuals must receive notice and an opportunity to be heard before the Government  
8 deprives them of property.”<sup>74</sup> “The fundamental requirement of due process is the  
9 opportunity to be heard at a meaningful time and in a meaningful manner.”<sup>75</sup>  
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.<sup>76</sup> Accordingly, MVIC is  
18 entitled to due process protection.  
19

20 ///  
21 ///  
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23 \_\_\_\_\_  
24 <sup>71</sup> Nev. Const. art. 1, § 8(2).  
25 <sup>72</sup> *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortg., a Div. of Wells Fargo*  
26 *Bank, N.A.*, 133 Nev. 28, 30 n.3, 388 P.3d 970, 972 n.3 (2017)  
27 <sup>73</sup> *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893, 901 (1976).  
28 <sup>74</sup> *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48, 114 S. Ct. 492, 498 (1993)  
<sup>75</sup> *Mathews*, 424 U.S. at 333, 96 S. Ct. at 902 (internal quotations omitted).  
<sup>76</sup> *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.<sup>77</sup> 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.<sup>78</sup> 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  
15 several amounts and rights hereinbefore specified...<sup>79</sup>

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

24 ///

25 ///

26 \_\_\_\_\_  
27 <sup>77</sup> See *Dermody v. City of Reno*, 113 Nev. 207, 213, 931 P.2d 1354, 1358 (1997).

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

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

<sup>80</sup> *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.”<sup>81</sup> The State Engineer further stated that “there is no conflict as  
8                   long as the senior water rights are served.”<sup>82</sup> 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.<sup>83</sup> 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.”<sup>84</sup> As noted above,  
19                  such an analysis here is a violation of NRS 533.3703.  
20  
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  
25

26 \_\_\_\_\_  
27 <sup>81</sup> *Id.* at p. 60 (SE ROA at 61).

28 <sup>82</sup> *Id.*

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

<sup>84</sup> *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.”<sup>85</sup> 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...”<sup>86</sup> 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 cfs since 2015.<sup>87</sup>  
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.

27 <sup>85</sup> See Muddy River Decree (SE ROA 33770-33816) at 20:1-8 (SE ROA 33790).

28 <sup>86</sup> *Id.* at 22:28-23:1 (emphasis added).

<sup>87</sup> 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.<sup>88</sup> 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".<sup>89</sup> 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

28 <sup>88</sup> See Order 1309 (SE ROA 2-69) at p. 61 (SE ROA 62).

<sup>89</sup> 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.<sup>90</sup> At the  
7 prehearing conference that occurred on August 8, 2019, the purpose of the hearing was  
8 stated as follows:  
9

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  
are going to be deciding at this point in time.

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

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

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

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

28 <sup>91</sup> 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 issue<sup>92</sup> 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.<sup>93</sup>

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,<sup>94</sup> 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.”<sup>95</sup> 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.<sup>96</sup> In fact, when asked  
23  
24

25 \_\_\_\_\_  
26 <sup>92</sup> 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 <sup>93</sup> See Hearing Transcript Vol. I (Sept. 23, 2019) (SE ROA 52960-53052) at 6:4-15 (emphasis added).

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

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

<sup>96</sup> 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.<sup>97</sup>

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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<sup>97</sup> 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 3. This opening brief complies with all applicable Nevada Rules of Appellate  
7 Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief  
8 regarding matters in the record to be supported by a reference to the page and volume  
9 number, if any, of the transcript or appendix where the matter relied on is to be found.

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

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

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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 27 day of August, 2021.  
6

7   
8

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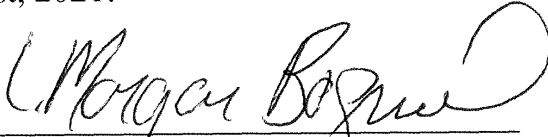
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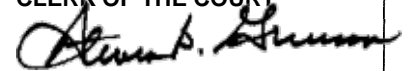
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**CERTIFICATE OF SERVICE**

Pursuant to NRCPC 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.

  
\_\_\_\_\_  
L. MORGAN BOGUMIL



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19 Attorneys for Petitioner MVIC

16 **DISTRICT COURT**

17 **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 NOTICE OF RECORD  
CITATIONS**

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

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

1 2	IN THE MATTER OF THE PETITION OF CENTER FOR BIOLOGICAL DIVERSITY	Case No.: A-20-817876-P (Sub Case) Dept. No.: 1
3 4	IN THE MATTER OF THE PETITION OF MUDDY VALLEY IRRIGATION COMPANY	Case No.: A-20-817977-P (Sub Case) Dept. No.: 1
5 6	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
7 8 9	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
10 11	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

**PETITIONER MUDDY VALLEY IRRIGATION COMPANY'S  
NOTICE OF RECORD CITATIONS**

For the convenience of the Court, MUDDY VALLEY IRRIGATION COMPANY, by and through its counsel, STEVEN D. KING and DOTSON LAW, attaches hereto the following documents found within the Record which are cited to within its Opening Brief filed on August 27, 2021:

<b>EXHIBIT</b>	<b>DESCRIPTION</b>	<b>SE ROA</b>
1	Order 1309	2-69
2	Interim Order 1303	70-88
3	Notice of Hearing (Aug. 23, 2019)	262-282
4	Addendum to Interim Order 1303	494-512
5	Transcript of Proceedings, Public Hearing, Prehearing Conference, August 8, 2019	519-552
6	Order on Objections and Witness Qualifications (Sept. 16, 2019)	567-572
7	Order 1169	659-669
8	Muddy Valley Decree of 1920	33770-33816
9	MVIC Summary of Witness Testimony of Mr. Todd Robison	39712

10	MVIC Rebuttal Report	39713-39717
11	Order 1194	46469-46472
12	Hearing Transcript Vol. I (Sept. 23, 2019)	52960-53052
13	Hearing Transcript Vol. V (Sept. 27, 2019)	53331-53383
14	Testimony of Todd Robison generally, Hearing Transcript Vol. IX	53657-53708

**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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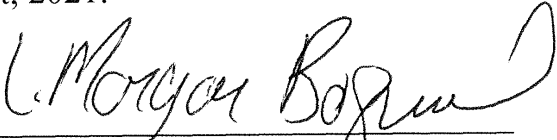
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**CERTIFICATE OF SERVICE**

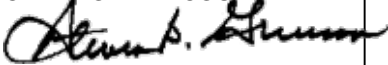
Pursuant to NRCP 5(b), I hereby certify that I am an employee of DOTSON LAW and that on this date I caused to be served a true and correct copy of the foregoing by electronic service to the participants in this case who are registered with the Eight Judicial District Court's Odyssey eFileNV File & Serve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

DATED this 27 day of August, 2021.

  
\_\_\_\_\_  
L. MORGAN BOGUMIL

**REFERENCE TABLE TO WHERE ATTACHMENTS  
LOCATED IN THE JOINT APPENDIX**

EXHIBIT	DESCRIPTION	SEROA	JA VOLUME	JA BATES	
1	Order 1309	2-69	2	JA_326	JA_393
2	Interim Order 1303	70-88	2	JA_394	JA_412
3	Notice of Hearing (Aug. 23, 2019)	262-282	2	JA_464	JA_484
4	Addendum to Interim Order 1303	494-512	2	JA_394	JA_412
5	Transcript of Proceedings, Public Hearing, Prehearing Conference, August 8, 2019	494-513	2	JA_703	JA_736
6	Order on Objections and Witness Qualifications (Sept. 16, 2019)	494-514	2	JA_751	JA_756
7	Order 1169	494-515	3	JA_824	JA_834
8	Muddy Valley Decree of 1920	494-516	13	JA_6634	JA_6680
9	MVIC Summary of Witness Testimony of Mr. Todd Robison	494-517	24	JA_10872	JA_10872
10	MVIC Rebuttal Report	494-518	24	JA_10873	JA_10877
11	Order 1194	494-519	30	JA_13804	JA_13807
12	Hearing Transcript Vol. I (Sept. 23, 2019)	494-520	44	JA_17357	JA_17449
13	Hearing Transcript Vol. V (Sept. 27, 2019)	494-521	44	JA_17728	JA_17780
14	Testimony of Todd Robison generally, Hearing Transcript Vol. IX	494-522	44	JA_18054	JA_18105



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8 **DISTRICT COURT**

9 **CLARK COUNTY, NEVADA**

10 LAS VEGAS VALLEY WATER DISTRICT, Case No.: A-20-816761-C (Lead Case)  
11 and SOUTHERN NEVADA WATER Dept. No.: 1  
12 AUTHORITY,

13 Petitioners,

14 vs.

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

17 Respondent.

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

18 **PETITIONERS' NEVADA  
COGENERATION ASSOCIATES NO. 1  
AND 2 OPENING BRIEF**

19 And All Consolidated Cases

20 **NRAP 26.1 DISCLOSURE**

21  
22 The undersigned counsel of record certifies that the following are persons and entities as  
23 described in NRAP 26.1(a), and must be disclosed. These representations are made in order that  
24 the judge of this court may evaluate possible disqualification or recusal.



1           1.     Petitioners Nevada Cogeneration Associates Nos. 1 and 2 (hereinafter collectively  
2 “NCA”), are businesses located in Clark County, Nevada.

3           2.     Kaempfer Crowell is the law firm which represents Petitioners NCA before this  
4 Court. The lawyers from Kaempfer Crowell are Alex J. Flangas (Nevada Bar Number 664), and  
5 Ellsie Lucero (Nevada Bar Number 15272).

6 DATED: August 27, 2021

7   KAEMPFER CROWELL

8   BY: /s/ Alex J. Flangas

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1 **I. JURISDICTIONAL STATEMENT**

2 Under NRS 533.450(1), orders of the State Engineer are subject to judicial review “in the  
3 proper court of the county in which the matters affected or a portion thereof are situated.” The real  
4 property to which the water at issue in this appeal is appurtenant lies within Clark County, and the  
5 Permits and Certificates of NCA arise on water located in basins in Clark County. Therefore, the  
6 Eighth Judicial District Court of the State of Nevada in and for Clark County is the proper venue  
7 for judicial review.

8 **II. STATEMENT OF ISSUES PRESENTED FOR REVIEW**

- 9 1. Whether the State Engineer has authority to delineate the LWRFS as a single  
10 hydrographic basin.  
11 2. Whether the State Engineer’s decision to include NCA’s production wells within the  
12 LWRFS was based on substantial evidence.  
13 3. Whether the decision to disqualify State Engineer Hugh Ricci as an expert and  
preclude him from testifying as an expert in the area of groundwater and surface  
water hydrology was prejudicial to NCA.

14 **III. STATEMENT OF THE NCA CASE and SUMMARY OF NCA ARGUMENTS**

15 1. In this case, the State Engineer’s decision to delineate the Lower White River Flow  
16 System (“LWRFS”) for management as a single, “super” hydrographic basin in final Order 1309  
17 issued on June 15, 2020<sup>1</sup>, was arbitrary and capricious because he lacked the statutory authority  
18 to do so. And, because he lacked authority, his decision regarding the establishment of the  
19 LWRFS and any further attempts to conjunctively manage the water rights therein must be set  
20 aside by this Court (at least until the State Engineer receives the necessary legal power to  
21 undertake these efforts, if ever).

22 Nearly 20 years ago, the State Engineer at that time was concerned about the effects of  
23 ground water pumping in a large area comprised of multiple hydrographic basins that he

24 \_\_\_\_\_  
<sup>1</sup> SE ROA 1, p. 2–69, attached as Exhibit 1 in Appendix.

1 believed, based on his analysis of existing records, might be hydrologically connected by a  
2 hydrogeologic feature known as the “carbonate” aquifer. As a result, he issued Order 1169 on  
3 March 8, 2002<sup>2</sup> wherein he required pump testing of that area. At that time, almost two decades  
4 ago, his successors at the Division of Water Resources could have begun the *legislative process*  
5 necessary to secure legal authority for the State Engineer to ultimately designate the boundaries  
6 of and conjunctively manage<sup>3</sup> any such “super-basin” that might be determined to exist  
7 following the pump tests.

8         Instead, years passed and nothing was done to bolster the State Engineer’s direct,  
9 statutory authority to conjunctively manage surface and groundwater; rather, it was business as  
10 usual, with the State Engineer continuing his long-standing process and procedure of managing  
11 surface water and groundwater as two, separate sources.<sup>4</sup> In fact, the only new statutory change

12 \_\_\_\_\_  
13 <sup>2</sup> *SE ROA* 68, p. 659–69, attached as Exhibit 2 in Appendix.

14 <sup>3</sup> The Nevada Water Words Dictionary (available online at the Division of Water Resources.  
15 “Programs” tab, under “Water Planning,” “Water Planning Publications”), defines “Conjunctive  
16 (Water) Use” in part, as “the integrated use and management of hydrologically connected  
17 groundwater and surface water.” The same dictionary separately defines “Conjunctive  
18 Management” as, “the integrated management and use of two or more water resources, such as a  
19 (groundwater) aquifer and a surface body of water.”

20 The two terms have distinct meanings, as was discussed in more length in a paper authored in  
21 2005-06 entitled, “Conjunctive Water Management: What is it? Why consider it? What are the  
22 challenges,” authored by Toccoy Dudley, a representative of the California Dept. of Water  
23 Resources, Northern Dist., and Allan Fulton, a UCCE Farm Advisor at the Univ. of Cal.  
24 Cooperative Extension, Tehama County (2005-06). There, the authors recognized that “surface  
and groundwater typically have a natural hydrologic connection. Conjunctive water use is an  
approach that recognizes this connection and tries to utilize it to use the overall supply more  
efficiently.” Noting a significant distinction, the authors then explain that while conjunctive  
water management “engages the principles of conjunctive water use, where surface water and  
groundwater are used in combination to improve water availability and reliability,” conjunctive  
*management* is more comprehensive and requires substantial monitoring, evaluation and  
scientific studies to implement the “management.” They recognized that conjunctive  
management requires a balancing of recharge (to a groundwater basin) with recovery and  
monitoring in order to validate the conjunctive water management plan.

<sup>4</sup> NRS Chapter 533 deals generally with “water rights,” which would address surface water as  
well as groundwater, but NRS 534 specifically deals with “underground water and wells,” and is  
thus limited to ground water. And, as is evident in numerous publications available at the Nev.

1 made in Chapters 533 or 534 that even remotely addresses the LWRFS occurred in the 2017  
2 session when the Nevada Legislature added subsection 1(e) to NRS 533.024, which is a  
3 “legislative declaration” of *policy*; subsection 1(e) discusses, for the first time in Nevada statutes,  
4 “conjunctive” management.”<sup>5</sup> This declaration is not, however, a grant of authority, and the State  
5 Engineer’s actions following that declaration confirmed as much when, in 2019, the State  
6 Engineer returned to the Nevada Legislature and sought more direct statutory authority for  
7 conjunctive management actions in proposed bill AB 51. The Legislature refused to provide it,  
8 choosing instead not to enact the bill. *See* discussion at Section VI(A)(1), *infra*.

9 On January 11, 2019, armed only with the “legislative declaration” of policy, the State  
10 Engineer at that time, Jason King, issued “Interim Order 1303”<sup>6</sup> wherein he outlined a process  
11 involving the various stakeholders in these multiple hydrographic basins (and their designated  
12 experts) designed to allow the State Engineer to finally determine the actual boundaries of what  
13 he said therein, “shall be known as the Lower White River Flow System.”<sup>7</sup> The stated intent of  
14 Order 1303 was to implement a process that, at its conclusion, would not only conjunctively  
15 manage the surface and groundwater flows of one basin, but rather to conjunctively manage a  
16 super-basin—the LWRFS—whose boundaries would be finally set upon issuance of the final  
17 Order. Importantly, Mr. King knew his Office had not yet been granted the direct, legislative  
18 authority to undertake such a Herculean task outside the scope of Chapters NRS 533 and 534  
19 because he was concurrently proposing a bill that would provide at least part of the additional

---

20 Div. of Water Resources, the *water budget* for any given basin is considered from both a  
21 *perennial yield* figure and a *system yield* number, with the system yield being the larger of the  
22 two because it includes *both* surface and groundwater (the amounts are considered as separate  
23 “sources” of available water). *See, e.g., Report 3: Nevada’s Water Resources*, 1971, at p. 12-13.

24 <sup>5</sup> Section (1)(e) is the only section that was added in 2017, and it reads, “The Legislature declares that: 1. It is the policy of this State: ... (e) To manage conjunctively the appropriation, use and administration of all waters of this State, regardless of the source of the water.”

<sup>6</sup> *SE ROA* 2, Ex. 3 in Appendix.

<sup>7</sup> *SE ROA* 2, p. 70, Ex. 3 in Appendix.

1 authority necessary to conjunctively manage this newly-defined area; indeed, the legislative  
2 session would begin less than a month later on February 4, 2019 (80<sup>th</sup> Session, Nev. Legis.).

3 Thus, the State Engineer knew he required more authority to allow him to manage the use  
4 of water *conjunctively* because that form of management was inconsistent with nearly 100 years  
5 of how Nevada water rights had previously been managed. He still doesn't have that authority.

6 2. The State Engineer's decision to include NCA's production wells within the LWRFS  
7 was not based on substantial evidence, but instead appears to have been a conclusion desired by  
8 the State Engineer to bolster a vague policy of "inclusion" rather than exclusion. In deciding to  
9 move the boundary in the Black Mountain Area (Basin 215) where NCA's production wells are  
10 located, the State Engineer actually *agreed* with NCA that the evidence presented at the hearing  
11 supports a lack of hydrologic connection between those wells and the seminal monitoring well  
12 for the establishment of the LWRFS—EH-4, and that the boundary line in Basin 215 (the Black  
13 Mountains Area) needed to be moved; there was no other reason for the State Engineer to move  
14 the line from where it had previously been located. But in choosing a *new, arbitrary straight-*  
15 *line boundary* in Basin 215, the State Engineer then ignored important evidence demonstrating  
16 that NCA's production wells (and thus their Certificated water rights associated with those wells)  
17 were not hydrologically connected and the line should have been to the *north* of where it ended  
18 up because there is an actual, geologic basis for its location—which was testified to and  
19 established by NCA's experts. Importantly, the State Engineer did not consider necessary  
20 testimony or expert discussions in reaching his foregone conclusion that NCA's wells were  
21 instead within the LWRFS.

22 Thus, *while the State Engineer did adjust the boundary in the Black Mountains area*  
23 *(Basin 215) in Final Order 1309 as a result of NCA's and SNWA's presentations at the*  
24 *hearing*, the State Engineer arbitrarily moved the boundary a bit *closer* to the production wells

1 but did not move them entirely *out* of the LWRFS despite the fact that evidence supported  
2 moving NCA out; yet, there is no substantial evidence to support the State’s new line keeping  
3 NCA barely inside the LWRFS, so it is again an arbitrary determination.

4 3. Finally, prior to the hearing but after NCA had issued its Rebuttal Report<sup>8</sup> and after  
5 Mr. Hugh Ricci had signed on as an author of that report, the State Engineer’s hearing officer  
6 disqualified Mr. Ricci from testifying as an expert in hydrology or groundwater, despite the fact  
7 that Hugh Ricci has more than three decades of experience working as an engineer in connection  
8 with water, water rights, hydrology and analysis of groundwater, and despite the fact that Hugh  
9 Ricci is the very State Engineer who had the foresight to issue order 1169 in 2002 because he  
10 believed there was a hydrologic connection between adjacent hydrographic basins in that area. In  
11 other words, the very water engineer whose conclusions began this entire process was  
12 disqualified from testifying as an expert *even about his own review and conclusions* that started  
13 this very process because that conclusion involves “hydrology”! That decision undoubtedly  
14 prejudiced the ability of NCA to fully present its position, and it weakened the conclusions  
15 expressed by NCA’s other experts by virtue of Mr. Ricci’s disqualification.

16 Accordingly, this Court should reverse the decision of the State Engineer or in the  
17 alternative remand for further findings as to whether NCA’s production wells—and thus NCA’s  
18 permitted and certificated water rights—should be included in the LWRFS.

19 **IV. STATEMENT OF FACTS**

20 **A. NCA’s water rights and interest in this proceeding.**

21 NCA Nos. 1 and 2 operate combined cycle gas-fired cogeneration facilities located near  
22 the southern boundary of the LWRFS. The points of diversion for the *permitted* and *certificated*  
23 water rights owned and utilized by NCA are located entirely within a narrow part of the Black  
24

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<sup>8</sup> *SE ROA* 580, p. 39730–755, attached as Exhibit 4 in Appendix.



1 Mountains Area in hydrographic Basin 215, which location was originally identified by the  
2 State Engineer in his interim Order 1303 as being very near the southern boundary of the  
3 LWRFS as that boundary existed prior to the hearings that led to the issuance of the Final  
4 Order.<sup>9</sup>

5 NCA 1 and 2 began commercial operations in June 1992 and February 1993,  
6 respectively. Collectively, the two plants account for 170 MW in baseload generation capacity.  
7 NCA sells 100% of its electric output to NV Energy under the terms of a long-term Power  
8 Purchase Agreement, and both facilities supply hot exhaust gas and chilled water (via a closed  
9 loop system) to Georgia Pacific and Pacific Coast Building Products' gypsum facilities under  
10 the terms of an Energy Purchase Agreement.<sup>10</sup> The NCA facilities have played an integral role  
11 in economic output in the region for more than 25 years. NCA's water rights have been put to  
12 continuous use since the construction of NCA's facilities in 1992 and 1993. The continued  
13 access of their certificated water rights is critical for NCA's sustained operations.

14 Notably, a permitted water right holder obtains a "certificate" only after that permitted  
15 holder has proven to the State Engineer that it has complied with the terms of its permit and has  
16 actually put water obtained pursuant to the permit to a "beneficial use" consistent with NRS  
17 533.035. The permit holder must file *proof* of its beneficial use with the State Engineer  
18 sufficient to "perfect" the appropriation of the water right, and must do so demonstrating that it  
19 has proceeded in good faith and with reasonable diligence to perfect the appropriation; failure to  
20 do so will result in the cancellation of the permit rather than the issuance of a certificate. NRS  
21 533.395(1). In this situation, NCA has long-since demonstrated its use of the permitted water  
22 rights, sufficiently so that it was granted certificates establishing that it had already placed the

23 <sup>9</sup> NCA holds the following water rights at issue: Permit 55269/Certificate 17123; Permit  
24 58031/Certificate 17124; Permit 58032/Certificate 17125, all of which have a point of diversion  
within the Black Mountains Area, Basin 215.

<sup>10</sup> *SE ROA* 580, p. 39732, attached as Ex. 4 in Appendix.

1 water appropriated under those permits to a beneficial use consistent with those permits.

2 **B. Order 1169 Pumping Tests**

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

16 Because of concerns of various parties involved with the flows of water that might affect  
17 a particular spring and the potential effect on an endangered species of fish, several years passed  
18 before the pump tests were actually conducted. On November 15, 2010, the Order 1169 aquifer  
19 test began, and, pursuant to the direction of the Nevada State Engineer, the pumping continued  
20 from the MX-5 well for slightly more than two years. That pumping provided both the State  
21 Engineer and the affected water right holders with data for use in assessing the effects of  
22 groundwater withdrawals from the LWRFS. The tests allowed the affected water right holders  
23 in the hydrographic basins identified as potentially interconnected to obtain and provide data to  
24 their respective experts from which those experts then could prepare reports analyzing the

1 effects and present those reports and comments to the State Engineer for consideration on how  
2 best to manage the LWRFS moving forward.

3 **C. Interim Order #1303**

4 Following the conclusion of the pump tests, NCA 1 and 2 continued to use their water  
5 rights consistent with their existing permits and certificates, awaiting further action from the  
6 State. As explained *supra* in Sec. (III), Statement of the Case, and again at Sec. VI(D),  
7 Legislative Declaration 533.024(1)(e) and Failed Assembly Bill 51, in 2017 the Legislature  
8 amended NRS 534(1) to add section (e) as a “policy” declaration regarding “conjunctive” water  
9 management, but no additional authority was expressly given to the State Engineer in that area.  
10 Nonetheless, beginning in 2018, the State Engineer conducted several public workshops to  
11 review and discuss the results of the pump tests and to review the status of groundwater use  
12 within the LWRFS, which area contains both surface and ground waters. The State Engineer  
13 elicited comments from the participants at those workshops regarding how to best develop the  
14 water resources involved in the LWRFS, acknowledging the apparent close, hydrologic  
15 connection between the various basins involved in the pump tests.

16 In the summer of 2018, the State Engineer drafted and made public a proposed order  
17 directed to address several issues involved in the future management of the LWRFS, and  
18 conducted public workshops between July and the end of the year, taking “comments” verbally  
19 during those meetings and in writing following them from interested participants. The last such  
20 meeting was conducted on December 14, 2018, when the State Engineer received comments  
21 from participants regarding that proposed order. Headed into the upcoming Nevada Legislative  
22 session, the State Engineer brought forth proposed Assembly Bill 51 in November of 2018  
23 which dealt specifically with expanding the authority of the State Engineer in regard to  
24

1 conjunctive management.<sup>11</sup> Perhaps counting on its passage, on January 11, 2019, the State  
2 Engineer at that time, Jason King, P.E., issued Interim Order 1303<sup>12</sup> (the “Interim Order”)  
3 which identified four, specific elements, and one catch-all element, about which the State  
4 sought expert “reports” from the various interested parties and participants. Those enumerated  
5 issues identified in Order 1303 that would be addressed in the reports and hearing, intended to  
6 be answered in the *final* order to be issued by the State Engineer, were:

- 7 a. The geographic boundary of the hydrologically connected groundwater and surface  
water systems comprising the Lower White River Flow System;
- 8 b. The information obtained from the Order 1169 aquifer test and Muddy River  
headwater spring flow as it relates to aquifer recovery since the completion of the  
9 aquifer test;
- 10 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  
11 pumping on discharge to the Muddy River Springs, and the capture of Muddy River  
flow;
- 12 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
- 13 e. Any other matter believed to be relevant to the State Engineer’s analysis.<sup>13</sup>

14 The Interim Order further stated that following the submission of such expert reports a  
15 hearing would be conducted wherein evidence would be taken by the State Engineer in  
16 connection with the reports, cross-examination would be allowed by interested parties, and the  
17 State Engineer would then render a final determination on the four, specific points identified.  
18 Importantly, it was repeatedly stressed that this was only phase 1 of the LWRFS process—the  
19 hydrologic analysis—and that this was *not* the policy analysis that will identify which water  
20 rights are allowed by the State Engineer to be actually put to use in each individual basin; those  
21 policy and management determinations were to be conducted in a later phase after the

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22 <sup>11</sup> See Section VI(1), *infra*, and Minutes of the Meeting of the Assembly Committee on Natural  
23 Resources, Agriculture and Mining, 80<sup>th</sup> Session of the Nevada Legislature, February 27, 2019.

24 <sup>12</sup> *SE ROA 2*, pp. 70–88, attached as Ex. 3.

<sup>13</sup> *Id.* at 82–83.

1 completion of the determinations rendered in the Final Order (1309).<sup>14</sup>

2 In response to Order 1303, many of the participants submitted initial reports. NCA chose  
3 to submit only a Rebuttal Report, which it did on August 16, 2019.<sup>15</sup> Parties were also required  
4 to file lists of witnesses and exhibits, and were required to identify objections to those witnesses  
5 and exhibits of others, which they did in August of 2019. The State Engineer conducted  
6 hearings concerning those witness and evidentiary objections prior to commencement of the  
7 hearing, and the hearings commenced in September of 2019, lasting approximately two weeks.

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

11 **D. Legislative Declaration NRS 533.024(1)(e) and Failed Assembly Bill 51**

12 In 2017, the Nevada Legislature amended the provisions of NRS 533.024 to add section  
13 1(e), which contains the sole reference to conjunctive management of water in NRS Chapters  
14 532, 533, and 534. NRS 533.024 is entitled a “legislative declaration,” and it provides in  
15 pertinent part:

16 NRS 533.024 **Legislative declaration.** The Legislature declares that:

- 17 1. It is the policy of this State:
- 18 (a) To encourage and promote the use of effluent, where that use is not contrary to  
19 the public health, safety or welfare, and where that use does not interfere with federal  
20 obligations to deliver water of the Colorado River.
  - 21 (b) To recognize the importance of domestic wells as appurtenances to private  
22 homes, to create a protectable interest in such wells and to protect their supply of water  
23 from unreasonable adverse effects which are caused by municipal, quasi-municipal or  
24 industrial uses and which cannot reasonably be mitigated.
  - (c) To encourage the State Engineer to consider the best available science in  
rendering decisions concerning the available surface and underground sources of water in  
Nevada.

<sup>14</sup> *SE ROA* 65, pp. 587–89 (pages 48 of the trans., line 14, through page 56, line 15), attached as Exhibit 5 in Appendix.

<sup>15</sup> *SE ROA* 580, pp. 39730–755, attached as Ex. 4 in Appendix.

1 (d) To encourage and promote the use of water to prevent or reduce the spread of  
2 wildfire or to rehabilitate areas burned by wildfire, including, without limitation, through  
the establishment of vegetative cover that is resistant to fire.

3 (e) *To manage conjunctively the appropriation, use and administration of all waters  
of this State, regardless of the source of the water.*  
4 ....

5 Recognizing that this statute did not confer statutory authority *to act*, in the next  
6 Legislative Session the State Engineer proposed Assembly Bill (“AB 51”) to the Nevada  
7 Legislature. The bill draft was discussed at length during a February 27, 2019 meeting of the  
8 Assembly Committee on Natural Resources, Agriculture, and Mining.<sup>16</sup> AB 51 proposed a  
9 specific grant of authority to the State Engineer which in relevant part included the following:

- 10 • “The State Engineer shall adopt regulations related to the conjunctive  
management of groundwater and surface water...recognize[ing] existing uses of  
water while protecting water rights that are senior in priority.”
- 11 • “Requirements or guidelines for establishing a mitigation plan to address conflicts  
between groundwater and surface water users.”
- 12 • “The creation of a program for the conjunctive management of groundwater and  
13 surface water in a hydrographic basin in the State in order to mitigate conflicts  
between groundwater and surface water users.”
- 14 • “Any other provisions that the State Engineer finds necessary to conjunctively  
15 manage groundwater and surface water, determine the amount of conflict between  
groundwater and surface water users or resolve a conflict between groundwater  
and surface water users.”<sup>17</sup>

16 The State Engineer expressly acknowledged during the meeting that AB 51 was necessary,  
17 stating, “[w]hile the 2017 Legislative declaration helpfully recognizes the hydrological  
18 connection that often exists between groundwater and surface water sources, *existing statute*  
19

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20 <sup>16</sup> *Meeting of the Assembly Comm. on Natural Resources, Agriculture, and Mining*, 2019 Leg.,  
21 80th Sess. (Nv. 2019) (statement of Tim Wilson), attached as Exhibit 6 in Appendix, at pp. 30–  
22 32. The highlighted sections identify for this Court the clear acknowledgement by the State  
23 Engineer that Nevada has for the last 100 years managed surface water and groundwater as two,  
separate sources, and the express language used by State Engineer Tim Wilson acknowledges  
24 that he needed to obtain *authority* through the passage of AB 51, when he said, in part, that  
“A.B. 51 *authorizes* the Division of Water Resources to create the programs *necessary to  
develop regulations and effectively implement conjunctive management of groundwater and  
surface water.*”

<sup>17</sup> A.B. 51, 2019 Leg., 80<sup>th</sup> Sess. (Nv. 2019), attached as Exhibit 7 in Appendix.

1 *does not provide the framework necessary to effectively implement the Legislature’s policy*  
2 *direction.”* (emphasis added).

3           Ultimately, as the minutes from the February 27, 2019 meeting/hearing demonstrate,  
4 there was substantial opposition to AB 51, and the Nevada Legislature took no further action on  
5 the bill. Currently, there is still no statute which confers statutory authority upon the State  
6 Engineer to conjunctively manage water. Notably, however, even in proposed AB 51 the State  
7 Engineer requested authority for the “creation of a program for the conjunctive management of  
8 groundwater and surface water *in a hydrographic basin in the State* in order to mitigate  
9 conflicts ...”; the State Engineer did *not* propose to obtain authority to create a program for the  
10 conjunctive management of water *in a super-basin comprised of multiple hydrographic basins*  
11 *such as the LWRFS*. Given that AB 51 failed, it is axiomatic that the State Engineer has no  
12 authority to take such action on a much *larger* scale such as the LWRFS.

13           **E.     The Final Order, 1309**

14           The hearings: Hearings commenced on September 23, 2019 for two weeks before  
15 Nevada State Engineer Tim Wilson, P.E., and members of his staff to consider the comments,  
16 objections and recommendations by several affected and interested parties. The reports and the  
17 testimony of experts during the hearings focused on the four, specific elements outlined for  
18 determination in Interim Order 1303 and in the Addendum issued by the State Engineer on May  
19 13, 2019 (hereinafter the “Addendum”)<sup>18</sup> clarifying the Interim Order. Importantly, the hearing  
20 officer who was managing the hearing, Deputy Administrator Micheline Fairbank, emphasized  
21 repeatedly before and during the hearings that the scope of the September, 2019 hearings would  
22 be limited to the hydrologic examination of the four specific elements identified in the Interim  
23 Order and in the Addendum and would *not* be extended to include policy determinations  
24

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<sup>18</sup> *SE ROA 57*, pp. 494–512, attached as Exhibit 8 in Appendix.

1 regarding which water right holders were entitled to the use of groundwater or surface water in  
2 the individual basins.<sup>19</sup>

3 NCA was allowed only a few hours during the two-week hearing period to make its  
4 presentation. NCA focused a significant portion of its presentation on evidence and analysis  
5 actually found in the Rebuttal Report of the Southern Nevada Water Authority (“SNWA”)<sup>20</sup> that  
6 identified a specific hydrologic finding strongly supporting the conclusion that the production  
7 wells owned and operated by NCA in the southern portion of the Black Mountains Area, Basin  
8 215, do *not* share a “close hydrologic connection” with the other wells located inside the  
9 LWRFS. The analysis and conclusion independently conducted and reached by SNWA was  
10 based in large part on actual, measured well responses between EH-4 (the seminal well relied  
11 upon by the State to determine impacts to the LWRFS “system”) and the production pumping  
12 wells in the Black Mountains area, in addition to pumping measured for a particular monitoring  
13 well, BM-DL-2, located some distance from those NCA production wells. The SNWA experts  
14 found that “while well BM-DL-2 is undoubtedly within the carbonate aquifer of the LWRFS,  
15 the current production wells (belonging to NCA—which are the water wells from which NCA  
16 pumps its certificated water rights) are probably not” within the LWRFS and therefore should  
17 *not* be included within the boundary.<sup>21</sup> Importantly, in Final Order 1309, the State  
18 acknowledged the existence of this same evidence and agreed the analysis and conclusion was  
19 supported by logic.<sup>22</sup>

20 What the State Engineer actually did with regard to NCA is this: in order to include  
21 NCA’s pumping in the LWRFS totals, he initially drew an arbitrary *straight line* across Basin

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22 <sup>19</sup> *SE ROA* 994, p. 52962, attached as Exhibit 9 in Appendix; *see also SE ROA* 65, pp. 587–89  
(pages 48 of the trans., line 14, through page 56, line 15), attached as Ex. 5 in Appendix.

23 <sup>20</sup> *SE ROA* 625, pp. 42165–214, attached as Exhibit 10 in Appendix.

24 <sup>21</sup> *Id.* at 42189.

<sup>22</sup> *SE ROA* 1, p. 51–52, attached as Ex. 1 in Appendix.



1 215 in a location that included NCA’s production wells *inside* the LWRFS, despite the fact that  
2 the line was not predicated on any geologic or hydrographic feature of the basin. After hearing  
3 from SNWA’s experts and NCA’s experts that the pumping results and analysis strongly  
4 suggested that the seminal well—EH-4 that was used as the “comparison well” for the system—  
5 reacted noticeably differently to NCA’s production well pumping than it did to other Basin 215  
6 monitoring well pumping (specifically BM-DL-2), the State Engineer then decided to move the  
7 line, *but he simply drew a new straight line and kept NCA’s production wells inside the LWRFS.*  
8 In doing so, the State Engineer first acknowledged “the logic” of NCA’s and SNWA’s analysis,  
9 but he rejected that evidence and analysis and simply chose a new line that was *closer* to the  
10 production wells—but still kept them inside the boundary. Recognizing he would likely be  
11 questioned about why he did this, the State Engineer attempts to support his decision by a  
12 reference in Order 1309 to the “Muddy Mountain Thrust” as a potential reason for the new  
13 line’s placement (*SE ROA 1*, p. 51)—but no witness testified at the hearing that the Muddy  
14 Mountain Thrust was a boundary condition or would somehow explain the SNWA and NCA  
15 analysis and conclusion that NCA’s production wells did not react similarly under pumping as  
16 did the other wells when compared to EH-4.

17 The Prehearing Ruling Excluding Hugh Ricci as an Expert: Prior to the September 2019  
18 hearings, the State Engineer’s office issued rulings on objections by interested parties regarding  
19 the exclusion of witnesses and evidence. One objection was raised as to the credentials of one of  
20 NCA’s expert witnesses who worked on and signed NCA’s Rebuttal Report, former State  
21 Engineer Hugh Ricci, P.E. Mr. Ricci was the State Engineer who first decided to issue Order  
22 1169 in 2002 because he was concerned, as the State Engineer at that time, that several adjacent  
23 groundwater basins in the area were in fact hydrologically connected, and he believed pumping  
24 in any one of them might have an effect on the Muddy River Springs and other groundwater

1 basins. Order 1169 held pending water right applications in those adjacent basins in abeyance  
2 until further information was obtained by stressing the aquifer, and it directed that pump tests be  
3 conducted to place sufficient stress on the aquifer so as to make what he felt were necessary  
4 determinations about the degree of hydrologic interconnectivity of the various adjacent basins.  
5 In common language, he applied his understanding of hydrology to discern a potential  
6 connection, and he ordered pumping tests be done that would confirm or refute that concern. It  
7 is the tests from that original order that form the basis from which all of the conclusions now  
8 reached regarding the inter-connectivity of the various hydrographic basins included within the  
9 boundary of the LWRFS are being made by the current State Engineer.

10 Mr. Ricci testified to his knowledge, his experience, and his decades of work as an  
11 engineer, as Deputy State Engineer, and as State Engineer in analyzing groundwater and  
12 groundwater hydrology—but he also truthfully testified that he did not obtain a degree  
13 specifically in “hydrology.” Given when Mr. Ricci first obtained his degree, it was not clear that  
14 any such specialty degree was even available to him; rather, he testified to having gained  
15 experience with hydrology and groundwater through his years of work—most of which was at  
16 Nevada’s Division of Water Resources. And, despite Mr. Ricci’s significant experience,  
17 background knowledge, and hydrologic understanding of the LWRFS system sufficient to  
18 initiate this entire exercise by his issuance of Order 1169, the hearing officer declared—  
19 surprisingly—that Mr. Ricci was “not qualified” to testify as an expert in hydrology or  
20 groundwater during the presentation of NCA’s case in chief.

21 In 2002, Mr. Ricci was clearly “qualified” as State Engineer to draw the conclusions  
22 necessary to initiate this entire process based on his analysis of pumping in the area, the effects  
23 of that pumping, and his understanding that more *precise* hydrographic information would be  
24 gleaned from a series of pump tests that he ordered be performed for the basins he believed

1 were hydrologically connected—yet NCA could not even have asked him to testify about *those*  
2 conclusions because they involved ‘hydrology’ and ‘groundwater.’ Most importantly, Mr. Ricci  
3 was not allowed to testify regarding his opinion on the establishment of the boundary of the  
4 LWRFS in the Black Mountains Area as it pertains to NCA’s production wells. Nor was he  
5 allowed to present his opinions on his analysis and consideration, if any, of SNWA’s evidence  
6 and conclusions that NCA’s production wells “are probably not” within the LWRFS boundary  
7 and should be excluded therefrom.

8           Final Order: On June 15, 2020, the current State Engineer, Tim Wilson, P.E., issued the  
9 Order 1309—the Final Order—purportedly addressing only the four, specific hydrologic  
10 elements identified as the focus of the hearing in Order 1303 and the Addendum. In Final Order  
11 1309 at pages 50 and 51, the State Engineer concluded that NCA’s production wells should be  
12 included in the boundary of the LWRFS despite the fact that “the State Engineer finds logic in  
13 NCA’s position” to exclude those wells from the boundary. Heading into the hearings, NCA  
14 had criticized the prior LWRFS boundary identified as the southern boundary in the Black  
15 Mountains Area that the State Engineer used in Interim Order 1303 which incorporated the  
16 NCA production wells, in part because it was drawn as a straight line and was not tied to any  
17 geologic or hydrologic formation that would provide a basin-boundary. NCA maintained that  
18 this straight-line boundary was arbitrary as no such hydrologic boundaries occur in nature, and  
19 there was no evidence to support its location other than an apparent desire to include the NCA  
20 production wells near that Southern boundary of the LWRFS; indeed, water does not follow a  
21 perfectly straight line on a map, but instead would follow a naturally occurring geologic  
22 structure.

23           During the hearings, in addition to the evidence and statistical analysis provided by  
24 SNWA that distinguished NCA’s production wells, NCA’s expert Jay Dixon testified about a

1 nearby geologic structure and the different hydrologic response exhibited in an NCA monitoring  
2 well as compared to the production wells of NCA. He also explained that this structure  
3 explained why NCA’s production wells were located where they were, why SNWA’s experts  
4 reached their conclusion regarding NCA’s production wells, and why it made hydrologic sense  
5 that NCA’s wells would be *disconnected* from the remaining wells in the LWRFS. The evidence  
6 presented showing the difference between the production wells and the seminal well—EH-4—  
7 was clearly discussed by experts.

8           Nonetheless, at page 51 of Order 1309, even though the State Engineer stated expressly  
9 that he “finds logic in NCA’s position” to exclude the NCA wells from the LWRFS, the State  
10 Engineer for the first time identified a new boundary for the southern portion of the LWRFS  
11 *right in the area where NCA’s production wells are located*. The State Engineer explained that  
12 this new boundary, “better honors the State Engineer’s criteria by acknowledging uncertainty in  
13 the data while reflecting a recognized physical boundary in the carbonate-rock aquifer.”<sup>23</sup> As  
14 such, the State Engineer recognized NCA’s criticism that the prior “straight-line” boundary of  
15 the LWRFS that was utilized heading into the hearings was likely arbitrary and unsupported,  
16 but rather than accept NCA’s identified, natural structure that was nearest to the production  
17 wells and conformed with the evidence actually presented at the hearing, the State Engineer  
18 apparently consulted a geologic map to which no one had testified, found something there that  
19 might be labeled as a geologic structure (the Muddy Mountain Thrust), and made a reference to  
20 that structure in Order 1309 because using it creates another boundary line that most assuredly  
21 includes NCA’s production wells *inside* the LWRFS. The new boundary is, again, a straight  
22 line, merely relocated further south and east, with no more support than the initial straight-line  
23 boundary.

24 \_\_\_\_\_  
<sup>23</sup> *SE ROA 1*, pp. 51–52, attached as Ex. 1 in Appendix.

1           Moreover, the State Engineer made this move identifying as his locator the “Muddy  
2 Mountain Thrust” (*SE ROA 1*, at p.51) despite the fact that no expert witness testified to that  
3 structure as creating a boundary in Basin 215 (the Black Mountains Area), no inquiries were  
4 made by the State Engineer of any experts about the possibility of the Muddy Mountain Thrust  
5 being a proper Southern Boundary, and nothing about the SNWA multiple linear regression  
6 analysis (which directly considered and addressed the Black Mountains Area and both the  
7 monitoring and production well pumping in that area) suggested that formation chosen by the  
8 State Engineer should be considered a boundary condition. No one even attempted to  
9 establish—during the hearing—a technical reason why this newly identified southern boundary  
10 for the LWRFS better explained the available data involving NCA’s production wells and the  
11 apparent disconnect with well EH-4 than the analysis provided by both NCA and SNWA—  
12 which was that the NCA wells were actually outside the LWRFS boundary.

13           Order 1309 goes further to identify “the maximum amount of groundwater that can  
14 continue to be developed over the long term in the LWRFS is 8,000 afa [acre feet annually].”  
15 As such, this could impact the certificated water rights held by NCA because if NCA’s water  
16 rights are, in fact, *within the LWRFS boundary*, then NCA’s pumping from its production wells  
17 may be impacted through potential curtailment by the State Engineer as a result of the limit on  
18 total pumping within the LWRFS that may be imposed within that 8,000 afa figure.<sup>24</sup> The final  
19 effect on NCA is, at phase 1 of these proceedings, still uncertain, but the potential exists that  
20 NCA’s pumping could ultimately be reduced because of the limits proposed by the State  
21 Engineer on the total amount of groundwater use allowed within the LWRFS identified in Order  
22 1309.

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

1 **V. STANDARD OF REVIEW**

2 All proceedings to review a decision of the State Engineer are governed by NRS 533.450,  
3 which provides that these proceedings are “in the nature of an appeal” and are “informal and  
4 summary.” In reviewing a decision brought under NRS 533.450, the district court will determine  
5 whether substantial evidence in the record supports the State Engineer's decision or whether that  
6 decision was arbitrary and capricious. *See Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264  
7 (1979). Substantial evidence is “that which a reasonable mind might accept as adequate to support  
8 a conclusion.” *Wilson v. Pahrump Fair Water, LLC*, 137 Nev. Adv. Op. 2, \*4, 481 P.3d 853, 858  
9 (2021) (citing *King v. St. Clair*, 134 Nev. 137, 139, 414 P.3d 314, 316 (2018)). The district court  
10 will not hesitate to intervene when an administrative decision is arbitrary, oppressive, or  
11 accompanied by a manifest abuse of discretion. *See Revert*, 95 Nev. at 787, 603 P.2d at 265.

12 In Nevada, “[t]he Legislature has established a comprehensive statutory scheme regulating  
13 the procedures for acquiring, changing, and losing water rights.” *See Wilson*. at \*3, 859 (citing  
14 *Mineral Cty. v. Lyon Cty.*, 136 Nev. Adv. Op. 58, 473 P.3d 418, 426 (2020)). The State Engineer’s  
15 powers under that statutory scheme are limited to “only those ... which the legislature expressly or  
16 implicitly delegates.” *Id.* (citing *Clark Cty. v. State, Equal Rights Comm'n*, 107 Nev. 489, 813 P.2d  
17 1006 (1991)). Where the scope of the State Engineer’s authority is a question of statutory  
18 interpretation, it is “subject to de novo review.” *Id.* (citing *Town of Eureka v. Office of State Eng’r*,  
19 108 Nev. 163, 826 P.2d 948 (1992) (noting that the State Engineer’s interpretation of his authority  
20 may be persuasive but it is not controlling and the “reviewing court may undertake independent  
21 review” of questions of statutory construction)). Thus, the arguments herein regarding whether the  
22 State Engineer exceeded his authority should be reviewed de novo; any assertion by the State  
23 Engineer that his interpretation of his own authority should be given deference is misplaced.  
24

1 **VI. ARGUMENT**

2 **A. The State Engineer’s Decision Delineating The LWRFS As A Single**  
3 **Hydrographic Basin Was Arbitrary And Capricious Because He Lacks Statutory**  
4 **Authority To Create A Super Hydrographic Basin And Manage It Conjunctively.**

5 The Nevada Legislature has enacted a comprehensive statutory scheme that regulates the  
6 procedures by which water rights may be acquired, changed, or lost. *See Wilson v. Pahrump Fair*  
7 *Water, LLC*, 137 Nev. Adv. Op. 2, \*3, 481 P.3d 853, 859 (2021) (citing *Mineral Cty. v. Lyon*  
8 *Cty.*, 136 Nev. Adv. Op. 58, 473 P.3d 418, 426 (2020)). The State Engineer’s authority is limited  
9 to his powers as set out under statute. *See Wilson*, 137 Nev. Adv. Op. at \*3, 481 P.3d at 854  
10 (2021) (citing *Clark Cty. v. State, Equal Rights Comm’n*, 107 Nev. 489, 492, 813 P.2d 1006,  
11 1007 (1991)) (The State Engineer's powers thereunder are limited to “only those ... which the  
12 legislature expressly or implicitly delegates.”); *see also Howell v. Ricci*, 124 Nev. 1222, 1230,  
13 197 P.3d 1044 (2008).

14 The State Engineer’s authority is outlined in NRS Chapters 532, 533 and 534. Nothing in  
15 those chapters grants the State Engineer the authority to create a super, single hydrographic basin  
16 from what is currently seven different hydrographic basins. Nor does the State Engineer have the  
17 direct authority to “conjunctively” manage in this proceeding both the surface and groundwater  
18 flows he believes are occurring in such a super-basin. Indeed, in 2019 the State Engineer knew  
19 this, and approached the Nevada Legislature in order to request just this authority because his  
20 authority in that regard was lacking. Having failed to obtain a statutory grant of authority, the State  
21 Engineer erroneously relied on a statement of policy in designating the LWRFS as a single  
22 hydrographic basin and in attempting to manage the Muddy River Springs Area (surface water)  
23 and the groundwater in the seven affected basins.  
24

1           **1. The State Engineer proposed a bill which would grant him statutory**  
2           **authority for the conjunctive management of water because the**  
3           **Legislature has not expressly granted this power to the State Engineer.**

4           In Order 1309, the State Engineer delineated the LWRFS, consisting of seven  
5 hydrographic basins (Kane Springs Valley, Coyote Spring Valley, Muddy River Springs Area,  
6 California Wash, Hidden Valley, Garnet Valley, and the northwest portion of the Black  
7 Mountain Area), as a single hydrographic basin. In doing so, he “created” the LWRFS, which  
8 also includes several surface water sources, including the Muddy River and the Muddy River  
9 Springs Area (MRSA). Yet, in 2019 there was no statute which expressly grants the State  
10 Engineer authority to conjunctively manage water, and that situation persists today. As such, the  
11 State Engineer is attempting to exercise authority he simply doesn’t have, and his Final Order  
12 must be set aside.

13           In 2017, the Nevada Legislature amended NRS 533.024—the sole reference to  
14 conjunctive management in NRS 532, 533, and 534. NRS 533.024—to add section 1(e). That  
15 statute was and remained merely a legislative declaration which provides, in part:

16           1. It is the policy of this State:

17           ....

18           (e) *To manage conjunctively the appropriation, use and administration of all waters*  
19           *of this State, regardless of the source of the water.*

20           Section 1(e) recognizes that it is the policy of the State to manage surface and groundwater  
21 “conjunctively,” which has generally been recognized as meaning to consider them as connected  
22 and related sources rather than as independent sources as was the case for the last 100 years  
23 under prior Nevada Division of Water Resources practice<sup>25</sup>. However, recognizing that the  
24 modified declaration did not expressly grant authority upon the State Engineer to conjunctively

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<sup>25</sup> *Meeting of the Assembly Comm. on Natural Resources, Agriculture, and Mining, 2019 Leg., 80th Sess. (Nv. 2019) (statement of Brad Crowell), attached as Ex. 6 in Appendix, at pp. 30–31.*



1 manage surface and groundwater, in 2019, the State Engineer proposed Assembly Bill 51 (“AB  
2 51”), which expressly sought additional *authority* for the State Engineer to “implement”  
3 conjunctive management and to create regulations authorizing such. AB 51 proposed a specific  
4 grant of authority to the State Engineer.<sup>26</sup>

5 The State Engineer at the time, Tim Wilson, testified in support of the bill, stating: “I am  
6 here today to present testimony in support of Assembly Bill 51, which addresses the  
7 implementation of ‘conjunctive management,’ an important water management concept  
8 approved by the Legislature in 2017.”<sup>27</sup> He also testified that “[w]hile the 2017 Legislative  
9 declaration [NRS 533.024(1)(e)] helpfully recognizes the hydrological connection that often  
10 exists between groundwater and surface water sources, *existing statute does not provide the*  
11 *framework necessary to effectively implement the Legislature’s policy direction.*”<sup>28</sup>

12 Raising several questions and noting substantial objections had been lodged to AB 51,<sup>29</sup>  
13 the Nevada Legislature took no further action on AB 51, thereby rejecting the State Engineer’s  
14 proposed bill. Notably, no other bills involving conjunctive management or the expansion of  
15 authority of the State Engineer to create and manage super-basins such as the LWRFS which  
16 contain both surface and groundwater sources have been proffered to the Legislature, and  
17 nothing expanding the authority of the State Engineer in that regard has passed the Nevada  
18 Legislature since the rejection of AB 51 in 2019. In considering whether the State Engineer has  
19 authority with regard to the establishment and management of a super-basin such as the LWRFS,  
20 it is telling to note that even in AB 51, the language sought by the State Engineer would only

21 <sup>26</sup> A.B. 51, 2019 Leg., 80<sup>th</sup> Sess. (Nv. 2019), attached as Ex. 7 in Appendix; *see also Meeting of*  
22 *the Assembly Comm. on Natural Resources, Agriculture, and Mining*, 2019 Leg., 80<sup>th</sup> Sess. (Nv.  
2019) (statement of Tim Wilson), attached as Ex. 6 in Appendix, at pp. 31–32.

23 <sup>27</sup> *Meeting of the Assembly Comm. on Natural Resources, Agriculture, and Mining*, 2019 Leg.,  
80<sup>th</sup> Sess. (Nv. 2019) (statement of Tim Wilson), attached as Ex. 6 in Appendix, at pp. 31–32.

24 <sup>28</sup> *Id.* at 32 (emphasis added).

<sup>29</sup> *Id.* at 35–52.

1 have allowed the State Engineer to create programs for conjunctive management “of  
2 groundwater and surface water *in a hydrographic basin*—not in a multiple-basin context such as  
3 is being attempted in the LWRFS. The obvious answer is that by their rejection of AB 51 and its  
4 more limited scope, the Legislature has clearly *not* authorized the State Engineer even more  
5 expansive authority.

6  
7 **2. The State Engineer erroneously relied on a statement of policy rather than  
8 an express grant of authority in delineating the LWRFS as a single  
9 hydrographic basin.**

10 The State Engineer cannot rely on NRS 533.024 in designating the LWRFS as a single,  
11 super hydrographic basin because it is a statement of policy rather than a grant of authority. NRS  
12 533.024 provides in relevant part: “It is the policy of this State:...(e) To manage conjunctively  
13 the appropriation, use and administration of all waters of this State, regardless of the source of  
14 the water.” Notably, NRS 533.024 is the only statute that refers to conjunctive management of  
15 water.

16 Nevada case law provides that statements of policy from the Legislature do not serve as a  
17 basis for government action, but rather inform the interpretation of specific statutes that authorize  
18 specific action. *See e.g., Pawlik v. Deng*, 412 P.3d 68, 71 (2018) (quoting *J.E. Dunn Nw., Inc. v.*  
19 *Corus Constr. Venture, LLC*, 127 Nev. 72, 79, 249 P.3d 501, 505 (2011)) (noting that “if the  
20 statutory language is subject to two or more reasonable interpretations, the statute is ambiguous,  
21 and we then look beyond the statute to the legislative history and interpret the statute in a  
22 reasonable manner ‘in light of the policy and the spirit of the law.’”). And while such statements  
23 of policy are accorded deference, the Nevada Supreme Court has specifically held that they are  
24 not binding. *See e.g., McLaughlin v. Housing Authority of the City of Las Vegas*, 227 P.2d 206  
(1951) (“It has often been said that the declaration of policy by the legislature, though not  
necessarily binding or conclusive upon the courts, is entitled to great weight, and that it is neither

1 the duty nor prerogative of the courts to interfere in such legislative finding unless it clearly  
2 appears to be erroneous and without reasonable foundation.”).

3 In *Wilson*, the Nevada Supreme Court analyzed whether Nevada law authorized the State  
4 Engineer to issue an order prohibiting the drilling of new domestic wells in the over-appropriated  
5 Pahrump Artisan Basin unless the applicant identified and relinquished 2.0 acres-feet annually  
6 from an alternate source. *Wilson*, 137 Nev. Adv. Op. at \*3, 481 P.3d at 854. The Court reasoned  
7 that the State Engineer had authority to issue the order pursuant to NRS 534.110(8) which  
8 expressly and specifically allowed the State Engineer to restrict the drilling of “additional wells”  
9 in a designated basin if the State Engineer determined additional wells would cause an undue  
10 interference with existing wells. *Id.* at \*4, 857. The Court found that NRS 534.110(8) authorized  
11 the State Engineer’s order under the particular circumstances of the over-appropriated basin. *Id.*

12 Here, the State Engineer in 2019 recognized that the legislative declaration in NRS  
13 533.024(1)(e) was insufficient to confer statutory authority upon him to conjunctively manage  
14 surface and groundwater. The State Engineer testified about the shortcomings of NRS 533.024  
15 when he acknowledged that the “existing statute does not provide the framework necessary to  
16 effectively implement the Legislature’s policy direction,”<sup>30</sup> Yet, the State Engineer engaged in  
17 conjunctive management when he delineated the LWRFS as a single hydrographic basin instead  
18 of maintaining the status quo of seven, separate hydrographic basins. Unlike in *Wilson*, where  
19 the State Engineer issued an order restricting the drilling of wells pursuant to NRS 534.110(8)  
20 which specifically authorized his actions, here, the State Engineer did not act pursuant to a  
21 specific grant of authority when he designated the LWRFS as a single hydrographic basin and  
22 directed in Order 1309 that the boundary of the LWRFS would be based on analysis of  
23 conjunctive use (hydrologically connected groundwater and surface water systems) and that the

24 \_\_\_\_\_  
<sup>30</sup> *Id.* (emphasis added).

1 total amount of groundwater available for pumping within the new super-basin would be  
2 considered in view of its effects on the Muddy River Springs and the capture of Muddy River  
3 flow.<sup>31</sup> Thus, the State Engineer’s decision designating the LWRFS as a single hydrographic  
4 basin for conjunctive management was arbitrary and capricious because it lacks a legal basis.

5 **B. The State Engineer’s Decision To Include NCA’s Wells Within The LWRFS**  
6 **Was Not Based On Substantial Evidence, And He Ignored the Only Evidence**  
7 **Presented On the Boundary Issue In Basin 215, The Black Mountains Area.**

8 In reviewing a decision brought under NRS 533.450, the district court will determine  
9 whether substantial evidence in the record supports the State Engineer's decision or whether that  
10 decision was arbitrary and capricious. *See Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264  
11 (1979). Substantial evidence is “that which a reasonable mind might accept as adequate to support  
12 a conclusion.” *Wilson v. Pahrump Fair Water, LLC*, 137 Nev. Adv. Op. 2, \*4, 481 P.3d 853, 858  
13 (2021) (citing *King v. St. Clair*, 134 Nev. 137, 139, 414 P.3d 314, 316 (2018)). The district court  
14 will not hesitate to intervene when an administrative decision is arbitrary, oppressive, or  
15 accompanied by a manifest abuse of discretion. *See Revert*, 95 Nev. at 787, 603 P.2d at 265.

16 NCA does not admit that the State Engineer had authority to delineate the LWRFS as a  
17 single hydrographic basin, but even if this Court finds that he did, the State Engineer’s decision to  
18 include NCA’s production wells within the LWRFS was not supported by substantial evidence. In  
19 Order 1309, the State Engineer decided as follows:

20 WHEREAS, NCA advocated for the exclusion of the portion of the Black  
21 Mountains Area from the LWRFS that contains their individual production wells.  
22 NCA premise this primarily on testimony and analysis performed by SNWA with  
23 respect to the impact of pumping from this area on discharge to the Warm Springs  
24 area. It also used hydrogeologic and water level response information to  
concluded that strike-slip faulting and weak statistical correlation between water  
levels at NCA well EBM-3 and EH-4 in the Warm Springs area support a  
boundary to the north of the NCA production wells. *While the State Engineer*  
*finds logic in NCA’s position, other testimony describing flaws in the SNWA*  
*analysis make for a compelling argument against relying on SNWA’s statistically-*

<sup>31</sup> *SE ROA 2*, pp 70–88, attached as Ex. 3 in Appendix.

1        *based results. The substantial similarity in observed water level elevation and*  
2        *water level response at EBM-3 compared to EH-4 and limitations in relying on*  
3        *poor resolution water level measurements for statistical or comparative analysis*  
4        *requires a more inclusive approach that places that boundary to the south of the*  
5        *NCA production wells to a geologic location that coincides with the projection of*  
6        *the Muddy Mountain Thrust. This more closely coincides with the measurable*  
7        *drop in water levels recognized to occur south of the NCA wells, between EBM-3*  
8        *and BM-ONCO-1 and 2, that is indicative of a hydraulic barrier or zone of lower*  
9        *permeability. It also better honors the State Engineer’s criteria by acknowledging*  
10       *the uncertainty in the data while reflecting a recognized physical boundary in the*  
11       *carbonate-rock aquifer.*<sup>32</sup>

12       At the hearing, NCA presented an analysis already discussed and presented by SNWA’s  
13       experts in both their rebuttal report filed with the State Engineer on August 19, 2019, and during  
14       the presentation of their case in chief. In its August 13, 2019 rebuttal report titled “Response to  
15       Stakeholder Reports Submitted to Nevada State Engineer with Regards to Interim Order 1303,”  
16       SNWA performed a multiple linear regression analysis (“MLR”) and found that carbonate walls  
17       inside the LWRFS demonstrate impacts on wells near Muddy River Springs Area (“MRSA”)  
18       whereas other wells appear unconnected, suggesting the boundary in that area is likely “off.”

19       Specifically, the MLR analysis demonstrated close connections for CSVM-2 and CSVM-  
20       1 (Coyote Springs Valley), UMVM-1 (Middy River Springs Area), and GV-1 (Garnett Valley)  
21       which all virtually mirror the hydrograph for EH-4 (Muddy River Springs Area). Importantly,  
22       the same MLR analysis produced a significantly different result when it was applied to NCA’s  
23       production wells in the Black Mountains Area. SNWA’s report recognized that a strong  
24       correlation exists between EH-4 in the MSRA and a monitoring well in the Black Mountains  
25       Area, BM-DL-2, that showed an extremely high correlation value ( $R^2$  of 0.95), but no such  
26       correlation was found to exist in connection with the NCA production wells. SNWA concluded  
27       that “while well BM-DL-2 is undoubtedly within the carbonate aquifer of the LWRFS, the

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<sup>32</sup> SE ROA 1, pp. 51–52, attached as Ex. 1 in Appendix.

1 current production wells (Figures 2-8) are probably not.”<sup>33</sup>

2 Jay Dixon, an expert for NCA, followed up SNWA’s analysis, and confirmed that high  
3 correlation for the nearby monitoring well, BM-DL-2 at  $R^2$  0.95, but he did a more thorough  
4 analysis of EBM-3 (the well representing NCA’s production wells) vs. EH-4 to more closely pin  
5 down the coefficient of determination, or  $R^2$  correlation value. Consistent with the SNWA  
6 findings, Mr. Dixon found that there was a very low correlation between EBM-3 vs. EH-4—  
7 taking an already low  $R^2$  of only 0.52 and finding, after updating with even more available  
8 pumping data, that the correlation dropped to less than 0.5.<sup>34</sup> Mr. Dixon explained this lack of  
9 connection because of the existence of a meaningful geologic structure, a strike-slip fault that  
10 should be used to form the actual southern boundary and which runs between the production  
11 wells (where EBM-3 sits) and BM-DL-2, which is actually nearby, but on the other side of that  
12 fault. Mr. Dixon included a map and explained that the actual strike-slip fault had been mapped,  
13 photographed and used expressly to site NCA’s production wells.

14 Initially in his discussion of NCA’s position in Order 1309, the State Engineer  
15 acknowledges “the logic” and appears to accept the evidence and the analysis, but then the State  
16 Engineer cites to “other testimony describing flaws in the SNWA analysis in order to disclaim  
17 the results.”<sup>35</sup> However, the “flaws” described were limited to other basins—not Basin 215, the  
18 Black Mountains Area—and therefore, do not provide a basis for the rejection of the NCA  
19 evidence presented or the SNWA conclusions/analysis applied. One of the witnesses cited by the  
20 State was Dwight Smith, an expert for the City of North Las Vegas, who testified that SNWA’s  
21 analysis was inaccurate in Basin 216, Garnet Valley, because SNWA failed to include pumping

22 \_\_\_\_\_  
23 <sup>33</sup> *SE ROA* 625, p. 42189, attached as Ex. 10 in Appendix.

24 <sup>34</sup> *See* NCA Closing Statement, *SE ROA* 990, at pp. 52896–97, attached as Exhibit 11 in Appendix.

<sup>35</sup> *SE ROA* 1, p.51, fn. 277, attached as Ex. 1 in Appendix.

1 data that was available even though it was not contained in the State Engineer’s records. The  
2 other witness, Rick Felling, raised issues regarding an alleged error in the SNWA analysis of the  
3 amount of water captured based on pumping at California Wash and a corresponding decrease in  
4 discharge at Warm Springs West—neither of which is in the Black Mountains Area basin.  
5 Notably, Mr. Felling expressly stated, “I don’t know about any of the other regression analyses  
6 or about any other basins.”<sup>36</sup> As such, it seems clear that neither Mr. Smith’s discovery of a lack  
7 of pumping data in Garnet Valley nor Mr. Felling’s admission that he doesn’t know about any  
8 other regression or about any other basin should have been the basis for the State Engineer’s  
9 conclusion that SNWA’s work in Black Mountains Area was faulty—yet that is clearly what the  
10 State Engineer stated in Order 1309. That is simply not supported by substantial evidence.

11 The State Engineer also makes entirely conflicting claims with regard to what is shown  
12 by the comparison of water levels in EBM-3 (a monitoring well close to the NCA production  
13 wells) and EH-4 (the seminal well used to analyze extent of connectivity within the carbonate-  
14 rock layer forming the LWRFS)—at one point acknowledging that NCA demonstrated a “weak  
15 statistical correlation” between the two wells and then, within two sentences, the State Engineer  
16 claims those two wells have a “substantial similarity in observed water level elevation and water  
17 level response....” But the issue here was whether there is a *correlation*<sup>37</sup> between these two  
18 wells, as there is in the other basins with other wells and EH-4, and that is what Mr. Dixon’s and  
19 the SNWA analysis demonstrated.

20 Next, Order 1309 also suggests that “poor resolution water level measurements in EBM-

21 \_\_\_\_\_  
22 <sup>36</sup> *SE ROA* 1008, p. 53728, (p. 1786 of the transcript) lines 22–23, attached as Exhibit 12 in  
Appendix.

23 <sup>37</sup> In determining whether a *correlation* exists, the statistical  $R^2$  determination provides guidance.  
24 An  $R^2$  of 1.0 is an exact match; that is, it shows a 1 to 1 correlation. One would expect wells  
showing this level of correlation to demonstrate a 1 to 1 drop in water levels based on pumping.  
If water levels drop at Well 1 by ten feet because of pumping, they will drop the same at well 2.  
The closer the  $R^2$  is to 1.0, the greater the statistical correlation.

1 3” somehow support a State *policy* that would require “a more inclusive approach,” yet why that  
2 “approach” is “required” is entirely undefined in Order 1309 or anywhere else in Nevada water  
3 law. There is nothing in Chapters 532, 533 or 534 stating that when data is unclear the “more  
4 inclusive approach” is to be applied. There is simply no support for this statement.

5 Finally, without testimony from any expert, the State Engineer simply grasped onto the  
6 *Muddy Mountain Thrust* in Order 1309 to suggest it is an appropriate place to draw a super-basin  
7 boundary. Yet there is no substantial evidence from any expert or witness explaining why this  
8 geologic formation should be considered to form a basin boundary. The wording used by the  
9 State Engineer in 1309 strongly implies that the decision to include NCA’s wells is, in fact, what  
10 drove the State’s decision to find the Muddy Mountain Thrust and use it as a boundary locator.  
11 The State Engineer states that his desire for a “more inclusive approach” “places the boundary to  
12 the south of the NCA production wells to a geological location that coincides with the projection  
13 of the Muddy Mountain Thrust.” Without any expert support for such presented during the  
14 hearing (to which NCA might have responded), and having had no opportunity to even address  
15 the Muddy Mountain Thrust during the hearing process, NCA was completely surprised by this  
16 newly-discovered “boundary” first identified in Order 1309. No expert opined as such that this  
17 “projection” created the basin-boundary line; rather, it seems the State’s “inclusive approach”  
18 encouraged the State Engineer to find a geologic formation that would support his desired  
19 conclusion—to keep NCA’s production wells inside the LWRFS. This last point is the  
20 quintessential example of a decision based on a complete absence of substantial evidence.

21 The State Engineer’s decision to include NCA’s wells within the LWRFS could not have  
22 been based on substantial evidence because the State Engineer did not consider *any* testimony or  
23 expert witness discussion about the effects of NCA’s production wells in deciding where to put  
24 his Southern boundary line for the LWRFS. To make this determination, the State needed some



1 expert to opine, somewhere in the record, as to why there should be a boundary change; that did  
2 *not* occur, yet the State Engineer still changed the Southern boundary. The decision to do so, and  
3 the location, are therefore necessarily arbitrary because there is no evidence upon which to  
4 support that change in the boundary. The only evidence presented demonstrated that the  
5 Southern boundary should have placed the NCA production wells *outside* the LWRFS.

6 In *Eureka Cnty v. State Eng'r*, the Nevada Supreme Court analyzed whether the State  
7 Engineer's decision approving applications and permits was supported by substantial evidence.  
8 *Eureka Cnty v. State Eng'r*, 131 Nev. 846, 855, 359 P.3d 1114, 1120 (2015). The State Engineer  
9 had approved applications and permits pursuant to NRS 533.370(2) based on a finding that the  
10 applicant could implement mitigation techniques that would ameliorate the depletion of Mud  
11 Springs. *Id.* at 852, 1118. The Nevada Supreme Court found the State Engineer had failed to  
12 articulate what mitigation would encompass, even in a general sense, and there was no mitigation  
13 plan in the record. *Id.* at 853, 1119. Thus, the Court ruled that substantial evidence did not  
14 support the State Engineer's decision due to his unsupported findings. *Id.* at 856, 1121.

15 Like in *Eureka Cnty.*, where the State Engineer failed to articulate what mitigation would  
16 encompass, here, there was not a single question raised about the State Engineer's new, arbitrary  
17 straight-line boundary during two weeks of hearings because no one knew it was coming. No one  
18 even attempted to establish—during the hearing—a technical reason why this newly identified  
19 Southern boundary for the LWRFS better explained the available data involving NCA's  
20 production wells and the apparent disconnect with well EH-4 than the analysis provided by both  
21 NCA and SNWA—that the NCA wells were actually outside the LWRFS boundary. Thus, the  
22 State Engineer's reliance on inconsistencies in SNWA's data alone does not constitute  
23 substantial evidence for including NCA's production wells within the LWRFS.  
24

1           Lastly, this Court should note that NCA’s expert—former State Engineer Hugh Ricci—  
2 was deemed unqualified to testify as to the boundary of the LWRFS, and it is impossible to  
3 estimate the impact of such testimony on this matter given the degree of uncertainty surrounding  
4 the placement of the Southern boundary in the Black Mountains Area. Hugh Ricci is the reason  
5 why testing commenced on the LWRFS. During his term as State Engineer, Hugh Ricci handled  
6 the exact issue we are dealing with today, and he—at least initially—successfully analyzed and  
7 identified those basins and water rights he felt should have been involved, applying hydrologic  
8 analyses, and using far less data than was available to him in 2019. Accordingly, substantial  
9 evidence does not support the State Engineer’s decision.

10 **VIII. CONCLUSION**

11           The State Engineer’s decision to delineate the LWRFS as a single hydrographic basin for  
12 conjunctive management was arbitrary and capricious because the State Engineer lacked the  
13 statutory authority to do so. The State Engineer likely relied on his belief that he would be  
14 successful in having AB 51 passed during this process, but that bill failed. Even if the State  
15 Engineer had authority, the State Engineer’s decision to include NCA’s production wells within  
16 the LWRFS was not based on substantial evidence. The State Engineer ignored the only  
17 evidence as to the Southern boundary of the LWRFS in the Black Mountains Area, and he did  
18 not consider any testimony or expert witness discussion about NCA’s production wells and the  
19 lack of effect on the Muddy River Springs Area. Therefore, this Court should reverse the  
20 decision of the State Engineer outright. In the alternative, this Court should remand this matter  
21 for further findings as to NCA’s inclusion in the LWRFS to allow NCA to present clearer and

1 precise water level data from its production wells.

2 DATED: August 27, 2021

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KAEMPFER CROWELL

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BY: */s/ Alex J. Flangas*

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1 **CERTIFICATE OF COMPLIANCE**

2 I hereby certify that I have read this **PETITIONERS’ NEVADA COGENERATION**  
3 **ASSOCIATES NO. 1 AND 2 OPENING BRIEF**, and to the best of my knowledge, information,  
4 and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief  
5 complies with all application Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1),  
6 which requires every assertion in the brief regarding matters in the record to be supported by a  
7 reference to the page and volume number, if any, of the transcript or appendix where the matter  
8 relied on is to be found. I understand that I may be subject to sanctions in the event that the  
9 accompanying brief is not in the conformity with the requirements of the Nevada Rules of the  
10 Appellate Procedure.

11 DATED: August 27, 2021

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1 **CERTIFICATE OF MAILING**

2 Pursuant to NRCP 5(b), EDCR 8.05(a) and EDCR 8.05(f), I hereby certify that service of  
3 the **PETITIONERS’ NEVADA COGENERATION ASSOCIATES NO. 1 AND 2**  
4 **OPENING BRIEF** was made on August 27, 2021 to the following counsel of record and/or  
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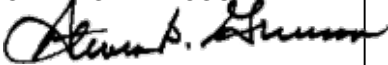
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8 **DISTRICT COURT**  
9 **CLARK COUNTY, NEVADA**

10 LAS VEGAS VALLEY WATER DISTRICT, Case No.: A-20-816761-C (Lead Case)  
11 and SOUTHERN NEVADA WATER Dept. No.: 1  
12 AUTHORITY, Consolidated With:  
13 Petitioners, A-20-817765-P  
14 vs. A-20-818015-P  
15 TIM WILSON, P.E., Nevada State A-20-817977-P  
16 Engineer, DIVISION OF WATER A-20-818069-P  
17 RESOURCES, DEPARTMENT OF A-20-817840-P  
18 CONSERVATION AND NATURAL A-20-817876-P  
19 RESOURCES, A-21-833572-J  
20 Respondent.

**APPENDIX OF EXHIBITS IN SUPPORT  
OF PETITIONERS' NEVADA  
COGENERATION ASSOCIATES NO. 1  
AND 2 OPENING BRIEF**

19 \_\_\_\_\_  
20 And All Consolidated Cases  
21 \_\_\_\_\_

22 Nevada Cogeneration Associates No. 1 and 2 hereby submit the Appendix of Exhibits in  
23 support of their Opening Brief.  
24

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2	Order 1169	NCA_070-081 (SE ROA 659-669)
3	Interim Order 1303	NCA_082-101 (SE ROA 70-88)
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6	Minutes of the Meeting of the Assembly Committee on Natural Resources, Agriculture, and Mining, February 27, 2019	NCA_135-159
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12	Transcript of Proceedings on Hearing on Order 1303 Volume X	NCA_246-275 (SE ROA 53709-53737)

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1 **CERTIFICATE OF MAILING**

2 Pursuant to NRCF 5(b), EDCR 8.05(a) and EDCR 8.05(f), I hereby certify that service of  
3 the **APPENDIX OF EXHIBITS IN SUPPORT OF PETITIONERS' NEVADA**  
4 **COGENERATION ASSOCIATES NO. 1 AND 2 OPENING BRIEF** was made on August  
5 27, 2021 to the following counsel of record and/or parties by electronic transmission through the  
6 Eighth Judicial District Court's electronic filing system, to all parties appearing on the electronic  
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11  
12 DATED August 27, 2021

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TABLE OF JA LOCATION TO AVOID DUPLICATES

<b>EXHIBIT</b>	<b>Description</b>	<b>SE ROA Bates No.</b>	<b>JA Volume</b>	<b>JA BATES</b>	
1	Order 1309	NCA_001-069 (SE ROA 2-69)	2	JA_326	JA_393
2	Order 1169	NCA_070-081 (SE ROA 659-669)	3	JA_824	JA_834
3	Interim Order 1303	NCA_082-101 (SE ROA 70-88)	2	JA_394	JA_412
4	Rebuttal Report Pertaining to Interim Order 1303	NCA_102-128 (SE ROA 39730-39755)	24	JA_10890	JA_10915
5	Transcript of Hearing on Objections to Witnesses and Evidence, September 19, 2019	NCA_129-134 (SE ROA 575-576, 587-589)	2	JA_759	JA_818
6	Minutes of the Meeting of the Assembly Committee on Natural Resources, Agriculture, and Mining, February 27, 2019	NCA_135-159	attached		
7	Assembly Bill No. 51	NCA_160-166	attached		
8	Interim Order 1303	NCA_167-186 (SE ROA 494-512)	2	JA_394	JA_412
9	Transcript of Hearing on Order 1303 Volume I, September 23, 2019	NCA_187-190 (SE ROA 52960-52962)	44	JA_17357	JA_17449
10	SNWA Response to Stakeholder Reports Submitted to the Nevada State Engineer with Regards to Interim Order 1303 Presentation	NCA_191-241 (SE ROA 42165-42214)	28	JA_12048	JA_12097

TABLE OF JA LOCATION TO AVOID DUPLICATES

11	Post-hearing Brief of Nevada Cogeneration Associates Nos. 1 and 2	NCA_242-245 (SE ROA 52889, 52896-52897)	43	JA_17286	JA_17308
12	Transcript of Proceedings on Hearing on Order 1303 Volume X	NCA_246-275 (SE ROA 53709-53737)	44	JA_18106	JA_18155

# EXHIBIT 6

# EXHIBIT 6

**MINUTES OF THE MEETING  
OF THE  
ASSEMBLY COMMITTEE ON NATURAL RESOURCES, AGRICULTURE,  
AND MINING**

**Eightieth Session  
February 27, 2019**

The Committee on Natural Resources, Agriculture, and Mining was called to order by Chair Heidi Swank at 4 p.m. on Wednesday, February 27, 2019, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4401 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada and to Room 203, Carl Diekhans Center Industrial Tech Bldg., Great Basin College, 1500 College Parkway, Elko, Nevada. Copies of the minutes, including the Agenda ([Exhibit A](#)), the Attendance Roster ([Exhibit B](#)), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at [www.leg.state.nv.us/App/NELIS/REL/80th2019](http://www.leg.state.nv.us/App/NELIS/REL/80th2019).

**COMMITTEE MEMBERS PRESENT:**

Assemblywoman Heidi Swank, Chair  
Assemblywoman Shannon Bilbray-Axelrod, Vice Chair  
Assemblyman Alex Assefa  
Assemblywoman Maggie Carlton  
Assemblywoman Lesley E. Cohen  
Assemblyman John Ellison  
Assemblyman Ozzie Fumo  
Assemblywoman Alexis Hansen  
Assemblywoman Sarah Peters  
Assemblywoman Robin L. Titus  
Assemblyman Howard Watts  
Assemblyman Jim Wheeler

**COMMITTEE MEMBERS ABSENT:**

None

**GUEST LEGISLATORS PRESENT:**

None

Minutes ID: 309





water demand from 5 percent to 6 percent. That is the context we are talking about here. While we appreciate some of the concern we are hearing from the opposition, there are a lot of overblown statements, distortions, and misinformation. There is a huge legislative record. The 2007 Legislature addressed staged development of water; in 2013, the Legislature addressed 3M plans. That record is there for your perusal.

**Chair Swank:**

Is there anyone in Elko who is speaking in neutral? Seeing no one, does the bill sponsor have closing remarks?

**Bradley Crowell:**

I want to say to everyone who made statements, we appreciate them. Specifically, I want to remind folks that in the context of A.B. 30, we are talking about available water and within that context, the best way to manage available water. There is obviously disagreement about the best way to manage it. I hope there is not disagreement about the need to manage available water. We do not have enough water in Nevada to let it be locked up or held hostage. We need to find a path forward if we are going to smartly and strategically use our limited water resources. I want to reference Mr. Tibbitts' remarks specifically. I appreciate his comments in that context, and I actually do not think we are that far apart. There are instances that are not being addressed or thought through. If you have a senior water rights holder with a groundwater well that has been there for 100 years and has been used—and through more contemporary science, we have learned that the aquifer is much deeper and more plentiful, and there is available water—if the senior water rights holder is unwilling to allow his well to be deepened so that others can access that water, he is holding hostage Nevada's water that belongs to everyone. It is those kinds of instances that we are trying to address with this legislation. It is clearly not perfect, but I hope the intent and understanding is common among us. There were a few folks who provided solutions, and I want to thank them. I understand criticisms, but I sure hope they come with solutions if we agree that there is a problem. As the Department, and as the Division of Water Resources, we stand ready to work with anyone and everyone in a collaborative process to understand concerns and come up with constructive solutions. I leave that as an open invitation.

**Chair Swank:**

I will close the hearing on A.B. 30. [Also provided but not mentioned are ([Exhibit M](#), [Exhibit N](#), and [Exhibit O](#)).] We will open the hearing on Assembly Bill 51.

**Assembly Bill 51:** Revises provisions governing the management of water.  
(BDR 48-213)

**Bradley R. Crowell, Director, State Department of Conservation and Natural Resources:**

Assembly Bill 51 addresses the very real and prudent scenario of conjunctive management, which is recognizing that our surface waters and groundwaters are connected and we should manage them in that way. Nevada is a leader among our peers in the West in recognizing this. However, in recognizing the connectedness of water and managing it conjunctively, we

are going to have conflicts arise. We have been managing groundwater and surface water separately for over 100 years. If we now start to look at them as connected entities—which we should because the science is undisputable—we are inevitably going to have conflict among the existing right holders. We are not talking about new available water, we are talking about existing water rights holders, senior, junior, and everything in between. When we look at our waters conjunctively, we are going to have some conflict. Assembly Bill 51 is designed to recognize that and get some direction from the Legislature as to how to best manage that situation.

**Tim Wilson, Acting State Engineer and Administrator, Division of Water Resources,  
State Department of Conservation and Natural Resources:**

I am here today to present testimony in support of Assembly Bill 51, which addresses the implementation of “conjunctive management,” an important water management concept approved by the Legislature in 2017. [Continued to read from prepared testimony (Exhibit P)]. Please allow me to begin with a bit of background and context. In 2017, the Legislature amended *Nevada Revised Statutes* (NRS) 533.024, subsection 1, and added a new paragraph, (e), requiring the Division of Water Resources within the State Department of Conservation and Natural Resources “To manage conjunctively the appropriation, use and administration of all waters of this State, regardless of the source of the water.” This simple amendment acknowledges that surface water sources and groundwater sources that are hydrologically connected need to be managed conjunctively.

My office has provided the members of the Committee with PowerPoint slides that I will walk through to illustrate the concept of conjunctive management and how it relates to the bill before you today (Exhibit Q). When Nevada’s foundational water statutes were adopted in 1903, the statutes focused exclusively on surface water sources and did not even consider underground sources of water. Therefore, the implementation of Nevada water law initially focused only upon the allocation and management of surface water sources. During the period of early statehood and into the 1900s, this approach was sufficient given Nevada’s small population and an economy that utilized water primarily for agricultural and mining needs. However, as groundwater well technology was developed and our economy expanded and diversified, the need to utilize and regulate additional water sources increased. In 1939, NRS Chapter 534, *Underground Water and Wells*, was adopted and specifically directed the management and administration of all groundwater sources. Because groundwater management is compartmentalized into its own chapter, since 1939 the State Engineer and the Division of Water Resources generally administered surface water and groundwater sources independently.

This practice, however, did not fully account for the fact that many surface and groundwater sources are hydrologically connected. In 2017, the Legislature took a proactive step to reconcile this disconnect. Specifically, the Legislature issued a declaration directing the Division to conjunctively manage all waters of the state, regardless of the source of water, as a necessary and appropriate first step towards harmonizing our laws with the science [Senate Bill 47 of the 79th Session].

Assembly Bill 51 is the next step to effectively and accurately implement conjunctive management practices in Nevada.

While the 2017 Legislative declaration helpfully recognizes the hydrological connection that often exists between groundwater and surface water sources, existing statute does not provide the framework necessary to effectively implement the Legislature's policy direction. Assembly Bill 51 seeks to incorporate conjunctive management into Nevada water law while balancing the interests of these formerly separately administered water sources in a legally defensible manner. This is a critical need, for unless statutes provide additional legislative direction for the manner in which the Division should implement the conjunctive management of Nevada's water resources, the ambiguity will ultimately be decided by the courts without the benefit of any substantive legislative intent to guide these inevitable judicial decisions.

As a continuation of the 2017 policy directive, Assembly Bill 51 proposes two basic first steps: First, it directs the Division of Water Resources to adopt regulations for the conjunctive management of groundwater and surface water resources. Regulations need to be specific to the affected region to account for different hydrologic settings and different manners of use. The process of developing regulations will include full public and stakeholder participation with full transparency. It is critical that any new regulations for conjunctive management have the benefit of careful consideration and a clear, understandable outcome. Second, A.B. 51 authorizes the Division of Water Resources to create the programs necessary to develop regulations and effectively implement conjunctive management of groundwater and surface water. Please allow me to walk through the language to accomplish the purposes as set forth in Assembly Bill 51.

Section 1 establishes a new section of NRS Chapter 533 with provisions allowing for the development of regulations and programs for the conjunctive management of connected surface and groundwater sources.

Section 2 incorporates domestic well owners, who are legally authorized to withdraw up to 2 acre-feet of groundwater without possessing a water right, into the definition of a "groundwater user." This does not require domestic wells to acquire a water right, but simply ensures that groundwater pumping from domestic wells is factored into overall usage when managing connected ground and surface water resources.

Section 3, subsection 1 directs the State Engineer to adopt conjunctive management regulations. This section further directs that any conjunctive management regulations must recognize existing uses of water while protecting senior water rights holders. Further, section 3, subsection 2 establishes certain elements that may be included in the adoption of conjunctive management regulations, including: (a) requirements or guidelines for establishing mitigation plans to address conflicts between groundwater and surface water users; (b) the creation of a conjunctive management program to help manage and mitigate conflicts between groundwater users and surface water users; and (c) establish additional methods as appropriate and necessary to effectively facilitate conjunctive management.

To provide some context regarding the hydrologic interaction between surface water and groundwater sources, page 2 ([Exhibit Q](#)) shows an illustration of how the Division of Water Resources historically administered surface water and groundwater sources. As illustrated, groundwater was administered as if there were an artificial barrier between appurtenant surface water sources. This was not a scientifically supported manner of administration. Today, we recognize that decisions made decades ago have incrementally led to conflict between surface water and groundwater users.

As illustrated on page 3, a groundwater source may have direct hydrological connectivity with a surface water source, such as a river or stream. When a well is first pumped, water is derived from aquifer storage. Over time, the water removed from aquifer storage may be replaced by capture from surface water. Capture can occur by reducing groundwater discharge to a stream or by inducing infiltration from the stream. Depending on the distance and hydrologic conductivity between the stream and the well, these effects may take years to manifest and many more years to recover, even after the pumping has ceased. The effects may also be muted by variability between wet and dry years.

Although groundwater pumping may capture surface water flows, this does not automatically mean there is a conflict with the surface water uses. Practically every stream and river system in Nevada is a fully appropriated system, meaning the totality of the flow of the surface water source is allocated to existing uses. The vast majority of these surface water rights are senior to all groundwater uses. Surface water rights are administered based upon “priority” and the seasonal flow of the river. If a surface water is flowing at a rate that satisfies each of the existing rights along the system, there is no harm or “conflict” to senior surface water rights, even if groundwater use has captured some of the flow, because all senior rights have been fully satisfied.

Conjunctive management is the mechanism for the Division of Water Resources to identify where, when, and how groundwater uses may cause near-term or long-term conflict with existing surface water uses. Presently, the Division has contracted with the United States Geological Survey (USGS) within the U.S. Department of the Interior and Desert Research Institute (DRI) to develop a capture model for the Humboldt River basin, depicted on page 4, which spans nearly 300 miles and includes 34 groundwater basins. Once completed early next year, this capture model will provide the best available science to accurately identify whether over a specified period of time, groundwater pumping results in capture of Humboldt River surface water. Based upon the results of the capture model, the Division will be able to determine the amount of conflict, if any, with senior surface water rights along the river system. Page 5 ([Exhibit Q](#)) demonstrates how the capture model helps identify a groundwater well location, and determine the quantity of water captured from the Humboldt River. The image on the lower right shows a hypothetical well located near the river. The different colors indicate model results of capture at any location after a certain duration of pumping. The chart on the upper left shows the percent capture of that same hypothetical well after pumping for 10 years. In this case, capture of stream flow is about 40 percent of the water pumped by that well.

Availing ourselves of the best available science is imperative when considering the development of conjunctive management programs. As illustrated on page 6 ([Exhibit Q](#)), unlike other states, Nevada is attempting to “sharpen the pencil” and identify with particularity whether a specific groundwater use is actually resulting in capture of surface water. Based upon that data, the Division has the ability to calculate the amount of conflict. Identifying a conflict using best available data is only the first step. Resolving conflicts based on sound management practices is equally important.

Each basin dominated by surface water in Nevada is hydrologically unique. The science and response in one region may not be appropriate in another region. Accordingly, the ability to develop regulations to address these unique areas is critical to assuring that the Division applies the best available science and avails itself of the best available management approaches.

Section 4 addresses the proposed scope of conjunctive management programs administered by the Division of Water Resources. Specifically, subsection 1, paragraph (a) provides that if the Division of Water Resources adopts a conjunctive management program, it is not required to curtail a conflicting groundwater use if it can be demonstrated that curtailment or the cessation of pumping will not result in the delivery of water to the conflicted surface water right. This is often referred to as the “futile call doctrine” because curtailment of a particular junior use is futile and will not result in an actual delivery of water to the senior use. In such instance, the junior use is not required to cease its use.

Section 4, subsection 1 paragraph (b) allows the Division to require a groundwater user, who is capturing surface water flow that results in conflict to senior users, to provide replacement water. It also requires the replacement water to be of sufficient quality to satisfy the use of the senior user. In essence, this provides the opportunity for a groundwater user to replace conflicted water rights by providing its own surface water rights or acquiring them from another surface water user. However, many groundwater users found to cause some conflict with surface water uses may not have substitute surface water available to use or offer to an impacted senior water rights holder.

Unfortunately, in these instances, curtailment of such uses may take years, if not longer, to reverse the surface water depletions and eliminate any conflict, with the very real potential to cause significant economic injury to those curtailed users and the communities in which they live. Therefore, section 4, subsection 1, paragraph (c) provides the Division of Water Resources authority to levy a special assessment for the purpose of creating a fund that would provide financial mitigation to senior surface water users in cases where replacement water is not immediately available. The mitigation fund would allow certainty for groundwater users and would provide a mechanism to make senior surface water users economically whole. It could also incentivize conservation, by exempting groundwater right holders from assessments if they choose not to pump. Subsection 1 paragraph (d) also allows the assessment of fees to pay the expenses of administering the conjunctive management program. It is important to emphasize that these assessments are not ad valorem taxes.

Section 4, subsection 2 addresses the mechanism for the collection of the assessments. Section 5 allows the Division of Water Resources to suspend the “use it or lose it” provision in law to help promote conservation over excessive use or waste as well as the unfair forfeiture of a water right when a conjunctive management plan is adopted. If a conjunctive management program is adopted, the best practice is to encourage water conservation. Accordingly, it is imperative that voluntary conservation, or mandated nonuse, of water does not subject the water rights holder to a claim of abandonment or forfeiture while the conjunctive management program is in effect. The goal of conjunctive management should be for the benefit of all users within the bounds of what the water resources in question can support over the short, medium, and long term.

Sections 6 through 9 contain conforming and clarifying language regarding existing law and establish that this bill would become effective upon approval. At this time, I am happy to take any questions from the members of the Committee.

**Assemblywoman Peters:**

My question is dependent on federal decisions and implications that they have on the idea of conjunctive management and how we manage it in the state of Nevada. What would it mean to be in the middle passing a law like this or even conducting management on the existing statutes? We have two situations, one is the *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262 (C.A.9 (Cal.), 2017). That confirmed jurisdiction to tribal governments to an aquifer for which they pull water from. That is for managing water quality, in particular. The other is that the Supreme Court has agreed to review whether the Clean Water Act can regulate groundwater, which also has to do with water quality. If we are addressing conjunctive management, and we get to the point where we address water quality in conjunctive management, how would those impact how we address conjunctive management?

**Tim Wilson:**

I would like to bring our attorney, Micheline Fairbank back. She is more familiar with those cases.

**Micheline Fairbank, Deputy Administrator, Division of Water Resources, State Department of Conservation and Natural Resources:**

When we talk about conjunctive management in the context of the *Agua Caliente* case, or some of the other pieces of litigation, this really establishes the framework for which our office can go ahead and address those particular issues. The *Agua Caliente* case is an extension of the analysis and potential application of a Federal Reserved Right Doctrine, otherwise known as the *Winters* doctrine, and that extension to groundwater. There are still a lot of questions and undecidedness in terms of how that is going to actually interplay in Nevada with respect to our water laws and the application.

Without a framework and guidance in terms of how we establish these management programs, we are stuck with competing interests. This is a mechanism to pave the way of how we can go ahead, within the statutory framework and through regulatory process,

provide that management solution, so that any potential conflict that may arise with regards to those differing and conflicting interests, can then have a mechanism in state law to be resolved. Again, the public owns the water, and we have to operate within those confines. With respect to water quality issues, obviously there is a little bit of an overlap with regards to water management and water quality, but that is a different agency that has the integral association with respect to the management of water quality. Obviously, we look at water quality issues when we are addressing issues of appropriation, but in terms of long-term management, that is more of a collaborative process within our agencies.

**Assemblywoman Peters:**

Is there is a way in this language that we could include our relationship with tribal governments and their right to the water, their ownership of the water in these aquifers, as the *Agua Caliente* case rolls out? I believe there are appeals happening around that, but perhaps we can make it clear in this bill that we consider the tribes in the decision making and build our framework for conjunctive management around, or at least with that in mind?

**Micheline Fairbank:**

I think that is part of the dialogue when it comes down to the regulations in terms of stakeholder involvement. Certainly, the regulations are intended to build upon stakeholder involvement, making sure we have all of the appropriate stakeholders involved is part of that dialogue. Whether that is a statutory amendment to the bill is certainly open for discussion. With regards to how that rolls out, I think that is part of not being overly specific while still allowing the regulatory process to ensure that we are doing our role, fulfilling our duty in terms of making sure we have that stakeholder and collaborative process as part of the program.

**Bradley Crowell:**

This should be duly considered as appropriate and we can discuss and figure out how to incorporate it. This also reminds me, as a point of clarification, during the comments on the last bill, there was discussion about federal land and federal ownership of water. While we do have approximately 86 percent of land in Nevada under federal control, all of the water in Nevada belongs to the people of Nevada. We want to be careful as we change our laws and do not subvert any of our water rights to the federal government.

Another point of emphasis, before we get to implementing conjunctive management in a way that meets everyone's concerns, there is a lot of analysis and data that needs to be done. The example of the Humboldt River and what we are doing with DRI, and the USGS, we need contemporary, best science like that in many other places in Nevada. We have it in some places, but not everywhere. There is a lot of hydrologically connected systems that would benefit from understanding their function and connectivity as a first step to implementing any plans that balance interest within conjunctive management.

**Assemblywoman Titus:**

Getting back to the language in the bill, section 4, subsection 1 states, "If the State Engineer creates a program for the conjunctive management of groundwater and surface water in a

hydrographic basin, the State Engineer . . . " and then it goes on about being required to curtail groundwater use, does not have to deal with the conflict, et cetera. Does this totally upend the prior appropriation concept in our laws? Also, it seems to me, this would actually strip seniors of property rights, their priority date, and therefore a taking. Would you clarify that?

**Tim Wilson:**

In the past when we administered surface water and groundwater separately, surface water priority has never been used against groundwater priority and vice versa. By eliminating that artificial brick wall, if we are going to look at both of those priorities together, the senior rights are almost always going to be senior to the groundwater rights. When people first came here, they obviously used surface water; we did not have good well technology to drill deep wells and tap our aquifers. We see this as protecting those senior surface water rights against groundwater depletion.

That is what the groundwater models are doing—they are telling us, first, is there an issue. Groundwater can be very compartmentalized, there can be lots of faulting. What is under the ground is very difficult to determine. We believe we have the technology to use groundwater models to determine an impact to the river. We have a well that is pumping near the Humboldt River. We do not know what that impact is today, but we think we will know what that impact is. If it is having a conflict with senior water rights holders on the Humboldt River, we want to make those senior water rights holders whole. We want to find a method to compensate them for the amount of water being taken out by that well. That is the goal of this legislation. Deputy Administrator Sullivan is intimately familiar with this subject and might be able to elaborate.

**Adam Sullivan, Deputy Administrator, Division of Water Resources, State Department of Conservation and Natural Resources:**

I think there is an additional point that will help clarify the answers. We need to work within the prior appropriations system, and in order to address existing conflicts, we have very limited tools within statute. Simply put, until the senior water user gets 100 percent of their water, the junior water user does not get any. The response to that would be to entirely curtail a groundwater user. In this example of the Humboldt River, we could entirely curtail groundwater users, but because of the hydrogeology of the system, that still would not result in a full delivery of water to the senior surface water users. This is a problem that has developed over many decades, and it would take many decades to solve it in that manner. What we need is to have some flexibility to work with the stakeholders in the affected region to fully satisfy the senior users but also allow junior users at least a portion of their water to the extent that it does not conflict.

**Assemblywoman Titus:**

Acting State Engineer Wilson, you stated that the senior water rights holders will always have priority in "most" cases. Will you clarify that statement?



**Tim Wilson:**

If I did state that, I did not intend it. If you are a senior water rights holder, you are a senior water rights holder. Our state is a prior appropriation state; it is based on the date when your water right came into fruition, either through a permit or through decree, and that sets your priority date. If we are going to balance surface water priorities to groundwater priorities, as I mentioned, the surface water is going to be senior in almost every case. There could be a very old well, maybe someone hand dug a well in the 1800s and they have a vested claim on it. That vested claim has an earlier priority date, and as a groundwater rights holder, he could have a senior right to a surface water holder later in time. That is almost never the case.

**Assemblywoman Titus:**

I have water rights on my property in Smith Valley. I understand if there is a drought year, we only get 10 percent, even though I have so many acre-feet, I may only get 10 percent of that due to the curtailment. I understand that. There are folks downstream from me, especially the Indian reservation in Schurz, who have much older rights than I have. We have to make sure they get their water, and I do understand all of that. I just want to make sure that we are managing the water with due process. I am concerned that, with this wording, there is potential for a loss of rights.

**Assemblyman Wheeler:**

Section 4, subsection 1, paragraph (c), says, "Any such special assessment must be proportionate to the amount of conflict caused by the groundwater user to the surface water user whose water right is senior in priority." The State Engineer can levy a special assessment annually. How much is a domestic well user going to be charged? How is the usage actually going to be measured? Are you going to put meters on wells? We went through that last session, and it was not good. I am trying to figure out what the "special assessment" really is.

**Adam Sullivan:**

For the specific example of the Humboldt River, the assessment would be based on the value of the portion of water that is not delivered. This is a concept that has been developed through working group negotiations with stakeholders as a potential mechanism for making surface water users whole. The assessment would be specific to that area for a given period of time. In this particular case, we have engaged with agricultural economists at the University of Nevada, Reno to make that determination. To address the point about domestic wells, in recent negotiations with the stakeholder working group, domestic well owners would be excluded from the mitigation program.

**Assemblyman Wheeler:**

What you are telling me is that you cannot put a figure on the assessment. It will just be something that is studied and we will define it later? This does not say anything about measurement. That is why I am asking about the meters on wells, how do you measure it? How do you know how much is being taken out, et cetera?

**Adam Sullivan:**

In the Humboldt region, all permitted water rights have meters on their wells and report monthly data to our office. To the first part of your question, the answer is, yes, specific for a region, we would directly study the value of water and make that determination with the assistance of a neutral third party.

**Assemblywoman Hansen:**

Section 4, subsection 1, paragraph (b) states, "May require a groundwater user to furnish replacement water to a surface water user so long as the replacement water is of sufficient quality." When there is a loss and the senior user has to be compensated, do you have any projections of how much water would need to be replaced? I am trying to envision what that looks like. How is the water getting there? Where is the water coming from? What kind of quantities are we talking about?

**Adam Sullivan:**

You are absolutely right, these are very difficult things to quantify. It is what we have to do because there is no fixed direction within our legislative prerogative to give us a more direct approach to resolve the existing conflict to the extent that it exists. The first point that you brought up was how to determine how much water is not being delivered. In the case of the Humboldt River, we have over 100 years of delivery records, an understanding of the system, and how much water is available to deliver to each user in priority based on flow at a given measuring point. Where those delivery schedules are not met, the challenge is in fractioning out exactly how much was deserved to be delivered to that user, how much was due to drought, for instance, versus how much was due to capture from surface water by groundwater pumping. These are all the difficult questions that we are trying to resolve through groundwater modeling and with the assistance of the USGS and DRI, and with abundant stakeholder engagement and negotiations on regional solutions.

**Assemblywoman Hansen:**

If there is a determination of water that needs to be supplied, how does the water get there? Where is the water coming from? If it is not going to come from the Humboldt River, where is the supply of water coming from?

**Adam Sullivan:**

Preferably, in that situation, the water would come from the Humboldt River. It would be an exchange or agreement to not divert an upstream users' rights so that it can be delivered as wet water to a downstream user.

**Assemblywoman Hansen:**

Section 5 states, "If the State Engineer creates a program for the conjunctive management of groundwater and surface water in a hydrographic basin, a right to groundwater or surface water that is not being used because of the program is not subject to a determination of abandonment or forfeiture for as long as the program is in effect." The discomfort I have with that is it is essentially giving all the authority to the State Engineer, someone who is not an elected official. This does not have a lot of input from the elected body, per se. During

Mr. Wilson's presentation he said ambiguity would be decided by the courts. To me, this shows that ambiguity will be decided by the State Engineer. Are we giving a lot of power to the State Engineer that does not reside there now?

**Tim Wilson:**

Section 5 goes a little bit to my very first presentation that I gave on water law. One of our concepts is that if you are not beneficially using the water, you could be subject to cancellation, forfeiture, or abandonment. In this case, if this program is in effect, we do not necessarily want the groundwater user to pump. That may be his solution, he does not want to pay for the interference of the surface water, so he is just not going to pump his well. That is a good thing. That is essentially like a voluntary curtailment. We do not want to take away his right through abandonment or forfeiture. Forfeiture works after five years of nonuse on a groundwater right, so we want to toll that provision while this program is in effect, so that people who choose to turn off their wells as their mitigation, they will not lose their water rights certificate. They can hold their water rights certificate so if they choose to participate in the program at a later date, they can pump their well and either supply the extra surface water to make up for their impact or have a financial obligation.

**Assemblyman Watts:**

I need some clarification around judicial review and how that might work through this process. I know in this bill, part of the framework is the development of regulations. I assume that as long as those are constitutional, they are set in terms of framework. When it comes to individual plans, I am wondering what that process would look like. Who would be able to initiate judicial review of a conjunctive management plan once it was approved? If it would only be the affected water rights holders, or if others would be able to participate in that process.

**Bradley Crowell:**

It is nearly impossible to predict the outcome of judicial review, especially in water cases. We get quite a range of outcomes from judicial review. If the regulations on conjunctive management conform to all of the rules, laws, and regulations, and the data and science underpinning the decisions related to conjunctive management are sound and defensible, I would hope that would guide any judicial review to the correct outcome. We cannot predict that, we can just set the table as appropriately as possible for that review.

**Assemblyman Watts:**

When a water rights application comes in, people have the ability to protest. Those protestants can participate in judicial review after an order is released. Outside of the regulations, when a conjunctive management is approved, who do you envision would be able to challenge the findings in that plan?

**Bradley Crowell:**

In the instance of judicial review for conjunctive management, we are not talking about new water right applicants, we are talking about all of the existing water rights. It is a matter of

the balancing of priority of different rights, based on different situations and hydrological scenarios.

**Chair Swank:**

I would like Mr. Amburn to answer that.

**Allan Amburn:**

When looking at NRS 533.450, which is what we are addressing with the new language, it addresses the judicial review of orders and decisions of the State Engineer. It states that any person feeling aggrieved by any order or decision of the State Engineer, acting in person or through the assistants, they have the ability to have that reviewed by a court.

**Micheline Fairbank:**

To build upon that response, any decision or order is subject to judicial review. The implementation of regulations are subject to one component of judicial review, not necessarily under NRS 533.450, but if the State Engineer were to adopt a conjunctive management program, if that adoption were to come through an order or other form of decision, then it is subject to the NRS 533.450 judicial review process. As already stated, any person feeling aggrieved by a decision or order is available to bring that action.

**Assemblyman Ellison:**

We have had hundreds of letters in opposition. Out of all of them, I have not seen one that says please adopt A.B. 51. These hundreds include letters from ranchers, farmers, businesses, The Nature Conservancy, et cetera. All of these letters show concern about this bill. I have a concern about this bill. I also have a concern about the lost value and collateral items. If you look at ranching and agriculture, and the impact, and the ecosystem, also, with the Southern Nevada Water Authority and what they have to say—I think you need to go back and take a look at this and maybe look at some other way to come up with a different approach. Assembly Bill 51 is totally against the reins of the people. I hope you will take that into consideration.

**Chair Swank:**

Are there any more questions? Seeing none, we will go back to the same process for testimony. Thirty minutes for support, 30 minutes for opposition, and 30 minutes for neutral. Each person gets two minutes. I will start with support in Carson City, Elko, or Las Vegas. Seeing no one, we will start with opposition in Las Vegas.

**Kenny Bent, Private Citizen, Pahrump, Nevada:**

Assembly Bill 51 strikes me as a kitchen sink concept. It is highly relying on what we heard before with Assembly Bill 30 for the mitigation aspect of it. I think this bill could easily change the balance and control of water in this state. In something like this, there are a lot of unintended consequences. I think we should be very cautious approaching this. It makes more sense to try this on a per-basin approach, rather than statewide, and do a test run on it. Largely, I am having a little trouble with the whole domestic well issue. I appreciate what Assemblyman Wheeler said, but I am going to address the domestic well issue here because

this seems to keep dragging around in the shadows, pretending that the State Engineer has authority to regulate. I think I heard that we are not going to regulate domestic wells, just their water. Domestic use was purposely exempted from 17 of the 18 western states. That was for both moral and legal reasons. What seems to be lacking here is anyone coming up and saying, From this day forward, we are going to deal with new domestic wells. There seems to be an intent here to take the water, at least 75 percent of it, from the existing domestic wells. I think it is very important that all of you on this Committee understand that the domestic use is exempt purposely out of water law.

**Chair Swank:**

Is there anyone in Carson City in opposition?

**Doug Busselman, Executive Vice President, Nevada Farm Bureau Federation:**

The Nevada Farm Bureau Federation is opposed to A.B. 51. One of the complicating factors in considering perennial yield assessments involves a way in which groundwater and surface water provide their respective and relative contributions to the basins. In the reach of the Humboldt River, and I think a lot of this bill is focused on that specific area, there are 32 basins that interact with groundwater and surface water. There are variations and complexities that I think some of this fails to recognize. Modeling is being carried out to attempt to capture a scientific perspective, but at this point, that is still a work in progress.

One of the things I would like to point out is in the discussions for this bill, much of this mirrors what was proposed as possible regulations during the interim process. Those proposed regulations never went anywhere, but they had a lot of components that were outlined here. There was mention made of stakeholders being involved in the construction of that. There were six or eight people who were involved representing different areas, but it did not involve stakeholders as a whole. I think that is part of our concern, there needs to be a greater level of input from the local stakeholders in order to facilitate meaningful solutions.

**David G. Hillis, Jr., Principal Engineer, Turnipseed Engineering, LTD, Carson City, Nevada:**

I work and deal exclusively with Nevada water rights. I have had the privilege of working with hundreds of Nevada ranchers, farmers, municipalities, and miners all across our state. I commend the State Engineer's proactive approach with both bills. We have heard tonight that the State Engineer's office wishes to collaborate with experts and stakeholders; however, to my knowledge, no collaboration has taken place in the drafting of the actual bills that are before you. Assembly Bill 51 promotes the concept of conjunctive management. This concept is not new; however, it is new within our state. I feel that this bill would rush forward legislation which has had no input from experts and stakeholders across our state. I would suggest the State Engineer's office collaborate and revise the bill for resubmission to the Committee. In addition, Director Crowell stated that it is beneficial to rely on the best and current science available; however, within our state, within some basins, we still rely on a perennial yield estimate, which was estimated from Hardman precipitation maps from 1936. That is a little outdated when it comes to establishing our most sacred concept when it comes to perennial yield. The newest, latest, and greatest science needs to apply to first

establish accurate perennial yields before we can begin management, especially across many basin lines. In addition, under A.B. 51 it is possible when implementing this legislation that a senior groundwater rights holder could be curtailed while a junior groundwater rights holder may not be affected based on his geographic proximity to the Humboldt River, for example.

**Steve Walker, representing Douglas County; and Storey County:**

Statewide application of conjunctive use methodology being developed on the Humboldt River is premature. The rulemaking process needs to be accepted, completed, and implemented before making a blanket state law or methodology that could affect other river systems. Each river system is unique both hydrologically and also have different decrees. Conjunctive use plans should be adapted on a case-by-case basis to recognize its uniqueness. We inherently know there is a relationship between surface water and groundwater, and our existing law could be used to deal with the current and future conflicts.

**Bennie B. Hodges, Manager, Pershing County Water Conservation District:**

I am here to speak in opposition to Assembly Bill 51. The Pershing County Water Conservation District (PCWCD) is a surface water irrigation district. Our reservoir is Rye Patch Reservoir. The main source of our water is the Humboldt River. We have an irrigation district 40,000 acres in size, and we are the largest surface water holders in the Humboldt River system. However, the downfall is that we are at the bottom of the system. The prior appropriation doctrine, "first in time, first in right," has been the cornerstone of Nevada water law for over 100 years. If it is not broken, please do not try to fix it.

Assembly Bill 51 would allow for the creation of a monetary assessment for conjunctive management of groundwater and surface water within the Humboldt River drainage. This mitigation program would allow junior underground water users to cause an injurious depletion of senior surface water users.

Water rights for the PCWCD constituents range from 1862 to 1921. These water rights are senior to all groundwater rights in the Humboldt River drainage.

Under this mitigation program, PCWCD constituents would receive monetary compensation from junior groundwater pumpers for causing injurious depletion and affecting base flows of the Humboldt River. The PCWCD constituents do not want money, they want their water. If they are compensated with money, the water table will drop and drastically affect current and future irrigation with less water.

Passage of A.B. 51 will slowly lead to the demise of a rural way of life in the Humboldt River drainage basin, namely the communities of Lovelock, Winnemucca, Battle Mountain, Carlin, and Elko.

**Jake Tibbitts, Natural Resources Manager, Department of Natural Resources, Eureka County:**

Eureka County does not support A.B. 51 as drafted. Again, we stand ready to continue our involvement in trying to find a good solution. I was happy to hear Director Crowell speak that this was intended to address existing appropriations in which there are conflicts. The bill as drafted does not make that clear. It seems that this bill could be used again, similar to our concerns with A.B. 30, where you could, under a conjunctive management rule, potentially appropriate new water that would be in conflict with existing rights. If the intent is truly to address conflicts that exist from rights that were already appropriated, I think there is some room to potentially find a solution. We have had this situation occur in Diamond Valley where we have had prestatutory vested rights affected and we feel that some rules to define situations like that are good to pursue. We do support localized approaches rather than a blanket conjunctive management rule for all of the state. We would support more localized rulemaking rather than blanket regulations. Again, we stand ready to assist in trying to find a common solution for this problem.

**Kyle Roerink, Executive Director, Great Basin Water Network:**

We oppose A.B. 51. We believe that A.B. 51 masquerades as conjunctive management, but the bill, in truth, intends to roll back existing laws and gives the State Engineer greater authority. State Engineers have the toughest job in the nation's driest state. I respect their service to Nevada, but over the years, State Engineers have overappropriated our basins and have lost many cases in court because the office mismanages its authority. We have to ask, why do we want to give him more power?

As written, A.B. 51 is a violation of constitutional rights under the Takings Clause. Section 4, subsection 1, paragraph (a) is a clear and explicit attempt to say that the "first in time, first in rights" doctrine no longer matters. Next, the bill sanctions unsound and unsustainable replacement water schemes. If someone takes your water, under A.B. 51 he can replenish it with something else—you could be getting your water from a pumper truck. Lastly, the bill sanctions monetary compensation as a means of repaying a harmed senior water rights holder. Assembly Bill 51 is giving the wealthy and powerful the upper hand with no recourse for the little guy. We envision scenarios where a powerful junior rights holder says, Take the money or take us to court. Money does not solve all problems in water policy, but A.B. 51 erroneously relies on that mantra and paves the way for powerful entities like the Southern Nevada Water Authority to build their disastrous 300-mile pipeline at the expense of hardworking families whose rights deserve protection. [A letter was also provided ([Exhibit R](#)).]

**Patrick Donnelly, Nevada State Director, Center for Biological Diversity:**

I think, with A.B. 51, what we have is an example of bad process leading to a bad outcome. This is really a top-down, heavy-handed approach with the State Engineer asking for almost unfettered discretion to pick winners and losers in our water system. We had Assembly Bill 298 of the 79th Session, which was an excruciating process involving the stakeholder negotiation in the committee room immediately before committee hearings. That was not the way to craft good water policy. In the interim, there have been no stakeholder processes on

this legislation. There are individual conjunctive management processes going on, some of which may result in good outcomes, but as far as addressing an overall framework, that has not happened. As a result, again, all of the people who would be affected by this legislation oppose it, even though I believe we all recognize groundwater and surface water are a single resource. I think there is widespread agreement that some form of conjunctive management is a good thing, and there is room for these parties to come together, but no effort has been made to do that. Instead, this seems like an attempt to railroad everyone who has an interest in rural water. Meanwhile, we have the ghost of former State Engineer, Jason King, looming over this process—these are Jason King's bills. These are not the current administration's bills. They are constituency lists. Nobody supports them, everyone who is affected opposes them, and we do not even have their progenitor in the room with us to defend them. These bills are a bad process leading to a bad outcome. They need to be scrapped and start over with a genuine bottom-up process to involve stakeholders to come up with something we can all at least live with, if not agree with. (A letter was also provided ([Exhibit S](#)).]

**Tobi Tyler, Executive Committee Member, Toiyabe Chapter, Sierra Club:**

The Toiyabe Chapter of the Sierra Club, representing more than 30,000 members and supporters in Nevada, is strongly opposed to A.B. 51. We urge the Committee to oppose and abandon this bill.

We oppose A.B. 51 because of the harm it will inflict on the people, wildlife, and scarce water resources of this state. It will encourage the overappropriation of our limited water resources and facilitate projects like the disastrous pumping and piping plan to siphon 58 billion gallons of water annually from eastern Nevada near Great Basin National Park to Las Vegas.

While the bill sets forth a path for outlining conjunctive management policies, the bill fails to mention any actual conjunctive management policies, only mitigation policies. The bill sanctions replacement water schemes, monetary compensation, and other unsound and inadequate gambits as a means for resolving conflicts when a junior rights holder harms a senior rights holder. This creates a situation where the powerful and wealthy will have the ability to push out anyone they like. That is not acceptable.

Most importantly, the bill completely upends Nevada water law's prior appropriations doctrine. The provision threatens the due process rights and constitutional rights of Nevadans by stripping senior water rights holders of a property right and their priority date, which results in a taking. After a permit is granted, an affected party would have only 30 days to file an appeal in district court. What about three months after? What about three years? Where is the recourse?

Progressive water policy ensures that a permit cannot be granted if conflicts exist between senior water rights holders, domestic well owners, and the environment. Nevada already has that enshrined in law. Our problem is not with the law. Our problem is with overappropriation of our scarce water resources. [A letter was also provided ([Exhibit T](#)).]



**Laurel Saito, Nevada Water Program Director, The Nature Conservancy:**

A goal of our Nevada water program is to ensure that there is water for people and nature for future generations. Dating back to the 2017 Legislative Session, The Nature Conservancy has consistently recognized conjunctive management as essential to the appropriate management of Nevada's scarce water resources. We commend the State Engineer's office for introducing A.B. 51 to address this topic.

However, we have some concerns with some areas of the bill and cannot support A.B. 51 in its current form. The bill should require conjunctive management to be environmentally sound. Most groundwater dependent ecosystems in Nevada are sensitive to the interaction of surface water and groundwater and could benefit from proper conjunctive management. Despite the importance of conjunctive management to the environment, the proposed legislation does not include any consideration of how conjunctive management regulations would influence or change the amount of water available for the environment. The Nature Conservancy recommends that the legislation be amended to direct the State Engineer's office, when adopting conjunctive management regulations, to recognize among existing uses of water not only water rights that are senior to priority, but also water that is being used by, and is necessary for, the environment. We believe this can be achieved by requiring that conjunctive management of groundwater and surface water be done in a manner that is environmentally sound.

As I said earlier, we support applying the mitigation hierarchy to avoid, minimize, and then mitigate. The language in A.B. 51 specifically mentions mitigation several times but does not acknowledge or require the need to avoid and minimize effects first. The Nature Conservancy recommends including such language to ensure that mitigation is not applied before all opportunities are explored to avoid and minimize conflicts first.

Finally, replacement water provisions are not appropriate for conjunctive management for environmental resources.

In summary, we are interested in working with interested parties to improve the legislation and hope that amendments can be made along the lines of our recommendations. Thank you for the opportunity to speak. [A letter was also provided ([Exhibit U](#)).]

**Jeff Fontaine, Executive Director, Central Nevada Regional Water Authority and Humboldt River Basin Water Authority:**

We are opposed to A.B. 51. That said, both authorities do support conjunctive management and certainly recognize the need to work within that arena. We also agree with Director Crowell's comments regarding the need for more detailed studies to determine the interaction between groundwater and surface water. We also agree very strongly with the previous speakers regarding the need for additional stakeholder input. The State Engineer has been working on promulgating regulations for conjunctive management in the Humboldt River Basin for about 18 months, and commented about the Humboldt River Basin working group to help craft those regulations. I have been a member of that group for a short period of time. There are not a lot of members, but to the extent that conjunctive management may, or can,

work out in a river basin, that may be the test case, or it may not. At this point we believe that the proposed legislation is probably not necessary and certainly premature.

**Rebekah Stetson, Private Citizen, Reno, Nevada:**

I am here representing our communities and specifically our children. Assembly Bill 51 is simply the destruction of Nevada's landscape history and future. Sustainability is most commonly defined as a way of meeting our needs while not limiting the ability of future generations to meet their needs. This legislation seriously puts in question the ability of our children to meet their needs in future generations. As written, A.B. 51 seems to encourage mismanagement of our most precious and already overappropriated resources in the nation's driest state. While we are looking at the effects of climate change, we are still uncertain of how severe that will be. Voting yes would be a modern day repeat of the Owens Valley disaster. Let us choose not to consciously and intentionally destroy our resources for our children. Please vote no on A.B. 51.

**Anthony Sampson, Tribal Chairman, Pyramid Lake Paiute Tribe:**

We oppose A.B. 51 for the simple fact that we have been through so much with water wars for over 100 years. We are dealing with water quality and the amount of water that is being flowed. We even have problems with our domestic wells in our area, to where we are looking at critical components of our groundwater in the Wadsworth area. When it comes down to it, you give the State Engineer all the power. He can do anything he wants. We were having problems with water recruitment; when it is going to happen, we do not know. That is something that is a reality. In opposing this bill, I hope that you will listen to what other people have to say about this. Some oppose it, some are for it. It is not about one group of people, it is about sharing it. We are a major stakeholder, one of the oldest in the state of Nevada. Thank you for your time. I hope you make the right decision.

**Will Adler, representing Pyramid Lake Paiute Tribe:**

I would like to ditto Mr. Sampson's comments and get a loud opposition to A.B. 51 on the record.

**Chair Swank:**

Is there anyone in Elko who would like to testify in opposition? [There was no one.] Is there anyone who would like to testify in neutral? Seeing no one, are there any closing remarks?

**Bradley Crowell:**

I would like to thank the Committee's indulgence and everyone in the room for some very good discussion. In the 2017 Legislative Session, this body approved the language in NRS 533.024 subsection 1, paragraph (e), that says, "To manage conjunctively the appropriation, use, and administration of all waters of this State, regardless of the source of water." That is what we are attempting to do. We do not have any further direction or guidance on how to do that. Assembly Bill 51 is our best attempt to untangle and address a very complex problem. If there is the sentiment and the will to not look at our waters conjunctively, then we can choose to do that. If we are going to move forward and manage

our waters conjunctively, then we need guidance to implement that. I hope that at the end of this hearing there is at least a sentiment of continuing constructive dialogue.

To folks who mentioned domestic wells, I understand the sensitivity, but if we ignore the fact that domestic wells in certain places can affect groundwater and surface water users, we are pretending and are not playing in the realm of reality. We have to recognize that.

To the comments regarding the accuracy of perennial yield, we fully agree. We would love to have the resources to do that on as quick a basis as we can. Data is essential for anything we do here, no matter what we come up with.

To comments regarding localized solutions, that is absolutely our goal and intention. That is what we are doing in the Humboldt River; that is what we are doing on the Lower White River Flow System and the Muddy River in Clark and Lincoln Counties, which we are happy to discuss further if folks are interested.

To comments regarding keeping the status quo, I would ask if that means you do not see any problems now or in the future with how our water laws allow us to administer and manage water.

I appreciate the comments regarding the importance of conjunctive management as the proper approach that reflects science and data, and I also appreciate the comments regarding the fact that more upfront work is needed. We agree. The system is not always designed to allow us to do that, but going forward, we certainly have no opposition and hope we have the support and participation of everyone in doing that.

To comments regarding monitoring, management, and mitigation as a last resort, that is absolutely our intention. Mitigation is not the preferred outcome, nor is it the first solution. Through monitoring and management we hope to never have to do mitigation, but if you simply want to ignore the need for mitigation after monitoring and management has not shown to be able to manage the situation, then what are we left to do?

This is a long way of saying I appreciate everyone's comments and hope we can have some additional guidance from this body as well as the stakeholders in the room.

**Micheline Fairbank:**

I want to build upon one of the elements that was discussed—that is that there is a desire and emphasis for a localized solution. That is absolutely what the structure of this bill is intended to do. The first part of A.B. 51 allows and directs our office to establish conjunctive management regulations and to allow for the authorization to adopt conjunctive management programs. The second part of the bill references what a conjunctive management program may or may not include. The reality is, the Humboldt River situation and process has been partly instructive and guiding with regards to the language, but the Humboldt River is not the only system that we are actively engaged in with this process. It certainly is not representative of the state. We understand that each system is unique and has to have its own

independent and individualized regulation and program. That is what this bill is conceptualized to do. What is going to work on the Humboldt River, ultimately, is not going to be appropriate for the Lower White River Flow System and the management of that interconnected water system. That is the idea; we need the ability, we need direction, and we need to have that from this body because right now we are left with very little.

**Chair Swank:**

Thank you for all the work done this evening. I will close the hearing on Assembly Bill 51. [Also provided and not mentioned were ([Exhibit V](#) and [Exhibit W](#)).] I will open it up for public comment. Seeing no one, we are adjourned [at 7:20 p.m.].

RESPECTFULLY SUBMITTED:

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Nancy Davis  
Committee Secretary

APPROVED BY:

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Assemblywoman Heidi Swank, Chair

DATE: \_\_\_\_\_

## EXHIBITS

[Exhibit A](#) is the Agenda.

[Exhibit B](#) is the Attendance Roster.

[Exhibit C](#) is a copy of a PowerPoint presentation titled "Division of Water Resources Overview," dated February 27, 2019, presented by Tim Wilson, P.E., Acting State Engineer and Administrator, Division of Water Resources, State Department of Conservation and Natural Resources.

[Exhibit D](#) is written testimony dated February 27, 2019, presented by Tim Wilson, P.E., Acting State Engineer and Administrator, Division of Water Resources, State Department of Conservation and Natural Resources regarding [Assembly Bill 30](#).

[Exhibit E](#) material submitted by Rupert Steele, Chairman, Confederated Tribes of the Goshute Reservation, Ibadah, Utah, consisting of the following:

1. A letter to Assemblyman Ellison, dated February 26, 2019, in opposition to [Assembly Bill 30](#) and [Assembly Bill 51](#).
2. A document titled "Talking Points on Water."
3. A document titled "Swamp Cedars Massacre Site," dated September 19, 2016, offered by the Confederated Tribes of the Goshute Reservation.

[Exhibit F](#) is written testimony dated February 27, 2019, presented by Jake Tibbitts, Natural Resources Manager, Department of Natural Resources, Eureka County, in opposition to [Assembly Bill 30](#) and [Assembly Bill 51](#).

[Exhibit G](#) is a letter dated February 25, 2018, to Chair Swank, authored by Kyle Roerink, Executive Director, Great Basin Water Network, in opposition to [Assembly Bill 30](#).

[Exhibit H](#) is a letter dated February 26, 2019, to Chair Swank, authored by Patrick Donnelly, Nevada State Director, Center for Biological Diversity, in opposition to [Assembly Bill 30](#).

[Exhibit I](#) is a letter dated February 27, 2019, to the Assembly Committee on Natural Resources, Agriculture and Mining, authored by Tobi Tyler, Executive Committee Member, Toiyabe Chapter, Sierra Club, in opposition to [Assembly Bill 30](#).

[Exhibit J](#) is a letter dated February 26, 2019, to Chair Swank, authored by Juan Palma, Nevada State Director, The Nature Conservancy, presented by Laurel Saito, Nevada Water Program Director, The Nature Conservancy in opposition to [Assembly Bill 30](#).

[Exhibit K](#) is a letter dated February 26, 2019, to Chair Swank and Members of the Assembly Committee on Natural Resources, Agriculture, and Mining, authored by Mark Butler, Executive Council Member, Coalition to Protect America's National Parks, et al., in opposition to [Assembly Bill 30](#).

[Exhibit L](#) is a letter dated February 27, 2019, to the Assembly Committee on Natural Resources, Agriculture, and Mining, authored by John Hadder, Director, Great Basin Resource Watch, presented by Susan Juetten, Private Citizen, Reno, Nevada, in opposition to [Assembly Bill 30](#).

[Exhibit M](#) is a letter dated February 26, 2019, to Chair Swank, authored by Richard Howe, Chairman, White Pine County Commission, in opposition to [Assembly Bill 30](#) and [Assembly Bill 51](#).

[Exhibit N](#) is a letter dated February 26, 2019, to the Assembly Committee on Natural Resources, Agriculture, and Mining, authored by Simeon Herskovits and Iris Thornton on behalf of Great Basin Water Network, submitted by Advocates for Community and Environment, in opposition to [Assembly Bill 30](#) and [Assembly Bill 51](#).

[Exhibit O](#) is a compilation of material in opposition to [Assembly Bill 30](#), consisting of the following:

1. A letter to Members of the Assembly Committee on Natural Resources, Agriculture, and Mining, written by Christine Saunders, Policy Director, Progressive Leadership Alliance of Nevada.
2. A letter dated February 25, 2018, to Chair Swank, authored by Tick Segerblom, Commissioner, Board of County Commissioners, Clark County.
3. A letter dated February 25, 2018, to Chair Swank, authored by Meghan Wolf, Environmental Activism Manager, Patagonia.
4. A letter dated February 26, 2019, to Nevada State Assembly, written by Dave Mendiola, Humboldt County Manager on behalf of the Humboldt County Commission.
5. A statement written by Delaine Spilsbury, Private Citizen, McGill, Nevada.

[Exhibit P](#) is written testimony dated February 27, 2019, presented by Tim Wilson, P.E., Acting State Engineer and Administrator, Division of Water Resources, State Department of Conservation and Natural Resources, regarding [Assembly Bill 51](#).

[Exhibit Q](#) is a copy of a PowerPoint presentation titled "[Assembly Bill 51](#)" dated February 27, 2019, presented by Tim Wilson, P.E., Acting State Engineer and Administrator, Division of Water Resources, State Department of Conservation and Natural Resources.

[Exhibit R](#) is a letter dated February 25, 2018, to Chair Swank, authored by Kyle Roerink, Executive Director, Great Basin Water Network, in opposition to [Assembly Bill 51](#).

[Exhibit S](#) is a letter dated February 26, 2019, to Chair Swank, authored by Patrick Donnelly, Nevada State Director, Center for Biological Diversity, in opposition to [Assembly Bill 51](#).

[Exhibit T](#) is a letter dated February 27, 2019, to Assembly Committee on Natural Resources, Agriculture, and Mining, authored by Tobi Tyler, Executive Committee Member, Toiyabe Chapter, Sierra Club, in opposition to [Assembly Bill 51](#).

[Exhibit U](#) is a letter dated February 26, 2019, to Chair Swank, authored by Juan Palma, Nevada State Director, The Nature Conservancy, presented by Laurel Saito, Nevada Water Program Director, The Nature Conservancy, in opposition to [Assembly Bill 51](#).

Exhibit V is a letter dated February 26, 2019, to Chair Swank and Members of the Assembly Committee on Natural Resources, Agriculture, and Mining, authored by Mark Butler, Executive Council Member, Coalition to Protect America's National Parks, et al., in opposition to [Assembly Bill 51](#).

[Exhibit W](#) is a compilation of letters in opposition to [Assembly Bill 51](#), consisting of the following:

1. A letter to Members of the Assembly Committee on Natural Resources, Agriculture, and Mining, authored by Christine Saunders, Policy Director, Progressive Leadership Alliance of Nevada.
2. A letter dated February 25, 2018, to Chair Swank, authored by Tick Segerblom, Commissioner, Board of County Commissioners, Clark County.
3. A letter dated February 25, 2018, to Chair Swank, authored by Meghan Wolf, Environmental Activism Manager, Patagonia.
4. A letter dated February 27, 2019, to the Assembly Committee on Natural Resources, Agriculture, and Mining, authored by John Hadder, Director, Great Basin Resource Watch.

# EXHIBIT 7

# EXHIBIT 7



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**A.B. 51**

ASSEMBLY BILL NO. 51—COMMITTEE ON NATURAL  
RESOURCES, AGRICULTURE, AND MINING

(ON BEHALF OF THE DIVISION OF WATER RESOURCES  
OF THE STATE DEPARTMENT OF  
CONSERVATION AND NATURAL RESOURCES)

PREFILED NOVEMBER 18, 2018

Referred to Committee on Natural Resources,  
Agriculture, and Mining

SUMMARY—Revises provisions governing the management of  
water. (BDR 48-213)

FISCAL NOTE: Effect on Local Government: May have Fiscal Impact.  
Effect on the State: Yes.

CONTAINS UNFUNDED MANDATE (§ 4)  
(NOT REQUESTED BY AFFECTED LOCAL GOVERNMENT)

~

EXPLANATION – Matter in *bolded italics* is new; matter between brackets ~~omitted material~~ is material to be omitted.

AN ACT relating to water; requiring the State Engineer to adopt  
regulations relating to the conjunctive management of  
groundwater and surface water; authorizing the State  
Engineer to impose certain special assessments related to  
a program for the conjunctive management of  
groundwater and surface water; providing that certain  
water rights are not subject to abandonment or forfeiture;  
and providing other matters properly relating thereto.

**Legislative Counsel’s Digest:**

1 Existing law declares that it is the policy of this State to manage conjunctively  
2 all waters of this State, regardless of the source of water. (NRS 533.024) **Section 3**  
3 of this bill requires the State Engineer to adopt regulations related to the  
4 conjunctive management of groundwater and surface water. The regulations may  
5 include, without limitation: (1) requirements or guidelines for establishing  
6 mitigation plans; (2) the creation of a program for the conjunctive management of  
7 groundwater and surface water in a particular hydrographic basin to mitigate  
8 conflicts between groundwater and surface water users; and (3) any other provision  
9 necessary to conjunctively manage groundwater and surface water, determine the



10 amount of conflict between groundwater and surface water users or resolve a  
11 conflict between groundwater and surface water users.

12 **Section 4** of this bill authorizes the State Engineer to levy certain special  
13 assessments related to a program for the conjunctive management of groundwater  
14 and surface water. **Section 7** of this bill provides that the partial abatements of  
15 property taxes does not apply to any such special assessment, consistent with other  
16 assessments levied against groundwater and surface water users.

17 **Section 5** of this bill provides that a right to groundwater or surface water that  
18 is not being used because of a program for the conjunctive management of  
19 groundwater or surface water is not subject to forfeiture or abandonment for as long  
20 as the program is in effect.

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THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN  
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 **Section 1.** Chapter 533 of NRS is hereby amended by adding  
2 thereto the provisions set forth as sections 2 to 5, inclusive, of this  
3 act.

4 **Sec. 2.** *As used in sections 2 to 5, inclusive, of this act,*  
5 *“groundwater user” includes, without limitation, an owner of a*  
6 *domestic well.*

7 **Sec. 3. 1.** *The State Engineer shall adopt regulations*  
8 *related to the conjunctive management of groundwater and*  
9 *surface water. In adopting such regulations, the State Engineer*  
10 *must recognize existing uses of water while protecting water rights*  
11 *that are senior in priority.*

12 *2. The regulations adopted pursuant to this section may*  
13 *include, without limitation:*

14 *(a) Requirements or guidelines for establishing a mitigation*  
15 *plan to address conflicts between groundwater and surface water*  
16 *users.*

17 *(b) The creation of a program for the conjunctive management*  
18 *of groundwater and surface water in a hydrographic basin in the*  
19 *State in order to mitigate conflicts between groundwater and*  
20 *surface water users.*

21 *(c) Any other provision that the State Engineer finds necessary*  
22 *to conjunctively manage groundwater and surface water,*  
23 *determine the amount of conflict between groundwater and*  
24 *surface water users or resolve a conflict between groundwater and*  
25 *surface water users.*

26 **Sec. 4. 1.** *If the State Engineer creates a program for the*  
27 *conjunctive management of groundwater and surface water in a*  
28 *hydrographic basin, the State Engineer:*

29 *(a) Is not required to curtail a groundwater user who has a*  
30 *conflict with a surface water user whose water right is senior in*  
31 *priority if the State Engineer finds that curtailment will not be*



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1 *effective to provide water for the beneficial use of the surface*  
2 *water user.*

3 *(b) May require a groundwater user to furnish replacement*  
4 *water to a surface water user so long as the replacement water is*  
5 *of sufficient quality.*

6 *(c) May levy a special assessment annually or at such times as*  
7 *needed against the taxable property of a groundwater user for the*  
8 *purpose of providing compensation for a conflict or injurious*  
9 *depletion of a surface water user whose water right is senior in*  
10 *priority to the groundwater user's water right or protectable*  
11 *interest in a domestic well, as applicable. Any such special*  
12 *assessment must be proportionate to the amount of conflict caused*  
13 *by the groundwater user to the surface water user whose water*  
14 *right is senior in priority.*

15 *(d) May levy a special assessment annually or at such times as*  
16 *needed against the taxable property of water users in the basin to*  
17 *pay for the expenses of administering the program.*


18 *2. Any charge or fee levied pursuant to subsection 1 must be:*

19 *(a) Collected on the tax roll in the same manner, by the same*  
20 *persons, and at the same time as the county's general taxes. Such*  
21 *charge or fee is a lien against the property.*

22 *(b) Accounted for separately and may only be used for the*  
23 *purposes described in subsection 1.*

24 **Sec. 5.** *If the State Engineer creates a program for the*  
25 *conjunctive management of groundwater and surface water in a*  
26 *hydrographic basin, a right to groundwater or surface water that*  
27 *is not being used because of the program is not subject to a*  
28 *determination of abandonment or forfeiture for as long as the*  
29 *program is in effect.*

30 **Sec. 6.** NRS 534.090 is hereby amended to read as follows:

31 534.090 1. Except as otherwise provided in this section    
32 *and section 5 of this act*, failure for 5 successive years after  
33 April 15, 1967, on the part of the holder of any right, whether it is  
34 an adjudicated right, an unadjudicated right or a right for which a  
35 certificate has been issued pursuant to NRS 533.425, and further  
36 whether the right is initiated after or before March 25, 1939, to use  
37 beneficially all or any part of the underground water for the purpose  
38 for which the right is acquired or claimed, works a forfeiture of both  
39 undetermined rights and determined rights to the use of that water to  
40 the extent of the nonuse.

41 2. If the records of the State Engineer or any other documents  
42 obtained by or provided to the State Engineer indicate 4 or more  
43 consecutive years of nonuse of all or any part of a water right which  
44 is governed by this chapter:



1 (a) The State Engineer shall notify the owner of the water right,  
2 as determined in the records of the Office of the State Engineer, by  
3 registered or certified mail of the nonuse and that the owner has 1  
4 year after the date of the notice of nonuse in which to use the water  
5 right beneficially and to provide proof of such use to the State  
6 Engineer or apply for relief pursuant to subsection 3 to avoid  
7 forfeiting the water right.

8 (b) If, after 1 year after the date of the notice of nonuse pursuant  
9 to paragraph (a), proof of resumption of beneficial use is not filed in  
10 the Office of the State Engineer, the State Engineer shall, unless the  
11 State Engineer has granted a request to extend the time necessary to  
12 work a forfeiture of the water right, send a final notice to the owner  
13 of the water right, as determined in the records of the Office of the  
14 State Engineer, by registered or certified mail, that the water right is  
15 held for forfeiture. If the owner of the water right, within 30 days  
16 after the date of such final notice, fails to file the required proof of  
17 resumption of beneficial use or an application for an extension of  
18 time to prevent forfeiture, the State Engineer shall declare the right,  
19 or the portion of the right not returned to beneficial use, forfeited.  
20 The State Engineer shall send notice of the declaration of forfeiture,  
21 by registered or certified mail, to the owner of record, as determined  
22 in the records of the Office of the State Engineer, of the water right  
23 that has been declared forfeited.

24 (c) If, after receipt of a notice of the declaration of forfeiture  
25 pursuant to paragraph (b), the owner of record of the water right  
26 fails to appeal the ruling in the manner provided for in NRS  
27 533.450, and within the time provided for therein, the forfeiture  
28 becomes final. Upon the forfeiture of the water right, the water  
29 reverts to the public and is available for further appropriation,  
30 subject to existing rights.

31 3. The State Engineer may, upon the request of the holder of  
32 any right described in subsection 1, extend the time necessary to  
33 work a forfeiture under subsection 2 if the request is made before  
34 the expiration of the time necessary to work a forfeiture. Except as  
35 otherwise provided in subsection 4, the State Engineer may grant,  
36 upon request and for good cause shown, any number of extensions,  
37 but a single extension must not exceed 1 year. In determining  
38 whether to grant or deny a request, the State Engineer shall, among  
39 other reasons, consider:

40 (a) Whether the holder has submitted proof and evidence that  
41 the holder is proceeding in good faith and with reasonable diligence  
42 to resume use of the water beneficially for the purpose for which the  
43 holder's right is acquired or claimed;

44 (b) The number of years during which the water has not been  
45 put to the beneficial use for which the right is acquired or claimed;



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1 (c) Any economic conditions or natural disasters which made  
2 the holder unable to put the water to that use;

3 (d) Whether the water right is located in a basin within a county  
4 under a declaration of drought by the Governor, United States  
5 Secretary of Agriculture or the President of the United States;

6 (e) Whether the holder has demonstrated efforts to conserve  
7 water which have resulted in a reduction in water consumption;

8 (f) Whether the water right is located in a basin that has been  
9 designated as a critical management area by the State Engineer  
10 pursuant to subsection 7 of NRS 534.110;

11 (g) The date of priority of the water right as it relates to the  
12 potential curtailment of water use in the basin;

13 (h) The availability of water in the basin, including, without  
14 limitation, whether withdrawals of water consistently exceed the  
15 perennial yield of the basin; and

16 (i) Any orders restricting use or appropriation of water in the  
17 basin.

18 ➤ The State Engineer shall notify, by registered or certified mail,  
19 the owner of the water right, as determined in the records of the  
20 Office of the State Engineer, of whether the State Engineer has  
21 granted or denied the holder's request for an extension pursuant to  
22 this subsection. If the State Engineer grants an extension pursuant to  
23 this subsection and, before the expiration of that extension, proof of  
24 resumption of beneficial use or another request for an extension is  
25 not filed in the Office of the State Engineer, the State Engineer shall  
26 send a final notice to the owner of the water right, by registered or  
27 certified mail, that the water right will be declared forfeited if the  
28 owner of the water right fails to file the required proof of  
29 resumption of beneficial use or an application for an extension of  
30 time to prevent forfeiture within 30 days after the date of the final  
31 notice. If the owner of the water right fails to file the required proof  
32 of resumption of beneficial use or an application for an extension of  
33 time to prevent forfeiture within 30 days after the date of such final  
34 notice, the State Engineer shall declare the water right, or the  
35 portion of the right not returned to beneficial use, forfeited.

36 4. If the State Engineer grants an extension pursuant to  
37 subsection 1 in a basin:

38 (a) Where withdrawals of groundwater consistently exceed the  
39 perennial yield of the basin; or

40 (b) That has been designated as a critical management area by  
41 the State Engineer pursuant to subsection 7 of NRS 534.110,

42 ➤ a single extension must not exceed 3 years, but any number of  
43 extensions may be granted to the holder of such a right.




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1 5. The failure to receive a notice pursuant to subsection 2 or 3  
2 does not nullify the forfeiture or extend the time necessary to work  
3 the forfeiture of a water right.

4 6. A right to use underground water whether it is vested or  
5 otherwise may be lost by abandonment. If the State Engineer, in  
6 investigating a groundwater source, upon which there has been a  
7 prior right, for the purpose of acting upon an application to  
8 appropriate water from the same source, is of the belief from his or  
9 her examination that an abandonment has taken place, the State  
10 Engineer shall so state in the ruling approving the application. If,  
11 upon notice by registered or certified mail to the owner of record  
12 who had the prior right, the owner of record of the prior right fails to  
13 appeal the ruling in the manner provided for in NRS 533.450, and  
14 within the time provided for therein, the alleged abandonment  
15 declaration as set forth by the State Engineer becomes final.

16 **Sec. 7.** NRS 361.47111 is hereby amended to read as follows:

17 361.47111 "Ad valorem taxes" does not include any  
18 assessments levied pursuant to NRS 533.190, 533.285 or 534.040   
19 *or section 4 of this act.*

20 **Sec. 8.** The provisions of NRS 354.599 do not apply to any  
21 additional expenses of a local government that are related to the  
22 provisions of this act.

23 **Sec. 9.** This act becomes effective:

24 1. Upon passage and approval for the purpose of adopting  
25 regulations and performing any other administrative tasks that are  
26 necessary to carry out the provisions of this act; and

27 2. On July 1, 2019, for all other purposes.



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1 be -- we need to be certain, and particularly in this flow  
2 system where we're already right at the limit of what we  
3 think, you know, we can pump just based on the Warm Springs  
4 West.  
5 MR. SULLIVAN: Okay.  
6 EXAMINATION  
7 By Ms. Barnes:  
8 Q. Michelle Barnes for the record. On slide 18 you  
9 show a figure with I believe the Division 4 Climate. And I  
10 had a question for you. In your opinion and experience do  
11 you think it's better to identify impacts of climate and  
12 precip using the annual totals or, you know, intensity and  
13 duration of specific storms, understanding we have data  
14 limitations with that?  
15 A. We've had evidence presented in previous hearings  
16 and in this hearing a little bit about that very issue. And  
17 there's been, I think, good evidence presented that a winter  
18 season precipitation may be a better indicator than annual  
19 precipitation just in terms of the observed effect on water  
20 levels.  
21 MS. BARNES: Thank you.  
22 HEARING OFFICER FAIRBANK: Ms. Cooper.  
23 ///  
24 ///

Page 1810

1 EXAMINATION  
2 By Ms. Cooper:  
3 Q. Hi. Christi Cooper for the record. Mr. Felling,  
4 I have a couple of questions, please. On slide four of your  
5 presentation, you overlaid what you agree with as evidence  
6 for the Kane Springs range front fault. Is that true?  
7 A. That's correct.  
8 Q. Sorry. I didn't hear the response.  
9 A. Yes.  
10 Q. Okay. Thank you. What is your opinion on the  
11 so-called highway fault?  
12 A. I'll just have to say that I didn't really  
13 research it, so I really don't have an opinion.  
14 Q. Okay. So going to slide 31, please. You say in  
15 your presentation that water levels in general in the Lower  
16 White River Flow System have continued to decline in most  
17 areas. Could you just walk me through these five hydrographs  
18 to tell me your opinion on each one and what you think?  
19 A. Well, I can't read my slide, so I'll have to look  
20 up here. And, as I recall, the upper -- the upper hydrograph  
21 I believe is Coyote Spring Valley. And I just look at the  
22 last four years since the recovery of the Order 1169 aquifer  
23 test. And I think that there is a decline there. From this  
24 figure, the scale is really not good for making these small

Page 1811

1 determinations. But we've also seen hydrographs that other  
2 scales saw. So I'm actually using that knowledge to make  
3 this description. So we have Coyote Spring Valley. I think  
4 we see a continued decline in water levels.  
5 The next panel down is EH-4. We've had that  
6 discussion. Hard to see a decline over the last few years.  
7 The next one is TH-2. TH-2 compares so closely  
8 with EH-4 that it's scary. I don't know that I see a decline  
9 in the last few years at TH-2. But I think we have looked at  
10 other California Wash levels and we still see that decline.  
11 The next one down that's Garnet Valley. I don't  
12 think there's any question that we see a continued decline  
13 there.  
14 And the last one at the very bottom, that's  
15 BM-DL-2. I actually had it in my presentation, BM-DL-2 and  
16 EH-4 hydrograph on the same figure. And one can really see  
17 they separate after the Order 1169 aquifer test where BM-DL-2  
18 is continuing to decline. Even if you don't see it that well  
19 here, when you place this hydrograph, BM-DL-2, on top of  
20 EH-4, you can really see that they separate after the test.  
21 And it's still declining.  
22 Q. So follow up to the same question, GV-1 and  
23 BM-DL-2 still declining, what is your opinion on the reason  
24 for that?

Page 1812

1 A. I think that water levels are declining  
2 everywhere because of groundwater pumping.  
3 Q. Carbonate and alluvial pumping?  
4 A. I don't think that alluvial pumping is having any  
5 effect on the carbonate aquifer, at least not in the Muddy  
6 River Springs area. I think that Coyote Spring Valley it  
7 could be a little more complicated.  
8 Q. Okay. My last question kind of going and tying  
9 all of this in, so in your report you talk about this  
10 carbonate pumping rate of seven to 8,000, maybe you mentioned  
11 differently in your presentation, but something similar to  
12 that. Do you have an opinion on your -- the total alluvial  
13 and carbonate pumping that should -- that should be nearly  
14 steady state as you would say?  
15 A. Well, in terms of pumping from the alluvium in  
16 the Muddy River Springs area, evidence is that that pumping  
17 doesn't affect the Muddy River Springs but it does affect the  
18 Muddy River. And the evidence is also very clear that it  
19 captures river flow. And to the extent of, you know, how  
20 much you can pump, I think you could pump as much as you're  
21 prepared to mitigate. I think mitigation ultimately is  
22 necessary.  
23 Q. Well, like, the 9,000 in the order from, total,  
24 the Lower White River from 2017, do you believe that the

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1 total number needs to be drastically lower than that?  
2 A. I'm sorry. I didn't really understand that  
3 question.  
4 Q. So in the Order 1303 there's the appendix table  
5 that shows in 2017 there was a little over 9,000 total  
6 acre-feet --  
7 A. Yes.  
8 Q. -- of pumpage in the Lower White River. So would  
9 your number total be drastically lower than that or is  
10 that -- is that number okay at this point?  
11 A. Well, there's two areas pumped. So, again, the  
12 pumping is from the alluvium. It shows -- conflicts in very  
13 short order with senior certificated rights. And to the  
14 extent that that conflicts with those rights, ultimately I  
15 think it may need to be mitigated.  
16 Carbonate pumping also will need to be mitigated  
17 to the extent of that conflict. Like I said, I don't think  
18 you can pump anything without basically capturing river flow.  
19 So, to the extent that there is that conflict, it would need  
20 to be mitigated.  
21 I think ultimately the amount of water that can  
22 be pumped isn't so much a function of conflict. It's a  
23 function of what effect will it have on habitat of the Moapa  
24 dace. So to that extent I don't know. I don't think we have

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1 that number yet. We have an estimate from SNWA that's it's  
2 four to 6,000. We have my evidence that suggests it might be  
3 a bit more. And I think we need to observe the system longer  
4 and try to make the right call.  
5 MS. COOPER: Thank you. That's all.  
6 HEARING OFFICER FAIRBANK: Okay. We have a  
7 little bit of time for recross. Coyote Springs Investment,  
8 do you have any recross? Seeing no.  
9 US Fish and Wildlife Service? Seeing none.  
10 National Park Service? None.  
11 Moapa Band? None.  
12 Southern Nevada Water Authority, Las Vegas Valley  
13 Water District?  
14 MR. TAGGART: One.  
15 HEARING OFFICER FAIRBANK: That's it. You get  
16 one.  
17 MR. TAGGART: Did I just say that? How will I  
18 build this in to one question?  
19 HEARING OFFICER FAIRBANK: To be fair, I'll give  
20 you four minutes.  
21 MR. TAGGART: I don't think I'll need that much  
22 time.  
23 ///  
24 ///

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1 CROSS-EXAMINATION  
2 By Mr. Taggart:  
3 Q. I just want to pick up on what's on the screen,  
4 Figure 5-5. You were asked about Garnet. And that was  
5 compared to Muddy River Springs area. There is a  
6 significantly different pumping stress in those basins in  
7 recent years, specifically in Garnet. There's continuing to  
8 be pumping for power generation whereas in Muddy River  
9 Springs area there's been a considerable decrease in pumping;  
10 right?  
11 A. Well, as I recall, pumping in the Muddy River  
12 Springs area decreased last year. That's carbonate pumping.  
13 And I'm not -- I'm addressing alluvial pumping. But in  
14 Garnet Valley I think the number has been -- it's bounced  
15 around a little bit. But I think it's been fairly steady the  
16 last few years or several years. There was an increase maybe  
17 four years ago. But since then I think it's been relatively  
18 steady.  
19 Q. Okay. And in your report you make a statement  
20 that picks up on some of the things that were just being  
21 discussed. This is on page eight. And it has to do with  
22 depletions of the Muddy River. It says a depletion of the  
23 Muddy River with this amount of pumping, and it's reflecting  
24 the seven to 8,000 acre-feet of carbonate pumping that you

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1 just talked about. The depletion of the Muddy River with  
2 this amount of pumping appears to be on the order of 2300 to  
3 3750 acre-feet and is not increasing. And my question is,  
4 one, is that -- would you agree with me that that value is,  
5 even if at steady state, that would be a consistent impact or  
6 conflict with water rights on the Muddy River and that it has  
7 to be mitigated?  
8 A. I do agree.  
9 MR. TAGGART: All right. Thank you.  
10 HEARING OFFICER FAIRBANK: Moapa Valley Water  
11 District? Seeing no questions.  
12 Lincoln County, Vidler? No further questions.  
13 City of North Las Vegas?  
14 MS. URE: No questions.  
15 HEARING OFFICER FAIRBANK: Center for Biological  
16 Diversity? No questions.  
17 Georgia Pacific Republic? No further questions.  
18 Nevada Cogeneration Associates? Seeing no  
19 questions.  
20 Muddy Valley Irrigation Company? No questions.  
21 And Bedroc?  
22 MS. URE: No questions.  
23 HEARING OFFICER FAIRBANK: No questions, okay.  
24 And then I'll just open it back up to Division of Water



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1 Resources and staff.  
2 EXAMINATION  
3 By Mr. Sullivan:  
4 Q. You mentioned in your testimony about using EH-4  
5 as a trigger and the possibility that it's, in a sense, too  
6 late to use that as a trigger because it's too close to the  
7 area to be protected. But looking at the hydrographs and the  
8 close hydraulic connectivity throughout the region, there  
9 is -- EH-4 is no closer in a sense than, say, TH-2 or some  
10 other sites. So do you have any more thoughts on that  
11 comment to elaborate on the effective triggers?  
12 A. So I think that EH-4 or Warm Springs West flow  
13 and the trigger at 3.2 would still work under the current  
14 pumping regime whether -- I think all the wells that we  
15 currently pump from they were in areas that had an immediate  
16 effect or impact seen from the Order 1169 pumping test. And  
17 I think the reverse is also true. That pumping affects the  
18 Muddy River Springs area in a relatively and equal amount of  
19 time.  
20 That said, I think that pumping in less  
21 well-connected areas, it might be appropriate to have  
22 triggers that are wells that measure water levels that are  
23 between Warm Springs West and where those pumping centers  
24 might be so that you then do have an advanced warning instead

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1 of waiting until the effects are seen at Warm Springs West,  
2 at which time turning off the wells may not have an immediate  
3 effect and those effects might be delayed for some period of  
4 time.  
5 So that you want to put your -- you want to put  
6 your trigger level or your monitoring point somewhere between  
7 that pumping in Warm Springs. Did that answer your question?  
8 MR. SULLIVAN: Yes. Thank you.  
9 HEARING OFFICER FAIRBANK: Okay. We'll go ahead  
10 and open it up for redirect if there's any further. So no  
11 further redirect.  
12 All right. Well, then we will go ahead and  
13 conclude the taking of presentation and information from the  
14 participants in these proceedings. And so we'll go ahead and  
15 address a few administrative matters.  
16 First, we -- And one of those administrative  
17 matter is, Mr. Felling, you were proffered as an expert,  
18 without objection. And so on that basis you've been  
19 qualified as an expert in these proceedings. And so that  
20 qualification will be limited to these proceedings based upon  
21 the fact that there was no objection.  
22 So we also want to address that there is a new  
23 exhibit, Nevada State Engineer Exhibit 335, which is an Excel  
24 solver for the White River Flow System. That was the version

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1 of the solver used by and replied upon by the Division of  
2 Water Resources and the State Engineer in Ruling 6165 through  
3 6167. This exhibit serves to replace Nevada State Engineer  
4 Exhibit 222, which we've removed, as that was an earlier  
5 version of the Excel solver but it was not the actual solver  
6 utilized by the Division of Water Resources in making those  
7 decisions relating to those particular rulings.  
8 Additionally, the sign-in sheets from these  
9 proceedings for the last ten days will be marked as Nevada  
10 State Engineer Exhibits 336 through 346, which will include  
11 today's sign-in sheet from Las Vegas.  
12 And then also all the presentations, all the  
13 power point presentations that were provided as demonstrative  
14 exhibits, will be on line in the State Engineer's website at  
15 water dot NV dot gov under the news tab. And then there  
16 under the Lower White River Flow System tab. And then it  
17 will be contained within the folder Order 1303 hearing  
18 documents.  
19 And, finally, there were requests that, by the  
20 Southern Nevada Water Authority and Las Vegas Valley Water  
21 District, that were joined by the Coyote Springs Investments  
22 participants and the Nevada Energy seeking permission for the  
23 State Engineer to entertain written closing statements and  
24 proposed orders.

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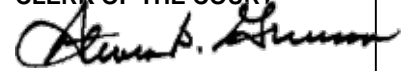
1 So the State Engineer will accept written closing  
2 statements, not to exceed 20 pages, from the participants.  
3 And the State Engineer will further accept written public  
4 comment from members of the public whom have not participated  
5 in these proceedings. And any closing statement or written  
6 public comment must be received by the State Engineer by the  
7 close of business or 5:00 p.m. on Monday, November 4th, 2019.  
8 So that's essentially 30 days from today. The State Engineer  
9 is got going to solicit or accept proposed draft orders.  
10 MR. HERREMA: Thank you. One question on that.  
11 Do we know when the transcripts will be final?  
12 HEARING OFFICER FAIRBANK: I anticipate the  
13 transcripts will be final -- I don't have a final question or  
14 final answer to that question, but I estimate that they  
15 should be available within the next couple of weeks. And it  
16 sounds like it might be as soon as the end of next week.  
17 MR. HERREMA: Thank you.  
18 MR. TAGGART: Would the State Engineer be willing  
19 to consider at all 60 days? We have an argument in Ely of  
20 the groundwater project on the 15th of November that we're  
21 going to be spending a lot of time getting ready for. And so  
22 I would just like to make that request.  
23 HEARING OFFICER FAIRBANK: That will be fine.  
24 We'll be similarly-situated. We're not going to be writing

1 anything.  
 2 MR. DONNELLY: Did you say there's archive video  
 3 available that I can look up?  
 4 HEARING OFFICER FAIRBANK: Yes. So the video  
 5 archives from these proceedings are also available on that  
 6 same folder where the power point presentations will be  
 7 located. So that's the LWRFS tab under the news tab in the  
 8 Order 1303 hearing documents folder. And that document is  
 9 titled LWRFS recording links. And it's a PDF document. And  
 10 then imbedded in the PDF document are hyperlinks to the video  
 11 recordings.  
 12 And 60 days. So that will extend the time for  
 13 the submission of the written closing statements to December  
 14 3rd. So close of business on December 3rd. And we'll do  
 15 that for both written public comment as well as those written  
 16 closing statements.  
 17 And so, finally, before we conclude this  
 18 proceeding, we will go ahead and open it to public comment.  
 19 Ask we'll start by asking Ms. Christi Cooper in Las Vegas if  
 20 there is anyone present in Las Vegas for public comment.  
 21 MS. COOPER: There is no one present.  
 22 HEARING OFFICER FAIRBANK: Is there anyone  
 23 present in Carson City for public comment? Not seeing  
 24 anybody jumping up for such.

1 Then we will go ahead and conclude these  
 2 proceedings. And we thank everyone for their cooperation and  
 3 participation and we appreciate the time. Thank you.  
 4 (Hearing concluded at 11:18 a.m.)  
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1 STATE OF NEVADA )  
 )ss.  
 2 COUNTY OF WASHOE )  
 3  
 4 I, CHRISTY Y. JOYCE, Official Certified Court  
 5 Reporter for the State of Nevada, Department of Conservation  
 6 and Natural Resources, Division of Water Resources, do hereby  
 7 certify:  
 8 That on Friday, the 4th day of October, 2019,  
 9 I was present at the Legislative Counsel Bureau, Carson City,  
 10 Nevada, for the purpose of reporting in verbatim stenotype  
 11 notes the within-entitled public hearing;  
 12 That the foregoing transcript, consisting of  
 13 pages 1713 through 1822, inclusive, includes a full, true and  
 14 correct transcription of my stenotype notes of said public  
 15 hearing.  
 16  
 17 Dated at Reno, Nevada, this 4th day of  
 18 October, 2019.  
 19  
 20  
 21  
 22  
 23  
 24

CHRISTY Y. JOYCE, CCR #625



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**DISTRICT COURT  
CLARK COUNTY, NEVADA**

10 LAS VEGAS VALLEY WATER  
11 DISTRICT, and SOUTHERN NEVADA  
12 WATER AUTHORITY,

13 Petitioners,

14 vs.

15 ADAM SULLIVAN, P.E., Nevada State  
16 Engineer, DIVISION OF WATER  
17 RESOURCES, DEPARTMENT OF  
18 CONSERVATION AND NATURAL  
19 RESOURCES,

20 Respondents.

Case No. A-20-816761-C

Dept. No: 1

Consolidated with Cases:

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

Hearing Requested

**OPENING BRIEF FROM  
PETITIONERS' LAS VEGAS VALLEY  
WATER DISTRICT AND SOUTHERN  
NEVADA WATER AUTHORITY**

21 Petitioners LAS VEGAS VALLEY WATER DISTRICT ("LVVWD") and  
22 SOUTHERN NEVADA WATER AUTHORITY ("SNWA") by and through their  
23 counsel of record, file their Opening Brief pursuant to EDCR 2.15.  
24

1 **NRAP RULE 26.1 DISCLOSURE**

2 The undersigned counsel of record certifies that the LAS VEGAS VALLEY  
3 WATER DISTRICT and the SOUTHERN NEVADA WATER AUTHORITY are  
4 governmental agencies and political subdivisions of the State of Nevada.

5 DATED this 27<sup>th</sup> day of August 2021.

6 TAGGART & TAGGART, LTD.

7 By: /s/ Paul Taggart

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19 LAS VEGAS VALLEY WATER DISTRICT

20 SOUTHERN NEVADA WATER

21 AUTHORITY

22 1001 S. Valley View Blvd.

23 Las Vegas, NV 89153

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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 27th day of August 2021.

TAGGART & TAGGART, LTD.

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**JURISDICTIONAL STATEMENT**

1  
2 This is a petition for judicial review of Nevada State Engineer Order 1309 (“Order  
3 1309”) issued June 15, 2020.<sup>1</sup> Under Nevada law “any person feeling aggrieved by any  
4 order or decision” of the State Engineer may have the order or decision reviewed “in the  
5 proper court of the county in which the matters affected or a portion thereof are  
6 situated.”<sup>2</sup> SNWA and LVVWD timely filed a petition for judicial review of Order 1309  
7 in the Eighth Judicial District of Nevada in and for Clark County on June 17, 2020.<sup>3</sup>  
8 Order 1309 addressed water availability in the Lower White River Flow System  
9 (“LWRFS”), which is primarily located in Clark County, Nevada, making the Eighth  
10 Judicial District the proper venue for judicial review of Order 1309. Additionally, the  
11 Eighth Judicial District Court is the court with jurisdiction over the Muddy River  
12 Decree, which is at issue in these related cases. Several other parties filed petitions for  
13 judicial review of Order 1309, and their petitions were consolidated with SNWA and  
14 LVVWD’s petition.<sup>4</sup>

**STATEMENT OF ISSUES**

- 15  
16 1. Whether the State Engineer incorrectly re-quantified decreed water rights  
17 in Order 1309 because that re-quantification was legally impracticable.  
18 2. Whether the State Engineer’s re-quantification of decreed water rights was  
19 based on incorrect factual findings that are not supported by substantial evidence.  
20  
21

22 \_\_\_\_\_  
23 <sup>1</sup> SE ROA 67. Filed concurrently with the opening brief is an appendix that includes  
24 excerpts of the record of appeal that are cited to in this opening brief.

<sup>2</sup> NRS 533.450(1).

<sup>3</sup> Petition for Judicial Review (Eighth Judicial Dis. Court, Case No. A-20-824381-P).

<sup>4</sup> Order Granting Consolidation, August 17, 2020, Case No. A-20-824381-P.

1 3. Whether the State Engineer improperly made findings regarding conflicts  
2 between junior groundwater pumping in the LWRFS and senior decreed Muddy River  
3 water rights because those findings were outside the scope of the administrative  
4 proceeding below.

5  
6 **STATEMENT OF THE CASE**

7 The LWRFS is an over-appropriated group of groundwater basins in southern  
8 Nevada, north of the Las Vegas valley. To date, the State Engineer's office has granted  
9 rights to pump approximately 50,000 acre-feet annually ("afa") of water from the  
10 LWRFS basins. However, only about 4,000 to 8,000 afa of groundwater can be  
11 sustainably pumped in the LWRFS without adversely impacting senior water rights in  
12 the Muddy River. Additionally, the Muddy River is home to the endangered Moapa  
13 dace that depend on the flows and quality of water in the Muddy River. Muddy River  
14 surface water rights are unquestionably senior in priority to the groundwater rights  
15 issued in the LWRFS. Current groundwater pumping has already, and continues to,  
16 impact senior decreed Muddy River surface water rights and threatens to reduce the  
17 habitat of the endangered Moapa dace.

18 For at least two decades, regulators have questioned whether groundwater is  
19 available for a massive residential development that is proposed by Coyote Springs  
20 Investment's ("CSI") because of groundwater pumping impacts on the Muddy River. In  
21 2002, the State Engineer ordered an aquifer test (the "Aquifer Test") to evaluate the  
22 impact of groundwater pumping in the LWRFS to better understand the connection  
23 between groundwater pumping and flow in the Muddy River. The Aquifer Test  
24 demonstrated that large-scale groundwater pumping in the LWRFS is unsustainable. If

1 the CSI project is developed using unsustainable LWRFS groundwater as a water source,  
2 homeowners would face a substantial likelihood of investing in a home without a  
3 sustainable water supply. The same is true for any non-residential development.

4 Order 1309 is the latest administrative action relating to the problem of over-  
5 pumping in the LWRFS. In 2020, the State Engineer issued Order 1309 after the two-  
6 year Aquifer Test, years of observing aquifer recovery and evaluating data, and an  
7 evidentiary hearing to interpret the data (“Order 1303 Hearing”). In Order 1309, the  
8 State Engineer correctly recognized that the LWRFS basins are hydrologically  
9 connected, and need to be managed as one administrative unit to avoid conflicts to senior  
10 water rights and adverse impacts to the environment. The State Engineer also  
11 recognized that far less water is available for appropriation in the LWRFS than once  
12 contemplated, and existing groundwater rights need to be curtailed. The State Engineer  
13 determined that 8,000 afa is the “maximum amount” of groundwater that can be pumped  
14 from the LWRFS.<sup>5</sup> He also ruled that even the 8,000 afa pumping limit “may need to  
15 be reduced in the future” if spring flows continue to decline due to groundwater  
16 pumping.<sup>6</sup>

17 Most of Order 1309 was correct. The State Engineer properly provided protection  
18 against further development of non-existent groundwater in the LWRFS. However, in  
19 Order 1309, the State Engineer failed to recognize the ongoing impact of junior  
20 groundwater pumping on senior surface water rights in the Muddy River. He unlawfully  
21 reduced the total duty of senior decreed Muddy River water rights to support the  
22 erroneous finding that current junior groundwater pumping is not conflicting with senior  
23

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24 <sup>5</sup> SE ROA 63.

<sup>6</sup> SE ROA 64.

1 rights. Even if the State Engineer could re-quantify decreed surface water rights (which  
2 he cannot), the calculations the State Engineer relied upon when re-quantifying the total  
3 duty of the senior decreed rights were erroneous. What is more troubling is that the  
4 State Engineer, on multiple occasions, indicated he *would not* be ruling on conflicts in  
5 the Order 1303 proceedings, and that conflicts would be specifically addressed in a  
6 future proceeding.

7 This Court should uphold the bulk of Order 1309 because the State Engineer’s  
8 conclusions regarding LWRFS hydrologic connections and water availability were all  
9 based upon much more than substantial evidence. However, the State Engineer’s wholly  
10 inconsistent conclusion that existing junior LWRFS groundwater pumping does not  
11 conflict with senior Muddy River surface water rights must be reversed because it was  
12 arbitrary, capricious, contrary to law, and made without substantial evidence.

## 13 STATEMENT OF FACTS

### 14 **I. Muddy River Decree**

15  
16 In 1920, the entire flow of the Muddy River was adjudicated by the district court  
17 in Clark County, Nevada, through the Muddy River Decree.<sup>7</sup> The Muddy River Decree  
18 identifies each water right holder on the Muddy River and quantified each water right.<sup>8</sup>  
19 The decree court also directed how water is to be distributed in times of surplus and  
20 shortage. A unique feature of the Muddy River Decree is that the Muddy Valley  
21 Irrigation Company (“MVIC”) is entitled to “divert and use upon its lands *all the waters*  
22  
23

24 <sup>7</sup> SE ROA 33770-816.

<sup>8</sup> SE ROA 33798-806.

1 of the [Muddy River] except the amounts specifically awarded and allotted to other  
2 parties” above an area known as Wells Siding.<sup>9</sup>

3 Put simply, instead of a specific duty of water, MVIC is entitled to all water in the  
4 Muddy River that is not owned by others with decreed rights. The decree fully  
5 appropriated all flows in the Muddy River to senior vested water right holders. Any  
6 reduction in flow – caused by groundwater pumping, upstream surface water diversions  
7 not included in the decree, or otherwise – necessarily conflicts with existing rights by  
8 reducing the amount of water delivered to the vested water right owner. Such conflicts  
9 are a violation of Nevada’s prior appropriation system.

10 **II. History Of LWRFS Administration**

11 **A. Order 1169**

12  
13 Beginning in 1989, and through the early 2000s, various parties (including CSI  
14 and LVVWD) filed applications to appropriate additional groundwater in various  
15 LWRFS basins - Coyote Spring Valley, Black Mountains Area, Garnet Valley, Hidden  
16 Valley, California Wash, and Muddy River Springs Area Hydrographic Basins.<sup>10</sup> In  
17 2001, the State Engineer held hearings on pending water right applications in Coyote  
18 Spring Valley.<sup>11</sup> Following the 2001 hearings, on March 8, 2002, the State Engineer  
19 issued Order 1169, which required a large-scale Aquifer Test under which fifty percent  
20 of existing groundwater rights in the subject basins would be pumped for at least two  
21 (2) consecutive years to determine the effects of groundwater pumping on senior water  
22

23 <sup>9</sup> SE ROA 33812-33813 (emphasis added).

24 <sup>10</sup> SE ROA 4.

<sup>11</sup> SE ROA 4.

1 rights and the environment.<sup>12</sup> During the Aquifer Test, the State Engineer held all  
2 pending groundwater applications in the LWRFS (excluding the Kane Springs basin) in  
3 abeyance.<sup>13</sup>

4 In Order 1169, the State Engineer expressed concern about how groundwater  
5 pumping was impacting the area. He found that he needed additional information to  
6 determine if existing groundwater rights “will have any detrimental impacts on existing  
7 water rights or the environment,”<sup>14</sup> because existing rights include Muddy River water  
8 rights that are senior to all groundwater rights. The State Engineer’s environmental  
9 concern was related to the Moapa dace. Moapa dace are small, thermophilic fish that  
10 only exist in the warm spring headwaters of the Muddy River, known as the Muddy  
11 River Spring Area.<sup>15</sup> The Moapa dace is listed as “endangered” by the United States  
12 Fish and Wildlife Service (“USFWS”) and is protected under the Endangered Species  
13 Act.<sup>16</sup> Since the 1990’s, SNWA, LVVWD and other stakeholders have been actively  
14 involved in efforts to protect and benefit the Moapa dace.<sup>17</sup> Protecting the Moapa dace  
15 necessarily involves protecting the warm spring sources of the Muddy River.<sup>18</sup>

16 Following the issuance of Order 1169, SNWA, USFWS, CSI, the Moapa Band of  
17 Paiute Indians (“Tribe”), and the Moapa Valley Water District (“MVWD”) entered into  
18 a Memorandum of Agreement (“MOA”). The purpose of the MOA was to minimize  
19 the impact of groundwater pumping on the endangered Moapa dace.<sup>19</sup> The MOA

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20 <sup>12</sup> SE ROA 4.

21 <sup>13</sup> SE ROA 665-66.

22 <sup>14</sup> SE ROA 665.

23 <sup>15</sup> SE ROA 42087.

24 <sup>16</sup> SE ROA 42087.

<sup>17</sup> SE ROA 42087.

<sup>18</sup> SE ROA 42087.

<sup>19</sup> SE ROA 5.

1 established minimum in-stream flow levels and identified trigger flow levels at specific  
2 springs to mandate the parties to reduce groundwater pumping. Actions to protect in-  
3 stream flows (in and to the Muddy River) were also required if flows at a specific gauge  
4 (the Warm Springs West gauge) falls below 3.2 cfs.<sup>20</sup> Greater pumping reductions are  
5 required if spring flows fall below 2.7 cfs.<sup>21</sup>

6  
7 **B. Common Concerns with CSI's Groundwater Rights**

8 Groundwater issues in the LWRFS were brought to a head by CSI's residential  
9 development proposal. CSI planned to use existing groundwater rights, in addition to  
10 pending groundwater applications, to develop a large scale residential and commercial  
11 development fifty miles north of the Las Vegas valley.<sup>22</sup> CSI recognized it was taking  
12 a significant risk.<sup>23</sup> CSI recognized that the water source for its development would be  
13 independent of water used in the balance of Clark County, and consequently assumed  
14 the risk regarding the sustainability of Coyote Spring Valley groundwater as its water  
15 source.<sup>24</sup> CSI's groundwater source was all the more risky because CSI's groundwater  
16 permits had been protested by the Nevada Department of Wildlife due to the negative

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19 <sup>20</sup> SE ROA 5.

<sup>21</sup> SE ROA 5.

20 <sup>22</sup> SE ROA 47860-61.

21 <sup>23</sup> SE ROA 47861 (one of the original developers stated "[i]t's the developers who are  
22 assuming all of the risk . . . [w]hether it's for acquisition of water rights, subsidy of  
operating costs . . . [and] the cost of the infrastructure.").

23 <sup>24</sup> SE ROA 47861-62 ("I also feel like it's important to point out that the water source  
24 that we are expecting to use out here is one that is outside of existing allocations within  
Clark County. We are living on our own water resources that don't have to take away  
from any of the water rights that would otherwise be used for the rest of Clark County  
residents.").



1 impact of increased groundwater pumping on senior water rights and the Moapa dace –  
2 forecasting the exact issues outlined in the cases at hand.<sup>25</sup>

3 **III. State Engineer Rulings 6254-6261**

4  
5 The Aquifer Test commenced on November 15, 2010 and concluded on  
6 December 21, 2012.<sup>26</sup> The Aquifer Test participants were LVVWD, SNWA, CSI,  
7 Nevada Power Company, MVWD, Dry Lake Water Company, LLC, Republic  
8 Environmental Technologies, Inc., Chemical Lime Company, Nevada Cogeneration  
9 Associates, and the Tribe. Each participant was given the opportunity to submit reports  
10 to the State Engineer to present evidence about the results of the Aquifer Test and how  
11 those results related to the amount of water available for appropriation in the subject  
12 basins.<sup>27</sup>

13 Based on the findings of the Aquifer Test, the State Engineer issued Rulings 6254-  
14 6261 on January 29, 2014. In these rulings, the State Engineer found, in part, that  
15 Aquifer Test pumping in the LWRFS caused widespread impacts throughout the  
16 LWRFS area, even though only a portion of the existing rights in the region were  
17 pumped during the Aquifer Test. The State Engineer also found that Aquifer Test  
18 pumping reduced flows in the warm springs which feed the Muddy River and provide  
19 habitat to the Moapa dace.<sup>28</sup> Based on these findings, the State Engineer denied all  
20 pending applications in the subject basins.<sup>29</sup>

21  
22 

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<sup>25</sup> SE ROA 48114-30.

23 <sup>26</sup> SE ROA 6.

24 <sup>27</sup> SE ROA 5-6.

<sup>28</sup> SE ROA 10.

<sup>29</sup> SE ROA 752-53.

1 The State Engineer also found in Rulings 6254-6261 that “[t]he vast majority of  
2 the scientific literature supports the premise that, unlike other separate and distinct  
3 basins in Nevada that do not feature carbonate-rock aquifers, all of the Order 1169 basins  
4 share virtually all of the same supply of water.”<sup>30</sup> With regards to existing water rights  
5 in the subject basins, the State Engineer found that “the amount and location of  
6 groundwater that can be developed without capture of and conflict with senior water  
7 rights on the Muddy River and springs remains unclear.”<sup>31</sup>

8 The issuance of Rulings 6254-6261 caused several parties to recognize that the  
9 system could not even support *existing* groundwater rights, including the existing rights  
10 needed to support CSI’s project. Rather than leave future residents with an uncertain  
11 supply of water, on November 16, 2017, LVVWD, as manager of the Coyote Springs  
12 Water Resources General Improvement District, sent a letter to the State Engineer  
13 inquiring whether the State Engineer would be signing CSI subdivision maps given the  
14 Aquifer Test results showing widespread pumping impacts.<sup>32</sup>

15 On May 16, 2018, the State Engineer replied to LVVWD, stating that pumping in  
16 the region adjacent to the Muddy River will be “limited to the amount that will not  
17 conflict with the Muddy River Springs and the Muddy River . . . [and] carbonate  
18 pumping will have to be limited to a fraction of the 40,300 acre-feet already appropriated  
19 in the five-basin area.”<sup>33</sup> To answer the question of how much water can sustainably be  
20

21 \_\_\_\_\_  
22 <sup>30</sup> SE ROA 749.

23 <sup>31</sup> SE ROA 749.

24 <sup>32</sup> SE ROA 48040.

<sup>33</sup> SE ROA 48041-42 (The State Engineer later withdrew this letter as part of a settlement agreement with CSI in which the CSI agreed to participate in the ongoing conjunctive management of the LWRFS basins.).

1 pumped in the LWRFS region, the State Engineer promptly initiated administrative  
2 proceedings to gather the necessary scientific data and engage stakeholders.<sup>34</sup>

3 **IV. Interim Order 1303**

4 On January 11, 2019, the State Engineer issued Interim Order 1303, which  
5 designated Coyote Spring Valley, Muddy River Springs Area, California Wash, Hidden  
6 Valley, Garnet Valley, and a portion of the Black Mountains Area Hydrographic Basins  
7 as a joint administrative unit called the LWRFS.<sup>35</sup> The State Engineer further found in  
8 Order 1303 that all water rights in the LWRFS would “be administered based upon their  
9 respective dates of priorities in relation to other rights within the regional groundwater  
10 unit.”<sup>36</sup> In Order 1303, the State Engineer invited all stakeholders to submit reports to  
11 address four factual matters: (1) the geographic boundary of the LWRFS, (2) aquifer  
12 recovery since the Aquifer Test, (3) long-term annual quantity of groundwater that may  
13 be pumped from the LWRFS, and (4) the effects of moving water rights between the  
14 carbonate and alluvial system to senior water rights on the Muddy River.<sup>37</sup>

15 Critical to LVVWD and SNWA’s petition here, the State Engineer did not ask for  
16 information regarding legal conflicts between junior groundwater pumping and senior  
17 water rights in the Muddy River. Rather, the exercise focused on how much water can  
18 be pumped, not who can pump it. The State Engineer also ruled that, during the  
19 pendency of the Order 1303, all permanent applications to change existing groundwater  
20 rights in the LWRFS would be held in abeyance. He also placed a temporary  
21

22  
23 <sup>34</sup> SE ROA 11-12.

<sup>35</sup> SE ROA 82.

24 <sup>36</sup> SE ROA 82.

<sup>37</sup> SE ROA 82-83.

1 moratorium on the State Engineer’s review of proposed subdivisions and developments  
2 in the LWRFS pending the Order 1303 proceedings.<sup>38</sup>

3 **V. Scope Of Order 1303 Hearing**

4 During a pre-hearing conference on August 8, 2019, the State Engineer’s hearing  
5 officer and the parties discussed the scope of the Order 1303 Hearing, and specifically  
6 whether the hearing would address the issue of conflicts between water rights.<sup>39</sup> The  
7 hearing officer stated that:

8 [T]he purpose of the hearing is *not to resolve or address*  
9 *allegations of conflict between groundwater pumping within*  
10 *the LWRFS and Muddy River decreed rights*. This is not the  
11 purpose of this hearing and that's not what we are going to be  
12 deciding at this point in time. The purpose of this hearing is to  
13 determine what the sustainability is, what the impact is on  
14 decreed rights, and then addressing and *resolving allegations*  
15 *of conflict should that be a determination that will be*  
16 *addressed in, at a future point in time.*<sup>40</sup>

14 The hearing officer also stated at the pre-hearing conference that the hearing is part of a  
15 “multi-tiered process in terms of determining the appropriate management strategy”<sup>41</sup> in  
16 the LWRFS, and legal conflicts are part of “larger substantive policy determinations  
17 [that are] not part of this proceeding.”<sup>42</sup>

18 On August 26, 2019, the hearing officer issued a Notice of Hearing.<sup>43</sup> In the  
19 Notice of Hearing, the hearing officer pointed out that “[t]he State Engineer further  
20 noted that the hearing on the Order 1303 reports was the first step in determining to what

21 \_\_\_\_\_  
22 <sup>38</sup> SE ROA 83.

23 <sup>39</sup> SE ROA 522.

24 <sup>40</sup> SE ROA 522 at 12:6-15 (Fairbank) (emphasis added).

<sup>41</sup> SE ROA 522 at 10: 8-10 (Fairbank).

<sup>42</sup> SE ROA 522 at 10:18-22 (Fairbank).

<sup>43</sup> SE ROA 285.

1 extent, if any, and in what manner the State Engineer would address future management  
2 decisions, including policy decisions, relating to the [LWRFS] basins.”<sup>44</sup>

3 Numerous parties participated in the Order 1303 Hearing.<sup>45</sup> This participation  
4 included submitting expert reports, testimony, and written closing arguments regarding  
5 the four issues presented by the State Engineer in Order 1303.

6 **VI. Order 1309**

7  
8 On June 15, 2020, the State Engineer issued Order 1309 based on the evidence  
9 presented at the Order 1303 Hearing.<sup>46</sup> The State Engineer found that (1) Kane Springs  
10 Valley hydrographic basin should be included in the LWRFS administrative boundary,  
11 (2) the maximum amount of groundwater that can be pumped in the LWRFS without  
12 causing further flow declines in the Muddy River Springs Area and the Muddy River is  
13 8,000 afa, and may be less, (3) the maximum amount of groundwater that may be  
14 pumped from the LWRFS may be reduced if it is determined that pumping will  
15 adversely impact the Moapa dace, and (4) movement of existing groundwater rights in  
16 the LWRFS will be processed in accordance with NRS 533.370.<sup>47</sup> The State Engineer  
17 rightfully determined that much less water is available for CSI’s development than is

18 \_\_\_\_\_  
19 <sup>44</sup> SE ROA 285.

20 <sup>45</sup> The following parties submitted expert reports and participated in the Order 1303  
21 Hearing; Center for Biological Diversity, The Church of Jesus Christ of Latter-day  
22 Saints, City of North Las Vegas, CSI, Georgia Pacific and Republic, Lincoln County  
23 Water District and Vidler Water Company, the Tribe, MVWD, MVIC, United States  
24 National Park Service, USFWS, Nevada Cogeneration Associates, NV Energy, SNWA  
and LVVWD, and West Elite Environmental and Bedroc. The Church of Jesus Christ  
of Latter-day Saints did not directly participate in the hearing but joined in the City of  
North Las Vegas’s evidentiary submissions.

<sup>46</sup> SE ROA 2-69.

<sup>47</sup> SE ROA 66.

1 currently permitted, and any increase in existing groundwater pumping will impact  
2 senior water rights and the Moapa dace. These are important findings that speak directly  
3 to the viability of Coyote Spring Valley groundwater as a source for CSI’s proposed  
4 development.

5 Despite the hearing officer and State Engineer making clear that the Order 1303  
6 hearing would not address conflicts between water users, in Order 1309 the State  
7 Engineer expressly and inexplicably did just that. He stated:

8 [C]apture or potential capture of the waters of a decreed system  
9 *does not constitute a conflict with decreed right holders* [. . .].  
10 The State Engineer finds that the current flow in the Muddy  
11 River is sufficient to serve all decreed rights in conformance  
12 with the Muddy River Decree, and that reductions in flow that  
13 have occurred because of groundwater pumping in the  
14 headwater basins is not conflicting with Decreed rights.<sup>48</sup>

15 The State Engineer based this finding on the flawed rationale that “[i]f all decreed acres  
16 were planted with a high-water use crop like alfalfa, the net irrigation water requirement  
17 (“NIWR”) would be 28,300 afa, based on a consumptive use rate of 4.7 afa.”<sup>49</sup>

18 Instead of accepting the quantity of water rights based on the Muddy River  
19 Decree, as he is required to do, the State Engineer reduced the total duty necessary to  
20 fulfill decreed surface water rights from approximately 34,000 afa to approximately  
21 28,300 afa. Without reference to any statute or regulation which permits him to do so  
22 (because none exists), the State Engineer ignored the actual quantification of water rights  
23 in the Muddy River decree and recalculated the amount of water needed to fulfill those

24 <sup>48</sup> SE ROA 61-62 (emphasis added).

<sup>49</sup> SE ROA 62. The NIWR is the total amount of water that is needed to grow a crop  
after subtracting the amount of water used to grow the crop that is recharged back into  
the aquifer.

1 rights based on a hypothetical alfalfa crop, and a hypothetical water consumption rate.  
2 The State Engineer also ignored other relevant factors about the quantity of water  
3 necessary to fulfill the Muddy River’s senior decreed surface water rights, including the  
4 fact not all decreed rights are used for irrigation.

5 Put simply, the State Engineer altered the Muddy River Decree, even though he  
6 is expressly prohibited from doing so under Nevada law. The State Engineer used this  
7 reduction in total water duty to find that junior groundwater pumping does not conflict  
8 with senior decreed water rights, even though he recognized junior pumping reduces the  
9 flow of the Muddy River.<sup>50</sup>

10 **VII. SNWA’s and LVVWD’s Interests In The LWRFS**

11  
12 SNWA is a non-profit political subdivision of the State of Nevada consisting of  
13 seven members (local municipalities and political subdivisions in Clark County) and is  
14 a wholesale water provider serving approximately 75 percent of Nevada’s population.  
15 SNWA’s water resource portfolio includes approximately 20,000 afa of senior Muddy  
16 River decreed water rights, 9,000 afa of groundwater in Coyote Spring Valley, and 2,200  
17 afa of groundwater in Garnet and Hidden valleys.<sup>51</sup> This portfolio includes control of  
18 water rights with points of diversion in five of the seven hydrographic basins that make  
19 up the LWRFS.<sup>52</sup> SNWA was a participant in the Order 1169 Aquifer Test and is one  
20 of the primary participants in the 2006 MOA concerning protection for the Moapa dace.

21 LVVWD is a member agency of SNWA. Additionally, LVVWD is the general  
22 manager of the Coyote Springs Water Resources General Improvement District, which

23 <sup>50</sup> SE ROA 62.

24 <sup>51</sup> SE ROA 40603-04.

<sup>52</sup> SE ROA 40604.

1 is the entity responsible for providing water and wastewater services for CSI's  
2 development in Coyote Spring Valley if a sustainable water resource exists.<sup>53</sup>

3 SNWA's decreed surface water rights include both decreed Muddy River water  
4 rights and shares in MVIC, which controls additional decreed surface water rights.<sup>54</sup>  
5 SNWA relies on these surface water rights to create Tributary Conservation  
6 Intentionally Created Surplus ("ICS") credits, which can then be stored in Lake Mead  
7 or delivered from Lake Mead to water purveyors in Las Vegas Valley.<sup>55</sup> The creation  
8 of ICS credits was established by the United States Bureau of Reclamation ("USBOR")  
9 in 2007.<sup>56</sup> To create ICS credits, the USBOR requires SNWA to submit ICS plans of  
10 creation, and certification reports.<sup>57</sup> The ICS program provides a significant benefit to  
11 southern Nevada, because it allows water purveyors to use water from the Muddy River  
12 without having to construct an expensive pipeline to deliver water directly to Las  
13 Vegas.<sup>58</sup>

14 In Nevada, the legislature declared ICS to be a beneficial use of water under NRS  
15 533.030. The State Engineer requires annual reports to be submitted that provide a full  
16 accounting of the water rights used to create ICS credits.<sup>59</sup> The State Engineer then  
17 reviews these reports and provides the party creating ICS credits (such as SNWA) with  
18 a letter confirming that the party controls the water rights used to create ICS credits.

21 <sup>53</sup> SE ROA 48007-034.

22 <sup>54</sup> SE ROA 42007.

23 <sup>55</sup> SE ROA 42007.

24 <sup>56</sup> SE ROA 42007.

<sup>57</sup> SE ROA 42007.

<sup>58</sup> SE ROA 53387 at 998:8-12 (Pellegrino).

<sup>59</sup> SE ROA 42007.



1 The State Engineer has provided SNWA with a letter verifying the use of its  
2 decreed surface water rights for creation of its Muddy River ICS credits annually since  
3 2009.<sup>60</sup> Importantly, when the State Engineer verifies SNWA’s decreed Muddy River  
4 water rights, he recognizes the full duty of the water rights awarded under the decree  
5 and does not limit the water rights based on NIWR, as he did in Order 1309.<sup>61</sup> SNWA  
6 has created 157,824 afa of Muddy River Tributary Conservation ICS credits since  
7 2009.<sup>62</sup> However, over that same period, LWRFS groundwater pumping has caused  
8 SNWA’s ICS creation to be approximately 12,040 acre-feet less than it should have  
9 been.<sup>63</sup>

### 10 SUMMARY OF THE ARGUMENT

11 While the State Engineer correctly decided most of Order 1309, he failed to  
12 recognize the full impact of ongoing groundwater pumping on senior decreed water  
13 rights. The State Engineer is prohibited by law from reducing the amount of decreed  
14 water rights,<sup>64</sup> or taking any action that impairs vested rights.<sup>65</sup> The State Engineer is  
15 also prohibited by law from using a consumptive use analysis to reduce decreed Muddy  
16 River surface water rights.<sup>66</sup> Yet in Order 1309, the State Engineer violated each of  
17 these legal mandates and reduced the amount of Muddy River rights he would recognize  
18 and protect.

19  
20  
21 <sup>60</sup> SE ROA 42007.

22 <sup>61</sup> SE ROA 46349-50.

23 <sup>62</sup> SE ROA 42007.

24 <sup>63</sup> SE ROA 42007-08.

<sup>64</sup> See NRS 533.0245.

<sup>65</sup> NRS 533.085.

<sup>66</sup> See NRS 533.3703(2)(b).

1 In addition, the State Engineer made a series of factual errors in his ruling  
2 regarding Muddy River water rights. These errors include: (1) incorrectly calculating  
3 the originally irrigated acreage in the Muddy River Decree, (2) incorrectly finding the  
4 decree overestimated the availability of supply, (3) failing to account for conveyance  
5 and evaporation loss of the river and ditches, (4) assuming all decreed rights continue to  
6 be used for irrigation, and (5) applying a duty inconsistent with the decree.

7 Finally, the State Engineer erred in conducting a conflicts analysis because it was  
8 outside the scope of the Order 1303 Hearing. The State Engineer and hearing officer  
9 stated on multiple occasions that conflicts between water rights holders would not be  
10 addressed at the Order 1303 Hearing. SNWA and LVVWD rightfully relied on the State  
11 Engineer’s limitation of the scope of the Order 1303 proceedings and did not present  
12 significant evidence on conflicts. Instead of following his own guidance on conflicts,  
13 the State Engineer performed an unlawful conflicts analysis based on his unlawful  
14 reduction of the total duty of Muddy River water rights. The State Engineer’s conflicts  
15 analysis was therefore erroneous, arbitrary, capricious, an abuse of discretion, and a  
16 violation of LVVWD and SNWA’s right to due process.

17 **ARGUMENT**

18 **I. Standard Of Review**

19  
20 Judicial review is “in the nature of an appeal.”<sup>67</sup> When reviewing a State  
21 Engineer’s decision, the role of the reviewing court is to determine if the State Engineer’s  
22 decision was arbitrary, capricious, or an abuse of discretion, or it was otherwise affected  
23

24  

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<sup>67</sup> NRS 533.450(1); *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979).

1 by prejudicial legal error.<sup>68</sup> A decision is arbitrary if it was made “without consideration  
2 of or regard for facts, circumstances, fixed rules, or procedures.”<sup>69</sup> A decision is  
3 capricious if it is “contrary to the evidence or established rules on law.”<sup>70</sup> The reviewing  
4 court’s focus must be “on whether the record includes substantial evidence to support  
5 the State Engineer’s decision.”<sup>71</sup> The Nevada Supreme Court has defined ‘substantial  
6 evidence’ as “that which a reasonable mind might accept as adequate to support a  
7 conclusion.”<sup>72</sup>

8 In *Revert v. Ray*, the Nevada Supreme Court articulated the procedural safeguards  
9 the State Engineer must employ prior to issuing an order.<sup>73</sup> First, the State Engineer  
10 must provide affected parties with a “full opportunity to be heard” and “must clearly  
11 resolve all the crucial issues presented.”<sup>74</sup> Next, the State Engineer’s order or decision  
12 must include “findings in sufficient detail to permit judicial review.”<sup>75</sup> Finally, if such  
13 procedures are not followed and “the resulting administrative decision is arbitrary,  
14 oppressive, or accompanied by a manifest abuse of discretion,” a court should “not  
15 hesitate to intervene and block the enforcement of the order or decision.”<sup>76</sup>

16 The Nevada Supreme Court has recently recognized that Nevada law prohibits the  
17 reallocation of decreed water rights, “[t]he statutory water scheme in Nevada therefore

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19 <sup>68</sup> *Pyramid Lake Paiute Tribe of Indians v. Washoe Cty.*, 112 Nev. 743, 751, 918 P.2d  
20 697, 702 (1996), citing *Shetakis Dist. v. State, Dep’t of Taxation*, 108 Nev. 901, 903, 839  
P.2d 1315, 1317 (1992).

21 <sup>69</sup> BLACK’S LAW DICTIONARY 125 (10<sup>th</sup> ed. 2014).

22 <sup>70</sup> BLACK’S LAW DICTIONARY 254 (10<sup>th</sup> ed. 2014).

23 <sup>71</sup> *Bacher v. Office of the State Engineer of State of Nevada*, 122 Nev. 1120, 1121 (2006)

24 <sup>72</sup> *Id.* (internal quotations omitted).

<sup>73</sup> *Revert*, 95 Nev. at 786, 603 P.2d at 264.

<sup>74</sup> *Revert*, 95 Nev. at 787, 603 P.2d at 264-65.

<sup>75</sup> *Revert*, 95 Nev. at 787, 603 P.2d at 265.

<sup>76</sup> *Id.*

1 expressly prohibits reallocating adjudicated water rights that have not been abandoned,  
2 forfeited, or otherwise lost pursuant to an express statutory provision.”<sup>77</sup> The 9<sup>th</sup> Circuit  
3 has also recognized the finality of water right decrees, “[p]articipants in water  
4 adjudications are entitled to rely on the finality of decrees as much as, if not more than,  
5 parties to other types of civil judgments.”<sup>78</sup>

6 **II. The State Engineer’s Decision To Re-Quantify Decreed Water Rights Was**  
7 **Arbitrary, Capricious, And An Abuse Of Discretion Because The Re-**  
8 **Quantification Was Unlawful.**

9 **A. Re-quantifying decreed water rights based on the NIWR of alfalfa is**  
10 **unlawful because it reduces the amount of water rights recognized**  
11 **under the decree.**

12 The State Engineer’s use of a hypothetical alfalfa-irrigation formula to measure  
13 the duty of decreed Muddy River’s already-adjudicated water rights violates Nevada  
14 law. The 1920 Muddy River Decree already fully and finally adjudicated water rights  
15 on the Muddy River. Under Nevada law and the doctrine of res judicata, water rights  
16 recognized under that decree cannot be relitigated over a century later.<sup>79</sup> The State  
17 Engineer himself recognized in Order 1194 that the Muddy River was fully  
18 appropriated: “The Muddy River Decree adjudicated the entire flow of the Muddy River  
19 and its tributaries, and there is insufficient flow in the Muddy River to grant any new  
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21 <sup>77</sup> *Mineral County v. Lyon County*, 136 Nev. Adv. Op. 58, \_\_\_, 473 P.3d 418, 429 (2020)  
22 (expressly provides that decreed water rights ‘shall’ be final and conclusive.”).

23 <sup>78</sup> *United States v. Alpine Land & Reservoir, Co.*, 984 F.2d 1047, 1050 (9<sup>th</sup> Cir. 1993).

24 <sup>79</sup> *See Nevada v. U.S.*, 463 U.S. 110 (1983) (The Supreme Court ruled that water rights  
recognized under the *Orr Ditch* decree could not be reallocated by the federal  
government because of the doctrine of res judicata), *Mineral County v. Lyon County*, 136  
Nev. Adv. Op. at \_\_\_, 473 P.3d at 429 (2020).

1 appropriations.”<sup>80</sup> The total amount of water recognized under the decree is  
2 approximately 34,000 afa.<sup>81</sup>

3 The State Engineer is also prevented by statute from reducing the amount of  
4 decreed water rights, as decreed water rights are under the jurisdiction of the judicial,  
5 not executive, branch because the decreed water rights were put to beneficial use prior  
6 to the existence of the State Engineer’s office. Under NRS 533.0245, the State Engineer  
7 is prohibited from carrying out his duties in any way that conflicts with a decree issued  
8 by a state or federal court.<sup>82</sup>

9 In Order 1309, instead of using approximately 34,000 afa as the measure of water  
10 rights awarded in the decree, the State Engineer re-quantified the decreed rights by first  
11 assuming a hypothetical situation where all decreed water right users would be growing  
12 alfalfa, and then using the NIWR of the hypothetical alfalfa crop to calculate the amount  
13 of water needed to fulfill the decreed rights. The State Engineer’s NIWR for alfalfa in  
14 Order 1309 was 4.7 af/acre, while the Muddy River decree uses 8.54 af/acre.<sup>83</sup> The  
15 obvious flaw in the State Engineer’s process is that not all decreed water rights are used

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16 <sup>80</sup> SE ROA 46471.

17 <sup>81</sup> SE ROA 33798 (original table, later supplemented to add winter use), 33813  
18 (amendment to add winter use to original table), 33787-33789 (final decree), 33799-  
19 33806 (acreage per claimant). The total summer acreage is approximately 3,261 acres  
20 and the total winter acreage is approximately 4,700 acres. When the respective winter  
21 and summer duties are applied, and a weighted average taken, the result is approximately  
22 34,000 afa of year-round flow necessary to satisfy the decreed rights. This amount does  
23 not account for non-irrigation use recognized in the decree, which total less than 100 afa.

24 <sup>82</sup> NRS 533.0245 (“The State Engineer shall not carry out his or her duties pursuant to  
this chapter in a manner that conflicts with any applicable provision of a decree or order  
issued by a state or federal court, an interstate compact or an agreement to which this  
State is a party for the interstate allocation of water pursuant to an act of Congress.”).

<sup>83</sup> SE ROA 33788. Under the Muddy River decree the diversion rates equate to 10.34  
af/acre in summer (153 irrigation days) and 7.24 af/acre in winter (212 irrigation days).  
These diversion rates have a weighted average of 8.54 af/acre.

1 to grow alfalfa, and some uses (such as ICS credits) utilize more water than the State  
2 Engineer’s hypothetical alfalfa crop would utilize requiring the full duty of 8.54 af/acre.  
3 By using the NIWR of alfalfa, instead of the amounts of water recognized in the Muddy  
4 River Decree, the State Engineer, in effect, reduced the total amount of water allocated  
5 to the senior decreed water right holders from approximately 34,000 afa to 28,300 afa.  
6 This reduced the amount of water allocated to decreed senior water rights by almost  
7 6,000 afa.<sup>84</sup>

8         The State Engineer’s re-quantification runs afoul of the court’s decreed duty of  
9 the water rights, as well as the State Engineer’s own statutory limitations which prevent  
10 him from carrying out his duties in any way that conflicts with a decree issued by a state  
11 of federal court.<sup>85</sup> No law or regulation exists that gives the State Engineer authority to  
12 re-quantify decreed water rights, let alone employ a hypothetical crop calculation like  
13 the NIWR to determine the water requirements of decreed water rights.<sup>86</sup> Notably, NRS  
14  
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18 <sup>84</sup> See SE ROA 62 (The calculated volume is notable for its convenience and coincidence  
19 – essentially giving the senior decreed vested rights holders a haircut of roughly the same  
20 amount currently being pumped by junior groundwater rights holders.).

21 <sup>85</sup> NRS 533.0245 (“The State Engineer shall not carry out his or her duties pursuant to  
22 this chapter in a manner that conflicts with any applicable provision of a decree or order  
23 issued by a state or federal court, an interstate compact or an agreement to which this  
24 State is a party for the interstate allocation of water pursuant to an act of Congress.”).

<sup>86</sup> NRS 533.210(1); NRS 533.220 (“the distribution of water by the State Engineer or by  
any of the State Engineer’s assistants or by the water commissioners or their assistants  
shall, at all times, be under the supervision and control of the district court. Such officers  
and each of them shall, at all times, be deemed to be officers of the court in distributing  
water under and pursuant to the order of determination or under and pursuant to the  
decree of the court”).

1 533.3703 impliedly forbids such a calculation on the Muddy River.<sup>87</sup> As such, his re-  
2 quantification was arbitrary and capricious, and an abuse of discretion.

3 The State Engineer's attempt to re-quantify the decreed Muddy River water rights  
4 also violates MVIC's right to all leftover water flows under the Muddy River Decree.<sup>88</sup>  
5 By re-quantifying the total water necessary to fulfill decreed water rights at about 28,300  
6 afa, the State Engineer ignored the plain language of the Muddy River Decree which  
7 gives MVIC the senior priority right to all remaining water in the system. The State  
8 Engineer effectively re-quantified MVIC's water rights from *all water left in the river*  
9 to *all water left in the river under 28,300 afa* which is harmful to MVIC shareholders  
10 like SNWA. This action was therefore arbitrary, capricious, and an abuse of discretion  
11 by the State Engineer.

12 **B. The State Engineer's re-quantification of decreed Muddy River water**  
13 **rights is arbitrary and capricious because it ignores the State**  
14 **Engineer's past practices without adequate justification.**

15 The State Engineer's has previously administered Muddy River water rights with  
16 full recognition of the duty of the water rights in the decree rather than reducing the duty  
17 of decreed rights as he did in Order 1309. For example, the State Engineer approved  
18 Applications 23600 and 22603,<sup>89</sup> which changed the manner of use of decreed Muddy

19 \_\_\_\_\_  
20 <sup>87</sup> Under NRS 533.3703 the State Engineer is allowed to consider consumptive use when  
21 evaluating change applications except for decreed Muddy River and Virgin River water  
22 rights.

21 <sup>88</sup> SE ROA 33790 (MVIC is decreed "all the waters of said Muddy River, its headwaters,  
22 sources of supply and tributaries, save and except the several amounts and rights  
23 hereinbefore specified and described as awarded and decreed to the other [decreed  
24 owners]").

23 <sup>89</sup> SNWA and LVVWD request this Court take judicial notice, pursuant to NRS  
24 47.130(2)(b), of Applications 23600 and 22603. Application 23600 available at

1 River water rights from irrigation to industrial use without reducing the duty of the water  
2 right recognized under the decree. Also, the State Engineer approved Application  
3 22739, which changed the manner of use of decreed Muddy River water rights from  
4 irrigation to municipal use without reducing the duty of the decreed water right.<sup>90</sup> In  
5 Order 1309, the State Engineer ignored his prior practice of honoring the full duty of  
6 decreed Muddy River water rights when he re-quantified the duty of decreed Muddy  
7 River water rights to a lower duty.

8 The State Engineer's finding in Order 1309 is also inconsistent with his ICS  
9 determinations. The State Engineer has continuously recognized that SNWA can use  
10 the total duty of the decreed Muddy River water rights it controls to create ICS credits.  
11 Since 2009, SNWA has utilized its decreed Muddy River water rights to create ICS  
12 credits which require a 100% consumptive use because these water rights must be left  
13 in the river and reach Lake Mead. In SNWA's annual ICS certification reports, SNWA  
14 explains that it uses the entire duty of the decreed Muddy River water rights it controls  
15 for the creation of ICS credits.<sup>91</sup> In other words, when calculating its ICS Credits,  
16 SNWA uses its fully-decreed annual duty of 8.54 afa/acre for its Muddy River water  
17 rights, which is the weighted average annual duty recognized in the Muddy River

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20 [http://images.water.nv.gov/images/Book\\_Records/23000/23600.pdf](http://images.water.nv.gov/images/Book_Records/23000/23600.pdf) (last visited May  
21 27, 2021). Application 22603 available at

21 [http://images.water.nv.gov/images/Book\\_Records/22000/22603.pdf](http://images.water.nv.gov/images/Book_Records/22000/22603.pdf) (last visited May  
22 27, 2021).

22 <sup>90</sup> SNWA and LVVWD request this Court take judicial notice, pursuant to NRS  
23 47.130(2)(b), of Application 22739. Application 22739 available at

23 [http://images.water.nv.gov/images/Book\\_Records/22000/22739.pdf](http://images.water.nv.gov/images/Book_Records/22000/22739.pdf) (last visited May  
24 27, 2021).

24 <sup>91</sup> SE ROA 46349, 8971.



1 Decree.<sup>92</sup> On an annual basis, the State Engineer certificated the correctness of this  
2 quantification when he stated:

3 [t]hese Certification Reports demonstrate that the amount of  
4 Tributary Conservation ICS created by the Authority and  
5 conveyed to Lake Mead are consistent with Nevada Water  
6 Law and State Engineer's Order 1193 and 1194.<sup>93</sup>

6 In ICS credit accounting, the State Engineer recognizes that decreed Muddy River  
7 water right holders are entitled to the full duty of their water rights. In Order 1309,  
8 without any legal authority to do so, the State Engineer failed to adhere to past practices  
9 and did not recognize the full duty of decreed Muddy River water rights. Instead, he  
10 chose to cut the duty nearly in half, from 8.54 af/acre to 4.7 af/acre. Furthermore, the  
11 State Engineer did not provide any justification for this change in practice.

12 The State Engineer's past practices regarding the consumptive use of decreed  
13 Muddy River water rights are also reflected in statutory limitations on the State  
14 Engineer's ability to consider the consumptive use of a water right. NRS 533.3703  
15 permits the State Engineer to consider the consumptive use of a water right when  
16 evaluating a change application, but decreed Muddy River water rights are specifically  
17 excluded from NRS 533.3703.<sup>94</sup> The legislature enacted a statute that expressly allowed  
18 the State Engineer to consider consumptive use, but importantly excluded Muddy River  
19

20 <sup>92</sup> SE ROA 8971.

21 <sup>93</sup> SE ROA 46349.

22 <sup>94</sup> NRS 533.3703(2)(a) ("the provisions of this section do not apply to any decreed,  
23 certified or permitted right to appropriate water which originates in the Virgin River or  
24 the Muddy River"); *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.").

1 decreed water rights. Therefore, the State Engineer’s re-quantification of the Muddy  
2 River decreed water rights was arbitrary and capricious.

3 **C. The State Engineer violated the non-impairment doctrine by reducing**  
4 **the amount of water recognized and protected under the decree.**

5 The State Engineer is prohibited from taking any action that would impair a pre-  
6 statutory water right, such as any Muddy River decreed water right.<sup>95</sup> This doctrine on  
7 non-impairment has been upheld by Nevada courts since the water law was first litigated  
8 in 1914.<sup>96</sup> By failing to properly recognize the full extent of existing decreed rights,  
9 including the current-day uses under valid change applications and ICS creation, the  
10 State Engineer impaired the use of those rights. But for Order 1309, SNWA and  
11 LVVWD’s Muddy River water rights would be recognized under their full duty as set  
12 forth in the Muddy River decree. Such an action is barred by statute, making the State  
13 Engineer’s Order 1309 arbitrary, capricious, and an abuse of discretion.

14 **D. The State Engineer violated the prior appropriation doctrine by using**  
15 **the NIWR of alfalfa to re-quantify decreed Muddy River water rights.**

16 By not recognizing the full duty of decreed Muddy River water rights, the State  
17 Engineer was, in effect, preferencing junior groundwater users in violation of Nevada  
18 law. Prior appropriation has been the basis of Nevada’s water law since statehood. This  
19 doctrine applies a “first in time, first in right” principle to all appropriations of water.<sup>97</sup>

20  
21 <sup>95</sup> NRS 533.085(1) (“Nothing contained in this chapter shall impair the vested right of  
22 any person to the use of water, nor shall the right of any person to take and use water be  
23 impaired or affected by any of the provisions of this chapter where appropriations have  
24 been initiated in accordance with law prior to March 22, 1913.”).

<sup>96</sup> *Ormsby County v. Kearney*, 37 Nev. 314, 142 P. 803 (Nev. 1914).

<sup>97</sup> *Lobdell v. Simpson*, 2 Nev. 274, 277 (1866) (“he has the best right who is first in  
time.”).

1 Priority is one element in the bundle that makes up a water right.<sup>98</sup> Every water right,  
2 whether vested or permitted, is assigned a relative priority date. This priority date is an  
3 essential component of the water right that cannot be stripped away without diminishing  
4 the right itself.<sup>99</sup>

5 Under NRS 533.430(1), all permitted water rights are subject to existing rights.  
6 Therefore, junior water right holders are prohibited from conflicting with senior water  
7 right holders. In Order 1309, the State Engineer held that junior groundwater pumping  
8 that captures Muddy River flow did not conflict with decreed Muddy River rights  
9 because he reduced the total duty of senior decreed water rights by using the NIWR of  
10 alfalfa to calculate the water demand of these rights.<sup>100</sup> By reducing the total duty of  
11 decreed Muddy River water rights in order to find that some amount of junior  
12 groundwater can be pumped without impacting the senior decreed rights, the State  
13 Engineer is allowing junior groundwater pumpers to continue to capture senior Muddy  
14 River water rights. For example, between 2008 and 2017, junior groundwater pumping  
15 captured 12,040 acre-feet of Muddy River flow.<sup>101</sup> Instead of recognizing that fact, the  
16 State Engineer reduced the total duty of the decreed water rights to support his finding  
17 that junior groundwater pumping does not illegally interfere with Muddy River flow. By  
18 failing to recognize the impact of junior groundwater pumping on senior decreed water  
19 rights, the State Engineer violated Nevada law. Therefore, the State Engineer's finding

21 \_\_\_\_\_  
22 <sup>98</sup> *Wilson v. Happy Creek, Inc.*, 135 Nev. 301, 313, 448 P.3d 1106, 1115 (2019).

23 <sup>99</sup> *Happy Creek*, 135 Nev. at 312, 448 P.3d at 1115.

24 <sup>100</sup> SE ROA 62.

<sup>101</sup> SE ROA 42009 (SNWA compared the pre-development baseflow of the of the Muddy River to the annual flood adjusted natural flow of the river to determine the amount of river capture caused by junior groundwater pumping).

1 regarding the capture of decreed Muddy River water rights by junior groundwater  
2 pumpers is arbitrary, capricious, and an abuse of discretion.

3 **III. The State Engineer's Re-Quantification Of Decreed Muddy River Water**  
4 **Rights Was Based On Erroneous Calculations.**

5 Even if the State Engineer had the authority to re-quantify decreed rights, the State  
6 Engineer cites to no substantial evidence in the record to support his calculated duty of  
7 Muddy River decreed water rights. And, while the State Engineer cites to the Muddy  
8 River Decree to support his assertion that the decree sets forth specific quantities of  
9 water per user,<sup>102</sup> the decree, by its plain terms, does not support any of the facts used in  
10 his analysis.

11 **A. Irrigated acres**

12 The State Engineer erroneously states that the total amount of irrigated land in the  
13 decree is 5,614 acres.<sup>103</sup> However, the acreages adjudicated in the Muddy River decree  
14 simply do not add up to this total. The acreage listed in the decree is divided by season  
15 with a "winter" season and a "summer" season.<sup>104</sup> The total winter acres in the decree  
16 is approximately 4,700 acres.<sup>105</sup> The total summer acres in the decree is approximately

17 \_\_\_\_\_  
18 <sup>102</sup> SE ROA 61.

19 <sup>103</sup> SE ROA 61.

20 <sup>104</sup> The winter season includes the months of October through April. The summer season  
21 includes the months of May through September.

22 <sup>105</sup> See SE ROA 33798 (original table, later supplemented to add winter use), 33813  
23 (amendment to add winter use to original table), 33787-33789 (final decree), 33799-  
24 33806 (acreage per claim). The winter acreages are calculated as follows: George and  
Aletha Baldwin 16 ac, Moapa and Salt Lake Produce Company 155 ac, Livingston and  
Smith 160 ac, Joseph and Kathryn Perkins 30 ac, G.S. Holms & Julia Knox 95 ac, Isaih  
& Anna Cox 10 ac, Cox/J.H. Mitchel 3 ac, W. J. and Mary Powers 29 ac, Sadie George  
2.1 ac, Jacob Bloedel 2 ac, John Perkins 2 ac, MVIC (Certificate 58) 398.11 ac, MVIC  
(Certificate 59W) 846.6 ac, MVIC (Certificate 60) 80 ac, MVIC (Permit 1611) 2,784.75  
ac, and Tribe 87 ac.

1 3,261 acres.<sup>106</sup> The State Engineer provided no explanation for how he calculated this  
2 number. Thus, the State Engineer's calculation is completely unsupported in the record  
3 and therefore cannot withstand judicial scrutiny.

4 **B. Muddy River flow**

5 The State Engineer also claimed that the total diversion rates in the decree far  
6 exceed the full the flow of the river.<sup>107</sup> This claim is unsupported by the record. In  
7 1920, the Muddy River flowed more than current day because groundwater development  
8 since 1920 has reduced the river flows. In 1920, the court reviewed evidence submitted  
9 and determined that the listed acreages were irrigated, leading to the duties described in  
10 the Muddy River Decree. The total diversion rates under the Muddy River Decree  
11 equate to approximately 34,000 afa,<sup>108</sup> which is roughly the same quantity as the  
12 estimated pre-development flow of the Muddy River and 10% more than the current  
13 flow.<sup>109</sup> However, current river flow is logically lower than the decreed amount due to  
14 junior groundwater pumping interfering with senior rights. Thus, the evidence supports  
15 that the amounts in the decree accurately reflect a full appropriation of the base flow of  
16 the river. No evidence supports the State Engineer's contrary position.

17  
18  
19 <sup>106</sup> ROA 33798, 33799-33806. The summer acres are calculated as follows: George and  
20 Aletha Baldwin 16 ac, Moapa and Salt Lake Produce Company 155 ac, Livingston and  
21 Smith 160 ac, Joseph and Kathryn Perkins 30 ac, G.S. Holms & Julia Knox 95 ac, Isaih  
22 & Anna Cox 10 ac, Cox/J.H. Mitchel 3 ac, W. J. and Mary Powers 29 ac, Sadie George  
2.1 ac, Jacob Bloedel 2 ac, John Perkins 2 ac, MVIC 2,244.8 acres, MVIC (certificate  
59S) 425.2 ac, and Tribe 87 ac.

22 <sup>107</sup> See SE ROA 61.

23 <sup>108</sup> This amount is derived by applying the summer duty to the summer acres, the winter  
24 duty to the winter acres, and taking a weighted average based on days per season to  
establish the annual average diversion of all rights.

<sup>109</sup> SE ROA 42009.

1           **C.    Conveyance losses**

2           The State Engineer’s decreed water right duty calculation is also flawed because  
3 it does not account for water conveyance losses to the hypothetical alfalfa fields.  
4 Instead, he concludes that there is no conveyance loss because “the alluvial corridor is  
5 narrow and well defined so water stays within the shallow groundwater or discharges  
6 back to the river.”<sup>110</sup>

7           When water is moved to a field through a ditch network or similar conveyance,  
8 losses of water occur such as seepage into the ground and evaporation. Those losses are  
9 included as part of the total duty of the water right, because those losses are often  
10 necessary to ensure water reaches its end place of use. The State Engineer assumed that  
11 the pre-1905 irrigation of the Muddy River was 100% efficient, with no evaporation or  
12 conveyance loss. The State Engineer cites no evidence to support this optimistic, but  
13 nearly impossible contention. Never has the State Engineer considered a water right  
14 based on a 100% efficiency factor because it is nearly impossible, if not impossible, to  
15 achieve 100% efficiency.<sup>111</sup> To the contrary, the State Engineer has consistently and  
16 historically used an irrigation efficiency multiplier to estimate the additional water  
17 needed to deliver the water to the plants.<sup>112</sup> The State Engineer cites to no evidence or

18 \_\_\_\_\_  
19 <sup>110</sup> SE ROA 62.

20 <sup>111</sup> The State Engineer’s own NIWR evidence (which provided the 4.7 acre-feet per acre  
21 value) undermines his determination. Ditches and reservoirs are used to convey water  
22 to irrigate fields. These conveyance structures are shallow open water features. The  
23 NIWR for shallow open water is approximately 5.1 acre-feet per acre. So there is  
24 unquestionably some conveyance loss of water. Thus, not only are the State Engineer’s  
findings not supported by substantial evidence, his findings are contrary to his own  
limited evidence cited in his Order, being the NIWR calculations and the decree.

<sup>112</sup> SNWA and LVVWD request this Court take judicial notice, pursuant to NRS  
47.130(2)(b), of the State Engineer’s 2017 Statewide Groundwater Pumpage Inventory.

1 reasoning why he abandoned his long-standing and tested efficiency calculation in this  
2 instance.

3 The State Engineer cites to no evidence that supports his flawed calculations, and  
4 in fact the limited evidence he cites in the ruling undermines his findings. Therefore,  
5 the dearth of evidence in the record on the diminishment of senior decreed rights means  
6 that the State Engineer's decision regarding the impact of junior groundwater pumping  
7 on senior decreed water rights is not sound.<sup>113</sup>

8 **D. Manner of use**

9 The State Engineer arbitrarily and capriciously assumed all decreed water rights  
10 are used for growing alfalfa instead of relying on his own records showing the current  
11 and lawful beneficial use of the decreed Muddy River water rights. These uses include  
12 municipal, industrial, and ICS credit creation. In the same way that it would be improper  
13 for the State Engineer to reduce an irrigation right based on some other hypothetical use,  
14 such as municipal, it was improper for the State Engineer to review all decreed rights  
15 through an irrigation lens when decreed rights are not all used for irrigation.

16 The State Engineer relied solely on one hypothetical manner of use when  
17 conducting his conflicts analysis. However, the State Engineer's own records show that  
18 the decreed water rights are not being used to solely irrigate alfalfa crops. In fact, much  
19 of the decreed water has lawfully been changed to other uses, such as power or municipal  
20 use. For example, Permits 23600 and 22603 changed the manner of use of decreed  
21 Muddy River water rights from irrigation to industrial use using the full duty awarded  
22

23 \_\_\_\_\_  
24 Located at [http://water.nv.gov/documents/Nevada\\_Groundwater\\_Pumpage\\_2015.pdf](http://water.nv.gov/documents/Nevada_Groundwater_Pumpage_2015.pdf) at  
4 (last visited August 27, 2021).

<sup>113</sup> *Revert*, 95 Nev. at 786, 603 P.2d at 264.

1 under the decree.<sup>114</sup> Similarly, Permit 22739 changed the manner of use of decreed  
2 Muddy River water rights from irrigation to municipal use.<sup>115</sup> Additionally, SNWA has  
3 created 157,824 afa of Muddy River Tributary Conservation ICS credits since 2009  
4 using decreed Muddy River rights.<sup>116</sup> The priority date and nature of these new uses  
5 relate back to the decreed amount.<sup>117</sup> The NIWR does not apply to these non-irrigation  
6 uses, so it was arbitrary for the State Engineer to use NIWR to estimate the duty of  
7 decreed Muddy River water rights. Nor did the State Engineer account for these water  
8 rights in his hypothetical calculation, although he was aware of the existence of these  
9 rights and the quantity of water committed to their beneficial use. By ignoring these  
10 relevant facts, the State Engineer acted arbitrarily and capriciously, and abused his  
11 discretion.

12 **E. Duty of decreed water rights**

13 In Order 1309, the State Engineer re-quantified decreed Muddy River water rights  
14 using the NIWR of alfalfa when he performed his conflicts analysis.<sup>118</sup> In effect, this  
15 reduced the duty of decreed Muddy River water rights to 4.7 af/acre which is  
16

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17 <sup>114</sup> Application 23600 available at  
18 [http://images.water.nv.gov/images/Book\\_Records/23000/23600.pdf](http://images.water.nv.gov/images/Book_Records/23000/23600.pdf) (last visited May  
19 27, 2021). Application 22603 available at  
20 [http://images.water.nv.gov/images/Book\\_Records/22000/22603.pdf](http://images.water.nv.gov/images/Book_Records/22000/22603.pdf) (last visited May  
21 27, 2021).

22 <sup>115</sup> Application 22739 available at  
23 [http://images.water.nv.gov/images/Book\\_Records/22000/22739.pdf](http://images.water.nv.gov/images/Book_Records/22000/22739.pdf) (last visited May  
24 27, 2021).

25 <sup>116</sup> SE ROA 42007.

26 <sup>117</sup> *Andersen Fam. Assocs. v. Hugh Ricci, P.E.*, 124 Nev. at 192, 179 P.3d at 1207  
27 (“[a]lthough Carson City changed the use of its vested rights, those rights remained of  
28 the same character – i.e., they remained vested and did not become solely permitted  
29 rights just because the holder obtained a permit changing the use of the rights.”).

30 <sup>118</sup> SE ROA 62.



1 significantly less than the duty recognized in the decree. The use of the NIWR also  
2 neglects to account for the winter use expressly recognized in the decree, as it is based  
3 on the water needs of alfalfa, which is typically grown only in the summer. All water  
4 rights adjudicated in the Muddy River Decree have a duty of 1 cubic feet per second  
5 (“cfs”) for 70 acres in the summer irrigation season and 1 cfs for 100 acres for the winter  
6 irrigation season.<sup>119</sup> These diversion rates equate to 10.34 af/acre in summer (153  
7 irrigation days) and 7.24 af/acre in winter (212 irrigation days).<sup>120</sup> The weighted average  
8 duty is thus 8.54 af/acre.<sup>121</sup> This duty is the vested amount of water to which each  
9 claimant is entitled to receive on an annual basis. In Order 1309 the State Engineer  
10 disregarded the duty recognized in the Muddy River Decree and instead reduced the duty  
11 of decreed Muddy River water rights to 4.7 af/acre. Therefore, the State Engineer’s  
12 conflict analysis was arbitrary, capricious, and an abuse of discretion.

13 **IV. The State Engineer’s Conflicts Analysis Was Arbitrary, Capricious, And An**  
14 **Abuse Of Discretion Because A Conflicts Analysis Was Beyond The Scope Of**  
15 **The Order 1303 Hearing.**

16 **A. The purpose of the Order 1303 Hearing was for parties to submit**  
17 **evidence pertaining to an impacts analysis, not a conflicts analysis.**

18 The State Engineer’s conflicts determination in Order 1309 was arbitrary and  
19 capricious because it went beyond the scope of the administrative hearing. The 1303

20 <sup>119</sup> SE ROA 33808.

21 <sup>120</sup> SE ROA 33796.

22 <sup>121</sup> The duty reduction from 8.54 af/ac to 4.7af/ac represents a 45% reduction to the duty  
23 established and protected under the Muddy River Decree. The calculations of reduction  
24 above based on acre feet are of a lesser degree due to the jumble of contradictory and  
unsupported numbers provided by the State Engineer in the Order. The State Engineer  
found an acreage of 5,614 acres, a duty of 4.7 af/ac, but a total of 28,300 afa. These  
numbers simply do not add up. The estimated degree of error varies based on which of  
these three incorrect numbers are used for the comparison against the decreed amounts.

1 Hearing was supposed to be the initial step in a “multi-tiered process” to develop a  
2 management strategy in the LWRFS.<sup>122</sup> The State Engineer and the hearing officer made  
3 clear on several occasions that the purpose of the Order 1303 Hearing was not to address  
4 conflicts and that conflicts would be addressed at a later stage of the administrative  
5 process.<sup>123</sup> The 1303 Hearing was expressly “not to resolve or address allegations of  
6 conflicts between groundwater pumping within the LWRFS and Muddy River decreed  
7 rights.”<sup>124</sup> Parties were told that the issue of conflicts would be addressed in a later phase  
8 of the proceeding.<sup>125</sup> Accordingly, the issue of conflicts was not fully litigated in the  
9 Order 1303 Hearing, and the State Engineer should not have included findings related  
10 to conflicts in the resulting Order.

11 Instead, the purpose of the Order 1303 Hearing was to conduct, in part, a  
12 sustainability analysis in order to determine how much water could be pumped, if any,  
13 before impermissible impacts occurred to the natural resources.<sup>126</sup> The distinction  
14 between an impacts analysis and a conflicts analysis is an important concept in water  
15 law. A conflict occurs when the impact prevents the full beneficial use of a senior right  
16 or is otherwise unreasonable. A conflicts analysis necessarily determines a review into  
17 whether the impact rises to the level of a conflict as well as a legal review of whether  
18 the water right being impacted has priority over the water right causing the impact. On  
19 the other hand, an impacts analysis looks at the general impact of a project while a  
20 conflicts analysis focuses on whether an impact rises to the level of a conflict. The

21 \_\_\_\_\_  
22 <sup>122</sup> SE ROA 522 at 10: 8-10 (Fairbank).

23 <sup>123</sup> SE ROA 522 at 12:6-9 (Fairbank), SE ROA 285.

24 <sup>124</sup> SE ROA 522 at 12:6-15 (Fairbank).

<sup>125</sup> SE ROA 522 at 12:6-15 (Fairbank).

<sup>126</sup> SE ROA 522 at 10:18-22 (Fairbank) “The purpose of the hearing is to determine what the sustainability is, *what the impact is on decreed rights.*” (emphasis added).

1 distinction between impacts and conflicts is reflected in Nevada law, which recognizes  
2 that some impacts are reasonable, where other impacts would cause a conflict with a  
3 water right.<sup>127</sup> The State Engineer’s determination that the impacts to senior water rights  
4 were not conflicts went beyond a mere impacts analysis and made a legal determination  
5 about whether those impacts constituted a conflict. SNWA and LVVWD were never  
6 afforded an opportunity to put on conflicts evidence, such as a legal review of whether  
7 impacts rose to the level of conflicts, because the State Engineer limited the hearing  
8 from conflicts evidence.

9 As part of the impacts analysis, the State Engineer found that pumping over 8,000  
10 afa caused declines in springs.<sup>128</sup> The State Engineer found that pumping decreased  
11 since 2014, and that at the pumping range of around 7,000 to 8,000 afa may be allowing  
12 the system to approach steady state.<sup>129</sup> Based on the State Engineer’s statements about  
13 scope, the analysis should have ended there. Instead, the paragraphs on page 60 and the  
14 first paragraph on page 61 of Order 1309 expanded the impacts analysis to one of  
15 conflicts, which the State Engineer said he would not be conducting in this proceeding.  
16 These paragraphs should be stricken as being outside the scope of this proceeding. Their  
17 exclusion has no impact on the remainder of the Order or any of the final conclusions of  
18 the State Engineer.

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21 <sup>127</sup> NRS 534.110(5) (allows for a reasonable lowering of the static water level at a water  
22 applicant’s place of diversion. Therefore, the Nevada legislature recognized that one can  
23 impact a senior water right without necessarily conflicting with the water right); NRS  
24 533.014(1)(b) (protects domestic wells from “unreasonable adverse effects.” You can  
impact domestic wells without reaching the level of unreasonable adverse effects).

<sup>128</sup> See SE ROA 64.

<sup>129</sup> SE ROA 58, 60 (“distributed pumping since the completion of the Aquifer Test in  
excess of 8,000 afa has correlated with a stabilization of spring discharge.”).

1 The State Engineer’s conflicts analysis in Order 1309 contradicted his own  
2 guidance regarding the scope of the Order 1303 Hearing. These actions make his  
3 decision to perform a conflicts analysis in Order 1309 arbitrary, capricious, and an abuse  
4 of discretion.

5 **B. The State Engineer’s conflicts analysis violated Nevada law because it**  
6 **was beyond the scope of the Order 1303 Hearing.**

7 The State Engineer violated Nevada law by performing a conflicts analysis that  
8 was outside the scope of the Order 1303 Hearing. The State Engineer must allow parties  
9 a “full opportunity to be heard” and “must clearly resolve all the crucial issues presented  
10 ... [w]hen these procedures, grounded in the basic notions of fairness and due process,  
11 are not followed, and the resulting administrative decision is arbitrary, oppressive, or  
12 accompanied by a manifest abuse of discretion, [the courts] will not hesitate to  
13 intervene.”<sup>130</sup> However, when setting the scope of the Order 1303 Hearing, the State  
14 Engineer’s office explained “the purpose of the hearing is not to resolve or address  
15 allegations of conflict between groundwater pumping within the LWRFS and Muddy  
16 River decreed rights.”<sup>131</sup>

17 SNWA and LVVWD did not get the opportunity to provide meaningful input at  
18 the hearing regarding conflicts because the scope of the Order 1303 Hearing was not  
19 supposed to include a conflicts analysis.<sup>132</sup> SNWA and LVVWD did not have a full and  
20 fair opportunity to present evidence of how Muddy River water rights should be  
21 calculated and how increased groundwater pumping would impact those rights. Instead,

22 \_\_\_\_\_  
23 <sup>130</sup> NRS 533.450(2) (requiring a full opportunity to be heard); *Revert*, 95 Nev. at 787,  
603 P.2d at 264-65.

24 <sup>131</sup> SE ROA 522 at 12:6-15 (Fairbank) (emphasis added).

<sup>132</sup> SE ROA 522 at 12:6-15 (Fairbank) (emphasis added).

1 they presented evidence on the general impact of groundwater pumping on Muddy River  
2 flows, but stopped short of addressing whether conflicts existed because parties were  
3 specifically told not to do so.<sup>133</sup>

4 If SNWA and LVVWD knew the State Engineer was going to recalculate the  
5 volume of decreed Muddy River water rights and make conflict determinations, the  
6 agencies would have presented legal and scientific evidence concerning (1) the proper  
7 method of calculating rights under the Muddy River decree, (2) how groundwater  
8 pumping in the LWRFS has conflicted with senior decreed rights, and (3) which rights  
9 are causing conflicts, and which are not. Instead, SNWA and LVVWD presented  
10 limited evidence and purposely avoided a more thorough presentation of conflicts to  
11 comply with the State Engineer's orders on the limited scope of the proceeding in  
12 anticipation of a later hearing to address conflicts. Therefore, by performing a conflicts  
13 analysis that was outside the scope of the Order 1303 Hearing, the State Engineer did  
14 not afford SNWA and LVVWD a full opportunity to be heard, in violation of Nevada  
15 law.

16 **C. The State Engineer's conflicts analysis violated SNWA's and**  
17 **LVVWD's due process rights because it was outside the scope of the**  
18 **hearing.**

19 The State Engineer's conflicts analysis violated SNWA and LVVWD's due  
20 process rights because it was beyond the scope of the Order 1303 Hearing and parties  
21 had no notice of the expanded scope or opportunity to be heard on the issue. The Nevada  
22 Supreme Court has recently affirmed that "[p]rocedural due process requires that parties  
23  
24

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<sup>133</sup> See SE ROA 53400 at 1048:24-1049:14 (Burns).

1 receive notice and an opportunity to be heard.”<sup>134</sup> The Nevada Supreme Court has  
2 explained that “a hearing is not meaningful without awareness of the matters to be  
3 considered.”<sup>135</sup> The Court has also recognized that “[i]nherent in any notice and hearing  
4 requirement are the propositions that notice will actually reflect the subject matter to be  
5 addressed and that the hearing will allow full consideration of it.”<sup>136</sup>

6 Here, Order 1303, the Notice of Pre-Hearing Conference, and the hearing officer’s  
7 subsequent statements, made clear that the Order 1303 Hearing was limited to the  
8 questions presented in the order and was not intended to address conflicts between water  
9 users in the LWRFS.<sup>137</sup> The State Engineer disregarded his own limitation and  
10 performed a *sua sponte* post-hearing conflicts analysis in Order 1309 that relied on the  
11 NIWR of alfalfa to support his finding that junior groundwater pumping did not conflict  
12 with senior decreed Muddy River water rights.<sup>138</sup> Furthermore, the NIWR method and  
13 data used by the State Engineer to make this finding were not part of the record or  
14 presented at the hearing. Indeed, no party had the opportunity to present evidence  
15 rebutting the State Engineer’s use of the NIWR of alfalfa to calculate the water  
16 requirement of decreed Muddy River water rights.

17 By performing a conflicts analysis beyond the scope of the Order 1303 Hearing,  
18 the State Engineer failed to provide SNWA and LVVWD with a meaningful hearing in  
19 which the agencies understood the subject matter in play. In fact, the State Engineer

20 \_\_\_\_\_  
21 <sup>134</sup> *Eureka Cnty. v. Seventh Judicial Dist. Ct.*, 133 Nev. 275, 279, 417 P.3d. 1121, 1124  
(2018) (internal quotations omitted).

22 <sup>135</sup> *Nevada Power Co. v. Public Service Commission*, 91 Nev. 816, 824, 544 P.2d 428,  
434 (1975).

23 <sup>136</sup> *Public Service Commission of NV v. Southwest Gas*, 99 Nev. 268, 662 P.2d 624, 626  
(1983).

24 <sup>137</sup> See SE ROA 82-83, SE ROA 513, SE ROA 522 at 11:4-12:15 (Fairbank).

<sup>138</sup> SE ROA 62.

1 affirmatively represented on numerous occasions that this subject *would not be*  
2 *addressed through the hearing*. The failure to provide SNWA and LVVWD with a  
3 meaningful hearing manifestly violated the agencies' due process rights and requires  
4 that the State Engineer's conflicts analysis be reversed by this Court.

5  
6 **CONCLUSION**

7 For the reasons stated herein, the State Engineer's finding in Order 1309 that  
8 junior groundwater pumping in the LWRFS does not conflict with senior decreed  
9 Muddy River water rights should be reversed.

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Pursuant to NRAP 28.2, undersigned counsel certifies that:

1. I have read this entire opening brief.
2. To the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose.
3. This answering brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.
4. This opening brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this answering brief has been prepared in a proportionally spaced font using Microsoft Word in 14-point Times New Roman font.
5. I further certify that this answering 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 contains less than 14,000 words.

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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 DATED this 27th day of August 2021.

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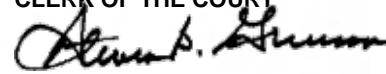
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17 **DISTRICT, and SOUTHERN NEVADA**  
18 **WATER AUTHORITY**

19 **Petitioners,**

20 vs.

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22 **Engineer, DIVISION OF WATER**  
23 **RESOURCES, DEPARTMENT OF**  
24 **CONSERVATION AND NATURAL**  
**RESOURCES,**

**Respondents.**

Case No. A-20-816761-C

Dept. No. 1

Consolidated with Cases:

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

**APPENDIX TO OPENING BRIEF**

As requested by Judge Yeager this appendix contains excerpts from the record on appeal that were cited to in the Las Vegas Valley Water District and Southern Nevada

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1 Water Authority's opening brief in the consolidated petitions for judicial review of Order  
2 1309. Excerpts from the record on appeal are attached as Exhibit 1.

3  
4 **AFFIRMATION:** The undersigned does hereby affirm that the preceding  
5 document and/or attachments do not contain the social security number of any person.  
6 Dated this 27th day of August 2021.

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Exhibit No.	Exhibit Title
1	Excerpts from record on appeal

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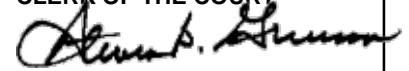
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**SEE SNWA REPLY APPENDIX FOR MATRIX OF SE ROA  
DOCUMENTS CONVERTED TO JOINT APPENDIX  
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28 **CLARK COUNTY, NEVADA**

29 LAS VEGAS VALLEY WATER DISTRICT,  
30 and SOUTHERN NEVADA WATER  
31 AUTHORITY, et al.,

Case No. A-20-816761-C

Dept. No. 1

32 Petitioners,

Consolidated with Cases:

33 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

34 ADAM SULLIVAN, P.E., Acting  
35 Nevada State Engineer, et al.,

36 Respondent.

37 **NOTICE OF ENTRY OF ORDER GRANTING INTERVENTION**

38 **YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE** that the *Order Granting Intervention* was entered on the 13<sup>th</sup> day of September, 2021, a copy of which is attached hereto.

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DATED this 13<sup>th</sup> day of September, 2021.

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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 13<sup>th</sup> day of September, 2021.

/s/ Nancy Fontenot  
NANCY FONTENOT

4831-5701-8875, v. 1

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28 **CLARK COUNTY, NEVADA**

29 LAS VEGAS VALLEY WATER DISTRICT,  
30 and SOUTHERN NEVADA WATER  
31 AUTHORITY, et al.,

Case No. A-20-816761-C  
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32 Petitioners,

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A-20-817876-P  
A-21-833572-J

33 vs.

34 ADAM SULLIVAN, P.E., Acting  
35 Nevada State Engineer, et al.,

36 Respondent.

37 **ORDER GRANTING INTERVENTION**

38 At the July 1, 2021 Status Check, counsel for SOUTHERN NEVADA WATER AUTHORITY  
("SNWA"), MUDDY VALLEY IRRIGATION COMPANY ("MVIC"), and ADAM SULLIVAN,

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1 P.E., NEVADA STATE ENGINEER (“STATE ENGINEER”) stipulated to the intervention of  
2 LINCOLN COUNTY WATER DISTRICT (“LCWD”) and VIDLER WATER COMPANY, INC.  
3 (“VIDLER”) into SNWA’s Case No. A-20-816761-C and MVIC’s Case No. A-20-817977-P.

4 Good cause appearing,

5 **IT IS HEREBY ORDERED THAT:**

6 1. LCWD and Vidler shall be granted the right to intervene in Case Nos. A-20-816761-C  
7 and A-20-817977-P; and

8 2. The Court Minutes from the July 1, 2021 Status Check are hereby supplemented by  
9 this Order.

10 **IT IS SO ORDERED.**

11 DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2021.

Dated this 13th day of September, 2021

*Bitia Yeager*

\_\_\_\_\_  
DISTRICT JUDGE

9EA 235 3826 93E7  
Bitia Yeager  
District Court Judge

12  
13  
14  
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4838-2892-3898, v. 1



1 CSERV

2 DISTRICT COURT  
3 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**

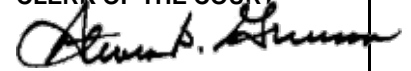
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15 **IN AND FOR THE COUNTY OF CLARK, STATE OF NEVADA**

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

19 Petitioners,

20 vs.

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

26 Respondent.

Case No. A-20-816761-C

Dept. 1

Consolidated with Cases:

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

Hearing Requested

**THE CENTER FOR BIOLOGICAL  
DIVERSITY'S ANSWERING BRIEF**

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1 **INTRODUCTION**

2 These consolidated Petitions for Judicial Review challenge various aspects of the Nevada  
3 State Engineer’s Order 1309, in which the State Engineer determined that it was necessary to  
4 jointly manage the appropriation and development of groundwater rights across a seven-basin area  
5 in Southern Nevada in order to protect senior water rights and the environment. Petitioner Center  
6 for Biological Diversity files this answering brief in response to the opening briefs of Petitioners  
7 Coyote Springs Investment, Inc., (“CSI”), Lincoln County Water District, and Vidler Water  
8 Company (together, “Lincoln/Vidler”), Georgia-Pacific Gypsum, LLC and Republic  
9 Environmental Technologies, Inc. (together, “Georgia-Pacific”), and APEX Holding Company,  
10 LLC, (“APEX”), and Nevada Cogeneration Associates Nos. 1 and 2 (“NCA”)

11 Petitioners CSI, Lincoln/Vidler, Georgia-Pacific, APEX, and NCA dispute the State  
12 Engineer’s authority to jointly or conjunctively manage ground- and surface-water resources,  
13 notwithstanding substantial evidence showing that groundwater pumping from the interconnected  
14 carbonate aquifers of the Lower White River Flow System (“LWRFS”) will reduce springflows in  
15 the Muddy River Springs Area, thereby impacting senior water rights and harming the endangered  
16 Moapa dace. Three Petitioners—CSI, Lincoln/Vidler, and APEX—further object to the State  
17 Engineer’s conclusions that (1) groundwater pumping may cause unlawful “take” of the Moapa  
18 dace, and (2) it would be contrary to the public interest to allow such “take.”

19 These assertions are wrong. the State Engineer is not only authorized, but required to  
20 manage groundwater pumping to ensure that it does not adversely impact senior water rights and  
21 endangered species. This duty is not altered or diminished where the impacts from pumping occur  
22 across multiple topographic “basins.”

23 Under the federal Endangered Species Act (“ESA”), the State Engineer is prohibited from  
24 causing or authorizing unpermitted “take” of an endangered species. The State Engineer, the  
25 Division of Water Resources, and the State of Nevada could all face civil liability under Section 9  
26 of the ESA if authorized groundwater pumping in the LWRFS were to cause unpermitted “take”  
27 of the Moapa dace. These principles are well established under both Nevada water law and federal  
28 court precedent. The Court should therefore uphold the State Engineer’s conclusion that preventing



1 unauthorized take of Moapa dace as required under the ESA is proper to consider as part of the  
2 public interest, and a limiting factor on groundwater development across the interconnected basins  
3 of the LWRFS.

4         The State Engineer also concluded correctly in Order 1309 that Kane Springs Valley should  
5 be included in the LWRFS and jointly managed along with the other LWRFS basins. The Court  
6 should uphold this conclusion because substantial evidence indicates that Kane Springs Valley  
7 shares the same supply of water with the rest of the LWRFS. Contrary to arguments from  
8 Petitioners CSI and Lincoln/Vidler, the existence of heterogenous geologic structures, such as  
9 faults, at the outlet of Kane Springs Valley does not undermine the conclusion that Kane Springs  
10 Valley carbonate aquifer is connected to the LWRFS. While the complex geology of the area has  
11 been observed to slightly impede groundwater movement across the Kane Springs basin boundary,  
12 a substantial amount of groundwater nevertheless flows from Kane Springs Valley into Coyote  
13 Spring Valley. This water, like most of the water in the LWRFS carbonate aquifer, eventually  
14 discharges from the Muddy River Springs and into the Muddy River. Consequently, groundwater  
15 pumping from Kane Springs Valley could impact both the Moapa dace and senior water rights in  
16 the Muddy River Springs Area. The State Engineer was correct to include Kane Springs in the  
17 LWRFS, and the court should uphold this aspect of Order 1309.

18         Joint management of the LWRFS basins, including Kane Springs, is necessary not only to  
19 protect the Moapa dace, but also to prevent impairment of senior water users' rights to the surface  
20 flow of the Muddy River. Nevada water law embraces prior appropriation, or "first in time, first  
21 in right," as a fundamental principle. Under the prior appropriation doctrine, water rights are given  
22 priority based on the date when the water in question was first appropriated or put to beneficial  
23 use. In the event of a shortage, water rights are managed based on relative priority, with the most  
24 junior rights being reduced, or "curtailed" first.

25         The most senior rights in the LWRFS are the rights awarded under the 1920 Muddy River  
26 Decree. Because the LWRFS carbonate aquifer and the Muddy River share the same supply of  
27 water, the development of junior groundwater rights in the LWRFS carbonate aquifer ultimately  
28 removes water from the Muddy River and impairs these senior rights.

1 Substantial evidence presented to the State Engineer indicates that groundwater pumping  
2 anywhere within the seven LWRFS basins could impact Muddy River flows and, by extension,  
3 senior decreed rights. The State Engineer was therefore correct to conclude that all water rights in  
4 the LWRFS should be jointly managed and capped at certain level in order to prevent impacts to  
5 senior Muddy River rights. The alternative—advanced by CSI, Lincoln/Vidler, Georgia Pacific,  
6 APEX, and NCA here—would permit junior groundwater users to impair senior decreed rights,  
7 and thus violate fundamental principles of Nevada water law.

8 This court should also reject the argument of Petitioners CSI, Lincoln/Vidler, Georgia-  
9 Pacific, APEX, and NCA, that the State Engineer lacks statutory authority to manage groundwater  
10 sources jointly across basin boundaries. Not only is such authority necessarily implied by the State  
11 Engineer’s paramount duty to protect senior water rights, but it is also firmly established in the  
12 Nevada Water statutes, which provide the State Engineer with ample authority to manage  
13 groundwater shortages and over-appropriation. CSI, Lincoln/Vidler, Georgia Pacific, APEX, and  
14 NCA all fail to identify any statutory provision that geographically limits the State Engineer’s  
15 authority to manage a common, over-appropriated supply of water such as the LWRFS carbonate  
16 aquifer. Moreover, these petitioners argue in favor of an unworkable construction of the statutes  
17 under which the State Engineer would have no authority to manage groundwater over-  
18 appropriation or conflicts with senior water rights where the impacts of overpumping occur across  
19 multiple basins. The Court should therefore reject these arguments and affirm the State Engineer’s  
20 authority to jointly manage the LWRFS basins.

21 Most of Order 1309 is correct. However, as the Center, the Southern Nevada Water  
22 Authority (“SNWA”), and the Muddy Valley Irrigation Company (“MVIC”) argued in their  
23 opening briefs, this Court must reverse certain aspects of the Order that permit ongoing impacts to  
24 senior water rights and the environment. Specifically, the State Engineer concluded in Order 1309  
25 that pumping up to 8,000 acre-feet per year of groundwater from these seven jointly-managed  
26 LWRFS basins will not conflict with senior water rights on the Muddy River or the public’s interest  
27 in the protection and recovery of the Moapa dace. This conclusion was erroneous because it was  
28 based on the unsupported assumption that groundwater levels in the LWRFS carbonate aquifer are

1 approaching a “steady state.” This “steady state” conclusion ignores data showing that  
2 groundwater levels and springflows have continued to decline since the conclusion of the Order  
3 1169 pumping test.

4 Further, the State Engineer erred in concluding that “current” levels of groundwater  
5 pumping do not conflict with Muddy River decreed rights. As discussed herein, groundwater  
6 pumping has removed thousands of acre-feet per year from the Muddy River, thereby impairing  
7 the rights of parties to the Muddy River decree. The State Engineer’s conclusion in Order 1309  
8 that this depletion of flows does not constitute a conflict must be reversed because it is both  
9 factually baseless and legally incorrect.

10 The Center therefore respectfully requests that this Court uphold (1) the State Engineer’s  
11 conclusion in Order 1309 that it is contrary to the public interest to allow unpermitted “take” of  
12 the Moapa dace; (2) the State Engineer’s decision to combine the seven LWRFS basis for joint  
13 administration of water rights; and (3) the State Engineer’s decision to include Kane Springs  
14 Valley in the LWRFS. However, the Court should reverse, vacate, and remand as appropriate: (1)  
15 the State Engineer’s determination that up to 8,000 acre-feet of groundwater may be pumped  
16 annually from the LWRFS; and (2) the State Engineer’s conclusion that permitting up to 8,000  
17 acre-feet per year of groundwater pumping from the LWRFS will adequately protect the Moapa  
18 dace and (3) the State Engineer’s conclusion that permitting up to 8,000 acre-feet per year of  
19 groundwater pumping from the LWRFS does not present a conflict with senior decreed water  
20 rights.

## 21 ARGUMENT

### 22 I. The State Engineer Correctly Determined that it is Contrary to the Public Interest to 23 Allow Unpermitted “Take” of an Endangered Species.

24 Answer to: Lincoln/Vidler Section VI.C; Georgia-Pacific Section V.F; APEX Section  
25 IV.A.5

26 In Order 1309, the State Engineer correctly recognized that the management of  
27 groundwater resources entails consideration of the public interest. *See* SE ROA 43-44. The State  
28 Engineer also correctly determined that “it is against the public interest to allow groundwater

1 pumping from the LWRFS that will reduce spring flow in the Warm Springs Area to a level that  
2 . . . could result in take of the endangered [Moapa dace].” SE ROA 47.

3 Several petitioners object to this finding. Lincoln/Vidler, for instance, argues that the State  
4 Engineer has “no jurisdiction” over the “protection of the Moapa Dace.” Lincoln/Vidler Op. Br.  
5 at 37. Similarly, Georgia-Pacific claims that the State Engineer has not “provided . . . the basis for  
6 his authority” to determine when any “take” of the Moapa dace could occur. Georgia-Pacific Op.  
7 Br. at 29. APEX’s opening brief, meanwhile, contains a conclusory assertion that State Engineer  
8 lacks authority and jurisdiction over matters concerning the ESA. Apex Op. Br. at 13-14. These  
9 objections misapprehend the nature of the State Engineer’s conclusions in Order 1309 regarding  
10 the Moapa dace and the ESA. They also ignore well-established legal precedent holding States and  
11 their political subdivisions liable for “take” under Section 9 of the ESA. They are therefore without  
12 merit and should be rejected by this Court.

13 **A. The State Engineer’s Conclusions Regarding the Moapa Dace are Consistent with**  
14 **Nevada Water Law, Which Requires Consideration of the Public Interest.**

15 In recognizing that groundwater pumping from LWRFS basins could cause “take” of the  
16 Moapa dace, and in concluding that it was against the public interest to allow such “take” to occur,  
17 the State Engineer was not asserting “jurisdiction” under the ESA, or claiming for himself any  
18 “authority” to administer the ESA’s provisions. Rather, he was following Nevada State law which,  
19 as noted, requires him to consider the public interest. *See* NRS § 533.370; *Pyramid Lake Paiute*  
20 *Tribe of Indians v. Washoe County*, 112 Nev 743, 747-48, 918 P.2d 697, 700 (1996).

21 Water rights granted by the State Engineer under the Nevada water statutes may be  
22 characterized as “relative, nonownership rights” which are “subject to regulation for the public  
23 welfare.” *Mineral Cty. v. Lyon Cty.*, 136 Nev. Adv. Rep. 58, 473 P.3d 418, 430 (Nev. 2020). In  
24 considering whether a particular appropriation of groundwater serves the public interest, the State  
25 Engineer must consider the appropriation’s “environmental impact,” a category which necessarily  
26 encompasses the potential for impacts to threatened and endangered species. *Pyramid Lake Paiute*  
27 *Tribe*, 112 Nev. at 752, 918 P.2d at 702; *Mineral Cty.*, 473 P.3d at 427. The State Engineer was  
28 also bound to consider potential liability for “take” under Section 9 of the ESA.

1 Thus, in resolving the four questions presented in Interim Order 1303,<sup>1</sup> the State Engineer  
2 was not only authorized, but required to consider how groundwater pumping in the LWRFS would  
3 impact the endangered Moapa dace and its habitat. To allow groundwater pumping at levels that  
4 would harm an endangered species and expose the State to liability for unpermitted “take” under  
5 the ESA would be contrary to any formulation of the “public interest” of which “environmental  
6 impact” is a component. And to ignore environmental concerns entirely, as several petitioners urge  
7 here, would violate both the letter and the spirit of the Nevada water statutes. *See* NRS § 533.370;  
8 *Pyramid Lake Paiute Tribe*, 112 Nev. at 752, 918 P.2d at 702; *Mineral Cty.*, 473 P.3d at 427.

9 **B. The ESA Prohibits the State Engineer From Authorizing Groundwater Withdrawals**  
10 **that Would Cause Unpermitted “Take” of an Endangered Species.**

11 The State Engineer correctly recognized in Order 1309 that liability for “take” under the  
12 ESA could extend to both groundwater users in the LWRFS basins and the State of Nevada itself.  
13 *See* SE ROA 47. The liability of States and their political subdivisions for “take” under the ESA  
14 is based on the plain text of the statute and has been well-established in federal-court case law for  
15 decades. Section 9 of the ESA prohibits any “person” from “taking any [endangered] species  
16 within the United States or the territorial sea of the United States.” 16 U.S.C. § 1538(a)(1)(B). In  
17 addition, the ESA makes it unlawful for any person “to attempt to commit, solicit another to  
18 commit, or cause to be committed, any offense defined” in the ESA. *See id.* § 1538(g).

19 In considering the potential liability of State agencies and private groundwater users under  
20 these provisions, one must consider, as the State Engineer did here, the broad statutory definitions  
21 of the terms “take” and “person.” *See* SE ROA 45. “Take” means to “harass, harm, pursue, hunt,  
22 shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C.  
23 § 1532(19). “‘Take’ is defined . . . in the broadest possible manner to include every conceivable

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24  
25 <sup>1</sup> The questions are: (1) the geographic boundary of the LWRFS, (2) aquifer recovery since the  
26 Order 1169 pumping test, (3) long-term annual quantity of groundwater that may be pumped from  
27 the LWRFS, and (4) the effects of moving water rights between the carbonate and alluvial system  
28 to senior water rights on the Muddy River. SE ROA 82-83.

1 way in which a person can ‘take’ or attempt to ‘take’ any fish or wildlife.” S. Rep. No. 93-307, at  
2 7 (1973); *see also* *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S.  
3 687, 115 S. Ct. 2407, 2416 (1995) (citing Senate and House Reports indicating that “take” is to be  
4 defined broadly). In addition, the regulations adopted by the Secretary of the Interior define “harm”  
5 broadly to include “significant habitat modification or degradation where it actually kills or injures  
6 wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or  
7 sheltering.” *See* 50 C.F.R. § 17.3 (1994). The statutory term “person” includes any “individual,  
8 corporation, partnership, trust, association, or any other private entity” as well as “any officer,  
9 employee, agent, department, or instrumentality . . . of any State, municipality, or political  
10 subdivision of a State . . . [or] any State, municipality, or political subdivision of a State . . .” 16  
11 U.S.C. § 1532(13).

12         Given these definitions, it follows that any “State,” any “officer employee, agency, [or]  
13 department” of that State, any private individual, and any private business entity may be liable  
14 under the ESA for conduct that kills or injures wildlife through “significant habitat modification.”  
15 States and their political subdivisions may also be liable for authorizing any such conduct.  
16 Consequently, private groundwater users in the LWRFSS may be liable under Section 9 of the ESA  
17 for harming the endangered Moapa dace, and the State Engineer may likewise be liable for  
18 allowing such harm to occur.

19         These principles have long been recognized by Federal courts. As the United States Court  
20 of Appeals for the First Circuit noted in *Strahan v. Coxe*, the ESA “not only prohibits the acts of  
21 those parties that directly exact the taking, but also bans those acts of a third party that bring about  
22 the acts exacting a taking.” 127 F.3d 155, 163 (1st Cir. 1997). Thus, “a governmental third party  
23 pursuant to whose authority an actor directly exacts a taking of an endangered species may be  
24 deemed to have violated the provisions of the ESA.” *Id.* A State or State agency may be liable  
25 under Section 9 if its regulatory action is found to be a “proximate cause” of the taking. *Id.*  
26 Licensing natural resource extraction “specifically in a manner that is likely to result in a violation  
27 of federal law,” has generally been understood to constitute a proximate cause of a taking. *Id.*  
28 “[W]hile indirect,” this sort of licensing activity “is not so removed that it extends outside the

1 realm of causation as it is understood in the common law.” *Id.* at 164. *See also Nat. Res. Def.*  
2 *Council v. Zinke*, 347 F. Supp. 3d 465, 491 (E.D. Cal. Sept. 28, 2018) (finding that water supply  
3 contracts could be the basis for Section 9 liability and that “strict but-for causation cannot be  
4 required under the circumstances. Any other finding would exclude categorically from Section 9  
5 liability any party whose conduct is individually insignificant, but is collectively significant, no  
6 matter how foreseeable to each of the individual actors the collective consequences of their  
7 actions.”); *Red Wolf Coal. v. N.C. Wildlife Res. Comm’n*, No. 2:13-CV-60-BO, 2014 U.S. Dist.  
8 LEXIS 65601, at \*20 (E.D.N.C. May 13, 2014) (“By authorizing coyote hunting in the five-county  
9 red wolf recovery area, and in particular by authorizing coyote hunting during all seasons and at  
10 any time day or night, the Commission has increased the likelihood that a red wolf will be shot, or  
11 that a breeding pair will be dismantled or a placeholder coyote killed. The Commission may  
12 therefore be liable for the unauthorized takes of red wolves where its actions have greatly increased  
13 the likelihood of the take.”); *Coalition for a Sustainable Delta v. McCamman*, 725 F. Supp. 2d  
14 1162, 1167 (E.D. Cal. 2010) (finding that “take” may “include acts of a third party that indirectly  
15 bring about a take by causing another to effect a take”); *Humane Soc’y of the United States v.*  
16 *Kienzle*, No. 16-cv-0724 WJ/SMV, 2017 U.S. Dist. LEXIS 181784, at \*9 (D.N.M. Nov. 2, 2017)  
17 (“[A] state licensing scheme can in fact be a proximate cause of a taking in violation of the ESA.”).

18         In *Strahan*, for example, the Massachusetts Division of Marine Fisheries (“Division”)—a  
19 State agency “vested with broad authority to regulate fishing in Massachusetts’s coastal waters”—  
20 issued licenses which allowed commercial fishing operations to use gillnets and lobster pots in  
21 ways that would injure or kill endangered northern right whales. *Id.* at 159-59, 164. In response to  
22 allegations that issuing these permits rendered the Division liable for “take” under the ESA, the  
23 Division argued that the State’s licensure of a “generally permitted activity” could not be  
24 considered a “proximate cause” of any taking. *Id.* at 164. The court rejected this argument and  
25 concluded that the Division was liable for “take,” for its licensure activities even though, strictly  
26 speaking, the conduct of third-party fishermen licensed by the Department was the immediate  
27 cause of any harm to endangered whales. *Id.*

1 Other federal courts have agreed with *Strahan*'s analysis. For example, in *Defenders of*  
2 *Wildlife v. Administrator, Environmental Protection Agency*, a federal regulatory agency  
3 authorized the use of certain pesticides, which resulted in the poisonings of endangered species.  
4 882 F.2d 1294, 1301 (8th Cir. 1989). The United States Court of Appeals for the Eighth Circuit  
5 found that "the relationship between the registration decision and the deaths of endangered species  
6 [was] clear" and the registration decision constituted a "taking[]" even though authorized third  
7 parties, and not the agency, had actually applied the pesticides in question. *Id.* Similarly, in  
8 *Loggerhead Turtle v. Volusia County Council*, a federal district court concluded that a county  
9 government had committed "take" of endangered sea turtles by permitting private vehicles to drive  
10 on the beaches where the turtles nested. 896 F. Supp. 1170, 1182 (M.D. Fla. 1995). And in *Palila*  
11 *v. Hawaii Department of Land and Natural Resources*, the Ninth Circuit found that by maintaining  
12 feral sheep and goats in an endangered bird's habitat, the State Department of Land and Natural  
13 Resources was violating Section 9 of the ESA, "since it was shown that the Palila was endangered  
14 by the [State's] activity." 639 F.2d 495, 497 (9th Cir. 1981). *See also Cascadia Wildlands v.*  
15 *Kitzhaber*, 911 F. Supp. 2d 1075, 1085 (D. Or. 2012) (finding that "state officials can indeed be  
16 liable for directly authorizing third-party activities . . . that are likely to result in take.") (cited in  
17 the Center's Opening Brief).

18 Here, the State Engineer's regulation of groundwater pumping in the LWRFS is similar to  
19 the Division's licensing of gillnet and lobster pot fishing in *Strahan* because, if the State Engineer  
20 allows a certain type of resource extraction (groundwater pumping from the LWRFS carbonate  
21 aquifer), "take" of an endangered species will occur through the exercise of otherwise lawful,  
22 permitted activities. As the State Engineer recognized in Order 1309, the Muddy River Springs—  
23 which provide the only known habitat for the endangered Moapa dace—discharge from the  
24 regional carbonate aquifer. *See* SE ROA 59-60. Reductions in carbonate groundwater levels  
25 therefore correspond to reductions in flow at the springs. SE ROA 59-60. As a consequence of this  
26 close relationship between groundwater and springflow, any pumping from the carbonate aquifer  
27 within the LWRFS ultimately removes water from the springs and reduces the amount of habitat  
28 available to the Moapa dace. SE ROA 34513; *see also* SE ROA 48713-15 (FWS report directly



1 correlating springflow reductions at the Pedersen, Pedersen East, and Jones/Apcar springs with  
2 groundwater level reductions at the EH-4 well). According to FWS, “any reduction in flow will  
3 negatively affect the amount of [dace] habitat.” SE ROA 48724

4 Thus, groundwater pumping authorized by the State Engineer can be directly attributed to  
5 reductions in springflows, which in turn cause the loss or modification of dace habitat. *See* SE  
6 ROA 47180, 47191-97. While the State Engineer’s role in exacting a “taking” of the dace is  
7 arguably “indirect,” it is “not so removed that it extends outside the realm of causation as it is  
8 understood in the common law.” *Strahan*, 127 F.3d at 164; *see Nat. Res. Def. Council*, 347 F.  
9 Supp. 3d at 520 (finding the record provided sufficient information to show that approved water  
10 transfers could be the proximate cause of harm to species).

11 The defendants in *Strahan* also argued, similar to Lincoln/Vidler and Georgia-Pacific here,  
12 that “the statutory structure of the ESA does not envision utilizing the regulatory structures of the  
13 states in order to implement its provisions.” *Strahan*, 127 F.3d at 164. The court quickly rejected  
14 this argument, pointing out that the State was “not being compelled to enforce the provisions of  
15 the ESA.” *Id.* Instead, the court’s ruling in the plaintiffs’ favor was intended to “end the [State’s]  
16 continuing violation of the Act.” *Id.*

17 The court’s analysis in *Strahan* shows that it is not the case, as argued by Lincoln/Vidler  
18 and Georgia-Pacific, that in recognizing the State’s well-established liability under the ESA the  
19 State Engineer was somehow asserting “authority” or “jurisdiction” to administer the Act in place  
20 of FWS. Rather, the State Engineer explained in Order 1309 that he intended to prevent a violation  
21 of the Act by maintaining a “minimum flow rate” of 3.2 cubic feet per second from the Muddy  
22 River Springs. SE ROA 46. Far from being an exceedance or abuse of the State Engineer’s  
23 statutory authority, this conclusion was compelled by both the “public interest” component of  
24 Nevada water law and the ESA itself. Lincoln/Vidler and Georgia Pacific’s position in this  
25 litigation—that the State Engineer should ignore the ESA entirely and allow junior groundwater  
26 pumpers to commit unpermitted “take” of the Moapa dace—is contrary to law and could expose  
27 all LWRFS groundwater users and the state of Nevada to liability under the ESA.

1           **C. The 2006 MOA and Programmatic Biological Opinion Do Not Provide Any**  
2           **Exemptions Allowing Take of the Moapa Dace.**

3           Finally, it should be noted that the U.S. Fish and Wildlife Service’s 2006 Programmatic  
4 Biological Opinion (“biological opinion”)—which accompanied a Memorandum of Agreement  
5 (“MOA”) between the Southern Nevada Water Authority, the Moapa Valley Water District, CSI,  
6 the Moapa Band of Paiutes, and FWS—provides no protection from Section 9 liability related to  
7 “take” of the Moapa dace. Nor does the 2006 biological opinion demonstrate that the State  
8 Engineer or any other party to this litigation is “complaint” with the ESA.

9           That biological opinion was the culmination of the consultation required under Section  
10 7(a)(2) of the ESA before FWS could enter into the MOA. Section 7(a)(2) requires each federal  
11 agency, in consultation with FWS, to ensure that any action it authorizes, funds, or carries out is  
12 not likely to jeopardize the continued existence of any threatened or endangered species. 16 U.S.C.  
13 § 1536(a)(2). Where federal agency actions may affect a listed species, FWS engages in a process  
14 of “formal consultation” with the “action” agency. 50 C.F.R. § 402.14. Formal consultation results  
15 in the issuance of a biological opinion explaining how the proposed agency action will affect the  
16 listed species in question. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14. If the biological opinion  
17 concludes that the agency action is not likely to jeopardize the continued existence of a listed  
18 species, but may nevertheless cause some degree of “take,” FWS must provide an “incidental take  
19 statement” along with the biological opinion, specifying the amount or extent of permitted take,  
20 describing any “reasonable and prudent measures” that FWS considers necessary or appropriate  
21 to minimize impacts to the species, and setting forth the “terms and conditions” that the “action”  
22 agency must comply with in implementing those measures. *Id.* § 1536(b)(4); 50 C.F.R. § 402.14(i).

23           A biological opinion is issued under Section 7(a)(2) in response to a proposal for federal  
24 agency action, and therefore applies only to effects of that particular agency action. Moreover, the  
25 “formal” consultation process for federal agencies under Section 7(a)(2) provides protection from  
26 Section 9 “take” liability only for the “action” agency and any licensees or permittees of that  
27 agency, and only if: (1) FWS issues an incidental take statement, and (2) the “terms and conditions”  
28 of that incidental take statement are followed.

1 Here, the 2006 biological opinion “evaluates, as the proposed action, the execution of the  
2 MOA by [FWS].” SE ROA 47146. The Biological Opinion specifically states that it does not cover  
3 “future site-specific actions,” and it does not “authorize any incidental take for . . . impacts  
4 associated with the activities included in the MOA,” such as groundwater pumping.<sup>2</sup> SE ROA  
5 47147; *see also* SE ROA 47207 (“No exemption from Section 9 of the Act is issued through this  
6 biological opinion”). This is because the “action of signing the MOA, in and of itself does not  
7 result in the pumping of any groundwater.” SE ROA 47207. In short, any future groundwater  
8 withdrawals, such as “utilization of . . . CSI[’s] water right[s],” must be “addressed on their own  
9 merits” through a separate consultation process. SE ROA 47148, 47157. Apart from an October  
10 29, 2008 biological opinion and incidental take statement issued to the Bureau of Land  
11 Management for a proposal to authorize a right of way on public lands for water supply facilities  
12 including pipelines that would facilitate the withdrawal of 1,000 acre-feet per year from Kane  
13 Springs Valley, (*see* SE ROA 49906-73) no additional consultation process related to groundwater  
14 withdrawals that could affect the Moapa dace has occurred.

15 The State Engineer was also correct to note in Order 1309 that he “and many other  
16 groundwater users are not covered by the terms of the MOA.” SE ROA 47. Indeed, Lincoln/Vidler  
17 stated clearly in their report in response to Interim Order 1303 that they “are not a party to, nor are  
18 they a signatory to the 2006 Memorandum of Agreement, and thus, . . . are not bound by th[e]  
19 agreement.” SE ROA 36351. The vast majority of groundwater users in the LWRFS similarly lack

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23 <sup>2</sup> Order 1309 states that “[s]ome groundwater users are signatories to an MOA that authorizes  
24 incidental take of the Moapa dace.” SE ROA 47. This is incorrect. The MOA did not and could  
25 not authorize incidental take. Take authorization is available only through a valid incidental take  
26 statement or incidental take permit issued by FWS. No incidental take statement was issued with  
27 the 2006 biological opinion, and the biological opinion plainly states that it provides “[n]o  
28 exemption for Section 9 of the Act.” SE ROA 47207.

1 any authorization for incidental take of the Moapa dace, and the State Engineer was therefore  
2 correct to recognize potential ESA liability from carbonate groundwater pumping in the LWRFS.

3 For all of these reasons, this court should reject any claims that the State Engineer erred or  
4 exceeded his statutory authority by recognizing that preventing unauthorized take of Moapa dace  
5 as required under the ESA is proper to consider as part of the public interest and a limiting factor  
6 on groundwater development in the LWRFS.

7 **II. While Order 1309 Correctly Recognizes Potential ESA Liability, It Fails to Protect**  
8 **the Moapa Dace From the Impacts of Carbonate Groundwater Pumping.**

9 Although Order 1309 correctly recognizes the limitations imposed on groundwater  
10 development by the need to avoid unpermitted “take” of Moapa dace under the ESA, it fails to  
11 impose appropriate limitations on water withdrawals to ensure that result. In Order 1309, the State  
12 Engineer found, “based upon the testimony and evidence offered in response to Interim Order  
13 1303,” that “it is necessary for spring flow measured at the Warm Springs West gage to flow at a  
14 minimum rate of 3.2 [cubic feet per second] in order to maintain habitat for the Moapa dace.” SE  
15 ROA 46. The State Engineer further recognized that this “minimum flow rate is not necessarily  
16 sufficient to support the rehabilitation of the Moapa dace.” SE ROA 46. However, the State  
17 Engineer then proceeded to authorize an arbitrarily high level of groundwater pumping—8,000  
18 acre-feet per year—based on a factually and legally incorrect “conflicts” analysis (see Section  
19 IV.B, *infra*) and the largely unsupported assertion that groundwater levels in the LWRFS were  
20 approaching a “steady state,” despite “compelling” evidence to the contrary. SE ROA 58-63; *see*  
21 *also* Center for Biological Diversity Op. Br. at 24-28.

22 As explained by FWS, the flow from the Muddy River springs is a function of the  
23 groundwater levels in the carbonate aquifer. SE ROA 48712-13. This means that springflows  
24 decline in direct relation to groundwater levels, with the highest-elevation springs affected first  
25 and more severely. *See* SE ROA 48713. According to an analysis of Order 1169 pumping test data  
26 by FWS, flows from Pedersen Spring, the highest-elevation spring in the Muddy River complex,  
27 decrease by 0.06 cubic feet per second for every one-foot decline in carbonate groundwater levels  
28 at the EH-4 monitoring well. SE ROA 48715. This amounts to a 19% decrease in springflow for

1 every foot of groundwater decline. SE ROA 48715. Flows from Pedersen East, the second highest  
2 elevation spring, decrease by about 0.036 cubic feet per second, or 14% for every foot of decline  
3 at EH-4. SE ROA 48715. Jones (a.k.a. Aparcar) Spring loses about 2.5% of its maximum flow with  
4 every foot of decline at EH-4. SE ROA 48715.

5 As FWS recognized in its Order 1303 report, “any reduction in flow” from these springs  
6 “will negatively affect the amount of habitat . . . for the Moapa dace,” particularly at the higher-  
7 elevation springs. SE ROA 48724; *see also* SE ROA 47191 (discussing specific adverse impacts  
8 to the Moapa dace from reduced springflow). SNWA’s experts further explained that these higher-  
9 elevation springs “are critical to the survival and reproduction” of the Moapa dace. SE ROA 42200.  
10 The Pedersen springs—which are most sensitive to groundwater declines—are “of particular  
11 concern” because they contain important Moapa dace spawning habitat. SE ROA 42200

12 As discussed in the Center’s opening brief, carbonate groundwater levels in the LWRFS  
13 have not achieved a “steady state.” Center Op. Br. at 24-28. In fact, carbonate groundwater levels  
14 in the LWRFS and flows from the Muddy River Springs declined precipitously during the Order  
15 1169 pumping test, *and have continued to decline since*, with water levels at the EH-4 monitoring  
16 well reaching an all-time low in November 2018, and flows from the Warm Springs West gage  
17 reaching 3.2 cubic feet per second in Fall 2019. SE ROA 8-12, 751, 34525, 53617. The State  
18 Engineer’s conclusion that current pumping rates could continue in spite of these declines ignores  
19 the ways in which groundwater declines impact springflows and, by extension, the quality and  
20 quantity of Moapa dace habitat. For this reason, the State Engineer’s conclusion in Order 1309  
21 that 8,000 acre-feet per year may be sustainably pumped from the LWRFS basins is arbitrary,  
22 capricious, and not supported by substantial evidence. *State Engineer v. Morris*, 107 Nev. 699,  
23 701, 819 P.2d 203, 205 (1991); *Pyramid Lake Paiute Tribe*, 112 Nev. at 751, 918 P.2d at 702.

24 This court should uphold the State Engineer’s determination that it is against the public  
25 interest to permit groundwater pumping that would cause “take” of the Moapa dace, but reverse,  
26 vacate, and remand as appropriate the State Engineer’s determination that up to 8,000 acre-feet  
27 per year may be pumped from the LWRFS.

1 **III. Substantial Evidence Supports the Inclusion of Kane Springs Valley in the LWRFS.**

2 Answer to: CSI Section VI.2.C; Lincoln/Vidler Section VI.B.3; Georgia-Pacific Section V.A

3 CSI, Lincoln/Vidler, and Georgia Pacific object to the inclusion of Kane Springs Valley in  
4 the LWRFS, despite irrefutable evidence that Kane Springs Valley is hydrologically connected to  
5 Coyote Spring Valley and thus to the rest of the LWRFS. The Court should reject this argument  
6 because substantial evidence supports the inclusion of Kane Springs Valley in the LWRFS.  
7 *Pyramid Lake Paiute Tribe*, 112 Nev. at 751, 918 P.2d at 702; *Bacher v. Office of the State Eng'r*  
8 *of Nev.*, 122 Nev. 1110, 1121, 146 P.3d 793, 800 (2006) (explaining that substantial evidence is  
9 “that which ‘a reasonable mind might accept as adequate to support a conclusion.’”) The data,  
10 technical reports, and testimony presented at the Interim Order 1303 hearing are more than  
11 adequate to support a conclusion that Kane Springs Valley is part of the LWRFS.

12 Kane Springs Valley borders Coyote Spring Valley to the northeast. The carbonate aquifer  
13 that underlies Coyote Spring Valley and the rest of the LWRFS extends into Kane Springs Valley.  
14 SE ROA 53. In Order 1309, the State Engineer explained that the “occurrence of the carbonate-  
15 rock aquifer in the Southern Kane Springs Valley indicates that there is no known geologic feature  
16 at or near the southern Kane Springs Valley border” separating Kane Springs Valley from the rest  
17 of the LWRFS. SE ROA 53. While the State Engineer acknowledged that there is a greater  
18 “hydraulic gradient” in the carbonate aquifer in northern Coyote Spring Valley and southwestern  
19 Kane Springs Valley—meaning, generally, that groundwater moves more slowly through the  
20 carbonate aquifer in these locations—he correctly recognized that significant inter-basin flow  
21 nevertheless occurs, and that the carbonate aquifer in southern Kane Springs Valley showed a  
22 response to groundwater pumping from the LWRFS carbonate aquifer during the Order 1169  
23 pumping test. SE ROA 53.

24 CSI, Lincoln/Vidler, and Georgia-Pacific dispute this conclusion. They suggest that a  
25 difference in “hydraulic head” between Kane Springs Valley and Coyote Spring Valley supports  
26 the exclusion of Kane Springs Valley from the LWRFS. *See, e.g.*, CSI Op. Br. at 36-41. In  
27 simplified terms, this refers to a difference in groundwater levels; the carbonate aquifer in Kane  
28 Springs Valley is higher in elevation than the carbonate aquifer in Coyote Spring Valley. However,

1 CSI, Lincoln/Vidler, and Georgia-Pacific assign far too much significance to this fact. The  
2 difference in elevation between Kane Springs Valley and central Coyote Spring Valley is indeed  
3 greater in general than in other parts of the LWRFS, where the aquifer is remarkably “flat.” SE  
4 ROA 34534. But the difference in groundwater elevation, or “hydraulic head,” between the two  
5 valleys is still minimal when compared to groundwater systems generally.<sup>3</sup> SE ROA 707, 34534.  
6 Between well KMW-1 in Kane Springs Valley and well CSVM-4 in northern Coyote Spring  
7 Valley there is a 5.5-foot vertical difference in water levels, which equates to a “hydraulic  
8 gradient” of 0.00042.<sup>4</sup> SE ROA 707, 34534. This is still a very flat gradient, and supports the  
9 conclusion that the valleys are closely connected. In comparison, the hydraulic gradient between  
10 northern Coyote Spring Valley and Pahrangat Valley to the northwest is orders of magnitude  
11 greater. SE ROA 34506.

12 CSI and Lincoln/Vidler also emphasize the results of a geologic mapping study  
13 commissioned by Lincoln, Vidler, and CSI which identified fault structures at the outlet of Kane  
14 Springs Valley. *See, e.g.*, CSI Op. Br. 40-42, 44, 50. CSI and Lincoln/Vidler incorrectly  
15 characterized these structures as a hydraulic “boundary” throughout the Interim Order 1303  
16 hearing and continue to do so here. However, there is no evidence that the fault structure identified  
17 by CSI and Lincoln/Vidler’s study acts as a barrier to groundwater flow between Kane Springs  
18 Valley and Coyote Spring Valley. The carbonate aquifer around southwestern Kane Springs Valley  
19 exhibits lower transmissivity—meaning groundwater moves more slowly through the geologic  
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22 <sup>3</sup> The term “hydraulic head,” when applied to groundwater, refers to a difference in elevation  
23 between two points, generally measured by the difference in water levels between two or more  
24 wells. *See* State of Nevada, Div. of Water Res., “Water Words Dictionary,” [http://water.nv.gov/  
25 WaterPlanDictionary.aspx](http://water.nv.gov/WaterPlanDictionary.aspx) (last accessed Nov. 21, 2021).

26  
27 <sup>4</sup> The term “hydraulic gradient” refers generally to the slope of a water table. *See* State of Nevada,  
28 Div. of Water Res., “Water Words Dictionary,” *supra* note 3.

1 structures there in comparison with exceptionally transmissive regions in Coyote Spring Valley  
2 and the Muddy River Springs Area—but there is no evidence of a “barrier” to groundwater flow  
3 in this area, such as “water flowing parallel to the fault,” or an abrupt change in groundwater levels  
4 corresponding with the fault. SE ROA 34536-37 (technical memorandum by Dr. Tom Myers); *see*  
5 *also* 42175-76 (SNWA expert report concluding that faults in northern Coyote Spring Valley “do  
6 not prohibit groundwater flow”), 48705-06 (FWS expert report concluding that while the carbonate  
7 aquifer in northern Coyote Spring Valley and southern Kane Springs Valley is “of less  
8 transmissivity,” it is “nonetheless transmissive and in hydraulic connection with the exceptionally  
9 high transmissivity portion of the aquifer”). Regardless of the lower transmissivity, the gradient  
10 still is relatively minimal and “large volumes of groundwater flow through the carbonate aquifer  
11 across the Kane Springs Wash Fault . . . into central Coyote Spring Valley.” SE ROA 48695 (FWS  
12 expert report).

13 Further, groundwater level declines from the Order 1169 pumping test were discernable in  
14 Kane Springs Valley, indicating a connection with Coyote Spring Valley. SE ROA 53, 34537,  
15 42176, 48694. Because of this connection, groundwater drawdowns will propagate across the  
16 alleged “boundary” fault, affecting groundwater supplies in both basins. *See* SE ROA 48705-06.  
17 This movement of water across the basin boundary supports the State Engineer’s decision to  
18 include Kane Springs Valley in the LWRFS, regardless of the slightly reduced transmissivity.

19 Lincoln/Vidler further argue that Order 1309’s inclusion of Kane Springs Valley is  
20 somehow “inconsistent” with the State Engineer’s Ruling 5712, issued in February 2007, years  
21 before the Order 1169 pumping test. *See* SE ROA 699-721. However, Ruling 5712 is of limited  
22 probative value due to its age and the limited information about the carbonate aquifer that was  
23 available at the time. Furthermore, the State Engineer’s analysis in Ruling 5712 does not support  
24 petitioners’ argument that Kane Springs Valley should be managed separately from the rest of the  
25 LWRFS. Instead, Ruling 5712 acknowledges “strong hydrologic connection” between Kane  
26 Springs and Coyote Spring Valleys, citing both “geochemical evidence” and “ground-water  
27 gradient” data. *See* SE ROA 705-08, 719. Ruling 5712 also notes that “pumping simulations” run  
28 by Lincoln/Vidler showed pumping in Kane Springs Valley would produce “a cone of depression



1 extending well into Coyote Spring Valley.” SE ROA 713. As Lincoln/Vidler point out, Ruling  
2 5712 acknowledges a difference in hydraulic head between Kane Springs Valley and Coyote  
3 Spring Valley but, as discussed above, this merely indicates a zone of lower transmissivity and not  
4 a “barrier or even a substantial impedance to flow.” SE ROA 34534. Because of these facts, the  
5 State Engineer concluded in Order 5712 that to authorize more than 1,000 acre-feet per year of  
6 pumping from Kane Springs Valley would adversely impact downgradient resources in the  
7 LWRFS, including the Muddy River Springs and the Muddy River. SE ROA 719-20.

8 To summarize, neither Ruling 5712, nor Lincoln/Vidler’s “hydrologic and geophysical  
9 data,” CSI Op. Br. at 44, demonstrate that a “barrier” to groundwater flow exists at the outlet of  
10 Kane Springs Valley, or that Kane Springs Valley should be excluded from the LWRFS.

11 CSI, Lincoln/Vidler, and Georgia Pacific further ignore the conclusions drawn in a 2008  
12 FWS biological opinion that analyzes impacts to the Muddy River Springs and the Moapa dace  
13 from the “Kane Springs Valley Groundwater Development Project,” a proposal by Lincoln/Vidler  
14 authorized under Ruling 5712 to extract and export 1,000 acre-feet per year of groundwater from  
15 Kane Springs Valley.<sup>5</sup> SE ROA 49906-73. In the biological opinion, FWS concludes that “[t]he  
16 high permeability and transmissivity of the carbonate aquifer underlying the Kane Springs Valley  
17 and down-gradient Coyote Spring[] Valley could connect the proposed action to springs in the  
18 Warm Springs Area,” and that “[l]ong-term effects from groundwater extraction [in Kane Springs  
19 Valley] could be propagated over great distances.” SE ROA 49926; *see also* ROA 49938 (“The  
20 pumping will be located along the same flow path that supplies the Warm Springs Area and is  
21 within the low-gradient, high-transmissivity zone that connects Kane Springs Valley, Coyote  
22 Spring Valley, and the Warm Springs Area.”). Because of this extraordinary connectivity, FWS  
23 concludes that groundwater pumping in Kane Springs Valley “will likely indirectly affect the  
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26 <sup>5</sup> This biological opinion was issued to the Bureau of Land Management, which authorized the  
27 construction of infrastructure necessary for Lincoln/Vidler’s groundwater pumping. SE ROA  
28 49906.

1 headwater spring discharges of the Muddy River, and therefore, the Moapa dace.” SE ROA 49938.  
2 FWS even concludes in the biological opinion that Kane Springs Valley pumping may cause  
3 “take” of the Moapa dace, and that an incidental take statement is necessary. SE ROA 49944.

4 In their opening brief, Lincoln and Vidler refer to this biological opinion to argue that they  
5 are “compliant” with the ESA, but elsewhere attempt to undermine the opinion’s factual basis.  
6 Lincoln/Vidler Opening Br. at 37. However, Lincoln and Vidler cannot have it both ways. Either  
7 Kane Springs Valley is not hydrologically connected to the LWRFS, in which case no biological  
8 opinion or incidental take statement would be necessary, or Kane Springs Valley is hydrologically  
9 connected, and the 2008 incidental take statement was necessary for groundwater development in  
10 Kane Springs Valley because the impacts of carbonate pumping in Kane Springs would propagate  
11 throughout the system and affect springflows in the Muddy River Springs Area. The latter  
12 conclusion is far more consistent with and supported by the available data and evidence.

13 Between the Order 1169 pump test reports, the expert reports submitted in response to  
14 Interim Order 1303, and various hydrologic analyses available in the record, there is substantial  
15 evidence supporting the inclusion of Kane Springs Valley in the LWRFS. As the State Engineer  
16 acknowledged in Order 1309, the existence of geologic features such as faults within the carbonate  
17 aquifer does not compel the conclusion that these structures act as barriers to groundwater flow.  
18 SE ROA 53-54; *see also* 34536-37 (technical memorandum from Dr. Tom Myers concluding that  
19 the geologic structures identified by Lincoln/Vidler do not act as barriers to groundwater flow).  
20 To the contrary, the Order 1169 pumping test results show that groundwater readily moves through  
21 these features from Kane Springs Valley to Coyote Spring Valley. SE ROA 53-54.

22 Ultimately, the argument against the inclusion of Kane Springs Valley is simply a more  
23 specific version of the general position that hydrographic basins in Nevada should not be jointly  
24 managed, regardless of the degree of hydrologic connection, the potential for impacts to senior  
25 rights, or the environmental consequences of regional over-appropriation. As discussed in detail  
26 below, this position is both legally incorrect and unworkable in practice. Based on the data  
27 presented below, there is more than substantial evidence from which to conclude that Kane Springs  
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1 Valley should be managed jointly with the other LWRFS basins. This Court should uphold the  
2 State Engineer’s decision.

3 **IV. The State Engineer Has Both the Authority and the Obligation to Jointly Manage**  
4 **the LWRFS Basins Because They Share the Same Over-Appropriated Supply of**  
5 **Water.**

6 Five petitioners—CSI, Lincoln/Vidler, Georgia Pacific, APEX, and NCA—argue that the  
7 State Engineer lacks authority to jointly manage water rights in the LWRFS basins based on  
8 relative priority. They characterize the designation of the LWRFS as the creation of a “mega-  
9 basin” which, in their view, runs contrary to certain provisions of Nevada water law that allegedly  
10 require the State Engineer to ignore the interconnections between groundwater basins and manage  
11 water resources based solely on the “perennial yield” of individual basins. This view is both  
12 unfounded in the law and unworkable in practice. Most obviously, it would undermine bedrock  
13 principles of Nevada water law by allowing junior water appropriators to impair the rights of senior  
14 users. It is also environmentally unsustainable and thus contrary to the public interest. If  
15 implemented in the LWRFS, it would allow groundwater pumping in Coyote Spring and Kane  
16 Springs Valleys to deplete springflows in the Muddy River springs area that currently support  
17 thriving ecosystems, communities, and agricultural enterprises. This Court must reject this view  
18 and uphold the State Engineer’s clear and common-sense authority to jointly manage groundwater  
19 and surface water resources where substantial evidence shows that those resources are inextricably  
20 connected.

21 **A. The State Engineer has Statutory Authority to Jointly Manage the LWRFS Basins.**

22 *Answer to: CSI Section VI.1.B; Lincoln/Vidler Section VI.A; Georgia-Pacific Section V.C;*  
23 *APEX Section IV.A; NCA Section VI.A*

24 The State Engineer is a creature of statute, and therefore has “only those powers which the  
25 legislature expressly or implicitly delegates.” *Clark Cty. v. State, Equal Rights Comm’n*, 107 Nev.  
26 489, 492, 813 P.2d 1006, 1007 (1991). However, this does not mean that the State Engineer’s  
27 authority is strictly limited to the exercise of certain enumerated powers. The Nevada Supreme  
28 Court has ruled that an agency possesses not only the powers expressly granted by statute, but also  
any powers that are necessary to fulfill its statutory powers. *City of Henderson v. Kilgore*, 122

1 Nev. 331, 334, 131 P.3d 11, 13 (2006) (holding that “certain powers may be implied even though  
2 they were not expressly granted by statute, when those powers are necessary to the agency’s  
3 performance of its enumerated duties”).

4       Where, as here, a State agency is called upon to interpret a complex statutory scheme,  
5 “great deference should be given to the agency’s interpretation when it is within the language of  
6 the statute.” *Clark Co. Sch. Dist. v. Local Gov’t*, 90 Nev. 442, 446, 530 P.2d 114, 117 (1974). The  
7 Nevada Supreme Court has explained that “[a]n agency charged with the duty of administering an  
8 act is impliedly clothed with power to construe it as a necessary precedent to administrative  
9 action.” *State v. Morros*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988). While not controlling, an  
10 agency’s interpretation of a statute is persuasive. *Id.*

11       Applying these principles, it becomes clear that the State Engineer has ample authority to  
12 jointly manage interconnected groundwater and surface water resources in the State of Nevada.  
13 To begin with, NRS § 534.020(1) provides that “[a]ll underground waters within the boundaries  
14 of the State belong to the public,” and are “subject to all existing rights to the use thereof.”  
15 Accordingly, the State Engineer is empowered to manage these resources for public benefit, and  
16 must also ensure that their use does not impair “existing rights.” This statutory direction to provide  
17 for the public interest and protect existing rights is nowhere limited solely to intra-basin  
18 application.

19       The statutes also grant the State Engineer considerable authority to manage water scarcity  
20 and over-appropriation. NRS § 534.110(6) provides:

21       [T]he State Engineer shall conduct investigations in any basin or portion thereof  
22 where it appears that the average annual replenishment to the groundwater supply  
23 may not be adequate for the needs of all permittees and all vested-right claimants,  
and if the findings of the State Engineer so indicate . . . the State Engineer may  
order that withdrawals . . . be restricted to conform to priority rights.

24       Within an area that has been designated for “active management,” where, “in the judgment of the  
25 [State Engineer], the groundwater basin is being depleted, the State Engineer in his or her  
26 administrative capacity may make such rules regulations, and orders as are deemed essential for  
27 the welfare of the area involved.” NRS §§ 534.030, 534.120. Again, these statutes do not limit the  
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1 State Engineer’s authority to manage over-appropriated resources such that his actions cannot  
2 encompass multiple hydrographic basins.

3 Finally, the statutes provide that it is State policy to “[t]o manage conjunctively the  
4 appropriation, use and administration of all waters of this State, regardless of the source of the  
5 water,” and “[t]o encourage the State Engineer to consider the best available science in rendering  
6 decisions concerning the available surface and underground sources of water in Nevada.” NRS §  
7 533.024(1). Together, these provisions provide the State Engineer sufficient authority to manage  
8 over-appropriated water resources such as the LWRFS carbonate aquifer jointly, across basin  
9 boundaries.

10 It is true, as Lincoln/Vidler points out, that the statutes typically use the term “basin,” in  
11 the singular, *see* Lincoln/Vidler Op. Br. at 16; *see also* CSI Op. Br. at 18-21; Georgia Pacific Op.  
12 Br. at 22-23; NCA Op. Br. at 20. But nowhere in chapters 533 and 534 is the State Engineer  
13 expressly limited to managing groundwater resources within a single basin. Indeed, the term  
14 “basin” is not even defined in the statutes. Lincoln/Vidler derive their definition of the term  
15 “basin,”—on which they rely throughout their argument—not from the statutes or the Nevada  
16 Administrative Code, but from the State Engineer’s “Water Words Dictionary.” Lincoln/Vidler  
17 Op. Br. at 18. While Lincoln/Vidler, CSI, and others claim the State Engineer has no statutory  
18 authority to jointly manage the interconnected water resources of the LWRFS, they fail to identify  
19 any statutory authority for their contention that the management of water resources must take place  
20 exclusively within the current boundaries of a single hydrographic basin.<sup>6</sup> Lincoln/Vidler’s  
21 argument for single-basin management also ignores the State Engineer’s findings in Order 1309  
22 and Rulings 6254-6261 that the LWRFS basins share the same supply of groundwater, and that,

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25 <sup>6</sup> It should also be noted that Nevada’s “hydrographic basins” were delineated primarily based on  
26 topography, and thus do not necessarily reflect the appropriate boundaries and interconnections  
27 within the regional groundwater aquifer. *See, e.g.*, SE ROA 9216 (Nevada State Engineer’s report  
28 discussing the delineation of “hydrographic areas” and “hydrographic basins”).

1 as a consequence of this fact, joint management is necessary to protect senior decreed water rights,  
2 communities dependent on those water rights, and the environment. SE ROA 47-60, 749-51.

3 In addition to assigning undue significance to the use of the singular “basin,” CSI,  
4 Lincoln/Vidler, Georgia Pacific, APEX, and NCA argue that the Court should entirely disregard  
5 the language of NRS § 533.024(1) because it is a declaration of legislative policy and does not  
6 confer any specific authority. *See* CSI Op. Br. at 22; Lincoln/Vidler Op. Br. at 18-19; Georgia  
7 Pacific Op. Br. at 21; APEX Op. Br. at 8-11; NCA Op. Br. at 23-24. This amounts to an argument  
8 that a legislative provision should be given no effect, and is therefore contrary to Nevada Supreme  
9 Court precedent and well-established rules of statutory construction.

10 The Nevada Supreme Court has held that while a “declaration of policy by the legislature,”  
11 is “not necessarily binding or conclusive upon the courts, it is entitled to great weight, and it is  
12 neither the duty nor the prerogative of the courts to interfere in such legislative finding unless it  
13 clearly appears to be erroneous and without reasonable foundation.” *McLaughlin v. Hous. Auth. of*  
14 *the City of Las Vegas*, 227 P.2d 206, 93 (1951); *see also Clean Water Coal. v. M Resort, Ltd. Liab.*  
15 *Co.*, 127 Nev. 301, 313, 255 P.3d 247, 255 (2011) (“The State acknowledges that when legislative  
16 findings are expressly included within a statute, those findings should be accorded great weight in  
17 interpreting the statute.”). Further, it is well established that a statute should not be interpreted in  
18 a manner that causes an entire provision to be ignored and have no consequence. *See* Antonin  
19 Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012).

20 Here, NRS § 533.024(1) meaningfully informs the scope and nature of the State Engineer’s  
21 substantive authority regarding interconnected groundwater and surface water resources. As noted,  
22 the State Engineer is empowered through other provisions of the Nevada Revised Statutes to  
23 “conduct investigations” into groundwater over-appropriation, NRS § 534.110(6), and “may make  
24 such rules regulations, and orders as are deemed essential for the welfare of the area involved.”  
25 NRS §§ 534.030, 534.120. In addition, groundwater appropriations are “subject to all existing  
26 rights,” and may not impair decreed or vested rights. NRS §§ 533.085; 533.0245. These provisions  
27 provide adequate authority to manage groundwater withdrawals in the over-appropriated LWRFS  
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1 jointly, with the purpose of protecting senior decreed rights on the Muddy River and the public’s  
2 interest in the ecosystems, communities, and enterprises dependent on Muddy River flows.

3 Through the inclusion of NRS § 533.024(1), the legislature expressed its intent that the  
4 State Engineer exercise this statutory authority in a way that considers the interconnection between  
5 surface water and groundwater resources, and that is exactly what the State Engineer did in Order  
6 1309. Prior to Order 1309, this was not always done, and the result was regional over-appropriation  
7 and the unsustainable depletion of groundwater resources. *See* SE ROA 749-52 (discussing the  
8 over-appropriation of groundwater in the LWRFS basins); *see also Eureka Cty. v. Seventh Judicial*  
9 *Dist. Court of Nev.*, 134 Nev. 275, 276, 417 P.3d 1121, 1123 (2018) (noting that over-pumping of  
10 groundwater in Diamond Valley, Nevada had caused springs to diminish in flow and dry up).

11 Instead of adopting CSI and others’ position that NRS § 533.024(1) “does not provide the  
12 [State Engineer] with authority to do anything,” CSI Op. Br. at 22, this Court should give all  
13 statutory provisions their intended effect, and recognize the conjunctive management of  
14 interconnected groundwater and surface water is both authorized by the Nevada water statutes and  
15 necessary to the exercise of the State Engineer’s statutory duties.

16 Finally, CSI, Lincoln/Vidler, Georgia Pacific, APEX, and NCA’s narrow view of the State  
17 Engineer’s authority would create inconsistency among the water statutes and lead to absurd  
18 results. *See City Council of City of Reno v. Reno Newspapers, Inc.*, 105 Nev. 886, 892, 784 P.2d  
19 974, 978 (1989) (“Statutory provisions should, whenever possible, be read in harmony provided  
20 that doing so does not violate the ascertained spirit and intent of the legislature.”); *Clark Cty. Sch.*  
21 *Dist. v. Clark Cty. Classroom Teachers Ass’n*, 115 Nev. 98, 103, 977 P.2d 1008, 1011 (1999)  
22 (“The legislature is presumed to have intended a logical result, rather than an absurd or  
23 unreasonable one.”) (quoting *Angoff v. M & M Management Corp.*, 897 S.W.2d 649 (Mo. Ct. App.  
24 W.D. 1995)). As described in more detail below, this narrow interpretation of the relevant  
25 statutes—which would strictly limit the State Engineer to intra-basin management of groundwater  
26 resources—conflicts with NRS § 533.085(1) and NRS § 533.0245, which prohibit the State  
27 Engineer from carrying out his duties in ways that impair or conflict with vested or decreed rights.  
28 And, as a practical matter, this interpretation would allow groundwater pumping by junior water

1 users to diminish senior decreed rights on the Muddy River, upending bedrock principles of  
2 Nevada water law.

3 For all of these reasons, this Court should reject the arguments put forth by CSI,  
4 Lincoln/Vidler, Georgia Pacific, APEX, and NCA that the State Engineer lacks statutory authority  
5 to jointly manage water rights in the LWRFS based on relative priority.

6 **B. Joint Management of the LWRFS Basins Does Not Violate the Prior Appropriation**  
7 **Doctrine; However, Order 1309 Unlawfully Permits Junior Groundwater Pumpers**  
8 **to Impair Senior Decreed Rights.**

9 Answer to: CSI Section VI.1.C; Lincoln/Vidler Section VI.A; Georgia-Pacific V.C; APEX  
10 IV.A.2

11 CSI, Lincoln/Vidler, Georgia Pacific, and APEX all argue that Order 1309 violates the  
12 prior appropriation doctrine by stripping their permitted water rights of their established priorities.  
13 These petitioners are correct in their general assertion that Order 1309 violates the prior  
14 appropriation doctrine, but they are incorrect as to why. Order 1309 is contrary to the principle of  
15 “first in time, first in right” because it permits junior groundwater users, such as CSI, to impair  
16 senior decreed rights on the Muddy River through carbonate groundwater pumping. Instead of  
17 recognizing this fact, however, CSI, Lincoln/Vidler, Georgia Pacific, and APEX argue that prior  
18 appropriation should be applied selectively, or in a geographically limited manner, such that the  
19 State Engineer could not protect senior water rights in one basin from the impacts of junior  
20 groundwater pumping in another. This position is contrary to fundamental principles of Nevada  
21 water law and must therefore be rejected.

22 **1. Joint Management of the LWRFS Basins is Consistent With the Doctrine of Prior**  
23 **Appropriation.**

24 “Nevada’s water statutes embrace prior appropriation as a fundamental principle.” *Mineral*  
25 *Cty.*, 473 P.3d at 423. “Water rights are given ‘subject to existing rights,’ given dates of priority,  
26 and determined based on relative rights.” *Id.* (internal citations omitted). The priority date of a  
27 water right is an important part of that right’s value, and is protected as real property by Nevada  
28 courts. *See Wilson v. Happy Creek, Inc.*, 135 Nev. 301, 313, 448 P.3d 1106, 1115 (2019).



1 Senior water rights are also expressly protected by statute. NRS § 534.020(1) provides that  
2 any appropriation of water is “subject to all existing rights to the use thereof.” NRS § 533.085(1)  
3 provides that “[n]othing contained in this chapter shall impair the vested right of any person to the  
4 use of water.” NRS § 534.110(6) and (7) provide that any curtailment of groundwater pumping  
5 “be restricted to conform to priority rights.” NRS § 533.040(2) protects the priority of a water right  
6 in the event that the place or manner of use is changed. And—particularly relevant to these  
7 proceedings—NRS § 533.0245 prohibits the State Engineer from carrying out his duties “in any  
8 way that conflicts with a decree issued by a state or federal court.”

9 Here, junior groundwater pumping from the LWRFS carbonate aquifer has been shown to  
10 conflict with senior decreed rights on the Muddy River. In Order 1309, the State Engineer correctly  
11 recognized that joint management of the LWRFS basin was necessary under the doctrine of prior  
12 appropriation because development of junior groundwater rights anywhere within the  
13 interconnected seven-basin area could potentially impact senior decreed rights.

14 The entire flow of the Muddy River has been assigned and adjudicated through the Muddy  
15 River Decree. SE ROA 33770-816. In addition to identifying each water right holder on the Muddy  
16 River and quantifying each water right, the Decree provides that the Muddy Valley Irrigation  
17 Company is entitled to “divert and use upon its lands all the waters of the [Muddy River] except  
18 the amounts specifically awarded and allotted to other parties” above the “Wells Siding” area. SE  
19 ROA 33798-33813. Thus, the Decree fully appropriated all flows in the Muddy River to senior  
20 vested right holders with priority dates in or before 1905, making these the most senior rights in  
21 the LWRFS. SE ROA 33770-816. Any reduction in Muddy River flow necessarily conflicts with  
22 existing rights by reducing the amount of water that may be delivered to those holding rights under  
23 the Decree.

24 The carbonate aquifer underlying the seven LWRFS basins discharges from springs in the  
25 Muddy River Springs Area and provides most—if not all—of the flow of the fully-appropriated  
26 Muddy River. In Order 1309, the State Engineer reiterated his previous findings that the LWRFS  
27 basins have a “uniquely connect[ed] . . . shared source and supply of water,” that this same water  
28 discharges from the Muddy River springs and contributes significantly to Muddy River flow, and

1 that groundwater withdrawals from the LWRFS carbonate aquifer reduce Muddy River flows and  
2 thus conflict with senior decreed rights. SE ROA 47-60; *see also* SE ROA 749 (State Engineer’s  
3 Ruling 6254, finding that “the LWRFS basins “share a unique and close hydrological connection  
4 and share virtually all of the same source and supply of water, unlike other basins in Nevada,” and  
5 therefore require joint management.).

6 Based on data showing that the regional carbonate aquifer and the Muddy River share the  
7 same supply of water, the State Engineer determined that joint management was necessary to  
8 protect senior water rights on the Muddy River. *See* SE ROA 59-60. Contrary to CSI,  
9 Lincoln/Vidler, Georgia Pacific, and APEX’s arguments, this did not violate the prior  
10 appropriation doctrine; rather, it was compelled by the State Engineer’s paramount duty under the  
11 law to protect senior decreed rights. NRS § 533.0245; *Mineral Cty.*, 473 P.3d at 423.

12 CSI, Lincoln/Vidler, Georgia Pacific, and APEX’s position that Order 1309 violates the  
13 prior appropriation doctrine overlooks two important points. First, Order 1309 did not change the  
14 priority date of any water rights in the LWRFS, decreed or otherwise. To illustrate, consider CSI’s  
15 water rights in Coyote Springs Valley. Before Order 1309, CSI’s permitted rights had priority  
16 dates ranging from 1983 to 2008. *See* SE ROA 995-1007 (Coyote Spring Valley Hydrographic  
17 Abstract, August 22, 2019). After Order 1309, CSI held the same water rights in Coyote Spring  
18 Valley with priority dates ranging from 1983 to 2008. CSI, Lincoln/Vidler, Georgia Pacific, and  
19 APEX all fail to identify any part of Order 1309 that changes the priority date of any of these water  
20 rights, because none exists. The same can be said of all other permitted groundwater rights in the  
21 LWRFS. CSI, Lincoln/Vidler, Georgia Pacific, and APEX are therefore wrong in arguing that  
22 Order 1309 stripped their water rights of their established priorities, or re-ordered the relative  
23 priority of water rights in the LWRFS.

24 Second, CSI, Lincoln/Vidler, Georgia Pacific, and APEX urge the Court to overlook one  
25 of the key factual findings of Order 1309—that the development of junior groundwater rights in  
26 the LWRFS adversely impacts senior decreed rights on the Muddy River. *See* SE ROA 60-61. CSI,  
27 Lincoln/Vidler, Georgia Pacific, and APEX offer no suggestion as to how the State Engineer or  
28 the Court should address these conflicts with senior rights. Instead, they appear to argue for a

1 selective, or geographically limited, application of the prior appropriation doctrine. CSI,  
2 Lincoln/Vidler, Georgia Pacific, and APEX apparently favor and approach that would either (1)  
3 grant relatively recent permitted groundwater rights priority against significantly senior rights to  
4 the Muddy River’s surface flow, thus violating Nevada water law by favoring their junior rights  
5 over the decreed rights of Muddy River users; or (2) apply the prior appropriation doctrine solely  
6 within the boundaries of a particular hydrographic basin, such that the State Engineer could not  
7 acknowledge any inter-basin impacts to senior water rights.

8         Neither of these approaches is tenable. In both cases, pumping by junior appropriators  
9 would be permitted to diminish senior water rights and, because the LWRFS is currently over-  
10 appropriated, the level of permitted groundwater pumping would likely have catastrophic  
11 environmental impacts. More importantly, there is absolutely no basis in statutory or common law  
12 for this kind of selective application of the prior appropriation doctrine. NRS § 533.0245 prohibits  
13 the State Engineer from “carrying out his duties in any way that conflicts with a decree.”  
14 Conspicuously absent from this language is the phrase, “within the same hydrographic basin.” The  
15 prohibition on adverse impacts to vested rights in NRS § 533.085(1) is similarly absolute, and not  
16 in any way limited to intra-basin causes or effects. When the Nevada Supreme Court stated that  
17 “[w]ater rights are given ‘subject to existing rights,’ given dates of priority, and determined based  
18 on relative rights,” it did not qualify this statement by stating that relative priorities should apply  
19 only within particular hydrographic basins. *Mineral Cty.*, 473 P.3d at 423.

20         CSI, Lincoln/Vidler, Georgia Pacific, and APEX also argue that joint administration of the  
21 LWRFS deprives them of regulatory certainty, but they ignore the continuing impact that their  
22 groundwater pumping is having on Muddy River decreed rights and, by extension, the superior  
23 finality and certainty to which the parties to the Decree are entitled. *See United States v. Alpine  
24 Land & Reservoir Co.*, 984 F.2d 1047, 1050 (9th Cir. 1993) (“Participants in water adjudications  
25 are entitled to rely on the finality of decrees as much as, if not more than, parties to other types of  
26 civil judgments.”). Further, CSI, Lincoln/Vidler, Georgia Pacific, and APEX offer no suggestion  
27 as to how the State Engineer should address inter-basin impacts to senior surface water rights from  
28 groundwater pumping. Again, CSI, Lincoln/Vidler, Georgia Pacific, and APEX appear to argue in

1 favor of a selective or geographically limited application of water law principles that has no basis  
2 in law. The Court should therefore reject CSI, Lincoln/Vidler, Georgia Pacific, and APEX’s  
3 contention that Order 1309 violates the prior appropriation doctrine by managing water rights the  
4 LWRFS basins jointly by priority.

5 **2. Although Order 1309 Correctly Recognizes the Need for Joint Management, It**  
6 **Violates the Prior Appropriation Doctrine by Permitting Impacts to Senior Rights**  
7 **From LWRFS Groundwater Pumping.**

8 This Court should uphold the bulk of Order 1309, insofar as it properly exercised the State  
9 Engineer’s authority to manage inter-basin impacts to senior water rights and the environment.  
10 However, the Court should reverse, vacate and remand as appropriate the State Engineer’s  
11 determination that pumping 8,000 acre-feet per year from the LWRFS does not represent a conflict  
12 with the Muddy River decree because it is contrary to law and not supported by substantial  
13 evidence.

14 After correctly determining that joint administration of the LWRFS basins is necessary to  
15 protect senior decreed rights, the State Engineer engaged in a factually and legally incorrect  
16 “conflicts” analysis, concluding that there is no conflict between junior groundwater pumping and  
17 senior rights on the Muddy River, even though Muddy River flows have declined by approximately  
18 6,500 acre-feet per year since groundwater pumping began in the LWRFS. SE ROA 34511.  
19 Despite acknowledging that current pumping is capturing Muddy River flows, the State Engineer  
20 determined that “capture or potential capture of flows of the waters of a decreed system does not  
21 constitute a conflict.” SE ROA 61. The State Engineer further stated that “there is no conflict as  
22 long as the senior water rights are served,” and went on to determine that senior rights were being  
23 served based on a hypothetical scenario in which all Muddy River decreed rights were used to  
24 grow alfalfa, and where “the net irrigation water requirement would be 28,300 [acre-feet per year],  
25 based on a consumptive use rate of 4.7 [acre-feet per year].” SE ROA 33788. The practical effect  
26 of this determination—for which there is no basis in the record—was to reduce the total amount  
27 of Muddy River decreed rights by nearly 6,000 acre-feet per year. *See* SE ROA 62.  
28

1 Order 1309 therefore fails to protect senior decreed rights as required under NRS §  
2 533.0245 and fundamental principles of Nevada Water law. *See Mineral Cty.*, 473 P.3d at 423.  
3 Furthermore, and as discussed in the Center’s opening brief, the State Engineer’s creative  
4 accounting with respect to decreed rights on the Muddy River fails to consider the minimum  
5 springflows needed to sustain the Moapa dace. *See Center for Biological Diversity’s Opening Brief*  
6 *at 28-33.* The irrigation needs of a hypothetical alfalfa crop have nothing to do with the habitat  
7 needs of the dace, which are directly related to springflow. To the extent that groundwater pumping  
8 is reducing the total amount of water in the Muddy River, it is also impacting springflows and  
9 decreasing habitat quantity and quality for the dace. The State Engineer’s determination that  
10 groundwater pumping may continue to diminish surface water flows in the Muddy River Springs  
11 area, so long as it does not interfere with the irrigation of a hypothetical alfalfa crop, thus fails to  
12 ensure that adequate springflows are maintained and senior decreed water rights protected. It is for  
13 these reasons, and not those argued by CSI, Lincoln/Vidler, Georgia Pacific, and APEX, that Order  
14 1309 is in part arbitrary, capricious, and unlawful. *Pyramid Lake Paiute Tribe*, 112 Nev. at 751,  
15 918 P.2d at 702 (*citing Shetakis Dist. v. State, Dep’t of Taxation*, 108 Nev. 901, 903, 839 P.2d  
16 1315, 1317 (1992)).

### 17 CONCLUSION

18 This Court should uphold the majority of Order 1309, including the State Engineer’s  
19 conclusion that it is contrary to the public interest to allow unpermitted “take” of the Moapa dace,  
20 and the State Engineer’s determination that joint management of the LWRFS basins is necessary  
21 to protect senior water rights and the environment. This Court should also uphold the State  
22 Engineer’s decision to include Kane Springs Valley in the LWRFS. As explained above, these  
23 aspects of Order 1309 are consistent with State and federal law, and based on substantial evidence.

24 However, the court should reverse, vacate, and remand as appropriate the portion Order  
25 1309 allowing up to 8,000 acre-feet of groundwater pumping per year from the LWRFS because  
26 it is based on legal and factual error. The State Engineer cannot authorize impairment of senior  
27 water rights or unpermitted “take” of the Moapa dace, yet Order 1309 ultimately does just that—  
28 it allows groundwater pumping at levels that will reduce flows in the fully decreed Muddy River

1 and diminish the springflows on which the dace depend. This aspect of Order 1309 is therefore  
2 arbitrary, capricious, contrary to law, and not based on substantial evidence. *Pyramid Lake Paiute*  
3 *Tribe*, 112 Nev. at 751, 918 P.2d at 702.

4  
5 **Affirmation:** The undersigned do hereby affirm that the preceding document and/or  
6 attachments do not contain the social security number of any person.

7  
8 Dated this 23rd day of November, 2021.

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**CERTIFICATE OF SERVICE**

1 I certify that I am an employee of the Center for Biological Diversity, and that on this 23rd  
2 day of November 2021, I served a true and correct copy of the foregoing by electronic service to  
3 the participants in this case who are registered with the Eighth Judicial District Court’s Odyssey  
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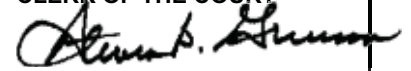
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14 **IN THE EIGHTH JUDICIAL DISTRICT COURT**  
15 **IN AND FOR THE COUNTY OF CLARK, STATE OF NEVADA**

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

19 Petitioners,

20 vs.

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

26 Respondent.

Case No. A-20-816761-C

Dept. 1

Consolidated with Cases:

A-20-817765-P

A-20-817840-P

A-20-817876-P

A-20-817977-P

A-20-818015-P

A-20-818069-P

A-21-833572-J

**THE CENTER FOR BIOLOGICAL  
DIVERSITY'S EXCERPTS OF RECORD**

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9	Tom Myers, Ph.D., Technical Memorandum Re: Groundwater Management and the Muddy River Springs, Rebuttal in Response to Stakeholder Reports Filed with Respect to Nevada State Engineer Order 1303 (August 16, 2019)	30
10	Hearing Transcript from October 2, 2019 (Center for Biological Diversity Testimony) (Selected Pages)	4
11	Nevada State Engineer's Ruling 5712 (Feb. 2, 2007) (Selected Pages)	18
12	Nevada State Engineer, Planning Report No. 3, "Nevada's Water Resources" (Oct. 1971) (Selected Pages)	5

1 13 Muddy River Decree (*Muddy Valley Irrigation Co., et al. v. Moapa and* 46  
2 *Salt Lake Produce Co, et al.*) (March 12, 1920).

3 14 Nevada State Engineer, Coyote Spring Valley Hydrographic Abstract 12  
4 (August 22, 2019)

5 Dated this 23rd day of November, 2021.

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**CERTIFICATE OF SERVICE**

1 I certify that I am an employee of the Center for Biological Diversity, and that on this 23rd  
2 day of November 2021, I served a true and correct copy of the foregoing by electronic service to  
3 the participants in this case who are registered with the Eighth Judicial District Court's Odyssey  
4 eFileNV File & Serve system to this matter.  
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## JA REFERENCE TO AVOID DUPLICATES

Exhibit Number	Description	SE ROA	A VOLUM	JA BATES	
1	Nevada State Engineer's Order 1309 (June 15, 2020)	2-69	2	JA_326	JA_393
2	Tom Myers, Ph.D., Technical Memorandum Re: Groundwater Management and the Muddy River Springs, Report in Response to Nevada State Engineer Order 1303 (June 1, 2019)	34490-34516	15	JA_7088	JA_7114
3	U.S. Fish and Wildlife Service, Issues Related to Conjunctive Management of the Lower White River Flow System, Presentation to the Office of the Nevada State Engineer in Response to Order 1303 (July 3, 2019) (Selected Pages)	48674, 48693-724	32	JA_14954	JA_15035
4	U.S. Fish and Wildlife Service, Programmatic Biological Opinion for the 2006 LWRFS MOA (Jan. 30, 2006) (Selected Pages)	47176-48, 47157-59, 47178-80, 47189-200, 47207	Attached		
5	U.S. Fish and Wildlife Service Biological Opinion re: Request for Formal and Informal Consultation on the Kane Springs Valley Groundwater Development Project in Lincoln County, Nevada (October 29, 2008) (Selected Pages)	49906, 49926, 49938-39, 49944	33	JA_15476	JA_15543
6	Lincoln County Water District and Vidler Water Co., Rebuttal Submittal by Lincoln County Water District and Vidler Water Company to the Interim Order #1303 Reports (July 3, 2019) (Selected Pages)	36346, 36351	18	JA_8080	JA_8230
7	Southern Nevada Water Authority and Las Vegas Valley Water District, Response to Stakeholder Reports Submitted to the Nevada State Engineer with Regards to Interim Order 1303 (Aug. 2019) (Selected Pages)	42165, 42174-76, 42199-200	28	JA_12048	JA_12097
8	Nevada State Engineer's Ruling 6254 (Jan. 29, 2014) (Selected Pages)	726, 749-51	3	JA_891	JA_919
9	Tom Myers, Ph.D., Technical Memorandum Re: Groundwater Management and the Muddy River Springs, Rebuttal in Response to Stakeholder Reports Filed with Respect to Nevada State Engineer Order 1303 (August 16, 2019)	34517-46	15	JA_7115	JA_7144
10	Hearing Transcript from October 2, 2019 (Center for Biological Diversity Testimony) (Selected Pages)	53611-12, 53617-18	44	JA_18008	JA_18053
11	Nevada State Engineer's Ruling 5712 (Feb. 2, 2007) (Selected Pages)	699, 705-21	3	JA_864	JA_886
12	Nevada State Engineer, Planning Report No. 3, "Nevada's Water Resources" (Oct. 1971) (Selected Pages)	9199-202, 9216	5	JA_2206	JA_2302
13	Muddy River Decree ( <i>Muddy Valley Irrigation Co</i>	33770-816	13	JA_6634	JA_6680
14	Nevada State Engineer, Coyote Spring Valley H	995-1007	3	JA_1160	JA_1172

**Excerpt/Exhibit 4**

**U.S. Fish and Wildlife Service, Programmatic Biological  
Opinion for the 2006 LWRFES MOA (Jan. 30, 2006) (Selected  
Pages)**

Record on Appeal (ROA) Nos. 47176-48, 47157-59, 47178-80,  
47189-200, 47207



# United States Department of the Interior



## FISH AND WILDLIFE SERVICE

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January 30, 2006  
File No. 1-5-05-FW-536

### Memorandum

To: Manager, California/Nevada Operations, Fish and Wildlife Service, Sacramento, California

From: Field Supervisor, Nevada Fish and Wildlife Office, Fish and Wildlife Service, Reno, Nevada

Subject: Intra-Service Programmatic Biological Opinion for the Proposed Muddy River Memorandum of Agreement Regarding the Groundwater Withdrawal of 16,100 Acre-Feet per Year from the Regional Carbonate Aquifer in Coyote Spring Valley and California Wash Basins, and Establish Conservation Measures for the Moapa Dace, Clark County, Nevada

This document transmits the Fish and Wildlife Service's (Service) programmatic biological opinion for the proposed Memorandum of Agreement (MOA) among the Southern Nevada Water Authority (SNWA), Moapa Valley Water District (MVWD), Coyote Springs Investment, LLC (CSI), Moapa Band of Paiutes (Tribe), and the Service. The Service has determined that the proposed action is likely to adversely affect the endangered Moapa dace (*Moapa coriacea*). No critical habitat has been designated for the Moapa dace; therefore, none will be affected and thus no further analysis is required. This biological opinion is being submitted in accordance with section 7 of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*). We have assigned 1-5-05-FW-536 to this programmatic consultation; please reference this number in future correspondence. Future actions pursuant to the MOA that may adversely affect Moapa dace will be tiered to this programmatic biological opinion.

This biological opinion evaluates, as the proposed action, the execution of the MOA by the Service. None of the activities included in the MOA will be implemented absent project or activity specific consultations. Since the MOA contemplates future groundwater development up to 16,100 acre-feet per year (afy), this total withdrawal and the potential effects to the Moapa dace are evaluated in this biological opinion. As part of the proposed action, the following biological opinion will evaluate the effects of the cumulative groundwater withdrawal of 16,100 afy from two basins within the regional carbonate aquifer to the federally listed as endangered Moapa dace at a programmatic level in light of the conservation measures proposed in the MOA. The groundwater is proposed to be withdrawn from the White River Groundwater



SE ROA 47146

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Flow System at the MX-5, RW-2 wells, CSI Well #1, and CSI Well #2 (SNWA 9,000 afy), and CSI Well #1 (Permit 70430) and CSI Well #2 (Permit 70429), and other wells (CSI 4,600 afy) in the Coyote Spring Valley (Basin 210), and from a well-field located in the southwestern third of the Moapa Reservation (2,500 afy) in the California Wash (Basin 218). Species not evaluated in this biological opinion but may be evaluated in the future as proposed actions are submitted in accordance with section 7 of the Act include, but are not limited to the following endangered species: (1) the Mojave population of desert tortoise (*Gopherus agassizii*) and its designated critical habitat; (2) southwestern willow flycatcher (*Empidonax traillii extimus*); and (3) the Yuma clapper rail (*Rallus longirostris yumanensis*); as well as, (4) the western U.S. distinct population segment of the Federal candidate yellow-billed cuckoo (*Coccyzus americanus*) (67 FR 40666).

This biological opinion is based on the following information: (1) the January 27, 2006, proposed MOA (Attachment A) and attached Exhibit (Attachment B); (2) the proposed final Water Supply Agreement among the Tribe, SNWA, MVWD, Las Vegas Valley Water District (LVVWD), and Muddy Valley Irrigation Company (MVIC) received on January 26, 2006, (Attachment C); (3) Bureau of Land Management's (BLM) July 8, 2003, Biological Assessment of the Coyote Spring Valley area (BLM 2003); (4) numerous meetings and discussions among MOA signatories; (5) discussions with species experts familiar with the ecology of the species; and (6) other sources of available information available in our files and cited herein. The Service has prepared this biological opinion in the absence of site-specific and spatially explicit information on future site-specific actions that would be tiered to this programmatic biological opinion. In the absence of this information, this biological opinion reflects the ecologically and hydrogeologically most conservative estimate of effects for the Moapa dace and its habitat. A complete administrative record for this consultation is on file at the Service's Southern Nevada Field Office.

## **PROGRAMMATIC CONSULTATION**

This biological opinion was prepared in accordance with the July 16, 2003, guidance for programmatic-level consultations (Service 2003). Such consultations can provide the benefit of streamlining the consultation process while leading to a more landscape-based approach to consultations that can minimize the potential "piecemeal" effects that can occur when evaluating individual projects out of the context of a complete agency program. Some of the benefits of programmatic consultations include: (1) better and more cost effective integration of ecosystem/recovery planning activities with agency activities; (2) streamlined consultation processes; (3) added predictability for all signatories of the MOA; (4) minimization of the potential "piecemeal" effects that can occur when evaluating individual projects out of the context of a complete agency program; and (5) the opportunity to better and more efficiently integrate the action agency's 7(a)(1) responsibilities at the program level.

Due to the number of impending actions by different entities included in the proposed action, a tiered-programmatic approach has been taken by the Service in an attempt to analyze the effects of the proposed action. This approach does not cover future site-specific actions resulting from implementation of the proposed action, nor does it authorize any incidental take for programmatic impacts associated with the activities included in the MOA. The tiered approach

is a two-stage consultation process with the two stages fulfilling the same purposes. The first stage biological opinion or concurrence, as appropriate, evaluates the landscape-level effects. The second stage results in the completion of project-specific documentation that addresses the specific effects of each individual project. Under the tiered approach, two complete biological opinions are completed for each proposed action, with the second-stage documents “tiering” to the first-stage document by incorporating portions of it by reference. Thus each action has its own individual consultation document that is supported by the programmatic document.

### **Project-level Consultation under the Tiered Programmatic Consultation Approach**

As individual projects are proposed under the tiered programmatic consultation approach, project-specific information will be provided that: (1) describes each proposed action and the specific areas to be affected; (2) identifies the species and critical habitat that may be affected; (3) describes the manner in which the proposed action may affect listed species; (4) describes the anticipated effects; (5) specifies the *anticipated effects from the proposed project are consistent with those analyzed in the programmatic biological opinion*; (6) describes proposed measures to minimize potential effects of the action; and (7) describes any additional effects, if any, not considered in the programmatic consultation. The Service reviews this information and then completes a tiered biological opinion with a project-specific incidental take statement. This document, while meeting the basic requirements of biological opinions as specified at 50 CFR 402.14(h), generally requires less effort to complete because it references back, or tiers, to the program-level biological opinion.

The following assumptions regarding future consultation (second stage) are incorporated into this programmatic biological opinion:

1. Analysis for site-specific actions proposed under the “umbrella” of this proposed MOA will be submitted to the Service pursuant to section 7 or section 10 of the Act, as appropriate.
2. Specific actions that the Federal permitting agency or the Service determines may affect listed species will undergo consultation according to section 7(a) (2). These actions will be assessed on their own merits and be evaluated relative to the jeopardy and adverse modification criteria of the Act, as appropriate.
3. Specific actions that do not have a Federal nexus but may result in take of a listed species will require a section 10 incidental take permit. These actions will be assessed on their own merits and be evaluated relative to the jeopardy and adverse modification criteria and section 10 issuance criteria of the Act, as appropriate.
4. The Service will provide guidance on future site-specific actions in order to ensure that the project description is consistent with our biological opinion, such that our determination remains valid.

The effects of actions resulting from the proposed action will require future programmatic and/or site-specific section 7 consultations for the listed species covered in this biological opinion. This

Clark County Multiple Species Habitat Conservation Plan (MSHCP); however the Moapa dace is not included in the MSHCP, nor the associated incidental take statement. Utilization of the CSI water right and its affect to Moapa dace would be analyzed in a future project-specific tiered biological opinion.

#### *Moapa Band of Paiutes*

Through a Water Supply Agreement with LVVWD (Attachment C), the LVVWD will transfer to the Tribe, 2,500 afy groundwater water rights in the California Wash Basin. Although no proposal has been submitted for any specific action regarding groundwater withdrawals, the Tribe has indicated the potential use of 500 afy of that 2,500 afy right for commercial development within the next two years. Utilization of the Tribe's water right and its affect to Moapa dace would be analyzed in a future project-specific tiered biological opinion, as will any other future projects up to the maximum 2,500 afy right analyzed in this programmatic opinion.

#### Proposed Conservation Measures

In order to minimize effects to the Moapa dace, conservation actions have been identified by the signatories of the MOA that propose to withdraw groundwater from the regional carbonate groundwater system. In order to be considered a benefit to the species, it is assumed that the proposed conservation measures will be initiated or fully implemented prior to the proposed groundwater withdrawal of 16,100 afy associated with the proposed action. Since development of the 16,100 afy requires the construction of facilities, as identified above, there would be a two to five year timeframe in which to implement many of these actions prior to the pumping of the full amount of water analyzed in this biological opinion. However, as indicated above, CSI would utilize a small portion of their water right in Coyote Spring Valley prior to full implementation of all of the conservation measures. While the contribution of funding is crucial to any conservation action, the completed, on-the-ground activity that results from the funding is the action that will be the evaluated benefit to the species. The true benefit to the species will occur with the implementation of the intended conservation action. Each of these actions, either separately or in combination, will be the subject of a future tiered biological opinion prior to their implementation. The action items are identified in the MOA (Attachment A); the following is a summary of those actions:

1. Implement restoration of Moapa dace habitat on the Service's Apcar Unit of the Moapa Valley National Wildlife Refuge (MVNWR);
2. Develop a Recovery Implementation Program (Recovery Program), which will be used to effectuate the goals of the MOA by implementing measures necessary to accomplish the protection and promote the recovery of the Moapa dace, as well as, outline the development of regional water facilities and include additional parties as appropriate. The Recovery Program will be developed for the purposes of continuing to identify the key conservation actions that, when implemented, would continue to contribute to offset any pumping impacts that may result from groundwater pumping;

3. Assist in developing an ecological study designed specifically to determine effects of groundwater pumping on the Moapa dace and other aquatic dependent species in the Muddy River system;
4. Construct fish barriers in order to prevent additional non-native fishes from migrating into Moapa dace habitat;
5. Eradicate non-native fish, such as tilapia from the historic range of Moapa dace;
6. Restore Moapa dace habitat outside the boundary of the MVNWR;
7. Provide the use of the Tribal greenhouse to cultivate native plants for restoration actions in the Muddy River area;
8. Provide access to Tribal lands for the construction and maintenance of at least one fish barrier;
9. Dedication of an existing 1.0 cfs Jones Spring water right (MVWD) towards establishing and maintaining in-stream flows in the Aparc tributary system that empties into the Muddy River as outlined in Attachment B; and
10. Dedication of 460 afy of water rights (portion of CSI appropriated water rights) to the survival and recovery of the Moapa dace, in perpetuity.

In addition, minimum in-stream flow levels were also established in the MOA that trigger various conservation actions should those predetermined levels be reached. The flow levels will be measured at the Warm Springs West Flume located on MVNWR. These automatic actions are identified in the MOA (Attachment A) and are summarized below:

1. Should the water flows reach 3.2 cfs, the signatories will meet to discuss the issue and compare/evaluate hydrology data;
2. Should the water flows reach 3.0 cfs, during the pendency of the pump test, the Arrow Canyon well will shut down and SNWA will provide the MVWD with the sufficient water quantity necessary to meet their municipal demands. In addition, SNWA and CSI will take necessary actions to geographically redistribute groundwater pumping in Coyote Springs Valley if flows levels continue to decline;
3. Should the water flows reach 3.0 cfs or less but greater than 2.9 cfs, SNWA and CSI will restrict groundwater pumping from MX-5 and RW-2 wells, and CSI Well #1 (Permit 70430) and CSI Well #2 (Permit 70429) and CSI's pumping from other wells in Coyote Spring Valley, in combination, to 8,050 afy;
4. Should the water flows reach 2.9 cfs or less but greater than 2.8 cfs, SNWA and CSI will restrict groundwater pumping from MX-5 and RW-2 wells, and CSI Well #1 (Permit 70430) and CSI Well #2 (Permit 70429) and CSI's pumping from other wells in Coyote



- Spring Valley, in combination, to 6,000 afy, and the Tribe will restrict their pumping (under permit number 54075) in the California Wash basin to 2,000 afy;
5. Should the water flows reach 2.8 cfs or less but greater than 2.7 cfs, SNWA and CSI will restrict groundwater pumping from MX-5 and RW-2 wells, and CSI Well #1 (Permit 70430) and CSI Well #2 (Permit 70429) and CSI's pumping from other wells in Coyote Spring Valley, in combination, to 4,000 afy, and the Tribe will restrict their pumping (under permit number 54075) in the California Wash basin to 1,700 afy;
  6. Should the water flows reach 2.7 cfs or less, SNWA and CSI will restrict groundwater pumping from MX-5 and RW-2 wells, and CSI Well #1 (Permit 70430) and CSI Well #2 (Permit 70429) and CSI's pumping from other wells in Coyote Spring Valley, in combination, to 724 afy, and the Tribe will restrict their pumping (under permit number 54075) in the California Wash basin to 1,250 afy.

### *Action Area*

The Action Area is defined as the hydrogeomorphic basins which have hydrologic connectivity to the Muddy River ecosystem. Although the entire White River Groundwater Flow System is hydrogeologically connected, only the basins that include the area of the proposed groundwater development and location of the Moapa dace and its habitat are included in the action area. These basins include the Coyote Spring Valley (Basin 210), Muddy River Springs Area (Basin 219) and California Wash (Basin 218).

### **Status of the Species**

#### *Moapa Dace*

The Moapa dace was federally-listed as endangered under the Endangered Species Preservation Act of 1966 on March 11, 1967 (32 FR 4001), and has been protected under the Act since its inception in 1973. Critical habitat has not been designated for the Moapa dace. The Service assigned the Moapa dace the highest recovery priority because: (1) it is the only species within the genus *Moapa*; (2) the high degree of threat to its continued existence; and (3) the high potential for its recovery (Service 1996). A final recovery plan was approved by the Service in 1996 (Service 1996).

The Moapa dace was first collected in 1938 and was described by Hubbs and Miller (1948). Key identification characteristics are a black spot at the base of the tail and small, embedded scales, which create a smooth leathery appearance. Coloration is olive-yellow above with indistinct blotches on the sides, with a white belly. A diffuse, golden-brown stripe may also be present. Maximum size is approximately 4.7 inches fork length. The oldest known specimen on record is over four-years old (Scopettone et al. 1992).

The Moapa dace is a member of the North American minnow family, *Cyprinidae*. The genus *Moapa* is regarded as being most closely related to the dace genera *Rhinichthys* (speckled dace) and *Agosia* (longfin dace) (Coburn and Cavender 1992). These three dace genera, along with the

*Current groundwater pumping at the Arrow Canyon Well and impacts*

In the following discussion, the groundwater/spring discharge relationships described above have been used to base our current analysis of impacts from current pumping and to project the impacts of future groundwater development on the springs. It is anticipated that upon completion of the pump test required in Order 1169, that additional hydrogeologic information will be available to assist in a better understanding of this relationship. In the interim, the Service recognizes that there are different interpretations and opinions regarding the timing and causes of recent groundwater level declines in the flow system than that discussed in this programmatic biological opinion (Buqo 2004, Johnson and Mifflin 2003 and 2005).

In 1990 and 1992, MVWD applied for water rights of an additional 3.0 and 5.0 cfs, respectively, of groundwater for municipal purposes from the carbonate aquifer in the Warm Springs Area. The point of diversion is the Arrow Canyon Well, located about 2.3 miles west of the MVNWR. The MVWD had existing water rights in the area, including a right for 2.0 cfs from the Arrow Canyon Well. MVWD forecasts of growth in the Moapa area indicated the need for additional water. The water right applications were formally protested by the Service, NPS, and Nevada Power Company, primarily due to concerns about Moapa dace and injury to senior water rights, including the Service's water right for the Pedersen Unit of the MVNWR. In 1995, the Nevada State Engineer overruled the protests but ordered (in Ruling 4243) that pumping be phased in incrementally from 1996 through 2004, with monitoring to evaluate any impacts to springs or groundwater levels (Nevada State Engineer 1995).

Growth in demand was less than forecasted by the MVWD and groundwater pumping from the Arrow Canyon Well has lagged behind the incremental pumping rate ordered by the State Engineer in Ruling 4243. Pumping was stepped up to 2.7 cfs in 1998, in part at the request of the Federal agencies to allow collection of data related to the effects of groundwater production from the carbonate aquifer, and has averaged 3.3 cfs or 2,400 acre-ft annually since that year (Mayer 2004). Concurrent with the increased pumping, groundwater levels and spring discharge in the Warm Springs Area have been consistently decreasing since 1998. Water levels in the two carbonate monitoring wells, EH-4 and EH-5B, have decreased by 0.38 ft/yr or a little more than 2 ft over the six-year period (Figures 2 and 8). Over the same period, the total spring discharge from the Pedersen Unit, as measured at Warm Springs West, has decreased from 4.00 cfs to 3.55 cfs. The rate of decrease is about 0.08 cfs/year, representing an 11 percent decrease over the period (Figure 9). The discussion in Mayer (2004) shows that the observed decreases in spring discharge are consistent with expected decreases based on the two-foot decline in groundwater levels observed in the carbonate monitoring wells in the Warm Springs Area. The relationship between groundwater levels and spring discharge at Warm Springs West was used to predict a 13 percent decrease in spring flows over the period from 1998 to 2003, in response to the 2-ft drawdown that has occurred (Table 4). The actual measured decrease of 11 percent is in close agreement with the predicted value.

Figure 8

**Arrow Canyon Well Pumping (bars) and  
Groundwater Elevations (circles/squares) in  
Carbonate Monitoring Wells EH4 and EH5B  
1987 - 2004**

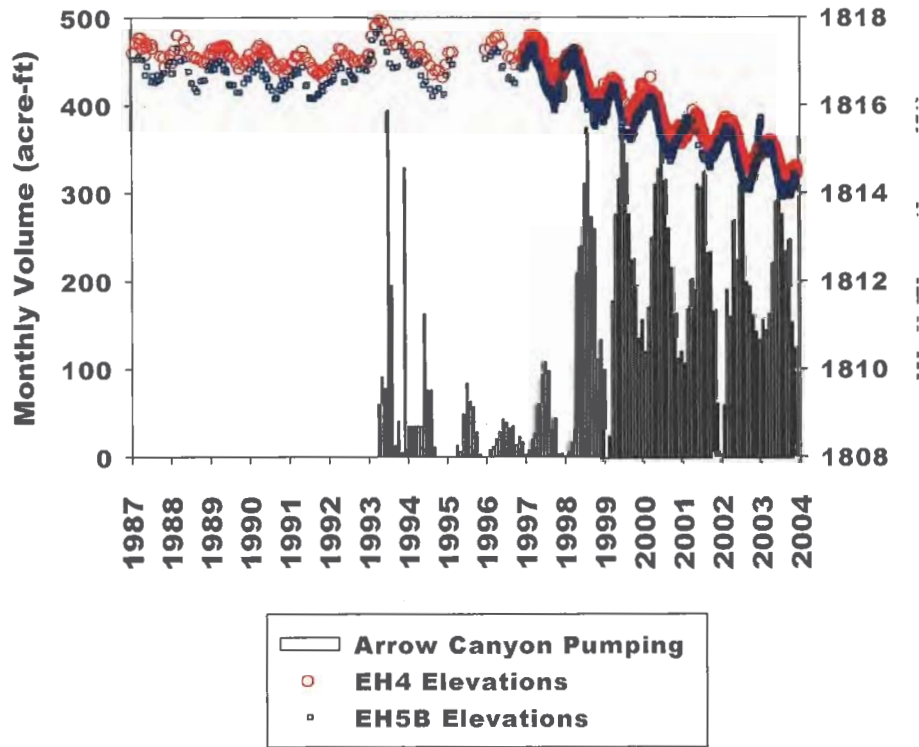
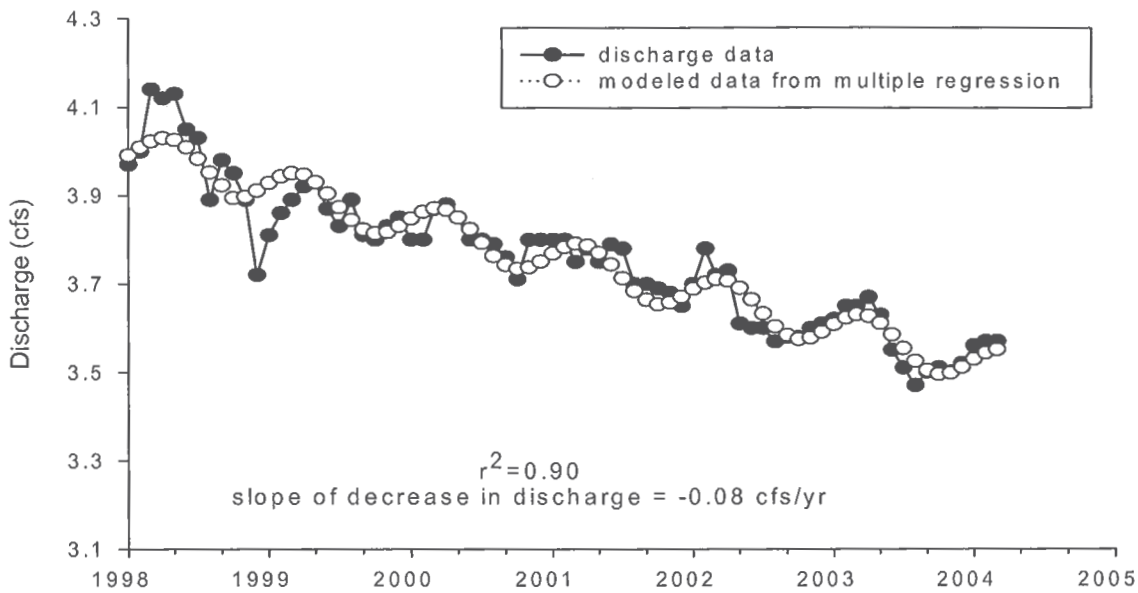


Figure 9

Warm Springs West Discharge 1998 to 2004



The exact timing of the groundwater level decline is important because if the actual decline precedes in time any action or event suspected of causing the decline (such as increased pumping or drought), then this is strong evidence that there are other factors causing the decline. We have attempted to analyze the timing of the decline here.

Figure 10 is a plot of the periodic water level readings in EH-5B. Also shown is a lowess smooth of the data. Lowess (locally weighted scatterplot smoothing) is a smoothing technique used to emphasize trends in xy data (ex. water levels with time). The lowess says nothing about the statistics of a trend, it is simply a method of ascertaining any trend. The lowess of the EH-5B data shows that while there was variability prior to 1998 (possibly due to climatic impacts, seismic activity, barometric changes, earth tides, existing pumping), the slope of the decline clearly became more negative starting in this year. In other words, the rate of decline increased from 1998 through 2004. Looking at similar data from EH-4, Mayer (2004) showed through multiple regression analysis that the slope of the decline changed from -0.06 ft/yr in the period 1989 to 1993, to -0.38 ft/yr in the period 1998 to 2003, and that this change in slope was statistically significant. The magnitude and extent of the decline is unlike anything observed in the earlier record. This rate and magnitude of the 1998 to 2004 decrease is what is of concern to the Service. The start of the decline coincides with MVWD's increased pumping from the carbonate aquifer (see Figure 8). It also coincides with a very wet year (see Figure 11), which has implications for likelihood of drought or climatic impacts causing this decline, as discussed below.

## Effects of the Action

### *Moapa Dace*

The Moapa dace will be directly affected by the proposed groundwater withdrawals since those actions are likely to affect the spring flows upon which the dace depends. The signatories of the MOA are proposing to cumulatively pump 16,100 afy of groundwater from the White River Groundwater Flow System at the MX-5, RW-2, Coyote Springs Wells #1 and #2, and other wells in the Coyote Spring Valley Basin (Basin 210) and from a well-field located in the southwestern third of the Moapa Reservation in the California Wash Basin (Basin 218). The purposes of these water withdrawals are: 1) part of a Nevada State Engineer Order (Order 1169) to test the carbonate systems response to groundwater withdrawals and continued use for residential and commercial purposes (9,000 afy); 2) municipal uses for a residential community in Coyote Spring Valley (4,600 afy); and 3) Tribal commercial developments (2,500 afy). For the purposes of this programmatic biological opinion, this consultation will only evaluate the effects of the MOA (cumulative groundwater withdrawal of 16,100 afy and their minimization measures) to the endangered Moapa dace. The specific actions associated with the uses of the groundwater will be evaluated in subsequent tiered biological opinions as applicants apply for Federal permits in the area.

The pump test to be undertaken pursuant to the MOA is expected to generate additional data to better understand and predict the effects of development of the carbonate-rock aquifer and to reduce or mitigate the effects of its development on the environment. In the interim, the Service recognizes that there are different interpretations regarding the causes of recent groundwater level declines in the flow system than that discussed in this programmatic biological opinion (Buqo 2004, Johnson and Mifflin 2003 and 2005). However, for the purposes of this programmatic biological opinion, the Service is utilizing the information and data presented above and analysis below. Groundwater extracted through a well, typically results in a decline in groundwater levels around the well. The technical term for this zone of lowered water levels is the "cone of depression" or the "drawdown cone." For a given aquifer, the drawdown cone increases in depth and extent with increasing time of pumping. Drawdown at any point and time is directly proportional to the pumping rate and inversely proportional to the transmissivity and storativity of the aquifer (Freeze and Cherry 1979). Aquifers of high transmissivity develop shallow drawdown cones of wide extent. As discussed earlier, the regional carbonate aquifer between Coyote Spring Valley and the Warm Springs Area is a zone of high transmissivity; the drawdown cone in this area is expected to be shallow and wide. This high transmissivity zone is one reason that the pumping at the Arrow Canyon Well is assumed to have caused the drawdown in well levels 12 miles upgradient in Coyote Spring Valley (Van Liew et al. 2004).

The hydraulic connectivity of the California Wash basin to the Warm Springs Area is uncertain although there are some indications that the area is connected with the Warm Springs Area based on monitoring well data that were shared with the Service in July 2004. These data from California Wash show a downward trend in groundwater levels. While there are various

opinions as to cause of the decline, based on the very limited available data, the Service assumes that groundwater pumping in California Wash is likely to cause a decline in spring flow in the Warm Springs Area.

The proposed groundwater development in Coyote Spring Valley and California Wash is likely to cause further declines in groundwater levels in the carbonate aquifer within the area of the proposed pumping, and the Warm Springs Area. Our analysis predicts that a reduction in head at springs in the Warm Springs Area and decreases in spring discharge and groundwater seepage into streams is likely to occur, although the magnitude and timing of impacts from pumping in Coyote Spring Valley and California Wash are uncertain. Differences in boundary conditions relating to the areal extent of the aquifer, location of the pumping, transmissivity, and permeability, all influence the magnitude and timing of pumping impacts. Also, if the proposed pumping lowers carbonate water levels in the Warm Springs Area further, not all springs will be affected equally. The decrease in spring discharge will be proportional to the decrease in head elevation at each spring. Higher elevation springs have a lower head difference initially and are therefore more susceptible to decreases in groundwater levels. Therefore, the higher elevation springs will be affected proportionately more for a given decline in groundwater levels. This relationship has been observed in the Warm Springs Area as a result of a 2-ft drawdown in groundwater levels that has occurred since 1998 (Mayer 2004). The highest elevation springs, which are the most susceptible to impacts from groundwater pumping, occur on the Pedersen Unit of MVNWR, an area which also comprises some of the most important spawning habitat for dace in the system.

As discussed above, existing data indicates a decline in the regional carbonate aquifer levels locally and in the Coyote Spring Valley, and a decrease in spring discharge in the warm Springs Area from the current groundwater pumping of the Arrow Canyon Well (Mayer 2004). In addition, existing data has suggested that the same pumping has led to a decrease in carbonate aquifer levels in the California Wash Area as well. The average pumping rate at the Arrow Canyon Well for the last five years has been 3.3 cfs or 2,400 afy. The proposed action includes pumping of an additional 22.2 cfs or 16,100 afy from the same regional carbonate aquifer, which is almost seven times the existing withdrawal rate. Much of the pumping (13,600 afy) will be located along the same flow path that supplies the Warm Springs Area and is within the low-gradient, high-transmissivity zone that connects the Coyote Spring Valley and Warm Springs Area. The remainder of the pumping (2,500 afy) will be located downgradient in California Wash which has uncertain hydrologic connection to Warm Springs Area.

Under the terms of the MOA, if flows reach 2.7 cfs at the Warm Springs West gage, the pumping from Coyote Spring Valley will be reduced to 724 afy and the pumping from California Wash will be reduced to 1,250 afy. This 724 afy will replace the flows (1 cfs) that MVWD once used from the Jones Spring (on the MVNWR's Apcar Unit) to meet their water demands, which would be utilized for the Moapa dace on the MVNWR per the MOA. The 1,250 afy will be available for use by the Tribe. The following assumptions are used relative to groundwater pumping if the 2.7 cfs "Average Flow Level" as identified in the MOA is reached:

- The Arrow Canyon Well will be turned back on and will resume pumping at the current rate of 2,400 afy to meet MVWD's existing municipal water demands;
- 724 afy will be pumped from MX-5 and RW-2 wells in the Coyote Spring Valley by SNWA to replace MVWD's municipal commitment from the Jones Spring;
- No additional pumping in Coyote Spring Valley will occur; and
- Pumping in the California Wash is assumed to be limited to 1,250 afy of the existing permitted water rights held by the Tribe.

The exact magnitude and timing of the impacts from pumping groundwater from the carbonate aquifer in Coyote Spring Valley and California Wash are unknown at this time, as are the effects of reduced or cessation of groundwater pumping or whether there will be some equilibration of the aquifer to the proposed pumping. Two approaches were used to bracket the range of potential impacts to groundwater levels and spring discharge at the Warm Springs West gage: (1) an extrapolation of the current groundwater impacts and trends; and (2) numerical groundwater modeling.

#### Extrapolation of Current Groundwater Impacts and Trends

Using this approach, the groundwater system is assumed to respond proportionally to increased pumping; that is, increasing the pumping rate by some factor will increase the rate of decline in groundwater levels by a similar factor. The assumption is that because of the high transmissivity of the carbonate aquifer in this area, the decline in groundwater levels will be relatively small, but widespread. The location of pumping within these three basins doesn't matter under these assumptions. Thus, the decline in groundwater levels would be similar in magnitude and timing to the decline in the Warm Springs Area for pumping at the Arrow Canyon Well; at MX-5, RW-2, or other wells in Coyote Spring Valley; or for wells in California Wash. This assumption is simplified and may tend to overestimate the effects because of different boundary conditions in Coyote Spring Valley and California Wash, and because the pumping in Coyote Spring Valley and California Wash is further from the Warm Springs Area than the Arrow Canyon well. Therefore, this represents a worst-case scenario that can be used to bracket the lower end of the possible range of effects.

Under the above assumption, increasing the total pumping from the system sevenfold, from 2,400 afy to 16,100 afy, will increase the rate of water level decline in carbonate levels approximately sevenfold, from the current rate of 0.38 ft/yr to 2.55 ft/yr. The rate of decline of the spring discharge from the Pedersen Unit of the MVNWR, as measured at the Warm Springs West gage, would increase proportionately as well, from 0.08 to approximately 0.6 cfs/yr, using the groundwater spring discharge relationships described in Mayer (2004). Initial projections based on these extrapolated rates suggest that the flow at Warm Springs West gage will decline during the two-year pump test. A decrease of 1.2 cfs (two years multiplied by 0.6 cfs/yr) is predicted. However, under the terms of the MOA, as flows are reduced below 3.0 cfs at Warm Springs West, the pumping at Arrow Canyon Well will be stopped and the pumping from Coyote Spring Valley and California Wash will be reduced. While the response of the aquifer to a reduction or cessation of pumping is not known and has not been tested, it is assumed that

reducing and ceasing the pumping will slow the decline in water levels. Furthermore, it is not likely that the entire 16,100 afy of groundwater will be withdrawn during the two-year pump test. CSI has proposed a five year incremental approach to utilizing their full water right of 4,600 afy and the Tribe has not identified a use for all of its 2,500 afy of potential groundwater pumping in California Wash. For the purposes of identifying the lower bound of the range of impacts, this analysis will assume that the total volume of water will be pumped and that the Warm Springs West gage will reach 2.7 cfs upon or before completion of the two-year pump test. Using the head/spring discharge relationships described in Mayer (2004), the groundwater levels are estimated to be about 5 ft below 1998 levels at a flow of 2.7 cfs. At this point, pumping would be adjusted to the levels stipulated in the MOA.

Under the terms of the MOA, if the 2.7 cfs average flow level is reached at the Warm Springs West gage, then the pump test is ended even if this occurs before two years. Following the pump test, if the average flow level at Warm Springs West gage remains below 2.7cfs, the total volume of groundwater that could be pumped from the regional carbonate aquifer in Coyote Spring Valley, California Wash, and the Warm Springs Area is 2,400 afy from Arrow Canyon Well, 724 afy from the MX-5 well or other CSI wells or wells, and 1,250 afy from California Wash, or a total of 4,374 afy. However, it is not certain that this amount would be pumped. The 4,374 afy total volume represents about an 80 percent increase above the current pumping volume from the Arrow Canyon Well. Assuming a proportional response in groundwater levels and spring discharge (e.g., an increase of the pumping rate results in a proportional increase in the rate of decline), then groundwater levels are predicted to decline about 1.8 times the present rate, or 0.7 ft/yr. Likewise, the spring discharge at the Warm Springs West gage would decline by about 1.8 times the present rate, or 0.14 cfs/yr. Using this approach, groundwater levels are projected to be about 8.5 ft lower than 1998 groundwater levels five years after the completion of the pump test. Total spring discharge from the Pedersen Unit, as measured at the Warm Springs West gage, would be about 2.0. cfs five years after completion of the pump test, (approximately 50 percent of 1998 flows). This likely represents the worst-case or lower bound of the range of possible impacts. The system may not respond as predicted, the pumping may be less than assumed, or the system may equilibrate, resulting in less severe impacts to groundwater levels and spring discharge.

#### Numerical Groundwater Model

The Service, in cooperation with other Federal agencies, has developed a numerical groundwater model for the southern half of the White River Groundwater Flow System (GeoTrans 2001). Several elements of the model were recently modified, including updated pumping and water-level information and updated spring elevation and discharge data (GeoTrans 2003). The model was recalibrated based on the modifications. Predicted water levels in the Warm Springs Area are still approximately 10 ft too low, but drawdown matches to carbonate wells EH4 and EH-5B were improved for the period 1998 to 2001 (GeoTrans 2003). However, when the model output from January 2002 to January 2004, was compared against measured water levels in EH-4 and EH-5B for the same period, the model was under-predicting drawdown considerably. The observed decreases in groundwater levels from January 2002 to January 2004, in both of these carbonate monitoring wells are greater than the model predicted. The model appears to be



predicting some kind of equilibration of the system that has not yet been observed in the field data. For this reason, the model output is believed to be an underestimate of the impact of pumping on groundwater levels and spring discharge in the Warm Springs Area. The model results should be viewed as a likely best-case or upper bound of the range of possible impacts.

The model was used to evaluate several pumping scenarios including a fivefold increase in total pumping in the system, to 12,400 afy (2,400 afy from Arrow Canyon Well and 10,000 afy from Coyote Spring Valley). This modeling was completed prior to the current MOA draft and does not include either the 4,600 afy of pumping by CSI or the 2,500 afy of pumping by the Tribe. The model predicted about 1 ft of drawdown in monitoring well EH4 and 1.5 ft of drawdown in monitoring well EH5-B after two years of pumping 10,000 afy in Coyote Spring Valley and 2,400 afy from Arrow Canyon Well pumping.

It is difficult to use the modeled drawdown to estimate spring discharge. A head loss of 1.0 to 1.5 ft is estimated to equate to a reduction of about 0.25 to 0.37 cfs in flow at the Warm Springs West gage (Mayer 2004). But the groundwater levels and spring discharge at the beginning of the pump test are not known. Pumping-related declines are expected to continue with the Arrow Canyon Well pumping until the pipeline is constructed and the pump test begins. However, groundwater levels have generally increased recently, likely in response to the extremely wet winter experienced by the region in 2005. This is expected to be a transient response but the timing and level of a return to equilibrium conditions is not known for certain. The pumping reductions identified in the MOA in response to decreases in the flow at Warm Springs West were not modeled either. So the validity and the applicability of the model results are difficult to ascertain. What can be noted is that the model predicts that there will be declines in groundwater levels with increased pumping, as opposed to no declines. This will affect spring discharge.

The potential effects on spring discharge at the Warm Springs West gage discussed above are applied below to predict potential effects to Moapa dace habitat.

#### Moapa Dace Habitat Loss Within the Pedersen Unit of the MVNWR

##### *Hydraulic Geometry Modeling*

The Hydraulic Geometry Modeling was only conducted for the Pedersen Unit because of the susceptibility of the higher elevation springs in this area to reductions in groundwater levels. The lower-elevation springs are not as susceptible to the decreases in groundwater level; therefore, these springs will not be as affected as those on the Pedersen Unit. The hydraulic model HEC-RAS was used to model the effect of reduced spring discharge on Moapa dace habitat on the MVNWR (Otis Bay 2003). The variation in width, depth, and velocity as a function of discharge is known as hydraulic geometry. Channel topographical survey data were collected at cross sections of the Pedersen Unit in order to estimate the changes in channel hydraulic geometry associated with declining spring discharge.

Representative cross-sections for pool and riffle habitats at two different locations on the Pedersen Unit were analyzed. The first pair of riffle/pool cross-sections was located just below

the confluence of the outflows from the Pedersen and Pedersen East Spring complexes. The second pair of riffle/pool cross-sections was located below the outflows from the five major spring complexes on the Pedersen Unit. The latter site represents approximately the total spring discharge as measured at the Warm Springs West gage. The relationship between groundwater levels and spring discharge on the Pedersen Unit was used to estimate the reduced flow at both pairs of cross-sections given an incremental decline in groundwater levels (Mayer 2004). The HEC-RAS modeling results were then used to estimate the change in hydraulic geometry and dace habitat at each cross-section based on the flow reductions (Otis Bay 2003). It is important to understand that higher elevation springs will show a greater percent flow reduction for a given head loss. Therefore, an equal percentage reduction cannot be applied to both pairs of cross-sections; the upstream pair will have a higher percentage loss of flow for a given decline in groundwater levels. Table 4 presents the estimated head differential, estimated flows, percent flow reduction, and percent habitat reduction as a function of groundwater levels for the upstream site (Pedersen and Pedersen East Spring groups) and the downstream site (Warm Springs West) for 1998.

The results indicate that both spring discharge and dace habitat are reduced with declines in groundwater levels. Flows and habitat loss at both upstream and downstream sites are projected as a function of incremental declines in groundwater levels in Table 4. As described in the section entitled Extrapolation of Current Groundwater Impacts and Trends, if flows decrease to 2.7 cfs by the end of the pump test, then groundwater levels are predicted to be about 5 ft below 1998 levels. Using the results in Table 4, flow at the upstream site is projected to be roughly 40 percent less than 1998 conditions at this groundwater level. Habitat is projected to be about 43 percent less for riffle habitat and 25 percent less for pool habitat relative to 1998 conditions. Flow at the downstream site is projected to be 30 percent less than 1998 conditions. Habitat at the downstream site is projected to be about 22 percent less for riffle habitat and 16 percent less for pool habitat relative to 1998 conditions. These results likely represent a worst-case or lower bound of impacts as discussed above.

Five years after the pump test is completed, groundwater levels are predicted to be approximately 8.5 ft below 1998 levels, under the worst-case scenario. Flows are projected to be about 65 and 53 percent of 1998 levels at the upstream and downstream sites, respectively. At the upstream site, riffle and pool habitat are projected to be 60 percent and 40 percent less, respectively, relative to 1998 conditions. At the downstream site, riffle and pool habitat are projected to be about 40 percent and 30 percent less, respectively, relative to 1998 conditions. Again, these results likely represent a worst-case or lower bound of impacts as discussed above.

The primary effect to the Moapa dace of diminished flows within the spring channels will be a decrease in the hydraulic conditions that create the diversity of habitat. A decrease in velocity and depth within riffles would result in a decrease of invertebrate and phytoplankton (food) production. Drift stations in pools are maintained by the scouring effect of turbulent flow. Scour will decrease in pools as water velocity and depth at the upstream end of the pool decreases. Perhaps the most prominent impact that would occur, as a result of decreased discharge and subsequent depth, is the reduction of overall volume of water that will be available to the species within the channel. Scoppettone et al. (1992) demonstrated that Moapa dace size is scaled to

water volume. Thus, larger water volumes provide the habitat necessary for increased food production and subsequently larger fish, therefore greater fecundity. Hence, more numerous, larger eggs provide a better opportunity for the long-term survival of the species.

As previously stated, decreasing flows in the headwater spring channels of the upper Muddy River were modeled and resulted in a decrease in the hydraulic parameters of width, depth, and velocity, for a loss of habitat available to the species. Additional factors that would influence channel and hydraulic characteristics within the stream channels following a decline in spring discharge include, but are not limited to, changes in sediment transportation rates, and the alteration of riffle and pool maintenance that is accomplished at the present rate of discharge in each spring channel. Additionally, vegetative encroachment and subsequent channel obstruction may also occur as the wetted cross sectional area of the channel decreases, and new surfaces become exposed for vegetation growth. Decreases in these parameters will likely have an adverse impact on the overall diversity and quantity of hydraulic habitat.

**Table 4. Estimated Habitat Loss**

<b>Pedersen Unit - Upstream Site</b>				
<b>(Combined flow of Pedersen Spring and Pedersen East Spring Groups)</b>				
Groundwater Level Reduction Since 1998 (ft)	Estimated Flow (cfs)	Estimated Percent Flow Reduction from 1998 Conditions	Estimated Percent Habitat Reduction in Riffles from 1998 Conditions	Estimated Percent Habitat Reduction in Pools from 1998 Conditions
0	1.47*			
2	1.23	16 percent	23 percent	9 percent
3	1.11	24 percent	33 percent	14 percent
4	0.99	33 percent	37 percent	20 percent
5	0.87	41 percent	43 percent	25 percent
6	0.75	49 percent	50 percent	31 percent
7	0.63	57 percent	55 percent	46 percent
8	0.57	62 percent	58 percent	39 percent
9	0.48	68 percent	63 percent	43 percent
<b>Pedersen Unit - Downstream Site</b>				
<b>(Combined flow of the 5 major spring groups/upstream of Warm Springs West gage)</b>				
Groundwater Level Reduction Since 1998 (ft)	Estimated Flow (cfs)	Estimated Percent Flow Reduction from 1998 Conditions	Estimated Percent Habitat Reduction in Riffles from 1998 Conditions	Estimated Percent Habitat Reduction in Pools from 1998 Conditions
1	4.03*			
2	3.51	13 percent	8 percent	6 percent
3	3.26	19 percent	13 percent	10 percent
4	3.02	25 percent	17 percent	13 percent
5	2.78	31 percent	22 percent	16 percent
6	2.50	38 percent	27 percent	20 percent
7	2.26	44 percent	32 percent	23 percent
8	2.03	51 percent	37 percent	27 percent
9	1.82	54 percent	42 percent	31 percent

\* based on a back-calculated estimate of flows at this site, as described in text

Note: Highlighted row indicates the level at which groundwater pumping would be reduced to levels stipulated in the MOA.

### Thermal Load Modeling

A Stream Segment Temperature Model (SSTEMP) was used to predict impacts of decreasing spring flows to the natural thermal load of the system (Brock 2004). A study area downstream of all the spring complexes was selected on the Pedersen Unit of the MNVWR that was approximately 220 meters (722 ft) long and appeared to have a minimal net accrual or loss of stream flows. The model was calibrated to the 220-meter-long segment and was based on inputs of meteorology, stream geometry, riparian shading, and hydrology. SSTEMP simulates downstream water temperature in a discrete homogenous segment of a flowing stream channel over a 24-hour day.

In all 16 scenarios the simulated result of the reductions in spring discharges was reduced water temperatures (Brock 2004); however, only 4 scenarios are presented herein (Table 5). The greatest impact of flow reduction to thermal load occurred during the winter (December) when air temperature is the coldest, relative to the temperature of the thermal spring channel. Since Moapa dace have a reproductive temperature threshold of 30° C (86° F) (Scoppettone et al. 1992) any area with cooler temperatures is not considered reproductive habitat. In the winter, a reduction in flow (3.6 cfs) by 10 percent (3.25 cfs), 20 percent (2.90 cfs), and 30 percent (2.50 cfs) brought about a respective decrease of 0.06° C, 0.14° C, and 0.25° C in the temperature of the spring channel at the end of the study segment (Brock 2004). These reductions of 10, 20, and 30 percent in spring flows would result in an upstream shift of the base thermal tail temperature by approximately 66 (20 meters), 131 (40 meters), and 197-ft (60 meters), respectively. Although under these scenarios the temperatures at the downstream reach of the study segment would remain above 30° C (86° F) and therefore within the reproductive temperature threshold, the model illustrates that reduced flows result in decreases in temperature and an upstream shift in the base thermal tail. Therefore, assuming that there is a minimal net accrual or loss of stream flows, the shift in base thermal tail in the downstream reach of the Pedersen Unit tributary (Refuge Stream off of MVNWR) would result in the loss of spawning habitat based on temperature.

Reductions in some of the headwater sources within the system will have downgradient repercussions to the Moapa dace. Since the springs on the MVNWR's Pedersen Unit are the highest in elevation of all the headwater sources, these springs would be the first to be affected by groundwater pumping. Reductions in the spring flows on the Pedersen Unit would cause the stream to cool more rapidly as it travels downstream resulting in a loss of thermal load, thereby decreasing the available downstream spawning habitat in the Refuge Stream.

**Table 5. Estimated Thermal Loss with 4-Water Flow Scenarios on the Pedersen Unit of the MVNWR**

Flow Scenario (cfs) (Warm Springs West gage)	3.60	3.25	2.90	2.50
Percent reduction	0.00	10.00	20.00	30.00
Distance from head of segment (meters)	Water Temperature (degrees C)			
0	31.20	31.20	31.20	31.20
10	31.17	31.16	31.16	31.16
20	31.14	31.13	31.12	31.12
30	31.11	31.10	31.09	31.07
40	31.08	31.06	31.05	31.03
50	31.05	31.03	31.01	30.99
60	31.02	30.99	30.98	30.95
70	30.99	30.96	30.94	30.91
80	30.95	30.93	30.90	30.86
90	30.92	30.89	30.87	30.82
100	30.89	30.86	30.83	30.78
110	30.86	30.82	30.79	30.74
120	30.83	30.79	30.75	30.70
130	30.80	30.76	30.72	30.65
140	30.77	30.72	30.68	30.61
150	30.74	30.69	30.64	30.57
160	30.71	30.65	30.61	30.53
170	30.68	30.62	30.57	30.49
180	30.64	30.59	30.53	30.44
190	30.61	30.55	30.50	30.40
200	30.58	30.52	30.46	30.36
210	30.55	30.48	30.42	30.32
220	30.52	30.45	30.38	30.28

Shading shows the loss of stream survey length with various scenarios of reduced spring flows.

### Summary of Adverse Effects Caused by the Proposed Groundwater Pumping

As discussed in the Status of the Species section, there are 5.6 miles of available habitat for all life stages of Moapa dace (Figure 4, Table 3) within the Muddy Springs Area. Of the total amount, approximately 1.78 miles of stream are located above the gabion barrier that protects the stream reaches on the MVNWR and the Refuge Stream on private property from tilapia predation (Figure 4). The remaining 3.82 miles of habitat continues to be threatened by the presence of tilapia and has been relatively uninhabitable. The 2005 dace survey data reflect that 95 percent of the dace population is relegated to the 1.78 miles (32 percent) of habitat above the gabion (Table 3) due to the presence of predatory non-native tilapia. However, dace still exist, albeit in low numbers, in the upper Muddy River mainstem and north and south forks of the Muddy River.

The 5.6 miles of the springs, tributaries, and mainstem of the Muddy River are not utilized proportionately by all life stages of the species due to the different hydrologic conditions of the various stream segments and the specific life history needs of adult, juvenile, and larval fish. The appropriate hydrologic conditions including velocity, depth, and temperature are necessary to provide for adequate spawning conditions. These various habitat types have not been quantified throughout the entire 5.6 miles of occupied or potential habitat. However, for the purposes of our analysis we have focused on the MVNWR streams and stream reaches above the gabion and attempted to quantify the availability of spawning, rearing and adult habitat. It is generally known that most of the habitat on the mainstem Muddy River is adult and juvenile habitat, with some limited spawning occurring in the north and south forks, and historically in the Muddy Spring. We have estimated that of the 1.78 miles of available occupied habitat above the gabion, 1.15 miles or approximately 66 percent of the habitat is essential spawning and rearing habitats. This habitat includes the 0.35 miles on the Pedersen Unit, 0.16 miles on the Plummer Unit, 0.14 miles on the Apcar Unit, 0.30 miles in the lower Apcar Stream, and 0.20 miles in the Refuge Stream upstream of the Iverson Flume.

The Pedersen Unit of the MVNWR is one of the six spring complexes that the Moapa dace depends on for successful reproduction and is devoid of tilapia. It is also the highest spring in elevation, and therefore, most susceptible to groundwater level declines. The analysis presented above likely represents the worst-case scenario or lower bound of impacts and it is uncertain whether it is likely to occur. The analysis estimates that at 2.7 cfs there is a loss of 31 percent in flow on the Pedersen Unit from 1998 conditions. This loss in flow is estimated to reduce available riffle habitat by 22 percent and pool habitat by 16 percent within the Pedersen Unit only. In addition to the loss of habitat, decreased flows would also result in a loss of temperature that would extend downstream, thereby reducing the thermal load in the system and thus the amount of available habitat at the appropriate spawning temperature. This loss in flow and habitat could further impact Moapa dace by restricting its reproductive potential and make it more vulnerable to catastrophic events such as wildfire.

The seepage run study conducted in 2001 by USGS reported the cumulative flows of the Refuge Stream at its confluence with the Muddy River to be approximately 12.99 cfs. The Pedersen Unit contributed approximately 3.5 cfs or 27 percent of that flow (see Hydrologic setting

discussion). Assuming a loss of .8 cfs (from 3.5 cfs to 2.7 cfs at the Warm Springs West gage) from the Pedersen Unit due to groundwater pumping proposed under the MOA, flows at the confluence would be reduced to 12.19 cfs for an overall reduction in flow by 6 percent. This reduction in flow assumes that flows in the lower elevation springs and subsurface seepage gains are not likely affected by the groundwater pumping. The Hydraulic Geometry Model indicated that habitat further upstream in the system would be affected greater than habitat lower in the system; however, given the existing information the extent of the affects of the groundwater pumping in these lower elevation springs and stream reaches is unknown at this time. Therefore, based on the seepage run (USGS 2001), we are assuming that spring discharge from the Plummer and Apcar units and the subsurface flows will continue to flow at a rate that would provide approximately 12 cfs above the gabion, thus providing spawning, juvenile, and adult habitat in those reaches.

Although the overall reduction in flow by 6 percent to the system above the gabion is relatively minor; it does not adequately reflect the importance of the Pedersen Unit to Moapa dace reproduction and recruitment throughout the system. The various units of the MVNWR and the tributaries downstream of the MVNWR are currently the primary areas that provide suitable spawning habitat due to the absence of predatory tilapia. Collectively, these reaches are extremely important to the survival and recovery of the species. Our analysis indicates that there would be a loss of 31 percent of the available spawning habitat currently on the Pedersen Unit due to the proposed groundwater pump test. However, it is also recognized that much of the available spawning habitat on the Plummer and Apcar Units, and the Refuge Stream would not be as affected by groundwater pumping since they are lower in elevation and would continue to provide adequate spawning habitat. The conservation measures described in the next section were identified as actions that would be implemented by the signatories to minimize the effects to the Moapa dace, including the loss of habitat on the Pedersen Unit and other reaches of the Refuge Stream. Such measures include the removal of non-native fishes, enhancing, and restoring habitat and restoring instream flows (Apcar Unit) to increase the amount of habitat available for use by all life stages of the species.

#### Conservation Measures Identified to Minimize Effects of the Proposed Action

The major threats to the continued existence of the Moapa dace are: (1) loss of suitable habitat caused by reduced spring discharge/water flows; (2) loss of suitable habitat and direct predation resulting from the presence of non-natives species such as tilapia; (3) degradation and loss of suitable habitat resulting from habitat modification and increased occurrence of fire facilitated by non-native vegetation invasion; and (4) a restricted distribution, which increases the species vulnerability to catastrophic and stochastic events. The signatories to the MOA are proposing conservation measures (Attachment A) to minimize these threats to the Moapa dace and its habitat. These conservation measures are generally grouped in two categories and will result in the following: (1) reduction in pumping and dedication of water (surface and ground); and (2) implementation of habitat restoration activities including removal of non-native fishes. Reduction of groundwater pumping, dedication of water, and implementation of restoration actions would result in providing improved long-term habitat for the Moapa dace, and would



### **Incidental Take Statement**

No exemption from Section 9 of the Act is issued through this biological opinion. The cumulative withdrawal of 16,100 afy from Coyote Spring Valley and California Wash is likely to adversely affect listed species. However, the proposed action of signing the MOA, in and of itself, does not result in the pumping of any groundwater, and is one of many steps in the planning process for proposed groundwater withdrawal projects identified in the MOA and in the action area. Therefore, the Service has taken a tiered-programmatic approach in an attempt to analyzing the effects of the action. This programmatic biological opinion does not authorize any incidental take for programmatic impacts associated with the activities included in the MOA. The likelihood of incidental take, and the identification of reasonable and prudent measures and terms and conditions to minimize such take, is anticipated to be addressed in future project-specific consultations (second stage). These tiered-consultations would incorporate conservation measures outlined in the MOA at the specific project level. Any incidental take and measures to reduce such take cannot be effectively identified at the programmatic level of the proposed action because of the number of impending actions by different entities and its regional scope. Incidental take and reasonable and prudent measures may be identified adequately through subsequent actions subject to section 7 consultation, and tiered to this programmatic biological opinion. Future site-specific projects that are in the Description of the Proposed Action section and identified in the MOA would require additional section 7 consultation (second stage) that would be tiered to this programmatic biological opinion.

### **Reporting Requirements**

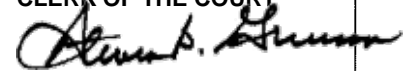
Upon locating a dead or injured endangered or threatened species, initial notification must be made to the Service's Division of Law Enforcement in Las Vegas, Nevada, at (702) 388-6380. Care should be taken in handling sick or injured fauna in order to ensure effective treatment and care. In addition, care should be given in the handling of dead specimens to preserve biological material in the best possible state for later analysis of cause of death. In conjunction with the care of sick or injured species or preservation of biological materials from a dead animal or fish, the finder has the responsibility to carry out instructions provided by the Service's Division of Law Enforcement to ensure that evidence intrinsic to the specimen is not unnecessarily disturbed. All deaths, injuries, and illnesses of Moapa dace, whether associated with project activities or not must be reported to the Service.

The following actions should be taken for injured or dead dace if directed by the Service's Division of Law Enforcement:

Dead Moapa dace suitable for preparation as museum specimens shall be frozen immediately and provided to the Southern Nevada Field Office in Las Vegas, Nevada.

### **Conservation Recommendations**

Section 7(a)(1) of the Act directs Federal agencies to use their authorities to further the purposes of the Act, by carrying out conservation programs for the benefit of endangered and threatened



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

21 LAS VEGAS VALLEY WATER DISTRICT,  
22 and SOUTHERN NEVADA WATER  
23 AUTHORITY

24 Petitioners,  
25 v.

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

Respondent.

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

**COYOTE SPRINGS INVESTMENT, LLC'S**  
**BRIEF IN INTERVENTION**

**DATE OF HEARING: February 14, 2022**  
**TIME OF HEARING: 9:00 a.m.**

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

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

3  
4 IN THE MATTER OF THE PETITION OF  
5 APEX HOLDING COMPANY, LLC

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

6 IN THE MATTER OF THE PETITION OF  
7 CENTER FOR BIOLOGICAL DIVERSITY

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

8 IN THE MATTER OF THE PETITION OF  
9 MUDDY VALLEY IRRIGATION COM  
10 PANY

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

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

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

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

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

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

Case No.: A-21-833572-J  
Dept. No. 1

21 **COYOTE SPRINGS INVESTMENT, LLC'S**  
22 **BRIEF IN INTERVENTION**

23 **I. INTRODUCTION**

24 Order 1309 represents a severe and extremely harmful curtailment of rights and  
25 privileges of the Petitioners herein.<sup>1</sup> Its invalidity is best illustrated by the fact that there

26  
27 <sup>1</sup> The term "Petitioners" to refer to those petitioners who filed opening briefs, including Las Vegas Valley  
28 Water District ("LVVWD"), Southern Nevada Water Authority ("SNWA"), Apex Holding Company, LLC  
("Apex"), Center for Biological Diversity ("CBD"), Muddy Valley Irrigation Company ("MVIC"), Nevada  
Cogeneration Associates Nos. 1 and 2 ("NCA"), Georgia-Pacific Gypsum, LLC and Republic  
Environmental Technologies, Inc. (collectively referred to as "Georgia Pacific"), and Lincoln County Water  
District and Vidler Water Company, Inc. (collectively referred to as "Vidler")

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are so many challenges to its validity.

Most Petitioners argue that Order 1309 is contrary to fundamental principles of law. Most Petitioners, in one way or another, argue that Order 1309 is an arbitrary and capricious order. Distilled to their common theories, Petitioners show:

- 1. The Nevada State Engineer (“NSE”) acted outside of his lawful authority.
- 2. The NSE ignored and violated the Petitioners’ fundamental entitlement to due process.
- 3. Order 1309 violates the prior appropriation doctrine.
- 4. The NSE failed to accurately apply the Endangered Species Act (“ESA”).
- 5. The NSE mistakenly construed the Muddy River Decree’s impact and applicability.
- 6. The NSE inexcusably ignored a substantial body of technical and credible evidence.
- 7. Order 1309 is not supported by substantial evidence.

As discussed more fully below, nearly all Petitioners, including CSI, agree that Order 1309 is contrary to law, arbitrary, and capricious. Several Petitioners raised issues related to the ESA, the 2006 Memorandum of Agreement among Moapa Valley Water District (“MVWD”), US Fish & Wildlife Service (“FWS”), CSI, SNWA, and the Moapa Band of Paiutes (the “MOA”), and the Muddy River Decree. Therefore, CSI addresses those issues herein to clarify how each should be considered when analyzing Order 1309.

**II. THE NSE AND CBD IMPROPERLY RELY ON THE ESA TO LIMIT THE AMOUNT OF PUMPING IN THE LWRFS.**

**A. The NSE Misunderstands State Agency Obligations Under the ESA.**

**i. The NSE relies on provisions of the ESA that apply to federal agencies, not state agencies.**

The NSE relies on provisions in the ESA to justify the arbitrary limitation on pumping set forth in Order 1309. See Exh. 2, pp. SE ROA 44-47 (Order 1309)<sup>2</sup>. The

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<sup>2</sup> To avoid overburdening this Court with duplicate exhibits, CSI refers to the exhibits attached to the Opening Brief as “Exh.”

1 NSE asserts that State agencies can be liable under the ESA for effectuating a taking of  
2 a species listed as endangered under the ESA and concludes it is necessary to limit  
3 pumping in order to protect itself from liability under the ESA for a “take”. *Id.* at 64.

4 In support of this argument, the NSE cites 16 U.S.C. § 1536. *Id.* at 45 n.248.<sup>3</sup>  
5 But § 1536 applies to *federal agencies*, not State agencies such as the NSE. See 16  
6 U.S.C. § 1536(a)(1) (“All other *Federal agencies* shall, in consultation with and with the  
7 assistance of the Secretary, utilize their authorities in furtherance of the purposes of this  
8 chapter by carrying out programs for the conservation of endangered species and  
9 threatened species . . . .”) (emphasis added); *South Yuba River Citizens League v.*  
10 *National Marine Fisheries Services*, 629 F.Supp.2d 1123, 1125 (E.D. Cal. 2009)  
11 (Section 7 of the ESA, 16 U.S.C. §1536, applies to federal agencies); *San Luis & Delta-*  
12 *Mendota Water Authority v. Salazar*, 638 F.3d 1163, 1167 (9th Cir. 2011) (explaining  
13 that Section 7 of the ESA requires federal agencies to consult with the Secretary before  
14 undertaking any action that might adversely impact any endangered species). Notably,  
15 Mr. Bob Williams even explained this at the 1303 Hearing. See **EXHIBIT 27**, p. SE  
16 ROA 53432.<sup>4</sup> Therefore, the NSE’s reliance on Section 7 as a requirement to limit  
17 pumping in the LWRFS is entirely misplaced and demonstrates that Order 1309 is  
18 arbitrary, capricious, and contrary to law.

19 16 U.S.C. §1539 applies to State actors. While the NSE uses the ESA as  
20 support for the position that pumping must be limited to avoid its own liability thereunder  
21 for a taking, the NSE has failed and continues to fail to take the necessary affirmative  
22 steps that would preclude such liability. See, e.g., *Loggerhead Turtle v. Cty. Council of*  
23 *Volusia Cty., Fla.*, 148 F.3d 1231, 1238 (11th Cir. 1998); 16 U.S.C. § 1539(a)(2)(A)).

24 If the NSE were actually concerned about liability or a taking, the NSE should  
25

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26 <sup>3</sup> The NSE also refers to 16 U.S.C. § 1531. However, Section 1531 only includes statements of  
27 legislative policy. See, e.g., 16 U.S.C. § 1531 (a)(5) (“The Congress finds and declares that encouraging  
28 the States and other interested parties, through Federal financial assistance and a system of incentives,  
to develop and maintain conservation programs which meet national and international standards is a key  
to meeting the Nation’s international commitments and to better safeguarding, for the benefit of all  
citizens, the Nation’s heritage in fish, wildlife, and plants.”).

<sup>4</sup> CSI numbers the exhibits attached to this brief consecutively with those attached to CSI’s Opening Brief.

1 comply with the ESA to prevent such liability.<sup>5</sup> The NSE's failure to take such steps  
2 while simultaneously using the ESA as a shield to arbitrarily limit pumping in the Mega  
3 Basin<sup>6</sup> demonstrates that the NSE's conclusion that 8,000 afa is the maximum amount  
4 of pumping that can occur without harming the Moapa dace is disingenuous, arbitrary,  
5 and capricious.

6  
7 **ii. The FWS has authorized CSI to exercise its water rights  
pursuant to the terms of the MOA.**

8 In compliance with the ESA, in 2006, CSI entered into the MOA which adopted  
9 mitigation policies to protect the Moapa dace.<sup>7</sup> See Exh. 6 (MOA). CSI has FWS  
10 authorization to exercise its water rights, subject to the terms of the MOA.<sup>8</sup> Some of  
11 those terms include mitigation measures to protect the Moapa dace that are triggered if  
12 flow rates decrease to certain levels. See Exh. 6, p. SE ROA 36109-111.

13 The NSE acknowledges the terms of the MOA but asserts in Order 1309 that the  
14 MOA's minimum rate of 3.2 cfs "is not necessarily sufficient to support the rehabilitation  
15 of the Moapa dace." Exh. 2, SE ROA 46. This statement is not supported by the record  
16 as FWS expert Dr. Michael Schwemm testified that the dace population has been  
17 increasing.<sup>9</sup> The NSE further states that "[s]ome groundwater users are signatories to  
18 an MOA that authorizes incidental take of the Moapa dace; however, the State Engineer  
19 and many other groundwater users are not covered by the terms of the MOA." *Id.* at p.  
20 47. Therefore, the NSE concludes that "[n]ot only would liability under the ESA for a

21  
22 <sup>5</sup> As CSI (and other parties to the MOA) did over a decade ago, in negotiating the MOA as a part of the  
mitigation to any potential take of the Moapa dace related to development of CSI's master planned  
community Coyote Springs.

23 <sup>6</sup> As defined in Exh. 2 (Order #1309).

24 <sup>7</sup> Pursuant to the MOA, CSI has performed all of its obligations and mitigation measures, including,  
25 without limitation, payment of monies and dedication of some of its groundwater rights for the protection  
and preservation of the dace. See **EXHIBIT 27**, p. SE ROA 53445.

26 <sup>8</sup> Even SNWA/LVVWD expert Zane Marshall recognized this at the 1303 Hearing. See *id.*, pp. SE ROA  
27 53438-39 ("...the MOA does two things ... it allows for development of 16,100 acre-feet in the Coyote  
Spring Valley and the California Wash ... And then the MOA provides for the long-term development of  
28 that 16,100 acre-feet in the associated biological opinion.").

<sup>9</sup> See **EXHIBIT 33**, p. SE ROA 53068. (Transcript from Order 1303 Hearing) (identifying and discussing  
the increasing number of Moapa dace in the Muddy River Springs Area).

1 'take' extend to groundwater users within the LWRFS, but would so extend to the State  
2 of Nevada through the Division as the government agency responsible for permitting  
3 water use." *Id.*

4 The NSE's determination that 8,000 afa is the maximum allowable to be pumped  
5 leads to even more stringent flow levels than even FWS agreed to in the MOA, and  
6 which is lower than the amount FWS suggested at the 1303 Hearing.<sup>10</sup> The parties to  
7 the MOA who have existing water rights should not be constrained by the NSE's  
8 arbitrary numbers but by the terms of the MOA. The NSE's conclusion was driven not  
9 by best available science, fact or testimony; instead, the NSE's analysis was results  
10 driven and therefore, arbitrary and capricious.

11 **B. CBD's Argument that No Carbonate Pumping Can Occur in the Mega**  
12 **Basin Because of Its Environmental Impact Does Not Have Support**  
13 **in the ROA.**

14 CBD argues that the NSE's determination of 8,000 afa as the maximum amount  
15 of water that can be pumped in the Mega Basin is arbitrary and capricious because the  
16 NSE did not consider the environmental impacts in determining the amount of pumping  
17 that could occur in the Mega Basin. CBD Brief, pp. 29-30. In Order 1309, the NSE  
18 summarily concludes that pumping in excess of 8,000 afa "will cause conditions that  
19 harm the Moapa dace". Exh. 2, p. SE ROA 64. As noted below, CBD is incorrect that  
20 no carbonate pumping can occur. However, CBD raises an important point about the  
21 NSE's arbitrary limitation on pumping.

22 The NSE relies on *Palila v. Hawaii Dep't of Land & Nat. Res.*, 852 F.2d 1106,  
23 1106 (9th Cir. 1988) to support the proposition that the NSE could be exposed to liability  
24 for "issuing a permit to withdraw groundwater that reduces the flow of the springs that  
25 form the habitat of the Moapa dace and were to result in harm to the Moapa dace". Exh  
26 2., p. SE ROA 46. While it is true that a state agency could be liable for violating the  
27 ESA, *Palila* does not support the NSE's statement. Rather, *Palila* demonstrates that  
28 actual evidence of a take—which is not present here—is necessary to impose liability

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<sup>10</sup> During the 1303 Hearing, Ms. Sue Braumiller confirmed FWS recommendation that a pumping level of 9318 afa would be acceptable in the LWRFS. See **EXHIBIT 33**, pp. SE ROA 53083-84.

1 under the ESA. *See Palila*, 852 F.2d at 1110 (“The district court made its findings  
2 based on the testimony of the Sierra Club witnesses, which was not contradicted by  
3 extrinsic evidence. Therefore, the district court’s findings should not be held clearly  
4 erroneous.”).

5 In *Palila*, evidence was presented that the Hawaii Department of Land and  
6 Natural Resources’ permitting mouflon sheep to graze in the habitat of an endangered  
7 species of bird called the palila was harming the palila and constituted a “taking” of the  
8 palila’s habitat. *Palila*, 852 F.2d at 1107. That evidence demonstrated that the mouflon  
9 sheep and palila could not co-exist because even though regeneration was occurring, it  
10 would take 25 years for the trees in the habitat to grow to the point of being able to  
11 provide food and shelter to the palila. *Id.* at 1109. However, further evidence  
12 demonstrated that the sheep would kill those trees within 10-15 years, thereby  
13 prohibiting full regeneration. *Id.* Multiple witnesses, including one presented by the  
14 State of Hawaii, conceded that the sheep were significantly damaging the palila’s  
15 habitat and that the sheep must be removed to ensure the survival of the palila. *See id.*  
16 Thus, *Palila* demonstrates that in order for ESA liability to be imposed upon a State  
17 agency, there has to be actual evidence presented that harm to an endangered species  
18 will result from the State action. *Id.* at 1110 (applying a deferential standard of review  
19 based on whether evidence was supported to support the district court’s finding of a  
20 taking under the ESA).

21 Similarly, the NSE’s reliance on *Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir.  
22 1991) is misplaced. Primarily, *Sierra Club* involved claims that the United States Forest  
23 Service’s timber management practices were actually harming an endangered species  
24 of woodpecker. *Id.* at 432. But regardless, *Sierra Club*, like *Palila*, involved a situation  
25 where actual evidence of harm to a protected species existed. *See id.* at 438  
26 (discussing the government’s own admissions that it failed to perform timber  
27 management practices that would protect the endangered woodpecker). As noted  
28 above, there is no similar evidence in this case to support the NSE’s conclusions



1 regarding the 8,000 afa.

2 To the contrary, the evidence in this case shows that 8,000 afa is a completely  
3 random number. In fact, the FWS suggested that pumping could exist at 9,318 afa  
4 without harming the dace. See **EXHIBIT 28**, p. SE ROA 48710-48711(USFWS  
5 Response to Order 1303); see also Exh. 2, p. SE ROA 62. As noted in Order 1309, CSI  
6 contends that the amount of pumping that can occur without harming the dace exceeds  
7 11,000 afa. See Exh. 2., p. 61. However, CSI notes that even the FWS took the  
8 position that more than 8,000 afa of pumping could occur without harming the dace  
9 because it shows that the NSE's concerns for liability under the ESA are baseless.

10 Notably, CBD agrees that the NSE's conclusion regarding 8,000 afa is arbitrary  
11 and capricious. See CBD Brief, pp. 24-25.<sup>11</sup> CBD, however, takes the extreme position  
12 that the NSE should prohibit all carbonate groundwater pumping within the LWRFS  
13 boundary, including Kane Springs Valley, because any carbonate pumping negatively  
14 impacts the dace population. *Id.* at 33-34. But Ms. Braumiller testified that it is not  
15 necessary to "cease carbonate pumping in order to maintain spring flows." **EXHIBIT 29**,  
16 p. SE ROA 53118 (Transcript from 1303 Hearing). Likewise, Dr. Michael Schwemm  
17 testified that pumping "can coexist with the dace and dace habitat restoration." *Id.* at  
18 53134.

19 CBD further avers that "[a]fter the completion of various habitat restoration  
20 actions under the 2006 MOA, springflow is now the limiting factor on dace abundance,  
21 and 'impacts to the flows in the upper streams are the major, primary threat to the  
22 existence of the Moapa dace' and that any pumping that reduces springflows may  
23 cause unlawful 'take' of the Moapa dace." CBD Brief, p. 32 (citing SE ROA 53436 and  
24 SE ROA 53443).<sup>12</sup> CBD's argument is based on cherry picked statements that can only  
25 be understood in the full context of the questioning and testimony of the FWS

26 \_\_\_\_\_  
27 <sup>11</sup> CSI refers to each respective Petitioners' opening brief by the Petitioner name set forth in Footnote 1  
accompanied by "Brief".

28 <sup>12</sup> It is important to note that CBD relies on Ms. Braumiller's testimony to support the conclusion that any  
pumping that reduces spring flow could result in a taking under the ESA. However, Ms. Braumiller  
confirmed that she is not qualified to opine on ESA compliance. See **EXHIBIT 29**, pp. SE ROA 53140-  
53141.

1 witnesses.

2           Primarily, as noted above, Ms. Braumiller testified that it is untrue that all  
3 carbonate pumping must cease in order to maintain spring flows. See **EXHIBIT 29**, p.  
4 SE ROA 53118. Ms. Braumiller explained, as did CSI in its Opening Brief, there are  
5 “inflows to the Lower White River Flow System’s basins and local recharge. And some  
6 amount can be captured ... without reducing spring flows below an unacceptable level”.  
7 *Id.* Additionally, Mr. Zane Marshall testified that the dace population was steadily  
8 increasing despite the declining level of groundwater. *Id.* at 53440-41.

9           Thus, there is no evidence to support the NSE’s conclusion that allowing  
10 pumping in excess of 8,000 afa will harm the Moapa dace. As fully set forth in CSI’s  
11 Opening Brief, the NSE simply selected the quantity of 8,000 afa at random. Similarly,  
12 there is no evidence to support CBD’s suggestion that no carbonate pumping can occur  
13 throughout the entire Mega Basin. There is no evidence in the record to support that  
14 pumping in excess of 8,000 afa will harm the Moapa dace or violate the ESA.  
15 Therefore, the NSE’s finding is arbitrary and capricious.

16           **C. If the NSE were Truly Concerned About Violating the ESA, the NSE**  
17 **Would have Considered CSI’s Climate Evidence.**

18           Throughout the 1303 Hearing, CSI repeatedly argued that the NSE should  
19 consider climatic cycles in determining water availability in the Mega Basin. Indeed,  
20 CSI presented data showing the varying water levels over the past one hundred years  
21 to demonstrate the large impact that climatic cycles have on water in the Mega Basin.  
22 See, e.g, Exh. 19. In Order 1309, the NSE was completely dismissive and failed to  
23 consider the importance of climate change and climate variability. Exh. 2, p. SE ROA  
24 57 (explaining that the NSE “only has the authority to regulate pumping, not climate,”  
25 and “must do so regardless of the relative contributing effects of climate”). The NSE’s  
26 disregard of climate change impacts on the water levels and Moapa dace is inconsistent  
27 with the procedures, policy, and the analysis required to be performed under the ESA.

28           For example, in *Alaska Oil & Gas Ass’n v. Pritzker*, 840 F.3d 671 (9th Cir. 2016),

1 the Ninth Circuit explained the importance of climate change in assessing whether a  
2 species is or may soon become endangered. The Court rejected the argument that  
3 climate projections were too “volatile”, concluding that “[t]he fact that climate projections  
4 for 2050 through 2100 may be volatile does not deprive those projections of value in the  
5 rulemaking process.” *Id.* at 680.

6 The NSE’s rejection of climate evidence is telling. Moreover, it demonstrates that  
7 the NSE rejected evidence that is routinely considered in cases involving the ESA. The  
8 NSE’s feigned concerns regarding the ESA neither provide authority nor support for the  
9 NSE’s arbitrary and capricious conclusion that 8,000 afa is the maximum amount  
10 allowable that can be pumped in the Mega Basin. Order 1309 should be vacated.

11 **III. SEVERAL PETITIONERS AND THE NSE MISUNDERSTAND THE MUDDY  
12 RIVER DECREE’S METHODOLOGY AND TERMS.**

13 Multiple Petitioners address various issues related to the assignment, allocation,  
14 and priority of water rights under the Muddy River Decree (the “Decree”) as it relates to  
15 groundwater pumping throughout the entire 1,100 square miles of the LWRFS.  
16 Analysis of the issues raised by the Petitioners, including a preliminary discussion of the  
17 Decree’s terms, the parties to the Decree, and the proper interpretation thereof is  
18 necessary.<sup>13</sup> The method of water allocation set forth in the Decree is instructive for  
19 understanding the physical characteristics of the water system that forms the Mega  
20 Basin.

21 The Decree was entered pursuant to a stipulation by and between the water  
22 Users located below the segment of the Muddy River known as “the Narrows” and those  
23 water Users located above the Narrows. See **EXHIBIT 30**, pp. SE ROA 33771, 33796  
24 (the “Muddy River Decree” or the “Decree”). In the Muddy River Decree, the division  
25 point was defined as “that above and that below the lowest diversion on the ranch now  
26 belonging to Knox and Holmes.” See *id.* at 33791.

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<sup>13</sup> Hereinafter, parties to the Decree will be referred to as “Users” to differentiate them from the parties to this action.

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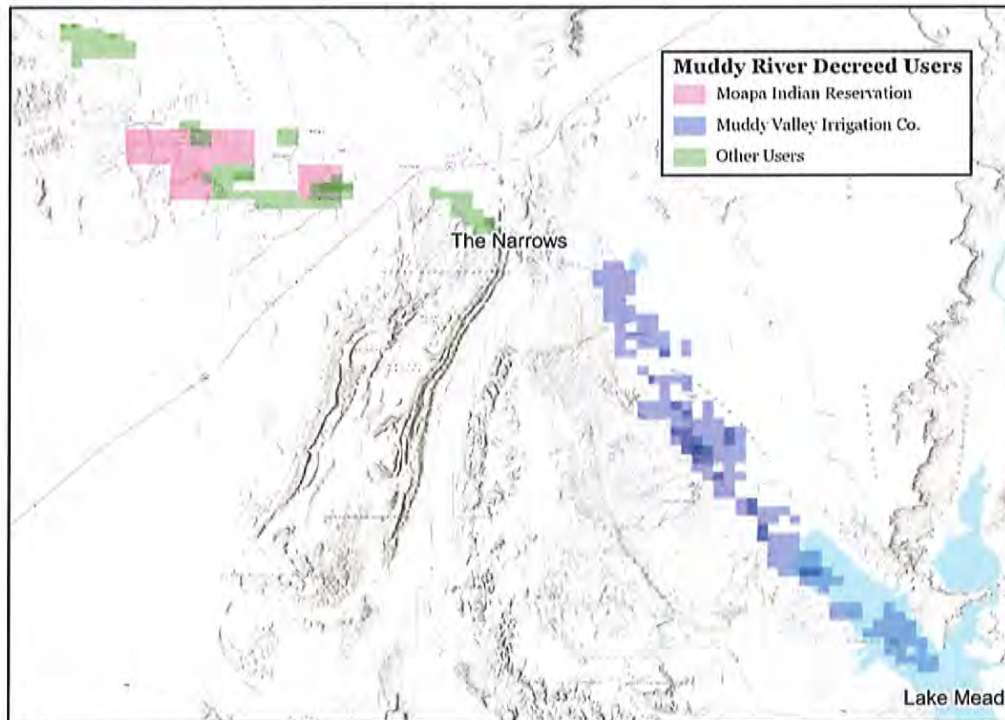


Figure 1. Muddy River Decreed Lands and Users<sup>14</sup>

At the time of the Decree, the Users below the Narrows included MVIC, with a place of use that extended from the south end of the Narrows to the edge of Lake Mead, near the mouth of the Virgin River. The Users above the Narrows included individual parties from the Muddy River Springs Area hydrographic basin, to the Narrows, including the Moapa Band of Paiutes. The lands as described in Exhibit “A” to the Decree are shown in Figure 1, above. The Decree assigned the majority of the Muddy River flows to the lower basin Users. *Id.* at 33798.

Several Petitioners discuss the terms of the Decree as though the Decree assigns a total *volume* of water. See, e.g., SNWA Brief, p. 20 (“The amount of water recognized under the decree is approximately 34,000 afa.”). However, the Decree does not establish a total volume of water required to meet the water assigned to all Users. Instead, the Decree assigns a rate, or duty, which is to be measured at each of the specific points of diversion for each User, which is a critical distinction explained more fully herein. See **EXHIBIT 30**, pp. SE ROA 33772-774. For example, the User Sadie

<sup>14</sup> These figures are intended to be demonstrative aids to assist the Court in understanding and visualizing CSI's arguments herein.

1 George owned 2.1 acres of decreed land, and under the Decree, Sadie George's  
2 decreed right is to divert 21/700 cfs at a specified point of diversion. *Id.* at 33773.

3 An instructive and important lesson gleaned from the Decree is that each User's  
4 duty or rate is measured as close to the named place of diversion as practicable. *Id.* at  
5 33789. The NSE missed, or ignored, this critical point in Order 1309 by concluding that  
6 *all* wells in the Mega Basin equally affect the springs within the Muddy River Springs  
7 Area hydrographic basin which are the home of the Moapa dace. Measuring each  
8 individual User's duty or rate at the place of diversion is appropriate because it  
9 eliminates the need to account for losses and additions to the Muddy River over its  
10 entire reach.<sup>15</sup> The methods used in the 1920 Decree were never intended to quantify  
11 a minimum amount of water required to bypass a User's specific gage. Instead, the use  
12 of a diversion rate, rather than allocation of amount or volume of water, was based on  
13 the reality that the flow system is complex and impacted by several processes, including  
14 losses, inefficiencies, and additions, among others.

15 **A. The Irrigation Practices in the Moapa Valley in 1920 Explain the**  
16 **Water Users' Choice to Allocate Diversion Rates for Water Use.**

17 The Decree allocated water rights to Users based on diversion rate, which is the  
18 rate that water can be diverted from a specific point on the river. Typical irrigation  
19 practices in the Moapa Valley at the time the Decree was entered involved surface or  
20 flood irrigation. Water was applied to land along rows or furrows or simply allowed to  
21 flood large parcels of land. These practices, some of which still occur today, result in  
22 excess water that is not consumed by the crop. Some of that excess water flows off the  
23 land, returning to the groundwater table and flowing back toward the river, becoming  
24 available to the next downstream User (such as a farm or ditch). This process of  
25 excess water existing in irrigated lands is referred to as an "irrigation inefficiency". It is  
26 not uncommon to have irrigation inefficiencies of 40%-50% in flood irrigation, which  
27 explains why the Decree's ***diversion rate*** is so much greater than the NSE's net  
28 irrigation water requirement ("NIWR").

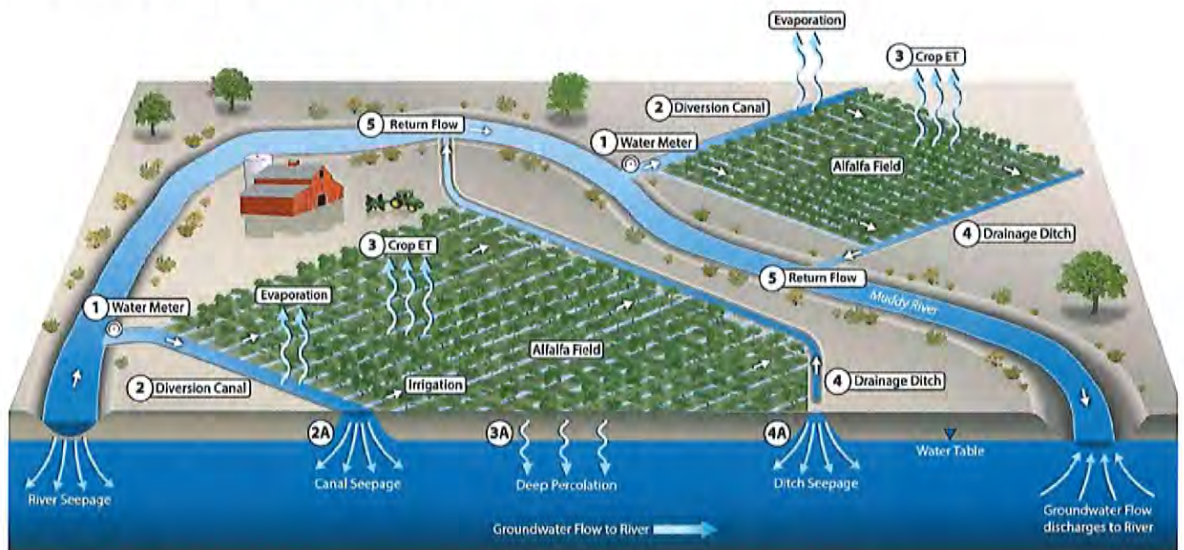
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<sup>15</sup> Typical losses include canal seepage, evaporation, and on-farm inefficiencies while additions may include rising groundwater from surrounding basins and contributions from downstream tributaries.

1 Because the Decree is based on these irrigation practices and their connection to  
2 the groundwater table and the river, return flows and losses from upstream farms were  
3 used as sources of water for downstream farms. This process of water returning to the  
4 groundwater table negates the need to determine a minimum volume of water in the  
5 Warm Springs Area required to fulfill downstream Decreed rights. Accordingly, and as  
6 explained more fully below, it would be very difficult to accurately estimate a minimum  
7 volume of water required to meet the needs of the Decreed land based on the sum of  
8 total **diversion rates** because the excess water returning to the river would be  
9 measured more than once.

### 10 B. A Visualization of the Irrigation Processes

11 The following Figure 2 shows a typical on-farm operation that may occur on  
12 decreed lands along the Muddy River. Generally, surface water is diverted from the  
13 Muddy River via a diversion ditch where it is applied to Decreed lands to grow crops.  
14 CSI outlines the path of how water may be applied and used by multiple farming  
15 operations along the Muddy River.



26  
27 *Figure 2: Conceptual Diversion Operations Showing On-Farm Inefficiencies in the*  
28 *Muddy River. The numbered paragraphs below explain the process associated with the*  
*numbers shown on Figure 2). Similar to Figure 1, this depiction is a demonstrative to*  
*show CSI's argument.*

1                   **1. Water is Diverted from the Muddy River at the Place of Diversion.**

2                   Water in the Muddy River is flowing from the left side of Figure 2 to the right side.  
3                   Beginning with the farm on the left, water diverted from the River is measured using a  
4                   flume or equivalent device “at the places of diversion or as near thereto as practicable  
5                   or convenient.” See **EXHIBIT 30**, p. SE ROA 33789.

6                   **2. Water is Conveyed to the Farm via Diversion Canal.**

7                   Water is then conveyed to the farm via an earthen “Diversion Canal” where  
8                   evaporation losses and canal seepage occur. See 2A on Figure 2. Evaporative losses  
9                   that occur from the open ditch are generally minor. Seepage loss to the groundwater  
10                  table occurs along unlined earthen diversion canals where the elevation of the water in  
11                  the canal is higher than the elevation of the groundwater table.

12                  **3. A Portion of the Water is Beneficially Used for On-Farm Irrigation,  
13                  which May Result in the Remaining Portion of Water Returning to the  
14                  River.**

15                  Water is applied to fields from the Diversion Canal and is subject to consumptive  
16                  use by crops, leaching requirements, and on-farm irrigation inefficiencies. A large  
17                  portion of the water is beneficially used to grow crops and is typically quantified as crop  
18                  evapotranspiration (Crop ET). See 3 on Figure 2. Additionally, there are deep  
19                  percolation losses (see 3A on Figure 2) that travel to the groundwater table due to  
20                  excess water applied using flood and row crop irrigation techniques. Also, additional  
21                  water applied to the fields is used to perform soil leaching requirements and flush  
22                  accumulated salts from the soils. Water applied to the field and not consumed by the  
23                  crop will reach the groundwater table and eventually return to or support the flow of the  
24                  River.

25                  **4. Drainage Ditches Return the Excess Water to the River.**

26                  Drainage ditches at the end of a field are used to convey excess applied water  
27                  away from the field and back to the river or the next downstream User (*i.e.*, farm). In  
28                  general, drainage ditches are used to better manage the soils and increase crop yields  
                    and are typically constructed based on topography and soil conditions. Water conveyed

1 in unlined earthen drainage ditches return less to the river than they receive due to  
2 seepage losses in the unlined ditches (see 4A on Figure 2), but some of the water does  
3 eventually return to or support the flow of the river.

4 **5. Water is then Diverted by the Next Downstream User.**

5 Water that is not consumed by crops or not lost to evaporation at upstream farms  
6 flows to the groundwater table or back to the Muddy River where it is available for  
7 diversion by the next downstream User (see 5 on Figure 2). Deep percolation and  
8 seepage water (see 2A, 3A, 4A on Figure 2) to the groundwater table may return to the  
9 Muddy River, support the flow of the river as underflow, and/or flow underground toward  
10 Lake Mead. Combined with the surface flow of the river, groundwater, and return flow  
11 from drainage ditches are available for diversion at the next downstream farm.

12 The cycle of diversion, measurement, application, and return flows to the river  
13 occurs at the next downstream User. This cycle is typical and not unique to the Muddy  
14 River, which is why the Decree specifies a **diversion rate** as close to the point of  
15 diversion as possible and not a total **quantity** of water at one singular location. Simply,  
16 some amount of water diverted and measured at one location will eventually be diverted  
17 and measured at another location sometime in the future through the water process.

18 Therefore, as discussed below, SNWA inappropriately misleads and quantifies  
19 the Decree based on a summation of water diversion rates. The Decree specifies the  
20 appropriate duty of water, as a **diversion rate**, which fully recognizes the system of  
21 losses and inefficiencies that were common in the 1920s, and in many cases continue  
22 today.

23 **C. The Decree's Allocation of Water by Diversion Rate Cannot Be Used**  
24 **to Quantify a Total Volume of Water Under the Decree.**

25 In Order 1309, the NSE refers to the "net irrigation water requirement". Exh 2., p.  
26 SE ROA 62. The NSE's published estimated NIWR of 4.7 afa per acre for crop  
27 irrigation, is fundamentally different from the Decree's weighted **diversion rate** of 8.54  
28 afa per acre as calculated by SNWA. SNWA Brief, p. 20. The NSE's published NIWR



1 and the Decree's diversion rate are different terms and should never be compared to  
2 each other without substantial qualifiers and mathematical calculations because  
3 conflating the terms leads to incorrect analysis and results like those set forth in Order  
4 1309. While the **NIWR** is generally understood to reflect the amount of water required  
5 by a specific crop less the effective rainfall, the **diversion rate** is simply the gross  
6 amount of water diverted from a river. The primary distinction difference between the  
7 two terms is that a "diversion rate" is a quantity to be delivered to a User, and that  
8 quantity of water includes an assumption that some of the water so delivered will be lost  
9 due to nature or inefficiencies (evaporated, flow across land not planted by a crop, seep  
10 into the unlined ditch, etc.). However, the NIWR is the maximum amount of water used  
11 by a crop regardless of what quantity a User diverts from the river.

12 Another component of this key distinction is that a diversion rate assumes that  
13 some of the water diverted to a particular User will return to the river from which it was  
14 diverted after that User has beneficially used the water and excess water returns to the  
15 groundwater table. On the other hand, the NIWR is simply a calculation of how much  
16 land a particular User is allowed is allowed to irrigate.

17 The Decree therefore allows Users to grow *any* crop—not just alfalfa as  
18 arbitrarily referenced by the NSE in Order 1309—and it does not limit the consumptive  
19 use for a User. Rather, the Decree limits the total water that Users can *divert* from the  
20 river.

21 Accordingly, SNWA's reference to the total volume of water allocated under the  
22 Decree is an incorrect characterization of the terms of the Decree because the Decree  
23 allocates water based on diversion rate measured at the place of diversion, and some  
24 portion of the diverted flow would still be available to downstream Users when any  
25 unused portion of the diverted flow is returned to the river. Therefore, the Decree cannot  
26 be interpreted as providing for a total volume of water at a single measurement point in  
27 the Warm Springs Area that would be required to fulfill Decreed rights. Instead, the  
28 decreed rights are based on the point of diversion for each User within the Decree.

1                   D.     **The Decree Reflects that Water is Added to the Muddy River from**  
2                                 **Points Downstream of Warm Springs.**

3                   By requiring the rate measurement to occur at the point of diversion, the Decree  
4                   adapts to changes in hydrologic conditions from other drainage basins (i.e. Meadow  
5                   Valley Wash, California Wash, and the Virgin River Valley). See Exh. 19, SE ROA  
6                   35615. Water budget analyses indicate that flow contributions from surrounding basins  
7                   not only discharge as spring flow in the Warm Springs Area, but also contribute to water  
8                   resources (i.e., streamflow, groundwater flow, phreatophyte ET) throughout the Lower  
9                   Moapa Valley. *Id.* at SE ROA 35644-48.

10                  Streamflow analyses indicate that there are flow contributions to the flow in the  
11                  Muddy River downstream of Warm Springs, resulting in a seasonal flow pattern. See  
12                  **EXHIBIT 31**, p. SE ROA 35763-66 (CSI 8-16-19 Rebuttal Report). Because the Decree  
13                  stipulates that each Decreed User's duty is measured at the User's specific place of  
14                  diversion, each User's diversion rate accounts for flow contributions other than those  
15                  from spring discharge located in the Warm Springs Area. This again demonstrates that  
16                  determining a minimum volume of water in Warm Springs Area required to fulfill  
17                  Decreed rights is inaccurate and unnecessary.

18                  To exemplify the point, there is a clear distinction between (1) MVIC being  
19                  entitled to all water in the Muddy River not owned by others with Decreed rights and (2)  
20                  MVIC being entitled to divert all water in the Muddy River that can be beneficially used  
21                  on decreed land. SNWA's argument that the former (point (1) above) is correct is based  
22                  on SNWA's misunderstanding of the portion of the Decree that states, "the Muddy  
23                  Valley Irrigation Company is declared and decreed to [...] be entitled to divert and ***use***  
24                  ***upon the lands described in the amended complaint and more particularly***  
25                  ***described in the order of determination***, all the waters of said Muddy River, [...] ***use***  
26                  except the several amounts and rights hereinbefore specified and described as  
27                  awarded and decreed to the other parties to this action and to the Moapa Indian  
28                  Reservation ." **EXHIBIT 30**, p. SE ROA 33790 (emphasis added). Contrary to SNWA's  
interpretation, this language means that MVIC has the right to beneficially use the

1 remaining water in the Muddy River upon its decreed lands. However, the Decree does  
2 not provide that MVIC is entitled to water in excess of its needs on decreed lands if that  
3 water cannot be beneficially used upon those lands. Such a practice would result in a  
4 non-beneficial use of water, which is blatantly contrary to NRS 533.040(2) (“If at any  
5 time it is impracticable to use water beneficially or economically at the place to which it  
6 is appurtenant, the right may be severed from the place of use and be simultaneously  
7 transferred and become appurtenant to another place of use, in the manner provided in  
8 this chapter, without losing priority of right.”).

9 The Decree provides that MVIC is entitled to divert and **beneficially use** upon its  
10 lands the water of the Muddy River after the upstream diverters have fulfilled their  
11 requirements, but the Decree does not **guarantee** MVIC (or any User) the use of  
12 additional water. Indeed, the Decree states that “said Company [MVIC] is to divert said  
13 waters . . . for the various purposes described in the complaint and specifically  
14 designated in the order of determination.” *Id.* The Decree further provides that “[b]elow  
15 the lowest diversion of the defendants Holmes and Knox [the Narrows] the flow in the  
16 stream shall be maintained substantially constant, subject to seasonal variation, only,  
17 however, in so far as the defendants can be held to be responsible for the fluctuations  
18 of the stream.” *Id.* at p. SE ROA 33791. This language ensures that adequate water  
19 remains in the Muddy River to meet the beneficial use requirement of MVIC after  
20 passing through the Narrows, not to allow MVIC to divert all unused flow regardless of  
21 use.

22 SNWA’s interpretation cannot be accepted by this Court because it would  
23 produce absurd results. SNWA’s argument that any amount of upstream pumping  
24 conflicts with decreed water rights is based on the incorrect theory that all water in the  
25 river, regardless of whether it is being beneficially used, is allotted to a specific decreed  
26 User (i.e., MVIC), as SNWA does by stating that the MVIC, “[...] is, by the decree,  
27 entitled to the entire flow of the Muddy River except the flows granted to the other  
28 parties.” See **EXHIBIT 32**, p. SE ROA 41942-44 (SNWA Assessment of LWRFS). The

1 Decree provides adequate water for MVIC, the downstream User, to meet its  
2 beneficially use the water, which at the time, was for irrigation of decreed lands along  
3 the river.

4 **E. SNWA’S Calculations are Inconsistent with the Decree.**

5 Although the water rights allocated under the Decree were not intended to be  
6 quantified, SNWA indicates “The total amount of water recognized under the decree is  
7 approximately 34,000 afa.” SNWA Brief, p. 20. As explained above, the Decree was not  
8 intended to be quantified. But regardless, the basis for SNWA’s calculation is the  
9 amount of decreed acreage and the water duty. Although SNWA’s use of the summer  
10 and winter duty rates<sup>16</sup> appears consistent with the Decree, there are discrepancies  
11 associated with the total acres of decreed lands that need to be addressed.

12 The Decree distinguishes between lands irrigated in the summer and those that  
13 are irrigated in the winter, including some lands that receive water year-around. While  
14 SNWA correctly notes that there are 3,261 acres of decreed lands entitled to divert  
15 water in the summer, SNWA’s calculation of the total decreed acres entitled to divert  
16 water in the winter cannot be verified. Based on the Decree, the total number of winter-  
17 time decreed lands is 5,131 acres, not 4,700 acres as indicated by SNWA.<sup>17</sup> SNWA  
18 Brief, p. 27. SNWA incorrectly includes the total acreage from Application 1611  
19 (2,784.75 acres) rather than the acreage from Certificate 1611 (970 acres) and fails to  
20 include an additional 2,244.8 ac listed in the Decree under MVIC. SNWA Brief, p. 20;  
21 **EXHIBIT 30**, SE ROA 33798. Applying the 5,131 winter acres would result in SNWA’s  
22 average annual estimate increasing from 34,000 afa to 35,712 afa. The average annual  
23 equivalent flow **rate** would be 49.3 cfs, a value greater than the extended baseflow  
24 measured at any gage<sup>18</sup> on the Muddy River since the United States Geological

25 \_\_\_\_\_  
26 <sup>16</sup> Summer Duty = 1 cfs per 70 acres; Winter Duty = 1 cfs per 100 acres. In their opening brief, SNWA  
converts these to 10.34 af/acre and 7.24 af/acre respectively.

27 <sup>17</sup> Summer and winter acreage does not account for irrigated lands from decreed rights to Baldwin  
28 Springs. Total estimated net irrigation water requirement estimated below in III.G accounts for 0.8928 cfs  
(58 acres) of decreed rights assigned to Baldwin Springs.

<sup>18</sup> See USGS gages at Moapa (09416000) and Glendale (09419000). November 21, 2021:  
[https://waterdata.usgs.gov/nwis/uv/?site\\_no=09416000&agency\\_cd=USGS](https://waterdata.usgs.gov/nwis/uv/?site_no=09416000&agency_cd=USGS) and

1 Services (“USGS”) records began in 1986.

2 **F. The NSE’S NIWR Calculation is Arbitrary Because It is Not**  
3 **Repeatable.**

4 Order 1309 states “the net irrigation water requirement would be 28,300 afa,  
5 based on a consumptive use rate of 4.7 afa [af/acre].” Exh. 2, SE ROA 62. Although  
6 Order 1309 attempts to determine the net irrigation water requirement of decreed lands  
7 and not a quantification of the Decree, the estimated 28,300 afa is not a repeatable  
8 calculation based on the Order’s stated decreed acreage of 5,614 acres. *Id.* at 61. The  
9 mathematical product of Order 1309’s 5,614 acres and 4.7 afa equates to 26,386 afa on  
10 an annual basis, a value that is 1,986 afa less than estimated by the NSE.

11 The NSE incorrectly applies the annual NIWR of 4.7 afa for the Muddy River  
12 Springs Area to calculate total water requirement within three different basins: the  
13 Muddy River Springs Area (Basin 219), California Wash (Basin 218), and the Lower  
14 Moapa Valley (Basin 220). Instead, the NSE should have considered specific NIWR for  
15 each of these individual hydrographic basins because each basin has distinct irrigation  
16 needs. The majority of Decreed lands are located in Lower Moapa Valley, which the  
17 NSE did not consider in calculating the NIWR for the entire Muddy River Springs Area,  
18 which shows that the NSE’s NIWR is incomplete and inaccurate.

19 The NSE’s NIWR also fails to consider that the irrigation requirements differ for  
20 winter and summer decreed acreage. Due to seasonal differences, there is a higher  
21 NIWR during summer months and a lower NIWR during winter months. The NSE’s  
22 reliance on a single value of net irrigated water requirement in this region is arbitrary  
23 and capricious.

24 **G. The Actual NIWR for Alfalfa on Decreed lands is 17,771 afa.**

25 Performing the correct mathematical and methodological calculation to determine  
26 the NIWR for all of the Decreed lands, results in an NIWR of 17,771 afa for three  
27 combined basins. The Decree identifies 3,319 acres and 5,131 acres of summertime  
28

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[https://waterdata.usgs.gov/nv/nwis/uv/?site\\_no=09419000&PARAMeter\\_cd=00065.00060](https://waterdata.usgs.gov/nv/nwis/uv/?site_no=09419000&PARAMeter_cd=00065.00060), respectively.

1 and winter-time decreed acreage, respectively.<sup>19</sup> Applying a monthly NIWR for  
2 summertime and winter-time periods, for each of the three basins (Basins 217, 219, and  
3 220), results in a total NIWR of 17,771 afa in total for all three basins. These  
4 calculations demonstrate the fundamental deficiencies in the NSE's findings and  
5 conclusions in Order 1309. The Order must be vacated.

6 **IV. CSI JOINS IN THE ARGUMENTS THAT ORDER 1309 IS CONTRARY TO LAW.**

7 Several Petitioners argue that Order 1309 is contrary to law because it (1)  
8 exceeds the scope of the NSE's statutory authority; (2) was issued without due process;  
9 and (3) violates the prior appropriation doctrine. CSI also argued these points in its  
10 Opening Brief and joins in those arguments set forth by the respective Petitioners who  
11 addressed each issue, as specified herein.

12 **A. The NSE Does Not Have Statutory Authority to Issue Order 1309.**

13 Apex, Georgia-Pacific, Vidler, and NCA argue that the NSE exceeded its  
14 statutory authority in issuing Order 1309. See Apex Brief, pp. 8-10; Georgia Pacific  
15 Brief, 20-23; Vidler Brief, pp. 15-20; and NCA Brief, pp. 20-23.

16 CSI joins in the arguments related to the NSE's statutory authority set forth in  
17 these Petitioners' briefs as NRS Chapter 533 does not provide the NSE with authority to  
18 join multiple basins into one "mega basin" for "joint administration", and the Legislature's  
19 statement of public policy in NRS 533.024 does not provide the NSE authority to issue  
20 Order 1309. Accordingly, Order 1309 is contrary to law and should be declared void.

21 **B. The NSE Violated Petitioners' Due Process Rights in Issuing Order**  
22 **1309.**

23 Apex, Georgia Pacific, Vidler, MVIC, and SNWA agree with CSI that the NSE  
24 failed to provide the Petitioners proper notice to satisfy the requirements of due process  
25 in the 1303 Hearing process that resulted in the NSE entering Order 1309. See Apex  
26 Brief, pp. 12-13; Georgia Pacific Brief, pp. 23-27; Vidler Brief, pp. 21-33; MVIC Brief; pp.  
27 20-25; SNWA Brief, pp. 35-38.

28 \_\_\_\_\_  
<sup>19</sup> Total Decreed acreage, including an accounting for Baldwin Springs, is estimated to be 5,613.9 acres. The total acres of lands irrigated by Baldwin Springs is not specified in the Decree, only a quantity of water of 0.8298 cfs, which is equivalent to 58.09 acres based on a summer-time diversion rate.

1           CSI joins in the arguments raised by these Petitioners concerning the NSE's  
2 violation of the Petitioners' due process rights because the NSE did not give proper  
3 notice of the criteria that the NSE applied post-hearing, failed to establish or give notice  
4 of the NSE's intent for a future management plan, and the NSE improperly used the  
5 evidence presented at the 1303 Hearing to conduct a conflicts analysis when the NSE  
6 expressly told the Petitioners that conflict issues would not be addressed at the 1303  
7 Hearing. Thus, Order 1309 should be vacated.

8           **C. Order 1309 Violates the Prior Appropriation Doctrine.**

9           Apex, Georgia Pacific<sup>20</sup>, Vidler, MVIC, and SNWA have all described how Order  
10 1309 violates the prior appropriation doctrine by redefining and reprioritizing the priority  
11 dates of the Petitioners' water rights. See Apex Brief, pp. 10-11; Georgia Pacific Brief,  
12 pp. 20-21, 25; Vidler Brief, pp. 17-20; MVIC Brief, pp. 14-16;<sup>21</sup> SNWA Brief, pp. 25-27.

13           CSI joins in these Petitioners' arguments that pertain to the prior appropriation  
14 doctrine as Order 1309 improperly re-prioritizes the priority rights of the water rights  
15 holders. Therefore, Order 1309 is void as a matter of law.

16           **V. CSI JOINS IN THE ARGUMENTS THAT ORDER 1309 IS NOT SUPPORTED  
17 BY SUBSTANTIAL EVIDENCE AND IS, THEREFORE, ARBITRARY AND  
18 CAPRICIOUS.**

19           CBD<sup>22</sup>, Georgia Pacific, Vidler, MVIC, NCA, and SWNA agree that Order 1309 is  
20 not supported by substantial evidence, rendering it arbitrary and capricious. See CBD  
21 Brief, pp. 24-28; Georgia Pacific Brief, pp. 13-20; Vidler Brief, pp. 35-40; MVIC Brief, pp.  
22 18-20; NCA Brief, pp. 25-31; SNWA Brief, pp. 27-32.

23           CSI joins in the arguments raised by these Petitioners concerning the dearth of  
24 evidence supporting the conclusions in Order 1309. Order 1309 is arbitrary, capricious,  
25 and should be vacated.

---

26 <sup>20</sup> Though Georgia Pacific does not expressly refer to the prior appropriation doctrine, Georgia Pacific  
27 challenges the NSE's "re-ordering" of the priority dates of the Petitioners' water rights. Accordingly,  
Georgia Pacific articulates the same principles that underlie the prior appropriation doctrine.

28 <sup>21</sup> CSI does not join in MVIC's discussion and analysis of the interpretation and consequences of the  
Muddy River Decree.

<sup>22</sup> While CSI agrees with CBD that Order 1309 is arbitrary and capricious, CSI does not concur in CBD's

1 **VI. CONCLUSION**

2 Based on the foregoing, CSI respectfully requests that this Court grant CSI's  
3 Petition for Judicial Review and enter an Order declaring Order 1309 void.

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

6 DATED this 23rd day of November, 2021.

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analysis, authority cited, nor the outcome CBD seeks.



1 CERTIFICATE OF SERVICE

2 Pursuant to NRCP 5(b), I hereby certify that I am an employee of Robison, Sharp,  
3 Sullivan & Brust, and that I served, or caused to be served, a true and correct copy of the  
4 foregoing COYOTE SPRINGS INVESTMENT, LLC'S BRIEF IN INTERVENTION to be  
5 served on all parties to this action by:

6  placing an original or true copy thereof in a sealed, prepaid delivery package via Federal  
7 Express at Reno, Nevada, addressed to:

8 Clark County District Court  
9 Attn: Honorable Bitu Yeager – District Court, Dept. 1  
10 Court Administration – 2<sup>nd</sup> Floor  
11 200 Lewis Avenue  
12 Las Vegas, NV 89101

13  emailing an attached Adobe Acrobat PDF version of the document to the email  
14 addresses below/facsimile (fax) and/or E-Filing pursuant to Section IV of the District of  
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**EXHIBIT LIST**

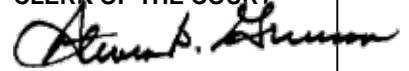
**EXHIBITS IN SUPPORT OF COYOTE SPRINGS INVESTMENT, LLC'S  
BRIEF IN INTERVENTION**

(Case No. A-20-816761-C (Lead Case))

<b>EXHIBIT NO.</b>	<b>DATE</b>	<b>DESCRIPTION</b>	<b>PAGES</b>
27	09/30/2019	Transcript of Order 1303 Hearing	61
28	07/03/2019	U.S. Fish and Wildlife Service Response to Order 1303	82
29	09/24/2019	Transcript of Order 1303 Hearing September 24, 2019 Afternoon Session	47
30	03/12/1920	Muddy River Decree	47
31	08/17/2019	CSI's Rebuttal Report	94
32	June 2019	SNWA's Assessment of LWRFS Water Resource Conditions and Aquifer Response	143
33	09/24/2019	Transcript of Order 1303 Hearing September 24, 2019 Morning Session	61

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29	09/24/2019	Transcript of Order 1303 Hearing September 24,2019 Afternoon Session	44	JA_17511	JA_17557
30	03/12/1920	Muddy River Decree	13	JA_6634	JA_6680
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32	June 2019	SNWA's Assessment of LWRFS Water Resource Conditions and Aquifer Response	27	JA_11813	JA_11955
33	09/24/2019	Transcript of Order 1303 Hearing September 24,2019 Morning Session	44	JA_17450	JA_17510



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10 **DISTRICT COURT**  
11 **CLARK COUNTY, NEVADA**

12 \* \* \* \*

13 **GEORGIA-PACIFIC GYPSUM LLC,**  
14 **AND REPUBLIC ENVIRONMENTAL**  
**TECHNOLOGIES, INC.**

15 **Petitioners,**

16 **vs.**

17 **TIM WILSON, P.E. Nevada State Engineer,**  
18 **DIVISION OF WATER RESOURCES, and the**  
**DEPARTMENT OF CONSERVATION AND**  
19 **NATURAL RESOURCES,**

20 **Respondent.**

**CASE NO.: A-20-816761-C (Lead Case)**

**DEPT. NO.: 1**

**Consolidated with:**

A-20-817765-P

A-20-818015-P

A-20-817977-P

A-20-818069-P

A-20-817840-P

A-20-817876-P

A-21-833571-J

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1 **INTRODUCTION**

2           Petitioners Georgia-Pacific Gypsum LLC (“Georgia-Pacific”) and Republic  
3 Environmental Technologies, Inc. (“Republic”) (collectively, “Petitioners”), by and through  
4 counsel Sylvia Harrison, Esq., Lucas Foletta, Esq., and Sarah Ferguson, Esq. of the law firm of  
5 McDonald Carano LLP, hereby submit this Answering Brief in response to the Petitioner’s  
6 Opening Brief filed by the Center for Biological Diversity (“CBD Brief”) and Opening Brief  
7 from Petitioners’ Las Vegas Valley Water District and Southern Nevada Water Authority  
8 (“LVVWD and SNWA Opening Brief”).

9           In its opening brief, the Center for Biological Diversity (“CBD”) contends that the State  
10 Engineer’s (“SE”) decision in Order 1309 was not supported by substantial evidence. More  
11 specifically, CBD contends that the SE’s conclusion that carbonate pumping can continue at  
12 8,000 afa is not consistent with evidence of declining streamflows. (CBD Brief at 24.) It  
13 further contends that the SE failed to consider the environmental factors—namely, declining  
14 spring flows and water volume—that contribute to the survival of the Moapa Dace (“Dace”) in  
15 determining to allow continued pumping in the Lower White River Flow System (“LWRFS”).  
16 (*Id.* at 28.) In doing so, however, CBD fails to acknowledge the scant evidence of declining  
17 streamflows in the record and the substantial evidence of the impact of invasive species on the  
18 Dace. CBD also misses the fact that the SE has no authority to adjudicate the issues involved  
19 in Order 1309 on the basis of the Endangered Species Act (“ESA”).

20           LVVWD and SNWA generally argue that Order 1309 was correctly decided but allege  
21 that the SE erroneously failed to recognize the impact of junior groundwater pumping in the  
22 LWRFS on senior surface water rights in the Muddy River. (LVVWD and SNWA Brief at 3.)  
23 Notwithstanding the merits of LVVWD’s and SNWA’s position regarding the impact on  
24 surface rights in the Muddy River, LVVWD and SNWA are wrong in their contention that  
25 Order 1309 was mostly correct. As set forth in Petitioners’ Opening Brief in Support of  
26 Petition for Judicial Review (“Petitioners’ Opening Brief”), Order 1309 suffers from several  
27 fatal flaws, including that the SE exceeded his authority in consolidating the LWRFS into a  
28 single hydrologic basin and failed to satisfy the due process rights of the participants in the

1 Order 1309 proceeding. What’s more, the SE’s decision was arbitrary, capricious, and not  
2 based on substantial evidence.

3 **I. DISUCSSION**

4 **a. CBD Brief**

5 **1. The CBD’s contention that the SE’s decision to allow continued**  
6 **pumping at 8,000 afa is not supported by substantial evidence is**  
7 **misplaced; there is almost no evidence of declining streamflows in the**  
8 **LWRFS today.**

9 The CBD argues that the SE’s decision to allow continued pumping in the LWRFS fails  
10 to recognize that “groundwater pumping continues to have negative impacts on springflows and  
11 senior decreed rights.” (CBD Opening Brief at 24.) More specifically, CBD contends that the  
12 evidence at the Order 1303 hearing showed that carbonate pumping at 8,000 afa continued to  
13 decrease spring flows despite average precipitation in the years leading up to the Order 1303  
14 hearing. (*Id.* at 25.) However, the evidence in the record does not support that conclusion.

15 As Petitioners pointed out in their Opening Brief, sustainable yield recommendations at  
16 the hearing included recommendations of more than 30,000 afa. (Petitioners’ Opening Brief  
17 at 18) (citing ROA 58, Ex. 1.) What’s more, Order 1309 added the Kane Springs Valley  
18 hydrographic basin to the LWRFS joint administration unit but failed to reflect the addition of  
19 those water resources in the basin in the 8,000 afa annual yield. (*Id.* at 18-19.) Perhaps more  
20 importantly, because Kane Springs Valley was not included in the Order 1303 hydrographic  
21 basin, the expert recommendations at the hearing did not reflect the contribution of additional  
22 resources from that area. According to the Division’s Hydrographic Basin Abstract as set forth  
23 prior to issuance of Order 1309, the Kane Springs Valley Hydrographic Basin (Basin 206) has a  
24 perennial yield of 1000 afa; the contribution to the LWRFS may be more than 4000 afa.<sup>1</sup>  
25 Nothing in Order 1309 indicates that the State Engineer considered this resource in determining

26 <sup>1</sup> “SNWA (2007) assessed local and regional flow in southeastern Nevada and found regional inflow to  
27 Coyote Spring Valley was 50,700 AFY, of which . . . Kane Springs Valley contributes 4,190 AFY. . .  
28 SNWA (2007) estimated local recharge to be 2,130 AFY.” ROA 35648, Ex. 13 (citing Southern Nevada  
Water Authority, *Water-Resources Assessment and Hydrologic Report for Cave, Dry Lake, and Delmar  
Valleys* (June 2007)).

1 the LWRFS limitation, which would have the impact of increasing the sustainable yield, not  
2 decreasing it.

3       What’s more, it is worth pointing out that data presented in the most recent Hydrologic  
4 Review Team report (“HRT Report”), published on the SE’s website in the LWRFS folder,  
5 demonstrate spring flows in the Muddy River Springs Area are generally stable relative to  
6 levels following the Order 1169 pumping, and in some cases are increasing, not declining. (*See*  
7 Request for Judicial Notice, Ex. 1.)<sup>2</sup> This report reflects the fact that evidence of the overly  
8 conservative nature of the SE’s 8,000 afa continues to mount, contravening the CBD’s  
9 assertion that the SE’s 8,000 is far too high.

10                               **2. The CBD’s assertion that the SE failed to appropriately consider the**  
11 **impact of declining streamflows on the Dace is misplaced because the**  
12 **SE did not have authority to consider the implications of the sustainable**  
13 **yield for the Dace under the ESA; and even if he did, there was not**  
14 **substantial evidence upon which to adjust the sustainable yield**  
15 **downward on that basis.**

16       The CBD contends Order 1309 fails to reflect consideration of the viability of the Dace.  
17 (CBD Opening Brief at 28.) More specifically, CBD argues that the SE “failed to explain the  
18 basis for his conclusion that pumping at current levels will adequately protect the Moapa dace,  
19 and failed to comply with Nevada water law, which requires him to consider environmental  
20 impacts as a component of the public interest.” (*Id.*) The CBD supports its argument by  
21 claiming that “the survival and recovery of the dace is entirely dependent on the unique  
22 conditions created by discharge from the carbonate aquifer in the MRSA,” including higher  
23 water temperatures for spawning and sufficient water volume for robust food production. (*Id.*  
24 at 31.) The CBD’s arguments, however, fail for several reasons.

25       As Petitioners pointed out previously, the SE lacked authority to premise Order 1309 on  
26 his conclusion on the circumstances that might generate a “take” under the ESA, and he failed

---

27 <sup>2</sup> Petitioners concurrently filed a Request for Judicial Notice in support of this brief, requesting that this  
28 Court take judicial notice of two public documents. Petitioners attached these documents to their  
Request for Judicial Notice, and cite these exhibits herein.

1 to provide proper notice of the consideration of the implications of sustainable yield for the  
2 viability of the Dace. (Petitioners’ Opening Brief at 29.) To reverse the SE on the basis that  
3 the evidence supports an even more conservative sustainable yield, as CBD suggests, would  
4 only compound these legal deficiencies.

5       Beyond that, substantial evidence does not support the notion that the 8,000 afa limit is  
6 not sufficient to support the viability of the Dace. Importantly, at the hearing, the U.S. Fish and  
7 Wildlife Service (“USFWS”) declined to endorse the conclusions stated in the SE’s findings  
8 regarding the implications for the Dace under the ESA. (*Id.*) (citing ROA 53140-41, Ex. 27  
9 (Hr’g Tr. at 483:10-484:15). Not only that, but as Petitioners pointed out in their Opening  
10 Brief, the USFWS previously reached agreement with several parties for implementation of  
11 mitigation measures triggered by *lower* flow rates. This suggests that the SE’s annual yield is  
12 overly conservative regarding the future of the Dace. (*Id.*) There was also evidence at the  
13 hearing that factors other than spring flows are more impactful regarding the survival of the  
14 Dace, including the impact of invasive species. (*Id.* at 30.)

15       In arguing that stream flows are paramount, the CBD glosses over the prominent impact  
16 of invasive species. For example, in support of its argument, CBD points the Court to selected  
17 excerpts of the USFWS Programmatic Biological Opinion for the 2006 LWRFS MOA  
18 (“USFWS Opinion”) and cites it for the proposition that the Dace need warmer water  
19 temperatures to spawn and higher water volumes for food production. (CBD Opening Brief at  
20 31.) However, the CBD fails to make the Court aware that the USFWS Opinion expressly  
21 identifies conservation actions that do *not* relate to spring flows to support the Dace, including  
22 the eradication of “non-native fish, such as tilapia from the historic range of Moapa dace.”  
23 (ROA 47158.) Moreover, at hearing, the USFWS submitted a white paper as an exhibit titled  
24 Issues Related to Conjunctive Management of the Lower White River Flow System (“USFWS  
25 Issues Report”). (ROA at 48674-755.) The USFWS Issues Report notes that invasive blue  
26 tilapia “invaded the Muddy River Springs Area in 1995 and dramatically reduced the entire  
27 population [of Dace].” (*Id.* at 48721 (internal citation omitted).) The USFWS Issues Report  
28 goes on to state that “[c]urrent knowledge of this system suggests that the negative interaction

1 between tilapia and Moapa dace was so severe that recovery of this species depended on the  
2 removal of tilapia from the system, a major recovery action only recently completed in full.”

3 (*Id.*)

4 The CBD fails to account for the impact of the tilapia on the prospects for the Dace,  
5 instead insisting on over emphasizing the impact of streamflows and water volume. It bears  
6 noting that recent research conducted by SNWA, the USFWS, and Nevada Department of  
7 Wildlife (“NDOW”) appears to support the notion that the impact of invasive tilapia exceeds  
8 that of streamflows and water volume. The research reflects the fact that the Dace population  
9 has substantially increased since the fish barrier—designed to mitigate the impact of invasive  
10 species like tilapia—was put in place. (*See* Request for Judicial Notice, Ex. 2.) For all these  
11 reasons, there is not substantial evidence to support CBD’s position, and the Court should reject  
12 it.

13 **b. LVVWD and SNWA Brief**

14 In its opening brief, LVVWD and SNWA contend that “most of Order 1309 was  
15 correct.” (LVVWD and SNWA Brief at 3.) LVVWD and SNWA argue, however, that the SE  
16 “failed to recognize the ongoing impact of junior groundwater pumping on senior surface water  
17 rights in the Muddy River,” contending that he “unlawfully reduced the total duty of senior  
18 decreed Muddy River Water rights . . . .” (*Id.*)

19 While there may be merit in LVVWD’s and SNWA’s argument regarding senior  
20 Muddy River surface rights, their position is particularly self-serving. While they contend that  
21 Muddy River rights are legally sacrosanct because of the language of the Muddy River Decree,  
22 they fail to acknowledge other blatant legal issues with Order 1309. As Petitioners pointed out  
23 in their Opening Brief, the SE exceeded his authority in establishing the LWRFS as a single  
24 hydrographic basin and failed to provide proper notice in doing so. (Petitioners’ Opening Brief  
25 at 20-26.) The SE’s decision to consolidate the LWRFS was also arbitrary, capricious, and not  
26 supported by substantial evidence, as was his decision regarding sustainable yield. (*Id.* at 13-  
27 20.) For these reasons and the others described in Petitioners’ Opening Brief, Order 1309 must  
28

1 be reversed. LVVWD's and SNWA's contention to the contrary should be rejected for the  
2 reasons set forth in Petitioners' Opening Brief.

3 **II. CONCLUSION**

4 For the reasons stated here, the Court should reject CBD's contention that the SE's  
5 sustainable yield determination is too high and that the SE should have settled on a lower  
6 sustainable yield to protect the Dace. The Court should further reject LVVWD's and SNWA's  
7 contention that the majority of Order 1309 was decided correctly. Instead, the Court should  
8 grant Petitioners' Petition for Judicial Review for the reasons set forth in Petitioners' Opening  
9 Brief.

10 DATED this 23rd day of November, 2021.

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**AFFIRMATION**

(Pursuant to NRS 239B.030)

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

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that I have read this **PETITIONER’S ANSWERING BRIEF** and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of Nevada Rules of Appellate Procedure.

DATED this 23rd day of November, 2021.

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I hereby certify, under penalty of perjury, that I am an employee of McDonald Carano LLP and that on November 23, 2021, a true and correct copy of **PETITIONER'S ANSWERING BRIEF** was electronically submitted to the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification. The parties below were also served via U.S. Mail, postage-prepaid:

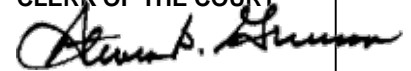
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10 **DISTRICT COURT**

11 **CLARK COUNTY, NEVADA**

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

14 Petitioners,

15 vs.

16 ADAM SULLIVAN, P.E., Nevada  
State Engineer, DIVISION OF  
17 WATER RESOURCES, DEPARTMENT OF  
CONSERVATION AND NATURAL  
18 RESOURCES,

19 Respondent.

20 And All Consolidated Cases.

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

Consolidated with:

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

21 **RESPONDENTS' ANSWERING BRIEF**  
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1 **ISSUES PRESENTED FOR REVIEW**

- 2 1. Is there substantial evidence supporting the State Engineer’s Order 1309?  
3 2. Did the State Engineer have legal authority to issue Order 1309?  
4 3. Is Order 1309 constitutional?

5 **INTRODUCTION**

6 This Court should affirm the State Engineer’s Order 1309. The State Engineer held  
7 a multiyear aquifer test to determine the effects of pumping a portion of the water rights  
8 granted for Coyote Spring Valley. The aquifer test showed an unprecedented decline in  
9 groundwater levels across a 1,100 square mile area. It also showed that the decline in  
10 groundwater resulted in a decline in the discharge of springs that feed the Muddy River.

11 The State Engineer received scientific reports on the aquifer test and post-test data  
12 from stakeholders in the area, including federal agencies, water districts, energy providers,  
13 private corporations and a conservation group. He then held a two-week hearing where  
14 stakeholders presented expert testimony, subject to cross-examination, before submitting  
15 closing briefs on their views.

16 Based on review of that extensive evidence and analysis – over 50,000 pages in the  
17 record on review – the State Engineer issued Order 1309. Order 1309 recognized that there  
18 are six sub-basins and a portion of a seventh within that 1,100 square mile area. Those  
19 sub-basins have a uniquely close hydrologic connection and share the same supply of water.  
20 That is why pumping in one part of the area causes groundwater declines in other areas,  
21 and pumping in nearly any part of the area eventually leads to declines in spring flow.

22 The State Engineer found that the uniquely close connection required joint  
23 administration of the area as a single hydrographic basin, identified as the Lower White  
24 River Flow System (“LWRFS”). He developed six hydrologic and geologic criteria to  
25 determine whether a basin or sub-basin should be included or excluded from the LWRFS.

26 The State Engineer also reviewed the data, analysis and argument presented to  
27 determine that 8,000 acre-feet annually (“afa”) is the maximum amount of groundwater  
28 that can be pumped from the LWRFS without conflicting with senior rights. That

1 determination was based on extensive evidence that reduced pumping after the aquifer test  
2 ended had allowed groundwater levels and spring flow to *partially* recover (though not  
3 enough to support increased pumping).

4 Order 1309 should be affirmed for three reasons. First, Order 1309 consists of a  
5 series of highly scientific factual findings. The State Engineer's findings must be deferred  
6 to. There is substantial evidence in the record supporting his determination of the LWRFS  
7 boundaries and the maximum sustainable amount of pumping.

8 Second, the State Engineer had legal authority to issue Order 1309. The Nevada  
9 Legislature empowered the State Engineer to regulate all the water in Nevada. He is  
10 obligated to protect senior rights and step in when an area's water resources are  
11 insufficient to serve existing rights. Order 1309 is nothing more than a set of factual  
12 determinations that allow him to perform his duty of protecting senior rights.

13 Third, Order 1309 provided sufficient prior notice, consistent with constitutional  
14 due-process requirements. The State Engineer provided prior notice that he would be  
15 determining the LWRFS's boundaries and the maximum amount that can be pumped in  
16 the LWRFS without conflicting with senior rights. Order 1309 determined the LWRFS's  
17 boundaries and maximum amount that can be pumped without conflicting with senior  
18 rights.

#### 19 **STATEMENT OF THE CASE**

20 The State Engineer issued Order 1309 on June 15, 2020. ROA 67. Seven sets of  
21 Petitioners timely filed petitions for judicial review in this Court pursuant to NRS 533.450.  
22 These parties stipulated to consolidating all the Order 1309 petitions for judicial review.  
23 Petitioners Lincoln County Water District and Vidler Water Co. timely petitioned for  
24 judicial review in the Seventh Judicial District Court, but that petition was transferred to  
25 this Court and consolidated with this proceeding. *See Lincoln Cty. Water Dist. v. Wilson*,  
26 No. 81792, 485 P.3d 210, 2021 WL 1440402, at \*3 (Nev. 2021) (unpublished disposition).  
27 Several other interested parties moved to intervene in the various cases. This Court  
28 ...

1 granted their motions to intervene. Petitioners filed their opening briefs, and the State  
2 Engineer now files his answering brief responding to all Petitioners.

3 **STATEMENT OF FACTS**

4 **I. Background**

5 **A. The State Engineer is responsible for managing Nevada’s water  
6 resources in accordance with Nevada’s water law**

7 The State Engineer has jurisdiction over all water in Nevada. *Mineral Cty. v. Lyon*  
8 *Cty.*, 136 Nev. 503, 513 & n.5, 473 P.3d 418, 426 & n.5 (2020). Nevada’s water law is  
9 founded upon the “fundamental principle” of “prior appropriation” which essentially means  
10 first in time, first in right. *Id.* at 513, 473 P.3d at 426; *Lobdell v. Simpson*, 2 Nev. 274, 277  
11 (1866).

12 Under prior appropriation, all water rights “are given ‘subject to existing rights.’”  
13 *Mineral Cty.*, 136 Nev. at 513, 473 P.3d at 426 (quoting NRS 533.430(1)). Granted rights  
14 are given priority dates based either upon the date in which water was first placed to  
15 beneficial use (pre-statutory water rights) or the date that the application to appropriate  
16 was filed with the Office of the State Engineer (statutory appropriations). *See Application*  
17 *of Filippini*, 66 Nev. 17, 21-22, 202 P.2d 535, 537-38 (1949). Thus, seniority is assigned to  
18 the holder of the right based upon the date of the appropriation. *See Lobdell*, 2 Nev. at 277.

19 When allocating the right to the use of water, the State Engineer is bound to consider  
20 whether water is available in the source of supply, whether the appropriation would conflict  
21 with existing rights or a protectable interest in domestic wells, and whether the  
22 appropriation is in the public interest. NRS 533.380(2). Further, Nevada law imposes  
23 upon the State Engineer the continuing duty to protect senior rights from later  
24 appropriations. Further, the State Engineer must consider the public interest when  
25 allocating and administering water rights. *Mineral Cty.*, 136 Nev. at 506, 473 P.3d at 421.

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1           **B.     The Lower White River LWRFS**

2           The LWRFS consists of six hydrographic sub-basins, plus a portion of one more, in  
3 the desert northeast of Las Vegas. ROA 66.<sup>1</sup> As the State Engineer explains below,  
4 intensive study and analysis of the LWRFS shows that its constituent sub-basins are  
5 characterized by a “uniquely close hydrologic interconnection and shared source and supply  
6 of water.” *Id.* at 47, 64.

7           The State has long recognized the uniqueness of the LWRFS. The State Engineer  
8 has actively managed most of the sub-basins within the LWRFS since 1971. ROA 2-3.  
9 Through a program for the study and testing of the carbonate-rock aquifers in southern  
10 Nevada funded by the Nevada Legislature, the U.S. Geological Survey and the Desert  
11 Research Institute concluded that “sustained withdrawals” of water from the area would  
12 “result in water-level declines and cause the depletion of large quantities of stored water.”  
13 *Id.* at 3

14           The Muddy River runs through a portion of the LWRFS before cutting southeast and  
15 discharging into Lake Mead. ROA 41943 (map of the LWRFS and the Muddy River). A  
16 series of springs (collectively referred to as the Muddy River Springs) in the appropriately  
17 named Muddy River Springs Area serves as the headwaters and feeds the river. *Id.* at  
18 41959, 48680. The springs, in turn, are fed by the carbonate-rock aquifer underlying the  
19 LWRFS. *Id.* at 641, 41959. There is also some seepage from groundwater, originating from  
20 the carbonate-rock aquifer, adjacent to the Muddy River that feeds the river. *Id.* at 48681,  
21 48686.

22           A 1920 federal-court decree established water rights to the Muddy River. ROA 61;  
23 *see generally* ROA 33770-816 (Muddy River Decree). It is undisputed that these decreed  
24 rights are the oldest – and therefore most senior – rights in the LWRFS.

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25           <sup>1</sup> Nevada’s water resources are managed through administrative units called  
26 hydrographic basins. Nevada is divided into 256 hydrographic basins and sub-basins based  
27 upon the surface geography and subsurface flow. The LWRFS’s sub-basins are: California  
28 Wash, Coyote Spring Valley, Garnet Valley, Hidden Valley, Kane Springs Valley, Muddy  
River Springs Area. ROA 66. The LWRFS also includes the northwest portion of the Black  
Mountains Area. *Id.*

1 The Muddy River springs are home to the Moapa dace, an endangered fish species.  
2 ROA 48725. Protecting the springs' flow is essential to support the continuing recovery of  
3 the dace. *Id.* at 64, 48726.

#### 4 C. The Petitioners

5 Eight groups of Petitioners filed petitions for judicial review challenging Order 1309:

- 6 • Apex Holding Co. and Dry Lake Water, LLC (collectively, "Apex") own  
7 real estate and water rights in Southern Nevada. Apex Br. 1.
- 8 • The Center for Biological Diversity (the "Center") is a California  
9 nonprofit conservation organization. Center Br. 2.
- 10 • Coyote Spring Investment, LLC ("CSI") is a developer intending to  
11 build a master planned community about 45 minutes from Las Vegas.  
12 CSI Br. 6. It has water rights with a 2002 priority date. *Id.* at 7.
- 13 • Georgia-Pacific Gypsum LLC and Republic Environmental  
14 Technologies, Inc. (collectively, "Georgia-Pacific") are industrial  
15 companies that have water rights. Ga.-P. Br. 3-4.
- 16 • Lincoln County Water District and Vidler Water Co. (collectively,  
17 "Vidler") are a public water district and a private company,  
18 respectively. Vidler Br. viii. They own water rights in Kane Springs  
19 Valley that they intend to sell to CSI. *Id.* at 5; CSI Br. 7 n.3.
- 20 • Moapa Valley Irrigation Co. ("MVIC") is a private company that owns  
21 most of the decreed rights in the Muddy River, which are the most  
22 senior rights in the LWRFS. MVIC Br. 1.
- 23 • Nevada Cogeneration Associates Nos. 1 and 2 ("NV Cogeneration")  
24 operate gas-fired facilities at the south end of the LWRFS. NV  
25 Cogeneration Br. 5.
- 26 • Southern Nevada Water Authority and Las Vegas Valley Water  
27 District (collectively, "SNWA") are government agencies serving  
28

1 Southern Nevada’s water needs. SNWA Br. 14. They own a significant  
2 portion of the Muddy River decreed rights. *Id.*

3 **II. The Order 1169 aquifer test**

4 **A. Order 1169 orders an aquifer test to evaluate the connectivity of the**  
5 **groundwater resources underlying the hydrographic basins of the**  
6 **southern portion of the White River regional flow system**

7 In 2001 the State Engineer took up consideration of various parties’ water right  
8 applications to appropriate some 135,000 afa in Coyote Spring Valley, in what is now the  
9 LWRFS. ROA 662. He acknowledged that – at that time – “little was known about the  
10 hydrologic connectivity” between the hydrographic basins around the study area. *Id.* at  
11 664-65. Continuing to develop the region’s groundwater could put existing rights at risk.  
12 *Id.*

13 For those reasons, the State Engineer ordered five organizations with interests in  
14 water rights within those groundwater basins to conduct an aquifer test. ROA 665. The  
15 study was initially intended to pump 50% of the then-existing water rights in Coyote Spring  
16 Valley to see the effects on the area’s water resources. *Id.* Fifty percent of the then-existing  
17 water rights amounted to 8,050 afa. *Id.* at 4. All pending applications in the area were  
18 held in abeyance pending the results of the pump test. *Id.* at 665.

19 **B. The aquifer-test participants enter into agreements to mitigate the**  
20 **test’s effects on the flow of the Muddy River**

21 After the State Engineer ordered the aquifer test, SNWA, the U.S. Fish and Wildlife  
22 Service, CSI, the Moapa Band of Paiute Indians and the Moapa Valley Water District  
23 entered into a memorandum of agreement. ROA 9921. The State Engineer was not a party  
24 to the agreement. *Id.*

25 The memorandum of agreement implicitly recognized that pumping groundwater  
26 could ultimately impact the Muddy River’s surface water. *See* ROA 9930-32. All the parties  
27 to the agreement affirmed that maintaining the Muddy River’s flow level was “essential for  
28 the protection and recovery of the Moapa dace.” *Id.* at 9930. They therefore mandated that  
flow levels at one part of the Muddy River be monitored and reported. *Id.* They also



1 established certain “[t]rigger [r]anges” based on flow levels. *Id.* The trigger ranges were  
2 designed so that, if flow levels declined, the parties would decrease pumping and move  
3 pumping farther away from the Muddy River, in the hopes of stopping the decline. *See id.*  
4 at 9930-32.

5 Even with the memorandum of agreement in place, there were still fears that  
6 increased withdrawals from the carbonate-rock aquifer under the aquifer test could cause  
7 the Muddy River’s flow to decrease to such an extent that it would impact senior water  
8 rights and potentially harm the Moapa dace. ROA 5-6. Accordingly, a broad group of  
9 interested parties agreed that the aquifer test would provide sufficient data even if less  
10 than 8,050 afa was ultimately pumped. *Id.*

11 **C. The two-year aquifer test shows consistent declines in groundwater**  
12 **levels across the regional carbonate-rock aquifer**

13 The aquifer test lasted about 26 months and ended December 31, 2012. ROA 6. The  
14 participants did not ever pump the contemplated 8,050 afa; on average they pumped 5,290  
15 afa from carbonate-rock aquifer wells in Coyote Spring Valley. *Id.* When added together  
16 with the normal pumping unrelated to the pumping test, 14,535 afa was pumped across  
17 the test sub-basins. *Id.*

18 The pumping and its effects were measured across the regional carbonate-rock  
19 aquifer. ROA 6. Over 30 wells reported the groundwater levels during the pumping period.  
20 *Id.* Monitoring of groundwater levels was even more extensive: data were collected from  
21 79 monitoring and pumping wells, including in Kane Springs Valley. *Id.* at 6, 39258.  
22 Participants also reported Muddy River data, like spring flow and the amount of water  
23 being discharged into Lake Mead. *Id.* at 6. All pump-test data were made publicly  
24 available. *Id.*

25 The test results delivered a stark warning to the participants and other  
26 stakeholders. Two aspects of the results stood out. First, the results showed “sharp  
27 declines” in the flows of springs that feed the Muddy River, as well as in the overall  
28 groundwater levels. ROA 7. One of the springs, Pederson Spring, declined 63% during the

1 aquifer test. *Id.* at 10928. The Pederson East Spring declined 45%. *Id.* at 10930.  
2 Groundwater declined 1.9 to 2.5 feet – “declines in groundwater levels [that were]  
3 unprecedented in the record” according to the federal government. *Id.* at 10889.

4 Second, the pumping’s detrimental effects were remarkably consistent and  
5 widespread. ROA 7. The decline was “of nearly uniform magnitude” in the central regional  
6 carbonate-rock aquifer area. *Id.* at 10888. And the effects were spread across 700,000  
7 acres – 1,100 square miles. *Id.* at 7, 10888; *see also id.* at 48740 (showing a near-identical  
8 change in water levels in northern Coyote Springs Valley and southern Kane Springs  
9 Valley).

10 **D. Groundwater levels and spring flows stabilize after the aquifer test,  
11 but never fully recover**

12 Total pumping in the LWRFS regional flow system slowed down once the test ended.  
13 ROA 56 & n.291. Reports showed a total of 8,300 afa of pumping in 2018 – about 6,000 afa  
14 less than during the aquifer test. *Id.* at 56 & n.293.

15 The decrease in pumping has coincided with a partial recovery in groundwater  
16 levels. ROA 56, 41993, 52887, 53733. But the groundwater has not returned to its pre-test  
17 levels. *Id.* at 56, 41992, 53733. Instead, the groundwater levels are approaching “steady  
18 state” – an equilibrium where they no longer are declining but they are not recovering  
19 further either. ROA 56-58, 41876, 41992-93, 53733.

20 Some Petitioners suggest that changes to groundwater levels during and after the  
21 aquifer test may be attributable to drought contributions, not pumping. *See, e.g.,* Ga.-P.  
22 Br. 14; CSI Br. 46. But substantial evidence shows that climate does not explain the  
23 declines observed on the LWRFS’s groundwater levels. ROA 57, 41876, 42187-89, 53070.  
24 Contrasting the LWRFS regional flow system with other drought-affected basins shows  
25 that the declines in groundwater was a consequence of pumping, not drought. *Id.* at 53070.

26 . . .

27 . . .

28 . . .

1 **III. The State Engineer immediately addresses the groundwater decline while**  
2 **soliciting additional data and analysis from interested parties**

3 **A. The State Engineer denies all pending groundwater applications in**  
4 **Order 1169 study basins based on the aquifer test results**

5 The State Engineer gave aquifer-test participants the opportunity to submit reports  
6 analyzing the test. ROA 7, 655. The U.S. Department of Interior was one participant that  
7 filed a report (among others). *Id.* at 8-9. Its report noted that pumping during the test  
8 amounted to only 1/3 of the water rights that had already been granted in Coyote Spring  
9 Valley. *Id.* at 9. Yet pumping that small fraction of rights caused declines at springs at  
10 the head of the Muddy River that are “critical to the Moapa dace habitat.” *Id.* at 8.  
11 Continuing pumping at that rate could have caused the springs to go completely dry in  
12 three years or less. *Id.* at 8.

13 After considering the aquifer-test results and the participants’ reports, the State  
14 Engineer issued a series of rulings denying all the water-rights applications that had been  
15 stayed during the test. ROA 10 & n.37. The rulings found that the tested basins “share a  
16 unique and close hydrological connection and share virtually all of the same source and  
17 supply of water.” *See, e.g., id.* at 749. Granting additional water rights would impact  
18 Muddy River spring flow, interfering with existing rights. *Id.* at 750.

19 **B. The State Engineer issues Order 1303, which establishes the initial**  
20 **scope of the LWRFS and sets up further analysis**

21 Those rulings disposed of pending applications for *additional* water rights in the  
22 regional carbonate-rock aquifer. But they did not address the already granted rights. As  
23 noted above, if the holders of water rights pumped the full amount that they had been  
24 granted, that would result in greater declines in groundwater levels and spring flow than  
25 even during the test period. ROA 8-9.

26 The State Engineer therefore issued Order 1303 to begin a public process to address  
27 future management strategies for the regional carbonate-rock aquifer. Order 1303  
28 reviewed the aquifer test results, post-test measurements of groundwater levels and spring  
flow and climate data. ROA 644. It found that those datapoints indicated that if pumping

1 returned to the level it had been during the aquifer test, that would conflict with senior  
2 rights on the Muddy River and adversely affect Moapa dace habitat. *Id.* But it also  
3 acknowledged that the “precise extent” of pumping that can continue without jeopardizing  
4 senior rights or the Moapa dace was not yet determined. *Id.* at 80.

5 Order 1303 established the initial identification of the LWRFS as a single delineated  
6 unit. ROA 82. The Order 1303 version of the LWRFS is identical to the currently  
7 delineated boundaries, except that it did not include Kane Springs Valley and its border  
8 within the Black Mountains Area was a little different. *See id.*

9 Order 1303 also called for reports from “[a]ny stakeholder with interests that may  
10 be affected by water right development within the [LWRFS].” ROA 647. The reports were  
11 to address five topics:

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

26 *Id.* at 82-83. It anticipated a hearing (the “hearing”) to consider the parties’ reports. *Id.*

27 Order 1303 also instituted a moratorium on the approval of plans for construction  
28 development in the LWRFS. ROA 83. It held in abeyance any application to permanently  
change existing water rights. *Id.* It also provided allowances for those applying for  
extensions of time to avoid cancellation or forfeiture of those water rights. *Id.* Lastly, it  
instituted a moratorium on the approval of plans for construction development in the  
LWRFS. *Id.*

...

1           **C. The State Engineer holds a two-week hearing for the parties to**  
2           **present evidence and analysis on the five topics identified in Order**  
3           **1303**

4           **1. The State Engineer explains the scope and procedure of the**  
5           **hearing at a prehearing conference**

6           After an extension granted to all interested parties, ROA 88, most Petitioners filed  
7           the reports solicited by Order 1303.<sup>2</sup> The State Engineer then held a prehearing conference  
8           for the Order 1309 hearing. *Id.* at 521. The State Engineer explained that the purpose of  
9           the hearing would be to allow each party to present its analysis and conclusions and  
10          respond to arguments. *Id.*

11          The State Engineer characterized the proceedings as part of a “multi-tiered process”  
12          to “determin[e] the appropriate management strategy” for the LWRFS. ROA 522. The  
13          hearing was to assess the facts underlying the LWRFS – what are its boundaries and what  
14          water is available for pumping within it without interfering with senior rights? *See id.*  
15          What policy tools to bring to bear once those underlying facts were determined is a question  
16          for later proceedings. *Id.* In short, the State Engineer wanted to establish how much could  
17          be utilized without resulting in conflict with senior rights before addressing how to manage  
18          the resource if the ultimate determination was that less water could be developed than  
19          permitted. *Id.*

20          The State Engineer specifically noted that the “quantity of water that may be  
21          sustainably developed within the [LWRFS] without conflicting with senior rights” was a  
22          topic for the hearing. ROA 522. But the hearing was not intended to resolve the potential  
23          allegations of conflicts between particular water users. *Id.*

24                   **2. Petitioners and others present their analyses at the hearing**

25          The State Engineer held the hearing for two weeks in fall 2019. ROA 12. The  
26          testimony and argument fills over 1800 pages of transcript. *Id.* at 53737. Every Petitioner  
27          except for Apex presented expert testimony, subject to cross-examination by the other  
28          participants. *Id.* at 12.

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<sup>2</sup> Apex did not file a report.

1           Afterwards, participants were entitled to submit written closing arguments. ROA  
2 12. Thirteen participants did so. *See generally id.* at 52757-959.

3 **IV. The State Engineer issues Order 1309, which defines the boundaries of the**  
4 **LWRFS and determines the maximum amount of water that can be pumped**  
5 **without conflicting with senior rights**

6           About six months after the submission of closing statements, the State Engineer  
7 issued Order 1309. ROA 67. Order 1309 found that the results of the Order 1169 aquifer  
8 test and the data collected in the years since showed that the hydrographic basins  
9 overlaying the carbonate-rock aquifer “exhibit[ ] a direct hydraulic connection” such that  
10 “joint administration of [them] is necessary and supported by the best available science.”  
11 *Id.* at 43. It delineated the now-current boundaries of the LWRFS and established that  
12 8,000 afa is the maximum amount that can be pumped from the LWRFS without conflicting  
13 with senior rights to the Muddy River. *Id.* at 66. All other aspects of Order 1303 were  
14 rescinded. *Id.* at 67.

14 **A. Order 1309 is supported by statutory authority and general**  
15 **principles of prior appropriation**

16           The State Engineer cited several bases for his legal authority to jointly administer  
17 the LWRFS. First, the Legislature has established that it is the State’s policy that the  
18 State Engineer “consider the best available science” when determining the availability of  
19 water. ROA 43 (citing NRS 533.024(1)(c)). And that the State Engineer “manage  
20 conjunctively the appropriation, use and administration of all waters.” *Id.* (NRS  
21 533.024(1)(e)).<sup>3</sup>

22           Second, all water rights are granted subject to existing rights and cannot interfere  
23 with more-senior rights. ROA 43; *see Lobdell v. Simpson*, 2 Nev. 274, 277 (1866). Order  
24 1309 gives force to that rule by determining the amount of water that can be pumped by  
25 holders of junior rights without interfering with senior rights. ROA 43.

26 . . .

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27 <sup>3</sup> Conjunctive management means managing groundwater and surface water sources  
28 together, as opposed to as separate and distinct resources. *See Nev. Div. of Water Res.,*  
*Water Words Dictionary by Letter, C* at 61, <https://bit.ly/3kYvcjm>.

1 Third, NRS 532.120 empowers the State Engineer to make “reasonable rules and  
2 regulations” to exercise his authority. ROA 44. And NRS Chapter 534 grants the State  
3 Engineer authority to protect groundwater basins that are being depleted. *Id.*

4 **B. Order 1309 establishes the boundaries of the LWRFS based on the**  
5 **evidence presented**

6 The lodestar in determining whether an area should be included for joint  
7 management as part of the LWRFS is whether it “demonstrat[es] a close hydrologic  
8 connection” with the other LWRFS sub-basins. ROA 48. The State Engineer developed six  
9 criteria to consider on that point:

10 1) Water level observations whose spatial distribution  
11 indicates a relatively uniform or flat potentiometric surface are  
consistent with a close hydrologic connection.

12 2) Water level hydrographs that, in well-to-well  
13 comparisons, demonstrate a similar temporal pattern,  
14 irrespective of whether the pattern is caused by climate,  
pumping, or other dynamic is consistent with a close hydrologic  
connection.

15 3) Water level hydrographs that demonstrate an observable  
16 increase in drawdown that corresponds to an increase in  
17 pumping and an observable decrease in drawdown, or a recovery,  
that corresponds to a decrease in pumping, are consistent with a  
18 direct hydraulic connection and close hydrologic connection to  
the pumping location(s).

19 4) Water level observations that demonstrate a relatively  
20 steep hydraulic gradient are consistent with a poor hydraulic  
connection and a potential boundary.

21 5) Geological structures that have caused a juxtaposition of  
22 the carbonate-rock aquifer with low permeability bedrock are  
consistent with a boundary.

23 6) When hydrogeologic information indicate a close hydraulic  
24 connection (based on criteria 1-5), but limited, poor quality, or  
25 low resolution water level data obfuscate a determination of the  
26 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.

27 *Id.* at 49.

28 . . .

1 Applying those criteria, the State Engineer added Kane Springs Valley to the  
2 LWRFS and he adjusted the boundary within the Black Mountains Area. *See* ROA 66. He  
3 found that the evidence compelled keeping the LWRFS’s other boundaries the same. *Id.* at  
4 55. He rejected NV Cogeneration’s argument that its own wells should be excluded from  
5 the LWRFS. *Id.* at 51-52.

6 The State Engineer *rejected* calls to include other sub-basins in the LWRFS. For  
7 Lower Meadow Valley Wash and the northern portion of Las Vegas Valley, there were  
8 insufficient data to apply the six criteria. ROA 51, 55. So those basins were not included  
9 in the LWRFS. *Id.* at 55. Other basins demonstrated only a weak connection with the  
10 LWRFS sub-basins. *Id.* at 50. The State Engineer explained that “there must be  
11 reasonable and technically defensible limits to the geographic boundary.” *Id.* Including  
12 only weakly connected basins would not comply with the six criteria and would make joint  
13 management “intractable.” *Id.*

14 **1. The State Engineer includes Kane Springs Valley because it**  
15 **responded to the aquifer test similarly to the rest of the LWRFS**  
16 **and it is geologically consistent with the other sub-basins**

17 “[N]umerous” participants advocated including Kane Springs Valley in the LWRFS.  
18 ROA 52; *see, e.g.*, 52898-52902 (NV Cogeneration), 52913-14 (NV Energy). Evidence  
19 showed that groundwater levels in Kane Springs Valley moved consistently with  
20 groundwater levels in the other LWRFS sub-basins before, during and after the aquifer  
21 test. *Id.* at 52, 52310, 52312, 52899. For example, the National Park Service testified that  
22 groundwater levels increased in 2004 and 2005, like in other LWRFS sub-basins; that levels  
23 decreased during the aquifer test, like in other LWRFS sub-basins; and that they partially  
24 recovered after the aquifer test ended; like in other LWRFS sub-basins. *Id.* at 53170.

25 The State Engineer further found that the same carbonate-rock aquifer present in  
26 the other LWRFS sub-basins extended into Kane Springs Valley. ROA 53; *see id.* at 48695.  
27 There was no known geological structure causing a hydrologic barrier between Kane  
28 Springs Valley and the rest of the LWRFS. *Id.* at 53.

...



1 The State Engineer did acknowledge that “non-carbonate bedrock” underlay the  
2 northern part of Kane Springs Valley. ROA 53. But little is known about that non-  
3 carbonate rock at this time. *Id.*

4 In other words, criteria 2 and 3 supported including Kane Springs Valley. ROA 53.  
5 Criterion 5 did not counsel against inclusion. And criterion 6 supported including all of  
6 Kane Springs Valley – not just the southern portion. *Id.* at 53 & n.287. The State Engineer  
7 therefore found that “the available information require[d] that Kane Springs Valley be  
8 included within the geographic boundary of the LWRFS.” *Id.* at 54.

9 **2. The State Engineer includes the area with NV Cogeneration’s**  
10 **wells because that area’s groundwater data is “substantially**  
11 **similar” to the data in the rest of the LWRFS**

12 NV Cogeneration’s wells sit near the southern border of the LWRFS. NV  
13 Cogeneration Br. 5. NV Cogeneration argued that the border should move north so that  
14 its wells were excluded from the LWRFS. ROA 51-52. It based this argument principally  
15 on SNWA’s analysis of that area. *Id.* at 51-52, 52890-91.

16 The State Engineer rejected NV Cogeneration’s argument. ROA 52. He cited  
17 compelling testimony that undermined SNWA’s analysis. *Id.* at 52. For instance, NV  
18 Energy’s expert compared the estimates produced by SNWA’s statistical model – which is  
19 what NV Cogeneration relies on – with the actual water measurements taken during and  
20 after the aquifer test. *Id.* at 53721. He found that the model’s estimates did not match the  
21 measurements, undermining its conclusions about NV Cogeneration’s wells. *Id.*

22 The State Engineer found that the best data available showed a “substantial  
23 similarity” between groundwater levels in the wells’ area and in another part of the  
24 LWRFS. ROA 52 (citing NV Cogeneration’s own chart at ROA 52906). And he found that  
25 including the wells in the LWRFS was more consistent with the area’s geology. *Id.* at 52;  
26 *see id.* at 48690 & n.20. Doing so “honor[ed] the State Engineer’s criteria by acknowledging  
27 the uncertainty in the data while reflecting a recognized physical boundary in the  
28 carbonate-rock aquifer.” *Id.* at 52.

...

1           **C.     Order 1309 determines that 8,000 acre-feet annually is the maximum**  
2           **amount of groundwater that can be pumped in the LWRFS without**  
3           **interfering with senior rights**

4           The aquifer test showed that uninhibited pumping in the LWRFS would harm senior  
5 rights by lowering groundwater levels and reducing the Muddy River's flow. However,  
6 there was no consensus among the participants as to what amount of pumping could safely  
7 continue. ROA 58. Recommendations ranged from 30,000 afa to zero. *Id.*

8           Most experts agreed that there "is an intermediate amount of pumping" that could  
9 be permitted without interfering with senior rights and further endangering the Moapa  
10 dace. ROA 62. That intermediate amount is close to the amount of pumping that has  
11 occurred since the aquifer test ended, which had decreased from 12,635 to 8,300 afa. *Id.* at  
12 56 & n.291. The rate of decline in groundwater levels and spring flow has nearly stabilized  
13 at around that amount of pumping. *Id.* at 56-58, 62, 41992. But neither groundwater levels  
14 nor spring flow have returned to pre-test levels. *Id.* at 41992.

15           At the same time, the State Engineer identified substantial risks to allowing  
16 continued pumping at the current amount of more than 8,000 afa. He pointed to "rising  
17 trends in groundwater levels" in other parts of Southern Nevada outside of the LWRFS.  
18 ROA 63; *see id.* at 53070, 53184. That shows that recent precipitation has helped mitigate  
19 the effects of pumping. *Id.* at 63. If conditions became drier, the current amount of  
20 pumping could cause groundwater levels and spring flow to decline again. *Id.*

21           And data from some LWRFS wells cut against the conclusion that the LWRFS is at  
22 equilibrium. Groundwater at those wells "appear[s] to have reached peak recovery" from  
23 the aquifer test and has "exhibited downward trends for the past several years." ROA 63;  
24 *see id.* at 40644. That downward trend could be a leading indicator of declines that will be  
25 observed closer to the Muddy River – and eventually in the amount of spring flow into the  
26 river. *Id.* at 63.

27           Having considered the groundwater-level declines during the aquifer test, the  
28 partial recovery since then and the warning signs just discussed, the State Engineer found  
that 8,000 afa is "the maximum amount of groundwater that can continue to be developed

1 over the long term” in the LWRFS. ROA 64. Data from during and after the aquifer test  
2 “indicate[d] that continued groundwater pumping that consistently exceeds this amount”  
3 would conflict with senior rights to the Muddy River and harm the endangered Moapa dace.  
4 *Id.* Continued monitoring of the groundwater, the springs and the Muddy River’s flow is  
5 necessary to determine whether further reductions to the maximum pumping amount are  
6 required. *Id.*

7 **D. The State Engineer finds that changes to pumping locations must be**  
8 **assessed on a case-by-case basis**

9 The State Engineer also determined how to treat applications to move pumping  
10 locations within the LWRFS. One of the topics raised in Order 1303 was whether it was  
11 preferable for pumping to take place in the alluvial aquifer or the carbonate-rock aquifer.  
12 ROA 83. The alluvial aquifer consists of soil directly adjacent to the Muddy River; it  
13 contributes to the river’s flow as water seeps from the alluvial aquifer into the river. *Id.* at  
14 48681, 48686. The carbonate-rock aquifer is generally not directly adjacent to the river,  
15 but it feeds the Muddy River’s springs and is connected to the alluvial aquifer. *See id.*

16 The State Engineer found that, as a general matter, he could not approve  
17 transferring pumping from the carbonate-rock aquifer to the alluvial aquifer or vice versa.  
18 ROA 64-65. Because of the interconnectedness of the LWRFS, both types of pumping can  
19 potentially interfere with senior rights and/or harm the Moapa dace. *Id.*

20 That said, the State Engineer recognized that there may be discrete areas that are  
21 less connected to the rest of the LWRFS. ROA 64-66. Moving some pumping to those  
22 locations may not be harmful. *See id.* at 66. Applications to move pumping will be  
23 considered on a case-by-case basis by looking at individualized evidence. *Id.*

24 **E. Order 1309 did not change parties’ relative priority or establish a**  
25 **management policy governing the LWRFS**

26 Many Petitioners accuse Order 1309 of having provisions that appear nowhere in its  
27 text. Order 1309 did not reprioritize any water rights. Nothing in Order 1309 changed the  
28 priority date of any water right. The priority date determines whether one right is senior

1 or junior relative to another right. *Desert Irr., Ltd. v. State*, 113 Nev. 1049, 1051, 944 P.2d  
2 835, 837 n.1 (1997); *Lobdell*, 2 Nev. at 277. Order 1309 did not grant or revoke any water  
3 rights.

4 Order 1309 also did not impose a specific policy for regulating the amount of  
5 pumping in the LWRFS going forward. As the State Engineer explained before the hearing,  
6 Order 1309's purpose was to establish certain essential facts – the boundaries of the  
7 LWRFS and the amount of water that can be safely pumped – that can be foundation for  
8 future policies. ROA 522.

9 Order 1309 therefore did *not* order any appropriator in the LWRFS to decrease its  
10 pumping. *See* ROA 66-67. It does not designate any basin or basins as a critical  
11 management area. *See id.* All parties with an interest in the LWRFS – including all  
12 Petitioners – will have an opportunity to contribute when the State Engineer addresses the  
13 manner of managing the uniquely connected sub-basins within the LWRFS given the facts  
14 established by Order 1309.

#### 15 SUMMARY OF ARGUMENT

16 Petitioners' arguments all fail to overcome their onerous burden on a petition for  
17 judicial review. Nearly all their arguments boil down to attempts to have this Court violate  
18 the standard of review by reweighing the evidence and substituting its judgment for that  
19 of the State Engineer. Because substantial evidence in the record supports each of the  
20 State Engineer's findings, the findings must be upheld. That is true even if Petitioners can  
21 point to other evidence in the record that arguably supports their position. On these highly  
22 technical hydrological and geological topics, the State Engineer's careful, evidence-based  
23 findings must receive deference.

24 The State Engineer had authority to issue Order 1309. Petitioners' arguments  
25 against his authority are dressed up as legal contentions but in substance attack the  
26 underlying factual determination that the LWRFS sub-basins have a unique hydrologic  
27 connection such that they are a single basin. Order 1309 is a basic exercise of the State  
28 . . .

1 Engineer’s legislative prescribed duty to protect the senior decreed rights in the Muddy  
2 River, as well as other express powers and State policies.

3 The State Engineer provided prior notice of precisely what he ultimately determined  
4 in Order 1309. Most of Petitioners arguments attempt to manufacture a prior notice  
5 problem by inventing provisions in Order 1309 that do not exist. A cursory review of Order  
6 1309 shows that it is cabined to the topics that were previously noticed to all parties. The  
7 other constitutional theories presented by Petitioners have no merit.

## 8 ARGUMENT

### 9 I. Substantial evidence supports Order 1309

#### 10 A. The State Engineer’s factual findings on the scientific questions 11 presented here are entitled to peak deference

12 NRS 533.450 sharply limits the courts’ review of State Engineer decisions. *See*  
13 *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979); *Application of Filippini*, 66 Nev.  
14 17, 27, 202 P.2d 535, 540 (1949). On a petition for judicial review, the State Engineer’s  
15 decision is “prima facie correct” and the burden of proof is on the petitioner. NRS  
16 533.450(10).

17 The State Engineer’s factual findings cannot be disturbed if they are supported by  
18 substantial evidence. *Wilson v. Pahrump Fair Water, LLC*, 137 Nev. \_\_\_\_, 481 P.3d 853,  
19 858 (Adv. Op. 2, Feb. 25, 2021). Substantial evidence is merely the amount of evidence  
20 that “a reasonable mind would accept as adequate.” *Id.* The reviewing court may not  
21 reweigh the evidence or pass upon witnesses’ credibility. *Revert*, 95 Nev. at 786, 603 P.2d  
22 at 264. And the Court’s review must be “at its most deferential” where – like here – it is  
23 reviewing scientific determinations. *Wilson*, 481 P.3d at 858.

#### 24 B. Substantial evidence supports the State Engineer’s determination of 25 the LWRFS’s boundaries

##### 26 1. Order 1309’s criteria for determining inclusion in the LWRFS 27 are appropriate

28 Order 1309 set out the criteria for determining if an area has a unique hydrological  
connection with the LWRFS such that it should be included in the LWRFS. ROA 48-49.

1 Determining those hydrological considerations is a highly technical project and the State  
2 Engineer's determination is entitled to peak deference. *Wilson*, 481 P.3d at 858.

3 Georgia-Pacific argues that the criteria themselves are not supported by substantial  
4 evidence. Ga.-P. Br. 13-16. It does not dispute that the LWRFS's monitor wells have shown  
5 consistent reactions to the start and end of the aquifer test. But it claims that the criteria  
6 fail to account for hypothetical other causes of the consistent movement, like climate. Ga.-  
7 P. Br. 14-15. Nothing requires the State Engineer to disprove every other hypothetical  
8 cause. Substantial evidence supports the findings that the State Engineer did make: the  
9 boundary was delineated by the unique connection between the sub-basins shown by the  
10 aquifer-test results and post-test measurements. ROA 65; *see, e.g., id.* at 10888-89, 41941.  
11 And in any event substantial evidence *did* disprove the theory that climate alone caused  
12 the movements. *See id.* at 57, 41876, 42187-89.

13 Georgia-Pacific also takes issue with the State Engineer's finding certain testimony  
14 to be more credible than Georgia-Pacific's preferred testimony. Ga.-P. Br. 15. The State  
15 Engineer is entitled to credit certain witnesses more than others, and his determinations  
16 cannot be set aside unless they lack substantial evidence. *See Revert*, 95 Nev. at 786, 603  
17 P.2d at 264.

18 CSI argues that the State Engineer's criteria are so subjective that "every basin [in  
19 Nevada] could be combined into one for management." CSI Br. 37-38. Yet it admits that  
20 the State Engineer found that some basins that geographically border the LWRFS do not  
21 exhibit the necessary hydrographic connection to be included. *Id.* at 40-41. The criteria  
22 were an evidence-based approach that distinguished between sub-basins that were  
23 hydrologically connected to the LWRFS and basins that were not. *See, e.g.,* ROA 50.

24 **2. Substantial evidence supports including Kane Springs Valley**

25 **a. CSI concedes that the State Engineer pointed to**  
26 **substantial evidence**

27 As the State Engineer explained above, Kane Springs Valley monitoring wells  
28 responded similarly to other LWRFS monitoring wells. ROA 52, 52310, 52312, 52899.

1 Indeed, Vidler concedes that there was “much testimony” about the “similar hydrographic  
2 pattern” between a Kane Springs Valley well and another well closer to the Muddy River.  
3 Vidler Br. 30.

4 Kane Springs Valley’s geology is also consistent with the rest of the LWRFS’s  
5 carbonate rock aquifer, with no known hydrological barriers. The Center’s evidence showed  
6 a close connection between Kane Springs Valley and Coyote Springs Valley and the rest of  
7 the LWRFS, meaning that pumping in Kane Springs Valley would affect groundwater  
8 levels and spring flow elsewhere. ROA 34508, 34533-38. All the criteria weighed in favor  
9 of finding that Kane Springs Valley has a close hydrologic connection with the rest of the  
10 LWRFS and must be included. *See* ROA 52-54. All of that was substantial evidence  
11 supporting including Kane Springs Valley.

12 CSI concedes that the State Engineer points to at least two bases for finding that  
13 Kane Springs Valley should be included: the U.S. Fish and Wildlife Service’s “analytical  
14 analysis” and the aquifer test results. CSI Br. 40. In other words, CSI concedes that there  
15 was substantial evidence supporting including Kane Springs Valley. CSI would have  
16 preferred the State Engineer rely on other purported evidence, but it was the State  
17 Engineer’s prerogative to find the federal government’s analysis and the aquifer test  
18 results to be more credible sources for determining whether to include Kane Springs Valley.  
19 *Revert*, 95 Nev. at 786, 603 P.2d at 264.

20 Nor does Order 1309’s acknowledgment that more data will be helpful going forward  
21 undermine its findings. *See* CSI Br. 38. The Order 1309 record contained substantial  
22 evidence that Kane Springs Valley should be included to protect all of the LWRFS’s water  
23 resources. The State Engineer is not obligated to sit on his hands and allow a scarce  
24 resource to be drained merely because of the possibility of future data.

25  
26 ...  
27 ...  
28 ...

1                   **b. Petitioners’ attempts to undermine the State Engineer’s**  
2                   **evidence lack merit**

3           Both CSI and Vidler put emphasis on geological studies they submitted. CSI Br. 42,  
4 51-54, Vidler Br. 31-33. They speculate that faults that underlay Kane Springs Valley  
5 “may” restrict groundwater flow from the LWRFS. CSI Br. 42; *accord* Vidler Br. 32.

6           The State Engineer properly gave little weight to those studies. Many participants  
7 faulted the studies because they did *not* test permeability or present evidence showing that  
8 the faults act as a barrier to flow. *See* ROA 52923-25. Permeability is a crucial factor in  
9 determining whether groundwater travels between Kane Springs Valley and the rest of the  
10 LWRFS, whether or not there are faults there. *See id.* And the aquifer-test results  
11 provided the data to contradict the speculation offered by CSI and Vidler; the test results  
12 showed that there was indeed a connection with Kane Springs Valley. ROA 52, 52310,  
13 52312, 52899.

14           Vidler cites favorably portions of the National Park Service’s expert’s testimony.  
15 Vidler Br. 31 (citing ROA 53170). But it ignores the most important part of the testimony:  
16 that Kane Springs Valley groundwater showed the same movements in groundwater as the  
17 rest of the LWRFS before, during and after the aquifer test. ROA 53170.

18           Vidler also attacks the aquifer-test results themselves. It points to an error in a  
19 transducer (part of the meter) that may have temporarily affected measurements. Vidler  
20 Br. 30. That is a red herring. The transducer was fixed and measurements were  
21 corroborated by separate manual measurements. ROA 53360, 53397 (testifying that the  
22 manual measurements were virtually identical to the transducer measurements). Vidler  
23 concedes that no other expert thought the potential temporary transducer error  
24 undermined the data. Vidler Br. 30-31.

25           Lastly, both CSI and Vidler cite the State Engineer’s Ruling 5712 as purportedly  
26 supporting their case. CSI Br. 43, Vidler Br. 33. The State Engineer was not obligated to  
27 follow Ruling 5712. Ruling 5712 predated the aquifer test, so it was based on less-  
28 comprehensive data. *See* ROA 721. And even at that time the State Engineer recognized



1 the “strong hydrologic connection” between Kane Springs Valley and other basins with  
2 senior rights. *Id.* at 719-20.

3 **3. Substantial evidence supports including NV Cogeneration’s**  
4 **wells**

5 Order 1309 found that NV Cogeneration’s wells are within the LWRFS. No  
6 Petitioner takes issue with that finding except NV Cogeneration.

7 NV Cogeneration claims that there was no evidence anywhere in the record to  
8 support including its wells in the LWRFS. NV Cogeneration Br. 29-30. Order 1309 itself  
9 refuted that claim. It cites substantial similarity in monitoring-well measurements. ROA  
10 52 (citing ROA 52906). It also points out that the geological and hydrological evidence  
11 shows that there is an LWRFS boundary on the other side of NV Cogeneration’s wells (to  
12 their south). *Id.* (citing *id.* at 48703). That was an adequate basis to find that NV  
13 Cogeneration’s wells should be included.

14 In disputing that, NV Cogeneration relies almost exclusively on SNWA’s model. NV  
15 Cogeneration Br. 26-28. As NV Cogeneration concedes in its brief, multiple experts  
16 testified as to inaccuracies in and issues with SNWA’s model. *Id.* at 27-28; *see* ROA 52 &  
17 n.277. While that testimony did not involve the model’s results for NV Cogeneration’s wells  
18 specifically, it called into question the model’s accuracy overall. As such, the State  
19 Engineer did not have to follow the potentially discredited model’s conclusion that there  
20 was “weak statistical correlation” between groundwater levels at NV Cogeneration’s wells  
21 and other wells. *See id.* at 52. The State Engineer was entitled to base his decision on  
22 other credible data instead. *See Revert, 95 Nev. at 786, 603 P.2d at 264.*

23 **C. Substantial evidence supports the State Engineer’s finding that 8,000**  
24 **afa is the maximum sustainable amount that can be pumped in the**  
25 **LWRFS**

26 Georgia-Pacific, CSI and Vidler contend that substantial evidence does not support  
27 the State Engineer’s finding that 8,000 afa is the maximum sustainable pumping amount  
28 – they argue that the limit is too low. The Center take the opposite tack and argue that  
it’s too high. And SNWA attacks calculations that do not affect the 8,000 afa figure.

1 Substantial evidence supports the finding that 8,000 afa is a sustainable pumping  
2 amount. Deference to the State Engineer’s scientific finding is appropriate and it would be  
3 improper to overturn it given the substantial evidence in the record. *See Wilson*, 481 P.3d  
4 at 858.

- 5 **1. The 8,000 afa figure is grounded in evidence showing the harm**  
6 **caused by pumping greater amounts**
  - 7 **a. Order 1309 explained that it balances evidence of**  
8 **recovering groundwater levels with evidence of threats**  
9 **to the LWRFS’s water resources**

10 Several parties attack the evidentiary foundation of the 8,000 afa number. Ga.-P.  
11 Br. 18-19; CSI Br. 48-50; Vidler Br. 35-36 Those arguments contradict each other.  
12 Georgia-Pacific argues (baselessly) that the State Engineer “simply took a poll of  
13 participants’ positions,” while CSI takes issue with 8,000 afa because no participant  
14 advocated for that precise figure. *Compare* Ga.-P. Br. 20, *with* CSI Br. 48. The truth is in  
15 between: the State Engineer used experts’ analysis to independently come to his reasoned  
16 judgment.

17 Contrary to the arguments that the State Engineer found 8,000 afa to be the  
18 appropriate amount “randomly” or without “clear analysis,” CSI Br. 48; Ga.-P. Br. 18, Order  
19 1309 carefully explained how the State Engineer determined that amount. The State  
20 Engineer studied the aquifer test’s effects on groundwater, ROA 8-9, the post-test data, *id.*  
21 at 58, and climate effects inside and outside the LWRFS, *id.* at 63. He compared  
22 groundwater levels at the LWRFS’s borders with data closer to the Muddy River. *Id.* at 63.  
23 Based on all of that, he found that 8,000 afa appropriately balanced two contradictory  
24 factors: (1) data showing that current pumping levels had led to the slowing of groundwater  
25 decline and (2) certain warning signs for future groundwater movement. *Id.* at 64. The  
26 record supports that analysis. *Id.* at 10928, 10930, 34695-96, 53070.

27 CSI’s argument that 8,000 afa is unsupported by the record because the State  
28 Engineer could have chosen 7,000 afa or 7,500 afa, *see* CSI Br. 48-4, misunderstands the  
standard of review. The State Engineer was not required to disprove every potential

1 number between zero and 30,000 afa. The inquiry is whether there is adequate support for  
2 his ultimate finding, not all other potential findings. *See Wilson*, 481 P.3d at 858. For the  
3 reasons discussed above, substantial evidence supports the 8,000 afa figure.

4 **b. The 8,000 afa limit reflects the hydrological connection**  
5 **between the LWRFS sub-basins**

6 Georgia-Pacific and CSI also argue that substantial evidence does not support  
7 applying the 8,000 afa across the whole of the LWRFS. Ga.-P. Br. 19-20; CSI Br. 49-54.  
8 Vidler makes a similar argument, asserting that it can pump in Kane Springs Valley  
9 without affecting the rest of the LWRFS. Vidler Br. 36-37. But the LWRFS's defining  
10 features are the uniquely close connection between its sub-basins – including Kane Springs  
11 Valley – and the shared single source of water. ROA 63.<sup>4</sup> Substantial evidence supports  
12 the finding that pumping in one location in the LWRFS affects the groundwater supply and  
13 spring flow throughout it. *Id.* at 64-65, 10888, 48740, 52899. All the evidence showing  
14 consistent hydrology across 1,100 square miles supports the finding that it is appropriate  
15 to establish one sustainable pumping limit uniformly applied across the region.

16 Vidler asserts that one piece of evidence it adduced, a biological opinion, should have  
17 carried the day. Vidler Br. 37. But the State Engineer was entitled to weigh other evidence  
18 of hydrological connection more heavily, and this Court may not reweigh the evidence.  
19 *Revert*, 95 Nev. at 786, 603 P.2d at 264

20 Georgia-Pacific argues that the State Engineer failed to account for the additional  
21 “water resources” added to the LWRFS by Order 1309’s including Kane Springs Valley.  
22 Ga.-P. Br. 18-19. That misunderstands the hydrology. Kane Springs Valley was always  
23 hydrologically connected to the rest of the LWRFS. ROA 53, 52899, 53170. The decline in  
24 groundwater and spring flows during the aquifer test therefore *already* accounts for  
25 whatever water flows from Kane Springs Valley into the other LWRFS sub-basins.  
26 Because Order 1309 was based on the aquifer test and post-test data, which inherently  
27 . . .

28 <sup>4</sup> *See, e.g.*, ROA 749, 10888, 42174, 48740.

1 reflect Kane Springs Valley’s connection to the LWRFS, there is no need to speculatively  
2 add to the pumping limit on account of Kane Springs Valley.

3 **c. The 8,000 afa limit accounts for the impact of drought**  
4 **conditions observed in and near the LWRFS**

5 CSI claims that the 8,000 afa figure is erroneous because it doesn’t account for the  
6 drought conditions present during and after the aquifer test. CSI Br. 32, 46-48. On the  
7 contrary, Order 1309 specifically considered climate effects in determining the 8,000 afa  
8 limit. ROA 63. The record shows that despite an overall drought, nearby basins with little  
9 pumping have shown *increasing* groundwater levels. *Id.* at 53070. Given that, Order 1309  
10 properly accounted for the fact that conditions could become drier going forward. *Id.* at 63.

11 **d. The State Engineer was entitled to act based on**  
12 **substantial evidence, even if additional evidence will**  
13 **eventually be developed**

14 Order 1309 acknowledged areas where further study will be beneficial. ROA 58.  
15 Georgia-Pacific and Vidler latch onto that to essentially argue that the State Engineer was  
16 obligated to do nothing until he has more data. Ga.-P. Br. 18; Vidler Br. 36.

17 There was substantial evidence that if a larger proportion of the junior water rights  
18 already granted in the LWRFS were pumped, that would significantly interfere with senior  
19 decreed rights to the Muddy River. ROA 8-9; *see, e.g., id.* at 10890, 10928-30. It would  
20 lower groundwater levels and reduce spring flow into the river, threatening senior rights  
21 and the endangered Moapa dace. *Id.* at 6-9. There is no obligation for the State Engineer  
22 to allow conditions to deteriorate just because hypothetically there may be better evidence  
23 later. If and when the parties develop more data, that data will be considered in future  
24 decisions related to the LWRFS.

25  
26 ...  
27 ...  
28 ...

1           **2. Substantial evidence supports the State Engineer’s finding that**  
2           **8,000 afa can be pumped without interfering with senior**  
3           **decreed rights**

4           **a. The plain text of Order 1309 undermines the Center’s**  
5           **arguments**

6           The Center contends that the maximum limit should be lower than 8,000 afa. It  
7           claims that the State Engineer “acknowledged that” his determination that 8,000 afa is a  
8           sustainable limit “was not supported by evidence.” Center Br. 24 (citing ROA 58). That is  
9           simply wrong. The State Engineer acknowledged the obvious truth that further study will  
10          help decide whether future adjustments to the limit are called for. ROA 58, 63. But he  
11          also set out the substantial evidence supporting an 8,000 afa limit at this time. *Id.* at 58-  
12          63, 41876, 41992-93, 53733.

13          The Center’s argument that the State Engineer “failed to consider environmental  
14          factors,” Center Br. 28 (title case omitted), is equally wrong. Order 1309 was chockablock  
15          with analysis of how pumping affects the Moapa dace. *See, e.g.*, ROA 7-8, 46, 66. The State  
16          Engineer chose an “intermediate amount of pumping” to allow because, in part, a majority  
17          of experts agreed, and substantial evidence showed, that that amount of pumping would  
18          “still protect the Moapa dace.” *Id.* at 61.

19          The Center misleadingly cites statutes and caselaw pertaining to water-rights  
20          applications to assert that the State Engineer was obligated to do more. Center Br. 29  
21          (citing NRS 533.370; *Pyramid Lake Paiute Tribe of Indians v. Washoe Cty.*, 112 Nev. 743,  
22          748, 918 P.2d 697, 700 (1996)). Those authorities have no relevance to Order 1309, which  
23          did not consider any water-rights applications.

24          The balance of the Center’s brief argues that the State Engineer should have  
25          privileged the Center’s evidence over other participants’. Center Br. 25-28. That is an  
26          impermissible request to have this Court reweigh the evidence. *See Revert*, 95 Nev. at 786,  
27          603 P.2d at 264. Order 1309 noted that different experts proposed different amounts. ROA  
28          58. But the only factor relevant on review is whether there was substantial evidence  
                supporting his finding that 8,000 afa is a sustainable limit. As the State Engineer has

1 already explained, there was. *See, e.g., id.* at 41876, 41992-93, 53733 (evidence indicating  
2 that the LWRFS’s groundwater and spring flow are approaching equilibrium).

3 **b. SNWA implicitly concedes that limiting pumping to 8,000**  
4 **afa is sufficient to protect its water rights**

5 SNWA argues that the State Engineer “failed to recognize the full impact of ongoing  
6 groundwater pumping on senior decreed rights.” SNWA Br. 16. But the central basis of  
7 Order 1309 was protecting decreed rights in the Muddy River, including SNWA’s. The  
8 State Engineer cited substantial evidence that post-test pumping amounts have allowed  
9 groundwater levels to recover and, consequently, spring flow to stabilize. ROA 56-58,  
10 41876, 53733. SNWA implicitly concedes as much – it does not challenge the finding that  
11 8,000 afa will protect its senior rights.

12 SNWA attacks calculations related to the Muddy River Decree. SNWA Br. 27-32.  
13 But those calculations are not necessary to the ultimate finding that 8,000 afa protects  
14 SNWA’s rights – again, a finding that SNWA does not dispute. *See id.*

15 **D. Petitioners’ other challenges to the State Engineer’s factual findings**  
16 **fail**

17 **1. The State Engineer was entitled to weigh aquifer-test results**  
18 **and post-test data more heavily than water budget estimates**

19 CSI accuses the State Engineer of “overemphasi[zing] and unreasonabl[y] rel[y]ing”  
20 on the aquifer-test results in making his findings. CSI Br. 29. But weighing the aquifer-  
21 test results more than other potential forms of evidence was within the State Engineer’s  
22 discretion and expertise. *See Wilson*, 481 P.3d at 858; *Revert*, 95 Nev. at 786.

23 CSI would have preferred that the State Engineer rely on a water budget, instead of  
24 the aquifer-test results. CSI Br. 31-35, 51. That is, it would like this Court to reweigh the  
25 evidence. Even if that were permissible, it would not make sense to privilege a water  
26 budget over the aquifer-test results. A water budget is merely an estimate of how much  
27 water flows into and out of an area. *See ROA* 58. The aquifer-test results are actual  
28 measurements of the real-world effects of pumping. The aquifer test showed that pumping  
caused declines that threaten to conflict with existing water rights, irrespective of the

1 water budget. *Id.* at 58 *see also id.* at 42196 (explaining that CSI’s water budget failed to  
2 account for the aquifer-test results).<sup>5</sup>

3 **2. Substantial evidence supports Order 1309’s findings on the**  
4 **connection between the alluvial aquifer and the carbonate-**  
5 **rock aquifer**

6 Order 1309 found that pumping the alluvial and the carbonate-rock aquifer both  
7 present risks to the senior rights in the Muddy River. ROA 64. It also found that there  
8 may be discrete pockets of the LWRFS that don’t present such a close connection with the  
9 aquifers. *Id.* at 66. Applications to move existing water rights will be determined on  
10 individualized evidence about the proposed new pumping location. *Id.*

11 Contrary to CSI, CSI Br. 50, it is not inconsistent to recognize that the data showed  
12 striking consistency over an 1,100 square mile area but that limited pockets of that area  
13 may not respond in exactly the same way. A party that can prove that his proposed location  
14 is in fact hydrologically isolated should be able to move pumping there. The problem for  
15 CSI is that it could not make that showing. Groundwater in Kane Springs Valley  
16 responded similarly to groundwater in the rest of the LWRFS, undermining any claim that  
17 it was an isolated pocket. ROA 52310, 52312, 52899.

18 CSI also cites evidence that it submitted to the State Engineer. CSI Br. 51-54. To  
19 the extent it is challenging the finding that both alluvial and carbonate-rock pumping affect  
20 senior rights to the Muddy River, its evidence does not carry its burden. The State  
21 Engineer’s finding is supported by substantial evidence in the record – evidence CSI does  
22 not seriously dispute. ROA 65 & nn.334-34; *see, e.g., id.* at 53575. This Court may not  
23 reweigh the evidence and credit CSI’s evidence over the evidence in the record the State  
24 Engineer based his finding on. *Revert*, 95 Nev. at 786, 603 P.2d at 264.

24 . . .

25 . . .

---

27 <sup>5</sup> CSI also attacks the aquifer test because it arose from applications for additional water  
28 rights. It does not explain how that would have had any effect on the results of the aquifer  
test, which showed that pumping a fraction of the already-granted rights caused  
groundwater-level and spring-flow declines.

1 **II. The State Engineer plainly has legal authority to issue Order 1309**

2 **A. Order 1309 is firmly rooted in the text of Chapters 533 and 534 and**  
3 **prior appropriation doctrine**

4 Challenges to the State Engineer’s authority start with the text. *Wilson v. Pahrump*  
5 *Fair Water, LLC*, 137 Nev. \_\_\_\_, 481 P.3d 853, 856 (Adv. Op. 2, Feb. 25, 2021). Here, they  
6 can end there too. The State Engineer was well within his legal authority to issue Order  
7 1309.

8 Several sections of Nevada statutory water law support the State Engineer’s power  
9 to issue Order 1309. “The State Engineer shall not carry out his or her duties pursuant to  
10 this chapter in a manner that conflicts with any applicable provision of a decree or order  
11 issued by a state or federal court, an interstate compact or an agreement to which this  
12 State is a party for the interstate allocation of water pursuant to an act of Congress.”  
13 NRS 533.0245. That language does not constrain the State Engineer’s fealty to decrees  
14 and vested rights depending on a basin-by-basin approach. Especially given the State  
15 Engineer’s duty “to consider the best available science in rendering decisions concerning  
16 the availability of surface and underground sources of water in Nevada.”  
17 NRS 533.0241(1)(c). That is just what the State Engineer did in Order 1309 by recognizing  
18 the close hydrological connection between the sub-basins across the LWRFS to protect  
19 senior rights established by the Muddy River Decree and to protect the Moapa dace that  
20 live within the waters to which those senior rights attach. ROA 43-44, 65-66.

21 In finding a close hydrological connection across the LWRFS, the State Engineer is  
22 keeping faith with this statutory duty. Nevada law requires the State Engineer to “conduct  
23 investigations in any basin or portion thereof where it appears that the average annual  
24 replenishment to the groundwater supply may not be adequate for the needs of all  
25 permittees and all vested-right claimants, and if the findings of the State Engineer so  
26 indicate, except as otherwise provided in subsection 9, the State Engineer may order that  
27 withdrawals, including, without limitation, withdrawals from domestic wells, be restricted  
28 to conform to priority rights.” NRS 534.110(6). An investigation authorized by NRS



1 534.110(6) is what the State Engineer did. In no way did he alter the priority rights of  
2 anyone by issuing Order 1309. By conducting an investigation and showing as a matter of  
3 fact the LWRFS is one basin, the State Engineer is acting pursuant to an express power  
4 from the Legislature and conducting fact finding that he is uniquely qualified to do under  
5 Nevada law. *Wilson*, 481 P.3d at 858.<sup>6</sup>

6 Order 1309's recognition of the uniquely close hydrological connections between the  
7 LWRFS sub-basins and the Muddy River's surface water also gives force to the State's  
8 policy of managing water conjunctively. NRS 533.024(1)(e). Manufacturing a new "basin-  
9 by-basin" management rule would have no basis in Nevada water law and be contrary to  
10 the policy of conjunctive management. *Id.*

11 Petitioners mistakenly argue that "any assertion by the State Engineer that his  
12 interpretation of his own authority should be given deference is misplaced." NV  
13 Cogeneration Br. 19-23. That is wrong as to the State Engineer and wrong as to any  
14 administrative body charged with implementing their statutory duties. The State  
15 Engineer's interpretation of his statutory authority is persuasive, but not controlling.  
16 *Wilson*, 481 P.3d at 856 (citing *Town of Eureka v. Office of State Eng'r*, 108 Nev. 163, 165-  
17 66, 826 P.2d 948, 949-50 (1992)). A reviewing court "may" undertake an independent  
18 review. *Id.*

19 To mistakenly try to strip the State Engineer of his persuasive interpretation of the  
20 statutes he is charged with interpreting and implementing, most Petitioners cite snippets  
21 of previous cases that say that the question of the State Engineer's authority is subject to  
22 de novo review. *See, e.g.*, CSI Br., 17 (citing *Bacher v. Office of State Eng'r*, 122 Nev. 1110,  
23 1117, 146 P.3d 793, 798 (2006)). But all questions of statutory interpretation, because they  
24 are legal questions, are subject to de novo review. *In re Estate of Murray*, 131 Nev. 64, 67,  
25 344 P.3d 419, 421 (2015). Merely because the Court is considering a legal question does

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26 <sup>6</sup> To be sure, the State Engineer has not ordered that withdrawals "be restricted to  
27 conform to priority rights" (known as curtailment). *See* NRS 534.110(6). But that doesn't  
28 change the State Engineer's right to investigate in the first place. *See id.* NRS 534.110(6)  
grants the State Engineer discretion as to whether to move onto the next step of  
curtailment. *See id.*

1 not mean that it jettisons (i) the express will of the Legislature regarding the correctness  
2 of the State Engineer’s decisions and (ii) administrative law principles that govern review  
3 of administrative action.

4 When discussing the persuasive character of the State Engineer’s interpretation of  
5 Chapters 533 and 534, the Nevada Supreme Court has been mindful of NRS 533.450(9).  
6 *See State v. Morros*, 104 Nev. 709, 712-13, 766 P.2d 263, 265-66 (1988). This section  
7 provides that “[t]he decision of the state engineer shall be prima facie correct, and the  
8 burden of proof shall be upon the party attacking the same.” *Id.* at 713, 766 P.2d at 266  
9 (quoting NRS 533.450(9)). The State Engineer’s interpretation of his authority, like any  
10 other agency, is entitled to great deference when it is within the language of the statute.  
11 *United States v. State Eng’r*, 117 Nev. 585, 589, 27 P.3d 51, 53 (2001).

12 History confirms that the State Engineer was well within his authority in  
13 recognizing the LWRFS and protecting the senior rights within it. Nevada uses prior  
14 appropriation to determine water rights. *Ormsby Cty. v. Kearney*, 37 Nev. 314, 142 P. 803,  
15 805-06 (1914). That means those who obtain their rights earlier have priority over those  
16 who obtain their rights later – first in time, first in right. *Id.*; *Lobdell v. Simpson*, 2 Nev.  
17 274, 277 (1866). All rights are obtained “subject to existing rights.” NRS 533.430(1),  
18 534.020(1); *Mineral Cty. v. Lyon Cty.*, 136 Nev. 503, 513, 473 P.3d 418, 426 (2020). There  
19 is no language in any prior appropriation case that limits existing rights by Petitioners’  
20 concept of a basin. Petitioners certainly cite to none. Further, there is no language in  
21 NRS 533.430(1) that cabins the State Engineer’s duty to protect senior rights to the  
22 exclusion of taking appropriate administrative actions authorized by law in the way  
23 Petitioners suggest either. That no case or statute even hints at such a limitation should  
24 tell the Court all it needs to know.

25 **B. Petitioners’ contrary view seeks to rewrite statutory text to**  
26 **misclassify a factual dispute as a legal one**

27 A Court’s review must be “at its most deferential” when it is reviewing scientific  
28 determinations. *Wilson*, 481 P.3d at 858. That is because technical and scientific

1 determinations are not defined by the Legislature (and are not even simple questions of  
2 fact) but left to the special expertise of the State Engineer whom the legislature has  
3 empowered to make those findings based on investigations “at the frontiers of science.” *Id.*  
4 In contrast, a State Engineer’s purely legal determination is subject to de novo review.  
5 *Eureka*, 108 Nev. at 165-66, 826 P.2d at 949-50. It is easy to see why Petitioners would  
6 seek to classify their dispute with Order 1309 as a purely legal one, but none of their  
7 arguments are persuasive.

8 Most Petitioners contend, as CSI does, that the State Engineer does not have  
9 statutory authority to “create a mega basin.” *See, e.g.*, CSI Br. 17. With comic book style  
10 flair, Vidler refers to LWRFS as a “super basin.” Vidler Br. 15. In its view, “[t]he  
11 comprehensive statutory scheme enacted by the Nevada Legislature allows the State  
12 Engineer to manage and take action in a groundwater basin or any portion thereof, as  
13 deemed essential for the welfare of the area involved.” *Id.* at 16-19. That view hinges on  
14 the Legislature’s use of the term “basin,” singular, versus basins, plural, in various Chapter  
15 534 sections. *See, e.g., id.; see also* CSI Br. 19-21.

16 That approach represents a fundamental misunderstanding of what is a legal  
17 question versus a factual one. Petitioners simply elide over the fact that no statute in  
18 Chapter 533 or Chapter 534 of the Nevada Revised Statutes defines the term, “basin.”  
19 Unwittingly, Vidler forfeits their statutory argument by citing the following definition from  
20 the Water Words Dictionary by Letter:

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

25 Vidler Br. 18 (quoting *Water Words Dictionary by Letter*, B at 25-26). The number 232 is  
26 not a magic legal number. It is found nowhere in the Nevada Revised Statutes to constrain  
27 the State Engineer’s view of what constitutes a basin. Accordingly, Petitioners’ cited  
28 definition shows (i) nothing in Nevada law defines what a basin is (ii) as far as Nevada law

1 is concerned it is up to Nevada Division of Water Resources to make that determination  
2 and (iii) most importantly, basins are determined for “water planning and management  
3 purposes” and not because of any statutory reason. Nothing in Nevada law, and indeed  
4 Petitioners’ own definition of the term “basin,” prevented the State Engineer from  
5 classifying the LWRFS as a basin.

6 Courts are equipped to interpret laws. That is lawyers’ work. To ask this Court to  
7 overrule the State Engineer’s view that the LWRFS is a basin is to not only stray into the  
8 unfamiliar but also to delve into a scientific question where courts lack special scientific  
9 expertise. Petitioners cite no statute requiring the State Engineer to manage Nevada’s  
10 waters basin-by-basin. Worse, there is no language in any statute explaining how each  
11 basin came to be identified and determined. The Legislature left it to the State Engineer  
12 to identify basins as a management and planning tool. Nothing in Chapter 533 and 534 of  
13 the Nevada Revised Statute is to the contrary.

14 Several Petitioners contend that NRS 533.024 cannot serve as statutory authority  
15 for Order 1309. The State Engineer does not argue that NRS 533.024 serves as an  
16 independent source of statutory authority. But Petitioners attempt to junk the  
17 Legislature’s statement of policy is not persuasive. The Legislature’s declaration of policy  
18 “is entitled to great weight . . . it is neither the duty or the prerogative of the courts to  
19 interfere with such legislative finding unless it clearly appears to be erroneous and without  
20 reasonable foundation.” *McLaughlin v. Housing Auth.*, 68 Nev. 84, 93, 227 P.2d 206, 209  
21 (1951). Petitioners never explain how using the “best available science” could be contrary  
22 to any statute. NRS 533.024(1)(c). Petitioners never explain how managing waters  
23 conjunctively could conceivably violate any statute. *See* NRS 533.024(1)(e). To the  
24 contrary, using the best available science and managing waters conjunctively better  
25 ensures that the prior decrees are complied with (NRS 533.0245) and the doctrine of prior  
26 appropriation (NRS 533.430(1)) is observed.

27 That AB 51 did not pass does not undermine Order 1309. Generally, courts are  
28 reluctant to draw inferences from a legislature's failure to act. *Brecht v. Abrahamson*, 507

1 U.S. 619, 632-33 (1993). In most cases, there are a number of possible reasons why the  
2 legislature might have failed to have enacted a proposed provision. *Arnett v. Dal Cielo*, 923  
3 P.2d 1, 16 (Cal. 1996). Thus, unpassed bills have little value as evidence of intent. *Id.* at  
4 17. Indeed, a cursory review of AB 51 reveals that its proposed provisions were broader  
5 than simply encouraging conjunctive management policies, but included new policies to  
6 resolve disputes between junior and senior rights holders that would be implemented  
7 through new regulations. AB 51, §§3-4. For this, and any number of reasons, AB 51 may  
8 not have passed. What is clear is that NRS 533.024(1)(e)'s policy of conjunctive  
9 administration of all waters in the state remained in effect.

10       Nothing in Order 1309 jeopardizes priority or finality of vested water rights. There  
11 is not a sentence in Order 1309 that adjusts the priority of water rights or lessens their  
12 finality. Vidler writes that prior appropriation means "first in time, first in right." Vidler  
13 Br. 19. The State Engineer agrees. Does it matter under the prior appropriation doctrine  
14 in which hydrographic area the junior right holder stakes its claim versus the senior right  
15 holder? The answer is, of course, no. Water rights are granted subject to existing rights  
16 and always determined based on who has the prior right. *Lobdell*, 2 Nev. at 277; *accord*  
17 *Mineral Cty.*, 136 Nev. at 513, 473 P.3d at 427. There is nothing in these statutes that  
18 limits the State Engineer's duty to protect senior rights. Due to the close hydrological  
19 connection that the State Engineer has scientifically determined as a matter of fact,  
20 Vidler's rights, as an example, were *always* subject to older (more senior) existing rights,  
21 including those protected by the Muddy River Decree.

22       None of the Petitioners can use the State Engineer's reference in Order 1309 to the  
23 Endangered Species Act to undermine it. First, the State Engineer is required to consider  
24 the public interest in managing Nevada's waters. Second, the Moapa dace is located in an  
25 area where senior water rights exist. Protecting senior rights, which the State Engineer is  
26 required to do, necessarily protects the dace.<sup>7</sup>

27       <sup>7</sup> NV Cogeneration complains that its proposed expert Hugh Ricci was not deemed to be  
28 a qualified expert on hydrology. NV Cogeneration Br. 31. The State Engineer had  
discretion to determine Order 1309 procedural matters like expert qualification. *See*

1 C. **SNWA does not challenge the State Engineer’s authority to determine**  
2 **that 8,000 afa is the maximum sustainable amount of water that can**  
3 **be pumped**

4 Order 1309 found that allowing a maximum of 8,000 afa of pumping in the LWRFS  
5 will protect senior rights in the Muddy River. ROA 64. That was based on evidence  
6 showing that pumping even more than 8,000 afa still allowed aquifer recovery and  
7 stabilization of spring flow decline. *Id.* at 56-58, 62. SNWA does not dispute this. SNWA  
8 Br. 19-27. It does not challenge the 8,000 afa finding.

9 SNWA argues that Order 1309 impairs its senior rights. SNWA Br. 25. But it does  
10 not explain how 8,000 afa could impair its rights if 8,000 afa is sufficient to maintain the  
11 current spring flow – or indeed allow additional aquifer recovery and greater spring flow.

12 SNWA’s argument that Order 1309 violates prior appropriation, SNWA Br. 25-27,  
13 fails for the same reason. While SNWA complains that LWRFS pumping “captures” Muddy  
14 River flow, it does not grapple with the finding that 8,000 afa of pumping is allowing aquifer  
15 recovery (or at least stabilization). Because the 8,000 afa limit does not diminish the  
16 Muddy River’s flow (again, a finding unchallenged by SNWA), it does not violate SNWA’s  
17 rights.

18 Substantial evidence supports the State Engineer’s ultimate conclusion in Order  
19 1309 that 8,000 afa is the volume of groundwater that can be sustainably pumped without  
20 conflicting with existing senior rights, like those claimed by SNWA and MVIC. This  
21 ultimate conclusion of 8,000 afa is not legitimately challenged by SNWA and MVIC.  
22 However, these parties attack an incidental finding by the State Engineer that “the current  
23 flow in the Muddy River is sufficient to serve all decreed rights in conformance with the  
24 Muddy River Decree, and that reductions in flow that have occurred because of  
25 groundwater pumping in the headwaters basins is not conflicting with Decreed rights.”  
26 ROA 62; *see also* SNWA Br. 19-22; MVIC Br. 16-20. In reaching this finding, SNWA and  
27 . . .

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28 *Dutchess Bus. Servs., Inc. v. State Bd. of Pharmacy*, 124 Nev. 701, 710 & n.12, 191 P.3d  
1159, 1165 n.12 (2008). Ricci was not qualified as an expert in hydrology because he was  
not a hydrologist. ROA 603-04, 606.

1 MVIC allege that the State Engineer made “an impermissible reduction” or “re-  
2 quantification” of the Muddy River’s decreed rights. SNWA Br. 19; MVIC Br. 16.

3 In Order 1309, the State Engineer did not “re-quantify” the vested rights in the  
4 Muddy River Decree. The quantities in the Decree are the diversion rate in cubic feet per  
5 second (cfs) and the number of acres that are irrigated under each vested right. *See, e.g.,*  
6 ROA 33798, 33813. In Order 1309, the State Engineer uses a standard accepted method  
7 to estimate a value that is not provided in the Decree: the actual volume of water  
8 consumed,<sup>8</sup> in acre-feet, under fully decreed irrigation use. *Id.* at ROA 61-62. To do this,  
9 the State Engineer looked to the consumptive use rate for a high-water use crop, alfalfa,  
10 based on a full cover, well-watered field. *Id.* This amount may be less than the  
11 accumulation of the full decreed diversion rate. This is because an irrigation system  
12 managed on rotation is delivered as needed to meet the crop water demands, and is not  
13 delivered at the constant decreed flow rate. The State Engineer applied a common method  
14 of calculating net irrigation water requirement to make a practical estimate of the actual  
15 water needed to satisfy the vested rights in the decree. *Id.* The State Engineer’s estimate  
16 of consumptive water volume in Order 1309 does not recalculate or “re-quantify” the values  
17 determined in the decree for acreage or diversion rates in cfs.

18 If this Court nevertheless finds that this portion of Order 1309 (the paragraph  
19 starting at the bottom of ROA 61 and going to the top of ROA 62) exceeded the charge of  
20 Order 1303 or the State Engineer’s legal authority, the State Engineer requests that the  
21 Court merely strike that paragraph and affirm the remaining portions of Order 1309. The  
22 incidental finding by the State Engineer at ROA 61-62 is not necessary for the State  
23 Engineer’s ultimate determination that 8,000 afa is the maximum sustainable amount of  
24 pumping that may occur in the LWRFS without conflicting with senior existing rights. As  
25 shown above, the State Engineer’s conclusion that the maximum quantity of groundwater

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26 <sup>8</sup> Consumptive water use in the context of irrigation is that quantity of water that is  
27 absorbed by the crop and transpired or used directly in the building of plant tissue, together  
28 with that evaporated from the cropped area. It does not include runoff or deep percolation.  
*See Nev. Div. of Water Res., Water Words Dictionary by Letter, C* at 63,  
<https://bit.ly/3kYvcjm>.

1 that may be pumped from the LWRFS “cannot exceed 8,000 afa and may be less” is  
2 supported by substantial evidence, is due the highest deference and should be affirmed. As  
3 stated previously, this finding protects SNWA’s (and MVIC’s) senior rights in the river and  
4 these parties do not challenge this ultimate conclusion.

5 **D. Petitioners’ “ad hoc rulemaking” arguments are baseless because the**  
6 **State Engineer is exempt from the Administrative Procedure Act**

7 Several Petitioners accuse the State Engineer of having undertaken “ad hoc  
8 rulemaking” by issuing Order 1309. *E.g.*, Ga.-P. Br. 27. As those Petitioners admit, ad hoc  
9 rulemaking is a concept that applies to rulemaking under the Nevada Administrative  
10 Procedure Act (the “APA”), NRS Chapter 233B. *E.g.*, *id.* But State Engineer adjudicatory  
11 proceedings like the Order 1309 proceedings are exempt from the APA’s requirements.  
12 NRS 233B.039(1)(i); *Wilson*, 481 P.3d at 858-89 (brackets omitted). No ad hoc rulemaking  
13 complaint can be pressed against the State Engineer. *See id.*

14 **III. Order 1309 is constitutional**

15 **A. Order 1309 satisfied all due process requirements**

16 Several Petitioners challenge Order 1309 on procedural due process grounds.  
17 Procedural due process is satisfied by “notice and an opportunity to be heard.” *Wilson v.*  
18 *Pahrump Fair Water, LLC*, 137 Nev. \_\_\_\_, 481 P.3d 853, 859 (Adv. Op. 2, Feb. 25, 2021).

19 None of Petitioners asserts that the State Engineer violated any procedural statute.  
20 Petitioners can therefore succeed on their challenges only if they prove a constitutional  
21 violation while overcoming the respect due to the Legislature’s choice of procedure in the  
22 unique context of water-rights proceedings. *Humboldt Land & Cattle Co. v. Dist. Court*, 47  
23 Nev. 396, 224 P. 612, 613 (1924); *see also Vineyard Land & Stock Co. v. Dist. Court*, 42 Nev.  
24 1, 171 P. 166, 174 (1918) (considering the “character of the proceeding” in upholding the  
25 constitutionality of statutes governing water-rights procedures).

26 . . .

27 . . .

28 . . .



1                   **1. All parties had prior notice consistent with due process**  
2                   **a. Order 1309 did not address policy issues outside the scope**  
3                   **of the notice**

4           Apex, Georgia-Pacific and CSI contend that the State Engineer did not provide prior  
5 notice that he would make policy determinations in Order 1309. Apex does not identify  
6 any purported “policy determinations” that were made. Apex Br. 12-13. (quoting ROA 522).  
7 Georgia-Pacific claims that Order 1309 “modifies the relative priority of water rights” in  
8 the LWRFS. Ga.-P. Br. 23-27. CSI claims that Order 1309 “curtail[s] senior water rights.”  
9 CSI Br. 27-28 (emphasis omitted).

10           None of them accurately characterizes Order 1309. Before the hearing, the State  
11 Engineer gave notice that he would be considering, among other things, (1) the “geographic  
12 boundary of the hydrologically connected groundwater and surface water systems  
13 comprising the [LWRFS]” and (2) “[t]he long-term annual quantity of groundwater that  
14 may be pumped from the [LWRFS].” ROA 82; *accord id.* at 522. Order 1309 decides the  
15 geographic boundary of the LWRFS and the long-term annual quantity of groundwater  
16 that can be pumped from it. *Id.* at 66. Petitioners had prior notice of everything  
17 accomplished by Order 1309.

18           There is no basis for Petitioners’ accusations about what Order 1309 did. Nothing  
19 in Order 1309 reprioritizes rights. *See* ROA 66. It makes no attempt to distinguish  
20 between senior rights and junior rights. *Id.*

21           Nor does it curtail any rights, let alone senior rights. ROA 66. Curtailment is where  
22 junior appropriators are ordered to stop using water in order to protect senior rights. *See*  
23 *Kobobel v. State*, 249 P.3d 1127, 1129-30 (Colo. 2011) (en banc). Order 1309 does not  
24 identify any party as having junior rights that need to be curtailed.

25           As the State Engineer explained, policy decisions on what tools to use to manage the  
26 LWRFS and maintain pumping at a sustainable quantity are for the next phase of  
27 proceedings. ROA 522. Georgia-Pacific alludes to many potential policies that may be  
28 . . .

1 considered in future proceedings. Ga.-P. Br. 25. Those future proceedings will occur after  
2 proper notice and a hearing for Petitioners and any other interest parties.<sup>9</sup>

3 **b. Order 1309’s discussion of the Muddy River’s flow was**  
4 **within the scope of the notice**

5 SNWA and MVIC contend that the State Engineer’s finding that the Muddy River’s  
6 current flow satisfies their water rights violated due process. SNWA Br. 36-38; MVIC Br.  
7 20. SNWA’s due process argument must be rejected out of hand. Both of SNWA’s  
8 components (the Southern Nevada Water Authority and the Las Vegas Valley Water  
9 District) are political subdivisions of the State. SNWA Br. 14-15; *Bella Layne Holdings,*  
10 *LLC v. S. Nev. Water Auth.*, No. 2:21-cv-235, 2021 WL 4268451, at \*1 (D. Nev. Sept. 20,  
11 2021). Political subdivisions cannot assert due process claims against the State. *City of*  
12 *Boulder v. State*, 106 Nev. 390, 392, 793 P.2d 845, 846 (1990).

13 MVIC is a corporation, so it is not prohibited from pressing a procedural due process  
14 claim. To succeed on that claim, MVIC needs to show more than just a deprivation of a  
15 property right; it must also show that the procedure provided was constitutionally  
16 inadequate. *Malfitano v. Cty. of Storey ex rel. Storey Cty. Bd. of Cty. Comm’rs*, 133 Nev.  
17 276, 282, 396 P.3d 815, 819 (2017). Even assuming that MVIC’s property right was  
18 deprived here (which the State Engineer does not concede), the State Engineer’s procedure  
19 was adequate.

20 The State Engineer finding challenged by MVIC is narrow. The State Engineer  
21 found that 8,000 afa would not conflict with senior rights because it would not cause further  
22 decline in Muddy River flow. ROA 62, 64. MVIC does not dispute the factual basis of that  
23 finding.

24 MVIC instead argues that it lacked prior notice because the State Engineer had  
25 stated at the prehearing conference that the “purpose of the hearing is not to resolve or  
26

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27 <sup>9</sup> To the extent that Georgia-Pacific argues that it did not have notice that the LWRFS  
28 would be designated a joint administrative unit, *see* Ga.-P. Br. 24, Order 1303 had already  
done that, ROA 82. Order 1303 was the principal notice for the Order 1309 proceedings.  
*See id.* at 82-83.

1 address allegations of conflict between groundwater pumping within the LWRFS and  
2 Muddy River decreed rights.” MVIC Br. 26 (quoting ROA 522). MVIC ignores that the  
3 State Engineer also said (on the same page of the transcript) that one hearing topic was  
4 the “quantity of water that may be sustainably developed within the [LWRFS] *without*  
5 *conflicting with senior rights.*” ROA 522 (emphasis added). The State Engineer’s finding  
6 that 8,000 afa can be pumped without conflicting with senior Muddy River rights is  
7 consistent with that prior notice. Indeed, we know MVIC had prior notice of the topic  
8 because it argued in the Order 1309 proceedings that LWRFS pumping “conflicts with [its]  
9 senior decreed” rights. ROA 52874.

10 The State Engineer’s two statements are not contradictory. The State Engineer  
11 needed to determine how much total water was available in the LWRFS to assess potential  
12 policies to manage it. But he did not need to know whether any particular user’s pumping  
13 conflicted with any other particular user’s rights. Allegations of conflict are usually  
14 adjudicated on a case-by-case basis based on the specific rights at issue.<sup>10</sup>

15 **d. Order 1309’s determination that Kane Springs Valley is**  
16 **within the LWRFS was within the scope of the notice**

17 Vidler argues that including Kane Springs Valley in the LWRFS violated its due  
18 process rights because it exceeded the scope of the hearing. Vidler Br. 21-24. But the  
19 LWRFS’s “geographic boundary” was expressly part of the notice provided by Order 1303.  
20 ROA 82.

21 Contrary to Vidler’s arguments, Vidler Br. 21-24, the State Engineer did not violate  
22 due process by developing the six criteria for inclusion as part of the Order 1309  
23 proceedings. Much as a court surveys existing caselaw before determining what is the best  
24 test to apply to a current set of facts, the State Engineer surveyed the extensive evidence  
25 presented to him to determine the best criteria for making the scientific finding that an  
26 area has a uniquely close hydrologic connection to the rest of the LWRFS. That was an

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27 <sup>10</sup> MVIC argues that the State Engineer violated NRS 533.3703. No. NRS 533.3703  
28 applies only to applications for a “change in the place of diversion, manner of use or place  
of use.” NRS 533.3703(1). Order 1309 does not determine any such application.

1 integral part of – not departure from – the announced topic of determining the LWRFS’s  
2 “geographic boundary.” *See* ROA 82, 522.

3 **2. There is no constitutional issue with Order 1309’s scope**

4 Georgia-Pacific’s prior notice section contains a different argument: that the State  
5 Engineer should have broadened the scope of the Order 1309 proceedings. Ga.-P. Br. 26-  
6 27. According to Georgia-Pacific, the State Engineer was constitutionally mandated to  
7 make certain policy decisions in Order 1309. *Id.*

8 Georgia-Pacific points to no authority for the principle that the Constitution  
9 mandates the scope of administrative proceedings. Georgia-Pacific may have thought it  
10 was better policy to tackle more issues at once, but the State Engineer has discretion to  
11 decide the scope of the issues.

12 **3. The hearing satisfied due process**

13 Vidler takes issue with two aspects of the hearing itself. First, it argues that it was  
14 unconstitutional for the State Engineer to allow experts to express new opinions “based  
15 upon testimony they heard at the hearing.” Vidler Br. 40. Second, it argues that the  
16 hearing violated the Constitution because it was too short. *Id.* Neither argument has  
17 merit.

18 Administrative hearings are subject to more relaxed procedural and evidentiary  
19 rules. *Dutchess Bus. Servs., Inc. v. State Bd. of Pharmacy*, 124 Nev. 701, 711, 191 P.3d  
20 1159, 1166 (2008). An agency has discretion to determine the procedure for its own  
21 hearings. *Id.* at 710 & n.12, 191 P.3d at 1165 & n.12. Vidler may have preferred a different  
22 procedure, but there is nothing in the Constitution that prohibited the State Engineer from  
23 considering experts’ final, most reasoned opinion. And Vidler admits that it responded to  
24 any purportedly different opinions by filing a motion to strike. Vidler Br. 40.

25 Similarly, there is no constitutional requirement that the State Engineer hold a  
26 hearing of interminable length. Due process requires notice and an opportunity to be  
27 heard. *Wilson*, 481 P.3d at 859. Vidler had notice. It had an opportunity to be heard  
28 through its Order 1303 report, its testimony (it presented a panel of five separate experts)

1 at the two-week hearing and its closing brief. *E.g.*, ROA 36184-187, 36201-03, 52815,  
2 53497; *see also* ROA 20-23 (detailing Vidler’s analysis as part of Order 1309).

3 **B. Petitioners’ other constitutional theories are baseless**

4 **1. The water statutes do not violate separation of powers**

5 Vidler argues that the State Engineer’s powers violate the separation of powers  
6 because they constitute a delegation of legislative authority. Vidler Br. 24-25. Strictly  
7 speaking, that is not a challenge to Order 1309, but instead to “legislative enactment[s]” –  
8 i.e. statutes. Vidler Br. 25; *see, e.g., Sheriff v. Luqman*, 101 Nev. 149, 153, 697 P.2d 107,  
9 109-10 (1985) (determining whether the Uniform Controlled Substances Act violated  
10 separation of powers). A statute is unconstitutional only if it lacks sufficient standards “to  
11 guide the agency with respect to the purpose of the law and the power authorized.”  
12 *Luqman*, 101 Nev. at 153-54, 697 P.2d at 110. Statutes are presumed constitutional and  
13 those challenging them bear a heavy burden. *Byars v. State*, 130 Nev. 848, 856, 336 P.3d  
14 939, 945 (2014).

15 Vidler does not carry its heavy burden. It does not point to any statute that delegates  
16 truly legislative power to the State Engineer without suitable standards. Vidler Br. 24-25.  
17 The opposite is true. NRS Chapters 533 and 534 establish a comprehensive scheme for the  
18 regulation of water in this State. They require “strict” compliance with their elaborate  
19 provisions. *Application of Filippini*, 66 Nev. 17, 27, 202 P.2d 535, 540 (1949). The extensive  
20 statutory provisions of Nevada’s water law, subject to judicial review by the Nevada courts,  
21 give sufficient standards for the State Engineer’s exercise of his duties.

22 What’s more, Vidler concedes that the Legislature can permissibly grant the State  
23 Engineer fact-finding authority to carry out his duties. Vidler Br. 25 (citing *Luqman*, 101  
24 Nev. at 153, 697 P.2d at 110). Order 1309 is an exercise in fact finding. The State Engineer  
25 determined as a factual matter the LWRFS boundaries and the maximum sustainable  
26 amount of pumping.

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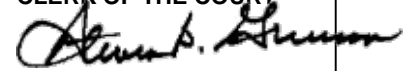


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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court by using the electronic filing system on the 23rd day of November, 2021, and e-served the same on all parties listed on the Court’s Master Service List.

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10 **DISTRICT COURT**

11 **CLARK COUNTY, NEVADA**

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

14 Petitioners,

15 vs.

16 ADAM SULLIVAN, P.E., Nevada  
State Engineer, DIVISION OF  
17 WATER RESOURCES, DEPARTMENT OF  
CONSERVATION AND NATURAL  
18 RESOURCES,

19 Respondent.

20 And All Consolidated Cases.

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

Consolidated with:

A-20-817765-P  
A-20-818015-P  
A-20-817977-P  
A-20-818069-P  
A-20-817840-P  
A-20-817876-P  
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21 **RESPONDENTS' EXCERPTS OF RECORD**  
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DATED this 23rd day of November, 2021.

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Testimony of  
Richard K. Waddell, Jr.  
on behalf of the  
U.S. National Park Service



# Kane Springs Valley

- Water levels responded to Order 1169 pumping

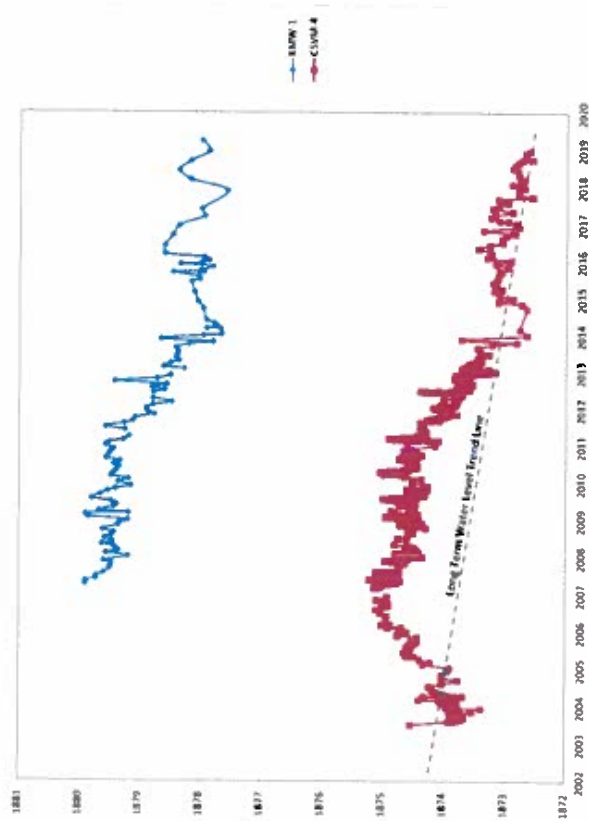
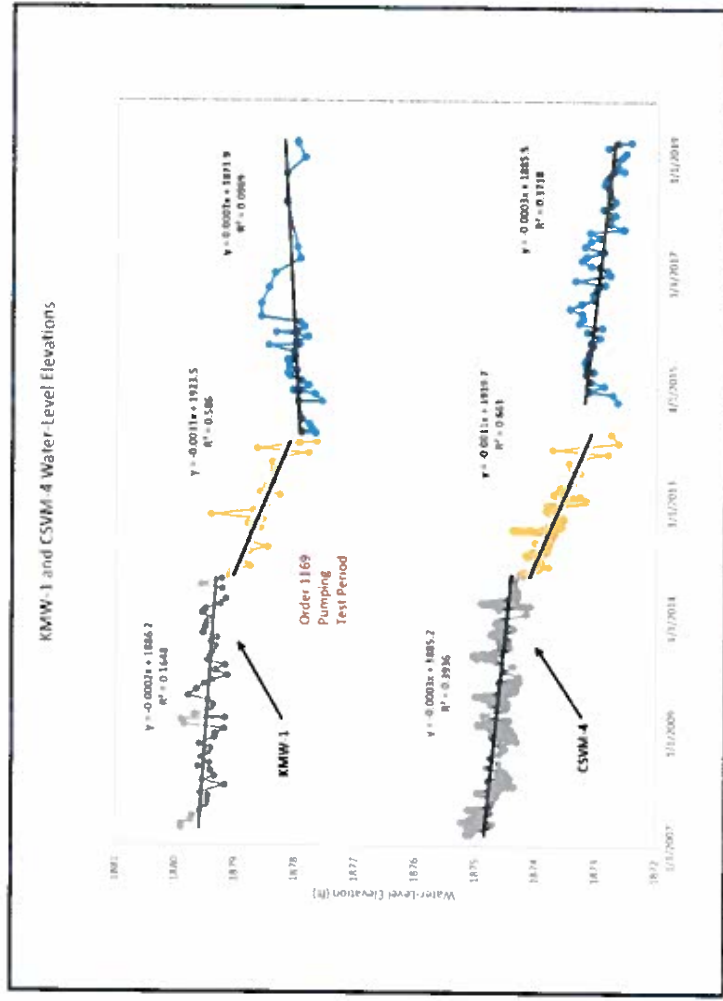


FIGURE 3-9. COMBINED HYDROGRAPHS OF WELLS KMW-1 AND CSVM-4

Ex. LC-V\_001



NPS Ex. No. 3

# Kane Springs Valley (continued)

- Faults are present in northern Coyote Spring Valley and Kane Springs Valley that may reduce permeability

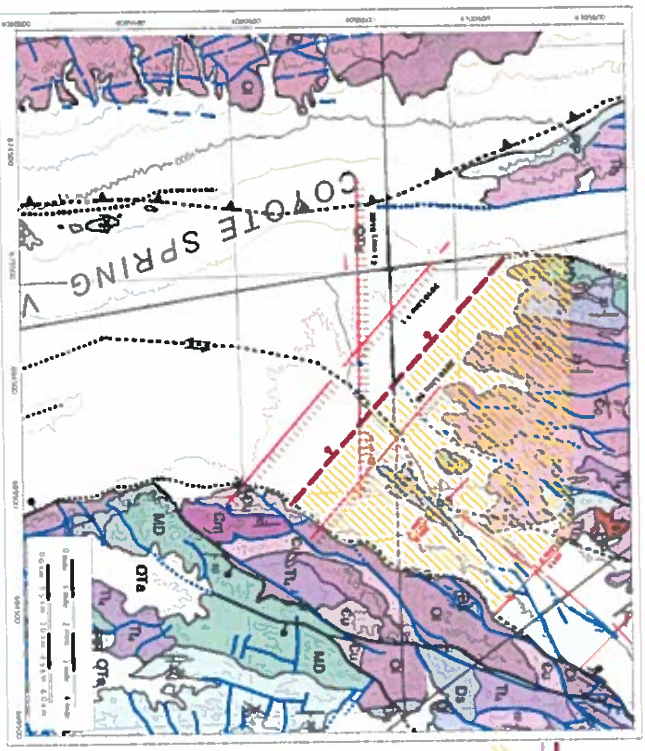


FIGURE 4-9: LOCATION MAP SHOWING THE NORTHERN LIFT'S BOUNDARY FAULT

LC-V\_001

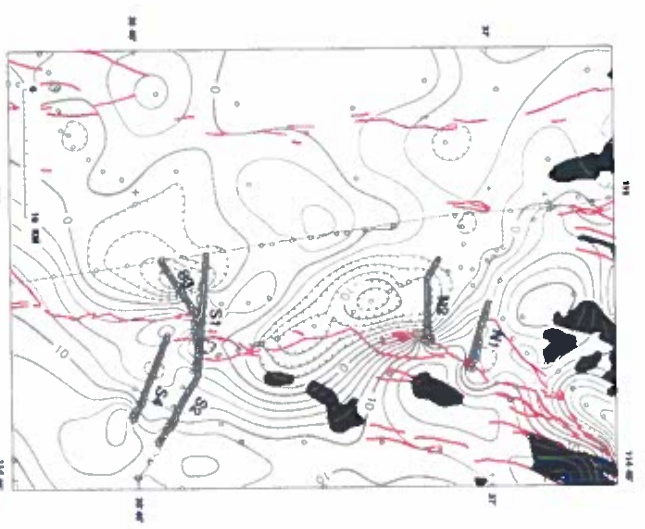
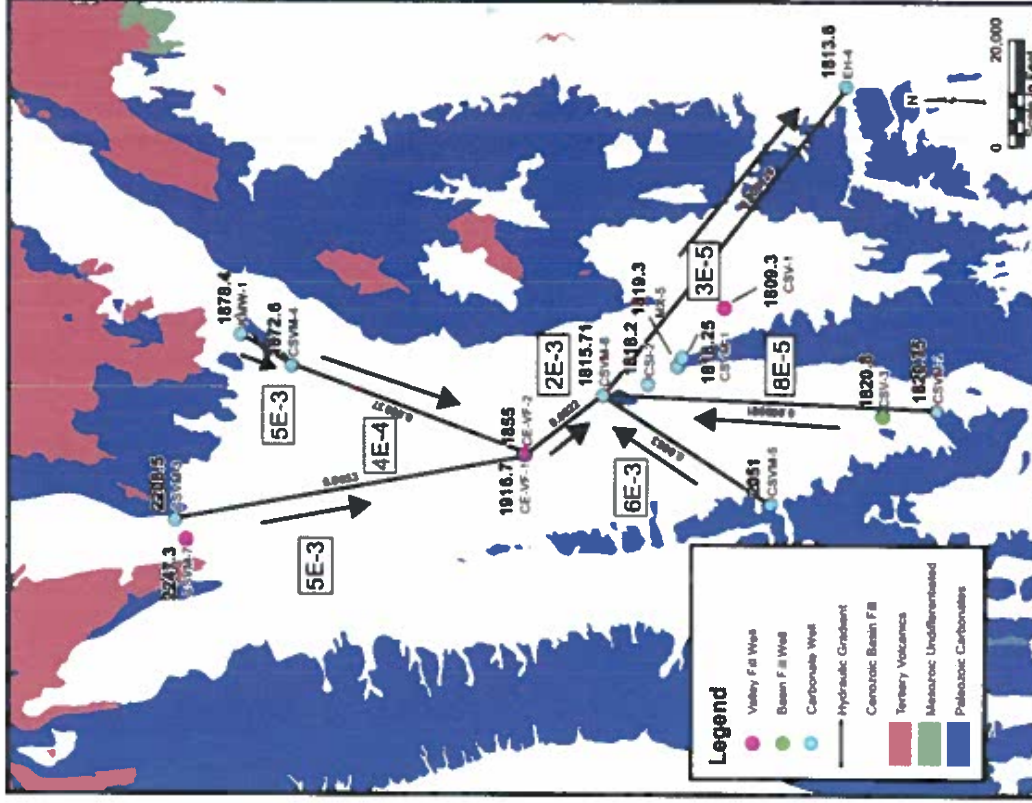


Figure 2. Map showing possible structural gravity of Coyote Spring Valley and vicinity. Contour interval = 2 mGal. Open circles show gravity stations. Elevations indicated in feet and meters. S1-S4 are detailed gravity profiles that were recorded to other basin studies. Red lines indicate faults mapped by Covert and others (1969). Dashed lines indicate the geology and culture. Refer to Plate 1 for upper basin preservation of these data.

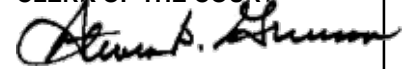
NPS EX. No. 3

## Kane Springs Valley (continued)

- Hydraulic gradients are higher in the northernmost part of Coyote Spring Valley
- But not enough to create a significant barrier, based on observed pumping responses in KMW-1 and CSVM-4



**Figure 2** Horizontal Hydraulic Gradients Between Selected Well Points, Coyote Springs Valley and Vicinity  
8/16/2019



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28 **CLARK COUNTY, NEVADA**

29 **LAS VEGAS VALLEY WATER DISTRICT,**  
30 **and SOUTHERN NEVADA WATER**  
31 **AUTHORITY, et al.,**

32 Petitioners,

33 vs.

34 **ADAM SULLIVAN, P.E., Acting**  
35 **Nevada State Engineer, et al.,**

36 Respondent.

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

37 **INTERVENORS LINCOLN COUNTY WATER DISTRICT'S AND VIDLER**  
38 **WATER COMPANY, INC.'S ANSWERING BRIEF TO OPENING BRIEF OF**  
39 **CENTER FOR BIOLOGICAL DIVERSITY**

40 ///

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**NRAP 26.1 DISCLOSURE**

Intervenors, Lincoln County Water District (“Lincoln” and Vidler Water Company, Inc. (“Vidler” and together with Lincoln the “Intervenors”) incorporate and restate their NRAP 26.1 Disclosure from their Opening Brief and as further stated in their Answering Brief to Opening Briefs of Las Vegas Valley Water District and Southern Nevada Water Authority and Muddy Valley Irrigation Company.

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Attorneys for Petitioner **VIDLER WATER COMPANY, INC.**

1           **I.       STATEMENT OF THE ISSUES**

2           A.       The evidence does not support an arbitrary 8,000 afa pumping limit in the  
3 Lower White River Flow System (“LWRFS”), and certainly does not support cessation  
4 of pumping groundwater entirely as argued by Center for Biological Diversity (“CBD”).

5           B.       State Engineer is required to consider public interest, including  
6 environmental impact, when considering appropriations of water as was done when he  
7 granted appropriations in Kane Springs while the Order 1169 proceeding were pending  
8 in six other hydrographic basins, and not after water appropriations are adjudicated as  
9 argued by the CBD.

10          C.       A taking in violation of the U.S. and Nevada Constitutions occurs when  
11 water is reallocated, even when taken to purportedly comply with the Endangered  
12 Species Act.

13          D.       The State Engineer inappropriately included Kane Springs Valley  
14 Hydrographic Basin (“Kane Springs”) in the LWRFS because: (1) evidence  
15 demonstrates that a barrier exists between Kane Springs and LWRFS; (2) State  
16 Engineer lacks authority to create super basin; and (3) inclusion of Kane Springs  
17 amounts to ad hoc rulemaking and improper legislation by an executive agency.

18           **II.       STATEMENT OF THE FACTS<sup>1</sup>**

19           **A.       Statutory and Legal Background**

20           In summarizing the statutory background and legal authorities, CBD disregards  
21 the statutory procedures for appropriating water and conflates water appropriation with  
22 the State Engineer’s *ultra vires* actions in this case culminating in Order 1309.  
23 Additionally, CBD fails to consider the legal and constitutional ramifications of  
24

25  
26 \_\_\_\_\_  
27 <sup>1</sup> CBD’s Opening Brief includes three sections summarizing the background of the  
28 proceedings below including sections on (A) Statutory Background; (B) Procedural  
Background; and (C) Factual Background. CBD Opening Brief at 3 – 23. Lincoln and  
Vidler incorporate their Opening Brief as though set forth in full in response to CBD’s  
Opening Brief, and particularly incorporate the full Statement of Relevant Facts in  
response to CBD’s statutory, procedural, and factual background sections. See  
Lincoln/Vidler Opening Brief at § IV, pp. 5-13.

1 eliminating all groundwater pumping in the LWRFS (as it urges this Court to require)  
2 or in any of the individual basins that comprise that super basin.

3       Importantly, Nevada’s “Legislature has established a comprehensive statutory  
4 scheme regulating the procedures for acquiring, changing, and losing water rights in  
5 Nevada.” *Mineral Cty. v. Lyon Cty.*, 136 Nev. Adv. Op. 58, 473 P.3d 418, 426 (2020).  
6 “Official powers of an administrative agency cannot be assumed by the agency, nor can  
7 they be created by the courts in the exercise of their judicial function.” *Andrews v. Nev.*  
8 *Bd. Of Cosmetology*, 86 Nev. 207, 208, 467 P.2d 96 (1970) *citing* *FTC v. Raladam Co.*,  
9 283 U.S. 643 (1931). Thus, the State Engineer is limited to act according to the statutory  
10 power delegated by the Legislature. *Wilson v. Pahrump Fair Water, LLC*, 481 P.3d  
11 853, 856 (Nev. 2021).

12       Although proceedings to appropriate water are statute-based administrative  
13 proceedings, the State Engineer has no statutory authority to reprioritize or reallocate  
14 previously appropriated rights. In fact, the case CBD cites for support actually holds  
15 that “the public trust doctrine as implemented through our state’s comprehensive water  
16 statutes *does not permit the reallocation of water rights already adjudicated and settled*  
17 *under the doctrine of prior appropriation.*” *Mineral Cty.*, 473 P.3d at 421 (emphasis  
18 added). Moreover, the State Engineer cannot grant a permit in a basin where there is  
19 no water available, where the appropriation would conflict with existing rights, or if the  
20 appropriation would prove detrimental to the public interest. NRS 533.370(2).  
21 However, the comprehensive statutes authorize the State Engineer to order “a  
22 hydrological study, an environmental study or any other study” before the State  
23 Engineer makes a final determination on an application. NRS 533.368(1).

24       Although CBD correctly asserts that the State Engineer “must determine whether  
25 a proposed appropriation is detrimental to the public interest before issuing a water  
26 appropriation permit,” CBD’s characterization of this process is misleading. CBD  
27 Opening Brief at 4:25-28 (internal citation omitted). Rather than an *ex post* analysis  
28 after the appropriation is granted, the State Engineer must make this determination

1 during the appropriation process. NRS 533.370(2). In fact, not only can the State  
2 Engineer require additional environmental studies during the adjudication process (*see*  
3 NRS 533.368), but he can also “require such additional information as will enable the  
4 State Engineer to guard the public interest properly . . . .” NRS 533.375. And “any  
5 person feeling aggrieved by any order or decision of the State Engineer” may have the  
6 order or decision reviewed by appeal to the Court. NRS 533.450(1).

7 Not only does the comprehensive statutory scheme prohibit the State Engineer  
8 from reallocating water rights, by requiring appropriated water to be unused to maintain  
9 an endangered species, the State Engineer effects a taking without just compensation  
10 prohibited by the United States and Nevada Constitutions. *See, e.g., Casitas Mun.*  
11 *Water Dist. v. U.S.*, 543 F.3d 1276 (Fed. Cir. 2008) (holding that diversion of water for  
12 protection of endangered species must be analyzed as a taking). By urging this Court  
13 to order the State Engineer to prohibit any groundwater pumping in the LWRFS, CBD  
14 urges the Court to cause an unconstitutional taking.

15 **B. Factual and Procedural Background**

16 **1. Order 1169 Proceedings and Pump Test Ordered to Determine**  
17 **Effect on Six Hydrographic Basins Excluding Kane Springs.**

18 In March 2002, the State Engineer issued Order 1169 in response to applications  
19 to appropriate water in six hydrographic basins which did not include the Kane Springs  
20 Valley Hydrographic Basin (“Kane Springs”). CBD Opening Brief at 7:11-14; ROA  
21 at 659, 665 (NRS 533.368 “provides the State Engineer with the authority to withhold  
22 action on pending applications and to advise the applicant of the need for additional  
23 study. The State Engineer finds that further hydrological study is needed before a final  
24 determination can be made on carbonate-rock aquifer system water right applications  
25 in the referenced basins.”). The additional studies and pump test required in Order 1169  
26 were part of the proceedings on those pending water applications, and the State  
27 Engineer specifically required the “applicants or permittees” of water in those basins to  
28 pay for the cost of the study. ROA at 665. In addition to the pump test, Order 1169

1 also held all water applications in abeyance in those six basins pending the results of  
2 the further studies. ROA at 665; CBD Opening Brief at 7:11-17.

3 CBD does not dispute, because it cannot, that Kane Springs was not included in  
4 the pump test or Order 1169. *See* CBD Opening Brief at 5-23. In fact, no water was  
5 pumped from Kane Springs during the Order 1169 proceedings. Furthermore, neither  
6 Lincoln nor Vidler were stakeholders and were not invited to participate in the Order  
7 1169 proceedings. Even after the aquifer test, none of the Order 1169 study participants  
8 recommended that Kane Springs be included in the LWRFS, and the State Engineer  
9 continued to exclude Kane Springs from the Order 1169 study area. ROA at 654-658.

10 This exclusion of Lincoln and Vidler was intentional and deliberate—neither  
11 Lincoln nor Vidler were applicants or parties in those pending applications in the six  
12 hydrographic basins under Order 1169. *See* Order 1169, ROA at 659-666. Further, the  
13 State Engineer never requested that Lincoln and Vidler provide a report on the outcome  
14 of the Order 1169 Pump test, hence none was ever developed. ROA at 36230-36231.

15 **2. Ruling 5712 Granting Water Appropriations to Lincoln and**  
16 **Vidler in Kane Springs Occurred During the Order 1169**  
17 **Proceedings.**

18 In its Procedural Background, CBD fails to point out that, not only was Kane  
19 Springs excluded from the Order 1169 proceedings from 2002 through 2019 (including  
20 Order 1169 A and Interim Order 1303), but the State Engineer also granted  
21 appropriations to Lincoln and Vidler in Kane Springs with a priority date of February  
22 14, 2005. ROA at 699-700. In granting Lincolns and Vidler’s appropriations, the State  
23 Engineer expressly rejected arguments that Kane Springs be included in the Order 1169  
24 proceedings. *Id.* He also explicitly refused to hold water appropriations in abeyance in  
25 Kane Springs as he had done in the six hydrographic basins subject to Order 1169. *Id.*

26 On February 14, 2005, Lincoln and Vidler filed Applications 72218, 72219,  
27 72220, and 72221 to appropriate groundwater in Kane Springs. ROA at 699-700.  
28 Several entities raised concerns that Kane Springs should be included in the Order 1169  
study area and further protested the applications under the relevant statutory procedures.

1 See ROA at 36689-36700. Specifically, the United States Department of the Interior,  
2 Fish and Wildlife Service (“USFWS”) and the National Parks Service (“NPS”)  
3 challenged the exclusion of Kane Springs from Order 1169, requested it be included in  
4 the study area, and demanded that the Lincoln/Vidler water applications be held in  
5 abeyance. See, e.g., ROA at 700-02, 718. In order to resolve the concerns regarding  
6 the exclusion of Kane Springs, Lincoln, Vidler, and the USFWS entered into an  
7 Amended Stipulation for Withdrawal of Protests which addressed concerns about any  
8 impact pumping from Kane Springs Valley would have on the Moapa dace. *Id.* The  
9 NPS challenges were addressed and dismissed by the State Engineer when he granted  
10 the appropriation of water in Kane Springs. ROA at 719.

11 On February 2, 2007, while the Order 1169 proceedings were still pending, the  
12 State Engineer issued Ruling 5712 which partially approved Lincoln and Vidler’s water  
13 applications in Kane Springs, ultimately granting 1,000 afa of water rights in that basin,  
14 the first and only water appropriated in that basin. ROA at 699-721. The State Engineer  
15 again confirmed that Kane Springs would be excluded from the Order 1169 study area  
16 because all evidence presented during the permitting process confirmed that the  
17 appropriation of this limited quantity of water would not have any measurable impact  
18 on the Muddy River Springs. ROA at 719. The State Engineer’s own records show  
19 that this was the first appropriation of water in Kane Springs. ROA at 1063.

20 Critically, the State Engineer specifically rejected the argument that the  
21 appropriation to Lincoln and Vidler would have any impact on prior appropriations in  
22 the down gradient basins, including those being studied pursuant to Order 1169. ROA  
23 at 713. The State Engineer further identified that the groundwater elevations in Kane  
24 Springs were 50 and 75 feet higher than the groundwater elevations in the Coyote  
25 Springs basin directly south, evidence that a barrier to water flow existed between Kane  
26 Springs and Coyote Springs Valley. ROA at 719.

27 He also concluded that “there is not substantial evidence that the appropriation  
28 of a limited quantity of water in Kane Springs Valley Hydrographic Basin will have any

1 measurable impact on the Muddy River Springs that warrants the inclusion of Kane  
2 Springs Valley in Order No. 1169.” ROA at 719. The record further contained an  
3 Amended Stipulation for Withdrawal of Protests entered into by Lincoln and Vidler  
4 with the USFWS in which the USFWS agreed to groundwater pumping in Kane  
5 Springs. ROA at 36689-36700. Moreover, in prosecuting their remaining applications,  
6 Lincoln and Vidler obtained a Biological Opinion from the USFWS that groundwater  
7 pumping in Kane Springs was unlikely to cause any harm to the Moapa dace. ROA at  
8 49906-49973.

9 Although the statutory procedures allow an appeal of orders granting water  
10 appropriations, no protestant nor any other party to this Consolidated Action appealed  
11 Ruling 5712. *See* NRS 533.450. The time period for challenging the exclusion of Kane  
12 Springs from the Order 1169 study area and the appropriation of water to Lincoln and  
13 Vidler expired over 15 years ago without protest from CBD or any other petitioner here.

14 **3. Testimony of CBD Witness Supporting Any Pumping Limit at**  
15 **or Lower Than 8,000 afa Is, at Best, Speculation and Ignores the**  
16 **Facts.**

17 CBD states that no evidence supports pumping 8,000 afa from the entire LWRFS  
18 and urges that any steady-state analysis by the State Engineer is unsupported. CBD  
19 Opening Brief at 15-23. CBD, relying on its expert, makes the following statements in  
20 its Opening Brief that are unsupported, contradicted by express findings, or contradict  
21 known principles:

22 “[P]umping anywhere within the carbonate system will capture water that would  
23 otherwise discharge from the springs and into the river.” CBD Opening Brief at 15:13-  
24 14. This speculative statement is undermined by specific findings that the LWRFS is  
25 heterogenous and that pumping distant from the spring flows would have less impact.  
26 ROA at 60, 64-65. The State Engineer further expressed that the connection between  
27 Kane Springs and the remainder of the LWRFS is “attenuated.” ROA at 53. He further  
28 recognized that the response in Kane Springs “is different compared to” other areas in  
the LWRFS. *Id.*

1 “The pumping test results also suggest that carbonate groundwater in the LWRFS  
2 is essentially a finite, nonrenewable resource.” CBD Opening Brief at 15:18-19. No  
3 party or expert agrees with this unsupported statement. And if this were true (it is not),  
4 the Moapa dace which CBD seeks to preserve would pass into extinction when the  
5 surface water system depletes the finite resource, and the habitat naturally dries  
6 regardless of any pumping.

7 CBD states that groundwater levels and spring flows continued to decrease  
8 despite “above-average precipitation” between 2016 and 2019. However, the State  
9 Engineer asserts that “total precipitation has been below average and since 2006 has  
10 been described as a drought.” Order 1309, ROA at 63.

11 CBD argues that the water in the carbonate system, if pumped, would be  
12 “replenished very slowly or not at all.” CBD Opening Brief at 16:1-2. However, no  
13 evidence supports the position that recharge will not continue to occur through  
14 precipitation and other sources.

15 The CBD states that “there is very little recharge in the LWRFS, meaning that  
16 very little water enters the carbonate aquifer system from precipitation and other  
17 sources.” CBD Opening Brief at 20:24-26 *citing* ROA at 34520, 34533. But the  
18 citations to the Record on Appeal do not support the assertion CBD makes about “very  
19 little recharge.” *Compare id., with* ROA 34520 and 34533.

20 CBD further asserts that even if pumping is stopped, the habitat for the Moapa  
21 dace will not recover. *Id.* at 20:26-28, *citing* ROA at 34544. But that citation to the  
22 record is from CBD’s own expert report rebutting the report of SNWA’s expert, and it  
23 discusses the impact of pumping on senior water rights holders, not the Moapa dace.  
24 *See* ROA at 34544.

25 Further, CBD’s expert witness testified that, although he was aware that the  
26 USFWS is responsible for managing the Moapa dace, he was unaware of either the  
27 Amended Stipulation for Withdrawal of Protests or Biological Opinion from the  
28 USFWS which stated that the USFWS consented to pumping in Kane Springs and that



1 any pumping by Lincoln and Vidler was unlikely to impact the Moapa dace. ROA at  
2 53632-532633; *see also* 36689-36700 and 49906-49973.

3 The evidence upon which CBD bases its argument to prohibit all pumping in the  
4 LWRFS is speculative and demonstrably inaccurate.

### 5 **III. SUMMARY OF THE ARGUMENT**

6 CBD raises two express issues in the argument section of its Opening Brief and  
7 a third in the Factual Summary. First, no substantial evidence supports CBD’s position  
8 regarding the elimination of all groundwater pumping in the six hydrographic basins in  
9 Nevada comprising the LWRFS and from Kane Springs.

10 Second, the determination of whether an appropriation is detrimental to the public  
11 interest, including consideration of environmental impact, must be made at the time of  
12 the appropriation or other application with the State Engineer. CBD’s position that the  
13 State Engineer should have included the environmental impact in Order 1309 is a *non*  
14 *sequitur*. Although Order 1169 issued in March 2002 was originally a proceeding based  
15 on water permit applications, Order 1309 issued over 18 years later was an extra-  
16 statutory and *ultra vires* action taken by the State Engineer not part of a proceeding to  
17 appropriate water—and it should be vacated for that reason.

18 Third, the State Engineer erred in including Kane Springs in the LWRFS super  
19 basin both because the inclusion is not supported by substantial evidence and because  
20 the State Engineer lacks the statutory authority to create super-basins.

### 21 **IV. ARGUMENT**

#### 22 **A. Substantial Evidence Does Not Support the State Engineer’s 23 Arbitrary Limit to Pump 8,000 afa from the LWRFS.<sup>2</sup>**

24 CBD argues that the 8,000 afa groundwater pumping limit is arbitrary and not  
25 supported by the “steady-state” theory upon which CBD argues the State Engineer  
26 relies. CBD Opening Brief at 24-28. CBD argues that, based on its own expert report,  
27

28 <sup>2</sup> *See also* Lincoln and Vidler Opening Brief, § VI.C, pp. 35-38, incorporated herein by  
reference.

1 water levels continue to decline across the LWRFS between 2016-2019 despite “above-  
2 average precipitation and slight reductions in pumping.” *Id.* at 24:7-10. Further,  
3 without citation CBD states that “carbonate groundwater in the LWRFS is essentially a  
4 finite, nonrenewable resource. *Id.* at 15:18-19. Based on CBD’s own position, the  
5 water providing the habitat for the Moapa dace will run dry when this “nonrenewable”  
6 water source bleeds its last drop into the Muddy River regardless of any pumping.

7 The evidence does not support CBD’s assertions and in fact the State Engineer  
8 erred by arbitrarily limiting pumping to 8,000 afa. First, the State Engineer found that  
9 “total precipitation has been below average and since 2006 has been described as a  
10 drought.” ROA at 63. This directly contradicts CBD’s expert who opines that  
11 precipitation has been “above-average.” Additionally, the State Engineer found that  
12 “pumping from locations within the LWRFS that are distal from the Warm Springs area  
13 can have a lesser impact on spring flow than pumping from locations more proximal to  
14 the springs. The LWRFS system has structural complexity and heterogeneity, and some  
15 areas have more immediate and more complete connection than others.” ROA at 60.  
16 Despite these findings regarding the complexity of the LWRFS and despite “near  
17 unanimity” that additional data collection is needed to determine the extent (and  
18 location) of groundwater development, the State Engineer put an arbitrary 8,000 afa  
19 limit on pumping. ROA at 63.

20 Further, in Order 1309, the State Engineer cites no evidence supporting his  
21 determination that pumping from wells in the LWRFS has gradually declined since  
22 completion of the Order 1169 pump test. Despite agreeing that pumping in different  
23 locations throughout the LWRFS will have different impacts on spring flows, the State  
24 Engineer then ignores these findings and imposes an arbitrary pumping limit of 8,000  
25 afa despite the complex nature of the LWRFS. ROA at 58-63. And he cites no evidence  
26 that the LWRFS can only sustain a pumping limit of 8,000 afa. Based on that lack of  
27 evidence, Order 1309 should be vacated.  
28

1 The conclusion supported by CBD—that no groundwater pumping occur in the  
2 LWRFS—is unsupportable for a second reason. The reallocation of appropriated  
3 groundwater would cause an unlawful taking of property in violation of the U.S. and  
4 Nevada Constitutions. *See, e.g., Casitas Mun. Water Dist. v. U.S.*, 543 F.3d 1276 (Fed.  
5 Cir. 2008). In Order 1309 the State Engineer already combined seven previously-  
6 individual basins and reallocated the water in those basins to service the individual over-  
7 appropriated basins. Further, by reducing pumping to 8,000 afa in the new super basin,  
8 previously senior water rights in some basins were reduced to the most junior rights in  
9 the super-basin. This resulted in several ongoing lawsuits for the unlawful taking by  
10 reallocation of water rights. *E.g., Lincoln County Water District v. Nevada*, Case No.  
11 2:20-01891 (D. Nev.).

12 If the State Engineer were to eliminate groundwater pumping entirely, all of those  
13 holding permitted and reallocated rights would also have a claim for unlawful taking.  
14 Indeed, when taken to its conclusion, CBD’s proposal demonstrates the principle  
15 *reductio ad absurdum*. If the State Engineer can reduce pumping to 8,000 afa without  
16 incurring liability to water rights holders, why not to zero afa with the same result?

17 **B. The Comprehensive Statutory Scheme Requires the State Engineer to**  
18 **Consider the Public Interest and Environmental Impact When**  
19 **Granting Water Appropriations—CBD’s Argument for**  
20 **Consideration of Public Interest after the Appropriation Is**  
21 **Unavailing.**

22 CBD argues that the State Engineer erred by failing to consider certain  
23 “environmental impacts as a component of the public interest” when he issued Order  
24 1309 and limited pumping to 8,000 afa instead of prohibiting groundwater pumping  
25 entirely. CBD Opening Brief at 28:23-25. CBD thus requests that Order 1309 be  
26 reversed because it does not do enough to protect the Moapa dace. *Id.* at 28-33.  
27 Although Lincoln and Vidler agree that Order 1309 should be vacated for different  
28 reasons, CBD ignores the statutes and case law providing for analyses of the public  
interest and fails to point to the statutory authority for the State Engineer to even issue  
Order 1309 and create the LWRFS, let alone to consider the environmental impacts. By

1 even combining basins and reallocating water rights, the State Engineer’s actions in  
2 Order 1309 are beyond the scope of authority granted, and Order 1309 should be  
3 vacated and reversed for those reasons.

4 The Nevada Legislature has adopted a comprehensive statutory scheme for  
5 regulating, administering, and appropriating water in Nevada. NRS Chapters 532-544.  
6 As part of those statutes, the State Engineer is prohibited from granting water  
7 appropriations where the appropriation “threatens to prove detrimental to the public  
8 interest . . . .” NRS 533.370(2). In fact, the term “public interest” appears in NRS 533  
9 ten times, all of which involve conditions upon which the State Engineer may grant  
10 appropriations of water. *E.g.*, NRS 533.345 (conditions for granting permit to change  
11 place of diversion, manner of use, or place of use); NRS 533.370(2) and .371(7)  
12 (appropriation may be denied if detrimental to public interest); 533.372 (appropriations  
13 for generation of energy); 533.375 (permitting additional information to guard public  
14 interest before adjudicating applications); NRS 533.436 (temporary permit to prevent  
15 or reduce wildfire); NRS 533.4375 (appropriations for environmental permits); NRS  
16 533.500 and .504 (approving permits for stock water).

17 The Nevada Supreme Court has held that Nevada’s “comprehensive water  
18 statutes are already consistent with the public trust doctrine” because the statutes both  
19 require that water allocations be based on public interest and that the allocations satisfy  
20 all of the elements to safeguard public trust property. *Mineral Cty.*, 473 P.3d at 426.

21 The elements of “public interest” that include any environmental impact must  
22 therefore be considered at the time an application is adjudicated by the State Engineer.  
23 *E.g.*, NRS 533.370(2). As CBD points out, this is in addition to the requirement that  
24 the State Engineer consider impact to existing senior water rights, but again, this is at  
25 the time of appropriation. CBD Opening Brief at 4-5. There is no authority for the  
26 State Engineer to create new procedures which are not authorized by statute.

27 As support that the State Engineer should have considered environmental impact  
28 in issuing Order 1309, CBD cites to inapposite case law. CBD Opening Brief at 29,

1 *citing Pyramid Lake Paiute Tribe*, 112 Nev. at 748, 918 P.2d at 700. In that case, the  
2 Supreme Court concluded that the State Engineer properly considered the  
3 environmental impacts when granting applications for inter-basin transfers of water. *Id.*  
4 at 751-52; 918 P.2d at 702. That case has no applicability here.

5 Order 1309 was not issued pursuant to the statutory grant of authority for  
6 determining detriment to public interest. Indeed, no such evaluation was statutory  
7 because the issuance of Order 1309 was extra-statutory and exceeded the scope of  
8 Legislative enactments. The environmental impact analysis CBD demands in Order  
9 1309 relates to elimination of groundwater pumping for rights already granted and  
10 permitted by the State Engineer rather than analysis during the appropriation process.  
11 The actions CBD seeks are addressed by an entirely different portion of the  
12 comprehensive statutes—statutes not invoked by the State Engineer when he issued  
13 Order 1309.

14 Pursuant to statute (and while the proceedings culminating in Order 1309 were  
15 pending), the State Engineer considered the public interest when he approved Lincoln’s  
16 and Vidler’s water applications in Kane Springs. ROA at 699-721 (Ruling 5712). The  
17 State Engineer specifically found that “there are no permitted or certificated  
18 groundwater rights in Kane Springs . . . .” ROA at 716. And he further found that the  
19 appropriation would not likely impair spring flow downgradient. ROA at 718. The  
20 State Engineer considered and rejected requests to include Kane Springs in the Order  
21 1169 tests. *Id.* Finally, the ruling appropriating water recognized the stipulation entered  
22 by Lincoln and Vidler with the USFWS regarding protection of the Moapa dace habitat.  
23 *Id.*

24 CBD further argues that the State Engineer should have limited pumping in the  
25 LWRFS as part of his obligation to consider the public interest “and avoid ‘take’ of  
26 federal listed endangered species.” CBD Opening Brief at 29:22-23. CBD and the State  
27 Engineer rely on case law which states that “the act of issuing a permit” to appropriate  
28 water that could affect wildlife may result in liability for a “take.” *Id. citing Strahan v.*

1 *Coxe*, 127 F.3d 155 (1st Cir. 1997). Thus, CBD argues, the State Engineer should have  
2 eliminated all groundwater pumping in the LWRFS to protect the Moapa dace. *Id.* at  
3 29-30.

4 The cases relied upon by CBD and the State Engineer are significantly different  
5 than the circumstances here. In *Strahan*, the court enjoined the state from issuing  
6 fishing permits which would likely result in a “take” of endangered species. 127 F.3d  
7 at 164. Here, however, permits appropriating water in Kane Springs have already been  
8 issued by the State Engineer based upon a determination that there would be no  
9 detriment to the public interest. *See, e.g.*, ROA at 699-718. This is consistent with the  
10 Federal entity responsible for managing the Moapa dace, the USFWS as indicated in its  
11 Biological Opinion. Thus, as pointed out above, elimination of pumping would result  
12 in a different kind of taking, one that is constitutionally prohibited.

13 **C. CBD’s Assertion That “Clear Evidence” Supports Inclusion of Kane  
14 Springs Valley in the LWRFS Is Contrary to the Facts in the Record  
and the Authority of the State Engineer.**

15 CBD asserts that the State Engineer properly included Kane Springs in the  
16 LWRFS based on clear evidence. CBD Opening Brief at 1:26-27. This statement  
17 misstates the State Engineer’s findings in Order 1309. Moreover, the inclusion of Kane  
18 Springs is contrary to the evidence, violated Lincoln and Vidler’s due process rights,  
19 and exceeded the authority of the State Engineer because it constitutes unlawful *ad hoc*  
20 rulemaking and amounts to an unauthorized delegation of the power to legislate.<sup>3</sup>

21 Contrary to CBD’s assertion, the State Engineer recognized that water levels in  
22 Kane Springs “are approximately 60 feet higher than those observed in the majority of  
23 carbonate-rock aquifer wells within the LWRFS to the south; consistent with a zone of  
24 lower permeability.” ROA at 53. This is contrasted with CBD’s witness who stated  
25 the difference in elevation is “very low.” CBD Opening Brief at 19:10-11. CBD’s  
26 witness fails to justify his speculation. ROA at 34508.

27  
28 \_\_\_\_\_  
<sup>3</sup> *See* Lincoln/Vidler Opening Brief at § VI.B, pp. 21-34, incorporated herein by  
reference.

1           Moreover, the State Engineer recognized that any response in Kane Springs to  
2 the Order 1169 pump test is “attenuated” at best due to the response “being muted,  
3 lagged, obscured by climate response, or compromised by low-resolution data.” ROA  
4 at 53. But without support, CBD alleges that Order 1309 found “clear evidence of a  
5 hydrologic connection between Kane Springs Valley and adjacent Coyote Spring  
6 Valley.” CBD Opening Brief at 1:26-27.

7           As further indicated in Lincoln and Vidler’s Opening Brief, not only does the  
8 evidence not support inclusion of Kane Springs, the action of doing so is outside the  
9 scope of authority of the State Engineer.

10           **V. CONCLUSION**

11           No evidence supports a cessation of groundwater pumping in the LWRFS and  
12 prohibiting all pumping would cause a taking without just compensation prohibited by  
13 the U.S. and Nevada constitutions. Further, no evidence supports a limitation of  
14 pumping to 8,000 afa let alone elimination of all pumping in the LWRFS.

15           The State Engineer properly considered the public interest and environmental  
16 impact when issuing permits to Lincoln and Vidler in Kane Springs. Those  
17 considerations were appropriately made during the appropriation process—not during  
18 the unauthorized proceedings that resulted in Order 1309.

19           Finally, there is no “clear evidence” that Kane Springs should be included in the  
20 LWRFS as admitted by the State Engineer. Thus, the Court should deny the Center for  
21 Biological Diversity’s Petition for Judicial Review in its entirety.

22           DATED this 24th day of November, 2021.

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**CERTIFICATE OF COMPLIANCE**

We hereby certify that we have read the foregoing Answering Brief and to the best of our knowledge, information and belief, it is not frivolous or interposed for any improper purpose. We further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. We further certify that this brief is proportionately spaced, has a typeface of 14 points or more, and contains 4,648 words. We understand that we may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of Nevada Rules of Appellate Procedure.

DATED this 24<sup>th</sup> day of November, 2021.

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1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I hereby certify that I am an employee of ALLISON  
3 MacKENZIE, LTD., Attorneys at Law, and that on this date, I caused a true and correct  
4 copy of the foregoing document to be served on all parties to this action by electronic  
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6 Court’s Odyssey eFileNV File & Service system to this matter.

7 I hereby certify that I caused a true and correct copy of the foregoing document  
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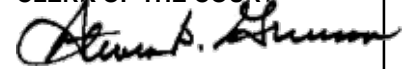
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14 DATED this 24th day of November, 2021.

15 /s/ Nancy Fontenot  
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17 4860-6417-6644, v. 1

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26 COMPANY, INC.

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

29 LAS VEGAS VALLEY WATER DISTRICT,  
30 and SOUTHERN NEVADA WATER  
31 AUTHORITY, et al.,

32 Petitioners,

33 vs.

34 ADAM SULLIVAN, P.E., Acting  
35 Nevada State Engineer, et al.,

36 Respondent.

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

37 **LINCOLN COUNTY WATER DISTRICT'S AND VIDLER WATER**  
38 **COMPANY, INC.'S ANSWERING BRIEF TO OPENING BRIEFS OF LAS**  
39 **VEGAS VALLEY WATER DISTRICT AND SOUTHERN NEVADA WATER**  
40 **AUTHORITY;**  
41 **AND MUDDY VALLEY IRRIGATION COMPANY**

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**NRAP 26.1 DISCLOSURE**

The undersigned counsel of record certify that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the Court may evaluate possible disqualification or recusal.

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

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

3. All parent corporations and publicly-held companies owning 10 percent or more of any of Petitioners' stock:

Vidler Water Company, Inc.'s parent company is Vidler Water Resources, Inc. There is no publicly held company that owns 10% or more of Vidler Water Company, Inc.'s stock.

4. Names of all law firms whose attorneys have appeared for Petitioners in this case:

Lincoln County District Attorney, Snell & Wilmer, L.L.P., Great Basin Law and Allison MacKenzie, Ltd. Snell & Wilmer, L.L.P. has been substituted out of this case and no longer represents any of the Petitioners.

5. If any litigant is using a pseudonym, the litigant's true name:

Not applicable.

DATED this 24<sup>th</sup> day of November, 2021.

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Attorneys for Petitioner **VIDLER WATER  
COMPANY, INC.**

1 LINCOLN COUNTY WATER DISTRICT (“LINCOLN”) and VIDLER  
2 WATER COMPANY, INC. (“VIDLER”), submit their Answering Brief to the Opening  
3 Brief of Las Vegas Valley Water District and Southern Nevada Water Authority  
4 (collectively “SNWA”) and Muddy Valley Irrigation Company’s (“MVIC”) Opening  
5 Brief in accordance with the Court’s minute order issued May 27, 2021. LINCOLN  
6 and VIDLER respond to the SNWA Opening Brief and the MVIC Opening Brief in one  
7 Answering Brief because the arguments of SNWA and MVIC are very similar and  
8 essentially the same. As the Court is aware, SNWA’s and MVIC’s interests in this case  
9 are aligned because SNWA is paying MVIC’s attorney’s fees for representing SNWA’s  
10 interests in this case pursuant to the professional services contract entered into between  
11 SNWA and MVIC.

12 I.

13 INTRODUCTION

14 Petitioner SNWA appeals Order 1309 on three issues: (1) the State Engineer  
15 unlawfully re-quantified decreed water rights in Order 1309, (2) the State Engineer’s  
16 re-quantification was based on incorrect factual findings not supported by substantial  
17 evidence, and (3) the State Engineer improperly made findings regarding conflicts  
18 outside the scope of the administrative hearing below. Opening Brief of SNWA at 1-2.

19 Similarly, Petitioner MVIC states its issues on appeal of Order 1309: (1) the State  
20 Engineer erred in determining the current flow of the Muddy River is sufficient to serve  
21 all decreed rights and reductions in flows that have occurred because of groundwater  
22 pumping in the headwaters are not conflicting with decreed rights, and (2) the State  
23 Engineer erred in determining that ground water pumping of up to 8,000 acre feet  
24 annually (“afa”) can continue to occur and is not a conflict with the Decree despite a  
25 reduction in flow of the Muddy River. MVIC’s Opening Brief at 1-2.

26 In sum, both briefs argue the State Engineer erred in Order 1309 by purportedly  
27 modifying the Muddy River Decree and by violating said Petitioners’ due process rights  
28 because the State Engineer indicated he was not going to address allegations of conflict

1 between LWRFS groundwater pumping and Muddy River Decree rights in the 2019  
2 hearing and then determined in Order 1309 that the current flow in the Muddy River is  
3 sufficient to serve all decreed rights in conformance with the Decree.

4 The State Engineer did not modify the Muddy River Decree in his determination  
5 of the long- term annual quantity of groundwater that can be pumped from the LWRFS.  
6 SNWA's and MVIC's arguments plainly misread the State Engineer's statements in  
7 Order 1309. SNWA's and MVIC's due process rights were not violated because the  
8 State Engineer quantified, just as he said he would do, the amount of groundwater that  
9 can be pumped from the LWRFS.<sup>1</sup> SNWA and MVIC participated as fully as they  
10 wanted to in the hearing regarding that quantification and cannot complain now of the  
11 rationale the State Engineer used to make his quantification based upon the arguments  
12 they made and the evidence they presented. The errors alleged by SNWA and MVIC  
13 are a ruse to further their efforts to shut down certain groundwater pumping in the  
14 LWRFS by LINCOLN/VIDLER and Coyote Springs Investment while allowing  
15 themselves and their allies to pump groundwater in the LWRFS. The SNWA and MVIC  
16 arguments are without merit and should be rejected by the Court. The Petitions for  
17 Judicial Review filed by SNWA and MVIC should be denied.

## 18 II.

### 19 **STATEMENT OF THE CASE AND STATEMENT OF RELEVANT FACTS**

20 LINCOLN/VIDLER's Statement of Relevant Facts regarding the Muddy River  
21 Decree in response to SNWA's and MVIC's arguments in their Opening Brief is set  
22 forth below with the relevant legal argument.

23 ///

24 ///

25 ///

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27 \_\_\_\_\_  
28 <sup>1</sup> LINCOLN/VIDLER disagree with the State Engineer's 8,000 afa quantity of water  
that can be pumped in the LWRFS. That issue, along with other issues, including  
whether the State Engineer has the statutory authority to create a super basin, are the  
subject of LINCOLN/VIDLER's appeal in consolidated Case No. A-21-833572-J.

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III.

**STANDARD OF REVIEW**

For the errors alleged by SNWA and MVIC in Order 1309, the Court’s review of Order 1309 is “in the nature of an appeal” and limited to the record before the State Engineer. *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979). On appeal, a reviewing court must “determine whether the evidence upon which the engineer based his decision supports the order.” *State Engineer v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991) (citing *State Engineer v. Curtis Park*, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985)). The Court determines only whether the State Engineer’s decision is supported by substantial evidence in the record. *Revert*, 95 Nev. at 786, 603 P.2d at 264. Substantial evidence is “that which a reasonable mind might accept as adequate to support a conclusion.” *Bacher v. State Engineer*, 122 Nev. 1110, 1121, 146 P.3d 793, 800 (2006) (a reasonable person would expect quantification of water rights needed and no evidence of such quantification or calculations by the State Engineer is included in the record). The Court may not substitute its judgment for that of the State Engineer, “pass upon the credibility of the witness or reweigh the evidence.” *Id.*

In *Revert v. Ray*, 95 Nev. 782, 787, 603 P.2d 262, 264–65 (1979), the Nevada Supreme Court also noted all interested parties must have had a full opportunity to be heard in the administrative proceedings, the State Engineer must resolve all crucial issues presented and the decisionmaker must prepare findings in sufficient detail to permit judicial review. *Id.* When these procedures, which are grounded in basic notions of fairness and due process, are followed, as they were followed in this case, the courts will uphold the State Engineer’s determination. SNWA and MVIC have nothing to complain about regarding due process – they just do not like the State Engineer’s rationale for his decision in response to their arguments and based in part upon their own evidence. Accordingly, the Court should deny the Petitions for Judicial Review filed by SNWA and MVIC.

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IV.

ARGUMENT

A. The State Engineer did not modify the Muddy River Decree or re-quantify or reduce SNWA’s or MVIC’s water rights in Order 1309.

The State Engineer determined in Order 1309 that 8,000 afa of groundwater is the maximum amount that can continue to be developed over the long term in the LWRFS. ROA at 64. This was based upon the State Engineer’s determination that current flow in the Muddy River is sufficient to serve all decreed rights in conformance with the Muddy River Decree. ROA at 62. SNWA and MVIC contend these findings by the State Engineer modified the Decree, re-quantified and reduced their water rights in violation of the Decree, in violation of NRS 533.085, NRS 533.0245 and NRS 533.3703 and in violation of the prior appropriation doctrine. SNWA Opening Brief at 19-27; MVIC Opening Brief at 13-20.

First, as noted in Order 1309, SNWA and MVIC raised the issue of conflicts with decreed rights based on their interpretation “that lowering of groundwater level anywhere within the LWRFS, whether caused by climate or pumping, eventually has an effect on spring discharge, and that any reduction in spring discharge caused by pumping conflicts with senior decreed rights or harms the Moapa dace or both.” ROA at 61, footnote 317 citing to SNWA Exhibit 7, p. 8-4 and MVIC Exhibit 1, p. 3. The State Engineer noted “SNWA and MVIC agree that capturing discharge from the Warm Springs area springs and the Muddy River are a conflict with the Muddy River decree, which ‘appropriates all of the flow of the said stream, its sources of supply, headwaters and tributaries.’” ROA at 61. Thus, this discussion by the State Engineer in Order 1309 which uses the word “conflict” responded to the conflict contentions raised by SNWA and MVIC that no groundwater should be pumped from the LWRFS and was not an issue raised by the State Engineer without notice to SNWA and MVIC.<sup>2</sup>

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<sup>2</sup> These conflict arguments raised by SNWA and MVIC related to the amount of groundwater that can be pumped from the LWRFS are inconsistent with their

1 The State Engineer observed the general language found in decrees, such as the  
2 language contained in the Muddy River Decree, that the Decree appropriates “all of the  
3 flow of the said stream, its sources of supply, headwaters and tributaries”, is a common  
4 conclusion in decrees to establish finality as to the relative priority of rights so no future  
5 claimants will interject a new priority right. ROA at 61. The State Engineer stated his  
6 general observations that junior appropriators may have rights to excess flows in a  
7 decreed system, groundwater development almost always exists in the tributary  
8 watersheds of decreed river systems even though the groundwater in a headwater or  
9 tributary basin is part of the same hydrologic system as the surface water and there is  
10 no conflict as long as the senior rights can be served. ROA at 61. These general  
11 observations by the State Engineer in no way modified, re-quantified or reduced the  
12 Muddy River Decree or the water rights of any Muddy River decree right holder,  
13 including SNWA or MVIC. SNWA’s and MVIC’s decree modification arguments  
14 require an interpretation of the State Engineer’s general observations about decree  
15 language, such as that contained in the Muddy River Decree, that is plainly not there.  
16 The State Engineer did not mention or discuss the SNWA or MVIC decree rights in his  
17 explanation of his determination, he did not re-quantify or reduce any decreed rights  
18 nor did the State Engineer perform any conflicts analysis with regard to SNWA’s or  
19 MVIC’s decree rights and any LWRFS pumping. The State Engineer determined “what  
20 the sustainability is, what the impact is on the decreed rights”, which is exactly what he  
21 said he would determine as a result of the 2019 hearing at the prehearing conference on  
22 August 8, 2019. ROA at 82; 522 at 12:6-15. As SNWA acknowledged, “the exercise  
23 focused on how much water can be pumped, not who can pump it.” SNWA Opening  
24 Brief at 10:17-18. Again, that is exactly what the State Engineer did in the Order 1309  
25 proceedings – he determined how much water can be pumped. SNWA’s and MVIC’s  
26 arguments the State Engineer modified the Muddy River Decree in Order 1309, re-  
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28 \_\_\_\_\_  
contentions their due process rights were violated because the State Engineer discussed  
conflicts. SNWA’s and MVIC’s due process arguments will be discussed *infra*.

1 quantified decreed rights or reduced decreed rights require a huge leap in the State  
2 Engineer's determinations. The State Engineer did not do anything unlawful in Order  
3 1309 by stating his observations about general decree language and responding to  
4 SNWA's and MVIC's conflict allegations.

5 The State Engineer then stated he disagreed with SNWA and MVIC that the  
6 above language from the Muddy River Decree "means that any amount of groundwater  
7 pumped within the headwaters that would reduce flow in the Muddy River conflicts  
8 with decreed rights." ROA at 61. The State Engineer found "that capture or potential  
9 capture of the waters of a decreed system does not constitute a conflict with decreed  
10 right holders if the flow of the source is sufficient to serve decreed rights." ROA at 61.  
11 The State Engineer disagreed with **SNWA's and MVIC's** conflict interpretation. The  
12 State Engineer disagreed the general finality language in the Decree supported SNWA's  
13 and MVIC's conflict analysis raised to the State Engineer in the Order 1309  
14 proceedings. ROA at 61. The State Engineer's disagreement does not constitute a  
15 modification of the Decree or any change to SNWA's or MVIC's decreed water rights.

16 Next, the State Engineer correctly noted that Muddy River decreed rights were  
17 defined by the number of acres irrigated and diversion rates for each user. ROA at 61.  
18 The State Engineer recognized the sum of diversion rates greatly exceeds the full flow  
19 of the River, but all users are still served through a rotation schedule managed by the  
20 water master. ROA at 61. The State Engineer stated the total amount of irrigated land  
21 in the Decree is 5,614 acres. ROA at 61. The State Engineer noted the flow in the  
22 Muddy River at the Moapa Gage has averaged approximately 30,600 afa since 2015,  
23 which is less than the predevelopment base flow of about 33,900 afa.<sup>3</sup> ROA at 62. The  
24 State Engineer then described his hypothetical pumping scenario if all decreed acres  
25 were planted with a high water use crop like alfalfa, the net irrigation water requirement  
26

27 \_\_\_\_\_  
28 <sup>3</sup> LINCOLN/VIDLER disagree this is the correct predevelopment base flow of the  
Muddy River. *See infra*. LINCOLN/VIDLER were not involved in any prior Order  
1169 or Order 1303 proceedings which may have discussed the Muddy River  
predevelopment base flows.

1 would be 28,300 afa based on a consumptive use rate of 4.7 afa.<sup>4</sup> The State Engineer  
2 then discussed conveyance loss as an additional consideration to serve all decreed users.  
3 ROA at 62. Finally, the State Engineer concluded, in response to the contentions of  
4 SNWA and MVIC in the Order 1309 proceedings there should be no groundwater  
5 pumping in the LWRFS, that the current flow in the Muddy River is sufficient to serve  
6 all the decreed rights in conformance with the Decree and that reductions in flow that  
7 have occurred because of groundwater pumping in the headwater basins is not  
8 conflicting with Decreed rights. ROA at 62. There was no modification by the State  
9 Engineer of the Decree in his analysis, no re-quantification of SNWA or MVIC rights,  
10 no reduction of SNWA or MVIC rights, nor did the State Engineer perform any conflicts  
11 analysis with regard to SNWA's or MVIC's water rights. The arguments the State  
12 Engineer modified the Muddy River Decree in any way in Order 1309 are imaginary  
13 and not supported by the plain statements and language of Order 1309.

14 Finally, SNWA's and MVIC's claims that *any* pumping in the LWRFS impacts  
15 the flows of the Muddy River and their decree rights are inconsistent with their expert's  
16 testimony and expert report conclusions that 4,000 – 6,000 afa can be sustainably  
17 pumped from the LWRFS on a long term basis. ROA at 35-36 and footnote 195 citing  
18 testimony of SNWA at Tr. 921-922 ROA at 53346; SNWA Exhibit 7 at pp. 8-1 through  
19 8-5 ROA at 42011-42015; SNWA Exhibit 9, p. 27 ROA at 42199. Their claim that *any*  
20 pumping in the LWRFS impacts the flows of the Muddy River and their decree rights  
21 is inconsistent with SNWA's acknowledgement that "no discernible responses were  
22 observed north of the Kane Springs Fault and west of the MX-5 and CSI wells near the  
23 eastern front of the Las Vegas Range" from the Order 1609 test pumping. ROA at  
24 41949. The entire Kane Springs basin is located north of the Kane Springs Fault and  
25 Petitioners' wells are located north of the Kane Springs Fault. ROA at 36258. SNWA's  
26 and MVIC's claim that *any* pumping in the LWRFS impacts the flows of the Muddy  
27  
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<sup>4</sup> The State Engineer's hypothetical will be discussed in further detail *infra*.



1 River and their decree rights is inconsistent with SNWA’s agreement that water can be  
2 pumped in Garnet Valley.<sup>5</sup>

3 If SNWA truly believed all pumping in the LWRFS conflicts with the Muddy  
4 River Decree, it would not have supported the change applications recently filed by NV  
5 Energy to pump water in Garnet Valley. *See* Georgia Pacific Opening Brief at pp. 11-  
6 13. The pending change applications in Garnet Valley should be denied outright based  
7 on SNWA’s and MVIC’s contention that all pumping in the LWRFS impacts Muddy  
8 River rights. Likewise, if SNWA believed all pumping in the LWRFS conflicts with  
9 Muddy River Decree rights, SNWA would retire and withdraw all its groundwater  
10 rights in the LWRFS. The arguments made by SNWA and MVIC should be placed in  
11 context – they are designed to allow SNWA or its allies to pump water in the LWRFS  
12 but shut down groundwater pumping in the LWRFS by others such as  
13 LINCOLN/VIDLER and Coyote Springs Investment.

14 In sum, the State Engineer did not modify the Muddy River Decree in Order 1309  
15 and his discussion that is so strenuously objected to by SNWA and MVIC was in  
16 response to SNWA’s and MVIC’s own arguments of conflict. SNWA’s and MVIC’s  
17 arguments that NRS 533.085, NRS 533.0245 and NRS 533.3703 and the prior  
18 appropriation doctrine were violated are premised on the fictitious conclusion the State  
19 Engineer modified the Muddy River Decree in Order 1309. Because the State Engineer  
20 did not modify the Muddy River Decree in Order 1309, there has been no violation of  
21 NRS 533.085, NRS 533.0245 and NRS 533.3703 and the prior appropriation doctrine.  
22 Accordingly, all the arguments of SNWA and MVIC should be rejected.

23 \_\_\_\_\_  
24 <sup>5</sup> SNWA conducted a flawed multiple linear regression analysis to determine the  
25 “connectivity” of groundwater levels for basins within the LWRFS. Lincoln’s and  
26 Vidler’s expert witness conducted the multiple linear regression analysis correctly and  
27 found that only groundwater levels in the Garnet Valley groundwater basin are  
28 statistically correlated to the groundwater levels from well EH-4 in the Muddy River  
Area. ROA at 53510-53511. Per SNWA’s multiple linear regression analysis, the only  
groundwater basin in the LWRFS that *IS* statistically correlated to flows of the Muddy  
River is Garnet Valley. Even though its regression analysis says Garnet Valley is  
statistically correlated to the Muddy River Area, SNWA hypocritically agreed to  
cooperate in furthering NV Energy’s recent change applications to pump more water in  
Garnet Valley .

1           **B. MVIC does not have rights to the total aggregate remaining volume of**  
2           **the Muddy River not otherwise allocated.**

3           MVIC incorrectly maintains the general language used by the Court in granting  
4 water to MVIC in the Decree which provides: “all waters of said Muddy River, its head  
5 waters, sources of supply and tributaries, save and except the several amounts and rights  
6 hereinbefore specified and described” to the other parties in the action, is a separate  
7 water right preserved to it. *See*, MVIC’s Opening Brief at 4-6, 11; SNWA Opening  
8 Brief at 22. MVIC contends it received a specific award of water pursuant to the  
9 quantified determinations of the Decree, i.e., 36.2588 cfs, three State Engineer  
10 certificates and Application No. 1611. MVIC Opening Brief at 4:4-9. MVIC then  
11 argues it gets “any additional flow from the Muddy River” not otherwise allocated by  
12 the specific awards” and “the total aggregate remaining volume of the river” based upon  
13 the Decree language in Paragraph Seventh and Twelfth. MVIC Opening Brief at 4:10,  
14 4:16, 5-6.

15           Paragraph Seventh of the Decree provides:

16           “Seventh: That as between the parties to the above-entitled action, the  
17 Muddy Valley Irrigation Company is declared and decreed to have  
18 acquired by valid appropriations and beneficial use and to be entitled to  
19 divert and use upon the lands described in the amended complaint and  
20 more particularly described in the order of determination, all waters of  
21 said Muddy River, its head waters, sources of supply and tributaries,  
22 save and except the several amounts and rights hereinbefore specified  
23 and described and awarded and decreed to the other parties to this  
24 action and to the Moapa Indian Reservation . . .” ROA at 33790.

25           In Paragraph Twelfth, the Decree states:

26           “Twelfth: That the aggregate volume of the several amounts and  
27 quantities of water awarded and allotted to the parties named in said  
28 order of determination, which include all of the parties to said action  
and the said Moapa Indian Reservation, 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 head waters, sources of supply and  
tributaries.” ROA at 33792-93.

          MVIC’s argument that it gets any flow from the Muddy River in addition to the  
specific sums allocated and quantified to it (36.2588 cfs, three State Engineer

1 certificates and Application No. 1611), ignores the order of determination tables in the  
 2 Decree:

3 **SUMMARY OF ALLOTMENTS AND CERTIFICATES**

4 <i>Claimant</i>	5 <i>Acreage</i>	6 <i>C.F.S. flow</i>	
		7 <i>Summer</i>	8 <i>Winter</i>
9 Jacob Bloedel	2	.0286	.02
10 Moapa & Salt Lake Produce Co.	155	2.215	0
11 Isaiah Cox and wife	10	.143	0
12 J. H. Mitchell	3	.043	0
13 George Baldwin	16	.2286	0
14 Sadie George	2.1	.0300	0
15 John F. Perkins	2	.0286	.02
16 Los Angeles & Salt Lake Ry	.....	.04646	.04646
17 Livingston and Smith	100	2.286	0
18 Knox and Holmes	95	1.357	0
19 W. J. Powers	29	.4143	.29
20 Muddy Valley Irr. Co.	2244.80	32.0068	22.448
21 Muddy Valley Irr. Co. (Cert. 58)	398.11	.....	3.98
22 Muddy Valley Irr. Co. (Cert. 59)	425.2	4.252	.....
23	846.6	.....	8.466
24 Muddy Valley Irr. Co. (Cert. 60)	80		.8
25 Joseph Perkins	30	.428	0
26 Moapa Indian Reservation	87	1.242	.87

19 ROA at 33798, and specific MVIC claim details found at ROA 33801-33806.

20 MVIC's water rights described in Paragraph Seventh of the Decree as "all waters  
 21 of said Muddy River, its head waters, sources of supply and tributaries, save and except  
 22 the several amounts and rights hereinbefore specified and described and awarded and  
 23 decreed to the other parties to this action and to the Moapa Indian Reservation" were  
 24 quantified in the order of determination tables based upon beneficial use upon the lands  
 25 described in the amended complaint. ROA at 33798, 33801-33806. The water rights  
 26 granted in the Decree were based upon each user's beneficial use of water. ROA at  
 27 33790. Paragraph Twelfth confirms that the aggregate volume and the amounts and  
 28 quantities awarded and allotted to the parties, including the quantity awarded and

1 allotted to MVIC, is the total available flow of the Muddy River, its head waters, sources  
2 of supply and tributaries. ROA at 33792-93. There is and was no right awarded to  
3 MVIC to use “all of the flows of the Muddy River” or “the total aggregate remaining  
4 volume of the river” independent of the beneficial use of the water on the irrigated land  
5 described in the Decree as MVIC contends. MVIC is entitled to protection of its  
6 specified, quantified and described water rights as defined above in the Decree and no  
7 more.

8 **C. SNWA’s Irrigated Acres and Consumptive Use of Water Under the**  
9 **Muddy River Decree are Wrong.**

10 In Order 1309, the State Engineer attempted to analyze the long-term annual  
11 quantity of water available for pumping in the LWRFS without impacting decreed rights  
12 on the Muddy River under the Muddy River Decree. ROA at 61-62. In order to  
13 determine how much water was available to the decreed lands on the Muddy River, the  
14 State Engineer calculated a hypothetical annual consumptive use under the Decree  
15 using the Decree’s irrigated acreage. ROA at 62. SNWA and MVIC attack the State  
16 Engineer’s calculation by arguing he used the wrong acreage under the decree and  
17 underestimated consumptive use.

18 On the contrary, the State Engineer did use the correct acreage, but significantly  
19 overstated the consumptive use of water by the lands within MVIC.

20 **1. Muddy River Decree Irrigated Acreage.**

21 In March 1920, the Honorable William E. Orr issued the Muddy River Decree  
22 (“Decree”). *See* ROA at 33770-33816. The Decree determined how much of the  
23 Muddy River flows can be diverted and used to irrigate specific parcels of land in the  
24 Muddy River area. *See* ROA at 33770-33816. The Muddy River adjudication  
25 proceedings involved water rights, including headwaters and tributaries, to the Muddy  
26 River in Clark County, Nevada. *See* ROA at 33770, 33771, 33786, 33815. The Muddy  
27 River adjudication proceedings did not involve waters in Lincoln County or Kane  
28 Springs.

1 The headwaters and tributaries of the Muddy River were described in those  
2 proceedings as only the springs and waters developed by the claimants and as  
3 adjudicated in the Decree. ROA at 33796, 33812. The appropriators and the  
4 appropriation sources which are tributary to the Muddy River are named in the Decree.  
5 ROA at 33799-33801, 33809. The tributaries recognized in the Decree were: Bloedel  
6 Spring, Big Spring, Jones Spring, High Springs, Rock Cabin Spring, Cox Spring and  
7 Baldwin Spring. ROA at 33799-33801, 33809. The appropriators with tributary  
8 sources are: Bloedel, Moapa & Salt Lake Produce Co., Isaiah Cox and Anna Cox,  
9 George Baldwin, Sadie George, Joseph Perkins, D.H. Livingston and Richard Smith  
10 and G.S. Holmes and Julie May Knox. ROA at 33799-33801, 33809. The Muddy  
11 Valley Irrigation Company is not listed as an appropriator in the Muddy River Decree  
12 *with tributary sources*. ROA at 33801-33806. The only basin mentioned in the Muddy  
13 River Decree adjudication proceedings as contributing water to the Muddy River during  
14 an extreme storm event was Meadow Valley Wash, not any basins or waters in Lincoln  
15 County. *See* Addendum to LINCOLN/VIDLER Opening Brief, Answer of Defendants  
16 G.S. Holmes and Julia May Knox, ¶ V, p. 9:18-20, from the Muddy River adjudication.<sup>6</sup>

17 The Decree also determined in which season specific lands could be irrigated:  
18 some during the summer only, some during the winter only, and some during both the  
19 summer and winter. ROA at 33770-33816. Four hundred and twenty-five and two  
20 tenths acres (425.2 acres) of land could be irrigated only in the summer irrigation season  
21 from May 1<sup>st</sup> to September 30<sup>th</sup>, 153 days. ROA at 33770-33816. One thousand three  
22 hundred and twenty-four and seventy-one one hundredths acres (1,324.71 acres) could  
23 be irrigated in winter only from October 1<sup>st</sup> to April 30<sup>th</sup>, 212 days. ROA at 33770-  
24 33816. Two thousand eight hundred and thirty-five and nine one hundredths acres  
25 (2,835.90 acres) could be irrigated in both the summer and winter combined. ROA at  
26 33770-33816.

27 \_\_\_\_\_  
28 <sup>6</sup> Petitioners' groundwater rights are not headwaters or tributaries to the Muddy River,  
a river system entirely within Clark County which was adjudicated as surface water  
rights pursuant to the Muddy River Decree.

1 The Decree further defined the flow at Baldwin Spring to be 0.8292 cubic feet  
 2 per second (cfs) through a Supplemental Order of Determination. ROA at 33789,  
 3 33809. This flow rate is equivalent to the amount of water needed to irrigate 58.09  
 4 acres of land year-round. ROA at 33789.

5 The Decree also recognized that MVIC's Permit 1611 had not yet been  
 6 certificated but was diverting and appropriating the waters of the Muddy River. ROA  
 7 at 33813. Accordingly, Judge Orr granted water appurtenant to the land described in  
 8 the permit but recognized that the specific quantity of water would be determined in a  
 9 certificate to be issued in the future. ROA at 33790-33791. In April 1926, Certificate  
 10 1199 was issued for Permit 1611, granting water for the irrigation of 970 acres in the  
 11 winter season.<sup>7</sup> With the addition of this certificate, there are 5,613.9 acres (5,614 acres)  
 12 of land that can be irrigated with water from the Muddy River in the Decree. The  
 13 following chart summarizes the irrigated acreage recognized under the Decree:

<u>Decree</u> Summer and Winter Irrigation Acreage	<u>Decree</u> Summer Only Irrigation Acreage	<u>Decree</u> Winter Only Irrigation Acreage	<u>Decree</u> Baldwin Springs	<u>Certificate</u> 1199 Winter Only Irrigation Acreage	<u>Total</u> Acreage
2.835.90	425.2	1.324.71	58.09	970	5.613.9

18 The State Engineer correctly recognized there are 5,614 acres of land that can be  
 19 irrigated under the Decree. ROA at 61.

20 **2. State Engineer's Muddy River Decree Irrigated Acreage and**  
 21 **Consumptive Use.**

22 For purposes of his consumptive use analysis, the State Engineer assumed all this  
 23 land was placed into production with a high-water use crop like alfalfa that has a  
 24 consumptive use (the amount of water that is consumed by the plant, along with the  
 25 water that infiltrates into the ground or evaporates) of 4.7 acre-feet annually (afa). The  
 26 State Engineer calculated the net irrigation water requirement (the amount of water  
 27

28 <sup>7</sup> See Permit 1611, Certificate 1199 available at [http://images.water.nv.gov/images/Book\\_Records/01000/1611.pdf](http://images.water.nv.gov/images/Book_Records/01000/1611.pdf)

1 needed to irrigate the land and raise a high water use crop of alfalfa) of all the land in  
2 the Decree would be 28,300 afa. ROA at 62. Contrary to SNWA and MVIC's  
3 assertions, this calculation significantly overstated the water requirements of the lands  
4 within the MVIC using the consumptive use method. This means that the water  
5 requirements are over 10,000 afa less than the amount calculated by the State Engineer.

6 LINCOLN/VIDLER have two observations about the State Engineer's net  
7 irrigation water requirement analysis.

8 **a. The State Engineer overstated the Decree acreage**  
9 **consumptive use because of a math error.**

10 The first observation is that 5,614 acres multiplied by a "duty" of 4.7 afa per  
11 irrigated acre equals 26,385.8 afa, not 28,300 afa. The State Engineer's consumptive  
12 use analysis overstates consumptive use under the Decree by 1,915 afa - - even under  
13 his hypothetical formula if all the acreage grows a high water use crop such as alfalfa.  
14 Order 1309 has a math error.

15 **b. The State Engineer overstated the Decree acreage**  
16 **consumptive use because he failed to use his own basin**  
17 **specific published consumptive use requirements for**  
18 **alfalfa.**

19 The second observation is that the Decree separated out land that can be irrigated  
20 into three categories: 1) land that can be irrigated in the summer, 2) land that can be  
21 irrigated in the winter, and 3) land that can be irrigated in both the summer and winter.  
22 In his hypothetical analysis, the State Engineer applied a uniform consumptive use rate  
23 of 4.7 afa to all the land that can be irrigated in the Decree no matter the season of use  
24 of the land. This uniform consumptive use rate overstates the consumptive use of water  
25 used under the Decree.

26 The Decree encompasses land from three separate groundwater basins  
27 (California Wash, Muddy River Springs Area, and the Lower Moapa Valley). ROA at  
28 85. Each groundwater basin has its own consumptive use rate for alfalfa according to

1 the State Engineer's *Evapotranspiration and Net Irrigation Water Requirements for*  
2 *Nevada* report. ROA at 62. For each basin, the consumptive use is different for summer  
3 irrigation only, winter irrigation only, and summer and winter irrigation combined.

4 To derive a net irrigation water requirement more accurately for lands included  
5 in the Muddy River Decree, the amount of acreage in each groundwater basin should  
6 be multiplied by its basin-specific consumptive use rate for alfalfa for the season that  
7 the land is to be irrigated. There are 324.1 acres of land in California Wash that can be  
8 irrigated in both summer and winter under the Decree. According to the  
9 *Evapotranspiration and Net Irrigation Water Requirements for Nevada* cited by the  
10 State Engineer in Order 1309, the consumptive use of alfalfa in this basin is 4.8 afa for  
11 both summer and winter irrigation. ROA at 54515. This would give California Wash  
12 a net irrigation requirement of 1,555.68 afa.

13 In the Muddy River Springs Area, the Decree has 228.09 acres of land that can  
14 be irrigated in both summer and winter. The consumptive use of alfalfa in the Muddy  
15 River Springs Area is 4.7 afa for both summer and winter irrigation pursuant to the State  
16 Engineer's *Evapotranspiration and Net Irrigation Water Requirements for Nevada*  
17 publication. ROA at 54520. The net irrigation requirement for the Muddy River  
18 Springs Area is 1,072.02 afa.

19 For the Lower Moapa Valley, the Decree allows 2,341.8 acres to be irrigated in  
20 both summer and winter, 425.2 acres to be irrigated in the summer only, and 2,294.71  
21 acres to be irrigated in the winter only. The consumptive use of alfalfa in Lower Moapa  
22 Valley is 4.5 afa for both the summer and winter irrigation seasons combined, 3.06-acre  
23 feet in the summer season only, and 1.44-acre feet in the winter season only per the  
24 State Engineer's net irrigation water requirements. ROA at 54519. Applying the  
25 correct consumptive use per season to the Decreed acreage per season, the net irrigation  
26 requirement for Lower Moapa Valley is 15,143.59 afa.

27 Using these consumptive use figures correlated to basin net irrigation  
28 requirements, the total net irrigation requirement for all the land in the Decree is



1 17,771.28 afa instead of the 28,300 afa used by the State Engineer in his hypothetical  
 2 analysis. This amounts to more than a 10,000 afa difference in consumptive use  
 3 requirements under the Decree.

4 The following chart summarizes the correct consumptive use for each basin in  
 5 the appropriate season under the Decree:

Basin	Acreage	Consumptive Use for Alfalfa in afa	Total afa
California Wash Basin Summer and Winter	324.1	4.8	1,555.68
Muddy River Basin Summer and Winter	228.09	4.7	1,072.02
Lower Moapa Valley Summer and Winter	2,341.8	4.5	10,538.10
Lower Moapa Valley Summer	425.2	3.06	1,301.11
Lower Moapa Valley Winter	2,294.71	1.44	3,304.38
<b>Total Consumptive Use for all acreage</b>			<b>17,771.59</b>

14 Thus, as the State Engineer correctly noted in Order 1309, current flow in the  
 15 Muddy River is sufficient to serve all decreed rights in conformance with the Muddy  
 16 River Decree. ROA at 62. Indeed, it appears that significantly more water than 8,000  
 17 afa can be withdrawn from the LWRFS without impacting the Muddy River.  
 18

19 **3. SNWA Overstates its Muddy River Decree Water Rights and**  
 20 **Consumptive Use.**

21 SNWA's claim that the amount of land that can be irrigated under the decree is  
 22 5,125.76 acres. See SNWA's Opening Brief at 27. Not only is this total acreage wrong  
 23 it appears that SNWA is using this acreage to erroneously calculate a pre-development  
 24 flow rate to match inconsistent and irregular measurements of pre-development flow  
 25 values taken over one-hundred years ago.

26 SNWA's Opening Brief states its Permit 1611/Certificate 1199 allows for  
 27 2,784.75 acres to be irrigated in the winter under the Decree. See SNWA's Opening  
 28 Brief at 27. Permit 1611/Certificate 1199 specifically states that the duty of water under

1 the permit/certificate is 9.70 cfs from October 1<sup>st</sup> to May 1<sup>st</sup> each year (winter irrigation),  
2 which is equivalent to 970 acres of land.<sup>8</sup> SNWA does not use 970 acres of winter  
3 irrigation in its calculation of its irrigated rights for Permit 1611 – SNWA leaves this  
4 out completely. Instead, SNWA changes the decreed MVIC right that grants 2,244.80  
5 acres of both summer and winter irrigation and erroneously claims 2,784.75 acres for  
6 the winter irrigation acreage under Permit 1611/Certificate 1199. Thus, the total  
7 number of irrigated acres claimed by SNWA under Permit 1611/Certificate 1199 is  
8 incorrect.<sup>9</sup>

9 SNWA’s calculations appear to assume Change Application 21873 filed in 1964,  
10 changed the amount of land that can be irrigated under the Decree. However, a change  
11 application cannot increase the amount of irrigated acreage that has been granted in a  
12 Decree; accordingly, SNWA’s increase in irrigated acreage under the Decree based on  
13 Change Application 21873 is neither possible nor lawful. SNWA ignores Permit 21873  
14 language which specifically states: “Total acreage under this certificate is 970 acres.”<sup>10</sup>  
15 The certificate that accompanies Permit 21873/Certificate 8325 states “appropriation is  
16 the same as that of certificate 1199.” ROA at 44190-44194. Permit 21873/Certificate  
17 8325 clearly limit the allowable land that can be irrigated to 970 acres. Additionally,  
18 SNWA does not include the acreage under George Baldwin and Wife (Baldwin  
19 Springs). Thus, SNWA’s acreage calculation and the Muddy Valley Irrigation  
20 Company’s acreage statement, which mirrors SNWA’s number, are erroneous and  
21 should not be relied upon by the Court for any purposes in this proceeding.

22 The table below shows the differences in acreage between the Decree and  
23 SNWA’s calculation:

24 ///

25 \_\_\_\_\_  
26 <sup>8</sup> See footnote 7 *supra*.

27 <sup>9</sup> After review of SNWA’s Opening Brief, LINCOLN/VIDLER informally asked  
28 SNWA to explain its Muddy River Decree irrigated acreage calculation. SNWA never  
responded to LINCOLN/VIDLER’s request.

<sup>10</sup> See Permit 21873, Certificate 8325 available at [http://images.water.nv.gov/images/Book\\_Records/21000/21873.pdf](http://images.water.nv.gov/images/Book_Records/21000/21873.pdf)

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Original Water Claimant	Proper Decreed Acreage		SNWA	
	Summer Acreage	Winter Acreage	Summer Acreage	Winter Acreage
Bloedel	2.00	2.00	2.00	2.00
Moapa & Salt Lake	155.00	155.00	155.00	155.00
Cox	10.00	10.00	10.00	10.00
Mitchell	3.00	3.00	3.00	3.00
Baldwin	16.00	16.00	16.00	16.00
George	2.10	2.10	2.10	2.10
Perkins	2.00	2.00	2.00	2.00
Los Angeles & Salt Lake	-	-		
Livingston and Smith	160.00	160.00	160.00	160.00
Knox and Holmes	95.00	95.00	95.00	95.00
Powers	29.00	29.00	29.00	29.00
MVIC	2,244.80	2,244.80	2,244.80	<b>2,784.75<sup>11</sup></b>
MVIC Cert 58		398.11		398.11
MVIC Cert 59	425.20		425.20	
MVIC Cert 59		846.60		846.60
MVIC Cert 60		80.00		80.00
Perkins	30.00	30.00	30.00	30.00
MIR	87.00	87.00	87.00	87.00
George Baldwin and Wife	58.09		(Missing)	(Missing)
MVIC (Cert 1199)		970.00		(Missing)
Summer Only	483.29		425.20	
Winter Only		2,294.71		1,864.66
Summer and Winter	2,835.90		2,835.90	
<b>Total</b>	<b>5,613.90</b>		<b>5,125.76</b>	

<sup>11</sup> Misstated as set out above.

1 In its Opening Brief, SNWA erroneously claims there are 3,261 acres of summer  
2 acreage<sup>12</sup> and 4,700 acres of winter acreage under the Decree. See SNWA Opening  
3 Brief at 27-28. SNWA uses a diversion rate equal to 10.34 af/acre in summer (153  
4 irrigation days) and 7.24 af/acre in winter (212 irrigation days). These diversion rates  
5 have a weighted average of 8.54 af/acre.<sup>13</sup> Based upon its claimed irrigated acreage and  
6 8.54 af/acre duty, SNWA argues it is entitled to a total diversion of water under the  
7 Decree of 33,900 afa – which SNWA claims is the pre-development flow of the river.

8 As set forth above, this claim is not correct because the winter acreage that  
9 SNWA uses is not correct. Under the Decree, there are 5,130.61 acres that can be  
10 irrigated in the winter not 4,700 acres. Applying SNWA’s weighted average of 8.54  
11 af/acre to the proper acreage of 5,130 would yield a total diversion of water under the  
12 Decree of over 36,000 afa which would not match SNWA’s arbitrary pre-development  
13 flow of the Muddy River.<sup>14</sup>

14 It appears SNWA’s erroneous claim of a Muddy River diversion rate of 33,900  
15 afa is designed to match SNWA’s erroneous estimates of pre-development flow of the  
16 Muddy River to provide legitimacy to both of its erroneous calculations by showing  
17 they match. Yet neither is based upon the irrigated acreage provided in the Decree.

18 **D. SNWA’s claimed injury and impairment based upon Intentionally**  
19 **Created Surplus Credits is specious.**

20 SNWA has claimed that unspecified pumping in the LWRFS is causing injury to  
21 SNWA by decreasing the amount of Tributary Conservation Intentionally Created  
22 Surplus (“ICS”) credits that SNWA is able to claim each year. SNWA’s assertions are  
23 baseless.

24 \_\_\_\_\_  
25 <sup>12</sup> 425.20 of summer only acreage plus 2,2835.90 of acreage that can be irrigated in both  
26 summer and winter. 1,864.66 of winter only acreage plus 2,835.90 acreage that can be  
27 irrigated in both summer and winter.

28 <sup>13</sup> This amount is derived by applying the summer duty to the summer acres, the winter  
duty to the winter acres, and taking a weighted average based on days per season to  
establish the annual diversion of all rights.

<sup>14</sup> The State Engineer noted the sum of diversion rates greatly exceeds the full flow of  
the River, but all users are still served through a rotation schedule managed by the Water  
Master. ROA at 61.

1 SNWA uses water from the Muddy River to create ICS credits by increasing  
2 tributary flows into the mainstem of the Colorado River. ROA at 46359. By allowing  
3 Muddy River water that would otherwise be used to flow to the Colorado River, the  
4 unused water is stored in Lake Mead to conserve the water levels in Lake Mead. SNWA  
5 can then use these credits in future years when the water is needed.

6 SNWA owns and leases both decreed Muddy River water rights and Muddy  
7 Valley Irrigation Company (“MVIC”) shares (which allows the shareholder to take a  
8 portion of the MVIC decreed water) to create ICS credits. ROA at 46392 and 46398.

9 In its annual ICS reports, SNWA breaks the Muddy River into two segments: 1)  
10 the upper Muddy River defined as the reach from its headwater to approximately the  
11 Glendale Gage and 2) the lower Muddy River defined as the reach from the Glendale  
12 Gage to where it flows into Lake Mead. ROA at 46361. As defined, the lower Muddy  
13 River encompasses the lands administered by MVIC. ROA at 46361. Thus, water  
14 rights above MVIC fall into the upper Muddy River and water rights MVIC controls  
15 are in the lower Muddy River. ROA at 46361.

16 The gage located on the Muddy River near Glendale, NV (USGS monitoring  
17 location number 09419000), (the “Glendale gage”) is the measuring point for both the  
18 water volume ICS calculation which reaches Lake Mead and the volume of water that  
19 continues to flow annually to MVIC. ROA at 46365. (Exhibit A of the Forbearance  
20 Agreement between the Lower Colorado River parties dated December 13, 2007).

21 As stated above, SNWA creates an ICS credit by allowing the water it controls  
22 for both its leased and owned decreed Muddy River water rights and MVIC shares to  
23 reach Lake Mead. In this proceeding, SNWA claims it is injured from  
24 unknown/unspecified junior groundwater pumpers because that pumping *could*  
25 intercept groundwater before it reaches and becomes surface water flows of the Muddy  
26 River. ROA at 42009. SNWA’s alleged injury is fallacious for several reasons:  
27  
28

- 1 • First, SNWA’s reliance on pre-development flows of the Muddy River is  
2 based on faulty and insufficient data that overstates pre-development  
3 flows;
- 4 • Second, SNWA speculates that the alleged depletion in flows is based on  
5 groundwater pumping rather than other documented causes like climate  
6 and drought or river conditions;
- 7 • Third, SNWA leases water that has been moved out of the MVIC upstream  
8 above the point where the water is measured entering the MVIC, but bases  
9 its injury on pre-development flows that include the volume of water that  
10 SNWA leases that has been transferred out of the MVIC;
- 11 • Fourth, SNWA artificially uses the full volume of its claimed pre-  
12 development flow (33,900 afa) every year to calculate its purported ICS  
13 impairment credit when the Muddy River flow varies year to year based  
14 upon weather and river conditions;
- 15 • Fifth, SNWA does not share in losses on the river, increasing its share of  
16 water and in fact increasing its ICS credits; and
- 17 • Sixth, SNWA uses the Moapa gage to create a fictitious harm while the  
18 Glendale gage is the gage used to determine both the water that reaches the  
19 MVIC and the ICS calculations.

20 **a. Predevelopment flows are overstated.**

21 SNWA compares the current flows of the Muddy River with purported historical  
22 “pre-development” flows to show injury by alleged groundwater pumping in the  
23 LWRFS to SNWA’s ICS credits. However, there are several reasons why the volume  
24 of water that reaches the Muddy River is less than SNWA’s claimed “pre-development”  
25 flows.

26 SNWA claims the “pre-development” flow is determined from measurements at  
27 the gage located on the Muddy River near Moapa, NV (USGS monitoring location  
28 number 09416000), (the “Moapa gage”). However, even a cursory review of the data

1 from the Moapa gage shows that the data only has two complete years of flow data:  
2 1914 and 1917. Calendar years 1913, 1915, 1916, and 1918 contain significant data  
3 gaps of six months or more. After 1918, the Muddy River at the Moapa gage is not  
4 measured again until 1944. The use of this inadequate data to make an estimation of  
5 “pre-development” flows of the Muddy River requires significant guesswork to fill in  
6 data for numerous months and years when measurements were not made. Again, this  
7 pre-development quantity is notable for its “coincidence” in matching the flawed  
8 SNWA calculation of the diversion rate for decreed irrigated acreage creating a flow of  
9 33,900 afa.

10 **b. Reasons why the flows into the MVIC are less than the “pre-**  
11 **development” flows.**

12 There are several reasons, other than groundwater pumping, that SNWA ignores  
13 which affect flows of the Muddy River.

14 **i. Climate change.**

15 Significant climate change and warming is occurring now as compared to over  
16 100 years ago as shown by the Palmer Drought Severity Index. ROA at 36586. This  
17 exhibit indicates the drought occurring since the Muddy River Decree was implemented  
18 in the 1920’s has more than doubled compared to the 2010-2019 decade. Nevada has  
19 been in a drought for many years resulting in less flows in the Muddy River.

20 This is demonstrated by reviewing the US Geological Survey gage data for the  
21 Muddy River near Moapa (Moapa Gage). ROA at 4912-4913. A cursory review of  
22 these data show that flows in the Muddy River have decreased overtime long before  
23 any pumping effects would have impacted flows in the Muddy River. Although SNWA  
24 provides a section on “climate change” in its expert report, SNWA clearly did not  
25 conduct a rigorous analysis of the effect of climate change on Muddy River flows, but  
26 included a section in its report so it could state it addressed the issue.

27 Both a lack of precipitation, as during drought conditions, and an intense  
28 precipitation event can affect the hydrology of the LWRFS. This was evaluated by

1 comparing water levels in monitor wells CSVM-4 in northern Coyote Springs Valley  
2 and KMW-1 in Kane Springs Valley to the Palmer Drought Severity Index for regions  
3 3 and 4, that include the LWRFS and surrounding areas of southern Nevada. ROA  
4 36589 and 36591. What these charts show are responses to a significant precipitation  
5 event that occurred in 2005 (where the Palmer Drought Severity Index is peaking) with  
6 a corresponding rise in water levels. Water levels decreased along with the drought  
7 occurrence as shown by the Palmer Drought Severity Index trending back into the  
8 negative values representing the lack of precipitation and the continuation of the  
9 drought. Neither of these wells are affected by groundwater pumping.

10 Climate change has negatively affected the flows in the Muddy River. SNWA's  
11 presumptive and simplistic assertion that decreased flows in the Muddy River are the  
12 result of groundwater pumping in the LWRFS is not supported by the record, much less  
13 by reality.

14 **ii. Poor gage data.**

15 There is poor pre-development historic gage data. According to the USGS  
16 records for the Moapa gage, the data collected during the initial years of the gage's  
17 operation is noted as ranging from "poor" to "good" data with the majority of it  
18 categorized as "fair." ROA at 4945. So not only does SNWA base its pre-development  
19 flows on insufficient data, but even that data is suspect at best.

20 **iii. SNWA controls more water above MVIC.**

21 To determine the volume of water to which MVIC shareholders are entitled,  
22 SNWA calculates the volume of water that passes through the Glendale gage monthly,  
23 subtracts the volume of water that is consumed by phreatophyte consumption from the  
24 Glendale gage to the Bowman Reservoir, and further subtracts off the monthly volume  
25 of upper Muddy River water rights that SNWA controls. ROA at 46395. (Exhibit A of  
26 the Forbearance Agreement between the Lower Colorado River parties dated December  
27 13, 2007). The remainder of the volume of water that flows past the Glendale gage goes  
28 to MVIC and is dispersed for use amongst its shareholders based on the number of



1 preferred and common shares owned or controlled by each shareholder.<sup>15</sup> ROA at  
2 46396.

3 The volume of water that MVIC receives is artificially low because SNWA  
4 controls water in the upper Muddy River, which now flows through MVIC directly to  
5 Lake Mead to create ICS. Some of upper Muddy River water SNWA controls was once  
6 water that resided in MVIC territory and has been moved up river above the Glendale  
7 gage. This means that water that once flowed below the Glendale gage is now subtracted  
8 from flows at the Glendale gage under the Forbearance Agreement calculation. Yet,  
9 SNWA calculates its “injury” while claiming the full duty of water that once flowed to  
10 MVIC and was dispersed amongst share holders.

11 c. **MVIC’s share calculation is erroneous, harming shareholders like**  
12 **VIDLER.**

13 Even though water represented by certain shares has been transferred upstream  
14 for use outside of the MVIC, the total number of shares used to calculate how much  
15 water each share is entitled to annually by MVIC has never been adjusted. In other  
16 words, the transferred water shares have never been removed from the share count  
17 denominator used to calculate the volume of water each share is entitled to for the  
18 coming year. The share count is 2,432 preferred shares and 5,044 common shares.  
19 ROA at 46396. The share count has remained the same for over 100 years, although  
20 the water appurtenant to those shares has been moved outside the MVIC. This has the  
21 effect of reducing the volume of water per share for shareholders within the MVIC,  
22 including VIDLER. This harm to MVIC shareholders, including VIDLER, caused by  
23 MVIC’s movement of water above the Glendale gage and now controlled by SNWA in  
24 the upper Muddy River has never been addressed by MVIC or SNWA.

25 \_\_\_\_\_  
26 <sup>15</sup> A preferred share is calculated by summing the volume flow from the summer months  
27 (May, June, July, August, and September) and adding seventy-five percent of the sum  
28 of the monthly flow volume from the seven winter months (January, February, March,  
April, October, November, and December) and then divided by the number of shares  
(2,432 shares). ROA at 46396. Common shares are calculated by twenty-five percent  
of the sum of seven months of winter flow divided by the number of shares (5,044  
shares). ROA at 46396.

1 SNWA's "Muddy River Tributary Conservation ICS Certification Report 2015"  
2 can be used to see how SNWA calculates the volume of water MVIC receives and how  
3 preferred and common shares are calculated. From the 2015 ICS report (ROA at  
4 46395), the volume of water that flowed to MVIC was 20,198 afa of which 7,798 af  
5 flowed in the summer and 12,400 af flowed in the winter. The calculation for MVIC  
6 preferred shares would be  $(7,798+0.75*12,400)/2,432 = 7.03$  af/share. The calculation  
7 for common shares would be  $(12,400*0.25)/5,044 = 0.61$  af/share.

8 Assume the volume of water moved upstream and out of the MVIC (lower  
9 Muddy River) is equivalent to 575 preferred shares and 575 common shares. To  
10 accurately reflect the movement of this lower Muddy River water to the upper Muddy  
11 River, the total number of MVIC shares should be reduced for purposes of calculating  
12 every share's annual water volume. The correct calculation for preferred shares would  
13 be  $(7,798+0.75*12,400)/(2,432-575) = 9.21$  af/share. The calculation for common  
14 shares would be  $(12,400*0.25)/(5,044-575) = 0.69$  af/share. As the calculation shows,  
15 each MVIC preferred and common share gets more water when the calculation is  
16 properly adjusted to reflect the removal of share represented by water now controlled  
17 by SNWA in the upper Muddy River.

18 **d. SNWA's "impairment" calculation assumes it will receive full flow of**  
19 **the Muddy River each year, a condition no other decree right holder**  
20 **is entitled to or receives under the Decree.**

21 SNWA calculates "impairment" to its ICS credits resulting from purported  
22 groundwater pumping based upon the natural flow of the Muddy River at the Moapa  
23 gage divided by its arbitrary "pre-development" flow of the Muddy River at the  
24 Glendale gage. ROA at 42009. The result of this calculation is a natural flow of the  
25 Muddy River as a percentage of pre-development base flow. This percentage is then  
26 divided by the certificated ICS credits created for that year. ROA at 42009. SNWA  
27 claims this would be the number of credits it could have created had the Muddy River  
28 been naturally flowing at SNWA's "pre-development" flow. As explained in Section

1 c, above, SNWA’s impairment calculation assumes the flow of the river will be the  
2 same every year and never change. It does not recognize or take into consideration the  
3 affects that climate, diversions upstream, or natural river conditions or fluctuations have  
4 on river flows. No other decreed water right holder is entitled to his or her full decreed  
5 flow every year or can claim “impairment” if natural river conditions, climate  
6 conditions, or transfer of water above the MVIC result in decreased river flows that  
7 reach the MVIC.

8 As shown in SNWA’s Table 7-2, entitled “Impacts of MR Streamflow Depletions  
9 on SNWA ICS Credits” (ROA at 42009), the natural flow of the Muddy River at the  
10 Moapa gage was 30,150 af in 2015. Dividing 30,150 af by the SNWA “pre-  
11 development” base flow of 33,900 af, results in 0.889 or 89%. In Table 7-2, SNWA  
12 created 8,509 af certified ICS credits. In its impairment calculation, SNWA takes 8,509  
13 af and divides by the impairment percentage of 89% resulting in 9,561 af of potential  
14 ICS credits. SNWA claims it is or has been impaired by 1,052 af (subtracting 8,509 af  
15 from 9,561 af) in ICS credits it could have created if the natural flows in the river were  
16 higher. Again, there is no evidence showing that decreased flows in the river are in any  
17 way connected to groundwater pumping in the LWRFS. SNWA uses its assumed pre-  
18 development base flow based off bad data that coincidentally coincides with SNWA’s  
19 erroneous decreed acreage calculation for purposes of its impairment calculation.

20 **i. SNWA does not share in losses on the Muddy River.**

21 In the ICS credit calculation, SNWA does not share in the losses on the Muddy  
22 River as every other Decree right holder is required to do. SNWA takes the full volume  
23 of water every year for all its upper Muddy River water as ICS credits. No matter what  
24 the annual flow of the river is, SNWA receives the same full volume amount of upper  
25 Muddy River water each year for purposes of its ICS credits. If SNWA shared in the  
26 losses of the river, as written in the Decree, then it would not be able to take the full  
27 volume of water for its upper Muddy River rights. SNWA would have to share in the  
28 natural river losses like all other decree right holders and MVIC shareholders. The

1 Decree states: “All abnormal losses from the flow of said stream shall be pro-rated and  
2 shared among the parties hereto.” ROA at 33811-12. This Decree provision is not  
3 being enforced because SNWA is taking the entire volume of its upper Muddy River  
4 rights including MVIC lower river water moved upstream. The downstream user,  
5 MVIC and its shareholders, then take all the losses of the river.

6 The MVIC shareholders do not receive the full volume of pre-development flows  
7 (33,900 afa) for purposes of determining their annual water right per share; their yearly  
8 calculation is based upon actual flows to determine their water use per share. Thus,  
9 SNWA’s impairment calculation is duplicitous and at the expense of groundwater right  
10 holders in the LWRFS and to the detriment of all other Muddy River decree right  
11 holders, including MVIC shareholders like VIDLER.

12 Finally, SNWA’s injury is self-inflicted with regard to any claimed injury to  
13 MVIC shares based upon Muddy River flows. Over time, receiving the same volume  
14 of water every year for its leased water actually increases the amount of ICS that SNWA  
15 creates. For purposes of calculating its ICS credits, SNWA receives the same volume  
16 of water every year - - which is the full volume of water under the leased permits and  
17 certificates. No other MVIC shareholder is guaranteed to get his or her full decreed  
18 right every year. Indeed, as SNWA is well aware, receiving the same volume of water  
19 every year for this leased water above the Glendale gage actually increases the amount  
20 of ICS that SNWA creates.

21 ii. **SNWA uses the wrong gage to calculate its alleged injury.**

22 SNWA’s Table 7-2 entitled “Assessment of LWRFS Water Resource Condition  
23 and Aquifer Response” (ROA at 42009) uses natural flow at the Muddy River Moapa  
24 gage to calculate the impacts to SNWA ICS credits. In all of SNWA’s annual ICS  
25 reports, SNWA uses the Glendale gage to calculate the volume of water in the Muddy  
26 River. It is the Glendale gage that is used to determine how much water MVIC receives.  
27 It is the Glendale gage that is used to calculate the volume per share for MVIC. The  
28

1 Glendale gage is located approximately 10 miles downstream from the Moapa gage.  
2 ROA at 42006.

3 For alleged harm SNWA should be using the Glendale gage to calculate alleged  
4 injury, not the Moapa gage. By using the Moapa gage, SNWA intentionally  
5 manufacturers its alleged impairment because it is including decree holder diversions  
6 that are not included in its ICS calculation and not included in river flows that reach or  
7 are intended to reach the MVIC. It is not comparing apples to apples and oranges to  
8 oranges for purposes of ICS credits. SNWA uses the Moapa gage to create alleged  
9 harm that does not in fact exist.

10 **E. SNWA's and MVIC's due process rights were not violated by certain**  
11 **findings made in Order 1309 and the State Engineer did not act**  
12 **outside the scope of the hearing he noticed.**

13 SNWA argues the State Engineer's conflict analysis was outside the scope of the  
14 hearing and therefore, that portion of Order 1309 needs to be reversed. SNWA's  
15 Opening Brief at 32-38. Likewise, MVIC argues that in making certain findings in  
16 Order 1309, the State Engineer violated MVIC's due process rights. MVIC's Opening  
17 Brief at 20-28. SNWA's and MVIC's arguments are without merit and should be  
18 disregarded by the Court. SNWA and MVIC were properly provided notice and an  
19 opportunity to participate in the Order 1309 proceedings. With regard to their allegation  
20 of error, the State Engineer's hearing notice and the statements made by the State  
21 Engineer's hearing officer at the prehearing conference accurately described the scope  
22 of the issues the State Engineer would be considering in Order 1309. SNWA and MVIC  
23 presented all evidence they desired at the Order 1309 hearings. In fact, as previously  
24 noted, SNWA and MVIC themselves brought up the issue of conflicts between junior  
25 groundwater pumping and Muddy River Decree rights and the State Engineer merely  
26 responded to their arguments in Order 1309 as due process requires. SNWA and MVIC  
27 just don't like the State Engineer's rejection of their conflicts notion. Therefore,  
28 SNWA's and MVIC's Petitions for Judicial Review should be denied.

1 SNWA and MVIC contend the State Engineer acted outside the scope of the  
2 hearing as described at the prehearing conference and in the State Engineer’s hearing  
3 notices. The hearing officer described the scope of the hearing as follows at the  
4 prehearing conference held on August 8, 2019:

5 The purpose of the hearing is not to resolve or address allegations of  
6 conflict between groundwater pumping within the LWRFS and Muddy  
7 River decreed rights. That is not the purpose of this hearing and that’s  
8 not what we are going to be deciding at this point in time.

9 The purpose of the hearing is to determine what the sustainability is,  
10 what the impact is on decreed rights, and then addressing and resolving  
11 allegations of conflict should that be a determination that will be  
12 addressed in, at a future point in time.

13 ROA at 522: p. 12:6-15.

14 The State Engineer’s hearing notice issued August 23, 2019 stated:

15 The State Engineer further noted that the hearing on the Order 1303  
16 reports was the first step in determining to what extent, if any, and in  
17 what manner the State Engineer would address future management  
18 decisions, including policy decisions, relating to the Lower White River  
19 Flow System basins.

20 ROA at 263, 285.

21 The State Engineer’s hearing procedures allowed for two evidentiary disclosures  
22 and production of exhibits: an initial disclosure and production on July 3, 2019 and a  
23 rebuttal disclosure and production on August 13, 2019. ROA at 88. SNWA submitted  
24 disclosures and exhibits on both dates. *See* ROA at 41930-42072, 42165-42214. MVIC  
25 did not submit any initial disclosures on July 3, 2019 but submitted rebuttal exhibits and  
26 disclosures on August 13, 2019. *See* ROA at 39713-39717. MVIC adopted the  
27 positions of SNWA for the four areas the State Engineer asked the parties to address in  
28 their reports. ROA at 39716. Thus, MVIC had an opportunity to present evidence and  
expert reports for the initial and rebuttal disclosures but chose not to do so. Instead,  
MVIC chose to adopt the positions of SNWA for the four issues the State Engineer  
asked the parties to address in their expert reports.

///

///

1 In responding to the State Engineer’s request for parties’ positions on the issue  
2 of the long-term quantity of groundwater that can be pumped in the LWRFS, SNWA  
3 presented its analysis on that issue in Section 8.0 of its initial report. ROA at 42012-  
4 42014. However, in addition to presenting evidence on the issue the State Engineer  
5 asked to be addressed, SNWA went one step further and provided *its* conflicts analysis  
6 and a specific calculation of the alleged harm to SNWA resulting from its assertion  
7 groundwater pumping was impacting SNWA’s water rights. ROA at 42005-42010.  
8 The State Engineer summarily accepted all expert reports into evidence. ROA at 570.  
9 Thus, any claim that SNWA was not permitted to present conflict evidence is without  
10 merit because SNWA did present such evidence in its initial expert report, the report  
11 was accepted into evidence and SNWA was allowed to testify regarding its conflicts  
12 analysis at the hearing. ROA at 53400.

13 Further, in presenting its conflict analysis, SNWA was not constrained by any  
14 notion of the scope of the hearing regarding conflicts. Initial expert reports were  
15 submitted on July 3, 2019. At the time of submission of the initial expert reports, there  
16 had been no statements by the hearing officer regarding the scope of the hearing or  
17 clarification as to the scope of the State Engineer’s analysis of the long-term quantity  
18 of water that can be pumped from the LWRFS as the State Engineer asked be addressed.  
19 Nor had the August 23, 2019 hearing notice been issued yet. Thus, SNWA’s complaints  
20 that it would have presented additional evidence on the issue of conflicts if it had known  
21 the State Engineer was going to address that issue is without merit because SNWA did  
22 submit all the evidence it wanted related to conflicts and harm to it before there was any  
23 discussion by the hearing officer of what the State Engineer was to determine in relation  
24 to the long term quantity of water that could be pumped from the source or clarification  
25 by the hearing officer the State Engineer wanted information on the “sustainability” of  
26 the source. ROA at 42005-42010, 42012-42014.

27 MVIC can’t complain either because it chose not to submit any initial expert  
28 reports or initial disclosures. MVIC’s hearing strategy was to respond to the reports of

1 others by presenting a rebuttal letter stating it supported the conclusions of SNWA’s  
2 initial report on the four issues the State Engineer asked to be addressed. ROA at 39716.  
3 MVIC’s rebuttal letter was admitted into evidence by the State Engineer. ROA at  
4 53681. As the State Engineer noted in Order 1309, MVIC concurred with SNWA’s  
5 conclusions regarding aquifer recovery, long term quantity of groundwater and  
6 movement of water between the alluvial and carbonate-rock aquifers. ROA at 28. Thus,  
7 MVIC’s argument it was not given an opportunity to present conflict evidence is  
8 without merit as MVIC chose not to submit evidence during the initial evidentiary  
9 exchange and instead chose to submit rebuttal evidence and join in the conclusions of  
10 SNWA in its initial report. ROA at 39713-39717.

11 On August 8, 2019, the day of the prehearing conference and on August 23, 2019,  
12 the date the State Engineer’s notice was issued, SNWA had already submitted its initial  
13 expert report and conflicts analysis as part of the initial disclosures. *See* ROA at 41930-  
14 42072. SNWA was not prejudiced by anything stated at the prehearing conference or  
15 in the State Engineer’s notice because it had already been given the opportunity to  
16 submit initial expert reports and exhibits which contained all the evidence it wanted to  
17 submit regarding alleged conflicts harming its water rights and its specific  
18 quantification of that conflict harm. *See* ROA at 41891-48624.

19 Finally, as noted above, it was SNWA and MVIC who brought up the issue of  
20 conflicts by their contention all junior groundwater pumping in the LWRFS impacts the  
21 flow of the Muddy River. The State Engineer was merely responding to their arguments  
22 and contentions. This is clearly not a denial of due process but the State Engineer’s  
23 compliance with due process requirements by addressing all issues presented by SNWA  
24 and MVIC in the proceeding. *Revert v. Ray*, 95 Nev. 782, 787, 603 P.2d 262, 264–65  
25 (1979). SNWA and MVIC just don’t like the State Engineer’s determination rejecting  
26 their theory any junior groundwater pumping impacts Decree rights. To claim their due  
27 process rights have been denied under the guise they were not allowed to present  
28



1 evidence on an issue they raised and submitted evidence on is patently false and  
2 misleading. Their twisted due process arguments should be rejected.

3 V.

4 **CONCLUSION**

5 For all the foregoing reasons, the Petitions for Judicial Review filed by SNWA  
6 and MVIC should be denied.

7 DATED this 24<sup>th</sup> day of November, 2021.

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**CERTIFICATE OF COMPLIANCE**

We hereby certify that we have read the foregoing Answering Brief and to the best of our knowledge, information and belief, it is not frivolous or interposed for any improper purpose. We further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. We further certify that this brief is proportionately spaced, has a typeface of 14 points or more, and contains 10,560 words. We understand that we may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of Nevada Rules of Appellate Procedure.

DATED this 24<sup>th</sup> day of November, 2021.

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1 **CERTIFICATE OF SERVICE**

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

7 I hereby certify that I caused a true and correct copy of the foregoing document  
8 to be served via FedEx as follow:

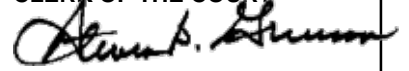
9 Clark County District Court  
10 Attn: Hon. Bita Yeager – District. Ct. Dept. 1  
11 Court Administration – 2<sup>nd</sup> Floor  
12 200 Lewis Avenue  
13 Las Vegas, NV 89101

14 DATED this 24<sup>th</sup> day of November, 2021.

15 */s/ Nancy Fontenot*  
16 NANCY FONTENOT \_\_\_\_\_

17 4854-6432-6916, v. 1

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

29 **LAS VEGAS VALLEY WATER DISTRICT,**  
30 **and SOUTHERN NEVADA WATER**  
31 **AUTHORITY, et al.,**

32 **Petitioners,**

33 **vs.**

34 **ADAM SULLIVAN, P.E., Acting**  
35 **Nevada State Engineer, et al.,**

36 **Respondent.**

Case No. A-20-816761-C

Dept. No. 1

Consolidated with Cases:  
A-20-817765-P  
A-20-818015-P  
A-20-817977-P  
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1                   **LINCOLN COUNTY WATER DISTRICT'S AND VIDLER WATER**  
2                   **COMPANY, INC.'S JOINDER TO OPENING BRIEFS OF GEORGIA-**  
3                   **PACIFIC GYPSUM, LLC AND REPUBLIC ENVIRONMENTAL**  
4                   **TECHNOLOGIES, INC.; APEX HOLDING COMPANY, LLC AND DRY**  
5                   **LAKE WATER LLC; COYOTE SPRINGS INVESTMENT, LLC; AND**  
6                   **LIMITED JOINDER TO NEVADA COGENERATION**  
7                   **ASSOCIATES NO. 1 AND 2 OPENING BRIEF**

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**NRAP 26.1 DISCLOSURE**

Petitioners, Lincoln County Water District (“Lincoln” and Vidler Water Company, Inc. (“Vidler” and together with Lincoln the “Petitioners”) incorporate and restate their NRAP 26.1 Disclosure from their Opening Brief and as further stated in their Answering Brief to Opening Briefs of Las Vegas Valley Water District and Southern Nevada Water Authority and Muddy Valley Irrigation Company.

DATED this 24<sup>th</sup> day of November, 2021.

LINCOLN COUNTY DISTRICT ATTORNEY  
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~ and ~

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Attorneys for Petitioner **VIDLER WATER COMPANY, INC.**

1 Petitioners, LINCOLN COUNTY WATER DISTRICT (“LINCOLN”) and  
2 VIDLER WATER COMPANY, INC. (“VIDLER”), hereby join in the Opening Briefs  
3 of GEORGIA-PACIFIC GYPSUM, LLC AND REPUBLIC ENVIRONMENTAL  
4 TECHNOLOGIES, INC.; APEX HOLDING COMPANY, LLC AND DRY LAKE  
5 WATER LLC; and COYOTE SPRINGS INVESTMENT, LLC filed with this Court on  
6 August 27, 2021; and submit their limited joinder to NEVADA COGENERATION  
7 ASSOCIATES NO. 1 AND 2’s Opening Brief filed with this Court on August 27, 2021.

8 LINCOLN/VIDLER support and therefore join in the Opening Briefs of the  
9 above-named Petitioners GEORGIA-PACIFIC GYPSUM, LLC AND REPUBLIC  
10 ENVIRONMENTAL TECHNOLOGIES, INC.; APEX HOLDING COMPANY, LLC  
11 AND DRY LAKE WATER LLC; and COYOTE SPRINGS INVESTMENT, LLC in  
12 their arguments the State Engineer had no statutory authority to create a super basin and  
13 reorder the priority of water rights, the State Engineer’s order to consolidate the  
14 individual basins into a super basin was not supported by substantial evidence, the State  
15 Engineer ‘s determination as to the long term annual quantity of water that could be  
16 pumped from the LWRFS was not based upon substantial evidence, the State Engineer  
17 violated due process rights and engaged in ad hoc rulemaking in his basin consolidation  
18 and the State Engineer exceeded his authority in making a ruling on the federal  
19 Endangered Species Act.

20 LINCOLN/VIDLER join in and support the arguments of NEVADA  
21 COGENERATION ASSOCIATES NO. 1 AND 2 (“NCA”) in its Opening Brief as to  
22 the lack of authority of the State Engineer to create a super basin. LINCOLN/VIDLER  
23 provide the following additional comments in response to NCA’s Opening Brief.  
24 LINCOLN/VIDLER disagree that the multiple linear regression analysis put forth by  
25 the Southern Nevada Water Authority (“SNWA”) should be relied upon to determine  
26 possible connection or possible correlation between certain wells or basins. The  
27 multiple linear regression analysis SNWA submitted was not performed properly as  
28 provided by testimony from LINCOLN/VIDLER’s expert witness. ROA at 53509-



1 53513. This rendered SNWA’s multiple linear regression analysis useless for  
2 determining any type of connection or correlation between groundwater levels in basins  
3 within the Lower White River Flow System (“LWRFS”). ROA at 53521. The State  
4 Engineer’s Office agreed and one of the SNWA witnesses acknowledged there was a  
5 limit in its application. *See for example*, ROA at 53407 (Tr. at 1075:6-8): “Last question  
6 that I have is about these linear relationships. I mean at some point it seems like these  
7 relationships can’t hold.” and (Tr. at 1077:4-10) “Q. How about for the relationship  
8 between water levels and pumping within the various basins. I mean just -- do you feel  
9 like that linear relationship has a limit with which you could apply it? A. You mean the  
10 multiple linear regression? Q. Yeah. A. (Mr. Burns) A limit.” The State Engineer did  
11 not rely upon SNWA’s multiple linear regression analysis in Order 1309. The Court  
12 cannot reweigh the evidence or substitute its judgment for that of the State Engineer.  
13 *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979); *Bacher v. State Engineer*,  
14 122 Nev. 1110, 1121, 146 P.3d 793, 800 (2006) (The Court may not substitute its  
15 judgment for that of the State Engineer, “pass upon the credibility of the witness or  
16 reweigh the evidence.”). Accordingly, the State Engineer’s determination not to rely  
17 upon SNWA’s multiple linear regression analysis should be upheld.

18 NCA argues its expert, former State Engineer Hugh Ricci, was not qualified as  
19 an expert in hydrology and it is impossible to estimate the impact of his testimony on  
20 the placement of the boundary in the Black Mountains Area. LINCOLN/VIDLER note  
21 there was no offer of proof during the hearing as to the substance of Mr. Ricci’s  
22 testimony if he was allowed to testify as an expert in hydrology and therefore, any claim  
23 of error based on Mr. Ricci not being allowed to testify on a certain matter has not been  
24 properly preserved on appeal. *Burgeon v. State*, 102 Nev. 43, 47, 714 P.2d 576, 579  
25 (1986) (“We have consistently held that this Court will not speculate as to the nature  
26 and substance of excluded testimony. *Van Valkenberg v. State*, 95 Nev. 317, 594 P.2d  
27 707 (1979). If appellant desired to preserve for our review the testimony that he  
28

1 reasonably expected the jury to hear, absent the adverse ruling of the trial court, a  
2 detailed offer of proof was essential.”)

3 LINCOLN/VIDLER take no further position on NCA’s arguments in its Opening  
4 Brief filed August 27, 2021 except as specifically set forth above.

5 The Excerpts of the Record cited herein are attached hereto as Exhibit “A”.

6 DATED this 24<sup>th</sup> day of November, 2021.

7 LINCOLN COUNTY DISTRICT ATTORNEY  
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24 *Attorneys for Vidler Water Company, Inc.*

1 **CERTIFICATE OF SERVICE**

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

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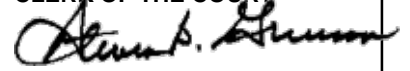
9 Clark County District Court  
10 Attn: Hon. Bita Yeager – District. Ct. Dept. 1  
11 Court Administration – 2<sup>nd</sup> Floor  
12 200 Lewis Avenue  
13 Las Vegas, NV 89101

14 DATED this 24<sup>th</sup> day of November, 2021.

15 */s/ Nancy Fontenot*  
16 NANCY FONTENOT

17 4884-9896-9860, v. 1

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

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30 and SOUTHERN NEVADA WATER  
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A-21-833572-J

34 ADAM SULLIVAN, P.E., Acting  
35 Nevada State Engineer, et al.,

36 Respondent.

37 **RECORD ON APPEAL CITED IN INTERVENORS LINCOLN COUNTY**  
38 **WATER DISTRICT'S AND VIDLER WATER COMPANY, INC.'S**  
**ANSWERING BRIEF TO OPENING BRIEF OF**  
**CENTER FOR BIOLOGICAL DIVERSITY**

///

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1 Intervenor, LINCOLN COUNTY WATER DISTRICT (“LINCOLN”) and  
2 VIDLER WATER COMPANY, INC. (“VIDLER”), by and through their counsel,  
3 DYLAN V. FREHNER, LINCOLN COUNTY DISTRICT ATTORNEY, WAYNE O.  
4 KLOMP of GREAT BASIN LAW, and KAREN A. PETERSON of ALLISON  
5 MacKENZIE, LTD., submit their Record on Appeal cited in their Answering Brief to  
6 Opening Brief of Center for Biological Diversity. The attached documents constitute  
7 excerpts from the Record on Appeal cited in LINCOLN/VIDLER’s Answering Brief.

8 **AFFIRMATION**

9 The undersigned does hereby affirm that the foregoing **DOES NOT** contain the  
10 social security number of any person.

11 DATED this 24<sup>th</sup> day of November, 2021.

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27 *Attorneys for Lincoln County Water District*

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*Attorneys for Vidler Water Company, Inc.*

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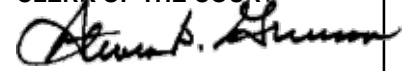
15 */s/ Nancy Fontenot*  
16 **NANCY FONTENOT**\_\_\_\_\_

17 4879-0475-1876, v. 1

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**SEE Lincoln/Vidler Master ROA List with Reply Appendix**





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

29 LAS VEGAS VALLEY WATER DISTRICT,  
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A-21-833572-J

34 ADAM SULLIVAN, P.E., Acting  
35 Nevada State Engineer, et al.,

36 Respondent.

37 **RECORD ON APPEAL CITED IN LINCOLN COUNTY WATER DISTRICT'S**  
38 **AND VIDLER WATER COMPANY, INC.'S ANSWERING BRIEF TO**  
**OPENING BRIEFS OF LAS VEGAS VALLEY WATER DISTRICT AND**  
**SOUTHERN NEVADA WATER AUTHORITY; AND**  
**MUDDY VALLEY IRRIGATION COMPANY**

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6 Opening Briefs of Las Vegas Valley Water District, Southern Nevada Water Authority  
7 and Muddy Valley Irrigation Company. The attached documents constitute excerpts  
8 from the Record on Appeal cited in LINCOLN/VIDLER’s Answering Brief to Opening  
9 Briefs of Las Vegas Valley Water District and Southern Nevada Water Authority; and  
10 Muddy Valley Irrigation Company.

11 **AFFIRMATION**

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

14 DATED this 24<sup>th</sup> day of November, 2021.

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*Attorneys for Lincoln County Water District*

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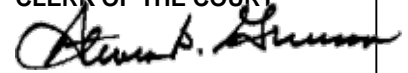
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16 NANCY FONTENOT \_\_\_\_\_

17 4894-4760-0132, v. 1

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**SEE Lincoln/Vidler Master ROA List with Reply Appendix**



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9 Attorneys for The Church of Jesus Christ  
10 of Latter-day Saints, a Utah corporation sole

11 DISTRICT COURT

12 CLARK COUNTY, NEVADA

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

16 Petitioners,

17 vs.

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

22 Respondents.

23 And All Consolidated Cases.  
24

Case No. A-20-816761-C (Lead Case)

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

**ANSWERING BRIEF FROM  
INTERVENOR RESPONDENT  
THE CHURCH OF JESUS CHRIST  
OF LATTER-DAY SAINTS**

1 Intervenor Respondent The Church of Jesus Christ of Latter-Day  
2 Saints, a Utah corporation sole (the “Church Corporation”), submits its Answering  
3 Brief pursuant to EDCR 2.15 and this Court’s March 5, 2021 Scheduling Order.  
4

5 **NRAP 26.1 DISCLOSURE**

6 The undersigned counsel of record certifies that the following are  
7 persons and entities as described in NRAP 26.1(a), and must be disclosed. These  
8 representations are made in order that the judges of this court may evaluate  
9 possible disqualification or recusal.

10 1. Intervener Respondent The Church of Jesus Christ of Latter-  
11 day Saints, is a Utah Corporation.  
12

13 2. All parent corporations and publicly-held companies owning  
14 10-percent or more of any of the Church Corporation’s stock: The Church  
15 Corporation, formerly known as Corporation of the Presiding Bishop of The  
16 Church of Jesus Christ of Latter-day Saints, a Utah corporation sole, has no parent  
17 corporation.. There is no publicly held company that owns 10% or more of the  
18 Church Corporation’s stock.  
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1 **I. INTRODUCTION**

2 The State Engineer’s Order 1309 should be upheld. The Order, which  
3 combines various basins into a single hydrographic basin and limits the amount of  
4 groundwater that may be pumped in the combined groundwater basin, is supported  
5 by Nevada law and by decades worth of substantial evidence. The State Engineer  
6 is authorized to act, including to delineate basins, by the Nevada Legislature as  
7 appropriate for the conjunctive management of the waters in Nevada. Prohibiting  
8 the State Engineer from determining basin boundaries would inhibit his ability to  
9 carry out the remainder of his duties as set forth in Nevada Revised Statute  
10 Chapters 532, 533, and 534.  
11

12 In addition, because the State Engineer has not yet ruled on how the  
13 water rights within the groundwater basin will be treated relative to each other, any  
14 argument regarding the same is premature. When such a ruling is made, the State  
15 Engineer must prioritize all water rights within the entirety of the combined  
16 groundwater basin relative to each other in order to preserve the requirements set  
17 forth in the prior appropriation doctrine.  
18

19 **II. STATEMENT OF THE ISSUES**

20  
21 1. Whether the State Engineer has the authority to combine the  
22 management of basins by creating a super basin such as the LWRFS when  
23 substantial evidence indicates the individual basins are interconnected.

24 2. Whether the State Engineer’s determination that 8,000 afa can

1 be pumped from the LWRFS was supported by substantial evidence.

2           3. Whether the State Engineer would violate the prior  
3 appropriation doctrine if he were to manage the LWRFS water rights relative to all  
4 water rights holders within the LWRFS and whether doing so would constitute a  
5 taking of property.  
6

7 **III. STATEMENT OF THE CASE**

8           This case is before the Court on numerous Petitions for Judicial  
9 Review of the State Engineer’s Order 1309 issued on June 15, 2020. The State  
10 Engineer’s Order combined several water basins into one hydrographic basin. The  
11 basins which were combined as a result of the State Engineer’s order include Kane  
12 Springs Valley, Coyote Spring Valley, Muddy River Springs Area, California  
13 Wash, Hidden Valley, Garnet Valley, and the northwest portion of the Black  
14 Mountains Area. ROA at 66. The State Engineer’s Order also limited the amount  
15 groundwater that can be pumped in the hydrographic basin to not more than 8,000  
16 afa. *Id.*  
17

18           The State Engineer’s Order 1309 is a culmination of several other  
19 orders and proceedings that pre-date it. In March 2002, the State Engineer issued  
20 Order 1169 as a result of various groundwater applications in Coyote Springs  
21 Valley, Black Mountain Area, Garnet Valley, Hidden Valley, California Wash, and  
22 Muddy River Springs Area which sought to appropriate more than 300,000 afa of  
23  
24

1 groundwater from the carbonate aquifer under those basins. ROA at 4<sup>1</sup>. With  
2 Order 1169, the State Engineer held the pending applications in abeyance so that it  
3 could be determined, prior to ruling on those applications, the extent of water  
4 available in the basins for the pending applications. *Id.* The test contemplated by  
5 the State Engineer did not take place until November 15, 2010—approximately 8  
6 and a half years after Order 1169 was issued.

8           After the conclusion of testing, the State Engineer denied the pending  
9 applications, determining that there was no unappropriated water left in the study  
10 area. Several years later, in January 2018, the State Engineer issued Interim Order  
11 1303 designating the previously identified basins as a multi-basin jointly  
12 administrative unit for purposes of administrating the water rights within those  
13 basins. Interim Order 1303 also sought reports from those with water rights  
14 interests within the basins to learn more about the availability of water in those  
15 basins and the true geographic boundary of the basins.

17           Following the submission of various reports and testimony from  
18 stakeholders, the State Engineer entered Order 1309 which is the subject of these  
19 proceedings. The State Engineer’s Order 1309 should be upheld. It seeks to  
20 protect senior water rights holders’ interests as required by Nevada law. Further,  
21 the State Engineer based his determination on decades of data and analysis of the  
22 basins at issue which show both a hydrologic connection between the basins and a  
23

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24 <sup>1</sup> One acre foot of water equals approximately 325,850 gallons.



1 limited amount of water availability.

2 **IV. STATEMENT OF RELEVANT FACTS**

3 The Church Corporation holds both groundwater and surface water  
4 rights in a portion of the Lower White River Flow System (“LWRFS”),  
5 specifically in the Muddy River Springs Area, Hydrographic Basin 219. The  
6 Church Corporation’s water rights consist of approximately 2,001 acre-feet of  
7 spring and surface water rights under the Muddy River Decree and approximately  
8 2,330 acre-feet of groundwater rights in the Muddy River Springs Area. ROA at  
9 52758–52759. The Church Corporation’s groundwater rights are all certificated  
10 and have priority dates from 1947, 1949, and 1965, making the Church  
11 Corporation’s groundwater rights some of the most senior groundwater rights in  
12 the entire LWRFS. ROA at 52759.

13  
14  
15 **A. Order 1169 and the Aquifer Test**

16 The State Engineer entered Order 1169 on March 8, 2002 as a result  
17 of pending applications seeking to appropriate groundwater from the carbonate-  
18 rock aquifer underlying the Coyote Springs Valley Hydrographic Basin. ROA at  
19 662. After hearings on these applications, it was determined that:

20  
21 little is known about the hydrologic connectivity between the  
22 groundwater basins, that virtually nothing is known about the  
23 mountain blocks, estimates of recharge to the area can vary by a factor  
24 of two, there is probably some connectivity between the water in the  
carbonate-rock aquifers and the alluvial groundwater basins, there is  
still little data available and not much has changed from the  
information known in 1984.

1  
2 ROA at 664. For this reason, the State Engineer ordered that all applications for  
3 the appropriation of water from the carbonate-rock aquifer system in Coyote  
4 Springs Valley, Black Mountains Area, Garnet Valley, Hidden Valley, Muddy  
5 River Springs, and Lower Moapa Valley be held in abeyance until further testing  
6 and information could be obtained regarding the water availability for the water  
7 right permits already issued in those areas. ROA at 665.  
8

9           As part of his order, the State Engineer required that at least 50% of  
10 the water rights already permitted in the Coyote Springs Valley groundwater basin  
11 be pumped for at least two consecutive years (the “aquifer test”). *Id.* The study  
12 participants included the Las Vegas Valley Water District, Southern Nevada Water  
13 Authority, Coyote Springs Investments, LLC, Nevada Power Company, Moapa  
14 Valley Water District, Dry Lake Water Company, LLC, Republic Environmental  
15 Technologies, Inc., Chemical Lime Co., Nevada Cogeneration Associates, or their  
16 successors. *Id.* at 666. The Church Corporation was not a study participant.  
17

18           The aquifer test ran from November 15, 2010 (over 8 and a half years  
19 after the issuance of Order 1169) through December 31, 2012. ROA at 655. Upon  
20 the completion of the aquifer test, the State Engineer issued Order 1169A inviting  
21 the study participants to file their reports regarding information obtained from the  
22 aquifer test, including the impacts pumping had on the availability of water. *Id.*  
23 During the aquifer test, approximately 11,249 acre-feet were pumped from the  
24

1 carbonate-rock aquifer wells, which averaged to 5,290 acre-feet per year. ROA at  
2 738.

3           After the aquifer test concluded, the State Engineer issued Rulings  
4 6254–6261 which denied all the pending groundwater applications in the LWRFS  
5 because, according to the State Engineer, after the aquifer test and the submission  
6 of reports from the participants, “the evidence [was] overwhelming that  
7 unappropriated water does not exist.” ROA at 749. The State Engineer concluded  
8 that the basins that make up the LWRFS “share a unique and close hydrological  
9 connection and share virtually all of the same source and supply of water, unlike  
10 other basins in Nevada,” requiring the basins to be jointly managed. *Id.*

11  
12  
13           **B. Interim Order 1303**

14           The purpose of Interim Order 1303 was to create a multi-basin area  
15 for those basins which “share a close hydrologic connection” in order to administer  
16 those areas jointly. ROA at 70. The Interim Order designated the LWRFS as a  
17 multi-basin area that should be managed jointly and where all water rights should  
18 be administered based upon their respective dates of priority in relation to other  
19 rights within the LWRFS. ROA at 70–86.

20  
21           The Interim Order recognized the findings from the aquifer test which  
22 “demonstrated that pumping 5,290 acre-feet annually [from the LWRFS] caused  
23 sharp declines in groundwater levels and flows in the Pederson and Pederson East  
24 springs.” ROA at 74. These springs, along with the Baldwin and Jones springs,

1 which also declined as a result of the aquifer test, “contribute to the decreed and  
2 fully appropriated Muddy River” and are also “the predominant source of water  
3 that supplies the habitat of the endangered Moapa dace.” ROA at 75. The Muddy  
4 River Springs Area also has some of the most senior rights in the LWRFS,  
5 including those rights held by the Church Corporation. This area, as was  
6 determined by the aquifer test, derives its water from the carbonate aquifer system.  
7 ROA at 76. Thus, pumping in other areas in the LWRFS would have a “direct  
8 interrelationship with” the water available in the Muddy River. *Id.*

9  
10           While Interim Order 1303 recognized the interconnectivity of the  
11 basins making up the LWRFS, it also recognized further analysis of the area was  
12 needed to determine where the interconnectivity boundaries truly lie in the  
13 LWRFS, the amount of water that can be pumped throughout those connected  
14 basins, and the effect of movement of water between the alluvial and carbonate  
15 wells within those interconnected basins. ROA at 82–83. The State Engineer  
16 invited any stakeholders with interests in the LWRFS to answer these questions  
17 through the submission of reports. *Id.* While the Church Corporation did not  
18 submit its own report pursuant to Interim Order 1303, it requested the State  
19 Engineer adopt the testimony and recommendations submitted by the City of North  
20 Las Vegas (“CNLV”) and its expert Dwight Smith, PE, PG which primarily  
21 addressed the movement of water between alluvial and carbonate wells. ROA at  
22 34697–34699; ROA at 34705–34710l; ROA at 52757–52762.  
23  
24

1           **C.    Order 1309**

2           On June 15, 2020, after review of all the reports submitted pursuant to  
3 Interim Order 1303, the State Engineer issued Order #1309 which directly  
4 impacted the LWRFS. ROA at 2–67. Specifically, the State Engineer determined  
5 that the LWRFS is comprised of the following previously identified hydrographic  
6 basins: Kane Springs Valley, Coyote Springs Valley, Muddy River Springs Area,  
7 California Wash, Hidden Valley, Garnet Valley, and the northwest portion of the  
8 Black Mountains Area. ROA at 66. The State Engineer also limited the amount of  
9 groundwater that can be pumped from the LWRFS to 8,000 afa or less in order to  
10 reduce declining flows in the Muddy River. *Id.*

11           The State Engineer based his order on several pieces of evidence,  
12 including:

- 13           • Evidence from Order 1169 and Interim Order 1303 support the  
14 conclusion that the LWRFS basins share a source and supply of water  
15 which requires joint management. ROA at 47–48.
- 16           • There was a majority consensus during the hearings for Interim Order  
17 1303 that the basins which make up the LWRFS are hydrologically  
18 connected. *Id.*
- 19           • In the Order 1169 aquifer test, an average of 5,290 afa were pumped  
20 from the carbonate-rock aquifer in Coyote Springs Valley and 3,840  
21 afa were pumped from the Muddy River Springs Area. ROA at 56.
- 22           • That pumping in these areas has gradually declined since the aquifer  
23 test and in 2018, pumping from wells in the LWRFS averaged 8,300  
24 afa with consistent pumping in the alluvial aquifer wells in the Muddy  
River Springs Area of 7,000 to 8,000 afa. *Id.*

- 1           • That the concentrated pumping from the aquifer test caused a sharp  
2 decline in discharge at the springs, but the distributed pumping since  
3 the test, which went above 8,000 afa, has stabilized spring discharge.  
4 ROA at 60.
- 5           • That pumping from wells in the LWRFS has gradually declined since  
6 the aquifer test, and is approaching 8,000 afa which coincides with the  
7 period of time when the spring discharge seems to be approaching  
8 steady state. ROA at 64.

9           Prior to the State Engineer’s Order, the Church Corporation  
10 participated in the administrative proceedings and filed a closing brief in those  
11 proceedings. In its brief, the Church Corporation asked the State Engineer to  
12 continue to administer and manage the LWRFS with a consistent application of the  
13 primary tenets of Nevada water law—prior appropriation and beneficial use. ROA  
14 at 52757–52762.

## 15 **V. STANDARD OF REVIEW**

16           The scope of the State Engineer’s authority “is a question of statutory  
17 interpretation subject to de novo review.” *Wilson v. Pahrump Fair Water, LLC*,  
18 137 Nev. Adv. Op. 2, 481 P.3d 853, 856 (2021) (citing *Town of Eureka v. Office*  
19 *of State Eng’r*, 108 Nev. 163, 165-66, 826 P.2d 948, 949-50 (1992)). “The plain  
20 meaning of the relevant text guides the answer. *Id.* (citing *Coast Hotels & Casinos,*  
21 *Inc. v. Nev. State Labor Comm’n*, 117 Nev. 835, 840, 34 P.3d 546, 550 (2001)).  
22 However, the office of the State Engineer “has the implied power to construe the  
23 statute.” *United States v. State Eng’r*, 117 Nev. 585, 589, 27 P.3d 51, 53 (2001).  
24 Thus, “great deference should be given to the [State Engineer’s] interpretation

1 when it is within the language of the statute.” *Id.* (quoting *Pyramid Lake Paiute*  
2 *Tribe v. Washoe Co.*, 112 Nev. 743, 747–48, 918 P.2d 697, 700 (1996)); *see also*  
3 *Andersen Family Associates v. Hugh Ricci*, P.E., 124 Nev. 182, 186, 179 P.3d  
4 1201, 1203 (2008) (“because the appropriation of water in Nevada is governed by  
5 statute, and the State Engineer is authorized to regulate water appropriations, that  
6 office has the implied power to construe the state's water law provisions and great  
7 deference should be given to the State Engineer's interpretation when it is within  
8 the language of those provisions.”) And “while the interpretation of the State  
9 Engineer is not controlling, its decision shall be presumed correct, and the party  
10 challenging the decision has the burden of proving error.” *Id.* (citing NRS  
11 533.450(10)).  
12  
13

## 14 **VI. SUMMARY OF THE ARGUMENT**

15 The State Engineer’s Order 1309 should be upheld. The Nevada  
16 Legislature has afforded the State Engineer the authority to manage basins within  
17 the State of Nevada which includes the authority to delineate basin boundaries.  
18 While a review of Chapters 532, 533 and 534 of Nevada Revised Statute certainly  
19 appear to grant the State Engineer the express authority to determine basin  
20 boundaries, the statutes certainly implicitly grant the State Engineer this authority.  
21 The State Engineer is required to investigate basins where the annual  
22 replenishment to the groundwater supply appears to be inadequate for the needs of  
23 all permittees and to investigate underground water areas in order to manage those  
24

1 areas as necessary. The State Engineer would not be able to carry out this function  
2 if he was prohibited from determining basin borders where ample evidence exists  
3 that the basins are interconnected. Independent management of those areas even  
4 though the basins are hydrologically connected could adversely impact more senior  
5 water rights holders which is contrary to the State Engineer's duties.  
6

7 Further, the State Engineer's determination that groundwater pumping  
8 in the LWRFS should not exceed 8,000 afa is supported by substantial evidence.  
9 The State Engineer has considered decades worth of data and reports in arriving to  
10 his conclusions. The State Engineer's Order was rightfully reached after  
11 considering the amount of water which has historically been pumped in the  
12 LWRFS and the point at which the system approached a steady state.  
13

14 Finally, while some opening briefs argue that the State Engineer's  
15 Order 1309 violates their property rights, these arguments are premature. The  
16 State Engineer's Order 1309 does not make a determination as to a priority of  
17 water rights within the LWRFS. Were the State Engineer to manage the water  
18 rights within the LWRFS relative to each other, with all basins combined, as some  
19 petitioners have prematurely concluded, this would be in accordance with Nevada  
20 Law and would not constitute a taking of property.  
21



1 **VII. ARGUMENT**

2 **A. The State Engineer Has The Statutory Authority to Support His**  
3 **Order 1309.**

4 Although the powers of the State Engineer, like other administrative  
5 agencies, are limited to those set forth in law, “certain powers may be implied even  
6 though they were not expressly granted by statute, when those powers are  
7 necessary to the agency’s performance of its enumerated duties.” *City of*  
8 *Henderson v. Kilgore*, 122 Nev. 331, 334, 131 P.3d 11, 13 (2006) (citing *Clark Co.*  
9 *School Dist. v. Teachers Ass’n*, 115 Nev. 98, 102, 977 P.2d 1008, 1010 (1999)); *see*  
10 *also City of Reno v. Civil Service Com’n of City of Reno*, 117 Nev. 855, 858  
11 (2001), opinion modified on denial of reh’g, 42 P.3d 813 (Nev. 2002) (“The scope  
12 of an agency’s authority is limited to the matters the legislative body has expressly  
13 or implicitly delegated to the agency.”) “[F]or implied authority to exist, the  
14 implicitly authorized act must be essential to carrying out an express duty.”  
15 *Stockmeier v. State, Bd. of Parole Com’rs*, 127 Nev. 243, 248, 255 P.3d 209, 212  
16 (2011) (citing *City of Henderson*, 122 Nev. at 335, 131 P.3d at 14). In order to  
17 determine whether an administrative agency has the express or implied authority to  
18 take certain action, “it is necessary to review the relevant statutes.” *Id.*

19  
20  
21  
22 Contrary to petitioners’ assertions<sup>2</sup>, the State Engineer has the

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23 <sup>2</sup> See Lincoln County Water District and Vidler Water Company, Inc.’s Opening  
24 Brief at 15:19–20:28; Coyote Springs Investment, LLC’s Opening Brief on  
Petition for Judicial Review at 17:24–22:19; Georgia-Pacific Gypsum LLC and  
Republic Environmental Technologies, Inc. Opening Brief in Support of Petition

1 express—and at a minimum, the implied—statutory authority to support his Order  
2 1309.

3 **1. The State Engineer has the Authority to Combine Basins in**  
4 **order to Create the Lower White River Flow System**  
5 **Hydrographic Basin.**

6 “The scope of the State Engineer's authority here is a question of  
7 statutory interpretation.” *Wilson v. Pahrump Fair Water, LLC*, 137 Nev. Adv. Op.  
8 2, 481 P.3d 853, 856 (2021).

9 When interpreting a statute, legislative intent “is the controlling  
10 factor.” *Robert E. v. Justice Court*, 99 Nev. 443, 445, 664 P.2d 957,  
11 959 (1983). The starting point for determining legislative intent is the  
12 statute's plain meaning; when a statute “is clear on its face, a court can  
13 not go beyond the statute in determining legislative intent.” *Id.*; *see*  
14 *also Catanio*, 120 Nev. at 1033, 102 P.3d at 590 (“We must attribute  
15 the plain meaning to a statute that is not ambiguous.”). But when “the  
16 statutory language lends itself to two or more reasonable  
17 interpretations,” the statute is ambiguous, and we may then look  
18 beyond the statute in determining legislative intent. *Catanio*, 120 Nev.  
19 at 1033, 102 P.3d at 590. To interpret an ambiguous statute, we look  
20 to the legislative history and construe the statute in a manner that is  
21 consistent with reason and public policy. *Great Basin Water Network*  
*v. State Eng'r*, 126 Nev. —, —, 234 P.3d 912, 918 (2010); *see*  
*also Moore v. State*, 122 Nev. 27, 32, 126 P.3d 508, 511 (2006)  
(looking to legislative history to determine legislative intent behind  
ambiguous statute); *Robert E.*, 99 Nev. at 445–48, 664 P.2d at 959–61  
(looking to legislative history, reason, and public policy to determine  
legislative intent behind ambiguous statute).

21 *State v. Lucero*, 127 Nev. 92, 95–96, 249 P.3d 1226, 1228 (2011).

22 In reviewing the statutory framework relied upon by the State

23 \_\_\_\_\_  
24 for Judicial Review of Order 1309 at 20:25–23:4 and 27:6–28:17; and Petitioners  
Apex Holding Company, LLC and Dry Lake Water, LLC’s Opening Brief at 8:1–  
12:9.

1 Engineer, we must first look at NRS 533.024 where the State Engineer is instructed  
2 to “manage conjunctively the appropriation, use and administration of all waters of  
3 this State, regardless of the source of the water.” NRS 533.024(1)(e). While the  
4 term “conjunctive” is not defined in Chapter 533 of the NRS, it is a common term  
5 and its definition and plain meaning can readily be surmised. Conjunctive is  
6 defined as “serving to connect; connective; conjoined; joint.”<sup>3</sup> Thus, NRS  
7 533.024(1)(e) instructs the State Engineer to manage all waters in Nevada as a  
8 whole, as connected, regardless of their source. NRS 533.024 further instructs the  
9 State Engineer to “consider the best available science in rendering decisions  
10 concerning the available surface and underground sources of water in Nevada.  
11 NRS 533.024(c). These statutes and instructions from the legislature form the  
12 backdrop for the State Engineer’s Order 1309. ROA at 43.

15 In NRS Chapter 533, the meaning of the term “basin” is expanded  
16 upon, if not altogether defined. Under NRS 533.438(7), the legislature explained  
17 that “[a] ‘basin’ is one designated by the State Engineer for the purposes of  
18 Chapter 534 of NRS.” This statute appears, through its plain language, to state that  
19 the State Engineer has the authority to draw basin boundaries (i.e. designate a  
20 “basin”).

22 However, because the term “designate” is a term that routinely

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24 <sup>3</sup> See <https://www.dictionary.com/browse/conjunctive>, last accessed November 16,  
2021.

1 appears throughout Nevada’s statutory framework for water rights, both for its  
2 plain meaning and as a term of art in water law, it could be subject to multiple  
3 interpretations as used in NRS 533.438. <sup>4</sup> For example, under NRS 534.110, the  
4 State Engineer “[m]ay *designate* as a critical management area any basin in which  
5 withdrawals of groundwater consistently exceed the perennial yield of the basin.”  
6 NRS 534.110(7)(a) (emphasis added). The term designate here is used in the same  
7 manner as in 533.438—they both entitle the State Engineer to make a  
8 determination as to a particular boundary, i.e. a basin boundary or a critical  
9 management area boundary. The confusion may arise because Chapter 534  
10 references designated areas repeatedly, often times referring to areas that have been  
11 designated by the State Engineer as critical management areas or areas where  
12 permitted groundwater rights approach or exceed the estimated annual recharge  
13 into the basin. *See* NRS 534.120(1) (“Within the area that has been designated by  
14 the State Engineer...”); NRS 534.110(8) (“In any basin or portion thereof in the  
15  
16  
17

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18 <sup>4</sup> Contrary to the argument presented by Apex Holding Company, LLC and Dry  
19 Lake Water, LLC in their joint opening brief, NRS 534.030 is *not* “the statute  
20 which grants authority for the State Engineer to take certain hydrographic areas  
21 and formally designate the same as a basin,” undermining their argument that NRS  
22 534.030 does not specifically grant the State Engineer the authority to create a  
23 super-basin. *See* Petitioners Apex Holding Company, LLC and Dry Lake Water,  
24 LLC’s Opening Brief at 11:10–11. Instead, NRS 534.030 grants the State  
Engineer the authority to designate a basin as an area of active management. *See*  
*Wilson*, 481 P.3d at 855 (NRS 534.030(1) provides the procedure for the State  
Engineer to designate a basin as an area of active management.) This confusion  
seems to stem from the statute’s use of the word “designated” which appears  
repeatedly throughout Nevada’s water law statutes, as touched upon below.

1 State designated by the State Engineer [as a critical management area]”).

2 This repeated reference to “designated” areas could thus be used to  
3 interpret 533.438(7) as meaning that a “basin” as used in that section, must refer to  
4 a “designated area” such as a critical management area rather than permitting the  
5 State Engineer to designate the boundaries of a basin. However, a review of the  
6 legislative history for NRS 533.438 does not support the interpretation the section  
7 is intended to only apply to areas that have been designated as critical management  
8 areas.  
9

10 NRS 533.438 deals with interbasin transfers of groundwater and  
11 permits a county of origin to impose a fee on the groundwater transfer where the  
12 proposed point of diversion (i.e. location of the well) is in a different basin than the  
13 proposed place of use. *See also* NRS 533.007. Nothing in the remainder of NRS  
14 533.438 suggests that only basins requiring additional management or critical  
15 basins qualify as basins for purposes of interbasin transfers. The legislative history  
16 also makes that clear, through testimony from Peter G. Morros, former Director of  
17 the State Department of Conservation and Natural Resources<sup>5</sup>:  
18

19  
20 [N]early all the surface water in the state has been appropriated.  
21 However, there are groundwater basins that have some unappropriated  
22 water. As an example,...there are two groundwater basins in Spring  
23 Valley and Steptoe Valley, in White Pine County, that contain 10  
percent of the state’s replenishable groundwater supply; yet, only 1  
percent of the state’s population is concentrated in that area. He said

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24 <sup>5</sup> “The State Engineer is appointed by and responsible to the Director of the State  
Department of Conservation and Natural Resources.” NRS 532.020.

1 the choice is to take the population to the water, or take the water to  
2 the population.

3 See Exhibit 1, Summary of Legislation for S.B. 526, Senate Committee on Natural  
4 Resources, May 10, 1991 at pp. 3, 7. This brief excerpt describing how this piece  
5 of legislation came into being certainly does not support the notion that interbasin  
6 transfers refer only to basins designated as critical. Through these statutes, the  
7 State Engineer is both instructed to view and manage collectively the waters in  
8 Nevada and to delineate basin boundaries thereby creating basins for management  
9 pursuant to NRS Chapter 534.  
10

11 **2. The State Engineer has the Implied Authority to Combine**  
12 **Basins in Order to Create the Lower White River Flow**  
13 **System Hydrographic Basin.**

14 Even if NRS 533.438 does not serve as an explicit grant of authority  
15 to the State Engineer to delineate basins and draw basin boundaries, the statutory  
16 framework certainly supports an implied grant of authority to the State Engineer to  
17 serve those functions. NRS 534.030 authorizes the State Engineer to designate  
18 “any particular basin or portion therein” as an area of active management by first  
19 investigating whether “such administration would be justified.” If the State  
20 Engineer determines such management is justified, the State Engineer is required  
21 to designate the area of active management “by basin, or portion therein, and make  
22 an official order describing the boundaries.” NRS 534.030(1)(b). Similarly, NRS  
23 534.110(6) requires the State Engineer to “conduct investigations *in any basin or*  
24

1 *portion thereof* where it appears that the average annual replenishment to the  
2 groundwater supply may not be adequate for the needs of all permittees and all  
3 vested-right claimants.” (Emphasis added). Finally, NRS 534.120(1) permits the  
4 State Engineer to “make such rules, regulations and orders as are deemed essential  
5 for the welfare of *the area involved.*” (Emphasis added). The State Engineer is  
6 also “authorized and directed to designate preferred uses of water *within the*  
7 *respective areas so designated by the State Engineer* and from which the  
8 groundwater is being depleted.” (Emphasis added).

9  
10 Through these statutes, the State Engineer is expressly authorized  
11 and in fact required to investigate underground water *areas* and *basins* in order to  
12 manage those areas as necessary for the welfare for those areas. Combining this  
13 express authority with the overarching instruction to manage the water in Nevada  
14 conjunctively and with the best available science in mind, the State Engineer must  
15 be able to manage basins together when the science supports that the basins affect  
16 each other.<sup>6</sup> The State Engineer could not carry out his express duties if he were  
17 prohibited from managing basins together where, as here, the basins are uniquely  
18 connected through “the presence of a distinct regional carbonate-rock aquifer that  
19  
20

21 \_\_\_\_\_  
22 <sup>6</sup> While some petitioners argue the State Engineer is not expressly authorized to act  
23 through legislative declarations such as NRS 533.024, the State Engineer is  
24 permitted to “adopt regulations” to “ensure the proper and orderly exercise of the  
powers granted by law, *and the speedy accomplishment of the purposes of Chapter*  
*533, 534, 535, and 536 of NRS.*” NRS 532.120(2) (emphasis added). NRS 533.024  
sets out such purposes.

1 underlies” these basins. ROA at 47. Not only that, the State Engineer is expressly  
2 authorized to wield his implied authority and “make such reasonable rules and  
3 regulations as may be necessary for the proper and orderly execution of the powers  
4 conferred by law.” NRS 532.120(1). Forcing the State Engineer to instead treat  
5 each basin separate and distinct from a connected basin would debilitate the State  
6 Engineer’s ability to manage the basins and make the rules necessary for the  
7 welfare of the areas involved. Thus, because managing basins together when  
8 necessary is essential to carrying out the State Engineer’s express duties, the State  
9 Engineer has the implicit authority to combine basins for the purpose of managing  
10 those basins together. *See Stockmeier, supra.*

11  
12  
13 **B. The State Engineer’s Determination that the Maximum  
14 Groundwater that May be Pumped from the Lower White River  
15 Flow System Hydrographic Basin on an Average Annual Basis  
16 Cannot Exceed 8,000 afa is Supported by Substantial Evidence.**

17 The State Engineer's decisions must be supported by substantial  
18 evidence. *King v. St. Clair*, 134 Nev. 137, 139, 414 P.3d 314, 316 (2018) (stating  
19 that “factual findings of the State Engineer should only be overturned if they are  
20 not supported by substantial evidence”) Evidence “is substantial if a reasonable  
21 mind would accept it as adequate support for the conclusion.” *Wilson*, 481 P.3d at  
22 858. In reviewing the evidence relied upon by the State Engineer, “neither the  
23 district court nor this court will substitute its judgment for that of the State  
24 Engineer.” *Id.* (quoting *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264



1 (1979)). Deference to the State Engineer’s findings “is especially warranted”  
2 where the analysis is “technical and scientifically complex.” *Id.* As the Court in  
3 *Wilson* held,

4 [w]hen examining this kind of scientific determination, as opposed to  
5 simple findings of fact, a reviewing court must generally be at its most  
6 deferential’ because such conclusions are ‘within [the agency’s] area  
7 of special expertise, at the frontiers of science.’ *Balt. Gas & Elec. Co.*  
8 *v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103, 103 S.Ct. 2246, 76  
9 L.Ed.2d 437 (1983). Accordingly, the instant record is of similar  
10 substance to that of others that have sufficiently supported a finding  
11 and action by the State Engineer. *See, e.g., Pyramid Lake Paiute Tribe*  
12 *of Indians v. Ricci*, 126 Nev. 521, 527, 245 P.3d 1145, 1149 (2010)  
13 (upholding State Engineer’s finding that approval of change use  
14 application would not be detrimental to the public interest when State  
15 Engineer limited pumping to the available perennial yield based on  
16 the State Engineer’s findings regarding the perennial yield); *Griffin v.*  
17 *Westergard*, 96 Nev. 627, 630-32, 615 P.2d 235, 236-38 (1980)  
18 (concluding that substantial evidence, in the form of studies regarding  
19 the amount of available groundwater, supported the finding that the  
20 basin at issue was already over-appropriated and affirming the denial  
21 of groundwater applications on that basis).

22 *Id.*

23 Here, the State Engineer’s determination and order that “the  
24 maximum quantity of groundwater that may be pumped from the Lower White  
River Flow System Hydrographic Basin on an average annual basis without  
causing further declines in Warm Springs area spring flow and flow in the Muddy  
River cannot exceed 8,000 afa and may be less” is supported by substantial  
evidence. To start, the idea that the State Engineer came to this conclusion without  
any evidence is wholly disingenuous and ignores the years of studies that have

1 been undertaken in the LWRFS. Petitioners disagreeing with the State Engineer’s  
2 ultimate conclusions is not synonymous with those conclusions not being  
3 supported by substantial evidence.<sup>7</sup>

4           In his order, the State Engineer begins his analysis relying upon Order  
5 1169, dating back to March 2002, and the accompanying aquifer test which was  
6 completed as a result of that Order. ROA at 4–11. The aquifer test was conducted  
7 for a period of over two years and resulted in pumpage and water-level  
8 measurements within the study basins in order to determine the impact of  
9 additional water appropriation in the LWRFS. ROA at 6. Through that test, the  
10 State Engineer learned “that pumping 5,290 afa” caused “sharp declines in  
11 groundwater levels and flows” of waters which contribute to the LWRFS “and are  
12 the predominant source of water that supplies the habitat of the endangered Moapa  
13 dace.” ROA at 7. The State Engineer also analyzed reports provided by many of  
14 the petitioners in this matter who themselves analyzed the aquifer test data. At the  
15 conclusion of the aquifer test, the State Engineer had already determined that  
16 additional pumping in Coyote Spring Valley would contribute to a decline in the  
17 springs which support the Muddy River and the Moapa dace. ROA at 10. The  
18  
19  
20

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21  
22 <sup>7</sup> Argument in response to Lincoln County Water District and Vidler Water  
23 Company, Inc.’s Opening Brief at 35:18–38:8; Georgia-Pacific Gypsum LLC and  
24 Republic Environmental Technologies, Inc. Opening Brief in Support of Petition  
for Judicial Review of Order 1309 at 17:19–20:24; Center for Biological  
Diversity’s Opening Brief at 24:2–28:10; and Coyote Springs Investment, LLC’s  
Opening Brief on Petition for Judicial Review at 48:8–50:7.

1 State Engineer also based his Order 1309 on the evidence provided by interim  
2 order 1303 wherein many reports were submitted addressing (1) the proper  
3 boundaries for the LWRFS; (2) aquifer recovery after the aquifer test; (3) the  
4 annual quantity and location of groundwater that may be pumped from the  
5 LWRFS; and (4) the effect of movement of water rights between alluvial and  
6 carbonate wells within the LWRFS. ROA at 11–42.

8 While, through those reports, as noted by the State Engineer,  
9 recommendations for the amount of ground water that can be pumped from the  
10 LWRFS ranged from zero to over 30,000 afa, “most experts agreed that the amount  
11 must be equal to or less than the current rate of pumping.” ROA at 58. Further,  
12 the State Engineer found, through these reports that:  
13

14 Pumping from wells in the LWRFS has gradually declined. Pumping  
15 in 2013-2014 averaged 12,635 afa; pumping in 2015-2017 averaged  
16 9,318 afa. Pumpage inventories for 2018 that were published after the  
17 completion of the hearing report a total of 8,300 afa. Pumping from  
18 alluvial aquifer wells in the Muddy River Spring Area has consistently  
19 declined since closure of the Reid Gardner power plant beginning in  
2014, while pumping from the carbonate-rock aquifer since the  
completion of the aquifer test has consistently ranged between  
approximately 7,000 and 8,000 afa.

20 ROA at 56 (citations to reports omitted). The State Engineer discounted the over  
21 30,000 afa estimate because it did not account for whether the availability of  
22 groundwater for pumping is appropriated for use in upgradient and downgradient  
23 basins as it should, and because it was an outlier estimate with most experts  
24 disagreeing. ROA at 58.

1 Further, through the reports and testimony submitted, the State  
2 Engineer determined that, pursuant to Order 1169, pumping 5,290 afa caused a  
3 sharp decline in discharge of water, but distributed pumping in excess of 8,000 afa  
4 was correlated with stabilizing spring discharge. Finally, the State Engineer took  
5 into account the impact precipitation may have had on the data, noting the rising  
6 trends in groundwater levels which suggests that “climate and recharge efficiency  
7 may have actually buffered the full effect of pumping on discharge at the Warm  
8 Springs area, and that the system could not support the current amount of  
9 groundwater pumping during an extended dry period with lesser recharge.” ROA  
10 at 63. For example, the City of North Las Vegas submitted a technical report from  
11 Dwight L. Smith, PE, PG, Principal Hydrologist, concluding that groundwater  
12 resources in the LWRFS is probably no greater than 10,000 afa. ROA at 34652.  
13 NV Energy submitted that the system is approaching steady state conditions with  
14 current carbonate pumping of 7,000 to 8,000 afa. ROA at 41876; *see also* ROA at  
15 52914–52915.  
16  
17

18 Similarly, Richard Waddell, Jr., a hydrologist, testifying for the  
19 National Park Service, concluded that groundwater pumping would have to be less  
20 than 14,500 afa as his model indicated with that volume of pumping, equilibrium  
21 within the system would not be reached in 500 years. ROA at 53226. In fact, Mr.  
22 Waddell testified that pumping should be below the current level of 9,318 afa. *Id.*  
23  
24

1 With all of this data and analysis combined, the State Engineer  
2 concluded that pumping from the LWRFS cannot exceed 8,000 afa. This is in line  
3 with the evidence that pumping in the LWRFS has gradually declined and is near  
4 the 8,000 afa mark. It is also in line with the finding that stabilization is reached at  
5 around 8,000 afa. While the State Engineer noted, as most petitioners have  
6 likewise done, that more data is needed to refine, with certainty the exact amount  
7 of groundwater that can be pumped while keeping the interests of all involved,  
8 including the Moapa dace, in mind, this does not mean the State Engineer did not  
9 rely on substantial evidence to reach his conclusions. The State Engineer is  
10 permitted to draw reasonable inferences from evidence, as the State Engineer has  
11 done here. *See Wilson*, 481 P.3d at 858 (“the State Engineer has authority to draw  
12 reasonable inferences from such evidence.”) (citing 4 Charles H. Koch, Jr.,  
13 *Administrative Law and Practice* § 11:24 [4] (3d ed. 2010) (explaining that an  
14 agency has “the power to draw inferences from the facts”); *see also id.* § 5:64 [3]  
15 (noting that “circumstantial evidence can satisfy the substantial evidence  
16 standard”)).

17  
18  
19  
20 **C. Order 1309 Does Not Deprive Petitioners of Property Rights.**

21 Contrary to some arguments presented in petitioners’ opening briefs<sup>8</sup>,  
22 Order 1309 does not strip or rearrange any of petitioners vested water rights. No  
23

24 <sup>8</sup> Argument in response to Lincoln County Water District and Vidler Water Company, Inc.’s Opening Brief at 19:15–20:28; Muddy Valley Irrigation Company’s Opening Brief at 20:4–22:23; Coyote Springs Investment, LLC’s

1 determination has yet been made with regard to priority of rights in the LWRFS  
2 Hydrographic Basin, rendering these arguments premature. Nevertheless, even if  
3 water rights within the LWRFS are administered based upon their respective  
4 priority dates in relation to others within the LWRFS, this would not constitute a  
5 deprivation of property rights.  
6

7 As argued by Lincoln County Water District and Vidler Water  
8 Company, Inc. in their opening brief (at 20:1–23), Nevada expressly prohibits the  
9 reallocating of adjudicated water rights. Again, importantly, there has been no  
10 Order reshuffling, or even advising the parties how water rights will be prioritized  
11 within the LWRFS, so argument regarding that issue is purely speculative.  
12 However, assuming the State Engineer will administer water rights based on their  
13 respective priority dates in relation to other water rights holders within the  
14 LWRFS, such an action would not constitute a reallocation of water rights and  
15 would comport with Nevada law.  
16

17 Nevada follows the prior appropriation doctrine.

18 The prior appropriation doctrine grants “[a]n appropriative right [that]  
19 ‘may be described as a state administrative grant that allows the use of  
20 a specific quantity of water for a specific beneficial purpose if water is  
21 available in the source free from the claims of others with earlier  
22 appropriations.’ ” *Desert Irrigation, Ltd. v. State*, 113 Nev. 1049,  
1051 n.1, 944 P.2d 835, 837 n.1 (1997) (quoting Frank J. Trelease &  
George A. Gould, *Water Law Cases and Materials* 13 (4th ed. 1986)).  
23

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24 Opening Brief on Petition for Judicial Review at 22:20–26:10; Petitioners Apex  
Holding Company, LLC and Dry Lake Water, LLC’s Opening Brief at 10:3–11:3.

1 *Mineral County*, 136 Nev. at 509, 473 P.3d at 423. NRS 533.430(1) provides that  
2 adjudicated permits to appropriate water and certificates of appropriation are  
3 “subject to existing rights.” This is achieved through the issuance of priority dates  
4 and determined through the relative rights of water rights holders. *See* NRS  
5 533.090 and NRS 533.265; *see also Mineral County*, 136 Nev. at 513, 473 P.3d at  
6 426 (“Nevada's water statutes embrace prior appropriation as a fundamental  
7 principle. Water rights are given subject to existing rights, given dates of priority,  
8 and determined based on relative rights.”) (internal citations and quotations  
9 omitted).  
10

11           Where, as here, multiple basins are determined to be “uniquely”  
12 interconnected to a degree where pumping in one basin affects the available water  
13 in another basin, ignoring that interconnectivity could adversely affect senior water  
14 rights holders which would be contrary to Nevada’s prior appropriation doctrine.  
15 ROA at 47–48. Instead, water rights should be determined based on relative rights.  
16 So long as water rights holders maintain their respective priority dates and rights  
17 are determined based on the relative rights of other water rights holders within the  
18 same interconnected water system, the prior appropriation doctrine has not been  
19 violated.  
20  
21

22           All water in the State of Nevada, whether above or below the surface  
23 of the ground, belongs to the public and is not private property. NRS 533.025; *see*  
24 *also Mineral County*, 136 Nev. at 513, 473 P.3d at 426. This is “the most

1 fundamental tenant of Nevada water law.” *Mineral County*, 136 Nev. at 510, 473  
2 P.3d at 424 (quoting *Mineral County v. State, Dept. of Conservation & Nat. Res.*,  
3 117 Nev. 235, 247, 20 P.3d 800, 808 (2001)). Thus, “those holding vested water  
4 rights do not own or acquire title to water, but merely enjoy a right to the beneficial  
5 use of the water.” *Id.* That some water rights holders will “acquiesce to senior  
6 water rights is a natural consequence of the prior appropriation doctrine.” *Wilson*,  
7 481 P.3d at 860 (quoting *Fox v. Skagit Cty.*, 193 Wash.App. 254, 372 P.3d 784,  
8 796 (2016)).

10           Where a water rights holder does not obtain water relative to other  
11 more senior water rights holders, a taking has not occurred, nor has due process  
12 been violated.

14           [B]ecause Nevada's resulting system of prior appropriation neither  
15 envisions nor guarantees that there will be enough water to meet every  
16 demand for it, a landowner's unilateral assumptions to the contrary are  
17 not the sort of justified reliance that would demand notice and a  
18 hearing prior to the State Engineer's imposition of the restriction at  
19 issue.

18 *Wilson*, 481 P.3d at 854; *see also Perry v. Sindermann*, 408 U.S. 593, 600, 92 S.Ct.  
19 2694, 33 L.Ed.2d 570 (1972) (holding that a “mere subjective ‘expectancy’ [is not]  
20 protected by procedural due process”).

21           Thus, while arguments in this regard are purely speculative as no  
22 water right priority has been determined or ruled upon by the State Engineer,  
23



1 where water rights are prioritized relative to each other and with regard to priority  
2 date, the prior appropriation doctrine has not been disrupted.

3 **VIII. CONCLUSION**

4           The State Engineer has the authority to create the LWRFS  
5 hydrographic basin, and his order limiting the quantity of groundwater that may be  
6 pumped from the LWRFS hydrographic basin to 8,000 afa or less is supported by  
7 substantial evidence. In addition, because the State Engineer has not yet made a  
8 finding as to the priority of water rights within the LWRFS, arguments in that  
9 regard are premature. For those reasons as more fully set forth above, the State  
10 Engineer's Order 1309 should be upheld.  
11

12           DATED this 24<sup>th</sup> day of November, 2021.

13  
14 KAEMPFER CROWELL

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1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCF 5(b), EDCR 8.05(a) and EDCR 8.05(f), I hereby certify  
3 that service of the **ANSWERING BRIEF FROM INTERVENOR**  
4 **RESPONDENT THE CHURCH OF JESUS CHRIST OF LATTER-DAY**  
5 **SAINTS** was made on November 24, 2021 to the following counsel of record  
6 and/or parties by electronic transmission through the Eighth Judicial District  
7 Court’s electronic filing system, to all parties appearing on the electronic service  
8 list in Odyssey E-File to the following:  
9

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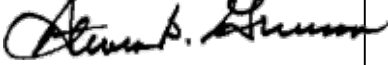
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14 DATED: November 24, 2021.

15           /s/ Sharon Stice            
16 An employee of Kaempfer Crowell



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DISTRICT COURT  
CLARK COUNTY, NEVADA

LAS VEGAS VALLEY WATER  
DISTRICT, and SOUTHERN  
NEVADA WATER AUTHORITY

Petitioners,

vs.

ADAM SULLIVAN, P.E., Nevada State  
Engineer, DIVISION OF WATER  
RESOURCES, DEPARTMENT OF  
CONSERVATION AND NATURAL  
RESOURCES,

Respondents.

And All Consolidated Cases.

Case No. A-20-816761-C (Lead  
Case)

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

**APPENDIX OF EXHIBITS AND  
EXCERPTS OF RECORDS IN  
SUPPORT OF ANSWERING  
BRIEF FROM INTERVENOR  
RESPONDENT THE CHURCH OF  
JESUS CHRIST OF LATTER-DAY  
SAINTS**

KAEMPFER CROWELL  
50 West Liberty Street, Suite 700  
Reno, Nevada 89501

1 For the convenience of the Court, THE CHURCH OF JESUS CHRIST OF  
 2 LATTER-DAY SAINTS, attaches hereto the following exhibit and documents found within the  
 3 Record which are cited to within its Answering Brief filed November 24, 2021:

4 **TABLE OF CONTENTS**

TAB	Description	Bates No.
1	Exhibit 1 - Summary of Legislation for S.B. 526, Senate Committee on Natural Resources, May 10, 1991	LDS_001-015
2	Order 1309	SE ROA 2-69
3	Interim Order 1303	SE ROA 70-86
4	Order 1169A, 2	SE ROA 655
5	Order 1169, 4, 6-7	SE ROA 662, 664-665
6	Ruling #6254, 1, 24	SE ROA 738, 749
7	Smith, Dwight L., and Alexa Terrell. InterFlow Hydrology, Inc., July 2, 2019, <i>Technical Memorandum Re: Garnet Valley Groundwater Pumping Review for APEX Industrial Complex, City of North Las Vegas, Clark County, Nevada</i>	SE ROA 34652, 34697-34699
8	DeVaul, Randall E., July 2, 2019, <i>Interim Order 1303 Report Submittal from the City of North Las Vegas.</i>	SE ROA 34705-34710
9	Felling, Richard A., August 16, 2019, <i>NV Energy Rebuttal Report to State Engineer's Order 1303 Initial Report by Respondents</i>	SE ROA 41876
10	Closing Brief of The Church of Jesus Christ of Latter-Day Saints	SE ROA 52757-52762
11	Nevada Energy's Closing Statement, 3-4	SE ROA 52914-52915
12	Transcript of Proceedings Hearing On Order 1303, Volume 3, 651-654	SE ROA 53226

1 DATED: November 24, 2021

2 KAEMPFER CROWELL

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1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCF 5(b), EDCR 8.05(a) and EDCR 8.05(f), I hereby certify  
3 that service of the **APPENDIX OF EXHIBITS AND EXCERPTS OF**  
4 **RECORDS IN SUPPORT OF ANSWERING BRIEF FROM INTERVENOR**  
5 **RESPONDENT THE CHURCH OF JESUS CHRIST OF LATTER-DAY**  
6 **SAINTS** was made on November 24, 2021 to the following counsel of record  
7 and/or parties by electronic transmission through the Eighth Judicial District  
8 Court’s electronic filing system, to all parties appearing on the electronic service  
9 list in Odyssey E-File to the following:  
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19 DATED: November 24, 2021.

20 /s/ Sharon Stice  
21 An employee of Kaempfer Crowell

TABLE OF JA LOCATION TO AVOID DUPLICATES

TAB	Description	SE ROA	JA Vol	JA BATES	
1	Exhibit 1 -Summary of Legislation for S.B. 526, Senate Committee on Natural Resources, May 10, 1991	LDS_001-015	attached		
2	Order 1309	2-69	2	JA_326	JA_393
3	Interim Order 1303	70-86	2	JA_394	JA_412
4	Order 1169A, 2	655	3	JA_819	JA_823
5	Order 1169, 4, 6-7	662, 664-665	3	JA_824	JA_834
6	Ruling #6254, 1, 24	738, 749	3	JA_891	JA_919
7	Smith, Dwight L., and Alexa Terrell. InterFlow Hydrology, Inc., July 2, 2019, <i>Technical Memorandum Re: Garnet Valley Groundwater Pumping Review for APEX Industrial Complex, City of North Las Vegas, Clark County, Nevada</i>	34652, 34697-34699	15	JA_7180	JA_7232
8	DeVaul, Randall E., July 2, 2019, <i>Interim Order 1303 Report Submittal from the City of North Las Vegas.</i>	34705-34710	15	JA_7234	JA_7239
9	Felling, Richard A., August 16, 2019, <i>NV Energy Rebuttal Report to State Engineer's Order 1303 Initial Report by Respondents</i>	41876	27	JA_11786	JA_11797
10	Closing Brief of The Church of Jesus Christ of Latter-Day Saints	52757-52762	43	JA_17154	JA_17161
11	Nevada Energy's Closing Statement, 3-4	52914-52915	43	JA_17309	JA_17314
12	Transcript of Proceedings Hearing On Order 1303, Volume 3, 651-654	53226	44	JA_17609	JA_17648

**NEVADA LEGISLATURE**

SIXTY-SIXTH SESSION 1991

**SUMMARY OF LEGISLATION**



PREPARED BY  
RESEARCH DIVISION  
LEGISLATIVE COUNSEL BUREAU

S.B. 526 (Chapter 469)

Senate Bill 526 authorizes the State Engineer to require an additional hydrological, environmental or any other study before approving an application to appropriate water. The applicant is required to pay for the cost of such studies.

The bill also authorizes the State Engineer to issue a temporary water permit. An application for a temporary permit must be rejected if the application is incomplete, the fees are not paid, the proposed use is not temporary, there is no water available without exceeding the perennial yield or safe yield of the source, the proposed use conflicts with existing water rights, or the proposed use threatens to prove detrimental to the public interest.

In addition, the bill provides for an annual tax of \$6 per acre-foot per year which may be imposed by the county of origin for the transfer of water to a county in this or another state. The revenue from this tax must be placed in a trust fund, and the principal and interest may be used only for purposes of economic development, health care and education.

If the county of origin does not impose such a tax, the bill allows an applicant and the county of origin to execute a plan to mitigate adverse economic effects caused by the transferring of water to another county. The plan may include, but is not limited to, provisions concerning the reservation of water rights to the county of origin and compensation for the foreseeable effects of the transfer. The plan must be reviewed by the State Engineer who may alter it if it violates a specific statute or if it becomes impossible or impractical to put into effect.

Senator Adler asked the committee to review Senate Bill (S.B.) 219, and Amendment 421 (Exhibit C), which had come over from the assembly.

S.B. 219: Makes various changes relating to discharges of petroleum.

SENATOR RHOADS MOVED TO CONCUR IN AMENDMENT 421 TO S.B. 219.

SENATOR JACOBSEN SECONDED THE MOTION.

THE MOTION CARRIED. (SENATORS VERGIELS AND SHAFFER WERE ABSENT FOR THE VOTE.)

\* \* \* \* \*

Senator Adler opened the hearing on Senate Bill (S.B.) 526 with a history of how the measure came into being.

S.B. 526: Requires additional approval for transfer of large amounts of water.

Senator Adler explained he, Senator Getto, and Senator Hal Smith had met with various parties to discuss interbasin and intercounty transfers of water. During the discussions, it became evident there were a number of matters not covered by Nevada water law. Those included protection for the county of origin, including economic factors, reservation of water rights, and various environmental considerations. The aim of S.B. 526, he declared, is to mitigate some of those issues which may impact counties when large transfers of water take place.

After discussions on S.B. 526 with Peter G. Morros, Director, State Department of Conservation and Natural Resources, Senator Adler said they decided the bill needed a few changes.

Mr. Morros presented copies of his proposed amendments (Exhibit D) to the committee and others in the audience. He indicated the amendments had been drawn in a manner which would preclude the necessity for a fiscal note to administer S.B. 526 in its original form.

Mr. Morros pointed out that each time a large transfer of water occurs, people feel the statutes need alteration, depending upon who perceives his "ox is getting gored." He contended Nevada water law has served the state well for nearly 90 years, and there is no need for changes. He said he did not believe the water planning division should get into a permitting process, because that was not the intended function of the division.



Mr. Morros warned the committee, care needs to be taken to avoid requirements for duplication of Environmental Impact Statements (EISes). As an example, he noted, the proposal by the Las Vegas Valley Water District (LVVWD) to import water will necessitate right-of-ways across federal lands, which will require extensive and comprehensive EISes. He could see no reason for those EISes to be duplicated by the state. He suggested the state engineer should consult with other divisions, within and without the Department of Conservation and Natural Resources, when it is appropriate.

Mr. Morros stated large interbasin transfers of water date back to the early days of the water law. He enumerated the three criteria in the existing law: an evaluation of the availability of unappropriated water; the effect on existing rights; and the state engineer's determination as to whether the appropriation would be in the public interest.

Mr. Morros asked to reserve the right to prepare a fiscal note to S.B. 526, depending upon the final form of the bill. He reiterated his belief the bill is unnecessary, but said his department could live with the proposed amendments.

In reply to a question by Senator Rhoads, Mr. Morros said large, historical water transfers took place in the east side of Spring Valley in the Snake Range of White Pine County around 1903 to 1905, while more recent applications for transfers had been made involving Carson Valley, Dayton Valley, and Washoe Valley. Some of the recent applications were approved, whereas some were denied when the state engineer determined there would be adverse effects upon the area of origin.

After discussion regarding the implication that the state engineer might not have the ability to deal effectively with applications, Senator Adler interjected, the point is, that the state engineer has no authority to assess fees to conduct EISes, nor can he compensate people for their loss of groundwater. Senator Rhoads characterized S.B. 526 as a measure to provide reasonable protection for those areas which have water. Mr. Morros argued:

Conceivably applications could be filed to utilize...a large amount of water within a groundwater basin that could have even a more disastrous effect on that groundwater basin than a project or a proposal to export that water out of the basin...If you're going to require Environmental Impact Statements...socio-economic studies...studies on economic growth...just based on exporting water out of one groundwater basin into another, I don't see where there's such a fine

distinction between that and issuing permits for...the development of a dozen land entries... that would consume the same amount of water.

Mr. Morros charged drilling even one domestic well would have some effect on groundwater, no matter how minuscule. Because water is such a limited resource, every drop should be utilized in the most efficient way possible, which, he declared, "means interbasin transfer." Senator Adler insisted there was no intention of preventing interbasin transfers, but rather the intention was to recognize some of the rural values. He concurred there is no difference between using water within the basin or transferring it out of the basin, but to the people in the basin it makes a great deal of difference. Mr. Morros responded the state engineer has the responsibility to see that the resource is not depleted beyond its ability to replenish itself.

Senator Getto commended the operation of the state engineer's office, and said the law had worked well. However, he expressed his support for the bill and the resolution that came from the interim study on water resources. He said the law presently reads "in the public interest," which he conceded can be interpreted very broadly. He advocated outlining some specific guidelines for the state engineer. He charged there is nothing that says protecting the "public interest" would include the environment, which then becomes a subjective interpretation by the state engineer.

Mr. Morros referred Senator Getto to the ruling, made by the state engineer, relating to applications made by Carson City to import water from Washoe Valley, as evidence that the state engineer was sensitive to the environment. The state engineer made a determination that the impact would be too much on the sensitive ecological situation in Washoe Valley, and he denied the applications on the basis of the impact on Washoe Lake and the groundwater system, even though Carson City had a great need for more water. According to Senator Getto, that provided proof that the law needed changing, rather than allowing the matter to rest on the strength of the individual serving as state engineer. Mr. Morros countered that the state engineer needs the discretion to make the determination whether or not he needs an EIS or socio-economic study.

Mr. Morros agreed there might be a need to provide the state engineer with more statutory guidance, as long as the legislation would clearly define the source of funds to pay for the studies or additional staff to implement the statutes.

R. Michael Turnipseed, State Engineer, Division of Water Resources, informed the committee his office has required applicants to pay for EISes when it was deemed the

appropriations sought were of sufficient magnitude to warrant studies. Most of those requirements to pay were imposed upon the mining industry, but some were imposed upon others, such as the Honey Lake study.

Senator Adler asked if it would be better to give the state engineer statutory authority to request an EIS, at his discretion. Mr. Morros agreed such an amendment could be accomplished in about a paragraph. The senator pointed out there is some concern that more statutory authority for the state engineer would be advisable.

Mr. Turnipseed expanded on the list of historic interbasin transfers that had taken place. He listed about 20 transbasin transfers, some of which had been interstate transfers.

The discussion regarding the discretion to order EISes continued. Mr. Turnipseed noted the suggested amendments would make studies discretionary, but the portions of the bill regarding temporary permits, or the tax that could be imposed by the basin of origin were left unchanged. Senator Adler suggested language be included to prevent any requirement for duplication of studies.

Senator Adler asked if it would not be a good idea to give the state water engineer the authority to issue temporary permits. Mr. Turnipseed concurred, and added, "If there's a use out there that can utilize the water between the time the basin becomes...fully appropriated, until the time the water actually has to be used, then it's in the benefit of the state to have that water used, in the interim."

Mr. Turnipseed believed he already had the authority to issue temporary permits, because when mining permits are issued, the bottom line on the permit states that the permit is terminated upon the completion of the mining and reclamation project. He added there had never been an appeal regarding the termination of the permit, and when protests had been filed regarding permits, the appellants had included language to the effect they had no interest in the water once the project was complete.

Mr. Morros substantiated Mr. Turnipseed's appraisal of his authority, but said there had been some question whether the water division would be able to defend the position had there been a challenge. He asserted there could be an economic disaster if the division were unable to issue temporary permits for mining projects, because they would have to deny permits for several large mining operations. The division has become dependent on the revenues from those permits, he said. Senator Adler deduced it would be a good idea to include

wording in the bill to specifically authorize the state water engineer to issue temporary permits.

In response to a question by Senator Jacobsen, Mr. Morros said nearly all the surface water in the state has been appropriated. However, there are groundwater basins that have some unappropriated water. As an example, he stated there are two groundwater basins in Spring Valley and Steptoe Valley, in White Pine County, that contain 10 percent of the state's replenishable groundwater supply; yet, only 1 percent of the state's population is concentrated in that area. He said the choice is to take the population to the water, or take the water to the population, but the two high growth areas, Clark County and Truckee Meadows, are each approximately 300 miles from those sources of water.

Mr. Morros opined there is adequate protection in the current law to protect the water sources. He called attention to court decisions which have been handed down when the state water engineer's decisions have been challenged, in which the state engineer has prevailed over 90 percent of the time. As an example, he cited cases in which the state prevailed when change applications in the Newlands project, in the Fallon area, were disputed by both the Pyramid Tribe and the United States Department of Interior.

Richard Carver, County Commissioner, Nye County, thanked the chairman for setting up a meeting on April 27th in which various parties could air their views on water issues. He asserted much of the water pumped out of the ground by ranchers in his area returns to the ground as recharge, or, if it evaporates, it is returned through precipitation from thunderclouds. He complained any water piped several hundred miles out of the basin would never be returned to the basin.

Mr. Carver aired his concern with the term "public interest." He agreed public interest could be anything. He wanted some assurance the issues he had brought up would be addressed by the legislature. He said,

We'd like to see that there's a guarantee that there's going to be an independent assessment on the water resources in a particular basin...We'd like to see, in a project as big what's happening in the three rural counties...an environmental impact statement addressing impacts on the project, on the proposed water-losing areas and water-gaining areas.

Mr. Carver suggested, since EISes would have to be done at some point, they should be done first, and then used for both the state and the Bureau of Land Management (BLM) issues of

right-of-ways. He also asked that the legal right to the land, engineering and economic feasibility studies, and a demonstrated need for the water be made first, and that the county of origin be allowed to participate in hearings on applications before the water engineer.

Mr. Carver said his opinions were discussed with the other Nye County Commissioners, and represented their viewpoint. He said they had some recommendations regarding S.B. 526 which would be explained by Steve Bradhurst, Planning Consultant, Department of Planning, Nye County.

Mr. Bradhurst told the committee the Board of Commissioners had discussed S.B. 526 in depth. Although they felt water law had worked well to date, they were concerned because the authority to decide what information is needed rests with the individual who serves as state water engineer. The commissioners concurred certain requirements should be met before applications get to the engineer. Although board members supported S.B. 526, he said, they felt there should be some revisions.

Senator Adler implied the proposed amendments may cover their concerns. Mr. Bradhurst reiterated his concern the process may lack consistency, and that the state engineer may not receive enough information up front upon which to base his decision on what the impact would be on the public interest. His Board of Commissioners advocated requiring the studies suggested by Mr. Carver be conveyed to the state engineer before he makes his decision on the application. Mr. Bradhurst said, if there are impacts which are not significant, his board proposed some way should be found to address mitigation after the application has been approved.

Mr. Bradhurst alleged two entities, Clark County and Ecovision, have filed on half the water in the state. By the next session of the legislature, he warned, "You're going to have, probably, the whole state covered by water brokers." He asserted all the water is tied up in applications, which means new applicants must "stand in line" to have their applications processed.

Senator Adler asked if Nye County was in agreement with section 5 of the proposed amendment, which would allow the state engineer to issue permits for a finite life, under certain conditions. Mr. Bradhurst indicated the board would accept it, he said, "If there was a process laid out that kept the playing field level, and the state engineer followed that process." An example he gave would be to obtain right-of-way information before going forward on an application.

In reply to a query by Senator Shaffer, Mr. Bradhurst responded there may be remedies in law, but without a definition of "public interest," cases from other states may have to be used to establish precedent for use in any action brought in Nevada. He said:

It would be a shame...[for] counties with limited resources to have to do that, when they could come to the legislature, and ask the legislature to make sure we have a level playing field, and not have to go to the court to get a fair assessment and an informed decision.

Mr. Bradhurst reiterated his position the state engineer should require an EIS and information on the right-of-way before making a decision on an application. Senator Adler asked if it might be difficult for the applicant to determine which right-of-way he would want unless he knew which water he was going to be granted. Mr. Bradhurst responded a tiered or staged EIS would be less costly. A first stage would be an EIS to show the impact on a water basin, its resources and natural habitats, once the water was drawn, even though the applicant might not be sure where the well would be located.

Mr. Bradhurst echoed Mr. Carver's request that the law allow host jurisdictions to participate in hearings regarding large transfers of water. Senator Adler asked that testimony be restricted to generalities, and not address specific applications.

Senator Adler asked what opinion Mr. Carver had regarding economic compensation. Mr. Carver concurred that was important, but would not fall under the purview of the state engineer. He repeated the prime concern of the Nye County Board of Commissioners was that the state water law needs guidelines to ensure it would not be abused in the transfer from one basin to another. He said members of the board would provide the committee with some specific language which they would like included in S.B. 526.

Mr. Morros asked the committee to be aware that the position taken by federal agencies is that they would not initiate an EIS until after the state engineer has made his decision on water appropriations.

Janet L. Gilbert, Lobbyist, League of Women Voters, made a statement in support of S.B. 526. She singled out the section requiring an EIS as of prime concern to the league. She also stated the importance of tying together conservation and the transfer of water.

Senator Getto wanted to know if any part of section 2, as proposed by Mr. Morros, would assure that there would be a reserve left when there is a transfer. Mr. Turnipseed answered that language addressing reserved rights had been left out of the proposed amendments, because, he said:

Nevada is a prior appropriation state, and has been since the riparian rights doctrine was repudiated back in 1881 in a Supreme Court case. California is the only western state that subscribes to any kind of reserve rights to groundwater, and theirs is called a 'relative rights doctrine' and you have a certain right to the groundwater simply by...virtue of your overlying land ownership. That doctrine has never been subscribed to in Nevada...nor has it been in any of the rest of the western states.

He has designated portions of basins strictly for municipal use, which is in essence, he declared, a reserve rights doctrine, without identifying who the user would be. An example would be the Rye Patch well field in Ralston Valley which was set aside for municipal use, presumably for Tonapah. Another is the Oriana subbasin in Lovelock Valley, which would presumably be for municipal use by the town of Lovelock. He opined it might be unconstitutional to reserve portions for specific use by a specific entity, but in some areas irrigation rights have been denied in order to reserve the use of the water for higher and better use.

Mr. Morros pointed out there is authority in groundwater law for the state engineer to adopt rules for management of water in a groundwater basin. He offered the opinion that authority would allow the engineer to designate preferred uses, and he has exercised that authority in the past. In Ely, he said, power generation was designated as a preferred use. Much depends upon public demand, he admitted. He agreed with Mr. Turnipseed that it might not be constitutional to reserve water for a specific entity, but only for specific use.

Mr. Morros opined the state engineer could take into account any information received in a hearing process from applicants or protestants, including future use within a basin.

Since there is no statutory language which would permit the state engineer to reserve any portion of water in a basin, Senator Getto asked, if a portion was denied, would the state engineer be able to defend his position in court. Mr. Morros replied the engineer would use the position of what would be best for the public interest. He admitted it had not been tested, and that such a situation would probably come up one

day in the not too distant future. He felt the public interest is a defensible position.

Larry Brown, Lobbyist, Las Vegas Valley Water District, deferred to Ross deLipkau, Attorney, Las Vegas Valley Water District. Mr. deLipkau voiced no opposition to S.B. 526, but said there is some vague language in the bill which needs clarification. He offered to meet at any time with protestants in any county to resolve problems. He suggested the bill should address transfers of any magnitude, not just large transcounty diversions, including groundwater or surface water.

Mr. deLipkau cited subsection 3 of section 3 on the first page of the proposed amendments in Exhibit D as an example of vague language. He said he did not know what "environmental effects" means, and charged the term environmental impact study has been used too much, often by laymen who place an incorrect interpretation on EIS. Senator Adler pointed out the measure does not require an EIS. Mr. deLipkau described it as an inconsistency to require an economic study when a pump tax must be paid anyway. He declared environmental studies are taken care of by requirements of other agencies.

Mr. deLipkau concurred that existing law gives the state engineer the authority to carry out the provisions of S.B. 526. He said the Las Vegas Valley Water District would comply with the provisions of S.B. 526, whether it became law or not. Going over the details of the bill, he stated the only new portion of the bill is the section dealing with the pump tax. His district agreed 6 months earlier to allow temporary use of water for mining in Lincoln County. As to section 3, Mr. deLipkau asserted it could be troublesome, because it could adversely take away a water right, which is a property right.

Mr. deLipkau said there are approximately 232 groundwater basins in Nevada, about half of which have been designated as critical groundwater basins. He pointed out 90 percent of the citizens of the state live within a designated critical groundwater basin, and yet permits have been granted in those basins without the requirement for an environmental study. He alleged S.B. 526, as written, would interfere with negotiated settlements on the Carson and Truckee Rivers, and could affect environmental movements taking place in the Walker River District.

Mr. deLipkau wanted to know if S.B. 526 would be retroactive. He intimated it would not affect the Honey Lake project.

Mr. deLipkau agreed he had no objection to section 5, as written in the proposal by the state engineer. According to



Senator Adler, everyone was in agreement that section 5 was acceptable.

Mr. deLipkau responded to a question by Senator Adler that he would have no problem if the state engineer was given the authority to require an environmental analysis, at his discretion, to be paid for by the applicant, when there was a large transbasin transfer. As to economic impact, Mr. deLipkau indicated the district would not oppose a pump tax, if it applied to groundwater only.

Senator Getto charged both surface water and groundwater have an impact on a community, and moving surface water could have an even greater impact than moving groundwater. Senator Adler pointed out surface water flows through a county, whereas groundwater is already in the county, and the impact would not be the same. Mr. deLipkau responded it would be most difficult to apportion shares from tax collections on water being transferred when it goes through several counties or states.

Senator Getto agreed it would be difficult, but contended, in testimony given before United States Senator Harry Reid, Churchill County had been concerned that they would be severely impacted if the water was moved from their land to wetlands or Pyramid Lake. Although Senator Reid's bill in the United States House of Representatives did not specifically address it, there was acknowledgement that there would be economic impact.

Senator Adler asked if references to definitions concerning streams should be deleted from S.B. 526. Mr. deLipkau concurred, saying he would make the bill apply to all transbasin diversions, whether they were surface or groundwater basins.

Mr. deLipkau reiterated the pump tax portion would be acceptable. He conceded surface water could be prorated on an acreage basis, even though it would be difficult to do.

Senator Adler confirmed there were no people in Las Vegas who wished to testify over the telecommunications system.

Janet Carson, Water Resource Supervisor, Westpac Utilities, and Susan L. Oldham, Manager, Federal Affairs, Legal Counsel, Sierra Pacific Power Company, asked for additional time to look over the amendments suggested by Mr. Morros.

Ms. Oldham gave an overview of matters she felt were missing from the discussion. She said:

Even though the intention of the committee is not to focus on the...interbasin projects that are there, I'm not sure that we've given enough thought to how this will impact the other areas of the state, and the other transfers that will occur over time...We've been focusing a lot on the unappropriated water, of which there really isn't as much of that as there will be transfers or water marketing, and the transfers of an existing water right. An existing water right, when it's transferred, is one... that by its very nature is transferring under our free enterprise system. It's a real property...interest that's held by the owner.

Ms. Oldham pointed out such water transfers may be used as part of a business, and when the transfer occurs the owner is making an economic decision. She conceded there is always an economic impact when water is transferred from one use to another use. She concurred Senator Getto had a legitimate concern with respect to mitigation of economic impact. However, she asserted that there should not be any government constraint on the free enterprise system. She suggested there should be incentives to allow people a choice. As an example, she said, there should not be a signal given to the farm implement dealer in a specific town that he could continue to be the farm implement dealer there into the next century. Such a person, she said, should recognize that he should move on to being a regional dealer, and then a state dealer, and then move on to a being national dealer, in order to stay in business.

Ms. Oldham recommended legislation that would allow Truckee-Carson Irrigation District (TCID) farmers, who want to stay in the business, to consider becoming water brokers, since they know better than anyone else how to transfer a water right. She asserted they could then benefit from transfers through brokerage fees, and thus there would not be adverse economic impacts to the farmers.

Ms. Oldham interpreted the bill to require mitigation of hydrologic, economic and environmental impacts, which she called trade-offs for each other. She declared you cannot mitigate a hydrologic impact without putting the water back into the stream. To mitigate an economic impact, each transfer of water into a higher-valued use would require payment to the entity from which it was taken.

Ms. Carson asked what the impact on the Truckee River system would be upon passage of S.B. 526, because the water supply routinely comes from moving water rights around. She

expressed concern over the transport tax which would be imposed from transfer of small increments of water as indicated in S.B. 526. She asked if the transport tax would apply when water is moved through a county, because there are four counties on the Truckee River. She wanted to know if each would receive a portion of the \$6 transfer fee.

Ms. Carson questioned how much water should be reserved in areas of origin according to section 9.1. Because a lot of water will be transferred into the Stillwater Wildlife Refuge, she wondered if that program, which already has financial difficulties, would suffer further economic burden in order to comply with the negotiated settlement portion of the bill.

Ms. Carson closed by reiterating that the Truckee River draws from several basins in four counties, and it ties into the Carson River, which draws from basins in three counties. She stressed her concern that there would be complications for the Truckee River if it were segmented into subbasins.

In summary, Senator Adler announced there were several points worthy of consideration in the draft of amendments prepared by Mr. Morros (Exhibit D), which he intended to use as a basis for further consideration of S.B. 526. He conceded everyone was in agreement that section 5 in the original bill needed revision to give more authority to issue temporary permits. He concurred that some clarifying language should be included to permit the state water engineer to request an environmental study, without using the term "statement." As to the economic impact, he took note of the suggestions made by Westpac Utilities, which had concern about whether they would be taxed each time water was moved from one basin to another. He agreed with Mr. deLipkau that the bill should apply to all large transbasin transfers, and not relate strictly to county lines.

Senator Adler posed the idea the bill might be altered to give the state water engineer the same authority over economic impact that he has over environmental impact. He suggested changing the wording regarding the pump tax so it would not apply each time water is transferred within a commonly-owned system. He acknowledged there could be a problem with Westpac Utilities transferring water out of state, and then back in again.

Mr. Morros stated the amendments had been prepared to address the original bill. He requested time to review the proposals discussed during the day's hearing and to return the following week with some revisions.

Senator Adler repeated his proposal to add a paragraph to authorize the state water engineer to order an applicant to

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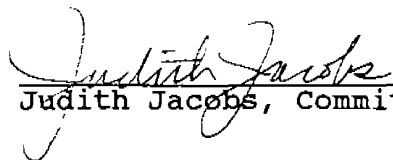
make an environmental analysis, if deemed necessary, and perhaps an economic analysis. Mr. Morros cautioned it is difficult to make an economic analysis, because the future of the county could be so uncertain. Senator Getto interposed, water reserves should be included, to give legal stature to any decision made by the state water engineer.

Mr. Turnipseed called attention to the uniqueness of Nevada, in which county lines do not follow basin lines. Senator Adler interjected the state water engineer may have to consider designating reserves for future municipal use, rather than simply reserving water with no specific future use. Mr. Turnipseed pointed out the future use of water in some areas might be for export only, because the basin of origin would have no use for the water. He described some areas of the state in which there are no ranches or residents, for which no future use would be contemplated. Mr. Morros put forth his opinion the state water engineer could not ignore impact on wildlife.


Senator Adler proposed that a sentence be included to describe the methods that could be used by the state water engineer to reserve water rights. Mr. Morros and Mr. Turnipseed assured the senator they would submit some broad language to address the problem of reservation of water rights. Mr. Morros defended the actions by his department to protect the municipal water supplies in the rural communities of the state in anticipation there would be a question of reservation for future growth.

In the absence of further testimony on S.B. 526, the hearing was adjourned.

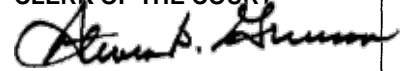
RESPECTFULLY SUBMITTED:

  
\_\_\_\_\_  
Judith Jacobs, Committee Secretary

APPROVED BY:

  
\_\_\_\_\_  
Senator Ernest E. Adler, Chairman

DATE: 6/17/91



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15 **DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

17  
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
IN THE MATTER OF THE PETITION OF APEX HOLDING COMPANY, LLC
IN THE MATTER OF THE PETITION OF CENTER FOR BIOLOGICAL DIVERSITY
IN THE MATTER OF THE PETITION OF MUDDY VALLEY IRRIGATION COMPANY
IN THE MATTER OF THE PETITION OF NEVADA COGENERATION ASSOCIATES NOS. 1 AND 2
IN THE MATTER OF THE PETITION OF GEORGIA-PACIFIC GYPSUM, LLC AND REPUBLIC ENVIRONMENTAL TECHNOLOGIES, INC.
IN THE MATTER OF THE PETITION OF LINCOLN COUNTY WATER DISTRICT AND VIDLER WATER COMPANY, INC.

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

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

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

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

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

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

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

1 **MUDDY VALLEY IRRIGATION COMPANY’S ANSWERING BRIEF**

2 MUDDY VALLEY IRRIGATION COMPANY (“MVIC”), by and through its  
3 counsel, STEVEN D. KING and DOTSON LAW, hereby files its Answering Brief  
4 regarding judicial review of Order 1309. This Answering Brief is in response to issues  
5 raised in the opening briefs of Coyote Springs Investment, LLC (“CSI”), Lincoln  
6 County Water District (“LCWD”), Vidler Water Company (“Vidler”), Nevada  
7 Cogeneration Associates Nos. 1 and 2 (“Nevada Cogeneration”), Center for Biological  
8 Diversity (“CBD”), Apex Holding Company, LLC (“Apex”), Georgia-Pacific  
9 Gypsum, LLC (“GPG”), and Republic Environmental Technologies, Inc. (“Republic”)  
10 and is based on all papers and pleadings on file with this Court relating to this matter.  
11

12 **NRAP RULE 26.1 DISCLOSURE**

13  
14 The undersigned counsel of record hereby certifies that MUDDY VALLEY  
15 IRRIGATION COMPANY is a Nevada Corporation. It has no parent corporations,  
16 and no public company owns 10% or more of its stock.

17 Dated this 24 day of November, 2021.



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8	<i>State Emp't Sec. Dep't v. Hilton Hotels Corp.</i> , 102 Nev. 606, 608, 729	
9	P.2d 497, 498 (1986).....	13
10	<i>Taylor v. State HHS</i> , 129 Nev. 928, 930, 314 P.3d 949, 951 (2013).....	12
11	<i>Three Levels Corp. v. Conservation Comm'n of the Town of Redding</i> ,	
12	148 Conn. App. 91, 101, 89 A.3d 3, 12 (2014) .....	15
13	<i>Wilson v. Happy Creek, Inc.</i> , 135 Nev. 301, 313, 448 P.3d 1106, 1115	
14	(2019).....	22
15		
16	<b><u>Statutes</u></b>	
17	NRS 533.024 .....	9,10,12,19
18	NRS 533.0245 .....	9,23
19	NRS 533.085 .....	23
20	NRS 533.450 .....	2,8
21	NRS 534.030 .....	10
22	NRS 534.110 .....	11
23	NRS 534.120 .....	11
24		
25	<b><u>Other Authorities</u></b>	
26		
27	James H. Davenport, <u>Nevada Water Law</u> 142 (2003) .....	16,19
28		

1 Judgment and Decree, *Muddy Valley Irrigation Company v.*  
2 *Moapa and Salt Lake Produce Company et al* (“Muddy  
3 River Decree” or “Decree”) (March 11, 1920) (SE ROA  
4 33770-33816)..... 1,5,20,22  
5 *Nevada Natural Resources Status Report*, Nevada Department of  
6 Conservation and Natural Resources, June 2001 ..... 16  
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1 **INTRODUCTION**

2 MVIC has a unique position amongst the various parties to these consolidated  
3 disputes. Not only is it undisputedly the most senior party in time, but it is also the  
4 holder of the majority of decreed water rights secured in the Muddy River Decree of  
5 1920 (sometimes hereafter “Muddy River Decree” or “Decree”).<sup>1</sup> This brief  
6 acknowledges and is reflective of that position.  
7

8 As the Court is aware, MVIC has filed its own Petition for Judicial review and  
9 has requested remand of Order 1309 on several issues. Despite this, and upon review  
10 of the other opening briefs, MVIC recognizes that some issues addressed by these  
11 briefs impact the issues raised by MVIC and are therefore appropriately addressed.  
12 This is particularly and primarily true to the extent the positions advanced either limit  
13 or undermine the rights of MVIC and/or the application or administration of the  
14 Decree. These principals of Order 1309 and by the Nevada State Engineer (sometimes  
15 “NSE” or “State Engineer”) should be defended and should not be disturbed (or the  
16 principles retained) on remand.  
17

18 **STATEMENT OF THE ISSUES**

19  
20 1. Whether the NSE had the authority to create or administer an area as a  
21 single hydrographic basin or area consisting of the formerly independent sub-basins.

22 2. In the event the Court believes the NSE lacked the authority to create a  
23 single hydrographic basin, whether the NSE has the authority to conjunctively manage  
24 or jointly administer the various basins individually.  
25  
26  
27

28 <sup>1</sup> 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.”<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup>  
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 <sup>8</sup> See *Revert*, 95 Nev. at 787, 603 P.2d at 265.

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

<sup>10</sup> *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 ARGUMENT

4  
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.<sup>11</sup>

17  
18 The second issue upon which all parties appear to agree is the application of the  
19 prior appropriation doctrine.<sup>12</sup> Indeed, the Nevada Supreme Court has recently  
20 confirmed that this doctrine applies in Nevada.<sup>13</sup> In essence, that doctrine provides  
21 water rights are granted "subject to existing rights,"<sup>14</sup> thus, the first person to use water  
22 should, absent certain circumstances not addressed here, have the right to the  
23

24  
25 <sup>11</sup> 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 <sup>12</sup> 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 <sup>13</sup> See *Mineral Cty. v. Lyon Cty.*, 473 P.3d 418, 423 (Nev. 2020).

<sup>14</sup> *Id.* at 426.



1 continued use of that water.<sup>15</sup> This leads to a determination of the priority of the water  
2 right, typically ascribed as a date in time.<sup>16</sup> 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.<sup>17</sup>  
5

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.<sup>18</sup> 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.  
19

20 ///

21 ///

22 ///

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

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

27 <sup>17</sup> 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 <sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup> 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”).<sup>21</sup> 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.<sup>22</sup> 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.”<sup>23</sup> 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  
24  
25

26 <sup>19</sup> See, e.g., Nevada Cogeneration Brief at 21:3-8.

27 <sup>20</sup> See Order 1309 (SE ROA 2 – 69) at SE ROA 11.

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

<sup>22</sup> *Id.* at SE ROA 79.

<sup>23</sup> *Id.* at SE ROA 82, ¶ 1.

1 of water” and would therefore be jointly managed.<sup>24</sup> 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.”<sup>25</sup> 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).<sup>26</sup> Thus, any claim or implication that this is a new action that was  
10 not foreseen is disingenuous.

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

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.<sup>28</sup>

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;”<sup>29</sup> however, this  
24 is similarly not a correct characterization. Order 1309 terminated the temporary

25 <sup>24</sup> 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 <sup>25</sup> Order 1169 (SE ROA 659-669) at SE ROA 659-660.

28 <sup>26</sup> Order 1169 (SE ROA 665).

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

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

<sup>29</sup> 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.<sup>30</sup> 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.<sup>31</sup> 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,<sup>32</sup> 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.”<sup>33</sup> 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.”<sup>34</sup> Thus, there is no “redefinition” of  
24  
25

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

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

28 <sup>32</sup> *Id.*

<sup>33</sup> CSI Opening Brief at 17:28-18:1.)

<sup>34</sup> 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.”<sup>35</sup> 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.”<sup>36</sup> The NSE’s authority to do so is  
18 only limited by any conflicting decrees, orders, or agreements.<sup>37</sup> 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.<sup>38</sup> However,  
23

24  
25 <sup>35</sup> *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).

28 <sup>36</sup> NRS 533.024(1)(e).

<sup>37</sup> NRS 533.0245.

<sup>38</sup> 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.<sup>39</sup>

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."<sup>40</sup> 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.<sup>41</sup>

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..."<sup>42</sup> 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.<sup>43</sup> 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.  
22  
23  
24

25 <sup>39</sup> *McLaughlin v. Hous. Auth. of Las Vegas*, 68 Nev. 84, 93, 227 P.2d 206, 210 (1951) (emphasis  
26 added).

27 <sup>40</sup> *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).

<sup>41</sup> *See* NRS 533.024(1)(e).

<sup>42</sup> NRS 534.030(1) (emphasis added).

<sup>43</sup> *Id.*

1           Additionally, the NSE has the power to prescribe all necessary regulations  
2 within the terms of NRS 534.<sup>44</sup> 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.<sup>45</sup>

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.<sup>46</sup> 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.<sup>47</sup> He further observed, following the pumping test, that:  
16

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.<sup>48</sup>

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..."<sup>49</sup>  
24

25 \_\_\_\_\_  
<sup>44</sup> See NRS 534.110(1).

26 <sup>45</sup> NRS 534.120(1) (emphasis added).

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

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

<sup>48</sup> *Id.* at p. 4 (SE ROA 73).

<sup>49</sup> *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.”<sup>50</sup>  
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.”<sup>51</sup> Accordingly,  
13 “courts should not substitute their own construction of a statutory provision for a  
14 reasonable interpretation made by an agency.”<sup>52</sup> 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 Accordingly, the Court should defer to the NSE’s interpretation that these statutes  
20  
21  
22  
23

24 <sup>50</sup> NRS 533.024(1)(e).

25 <sup>51</sup> *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.”).

<sup>52</sup> *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.<sup>53</sup>  
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.<sup>54</sup> 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.”<sup>55</sup> 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.<sup>56</sup>

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.”<sup>57</sup> The NSE relied upon the results of this two-year test, which  
22

23  
24 <sup>53</sup> 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 <sup>54</sup> 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 <sup>55</sup> *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 <sup>56</sup> 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.

<sup>57</sup> 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.<sup>58</sup> This same evidence and justification was cited in Order 1309.<sup>59</sup>

7 CSI is critical of the NSE for purportedly relying solely on the aquifer test data  
8 to the exclusion of all other evidence.<sup>60</sup> 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,<sup>61</sup>  
16 poor water level measurements,<sup>62</sup> water budget analysis,<sup>63</sup> flow paths,<sup>64</sup> and modeling  
17 presented by CSI.<sup>65</sup> 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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22  
23

24 <sup>58</sup> *Id.* at pp. 4-6 (SE ROA 73-75).

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

26 <sup>60</sup> *See* CSI Opening Brief at 29:25-35:25.

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

28 <sup>62</sup> *Id.* at p. 51 (SE ROA 52).

<sup>63</sup> *Id.* at pp. 48-50 (SE ROA 49-51).

<sup>64</sup> *Id.* at p. 59 (SE ROA 60).

<sup>65</sup> *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.<sup>66</sup>

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.”<sup>67</sup> 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,<sup>68</sup> 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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26  
27 <sup>66</sup> *Id.* at pp. 58-59 (SE ROA 59 – 60).

28 <sup>67</sup> *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).

<sup>68</sup> *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.”<sup>69</sup> It has  
3 also been recognized that recharge in one basin can result in flow from that basin into  
4 adjacent basins.<sup>70</sup> 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.<sup>71</sup> 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.<sup>72</sup>  
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23

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24 <sup>69</sup> 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 <sup>70</sup> 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 <sup>71</sup> 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).

<sup>72</sup> 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.<sup>73</sup> 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.<sup>74</sup> 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."<sup>75</sup> 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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23

24  
25 <sup>73</sup> See Order 1303 (SE ROA 70 – 88) at p. 7 (SE ROA 76); and Order 1309 (SE ROA 2 – 69) at p. 42  
26 (SE ROA 43) (both recognizing that, prior to groundwater development, the Muddy River flowed at  
approximately 34,000 afa., while the average flows since 2015 are approximately 30,600 afa. (See  
Order 1309 at SE ROA 62.)

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

28 <sup>75</sup> *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.”<sup>76</sup> 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.  
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<sup>76</sup> 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."<sup>77</sup> 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.<sup>78</sup> It has similarly been acknowledged for decades that  
10 Nevada's water sometimes flows below the surface between basins.<sup>79</sup> 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."<sup>80</sup>

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 

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<sup>77</sup> See Davenport at 143-144.

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

27 <sup>79</sup> 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).

<sup>80</sup> 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.<sup>81</sup>

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."<sup>82</sup> 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."<sup>83</sup> 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 <sup>81</sup> Muddy River Decree (SE ROA 33770-33816).

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

<sup>83</sup> *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.<sup>84</sup> 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.<sup>85</sup> 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.<sup>86</sup> 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,<sup>87</sup> 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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26 \_\_\_\_\_  
27 <sup>84</sup> *Id.* at p. 57 (SE ROA 58).

28 <sup>85</sup> CSI Opening Brief at 49:8-11.

<sup>86</sup> CBD Opening Brief at 25:20-24; 27:15-18.

<sup>87</sup> 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."<sup>88</sup>  
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."<sup>89</sup> 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.<sup>90</sup> In other words, MVIC received a  
19 specific award of water pursuant to those quantified determinations of the Decree.<sup>91</sup>  
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 <sup>88</sup> 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 <sup>89</sup> See Muddy River Decree (SE ROA 33770-33816) at 20:1-8 (SE ROA 33790).

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

<sup>91</sup> 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.”<sup>92</sup>

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.<sup>93</sup> 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.”<sup>94</sup> 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.<sup>95</sup>

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 <sup>92</sup> See Order 1194 (SE ROA 46469-46472) at 46471, § 4.

27 <sup>93</sup> NRS 533.0245.

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

<sup>95</sup> 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.

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ATTORNEY CERTIFICATE

Pursuant to NRAP 28.2, undersigned counsel certifies that:

1. I have read this entire answering brief.

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

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

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

5. I further certify that this answering 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 24 pages long and contains 7,627 words.

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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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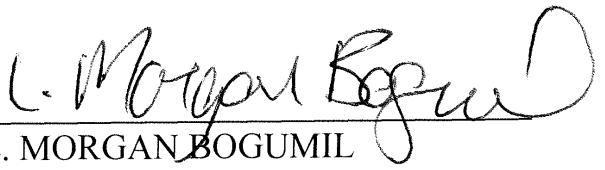
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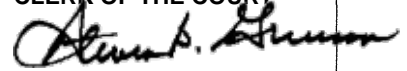
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**CERTIFICATE OF SERVICE**

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.

  
L. MORGAN BOGUMIL



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19 Attorneys for Petitioner MVIC

20 **DISTRICT COURT**  
21 **CLARK COUNTY, NEVADA**

22 LAS VEGAS VALLEY WATER DISTRICT  
23 and SOUTHERN NEVADA WATER  
24 AUTHORITY,

25 Petitioners,

26 vs.

27 ADAM SULLIVAN, P.E., Nevada State  
28 Engineer, DIVISION OF WATER  
RESOURCES, DEPARTMENT OF  
CONSERVATION AND NATURAL  
RESOURCES,

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 NOTICE OF RECORD  
CITATIONS IN ANSWERING 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



1 2	IN THE MATTER OF THE PETITION OF CENTER FOR BIOLOGICAL DIVERSITY	Case No.: A-20-817876-P (Sub Case) Dept. No.: 1
3 4	IN THE MATTER OF THE PETITION OF MUDDY VALLEY IRRIGATION COMPANY	Case No.: A-20-817977-P (Sub Case) Dept. No.: 1
5 6	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
7 8 9	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
10 11	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

**PETITIONER MUDDY VALLEY IRRIGATION COMPANY'S  
NOTICE OF RECORD CITATIONS IN ANSWERING BRIEF**

For the convenience of the Court, MUDDY VALLEY IRRIGATION COMPANY, by and through its counsel, STEVEN D. KING and DOTSON LAW, attaches hereto the following documents found within the Record which are cited to within its Answering Brief filed on November 24, 2021:

<b>EXHIBIT</b>	<b>DESCRIPTION</b>	<b>SE ROA</b>
1	Order 1309	2-69
2	Interim Order 1303	70-88
3	Order 1169	659-669
4	Rulings 6254-6261	726-948
5	Muddy Valley Decree of 1920	33770- 33816
6	Order 1194	46469- 46472

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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 29 day of November, 2021.



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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.

  
\_\_\_\_\_  
L. MORGAN BOGUMIL

# **EXHIBIT 1**

# **EXHIBIT 1**

**Document (Order 1309) Located at JA Vol. 2 at  
JA\_326 through JA\_393**

## **EXHIBIT 2**

## **EXHIBIT 2**

**Document (Order 1303) Located at JA Vol. 2 at JA 394  
through JA 410**

**Document (Addendum to Order 1303) Located at JA Vol. 2 at  
JA\_411  
through JA 412**



# **EXHIBIT 3**

# **EXHIBIT 3**

**Document (Order 1169) Located at JA Vol. 3 at JA\_824  
through JA 834**

# **EXHIBIT 4**

# **EXHIBIT 4**

**Document (Rulings 6254-6261) Located at JA Vol. 3 at JA\_920 to  
JA\_1113**

# **EXHIBIT 5**

# **EXHIBIT 5**

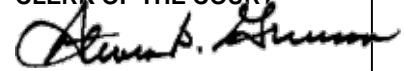
**Document (Muddy River Decree) Located at JA Vol. 13 at  
JA\_6634 through JA\_6680**

# **EXHIBIT 6**

# **EXHIBIT 6**

**Document (Order 1194) Located at JA Vol. 30 at JA\_13804 to  
JA\_13807**





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IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF CLARK

LAS VEGAS VALLEY WATER DISTRICT  
and SOUTHERN NEVADA WATER  
AUTHORITY,

Petitioners,

vs.

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

Respondent.

Case No. A-20-816761-C (Lead Case)

Dept. No. 19

Consolidated With

Case No. A-20-817765-P

Case No. A-20-817876-P

Case No. A-20-817977-P

Case No. A-20-818015-P

Case No. A-20-818069-P

Case No. A-20-817840-P

And All Consolidated Cases.

**INTERVENOR-RESPONDENT'S ANSWERING BRIEF**

The Moapa Valley Water District ("District"), by and through its counsel, Gregory H. Morrison of the law firm of Parsons Behle & Latimer, hereby submits this Answering Brief ("Answer") in response to the Opening Briefs filed by the Petitioners in the consolidated cases captioned above. This Answer is based upon the following Memorandum of Points and Authorities and all pleadings and papers on file in this matter. Pursuant to Eighth Judicial District Court Rule 2.15(e), this Answer is in the form provided for appellate briefs in Rule 28 of the Nevada Rules of Appellate Procedure.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The State Engineer issued Order No. 1309 (the “Order”) on June 15, 2020.<sup>1</sup> The Order was  
4 the result of over a decade of State Engineer Orders and Rulings and extensive studies and  
5 agreements among stakeholders. The culmination of the effort was a two-week administrative  
6 hearing (“Interim Order 1303 Hearing”) at which stakeholders had the opportunity to present expert  
7 reports and evidence, provide expert testimony, and cross-examine other stakeholders’ expert  
8 witnesses. The decade-plus of effort and the extensive hearing resulted in a robust record upon  
9 which the State Engineer could rely in crafting the Order. The result was an order that, while not  
10 ideal for any individual stakeholder, distilled the extensive record into well-supported parameters  
11 for future management of the Lower White River Flow System (“LWRFS”).

12 Several stakeholders who participated in the Interim Order 1303 Hearing have petitioned  
13 for judicial review of the Order on various grounds. Other stakeholders, the District among them,  
14 did not petition for judicial review of the Order, but have a significant interest in the outcome of  
15 this litigation. The District intervened in order to preserve its opportunity to (i) support the State  
16 Engineer’s record and reasoning in the Order; and (ii) address any issues it identifies in the  
17 Petitioners’ arguments. To the extent that Opening Briefs address matters beyond the concerns of  
18 the District, the District will not argue the merits of those issues. The District’s primary concerns  
19 here are Petitioners Coyote Springs Investment, LLC (“CSI”) and Lincoln County Water District  
20 and Vidler Water Company’s (“LC-V”) challenges to the inclusion of the Kane Springs  
21 Hydrographic Basin (“KSV”) in the LWRFS management area, the 8,000 acre-foot annually (“afa”)  
22 and possibly less limit on future LWRFS pumping, and the integrity of the process that led to those  
23 conclusions.

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28 <sup>1</sup> Located in State Engineer Record on Appeal (“SEROA”) 2-69.

1 **II. STATEMENT OF THE ISSUES**

2 1. Whether the State Engineer’s finding on the geographic scope of the LWRFS,  
3 particularly his inclusion of KSV in the management area, is supported by substantial evidence in  
4 the record.

5 2. Whether the State Engineer’s finding that the long-term annual quantity of  
6 groundwater that may be pumped from the LWRFS is 8,000 afa (or possibly less) is supported by  
7 substantial evidence in the record.

8 3. Whether the Order denied due process to any of the affected stakeholders.

9 **III. STATEMENT OF THE CASE**

10 This case arises from Order 1309, by which the State Engineer set certain parameters—  
11 essentially “guardrails”—for future groundwater management in the LWRFS. Specifically, the  
12 Order established the boundaries of the LWRFS, the volume of water that can be pumped from the  
13 LWRFS, and how change applications within the LWRFS will be evaluated. With the guardrails  
14 defined, the State Engineer can begin working with stakeholders to develop a groundwater and/or  
15 conjunctive management plan to prevent groundwater depletion, protect municipal and senior  
16 decreed water rights, and preserve spring flows necessary to sustain the endangered Moapa dace.

17 As municipal water provider to the oldest communities within the LWRFS, including the  
18 Towns of Overton, Logandale, and Moapa and the reservation of the Moapa Band of Paiutes, the  
19 District has a unique interest in sustainable groundwater management. The District has been a  
20 participant in regional and LWRFS studies and planning for as long as those efforts have taken  
21 place. The Order is a logical progression of that planning, and nothing in it is unsupported or  
22 unprecedented.

23 That is true for the inclusion of KSV in the LWRFS. KSV was not included in the Order  
24 1169 aquifer tests, or in Interim Order 1303, which initiated LWRFS management, but KSV has  
25 consistently been scrutinized and studied for potential inclusion in the management area. The  
26 parties to this litigation were all aware that it was under consideration for inclusion, and a significant  
27 portion of the evidence developed for and presented at the Interim Order 1303 Hearing addressed  
28

1 whether KSV should be part of the LWRFS. For CSI and LC-V to now argue that the Order’s  
2 inclusion of KSV in the LWRFS is unexpected or unsupported ignores the record and the history  
3 of LWRFS management.

4 The Order is neither ideal nor flawless, but it is legally defensible. The State Engineer, with  
5 the participation of the stakeholders, built a substantial record and relied on that record to support  
6 his decisions in the Order. The Order is neither contradicted by substantial evidence in the record  
7 nor an abuse of discretion. Therefore, the Court should affirm the Order and let the stakeholders  
8 and the State Engineer get on with the important business of developing a management scheme for  
9 the LWRFS.

10 **IV. STATEMENT OF THE FACTS**

11 The Order represents the evolution of the State Engineer’s efforts to sustainably manage the  
12 LWRFS, to protect senior decreed surface water rights on the Muddy River, and to protect the  
13 endangered Moapa dace. Several of the Petitioners have provided an extensive and thorough history  
14 of LWRFS orders and management, so the District need not expand upon those histories. For the  
15 purposes of this Answer, the salient history begins with Interim Order 1303 (January 11, 2019).<sup>2</sup>

16 **A. Interim Order 1303**

17 Interim Order 1303 began “to designate a multi-basin area known to share a close  
18 hydrologic connection as a joint administrative unit,” which would be known as the LWRFS.<sup>3</sup> It  
19 guided the process of collecting and analyzing data regarding sustainable groundwater development  
20 in the LWRFS, determining the geographic extent of the LWRFS, and considering other matters  
21 relating to pumping within the LWRFS and its effects on the fully decreed Muddy River.<sup>4</sup> To that  
22 end, Interim Order 1303 initially designated the LWRFS as the Coyote Spring Valley (“CSV”)  
23 (210), a portion of the Black Mountains Area (215), Garnet Valley (216), Hidden Valley (217),  
24 California Wash (218), and Muddy River Springs Area (219) Basins and stated that “[a]ll water  
25 rights within the LRWFS will be administered based upon their respective date of priorities in  
26

27 <sup>2</sup> SEROA 70-88.

28 <sup>3</sup> SEROA 70.

<sup>4</sup> SEROA 70.

1 relation to other rights within the regional groundwater unit.” The Interim Order clarified that the  
2 initial LWRFS geographic area was subject to change pending the submittal and analysis of  
3 stakeholder data.<sup>5</sup>

4 Interim Order 1303 invited stakeholders “with interests that may be affected by water right  
5 development within the [LWRFS] [to] file a report in the Office of the State Engineer.”<sup>6</sup> The  
6 requested reports were to address the following:

- 7 (i) The geographic boundary of the hydrologically connected groundwater and  
8 surface water systems comprising the LWRFS;
- 9 (ii) Information obtained from the Order 1169 aquifer test and subsequent to that  
10 test, and Muddy River headwater spring flow as it relates to aquifer recovery  
11 since the test;
- 12 (iii) Long term annual quantity of groundwater that may be pumped from the  
13 LWRFS;
- 14 (iv) Effects of movement of water rights between alluvial wells and carbonate  
15 wells on deliveries of senior decreed rights to the Muddy River; and
- 16 (v) Any other matter believed to be relevant to the State Engineer’s analysis.

17 **B. Stakeholder Submittals and 2019 Hearing**

18 More than a dozen stakeholders submitted reports and evidence. Thousands of pages of  
19 reports and rebuttal reports were submitted by the stakeholders, along with thousands of pages of  
20 State Engineer records, including but not limited to prior State Engineer Rulings and Orders, studies  
21 and reports prepared by stakeholders and third parties pursuant to the Order 1169 aquifer test,  
22 USGS maps and studies, well logs and lithology readings, and other documents relating to the  
23 questions posed by Interim Order 1303. The State Engineer held the Interim Order 1303 Hearing  
24 from September 23 through October 4, 2019. At least 15 stakeholders participated in the hearing,  
25 which included expert testimony and cross examination, as well as questions from the State  
26 Engineer and staff.

27 <sup>5</sup> SEROA 83.

28 <sup>6</sup> SEROA 83.



1 Both CSI and LC-V participated in the Interim Order 1303 Hearing. CSI submitted an  
2 Interim Order 1303 report (the “CSI Report”),<sup>7</sup> as well as a rebuttal (“CSI Rebuttal”).<sup>8</sup> Both the  
3 CSI Report<sup>9</sup> and the CSI Rebuttal<sup>10</sup> address the geographic scope of the LWRFS, including  
4 whether KSV should be within the management area. At the Interim Order 1303 hearing, CSI’s  
5 expert witness, Stephen Reich, testified at length about KSV and its connection to the LWRFS.<sup>11</sup>

6 LC-V submitted an Interim Order 1303 report (“LC-V Report”),<sup>12</sup> as well as a rebuttal  
7 (“LC-V Rebuttal”).<sup>13</sup> Virtually the entire LC-V Report and the LC-V Rebuttal address the issue of  
8 whether KSV should be included in the LWRFS. At the Interim Order 1303 hearing, LC-V  
9 presented testimony from a five-member panel of expert witnesses, most of which was focused on  
10 southern KSV and the northern boundary of the LWRFS.

### 11 C. Order 1309

12 The Order includes a brief synopsis of each stakeholder’s position on the issues presented  
13 in Interim Order 1303, citing to supporting sections of reports and testimony from the transcript.<sup>14</sup>  
14 The Order provides detailed analysis relating to each of the issues teed up by Interim Order 1303  
15 before eventually ordering as follows:

- 16 • The LWRFS will consist of KSV, Coyote Spring Valley (“CSV”), Muddy River Springs  
17 Area, California Wash, Hidden Valley, Garnet Valley, and the northwest portion of the  
18 Black Mountains Area, with those individual hydrographic units defined as “sub-basins  
19 within the [LWRFS].”  
20

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22 <sup>7</sup>SEROA 35600-35712; Stephen B. Reich, P.E., P.G. (Stetson Engineers Inc.), *Evaluation of Basin Hydrogeology and*  
23 *Assessment of Sustainable Yield in the Lower White River Flow System* (July 3, 2019).

24 <sup>8</sup> SEROA 35713-35806; Stephen B. Reich, P.E., P.G. (Stetson Engineers Inc.), *Rebuttal to Order 1303 Reports*  
25 *Submitted to the Nevada State Engineer* (Aug. 16, 2019).

26 <sup>9</sup> SEROA 35619-35634

27 <sup>10</sup> SEROA 35732-35734, 35737, 35742, 35745-35748.

28 <sup>11</sup> See, e.g. Transcript, Vol. I (Sept. 23, 2019) at 134:10-136:2 (Reich).

<sup>12</sup> SEROA 36193-36345; LC-V and Zonge International, Inc., *Lower White River Flow System Interim Order #1303*  
*Report Focused on the Northern Boundary of the Proposed Administrative Unit* (July 3, 2019).

<sup>13</sup> SEROA 36346-36496; *Rebuttal Submittal to the Interim Order #1303 Reports* (Aug. 16, 2019).

<sup>14</sup> SEROA 13-42.

- 1 • The maximum quantity of groundwater that may be pumped from the LWRFS on an  
2 average annual basis without causing further declines in spring flows “cannot exceed 8,000  
3 afa and may be less.”
- 4 • The maximum quantity of water that may be pumped is subject to a reduction if it is  
5 determined that pumping will adversely impact the Moapa dace.
- 6 • Applications for movement of existing groundwater rights among sub-basins of the LWRFS  
7 will be processed in accordance with NRS 533.370.
- 8 • The temporary moratorium on submission of final subdivision maps within the LWRFS is  
9 terminated.
- 10 • All other matters set forth in Interim Order 1303 that are not specifically addressed in the  
11 Order are rescinded.<sup>15</sup>

12 The Order includes a list of the criteria that the State Engineer considered in making his  
13 determination of the geographic scope of the LWRFS but did not state that it had any precedential  
14 or prospective effect on future decisions regarding multiple-basin management areas.

15 Interim Order 1303 stated that “[a]ll water rights within the LRWFS will be administered  
16 based upon their respective date of priorities in relation to other rights within the regional  
17 groundwater unit.”<sup>16</sup> The Order did not affirm that mandate. By its express terms, the Order  
18 rescinded any part of Interim Order that it did not expressly affirm. The Order therefore did not re-  
19 prioritize water rights from among the individual basins. The Order did not order cessation or  
20 curtailment of groundwater pumping, by strict priority or otherwise. The Order did not cancel or  
21 forfeit any permitted water rights, so it did not strip any party of a real property interest. Finally,  
22 and perhaps most importantly, the Order is not the final word in LWRFS management. That will  
23 come later when the State Engineer and stakeholders negotiate a groundwater and/or conjunctive  
24 management plan for the LWRFS.

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27 <sup>15</sup> SEROA 66-67.

28 <sup>16</sup> SEROA 82.

1 **V. STANDARD OF REVIEW**

2 Judicial review of an Order of the State Engineer is “in the nature of an appeal.”<sup>17</sup> When  
3 reviewing a State Engineer’s decision, the role of the reviewing court is to determine if the State  
4 Engineer’s decision was arbitrary, capricious, or an abuse of discretion, or it was otherwise affected  
5 by prejudicial legal error.<sup>18</sup> On issues of fact, a reviewing court must limit itself to a determination  
6 of whether substantial evidence in the record supports the State Engineer’s decision.<sup>19</sup> The Nevada  
7 Supreme Court has defined “substantial evidence” as “that which a reasonable mind might accept  
8 as adequate to support a conclusion.”<sup>20</sup> The State Engineer’s decision is presumed to be correct,  
9 and the burden of proof is on the party attacking it.<sup>21</sup>

10 The State Engineer’s interpretation of the meaning and legal effect of Nevada’s water law  
11 statutes are entitled to deference and respect by the courts.<sup>22</sup> Even though the State Engineer’s  
12 interpretation of a statute is not controlling, it is presumed to be correct and the party challenging  
13 it has the burden of proving error.<sup>23</sup>

14 **VI. ARGUMENT**

15 The Order established the parameters by which future LRWFS management decisions will  
16 be constrained and guided. Substantial evidence supported each of the State Engineer’s findings in  
17 the Order, and the State Engineer did not abuse his discretion in issuing the Order. Therefore, the  
18 Order should be affirmed.

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<sup>17</sup> NRS 533.450(1); *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979).

22 <sup>18</sup> *Pyramid Lake Paiute Tribe of Indians v. Washoe Cty.*, 112 Nev. 743, 751, 918 P.2d 697, 702 (1996).

23 <sup>19</sup> *Revert v. Ray*, 95 Nev. at 786, 603 P.2d at 264; *Town of Eureka v. State Eng’r*, 108 Nev. 163, 165, 826 P.2d 948,  
950 (1992).

24 <sup>20</sup> *Bacher v. State Engineer*, 122 Nev. 1110, 1121, 146 P.3d 793, 800 (2006).

25 <sup>21</sup> NRS 533.450(10); *State Eng’r v. Morris*, 107 Nev. 699, 701, 703, 819 P.2d 203, 205 (1991); *Town of Eureka* 108  
26 Nev. at 165, 826 P.2d at 950.

27 <sup>22</sup> *In re Nevada State Eng’r Ruling No. 5283*, 128 Nev. 232,239, 277 P.3d 449, 453 (2012) (“this court recognizes the  
28 State Engineer’s expertise and looks to his interpretation of a Nevada water law statute as persuasive, if not mandatory,  
authority”).

<sup>23</sup> See *Anderson Family Assocs. v. Ricci*, 124 Nev. 182, 186, 179 P.3d 1201, 1203 (2008) (recognizing that the State  
Engineer “has the implied power to construe the state’s water law provisions and great deference should be given to  
the State Engineer’s interpretation when it is within the language of those provisions”); *United States v. State Eng’r*,  
117 Nev. 585, 589, 27 P.3d 51, 53 (2001); *Pyramid Lake Paiute Tribe v. Washoe Cnty.*, 112 Nev. 743, 747-48, 918  
P.2d 697, 700 (1996); *State v. Morros*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988).

1           **A. State Engineer Has the Implicit Authority to Create a Multi-Basin**  
2           **Management Area.**

3           Among the authority cited by the State Engineer to support the Order are: NRS  
4 533.024(1)(c) (the State Engineer is required to consider the best available science in rendering  
5 decisions concerning water management); NRS 533.024(1)(e) (it is the policy of the State to  
6 conjunctively manage water resources); NRS 532.120 (empowering the State Engineer to make  
7 such reasonable rules and regulations as necessary to execute the duties of the office conferred by  
8 law); and NRS 534.120 (the State Engineer may make rules, regulations, and orders essential for a  
9 basin in which groundwater is being depleted). The State Engineer’s determination that the effect  
10 of the authority cited empowers him to designate the multi-basin management area is a reasonable  
11 interpretation of law.

12           CSI and LC-V question the State Engineer’s authority to create multi-basin management  
13 area. Both argue that because the authority to designate a management unit such as the LWRFS is  
14 not expressly granted in statute, it cannot be within the State Engineer’s authority.<sup>24</sup> Both CSI and  
15 LC-V ignore the fact that the State Engineer’s authority is not limited to that expressly delegated  
16 by the State Engineer, but includes powers implicitly designated through legislative action.<sup>25</sup> As  
17 the State Engineer noted in the Order, the Nevada Legislature empowered his office to make such  
18 reasonable rules and regulations as are necessary to execute the duties of his office, and to make  
19 orders essential for a basin in which groundwater is being depleted.<sup>26</sup> The State Engineer found in  
20 the Order that “conjunctive management and joint administration of these groundwater basins is  
21 necessary.”<sup>27</sup> As such, the authority to make an order “deemed essential for the welfare of the area  
22 involved” was expressly and implicitly granted to the State Engineer in statute.<sup>28</sup>

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25 <sup>24</sup> CSI Opening Brief at 17:25-22:19; LC-V Opening Brief at 15:21-20:27.

26 <sup>25</sup> See *Wilson v. Pahrump Fair Water, LLC*, 137 Nev. Adv. Op. 2, 481 P.3d 853 (2021) (State Engineer powers are those “which the legislature expressly **or implicitly** designates”) (emphasis added).

27 <sup>26</sup> NRS 532.120; NRS 534.120 (which repeatedly refers to an “area” in need of administration).

28 <sup>27</sup> SEROA 43.

<sup>28</sup> NRS 534.120(1) (Within an **area** that has been designated by the State Engineer ... the State Engineer ... may make such rules, regulations and orders as are deemed essential for the welfare of the **area** involved.”) (emphasis added).

1           **B.       The Order did not Re-Prioritize Water Rights in the LWRFS.**

2           In challenging the State Engineer’s authority to designate the multi-basin unit, both CSI and  
3 LC-V characterize the designation of the LWRFS as a “re-allocation of adjudicated water rights.”<sup>29</sup>  
4 CSI states that in designating the multi-basin LWRFS, “the [State Engineer] stripped senior right  
5 holders of their priority rights by ordering that all water rights within the [LWRFS]<sup>30</sup> should be  
6 administered based upon their respective dates of priority in relation to other rights ‘within the  
7 regional groundwater unit.’”<sup>31</sup> LC-V argues that “[p]ursuant to Order 1309, Lincoln-Vidler’s water  
8 rights are reprioritized from the most senior rights in [KSV] to close to the last water rights in  
9 priority in the LWRFS ....”<sup>32</sup> Both CSI and LC-V thus conclude that the Order stripped their water  
10 rights’ priority.

11           Neither of the Opening Briefs identifies what specific language in the Order has the effect  
12 of re-prioritizing their water rights.<sup>33</sup> Both Opening Briefs simply conclude without citation that  
13 re-prioritization was the intent and/or effect of the Order and expect the Court to accept their  
14 conclusion. Both rely on it as foundation for several arguments, including violations of Nevada  
15 law,<sup>34</sup> improper regulatory “takings” pursuant to the federal and Nevada Constitutions,<sup>35</sup> and due  
16 process.<sup>36</sup> Any argument predicated on the re-prioritization of water rights is flawed, because the  
17 Order did not re-prioritize water rights in the LWRFS. Interim Order **1303** stated that water rights  
18 in the LWRFS should be administered based upon their respective dates of priority in relation to  
19 other rights. Any matter from Interim Order 1303 that the Order did not specifically address or  
20 reiterate was rescinded.<sup>37</sup> The Order did not specifically address priority dates among LWRFS

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21 <sup>29</sup> LC-V Brief at 20:2-3.

22 <sup>30</sup> CSI refers to the LWRFS as the “Mega Basin,” a term coined by CSI for the purpose of this litigation and used only  
by CSI. For the sake of consistency with the Order, the District will not use the term “Mega Basin”.

23 <sup>31</sup> CSI Opening Brief at 25:12-17 (purportedly citing to the Order).

24 <sup>32</sup> LC-V brief at 20:21-23.

25 <sup>33</sup> Only CSI attempts to cite a provision in the Order that has the effect of re-prioritization. CSI Opening Brief at 25:11-  
17. As noted above, the cited language is a reference to Interim Order 1303, and not a substantive provision of the  
Order. LC-V does not identify any language that could be interpreted re-prioritize water rights.

26 <sup>34</sup> CSI Opening Brief at 25:9-26:9; LC-V Opening Brief 19:15-20:27.

27 <sup>35</sup> CSI Opening Brief at 23:14-27:16.

28 <sup>36</sup> CSI Opening Brief at 27:18-28:11.

<sup>37</sup> SEROA 67 (“All other matters set forth in Interim Order 1303 that are not specifically addressed herein are hereby  
rescinded.”).

1 rights. In fact, the only reference to priority of water rights in the Order is a cite to Interim Order  
2 1303 in the recitals; otherwise the Order did not address the matter of water right priorities.<sup>38</sup> To  
3 the extent that the cited language from Interim Order 1303 can be characterized as re-prioritizing  
4 water rights, the Order rescinded it. The Court should therefore reject Petitioners' arguments  
5 premised upon re-prioritization of water rights.

6 **C. KSV Was Properly Included in the LWRFS.**

7 The Order includes KSV in the LWRFS.<sup>39</sup> Whether KSV should be included in the LWRFS  
8 was one of the most extensively discussed and contested matters at the Interim Order 1303 Hearing,  
9 with evidence and testimony provided by stakeholders both in favor of and against its inclusion.  
10 Ultimately, the State Engineer concluded that the evidence supporting inclusion of KSV was more  
11 reliable and outweighed evidence supporting exclusion. The Court should not re-weigh that  
12 evidence on review.<sup>40</sup>

13 1. Substantial Evidence in the Record Supports Inclusion of KSV.

14 Several stakeholders, including the District, U.S. National Park Service ("NPS"), U.S. Fish  
15 and Wildlife Service ("FWS"), Nevada Cogeneration Associates Nos. 1 and 2 ("NCA"), and Center  
16 for Biological Diversity ("CBD"), argued that KSV should be included in the LWRFS. Other  
17 stakeholders, such as SNWA, did not advocate including KSV, but placed evidence in the record  
18 that tended to support its inclusion. The result is that there is substantial evidence in the record that  
19 supports the State Engineer's decision to include KSV.

20 a. *Propagation of Declines into KSV During Order 1169 Aquifer Test*

21 Order 1169 required a minimum of 8,050 afa of pumping from a well in CSV ("MX-5") for  
22 at least two consecutive years, so that drawdown trends could be observed.<sup>41</sup> During the Order  
23 1169 aquifer test, pumpage was measured from 30 additional wells in several LWRFS basins.<sup>42</sup>

24  
25 <sup>38</sup> See SEROA 66-67.

26 <sup>39</sup> SEROA 66.

27 <sup>40</sup> NRS 533.450(10); *State Eng'r v. Morris*, 107 Nev. 699, 701, 703, 819 P.2d 203, 205 (1991); *Town of Eureka v.*  
*State Eng'r*, 108 Nev. 163, 165, 826 P.2d 948, 950 (1992).

28 <sup>41</sup> SEROA 4 (approximately 5,290 afa were actually pumped during the test).

<sup>42</sup> SEROA 6.

1 Although KSV was not within the Order 1169 study area, water level measurements were taken at  
2 a monitoring well in KSV, KMW-1. The Order notes that the hydrographic pattern observed in  
3 KMW-1 as a result of the Order 1169 aquifer test reflected a response to MX-5 pumping. The Order  
4 cites the testimony of NPS expert witness, Dr. Richard Waddell, Jr., P.G., Ph.D.<sup>43</sup> Dr. Waddell  
5 noted in his report and testimony that he observed drawdowns in KMW-1 as result of pumping  
6 from MX-5.<sup>44</sup> The model upon which Dr. Waddell based much of his testimony also predicted that  
7 drawdown cones from wells in northern CSV and southern KSV would coalesce within 100 years  
8 of pumping, indicating an attenuated, but clear, hydrologic connection.<sup>45</sup>

9 District expert witness Jay Lazarus also presented data showing that water levels at KMW-  
10 1 were lowered by MX-5 pumping.<sup>46</sup> Mr. Lazarus, relying on hydrographs collected by SNWA,  
11 noted in his report and testimony that water levels at KMW-1 decreased approximately 0.5 feet  
12 over the duration of the Order 1169 pumping, in a descending trend parallel to that of other LWRFS  
13 monitoring wells.<sup>47</sup> The corresponding drawdowns in KMW-1 and other LWRFS monitoring wells  
14 indicate connectivity between KSV and downgradient basins.

15 NCA witness Robert Coache noted that impacts from the Order 1169 pumping test that were  
16 observed in KSV were similar to those observed in CSV.<sup>48</sup> NCA expert witness Jason Dixon, P.E  
17 stated, “there is significant correlation between KMW-1 and impacts from pumpage within the  
18 LWRFS with effects from present day pumpage within the LWRFS observed in well KMW-1.”<sup>49</sup>  
19 Thus, both the Order 1169 aquifer test and current pumping in the LWRFS show impacts in KSV.  
20 Dr. Tom Myers, Ph.D., on behalf of CBD, also recognized drawdowns at KMW-1 as the result of  
21 pumping at MX-5.<sup>50</sup>

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23 <sup>43</sup> SEROA 53, FN 286.

24 <sup>44</sup> SEROA 51464; Transcript, Vol. III p. 524-525 (Wadell).

25 <sup>45</sup> SEROA 51464; Transcript, Vol. III pp. 523-526.

26 <sup>46</sup> SEROA 25, FN 125.

27 <sup>47</sup> SEROA 39258; Transcript Vol. VI pp. 1187-1189.

28 <sup>48</sup> SEROA 39739-39748; Transcript Vol. IX at p. 1636 (Coache).

<sup>49</sup> SEROA 89739-40.

<sup>50</sup> SEROA 13, FN 45 (citing CBD Report, p. 17-18, Transcript, Vol. VIII pp. 1520-21 (Myers) (“the groundwater level lowering that occurred during the pump test did propagate into Kane Springs Valley”)).

1                   **b.        Hydraulic Gradient between KSV and Remaining LWRFS Basins**

2           Several parties presented evidence regarding the flat hydraulic gradient between KSV and  
3 the remaining LWRFS basins, indicating hydrologic connectivity throughout the management area.  
4 Jay Lazarus testified at length about the flat hydraulic gradient.<sup>51</sup> As Mr. Lazarus explained,  
5 examination of groundwater gradient, rather than absolute elevation values, is the preferred  
6 methodology to determine hydrologic connectivity.<sup>52</sup> Mr. Lazarus’ calculations indicated that the  
7 gradient between KMW-1 and CSVM-4 in CSV is  $4.9 \times 10^{-4}$  ft/ft.<sup>53</sup> The gradient calculated on a  
8 straight line between KMW-1 and EH-5B (immediately up-gradient from the Warm Springs area)  
9 is  $5.9 \times 10^{-4}$  ft/ft.<sup>54</sup> Those figures demonstrate a negligible difference in the gradient between KSV  
10 and CSV, and a virtually flat gradient between KSV and the Warm Springs area. Mr. Lazarus  
11 characterized the hydraulic gradient between KMW-1 and the EH-4 monitoring well as  
12 “exceptionally flat,” indicating strong hydrologic connectivity between KSV and the southern  
13 LWRFS.<sup>55</sup> The exceptionally flat gradient indicates a highly transmissive aquifer that will allow  
14 pumping effects from KSV to be transmitted to the Warm Springs area.<sup>56</sup>

15           On behalf of CBD, Dr. Myers also described the flat potentiometric surface between  
16 southern KSV and the Warm Springs area.<sup>57</sup> Dr. Myers stated that the groundwater level in CSVM-  
17 4, in CSV near the southern end of KSV, is just six feet lower than well KMW-1 further north in  
18 KSV, for a calculated gradient of 0.00016. This suggested to Dr. Myers that the high transmissivity  
19 carbonate rock extends into KSV, and that flow could be induced from KSV by pumping in CSV.<sup>58</sup>

20                   **c.        Presence of Carbonate Aquifer in KSV**

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22  
23 \_\_\_\_\_  
24 <sup>51</sup> SEROA 25, FN 127 (citing Transcript, Vol. VI at p. 1177-78).

25 <sup>52</sup> SEROA 39268-69.

26 <sup>53</sup> SEROA 39268-69.

27 <sup>54</sup> SEROA 39269.

28 <sup>55</sup> Transcript, Vol VI at 1178.

<sup>56</sup> Transcript, Vol. VI at 1176 through 1195; 1250, 1219

<sup>57</sup> SEROA 52090; CBD Report, p. 19 (the CBD Report does not appear in the SEROA, so cites are to the Report as it appears on the State Engineer’s website); Transcript Vol. VIII p. 1520-21, 1557:21-1558:2 (Meyers).

<sup>58</sup> CBD Report at 12-13.



1 Virtually every stakeholder, including CSI and LC-V agree that the carbonate aquifer  
2 extends into KSV to some degree.<sup>59</sup> The State Engineer agreed, although he acknowledged that he  
3 could not determine precise permeability of the carbonate aquifer throughout KSV.<sup>60</sup>

4 As a result of the conditions and evidence cited above, the State Engineer properly  
5 concluded that KSV has a close hydrologic connection to the LWRFS as a whole and should be  
6 included in the multi-basin management area. The evidence supporting that conclusion was  
7 substantial, and a reasonable person would accept that the evidence was sufficient to support  
8 inclusion of KSV.<sup>61</sup>

9 2. SCI and LC-V's Contradictory Evidence and Testimony does not Outweigh  
10 Evidence in Support of Including Kane Springs.

11 CSI and LC-V both cite evidence they presented before and during the Interim Order 1303  
12 Hearing to support their argument that substantial evidence in the record does not support the  
13 inclusion of KSV. In doing so, both Petitioners are improperly asking this Court to re-weigh the  
14 evidence and substitute its judgment for that of the State Engineer. Additionally, even if the Court  
15 could properly re-weigh the evidence, the evidence cited to support CSI and LC-V's arguments  
16 does not outweigh the substantial evidence to the contrary.

17 a. *Postulated Fault Preventing Flow from KSV*

18 At the Interim Order 1303 Hearing, both CSI and LC-V relied on a 2019 field investigation  
19 conducted by LC-V and Zonge International, Inc. ("Zonge Report") to argue that a geologic  
20 structure in southern KSV operates as a complete or partial barrier to groundwater flows from KSV  
21 into CSV.<sup>62</sup> Here, both argue that the State Engineer erred by refusing to rely on the Zonge Report  
22 in the Order to exclude KSV from the LWRFS.<sup>63</sup> The Zonge Report relied on Controlled Source  
23 Audio Frequency Magneto Telluric ("CSAMT") methodology to characterize subsurface geology.

24 \_\_\_\_\_  
25 <sup>59</sup> SEROA 41965 (Figure 3-6 of SNWA Report showing the carbonate aquifer extending into southern Kane Springs);  
26 SEROA 35626-28 (CSI Report geologic maps showing carbonate aquifer extending into Kane Springs). CSI and LC-  
27 V rely on conclusions relating to faults that impede aquifer flows to exclude Kane Springs from the LWRFS.

28 <sup>60</sup> SEROA 53.

<sup>61</sup> *Town of Eureka v. State Eng'r*, 108 Nev. 163, 165, 826 P.2d 948, 950 (1992).

<sup>62</sup> SEROA 36193-36345; SEROA 36234.

<sup>63</sup> CSI Opening Brief at p. 42:9-28; LC-V Opening Brief at pp. 27:19-28:19.

1 It concluded that faulting in northern CSV explains the difference in water levels between KSV  
2 and CSV. Because the newly-discovered faults are of lower permeability than the carbonate aquifer  
3 as a whole, the Zonge Report concluded that the fault would “significantly impede flow” between  
4 the basins.<sup>64</sup>

5 As a preliminary matter, if faults exist at the noted location, those faults do not necessarily  
6 act as a barrier to flows. LC-V attempts to convince the Court that the presence of a relatively low  
7 permeability structure between KSV and CSV means that there cannot be substantial groundwater  
8 flow between the two basins. But substantial evidence in the record shows that both facts can  
9 coexist. There can be a relatively low permeability structure in southern KSV that impedes (but  
10 does not prevent) flows into CSV, and KSV as a unit can have a close hydrological connection with  
11 the remaining LWRFS.<sup>65</sup> That hydrologic connection becomes more likely when one understands  
12 the “remarkably flat” gradient between KSV and Muddy River Springs.<sup>66</sup> Some structure might be  
13 present that impedes flows at specific points in southern KSV, which would explain the hydraulic  
14 head differential. However, an isolated structure would not necessarily prevent flows throughout  
15 the greater carbonate aquifer, a fact which CSI’s expert witness acknowledged.<sup>67</sup> The concept was  
16 perhaps best addressed by Dr. Braumiller, who clarified that because of faulting, “the transmissivity  
17 is just lower in that chunk of the carbonates than it is in this very large area possessing exceptionally  
18 high transmissivity.”<sup>68</sup> Thus, possible faulting between KSV and CSV does not automatically  
19 exclude KSV from the LWRFS, and the State Engineer properly relied on the whole of the record  
20 to include it.

21 On cross examination from his testimony on behalf of LC-V, several stakeholders  
22 questioned the author of the Zonge Report, Mr. Carlson. Mr. Carlson acknowledged that the alleged  
23 fault does not appear on any maps developed through previous geophysical studies completed on  
24

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25 <sup>64</sup> SEROA 36227-28.

26 <sup>65</sup> SEROA 39268.

27 <sup>66</sup> *See, e.g.*, Transcript, Vol V at pp. 1176-1177 (Lazarus) (the differences in heads do not indicate a barrier to flow,  
and the overall hydraulic gradient confirms the connectivity).

28 <sup>67</sup> Transcript, Vol I at pp. 135:7-136:23 (Reich); p. 185:18-23 (Reich); p. 200:14-24 (Reich).

<sup>68</sup> Transcript, Vol. II at pp. 254:24-255:8 (Braumiller).

1 behalf of the USGS.<sup>69</sup> Mr. Carlson also acknowledged the flaws in his methodology. To locate  
2 faults, CSAMT lines should run perpendicular to a fault, otherwise, the image is distorted and  
3 unreliable.<sup>70</sup> For the CSAMT study, Mr. Carlson ran three lines: (i) “Line 10”, running from  
4 southeast to northwest in the southern portion of the basin; (ii) “Line 11”, which ran parallel to Line  
5 10, slightly to the southwest in northern CSV; and (iii) “Line 12”, which ran east to west and  
6 transected the other two lines at an approximately 45 degree angle.<sup>71</sup> Mr. Carlson testified that he  
7 identified the southern KSV fault by comparing two *parallel* CSAMT lines.<sup>72</sup> His error in  
8 methodology is compounded by the fact that LC-V had a CSAMT line that ran across its postulated  
9 fault—Line 12—but it did not rely on Line 12 to interpret a fault at the mouth of KSV. That is  
10 because Line 12, which would have bisected the fault, did not clearly indicate any such fault or  
11 underground structure.<sup>73</sup> In light of the questionable methodology employed by CSI and LC-V to  
12 “discover” a convenient fault that would allow them to develop groundwater, the State Engineer  
13 properly discounted the CSAMT evidence.

14 *b. Ruling 5712*

15 Both CSI and LC-V cite State Engineer Ruling 5712 as evidence that the State Engineer  
16 acted arbitrarily when he included KSV in the LWRFS.<sup>74</sup> CSI states that Ruling 5712 ruled that  
17 the difference in hydraulic head between KSV and CSV constituted “conclusive evidence that KSV  
18 should not be included in the [LWRFS].”<sup>75</sup> LC-V argues that the State Engineer “ignore[] the  
19 determination made by his predecessor” in Ruling 5712 that the marked difference in head ...  
20 supports the probability of a low permeability structure or change in lithology” between KSV and  
21

22  
23  
24 <sup>69</sup> Transcript, Vol. VI at p. 1381:10-1382:9 (Carlson).

25 <sup>70</sup> Transcript, Vol. VI at 12161:16-19; 1262:2-6 (Carlson) (“if we put a survey line directly on top of a fault and  
26 running parallel with it, the image is distorted. You get very ambiguous data. You can't really resolve it.”).

27 <sup>71</sup> Transcript, Vol. VI at p.1344:16-1345:6 (Carlson).

28 <sup>72</sup> Transcript, Vol. VI at p. 1344:16-22 (Carlson).

<sup>73</sup> SEROA 36262.

<sup>74</sup> CSI Opening Brief at 43:1-44:12; LC-V Opening brief at 33.

<sup>75</sup> CSI Opening Brief at 43:15-18 (CSI does not explain how the State Engineer concluded that Kane Springs should  
be excluded from the LWRFS more than 10 years before the LWRFS was first named in Interim Order 1303).

1 CSV.<sup>76</sup> Both Petitioners cherry pick segments of Ruling 5712 to make their arguments, and Ruling  
2 5712 does not have the preclusive effect for which both Petitioners cite it.

3 Ruling 5712, issued in 2007, addressed water permit applications filed by LC-V for 5,000  
4 afa of water from the carbonate aquifer in KSV.<sup>77</sup> The State Engineer ultimately approved the  
5 applications for a total duty of 1,000 afa, or 20 percent of the requested water.<sup>78</sup> In discussion  
6 regarding the possibility of a hydrologic barrier between KSV and CSV, Ruling 5712  
7 acknowledged that there is approximately 50 feet of difference in water elevations between KSV  
8 and CSV, which “supports the probability of a low-permeability structure or change in lithology  
9 between KSV and the southern part of CSV.”<sup>79</sup> Ruling 5712 did not at any point state that a low-  
10 permeability structure acts as a barrier to flows. In fact, LC-V ignores the fact that on the very same  
11 page, Ruling 5712 states that “the evidence indicates a strong hydrologic connection between Kane  
12 Springs [] and [CSV],” and that ground water flows from KSV into CSV.<sup>80</sup>

13 Further flaws with CSI and LC-V’s reliance on Ruling 5712 are identified in the NCA  
14 Rebuttal Report.<sup>81</sup> Flaws in that reliance include, but are not limited to the fact that Ruling 5712  
15 was issued seven years prior to conclusion of the Order 1169 aquifer test, and test pumping  
16 simulations provided by LC-V and referenced in Ruling 5712 show a cone of depression from  
17 pumping in KSV extending into CSV.<sup>82</sup> In comparison to the voluminous evidence and testimony  
18 provided by experts at the Interim Order 1303 Hearing, Ruling 5712 is of very little value to support  
19 excluding KSV from the LWRFS.

20 In comparison to the reliable evidence in the record that supports including KSV in the  
21 LWRFS, the evidence cited by CSI and LC-V is questionable and insufficient to find that KSV  
22 should be excluded. It is also insufficient to support a finding that the State Engineer acted  
23

24 \_\_\_\_\_  
25 <sup>76</sup> LC-V Opening Brief at 33:7-11.

26 <sup>77</sup> SEROA 699-721.

27 <sup>78</sup> SEROA 720.

28 <sup>79</sup> SEROA 719.

<sup>80</sup> SEROA 719.

<sup>81</sup> SEROA 39739-39743 (Dixon, Coache, Ricci, *Rebuttal Report Pertaining to Interim Order 1303* (Aug. 16, 2019)).

<sup>82</sup> SEROA 39739-39742.

1 arbitrarily and capriciously. The State Engineer thus did not err when he determined in the Order  
2 that KSV should be a party of the management area.

3 **D. The Finding that the Maximum Long-Term Quantity of Groundwater that can**  
4 **be Safely Pumped is 8,000 afa was Proper.**

5 The Order states that the maximum quantity of groundwater that may be pumped from the  
6 LWRFS on an average annual basis without causing further declined in Warm Spring area spring  
7 flow cannot exceed 8,000 afa and may be less.<sup>83</sup> That conclusion is supported by substantial  
8 evidence in the record, and reasonable in light of the estimates presented by stakeholders at the  
9 Interim Order 1303 Hearing. The Court should not re-weigh the evidence here to reach a different  
10 conclusion.

11 1. Substantial Evidence in the Record Supports the State Engineer’s  
12 Conclusion that 8,000 afa is the Maximum Safe Pumping Level in the  
13 LWRFS.

14 In their Interim Order 1303 Reports and at the Interim Order 1303 Hearing, stakeholders  
15 presented evidence and testimony relating to safe pumping levels in the LWRFS ranging from “no  
16 safe pumping” to 30,630 afa, with others arguing that the location of pumping was determinative  
17 of the volume of water that can be pumped. The Order notes that most of the experts agreed that  
18 the maximum safe pumping level is something less than current pumping – approximately 9,000  
19 afa.<sup>84</sup>

20 The State Engineer considered several estimates of safe pumping level, each supported by  
21 the evidence presented by the stakeholder advocating it. USFWS and NCA suggested that the  
22 maximum initial pumping levels in the LWRFS be based on average pumping levels from 2015  
23 through 2017 – 9,318 afa.<sup>85</sup> CSI took a similar approach, but recommended that pumping be based  
24 on pumping levels from 2010 through 2015 – 11,400 afa.<sup>86</sup> The City of North Las Vegas estimated  
25 10,000 afa.<sup>87</sup> NV Energy noted that pumping in the carbonate aquifer since completion of the Order

26 <sup>83</sup> SEROA 66.

27 <sup>84</sup> SEROA 58.

28 <sup>85</sup> SEROA 62 (citing SEROA 48676 & SEROA 39750)

<sup>86</sup> *Id.* (citing SEROA 52780).

<sup>87</sup> *Id.* (citing SEROA 34652).

1 1169 aquifer test had ranged from 7,000 to 8,000 afa, and water levels had remained stable.<sup>88</sup>  
2 SNWA estimated that safe pumping levels were in the 4,000-6,000 afa range.<sup>89</sup> The District did  
3 not estimate a safe pumping level, but noted that water levels had remained fairly stable at pumping  
4 levels near 9,200 afa.<sup>90</sup> The State Engineer found that the available data are adequate to  
5 approximate a limit on pumping, but that continued monitoring of pumping and water levels would  
6 be essential to “refine and validate” that limit.<sup>91</sup> Ultimately, noting that pumping in the carbonate  
7 aquifer had declined since completion of the Order 1169 aquifer test and was nearing 8,000 afa  
8 with water levels stable, the State Engineer set the initial maximum withdrawal limit at 8,000 afa.<sup>92</sup>

9 The record contains extensive analyses that led each of the stakeholders to the conclusion  
10 that they advocated. The State Engineer had the opportunity to review all of those analyses before  
11 determining an initial estimate of safe withdrawal levels. Because current pumping levels are  
12 approximately 8,000 afa and water levels have remained stable, the State Engineer found that 8,000  
13 is a reasonable initial estimate. Importantly, it is only a starting point, and water levels will be  
14 continuously monitored as pumping continues. The Order is not the final word on LWRFS  
15 management, and that number may be adjusted as further data is collected. But most importantly,  
16 it is a defensible number based upon current pumping conditions, and not just a random number  
17 chosen by the State Engineer for the Order.

18  
19  
20 2. Petitioners’ Arguments that the 8,000 afa Limit on Pumping is Arbitrary and  
21 Capricious are Unsupported.

22 CSI and LC-V both argue that there is not substantial evidence in the record simply because  
23 no stakeholder at the Interim Order 1303 Hearing estimated that exactly 8,000 afa should be the  
24 limit to pumping. CSI goes so far as to characterize the 8,000 afa limit as “randomly selected,” and  
25

26 <sup>88</sup> SEROA 62-63 (citing SEROA 41882).

27 <sup>89</sup> SEROA 63 (citing SEROA 42014).

28 <sup>90</sup> SEROA 52866.

<sup>91</sup> SEROA 63.

<sup>92</sup> SEROA 60.

1 “completely random and arbitrary.”<sup>93</sup> LC-V simply notes that no stakeholder specifically estimated  
2 that 8,000 afa is the safe pumping level to argue, and concludes that there is no substantial evidence  
3 in the record to support that number.<sup>94</sup> Petitioners’ logic – unless the State Engineer selects a safe  
4 pumping figure from among those forwarded by stakeholders, it is per se arbitrary – is flawed. It is  
5 also a contortion of the “substantial evidence in the record” standard that governs judicial review  
6 of State Engineer factual findings.

7       Again, “substantial evidence” is “[evidence] which a reasonable mind might accept as  
8 adequate to support a conclusion.”<sup>95</sup> This Court should ignore the irrelevant fact that no stakeholder  
9 specifically estimated that 8,000 afa is the volume of water that can be safely pumped. Instead,  
10 judicial review should focus on whether the evidence in the record, when considered as a whole,  
11 could lead a reasonable person to conclude that 8,000 afa is a pumping level supported by the  
12 evidence. Considering (i) the majority of the estimates submitted by the stakeholders ranged  
13 between 4,000 afa, and 11,400 afa; and (ii) the voluminous evidence that State Engineer had at his  
14 disposal to reach an independent determination of safe pumping levels, the finding that the safe  
15 level is 8,000 afa “and possibly less” is supported by substantial evidence in the record.

#### 16       **E.       Due Process Issues**

17       CSI and LC-V both argue on various theories that the State Engineer did not afford them  
18 due process.<sup>96</sup> CSI and LC-V’s arguments tend to be constructed on straw men and mischaracterize  
19 what the Order actually did.

##### 20               1.       The Order Did Not Curtail Pumping

21       Initially, CSI argues that the State Engineer denied it due process because he did not provide  
22 the parties to the Interim Order 1303 Hearing that the evidence presented would be used to curtail  
23 senior water rights. For CSI’s curtailment-based due process argument to have merit, the Order  
24 must have curtailed pumping under one or more of CSI’s water permits. CSI does not identify  
25 which of its water permits was curtailed by the Order or where the State Engineer curtailed any

26 <sup>93</sup> CSI Opening Brief at p. 48:11-28; p. 49:12-15.

27 <sup>94</sup> LC-V Opening Brief at p. 36:1-20.

28 <sup>95</sup> *Town of Eureka v. State Eng’r*, 108 Nev. 163, 165, 826 P.2d 948, 950 (1992).

<sup>96</sup> CSI Opening Brief at 27:17-28:27; LC-V Opening Brief at 22:12-24:21.

1 water rights. The simple reason for that omission is that the Order did not curtail any water rights.  
2 Without curtailment, there cannot be a deprivation of due process.

3 2. The Order was Not Ad Hoc Rulemaking

4 CSI and LC-V both argue that, in outlining six criteria he used to determine a close  
5 hydrologic connection among LWRFS basins, the State Engineer engaged in improper ad hoc  
6 rulemaking.<sup>97</sup> The State Engineer is not subject to the Nevada Administrative Procedure Act  
7 (“NAPA”).<sup>98</sup> Therefore, the rulemaking case law relied upon by CSI and LC-V that are based on  
8 the NAPA are irrelevant. Even if the Court chooses to infer a standard from the cited cases, nothing  
9 in the Order would constitute improper ad hoc rulemaking.

10 The six criteria that the State Engineer relied upon in crafting the Order are specific to the  
11 Order.<sup>99</sup> Neither the criteria listed in the Order nor the Order itself has a prospective or general  
12 application, so cannot be characterized as a “rule making” in any reasonable sense of the term.<sup>100</sup>  
13 The State Engineer explained in the Order that he “considered [] evidence and testimony on a  
14 common set of criteria that are consistent with the original characteristics considered critical in  
15 demonstrating a close hydrologic connection requiring joint management...”.<sup>101</sup> The Order does  
16 not state that the criteria would be the basis for evaluating any other multi-basin management  
17 area.<sup>102</sup>

18 Including the list of criteria that the State Engineer applied in the Order does not constitute  
19 a rulemaking. And, contrary to LC-V’s argument, the fact that it was not a party to a previous  
20 hearing at which some of the criteria were applied does not result in a denial of due process. Interim  
21 Order 1303 stated that the boundary of the LWRFS was in issue, giving LC-V sufficient notice and  
22 the opportunity to present evidence on the issue. LC-V, represented by sophisticated legal counsel,  
23

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24 <sup>97</sup> CSI Opening Brief at 28:12-18; LC-V Opening Brief at 22:13-.

25 <sup>98</sup> NRS 23B.039(1)(i).

26 <sup>99</sup> SEROA 48.

27 <sup>100</sup> *See Pub. Serv. Commn of Nevada v. SW Gas Corp.*, 99 Nev. 268, 273, 662 P.2d 624, 627 (1983) (A regulation is  
a rule, standard, directive or any statement **of general applicability** ...) (emphasis added) (citing NRS 233B.038).

28 <sup>101</sup> SEROA 48.

<sup>102</sup> The Order does clarify that the criteria include some previously used by the State Engineer to determine hydrologic  
connectivity.



1 surely considered the standard by which that boundary would be determined and tailored its  
2 evidence and testimony to that standard. In fact, LC-V appeared to recognize the standard that the  
3 State Engineer would apply and presented extensive evidence and testimony regarding hydrologic  
4 connectivity that directly addressed at least five of the six criteria that the State Engineer applied in  
5 the Order.<sup>103</sup> For LC-V to now claim that it was unaware of the standard to be applied and/or  
6 unable to present evidence and argument to address that standard is belied by the record itself.

7 3. CSI and LC-V had Notice that KSV was being Considered for Inclusion

8 CSI's final basis to claim that the State Engineer denied it due process is perhaps its most  
9 meritless. It alleges that the denial of due process happened when the State Engineer did not state  
10 in the Notice of Pre-Hearing Conference that whether KSV should be included in the LWRFS  
11 would be in issue.<sup>104</sup> As a threshold matter, the Notice of Pre-Hearing Conference is not the  
12 operative document to determine whether CSI was afforded due process. It was simply a notice of  
13 what matters would be discussed at an August 8, 2019 status conference regarding hearing structure  
14 at the Interim Order 1303 Hearing.<sup>105</sup> At that status conference, the State Engineer mentioned on  
15 multiple occasions that the geographic boundary of the hydrologically connected groundwater and  
16 surface water systems would be in issue at the Interim Order 1303 Hearing.<sup>106</sup>

17 The operative document to determine whether CSI was deprived due process at the Interim  
18 Order 1303 Hearing is Interim Order 1303. It stated that parties would be given the opportunity to  
19 present evidence and argument addressing “[t]he geographic boundary of the hydrologically  
20 connected groundwater and surface water systems comprising the [LWRFS].”<sup>107</sup> For CSI to argue  
21

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22 <sup>103</sup> LC-V's Interim Order 1303 Report, entitled *Lower White River Flow System Interim Order 1303 Report Focused*  
23 *on the Northern Boundary of the Proposed Administrative Unit*, solely addressed whether the northern boundary of the  
24 LWRFS should be CSV, or if KSV should be included. LC-V addressed relative water levels and the potentiometric  
25 surface. SEROA 36211-12. It addressed hydrographs that, in well-to-well comparisons, demonstrated (or didn't  
26 demonstrate) similar temporal patterns. SEROA 36210-11. It addressed hydrographs showing a response to pumping.  
27 SEROA 36210. It addressed hydraulic gradients between production and monitoring wells. SEROA 36211-12. It  
28 addressed geological structures. SEROA 36223-27.

<sup>104</sup> CSI Opening Brief at 28:17-21.

<sup>105</sup> See SEROA 513-518; see also SEROA 519-539 (Conference Transcript).

<sup>106</sup> SEROA 522 (Hearing Transcript p. 9:4-7; p. 11:17-22)

<sup>107</sup> SEROA 82. The Notice of Pre-Hearing Conference, to the extent that it is relevant to the question of due process,  
specifically referenced Interim Order 1303 and the issues that would be addressed at the Interim Order 1303 Hearing.

1 that it did not understand that KSV was a part of that boundary discussion is patently unreasonable.  
2 In fact, the record shows that CSI had actual knowledge that KSV would in in issue at the Interim  
3 Order 1303 Hearing and was fully prepared to argue the issue. It had a meaningful chance to present  
4 evidence and testimony on the KSV issue, and presented extensive evidence and testimony. CSI  
5 specifically addressed whether KSV should be included in the CSI Report<sup>108</sup> and extensively in  
6 the CSI Rebuttal,<sup>109</sup> both of which predated the Interim Order 1303 Hearing.

7 **VII. CONCLUSION**

8 Every stakeholder had sufficient notice of what was in issue at the Interim Order 1303  
9 Hearing and the standard by which evidence and testimony would be considered. Every stakeholder  
10 had the opportunity to develop and submit a report to answer the questions posed in Interim Order  
11 1303, and to present an expert witness or witnesses to explain the reports that they submitted. Each  
12 stakeholder had the chance to cross examine other stakeholders' expert witnesses and to develop a  
13 robust and substantial record. In crafting the Order, the State Engineer distilled an extensive record  
14 and properly weighed the evidence that had been submitted. The result is that the Order is supported  
15 by substantial evidence in the record and is not arbitrary and capricious or an abuse of discretion.

16 The Court must refuse Petitioners' invitation to re-weigh the evidence. The Court should  
17 also refuse to rely on Petitioners' mischaracterizations of what is included in the Order and rely  
18 solely on the language of Order itself to determine what effect it will have. With that in mind, the  
19 Court should affirm the Order and allow the stakeholders and State Engineer to continue to develop  
20 a plan to preserve the available water, protect the Moapa dace, and ensure that senior decreed water  
21 rights are prioritized.

22 **AFFIRMATION**

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

25  
26  
27 \_\_\_\_\_  
28 <sup>108</sup> SEROA 35619, 35659-60 (CSI Report expressly states that KSV should not be included in the LWRFS).

<sup>109</sup> SEROA 35732-34; 35737; 35742; 35745-46; 35748 (all arguments regarding inclusion of KSV).

1 DATED: November 2 , 2021

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**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5, I hereby certify that I am an employee of Parsons Behle & Latimer, and that on this 24<sup>t</sup> day of November, 2021, I caused a true and correct copy of the foregoing document to be filed via the Clerk of the Court's ECF system which sent notice of electronic filing to the following:

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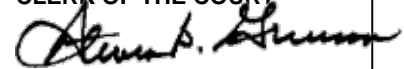
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IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF CLARK

LAS VEGAS VALLEY WATER DISTRICT  
and SOUTHERN NEVADA WATER  
AUTHORITY,

Petitioners,

vs.

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

Respondent.

Case No. A-20-816761-C (Lead Case)

Dept. No. 19

Consolidated With:

Case No. A-20-817765-P

Case No. A-20-817876-P

Case No. A-20-817977-P

Case No. A-20-818015-P

Case No. A-20-818069-P

Case No. A-20-817840-P

And All Consolidated Cases.

**APPENDIX TO ANSWERING BRIEF**

As requested by the Court in its Order dated June 25, 2021, this Appendix contains excerpts from the Record on Appeal that were cited to in the Moapa Valley Water District's Answering Brief in the consolidated Petitions for Judicial Review of Order 1309.

The excerpts from the Record on Appeal are attached hereto as Exhibit 1.

**AFFIRMATION**

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

DATED: November 24, 2021

PARSONS BEHLE & LATIMER

By: /s/ Gregory H. Morrison  
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**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5, I hereby certify that I am an employee of Parsons Behle & Latimer, and that on this 24<sup>t</sup> day of November, 2021, I caused a true and correct copy of the foregoing document to be filed via the Clerk of the Court's ECF system which sent notice of electronic filing to the following:

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EXHIBIT 1

Bates No.	Document Name
SE ROA 2-69	Order # 1309
SE ROA 70-88	Interim Order #1303
SE ROA 513-518	Notice of Pre-Hearing Conference
SE ROA 699-721	Ruling 5712
SE ROA 35600-35712	Order 1303 Report
SE ROA 35713-35806	Rebuttal Report
SE ROA 36193-36345	LWRFS Report
SE ROA 36346-36496	Rebuttal Submittal
SE ROA 39258-39265	MVWD 1303 Report
SE ROA 39266-39271	MVWD Rebuttal Comments to Interim Order 1303
SE ROA 39730-39755	NCA Rebuttal Report Pertaining to Interim Order 1303
SE ROA 41930-42072	Assessment of LWRFS
SE ROA 51439-51531	NPS Order 1303 Report
SE ROA 52075-52118	Center for Biological Diversity – Myers Electronic Presentation
SE ROA 52858-52872	MVWD Post Hearing Brief
Pages 1 – 27	Order 1303 – Report dated July 3, 2019 from Patrick Donnelly to Tim Wilson

TABLE OF JA LOCATION TO AVOID DUPLICATES

Bates No.	Document Name	JA VOL	JA BATES	
SE ROA 2-69	Order # 1309	2	JA_326	JA_393
SE ROA 70-88	Interim Order #1303	2	JA_394	JA_412
SE ROA 513-518	Notice of Pre-Hearing Conference	2	JA_464	JA_484
SE ROA 699-721	Ruling 5712	3	JA_864	JA_886
SE ROA 35600-35712	Order 1303 Report	16	JA_7536	JA_7648
SE ROA 35713-35806	Rebuttal Report	17	JA_7649	JA_7742
SE ROA 36193-36345	LWRFS Report	18	JA_7927	JA_8079
SE ROA 36346-36496	Rebuttal Submittal	18	JA_8080	JA_8230
SE ROA 39258-39265	MVWD 1303 Report	23	JA_10518	JA_10525
SE ROA 39266-39271	MVWD Rebuttal Comments to Interim Order 1303	23	JA_10526	JA_10531
SE ROA 39730-39755	NCA Rebuttal Report Pertaining to Interim Order 1303	24	JA_10890	JA_10915
SE ROA 41930-42072	Assessment of LWRFS	27	JA_11813	JA_11955
SE ROA 51439-51531	NPS Order 1303 Report	41	JA_16570	JA_16662
SE ROA 52075-52118	Center for Biological Diversity – Myers Electronic Presentation	<b>attached</b>		
SE ROA 52858-52872	MVWD Post Hearing Brief	43	JA_17255	JA_17269
Pages 1 – 27	Order 1303 - Report Dated July 3, 2019 from Patrick Donnelly to Tim Wilson	<b>attached</b>		

Presentation on Behalf of the  
Center for Biological Diversity  
To Nevada State Engineer  
Lower White River Flow System

Tom Myers, Ph.D.  
Hydrologic Consultant

SE ROA 52075

# Outline of Presentation

- Summary of Direct evidence report
- **Technical Memorandum: Groundwater Management and the Muddy River Springs, Report in Response to Nevada State Engineer Order 1303**
- Rebuttal is included in this section when directly relevant to the direct testimony
- Summary of Rebuttal Report
- **Technical Memorandum: Groundwater Management and the Muddy River Springs, Rebuttal in Response to Stakeholder Reports Filed with Respect to Nevada State Engineer Order 1303**
- Page numbers refer to the report.

# Analysis of Order 1169 pump test and subsequent data

- Climate
- Water level changes by well
- Water level changes over the area
- Spring flows

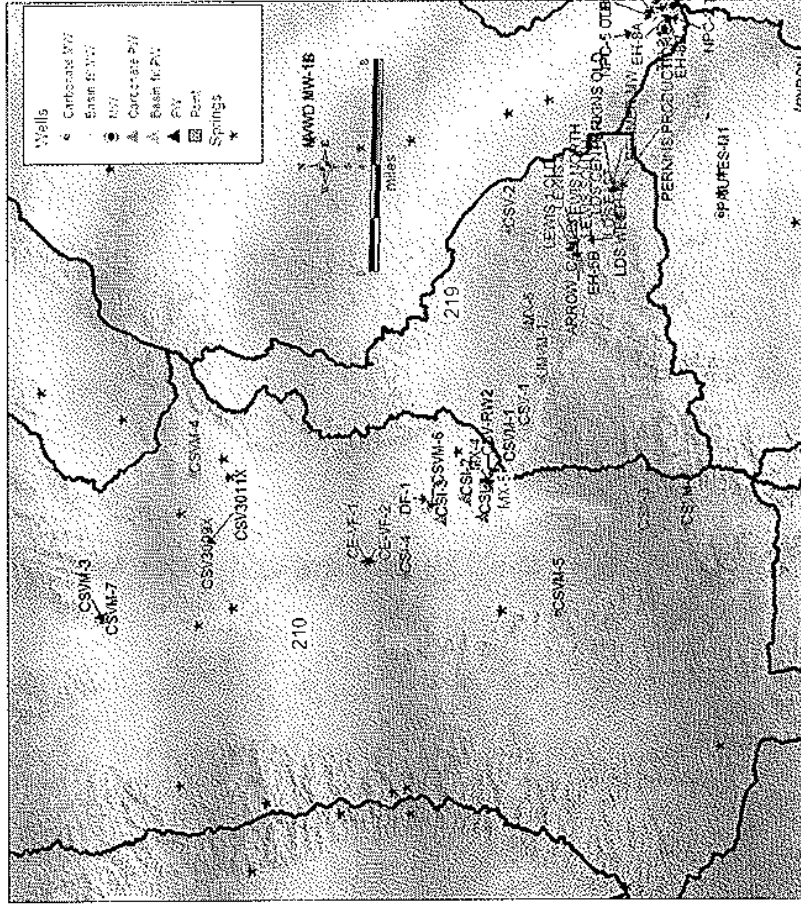
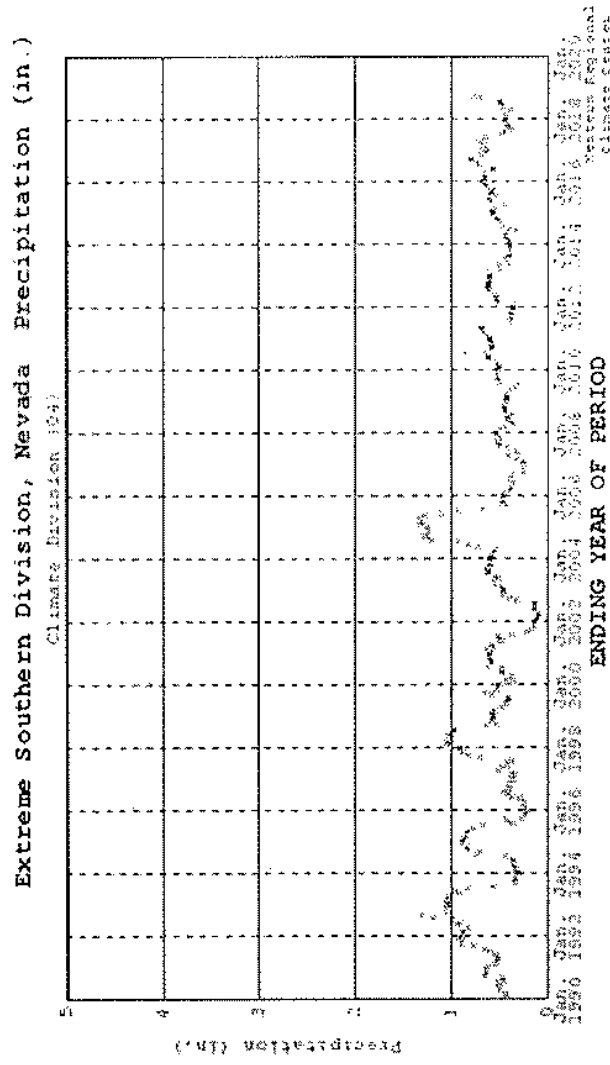


Figure 1: Detailed well layout and names for Coyote Spring Valley (210) and Muddy River Springs Area (219). Source of well data: NVSE website

# Precipitation trends for southern NV

- Seasonal variation
- No evidence of 20-yr drought
- Lowest in 2002, highest in 2005
- Slight upward trend starting 2010
- Values in January 2017 and 19 as high as 2011



SE ROA 52078

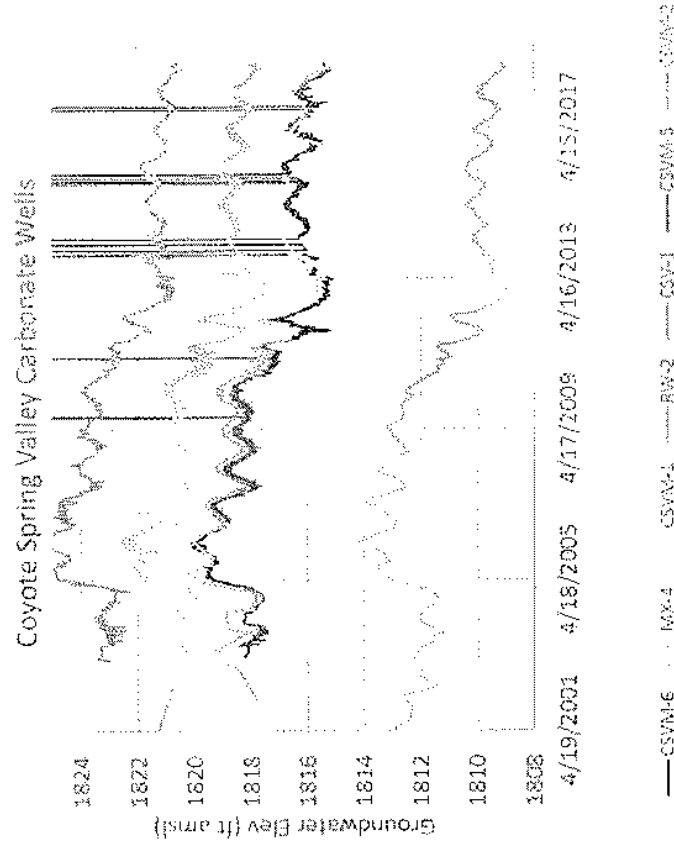


# Precipitation v PDSI

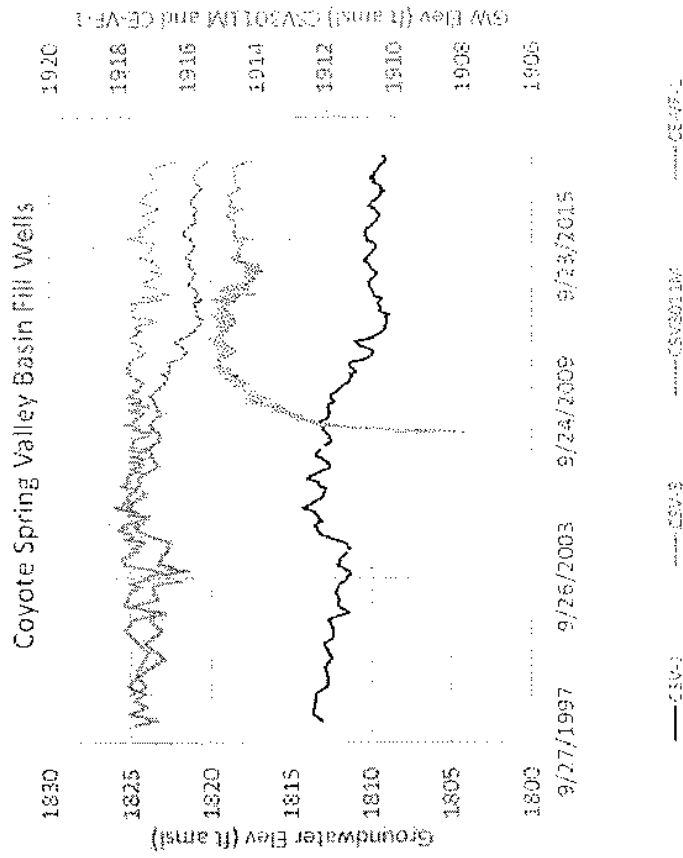
## Indicators of recharge in arid regions

- PDSI tracks precipitation and evaporation, based on temperature
- Precipitation events drive runoff, even during dry periods
- Runoff occurs before moisture deficits are made up
- Recharge occurs due to runoff on pervious outcrops
- Mountainfront recharge
  
- In the future, PDSI may trend downward more often due to a warming climate, but runoff/recharge will still occur
- It is not necessary to make up long-term deficits before recharge begins

- The NSE found that even the reduced pumping completed during the aquifer test satisfied its goals and that pumping in CSV caused impacts north in CSV “at least to Kane Springs Valley, south to Hidden Valley and Garnet Valley, and southeast to Muddy River Springs Area and California Wash” (NSE Order 6254, p 20-21). (p 7)
- Water levels in carbonate MWs in central and southern CSV have varied in parallel since the early 2000s. The trend has been downward except for the increase during the wet period around 2005. All the carbonate MWs in central and southern CSV decreased more than two feet during the pump test period and all have recovered less than half ... (p 7)
- Most carbonate MWs show a continuing lowering of water levels from 2016 through the present, even with the wet winters in 2017 and 2019
- The lack of recovery indicates the increased gradient, caused by the 2-foot drawdown, does not draw substantially more water from beyond the boundaries of the high-transmissivity area (p 7)

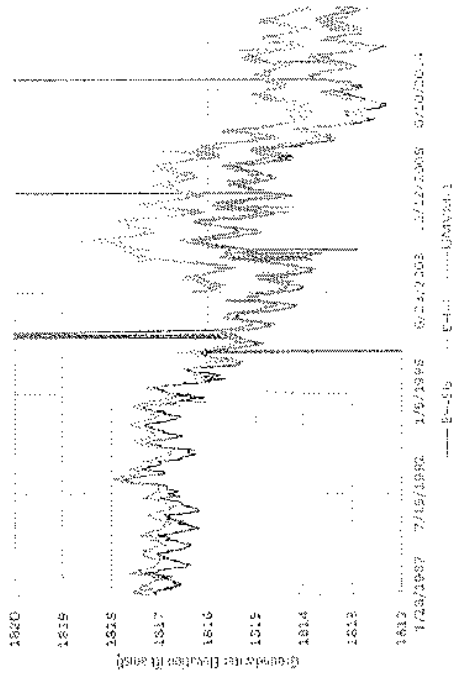


- Basin fill well groundwater levels in the southern portion of CSV have also trended downward since the late 1990s, with an exception being during the wet period around 2005.
- Well CSV3011M water levels increased from its installation in 2008 until the aquifer test.
- Well DF-1, a basin fill well in the middle of southern CSV, has water levels about 200 feet higher than other wells in the area. (well not shown on figure)

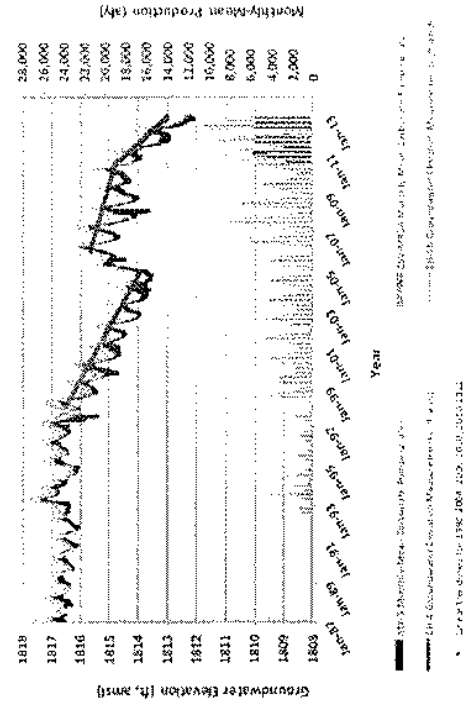


: Hydrograph of basin fill monitoring wells in the south half of Coyote Spring Valley. Source of data - NSE web page.

- Carbonate MWs in the MRSA also show a long-term downward trend commencing in the 1990s with an uptick in 2005. (p 8)
- USDOI (2013, p 11) identified several wet year responses in the groundwater levels, including in 1992, 1993, 2005, and to a lesser degree in 1998 and 2011.
- **The small seasonal fluctuation may relate to pumping in the basin fill (Id.), which would reflect the connection between aquifers. ( p8)**
- The 1169 aquifer test accelerated the decline in the MWs in the MRSA with a decrease of as much as 2.5 feet. (p 8)
- Groundwater levels began to decrease as carbonate pumping commenced. (p 23)



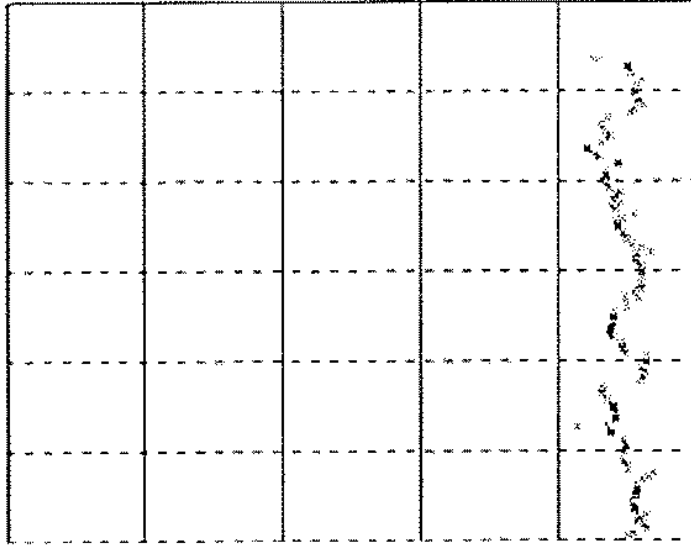
Muddy River Springs Area carbonate monitoring wells



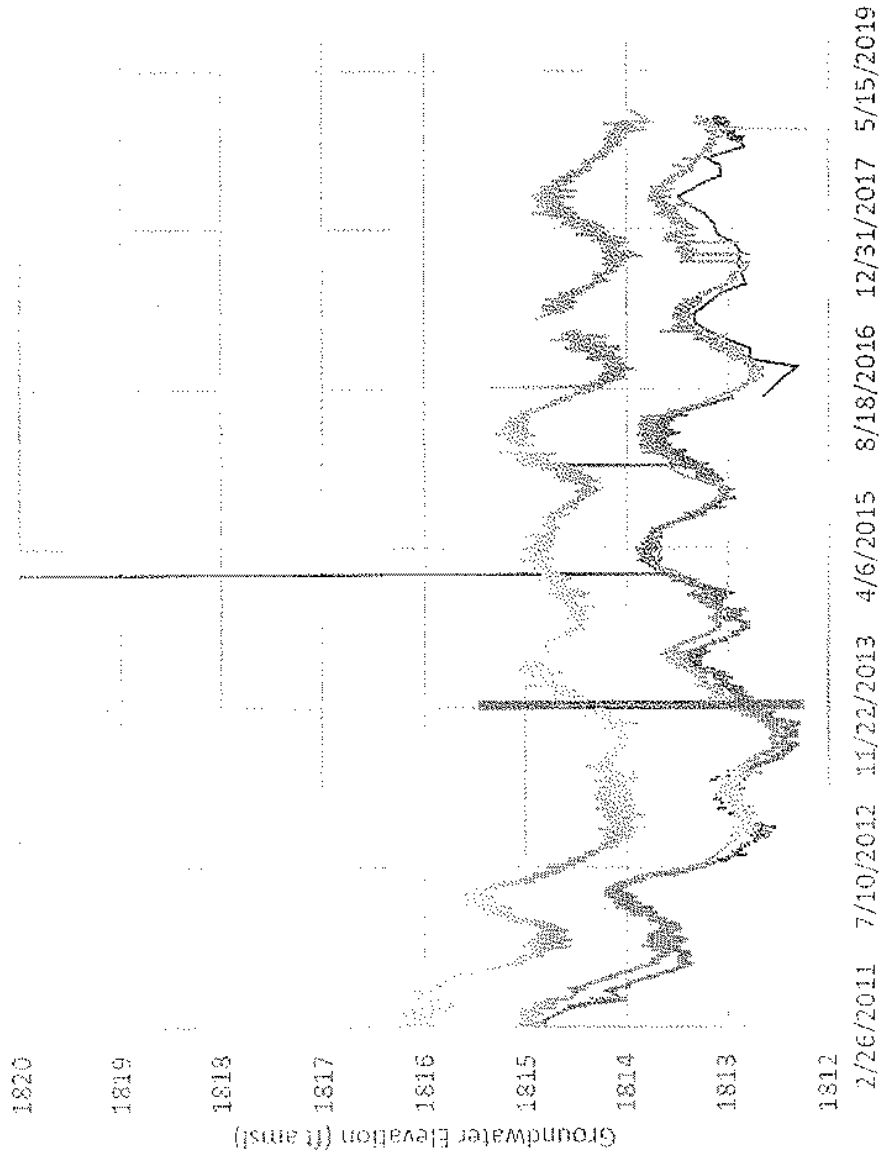
Trends in carbonate water levels at MW's EH-4 and EH-5b with carbonate pumping in Coyote Spring Valley and Muddy River Springs Area. Source: USDOI (2013) ~~ROA~~ ROA 52082

Yavapai Precipitation (in.)

(0.4)

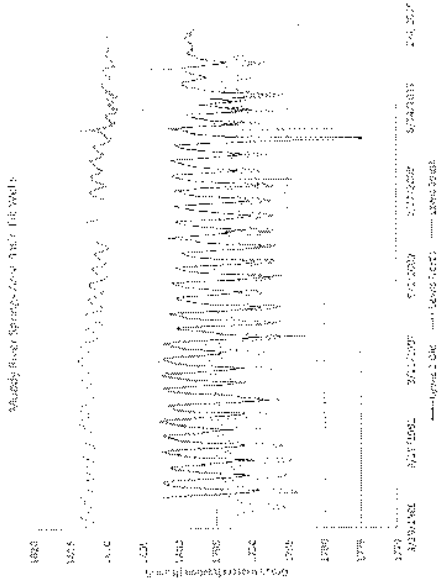


06 Jan 2016 06 Jan 2014 06 Jan 2013 06 Jan 2016 06 Jan 2016 06 Jan 2016  
Western Regional  
Climate Center



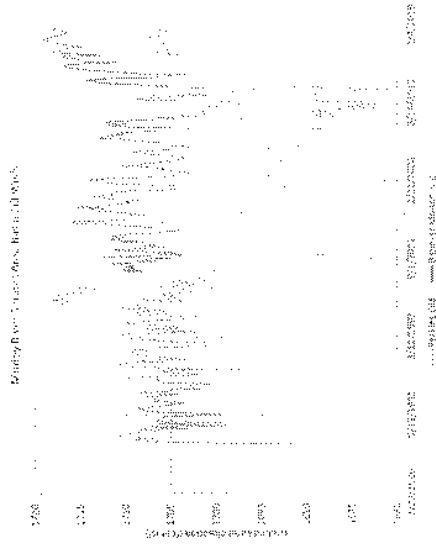
EH-5b EH-4 UMVM-1

- Basin fill MWs in the Lewis Field portion of the MRSA have been steady since the 1990s except for a three-foot decline in the Lewis North MW. Lewis South and Lewis 1 Old have declined a couple feet since the 1990s, but with an almost ten-foot seasonal variation. (p 8)



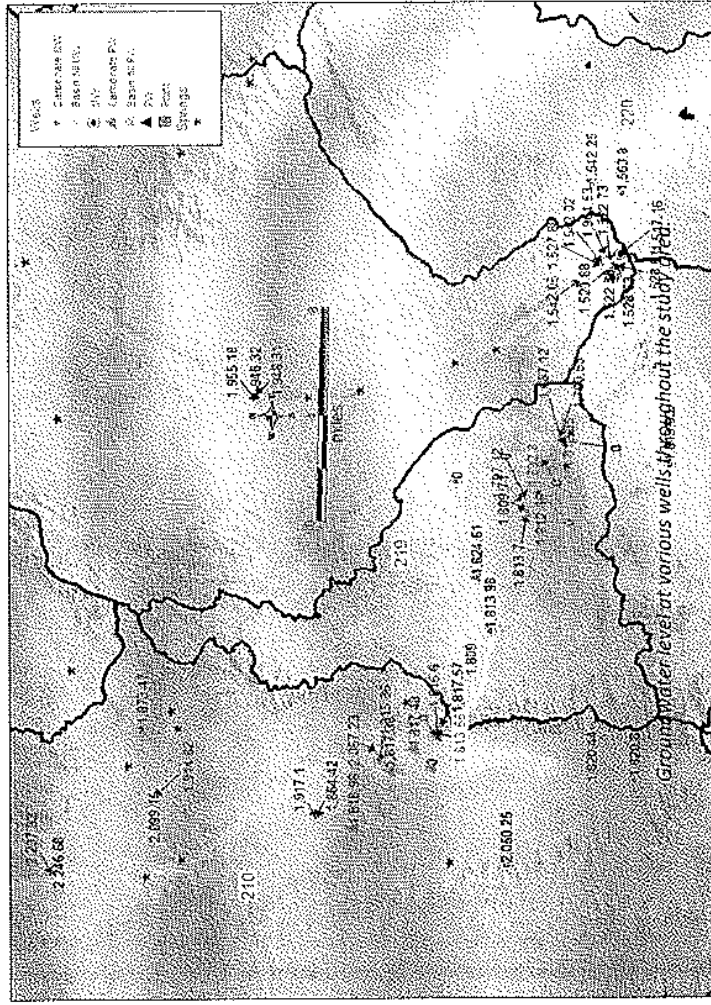
- All wells in the Lewis Field portion of the MRSA exhibited a substantial drawdown of several feet during and for two years after the pump test (p 8).

- Basin fill MWs near the springs have declined, other than the uptick in 2005, since the 1990s much more than the Lewis Field wells. The decline accelerated through the aquifer test period, although, in contrast to the carbonate wells, these basin fill wells have mostly recovered since the aquifer test. The recovery is probably due to decreased pumping (p 8)

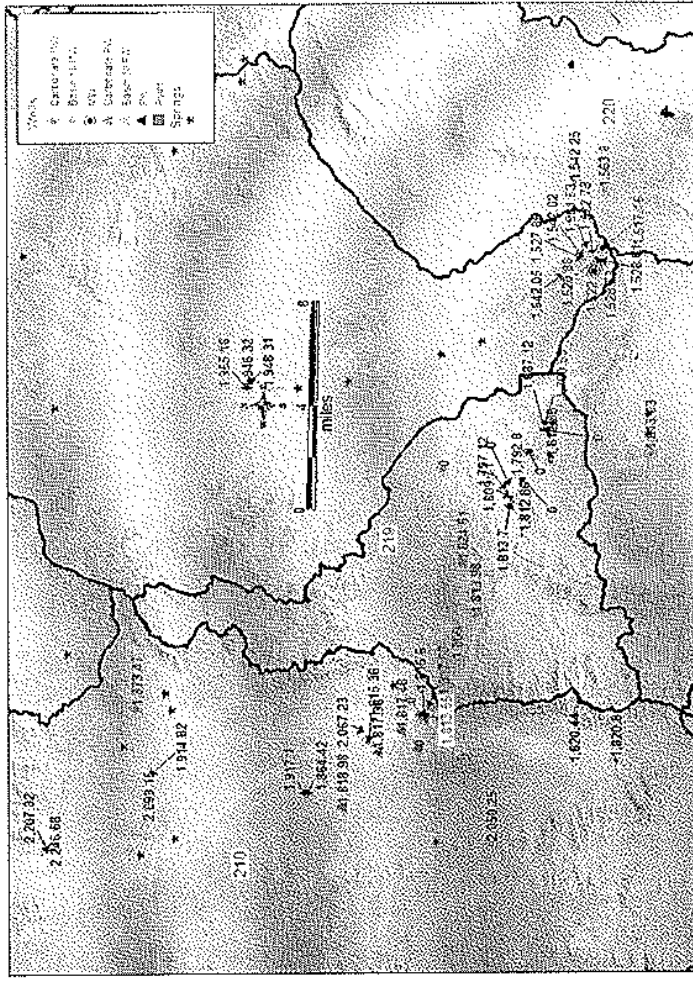


- The downward trend reflects the trend in the carbonate wells, the source for most basin fill water. Recovery however could be due to decreased pumpage in the Lewis Field. (p 8)

- GW levels at the end of the pump test show the very flat potentiometric surface from midway up CSV through the MRSA. Likely due to area with very high transmissivity. (p 11)
- During pumping, water levels responded as if the aquifer is a pond with water level changes transmitted quickly throughout. (p 11)
- Carbonate water levels in northern CSV are several tens to almost 400 feet higher than near the southeast portion of CSV, but the water levels did decline during the aquifer test (USDOL 2013). (p 11)
- The groundwater level in CSVM-4, near the southern end of Kane Springs Valley, is just four feet lower than well KMW-1 (206 S11 E64 06CACC1) further north in Kane Springs Valley. This suggests the high transmissivity carbonate rock extends into that valley. (p 11, 12)
- Carbonate groundwater levels drop almost 250 feet between the MRSA and the southeast portion of the Lower Meadow Valley Wash valley. (p 12)
- The carbonate groundwater levels in the MRSA are several tens of ft above the levels in basin fill, which drives flow into the basin fill. (p 12)
- Both observations support the idea of a flow impedance in the carbonate aquifer near the southeast boundary of MRSA which could be a major cause of the springs. (p 12)



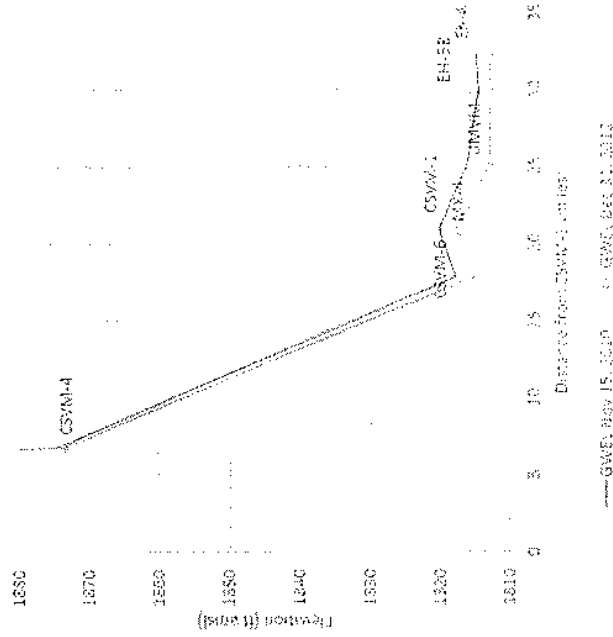
- Basin fill water levels in CSV are substantially higher than in the carbonate. Most apparent is CE-VF-2 for which the water level is more than 50 feet lower in the carbonate. (p 12)
- Basin fill well DF-1 groundwater levels exceed 2000 ft amsl while underlying carbonate wells have levels 200 feet lower.
- Because of the aridity of the area and because of the likely confining unit between the aquifers, it is unlikely the higher basin fill levels reflect substantial recharge to the carbonate. Rather it suggests a hydrologic disconnect. (p 12)
- In the MRSA, carbonate water levels exceed those in the basin fill, which forms the springs. (p 12)
- In the Lower Meadow Valley Wash area, outside of the pump test study area, at wells MW-1 there is a substantial upward gradient from depth in a very thick basin fill aquifer. (p 12)





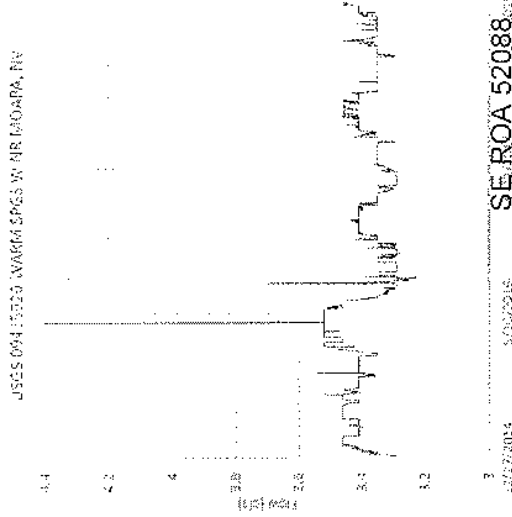
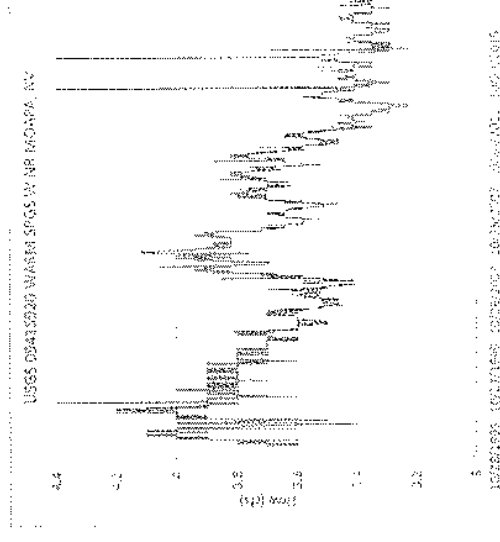
- A profile of the carbonate groundwater levels through CSV and MRSA at the beginning and ending of the aquifer test demonstrates the flatness of the potentiometric surface in the high transmissivity zone through the area and how the response decreases to the north.
- For almost 20 miles, the carbonate water level is between 1820 and 1813 feet amsl. During the aquifer test, the level consistently dropped about 2 feet.
- Further north at CSVM-4, the groundwater level change was less than a foot. Groundwater levels at well CSVM-4 are also several tens of feet higher than further south.
- Even further north, carbonate groundwater levels are about 200 feet higher and there was little effect from the aquifer test.
- Transmissivity is probably lower in northern CSV as reflected by the steeper gradient.
- Inflow to CSV from Pahrangat or Delamar Valley flows through the lower transmissivity area to reach southern CSV and well MX-5.

Gradient = 50 ft in 10 miles or 0.1%

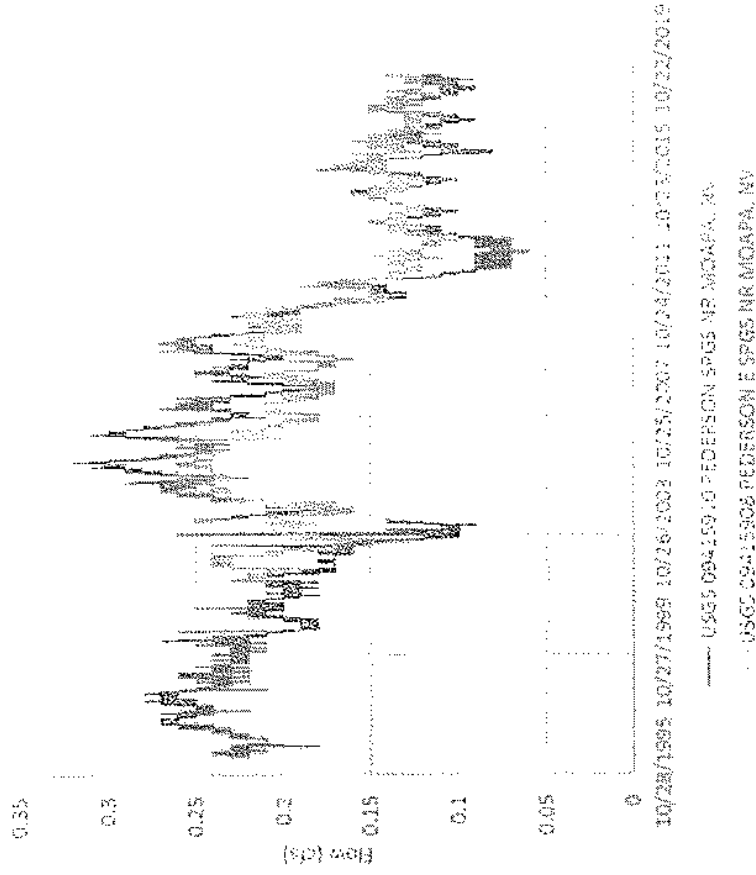


GW elevation from northern Coyote Spring Valley to well EH-4 at the beginning and end of the Order 1169 pump test.

- Discharge from Warm Spring West decreased from about 4.0 cfs to as low as 3.4 cfs between the 1990s and mid-2000s, then after an uptick in flows during the wet period in 2005, flows dropped to almost 3.2 cfs during the Order 1169 pump test.
- Flow at Warm Springs West declined about 9% during the test.
- It recovered only to a little more than 3.4 cfs since 2012
- Flow has decreased since 2016 and has been steady at less than 3.4 cfs since a brief increase following the wet 2017.
- Most flows since 2017 are critically close to the trigger points.



- At the Pederson springs, flow is about half of what it was in the mid-2000s, with much of the decrease occurring during the Order 1169 pump test. Flows recovered some after the test
- At Pederson Springs flows had declined about 63% and at Pederson East Spring about 45% during the test (USDOI 2013).
- Based on correlation analysis, USDOI (2013) found that if the rate of drawdown observed during the aquifer test continued, Pederson Spring would have gone dry in 1.5 years.
- USDOI also estimated that Pederson East Spring would have gone dry in another 2.5 to 3 years if pumping continued.



## Kane Springs Valley should be added to the LWRFS

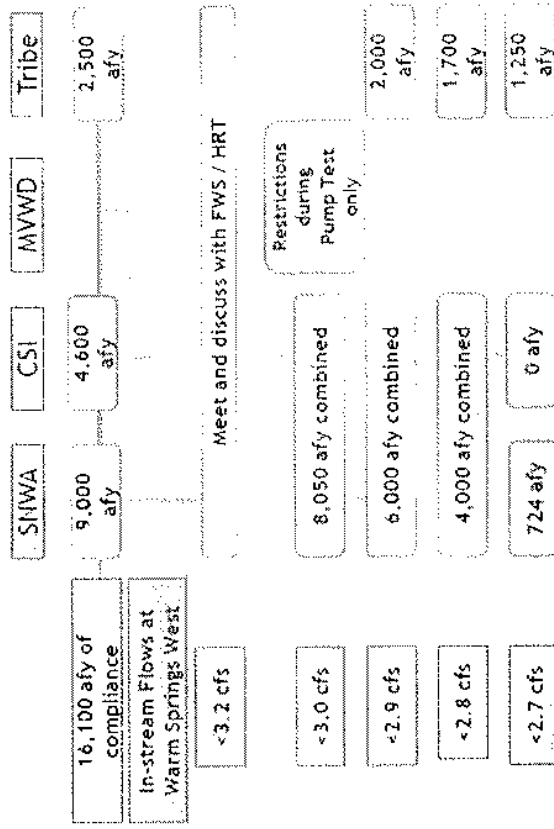
- High transmissivity to at least CSVM-4
- Groundwater level at KMW-1 just four feet higher than at KMW-1, Groundwater level lowering in CSV propagated into KSV.
- Large expanses of carbonate rock near the downgradient end of KSV, no structural hydrogeologic barriers.
- Groundwater flow from KSV limited to local recharge

## No reason to separate northern CSV

- Water levels in northern CSV are as much as 400 feet higher than in central CSV
- Suggest lower transmissivity in the north
- All flow to southern CSV and MRSA must pass through this area from Pahranaagat Valley and Delamar Valley

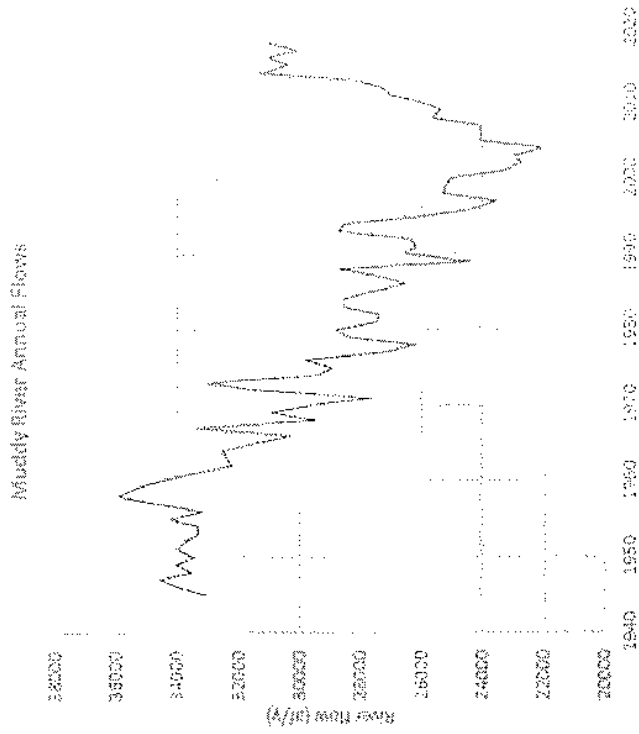
## There should be no carbonate pumping in the future

- The limits on pumping water in the LWRFS are the impacts caused by that pumping on spring flow necessary to support the Moapa Dace and water rights to flow from the springs and in the Muddy River. (p 19)
- Memorandum of Agreement (MOA) signed by Southern Nevada Water Authority, Coyote Springs Investment, Moapa Valley Water District, and the Moapa Valley Paiute Tribe, established trigger ranges for flows at Warm Springs West. (p 19)
- Warm Springs West flows almost dropped to 3.2 cfs during the aquifer test. (p 20)



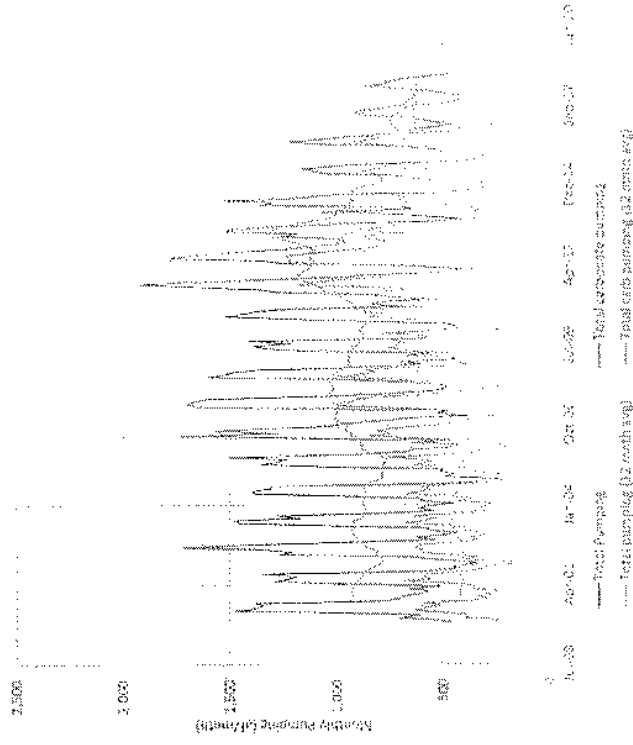
*Description of trigger flows and pumping limits for those trigger flow for the Memorandum of Agreement described in the text*

- **The 1920 Muddy River Decree has total rights of 37,000 afa.**
- Muddy River near Moapa is downstream of all area springs and some irrigation diversions.
- Based on the gage, discharge from the LWRFs had been estimated to be about 36,000 afa from springs that supply the MRSA (Eakin 1964, p 24).
- From about 1943 to 1960, the recorded flow was just less than 34,000 afa. After 1960, the flow rate decreased to less than 24,000 afa. After the wet year in 2005, it began to increase again to over 30,000 afa in 2012.
- Trends at the Muddy River gage are likely due to surface and groundwater development upstream from the gage
  - including diversion of up to 9.2 cfs to the Reid-Gardner electrical generating station which began in 1968 (USFWS 1996).
  - Carbonate pumping beginning in the 1990s.
  - Increase just after 2005 due to the high precipitation year
  - Increase after 2010 could be due to the decreased ET after a fire in 2010.
  - Flows have been relatively constant at about 30,500 afa since 2014.
- **Flow at the gage has not met the requirements of the Decree because the flow has been less than 37,000 afa.**



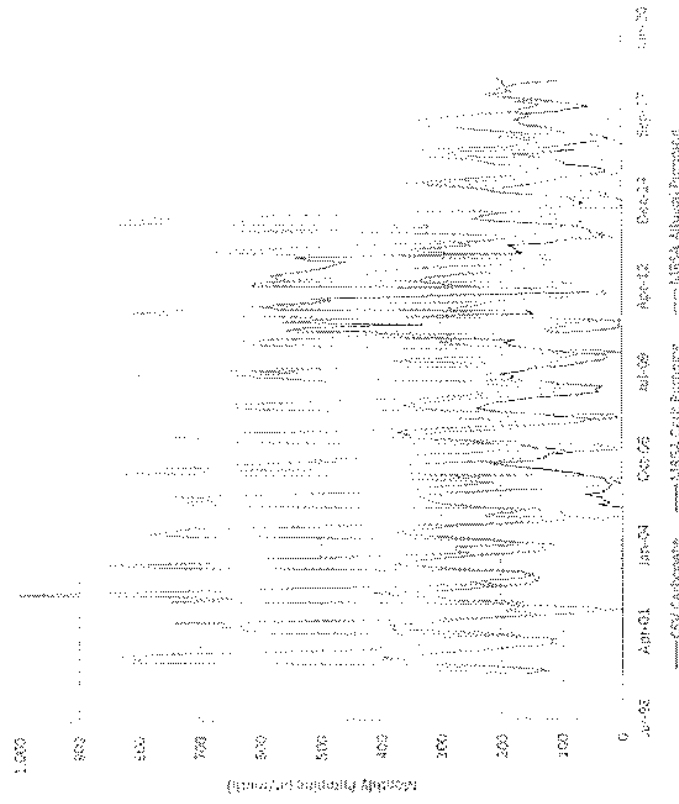
Annual flows (cfs) at the Muddy River near Moapa, NV gage (09416000)

- Pumpage since 2000 has been from variable sources.
- Monthly pumpage varied from 500 to 1600 af/mnth between 2000 and 2010, which converts to annual pumping from about 9600 to 12,000 afa.
- Total carbonate pumping increased from about 4800 to 7200 afa between 2000 and 2010.
- There was a substantial jump in pumping between 2010 and 2012 due to the 1169 aquifer test.
- After the test and especially since 2014, total pumping has decreased to just over 8000 afa.



Total pumping and total carbonate pumping, by month and by 12-month moving average, for the study area. Data from NSE Web page

- Alluvial pumping has dropped to close to zero since 2015 (p 22)
- Carbonate pumping in CSV began in 2005, so flow in the carbonate system upstream from the springs has only been pumped for 14 years. (p 22) Prior to 2010 and after 2013, CSV pumping had been from 100 to 200 af/mnth. During the pump test it ranged from 350 to 550 af/mnth.
- MRSA carbonate pumping has been steady or slightly decreasing with ranges from 100 to 400 af/mnth. Production is primarily from the Arrow Canyon wells (p 22)
- During the aquifer test, CSV carbonate pumping dominated the pumping from the carbonate aquifer. Since the aquifer test, CSV carbonate pumping has been about half that in MRSA (p 22)

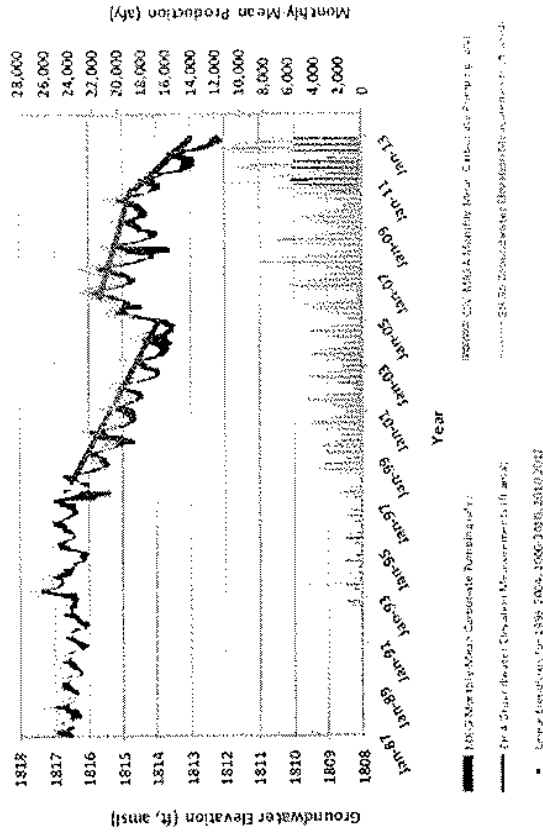


Carbonate pumping for Coyote Spring Valley and the Muddy River Springs Area. Source of data: NSE web page.



- Carbonate pumping mostly removes water from storage, as evidenced by the general downward trend around the aquifer
- Drawdown will stop only when pumpage equals captured discharge and induced recharge or inflow.
- The carbonate system has not reached equilibrium for any rate of pumping
- With carbonate pumping, it is only a matter of time before spring flow decreases significantly or is completely lost (p 24)

• ...the NSE should not allow any carbonate pumping in the LWRFS to prevent further decreases and to allow recovery in the flow to Muddy River Area Springs (p 24)



Trends in carbonate water levels at MWs EH-4 and EH-5b with carbonate pumping in Coyote Spring Valley and Muddy River Springs Area. Source: USDOI (2013) Figure 1.2.

## Conjunctive use of alluvial wells

- ...carbonate water discharges into basin fill and supports the basin fill aquifer. Secondary recharge, probably including both direct spring flow and irrigation recharge, supports the basin fill water levels. (p 24)
- Some basin fill pumping could be acceptable in MRSA because ...as secondary recharge, the water has already been used in the spring channels most important for the dace. (p 25)
- ...possible that some basin fill pumping (in CSV) there could be sustainable. (p 25)
- ... basin fill water is likely disconnected from the carbonate and not responsible for substantial recharge to the carbonate.
- ...it is essential to determine where the basin fill groundwater discharges. If ultimately it supports carbonate groundwater, it should not be pumped.

# Conclusions

- There is a broad highly transmissive carbonate aquifer underlying CSV, MRSA, Garnet Valley, Hidden Valley and California Wash. The aquifer is interconnected so much among basins that it is necessary to manage groundwater through all basins as if they were part of a whole basin.
- The NSE should not allow any pumping of the carbonate aquifer to avoid continued decrease in spring flow in MRSA. This conclusion results from the direct correlation of carbonate pumping and carbonate water level and spring discharge decline.
- Until all pumping is captured from spring discharge, carbonate water levels will continue to decline.
- Preventing carbonate pumpage is also necessary for protecting downstream water rights in the long term.
- Kane Springs Valley should be managed as part of LWRFS based on the observed relative flat carbonate water level extending into that valley and the response of KSV wells to pumping. There is a high likelihood that water pumped from KSV would quickly contribute to the depletion of the carbonate aquifer in CSV and MRSA.
- Some basin fill pumping could occur without significantly affecting the spring flow. A preliminary estimate is the pumping that occurred prior to significant carbonate pumping, or about 4000 afa. It is probably not possible to increase that pumpage by transferring carbonate rights to basin fill wells because of the observed long-term decline in Muddy River flows.

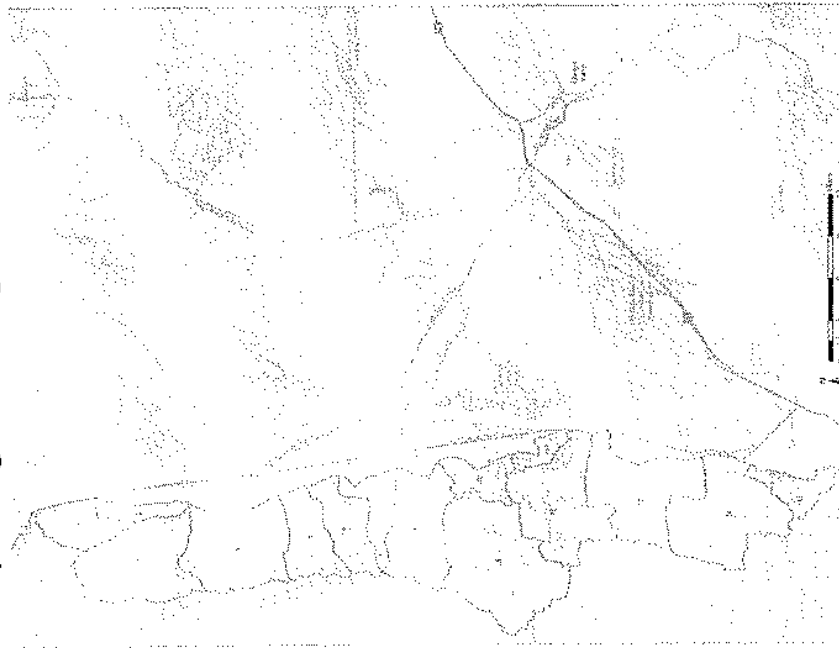
## References

- Johnson C, Mifflin M (2013) Summary of Order 1169 Testing Impacts, per Order 1169A. Mifflin and Associates, Inc.
- Myers T (2013) Technical Memorandum, Comments on Carbonate Order 1169 Pump Test Data and the Groundwater Flow System in Coyote Springs and Muddy River Springs Valley, Nevada. Prepared for Great Basin Water Network.
- SNWA (Southern Nevada Water Authority) (2018) Assessment of Environmental Conditions Related to Moapa Dace in the Lower White River Flow System. Las Vegas, Nevada, 55 p.
- SNWA (Southern Nevada Water Authority) (2013) Nevada State Engineer Order 1169 and 1169A Study Report. Las Vegas, Nevada, Doc. No, WMP-ED\_0001, x p.
- US DOI (US Fish and Wildlife Service, Bureau of Land Management, National Park Service) (2013) Test Impacts and Availability of Water Pursuant to applications Pending Under Order 1169.
- USFWS (US Fish and Wildlife Service, Region 1) (1996) Recovery Plan for the Rare Aquatic Species of the Muddy River Ecosystem, First Revision. Portland OR

## Rebuttals

- Highlights by Stakeholder
- Detailed reference should be made to Myers CBD rebuttal report
- There is overlap in rebuttals for the various stakeholders

Coyote Springs Investment Rebuttal:  
 Sheep Range Recharge estimates are inaccurate



LOCATION OF RECHARGE ZONE WEST OF COYOTE SPRING VALLEY  
 RECHARGE ZONES NUMBERED 1 THROUGH 15. BASEMAP: USGS NATIONAL MAP (2019)

TABLE 7. SUMMARY OF RECHARGE CALCULATIONS FOR THE SHEEP RANGE

Hydro-graphic Area	Recharge Zone and Name	Elevation (USGS, 2017)		Precipitation Raster (PRISM, 2015)	
		Delineation of bands from:		Precipitation Raster (PRISM, 2015)	
		Maxey & Eakin (1949) <sup>a</sup>	Maxey & Eakin (1949) <sup>b</sup>	Maxey & Eakin (1949) <sup>b</sup>	Epstein (2004) <sup>c</sup>
COYOTE SPRING VALLEY (210)	1 Evergreen Flat	0	60	10	110
	2 Pahrangat Wash A	0	0	0	40
	3 Coyote Spring Valley A	30	480	300	590
	4 Coyote Spring Valley B	100	550	650	630
	5 Cherry Spring	60	230	310	340
	6 Grapevine Spring	50	230	250	290
	7 Pahrangat Wash B	10	80	60	140
	8 Perkins Spring	120	610	890	600
	9 Sawmill Wash	1,170	2,830	3,920	1,760
	10 Las Vegas Range A	0	0	0	80
	11 Las Vegas Range B	0	0	0	30
	12 Wannup Spring	50	660	980	680
	13 Hidden Valley A	30	470	690	520
	14 Hidden Valley B	30	400	530	540
	15 Dry Lake	0	0	0	60
<b>Total</b>		<b>1,640</b>	<b>6,700</b>	<b>8,600</b>	<b>6,400</b>
		Range of Estimate: 1,600 AFY to 8,600 AFY			

Notes:

- a. See supporting calculations in Appendix Table F-1
- b. See supporting calculations in Appendix Table F-2
- c. See supporting calculations in Appendix Table F-3
- d. See supporting calculations in Appendix Table F-4

- Nichols and Epstein methods are based on methodology of Maxey and Eakin (1949)
  - recharge estimated as a percent of total precipitation volume within a precipitation interval within a basin.
  - if 10,000 af falls in the >20 in/y zone which has a 0.25 coefficient, 2500 af it would be assumed to become recharge within the basin
- Stetson's application of the methods shows a misunderstanding of the methodology.
- Methods were derived by equating precipitation bands to discharge from an entire basin
- This is important because it blends the geology over the basin. Recharge occurs anywhere within the basin, not necessarily at the point the precipitation falls
- The method does not consider geology...precipitation runs off granitic and much volcanic rock, but infiltrates carbonate rock.
- Because the M-E method was derived using outflow estimates and precipitation zones for entire basins, it is inappropriate to estimate recharge for small subbasins. Stetson's subdivision of the Sheep Range portion of CSV introduces a level of granularity to the analysis which is not appropriate in the model

- The method depends on using the same source of precipitation estimates as was done for developing the method.
  - Not appropriate to use M-E coefficients with PRISM-estimated rainfall as described (Stetson 2019, p 33-34).
  - Being “more scientifically sophisticated” (Stetson 2019, p 38) does not make an estimate using most recent PRISM data more accurate.
  - Nichols used PRISM 1997 data for 1960 to 1990 annual precipitation
  - Maxey Eakin used 1936 Hardman map, Stetson used 1962 values from Eakin (1966)
- The mismatch of coefficients with rainfall estimates also makes the estimate wrong.
- **The estimated recharge of 5280 af/y is therefore not accurate**



## Evapotranspiration

- “This report recommends and supports an initial estimate of groundwater available for appropriation should be based on capturing *all evapotranspiration* and groundwater outflow from the LWRFS.” (Stetson 2019; emphasis added). (p 6).
- There is no evidence that all ET from the extensive LWRFS groundwater system that supports functioning ecosystems could feasibly be captured—as Stetson 2019 asserts.
- Second, the CSI report makes no showing that *any* of the estimated amount of evapotranspiration in the LWRFS (Stetson 2019, Appx. C, chart “LWRFS ET (AFY)”) is “available” for capture.
- Third, the CSI report does not consider downgradient water rights

- ET in the hydrographic areas in the LWRFS supports functioning ecosystems including both dense and moderate meadowland, woodland, and shrubland vegetation as well as agriculture (Table 7)
- Stetson ignores the fact that the capture of any significant amount of ET would cause significant impacts to native vegetation as well as to spring flow.
- Stetson (2019) does not consider the effect of pumping on the spring flows necessary for the dace
- **Proposal to include all ET as available water to be captured is unsupported and should be rejected**
- Stetson claims ET in CSV is 1000 af/y and reference Thomas et al (2001). Where would that ET occur?
- DeMeo et al (2008) estimated ET from CSV is 0 (Table 7).
- Depth to water is too high – there is nothing to capture.
- **GW ET from CSV should be considered 0**

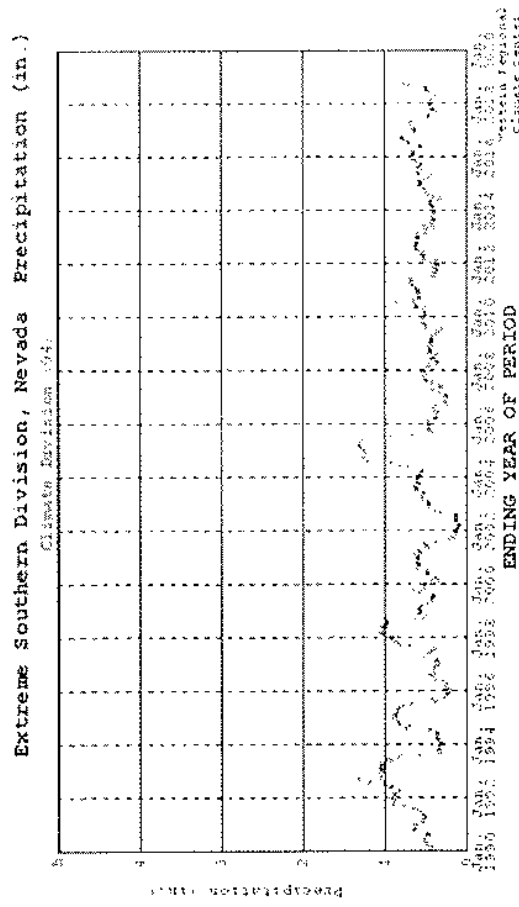
Table 7. Estimates of annual discharge from ground- and surface-water resources for each ET area in each hydrographic area in the study area, southern Nevada and adjacent areas in Utah and Arizona, 2000-06.

ET = evapotranspiration; ET<sub>g</sub> = ground- and surface-water evapotranspiration; ET<sub>s</sub> = stream evapotranspiration; ET<sub>total</sub> = ET<sub>g</sub> + ET<sub>s</sub>; NPV = net percolation volume; CSV = cumulative spring volume; DMV = direct mountain-valley discharge; DMV<sub>g</sub> = direct mountain-valley discharge from groundwater; DMV<sub>s</sub> = direct mountain-valley discharge from surface water; MSV = mountain-valley spring volume; MSV<sub>g</sub> = mountain-valley spring volume from groundwater; MSV<sub>s</sub> = mountain-valley spring volume from surface water; DSV = direct spring discharge; DSV<sub>g</sub> = direct spring discharge from groundwater; DSV<sub>s</sub> = direct spring discharge from surface water; AGV = agricultural groundwater volume; AGV<sub>g</sub> = agricultural groundwater volume from groundwater; AGV<sub>s</sub> = agricultural groundwater volume from surface water; OWB = other water bodies; OWB<sub>g</sub> = other water bodies from groundwater; OWB<sub>s</sub> = other water bodies from surface water; ET<sub>total</sub> = total evapotranspiration; ET<sub>total</sub> = total evapotranspiration from groundwater and surface water.

Hydrographic area	Annual ET <sub>g</sub> discharge in acre feet										Total annual ET <sub>total</sub> discharge (acre/yr)
	NPV	MSV	DSV	MSV	DMV	DMV	DMV	AGV	OWB	ET <sub>total</sub>	
Great Meadows AWP	0	1,276	479	1,755	0	0	0	0	0	0	1,755
Cliffside BWSB	0	1,276	149	1,425	0	0	3,129	0	0	0	4,554
Moapa River Springs-Mesa	0	1,186	0	1,186	0	0	0	0	0	0	1,186
Lower Moapa Valley	0	1,456	1,331	2,787	0	0	3,043	0	0	0	5,830
Upper Moapa Valley	0	3,730	1,244	4,974	19,269	0	9,460	0	0	0	29,703
Lower Moapa Valley West	0	4,092	1,068	5,160	2,899	0	3,093	0	0	0	8,252
Lower Valley	0	2,386	949	3,335	0	0	3,410	0	0	0	6,745
Spring Valley	0	0	0	0	0	0	0	0	0	0	0
Lower Valley	0	0	0	0	0	0	0	0	0	0	0
Moapa Valley	0	0	0	0	0	0	0	0	0	0	0
Moapa Valley (West)	0	0	0	0	0	0	0	0	0	0	0
Moapa Valley (East)	0	0	0	0	0	0	0	0	0	0	0
Moapa Valley (South)	0	0	0	0	0	0	0	0	0	0	0
Moapa Valley (North)	0	0	0	0	0	0	0	0	0	0	0
Total	0	22,820	22,249	45,069	21,168	0	68,119	0	0	0	113,187

# Moapa Band of Paiutes

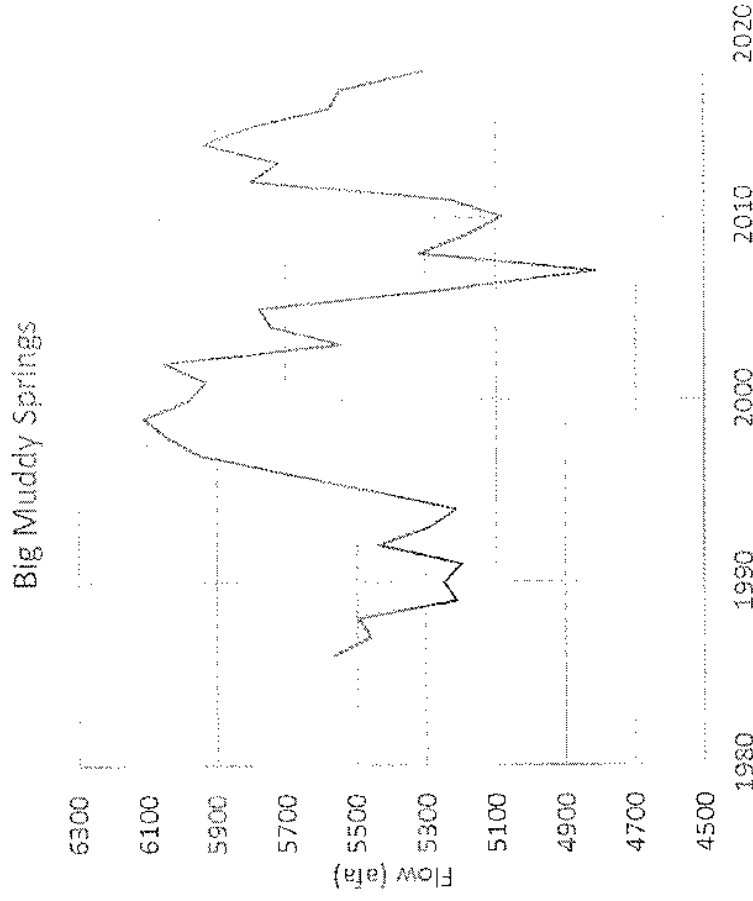
- **Water-Level Decline in the LWRFS: Managing for Sustainable Groundwater Development, Initial Report of Moapa Band of Paiutes in Response to Order #1303** by Cady Johnson and Martin Mifflin, Mifflin & Associates, Inc. (MAI) (Johnson/Mifflin)
- No 20-year drought
- No analysis of LWRFS climate data by Johnson/Mifflin
- Data from Climate division 4 show three periods during which the average monthly precipitation exceeds 1 inch and two periods where it is very low, but neither occur since 2006.



- Discharge from Big Muddy Spring... increased by 1 cfs from 2010 through 2014 after which it declined (Johnson and Mifflin 2019, p 32).

- They claim that the flow increases during the aquifer test and increase after the test “demonstrates climate-dominance rather than pumping as a forcing agent for water-level change within the MRSA, and perhaps a complete absence of Order-1169 pumping effect in Big Muddy Spring” (p 32).

- Johnson/Mifflin fail to note that a fire in 2010 burned over 600 acres and that this caused a decrease in annual evapotranspiration of about 1000 af/y (SNWA 2019, p 5-2, -3 and Figure 5-1).



- The 40,000 af/y estimate for flow from LWRFS to the Las Vegas Valley should be given no credence because it is highly dependent on undocumented and unverified assumptions.
- Darcy's Law analysis with transmissivity estimated based on a report published for a pump test at a well along the proposed flow path.
  - The reference Mifflin and others (1992) is unpublished
  - No evidence the transmissivity would apply along the length of the flow path
  - No evidence provided supports the 10:1 ratio of maximum to minimum horizontal transmissivity.
  - Also there is no evidence provided to support the most transmissive direction being parallel to the postulated flow path.
- **No evidence the water is available**

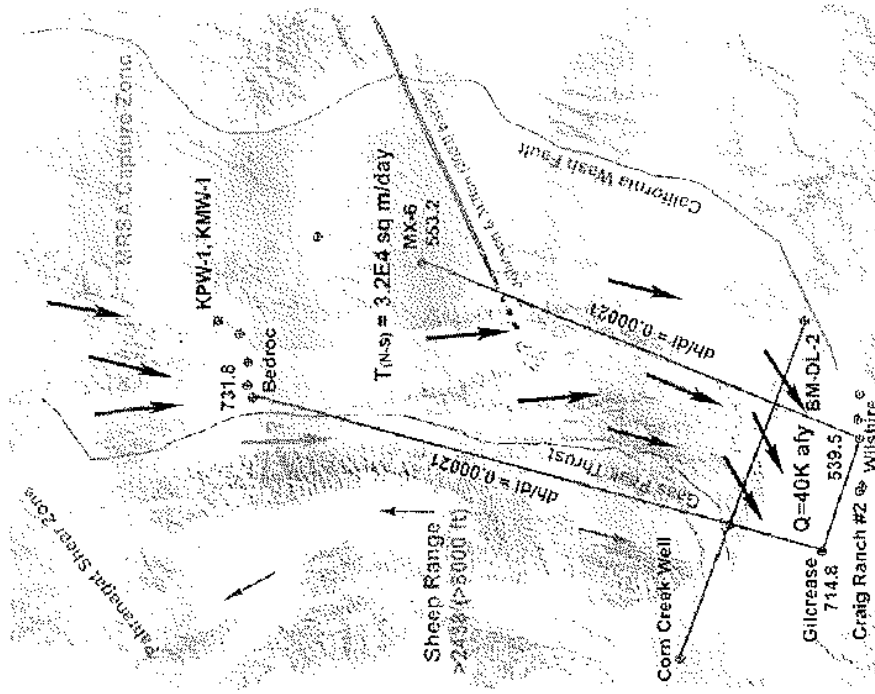


Figure 1. Conceptual model for groundwater system in terminal "LWRFS" flow corridor, with bounding faults from Feiger and Beard (2010). Blue arrows indicate regional flow, green for local Craig Ranch #2 water is among topographically highest in Las Vegas Valley (1050 ft, 314.5 ft); (3)FLOWscreens&3tamaripia

# The analysis in Johnson/Mifflin Appendix IV does not prove correlation between EH-4 levels and pumping at ACW

- Coefficients indicate that the average drawdown as defined by J/M is the best predictor
- Intercept and Lag0 are the only statistically significant coefficients
- If this has meaning, it is that current pumping is most responsible for drawdown
- Report also notes that just 8% of ACW pumping is captured at the springs. This ignores that the remainder is captured from storage.

Regression Statistics	
Multiple R	0.947248
R Square	0.897278
Adjusted R Square	0.880158
Standard Error	0.041409
Observations	92

# obs indicates 92 weeks or daily data  
For 13 weeks?

	df	SS	MS	F	Significance F
Regression	13	1.168279	0.089868	52.4102	4.83E-33
Residual	78	0.133746	0.001715		
Total	91	1.302025			

ANOVA

	Coefficients	Standard Error	t Stat	P-value	Lower 95%	Upper 95%
Intercept	1.248628	0.148676	8.4077	0.000000	0.938852	1.558404
Lag0	-0.07263	0.031705	-2.29057	0.024442	-0.135685	-0.009575
Lag1	-0.01453	0.027725	-0.52393	0.601	-0.04874	0.019681
Lag2	-0.00258	0.027610	-0.09344	0.92684	-0.03404	0.028914
Lag3	-0.00661	0.021025	-0.31405	0.75165	-0.02644	0.013161
Lag4	-0.00669	0.034968	-0.19167	0.849943	-0.036045	0.022692
Lag5	-0.01098	0.034589	-0.31751	0.748089	-0.04383	0.021867
Lag6	-0.00788	0.044111	-0.17852	0.864844	-0.046696	0.031109
Lag7	-0.01062	0.046822	-0.22688	0.826854	-0.044301	0.022472
Lag8	-0.00834	0.036473	-0.22830	0.819152	-0.034661	0.017733
Lag9	-0.00651	0.032668	-0.20006	0.757107	-0.01403	0.011044
Lag10	-0.00401	0.017387	-0.23090	0.81991	-0.00481	0.00491
Lag11	-0.00542	0.037229	-0.14573	0.88971	0.00387	0.01391
Lag12	-0.00319	0.041143	-0.07762	0.93431	-0.03561	0.02481

Table 1. Multiple-regression coefficients representing how pumping in the current week (Lag0) and the 12 prior weeks (Lag1 through Lag12) explain drawdown at EH-4 as a function of weekly pumping at the Arrow Canyon Well(s). Note all coefficients are negative, indicating SE ROA #52108 has the expected effect. [EH4ACWresponse2.xlsx, sheet 'WeeklyMP']

## Lincoln/Vidler: Primary argument is that KSV should not be added to LWRFS

- Lincoln County et al present water level data that supports managing KSV as part of LWRFS
- KMW just 4 ft higher than CSVM-4
- Both began long-term decline after high-precipitation period, coinciding with the commencement of pumping in CSV
- Both responded to Order 1169 test, after some delay
  - The delay is likely due to the lower transmissivity in northern CSV
- Both continued decline after a brief recovery and is ongoing

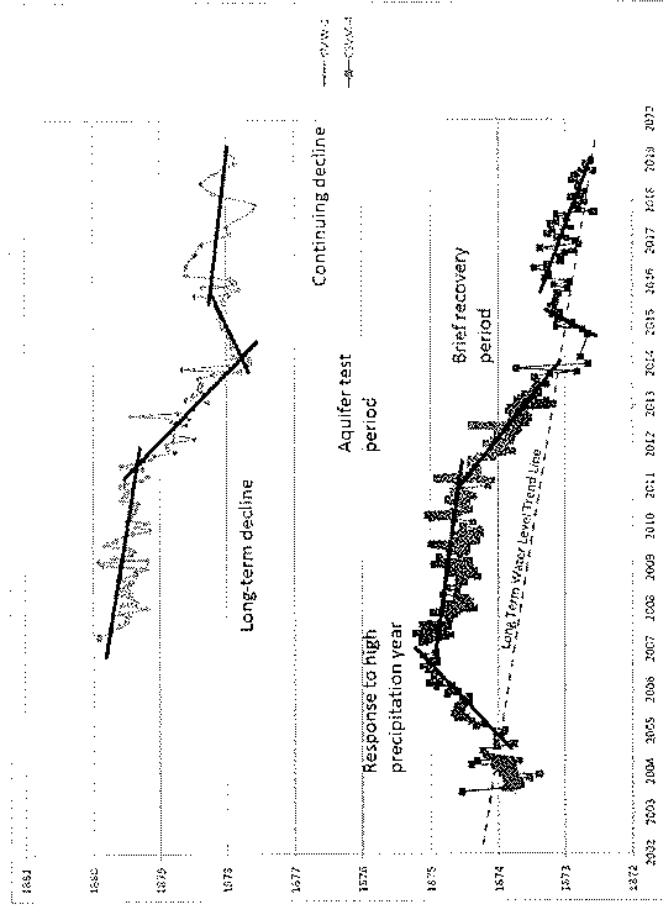


FIGURE 3-9. COMBINED HYDROGRAPHS OF WELLS KMW-3 AND CSVM-4

Trends at hydrographs of wells KMW-1 and CSVM-4. Adapted from Lincoln/Vidler et al (2019) Figure 3-9

- Groundwater from KPW-1 has total dissolved solids (TDS) at 774 mg/l, a little higher than the groundwater at CSVM-4 which is 682 mg/l (p 3-8). This could be mixing with CSV water.

- None of the wells in their Table 3-2 stand out as substantially different than the others. No obvious difference among sources that would dispel mixing.

Lincoln County et al (2019)

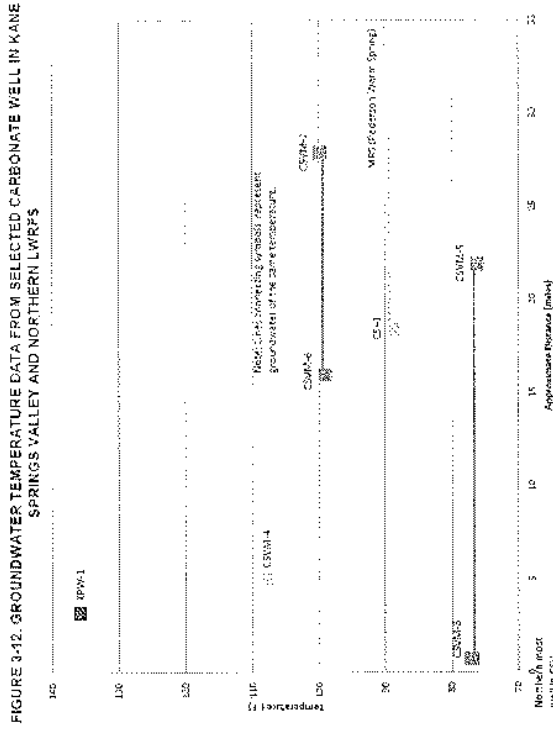
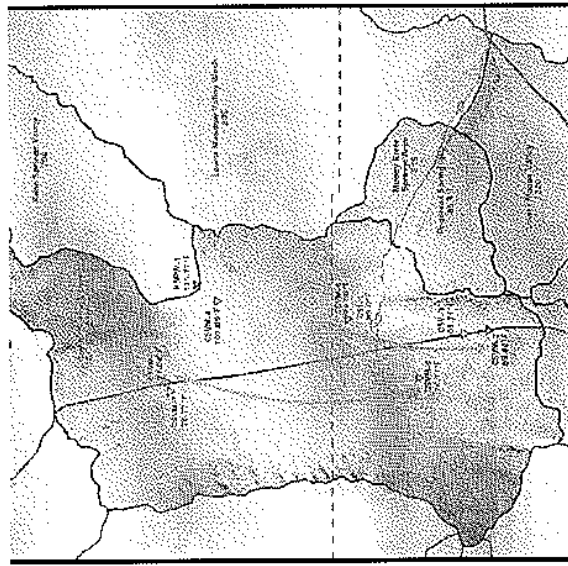
Table 3-2. Total Dissolved Solids Sum for Selected Wells and Springs

Water Source	Parameter								TDS
	Na + K	Ca	Mg	Cl	HCO <sub>3</sub>	SO <sub>4</sub>	SO <sub>4</sub>	TDSS	
Big Muddy Spring	108	64	27	61	276	177	177	713	
Pederson's Warm Spring	111	71	26	60	270	190	190	728	
KPW-1	168	48	14	63	341	140	140	774	
MX-5	96.3	48.7	21	35.7	294	93.1	93.1	588.8	
CSV-4	145	40	13	53	311	120	120	682	



- Groundwater at KPW-1 is almost the oldest (29,000 years) and hottest (136° F) of the wells in the area (p 3-9, -10).
- If the water in KPW-1 originated in KSV as recharge, it circulated deeply over a long time period.
- Once KPW-1 water joins water in CSV, the average age of the mixed water is younger and the temperature is cooler due to mixing.

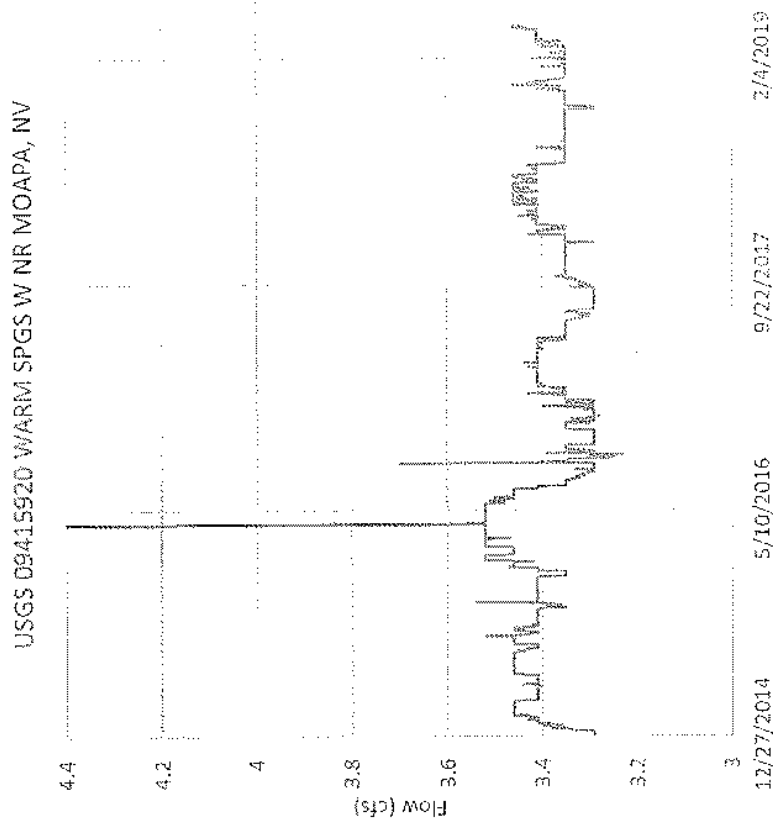
The supposed pathways in Lincoln County et al Figure 3-12 do not account for mixing along the pathways. There is no basis to claim that groundwater remains at the same temperature as it flow along a pathway Lincoln County et al Figures 3-11 and 3-12 are not evidence of a disconnect between KSV and CSV



US Fish and Wildlife Service argues for too much pumping from LWRFS

- FWS states that the average pumping of years 2015 through 2017 (9318 afa) should be the long-term allowed total pumping rate from carbonate and alluvial aquifers.
- FWS claims flows and levels are steady during that period
- Not true ... many graphs and analyses have shown a small water level decline during a relatively wet period, especially during 2018-19

- Although they briefly recovered to almost 3.6 cfs, WSW flows have been decreasing since, including through a wet period.
- Most ongoing carbonate pumping is removed from storage. As pumping continues, more of it will be captured from discharge and spring flow will decrease to critical levels
- See rebuttal analysis of SNWA below



## National Park Service

- NPS presented simulation completed by Tetra Tech to consider different pumping scenarios (locations) but with the same total rate, 14,535 afa
- Most differences among scenarios were during the initial years (drawdown maps for 10 years), for which drawdown concentrated near pumping.
- After 100 years, drawdown had spread over much of the LWRFS
- Over the 500-year period simulated, spring flows would decrease by about 20% with just small variation among simulations.
- **The lack of difference among outcomes in these simulations is evidence that there is not some perfect scenario that would allow pumping to continue at a much higher rate**

# Southern Nevada Water Authority

- SNWA shows there have not been any significant climatic trends or shifts in the area since 1895 (SNWA, p 5-1).
- since 2016, heads in the carbonate aquifer and discharge measured at Pederson Spring and WSW have declined (SNWA, p 6-2).

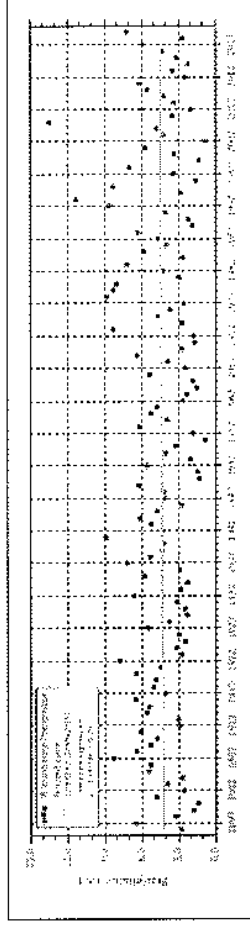


Figure 4-2  
Climate Division 4 Precipitation with Trendline

“In the long-term, it is expected that **any groundwater production from the carbonate system with in the LWRFS will ultimately capture discharge to the MRSA** (e.g., spring discharge, subsurface inflow the o the alluvial reservoir and, consequently, Muddy River streamflow) because of the high aquifer diffusivity and hydraulic connectivity throughout the flow system and because the MRSA constitutes the majority, if not all, of the discharge from the flow system” (SNWA, p 6-2, emphasis added).

SE ROA 52115 41

- SNWA 4000 to 6000 afa carbonate pumping based on relation between WSW flow and MRSA Q

- Appears to assume linear relation. As long as MRSA Q is within that range, WSW Q is between 3.2 and 3.4 cfs

**Table 6-2**  
**Limits on Carbonate-Aquifer Production Based on Selected Discharge Rates at Warm Springs West Gage**

WSW Flow Condition (cfs)	Decrease from Predevelopment Discharge			
	Warm Springs West		MRSA Discharge	
	(cfs)	(afy)	(cfs)	(afy)
3.82	0.88	0	0.00	0
3.66	0.72	156	2.89	2,062
3.40	0.42	334	5.53	4,000
3.20	0.32	449	8.16	5,908
3.00	0.32	594	10.79	7,818
2.80	0.32	667	12.11	8,776
2.80	1.02	736	13.42	9,724
2.70	1.12	811	14.74	10,671

\*Predevelopment discharge at WSW gage computed at 3.62 cfs (2,757 afy); predevelopment discharge from MRSA measured at 50.2 cfs (36,387 afy) (Eakin, 1964)

- However, the aquifer is not at equilibrium. This relationship shows that pumping is still removing groundwater from storage. Storage decrease is groundwater level decrease. As water levels at EH-4 go down, so will the WSW Q.

- SNWA's analysis does not support the recommendation that 4000 to 6000 af/y can continue to be developed from the carbonate aquifer

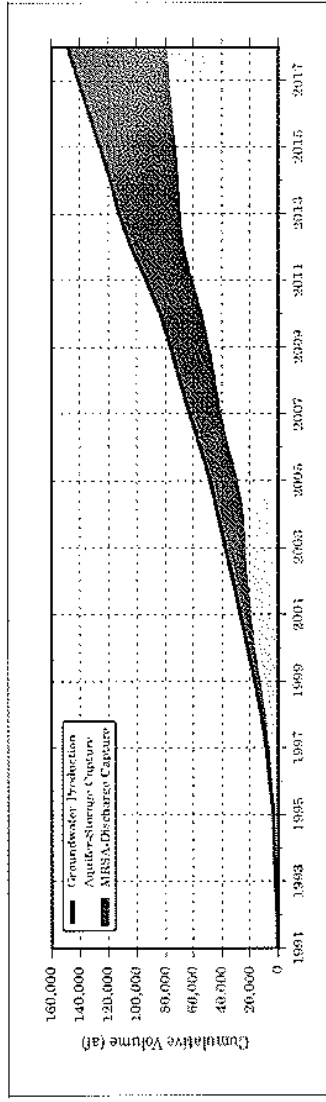


Figure 6-3  
LWRFS Carbonate Groundwater Production Capture Analysis

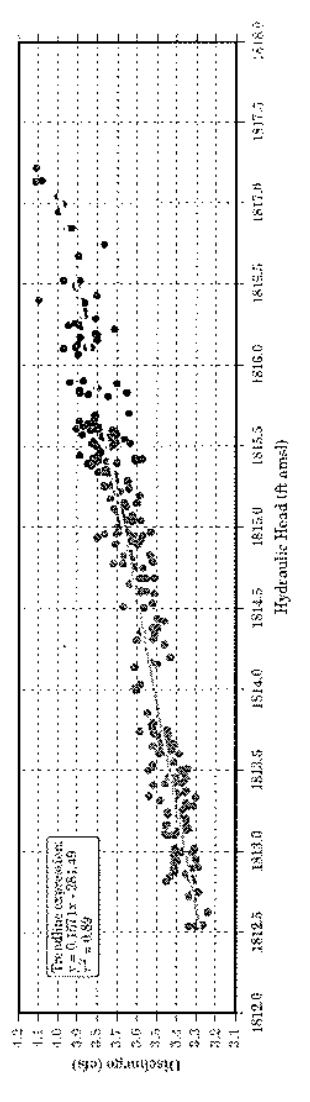
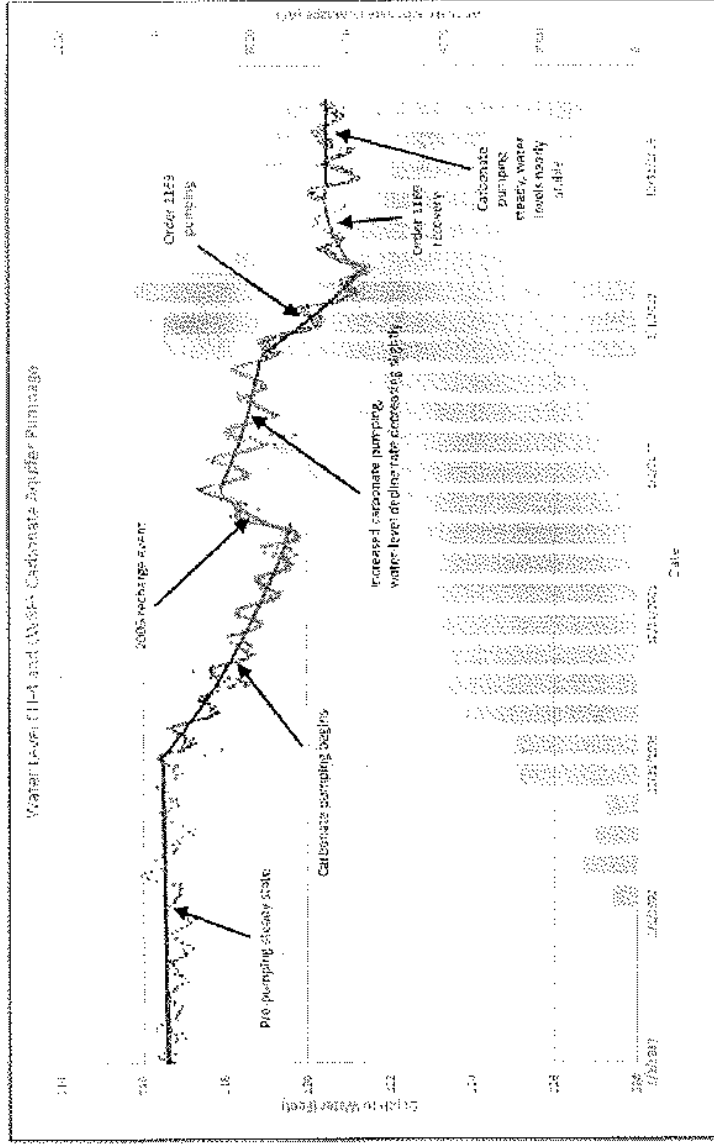


Figure 5-9  
Correlation between Hydraulic Head at Well EH-4 and Discharge at Warm Springs West near Moapa Gage

- NV Energy rebuttal reports claims recent water levels are steady.
- The claim is based on selective reading of carbonate water levels.







July 3, 2019

Tim Wilson, Acting State Engineer  
Nevada Division of Water Resources  
901 S. Stewart St., Suite 2002  
Carson City, NV 89701

Mr. Wilson,

The Center for Biological Diversity is pleased to submit the attached technical memorandum from hydrologist Dr. Tom Myers, regarding the questions raised by Interim Order 1303.

As the Center has stated from the beginning of this process, our primary concern is ensuring long-term sustainable flows in the Muddy River Springs Area (MRSA) to ensure adequate habitat for the survival and recovery of the federally protected endangered Moapa dace. Protecting the dace is a legal obligation for the Division of Water Resources, in order to ensure compliance with the federal Endangered Species Act, and acting in compliance with NRS 533.370(2) to ensure that water right applications are not “detrimental to the public interest.”

Dr. Myers’ report contains three primary conclusions:

- The Division should not allow any pumping of the carbonate aquifer if the continued decrease in spring flow in the MRSA is to be avoided.
- The Kane Springs Valley should be managed as a part of the LWRFS.
- Some basin-fill pumping could occur without significantly affecting MRSA spring flow, with a preliminary estimate of 4,000 afa as a sustainable yield.

We appreciate this opportunity for engagement and look forward to further discussions on this issue.

Sincerely,

Patrick Donnelly  
*Nevada State Director*  
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**Technical Memorandum**

**Groundwater Management and the Muddy River Springs, Report in Response to Nevada State Engineer Order 1303**

**June 1, 2019**

**Prepared for: Center for Biological Diversity**

The Nevada State Engineer (NSE) is planning to establish a plan to conjunctively use groundwater and surface water in the Lower White River Flow System (LWRFS). The NSE has established the LWRFS as the valleys shown in Figure 1, except that only the northern portion of Black Mountains Area would be included. The basis for his planning is the Order 1169 aquifer test results and observations ongoing since the end of the test. The NSE in order 1303 requested that stakeholders provide reports with "further analysis of the historic and ongoing groundwater pumping data, the relationship of groundwater pumping within the LWRFS to spring discharge and flow of the fully decreed Muddy River, the extent of impact of climate conditions on groundwater levels and spring discharge, and the ultimate determination of the sustainable yield of the LWRFS" (NSE Order 1303, p 11). This report addresses the four points the NSE requests stakeholders to address, although in a different order:

1. The report summarizes the Order 1169 aquifer test, specifically regarding groundwater levels throughout the LWRFS and spring flows at Muddy River Springs, and extends the interpretations through the recovery period of 2013 through the present,
2. The report considers the reasons to consider Kane Springs Valley (KSV) as part of the LWRFS (the water level is just five feet higher than in Coyote Springs Valley (CSV), and pumping in KSV could reverse the gradient pulling water from CSV,
3. The report addresses the long-term quantity of water that could be pumped from the LWRFS without harming any Muddy River Springs. (Because of the flat gradient over the 1100 sq miles of the joint management area, there can be no location for pumping within the LWRFS that is safe meaning it would not affect Muddy River Springs),
4. Finally, the report also considers the relationship between alluvial and carbonate wells and how that could affect senior decreed rights to the Muddy River.

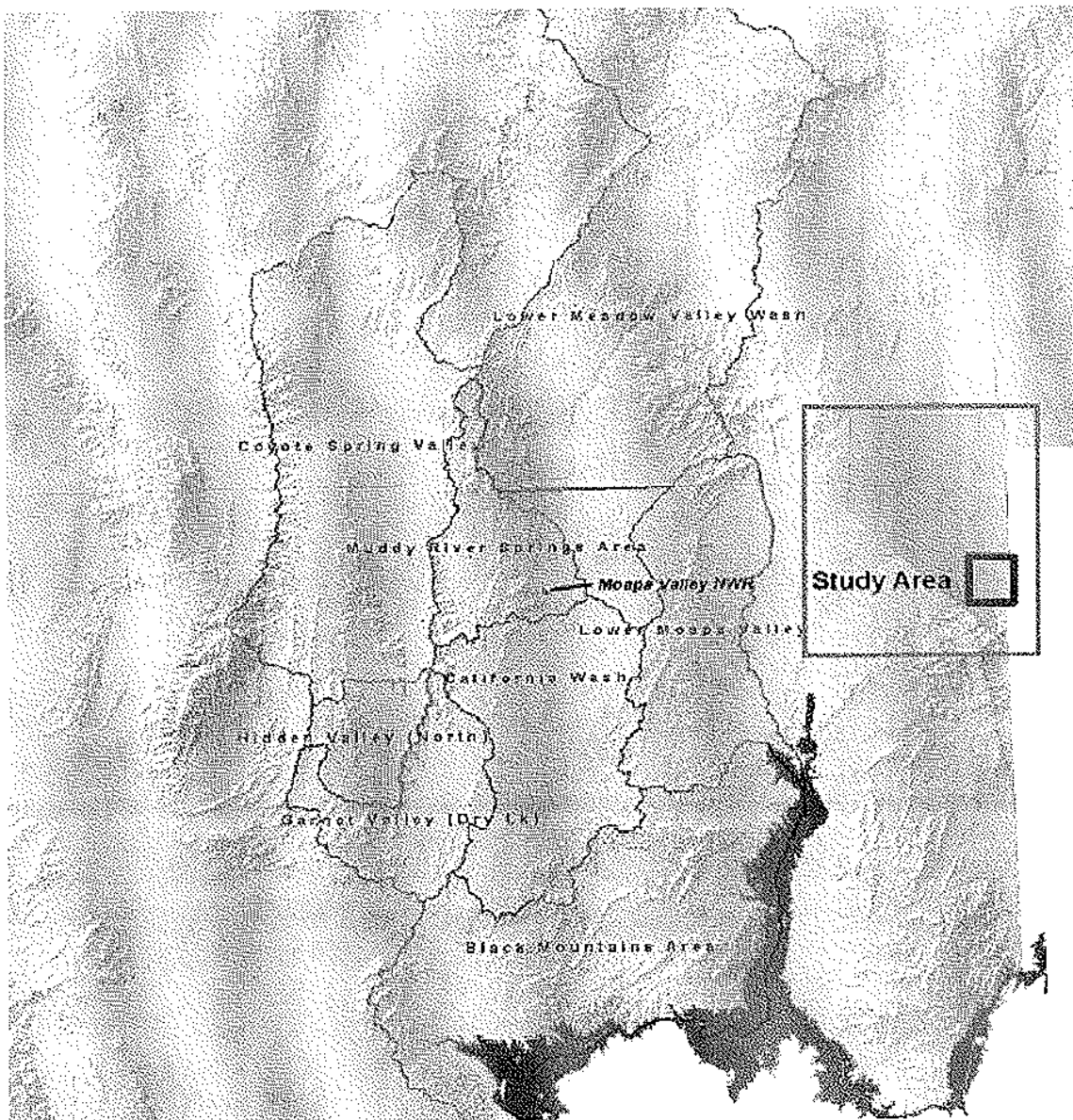


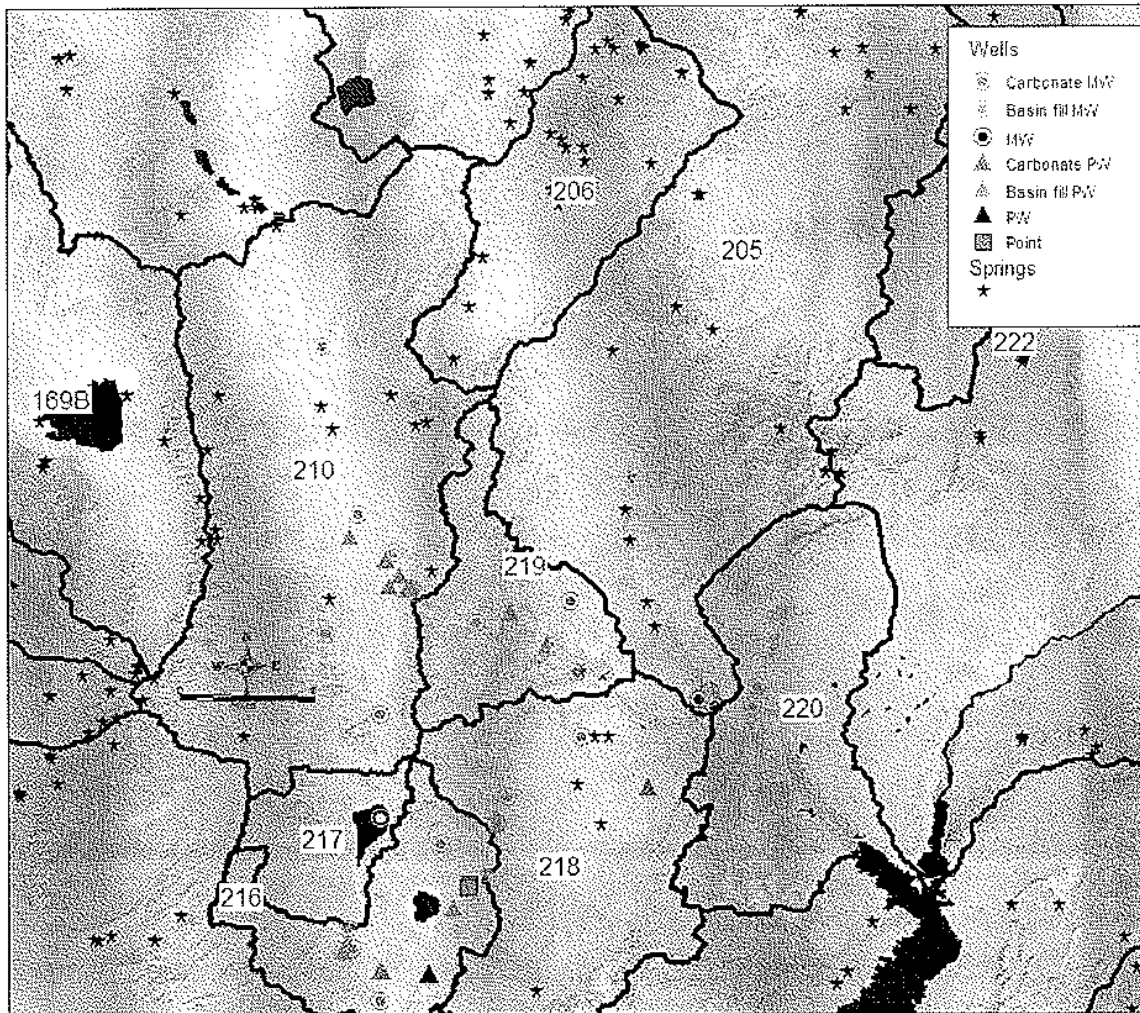
Figure 1: Study area showing the Lower White River Flow System. Kane Springs Valley is northeast of Coyote Spring Valley. Source: USDOJ (2013).

### Order 1169 Aquifer Test and the Period 2013 to 2019

NSE Ruling 6254 summarizes the finding of the 1169 aquifer test as reported on by various stakeholders including SNWA (2013), US DOI (2013), Myers (2013), and Johnson and Mifflin (2013). The 1169 aquifer test had been required by NSE Order 1169 to determine the effects of developing the carbonate aquifer in CSV. The order had required the participants to pump 8050

acre-feet per year (afa) from wells in CSV for two years. However, for the duration of the test, from November 15, 2010 to December 31, 2012, the total pumpage from the CSI wells and MX-5 well was 11,249 af, or only 5290 afa. During the test period, 79 monitoring and pumping wells (MWs and PWs) monitored water levels throughout the area (Figures 2 and 3). The CSV carbonate PWs lie on the east side of the valley near the boundary with Muddy River Springs Area (MRSA) and basin fill and carbonate MWs lie throughout the valley (Figures 2 and 3). MRSA wells concentrate along a trend along a wash running southeast through the middle of the valley (Figures 2, 3 and 4). The Arrow Canyon wells (Figure 3) are high-producing carbonate wells. The basin fill pumping wells on the southeast portion of MRSA are commonly called the Lewis Well field. The Muddy River Springs also lie in the far southeast portion of MRSA. The clastic rocks just east of the MRSA (Figure 4) may provide a structural boundary that partly controls flow and the location of the Muddy River springs (Johnson and Mifflin 2013).

Southern Nevada is generally very dry and average recharge over the LWRFS is very low (NSE Ruling 6254). But some years can be relatively very wet and the runoff that occurs during those years can cause recharge into washes and into outcrops of conductive rock. The twelve-month moving average of monthly precipitation ranges averages near half an inch but was close to zero in 2002 and approached 1.3 inches in 2005 (Figure 5). These monthly values correspond with an annual average of about 1 inch and 14 inches per year in those years, as reported by USDOI (2013). Several years in the 1990s have monthly average precipitation near an inch. During the aquifer test, the first year, 2011, appears to be slightly wetter than the average and 2012 became dry relative to most years.



**Figure 2: General layout and type of wells in the Coyote Spring Area. Basin 210 is Coyote Spring Valley, 219 is Muddy River Spring Area, 220 is Lower Moapa Valley, 218 is California Wash, 217 is Hidden Valley, 216 is Garnet Valley, 205 is Lower Meadow Valley Wash, and 206 is Kane Springs Valley. MW is monitoring well; PV is production well. See Figure 3 for the names for some of the wells. Source of well data: NVSE website.**

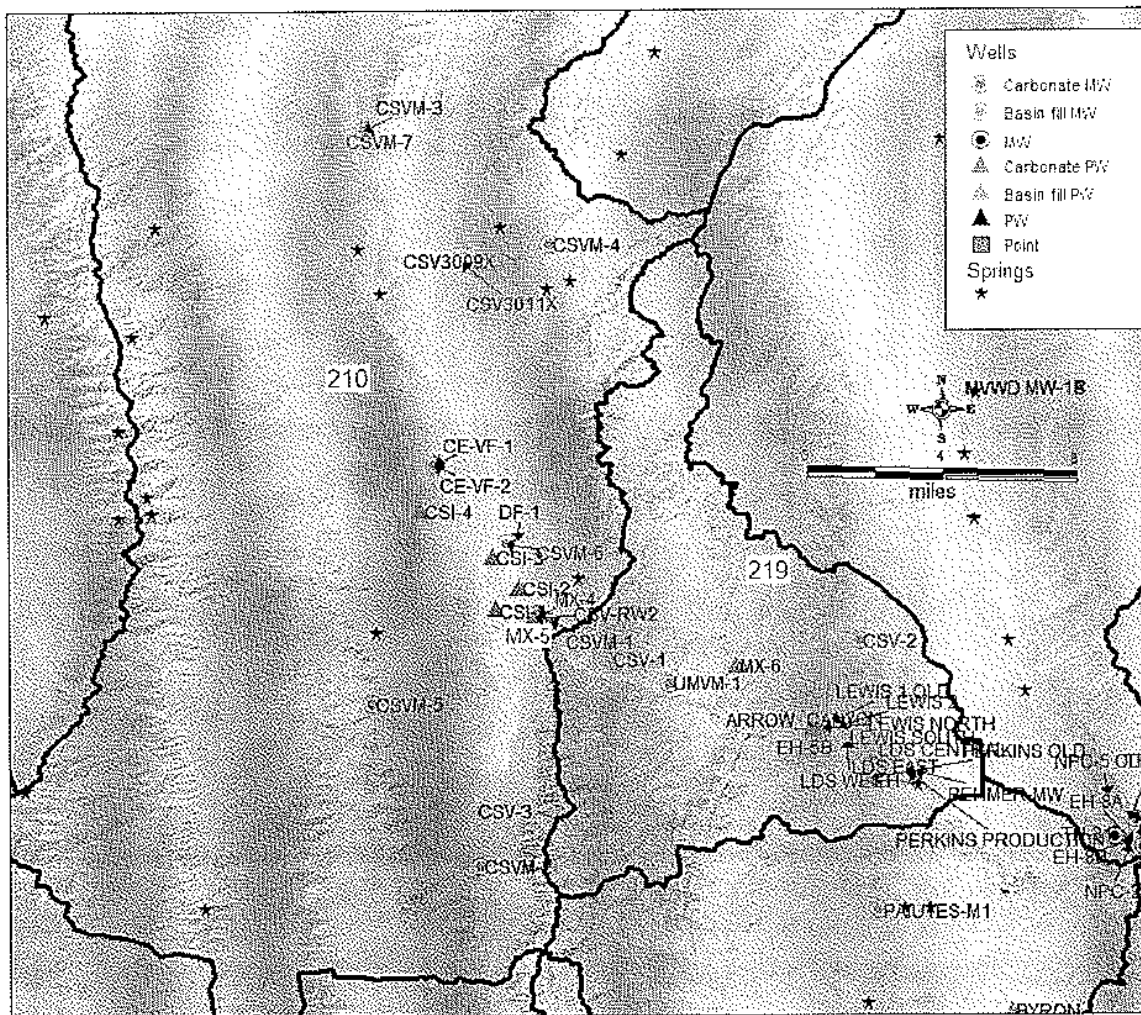


Figure 3: Detailed well layout and names for Coyote Spring Valley (210) and Muddy River Springs Area (219). Source of well data: NVSE website.

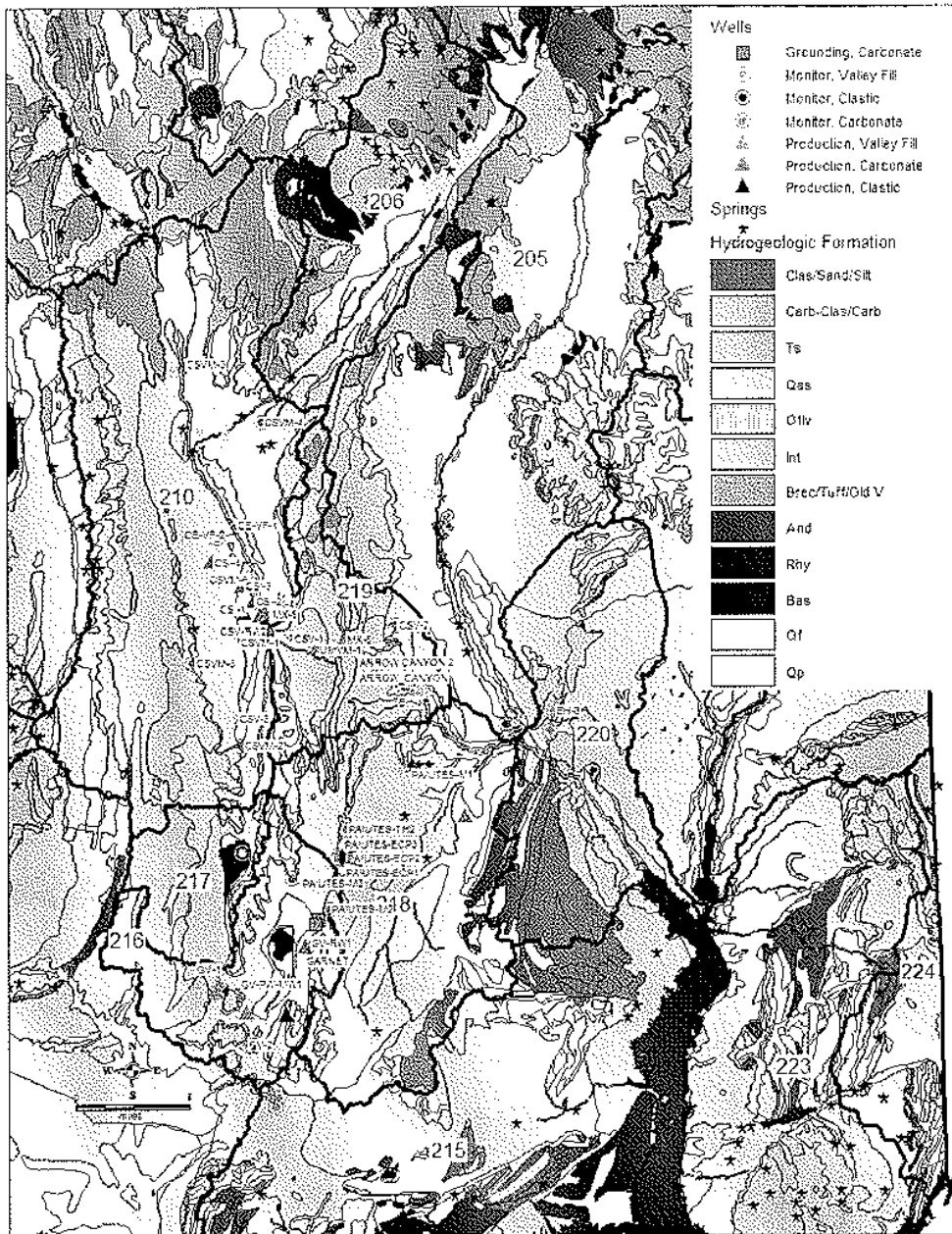
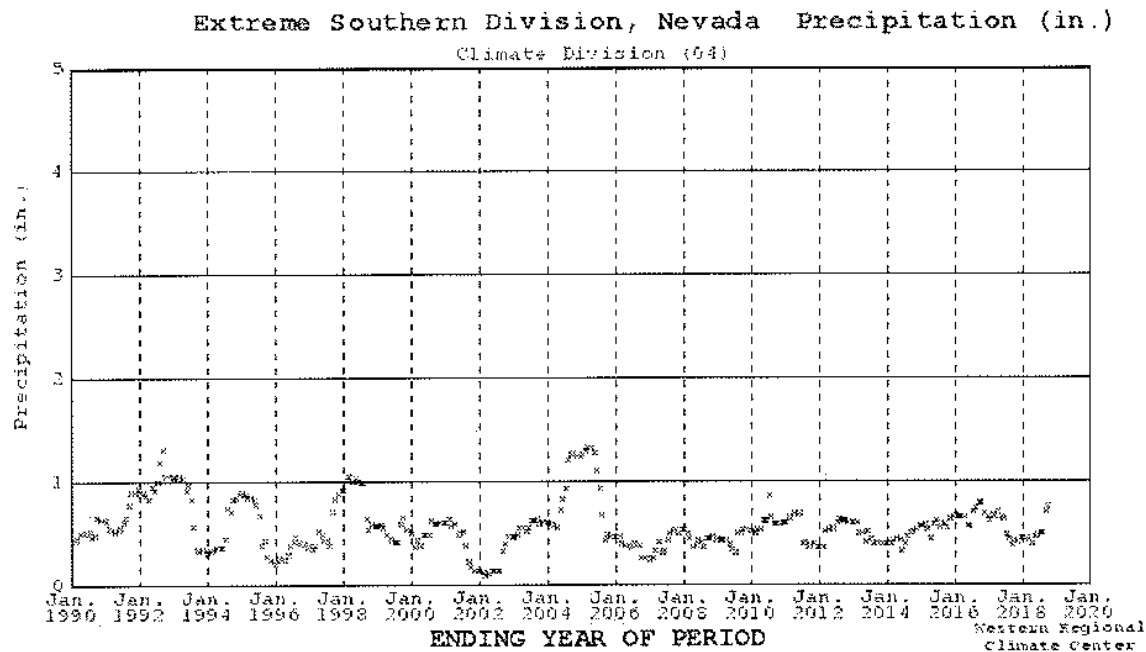


Figure 4: Lower White River Flow System wells and hydrogeology.



**Figure 5: Twelve-month running average of precipitation for the southern zone of Nevada. Data from the Western Regional Climate Center, <https://wrcc.dri.edu/spi/divplot2map.html>**

The NSE found that even the reduced pumping completed during the aquifer test satisfied its goals and that pumping in CSV caused impacts north in CSV “at least to Kane Springs Valley, south to Hidden Valley and Garnet Valley, and southeast to Muddy River Springs Area and California Wash” (NSE Order 6254, p 20-21). There was no monitoring for the test in Kane Springs Valley, so it is not possible to assess whether the impacts extended into that valley. USDOI (2013) concluded the impacts covered 1100 square miles. NSE summarized that groundwater level declines attributable to MX-5 pumping ranged from less than one foot in northern CSV to more than two feet in central CSV to more than a foot in central MRSA and California Wash (NSE Order 6254, p 21). The following paragraphs detail the water levels before, during, and after the aquifer test.

Carbonate MWs in central and southern CSV have varied in parallel since the early 2000s (Figure 6). The trend has been downward except for the increase during the wet period around 2005. All the carbonate MWs in central and southern CSV decreased more than two feet during the pump test period and all have recovered less than half the pump-test decrease by 2019 (Figure 6). The lack of recovery indicates the increased gradient, caused by the 2-foot drawdown, does not draw substantially more water from beyond the boundaries of the high-transmissivity area. Drawdown in northern CSV was much less (not shown). Basin fill well groundwater levels in the southern portion of CSV have also trended downward since the late

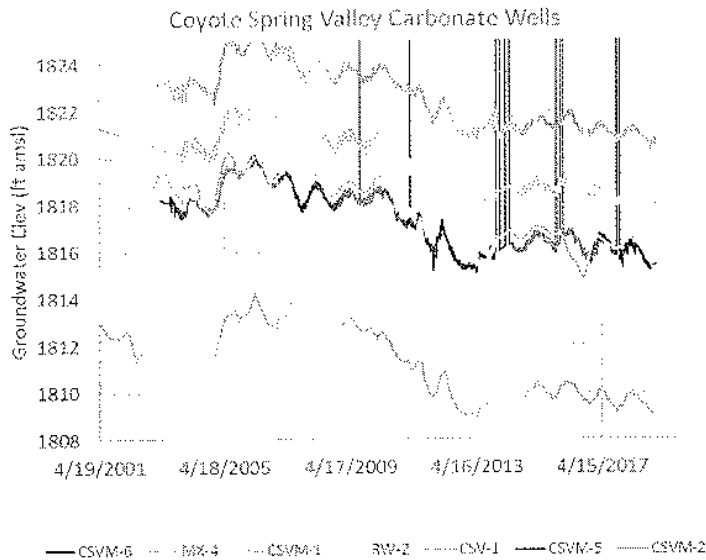


1990s, with an exception being during the wet period around 2005 (Figure 7). Well CSV3011M water levels increased from its installation in 2008 until the aquifer test. Well DF-1, a basin fill well in the middle of southern CSV, has water levels about 200 feet higher than other wells in the area.

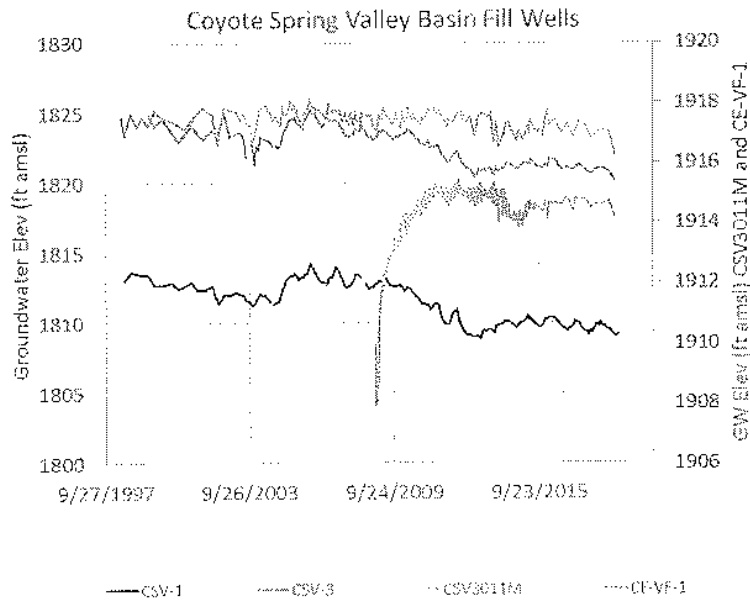
Carbonate MWs in the MRSA also show a long-term downward trend commencing in the 1990s with an uptick in 2005 (Figure 8). USDOI (2013, p 11) identified several wet year responses in the groundwater levels, including in 1992, 1993, 2005, and to a lesser degree in 1998 and 2011. The small seasonal fluctuation may relate to pumping in the basin fill (Id.), which would reflect the connection between aquifers. The 1169 aquifer test accelerated the decline in the MWs in the MRSA with a decrease of as much as 2.5 feet. Recovery since the decline was as much as a foot in the first year, but levels have remained steady since.

Basin fill MWs in the Lewis Field portion of the MRSA have been steady since the 1990s except for a three-foot decline in the Lewis North MW (Figure 9). Lewis South and Lewis 1 Old have declined a couple feet since the 1990s, but with an almost ten-foot seasonal variation. Seasonal variation in Lewis North was much less. All wells in the Lewis Field portion of the MRSA exhibited a substantial drawdown of several feet during and for two years after the pump test (Figure 9).

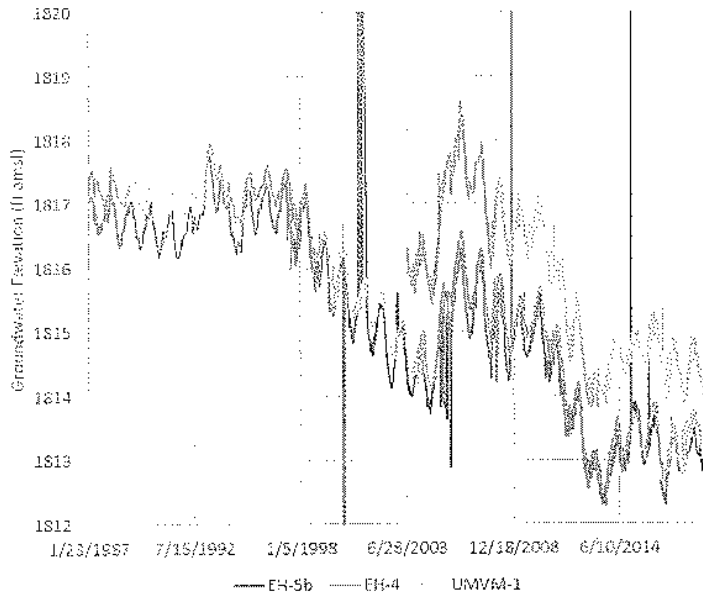
Basin fill MWs near the springs have declined, other than the uptick in 2005, since the 1990s much more than the Lewis Field wells (Figure 10). The decline accelerated through the aquifer test period, although, in contrast to the carbonate wells, these basin fill wells have mostly recovered since the aquifer test. Seasonal variations are as much as ten feet. The downward trend probably reflects the trend in the carbonate wells, the source for most basin fill water. Recovery however could be due to decreased pumpage in the Lewis Field, as discussed below.



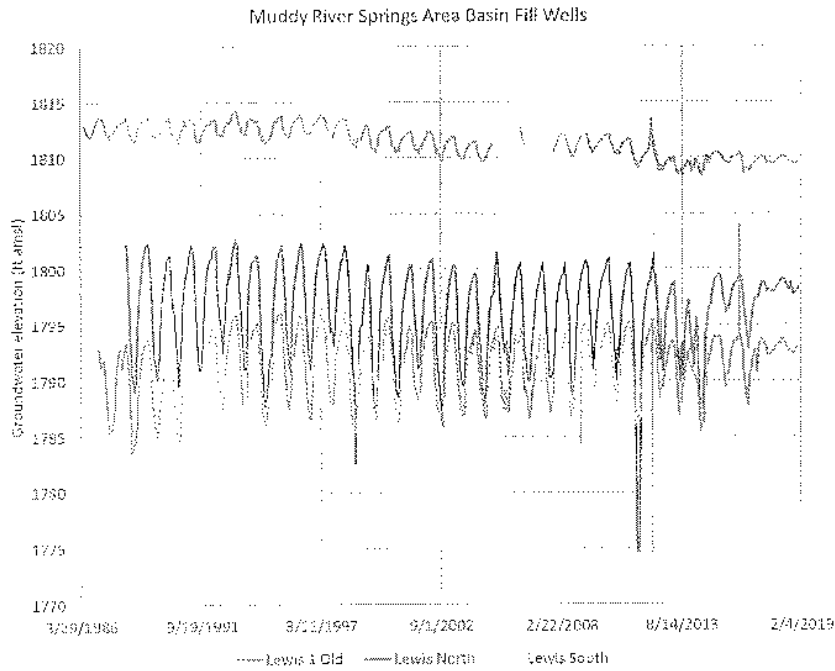
**Figure 6: Hydrograph of carbonate monitoring wells in Coyote Spring Valley, through the Order 1169 pump test and to 2019. Source of data-NSE web page.**



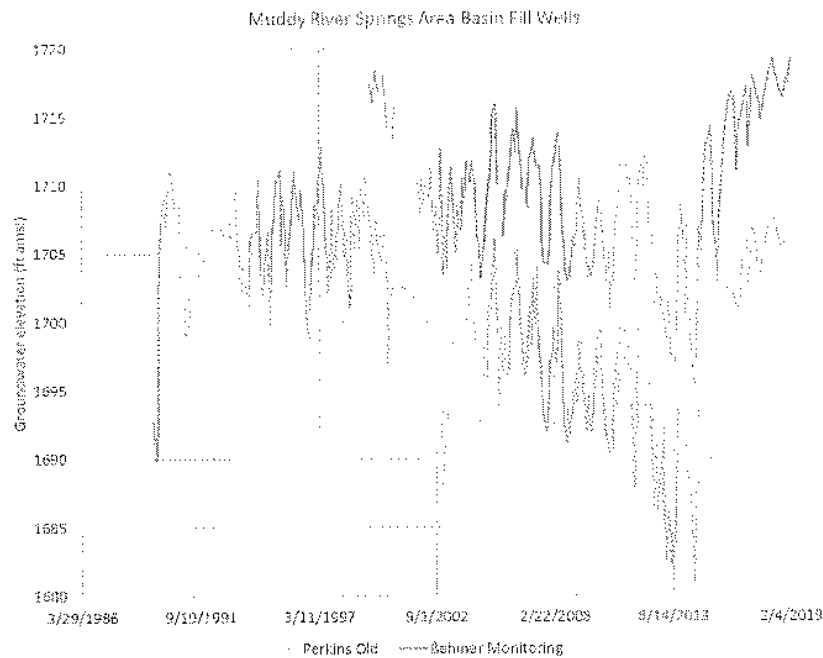
**Figure 7: Hydrograph of basin fill monitoring wells in the south half of Coyote Spring Valley. Source of data - NSE web page.**



**Figure 8: Muddy River Springs Area carbonate monitoring wells.**



**Figure 9: Hydrographs of basin fill wells in the Lewis Field portion of the Muddy River Springs Area. Perforations are from 28 to 68 feet bgs for Lewis North and are unknown for the other wells. Source of data - NSE web page.**



**Figure 10: Hydrographs of basin fill wells in the Muddy River Springs portion of the Muddy River Springs Area. The Perkins Old well is screened from 20 to 60 ft bgs. Source of data -NSE web page.**

The groundwater levels recorded at the end of the pump test throughout the CSV and MRSA show the very flat potentiometric surface from midway up CSV through the MRSA. The groundwater gradient through the area affected by the pump test is very flat because of the likely very high transmissivity from about the southern half of Coyote Spring Valley through the Muddy River Springs and further downstream to the Lower Moapa Valley (Figure 11). The groundwater elevation ranges from about 1815 ft above mean sea level (amsl) at CSV-6 almost three miles northwest of MX-5 to about 1814 at UMVM-1 about 4 ½ miles southeast of MX-5. Interestingly, the groundwater elevation is 1817 at CSV-1 which is very near MX-5, which itself is at 1813. In other words, there is a small rise in the potentiometric surface of the carbonate aquifer southeast of MX-5. The minor groundwater divide may be slightly southwest of the direct flow path, thereby partly bounding the divide. During pumping, water levels throughout this highly transmissive aquifer responded as if the aquifer water is a pond with water level changes transmitted quickly throughout.

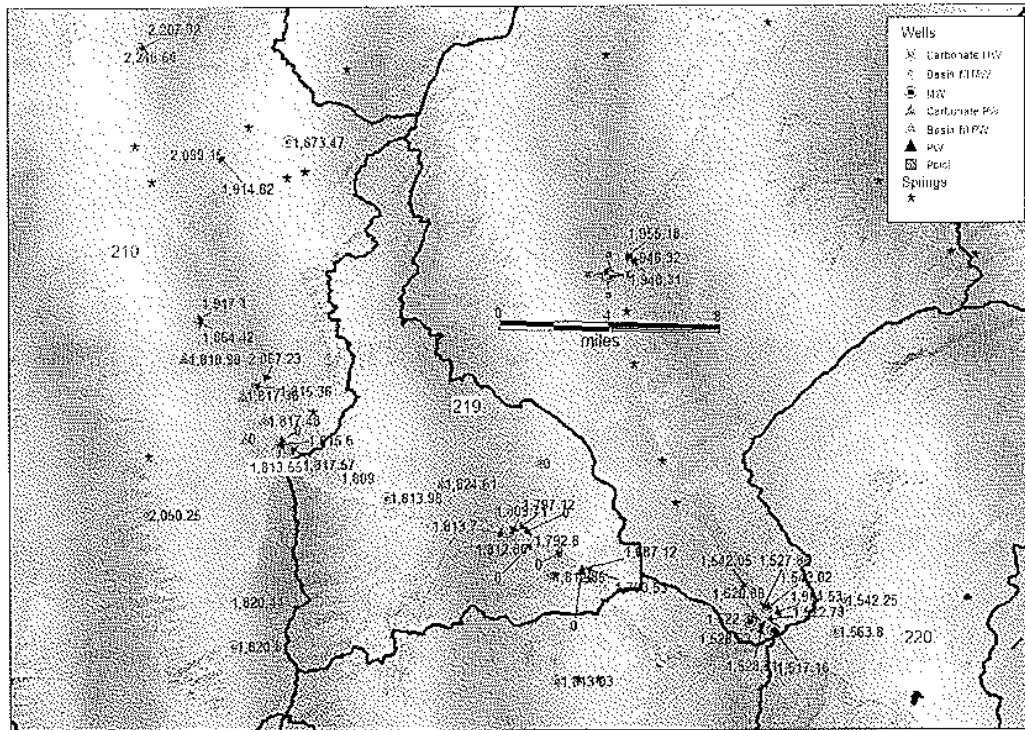
Carbonate water levels in northern CSV are several tens to almost 400 feet higher than near the southeast portion of CSV, but the water levels did decline during the aquifer test (USDOI 2013). The groundwater level in MW CSV-4, in CSV but near the southern end of Kane Springs Valley,

is just six feet lower than well KMW-1 (206 S11 E64 O6CACC1) further north in Kane Springs Valley. This suggests the high transmissivity carbonate rock extends into that valley.

Carbonate groundwater levels drop almost 250 feet between the MRSA and the southeast portion of the Lower Meadow Valley Wash valley. The carbonate groundwater levels in the MRSA are several tens of feet above the levels in the basin fill, which drives upward flow into the basin fill. Both observations support the idea of a flow impedance in the carbonate aquifer near the southeast boundary of MRSA which could be a major cause of the springs.

Basin fill water levels in Coyote Spring are substantially higher than the carbonate water levels. Most apparent is CE-VF-2 for which the water level is more than 50 feet lower in the carbonate (Figures 2 and 11). Basin fill well DF-1 groundwater levels exceed 2000 ft amsl while underlying carbonate wells have levels 200 feet lower. Because of the aridity of the area and because of the likely confining unit between the aquifers, it is unlikely the higher basin fill levels reflect substantial recharge to the carbonate. Rather it suggests a hydrologic disconnect. Groundwater levels in basin fill wells CSVM3009M and DF-1 have been trending upward, with no signal from the aquifer test; this also indicates there is no connection between carbonate and basin fill.

Downgradient in the Muddy River Springs Area, the carbonate water levels exceed those in the basin fill, which reflects the discharging springs in the area. In the Lower Meadow Valley Wash area, outside of the pump test study area, at wells MW-1 there is a substantial upward gradient from depth in a very thick basin fill aquifer.

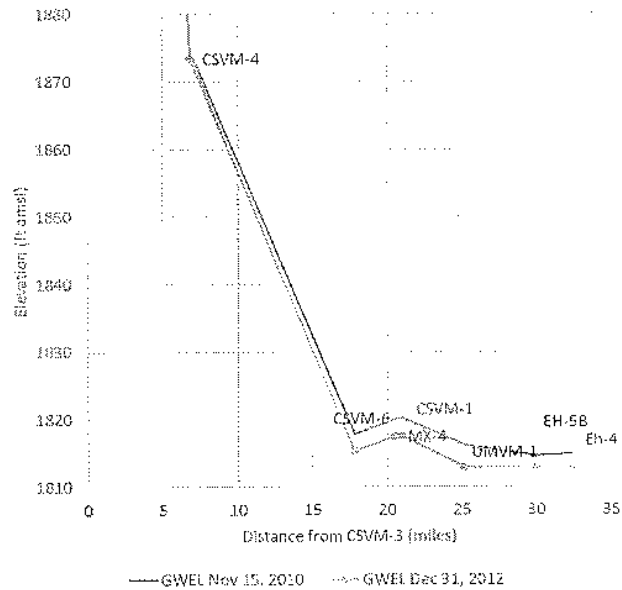


**Figure 11: Groundwater level at various wells throughout the study area. See Figure \* for the well names. The label 0 means either the data is not available or the well is a production well and the water level is very low.**

A profile of the carbonate groundwater levels through CSV and MRSA at the beginning and ending of the aquifer test demonstrates the flatness of the potentiometric surface in the high transmissivity zone through the area and how the response decreases to the north (Figure 12). For almost 20 miles, the carbonate water level is between 1820 and 1813 feet amsl. During the aquifer test, the level consistently dropped about 2 feet. The small rise at CSVM-1 may reflect a slightly higher groundwater ridge south in CSV, as seen at well CSVM-2 where the groundwater levels exceed 1820 feet amsl about five miles south of the profile line (Figure 11). This slight rise suggests there is no flow south from CSV but the groundwater levels in southern CSV did decline during the aquifer test.

Further north at CSVM-4, the groundwater level change was less than a foot. Groundwater levels at well CSVM-4 are also several tens of feet higher than further south. As noted, groundwater levels rise about six feet into Kane Springs. Even further north, carbonate

groundwater levels are about 200 feet higher and there was little effect from the aquifer test. Transmissivity is probably lower in northern CSV as reflected by the steeper gradient. Inflow to CSV from Pahranaagat or Delamar Valley flows through the lower transmissivity area to reach southern CSV and well MX-5.



**Figure 12: GW elevation from northern Coyote Spring Valley to well EH-4 at the beginning and end of the Order 1169 pump test.**

The changes in groundwater levels in the carbonate aquifer manifests in the Muddy River Springs Area (Figure 13) spring flows. Pederson Springs and Warm Springs West provide most of the flow to one of the channels that is tributary to the Refuge Stream, which is then tributary to the Muddy River Channel (Figure 13). The Pederson Springs are the highest elevation springs on the site.

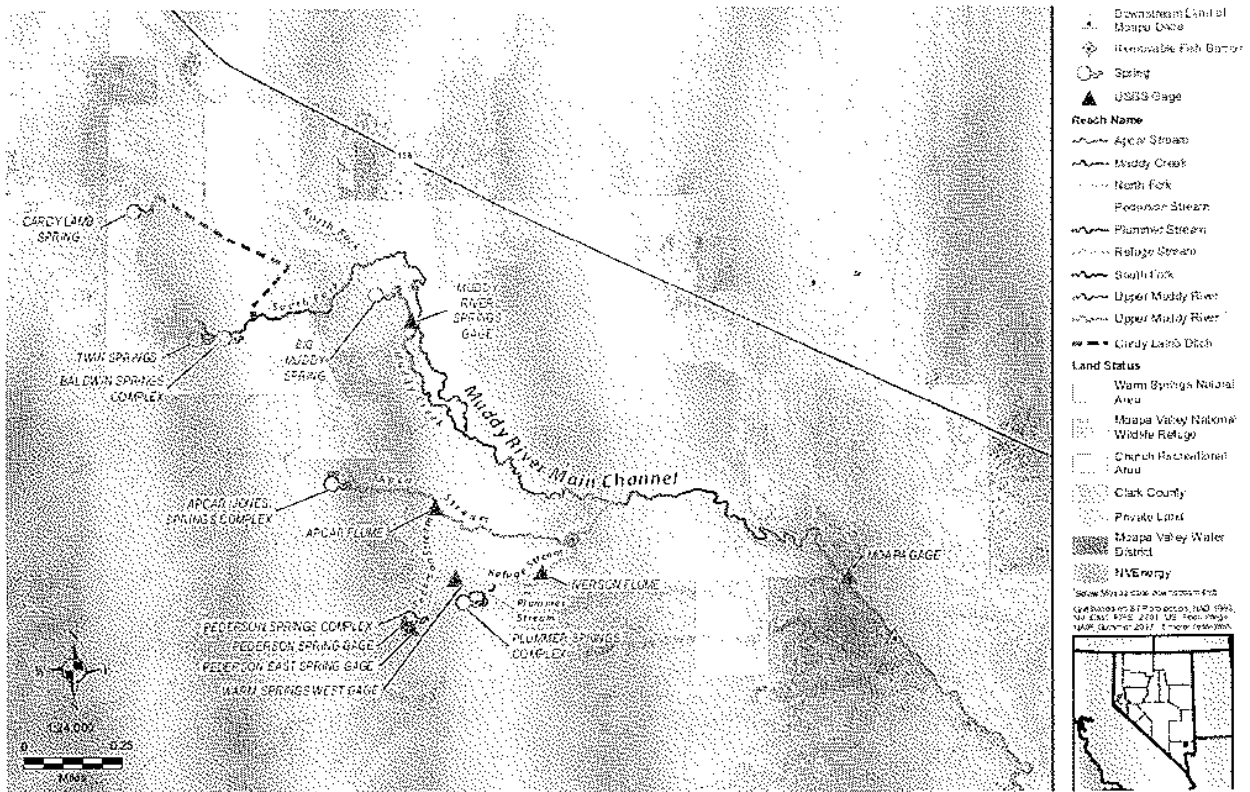


Figure 13: Muddy River Springs area. Source, SNWA (2018) Figure 2-1.

Discharge from the Warm Spring West decreased from about 4.0 cfs to as low as 3.4 cfs between the 1990s and mid-2000s, then after an uptick in flows in the wet period in 2005 (Figure 14) and during the Order 1169 pump test dropped to almost 3.2 cfs (Figure 14). It has recovered only to a little more than 3.4 cfs since 2012. At the Pederson springs, flow is about half of what it was in the mid-2000s, with much of the decrease occurring during the Order 1169 pump test (Figure 15). Flows recovered some after the test, but for about four years flows have been steadily low. At the Pederson Springs East gage, flows had fluctuated around 0.2 cfs prior to the pump test during which the flow decreased to about 0.14 cfs (Figure 15). The flow has not recovered at these springs.

USDOJ (2013) determined that the flow rate at Pederson Springs had declined about 63% and at Pederson East Spring about 45% during the test. Flow at Warm Springs West (Figure 14) declined about 9% during the test. USDOJ (2013) correlated spring flows to carbonate groundwater level drawdown and found that if the rate of drawdown observed during the aquifer test continued, Pederson Spring, the highest elevation spring in the MRSA, would have gone dry in 1.5 years. USDOJ also estimated that Pederson East Spring would have gone dry in another 2.5 to 3 years if pumping continued. In other words, if the trend observed on Figure 15



had continued, the springs would be dry. Flow at Jones and Baldwin Springs (Figure 13) declined about 4%. Curiously, the flow at Muddy Springs increased by 19% per year, possibly due to decreased evapotranspiration (ET) resulting from a fire in July 2010.

USDOI also estimated that 80 to 90% of the groundwater pumped during the aquifer test was drawn from groundwater storage (USDOI 2013, p 4) which means that the groundwater system is far from being in equilibrium, which occurs when inflow (recharge and groundwater flow from adjoining basins) equals the outflow. Although several ecologically important springs had their flow reduced substantially during the aquifer test, those flow reductions represent only a small portion of the outflow from the LWRFS. Continued pumping at those rates would have continued to decrease spring flow as the pumping removed additional groundwater storage and decreased the groundwater level controlling discharge from the springs. Even after pumping ceases, groundwater discharge would continue to reduce as it is diverted to replenish the groundwater storage (make up drawdown).

The discharge before the aquifer test was spring discharge and existing pumpage. As pumpage increased, the spring discharge would decrease until the sum equals the inflow. Because of the extremely flat gradient through the carbonate system, the pump test has essentially reset steady state conditions. A major recharge event may eventually allow some temporary recovery, as was seen in 2005, but the ongoing pumping would resume the drawdown trend.

The limited recovery in carbonate groundwater levels and springs indicates there is a steady state inflow to the system. Inflow from upstream would not increase due to drawdown in CSV because the controlling gradient is quite high due to the drop from Delamar and Pahranaagat Valley into CSV. Between Hoyt Spring in Pahranaagat Valley and MW CSV-3, a distance of 11.47 miles, the water level drops from 3195 to 2207 ft amsl for a gradient of 0.0163. This assumes the water level in Hoyt Springs is that of the carbonate aquifer. Between Delamar Valley and Coyote Spring Valley, the gradient would be the difference in water level between well 182 S07 E64 19ACDB1 at about 3480 ft amsl and CSV-3 over 20 miles, or be 0.012. Between groundwater levels in Kane Springs Valley at well 206 S11 E64 06CACC1 at 1878 ft amsl and CSV-4 at 1873 ft amsl over about 6 miles, the gradient is about 0.00016. The flat gradient through the Coyote Spring Valley apparently extends into Kane Springs Valley, so it is possible that some flow could be induced from Kane Springs Valley by pumping in CSV.

The drawdown in the MRSA alluvial wells suggests that lowering the water levels in the carbonate is decreasing the inflow from below into the alluvium. Spring flow has decreased but it is doubtful this has been sufficient to decrease secondary recharge.

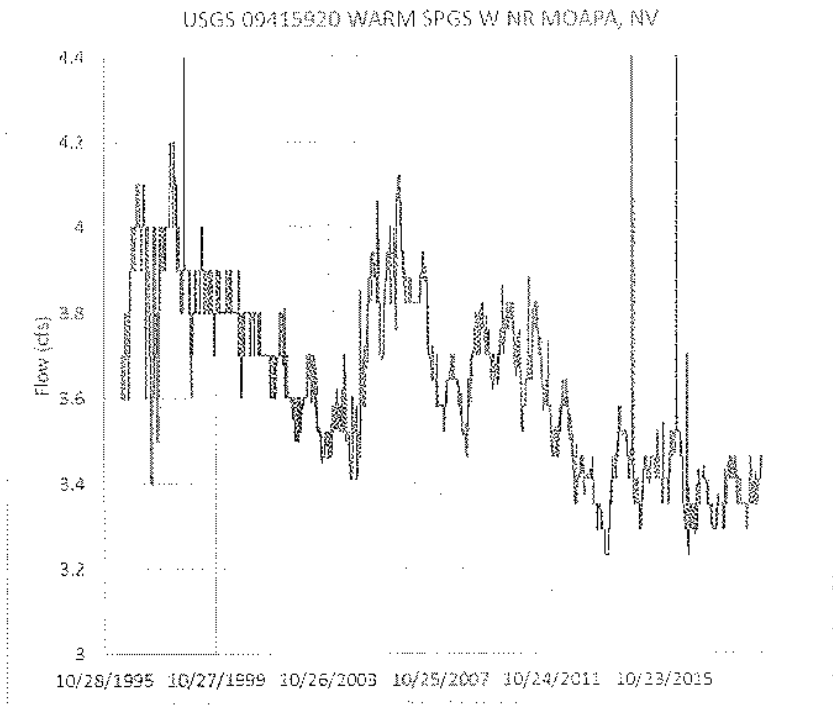


Figure 14: Daily flow at Warm Springs W near Moapa.

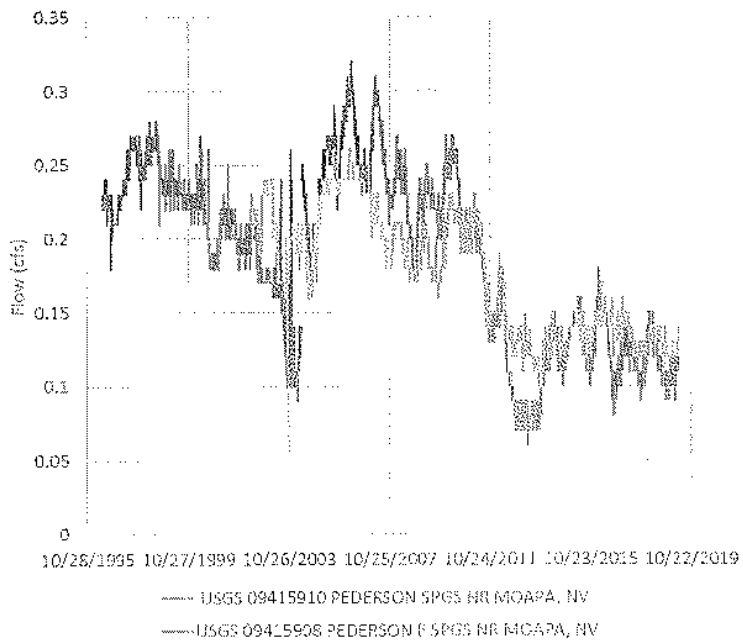


Figure 15: Daily flow at the Pederson gages

## **Boundary of the Lower White River Flow System**

NSE Order 1303 requests the reports filed in response to the order address the “geographic boundary of the hydrologically connected groundwater and surface water systems comprising the Lower White River Flow System” (NSE Order 1303, p 13). The NSE has already outlined reasons for including CSV, MRSA, Garnet Valley, Hidden Valley, a portion of the Black Mountains Area, and the Lower Moapa Valley. The analysis herein and the analyses of USDOl (2013), SNWA (2013), Myers (2013), and NSE Order 5462 found a large high transmissivity area within the carbonate aquifer of these areas and basin fill aquifers within CSV, MRSA and Lower Moapa Valley that should be managed as one basin.

Information presented herein suggests that Kane Springs Valley should be added to the LWRFS. Because water levels in that basin are just a few feet higher than in adjoining portions of CSV, the gradient between them is very low. Pumping in Kane Springs Valley that decreases that gradient would decrease flow into CSV in a time frame likely measured in less than a few years. I base the time frame estimate on the rapid response observed in the aquifer in CSV and the assumption that a carbonate aquifer extending into Kane Springs Valley would also have a high transmissivity. Because of the very low perennial yield in Kane Springs Valley and lack of inflow to the valley from upgradient valleys, pumpage in Kane Springs Valley could reverse the gradient and draw water from CSV. Considering how fast MX-5 pumping manifest through the carbonate aquifer, a decreased flow into or reversed flow from the high transmissivity portion of the CSV carbonate aquifer would also spread through the system and lower the groundwater levels. It would have a significant effect on water rights through the LWRFS. Lowering the water table in CSV could increase the gradient between CSV and Kane Springs and draw a small amount of groundwater into the CSV. Because groundwater at the source in Kane Springs is limited, inducing flow from Kane Springs Valley is not a sustainable means of increasing the available water in LWRFS. Kane Springs should be managed as part of LWRFS.

Groundwater levels in northern CSV were several hundred feet higher than in southern CSV and there was no apparent effect of the drawdown reaching MW CSVM-3. Transmissivity in northern CSV is likely lower than further south. There is no evidence of an impedance caused by a fault structure isolating north CSV because a fault would prevent groundwater from flowing south through CSV. The pump test did not propagate to that point during the test but there is no evidence suggesting it would not do so if the pumping continued. Developing groundwater in this area would intercept groundwater flowing into southern CSV and have the same effect as diverting from Kane Springs Valley; it would decrease flow to the springs and downgradient water rights.

The ultimate source of groundwater for the LWRFS is upgradient in Pahranaagat and Delamar Valley. Recharge in each of these valleys could combine with interbasin flow from upstream to provide the inflow to CSV. Groundwater developed upstream, especially in Delamar, Dry Lake or Cave Valleys, would ultimately decrease flow to CSV. The only question is timing. Once depletions upstream reach CSV, they will manifest as a loss of flow to the LWRFS. The inflow of approximately 47,900 afa will begin decrease<sup>1</sup>. As shown by the Order 1169 aquifer test, this reduced flow will propagate through the system and manifest as reduced carbonate water levels and spring flows. The Judge Esty order<sup>2</sup> properly requires that the NSE not grant any water rights above CSV in order to protect water rights and spring flows in the LWRFS in perpetuity.

The White River Flow System above CSV does not have to be added to LWRFS boundary in order to manage it properly. Developing groundwater in the LWRFS will not propagate impacts north of CSV.

### **Long-term Quantity of Water that Could be Pumped from LWRFS**

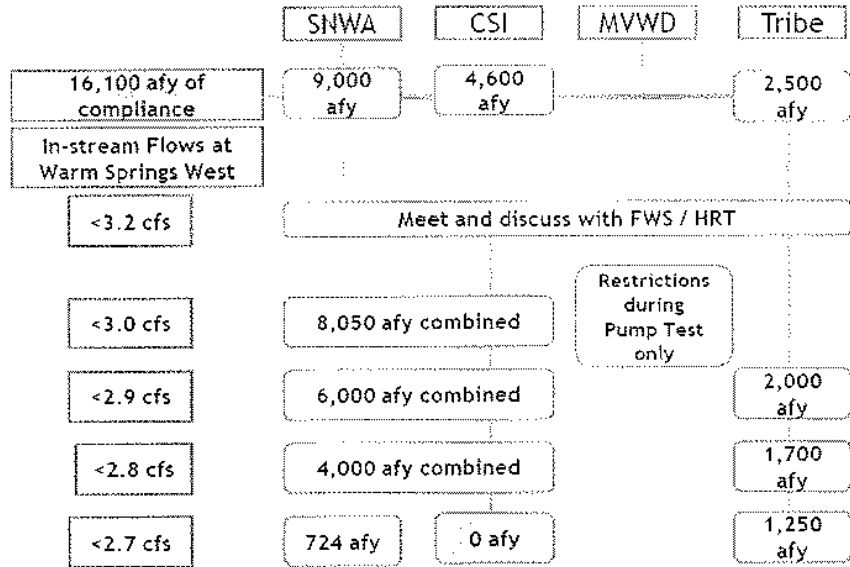
One limit on pumping water in the LWRFS are the impacts caused by that pumping on spring flow necessary to support the Moapa Dace and water rights to flow from the springs and in the Muddy River. The recovery plan for the Moapa Dace requires that existing instream flow and historical habitat be protected in three of five channels supported by springs in order to reclassify the dace. The five channels are Aparcar, Baldwin, Cardy Lamb, Muddy Spring, and Refuge (Figure 13) (USFWS 1996, p 33, 34). According to the recovery plan, all five must be protected for delisting. USFWS does not specify a required flow rate for each channel, but a Memorandum of Agreement (MOA) signed by Southern Nevada Water Authority, Coyote Springs Investment, Moapa Valley Water District, and the Moapa Valley Paiute Tribe, established trigger ranges for flows at Warm Springs West. Figure 16, sourced from the NSE

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<sup>1</sup> The DEIS groundwater model (SNWA 2009) simulated that all flow went from Delamar Valley to Pahranaagat Valley and then to CSV (as shown in a data file accompanying the original reference: folder/file deis groundwater model/simulation files/3\_Detailed\_Results/Interbasin-Flow-Tables/IBF\_rev2\_1b\_NoAction.xls). The estimated flow was 41,900 afa. The value did not vary due to project development. There was also 1900 afa flow from Kane Springs Valley to CSV. NSE Ruling 6167 concluded that inflow from Tikaboo South Valley to CSV is 4100 afa. This brings the total inflow to 47,900 afa. In his presentation on LWRFS of July 24, 2018, the NSE estimated inflow equaled 47,502 afa. He also estimated CSV LWRFS recharge at approximately 3000 afa, so the total supply is 50,500 afa, which the NSE stated was "50,000 afa or less" (NSE July 24, 2018 LWRFS Presentation, p 41).

<sup>2</sup> White Pine County and Consolidate Cases, Et al, v Jason King, P.E., Nevada State Engineer, State of Nevada Division of Water Resources. In the Seventh Judicial District Court of the State of Nevada in and for the County of White Pine. Case No. CV1204049. The ruling required the NSE to recalculate "appropriations from Cave Valley, Dry Lake and Delamar Valley to avoid over appropriation or conflicts with downgradient, existing water rights". (NSE Ruling 6446, p 109)

July 24, 2018 presentation regarding the LWRFS, describes the trigger ranges and pumping limitations for the MOA. Warm Springs West is on the Pederson Stream which is not listed as one of the channels for protection in the recovery plan but does contribute to the Apcar Channel (Figure 13). Warm Springs West flows almost dropped to 3.2 cfs during the aquifer test (Figure 14).



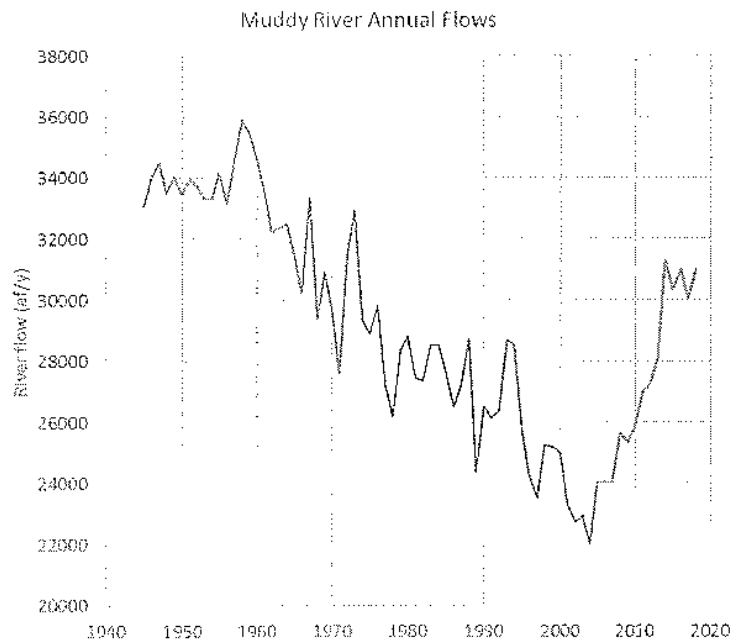
**Figure 16: Description of trigger flows and pumping limits for those trigger flow for the Memorandum of Agreement described in the text.**

The 1920 Muddy River Decree has total rights of 37,000 afa, as noted by NSE Order 1169. There are other stream and spring rights listed in the hydrographic abstract that could be in addition to Muddy River Decree rights.

The best way to determine the effect of pumping on the LWRFS is to consider the water balance of the system that feeds the Muddy River Springs. Ignoring local recharge which is probably to basin fill, the inflow through CSV is about 50,500 afa. The Muddy River Springs represent most of the outflow from the area, although estimating that outflow is complicated by the irrigation in the area and ET from the basin fill. The gaging station Muddy River near Moapa (#9416000) is downstream of and therefore includes flow for all area springs (Figure 13) but the gaging station description notes irrigation diversions above the gage. Based on the gage, discharge from the LWRFS had been estimated to be about 36,000 afa from springs that supply the MRSA (Eakin 1964, p 24). However, none of the recorded flows since 1943 have been that

high (Figure 17). From about 1943 to 1960, the recorded flow was just less than 34,000 afa. After 1960, the flow rate decreased to less than 24,000 afa. After the wet year in 2005, it began to increase again to over 30,000 afa in 2012.

Trends at the Muddy River gage are likely due to surface and groundwater development upstream from the gage, including diversion of up to 9.2 cfs to the Reid-Gardner electrical generating station which began in 1968 (USFWS 1996). Decreasing spring flow likely began in the 1990s with carbonate pumping. The increase just after 2005 may be due to the high precipitation year and after 2010 could be due to the decreased ET after a fire in 2010 (Figure 17). Flows have been relatively constant at about 30,500 afa since 2014. Notwithstanding the portions of the decree satisfied by diversions upstream of the gage, flow at the gage has not been meeting the requirements of the Muddy River Decree because the flow has been less than 37,000 afa (Figure 17).

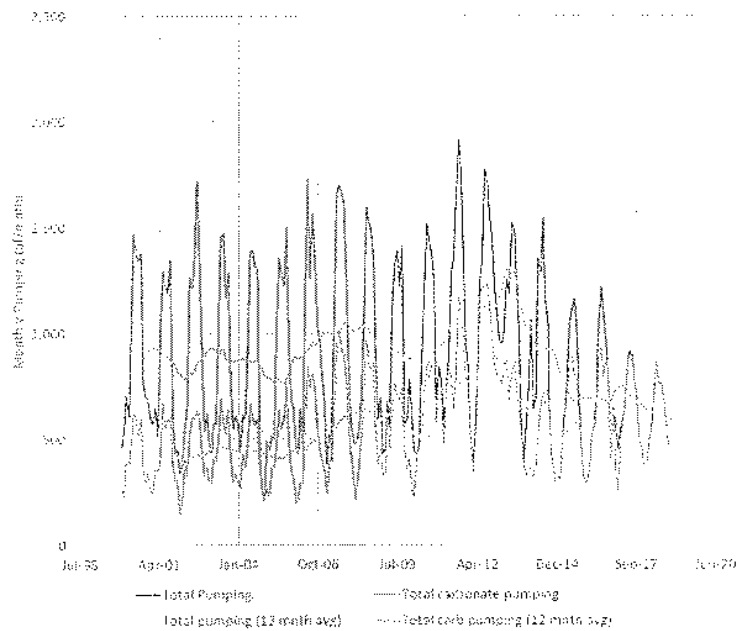


**Figure 17: Annual flows (cfs) at the Muddy River near Moapa, NV gage (09416000)**

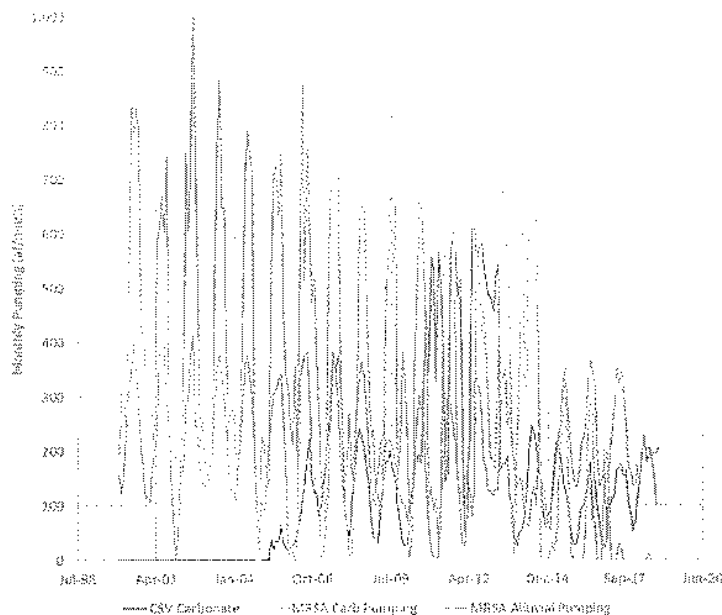
Pumpage since 2000 has been from variable sources. Monthly pumpage varied from 500 to 1600 af/mnth between 2000 and 2010, with the 12-month average ranging from 800 to a little more than 1000 af/mnth (Figure 18), which converts to annual pumping from about 9600 to 12,000 afa. Total carbonate pumping increased from about 400 to 600 af/mnth, or 4800 to 7200 afa between 2000 and 2010, so there was a decrease in alluvial pumping in MRSA (Figure 18). There was a substantial jump in pumping between 2010 and 2012 due to the 1169 aquifer

test. After the test and especially since 2014, total pumping has decreased to just over 8000 afa with carbonate pumping being most of it. Alluvial pumping has dropped to close to zero since 2015 (Figure 19).

Carbonate pumping in CSV first began in 2005, so flow in the carbonate system upstream from the springs has only been pumped for 14 years. MRSA carbonate pumping has been steady or slightly decreasing with ranges from 100 to 400 af/mnth (Figure 19). Production is primarily from the Arrow Canyon wells. During the aquifer test, CSV carbonate pumping dominated the pumping from the carbonate aquifer. Since the aquifer test, CSV carbonate pumping has been about half that in MRSA.



**Figure 18: Total pumping and total carbonate pumping, by month and by 12-month moving average, for the study area. Data from NSE Web page.**



**Figure 19: Carbonate pumping for Coyote Spring Valley and the Muddy River Springs Area.**  
**Source of data: NSE web page.**

Prior to the pump test, the trend for water levels in most carbonate monitoring wells had been for them to decrease except during brief wet periods. This may be seen by plotting the carbonate groundwater levels with carbonate pumping, as done by the USDOI (Figure 20). Groundwater levels began to decrease as carbonate pumping commenced. Carbonate spring flow also began to decrease with pumping in the mid-1990s, also except during very wet years. The trend has been for the flows to decrease. At Warm Springs West, flow had been near 4.0 cfs in the 1990s and now is near 3.4 cfs, having recovered about 0.1 cfs since the aquifer test (Figure 14). Smaller, higher altitude springs are flowing at a little more than half of their 1990s flow.

Carbonate pumping as it occurred in the 1990s caused spring flow and groundwater levels to decline; total pumping was less than 10,000 afa and carbonate pumping was less than 5000 afa. Excepting those downstream of the springs, the basin fill wells were not experiencing a water level decline even with the alluvial pumping of near 5000 afa.

It is therefore apparent that any carbonate pumping removes water from the springs. Prior to the pump test, the small amount of carbonate pumping was causing a small but measurable decrease in spring flow. The decrease would occasionally be partially countered by extremely wet years, such as in 2005. As noted above, the majority of carbonate pumping was removed from storage, so the flow decreases would continue into the future as the storage recovers.



The conclusion therefore is that the NSE should not allow any carbonate pumping in the LWRFs to prevent further decreases and to allow recovery in the flow to Muddy River Area Springs. Pumping carbonate water intercepts spring flow and upward flowing groundwater recharge to the basin fill. With carbonate pumping, it is only a matter of time before the spring flow on which the Moapa dace depends decreases significantly or is completely lost. The next section addresses the potential for basin fill pumpage.

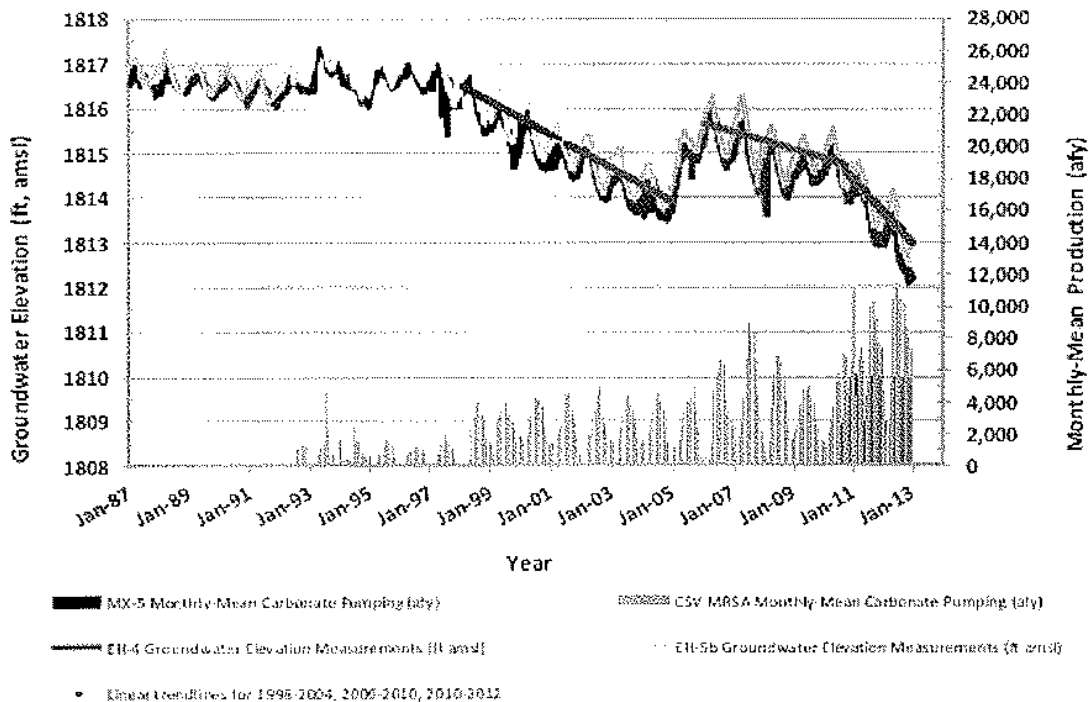


Figure 20: Trends in carbonate water levels at MWs EH-4 and EH-5b with carbonate pumping in Coyote Spring Valley and Muddy River Springs Area. Source: USDOl (2013) Figure 1.2.

### Relation between Carbonate and Basin Fill Wells and the Potential for Conjunctive Use

The pumping and water level relations discussed in the previous section suggest that some water can be pumped if sourced from the basin fill aquifer. Except in the far southeast portion of MRSA, basin fill groundwater levels did not decline due to carbonate pumping. This is probably because carbonate water discharging into the basin fill supports the basin fill aquifer. Secondary recharge, probably including both direct spring flow and irrigation recharge, supports the basin fill water levels. Some basin fill pumping could be acceptable in MRSA because alluvial groundwater is partly secondary recharge from the springs. As secondary recharge, the water has already been used in the spring channels most important for the dace. The existing levels of pumping in MRSA basin fill, about 4000 afa, is probably acceptable.

Although there is no basin fill pumping in CSV, it is possible that some basin fill pumping there could be sustainable. The evidence for this is that basin fill water is likely disconnected from the carbonate and not responsible for substantial recharge. That basin fill water levels increased during the aquifer test exemplifies that. Prior to allowing basin fill pumping, it is essential to determine where the basin fill groundwater discharges. If ultimately it supports carbonate groundwater, it should not be pumped.

NSE Order 1303 requests reports address “effects of movement of water rights between alluvial wells and carbonate wells on deliveries of senior decreed rights to the Muddy River” (NSE Order 1303, p 14). This suggests that reports consider the change in the point of diversion from one to the other aquifer. As noted previously, carbonate pumping would eventually dry the Muddy River Springs, but carbonate groundwater flow also supports basin fill water through direct discharge from the carbonate to the basin fill and secondary recharge of springflow into the basin fill. The long-term decline of flow in the Muddy River indicates there is a limit to the amount of even basin fill groundwater that can be pumped without affecting Muddy River flows.

#### **Conclusion**

The Order 1169 pump test made apparent that there is a broad highly transmissive carbonate aquifer underlying CSV, MRSA, Garnet Valley, Hidden Valley and California Wash. The aquifer is interconnected so much among basins that it is necessary to manage groundwater through all basins as if they were part of a whole basin. The primary conclusion of this analysis is that the NSE not allow any pumping of the carbonate aquifer if the continued decrease in spring flow in MRSA is to be avoided. This conclusion results from the direct correlation of carbonate pumping and carbonate water level and spring discharge decline. Because the spring flow is directly responsible for Muddy River flows, preventing any additional carbonate pumpage is also necessary for protecting downstream water rights.

Another conclusion is that Kane Springs Valley should be managed as part of LWRFS. This conclusion results from the flat carbonate water level extending into that valley and the likelihood that water pumped from Kane springs Valley would quickly contribute to the depletion of the carbonate aquifer in CSV and MRSA.

A third conclusion is that some basin fill pumping could occur without significantly affecting the spring flow. A preliminary estimate is the pumping that occurred prior to significant carbonate pumping, or about 4000 afa. It is probably not possible to increase that pumpage by transferring carbonate rights to basin fill wells because of the observed long-term decline in Muddy River flows.

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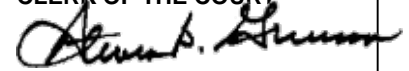
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12 *Nos. 1 and 2*

13 DISTRICT COURT

14 CLARK COUNTY, NEVADA

15 LAS VEGAS VALLEY WATER  
16 DISTRICT, and SOUTHERN  
17 NEVADA WATER AUTHORITY,

18 Petitioners,

19 vs.

20 TIM WILSON, P.E., Nevada State  
21 Engineer, DIVISION OF WATER  
22 RESOURCES, DEPARTMENT OF  
23 CONSERVATION AND NATURAL  
24 RESOURCES,

Respondent.

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

Dept. No.: 1

Consolidated With:

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

**NEVADA COGENERATION  
ASSOCIATES NO. 1 AND 2  
ANSWERING/RESPONDENT'S  
BRIEF (JOINDER IN CERTAIN  
ARGUMENTS)**

And All Consolidated Cases

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**I. NRAP 26.1 DISCLOSURE**

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judge of this court may evaluate possible disqualification or recusal.

1. Petitioners Nevada Cogeneration Associates Nos. 1 and 2 (hereinafter collectively “NCA”), are businesses located in Clark County, Nevada.

2. Kaempfer Crowell is the law firm which represents Petitioners NCA before this Court. The lawyers from Kaempfer Crowell are Alex J. Flangas (Nevada Bar Number 664), and Ellsie Lucero (Nevada Bar Number 15272).

DATED: November 24, 2021

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1 **I. JURISDICTIONAL STATEMENT**

2 Under NRS 533.450(1), orders of the State Engineer are subject to judicial  
3 review “in the proper court of the county in which the matters affected or a portion  
4 thereof are situated.” The real property to which the water at issue in this appeal is  
5 appurtenant lies within Clark County, and Applications arise on water located in  
6 basins in Clark County. Therefore, the Eighth Judicial District Court of the State of  
7 Nevada in and for Clark County is the proper venue for judicial review.

8 **II. NCA’S STATEMENT OF INTENT TO “JOIN” CERTAIN**  
9 **ARGUMENTS<sup>1</sup>**  
10 **(Summary of Argument)**

11 The nature of this proceeding is unusual in that it is a collection of  
12 consolidated petitions for judicial review all challenging the same State Engineer’s  
13 Order, 1309, but each party was also allowed intervenor status in each other’s  
14 petition. As such, all parties who filed Opening Briefs— as well as even more  
15 “responding” and “intervening parties” — were allowed the opportunity to file  
16 “answering/responding briefs” to the various Opening Briefs filed by others.

17 NCA reviewed the arguments in the other Opening Briefs and determined—  
18 not surprisingly—that while they all challenged State Engineer’s Order 1309 in one  
19 fashion or another, they did not all raise arguments that NCA supports or that are  
20 relevant to NCA’s petition. NCA essentially challenges the State Engineer on  
21 several key, threshold grounds including a lack of statutory jurisdiction and authority

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22 <sup>1</sup> In this Answering Brief, NCA has determined pursuant to NRAP 28(b) that it is  
23 unnecessary to restate the jurisdictional statement, routing statement, statement of  
24 issues, statement of the case, statement of facts, or the standard of review; rather,  
in the interest of brevity, NCA incorporates those from its own Opening Brief and  
from those of the other Petitioners who filed opening briefs.



1 to even recognize or “create” the Lower White River Flow System (“LWRFS”), as  
2 do several other petitioners—yet some appear to acknowledge that authority and  
3 challenge Order 1309 on entirely different grounds.

4       Rather than re-argue positions in a classic, “responding” brief fashion, NCA  
5 decided it would best serve this Court—in the interest of brevity— to simply *join* in  
6 those arguments which NCA supports so that this Court may understand that NCA  
7 shares certain common concerns raised by other petitioners and that more than one  
8 legal basis exists for questioning the State Engineer’s attempted exercise of  
9 excessive authority in the establishment and attempted management of a  
10 “superbasin” such as the LWRFS with both surface and groundwater permits in one  
11 proceeding. In order to satisfy this Court’s direction that Answering/Responding  
12 Briefs identify those particular arguments to which an answering brief is directed,  
13 NCA has specifically identified the arguments which it joins so that this Court will  
14 have an understanding and appreciation of the common concern expressed by both  
15 NCA and the other petitioners involved.

16       By filing this Joinder, NCA does not mean to minimize the basin specific  
17 issue raised by NCA in its Opening Brief regarding the lack of substantial evidence  
18 to support the establishment of the arbitrary, straight-line boundary through the  
19 middle of Basin 215, the Black Mountains Area, in what appears to be an attempt to  
20 merely include NCA’s production wells inside the modified (by Order 1309)  
21 LWRFS boundary, but that issue was not addressed in any Opening Brief and so it is  
22 premature for NCA to discuss a response at this time.

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1 **III. JOINDER IN CERTAIN ARGUMENTS**

2 NCA along with several other petitioners agree that the State Engineer  
3 lacked statutory authority to delineate the Lower White River Flow System  
4 (“LWRFS”) as a single super hydrographic basin. Those petitioners who make that  
5 point present a variety of reasons why the State Engineer did not have a legal basis  
6 to undertake the Herculean task of consolidating seven separate hydrographic  
7 basins into one. Several of the petitioners also raise important due process concerns  
8 because the petitioners were not afforded an opportunity to present evidence on the  
9 management of the LWRFS. The hearings following the issuance of Order 1303  
10 (which led to Order 1309) were limited in scope by the State Engineer and his  
11 hearing officer, and all discussions concerning the management of the LWRFS  
12 were supposed to be held in a date-yet-to-be-determined “phase two” of the State  
13 Engineer’s LWRFS proceeding. Despite this, the State Engineer made some  
14 determinations as to the management of the LWRFS in phase one of his regulatory  
15 proceeding without any input from the petitioners. Therefore, the State Engineer’s  
16 decision should be reversed because it was arbitrary and capricious, and it violated  
17 petitioners’ constitutional rights.

18 NCA responds only to the arguments it is joining.

19 **A. NCA Joins in Certain Arguments Raised in Lincoln County Water  
20 District and Vidler Water Company Inc.’s Opening Brief.**

21 NCA joins Lincoln County and Vidler’s opening brief as to their arguments  
22 regarding the State Engineer’s lack of authority to conjunctively manage several  
23 hydrographic basins. NCA agrees that the under the plain language of the statutes  
24

1 in NRS 532, 533, and 534, the powers granted to the State Engineer are based upon  
2 basin-by-basin management rather than multi-basin joint management. The statutes  
3 discussed therein use the term “basin,” and the concepts addressed in those statutes  
4 confine the State Engineer’s authority to manage by *basin*, indicating that the  
5 Nevada Legislature contemplated the State Engineer would exercise his authority  
6 basin-by-basin. Nothing in NRS Chapter 532, 533 or 534 supports a finding that  
7 the Nevada legislature contemplated multi-basin management in the manner  
8 currently being attempted by the State Engineer here; indeed, the State Engineer  
9 acknowledged he was taking a novel approach in delineating the LWRFS as a  
10 super hydrographic basin. The more appropriate legal approach would have been  
11 to request and obtain the necessary authority first from the Legislature rather than  
12 attempting to use statutes not designed for multi-basin management.

13 Even the State Engineer’s citation to one of the more broadly worded  
14 statutes in Nevada water law as a basis for his actions here, such as NRS  
15 534.120(1) which authorizes the State Engineer to make such rules, regulations and  
16 orders “as are deemed essential for the welfare of the area involved,” is unavailing.  
17 This broadly stated directive does not accord the State Engineer authority to  
18 impose new and different boundaries beyond “basin” boundaries, nor does it give  
19 the State Engineer the unfettered authority to do whatever he feels is “essential”  
20 within any given area. If that *were* a correct interpretation, then the State Engineer  
21 would never need any of the more specific, statutory grants of authority outlined in  
22 Chapters 532, 533 and 534 to manage water rights in difficult situations because  
23 potentially any action taken by the State Engineer would fall under the broad  
24 language of NRS 534.120. But, that simplistic and broad approach was never even

1 considered when the Nevada Supreme Court analyzed the State Engineer’s  
2 authority to “restrict the drilling of wells” in *Wilson v. Pahrump Fair Water, LLC*,  
3 137 Nev. Adv. Op. 2, 481 P.3d 853 (2021), decided just this year.

4 In *Wilson*, the Nevada Supreme Court analyzed whether Nevada law  
5 authorized the State Engineer to issue an order prohibiting the drilling of new  
6 domestic wells in the over-appropriated Pahrump Artisan Basin unless the  
7 applicant identified and relinquished 2.0 acre-feet annually from an alternate  
8 source. *Wilson*, 137 Nev. Adv. Op. at \*3, 481 P.3d at 854. The Supreme Court  
9 spent four, detailed pages discussing Nevada’s statutory scheme governing the  
10 State Engineer’s “power” and “authority,” and focused intently on those statutes  
11 specifically governing his rights to manage and regulate “wells” in order to decide  
12 whether that term used in the water statutes also included “domestic wells” within  
13 their intent. Notably, *none of the Court’s analysis would have been necessary had*  
14 *the Court believed that NRS 534.120(1) simply gave the State Engineer broad*  
15 *authority to do whatever he felt was “essential to protect the welfare” of an area.*

16 Similarly here, the Court cannot allow NRS 534.120(1) to be construed as a  
17 catch-all statute that provides unprecedented authority and latitude to the State  
18 Engineer to consolidate seven hydrographic basin into one superbasin, thus  
19 avoiding the need to even consider the relevance of the 69 times other statutes in  
20 NRS Chapter 534 use the term “basin” to direct their focus on the State Engineer’s  
21 scope of management authority.

22 Thus, NCA joins in the argument that the State Engineer’s decision to  
23 delineate the LWRFS as a super hydrographic basin was arbitrary and capricious.

1           **B. NCA Joins in Certain Arguments Raised in CSI’s Opening Brief.**

2           Similarly, NCA joins those arguments raised by Coyote Springs  
3 Investments, LLC (“CSI”) in their opening brief concerning the State Engineer’s  
4 lack of statutory authority to delineate the LWRFS as a super hydrographic basin.  
5 Under the plain language of NRS 534.030 and NRS 534.110(6), the powers  
6 granted to the State Engineer are for basin-specific management rather than joint  
7 management.

8           NCA also joins CSI’s arguments regarding the State Engineer’s violation of  
9 constitutional rights. The State Engineer’s decision in Order 1309 violates NCA’s  
10 constitutional rights because it constitutes a taking without just compensation  
11 under the Nevada and U.S. constitutions. The State Engineer’s decision could  
12 deprive NCA of its water rights by changing the priority of the water rights from  
13 highest in its basin (Basin 215, the Black Mountains Area) to an undetermined  
14 priority in the LWRFS.

15           Therefore, the State Engineer not only lacked authority to delineate the  
16 LWRFS as a super basin, he also violated NCA and other petitioners’  
17 constitutional rights.

18           **C. NCA’s Joins in Certain Arguments Raised in Georgia Pacific Gypsum  
19 LLC and Republic Environmental Technologies, Inc.’s Opening Brief.**

20           NCA joins Georgia Pacific and Republic’s arguments concerning the State  
21 Engineer’s lack of authority to delineate the LWRFS as a super hydrographic  
22 basin. NCA agrees that the State Engineer erroneously relied on NRS 533.024(1)  
23 which is a statement of policy rather than a statutory grant of authority. NCA  
24 discussed this at length in its Opening Brief.

1 NCA also joins Georgia Pacific and Republic's arguments that the State  
2 Engineer violated the petitioners' due process rights by failing to provide notice or  
3 an opportunity to be heard on the administrative policies inherent in consolidating  
4 the hydrographic basins into the LWRFS. Throughout the hearings on Order 1303,  
5 the hearing officer made clear several times that the scope of the hearings was  
6 limited to the four issues<sup>2</sup> posed in Order 1303:

- 7 a. The geographic boundary of the hydrologically connected  
8 groundwater and surface water systems comprising the Lower White  
9 River Flow System;
- 10 b. The information obtained from the Order 1169 aquifer test and  
11 Muddy River headwater spring flow as it relates to aquifer recovery  
12 since the completion of the aquifer test;
- 13 c. The long-term annual quantity of groundwater that may be pumped  
14 from the Lower White River Flow System, including the  
15 relationships between the location of pumping on discharge to the  
16 Muddy River Springs, and the capture of Muddy River flow;
- 17 d. The effects of movement of water rights between alluvial wells and  
18 carbonate wells on deliveries of senior decreed rights to the Muddy  
19 River; and
- 20 e. Any other matter believed to be relevant to the State Engineer's  
21 analysis.<sup>3</sup>

22 The listed items clearly define that the focus of this "phase one" proceeding was  
23 supposed to be to establish the *hydrology* of the surface and groundwater system  
24 occurring within a certain geographic area, and to attempt to define its boundaries

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21 <sup>2</sup> The fifth issue, issue "e" ("[a]ny other matter believed to be relevant to the State  
22 Engineer's analysis") was dismissed by the hearing officer as a broadly-worded  
23 addition; it was clarified that the hydrology of the system was the focus of the  
24 hearings and the evidence presented, which is embodied in the first four issues.  
This is evident by the fact that the only witnesses allowed to testify were  
hydrologic experts.

<sup>3</sup> ROA 2 at 82–83.

1 and scope (amount of water involved). No management or priority determinations  
2 among participants was to be discussed or considered at this first phase, and thus  
3 no cross-examination of witnesses on those points was allowed.

4 As Georgia Pacific and Republic state, the petitioners did not have an  
5 opportunity to and were even discouraged from addressing policy issues related to  
6 the management of the LWRFS, “because those are going to be decisions that  
7 would have to be made in subsequent proceedings.”<sup>4</sup> Despite those statements  
8 made by the hearing officer at the hearing that led to Order 1309, portions of Order  
9 1309, such as the State Engineer’s statements regarding preserving the priority of  
10 “senior surface rights” or “decreed rights” to the potential detriment of  
11 groundwater right holders are entirely policy and management related decisions;  
12 they are not restricted to the State Engineer’s determination of simply the  
13 hydrology of the systems at issue.

14 **D. NCA Joins in Certain Arguments Raised in Apex and Dry Lake**  
15 **Water’s Opening Brief.**

16 NCA joins Apex and Dry Lake Water’s opening brief as to their arguments  
17 concerning the State Engineer’s lack of statutory authority to delineate the LWRFS  
18 as a single super hydrographic basin. NRS 533.024(1) is a statement of policy  
19 rather than a statutory grant of authority. Moreover, there is no statute empowering  
20 the State Engineer to conjoin seven separate hydrographic basins into one. NCA  
21 also joins Apex and Dry Lake Water’s arguments regarding the State Engineer’s  
22 violation of petitioners’ due process rights.

23 \_\_\_\_\_  
24 <sup>4</sup> ROA 52962 at 6:4–15.

1           **E. NCA Join in Certain Arguments Raised in Muddy Valley Irrigation’s**  
2           **Opening Brief.**

3           NCA joins Muddy Valley’s opening brief as to its argument that the State  
4           Engineer violated petitioners’ due process rights when he made determinations  
5           about conflicts and the management of the LWRFS without affording the  
6           petitioners an opportunity to present evidence on the issue. To the extent there  
7           were procedural due process considerations that arose because of the truncated  
8           nature of the hearings and the limitations placed on participants who desired to  
9           present arguments and positions in support of reasons why the LWRFS process  
10          was flawed and how the management of the LWRFS would conflict with existing,  
11          permitted and certificated rights in individual basins, NCA was clearly prejudiced  
12          in that regard. NCA was accorded a mere 1.5 hours of direct hearing time to  
13          present its “case” to the State Engineer on a matter of significant importance,  
14          especially when this Court recognizes that NCA holds first-position priority,  
15          certificated groundwater rights in Basin 215, the Black Mountains Area.

16          **VIII. CONCLUSION**

17          This Court should reverse the decision of the State Engineer to issue Order  
18          1309 on grounds that the State Engineer lacked the legal authority to even  
19          undertake such a multi-basin management of water without additional Legislative  
20          authorization to do so. Furthermore, the State Engineer’s actions directly conflict  
21          with existing Nevada statutes governing basin-by-basin management of  
22          groundwater, as pointed out by numerous petitioners Opening Briefs into which  
23          NCA joined. Finally, this Court should reverse the State Engineer’s Order, or in  
24          the alternative reverse and remand this matter back to the State Engineer for a new



1 regulatory proceeding, because of violations of due process and conflicting  
2 direction involving both “phase one” and “phase two” limitations, and for outright  
3 procedural violations of direct due process in his failure to allow sufficient time  
4 and scope for the full and fair presentation by all participants of their positions for  
5 consideration before the issuance of Order 1309.

6 Finally, consistent with the request made by NCA in its Opening Brief, NCA  
7 requests that this Court reverse the determination made by the State Engineer to  
8 include NCA within the newly modified LWRFS boundary because such inclusion  
9 was not based on substantial evidence and was entirely arbitrary and capricious.  
10 The new boundary determined for Basin 215, the Black Mountains Area, was not  
11 based on any expert testimony presented at the hearing on this matter, is not  
12 supported by any physical manifestation that would support a reasonable scientific  
13 conclusion (that, without an obvious naturally occurring geologic condition,  
14 groundwater flow would suddenly change gradient along a straight line boundary  
15 beginning almost immediately adjacent to the production wells owned and  
16 operated by NCA, midway through Basin 215), and was arbitrarily determined  
17 simply to support the State Engineer’s desire to include the NCA production wells

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1 within the LWRFS boundary despite evidence supporting their exclusion  
2 therefrom.

3 DATED: November 24, 2021

KAEMPFER CROWELL

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that I have read this **NEVADA COGENERATION ASSOCIATES NO. 1 AND 2 ANSWERING/RESPONDENT’S BRIEF (JOINDER IN CERTAIN ARGUMENTS)**, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all application Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in the conformity with the requirements of the Nevada Rules of the Appellate Procedure.

DATED: November 24, 2021

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1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), EDCR 8.05(a) and EDCR 8.05(f), I hereby  
3 certify that service of the **NEVADA COGENERATION ASSOCIATES NO. 1**  
4 **AND 2 ANSWERING/RESPONDENT’S BRIEF (JOINDER IN CERTAIN**  
5 **ARGUMENTS)** was made on November 24, 2021 to the following counsel of  
6 record and/or parties by electronic transmission through the Eighth Judicial District  
7 Court’s electronic filing system, to all parties appearing on the electronic service  
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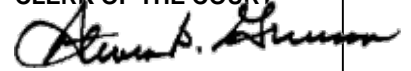
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14 **DISTRICT COURT**  
15 **CLARK COUNTY, NEVADA**

16 LAS VEGAS VALLEY WATER DISTRICT, and )  
17 SOUTHERN NEVADA WATER AUTHORITY )

18 Petitioner,  
19 vs. )

20 TIM WILSON, P.E., Nevada State Engineer, )  
21 DIVISION OF WATER RESOURCES, )  
22 DEPARTMENT OF CONSERVATION AND )  
23 NATURAL RESOURCES, )

24 Respondent. )

25 \_\_\_\_\_ )  
26 And All Consolidated Cases )

Case No. A-20-816761-C

Dept. No. 19

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

27 **SIERRA PACIFIC POWER COMPANY AND**  
28 **NEVADA POWER COMPANY'S**  
**ANSWERING BRIEF**

Nevada Power Company  
and Sierra Pacific Power Company  
d/b/a NV Energy



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1 **I. INTRODUCTION**

2 Sierra Pacific Power Company d/b/a NV Energy (“Sierra Pacific”) and Nevada Power  
3 Company d/b/a NV Energy (“Nevada Power” and, together with Sierra Pacific, “NV Energy”) are in a unique position. Unlike most of the parties in this matter, NV Energy’s surface water  
4 and groundwater rights conflict with each other under Nevada State Engineer’s Order No. 1309  
5 (“Order No. 1309”). Nevertheless, NV Energy continues to support the State Engineer’s  
6 conjunctive management of the Lower White River Flow System (“LWRFS”) and the 8,000 acre  
7 feet annual limit set forth in Order No. 1309.<sup>1</sup> Order No. 1309 ensures that there is adequate  
8 groundwater available for use in the LWRFS by senior groundwater right users, while  
9 simultaneously ensuring that the senior surface water rights in the Muddy River and the Muddy  
10 River Springs Area (“MRSA”), are not impacted by groundwater pumping and remain at a level  
11 to support and maintain the habitat for the Moapa dace.  
12

13 **II. STATEMENT OF FACTS**

14 *a. NV Energy Water Rights And Interest In Order No. 1309.*

15 NV Energy is a unique party to these proceedings. NV Energy owns and operates a  
16 2,250-megawatt three-plant complex which includes the Harry Allen, Chuck Lenzie and  
17 Silverhawk Generating Stations in Garnet Valley. The three-plant complex can produce enough  
18 electricity to serve approximately 1,355,000 Nevada households and businesses. In addition,  
19 NV Energy is in the process of remediating and repurposing the Reid Gardner coal power plant  
20 site along the Muddy River near Moapa, Nevada. In order to provide power to its 2.4 million  
21 customers in Nevada, NV Energy owns surface water rights in the Muddy River as well as  
22 groundwater rights in the LWRFS. Specifically, NV Energy owns roughly 5,200 acre feet  
23 annually (“afa”) of both certificated and permitted groundwater rights in the Muddy River  
24 Springs Area, Garnet Valley, California Wash, and Coyote Springs Valley.  
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28 <sup>1</sup> NV Energy is not responding to or opposing Petitioners Las Vegas Valley Water District and Southern Nevada Water Authority’s or Muddy Valley Irrigation Company's opening briefs.

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***b. History Of The State Engineer Orders In The LWRFS That Led To Order No. 1309***

The State Engineer held a hearing in 2001 on various groundwater applications and issued Order No. 1169 on March 8, 2002.<sup>2</sup> Order No. 1169 required a large-scale aquifer test.<sup>3</sup> The aquifer test required fifty percent of existing groundwater rights in the Coyote Springs Valley be pumped for at least two (2) consecutive years to determine the effects of groundwater pumping on existing water rights or the environment.<sup>4</sup>

Las Vegas Valley Water District (“LVVWD”), Southern Nevada Water Authority (“SNWA”), Coyote Springs Investments, LLC (“CSI”), NV Energy, Moapa Valley Water District (“MVWD”), Dry Lake Water Company, LLC, Republic Environmental Technologies, Inc., Chemical Lime Company, Nevada Cogeneration Associates (“NCA”), and the Moapa Band of Paiutes (“Tribe”) participated the Order No. 1169 aquifer test. The aquifer test began November 15, 2010 and ended December 21, 2012. The aquifer test measured monthly pumping in 37 wells in the LWRFS, water levels in 81 monitoring wells, and flows in the Muddy River and Muddy River headwater springs. The participants gathered data throughout the aquifer test, which was shared with the State Engineer and other stakeholders. Participants were also given the opportunity to file reports at the conclusion of the aquifer test with the State Engineer.<sup>5</sup>

On January 11, 2019, the State Engineer issued Interim Order No. 1303. Interim Order No. 1303 designated Coyote Spring Valley, Muddy River Springs Area, California Wash, Hidden Valley, Garnet Valley, and a portion of the Black Mountains Area Hydrographic Basins as a joint administrative unit, which was named the LWRFS. Interim Order No. 1303 also set forth a procedural schedule for briefs, reply briefs and a hearing to address five questions relating to the LWRFS:

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<sup>2</sup> SE ROA 659-669.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 665.

<sup>5</sup> SE ROA 5589-7787; 7855-8209,10090-33569; 33744-33752, 34929-35209; 37432-37473; 38301-38371; 48620-48620.

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- a. The geographic boundary of the hydrologically connected groundwater and surface water systems comprising the LWRFS;
- b. The information obtained from Order 1169 aquifer test and subsequent to the aquifer test and Muddy River headwater spring flow as it relates to aquifer recover since the completion of the aquifer test;
- c. The long-term annual quantity of groundwater that may be pumped from the LWRFS, including the relationships between the location of the pumping on discharge to the Muddy River Springs, and the capture of Muddy River flow;
- d. The effects of movement of water rights between alluvial wells and carbonate wells on deliveries of senior decreed rights to the Muddy River; and
- e. Any other matter believed to be relevant to the State Engineer’s analysis.

In response to Interim Order No. 1303, NV Energy along with CSI; United States Fish and Wildlife Service (“USFWS”); United States National Park Service (“NPS”); the Tribe; LVVWD; SNWA; MVWD; Lincoln County Water District and Vidler Water Company (collectively “Vidler”); City of North Las Vegas (“CNLV”); Center For Biological Diversity and Great Basin Water Network (“CBD”); Dry Lake Water LLC (“Apex/Dry Lake”); Georgia Pacific Corporation, Georgia Pacific Gypsum, LLC, and Republic Environmental Technologies (collectively “Georgia Pacific”); NCA; Muddy Valley Irrigation Company (“MVIC”); and Bedrock Limited and Western Elite Environmental Inc. (collectively “Bedrock”) filed reports and participated in the September 23 through October 4, 2019 hearing.

The State Engineer issued Order No. 1309 on June 15, 2020.<sup>6</sup> The State Engineer found that:

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

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<sup>6</sup> SE ROA 2-69.

2. The maximum quantity of groundwater that may be pumped from the Lower White River Flow System Hydrographic Basin on an average annual basis without causing further declines in Warm Springs area spring flow and flow in the Muddy River cannot exceed 8,000 afa and may be less.
3. The maximum quantity of water that may be pumped from the Lower White River Flow System Hydrographic Basin may be reduced if it is determined that pumping will adversely impact the endangered Moapa dace.
4. All applications for the movement of existing groundwater rights among sub-basins of the Lower White River Flow System Hydrographic Basin will be processed in accordance with NRS 533.370.

LVVWD, SNWA, CSI, Vidler, CBD, Apex/Dry Lake, MVIC, Georgia Pacific, and NCA filed petitions for judicial review of Order No. 1309.

### III. STANDARD OF REVIEW

Actions to review decisions of the State Engineer under NRS 533.450 are "in the nature of an appeal" and the proceedings are "informal and summary."<sup>7</sup> Pursuant to NRS 533.450(9), "[t]he decision of the state engineer shall be prima facie correct, and the burden of proof shall be upon the party attacking the same."<sup>8</sup> On appeal, the function of the District Court, as well as the Nevada Supreme Court, is to review the evidence on which the State Engineer based his decision to ascertain whether the evidence supports the decision. If so, the Court is bound to sustain the State Engineer's decision.<sup>9</sup> With questions of fact, the Court shall review the evidence presented to the State Engineer in order to determine whether the State Engineer's decision was arbitrary or capricious, and thus an abuse of the State Engineer's discretion.<sup>10</sup> Thus, the question for the Court is whether the State Engineer's decision was based on substantial evidence.<sup>11</sup> The Nevada Supreme Court has interpreted this to mean that a petitioner does not have a right to de novo

<sup>7</sup> NRS 533.450(1) and (2); *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979).

<sup>8</sup> NRS 533.450(9); *Town of Eureka v. Office of State Eng'r of State of Nev., Div. of Water Res.*, 108 Nev. 163, 165, 826 P.2d 948, 949 (1992).

<sup>9</sup> *State Engineer v. Curtis Park*, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985).

<sup>10</sup> *In re Application No. 71860 filed to Appropriate Pub. Waters of an Underground Source within Carson Desert Segment Hydrographic Basin, Churchill County*, 53958, 2011 WL 1744157, at \*2 (2011) (citing *Weaver v. State, Dep't of Motor Vehicles*, 121 Nev. 494, 498, 117 P.3d 193, 196 (2005) (quoting *United Exposition Service Co. v. SIFS*, 109 Nev. 421, 423, 851 P.2d 423, 424 (1993)).

<sup>11</sup> *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979).



1 review or to offer additional evidence at the district court.<sup>12</sup> The Court is limited to a  
2 determination of whether substantial evidence in the record before the State Engineer supports  
3 the State Engineer's decision.<sup>13</sup>

4 While legal issues or questions may be reviewed without deference to an agency's  
5 determination, the agency's conclusions of law that are closely related to the agency's view of  
6 the facts are entitled to deference and will not be disturbed if they are supported by substantial  
7 evidence.<sup>14</sup> Likewise, an agency's view or interpretation of its statutory authority is persuasive,  
8 even if not controlling.<sup>15</sup> Additionally, any review of the State Engineer's interpretation of his  
9 legal authority must be made with the thought that "[a]n agency charged with the duty of  
10 administering an act is impliedly clothed with power to construe it as a necessary precedent to  
11 administrative action."<sup>16</sup>

12 Furthermore, Nevada administrative agencies, and specifically the State Engineer, are  
13 not bound by stare decisis.<sup>17</sup> The Nevada Supreme Court in *Desert Irrigation, Ltd.* held "[t]he  
14 facts and circumstances of each case are to be considered on an individual basis, taking into  
15 account the nature of the task and the difficulties encountered ... Even if the [agency] has failed  
16 to follow some of its prior decisions, the [agency] has not thereby abused its discretion."<sup>18</sup>

#### 17 **IV. ARGUMENT**

##### 18 **a. *The State Engineer has authority to conjunctively manage the LWRFS***

19 "The water of all sources of water supply within the boundaries of the State whether  
20

21 <sup>12</sup> *Id.* See also *Kent v. Smith*, 62 Nev. 30, 32, 140 P.2d 357, 358 (1943).

22 <sup>13</sup> *Id.*

23 <sup>14</sup> *Jones v. Rosner*, 102 Nev. 215, 217, 719 P.2d 805, 806 (1986); *Town of Eureka v. State Engineer*, 108 Nev.  
163, 826 P.2d 948 (1992).

24 <sup>15</sup> *State Engineer v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991) (quoting *State v. State Engineer*, 104  
Nev. 709, 713, 766 P.2d 263, 266 (1988)).

25 <sup>16</sup> *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 112 Nev. 743, 747, 918 P.2d 697, 700  
(1996) (citing *State v. State Engineer*, 104 Nev. at 713, 766 P.2d at 266 (1988)). See also *Chevron U.S.A.,  
Inc. v. N.R.D.C.*, 467 U.S. 837 (1984) (Deference promotes uniformity in the law because it makes various  
courts less likely to adopt differing readings of a statute. Instead, the view taken by a single centralized  
agency will usually control).

26 <sup>17</sup> *Desert Irrigation, Ltd. v. State of Nevada, State Engineer*, 113 Nev. 1049, 1058, 994 P.2d 835, 841  
(1997).

27 <sup>18</sup> *Id.* (citing *Motor Cargo v. Public Service Comm'n*, 108 Nev. 335, 337, 830 P.2d 1328, 1330 (1992)).

1 above or beneath the surface of the ground, belongs to the public.”<sup>19</sup> As such, the State  
2 Engineer is responsible for managing all of Nevada’s water, both surface and groundwater.<sup>20</sup>  
3 The State Engineer has been tasked with adjudicating pre-statutory vested water rights<sup>21</sup>,  
4 issuing permits to water right applicants, issuing certificates when the permitted water rights  
5 have been placed to beneficial use, forfeiting groundwater rights that have not been  
6 abandoned, and curtailing water rights, if necessary.<sup>22</sup>

7 Underlying all of these duties is the basic duty to designate a hydrographic basins,  
8 including preparing budgets for each basin, and determining when that budget has been exceeded  
9 and can designate a critical management area when withdrawals of groundwater exceed the  
10 perennial yield of the basin.<sup>23</sup> Under NRS 534.030, the State Engineer is given the authority to  
11 “designate” a groundwater basin if the State Engineer determines that the basin is in need of  
12 further administration.<sup>24</sup> As provided in NRS 534.120, in designated basins where the  
13 groundwater is being depleted, the State Engineer is authorized to make such rules, regulations  
14 or orders as are deemed essential for the welfare of the area involved, and the State Engineer is  
15 directed to designate preferred uses of water. In such designated basins, the State Engineer may  
16 also: 1. Issue temporary well permits which are revocable when water can be furnished by a  
17 municipality or water district; 2. Prohibit the drilling of domestic wells where water can be  
18 provided by such an entity engaged in furnishing water; 3. Limit the depth of domestic wells;  
19 and 4. Deny application to appropriate groundwater for any purpose in an area served by such  
20 an entity that furnishes water.<sup>25</sup>

21 <sup>19</sup> NRS 533.025; *see also* NRS 534.020(1) “All underground waters within the boundaries of the State belong to  
22 the public, and, subject to all existing rights to the use thereof, are subject to appropriation for beneficial use only  
23 under the laws of this State relating to the appropriation and use of water and not otherwise.”

24 <sup>20</sup> NRS chapters 532, 533 and 534.

25 <sup>21</sup> Throughout its Opening Brief, Vidler repeatedly incorrectly refers to their water rights as “vested.” A vested  
26 water right is the right to use either surface or ground water acquired through more or less continual beneficial use  
27 prior to the enactment of water law pertaining to the source of the water. These claims become final through  
28 adjudication. *See* NRS 533.087. Vidler’s Kane Spring Valley water rights are not pre-statutory water rights,  
rather they are uncertificated permits, not vested water rights.

<sup>22</sup> *See* NRS chapters 532, 533 and 534.

<sup>23</sup> NRS 532.167; NRS 534.110.

<sup>24</sup> NRS 534.030.

<sup>25</sup> NRS 534.120.

1 The Nevada Legislature has also declared that:

2 1. It is the policy of this State:

3 (c) To encourage the State Engineer to consider the best available science in rendering  
4 decisions concerning the available surface and underground sources of water in Nevada.

5 (e) To manage conjunctively the appropriation, use and administration of all waters of  
6 this State, regardless of the source of the water.<sup>26</sup>

7 Since the inception of Nevada water law, the State Engineer has amended basin boundaries  
8 numerous times and has broken out numerous subareas as the need for separate regulation has  
9 arisen.<sup>27</sup> Similarly, the State Engineer has managed several basins together based on hydrologic  
10 connections.<sup>28</sup> As the best available science continues to evolve in the area of hydrologic  
11 connections, the State Engineer has a duty to use that science and make changes when necessary.  
12 The State Engineer is not bound to use the same basin boundaries that existed in 1971,<sup>29</sup> nor  
13 should he be. The Petitioners' arguments that the State Engineer could not continue to identify  
14 new management areas, reduce the number of basins or conjunctively management basins as  
15 new information and the need arises is illogical, not supported by Nevada Law and would be a  
16 dereliction of the duties of the State Engineer.

17 ***b. The State Engineer is not ignoring the prior appropriation  
18 doctrine.***

19 Like most western states, Nevada is a prior appropriation state. Prior appropriation is a  
20 doctrine that grants a right "that allows the use of a specific quantity of water for a specific  
21 beneficial purpose if water is available in the source free from the claims of others with earlier  
22 appropriations."<sup>30</sup> In 1866 the Nevada Supreme Court formally recognized the prior  
23 appropriation doctrine in Nevada in *Lobdell v. Simpson*.<sup>31</sup> Decades later, the Nevada Supreme

24 <sup>26</sup> NRS 533.024.

25 <sup>27</sup> Nevada Division of Water Resources, Ruling No. 995, 1964.

26 <sup>28</sup> Nevada Dept. of Conservation and Natural Resources Reconnaissance Series Report 27, 1964

27 <sup>29</sup> Water for Nevada, Nevada Division of Water Resources Water Planning Report 3, 1971.

28 <sup>30</sup> *Mineral County v. Lyon County*, 473 P.3d 418, 423, 136 Nev. 503, 509 (2020) citing *Desert Irrigation, Ltd. v. State*, 113 Nev. 1049, 1051 n.1, 944 P.2d 835, 837 n.1 (1997) (quoting *Frank J. Trelease & George A. Gould, Water Law Cases and Materials* 13 (4th ed. 1986)).

<sup>31</sup> *Lobdell v. Simpson*, 2 Nev. 274, 279 (1866).

1 Court affirmed that the doctrine of prior appropriation was, and continues to be, the prevailing  
2 doctrine in Nevada.<sup>32</sup>

3 Furthermore, all water rights that are issued by the State Engineer are subject to existing  
4 rights.<sup>33</sup> NRS 533.030 (1), the appropriation for beneficial use of water rights specifically states  
5 “Subject to existing rights, and except as otherwise provided in this section and NRS 533.0241  
6 and NRS 533.027, all water may be appropriated for beneficial use as provided in this chapter  
7 and not otherwise.”<sup>34</sup> NRS 533.030 is not limited to surface water rights or ground water rights,  
8 nor is it limited to water rights in the same basin. Existing rights are specifically protected  
9 against any conflict by any water right, within and without the basin in which that existing right  
10 is located within the State of Nevada. Prior appropriation is simple “first in time first in right.”<sup>35</sup>  
11 Order No. 1309 does not violate the doctrine of prior appropriation.

12 ***c. The 8,000 afa is supported by substantial evidence in the***  
13 ***record and is not arbitrary, capricious or an abuse of***  
14 ***discretion.***

15 The State Engineer established 8,000 afa as the maximum amount that could be  
16 pumped based on evidence and testimony at the two-week long hearing in September 2019,  
17 and clearly stated how that figure was determined.<sup>36</sup> The Order No. 1169 aquifer test and  
18 other related studies into the LWRFS constitute the largest hydrologic test and study ever  
19 implemented by the State Engineer. Recent pumping amounts in the LWRFS were shown to  
20 be 7,000 to 8,000 afa.<sup>37</sup> Since 2016, water levels in MRSA are approaching, or possibly have  
21 reached steady state.<sup>38</sup> Flow at the Warm Springs West gage and are staying above the 3.2

22 <sup>32</sup> *Reno Smelting, Milling & Reduction Works v. Stevenson*, 20 Nev. 269, 282, 21 P. 317, 322 (1889); *see also*  
23 *Jones v. Adams*, 19 Nev. 78, 84-86, 6 P. 442, 445-46 (1885) (noting that the common-law doctrine of riparian  
rights was not suitable for the conditions in Nevada).

24 <sup>33</sup> NRS 533.030(1).

25 <sup>34</sup> *Id.*

26 <sup>35</sup> *Ormsby County v. Kearney*, 142 P. 803, 820 (1914).

27 <sup>36</sup> SE ROA 2-69.

28 <sup>37</sup> SE ROA 56; SE ROA 116-1183, NSE Ex. 50, *Pumpage Report Coyote Spring Valley 2017*; SE ROA 1280-  
1294, NSE Ex. 67, *Pumpage Report Black Mountains Area 2017*; SE ROA 1397-1412, NSE Ex. 84, *Pumpage*  
*Report Garnet Valley Area 2017*; SE ROA 1427-1440 NSE Ex. 86, *Pumpage Report California Wash Area 2017*;  
SE ROA 1471-1799, Ex. 88. *Pumpage Report Muddy River Springs Area 2017*.

<sup>38</sup> SE ROA 4193-42072, SNWA Ex. 7, pp. 5-7.

1 cubic feet per second (“cfs”) trigger established under the 2006 Memorandum of Agreement  
2 (“MOA”).<sup>39</sup> The current pumping regime of 7,000 to 8,000 acre feet annually should be  
3 maintained for additional time to ensure that steady state conditions exist in the MRSA  
4 is reached and a minimum of 3.2 cfs is maintained at the Warm Springs West gage MRSA  
5 pursuant to the MOA. Under the current pumping regime, steady-state conditions may  
6 already exist in the MRSA. Water levels and flows of the Muddy River and high elevation  
7 springs appear to have stabilized. Water levels in surrounding basins continue to decline at a  
8 very modest rate.

9 ***d. The Endangered Species Act cannot be ignored.***

10 Under the Supremacy Clause of the United States Constitution, federal law and  
11 regulation supersedes state law when the two conflict.<sup>40</sup> Unlike other federal regulations,  
12 such as the Reclamation Act of 1902, the Federal Power Act and the Clean Water Act, which  
13 all defer to state control over water, the Endangered Species Act (“ESA”) does not.<sup>41</sup> The  
14 ESA refers to state water allocation laws only once in section (c)(2) states that “[I]t is further  
15 declared to be the policy of Congress that Federal agencies shall cooperate with State and  
16 local agencies to resolve water resource issues in concert with conservation of endangered  
17 species.”<sup>42</sup>

18 In the past, when the Nevada State Engineer ignored the endangered species act,  
19

20 <sup>39</sup> SE ROA 9,921-9,946, NSE Ex. 236, *2006 Memorandum of Agreement between the Southern Nevada Water*  
21 *Authority, United States Fish and Wildlife Service, Coyote Springs Investment UC, Moapa Band of Paiute Indians*  
22 *and Moapa Valley Water District, Hearing on Interim Order 1303, official records of the Division of Water*  
23 *Resources.*

24 <sup>40</sup> U.S. CONST. art. VI, cl. 2.

25 <sup>41</sup> 43 U.S.C. §§ 371-573 (2009) (codified as amended in scattered sections). Section 383 provides that “nothing in  
26 this Act shall be construed as affecting or intending to affect or in any way interfere with the laws of any States ...  
27 relating to the control, appropriation, use or distribution of water used in irrigation . . . and the Secretary of the  
28 Interior shall proceed in conformity with such laws . . .”; 16 U.S.C. §§ 791-828 (2009). Section 821 requires  
federally licensed hydropower projects to comply with state laws relating to the “control, appropriation, use, or  
distribution” of water; 33 U.S.C. § 1251 et seq (2001). Section 1251(g) the “Wallop Amendment” states that: “It  
is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall  
not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that  
nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been  
established by any state.”

<sup>42</sup> 16 U.S.C. § 1531(c)(2).

1 water right holders in the state of Nevada were significantly impacted. One of the most  
2 significant cases to address with the interaction between water rights and the ESA was  
3 *Cappaert v. United States*.<sup>43</sup> In *Cappaert*, the Court shut down groundwater pumping by  
4 private landowners in Nevada to protect the endangered Desert Pupfish. Groundwater  
5 pumping around the Devil’s Hole National Monument, the Desert Pupfish’s habitat, lowered  
6 the level of water of in the Devils Hole cave. Since the Nevada State Engineer chose not to  
7 act, the Supreme Court affirmed an injunction limiting the water right holders’ groundwater  
8 withdrawals in order to maintain the pool’s water at the level necessary to sustain the fish.

9 Since *Cappaert*, the ESA has had a major impact in Nevada water law, particularly in  
10 the negotiations involving the Truckee River and Pyramid Lake in Northern Nevada.  
11 Protection for in-stream rights was established in 1988 in the case of *Nevada v. Morros* when  
12 the State Supreme Court upheld the State Engineer’s issuance of appropriative water rights  
13 to two federal agencies for recreation, fishery, and stock and wildlife watering purposes,  
14 including in-stream rights.<sup>44</sup> Furthermore, wildlife watering is specifically encompassed in  
15 the NRS 533.030(2) definition of recreation as a beneficial use of water. Nevada law  
16 recognizes the recreational value of wildlife, and the need to provide wildlife with water.<sup>45</sup>

17 There is clear precedent that the State Engineer must consider the ESA when  
18 addressing groundwater right issues that impact threatened or endangered species in the state  
19 of Nevada. Failing to take the ESA into consideration, in light of *Cappaert*, has shown that  
20 the Federal Court will continue make management decisions on Nevada’s groundwater if the  
21 State Engineer does not act. Impacts of a *Cappaert* like decision in the LWRFS would be  
22 devastating, as the LWRFS contains communities such as Moapa and the Tribe, NV Energy’s  
23 power supply, ranches and farms that comprise the MVIC, businesses, industrial users and all  
24 of the other remaining water right users throughout the LWRFS.

25  
26 <sup>43</sup> *Cappaert v. United States*, 426 U.S. 128 (1976).

27 <sup>44</sup> *State v. Morros*, 766 P.2d 263, 268, 104 Nev. 709, 716–17 (1988).

28 <sup>45</sup> See NRS 501.100(2), NRS 501.181(3)(c); and NRS 533.367.

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**V. CONCLUSION**

The thousands of pages of exhibits and the two-week long hearing provided copious amounts of information for the State Engineer to work with and supports the fact that there is substantial evidence in the record to support Order No. 1309 with respect to the State Engineer’s findings related to the groundwater in the LWRFS.

**AFFIRMATION PURSUANT TO NRS 239B.030**

Pursuant to NRS 239B.030, the undersigned hereby affirms that this Answering Brief does not contain the personal information of any person.

Dated this 24<sup>th</sup> day of November, 2021.

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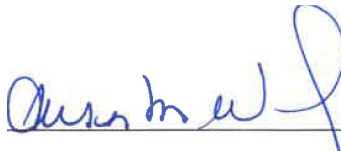
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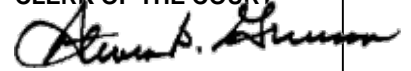
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14 **DISTRICT COURT**  
15 **CLARK COUNTY, NEVADA**

16 LAS VEGAS VALLEY WATER DISTRICT, and )  
17 SOUTHERN NEVADA WATER AUTHORITY )

18 Petitioner,  
19 vs. )

20 TIM WILSON, P.E., Nevada State Engineer, )  
21 DIVISION OF WATER RESOURCES, )  
22 DEPARTMENT OF CONSERVATION AND )  
23 NATURAL RESOURCES, )

24 Respondent. )

25 \_\_\_\_\_ )  
26 And All Consolidated Cases )

Case No. A-20-816761-C

Dept. No. 19

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

27 **SIERRA PACIFIC POWER COMPANY AND**  
28 **NEVADA POWER COMPANY'S**  
**APPENDIX OF EXHIBITS**

Nevada Power Company  
and Sierra Pacific Power Company  
d/b/a NV Energy

1 Sierra Pacific Power Company d/b/a NV Energy (“Sierra Pacific”) and Nevada Power  
 2 Company d/b/a NV Energy (“Nevada Power” and, together with Sierra Pacific, “NV Energy”)
 3 hereby submit the Appendix of Exhibits (“Appendix”) in support of their Answering Brief.

EXHIBIT	DESCRIPTION	SE ROA BATES NO.
1.	Order No. 1169	SE ROA 659-669
2.	Order No. 1309	SE ROA 2-69
3.	NSE Ex. 50, Pumpage Report Coyote Spring Valley 2017	SE ROA 116-1183
4	NSE Ex. 67, Pumpage Report Black Mountains Area 2017	SE ROA 1280-1294
5	NSE Ex. 84, Pumpage Report Garnet Valley Area 2017	SE ROA 1397-1412
6	NSE Ex. 86, Pumpage Report California Wash Area 2017	SE ROA 1427-1440
7	Ex. 88. Pumpage Report Muddy River Springs Area 2017	SE ROA 1471-1799
8	SNWA Ex. 7, pp. 5-7	SE ROA 41982
9	NSE Ex. 236, 2006 Memorandum of Agreement between the Southern Nevada Water Authority, United States Fish and Wildlife Service, Coyote Springs Investment UC, Moapa Band of Paiute Indians and Moapa Valley Water District, Hearing on Interim Order 1303, official records of the Division of Water Resources.	SE ROA 9921-9946

**AFFIRMATION PURSUANT TO NRS 239B.030**

18 Pursuant to NRS 239B.030, the undersigned hereby affirms that this appendix of  
 19 exhibits does not contain the personal information of any person.

20 Dated this 24<sup>th</sup> day of November, 2021.

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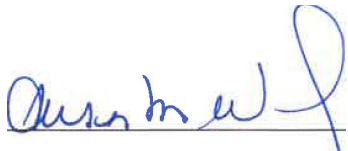
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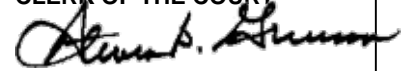


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TABLE OF JA LOCATION TO AVOID DUPLICATES

EXHIBIT	DESCRIPTION	SE ROA BATES NO.	JA VOL	JA BATES	
1.	Order No. 1169	659-669	3	JA_824	JA_834
2.	Order No. 1309	2-69	2	JA_326	JA_393
3.	NSE Ex. 50, Pumpage Report Coyote Spring Valley 2017	1116-1183	3	JA_1331	JA_1348
4	NSE Ex. 67, Pumpage Report Black MountainsArea 2017	1280-1294	3	JA_1445	JA_1459
5	NSE Ex. 84, Pumpage Report Garnet ValleyArea 2017	1397-1412	3	JA_1562	JA_1577
6	NSE Ex. 86, Pumpage Report California Wash Area 2017	1427-1440	3	JA_1592	JA_1605
7	Ex. 88. Pumpage Report Muddy River SpringsArea 2017	1471-1799	3	JA_1636	JA_1664
8	SNWA Ex. 7, pp. 5-7	41982	27	JA_11813	JA_11955
9	NSE Ex. 236, 2006 Memorandum of Agreement between the Southern Nevada Water Authority, United States Fish and Wildlife Service, Coyote Springs InvestmentUC, Moapa Band of Paiute Indians and MoapaValley Water District, Hearing on Interim Order 1303, official records of the Division ofWater Resources.	9921-9946	5	JA_2928	JA_2953





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**DISTRICT COURT  
CLARK COUNTY, NEVADA**

10 LAS VEGAS VALLEY WATER  
11 DISTRICT, and SOUTHERN NEVADA  
12 WATER AUTHORITY,

13 Petitioners,

14 vs.

15 ADAM SULLIVAN, P.E., Nevada State  
16 Engineer, DIVISION OF WATER  
17 RESOURCES, DEPARTMENT OF  
18 CONSERVATION AND NATURAL  
19 RESOURCES,

20 Respondents.

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

Consolidated with Cases:

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

Hearing Requested

**ANSWERING BRIEF OF  
PETITIONERS' LAS VEGAS VALLEY  
WATER DISTRICT AND SOUTHERN  
NEVADA WATER AUTHORITY**

21 Petitioners LAS VEGAS VALLEY WATER DISTRICT ("LVVWD") and  
22 SOUTHERN NEVADA WATER AUTHORITY ("SNWA") by and through their  
23 counsel of record, file their Answering Brief pursuant to EDCR 2.15.  
24

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

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

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

**STATEMENT OF THE CASE<sup>1</sup>**

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

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<sup>1</sup> SNWA and LVVWD incorporate by reference their Statement of the Case from their Opening Brief.

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

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

17 In 2019, prompted largely by Coyote Springs Investment’s (“CSI”) intention to  
18 use existing groundwater rights to support large residential and commercial project in  
19 Coyote Spring Valley, the State Engineer issued Interim Order 1303.<sup>4</sup> Prior to issuing  
20 Order 1303, the State Engineer held several public workshops that invited stakeholders  
21 to provide input on water issues in the area. Order 1303 initiated a two-phased process

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22 <sup>2</sup> ROA 665-66.

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

24 <sup>4</sup> ROA 70-88.



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

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

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

15 **STATEMENT OF FACTS**<sup>6</sup>

16 **I. History of groundwater administration in LWRFS region**

17 Order 1309 is the culmination of decades of LWRFS investigation. In the 1980s,  
18 the State Engineer began an in-depth study of the area now known as the LWRFS with  
19 the United States Department of Interior, Geological Survey (“USGS”).<sup>7</sup> The initial

20 \_\_\_\_\_  
21 <sup>5</sup> Another determination in Order 1309 related to the impact of existing groundwater  
22 pumping on senior surface water rights in the Muddy River. SNWA and LVVWD  
23 challenged that determination in their petition for judicial review and presented their  
24 argument against that determination in their Opening Brief.

<sup>6</sup> SNWA and LVVWD incorporate by reference their Statement of Facts from their  
Opening Brief.

<sup>7</sup> See SE ROA 654-658 for a history of the studies conducted prior to 2002.

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

6 **A. Application 46777**

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

15 In 1997, Application 46777 was conditionally granted. After an evidentiary  
16 hearing, the State Engineer granted Permit 46777 with specific permit terms that  
17 preclude impacts to the Muddy River. Specifically, the State Engineer issued Ruling  
18 4542 and stated that protests were withdrawn "on the understanding that *groundwater*  
19 *pumping would be stopped* should the project adversely affect the water table in the  
20 Muddy River Springs Area."<sup>10</sup> To protect the Muddy River and Moapa dace from  
21 pumping that Permit 46777 authorized, the State Engineer established an early warning  
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23 <sup>8</sup> SE ROA 47837.

24 <sup>9</sup> SE ROA 48114-48130, 47837-47840 (Ruling 4542, Permit 46777).

<sup>10</sup> SE ROA 48115 (emphasis added).

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

7 **B. Order 1169**

8 Joint management of the LWRFS region began with Order 1169 and continued  
9 with Rulings 6254-6261 because the region shares a close hydrologic connection, and a  
10 *joint* groundwater supply. In the early 2000s, the State Engineer had to consider  
11 additional applications for groundwater in Coyote Spring Valley and the LWRFS region.  
12 Instead of acting on those applications, he issued Order 1169 to require the Aquifer  
13 Test.<sup>14</sup> The State Engineer ordered that half the existing rights issued in the LWRFS be  
14 pumped and the effects of pumping be monitored.<sup>15</sup> Order 1169 included all the LWRFS  
15 basins, except Kane Springs Valley.<sup>16</sup> The Aquifer Test yielded data that proved  
16 groundwater in Coyote Spring Valley has a close hydrologic connection to groundwater  
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19 <sup>11</sup> SE ROA 48123 (emphasis added).

20 <sup>12</sup> SE ROA 47838.

21 <sup>13</sup> *See e.g.*, SE ROA 33952, 35507-35508, 41852.

22 <sup>14</sup> SE ROA 654-669.

23 <sup>15</sup> The State Engineer had previously issued approximately 50,465 afa in six of the  
24 LWRFS Basins, usually with strict permit terms noting that the permits are subject to  
reductions in pumping if harm occurs to others or the environment, and had pending  
applications before him requesting over 100,000 afa of additional appropriations.

<sup>16</sup> *See* SE ROA 992-994. The State Engineer added Kane Springs Valley to the LWRFS  
in Order 1309.

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

3 After the Aquifer Test, the State Engineer had data the USGS did not have in the  
4 1980s. Rather than simple theoretical estimates, empirical data showed common  
5 groundwater level responses throughout the LWRFS region due to Aquifer Test stress  
6 imposed by pumping.<sup>17</sup> More importantly, monitoring wells near the Muddy River and  
7 critical Moapa dace habitat showed a direct and nearly immediate groundwater decline  
8 in response to Aquifer Test pumping.

9 Based on the Aquifer Test evidence, the State Engineer issued Rulings 6254-6261  
10 in 2014. His office treated the LWRFS (except Kane Springs Valley) as one aquifer.<sup>18</sup>  
11 Each ruling addressed a different basin in the LWRFS and denied each pending water  
12 right application that existed in that basin. The rationale for all the rulings was the same:  
13 “because these basins share a unique and close hydrologic connection and share virtually  
14 all of the same source and supply of water, unlike other basins in Nevada, these five  
15 basins will be jointly managed.”<sup>19</sup> The State Engineer then set one perennial yield for  
16 all the Order 1169 basins and the Muddy River.<sup>20</sup>

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19 <sup>17</sup> SE ROA 41986.

20 <sup>18</sup> SE ROA 726-948.

21 <sup>19</sup> *See e.g.*, SE ROA 479.

22 <sup>20</sup> *Id.* (“The perennial yield of these basins cannot be more than the total annual supply  
23 of 50,000 acre-feet. Because the Muddy River and Muddy River springs also utilize this  
24 supply, and are the most senior water rights in the region, the perennial yield is further  
reduced to an amount less than 50,000 acre-feet. The State Engineer finds that the  
amount and location of groundwater that can be developed without capture of and  
conflict with senior water rights on the Muddy River and springs remains unclear, but  
the evidence is overwhelming that unappropriated water does not exist.”).

1 **II. Interim Ruling 1303**

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

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

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<sup>21</sup> SE ROA 84.

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<sup>22</sup> SE ROA 81.

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<sup>23</sup> SE ROA 82-83. The State Engineer also include a fifth general request for “[a]ny other matter believed to be relevant to the State Engineer's analysis.”

1 required. Thus, without mitigation, even the existing pumping of about 8,300 afa poses  
2 an imminent threat to senior water rights in the Muddy River.<sup>24</sup>

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

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

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23 <sup>24</sup> SE ROA 56.

24 <sup>25</sup> SE ROA 49-50.

<sup>26</sup> SE ROA 22 at fn. 104.

1 **III. Evidence presented by SNWA and LVVWD**

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

7 **A. Boundary of LWRFS**

8 At the administrative hearing, SNWA and LVVWD did not recommend that the  
9 State Engineer extend the boundary of the LWRFS beyond what was defined in Order  
10 1169.<sup>27</sup> Rather, SNWA and LVVWD recommended adjacent basins be included in  
11 Phase 2 when groundwater management decisions could be made regarding those basins  
12 because, “regardless of the boundary, we know that the State will have to continue  
13 managing the adjacent basins to” protect the LWRFS from pumping in those basins.<sup>28</sup>  
14 Ultimately, the boundary must be protected from activities that could cause drawdown  
15 to propagate to the LWRFS, such as allowing a “pile-up” of “points of diversion along  
16 the boundary [of the LWRFS].”<sup>29</sup> The State Engineer considered this testimony, but  
17 determined based upon his previous criteria for an area’s inclusion in the LWRFS  
18 management area (described in Rulings 6254-6261) that Kane Springs Valley, and a  
19 modified section of Black Mountain Area, should be added to the LWRFS Hydrographic  
20 Basin.<sup>30</sup>

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22 <sup>27</sup> SE ROA 34-35.  
23 <sup>28</sup> SE ROA 53335 at 876:2-15.  
24 <sup>29</sup> *Id.*  
<sup>30</sup> SE ROA 48-49.

1           **B. Hydrologic connection within the LWRFS**

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

11           **C. Protection of Moapa dace**

12           SNWA and LVVWD have prioritized protection of the Moapa dace for decades.  
13 Since the 1990s, habitat restoration and other conservation efforts have been completed  
14 by SNWA, the United States Fish and Wildlife Service (“USFWS”) and others to  
15 increase dace populations.<sup>34</sup> SNWA and LVVWD’s experts Zane Marshall and Robert  
16 Williams are highly experienced in the field of conservation biology and in protecting  
17 Moapa dace, and they testified regarding their involvement in the development of the  
18 2006 Memorandum of Agreement, associated Biological Opinion, and other studies and  
19 conservation efforts for protection of Moapa dace. They testified that 3.2 cubic feet per  
20 second (“cfs”) of flow at the Warm Springs West gage is necessary to protect the Moapa  
21

22 \_\_\_\_\_  
<sup>31</sup> SE ROA 35-36; SE ROA 53340 at 899 – SE ROA 53341 at 900.

23 <sup>32</sup> SE ROA 34; SE ROA 42187-42189; SE ROA 53341 at 903:14-53343 at 909:9.

24 <sup>33</sup> SE ROA 53, 56.

<sup>34</sup> SE ROA 42087-89.



1 dace.<sup>35</sup> This testimony was based on extensive scientific study and documentation. The  
2 State Engineer relied on their testimony and found that “it is clear that it is necessary for  
3 spring flow measured at the Warm Springs West gage to flow at a minimum rate of 3.2  
4 cfs in order to maintain the habitat for the Moapa dace.”<sup>36</sup>

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

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

13 **IV. Ruling 1309**

14 After an evidentiary hearing with extensive testimony from many experts, Order  
15 1309 was issued with four factual findings that are relevant to these appeals. First, the  
16 State Engineer delineated the LWRFS Hydrographic Basin.<sup>38</sup> Second, the State  
17 Engineer determined the maximum quantity of groundwater that can be pumped in the  
18 LWRFS Hydrographic Basin is 8,000 afa, or could be less.<sup>39</sup> Third, the State Engineer  
19 found that the 8,000 afa cap may be reduced if it is determined that pumping will impact  
20

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21 <sup>35</sup> SE ROA 53438 at 1121:21-1122:24; SE ROA 53439 at 1127:2 – SE ROA 53440 at  
22 1128:18.

23 <sup>36</sup> SE ROA 46.

24 <sup>37</sup> SE ROA 42014.

<sup>38</sup> SE ROA 66, item 1.

<sup>39</sup> SE ROA 66, item 2.

1 the endangered Moapa Dace.<sup>40</sup> Fourth, the State Engineer rescinded the provisions in  
2 Order 1303 that were not specifically addressed in Order 1309.<sup>41</sup> These appeals  
3 followed.

#### 4 **SUMMARY OF ARGUMENT**

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

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

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

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23 <sup>40</sup> SE ROA 66, item 3.

24 <sup>41</sup> SE ROA 67, item 6.

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

10 **ARGUMENT**

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

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23 <sup>42</sup> SNWA and LVVWD presented its challenge to another aspect of Order 1309 in its  
24 opening brief. SNWA and LVVWD support all aspects of Order 1309 except the limited  
portions that are addressed in that opening brief.

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

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

8 The State Engineer has authority over all water in the State (NRS 533.030(1)),  
9 limited only by the continued authority of the courts, or act of Congress (NRS 533.0245).  
10 The State Engineer has express authority to “make such reasonable rules and regulations  
11 as may be necessary for the proper and orderly execution of the powers conferred by  
12 law.”<sup>45</sup> The State Engineer has authority to regulate the withdrawal of groundwater  
13 within the LWRFS because the LWRFS is entirely located within the State of Nevada.  
14 The State Engineer properly used the tools available to him under NRS 534.030,  
15 534.110, and 534.120 to exercise this power to establish the extent of an area in need of  
16 special administration and set a maximum quantity of groundwater that can be pumped.

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

18 Nevada law gives the State Engineer numerous tools to administer groundwater  
19 and surface water. Those tools include the ones the State Engineer expressly relied on -  
20 NRS 532.120, NRS 534.030, NRS 534.110 and NRS 534.120.<sup>46</sup> Taken separately, each

21 <sup>43</sup> NRS 532.120, 534.030, 534.110, 533.020, 534.120. *See generally*, SE ROA 43 and  
22 NRS Chapters 532-534.

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

<sup>45</sup> NRS 532.120.

<sup>46</sup> SE ROA 43-44.

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

5 **1. NRS 532.120**

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

11 **2. NRS 534.030**

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

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23 <sup>47</sup> NRS 534.030.  
24 <sup>48</sup> NRS 534.030(2).  
<sup>49</sup> *Id.*

1 Here, the State Engineer held stakeholder meetings and a formal administrative  
2 hearing to take testimony regarding the designation of the LWRFS.<sup>50</sup> The State Engineer  
3 specifically held the hearing to determine the geographic boundary of the LWRFS and  
4 establish the need for additional administration, as required by NRS 533.030.<sup>51</sup> Based  
5 on these meetings and hearings, the State Engineer designated the LWRFS Hydrographic  
6 Basin, and established Kane Springs Valley, Coyote Spring Valley, Muddy River  
7 Springs Area, California Wash, Hidden Valley, Garnet Valley, and the northwest portion  
8 of the Black Mountains Area as sub-basins.<sup>52</sup> As expressly permitted by NRS  
9 534.030(2),<sup>53</sup> the State Engineer designated the LWRFS as an area in need of  
10 administration based on the evidence and input from public meetings and the Order 1303  
11 evidentiary hearing.

12 **3. NRS 534.110**

13 The State Engineer completed a robust, long-term, and thorough “due  
14 investigation” of each basin, or portion thereof, that was later consolidated into the  
15 LWRFS, as required by NRS 534.110. The “due investigation” began with Order 1169,  
16 and continued with Interim Order 1303, wherein the State Engineer first began joint  
17 management, and then exercised the powers conferred by NRS 534.110(2). Under NRS  
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21 <sup>50</sup> SE ROA 12; SE ROA 33863-922.

22 <sup>51</sup> SE ROA 11.

23 <sup>52</sup> SE ROA 66, 69.

24 <sup>53</sup> NRS 534.030(2)(b) (“If the basin is found, after due investigation, to be in need of  
administration the State Engineer may enter an order” designating the area by basin, or  
portion therein, and make an official order describing the boundaries by legal  
subdivision as nearly as possible.).

1 534.110(2), the State Engineer is specifically authorized to determine the specific  
2 [sustainable] yield of an aquifer and to determine permeability characteristics.<sup>54</sup>

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

13 **4. Basin should not be narrowly defined.**

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

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

23 <sup>55</sup> NRS 534.0105.

24 <sup>56</sup> NRS 534.110(2).

<sup>57</sup> Apex Opening Brief at 11-12; CSI Opening Brief at 17-19; LCWD and Vidler  
Opening Brief at 16-17.

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

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

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

11 To the extent the Water Words Dictionary has any legal significance, its definition  
12 of the term "basin" does not refer to the 232 Hydrographic areas in Nevada, as opposing  
13 parties suggest, but rather to the *14 major Hydrographic regions or basins*. One of these  
14 regions, the Colorado River Basin, includes all the formerly independent sub-basins  
15 which became the LWRFS Hydrographic Basin in Order 1309.<sup>60</sup> The opposing parties'  
16 conclusory argument fails to consider how the term *basin* is actually used in different  
17 contexts. By contrast, the overwhelming authority in NRS 534.030(2) for designating  
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19 <sup>58</sup> SE ROA 71-72 (Coyote Spring Valley, Black Mountains Area, Garnet Valley,  
20 California Wash, Hidden Valley, and Muddy River Springs Area Hydrographic Basins  
were all previously designated pursuant to NRS 534.030).

21 <sup>59</sup> Division of Water Resources Water Words Dictionary at 25-26. Available at  
<http://water.nv.gov/programs/planning/dictionary/wwords-B.pdf> (last visited October 12,  
22 2021).

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



1 an area “within a basin” (the Colorado River Basin) clearly authorized designation of  
2 the LWRFS.

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

5 Several parties argue that the State Engineer improperly relied on NRS 533.024(1)  
6 as the exclusive source of authority to designate the LWRFS.<sup>61</sup> This claim is also without  
7 merit. In Order 1309, the State Engineer expressly stated he was relying on many  
8 different provisions of the water statutes, not NRS 533.024(1). Also, even though NRS  
9 533.024(1) is a legislative declaration of policy, the Supreme Court has held a  
10 “declaration of policy by the legislature, though not necessarily binding or conclusive  
11 upon the courts, is entitled to great weight.”<sup>62</sup>

12 In 2017, the Nevada legislature clarified that the State Engineer’s obligation to  
13 protect existing water rights included protection from impacts caused by groundwater  
14 pumping that depletes the surface water. Nevada’s legislative policy in this respect is to  
15 “manage conjunctively the appropriation, use and administration of all waters regardless  
16 of the source of the water.”<sup>63</sup> This declaration clarified that the State Engineer’s express  
17 statutory powers must be used to manage all waters – groundwater and surface water –  
18 to protect existing surface water rights and the public from over-pumping groundwater.

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

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

<sup>63</sup> SE ROA 43.

1 While NRS 534.030 authorized the State Engineer to designate the LWRFS, NRS  
2 533.024(1)(e) is particularly notable in the present case because it clarifies that authority.  
3 The legislature directed the State Engineer to recognize that ground and surface water  
4 sources routinely have a hydrological connection. For example, groundwater often  
5 produces springs, and those springs contribute to river flows. Here, those are the flows  
6 relied upon by senior Muddy River surface water rights holders and the Moapa Dace in  
7 this case. Thus, groundwater and surface water cannot be viewed in isolation.

8 That hydrologic connection between groundwater and surface water is certainly  
9 relevant in the State Engineer's determination of whether a basin needs additional  
10 administration. The factual question of whether a hydrologic connection exists between  
11 ground and surface water is also critical to how the State Engineer executes his or her  
12 other statutory obligations to protect senior water rights from impacts that are caused by  
13 the use and development of junior water rights. In the LWRFS, the State Engineer made  
14 strongly supported factual determinations that junior groundwater pumping is impacting  
15 senior surface water rights in the Muddy River. The State Engineer is obligated to  
16 protect senior water rights by express provisions in Nevada's statutes and case law. NRS  
17 533.024(1)(e) made that obligation clearer.

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

20 Despite being conspicuously absent from the State Engineer's findings, several  
21 parties incorrectly argue the State Engineer re-prioritized all water rights in the LWRFS  
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1 basin by combining the priorities of all water rights into one list.<sup>64</sup> Not a single word in  
2 Order 1309 re-prioritizes the water rights in the LWRFS. The only language in Order  
3 1303 related to this question was rescinded in Order 1309.<sup>65</sup> The State Engineer did not  
4 address the issue of priorities within the LWRFS in Order 1309, which included the  
5 following language, “[a]ll other matters set forth in Interim Order 1303 that are not  
6 specifically addressed herein are hereby rescinded.”<sup>66</sup> Therefore, the State Engineer did  
7 not re-prioritize the priority of water rights in Order 1309.

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

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

23 <sup>65</sup> SE ROA 82 (“All water rights within the Lower White River Flow System will be  
24 administered based upon their respective date priorities in relation to other rights within  
the regional groundwater unit.”).

<sup>66</sup> SE ROA 67.

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

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

4           All statutory water rights are issued a “priority” date based on when the first  
5 application to appropriate the public waters of the state occurred.<sup>68</sup> These dates are then  
6 used to apply the principles of “first in time, first in right,”<sup>69</sup> as all the water rights issued  
7 by the State Engineer are permitted subject to prior senior water rights. The State  
8 Engineer did not alter the priority date of any water right in the LWRFS, nor has any  
9 party argued that their actual priority date has changed.

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

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

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

<sup>70</sup> *Kobobel v. State Dept. of Natural Resources*, 249 P.3d 1127, 1134 (Col. 2011).

<sup>71</sup> NRS 533.030 also provides that all statutory water rights are issued “subject to existing  
rights.”

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

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

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

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

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

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

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

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

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

15 **1. Eureka County v. State Engineer**

16 Lincoln County Water District (“LCWD”) and Vidler Water Company (“Vidler”)  
17 argue that in Order 1309, the State Engineer improperly deferred management and  
18 administration decision to the future in violation of *Eureka County v. State Engineer*.<sup>77</sup>

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19 <sup>75</sup> NRS 534.110(6).

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

<sup>77</sup> LCWD and Vidler Opening Brief at 38.

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

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

19 Furthermore, the water statutes specifically contemplate management of  
20 groundwater in stages.<sup>79</sup> Order 1309 is the initial designation of the LWRFS under NRS  
21 534.030. Under NRS 534.120(1), the State Engineer has the authority to make rules and  
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23 <sup>78</sup> *Eureka County v. State Engineer*, 359 P.3d 1114, 1120 (2015).

24 <sup>79</sup> NRS 534.030 and 534.120.

1 regulations *after designation*.<sup>80</sup> The law expressly recognizes that management  
2 decisions can be deferred until after designation and does not require all rules and  
3 regulations to be implemented simultaneously with the designation order.

4 **2. Due Process**

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

13 The scope of the hearing related to the delineation of the boundary of the LWRFS  
14 and the amount of groundwater that could be sustainably pumped from the LWRFS. All  
15 parties had notice of the limited issues that were being considered. The State Engineer  
16 provided all parties adequate notice of those issues through Order 1303 and the pre-  
17 hearing notice. All parties had the ability to be heard on the enumerated issues. All  
18 parties are also on notice that any future decisions will be subject to further  
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20 <sup>80</sup> NRS 534.120(1) (“Within an area that has been designated by the State Engineer, as  
21 provided for in this chapter, where, in the judgment of the State Engineer, the  
22 groundwater basin is being depleted, the State Engineer in his or her administrative  
capacity may make such rules, regulations and orders as are deemed essential for the  
welfare of the area involved.”) (emphasis added).

23 <sup>81</sup> Apex Opening Brief at 12.

24 <sup>82</sup> This argument puts the “cart before the horse” and asks this court to resolve issues that  
have yet to be heard by the administrative agency.



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

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

6 Georgia-Pacific Gypsum LLC, and Republic Environmental Technologies, Inc.  
7 (“Georgia-Pacific”) and Apex argue the State Engineer was not authorized to consider  
8 the Endangered Species Act (“ESA”) in Order 1309.<sup>83</sup> The parties fail to explain why  
9 the State Engineer should ignore his agency’s need to comply with federal law. Not only  
10 is it obvious that the State Engineer must comply with the ESA, the State Engineer also  
11 has an express duty to protect the public interest.

12 The State Engineer’s duty to the public interest is twofold: he has a fiduciary  
13 public trust obligation and a statutory duty to protect the public interest.<sup>84</sup> Public interest  
14 has been defined and interpreted by the State Engineer and the Supreme Court.<sup>85</sup>  
15 Pursuant to instructions from the Supreme Court, specific public interest criterion and  
16 guidelines exist within the meaning of NRS 533.370.<sup>86</sup> Specifically, the State Engineer

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17  
18 <sup>83</sup> Apex Opening Brief at 13; Georgia-Pacific Opening Brief at 28.

19 <sup>84</sup> NRS 533.345; NRS 533.370(2); *Min. Cty. v. Lyon Cty.*, 136 Nev. 503, 514, 473 P.3d  
20 418, 427 (2020) (“Nevada's water statutes constrain water allocations to those that are  
21 public uses and require the State Engineer to reject permits if they are unnecessary or  
22 detrimental to the public interest. These considerations are consistent with  
23 the public trust doctrine.”).

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

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

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

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

16         In addition to the clear statutory authority that authorized the State Engineer to  
17 consider the ESA, the State Engineer correctly recognized that a state agency could be  
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19 (“Ruling 6454”). *See also*, State Engineer Ruling 6164 (March 22, 2012) available at  
20 <http://images.water.nv.gov/images/rulings/6164r.pdf> (last visited October 14, 2021)  
21 (“Ruling 6164”) at 152-158.

<sup>87</sup> Ruling 6454 at 10-11.

<sup>88</sup> *See* NRS 533.023, NRS 533.367.

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

<sup>90</sup> *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978).

<sup>91</sup> SE ROA 53434 at 1107:14 – SE ROA 53435 at 1108:16.

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

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

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14 <sup>92</sup> SE ROA 45-47 (“a state regulator is not exempted from the EA for takings that occur  
15 as a result of a licensee’s regulated activity. States have faced the impediment of their  
16 administrative management actions being subservient to the ESA. For example, the  
17 Massachusetts Division of Marine Fisheries was subject to an injunction prohibiting it  
18 from issuing commercial fishing licenses because doing so would likely lead to the  
19 taking of an endangered species.” See *Strahan v. Coxe*, 127 F.3d 155, 163 (1<sup>st</sup> Cir.  
20 1997)).

21 <sup>93</sup> 16 U.S.C. § 1540, *Ctr.for Biological Diversity v. Holsten*, 541 F. Supp.2d 1073, 1079  
22 (D. Minn. 2008).

23 <sup>94</sup> SE ROA 42121.

24 <sup>95</sup> SE ROA 42134.

<sup>96</sup> Georgia Pacific Opening Brief at 30.

<sup>97</sup> NRS 533.367.

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

<sup>99</sup> SE ROA 42124-46, 47605, 47807.

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

5 **II. The State Engineer’s Decision To Designate The LWRFS Basin Was Proper.**

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

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

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22 <sup>100</sup> SE ROA 53167 at 509:11-12; SE ROA 53453 at 1178:1-18; SE ROA 53341 at 903:2-  
5; SE ROA 53167 at 509:12; SE ROA 53453 at 1178:10-11.

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

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

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

14 In Order 1309, the State Engineer found that “the geographic extent of the LWRFS  
15 is intended to represent the area that shares both a unique and close hydrologic  
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17 SE ROA 53670 at 1645:7-10; SE ROA 53722 at 1763 to SE ROA 53723 at 1765; SE  
18 ROA 52984 at 95:14-16.

102 SE ROA 16-19.

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

104 The Court may not “substitute its judgment for that of the State Engineer.” *Wilson v.*  
19 *Pahrump Fair Water, LLC*, 481 P.3d 853, 858 (Nev. 2021) (internal citation omitted).  
20 When reviewing a decision or order of the State Engineer, the court may not “pass upon  
21 the credibility of the witness nor reweigh the evidence.” *Revert v. Ray*, 95 Nev. 782, 786,  
22 603 P.2d 262, 264 (1979); *see also, Bacher v. State Eng’r*, 122 Nev. 1110, 1121, 146  
23 P.3d 793,800 (2006). The Legislature has specified that “[t]he decision of the State  
24 Engineer shall be prima facie correct, and the burden of proof shall be upon the party  
attacking the same.” NRS 533.450(10); *see also, Revert*, 95 Nev. at 786, 603 P.2d at  
264.

1 connection and virtually all of the same source and supply of water, and *therefore will*  
2 *benefit from joint and conjunctive management.*”<sup>105</sup> The State Engineer also developed  
3 a common set of criteria, that were consistent with characteristics considered in prior  
4 rulings regarding the LWRFS, to determine if the hydrologic connection between basins  
5 requires joint management.<sup>106</sup> These criteria account for water level, hydrographic, and  
6 hydrogeologic data to determine the extent of hydrologic connection between sub-  
7 basins in the LWRFS. Such factual determinations should not be lightly disregarded or  
8 disturbed.<sup>107</sup> Indeed, the State Engineer is entrusted with administering this important  
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10

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11 <sup>105</sup> SE ROA 55 (emphasis added).

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

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

1 and technical subject because he possesses the necessary technical qualifications and  
2 experience to understand and analyze complex issues.<sup>108</sup>

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

12 At the administrative hearing, there was also a general consensus among experts  
13 that pumping in the LWRFS caused corresponding drawdowns throughout the LWRFS  
14 groundwater aquifer and a decline of Muddy River spring flows.<sup>112</sup> Volumes of

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15 <sup>108</sup> NRS 532.030 (“No person may be appointed as State Engineer who is not a licensed  
16 professional engineer pursuant to the provisions of chapter 625 of NRS and who does  
17 not have such training in hydraulic and general engineering and such practical skill and  
18 experience as shall fit that person for the position”).

18 <sup>109</sup> SE ROA 66.

19 <sup>110</sup> SE ROA 745-746.

20 <sup>111</sup> SE ROA 746.

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

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

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

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

18 <sup>113</sup> SE ROA 54.

19 <sup>114</sup> SE ROA 42178; SE ROA 42179-42180 (*see* Figure 2-4). SE ROA 53173 at 533-  
534; SE ROA 53173 at 534:4-7.

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



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

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

13 In any contested hearing, the decisionmaker must decide between competing and  
14 conflicting arguments. Through Order 1309, the State Engineer carefully summarized  
15 the various parties’ evidence and arguments and, with extensive citations to the record,  
16 explained why he was persuaded by certain evidence and unpersuaded by other  
17 evidence.<sup>117</sup> Certain parties argue the State Engineer ignored their evidence. But this is  
18 not the case. Considering evidence and rejecting it in favor of other evidence does not  
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21 <sup>116</sup> *Pyramid Lake Paiute Tribe v. Washoe Cty.*, 112 Nev. at 751, 918 P.2d at 702 (The  
22 State Engineer's “factual determinations will not be disturbed” by the reviewing court  
23 on a petition for judicial review pursuant to NRS 533.450 so long as they are "supported  
24 by substantial evidence."). The Legislature has specified that “[t]he decision of the State  
Engineer shall be prima facie correct, and the burden of proof shall be upon the party  
attacking the same.” NRS 533.450(10) *see also, Revert*, 95 Nev. at 786, 603 P.2d at 264.

<sup>117</sup> SE ROA 47-55, 66.

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

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

17 CSI also argues that the State Engineer ignored evidence that geologic faults may  
18 act as complete or partial barriers to groundwater flow and a close hydraulic connection  
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20 <sup>118</sup> CSI Opening Brief at 29-35.

21 <sup>119</sup> SE ROA 17, 53, 52, 49-51, 60.

22 <sup>120</sup> SE ROA 49. The State Engineer further found that “availability of groundwater for  
23 pumping based on water budget should consider whether the same water is appropriated  
24 for use in upgradient and downgradient basins, and CSI did not account for this.” SE  
ROA 58.

<sup>121</sup> SE ROA 13-15, 25-36, 38-39.

<sup>122</sup> SE ROA 59.

1 does not exist where heterogeneities occur within the LWRFS.<sup>123</sup> Contrary to CSI’s  
2 claim, however, the State Engineer recognized that heterogeneities exist in the LWRFS,  
3 but concluded they do not “create hydraulically isolated compartments or subareas  
4 within the LWRFS carbonate-rock aquifer from which pumping can occur without effect  
5 on the Warm Springs area.”<sup>124</sup>

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

15 In contrast to CSI and the Moapa Band of Paiute Indians, SNWA and LVVWD  
16 presented expert testimony that because wells on different sides of the same faults  
17 behaved similarly, those faults did not create discrete pockets where CSI could pump  
18 water without impacting groundwater levels throughout the LWRFS.<sup>129</sup> The National  
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20 <sup>123</sup> CSI Opening Brief at 42.

21 <sup>124</sup> SE ROA 60.

22 <sup>125</sup> SE ROA 52-54, 59-60.

23 <sup>126</sup> SE ROA 59-60.

24 <sup>127</sup> SE ROA 60. *See, e.g.*, SE ROA 42195-96, SE ROA 51543-51547. *See also*, SE  
ROA 28-30.

<sup>128</sup> SE ROA 65; SE ROA 10883-10974.

<sup>129</sup> SE ROA 53352 at 944:6 to SE ROA 53353 at 950:2.

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

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

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20 <sup>130</sup> SE ROA 51543

21 <sup>131</sup> SE ROA 51546.

22 <sup>132</sup> *Id.*

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

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

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

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

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

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22 <sup>134</sup> SE ROA 48.

23 <sup>135</sup> SE ROA 48-49.

24 <sup>136</sup> CSI Opening Brief at 30:19-35:25.

<sup>137</sup> *Id.*

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

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

17            **2. The State Engineer properly considered groundwater budgets.**

18        The State Engineer properly found that groundwater budgets are useful, but only  
19 a starting point in determining hydrologic connectivity or the amount of water available  
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22 <sup>138</sup> SE ROA 664.

<sup>139</sup> SE ROA 780.

23 <sup>140</sup> SE ROA 665.

<sup>141</sup> SE ROA 664.

24 <sup>142</sup> NRS 533.024(1)(c).

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

7 CSI argues that the criteria used for inclusion of a basin in the LWRFS boundary  
8 is subjective and “dependent on who the [State Engineer] is.”<sup>145</sup> CSI then argues that  
9 the only “objective” method for determining inclusion of a basin in the LWRFS is to use  
10 a groundwater budget method.<sup>146</sup> These arguments are a red herring and meant only to  
11 confuse the issue.

12 Whether or not evidence provided at a hearing meets the criteria is logically  
13 subjective, and within the discretion of the State Engineer. Such findings must be upheld  
14 by this court if they are supported by substantial evidence and are not otherwise arbitrary  
15 or capricious.<sup>147</sup> However, the criteria themselves are objective scientific factors and a  
16 list of evidence that must be evaluated in making a determination. The factors to be  
17 consider are 1) spatial distribution of water level observations, 2) temporal patterns of  
18 hydrographs, 3) correlation of observed water level responses to pumping stress, 4) water  
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21 <sup>143</sup> SE ROA 49-50, 58-59.

22 <sup>144</sup> SE ROA 59.

23 <sup>145</sup> CSI Opening Brief at 38:2-4.

24 <sup>146</sup> CSI Opening Brief at 33:2-5.

<sup>147</sup> *See generally, Revert*, 95 Nev. 782, 603 P.2d 262.

1 level gradients, and 5) geologic structures.<sup>148</sup> These factors are logically relevant to  
2 determining hydrologic connectivity.<sup>149</sup>

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

13 Order 1169 specifically found that a portion of the 16,000 afa of water  
14 appropriated in Coyote Spring Valley was to be included in the Aquifer Test “to  
15 determine if the pumping of those water rights will have any detrimental impacts on  
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17 <sup>148</sup> SE ROA 48-49. Note, the sixth criteria is how the State Engineer is to address  
18 uncertainty: if factors 1-5 support a connection, but data is limited, the boundary will  
19 match visible features on the land surface.

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

<sup>150</sup> CSI Opening Brief at 31:3-32:11.

<sup>151</sup> SE ROA 663.

<sup>152</sup> CSI Opening Brief at 32:5-6.

<sup>153</sup> SE ROA 664.



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

12 **D. The State Engineer provided adequate due process.**

13 CSI and other parties argue that the State Engineer violated their due process  
14 rights because they were not notified of the State Engineer’s criteria for determining  
15 hydrologic connection in the LWRFS before the Order 1303 Hearing.<sup>157</sup> This argument  
16 lacks merit. Order 1303 put all parties on notice of what factual issues would be  
17 addressed at the administrative hearing, and all parties had the opportunity to present  
18 evidence and testimony on those factual issues. The extent of hydrologic connection  
19 was one of the main issues. Parties submitted expert reports, faced questioning from the  
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21 <sup>154</sup> SE ROA 665.

22 <sup>155</sup> SE ROA 782.

23 <sup>156</sup> SE ROA 779 (based on decades of additional studies, the State Engineer revised his  
initial estimate and determined the subsurface outflow was likely closer to 9,900 afa and  
not the 16,000 afa as originally estimated).

24 <sup>157</sup> CSI Opening Brief at 28:12-15, LCWD and Vidler Opening Brief at 22:13-21.

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

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

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

21 Additionally, LCWD and Vidler argue that the participants' due process rights  
22 were violated because experts testified to new opinions that differed from their reports.<sup>158</sup>

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<sup>158</sup> LCWD and Vidler Opening Brief at 40.

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

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

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

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<sup>159</sup> SE ROA 35-36.

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

1 But, he said, that 8,000 afa cap “may need to be reduced in the future if the stabilizing  
2 trend in spring discharge does not continue.”<sup>161</sup>

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

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

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

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19 <sup>161</sup> SE ROA 63.

20 <sup>162</sup> If pumping over 6,000 afa is allowed in the LWRFS it should be temporary in nature  
21 because the pumping may need to be reduced if impacts do not stabilize.

22 <sup>163</sup> SE ROA 56.

23 <sup>164</sup> SE ROA 56, 64.

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

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

3 In addition, the State Engineer also relied on the 3.2 cfs threshold at the Warm  
4 Springs West gage to support the 8,000 afa pumping limitation. The State Engineer  
5 recognized that “it is clear that it is necessary for spring flow measured at the Warm  
6 Springs West gage to flow a minimum rate of 3.2 cfs in order to maintain habitat for the  
7 Moapa dace.”<sup>166</sup> Sufficient evidence exists to demonstrate that spring flow at the Warm  
8 Springs West gage is highly correlated to water levels in the LWRFS aquifer.<sup>167</sup> The  
9 current levels of production are causing water levels and spring flows at the Warm  
10 Springs West gage to fluctuate around 3.2 cfs. Therefore, substantial evidence exists to  
11 support that pumping 8,000 afa, or less, is necessary to maintain the 3.2 cfs flows at the  
12 Warm Springs West gage and protect the Moapa dace.

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

15 Various parties argue that the State Engineer did not develop clear analysis or cite  
16 to substantial evidence to support the pumping limitation of 8,000 afa.<sup>168</sup> However, the  
17 State Engineer relied upon decades of pumping data, observed flows in the Muddy River,  
18 and extensive scientific study to support his conclusion. Since empirical pumping and  
19 water level data show the pumping of approximately 8,000 afa in the LWRFS is  
20 *approaching steady state*, a reasonable mind can conclude that the amount of water  
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22 <sup>166</sup> SE ROA 45.

23 <sup>167</sup> SE ROA 41986, Figure 5-9.

24 <sup>168</sup> Georgia-Pacific Opening Brief at 18:1-20:24; LCWD and Vidler Opening Brief at 36:21-38:8.

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

5 Georgia-Pacific argues that the State Engineer wrongly applied the 8,000 afa  
6 limitation to the entire LWRFS without regard to the location of pumping.<sup>170</sup> This  
7 argument fails for three reasons. First, the LWRFS is a closely connected hydrologic  
8 system, and the pumping limitation should apply throughout that system. Second, the  
9 maximum quantity of water that can be pumped from a source is based on a limit of total  
10 available water from that source. Total availability is determined by whether the system  
11 can reach equilibrium, or *steady state*, given a certain amount of pumping.<sup>171</sup> The State  
12 Engineer found that the LWRFS is *reaching equilibrium* from the Aquifer Test and  
13 subsequent annual pumping of about 8,000 acre feet. Third, site-specific limitations  
14 were included by the State Engineer for impacts from specific points of diversion to be  
15 addressed on a case-by-case when acting on a specific application.<sup>172</sup> Even though the  
16 8,000 afa limitation applies throughout the interconnected portion of the LWRFS, the  
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19 <sup>169</sup> *Bacher*, 122 Nev. at 1121, 146 P.3d at 800 (quoting *State, Employee Sec. Dep't v.*  
20 *Hilton Hotels Corp.*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986) (An agency decision  
21 is only supported by substantial evidence if it includes evidence that a “reasonable mind  
22 might accept as adequate to support a conclusion.”).

23 <sup>170</sup> Georgia-Pacific Opening Brief at 19:14-19.

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

<sup>172</sup> NRS 533.370(2).

1 State Engineer properly acknowledged that allegations that certain areas are  
2 disconnected from the flow system can be addressed on a case-by-case basis.<sup>173</sup>

3 Similarly, LCWD and Vidler argue that the pumping cap is “discriminatory and  
4 contrary” because the pumping cap ignores the location of pumping.<sup>174</sup> They argue that  
5 even though their rights are junior to most rights in the LWRFS, they should be treated  
6 differently because their wells are located twenty-two miles from the Muddy River.<sup>175</sup>

7 However, in making such arguments, LCWD and Vidler are confusing the three separate  
8 limitations to groundwater pumping: unappropriated water, conflicts, and public  
9 interest.<sup>176</sup> The cumulative quantity of water available to all appropriations is relevant  
10 under an unappropriated water analysis, which means that all appropriations must be less  
11 than or equal to the amount of available supply. The unappropriated water analysis is  
12 relevant to a *regional* conflict analysis as pumping above the amount of available supply  
13 will necessarily cause conflicts and be detrimental to the public interest.<sup>177</sup> In contrast,  
14 location of pumping from a specific well is relevant under a *case-by-case* analysis and  
15 not an unappropriated water analysis. Accordingly, the 8,000 afa cap is a proper regional  
16 limit, and movement of individual water rights will be considered case-by-case, and  
17 these two concepts work together and are not in conflict with each other.

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19 <sup>173</sup> SE ROA 54.

20 <sup>174</sup> LCWD and Vidler Opening Brief at 39:15-40:2.

21 <sup>175</sup> LCWD and Vidler Opening Brief at 39:15-40:2.

22 <sup>176</sup> NRS 533.370(2).

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

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

10           CSI also argues that that the State Engineer ignored the location of pumping wells  
11 when evaluating aquifer recovery, “such that a change in pumping rates by some wells  
12 might mask observations of recovery.”<sup>181</sup> This is false. The State Engineer accounted  
13 for changes in pumping in all wells located within the interconnected portion of the  
14 LWRFS. He properly found that the effects of pumping, and the recovery from pumping  
15 throughout the LWRFS eventually manifests in the observed water levels.<sup>182</sup> The current  
16 location of wells is impliedly in the current observation of recovery.

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



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

4           CBD argues that the State Engineer’s cap on pumping in the LWRFS will not  
5           adequately protect the Moapa dace.<sup>183</sup> However, CBD’s argument fails to recognize that  
6           the State Engineer conditioned the 8,000 afa limitation on further reductions if the flow  
7           rate at Warm Springs West continues to decline because the minimum flow of 3.2 cfs  
8           must be maintained to protect the existing population of the Moapa Dace. More than  
9           sufficient evidence indicates flow is necessary at a minimum rate of 3.2 cfs for the  
10          Moapa dace.<sup>184</sup> Mr. Marshall testified that in the last few years the flows at Warm  
11          Springs West were “bouncing [a]round 3.3 to 3.4 cfs.”<sup>185</sup> Then in Order 1309 the State  
12          Engineer recognized that pumping at 8,000 afa has coincided with a period where spring  
13          discharge may be approaching steady state.<sup>186</sup> Hence, imposing a pumping limitation of  
14          8,000 afa will keep spring flows above 3.2 cfs. But, since the State Engineer was clear  
15          that the pumping limit may be reduced further,<sup>187</sup> CBD’s argument is without merit.

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

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22          <sup>183</sup> CBD Opening Brief at 28.

23          <sup>184</sup> SE ROA 46.

24          <sup>185</sup> SE ROA 53437 at 1116:14-16.

<sup>186</sup> SE ROA 64.

<sup>187</sup> SE ROA 66.

<sup>188</sup> CBD Opening Brief at 30.

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

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

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

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

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23 <sup>189</sup> CBD Opening Brief at 28.

24 <sup>190</sup> SE ROA 66.

<sup>191</sup> SE ROA 47.

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

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

19           As substantial evidence supports the State Engineer’s decision, and his decision  
20 is supported by a well-reasoned and thorough analysis that a reasonable mind would  
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23 <sup>192</sup> SE ROA 57 (“The State Engineer only has authority to regulate pumping, not climate,  
24 in consideration of its potential to cause conflict or to be detrimental to the public interest  
and must do so regardless of the relative contributing effects of climate.”).

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

3 **1. SNWA and LVVWD Evidence**

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

15 **2. USFWS, NPS and MVWD Evidence**

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

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22 <sup>193</sup> SE ROA 42188.

23 <sup>194</sup> *Id.*

24 <sup>195</sup> *Id.*

<sup>196</sup> SE ROA 53074, 322:15-19.

<sup>197</sup> SE ROA 53183 at 574:4 to SE ROA 53185 at 582:23.

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

6 **3. State Engineer’s Conclusion Regarding Climate Conditions**

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

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16 <sup>198</sup> SE ROA 53455 at 1190:8-12.

17 <sup>199</sup> SE ROA 53455 at 1190:24-1191:2.

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

<sup>201</sup> LCWD and Vidler Opening Brief at 12, 26.

<sup>202</sup> CSI Opening Brief at 32.

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

8 **E. The State Engineer provided adequate due process.**

9 Georgia-Pacific argues that the State Engineer violated parties’ due process rights  
10 because the State Engineer failed to provide notice he would consider the ESA in  
11 deciding the flow requirements of the Moapa dace.<sup>204</sup> This argument fails because, in  
12 Interim Order 1303, the State Engineer put all parties on notice that impacts to the Moapa  
13 dace would be considered by the State Engineer.<sup>205</sup> The State Engineer even mentioned  
14 the flow requirement for the Moapa dace in Interim Ruling 1303. Then all parties,  
15 including Georgia-Pacific, had the opportunity to present evidence regarding the Moapa  
16 dace.<sup>206</sup>

17 **CONCLUSION**

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

20 \_\_\_\_\_  
21 <sup>203</sup> Georgia-Pacific Opening Brief at 14.

22 <sup>204</sup> Georgia-Pacific Opening Brief at 31.

23 <sup>205</sup> SE ROA 79.

24 <sup>206</sup> Ironically, since Georgia-Pacific has not consulted with the USFWS to have its  
pumping authorized under the ESA *take* provisions, the State Engineer is protecting  
parties like Georgia-Pacific from potential liability under the ESA by capping pumping  
to maintain Moapa dace habitat.



**ATTORNEY CERTIFICATE**

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Pursuant to NRAP 28.2, undersigned counsel certifies that:

1. I have read this entire answering brief.

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

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

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

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

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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 DATED this 24<sup>th</sup> day of November 2021.

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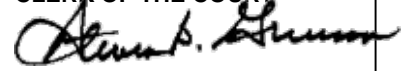
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12 **LAS VEGAS VALLEY WATER**  
13 **DISTRICT, and SOUTHERN NEVADA**  
14 **WATER AUTHORITY**

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Petitioners,

vs.

ADAM SULLIVAN, P.E., Nevada State  
Engineer, DIVISION OF WATER  
RESOURCES, DEPARTMENT OF  
CONSERVATION AND NATURAL  
RESOURCES,

Respondents.

Case No. A-20-816761-C

Dept. No. 1

Consolidated with Cases:

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

**APPENDIX TO ANSWERING  
BRIEF**

As requested by Judge Yeager this appendix contains excerpts from the record on  
appeal that were cited to in the Las Vegas Valley Water District and Southern Nevada

1 Water Authority's answering brief in the consolidated petitions for judicial review of  
2 Order 1309. Excerpts from the record on appeal are attached as Exhibit 1.

3  
4 **AFFIRMATION:** The undersigned does hereby affirm that the preceding  
5 document and/or attachments do not contain the social security number of any person.

6 Dated this 24th day of November 2021.

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<b>Exhibit No.</b>	<b>Exhibit Title</b>
1	Excerpts from Record on Appeal

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

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# EXHIBIT 1

# EXHIBIT 1

**SEE SNWA REPLY APPENDIX FOR MATRIX OF SE ROA  
DOCUMENTS CONVERTED TO JOINT APPENDIX  
REFERENCES**

A-20-816761-C

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Other Civil Matters**

**COURT MINUTES**

**December 03, 2021**

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A-20-816761-C      Southern Nevada Water Authority, Plaintiff(s)  
vs.  
Nevada State Engineer, Division of Water Resources, Defendant(s)

---

**December 03, 2021**

**Minute Order**

**HEARD BY:** Yeager, Bitia

**COURTROOM:** RJC Courtroom 16A

**COURT CLERK:** Michele Tucker

**JOURNAL ENTRIES**

The Court having reviewed Georgia-Pacific Gypsum LLC and Republic Environmental Tech, Inc.'s Request for Judicial Notice and the related briefing and being fully informed, DENIES the request.

The Court having also reviewed Coyote Springs Investment, LLC's ("CSI") Request for Judicial Notice and the related briefing and being fully informed, DENIES the request.

"On appeal, a court can only consider those matters that are contained in the record made by the court below and the necessary inferences that can be drawn therefrom. Toigo v. Toigo, 109 Nev. 350, 350, 849 P.2d 259, 259 (1993) (citing Lindauer v. Allen, 85 Nev. 430, 433, 456 P.2d 851, 853 (1969))." Mack v. Est. of Mack, 125 Nev. 80, 91, 206 P.3d 98, 106 (2009).

Under NRS 47.150, a court must take judicial notice "if requested by a party and supplied with the necessary information." NRS 47.150(2). Under NRS 47.130(1), "The facts subject to judicial notice are facts in issue or facts from which they may be inferred." If a fact is judicially noticed, it must be "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." NRS 47.130(2)(b).

Upon review of a final judgment, a court generally "... will not take judicial notice of records in another and different case, even though the cases are connected." Occhiuto v. Occhiuto, 97 Nev. 143, 145, 625 P.2d 568, 569 (1981) (citing Giannopoulos v. Chachas, 50 Nev. 269, 270, 257 P.618, 618 (1927)). Mack v. Est. of Mack, 125 Nev. 80, 91-92, 206 P.3d 98, 106 (2009).

**Georgia-Pacific Gypsum LLC and Republic Environmental Tech, Inc Request for Judicial Notice**

Georgia-Pacific Gypsum LLC and Republic Environmental Tech, Inc. seek judicial notice for items that post-date Order #1309, which is the subject of review in this case. As these exhibits postdate the issuance of Order 1309, they are not "... facts in issue" under NRS 17.130(1). In addition, the Court GRANTS Respondent State Engineer's request to strike the

PRINT DATE: 12/03/2021

Page 1 of 2

Minutes Date: December 03, 2021

portion of Georgia-Pacific Gypsum LLC and Republic Environmental Tech, Inc Opening Brief as set forth in their pleadings.

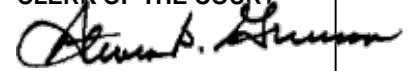
**Coyote Springs Investment, LLC's Request for Judicial Notice**

The Court finds the request from CSI to be distinguished from Wilson v. Pahrump Fair Water, LLC, 137 Nev. Adv. Op.2 \_\_\_, 481 P.3d 853 (2021) in that CSI participated in the administrative hearing and had the opportunity to introduce evidence and testimony into the record before Order 1309 was issued. The petitioner in Wilson v. Pahrump Fair Water, LLC was allowed to file a supplemental record, but the court notes the significant distinction that the petitioner in that case had no opportunity to introduce evidence and testimony into the record before the order was issued, since an administrative hearing was not held prior to the issuance of the order. CSI had the opportunity to introduce the subject matter of the instant request at the administrative hearing, but failed do so.

The Court also finds that there is no authority that allows this Court to take judicial notice of the expert-created "Glossary" of terms in Exhibit 1, nor does the exhibit meet the requirements of NRS 47.130(1) or (2).

Respondent State Engineer is to directed to submit a proposed order approved by moving counsel consistent with the foregoing within fourteen (14) days and distribute a filed copy to all parties involved in this matter. Such order should set forth a synopsis of the supporting reasons proffered to the Court in their briefing. This Decision sets forth the Court's intended disposition on the subject but anticipates further order of the Court to make such disposition effective as an order.

CLERK'S NOTE: A copy of this minute order was distributed via the E-Service list. / mlt



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20 *Attorneys for Respondent State Engineer*

11  
12 **DISTRICT COURT**  
13 **CLARK COUNTY, NEVADA**

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

17 Petitioners,

18 vs.

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

24 Respondent.

25 And All Consolidated Cases.

Case No. A-20-816761-C

Dept. No. 1

Consolidated with:

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

26 **NOTICE OF ENTRY OF ORDER DENYING**  
27 **REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF**  
28 **GEORGIA-PACIFIC GYPSUM, LLC AND REPUBLIC ENVIRONMENTAL**  
**TECHNOLOGIES, INC.'S ANSWERING BRIEF**

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///

///



1 TO: ALL INTERESTED PARTIES AND THEIR ATTORNEYS OF RECORD:

2 YOU, AND EACH OF YOU, please take notice that an Order Denying Request for  
3 Judicial Notice in Support of Georgia-Pacific Gypsum, LLC and Republic Environmental  
4 Technologies, Inc.'s Answering Brief was entered in the above-entitled matter on the  
5 23rd day of December, 2021. A copy of said Order is attached hereto as Exhibit 1.

6 **AFFIRMATION**

7 The undersigned does hereby affirm that the foregoing Notice of Entry of Order  
8 Denying Request for Judicial Notice in Support of Georgia-Pacific Gypsum, LLC and  
9 Republic Environmental Technologies, Inc.'s Answering Brief does not contain the social  
10 security number of any person.

11 DATED this 23rd day of December, 2021.

12 AARON D. FORD  
13 Attorney General

14 By: /s/ James N. Bolotin  
15 JAMES N. BOLOTIN  
16 Senior Deputy Attorney General

17 **CERTIFICATE OF SERVICE**

18 I certify that I am an employee of the State of Nevada, Office of the Attorney  
19 General, and that on this 23rd day of December, 2021, I served a true and correct copy of  
20 the foregoing NOTICE OF ENTRY OF ORDER DENYING REQUEST FOR JUDICIAL  
21 NOTICE IN SUPPORT OF GEORGIA-PACIFIC GYPSUM, LLC AND REPUBLIC  
22 ENVIRONMENTAL TECHNOLOGIES, INC.'S ANSWERING BRIEF, by electronic  
23 service to the participants in this case who are registered with the Eighth Judicial  
24 District Court's Odyssey eFileNV File & Serve system to this matter.

25 /s/ Dorene A. Wright  
26  
27  
28

INDEX OF EXHIBITS

EXHIBIT No.	EXHIBIT DESCRIPTION	NUMBER OF PAGES
1.	Order Denying Request for Judicial Notice in Support of Georgia-Pacific Gypsum, LLC and Republic Environmental Technologies, Inc.'s Answering Brief filed December 23, 2021	8

1  
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# EXHIBIT 1

# EXHIBIT 1

1 **ORDD**

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

6 LAS VEGAS VALLEY WATER  
7 DISTRICT, and SOUTHERN NEVADA  
8 WATER AUTHORITY,

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Petitioners,

Case No. A-20-816761-C

Dept. No. 1

vs.

ADAM SULLIVAN, P.E., Nevada  
State Engineer, DIVISION OF  
WATER RESOURCES, DEPARTMENT  
OF CONSERVATION AND NATURAL  
RESOURCES,

Consolidated with:

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

Respondent.

And All Consolidated Cases.

**ORDER DENYING REQUEST FOR JUDICIAL NOTICE  
IN SUPPORT OF GEORGIA-PACIFIC GYPSUM, LLC AND REPUBLIC  
ENVIRONMENTAL TECHNOLOGIES, INC.'S ANSWERING BRIEF**

This matter came before this Court pursuant to Georgia-Pacific Gypsum, LLC and Republic Environmental Technologies, Inc.'s (collectively, "G-P and R") Request for Judicial Notice in Support of G-P and R's Answering Brief, filed November 23, 2021. The Court having reviewed this filing, and the briefing related thereto, hereby **DENIES** the Request for Judicial Notice in Support of G-P and R's Answering Brief ("G-P and R's Second Request for Judicial Notice") as set forth in further detail below.

**A. Standard for Judicial Notice**

"On appeal, a court can only consider those matters that are contained in the record made by the court below and the necessary inferences that can be drawn therefrom. *Toigo v. Toigo*, 109 Nev. 350, 350, 849 P.2d 259, 259 (1993) (citing *Lindauer v. Allen*, 85 Nev. 430, 433, 456 P.2d 851, 853 (1969)); *Mack v. Est. of Mack*, 125 Nev. 80, 91,

1 206 P.3d 98, 106 (2009). Under NRS 47.150, a court must take judicial notice “if requested  
2 by a party and supplied with the necessary information.” NRS 47.150(2). Under  
3 NRS 47.130(1), “The facts subject to judicial notice are facts in issue or facts from which  
4 they may be inferred.” If a fact is judicially noticed, it must be “capable of accurate and  
5 ready determination by resort to sources whose accuracy cannot reasonably be questioned.”  
6 NRS 47.130(2)(b). Upon review of a final judgment, a court generally “. . . will not take  
7 judicial notice of records in another and different case, even though the cases are  
8 connected.” *Occhiuto v. Occhiuto*, 97 Nev. 143, 145, 625 P.2d 568, 569 (1981) (citing  
9 *Giannopoulos v. Chachas*, 50 Nev. 269, 270, 257 P.618, 618 (1927)); *Mack v. Est. of Mack*,  
10 125 Nev. 80, 91–92, 206 P.3d 98, 106 (2009).

11 **B. G-P and R’s Second Request for Judicial Notice**

12 G-P and R’s Second Request for Judicial Notice requests that this Court take judicial  
13 notice of two documents pursuant to NRS 47.150: (1) excerpts from a 2021 Annual  
14 Determination Report, prepared by the Hydrologic Review Team dated August 2021; and  
15 (2) a news article titled “Moapa Dace Numbers Tick Up Once Again” dated August 24, 2021.  
16 Neither of these items exists in the State Engineer’s Record on Appeal (“SE ROA”) and both  
17 items postdate the issuance of Order 1309 (the State Engineer’s decision under judicial  
18 review in these consolidated cases). Adam Sullivan, P.E., in his capacity as the Nevada  
19 State Engineer, Department of Conservation and Natural Resources, Division of Water  
20 Resources (hereafter “State Engineer”) opposed G-P and R’s Second Request for Judicial  
21 Notice. The State Engineer’s Opposition was joined by Las Vegas Valley Water District  
22 (“LVVWD”) and Southern Nevada Water Authority (“SNWA”).

23 G-P and R argue that judicial notice is appropriate because these two documents are  
24 posted publicly and contain information that is “capable of accurate and ready  
25 determination by resort to sources whose accuracy cannot reasonably be questioned” under  
26 NRS 47.130(2). Further, G-P and R argue that Exhibit 1, the Annual Determination  
27 Report, is posted on the Nevada Division of Water Resources website in the same area as  
28 the other SE ROA documents related to the Lower White River Flow System (“LWRFS”)

1 and is therefore relevant and pertinent to this proceeding as directly relating to the issues  
2 in this proceeding. Lastly, G-P and R argue that Exhibit 2, the Moapa dace article, is based  
3 on research and directly relates to Order 1309. G-P and R argue that Nevada’s rule  
4 regarding judicial notice is “flexible” such that its Second Request for Judicial Notice is  
5 consistent with Nevada caselaw and should be granted. *See* G-P and R’s Second Request  
6 for Judicial Notice, p. 4 (citing *Mack v. Est. of Mack*, 125 Nev. 80, 91–92, 206 P.3d 98, 106  
7 (2009)).

8 In Opposition, the State Engineer argues that this case is “in the nature of an appeal”  
9 under NRS 533.450(1), and turns on whether substantial evidence in the record supports  
10 the State Engineer’s decision. State Engineer’s Opposition, p. 2. The State Engineer  
11 further argues that G-P and R requests judicial notice of two documents that both postdate  
12 Order 1309 by over a year, and therefore these are not facts in issue subject to judicial  
13 notice under NRS 47.130(1). Lastly, the State Engineer argues that the Court should strike  
14 the portions of G-P and R’s Answering Brief that relied on this extra-record evidence that  
15 did not exist at the time the State Engineer issued Order 1309. The State Engineer  
16 incorporated by reference his prior Opposition to Request for Judicial Notice in Support of  
17 G-P and R’s Opening Brief in Support of Petition for Judicial Notice, filed in response to  
18 G-P and R’s prior Request for Judicial Notice that likewise sought judicial notice of items  
19 that postdated Order 1309.

20 The Court finds that G-P and R’s Second Request for Judicial Notice seeks judicial  
21 notice of two items that both postdate the State Engineer’s Order 1309, the subject of  
22 judicial review in this case pursuant to NRS 533.450. Because these exhibits postdate the  
23 issuance of Order 1309, they are not “facts in issue” under NRS 47.130(1). In addition,  
24 these exhibits do not meet the requirements of NRS 47.130(1) or (2). The Court notes that  
25 the newspaper article, identified as Exhibit 2, contains assertions or opinions of facts made  
26 by a third-party unrelated to this case. G-P and R cite *Mack*, arguing that “judicial notice  
27 of state court and administrative proceedings [is warranted] when a valid reason present[s]  
28 itself.” *Mack*, 125 Nev. at 91–92, 106 P.3d at 106. G-P and R argue that these exhibits

1 support their argument that data are continuing to evolve. The Court does not find  
2 G-P and R's argument persuasive that there is a valid reason to make these exhibits  
3 appropriate for judicial notice in this NRS 533.450 proceeding.

4 Therefore, these exhibits are not subject to judicial notice and the Court **DENIES**  
5 G-P and R's Second Request for Judicial Notice. The Court will not consider Exhibits 1  
6 and 2 attached to G-P and R's Second Request for Judicial Notice in its judicial review of  
7 Order 1309. Further, pursuant to NRCP 12(f)(1), the Court **GRANTS** the State Engineer's  
8 request to strike the portions of G-P and R's Answering Brief that relied on Exhibits 1  
9 and 2, and hereby strikes the portions of G-P and R's Answering Brief at page 3, line 3  
10 through line 9, and page 5, the second and third sentences of the paragraph beginning at  
11 line 4.

12 **IT IS SO ORDERED.**

Dated this 23rd day of December, 2021



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14 **91B 9AA E692 6E55**  
15 **Bita Yeager**  
16 **District Court Judge**

17  
18 Submitted by:  
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1  
2 **CSERV**

3 DISTRICT COURT  
4 CLARK COUNTY, NEVADA

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

CASE NO: A-20-816761-C

8 vs.

DEPT. NO. Department 1

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

12 **AUTOMATED CERTIFICATE OF SERVICE**

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

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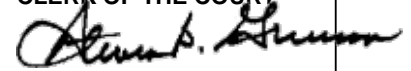
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17 *Attorneys for Respondent State Engineer*

18 **DISTRICT COURT**  
19 **CLARK COUNTY, NEVADA**

20 LAS VEGAS VALLEY WATER DISTRICT,  
21 and SOUTHERN NEVADA WATER  
22 AUTHORITY,

23 Petitioners,

24 vs.

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

And All Consolidated Cases.

Case No. A-20-816761-C  
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A-20-818069-P  
A-20-817840-P  
A-20-817876-P

**AMENDED RECORD ON APPEAL**

Adam Sullivan, P.E., State Engineer, in his capacity as the Nevada State Engineer, Department of Conservation and Natural Resources, Division of Water Resources (hereafter "State Engineer"), by and through counsel, Nevada Attorney General Aaron D. Ford, Senior Deputy Attorney General James N. Bolotin, and Deputy Attorney General Kiel B. Ireland, hereby files this Amended Record on Appeal.

This Amended is replacing Bates Nos. SE ROA 41891 through SE ROA 48624 only,

1 **in bold below**, to conform to the documents that were considered by the State Engineer.

2 ...

3 **Index to Administrative Record re: Order 1309**

4	NO.	DATE	DESCRIPTION	Bates Range SE ROA	
5	<b>Certificate of Record</b>				
6	0.	07/27/20	Certificate of Record	1	1
7	<b>Order 1309</b>				
8	1.	06/15/20	Order 1309	2	69
9	<b>Interim Order 1303</b>				
10	2.	01/11/19	Interim Order 1303	70	88
11	<b>Requested Exceptions to Interim Order 1303</b>				
12	3.	2018	Large Lot Final Map of Coyote Springs Village A	89	109
13	4.	09/07/18	Tentative Subdivision Review No. 13216-T Permit None	110	113
14	5.	09/12/18	Correspondence from Las Vegas Valley Water District (LVVWD) to Division of Water Resources (DWR) re Water Availability for Residential Subdivision Map	114	114
15	6.	2019	Water Use/License Agreement	115	124
16	7.	04/30/19	Correspondence from DWR to Dry Lake Water re Groundwater in the Apex Area and State Engineer Interim Order 1303	125	126
17	8.	05/31/19	Technical Report 053119.0	127	207
18	9.	06/13/19	Correspondence from Coyote Springs Land to DWR re Submittal pursuant to Nevada State Engineer Interim Order 1303	208	209
19	10.	06/06/19	Memo to file from State Engineer re Permit 83553	210	210
20	<b>Prehearing Filings</b>				
21	<b>All dated Documents in Chronological Order, Through and Including 09/27/19, Notice of Entry of Order Admitting Berley and Baldwin</b>				
22	11.	04/26/19	Correspondence from US Dept of the Interior	211	211
23					
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28					

**Index to Administrative Record re: Order 1309**

NO.	DATE	DESCRIPTION	Bates Range SE ROA	
		to State Engineer re Request for an Extension of Time to the Report and Rebuttal Submission Dates Pursuant to Order No. 1303		
12.	05/02/19	Correspondence from DWR to Stakeholders re Request for extension of deadlines in State Engineer Interim Order 1303	212	215
13.	05/02/19	Correspondence from Coyote Springs to State Engineer re Interim Order 1301; U.S. Fish & Wildlife Service May 2, 2019 letter	216	216
14.	05/02/09	Email re request for comments on extension of deadlines in State Engineer Interim Order 1303	217	218
15.	05/09/19	Email re response from Apex Industrial Park	219	220
16.	05/06/19	Email re 1303 extension	221	221
17.	05/08/19	Correspondence from Taggart & Taggart to State Engineer re Request for Extension of Deadlines in State Engineer Interim Order 1303	222	223
18.	07/26/19	Correspondence from Alex Flangas to State Engineer re Notice of Nevada Cogeneration Associates Nos. 1 and 2 of intent to participate in pre-hearing and hearing on LWRFS	224	224
19.	08/18/19	Email re GBWN not appearing at LWRFS hearing	225	225
20.	08/20/19	NV Energy's Motion for Extension of Time to File Reply Comments Pursuant to NRCP (6)(b)(1)(B)(ii)	226	256
21.	08/21/19	Order Granting NV Energy's Motion for Extension of Time to File Reply Comments	257	261
22.	08/23/19	Notice of Hearing	262	282
23.	08/26/19	Correspondence from DWR re Amended Notice of Hearing regarding Order 1303	283	283
24.	08/26/19	Amended Notice of Hearing	284	301
25.	08/27/19	Notice of Appearance on Behalf of Coyote Springs Investment, LLC	302	305

**Index to Administrative Record re: Order 1309**

<b>NO.</b>	<b>DATE</b>	<b>DESCRIPTION</b>	<b>Bates Range SE ROA</b>	
26.	08/28/19	Coyote Springs Investment, LLC's Request for Reconsideration and Revision of State Engineer's Notice of Hearing	306	309
27.	08/28/19	Notice of Appearance of Lincoln County Water District and Vidler Water Company, Inc.	310	314
28.	08/29/19	Email re Procedural Questions relating to Order 1303	315	318
29.	08/30/19	Notice of Appearance on Behalf of Georgia Pacific Corporation	319	321
30.	08/30/19	Motion to Associate Counsel (Georgia Pacific Corporation)	322	345
31.	09/05/19	Notice of Appearance of Counsel for The United States Department of the Interior Fish and Wildlife Service and National Park Service	346	355
32.	09/05/19	Notice of Appearance on Behalf of Moapa Valley Water District	356	358
33.	09/05/19	Notice of Appearance on Behalf of NV Energy	359	362
34.	09/06/19	Notice of Appearance for Patrick Donnelly, an agent of the Center for Biological Diversity	363	364
35.	09/06/19	Notice of Appearance of Counsel for City of North Las Vegas	365	367
36.	09/06/19	Notice of Appearance on Behalf of Muddy Valley Irrigation Company	368	370
37.	09/06/19	Notice of Appearance of Counsel for Nevada Cogeneration Associates Nos. 1 and 2	371	375
38.	09/06/19	Notice of Appearance on Behalf of 3335 Hillside LLC	376	378
39.	09/06/19	Order Denying Request for Reconsideration and Revision of State Engineer's Notice of Hearing	379	383
40.	09/06/19	Notice of Appearance on Behalf of Republic Environmental Technologies, Inc.	384	386
41.	09/06/19	Notice of Appearance (Southern Nevada Water Authority and Las Vegas Valley Water	387	391

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NO.	DATE	DESCRIPTION	Bates Range SE ROA	
		District)		
42.	09/06/19	Notice of Appearance of Counsel for Western Elite Environmental, Inc. and Bedroc Limited, LLC	392	395
43.	09/10/19	Notice of Appearance of Counsel for the Church of Jesus Christ of Latter-Day Saints	396	399
44.	09/13/19	Notice of Appearance of Therese M. Shanks, Esq. on behalf of Coyote Springs Investment, LLC	400	403
45.	09/13/19	Coyote Springs Investment, LLC's Objection to Certain Disclosed Scopes of Testimony	404	410
46.	09/13/19	Notice of Appearance on Behalf of Georgia Pacific Corporation	411	413
47.	09/13/19	Lincoln County Water District and Vidler Water Company, Inc.'s Objections to Proffered Experts and Exhibits	414	420
48.	09/13/19	Notice of Appearance (Moapa Band of Paiutes)	421	424
49.	09/23/19	Order Admitting to Practice (Beth Baldwin and Richard Berley)	425	426
50.	09/13/19	Notice of Non-Opposition to Georgia Pacific Corporation's August 30, 2019, Motion to Associate Counsel	427	431
51.	09/13/19	Southern Nevada Water Authority and Las Vegas Valley Water District's Objections to Various Parties' Proposed Evidence	432	440
52.	09/16/19	Georgia Pacific Corporation and Republic Environmental Technologies' Response to Southern Nevada Water Authority and Las Vegas Valley Water District's Objections to Various Parties Proposed Evidence	441	443
53.	09/19/19	Correspondence from Schroeder Law Offices to DWR re Western Elite Environmental, Inc. and Bedroc Limited, LLC In the Matter of the Administration and Management of the Lower White River Flow System Amendment by Deletion: Exhibit: Bedroc Ex. No. 21	444	444



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<b>NO.</b>	<b>DATE</b>	<b>DESCRIPTION</b>	<b>Bates Range SE ROA</b>	
54.	09/19/19	Motion to Associate Counsel (Moapa Band of Paiutes)	445	483
55.	09/19/19	Errata to the Exhibit 7 of Nevada Cogeneration Associates Nos. 1 & 2 (“NAC”)	484	486
56.	09/27/19	Notice of Entry of Order Admitting to Practice	487	493
<b>Addendum to Interim Order 1303 Modifying Schedule</b>				
57.	05/13/19	Addendum to Interim Order 1303	494	512
<b>Prehearing Conference Notice of Prehearing Conference</b>				
58.	07/25/19	Notice of Pre-Hearing Conference	513	518
<b>Transcript – Pre-Hearing Conference</b>				
59.	08/08/19	Transcript of Proceedings – Pre-Hearing Conference	519	552
<b>Hearing Documents Hearing Schedule</b>				
60.	09/23/19	Order 1303 Hearing Schedule Matrix	553	553
<b>LWRFS Recording Links</b>				
61.	09/23/19	LWRFS Recording Links	554	554
<b>LWRFS Scheduling Order Exhibit A Amended 10-4 with Sign-In Sheets</b>				
62.	N/A	Amended Exhibit A – Documents and Records of the Nevada State Engineer Which Administrative Notice is Taken for the Purposes of the Order 1303 Administrative Hearing	555	566
<b>Witness Qualification Order on Objections and Witnesses</b>				
63.	09/16/19	Order on Objections to Witnesses and Evidence	567	572
<b>Sign-In Sheet</b>				
64.	09/19/19	Sign-In Sheet	573	574

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<b>Witness Qualification Transcript</b>				
65.	09/19/19	Transcript of Proceedings – Hearing on Objections to Witnesses and Evidence	575	634
<b>Nevada State Engineer’s (“NSE”) Exhibits</b>				
66.	01/11/19	NSE Ex 1 – Interim Order 1303	635	653
67.	12/21/12	NSE Ex 2 – Order 1169A	654	658
68.	03/08/02	NSE Ex 3 – Order 1169	659	669
69.	04/24/90	NSE Ex 4 – Order 1026	670	672
70.	04/24/90	NSE Ex 5 – Order 1025	673	675
71.	04/24/90	NSE Ex 6 – Order 1024	676	678
72.	04/24/90	NSE Ex 7 – Order 1023	679	681
73.	11/22/89	NSE Ex 8 – Order 1018	682	686
74.	08/21/85	NSE Ex 9 – Order 905	687	691
75.	11/23/82	NSE Ex 10 – Order 803	692	697
76.	07/14/71	NSE Ex 11 – Order 392	698	698
77.	02/02/07	NSE Ex 12 – Ruling 5712	699	721
78.	04/29/09	NSE Ex 13 – Ruling 5987	722	725
79.	01/29/14	NSE Ex 14 – Ruling 6254	726	754
80.	01/29/14	NSE Ex 15 – Ruling 6255	755	785
81.	01/29/14	NSE Ex 16 – Ruling 6256	786	815
82.	01/29/14	NSE Ex 17 – Ruling 6257	816	847
83.	01/29/14	NSE Ex 18 – Ruling 6258	848	884
84.	01/29/14	NSE Ex 19 – Ruling 6259	885	905
85.	01/29/14	NSE Ex 20 – Ruling 6260	906	928

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NO.	DATE	DESCRIPTION	Bates Range SE ROA	
86.	01/29/14	NSE Ex 21 – Ruling 6261	929	948
87.	N/A	NSE Ex 22 – Hydrographic Abstracts Lower Meadow Valley Wash (Basin 205)	949	991
88.	N/A	NSE Ex 23 – Hydrographic Abstracts Kane Springs Valley (Basin 206)	992	994
89.	N/A	NSE Ex 24 – Hydrographic Abstracts Coyote Springs Valley (Basin 210)	995	1007
90.	N/A	NSE Ex 25 – Hydrographic Abstracts Black Mountains Area (Basin 215)	1008	1020
91.	N/A	NSE Ex 26 – Hydrographic Abstracts Garnet Valley (Basin 216)	1021	1036
92.	N/A	NSE Ex 27 – Hydrographic Abstracts Hidden Valley (Basin 217)	1037	1039
93.	N/A	NSE Ex 28 – Hydrographic Abstract California Wash (Basin 218)	1040	1045
94.	N/A	NSE Ex 29 – Hydrographic Abstract Muddy River Springs Area (Basin 219)	1046	1061
95.	N/A	NSE Ex 30 – Hydrographic Area Summary Lower Meadow Valley Wash (Basin 205)	1062	1062
96.	N/A	NSE Ex 31 – Hydrographic Area Summary Kane Springs Valley (Basin 206)	1063	1063
97.	N/A	NSE Ex 32 – Hydrographic Area Summary Coyote Spring Valley (Basin 210)	1064	1064
98.	N/A	NSE Ex 33 – Hydrographic Area Summary Black Mountains Area (Basin 215)	1065	1065
99.	N/A	NSE Ex 34 – Hydrographic Area Summary Garnet Valley (Basin 216)	1066	1066
100.	N/A	NSE Ex 35 – Hydrographic Area Summary Hidden Valley (Basin 217)	1067	1067
101.	N/A	NSE Ex 36 – Hydrographic Area Summary California Wash (Basin 218)	1068	1068
102.	N/A	NSE Ex 37 – Hydrographic Area Summary Muddy River Springs Area (Basin 219)	1069	1069

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NO.	DATE	DESCRIPTION	Bates Range SE ROA	
103.	2005	NSE Ex 38 – Groundwater Pumpage Inventory Coyote Spring Valley, No. 210 2005	1070	1070
104.	2006	NSE Ex 39 – Groundwater Pumpage Inventory Coyote Springs Valley, No. 210 2006	1071	1072
105.	2007	NSE Ex 40 – Groundwater Pumpage Inventory Coyote Springs Valley, No. 210 2007	1073	1074
106.	2008	NSE Ex 41 – Groundwater Pumpage Inventory Coyote Springs Valley, No. 210 2008	1075	1076
107.	2009	NSE Ex 42 – Groundwater Pumpage Inventory Coyote Springs Valley, No. 210 2009	1077	1078
108.	2010	NSE Ex 43 – Groundwater Pumpage Inventory Coyote Springs Valley, No. 210 2010	1079	1081
109.	2011	NSE Ex 44 – Groundwater Pumpage Inventory Coyote Springs Valley, No. 210 2011	1082	1084
110.	2012	NSE Ex 45 – Groundwater Pumpage Inventory Coyote Springs Valley, No. 210 2012	1085	1087
111.	2013	NSE Ex 46 – Groundwater Pumpage Inventory Coyote Springs Valley, No. 210 2013	1088	1108
112.	2014	NSE Ex 47 – Groundwater Pumpage Inventory Coyote Springs Valley, No. 210 2014	1109	1128
113.	2015	NSE Ex 48 – Groundwater Pumpage Inventory Coyote Springs Valley, No. 210 2015	1129	1147
114.	2016	NSE Ex 49 – Groundwater Pumpage Inventory Coyote Springs Valley, No. 210 2016	1148	1165

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<b>NO.</b>	<b>DATE</b>	<b>DESCRIPTION</b>	<b>Bates Range SE ROA</b>	
115.	2017	NSE Ex 50 – Groundwater Pumpage Inventory Coyote Springs Valley, No. 210 2017	1166	1183
116.	2001	NSE Ex 51 – Groundwater Pumpage Inventory Black Mountains Area, No. 215 2001	1184	1185
117.	2002	NSE Ex 52 – Groundwater Pumpage Inventory Black Mountains Area, No. 215 2002	1186	1188
118.	2003	NSE Ex 53 – Groundwater Pumpage Inventory Black Mountains Area, No. 215 2003	1189	1191
119.	2004	NSE Ex 54 – Groundwater Pumpage Inventory Black Mountains Area, No. 215 2004	1192	1193
120.	2005	NSE Ex 55 – Groundwater Pumpage Inventory Black Mountains Area, No. 215 2005	1194	1195
121.	2006	NSE Ex 56 – Groundwater Pumpage Inventory Black Mountains Area, No. 215 2006	1196	1198
122.	2007	NSE Ex 57 – Groundwater Pumpage Inventory Black Mountains Area, No. 215 2007	1199	1201
123.	2008	NSE Ex 58 – Groundwater Pumpage Inventory Black Mountains Area, No. 215 2008	1202	1204
124.	2009	NSE Ex 59 – Groundwater Pumpage Inventory Black Mountains Area, No. 215 2009	1205	1207
125.	2010	NSE Ex 60 – Groundwater Pumpage Inventory Black Mountains Area, No. 215 2010	1208	1210
126.	2011	NSE Ex 61 – Groundwater Pumpage Inventory Black Mountains Area, No. 215 2011	1211	1213

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NO.	DATE	DESCRIPTION	Bates Range SE ROA	
127.	2012	NSE Ex 62 – Groundwater Pumpage Inventory Black Mountains Area, No. 215 2012	1214	1216
128.	2013	NSE Ex 63 – Groundwater Pumpage Inventory Black Mountains Area, No. 215 2013	1217	1232
129.	2014	NSE Ex 64 – Groundwater Pumpage Inventory Black Mountains Area, No. 215 2014	1233	1248
130.	2015	NSE Ex 65 – Groundwater Pumpage Inventory Black Mountains Area, No. 215 2015	1249	1264
131.	2016	NSE Ex 66 – Groundwater Pumpage Inventory Black Mountains Area, No. 215 2016	1265	1279
132.	2017	NSE Ex 67 – Groundwater Pumpage Inventory Black Mountains Area, No. 215 2017	1280	1294
133.	2001	NSE Ex 68 – Groundwater Pumpage Inventory Garnet Valley, No. 216 2001	1295	1296
134.	2002	NSE Ex 69 – Groundwater Pumpage Inventory Garnet Valley, No. 216 2002	1297	1299
135.	2003	NSE Ex 70 – Groundwater Pumpage Inventory Garnet Valley, No. 216 2003	1300	1302
136.	2004	NSE Ex 71 – Groundwater Pumpage Inventory Garnet Valley, No. 216 2004	1303	1304
137.	2005	NSE Ex 72 – Groundwater Pumpage Inventory Garnet Valley, No. 216 2005	1305	1306
138.	2006	NSE Ex 73 – Groundwater Pumpage Inventory Garnet Valley, No. 216 2006	1307	1309
139.	2007	NSE Ex 74 – Groundwater Pumpage Inventory Garnet Valley, No. 216 2007	1310	1312
140.	2008	NSE Ex 75 – Groundwater Pumpage Inventory Garnet Valley, No. 216 2008	1313	1315

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NO.	DATE	DESCRIPTION	Bates Range SE ROA	
141.	2009	NSE Ex 76 – Groundwater Pumpage Inventory Garnet Valley, No. 216 2009	1316	1318
142.	2010	NSE Ex 77 – Groundwater Pumpage Inventory Garnet Valley, No. 216 2010	1319	1322
143.	2011	NSE Ex 78 – Groundwater Pumpage Inventory Garnet Valley, No. 216 2011	1323	1326
144.	2012	NSE Ex 79 – Groundwater Pumpage Inventory Garnet Valley, No. 216 2012	1327	1330
145.	2013	NSE Ex 80 – Groundwater Pumpage Inventory Garnet Valley, No. 216 2013	1331	1347
146.	2014	NSE Ex 81 – Groundwater Pumpage Inventory Garnet Valley, No. 216 2014	1348	1364
147.	2015	NSE Ex 82 – Groundwater Pumpage Inventory Garnet Valley, No. 216 2015	1365	1381
148.	2016	NSE Ex 83 – Groundwater Pumpage Inventory Garnet Valley, No. 216 2016	1382	1396
149.	2017	NSE Ex 84 – Groundwater Pumpage Inventory Garnet Valley, No. 216 2017	1397	1412
150.	2016	NSE Ex 85 – Groundwater Pumpage Inventory California Wash, No. 218 2016	1413	1426
151.	2017	NSE Ex 86 – Groundwater Pumpage Inventory California Wash, No. 218 2017	1427	1440
152.	08/17/16	NSE Ex 87 – Groundwater Pumpage Inventory Muddy River Springs Area (Upper Moapa Valley) 2016	1441	1470
153.	09/22/17	NSE Ex 88 –Groundwater Pumpage Inventory Muddy River Springs Area (Upper Moapa Valley) 2017	1471	1499
154.	N/A	NSE Ex 89 – Water Level Data 205 S14 E66 15CAD1 Lower Meadow Valley Wash	1500	1502
155.	N/A	NSE Ex 90 – Water Level Data 205 S14 E66 22DCAD1 Lower Meadow Valley Wash	1503	1507

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<b>NO.</b>	<b>DATE</b>	<b>DESCRIPTION</b>	<b>Bates Range SE ROA</b>	
156.	N/A	NSE Ex 91 – Water Level Data 205 S14 E66 35CABA1 Lower Meadow Valley Wash	1508	1512
157.	N/A	NSE Ex 92 – Water Level Data 205 S12 E66 12BBBD1 Lower Meadow Valley Wash	1513	1516
158.	N/A	NSE Ex 93 – Water Level Data 205 S12 E66 12BBBD2 Lower Meadow Valley Wash	1517	1520
159.	N/A	NSE Ex 94 – Water Level Data 205 S12 E66 12BBBD3 Lower Meadow Valley Wash	1521	1523
160.	N/A	NSE Ex 95 – Water Level Data 205 S14 E66 04DB1 Lower Meadow Valley Wash	1524	1525
161.	N/A	NSE Ex 96 – Water Level Data 205 S14 E66 22DC1 Lower Meadow Valley Wash	1526	1528
162.	N/A	NSE Ex 97 – Water Level Data 205 S14 E66 26CD1 Lower Meadow Valley Wash	1529	1531
163.	N/A	NSE Ex 98 – Water Level Data 205 S14 E66 26CDAB1 Lower Meadow Valley Wash	1532	1536
164.	N/A	NSE Ex 99 – Water Level Data 205 S14 E66 26CDBA1 Lower Meadow Valley Wash	1537	1541
165.	N/A	NSE Ex 100 – Water Level Data 205 S14 E66 26DDCD1 Lower Meadow Valley Wash	1542	1546
166.	N/A	NSE Ex 101 – Water Level Data 205 S14 E66 34ACDA1 Lower Meadow Valley Wash	1547	1551
167.	N/A	NSE Ex 102 – Water Level Data 205 S14 E66 35BDAB1 Lower Meadow Valley Wash	1552	1556
168.	N/A	NSE Ex 103 – Water Level Data 205 S14 E66 35CA1 Lower Meadow Valley Wash	1557	1562
169.	N/A	NSE Ex 104 – Water Level Data 205 S14 E66 CABA2 Lower Meadow Valley Wash	1563	1567
170.	N/A	NSE Ex 105 – Water Level Data 205 S14 E66 35CACCC1 Lower Meadow Valley Wash	1568	1572
171.	N/A	NSE Ex 106 – Water Level Data 205 S14 E66 35DACC1 Lower Meadow Valley Wash	1573	1577
172.	N/A	NSE Ex 107 – Water Level Data 205 S14 E66	1578	1580



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NO.	DATE	DESCRIPTION	Bates Range SE ROA	
		35DD 1 Lower Meadow Valley Wash		
173.	N/A	NSE Ex 108 – Water Level Data 206 S11 E64 06CAC1 Kane Springs	1581	1585
174.	N/A	NSE Ex 109 – Water Level Data 210 S10 E62 25ACAD1 Coyote Spring Valley	1586	1678
175.	N/A	NSE Ex 110 – Water Level Data 210 S10 E62 25CBCC1 Coyote Spring Valley	1679	1684
176.	N/A	NSE Ex 111 – Water Level Data 210 S11 E62 13BDDC1 Coyote Spring Valley	1685	1686
177.	N/A	NSE Ex 112 – Water Level Data 210 S11 E62 24BA2 Coyote Spring Valley	1687	1689
178.	N/A	NSE Ex 113 – Water Level Data 210 S11 E62 24BD1 Coyote Spring Valley	1670	1691
179.	N/A	NSE Ex 114 – Water Level Data 210 S11 E62 24DB1 Coyote Spring Valley	1692	1693
180.	N/A	NSE Ex 115 – Water Level Data 210 S11 E63 13CBAB1 Coyote Spring Valley	1694	1745
181.	N/A	NSE Ex 116 – Water Level Data 210 S11 E63 19ABAA1 Coyote Spring Valley	1746	1802
182.	N/A	NSE Ex 117 – Water Level Data 210 S11 E63 21ABCA1 Coyote Spring Valley	1803	1855
183.	N/A	NSE Ex 118 – Water Level Data 210 S12 E63 29ADCC1 Coyote Spring Valley	1856	1861
184.	N/A	NSE Ex 119 – Water Level Data 210 S12 E63 29DABC1 Coyote Spring Valley	1862	1937
185.	N/A	NSE Ex 120 – Water Level Data 210 S13 E63 05ABCC1 Coyote Spring Valley	1938	1950
186.	N/A	NSE Ex 121 – Water Level Data 210 S13 E63 10DCCA1 Coyote Spring Valley	1951	1991
187.	N/A	NSE Ex 122 – Water Level Data 210 S13 E63 11BACD1 Coyote Spring Valley	1992	1996
188.	N/A	NSE Ex 123 – Water Level Data 210 S13 E63	1997	2105

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NO.	DATE	DESCRIPTION	Bates Range SE ROA	
		11BCCC1 Coyote Spring Valley		
189.	N/A	NSE Ex 124 – Water Level Data 210 S13 E63 22DCAC1 Coyote Spring Valley	2106	2125
190.	N/A	NSE Ex 125 – Water Level Data 210 S13 E63 23BAAB1 Coyote Spring Valley	2126	2173
191.	N/A	NSE Ex 126 – Water Level Data 210 S13 E63 23DDDC1 Coyote Springs Valley	2174	2185
192.	N/A	NSE Ex 127 – Water Level Data 210 S13 E63 25BDBB1 Coyote Spring Valley	2186	2293
193.	N/A	NSE Ex 128 – Water Level Data 210 S13 E63 26AAAA1 Coyote Spring Valley	2294	2372
194.	N/A	NSE Ex 129 – Water Level Data 210 S13 E63 26AABD1 Coyote Spring Valley	2373	2404
195.	N/A	NSE Ex 130 – Water Level Data 210 S13 E64 31DAAD1 Coyote Spring Valley	2405	2411
196.	N/A	NSE Ex 131 – Water Level Data 210 S14 E62 01ADBD1 Coyote Spring Valley	2412	2487
197.	N/A	NSE Ex 132 – Water Level Data 210 S14 E63 28ACDC1 Coyote Spring Valley	2488	2492
198.	N/A	NSE Ex 133 – Water Level Data 210 S15 E63 03BBCC1 Coyote Spring Valley	2493	2573
199.	N/A	NSE Ex 134 – Water Level Data 215 S19 E63 13AADD1 Black Mountains Area	2574	2577
200.	N/A	NSE Ex 135 – Water Level Data 215 S19 E63 13ABCB1 Black Mountains Area	2578	2605
201.	N/A	NSE Ex 136 – Water Level Data 215 S19 E63 13DAAB1 Black Mountains Area	2606	2607
202.	N/A	NSE Ex 137 – Water Level Data 215 S19 E63 13DACA1 Black Mountains Area	2608	2609
203.	N/A	NSE Ex 138 – Water Level Data 215 S19 E63 13DCAA1 Black Mountains Area	2610	2616
204.	N/A	NSE Ex 139 – Water Level Data 215 S20 E65	2617	2619

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NO.	DATE	DESCRIPTION	Bates Range SE ROA	
		08CDBA1 Black Mountains Area		
205.	N/A	NSE Ex 140 – Water Level Data 215 S20 E65 08DCAA1 Black Mountains Area	2620	2622
206.	N/A	NSE Ex 141 – Water Level Data 216 S16 E64 19DCDB1 Garnet Valley	2623	2683
207.	N/A	NSE Ex 142 – Water Level Data 216 S17 E63 32AABA1 Garnet Valley	2684	2780
208.	N/A	NSE Ex 143 – Water Level Data 216 S17 E63 32CCCB1 Garnet Valley	2781	2782
209.	N/A	NSE Ex 144 – Water Level Data 216 S17 E63 333CBCB1 Garnet Valley	2783	2784
210.	N/A	NSE Ex 145 – Water Level Data 216 S17 E64 09DDCD1 Garnet Valley	2785	2805
211.	N/A	NSE Ex 146 – Water Level Data 216 S17 E64 10CBCC1 Garnet Valley	2806	2819
212.	N/A	NSE Ex 147 – Water Level Data 216 S17 E64 21CBBD1 Garnet Valley	2820	2828
213.	N/A	NSE Ex 148 – Water Level Data 216 S17 E64 21CCAB1 Garnet Valley	2829	2832
214.	N/A	NSE Ex 149 – Water Level Data 216 S18 E63 04CBBA1 Garnet Valley	2833	2923
215.	N/A	NSE Ex 150 – Water Level Data 216 S18 E63 05AADB1 Garnet Valley	2924	2929
216.	N/A	NSE Ex 151 – Water Level Data 216 S18 E63 05DBCA1 Garnet Valley	2930	2934
217.	N/A	NSE Ex 152 – Water Level Data 216 S18 E63 05DBCD1 Garnet Valley	2935	2939
218.	N/A	NSE Ex 153 – Water Level Data 216 S18 E63 15AACC1 Garnet Valley	2940	2945
219.	N/A	NSE Ex 154 – Water Level Data 216 S18 E63 15AACD1 Garnet Valley	2946	2954
220.	N/A	NSE Ex 155 – Water Level Data 216 S18 E63	2955	2978

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NO.	DATE	DESCRIPTION	Bates Range SE ROA	
		27ACAD1 Garnet Valley		
221.	N/A	NSE Ex 156 – Water Level Data 216 S18 E64 07DDCC1 Garnet Valley	2979	2980
222.	N/A	NSE Ex 157 – Water Level Data 216 S18 E64 18ACDB1 Garnet Valley	2981	2983
223.	N/A	NSE Ex 158 – Water Level Data 216 S18 E64 20BABA1 Garnet Valley	2984	2986
224.	N/A	NSE Ex 159 – Water Level Data 218 S15 E65 09DDDD1 Hidden Valley	2987	3052
225.	N/A	NSE Ex 160 – Water Level Data 217 S16 E63 09DDAB1 Hidden Valley	3053	3055
226.	N/A	NSE Ex 161 – Water Level Data 218 S15 E66 31DACA1 California Wash	3056	3115
227.	N/A	NSE Ex 162 – Water Level Data 218 S16 E64 02ABCD1 California Wash	3116	3116
228.	N/A	NSE Ex 163 – Water Level Data 218 S16 E64 15AAAA1 California Wash	3117	3166
229.	N/A	NSE Ex 164 – Water Level Data 218 S16 E64 15AADD1 California Wash	3167	3187
230.	N/A	NSE Ex 165 – Water Level Data 218 S16 E64 15ADAA1 California Wash	3188	3252
231.	N/A	NSE Ex 166 – Water Level Data 218 S16 E64 34CDBC1 California Wash	3253	3305
232.	N/A	NSE Ex 167 – Water Level Data 219 S13 E64 35DCAD1 Muddy River Springs Area	3306	3399
233.	N/A	NSE Ex 168 – Water Level Data 219 S13HE64 33DBBC1 Muddy River Springs Area	3400	3472
234.	N/A	NSE Ex 169 – Water Level Data 219 S14 E65 07ADDA1 Muddy River Springs Area	3473	3528
235.	N/A	NSE Ex 170 – Water Level Data 219 S14 E65 07ADDA2 Muddy River Springs Area	3529	3539

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NO.	DATE	DESCRIPTION	Bates Range SE ROA	
236.	N/A	NSE Ex 171 – Water Level Data 219 S14 E65 08AB1 Muddy River Springs Area	3540	3540
237.	N/A	NSE Ex 172 – Water Level Data 219 S14 E65 08AB2 Muddy River Springs Area	3541	3570
238.	N/A	NSE Ex 173 – Water Level Data 219 S14 E65 08ABBD1 Muddy River Springs Area	3571	3574
239.	N/A	NSE Ex 174 – Water Level Data 219 S14 E65 08AC1 Muddy River Springs Area	3575	3576
240.	N/A	NSE Ex 175 – Water Level Data 219 S14 E65 08AC2 Muddy River Springs Area	3577	3629
241.	N/A	NSE Ex 176 – Water Level Data 219 S14 E65 08ADBB1 Muddy River Springs Area	3630	3632
242.	N/A	NSE Ex 177 – Water Level Data 219 S14 E65 08BD1 Muddy River Springs Area	3633	3678
243.	N/A	NSE Ex 178 – Water Level Data 219 S14 E65 08BDBD1 Muddy River Springs Area	3679	3735
244.	N/A	NSE Ex 179 – Water Level Data 219 S14 E65 08BDCC1 Muddy River Springs Area	3736	3740
245.	N/A	NSE Ex 180 – Water Level Data 219 S14 E65 08DB1 Muddy River Springs Area	3741	3749
246.	N/A	NSE Ex 181 – Water Level Data 219 S14 E65 08DB2 Muddy River Springs Area	3750	3750
247.	N/A	NSE Ex 182 – Water Level Data 219 S14 E65 08DD1 Muddy River Springs Area	3751	3759
248.	N/A	NSE Ex 183 – Water Level Data 219 S14 E65 09CA1 Muddy River Springs Area	3760	3813
249.	N/A	NSE Ex 184 – Water Level Data 219 S14 E65 09CBCC1 Muddy River Springs Area	3814	3818
250.	N/A	NSE Ex 185 – Water Level Data 219 S14 E65 09CC1 Muddy River Springs Area	3819	3826
251.	N/A	NSE Ex 186 – Water Level Data 219 S14 E65 09CCBC1 Muddy River Springs Area	3827	3831
252.	N/A	NSE Ex 187 – Water Level Data 219 S14 E65	3832	3836

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NO.	DATE	DESCRIPTION	Bates Range SE ROA	
		09DC1 Muddy River Springs Area		
253.	N/A	NSE Ex 188 – Water Level Data 219 S14 E65 09DD1 Muddy River Springs Area	3837	3842
254.	N/A	NSE Ex 189 – Water Level Data 219 S14 E65 14CD1 Muddy River Springs Area	3843	3855
255.	N/A	NSE Ex 190 – Water Level Data 219 S14 E65 14CDBB1 Muddy River Springs Area	3856	3856
256.	N/A	NSE Ex 191 – Water Level Data 219 S14 E65 15AC1 Muddy River Springs Area	3857	3864
257.	N/A	NSE Ex 192 – Water Level Data 219 S14 E65 15BBCA1 Muddy River Springs Area	3865	3871
258.	N/A	NSE Ex 193 – Water Level Data 219 S14 E65 16AACD1 Muddy River Springs Area	3872	3875
259.	N/A	NSE Ex 194 – Water Level Data 219 S14 E65 21ACAA1 Muddy River Springs Area	3876	3941
260.	N/A	NSE Ex 195 – Water Level Data 219 S14 E65 22AA1 Muddy River Springs Area	3942	3942
261.	N/A	NSE Ex 196 – Water Level Data 219 S14 E65 22AABB1 Muddy River Springs Area	3943	3981
262.	N/A	NSE Ex 197 – Water Level Data 219 S14 E65 22AABB2 Muddy River Springs Area	3982	3989
263.	N/A	NSE Ex 198 – Water Level Data 219 S14 E65 23AB1 Muddy River Springs Area	3990	3995
264.	N/A	NSE Ex 199 – Water Level Data 219 S14 E65 23BB1 Muddy River Springs Area	3996	4005
265.	N/A	NSE Ex 200 – Water Level Data 219 S14 E65 23BB2 Muddy River Springs Area	4006	4010
266.	N/A	NSE Ex 201 – Water Level Data 219 S14 E65 23BB3 Muddy River Springs Area	4011	4017
267.	N/A	NSE Ex 202 – Water Level Data 219 S14 E65 23BBBB1 Muddy River Springs Area	4018	4024
268.	N/A	NSE Ex 203 – Water Level Data 219 S14 E65	4025	4027

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NO.	DATE	DESCRIPTION	Bates Range SE ROA	
		23BC1 Muddy River Springs Area		
269.	N/A	NSE Ex 204 – Water Level Data 219 S14 E66 35DD1 Muddy River Springs Area	4028	4029
270.	N/A	NSE Ex 205 – Nevada Climate Divisional 3, 4 and PRISM Precipitation Data 1985–2012	4030	4049
271.	N/A	NSE Ex 206 – USGS 09415900 Muddy Springs LDS Moapa NV (all data)	4050	4235
272.	N/A	NSE Ex 207 – USGS 09415908 Pederson E. Springs Moapa 2002–2012	4236	4353
273.	N/A	NSE Ex 208 – USGS 09415910 Pederson Springs Moapa 1985–2013	4354	4569
274.	N/A	NSE Ex 209 – USGS 09415920 Warm Springs West 1985–2012	4570	4807
275.	N/A	NSE Ex 210 – USGS 09415927 Warm Springs Confluence at Iverson Flume 2001–10	4808	4911
276.	N/A	NSE Ex 211 – USGS 09416000 Muddy River Moapa 1914–2013	1912	5476
277.	N/A	NSE Ex 212 – USGS Partial Muddy River Springs 11, 12, 13, 19, 15, 16	5477	5588
278.	N/A	NSE Ex 213 – All Order 1169 Water Level Data	5589	7787
279.	N/A	NES Ex 214 – Baldwin Jones Monthly Data 2000–2019	7788	7798
280.	N/A	NSE Ex 215 – Moapa Valley Water District Data Baldwin Jones Daily/Monthly 2010–2012	7799	7854
281.	N/A	NSE Ex 216 – Order 1169 EH4 Data NDWR Dec. 2012	7855	7937
282.	N/A	NSE Ex 217 – Order 1169 Daily Pumpage 2010–2013	7938	8057
283.	N/A	NSE Ex 218 – Order 1169 Monthly Pumpage Data 2000–2012	8058	8104
284.	N/A	NSE Ex 219 – Order 1169 Monthly Pumpage	8105	8176

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		Data 2000–2019		
285.	N/A	NSE Ex 220 – Intentionally Omitted	8177	8177
286.	N/A	NSE Ex 221 – Southern Nevada Water Authority Shallow Monitor Wells Muddy River Springs Area Periodic Measurements 2009–2012	8178	8207
287.	N/A	NSE Ex 222 – Stricken	8208	8208
288.	N/A	NSE Ex 223 – Order 1169 Nevada State Engineer Monitoring Well Site ID and Locations	8209	8214
289.	N/A	NSE Ex 224 – Lower White River Flow System Water Rights by Priority	8215	8227
290.	09/21/16	NSE Ex 225 – 2016 Hydrologic Review Team Annual Determination Report with Appendices	8228	8394
291.	2017	NSE Ex 226 – 2017 Hydrologic Review Team Annual Determination Report with Appendices	8395	8510
292.	N/A	NSE Ex 227 – Lower White River Flow System Water Rights by Priority	8511	8513
293.	08/07/18	NSE Ex 228 – 2018 Hydrologic Review Team Annual Determination Report and Appended Moapa Valley Water District and Moapa Band of Paiutes Reports	8514	8673
294.	2017	NSE Ex 229 – 2016 Southern Nevada Water Authority Muddy River Intentionally Created Surplus Certification Report	8674	8927
295.	11/14/18	NSE Ex 230 – 2017 Southern Nevada Water Authority Muddy River Intentionally Created Surplus Certification Report	8928	9198
296.	2017	NSE Ex 231 – State of Nevada, Nevada Water Resources Water Planning Report No. 3, Water for Nevada, October 1971	9199	9295



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NO.	DATE	DESCRIPTION	Bates Range SE ROA	
297.	1964	NSE Ex 232 – State of Nevada, Department of Conservation and Natural Resources, Ground-Water Resources – Reconnaissance Series Report 25: Ground-Water Appraisal of Coyote Spring and Kane Spring Valleys and Muddy River Springs Area, Lincoln and Clark Counties, Nevada, by Thomas E. Eakin February 1964	9296	9347
298.	1968	NSE Ex 233 – State of Nevada, Department of Conservation and Natural Resources, Ground-Water Resources – Reconnaissance Series Report 50: Water-Resources Appraisal of the Lower Moapa-Lake Mead Area, Clark County, Nevada, by F. Eugene Rush, December 1968	9348	9422
299.	1978	NSE Ex 234 – State of Nevada, Department of Conservation and Natural Resources, Division of Water Resources, Nevada Water Resources-Informational, Nevada Streamflow Characteristics, October 1978	9423	9896
300.	1966	NSE Ex 235 – State of Nevada, Department of Conservation and Natural Resources, Water Resources Bulletin No. 33, A Regional Interbasin Ground-Water System in the White River Area, Southeastern Nevada, by Thomas E. Eakin 1966	9897	9920
301.	04/20/06	NSE Ex 236 – 2006 Memorandum of Agreement between the Southern Nevada Water Authority, United States Fish and Wildlife Service, Coyote Springs Investment LLC, Moapa Band of Paiute Indians and Moapa Valley Water District	9921	9946
302.	07/12/01	NSE Ex 237 – 2001 Stipulation for Dismissal of Protests between Las Vegas Valley Water District, Southern Nevada Water Authority and Federal Bureaus	9947	9966
303.	04/20/06	NSE Ex 238 – Southern Nevada Water Authority Agenda Item Re: Memorandum of Agreement, Water Supply Agreement and Back-Up Water Rights Agreement	9967	9970
304.	04/18/06	NSE Ex 239 – Las Vegas Valley Water	9971	9971

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		District Board of Directors Agenda Item Re: Water Supply Agreement and Back-Up Water Rights Agreement		
305.	04/13/06	NSE Ex 240 – Letter from Nevada Department of Conservation and Natural Resources Re: Supporting Water Settlement Agreement	9972	9972
306.	04/20/06	NSE Ex 241 – Back-Up Water Rights Agreement Between Southern Nevada Water Authority, Moapa Valley Water District, Moapa Valley Irrigation Company and Moapa Band of Paiute Indians	9973	9984
307.	04/20/06	NSE Ex 242 – Surface Water Lease Between Moapa Valley Irrigation Company and Moapa Band of Paiute Indians	9985	10076
308.	04/20/06	NSE Ex 243 – Water Rights Deed and Indenture Between Las Vegas Valley Water District and Moapa Band of Paiute Indians	10077	10088
309.	N/A	NSE Ex 244 – 2006 Memorandum of Agreement Trigger Levels agreed to by the Southern Nevada Water Authority, Moapa Valley Water District, Coyote Springs Investments LLC and Moapa Band of Paiute Indians	10089	10089
310.	N/A	NSE Ex 245 – Southern Nevada Water Authority Order 1169 Report	10090	10370
311.	06/25/13	NSE Ex 246 – Great Basin Water Network Order 1169 Report	10371	10398
312.	06/14/13	NSE Ex 247 – Coyote Springs Investments, LLC Order 1169 Report	10399	10401
313.	06/27/13	NSE Ex 248 – Center for Biological Diversity Order 1169 Report	10402	10429
314.	2012	NSE Ex 249 – Moapa Valley Water District Order 1169 Report	10430	10478
315.	06/21/13	NSE Ex 250 – Moapa Valley Water District Basin 220 Well Site Analysis	10479	10485
316.	06/24/13	NSE Ex 251 – Moapa Valley Water District Evaluation of MX-5 Pumping Test on Springs	10486	10488

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		and Wells in the Muddy Springs Area		
317.	06/28/13	NSE Ex 252 – Moapa Band of Paiute Indians Order 1169 Report	10489	10566
318.	2001	NSE Ex 253 – Hydrogeologic and Groundwater Modeling Analysis for the Moapa Paiute Energy Center by Mifflin and Associates	10567	10790
319.	1989	NSE Ex 254 – PowerPoint Presentation Re: Lewis Field Production Effects on Groundwater Temperatures	10791	10880
320.	06/27/13	NSE Ex 255 – Cover Letter Federal Bureaus Order 1169 Report	10881	10882
321.	06/28/13	NSE Ex 256 – Federal Bureaus Order 1169 Report	10883	10974
322.	06/28/13	NSE Ex 257 – Federal Bureaus Order 1169 Report Appendix A	10975	10994
323.	2006	NSE Ex 258 – Federal Bureaus Order 1169 Report Selected References: Water-Surface Elevations, Discharge, and Water-Quality Data for Selected Sites in the Warm Springs Area near Moapa, Nevada, Beck et. al., 2006	10995	11234
324.	2001	NSE Ex 259 – Federal Bureaus Order 1169 Report Selected References: Hydraulic-Property Estimates for Use with a Transient Ground-Water Flow Model for the Death Valley Regional Ground-Water Flow System, Nevada and California, Belcher et. al., 2001	11235	11267
325.	2009	NSE Ex 260 – Federal Bureaus Order 1169 Report Selected References: Ground Water Development – The Time to Full Capture Problem, Bredehoeft and Durbin 2009	11268	11276
326.	2007	NSE Ex 261 – Federal Bureaus Order 1169 Report Selected References: It Is the Discharge, Bredehoeft, 2007	11277	11277
327.	2002	NSE Ex 262 – Federal Bureaus Order 1169 Report Selected References: Basic Principles and Ecological Consequences of Altered Flow Regimes for Aquatic Biodiversity, Bunn &	11278	11293

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NO.	DATE	DESCRIPTION	Bates Range SE ROA	
		Arthington, 2002		
328.	2012	NSE Ex 263 Federal Bureaus Order 1169 Report Selected References: Extinction Rates in North American Freshwater Fishes, 1900–2010, Burkhead, 2012	11294	11305
329.	2010	NSE Ex 264 – Federal Bureaus Order 1169 Report Selected References: The Disconnect Between Restoration Goals and Practices: A Case Study of Watershed Restoration in the Russian River Basin, California, Christian-Smith and Merenlender, 2010	11306	11314
330.	2008	NSE Ex 265 – Federal Bureaus Order 1169 Report Selected References: Quantifying Ground-Water and Surface-Water Discharge from Evapotranspiration Processes in 12 Hydrographic Areas of the Colorado Regional Ground-Water Flow System, Nevada, Utah, and Arizona, Demeo et. al., 2008	11315	11348
331.	1966	NSE Ex 266 – Federal Bureaus Order 1169 Report Selected References: A Regional Interbasin Groundwater System in the White River Area, Southeastern Nevada, Eakin, 1966	11349	11359
332.	2013	NSE Ex 267 – Federal Bureaus Order 1169 Report Selected References: Detecting Drawdowns Masked by environmental Stresses with Water-Level Models, Garcia et. al., 2013	11360	11370
333.	2012	NSE Ex 268 – Federal Bureaus Order 1169 Report Selected References: Advanced Methods for Modeling Water-Levels and Estimating Drawdowns with Series SEE, and Excel Add-In, Halford et. al., 2012	11371	11412
334.	2013	NSE Ex 269 – Federal Bureaus Order 1169 Report Selected References: An Ecohydraulic Model to Identify and Monitor Moapa Dace Habitat, Hatten et. al., 2013	11413	11424
335.	2005	NSE Ex 270 – Federal Bureaus Order 1169 Report Selected References: The Myths of Restoration Ecology, Hilderbrand et. al., 2005	11425	11435

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NO.	DATE	DESCRIPTION	Bates Range SE ROA	
336.	06/04/13	NSE Ex 271 – Federal Bureaus Order 1169 Report Selected References: Technical Memo Re: Analysis of Evapotranspiration for the Muddy River Springs Area, Huntington et. al., 2013	11436	11486
337.	2006	NSE Ex 272 – Federal Bureaus Order 1169 Report Selected References: The AEM and Regional Carbonate Aquifer Modeling, Johnson and Mifflin, 2006	11487	11497
338.	2008	NSE Ex 273 – Federal Bureaus Order 1169 Report Selected References: Evaluating Climate Variability and Pumping Effects in Statistical Analyses, Mayer and Congdon, 2008	11498	11513
339.	1983	NSE Ex 274 – Federal Bureaus Order 1169 Report Selected References: Vanishing Fishes of North America, Ono et. al., 1983	11514	11519
340.	1992	NSE Ex 275 – Federal Bureaus Order 1169 Report Selected References: Life History, Abundance, and Distribution of Moapa Dace, Scopettone et. al., 1992	11520	11531
341.	2007	NSE Ex 276 – Federal Bureaus Order 1169 Report Selected References: Geology of White Pine and Lincoln Counties and Adjacent Areas, Nevada and Utah: The Geologic Framework of Regional Groundwater Flow Systems, Southern Nevada Water Authority, 2007	11532	11688
342.	2007	NSE Ex 277 – Federal Bureaus Order 1169 Report Selected References: Water-Resources Assessment and Hydrogeologic Report for Gave, Dry Lake, and Delamar Valleys, Southern Nevada Water Authority, 2007	11689	12040
343.	2009	NSE Ex 278 – Federal Bureaus Order 1169 Report Selected References: Hydrologic Data Analysis Report for Test Well 184W105 in Spring Valley Hydrographic Area 184, Southern Nevada Water Authority, 2009	12041	12121
344.	2011	NSE Ex 279 – Federal Bureaus Order 1169 Report Selected References: Warm Springs	12122	12202

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NO.	DATE	DESCRIPTION	Bates Range SE ROA	
		Natural Area Stewardship Plan, Southern Nevada Water Authority, 2011		
345.	09/28/12	NSE Ex 280 – Federal Bureaus Order 1169 Report Selected References: Development of a Numerical Groundwater Flow Model of Selected Basins within the Colorado Regional Groundwater Flow System, Southeastern Nevada, Tetra Tech 2012	12203	12380
346.	09/28/12	NSE Ex 281 – Federal Bureaus Order 1169 Report Selected References: Predictions of the Effects of Groundwater Pumping in the Colorado Regional Groundwater Flow System Southeastern Nevada, Tetra Tech, 2012	12381	12503
347.	06/10/13	NSE Ex 282 – Federal Bureaus Order 1169 Report Selected References: Comparison of Simulated and Observed Effects of Pumping from MX-5 Using Data Collected to the End of the Order 1169 Test, and Prediction of the Rates of Recovery from the Test, TetraTech,2013	12504	12534
348.	1996	NSE Ex 283 – Federal Bureaus Order 1169 Report Selected References: Geochemistry and Isotope Hydrology of Representative Aquifers in the Great Basin Region of Nevada, Utah, and Adjacent States, Thomas et. al.,1996	12535	12642
349.	03/11/67	NSE Ex 284 – Federal Bureaus Order 1169 Report Selected References: Federal Register, Vol. 32, No. 48, p. 4001, Department of the Interior Fish and Wildlife Service Endangered Species Listing (Moapa Dace), 1967	12643	12643
350.	2013	NSE Ex 285 – Federal Bureaus Order 1169 Report Selected References: United States Fish and Wildlife Service, 2013 Moapa Dace survey data (1994–2013)	12644	12647
351.	N/A	NSE Ex 286 – Federal Bureaus Order 1169 Report Selected References: Analysis and Management of Animal Populations, Modeling, Estimation, and Decision Making, Williams et. al., 2002	12648	12656
352.	2005	NSE Ex 287 – Federal Bureaus Order 1169 Report Selected References: Prospects for Recovering Endemic Fishes Pursuant to the U.S. Endangered Species Act, Williams et. al.,	12657	12662

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NO.	DATE	DESCRIPTION	Bates Range SE ROA	
		2005		
353.	2009	NSE Ex 288 – Federal Bureaus Order 1169 United States Fish and Wildlife Service Desert National Wildlife Refuge Complex, Ash Meadows, Desert, Moapa Valley, and Pahrnatagat National Wildlife Refuges, Final Comprehensive Conservation Plan and Environmental Impact Statement Summary, August 2009	12663	12706
354.	2009	NSE Ex 289 – Federal Bureaus Order 1169 United States Fish and Wildlife Service Desert National Wildlife Refuge Complex, Ash Meadows, Desert, Moapa Valley, and Pahrnatagat National Wildlife Refuges, Final Comprehensive Conservation Plan and Environmental Impact Statement, Volume 1, August 2009	12707	13065
355.	2009	NSE Ex 290 – Federal Bureaus Order 1169 United States Fish and Wildlife Service Desert National Wildlife Refuge Complex, Ash Meadows, Desert, Moapa Valley, and Pahrnatagat National Wildlife Refuges, Final Comprehensive Conservation Plan and Environmental Impact Statement, Volume 2, Appendix A Index	13066	13070
356.	2009	NSE Ex 291 – Federal Bureaus Order 1169 United States Fish and Wildlife Service Desert National Wildlife Refuge Complex, Ash Meadows, Desert, Moapa Valley, and Pahrnatagat National Wildlife Refuges, Final Comprehensive Conservation Plan and Environmental Impact Statement, Volume 2, Appendix B References	13071	13097
357.	2009	NSE Ex 292 – Federal Bureaus Order 1169 United States Fish and Wildlife Service Desert National Wildlife Refuge Complex, Ash Meadows, Desert, Moapa Valley, and Pahrnatagat National Wildlife Refuges, Final Comprehensive Conservation Plan and Environmental Impact Statement, Volume 2, Appendix C List of Preparers	13098	13102

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358.	2009	NSE Ex 293 – Federal Bureaus Order 1169 United States Fish and Wildlife Service Desert National Wildlife Refuge Complex, Ash Meadows, Desert, Moapa Valley, and Pahrnatagat National Wildlife Refuges, Final Comprehensive Conservation Plan and Environmental Impact Statement, Volume 2, Appendix D Distribution List	13103	13120
359.	2009	NSE Ex 294 – Federal Bureaus Order 1169 United States Fish and Wildlife Service Desert National Wildlife Refuge Complex, Ash Meadows, Desert, Moapa Valley, and Pahrnatagat National Wildlife Refuges, Final Comprehensive Conservation Plan and Environmental Impact Statement, Volume 2, Appendix E Laws and Regs	13121	13124
360.	2009	NSE Ex 295 – Federal Bureaus Order 1169 United States Fish and Wildlife Service Desert National Wildlife Refuge Complex, Ash Meadows, Desert, Moapa Valley, and Pahrnatagat National Wildlife Refuges, Final Comprehensive Conservation Plan and Environmental Impact Statement, Volume 2, Appendix F GOS	13125	13187
361.	2009	NSE Ex 296 – Federal Bureaus Order 1169 United States Fish and Wildlife Service Desert National Wildlife Refuge Complex, Ash Meadows, Desert, Moapa Valley, and Pahrnatagat National Wildlife Refuges, Final Comprehensive Conservation Plan and Environmental Impact Statement, Volume 2, Appendix G CDs	13188	13339
362.	2009	NSE Ex 297 – Federal Bureaus Order 1169 United States Fish and Wildlife Service Desert National Wildlife Refuge Complex, Ash Meadows, Desert, Moapa Valley, and Pahrnatagat National Wildlife Refuges, Final Comprehensive Conservation Plan and Environmental Impact Statement, Volume 2, Appendix H Biological Resources	13340	13415



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363.	2009	NSE Ex 298 – Federal Bureaus Order 1169 United States Fish and Wildlife Service Desert National Wildlife Refuge Complex, Ash Meadows, Desert, Moapa Valley, and Pahrnagat National Wildlife Refuges, Final Comprehensive Conservation Plan and Environmental Impact Statement, Volume 2, Appendix I Wilderness Review	13416	13469
364.	2009	NSE Ex 299 – Federal Bureaus Order 1169 United States Fish and Wildlife Service Desert National Wildlife Refuge Complex, Ash Meadows, Desert, Moapa Valley, and Pahrnagat National Wildlife Refuges, Final Comprehensive Conservation Plan and Environmental Impact Statement, Volume 2, Appendix J Bighorn Sheep	13470	13475
365.	2009	NSE Ex 300 – Federal Bureaus Order 1169 United States Fish and Wildlife Service Desert National Wildlife Refuge Complex, Ash Meadows, Desert, Moapa Valley, and Pahrnagat National Wildlife Refuges, Final Comprehensive Conservation Plan and Environmental Impact Statement, Volume 2, Appendix K Implementation	13476	13490
366.	2009	NSE Ex 301 – Federal Bureaus Order 1169 United States Fish and Wildlife Service Desert National Wildlife Refuge Complex, Ash Meadows, Desert, Moapa Valley, and Pahrnagat National Wildlife Refuges, Final Comprehensive Conservation Plan and Environmental Impact Statement, Volume 2, Appendix L Moapa LPP-CMP	13491	13525
367.	2009	NSE Ex 302 – Federal Bureaus Order 1169 United States Fish and Wildlife Service Desert National Wildlife Refuge Complex, Ash Meadows, Desert, Moapa Valley, and Pahrnagat National Wildlife Refuges, Final Comprehensive Conservation Plan and Environmental Impact Statement, Volume 2, Appendix M Response to Comments	13526	13728
368.	N/A	NSE Ex 303 – Federal Bureaus Order 1169 Detailed Production Data with Checks	13729	13838

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369.	N/A	NSE Ex 304 – Federal Bureaus Order 1169 Groundwater level & production data	13839	30175
370.	N/A	NSE Ex 305 – Federal Bureaus Order 1169 Baldwin Jones Monthly Data 2002–2019	30176	30267
371.	N/A	NSE Ex 306 – Federal Bureaus Order 1169 NV Climate Divisional 3, 4 and PRISM pcp data 1985–2012	30268	30336
372.	N/A	NSE Ex 307 – Federal Bureaus Order 1169 EH4 Data NDWR Dec 2012	30337	30615
373.	N/A	NSE Ex 308 – Federal Bureaus Order 1169 Monthly Pumpage Data 2000–2012	30616	30681
374.	N/A	NSE Ex 309 – Federal Bureaus Order 1169 Southern Nevada water Authority shallow monitor wells MRSA periodic measurements 2009–2012	30682	30762
375.	N/A	NSE Ex 310 – Federal Bureaus Order 1169 Muddy Springs LDS Moapa NV (all data)	30763	31007
376.	N/A	NSE Ex 311 – Federal Bureaus Order 1169 Pederson E. Springs near Moapa 2002–2012	31008	31171
377.	N/A	NSE Ex 312 – Federal Bureaus Order 1169 Pederson Springs near Moapa 1985–2013	31172	31487
378.	N/A	NSE Ex 313 – Federal Bureaus Order 1169 Warm Springs West all data 1985–2012	31488	32190
379.	N/A	NSE Ex 314 – Federal Bureaus Order 1169 Warm Springs Confluence at Iverson Flume 2001–2010	32191	32371
380.	N/A	NSE Ex 315 – Federal Bureaus Order 1169 Muddy River near Moapa all data 1914–2013	32372	32958
381.	02/11/13	NSE Ex 316 – Federal Bureaus Order 1169 Muddy River Springs Partial	32959	33569
382.	02/27/14	NSE Ex 317 – Tetra Tech Cover Letter	33570	33571
383.	12/13/13	NSE Ex 318 – Responses Tetra Tech Model final	33572	33668
384.	03/05/14	NSE Ex 319 – Lincoln County/Vidler Water	33669	33670

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		Company Response to National Park Service		
385.	04/01/10	NSE Ex 320 – Settlement Agreement between the Nevada State Engineer, Lincoln County and Vidler Water Company	33671	33686
386.	03/05/08	NSE Ex 321 – Clearing the Waters: Unraveling Hydrologic Trends in the Muddy River Springs Area, Tim Mayer, U.S. Fish and Wildlife Service, March, 2008, NWRA Annual Meeting	33687	33726
387.	N/A	NSE Ex 322 – Geologic Map of Lincoln County	33727	33727
388.	N/A	NSE Ex 323 – Geologic Map of Clark County	33728	33728
389.	04/26/19	NSE Ex 324 – United States Fish and Wildlife Service Request for Extension of Time to submit Order 1303 Reports	33729	33730
390.	05/02/19	NSE Ex 325 – NDWR Letter Seeking Responses to Request for Extension of Time to submit Order 1303 Reports	33731	33735
391.	05/02/19	NSE Ex 326 – Coyote Springs Investment, LLC Response to Request for Extension of Time to submit Order 1303 Reports	33736	33736
392.	05/02/19	NSE Ex 327 – Moapa Band of Paiutes’ Response to Request for Extension of Time to submit Order 1303 Reports	33737	33738
393.	05/06/19	NSE Ex 328 – Centers for Biological Diversity Response to Request for Extension of Time to submit Order 1303 Reports	33739	33739
394.	05/08/19	NSE Ex 329 – Las Vegas Valley Water District and Southern Nevada Water Authority Response to Request for Extension of Time to submit Order 1303 Reports	33740	33741
395.	05/09/19	NSE Ex 330 – Dry Lake Water Response to Request for Extension of Time to submit Order 1303 Reports	33742	33743
396.	03/05/18	NSE Ex 331 – Memorandum by Stetson Engineer Inc. to Coyote Springs Investment, LLC Re: Review of Nevada State Engineer’s Ruling 6255 and Order 1169 Pumping Test in	33744	33752

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		the Coyote Spring Valley		
397.	12/31/07	NSE Ex 332 – Evaluation of boundary fluxes for the ground-water flow model being prepared as part of the NDPLMA-5 project by James R. Harrill	33753	33769
398.	05/16/56	NSE Ex 333 – Muddy River Decree	33770	33816
399.	08/21/19	NSE Ex 334 – Vidler Water Company Quarterly Update of Ongoing Data Collection in Kane Springs Valley Hydrographic Basin (206)	33817	33834
400.	10/11/11	NSE Ex 335 – Solver WRFS Ruling 6165 6167	33835	33862
401.	09/23/19	NSE Ex 336 – LWRFS Sign-in sheet	33863	33868
402.	09/24/19	NSE Ex 337 – LWRFS Sign-in sheet	33869	33874
403.	09/25/19	NSE Ex 338 – LWRFS Sign-in sheet	33875	33880
404.	09/26/19	NSE Ex 339 – LWRFS Sign-in sheet	33881	33886
405.	09/27/19	NSE Ex 340 – LWFRS Sign-in sheet	33887	33892
406.	09/30/19	NSE Ex 341 – LWFRS Sign-in sheet	33893	33898
407.	10/01/19	NSE Ex 342 – LWFRS Sign-in sheet	33899	33904
408.	10/02/19	NSE Ex 343 – LWFRS Sign-in sheet	33905	33910
409.	10/03/19	NSE Ex 344 – LWFRS Sign-in sheet	33911	33916
410.	10/04/19	NSE Ex 345 – LWFRS Sign-in sheet	33917	33922
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<b>All Participants' Exhibits, Alphabetical</b>				
<b>Western Elite Environmental, Inc. and Bedrock Limited, Inc. and Bedroc Limited, LLC's (BEDROC) Exhibits</b>				
411.	09/06/19	Western Elite Environmental, Inc. and Bedrock Limited, Inc. and Bedroc Limited, LLC's Witness List, Summary of Testimony, and Exhibit List	33923	33930
412.	N/A	BEDROC Ex 1 – Jay Dixon Curriculum Vitae	33931	33938

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413.	2019	BEDROC Ex 2 – Interim Order 1303 – Rebuttal Report – Prepared by Bedroc and Dixon Hydrologic, PLLC	33939	33944
414.	10/11/85	BEDROC Ex 3 – NDWR Vested Proof V04545	33945	33947
415.	01/29/14	BEDROC Ex 4 – Application 71031	33948	33951
416.	12/22/14	BEDROC Ex 5 – NDWR Permit 83044	33952	33956
417.	10/04/16	BEDROC Ex 6 – NDWR Permit 85249	33957	33962
418.	10/04/16	BEDROC Ex 7 – NDWR Permit 85250	33963	33968
419.	06/23/15	BEDROC Ex 8 – NDWR Application 85251	33969	33973
420.	06/23/15	BEDROC Ex 9 – NDWR Application 85252	33974	33978
421.	06/23/15	BEDROC Ex 10 – NDWR Application 85253	33979	33983
422.	06/23/15	BEDROC Ex 11 – NDWR Application 85254	33984	33988
423.	11/22/17	BEDROC Ex 12 – NDWR Application 87496	33989	33991
424.	11/22/17	BEDROC Ex 13 – NDWR Application 87497	33992	33994
425.	11/22/17	BEDROC Ex 14 – NDWR Application 87498	33995	33997
426.	11/22/17	BEDROC Ex 15 – NDWR Application 87499	33998	34000
427.	11/22/17	BEDROC Ex 16 – NDWR Application 87500	34001	34003
428.	N/A	BEDROC Ex 17 – Select pages from NDWR water right files for V04545, Permit 71031 and Permit 83044	34004	34068
429.	09/13/17	BEDROC Ex 18 – Bedroc Shallow Groundwater Contour and Monitoring Well Location Map	34069	34069
430.	12/10/99	BEDROC Ex 19 – Bedroc Borehole Lithologic and Well Log Summaries	34070	34170
431.	N/A	BEDROC Ex 20 – Bedroc Historical Site Aerial Photos	34171	34177

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NO.	DATE	DESCRIPTION	Bates Range SE ROA	
432.	2012	BEDROC Ex 21 – Wilson, J.W., 2019, Drilling, construction, water chemistry, water levels, and regional potentiometric surface of the upper carbonate-rock aquifer in Clark County, Nevada, 2009–2015: U.S. Geological Survey Scientific Investigations Map 3434, scale 1:500,000, <a href="https://doi.org/10.311/sim3434">https://doi.org/10.311/sim3434</a>	34178	34194
433.	2017	BEDROC Ex 22 – Rowley, P.D., G.L. Dixon, E.A. ManKinen, K.T. Pari, D.K. McPhee, E.H. KcKee, A.G. Burns, J.M. Watrus, E.B. Ekren, W.G. Patrick, and J.M. Band, 2017. Geology and geophysics of White Pine and Lincoln counties, Nevada, and adjacent parts of Nevada and Utah – the geologic framework of regional groundwater flow systems. Nevada Bureau of Mines and Geology Report 56. Scale 1:250,000, 4 plates	34195	34345
434.	07/03/19	BEDROC Ex 23 – Assessment of Lower White River Flow System Water Resource Conditions and Aquifer Response. SNWA, June 2019	34346	34488
435.	09/17/19	BEDROC Ex 23a – Transmittal Letter for Ex 23	34489	34489
<b>Center for Biological Diversity’s (CBD) Exhibits</b>				
436.	07/03/19	CBD Ex 3 – Center for Biological Diversity. Groundwater Management and the Muddy River Springs, Report in Response to Nevada State Engineer Order 1303. Tom Meyers	34490	34516
437.	08/16/19	CBD Ex 4 – Rebuttal Report – Tom Myers	34517	34546
438.	2019	Witness List, Summary of Witness Testimony, and Exhibit List – Center for Biological Diversity (CBD)	34547	34550
439.	N/A	CBD Ex 1 – Curriculum Vitae for Tom Myers, Ph.D.	34551	34561
440.	N/A	CBD Ex 2 – PowerPoint from Dr. Tom Myers for presentation at the evidentiary hearing	34562	34606

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441.	09/06/19	CNLV Witness List, Summary of Testimony, and Exhibit List	34607	34614
442.	N/A	CNLV Ex 1 – Dwight L. Smith – Curriculum Vitae and Qualification List	34615	34627
443.	07/02/19	CNLV Ex 2 – Concept Review of Artificial Recharge in Garnet Valley for the APEX Industrial Complex, City of North Las Vegas, Clark County, Nevada – Prepared by Interflow Hydrology, Inc. – July 2019	34628	34650
444.	07/02/19	CNLV Ex 3 – Garnet Valley Groundwater Pumping Review for APEX Industrial Complex, City of North Las Vegas, Clark County, Nevada – Prepared by Interflow Hydrology, Inc.	34651	34703
445.	08/02/19	CNLV Ex 4 – Addendum No. 1 – Garnet Valley Groundwater Pumping Review for APEX Industrial Complex, City of North Las Vegas, Clark County, Nevada	34704	34704
446.	07/02/19	CNLV Ex 5 – City of North Las Vegas Utilities Department: Interim Order 1303 Report Submittal from the City of North Las Vegas	34705	34710
447.	2019	CNLV Ex 6 – Rebuttal Document submitted on behalf of the City of North Las Vegas, to Interim Order 1303 REPORT Submittals of July 3, 2019 – Prepared by Interflow Hydrology	34711	34714
448.	N/A	CNLV Ex 7a – Page, W.R., Dixon, G.L., Rowley, P.D., and Brickey, D.W., 2005, Geological Map of Parts of the Colorado, White River, and Death Valley Groundwater Flow Systems, Nevada, Utah, and Arizona; Nevada Bureau of Mines and Geology, Map 150, 1:250,000 and accompanying Text and References	34715	34715

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449.	N/A	CNLV Ex 7b – Page, W.R., Dixon, G.L., Rowley, P.D., and Brickey, D.W., Test and references to accompany Nevada Bureau of Mines and Geologic Map of Parts of the Colorado, White River, and Death Valley Groundwater Flow Systems	34716	34738
450.	2004	CNLV Ex 8 – Smith, D.L., Johnson, J., Donovan, D., Kistinger, G., and Burns, A., 2004, Climate and Barometric Pressure Influences on Pederson Spring Discharge and the Carbonate Aquifer near the Muddy Springs, Southern Nevada; Journal of the Nevada ATER Sources Association, Fall 2004, p. 76–103	34739	34768
451.	2011	CNLV Ex 9a – Page, W. R., Scheirer, D.S., Langenheim, V.E., Berger, M.A., 2011, Revised Geologic Cross Sections of Parts of the Colorado, White River, and Death Valley Regional Groundwater Flow Systems, Nevada, Utah and Arizona; USGS Open File Report 2006–1040 and accompanying Plate	34769	34793
452.	2011	CNLV Ex 9b – USGS Open-File Report 2006-1040 Plate	34794	34794
453.	12/28/12	CNLV Ex 10 – Poggemeyer Design Group, 2012, Water and Wastewater Master Plan, Apex Industrial Park, City of North Las Vegas, Nevada, prepared for Kapex, LLC	34795	34927
454.	N/A	CNLV Ex 11 – Wilson, Jon W., Drilling, Construction, Water Chemistry, Water Levels, and Regional Potentiometric Surface of the Upper Carbonate-Rock Aquifer in Clark County, Nevada, 2009–2015	34928	34928
455.	06/27/13	CNLV Ex 12 – Southern Nevada Water Authority, 2013, Submittal of Nevada State Engineer Orders 1169 and 1169A Study Report	34929	35209
456.	01/14/16	CNLV Ex 13 – Southern Nevada Water Authority, 2016, Garnet Valley Groundwater Production Simulated Effects of Pumping the Southern Nevada Water Authority’s Temporary Applications; memorandum submitted to NDWR on January 14, 2016	35210	35215



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457.	2018	CNLV Ex 14 – Southern Nevada Water Authority 2018 Water Resource Plan & Water Budget	35216	35297
458.	08/07/18	CNLV Ex 15 – 2006 Memorandum of Agreement Hydrologic Review Team: 2018 Annual Determination Report – April 2018, Appended August 7, 2018	35298	35457
459.	06/13/13	CNLV Ex 16 – Southern Nevada Water Authority Transmittal of SNWA Comments on the Numerical Groundwater Flow Model	35458	35459
460.	06/00/13	CNLV Ex 17 – Southern Nevada Water Authority, 2013, Technical review of Numerical Groundwater Flow Model of Selected Basins with the Colorado Regional Groundwater Flow System, Southeastern Nevada, Version 1.0-A Model Prepared by Tetra Tech for the National Park Service, US Fish and Wildlife Service and Bureau of Land Management; submitted to Mr. Bill Van Liew, June 13, 2013, copied to Rick Felling, NDWR,; SNWA Doc No. WRD-ED-0020	35460	35489
461.	07/16/15	CNLV Ex 18 – Agenda Item – Water Service Agreement between Southern Nevada Water Authority and City of North Las Vegas	35490	35499
462.	12/02/14	CNLV Ex 19 – NDWR Permit 77745, Certificate 19642	35500	35506
463.	08/22/14	CNLV Ex 20 – NDWR Permit 83490	35507	35512
464.	04/15/19	CNLV Ex 21 – NDWR Application 88821	35513	35521
465.	04/15/19	CNLV Ex 22 – NDWR Application 88822	35522	35529
466.	04/15/19	CNLV Ex 23 – NDWR Application 88823	35530	35538
467.	04/15/19	CNLV Ex 24 – NDWR Application 88824	35539	35547
468.	04/15/19	CNLV Ex 25 – NDWR Application 88825	35548	35555
469.	2017	CNLV Ex 26 – LWRFS water rights by priority with 2017 pumpage	35556	35558
470.	N/A	CNLV Ex 27 – Garnet Valley Pre-2000 Water Rights in Use Summary	35559	35559

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<b>Coyote Springs Investment, LLC's (CSI) Exhibits</b>				
471.	09/06/19	CSI's Disclosure of Witnesses and Exhibits	35560	35599
472.	07/03/19	CSI Ex 1 – CSI Order 1303 Report	35600	35712
473.	08/16/19	CSI Ex 2 – CSI Rebuttal Report	35713	35806
474.	10/04/18	CSI Ex 3 – CSI Concept Paper	35807	35820
475.	06/13/19	CSI Ex 4 – CSI Submittal of May 31, 2019 Technical Report and Large Lot Coyote Springs – Village A Map	35821	35925
476.	N/A	CSI Ex 5 – NCDC 2019 Nevada Division 3 south-central climate data	35926	35926
477.	N/A	CSI Ex 6 – NCDC 2019 Nevada Division 4 extreme-south climate data	35927	35927
478.	N/A	CSI Ex 7a – CSI-1 water level vs CSI-1 pumping and CSV pumping	35928	35928
479.	N/A	CSI Ex 7b – CSI-1 water level vs CSI-1 pumping and MRSA pumping	35929	35929
480.	N/A	CSI Ex 8a – CSI-2 water level vs CSI-2 pumping and CSV pumping	35930	35930
481.	N/A	CSI Ex 8b – CSI-2 water level vs CSI-2 pumping and MRSA pumping	35931	35931
482.	N/A	CSI Ex 9a – CSI-3 water level vs CSI-3 pumping and CSV pumping	35932	35932
483.	N/A	CSI Ex 9b – CSI-3 water level vs CSI-3 pumping and MRSA pumping	35933	35933
484.	N/A	CSI Ex 10a – CSI-4 water level vs CSI-4 pumping and CSV pumping	35934	35934
485.	N/A	CSI Ex 10b – CSI-4 water level vs CSI-4 pumping and MRSA pumping	35935	35935
486.	N/A	CSI Ex 11a – MX-5 water level vs MX-5 pumping and CSV pumping	35936	35936
487.	N/A	CSI Ex 11b – MX-5 water level vs MX-5 pumping and MRSA pumping	35937	35937

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488.	N/A	CSI Ex 12 – Groundwater Level and Pumping versus Monthly Precipitation in Basin 210	35938	35947
489.	N/A	CSI Ex 13 – Map Showing Pumping and Monitoring wells in Basins 210 and portions of 219 with Fault locations identified from April 2019 CSAMT Survey	35948	35948
490.	2017	CSI Ex 14 – Rowley, P.D., Dixon, G.L., Mankinen, E.A., Pari, K.T., McPhee D.K., et al., 2017. Geology and Geophysics of White Pine and Lincoln Counties, Nevada, and Adjacent Parts of Nevada and Utah: The Geologic Framework of Regional Groundwater Flow Systems. Nevada Bureau of Mines and Geology Report 56	35949	36099
491.	04/20/06	CSI Ex 15 – Memorandum of Agreement and Amendments thereto	36100	36134
492.	05/19/16	CSI Ex 16 – CSI recorded Affidavits to Relinquish Water Rights for Moapa Dace	36135	36146
493.	N/A	CSI Map 1 CSV and Surrounding Basins	36147	36147
494.	N/A	CSI Map 2 Lower White River Flow System and Surrounding Basins	36148	36148
<b>Georgia Pacific Corporation and Republic Environmental Technologies, Inc.'s (GP-REP) Exhibits</b>				
495.	09/06/19	Joint Disclosure Statement of Georgia Pacific Corporation and Republic Environmental Technologies, Inc.	36149	36154
496.	07/02/19	GP-REP Ex 1 – Response to Nevada State Engineer Interim Order 1303	36155	36163
497.	08/16/19	GP-REP Ex 2 – Rebuttal to Reports submitted for State Engineer Order 1303	36164	36171
498.	N/A	GP-REP Ex 3 – Curriculum Vitae Jonathan Bell	36172	36175
499.	10/09/19	Georgia Pacific Corporation and Republic Environmental Technologies, Inc. Errata to Response and Rebuttal	36176	36183

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<b>Lincoln County Water District and Vidler Water Company, Inc.'s (LC-V) Exhibits</b>				
500.	09/06/19	List of Witnesses and Exhibits of Lincoln County Water District and Vidler Water Company, Inc.	36184	36192
501.	07/03/19	LC-V Ex 1 – LWRFS Report	36193	36345
502.	08/16/19	LC-V Ex 2 – Rebuttal Submittal	36346	36496
503.	N/A	LC-V Ex 3 – CV Greg L. Bushner, P.G.	36497	36502
504.	N/A	LC-V Ex 4 – CV Peter A. Mock, Ph.D., R.G./P.G.	36503	36528
505.	N/A	LC-V Ex 5 – CV Thomas W. Butler PG, CH, CEG	36529	36534
506.	N/A	LC-V Ex 6 – CV Todd G. Umstot	36535	36544
507.	N/A	LC-V Ex 7 – CV Norman R. Carlson	36545	36547
508.	09/00/19	LC-V Ex 8 – PowerPoint – Greg L. Bushner	36548	36563
509.	09/00/19	LC-V Ex 9 – PowerPoint – Peter A. Mock	36564	36571
510.	09/00/19	LC-V Ex 10 – PowerPoint – Thomas Butler	36572	36583
511.	09/30/19	LC-V Ex 11 – PowerPoint – Todd Umstot	36584	36611
512.	09/00/19	LC-V Ex 12 – PowerPoint – Norman R. Carlson	36612	36634
513.	02/02/07	LC-V Ex 13 – State Engineer Ruling 5712	36635	36657
514.	06/21/00	LC-V Ex 14 – Ricci memo re Pumping in the Carbonates	36658	36661
515.	05/07/02	LC-V Ex 15 – Stipulation for Dismissal of Protests	36662	36688
516.	08/01/06	LC-V Ex 16 – Amended Stipulation for Withdrawal of Protests	36689	36700
517.	2006	LC-V Ex 17 – Hydrologic Assessment of Kane Springs Valley Hydrographic Area (206): Hydrologic Framework, Hydrologic Conceptual Model, and Impact Analysis	36701	36758

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518.	03/17/03	LC-V Ex 18 – Cooperative Agreement Among Lincoln County, the Southern Nevada Water Authority and the Las Vegas Valley Water District	36759	36781
519.	2006	LC-V Ex 19 – Groundwater Article of Johnson and Mifflin	36782	36792
520.	09/05/18	LC-V Ex 20 – Email string re USFWS/Vidler Agreement	36793	36820
<b>Moapa Band of Paiute Indians' (MBOP) Exhibits</b>				
521.	09/06/19	Evidentiary and Witness Disclosure of the Moapa Band of Paiute Indians for Order 1303 Hearing	36821	36830
522.	N/A	MBOP Ex 1 – CV Cady L. Johnson	36831	36835
523.	07/03/19	MBOP Ex 2 – Initial Report of MBOP in Response to Order 1303	36836	36919
524.	08/16/19	MBOP Ex 3 – Rebuttal Report in Response to Stakeholder Technical Reports Filed under Order 1303	36920	36946
525.	2011	MBOP Ex 4 – SMU Geothermal Laboratory Heat Flow Map	36947	36947
526.	2007	MBOP Ex 5 – Groundwater Article of Bredehoeft	36948	36948
527.	2006	MBOP Ex 6 – CH2MHill Hydrologic Assessment of Kane Springs	36949	36991
528.	1999	MBOP Ex 7 – Chamberlain, A.K., 1999. Structure and Devonian Stratigraphy of the Timpahute Range, Nevada	36992	37362
529.	1999	MBOP Ex 8 – Fricke, H.C. and J.R. O'Neil, 1999. Article	37363	37378
530.	02/03/10	MBOP Ex 9 – Hershey, R.L., S.A. Mizell, and S. Earman, 2010. Chemical and physical characteristics of springs discharging from regional flow systems of the carbonate-rock province of the Great Basin, western United States: Hydrogeology Journal 18(4):1007–1026.	37379	37398

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531.	03/23/11	MBOP Ex 10 – Johnson, C. 2011. Empirical Mode Decomposition – Applications to the Muddy River Hydrograph – Preliminary Evaluation and Results: unpublished report districted to HRT	37399	37419
532.	04/04/19	MBOP Ex 11 – Johnson, C. 2019. Isotopic characteristics of regional-spring capture zones in eastern Nevada: unpublished report for LWRFS study	37420	37431
533.	10/01/13	MBOP Ex 12 – Johnson, C. and M. Mifflin, 2013a. Technical note: Order 1169 post-audit analysis of pumping response: unpublished HRT report	37432	37441
534.	09/12/13	MBOP Ex 13 – Johnson, C. and M. Mifflin, 2013b. Hydrologic Review Team Presentation: unpublished HRT report	37442	37456
535.	01/06/14	MBOP Ex 14 – Johnson, C. and M. Mifflin, 2014. Derivation of responses to Order 1169 pumping by the method of differences: Mifflin & Associates, Inc. unpublished HRT report	37457	37473
536.	05/03/18	MBOP Ex 15 – Johnson, C. and M. Mifflin, 2018. A Climate “Sweet Spot” may Refute Groundwater Model Forecasts”: Devils hole Workshop, Beatty, NV	37474	37489
537.	2009	MBOP Ex 16 – Donghoh Kim and Hee-Seok Oh (2009) EMD: A Package for Empirical Mode Decomposition and Hilbert Spectrum	37490	37496
538.	1994	MBOP Ex 17 – Kruseman, G.P. and N.A. de Ridder, 1994. Analysis and Evaluation of Pumping Test Data (2nd ed.): International Institute for Land Reclamation and Improvement	37497	37548
539.	2012	MBOP Ex 18 – Masbruch, M.D., V.M. Heilweil, and L.E. Brooks, 2012. Using Hydrogeologic Data to Evaluation Geothermal Potential in the Eastern Great Basin: GRC Transactions	37549	37554
540.	2005	MBOP Ex 19a – McQuarrie, N. and B.P. Wernicke, 2005. An animated tectonic reconstruction of southwestern North America since 36 Ma	37555	37580

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541.	2014	MBOP Ex 19b – McQuarrie, N. and B.P. Wernicke, 2005. An animated tectonic reconstruction of southwestern North America since 36 Ma	37581	37581
542.	2014	MBOP Ex 20 – Reynolds, A.R., and A.J. Jefferson, 2014. Sensitivity of precipitation isotope meteoric water lines and seasonal signals to sampling frequency and location: CUAHSI poster	37582	37582
543.	2014	MBOP Ex 21 – Salzer, M.W., A.G. Bunn, N.E. Graham, and M.K. Hughes, 2014. Five millennia of paleotemperature from tree-rings in the Great Basin, USA: Clim Dyn	37583	37592
544.	04/20/87	MBOP Ex 22 – Schroth, B.K., 1987. Water Chemistry Reconnaissance and Geochemical Modeling in the Meadow Valley Wash Area, Southern Nevada: M.S. Thesis, University of Nevada, Reno	37593	37696
545.	2018	MBOP Ex 23 – SNWA and LVVWD, 2018. Assessment of Water Resource Conditions in the LWRFS: SNWA, LV, NV	37697	37812
546.	2017	MBOP Ex 24 – Swanson, E. and Wernicke, B.P., 2017. Geologic map of the east-central Meadow Valley Mountains, and implications for reconstruction of the Mormon Peak detachment, Nevada: Geosphere	37813	37832
547.	08/16/95	MBOP Ex 25 – Wahl, K.L. and Wahl, T.L., 1995. Determining the Flow of Comal Springs at New Braunfels, Texas, Texas Water '95, American Society of Civil Engineers	37833	37847
548.	2001	MBOP Ex 26 – Johnson, C., M.D. Mifflin, R.J. Johnson, and H. Haitjema, 2001. Hydrogeologic and groundwater modeling analyses for the Moapa Paiute Energy Center: in PBS&J, 2001, Moapa Paiute Draft Environmental Impact Statement, Appendix D, prepared for U.S. Bureau of Indian Affairs and Bureau of Land Management	37848	38071

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549.	2010	MBOP Ex 27 – Mackley, R.D., F.A. Spane, T.C. Pulsipher, and C.H. Allwardt, 2010. Guide to using Multiple Regression in Excel (MRCX v.1.1) for Removal of River Stage Effects from Well Water Levels: Pacific Northwest National Laboratory	38072	38126
550.	1982	MBOP Ex 28a – Sass, J.H. and A.H. Lachenbruch, 1982. Preliminary interpretation of thermal data from the Nevada Test Site: U.S. Geological Survey Open-File Report USGS-OFR-82-973	38127	38156
551.	1988	MBOP Ex 28b – Sass, J.H., A.H. Lachenbruch, W.W. Dusley, Jr., S.S. Priest and R.J. Munroe, 1987. Temperature, thermal conductivity, and heat flow near Yucca Mountain, Nevada: Some tectonic and hydrologic implications: U.S. Geological Survey Open File Report	38157	38280
552.	2015	MBOP Ex 29 – Anderson, M.P., W.W. Woessner, and R.J. Hunt, 2015. Applied Groundwater Modeling – Simulation of Flow and Advective Transport: Elsevier	38281	38289
553.	2006	MBOP Ex 30 – Johnson, C. and M.D. Mifflin, 2006. The AEM and Regional Carbonate Aquifer Modeling: Groundwater	38290	38300
554.	03/17/12	MBOP Ex 31 – Johnson, C. and M. Mifflin, 2012a. Analysis Progress Report – Order 1169 Impacts Assessment: unpublished report distributed to HRT	38301	38315
555.	08/27/12	MBOP Ex 32 – Johnson, C. and M.D. Mifflin, 2012b. Parameter Estimation for Order 1169: unpublished report distributed to HRT	38316	38340
556.	05/27/10	MBOP Ex 33 – Mifflin and Associates, Inc., 2010. Order 1169 Impacts (with September 8, 2010 Addendum): unpublished report	38341	38371
557.	1989	MBOP Ex 34 – Bennett, G.D., 1989. Introduction to Ground-Water Hydraulics – A programmed Text for self-Instruction: U.S. Geological Survey, Techniques of Water-Resources Investigations	38372	38555
558.	1979	MBOP Ex 35 – Freeze, R.A. and Cherry, J.A. 1979. Groundwater: Prentice-Hall	38556	38556



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559.	2011	MBOP Ex 36 – Heilweil, V.M., and Brooks, L.E., eds., 2011. Conceptual model of the Great Basin carbonate and alluvial aquifer system: U.S. Geological Survey Scientific Investigation Report	38557	38764
560.	2009	MBOP Ex 37 – SNWA, 2009. Delamar, Dry Lake, and Cave Valleys Stipulation Agreement Hydrologic Monitoring Plan Status and Historical Data Report: SNWA Water Resources Division	38765	38926
561.	2001	MBOP Ex 38 – Thomas, J.M., S.C. Calhoun and W.B. Apambire, 2001. A deuterium mass-balance interpretation of groundwater sources and flows in southeastern Nevada Desert Research Institute	38927	38978
562.	05/00/11	MBOP Ex 39 – Thomas, J.M. and T.M. Mihevc, 2011. Evaluation of Groundwater Origins, Flow Paths, and Ages in East-Central and Southeastern Nevada: University of Nevada, Desert Research Institute, Division of Hydrologic Sciences	38979	39045
563.	01/30/06	MBOP Ex 40 – U.S. Fish and Wildlife Service, 2006. Intra-Service Programmatic Biological Opinion for the Proposed Muddy River MOA	39046	39163
564.	10/03/11	MBOP Ex 41 – Burns, A.G. and Drici, W., 2011. Hydrology and water resources of Spring Cave, Dry Lake and Delamar Valleys, Nevada and vicinity	39164	39229
565.	12/22/17	MBOP Ex 42 – Interior Secretarial Order 3360	39230	39232
566.	12/28/18	MBOP Ex 43 – Interior Secretarial Order 3369	39233	39236
<b>Moapa Valley Water District's (MVWD) Exhibits</b>				
567.	09/05/19	Moapa Valley Water District's List of Witnesses and Documents Provided Pursuant to Notice of Hearing Section V	39237	39242
568.	N/A	MVWD Ex 1 – CV Jay Lazarus	39243	39256
569.	N/A	MVWD Ex 2 – Resume of Joseph Davis	39257	39257

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571.	08/16/19	MVWD Ex 4 – Rebuttal Report	39266	39271
572.	07/24/18	MVWD Ex 5 – King, Jason, Water Use in the Lower White River Flow System	39272	39330
573.	06/24/15	MVWD Ex 6 – Glorieta Geoscience, Inc., MVWD 2014 Integrated Water Resources Plan	39331	39388
574.	2019	MVWD Ex 7 – Glorieta Geoscience, Inc. Muddy Springs Area Monitoring Report for January 2018 through December 2018	39389	39430
575.	2001	MVWD Ex 8 – LVVWD, Water Resources and Ground-Water Modeling in the White River and Meadow Valley Flow Systems, Clark, Lincoln, Nye, and White Pine Counties, Nevada	39431	39705
576.	10/04/18	MVWD Ex 9 – Stetson Engineers Inc., Proposed Groundwater Pumping for the 6-Basin Area Addressed in the Nevada State Engineer’s September 19, 2018 Draft Order	39706	39711
<b>Muddy Valley Irrigation Company’s (MVIC) Exhibits</b>				
577.	2019	Muddy Valley Irrigation Company Summary of Witness Testimony Mr. Todd Robison	39712	39712
578.	08/15/19	MVIC Ex 1 – Rebuttal Report	39713	39717
<b>Nevada Cogeneration Associates Nos. 1 and 2’s (NCA) Exhibits</b>				
579.	09/06/19	Witness List, Exhibit List, and Summary of Anticipated Testimony of Witnesses for Nevada Cogeneration Associates Nos. 1 and 2	39718	39729
580.	08/16/19	NCA Ex 1 – Rebuttal Report	39730	39755
581.	07/02/19	NCA Ex 2 – City of North Las Vegas, Garnet Valley Groundwater Review for APEX Industrial Complex, City of North Las Vegas, Clark County, Nevada. Interflow Hydrology, Inc.	39756	39809

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582.	07/03/19	NCA Ex 3 – Prediction of the Effects of Changing the Spatial Distribution of Pumping in the Lower White River Flow System	39810	39838
583.	N/A	NCA Ex 4 – Geology of the Frenchman Mountain Quadrangle	39839	39864
584.	07/03/19	NCA Ex 6 – USFWS Issues Related to Conjunctive Management of the Lower White River Flow System	39865	39946
585.	00/00/19	NCA Ex 7 – Wilson, J.W., 2019, Drilling, construction, water chemistry, water levels, and regulation potentiometric surface of the upper carbonate-rock aquifer in Clark County, Nevada, 2009–2015	39947	39963
586.	2010	NCA Ex 8 – Converse Consultants, 2010. Groundwater Level Monitoring Program, 2009 Annual Report	39964	40046
587.	06/00/01	NCA Ex 9 – LVVWD Errata to Water Resources and Ground Water Modeling in the White River and Meadow Valley Flow Systems	40047	40271
588.	2011	NCA Ex 10 – Page, W.R., Scheirer, D.S., Langenheim, V.E., and Berger, M.A., 2011. Revised Geological Cross Sections of Parts of the Colorado, White River, and Death Valley Regional Groundwater Flow Systems, Nevada, Utah, and Arizona	40272	40297
589.	1997	NCA Ex 11 – Burbey, T.J., 1997. Hydrogeology and potential for ground-water development, Carbonate-Rock Aquifers, southern Nevada and southeastern California	40298	40367
590.	2017	NCA Ex 12 – Rowley, P.D., G.L. Dixon, E.A. Mankinen, K.T. Pari, D.K. McPhee, E.H. KcKee, A.G. Burns, J.M. Watrus, E.B. Ekren, W.G. Patrick, and J.M. Bandt, 2017. Geology and Geophysics of White Pine and Lincoln Counties, Nevada, and Adjacent Parts of Nevada and Utah – The Geologic Framework of Regional Groundwater Flow Systems	40368	40518

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591.	07/03/19	NCA Ex 13 – Lower White River Flow System Interim Order 1303 Report Focused on the Northern boundary of the Proposed Administrative Unit	40519	40568
592.	02/02/07	NCA Ex 14 – Ruling 5712	40569	40591
593.	2019	NCA Ex 15 – Assessment of Lower White River Flow System Water Resource Conditions and Aquifer Response	40592	40734
594.	01/29/14	NCA Ex 16 – NSE Ex 14 – Ruling 6254	40735	40763
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596.	07/03/19	NCA Ex 18 – Water-Level Decline in the LWRFS: Managing for Sustainable Groundwater Development. Initial Report of MBOP in Response to Order 1303	40766	40849
597.	07/03/19	NCA Ex 19 – CSI Evaluation of Basin Hydrology and Assessment of Sustainable Yield in the LWRFS, Southeastern Nevada	40850	40962
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609.	06/05/04	NCA Ex 31 – Lake Las Vegas Phase 1 Tech Memorandum	41765	41836
610.	N/A	NCA Ex 44 – CV Jay Dixon, P. E.	41837	41844
611.	N/A	NCA Ex 45 – CV Robert Coache, P.E., WRS	41845	41848
612.	N/A	NCA Ex 46 – CV Hugh Ricci, P.E.	41849	41850
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<b>618.</b>	<b>09/06/19</b>	<b>SNWA Ex 2 – List of Witnesses and Summary of Testimony</b>	<b>41897</b>	<b>41905</b>
<b>619.</b>	<b>N/A</b>	<b>SNWA Ex 3 – Andrew G. Burns Resume</b>	<b>41906</b>	<b>41911</b>
<b>620.</b>	<b>N/A</b>	<b>SNWA Ex 4 – Warda Drici Resume</b>	<b>41912</b>	<b>41916</b>
<b>621.</b>	<b>N/A</b>	<b>SNWA Ex 5 – CV Zane L. Marshall</b>	<b>41917</b>	<b>41924</b>
<b>622.</b>	<b>N/A</b>	<b>SNWA Ex 6 – Resume Robert D. Williams</b>	<b>41925</b>	<b>41929</b>

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625.	2019	SNWA Ex 9 – Response to Stakeholder Reports Submitted to the Nevada State Engineer	42165	42214
626.	1964	SNWA Ex 10 – Eakin and Moore. Uniformity of Discharge of Muddy River Springs, Southeastern Nevada, and Relation to Interbasin Movement of Ground Water	42215	42220
627.	1962	SNWA Ex 11 – Sauer, V.B. and R.W. Meyer. Determination of Error in Individual Discharge Measurements	42221	42245
628.	12/29/89	SNWA Ex 12 – Grumbach Case Study of Water Supply System at Nellis Airforce Base	42246	42362
629.	2002	SNWA Ex 13 – USGS – Statistical Methods in Water Resources	42363	42886
630.	2001	SNWA Ex 14 – USGS – Thickness and geometry of Cenozoic deposits in California Wash area, Nevada, based on gravity and seismic-reflection data	42887	42913
631.	N/A	SNWA Ex 15 – Ground-Water Conditions in the Vicinity of Lake Mead Base	42914	42934
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634.	N/A	SNWA Ex 18 – Geologic Map of Parts of the Colorado, White River, and Death Valley Groundwater Flow Systems	42938	42960
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638.	2017	SNWA Ex 22 – Geology and Geophysics of White Pine and Lincoln Counties, Nevada, and Adjacent Parts of Nevada and Utah: The Geologic Framework of Regional Groundwater Flow Systems	43363	43513
639.	2008	SNWA Ex 23 – Volume 3 Physical Settings of Selected Springs in Clark, Lincoln, and White Pine Counties Groundwater Development Project	43514	43839
640.	2009	SNWA Ex 24 – Muddy River Tributary Conservation Intentionally Created Surplus Certification Report Calendar Year 2008	43840	44065
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<b>651.</b>	<b>07/05/84</b>	<b>SNWA Ex 24-E-4 – Certificate 10952</b>	<b>44168</b>	<b>44169</b>
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<b>655.</b>	<b>05/12/08</b>	<b>SNWA Ex 24-F-2 – MVIC Request for Offers to Sell Preferred and/or Common Shares of Stock</b>	<b>44186</b>	<b>44189</b>
<b>656.</b>	<b>07/19/74</b>	<b>SNWA Ex 24-G-1 – Certificate 8325</b>	<b>44190</b>	<b>44194</b>
<b>657.</b>	<b>07/19/74</b>	<b>SNWA Ex 24-G-2 – Certificate 8326</b>	<b>44195</b>	<b>44197</b>
<b>658.</b>	<b>07/19/74</b>	<b>SNWA Ex 24-G-3 – Certificate 8327</b>	<b>44198</b>	<b>44200</b>
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<b>663.</b>	<b>2008</b>	<b>SNWA Ex 24-I – MVIC 2008 Water Delivery Schedules</b>	<b>44231</b>	<b>44234</b>
<b>664.</b>	<b>2011</b>	<b>SNWA Ex 25 – Muddy River Tributary Conservation Intentionally Created Surplus Certification Report</b>	<b>44235</b>	<b>44508</b>
<b>665.</b>	<b>N/A</b>	<b>SNWA Ex 25 – Complete Appendices</b>	<b>44509</b>	<b>44692</b>
<b>666.</b>	<b>12/13/07</b>	<b>SNWA Ex 25-A</b>	<b>44693</b>	<b>44698</b>
<b>667.</b>	<b>12/09/08</b>	<b>SNWA Ex 25-B-1 – Approval letter from USBR on ICS plan</b>	<b>44699</b>	<b>44701</b>
<b>668.</b>	<b>12/09/08</b>	<b>SNWA Ex 25-B-2 – Approval letter from USBR on ICS plan</b>	<b>44702</b>	<b>44704</b>



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<b>670.</b>	<b>07/15/08</b>	<b>SNWA Ex 25-B-4 – Order 1193</b>	<b>44733</b>	<b>44736</b>
<b>671.</b>	<b>07/15/08</b>	<b>SWNA Ex 25-B-5 – Order 1194</b>	<b>44737</b>	<b>44740</b>
<b>672.</b>	<b>07/15/08</b>	<b>SNWA Ex 25-C – Order 1194</b>	<b>44741</b>	<b>44744</b>
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<b>674.</b>	<b>03/12/ 1920</b>	<b>SNWA Ex 25-D-2 – Muddy River Decree</b>	<b>44793</b>	<b>44840</b>
<b>675.</b>	<b>10/01/68</b>	<b>SNWA Ex 25-E-1 – Certificates for Muddy River Water Rights</b>	<b>44841</b>	<b>44849</b>
<b>676.</b>	<b>04/18/06</b>	<b>SNWA Ex 25-E-2 – Paiute Lease Certificates Letter</b>	<b>44850</b>	<b>44866</b>
<b>677.</b>	<b>05/12/08</b>	<b>SNWA Ex 25-F-1 – MVIC Request for Offers to Lease</b>	<b>44867</b>	<b>44870</b>
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<b>679.</b>	<b>07/17/74</b>	<b>SNWA Ex 25-G – MCVI Water Rights Certificates</b>	<b>44875</b>	<b>44896</b>
<b>680.</b>	<b>02/16/10</b>	<b>SNWA Ex 25-H – MCVI Concurrence Letter</b>	<b>44897</b>	<b>44897</b>
<b>681.</b>	<b>10/09/09</b>	<b>SNWA Ex 25-I – MCVI 2009 Water Delivery Schedules</b>	<b>44898</b>	<b>44905</b>
<b>682.</b>	<b>2009</b>	<b>SNWA Ex 25-J – Appendix J</b>	<b>44906</b>	<b>44910</b>
<b>683.</b>	<b>06/15/12</b>	<b>SNWA Ex 26 – Muddy River Tributary Conservation Intentionally Created Surplus Certification Report Calendar Year 2010</b>	<b>44911</b>	<b>45008</b>
<b>684.</b>	<b>12/13/07</b>	<b>SNWA Ex 26-A – Forbearance Agreement</b>	<b>45009</b>	<b>45014</b>
<b>685.</b>	<b>06/25/10</b>	<b>SNWA Ex 26-B-1 – USBR Approval Letter</b>	<b>45015</b>	<b>45016</b>
<b>686.</b>	<b>06/25/10</b>	<b>SNWA Ex 26-B-2 – USBR Approval Letter Pg. 1</b>	<b>45017</b>	<b>45017</b>

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691.	03/12/ 1920	SNWA Ex 26-D-2 – Muddy River Decree	45098	45145
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694.	03/04/94	SNWA Ex 26-E-3 – NVE Lease	45157	45160
695.	01/10/06	SNWA Ex 26-E-4 – Paiute Lease Certificates	45161	45177
696.	05/12/08	SNWA Ex 26-F-1 – MVIC Request for Offers to Lease	45178	45181
697.	05/12/08	SNWA Ex 26-F-2 – MVIC Request for Offers to Sell Shares	45182	45185
698.	07/19/74	SNWA Ex 26-G – MVIC Water Rights Certificate	45186	45207
699.	04/14/11	SNWA Ex 26-H – MVIC Concurrence Letter	45208	45208
700.	10/13/09	SNWA Ex 26-I – 2009 Water Delivery Schedule	45209	45220
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707.	N/A	SNWA Ex 27- E-2 – LDS Lease Certificates Appendix E	45450	45489
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709.	10/27/81	SNWA Ex 27-E-4 – Certificate 9609	45491	45491
710.	02/13/07	SNWA Ex 27-E-5 – Hidden Valley Application	45492	45493
711.	N/A	SNWA Ex 27-E-6 – Inserts	45494	45499
712.	10/01/68	SNWA Ex 27-E-7 – LDS Certificates	45500	45508
713.	03/04/94	SNWA Ex 27-E-8 – NVE Lease Permits	45509	45512
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715.	05/12/11	SNWA Ex 27-E-10 – NVE Water Lease Report	45517	45517
716.	01/10/06	SNWA Ex 27-E-11 – Paiute Lease Certificates	45518	45534
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718.	05/12/11	SNWA Ex 27-E-13 – NV Energy Water Lease Report	45538	45538
719.	05/12/11	SNWA Ex 27-E-14 – NV Energy Water Lease Report	45539	45539
720.	03/14/12	SNWA Ex 27-E-15 – NV Energy Water Lease Report	45540	45540
721.	03/14/12	SNWA Ex 27-E-16 – NV Energy Water Lease Report	45541	45541
722.	05/12/08	SNWA Ex 27-F-1 – MVIC Request for Offers to Lease	45542	45545
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726.	03/05/12	SNWA Ex 27-H – MVIC Letter of Concurrence	45573	45573
727.	2011	SNWA Ex-I-1 – 2011 Water Schedule Summer	45574	45577
728.	2011	SNWA Ex 27-I-2 – 2011 Water Schedule Winter	45578	45581
729.	02/24/14	SNWA Ex 28 – Muddy River Tributary Conservation Intentionally Created Surplus Certification Report Calendar Year 2012	45582	45674
730.	12/13/07	SNWA Ex 28-A – Intentionally Created Surplus	45675	45680
731.	06/30/11	SNWA Ex 28-B – Plans of Creation with Cover Letter	45681	45706
732.	07/15/08	SNWA Ex 28-C – Order 1194	45707	45710
733.	03/12/1920	SNWA Ex 28-D – Muddy River Decree	45711	45758
734.	N/A	SNWA Ex 28-E – Appendix E Letter	45759	45800
735.	05/12/08	SNWA Ex 28-F-1 – MVIC Request for Offers to Lease	45801	45804
736.	05/12/08	SNWA Ex 28-F-2 – MVIC Request for Offers to Sell Shares	45805	45808
737.	N/A	SNWA Ex 28-G-1 – Hydrographic Abstract	45809	45809
738.	07/19/74	SNWA Ex 28-G-2 – MVIC Water Rights Certificates	45810	45831
739.	02/25/13	SNWA Ex 28-H – MVIC Letter of Concurrence	45832	45832
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742.	2012	SNWA Ex 28-I-3 – 2012 Water Schedule Winter	45841	45844
743.	2015	SNWA Ex 29 – Muddy River Tributary Conservation/Intentionally Created Surplus Certification Report Calendar Year 2013	45845	45934
744.	N/A	SNWA Ex 29-A – Intentionally Created Surplus	45935	45940
745.	06/13/12	SNWA Ex 29-B – Plans of Creation with Submittal and Approval Letters	45941	45970
746.	07/15/08	SNWA Ex 29-C – Order 1194	45971	45974
747.	03/12/ 1920	SNWA Ex 29-D – Muddy River Decree	45975	46022
748.	N/A	SNWA Ex 29-E – Appendix E Letter	46023	46066
749.	05/12/08	SNWA Ex 29-F-1 – MVIC Request for Offers to Lease	46067	46070
750.	05/12/08	SNWA Ex 29-F-2 – MVIC Request for Offers to Sell Shares	46071	46074
751.	N/A	SNWA Ex 29-G-1 – Hydrographic Abstract	46075	46075
752.	07/19/74	SNWA Ex 29-G-2 – MVIC Water Rights Certificates	46076	46097
753.	09/16/14	SNWA Ex 29-H – MVIC Letter of Concurrence	46098	46098
754.	2013	SNWA Ex 29-I – 2013 Water Schedule Winter	46099	46106
755.	2015	SNWA Ex 30 – Muddy River Tributary Conservation Intentionally Created Surplus Certification Report Calendar Year 2014	46107	46190
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<b>759.</b>	<b>07/15/08</b>	<b>SNWA Ex 30-C – Order 1194</b>	<b>46201</b>	<b>46204</b>
<b>760.</b>	<b>04/23/ 1919</b>	<b>SNWA Ex 30-D – Muddy River Decree</b>	<b>46205</b>	<b>46252</b>
<b>761.</b>	<b>N/A</b>	<b>SNWA Ex 30-E – LDS Lease Certificates</b>	<b>46253</b>	<b>46294</b>
<b>762.</b>	<b>05/12/08</b>	<b>SNWA Ex 30-F-1 – MVIC Request for Offers to Lease</b>	<b>46295</b>	<b>46298</b>
<b>763.</b>	<b>05/12/08</b>	<b>SNWA Ex 30-F-2 – MVIC Request for Offers to Sell Shares</b>	<b>46299</b>	<b>46302</b>
<b>764.</b>	<b>N/A</b>	<b>SNWA Ex 30-G-1 – Hydrographic Abstract</b>	<b>46303</b>	<b>46303</b>
<b>765.</b>	<b>07/19/74</b>	<b>SNWA Ex 30-G-2 – MVIC Water Rights Certificates</b>	<b>46304</b>	<b>46325</b>
<b>766.</b>	<b>05/14/14</b>	<b>SNWA Ex 30-G-3 – NVE Water Lease Report</b>	<b>46326</b>	<b>46327</b>
<b>767.</b>	<b>03/04/15</b>	<b>SNWA Ex 30-H – MVIC Letter of Concurrence</b>	<b>46328</b>	<b>46328</b>
<b>768.</b>	<b>2013</b>	<b>SNWA Ex 30-I-1 – 2013 Water Schedule Winter</b>	<b>46329</b>	<b>46332</b>
<b>769.</b>	<b>2014</b>	<b>SNWA Ex 30-I-2 – 2014 Water Schedule Summer</b>	<b>46333</b>	<b>46336</b>
<b>770.</b>	<b>2015</b>	<b>SNWA Ex 30-I-3 – 2015 Water Schedule Summer</b>	<b>46337</b>	<b>46344</b>
<b>771.</b>	<b>06/23/16</b>	<b>SNWA Ex 31 – Muddy River Tributary Conservation Intentionally Created Surplus Certification Report Calendar Year 2015</b>	<b>46345</b>	<b>46430</b>
<b>772.</b>	<b>12/13/07</b>	<b>SNWA Ex 31-A – SNWA ICS Project</b>	<b>46431</b>	<b>46436</b>
<b>773.</b>	<b>06/30/14</b>	<b>SNWA Ex 31-B-1 – SNWA Submittal Letter</b>	<b>46437</b>	<b>46463</b>

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774.	09/25/14	SNWA Ex 31-B-2 – US BOR Approval Letter	46464	46465
775.	09/10/15	SNWA Ex 31-B-3 – US BOR Approval Letter	46466	46468
776.	07/15/08	SNWA Ex 31-C – Order 1194	46469	46472
777.	03/12/ 1920	SNWA Ex 31-D – Muddy River Decree	46473	46520
778.	N/A	SNWA Ex 31-E – LDS Lease Certificates	46521	46562
779.	05/12/08	SNWA Ex 31-F-1 – MVIC Request for Offers to Lease	46563	46566
780.	05/12/08	SNWA Ex 31-F-2 – MVIC Request for Offers to Sell Shares	46567	46570
781.	N/A	SNWA Ex 31-G-1 – Hydrographic Abstract	46571	46571
782.	07/19/74	SNWA Ex 31-G-2 – MVIC Water Rights Certificates	46572	46593
783.	05/14/14	SNWA Ex 31-G-3 – NVE Water Lease Report	46594	46595
784.	01/06/16	SNWA Ex 31-H – MVIC Letter of Concurrence	46596	46596
785.	2015	SNWA Ex 31-I-1 – 2018 Water Schedule Summer	46597	46604
786.	2015	SNWA Ex 31-I-2 – 2018 Water Schedule Winter	46605	46608
787.	2007	SNWA Ex 32 – Thomas, James W. and Todd M. Miheve Letter Report	46609	46799
788.	2011	SNWA Ex 33 – Evaluation of Groundwater Origins, Flow Paths, and Ages in East-Central and Southeastern Nevada	46800	46868
789.	1998	SNWA Ex 34 – The relative contributions of summer and cool-season precipitation to groundwater recharge, Spring Mountains, Nevada, USA	46869	46885

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790.	N/A	SNWA Ex 35 – NOAA Climate Division	46886	46921
791.	04/20/06	SNWA Ex 36 – Water Supply Agreement	46922	46944
792.	05/19/16	SNWA Ex 37 – Affidavit to Relinquish Water Rights	46945	47070
793.	04/20/06	SNWA Ex 38 – Jones Spring Agreement	47071	47096
794.	08/20/09	SNWA Ex 39 – Moapa Transmission System Design, Construction, Operation and Maintenance Agreement	47097	47133
795.	2013	SNWA Ex 40 – Hadden, James R., et al. An Ecohydraulic Model to Identify and Monitor Moapa Dace Habitat	47134	47145
796.	01/30/06	SNWA Ex 41 – USFWS Memo Inter-Service Programmatic Biological Opinion for the Proposed Muddy River MOA	47146	47213
797.	05/16/96	SNWA Ex 42 – USFWS Recovery Plan for the Rare Aquatic Species of The Muddy River Ecosystem	47214	47273
798.	2014	SNWA Ex 43 – Spawning Ecology and Captive Husbandry of Endangered Moapa Dace	47274	47343
799.	2015	SNWA Ex 44 – A Stochastic Population Model to Evaluate Moapa Dace (Moapa coriacea) Population Growth Under Alternative Management Scenarios – Open File Report 2015–2016	47344	47397
800.	09/04/16	SNWA Ex 45 – The Status of Moapa Coriacea and Gila Seminuda and Status Information on Other Fishes of the Muddy River	47398	47406
801.	07/28/05	SNWA Ex 46 – Blue tilapia (Oreochromis aureus) predation on fishes in the Muddy River system	47407	47412
802.	07/16/15	SNWA Ex 47 – First Amendment to Moapa Transmission System Design,	47413	47424



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<b>803.</b>	<b>10/25/14</b>	<b>SNWA Ex 48 – DRI – Preliminary Analysis of Effects of Reduced Discharge on Thermal Habitat of Pedersen Warm Springs Channel</b>	<b>47425</b>	<b>47446</b>
<b>804.</b>	<b>05/01/19</b>	<b>SNWA Ex 49 – SNWA Holds Event at Warm Springs Area – Newspaper Article</b>	<b>47447</b>	<b>47448</b>
<b>805.</b>	<b>N/A</b>	<b>SNWA Ex 50 – Moapa Dace images</b>	<b>47449</b>	<b>47451</b>
<b>806.</b>	<b>11/25/03</b>	<b>SNWA Ex 51 – Preliminary Analysis of the Effects of Declining Flows on Channel Characteristics and Hydraulic Habitat within the Pedersen and Plummer Spring Channels of the Muddy River</b>	<b>47452</b>	<b>47464</b>
<b>807.</b>	<b>N/A</b>	<b>SNWA Ex 52 – Ruggirello, Jack E., et al., Propagation of Endangered Moapa Dace</b>	<b>47465</b>	<b>47475</b>
<b>808.</b>	<b>06/00/94</b>	<b>SNWA Ex 53 – Growth and Survivorship of Moapa Dace</b>	<b>47476</b>	<b>47479</b>
<b>809.</b>	<b>01/00/19</b>	<b>SNWA Ex 54 – Southwestern Willow Flycatcher and Yellow-billed Cuckoo Surveys at the Warm Springs Natural Area</b>	<b>47480</b>	<b>47515</b>
<b>810.</b>	<b>2018</b>	<b>SNWA Ex 55 – Warm Springs Natural Area 2018 Highlights</b>	<b>47516</b>	<b>47517</b>
<b>811.</b>	<b>03/02/06</b>	<b>SNWA Ex 56 – USFWS Biological Opinion for the proposed Coyote Springs Investment Development</b>	<b>47518</b>	<b>47750</b>
<b>812.</b>	<b>05/09/07</b>	<b>SNWA Ex 57 – USFWS Proposed Right of Way Permit</b>	<b>47751</b>	<b>47836</b>
<b>813.</b>	<b>10/07/97</b>	<b>SNWA Ex 58 – Amended Application for Permit No. 46777</b>	<b>47837</b>	<b>47840</b>
<b>814.</b>	<b>04/22/04</b>	<b>SNWA Ex 59 – Amended Application for Permission to Change Point of Diversion</b>	<b>47841</b>	<b>47852</b>
<b>815.</b>	<b>10/17/06</b>	<b>SNWA Ex 60 – LVVWD Meeting Transcript</b>	<b>47853</b>	<b>47875</b>

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817.	02/06/07	SNWA Ex 62 – Coyote Springs Service Rules	47910	48006
818.	07/07/15	SNWA Ex 63 – Amended and Restated Coyote Springs Water and Wastewater Multi-Party Agreement	48007	48034
819.	04/19/17	SNWA Ex 64 – Coyote Springs Infrastructure Status	48035	48037
820.	08/29/17	SNWA Ex 65 – Long Term Coyote Springs Valley Water Supply	48038	48039
821.	05/16/18	SNWA Ex 66 – Coyote Spring Valley Water Supply	48040	48042
822.	06/06/18	SNWA Ex 67 – State Engineer May 16, 2018, Correspondence on Long Term Coyote Spring Valley Water Supply	48043	48044
823.	06/14/18	SNWA Ex 68 – Public Workshop Regarding Existing Water Right Use and Groundwater Pumping in the Lower White River Flow System	48045	48048
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825.	08/20/18	SNWA Ex 70 – Water Availability for Residential Subdivision Map	48108	48109
826.	09/07/18	SNWA Ex 71 – Tentative Subdivision Review No. 13216-T Permit Note	48110	48113
827.	06/19/97	SNWA Ex 72 – Ruling 4542	48114	48130
828.	07/03/19	SNWA Ex 73 – Request to Investigate Alleged Violation	48131	48132
829.	N/A	SNWA Ex 74 – Hydrographic Area Survey	48133	48133
830.	10/03/17	SNWA Ex 75 – Transcript of Proceeding Vol 7	48134	48218
831.	10/04/17	SNWA Ex 76 – Transcript of Proceeding Vol 8	48219	48260

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833.	10/27/95	SNWA Ex 78 – Ruling 4243	48574	48593
834.	03/18/99	SNWA Ex 79 – Revised Trigger Levels for Moapa Valley National Wildlife Refuge Springs	48594	48595
835.	2002	SNWA Ex 80 – Muddy Springs Area Monitoring Plan	48596	48619
836.	N/A	SNWA Ex 81 – Order 1169 Aquifer Test Post-Recovery Trendline	48620	48620
837.	N/A	SNWA Ex 82 – Monthly Test Period	48621	48622
838.	06/21/83	SNWA Ex 83 – Nevada Power Company Protest	48623	48623
839.	06/29/83	SNWA Ex 84 – Nevada Power Company Protest	48624	48624

**United States Department of the Interior Fish and Wildlife Service's  
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840.	09/23/19	List of Witnesses, Summaries of Witnesses' Testimony and List of Exhibits for the United States Department of the Interior Fish and Wildlife Service	48625	48635
841.	N/A	USFWS Ex 1 – CV Sue Braumiller	48636	48651
842.	N/A	USFWS Ex 2 – CV Tim D. Mayer, Ph.D.	48652	48657
843.	N/A	USFWS Ex 3 – CV Michael R. Schwemm	48658	48671
844.	07/03/19	USFWS Ex 4 – Dept of Interior Report in Response to Order 1303	48672	48673
845.	07/03/19	USFWS Ex 5 – Issues Related to Conjunctive Management of the Lower White River Flow System	48674	48755
846.	08/24/01	USFWS Ex – Volume V Transcript of Proceedings – Rick Waddell Expert Witness Qualification	48756	48769

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848.	03/23/04	USFWS Ex – Volume II Transcript of Proceedings – Rick Waddell Expert Witness Qualification	48771	48775
849.	08/16/19	USFWS Ex 7 – Rebuttal to Water-Level Decline in LWRFS: Managing for Sustainable Groundwater Development	48776	48791
850.	N/A	USFWS Ex 8 – Warm Springs Regression Output	48792	48799
851.	N/A	USFWS Ex 9 – Jones Springs Regression Output	48800	48807
852.	N/A	USFWS Ex 10 – Iverson Flume Regression Output	48808	48813
853.	N/A	USFWS Ex – Summary of Direct Testimony of Richard K. Waddell, Jr., Ph.D., PG	48814	48819
854.	N/A	USFWS Ex 11 – NV Climate Division 4	48820	48824
855.	N/A	USFWS Ex 12 – NV Climate Division 3	48825	48829
856.	N/A	USFWS Ex – CV Richard Waddell, Jr., P.G., Ph.D.	48830	48839
857.	N/A	USFWS Ex 13 – Water Level Data Chart	48840	48840
858.	N/A	USFWS Ex 14 – Water Level Data Chart	48841	48843
859.	N/A	USFWS Ex 15 – Dry Lake 1980–2019	48844	48850
860.	N/A	USFWS Ex 16 – Water Level Data Chart	48851	48852
861.	N/A	USFWS Ex 17 – Water Level Data Chart	48853	48855
862.	N/A	USFWS Ex 18 – Water Level Data Chart	48855	48855
863.	N/A	USFWS Ex 19 – Water Level Data Chart	48856	48858
864.	N/A	USFWS Ex 20 – Water Level Data Chart	48859	48860
865.	N/A	USFWS Ex 21 – Water Level Data Chart	48861	48864
866.	N/A	USFWS Ex 22 – Water Level Data Chart	48865	48868

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867.	N/A	USFWS Ex 23 – Water Level Data Chart	48869	48871
868.	N/A	USFWS Ex 24 – Water Level Data Chart	48872	48873
869.	N/A	USFWS Ex 25 – Water Level Data Chart	48874	48875
870.	N/A	USFWS Ex 26 – Water Level Data Chart	48876	48879
871.	N/A	USFWS Ex 27 – Water Level Data Chart	48880	48883
872.	N/A	USFWS Ex 28 – Water Level Data Chart	48884	48887
873.	N/A	USFWS Ex 29 – Water Level Data Chart	48888	48889
874.	N/A	USFWS Ex 30 – Water Level Data Chart	48890	48893
875.	N/A	USFWS Ex 31 – Water Level Data Chart	48894	48894
876.	N/A	USFWS Ex 32 – Water Level Data Chart	48895	48895
877.	N/A	USFWS Ex 33 – North Fork Virginia River Baseflow	48896	48900
878.	N/A	USFWS Ex 34 – Panaca Springs and CSVN-4	48901	48903
879.	08/21/19	USFWS Ex 35 – Email re Panaca Springs	48904	48904
880.	09/00/02	USFWS Ex 36 – Statistical Methods in Water Resources	48905	48915
881.	2006	USFWS Ex 37 – Water-Surface Elevations, Discharge, and Water-Quality Data for Selected sites in the Warm Springs Area near Moapa, Nevada	48916	49155
882.	2007	USFWS Ex 38 – Geologic Map of Nevada	49156	49205
883.	N/A	USFWS Ex 39 – Deacon, James E. and Bradley, W. Glen, Ecological Distribution of Fishes of Moapa (Muddy) River in Clark County, Nevada	49206	49217
884.	02/07/01	USFWS Ex 40 – Synoptic Discharge, Water-Property, and pH Measurements for Muddy River Springs Area and Muddy River, Nevada	49218	49236
885.	02/00/64	USFWS Ex 41 – Ground-Water Resources – Reconnaissance Series Report 25	49237	49288

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886.	2011	USFWS Ex 42 – Conceptual Model of the Great Basin Carbonate and Alluvial Aquifer System	49289	49494
887.	05/20/48	USFWS Ex 43 – Two New, Relict Genera of Cyprinid Fishes from Nevada	49495	49532
888.	1990	USFWS Ex 44 – A Deuterium-Calibrated Groundwater Flow Model of a Regional Carbonate-Alluvial System	49533	49564
889.	1994	USFWS Ex 45 – Fishes and Fisheries of Nevada	49565	49569
890.	06/25/66	USFWS Ex 46 – Ground Water in Upper Muddy River Basin	49570	49597
891.	2006	USFWS Ex 47 – Geologic Cross Sections of Parts of the Colorado, White River, and Death Valley Regional Ground-Water Flow Systems, Nevada, Utah and Arizona	49598	49620
892.	N/A	USFWS Ex 48 – Geologic Map of Parts of the Colorado, White River, and Death Valley Groundwater Flow Systems	49621	49643
893.	N/A	USFWS Ex 49 – Map 150	49644	49644
894.	N/A	USFWS Ex 50 – A Stochastic Population Model to Evaluate Moapa Dace (Moapa coriacea) Population Growth Under Alternative Management Scenarios	49645	49698
895.	1993	USFWS Ex 51 – Interactions between Native and Nonnative Fishes of the Upper Muddy River	49699	49708
896.	N/A	USFWS Ex 52 – Growth and Survivorship of Moapa Dace in an Isolated Stream Reach on Moapa National Wildlife Refuge	49709	49713
897.	1987	USFWS Ex 53 – Life History and Status of the Endangered Moapa Dace (Moapa cariacca)	49714	49807
898.	N/A	USFWS Ex 54 – The Status of Moapa Coriacea and Gila Seminuda and Status Information on Other Fishes of the Muddy River	49808	49816

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899.	2005	USFWS Ex 55 – Blue tilapia ( <i>Oreochromis aureus</i> ) predation on fishes in the Muddy River system, Clark County	49817	49822
900.	02/14/83	USFWS Ex 56 – Recovery Plan for the Rare Aquatic Species of the Muddy River Ecosystem	49823	49882
901.	08/01/06	USFWS Ex 57 – Amended Stipulation for Withdrawal of Protests	49883	49894
902.	12/18/92	USFWS Ex 58 – Life history, abundance, and distribution of Moapa dace	49895	49905
903.	10/29/08	USFWS Ex 59 – US Dept of Interior memorandum request for formal and informal consultation on the Kane Springs Valley Groundwater Development Project in Lincoln County	49906	49973
904.	11/00/07	USFWS Ex 60 – Geology of White Pine and Lincoln Counties and Adjacent Areas, Nevada and Utah: The Geologic Framework of Regional Groundwater Flow Systems	49974	50131
905.	N/A	USFWS Ex 61 – Geologic Map of Nevada	50132	50132
906.	1935	USFWS Ex 62 – Reports and Papers, Hydrology	50133	50138
907.	1970	USFWS Ex 63 – Geology and Mineral Deposits of Lincoln County (Cover page only)	50139	50139
908.	2013	USFWS Ex 64 – Detecting Drawdowns Masked by Environmental Stresses with Water-Level Models	50140	50150
909.	2012	USFWS Ex 65 – Advanced Methods for Modeling Water-Levels and Estimating Drawdowns with Series SEE, an Excel Add-In	50151	50192
910.	N/A	USFWS Ex 66 – Regional Analysis of Ground-Water Recharge	50193	50224
911.	1995	USFWS Ex 67 – Distribution of Carbonate-Rock Aquifers and the Potential for Their Development, Southern Nevada and Adjacent Parts of California, Arizona and Utah	50225	50331

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912.	1995	USFWS Ex 68 – Map Showing Geology and Geographic Features of Southern Nevada and Adjacent Parts of Arizona, California and Utah	50332	50332
913.	1995	USFWS Ex 69 – Map Water-Resources Investigations Report 91-4146	50333	50333
914.	11/00/09	USFWS Ex 70 – Conceptual Model of Groundwater Flow for the Central Carbonate-Rock Province: Clark, Lincoln, and White Pine Counties Groundwater Development Project	50334	50749
915.	2009	USFWS Ex 71 – Transient Numerical Model of Groundwater Flow for the Central Carbonate-Rock Province: Clark, Lincoln, and White Pine Counties Groundwater Development Project	50750	51143
916.	N/A	USFWS Ex 72 – Regression output Pederson Spring	51144	51151
917.	N/A	USFWS Ex 73 – Regression output Pederson East Spring	51152	51159
918.	2004	USFWS Ex 74 – Fundamental Concepts of Recharge in the Desert Southwest: A Regional Modeling Perspective	51160	51184
919.	N/A	USFWS Ex 75 – Online National Climate Data	51185	51186
920.	N/A	USFWS Ex 76 – NV Division 3 Central Climate Data	51187	51203
921.	N/A	USFWS Ex 77 – NV Division 3 Central Climate Data	51204	51209
922.	N/A	USFWS Ex 78 – NV Division 4 Extreme South Climate Data	51210	51215
923.	N/A	USFWS Ex 79 – NV Division 4 South Central Climate Data	51216	51232
924.	09/03/19	USFWS Ex 80 – Well Driller’s Log – General Report	51233	51234
925.	09/03/19	USFWS Ex 81 – Well Driller’s Log – General	51235	51236



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927.	09/03/19	USFWS Ex 83 – Well Driller’s Log – General Report	51239	51240
928.	09/03/19	USFWS Ex 84 – Well Driller’s Log – General Report	51241	51242
929.	09/03/19	USFWS Ex 85 – Well Driller’s Log – General Report	51243	51244
930.	09/03/19	USFWS Ex 86 – Well Driller’s Log – General Report	51245	51246
931.	09/03/19	USFWS Ex 87 – Well Driller’s Log – General Report	51247	51248
932.	N/A	USFWS Ex 88 – Well Log Search	51249	51250
933.	N/A	USFWS Ex 89 – Screen shots examples of data locations and retrieved	51251	51255
934.	N/A	USFWS Ex 90 – Screen shot NDWR	51256	51256
935.	N/A	USFWS Ex 91 – Screen shot examples of data locations	51257	51264
936.	N/A	USFWS Ex 92 – Screen shot portal to NSE online inter water rights map	51265	51265
937.	2007	USFWS Ex 93 – Geology of White Pine and Lincoln Counties and Adjacent Areas, Nevada and Utah: The Geologic Framework of Regional Groundwater Flow Systems	51266	51423
938.	N/A	USFWS Ex 94 – Braumiller – PowerPoint Slides with at Least Some Information Different or Beyond that Provided in the July 3 Report	51424	51428
<b>United States National Park Service’s (USNPS) Exhibits</b>				
939.	N/A	USNPS Ex 1 – CV Richard Waddell, Jr., P.G., Ph.D.	51429	51438
940.	07/03/19	USNPS Ex 2 – Prediction of the Effects of Changing the Spatial Distribution of Pumping in the Lower White River Flow System	51439	51531

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941.	08/16/19	USNPS Ex 3 – National Park Service’s Response to July 2019 Interim Order 1303 Reports	51532	51622
942.	2014	USNPS Ex 4 – Konikow and Leake, Depletion and Capture: Revisiting “The Source of Water Derived from Wells”	51623	51634
943.	03/15/06	USNPS Ex 5 – Final Well Completion Report Kane Springs Valley	51635	51893
944.	N/A	USNPS Ex 6 – Principal Facts for Gravity Stations in the Vicinity of Coyote Spring Valley, Nevada, With Initial Gravity Modeling Results	51894	51915
945.	12/12/08	USNPS Ex 7 – Water Level Elevations in the Vicinity of the Black Mountains	51916	51916
946.	2011	USNPS Ex 8 – Revised Geologic Cross Sections of Parts of the Colorado, White River, and Death Valley Regional Groundwater Flow Systems, Nevada, Utah, and Arizona	51917	51941
947.	2011	USNPS Ex 9 – Revised Geologic Cross Sections of Parts of the Colorado, White River, and Death Valley Regional Groundwater Flow Systems, Nevada, Utah, and Arizona	51942	51942
948.	2019	USNPS Ex 10 – Drilling, Construction, Water Chemistry, Water Levels, and Regional Potentiometric Surface of the Upper Carbonate-Rock Aquifer in Clark County, Nevada 2019–2015	51943	51943
949.	N/A	USNPS Ex 11 – Pages from Environmental Isotopes in Hydrogeology	51944	51947
950.	1998	USNPS Ex 12 – Investigation of the Origin of Springs in the Lake Mead National Recreation Area	51948	52039
951.	N/A	USNPS Witness List	52040	52040
952.	N/A	USNPS Evidentiary Disclosures	52041	52045

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953.	N/A	Modeling Files are available on the NVSE website at: <a href="http://water.nv.gov/news.aspx?news=LWRFS">http://water.nv.gov/news.aspx?news=LWRFS</a>	52046	52046
954.	10/04/19	Bedroc presentation	52047	52074
955.	N/A	Center for Biological Diversity presentation	52075	52118
956.	N/A	Center for Biological Diversity presentation	52119	52162
957.	N/A	Testimony of Dwight L. Smith on behalf of City of North Las Vegas	52163	52195
958.	09/23/19	Coyote Springs Investment, LLC Presentation	52196	52260
959.	09/23/19	Coyote Springs Investment, LLC Rebuttal Presentation	52261	52287
960.	N/A	Testimony of Richard K. Waddell on behalf of U.S. National Park Service	52288	52367
961.	N/A	Testimony USFWS	52368	52445
962.	09/23/19	Testimony of Tim Mayer for USFWS	52446	52449
963.	09/23/19	Testimony of Tim Mayer for Moapa Band of Paiutes	52450	52463
964.	N/A	USFWS presentation by Schwemm	52464	52472
965.	N/A	Lincoln County Vidler Water Presentation by Thomas Butler	52473	52484
966.	N/A	Lincoln County Vidler Water Rebuttal Testimony by Norm Carlson	52485	52507
967.	N/A	Lincoln County Vidler Water Demonstratives	52508	52524
968.	N/A	Lincoln County Vidler Water Mock Rebuttal	52525	52532
969.	N/A	Lincoln County Vidler Water Todd Umstot Presentation	52533	52560
970.	09/25/19	Moapa Band of Paiutes Testimony of Dr. Cady Johnson	52561	52571
971.	2019	MVWD Testimony of Joseph Davis	52572	52579

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973.	10/03/19	Nevada Cogeneration Associates No. 1 and 2 Presentation	52599	52642
974.	10/04/19	NV Energy Testimony of Richard A. Felling	52643	52679
975.	N/A	SNWA Biologists Presentation	52680	52692
976.	N/A	SNWA Presentation	52693	52740
977.	N/A	SNWA Errata	52741	52744
978.	N/A	SNWA Map	52745	52745
<b>Written Public Comment</b>				
979.	11/04/19	Lincoln County	52746	52748
<b>Georgia Pacific Errata to Response and Rebuttal</b>				
980.	10/08/19	Georgia Pacific Corporation and Republic Environmental Technologies, Inc. Errata to Response and Rebuttal	52749	52756
<b>Closing Statements</b>				
981.	12/03/19	Closing Brief of The Church of Jesus Christ of Latter-Day Saints	52757	52764
982.	12/03/19	City of North Las Vegas' Closing Statement	52765	52778
983.	12/03/19	Coyote Springs Investment LLC's Closing Statement Regarding Nevada State Engineer Interim Order 1303 Public Hearing That Occurred Between September 23, 2019 and October 4, 2019 ("Hearing")	52779	52800
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985.	12/03/19	Written Closing Statement of Lincoln County Water District and Vidler Water Company, Inc.	52811	52834
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**Index to Administrative Record re: Order 1309**

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987.	12/03/09	Post-Hearing Brief on Moapa Valley Water District	52858	52872
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992.	12/03/19	Closing Brief of Southern Nevada Water Authority and Las Vegas Valley Water District	52918	52943
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3 DATED this 7th day of January 2022.

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I electronically filed the foregoing document with the Clerk of  
3 the Court by using the electronic filing system on the 7th day of January 2022, and e-served  
4 the same on all parties listed on the Court's Master Service List. The documents identified  
5 herein as Bates Numbers SE ROA 1-54988 were submitted on a USB drive to the Court  
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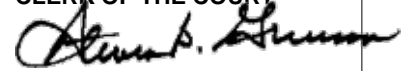
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6 **DISTRICT COURT**  
7  
8 **CLARK COUNTY, NEVADA**

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

Case No. A-20-816761-C  
Dept. No. 19

11 Petitioners,

12 vs.

Consolidated With:  
Case No. A-20-817765-P  
Case No. A-20-817876-P  
Case No. A-20-817977-P  
Case No. A-20-818015-P  
Case No. A-20-818069-P  
Case No. A-20-817840-P

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

16 Respondent.

17 And All Consolidated Cases

18 **APEX HOLDING COMPANY, LLC AND DRY LAKE WATER, LLC'S REPLY IN**  
19 **SUPPORT OF OPENING BRIEF**

20 Real Parties in Interest Apex Holding Company, LLC ("Apex") and Dry Lake Water,  
21 LLC ("Dry Lake"), by and through their attorneys of record, the law firm of Marquis Aurbach  
22 Coffing, hereby submits their Reply in Support of Opening Brief in the above-referenced cases  
23 pursuant to the Court's instructions to the parties during the October 6, 2020 status conference.

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**I. LEGAL ARGUMENT**

We incorporate the arguments set forth in Coyote Springs reply brief, attached hereto as **Exhibit A**, as though set forth herein. Those arguments apply equally to Apex and Dry Lake, and so instead of filing even more paperwork with the Court, Apex and Dry Lake utilize those points and authorities as if set forth in this reply. We further reserve our right to argue at the hearing.

We thank you for your time and attention to this matter.

Dated this 11th day of January, 2022.

MARQUIS AURBACH COFFING

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **APEX HOLDING COMPANY, LLC AND DRY LAKE WATER, LLC'S MEMORANDUM REGARDING SCOPE OF INTERVENTION** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 11th day of January, 2022. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:<sup>1</sup>

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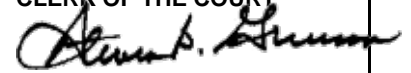
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14 **IN THE EIGHTH JUDICIAL DISTRICT COURT**  
15 **IN AND FOR THE COUNTY OF CLARK, STATE OF NEVADA**

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

19 Petitioners,

20 vs.

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

26 Respondent.

Case No. A-20-816761-C

Dept. 1

Consolidated with Cases:

A-20-817765-P

A-20-817840-P

A-20-817876-P

A-20-817977-P

A-20-818015-P

A-20-818069-P

A-21-833572-J

Hearing Requested

**THE CENTER FOR BIOLOGICAL  
DIVERSITY'S REPLY IN SUPPORT OF  
PETITION FOR JUDICIAL REVIEW**

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1 **INTRODUCTION**

2 Petitioner, the Center for Biological Diversity, (the “Center”) hereby replies to the  
3 answering briefs of Intervenor/Petitioners Coyote Springs Investment, LLC (“CSI”), Lincoln  
4 County Water District and Vidler Water Company, Inc. (together, “Vidler”), Georgia-Pacific  
5 Gypsum, LLC and Republic Environmental Technologies, Inc. (together, “Georgia-Pacific”), and  
6 the Southern Nevada Water Authority and Las Vegas Valley Water District (together, “SNWA”).  
7 The Center also responds to the answering brief of Respondents, Adam Sullivan, P.E., Nevada  
8 State Engineer, and the Division of Water Resources, Department of Conservation and Natural  
9 Resources (together, “State Engineer”).

10 CSI, Vidler, and Georgia-Pacific argue in their answering briefs that the State Engineer’s  
11 Order 1309 is unlawful because the State Engineer lacks authority to consider the federal  
12 Endangered Species Act (“ESA”) in managing the State’s groundwater resources; that the State  
13 Engineer lacks statutory authority to jointly manage the various “hydrographic basins” within the  
14 hydrologically connected and over-appropriated Lower White River Flow System (“LWRFS”);  
15 that Kane Springs Valley should not have been included in the LWRFS; and that Order 1309’s  
16 8,000 acre-foot annual limit on groundwater pumping in the LWRFS is too low and not supported  
17 by substantial evidence. SNWA and the State Engineer, meanwhile, acknowledge the State  
18 Engineer’s duty to consider the ESA in groundwater management decisions, and claim that the  
19 8,000 acre-foot limit is adequately supported.

20 The Center has addressed these topics in considerable detail in past filings. Specifically,  
21 the Center’s opening brief explains that the 8,000 acre-foot limit is too high and not supported by  
22 substantial evidence because it is based an unsupported assumption that the interconnected  
23 LWRFS carbonate aquifer is approaching a “steady-state.” Center Op. Br. at 24-28. The Center’s  
24 opening brief further explains that the State Engineer’s decision to allow up to 8,000 acre-feet of  
25 pumping fails to consider or adequately protect the public’s interest in the Muddy River Springs  
26 and the endangered Moapa dace. *Id.* at 28-33.

1 The Center’s answering brief, meanwhile, explains that the State Engineer must consider  
2 impacts to endangered species and potential liability for “take” as a component of the public  
3 interest, Center Ans. Br. at 4-11; that the State Engineer has ample statutory authority to jointly  
4 manage the LWRFS basis because they share the same over-appropriated supply of water, *id.* at  
5 20-25; that nothing in the Nevada water statutes at NRS Chapters 533 and 534 limits the State  
6 Engineer’s authority to manage groundwater over-appropriation to the boundaries of particular  
7 topographic basins, *id.*; that Kane Springs Valley was properly included in the LWRFS, *id.* at 15-  
8 20; and that allowing up to 8,000 acre-foot of pumping per year will reduce springflows in the  
9 Muddy River Springs Area and the surface flow of the Muddy River, *id.* at 13-15, 25-30. The  
10 Center’s answering brief also discusses in detail the legal basis for the application of the ESA in  
11 this case, particularly the potential liability of States, their political subdivisions, and private  
12 entities for “take” of endangered species. *Id.* at 6-11.

13 In the interests of brevity and efficiency, the Center will not re-state those arguments here,  
14 to the extent that they have not been addressed or rebutted by CSI, Vidler, Georgia-Pacific, SNWA,  
15 or the State Engineer. Instead, the Center responds below only to particular answering arguments  
16 and issues raised by Intervenor/Petitioners and Respondents that have not been previously  
17 addressed. Further, the Center limits this Reply to issues relevant to the Center’s interests in the  
18 Moapa dace and the Muddy River Springs.

#### 19 **CLARIFICATION OF THE CENTER’S POSITION ON APPEAL**

20 Several parties mischaracterize the Center’s position on appeal as advocating for a  
21 complete ban on all groundwater pumping. To clarify: the Center took the position in the hearing  
22 below that the State Engineer should not allow any *carbonate* pumping within the LWRFS,  
23 because the results of the Order 1169 pumping test showed that any carbonate pumping will  
24 eventually intercept water that would otherwise discharge from the Muddy River Springs and  
25 contribute to the surface flow of the fully-decreed Muddy River. SE ROA 34514. The Center  
26 disagreed with other participants that there were multiple carbonate flow-paths in the LWRFS that  
27 could be tapped without impacting the springs and the river. *See id.* However, the Center conceded  
28

1 that roughly 4,000 acre-feet could be safely pumped annually from alluvial or basin-fill sources.  
2 *Id.* Thus, the Center’s position below cannot be accurately characterized as “no pumping.”

3 The Center further recognizes that it is beyond the scope of the Court’s review to specify  
4 a specific amount of water that may be safely pumped. The question, instead, is whether the State  
5 Engineer’s decision to allow up to 8,000 acre-feet of pumping per year was supported by  
6 substantial evidence. *See Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979); *Pyramid*  
7 *Lake Paiute Tribe of Indians v. Washoe Cty.*, 112 Nev. 743, 751, 918 P.2d 697, 702 (1996). As  
8 explained in the Center’s previous filings, and discussed further below, it was not. There is very  
9 little evidence in the record supporting the “steady-state” hypothesis on which the 8,000 acre-foot  
10 limit is based, and even the State Engineer’s own analysis in Order 1309 shows that this limit may  
11 not be sufficient to protect the Moapa dace and senior decreed water rights.

#### 12 **REPLY TO VIDLER’S STATEMENT OF FACTS**

13 Vidler’s answering brief contains a “statement of facts” that includes substantial argument  
14 regarding Kane Springs Valley and the amount of groundwater available for pumping in the  
15 LWRFS. *See Vidler Ans. Br.* at 1-8. In response, the Center incorporates by reference the “Factual  
16 Background” section of its opening brief, as well as Section III of its answering brief, which  
17 explains why substantial evidence supports the decision to include Kane Springs Valley in the  
18 LWRFS. *See Center Op. Br.* at 10-24; *Center Ans. Br.* at 15. The Center further offers the  
19 following points in reply.

20 First, Vidler argues that “Kane Springs [Valley] was not included” in the Order 1169  
21 pumping test, which was designed to test the hydrologic connection among the LWRFS basins.  
22 Vidler *Op. Br.* at 4. This is irrelevant to the question presented—namely, whether the State  
23 Engineer’s decision in Order 1309 to include Kane Springs Valley in the LWRFS is supported by  
24 substantial evidence. As the Center has previously explained, the close hydrologic connection  
25 between Kane Springs Valley and neighboring Coyote Springs Valley, as well as the low  
26 “hydraulic gradient” between the two valleys, support the inclusion of Kane Springs. *See Center*  
27 *Ans. Br.* at 15-20.

1 Vidler also cites the State Engineer’s Ruling 5712, from 2007, as well as a 2008 Biological  
2 Opinion that the U.S. Fish and Wildlife Service (“FWS”) issued to the Bureau of Land  
3 Management for a proposal to authorize a right-of-way on public lands for water supply facilities  
4 that would facilitate the withdrawal of 1,000 acre-feet per year from Kane Springs Valley. *See* SE  
5 ROA 49906-73. But as the Center explained in its answering brief, both of these documents  
6 support the inclusion of Kane Springs Valley in the LWRFS. Ruling 5172 acknowledges the close  
7 hydrologic connection, and low hydraulic gradient, between Kane Springs Valley and the rest of  
8 the LWRFS, and also acknowledges that Kane Springs pumping could impact downgradient water  
9 rights. SE ROA 705-08, 713, 719-20. And the 2008 Biological Opinion acknowledges that  
10 pumping in Kane Springs Valley could reduce springflows in the Muddy River Springs Area and  
11 cause “take” of the Moapa dace. SE ROA 49926, 49938, 49944. Consequently, Vidler fails to  
12 show that the State Engineer committed reversible error by including Kane Springs Valley in the  
13 LWRFS.

14 Vidler also disputes that there is “very little recharge” in the LWRFS, citing portions of the  
15 Center’s rebuttal report from the hearing below discussing and disagreeing with CSI’s and Vidler’s  
16 hydrologic analysis. *See* SE ROA 34520, 34533. The cited passages mention precipitation, but do  
17 not state or discuss the amount of recharge in the LWRFS. The same report states elsewhere that  
18 Vidler’s analysis “do[es] not present enough data with which to estimate recharge.” SE ROA  
19 34533. Further, there is evidence throughout the record that, due to arid climactic conditions, there  
20 is very little recharge to the LWRFS carbonate aquifer, SE ROA 34493, 34513, 53071, 53183,  
21 53443, and that much of the water in the aquifer accumulated over an extremely long period of  
22 time. *See* SE ROA 54953. For example, mean ages of groundwater in the system range from 1,600  
23 to 34,000 years, with the oldest waters exceeding 100,000 years old. SE ROA 49533. “[I]f  
24 depleted, [this water] would be replenished very slowly or not at all.” SE ROA 54953.

25 Relatedly, Vidler disputes the Center’s assertion that carbonate groundwater in the LWRFS  
26 is essentially a “finite, nonrenewable” resource. *See* Center Op. Br. at 15, 18-19. Vidler claims that  
27 if this were true, the Muddy River springs and the river itself would eventually run dry as the  
28

1 carbonate aquifer naturally depleted itself. Vidler Ans. Br. at 7. This claim fundamentally  
2 misunderstands groundwater hydrology and the impacts of pumping. As the Center explained in  
3 its opening brief, pumping can draw from, or “capture,” discharge, storage, or both. *See* SE ROA  
4 36948. Capture of storage permanently depletes the resource, is therefore sometimes called  
5 “groundwater mining.” *See* SE ROA 50133, 53618. When aquifers are pumped, some  
6 “groundwater mining” always occurs, SE ROA at 50133, and during the Order 1169 pumping test,  
7 80 to 90 percent of the groundwater pumped came from storage. SE ROA 10889, 34506, 34538-  
8 41, 34545. Because most of the pumping drew from storage, the resulting depletion of the aquifer  
9 was effectively permanent, and would represent a “new steady state” in the absence of additional  
10 pumping.<sup>1</sup> SE ROA 34506. Vidler’s statement assumes that only discharge or evapotranspiration  
11 are captured by pumping—a hydrological impossibility that this Court should not entertain. Vidler  
12 also ignores the age of the water in the carbonate aquifer, which demonstrates that the water has  
13 accumulated in the aquifer over a long period of time, and at a much slower rate that it is currently  
14 being pumped. SE ROA 49533, 54953. Because of this low rate of recharge, groundwater pumping  
15 risks substantially and permanently depleting the LWRFS carbonate aquifer.

16 Vidler further states that “total precipitation has been below average” and suggests that  
17 drought conditions, not pumping, are responsible for observed decreases in groundwater levels  
18 and springflow. Vidler Ans. Br. at 7. But Vidler ignores substantial evidence in the record showing  
19 that drought conditions were not responsible for declining groundwater levels in the LWRFS  
20 before, during, and after the Order 1169 pumping test. Several parties at the Order 1303 hearing,  
21 including Vidler, attempted to blame water-level declines on drought instead of pumping.  
22 However, a large body of evidence, including a “strong correlation[.]” between pumping rates and  
23 groundwater levels, SE ROA 42187, rising groundwater levels in neighboring basins with minimal  
24 pumping, SE ROA 51547-53, and “weak” evidence of a long-term drought in the region, SE ROA

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25  
26 <sup>1</sup> Because most of the pumping drew from storage, moreover, discharge from the Muddy River  
27 springs would continue to decline for some time even if pumping were to cease, because instead  
28 of discharging to the surface, groundwater would be diverted to replenish the storage that was  
removed. SE ROA 34506.



1 under Section 9 of the ESA. But as the Center previously explained, a State agency’s liability for  
2 “take” under the ESA is well-established in federal law.

3 “[A] governmental third party pursuant to whose authority an actor directly exacts a taking  
4 of an endangered species may be deemed to have violated the provisions of the ESA.” *Strahan v.*  
5 *Coxe*, 127 F.3d 155, 163 (1st Cir. 1997); *see also Cascadia Wildlands v. Kitzhaber*, 911 F. Supp.  
6 2d 1075, 1085 (D. Or. 2012) (finding that “state officials can indeed be liable for directly  
7 authorizing third-party activities . . . that are likely to result in take.”). The State Engineer cannot  
8 simply ignore the limitations of the ESA, as CSI and Georgia-Pacific suggest. *See* U.S. CONST.  
9 art. VI, cl. 2 (stating that “the Laws of the United States . . . shall be the supreme Law of the Land;  
10 and the Judges in and the Judges in every State shall be bound thereby, any Thing in the  
11 Constitution or Laws of any State to the Contrary notwithstanding”). Doing so would not only be  
12 unlawful, but also risk exposing the state, as well as private groundwater users, to civil liability.

13 CSI’s answering brief cites and discusses Section 7 of the ESA, a provision that applies  
14 only to federal agencies, and prevents those agencies from doing anything that would “jeopardize  
15 the continued existence” of a threatened or endangered species. CSI Ans. Br. at 4. *See also* Center  
16 Ans. Br. at 11; 16 U.S.C. § 1536(a)(2). CSI therefore confuses the issue.<sup>2</sup> “Take” liability derives  
17 not from Section 7, but from Section 9, which prohibits any “person” from “taking” any  
18 endangered species, or “attempt[ing] to commit, solicit[ing] another to commit, or caus[ing] to be  
19 committed,” any offense encompassed in the broad statutory definition of “take.” 16 U.S.C. §§  
20 1538; 1532(19).

21 CSI also relies on a 2006 memorandum of agreement (“MOA”) and Programmatic  
22 Biological Opinion, claiming that these documents authorize CSI to “exercise its water rights.”  
23 CSI Ans. Br. at 5. But as the Center explained in its answering brief, this mischaracterizes both  
24 the MOA and the Biological Opinion. Neither document authorizes any “take” of the Moapa dace,  
25

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26 <sup>2</sup> Elsewhere in its answering brief, CSI relies on *Alaska Oil & Gas Association v. Pritzker*, 840  
27 F.3d 671 (9th Cir. 2006), which is similarly inapposite. *Pritzker* involved a determination as to  
28 whether a species was “warranted” for listing under Section 4 of the ESA, not whether “take” had  
occurred. *See id.* at 674.

1 and neither document authorizes CSI to develop its water rights. *See* SE ROA 47207 (“No  
2 exemption from Section 9 of the Act is issued through this biological opinion”); 47148 (stating  
3 that “any future groundwater withdrawals, such as “utilization of . . . CSI[’s] water right[s],” must  
4 be “addressed on their own merits” through a separate consultation process.). More importantly,  
5 neither document establishes that the State Engineer was wrong in Order 1309 to consider the  
6 potential liability of the State, or other parties that are not signatories to the MOA.

7 CSI further argues that no limitations on pumping may be imposed without “actual  
8 evidence of a take,” citing *Palila v. Hawaii Department of Land & Natural Resources*, 852 F.2d  
9 1106 (9th Cir. 1988). Again, CSI confuses the issue. *Palila* involves, in part, the standard of proof  
10 necessary to establish liability for a take. *See* 852 F.2d at 1107-10 (discussing evidence that State  
11 agency’s actions had caused actual “take”). But whether a “take” had occurred was not at issue in  
12 the Order 1303 hearing and, in any case, would be a matter for a federal court and not the State  
13 Engineer. Rather, the State Engineer’s analysis in Order 1309 was prospective; Order 1309  
14 explains that, if allowed above a certain level, groundwater pumping could reduce the habitat  
15 available to the Moapa dace and thus cause “take.” *See* SE ROA 45-46. Order 1309 further  
16 concludes, correctly, that it would be contrary to the public interest to allow such impacts to the  
17 dace, or to take action which could expose the State and private groundwater users to ESA liability.  
18 *Id.* Such a conclusion does not require evidence of actual “take,” as CSI contends, but instead  
19 follows from the plain text of the ESA and the binding federal precedent that the Center discussed  
20 in its prior briefing. CSI apparently takes the absurd position that the State Engineer cannot act to  
21 prevent “take,” but must wait until after “take” has occurred to do anything to protect the dace. Put  
22 simply, CSI would have the State Engineer violate the ESA before acknowledging its existence.  
23 This is an unreasonable position, with no basis in law, and this Court should reject it.

24 Georgia-Pacific, meanwhile, argues that factors other than springflow, such as invasive  
25 fish species, are more important to the conservation of the dace. Georgia-Pacific Ans. Br. at 4.  
26 This ignores that invasive species have been removed from much of the dace’s habitat,  
27 dramatically reducing the threat. SE ROA 53140. After the removal of Tilapia and other invasive  
28



1 species—along with considerable habitat restoration efforts undertaken by FWS and SNWA under  
2 the 2006 MOA—reductions in springflow are the primary remaining threat to the dace. SE ROA  
3 53117, 53436, 53140. As witnesses for FWS testified at the Order 1309 hearing, any reduction in  
4 flow will decrease the amount of habitat available for the dace, and thus reduce the number of  
5 individual dace. SE ROA 53117. Experts for FWS and SNWA also affirmed in testimony that  
6 reductions in springflow from pumping are currently the primary threat to the dace. SE ROA  
7 53140, 53436. Georgia-Pacific ignores this testimony, as well as substantial portions of the 2006  
8 Programmatic Biological Opinion and the 2008 Biological Opinion for the Kane Springs  
9 Groundwater Development Project. SE ROA 47146-57, 49906-73. Both of these documents  
10 discuss in detail the threat posed to the dace from groundwater pumping, and the potential for  
11 “take.” Georgia-Pacific is therefore incorrect in arguing invasive species are a more serious threat  
12 to the dace than declining springflows.

13 Finally, Georgia-Pacific’s discussion of invasive species confuses “jeopardy” under the  
14 ESA with “take.” As noted, Section 7 of the ESA prohibits federal agencies from doing anything  
15 that would “jeopardize the continued existence” of a threatened or endangered species. 16 U.S.C.  
16 § 1536(a)(2). “Jeopardy,” as defined in the ESA, relates to the species as a whole, and is therefore  
17 different than “take,” which relates to individual members of the species. *See Or. Nat. Desert Ass’n*  
18 *v. Tidwell*, 716 F. Supp. 2d 982, 997 (D. Or. 2010) (distinguishing jeopardy from take, and noting  
19 that “[t]he ESA requires the issuance of an [incidental take statement] where harm to even one”  
20 member of a listed species “is anticipated”). In arguing that “recovery of [the dace] depended” on  
21 removal of invasive species, Georgia-Pacific Ans. Br. at 4-5, Georgia-Pacific addresses the  
22 conservation of the species as a whole and thus confuses “jeopardy” with “take.” But nothing in  
23 Order 1309, or in the Center’s Petition for Judicial Review, had anything to do with “jeopardy” or  
24 ESA Section 7. Georgia-Pacific therefore fails to show that the State Engineer was wrong to  
25 consider “take” in Order 1309. Even if invasive species still posed a significant threat to the dace—  
26 something that cannot be established on the record due to FWS and SNWA’s conservation  
27 actions—it would not reduce the liability of the State or private parties for any “take” of individual  
28

1 dace that resulted from loss of springflow. The State Engineer was correct to recognize this in  
2 Order 1309.

3 **B. Authority to Create LWRFS: The State Engineer has an Ongoing Obligation to**  
4 **Consider the Public Interest Because Water in Nevada is a Publicly Owned Resource.**

5 Vidler argues on various grounds that Order 1309 is unlawful due to a lack of statutory  
6 authority. The Center addressed these objections in its answering brief, which discusses the various  
7 sources of express and implied authority that permit the State Engineer to jointly manage and limit  
8 pumping in the interconnected and over-appropriated groundwater “basins” that comprise the  
9 LWRFS. *See* Center Ans. Br. at 15-30. Vidler further argues that the State Engineer was wrong in  
10 Order 1309 to consider the public’s interest in conservation and protection of the Moapa dace  
11 because, according to Vidler, the Nevada water statutes allow for consideration of the public  
12 interest only in the narrow context of applications to appropriate new sources of water. Vidler Ans.  
13 Br. at 11. This is incorrect. The water statutes and the public trust doctrine both impose an ongoing  
14 obligation to consider the public interest in water-management decisions.

15 In Nevada, “[t]he water of all sources . . . within the boundaries of the State whether above  
16 or beneath the surface of the ground, belongs to the public.” *Mineral Cty. v. Lyon Cty.*, 473 P.3d  
17 418, 426 (Nev. 2020) (quoting NRS § 533.025). “[T]hose holding vested water rights do not own  
18 or acquire title to water, but merely enjoy a right to the beneficial use of the water.” *Id.* at 424  
19 (quoting *Mineral County v. State, Department of Conservation*, 117 Nev. 235, 247, 20 P.3d 800,  
20 808 (2001) (Rose, J., concurring)). This right, moreover, “is *forever* subject to the public trust,  
21 which *at all times* ‘forms the outer boundaries of permissible government action with respect to  
22 public trust resources.’” *Id.* (emphasis added).

23 In *Mineral County*, the Nevada Supreme Court held that “the state’s statutory water scheme  
24 is consistent with the public trust doctrine,” including the requirement to “maintain the trust for  
25 use and enjoyment of present and future generations,” because it requires the State Engineer to  
26 “consider the public interest when allocating *and administering* water rights.” *Id.* at 421, 428  
27 (emphasis added). Through the water statutes, including NRS § 534.120, the State Engineer is  
28 authorized to “regulate groundwater in the interest of pubic welfare,” and “limit water rights when

1 water resources are depleted.” *Id.* at 427. Although the Court held that public trust doctrine does  
2 not permit *reallocation* of adjudicated water rights, it acknowledged that the doctrine does require  
3 ongoing *regulation* of such rights to protect the public welfare.<sup>3</sup> *See id.* at 430 (agreeing with the  
4 proposition that “a right is not exempt from regulation to protect the public welfare simply because  
5 it has vested or been adjudicated”).

6 Vilder’s narrow reading of the State Engineer’s “public interest” obligation is  
7 fundamentally at odds with the Nevada Supreme Court’s decision in *Mineral County*, and would  
8 undermine the Court’s holding that the Nevada water statutes are consistent with the State’s public  
9 trust responsibilities. *See id.* at 431 (“To allow the state to otherwise allocate waters without due  
10 regard for the public trust would permit the state to evade its fiduciary duties, and this we cannot  
11 sanction.”). In addition, the practical consequences of Vilder’s position would be environmentally  
12 and economically disastrous. In the LWRFS, where permitted water rights exceed the amount of  
13 available water by several thousand acre-feet per year, the State Engineer would be forced to stand  
14 by as groundwater over-appropriation in Coyote Springs Valley and other upgradient basis  
15 depleted water supplies for the communities and farms dependent on the Muddy River, and drove  
16 the Moapa dace toward extinction. This would be wholly inconsistent with the State’s duty to  
17 “maintain the [public] trust for use and enjoyment of present and future generations,” as well as  
18 the Nevada water statutes’ fundamental principles that all water in the state belongs to the public,  
19 that permitted water rights under Nevada water law are characterized by relative, non-ownership  
20 rights, and that these usufructuary rights are subject to regulation for the public welfare. *Id.* at 421,  
21 427-28; NRS § 533.025. *See also Desert Irrigation, Ltd. v. State*, 113 Nev. 1049, 1059, 944 P.2d  
22 835, 842 (1997) (recognizing water right as a “inchoate usufructuary right” and that rights holders  
23 do not own or acquire title to water); *Town of Eureka v. Office of the State Eng’r*, 108 Nev. 163,  
24 167, 826 P.2d 948, 950 (1992) (“Water rights are subject to regulation under the police power as  
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26

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27 <sup>3</sup> As discussed in the Center’s answering brief, Order 1309 did not reallocate water rights, as  
28 Vidler, CSI, Georgia-Pacific, and others argue. *See* Center Ans. Br. at 27.

1 is necessary for the general welfare.”); *In re Manse Spring & Its Tributaries*, 60 Nev. 280, 287,  
2 108 P.2d 311, 315 (1940) (noting the state has the right to prescribe how water may be used).

3 **C. Hydrologic Basis for 8,000 Acre-Foot Cap: Substantial Evidence Does Not Support**  
4 **the 8,000 Acre-Foot Cap as Adequate to Protect Senior Water Rights and the Moapa**  
5 **Dace.**

6 Several parties, including the State Engineer and SNWA, argue that substantial evidence  
7 supports the State Engineer’s 8,000 acre-foot cap on pumping, and that the cap is sufficient to  
8 protect senior water rights and the Moapa dace. But as the Center explained in its opening and  
9 answering briefs, the 8,000 acre-foot cap is not supported by substantial evidence because the State  
10 Engineer’s basis for the 8,000 acre-foot figure—that the LWRFS carbonate aquifer is approaching  
11 a “steady-state” at “current” levels of pumping—lacks factual support in the record. *See* Center  
12 *Op. Br.* at 24-28, *Center Ans. Br.* at 13-15.

13 To summarize, most of the evidence presented at the Order 1303 hearing showed that  
14 carbonate pumping at less than 8,000 acre-feet per year was continuing to decrease groundwater  
15 elevations and springflows, despite above-average precipitation in the years leading up to the  
16 hearing. *See, e.g.,* SE ROA 34519, 41995, 51449, 51464-65, 52887-88. Some parties at the Order  
17 1303 hearing argued that groundwater levels were at or near a “steady-state,” but failed to identify  
18 evidence supporting this assertion. Instead, these parties explained that the data was uncertain, at  
19 best, and that further study was necessary to draw a conclusion. *See* SE ROA 53118 (FWS), 53729  
20 (NV Energy), SE ROA 53459 (Muddy Valley Water District); *see also* SE ROA 58 (explaining  
21 that that the apparent stabilizing “trend” was “of insufficient duration to make this determination  
22 . . . and continued monitoring is necessary to determine if this trend continues or if water levels  
23 continue to decline”).

24 The State Engineer’s answering brief acknowledges this uncertainty, stating that “data  
25 from some LWRFS wells cut against the conclusion that the LWRFS is at equilibrium,” and that  
26 a “downward trend” in these wells “could be a leading indicator of declines that will be observed  
27 closer to the Muddy River—and eventually in the amount of spring flow into the river.” State  
28 Engineer’s *Ans. Br.* at 16 (citing SE ROA 40644). SNWA, too, acknowledges that “existing

1 pumping of 8,000 [acre-feet per year] is causing spring flow declines, just less rapidly” than during  
2 the pumping test. SNWA Ans. Br. at 46 (citing SE ROA 53349 at 932:21-22; SE ROA 53336 at  
3 880:6-9; SE ROA 53169 at 519:24 to 520:4; SE ROA 53623 at 1545:16 to 1546:1; SE ROA 41876;  
4 SE ROA 53729 at 1790:6-10).

5 Both SNWA and the State Engineer nevertheless argue that the 8,000 acre-foot cap should  
6 be upheld because the State Engineer “recognized that continued monitoring is necessary, and that  
7 pumping may need to be further reduced in the future if water levels continue to decline.” SNWA  
8 Ans. Br. at 50; *see also* State Engineer Ans. Br. at 16 (“Continued monitoring of the groundwater,  
9 the springs and the Muddy River’s flow is necessary to determine whether further reductions to  
10 the maximum pumping amount are required.”). The Court should decline these invitations to base  
11 a finding of “substantial evidence” on the State Engineer’s promise to monitor, evaluate, and act  
12 at some unspecified point in the future. The “substantial evidence” standard requires the State  
13 Engineer to base his conclusions on evidence in the record, not assertions that problems can be  
14 fixed at a later date. *See Eureka Cty. v. State Eng’r of Nev.*, 131 Nev. 846, 856, 359 P.3d 1114,  
15 1120-21 (2015).

16 To illustrate, consider *Eureka County*, which involved a dispute over water-rights  
17 applications to support a mining project. 131 Nev. at 851, 359 P.3d at 1118. Evidence showed that  
18 the mine’s groundwater pumping would dewater springs and impact existing water rights. *Id.* The  
19 State Engineer maintained that any impacts to the springs could be mitigated, but had yet to  
20 develop a mitigation plan. 131 Nev. at 853-55, 359 P.2d at 1119-20. The Court held that the State  
21 Engineer could not grant water rights applications on that basis, and explained that because the  
22 State Engineer based his conclusions on future action, rather than evidence in the record, his  
23 decision to grant the applications was not supported by substantial evidence:

24           Essentially, and with all other arguments aside, the State Engineer[’s] . . . position  
25           is that the State Engineer may leave for a later day, . . . the determination of exactly  
26           what . . . mitigation would entail. But the State Engineer’s decision to grant an  
27           application, which requires a determination that the proposed use or change would  
28           not conflict with existing rights, NRS 533.370(2), *must be made upon presently  
                  known substantial evidence, rather than information to be determined in the future.*

1 131 Nev. at 856, 359 P.2d at 1120 (emphasis added). The Court also explained that the State  
2 Engineer’s reliance on future data and future actions did not amount to an explanation sufficient  
3 to permit judicial review. 131 Nev. at 856, 359 P.2d at 1120-21.

4 Here, in the face of data showing continuing declines in springflows at current rates of  
5 pumping, acknowledgements that there was insufficient data to support the “steady state”  
6 hypothesis, and warnings that adverse impacts to the Moapa dace and senior water rights could  
7 occur at current levels of pumping, the State Engineer relies entirely on future monitoring and  
8 future “adjustments” to justify his decision to allow up to 8,000 acre-feet of pumping. But the State  
9 Engineer’s acknowledgements of the uncertainty underlying his determination and the need for  
10 future action do not compensate for the lack of substantial evidence supporting that decision. As  
11 in *Eureka County*, the State Engineer’s reliance on future actions, including data collection and  
12 post-hoc mitigation of impacts, demonstrates that the 8,000 acre-foot figure is not based on  
13 substantial evidence.

14 **D. Hydrologic Basis for 8,000 Acre-Foot Cap: The Inclusion of Kane Springs Valley in**  
15 **the LWRFS Does Not Require the State Engineer to Determine that Additional Water**  
16 **is Available for Pumping.**

17 Georgia-Pacific argues that “because Kane Springs Valley was not included in the Order  
18 1303 hydrographic basin, the expert recommendations at the hearing did not reflect the  
19 contribution of additional resources from that area.” Georgia-Pacific Ans. Br. at 2. Georgia-Pacific  
20 further contends that Kane Springs Valley may “contribute” up to 4,000 acre-feet per year to the  
21 LWRFS. *Id.* The Court should reject this argument because Georgia-Pacific invites the Court to  
22 “find” water that does not exist. *See* SE ROA 749 (“[T]he evidence is overwhelming that  
23 unappropriated water does not exist”).

24 The State Engineer’s designation of the LWRFS was based largely on the results of the  
25 Order 1169 pumping test, which revealed that all of the LWRFS basins share the same supply of  
26 water. *See* SE ROA 47-60, 749-51. Put differently, the LWRFS was designated because, due to  
27 the interconnected and highly transmissive nature of the carbonate aquifer, one cannot simply draw  
28 lines at basin boundaries and declare that one or another basin represents a separate supply of water

1 that can be exploited without impact to downgradient users and the Muddy River Springs. These  
2 characteristics render a strict water-budget approach inapplicable. As the State Engineer explained  
3 in Order 1309, “availability of groundwater for pumping based on water budget should consider  
4 whether the same water is appropriated for use in upgradient and downgradient basins.” SE ROA  
5 58; *see also* SE ROA 749 (“unlike other separate and distinct basins in Nevada that do not feature  
6 carbonate-rock aquifers, all of the [LWRFS] basins share virtually all of the same supply of  
7 water”).

8 Georgia-Pacific’s argument fails to do this. Specifically, Georgia-Pacific fails to consider  
9 that the 1,000 to 4,000 acre-feet of water allegedly “available” in Kane Springs Valley is part of  
10 the same common water supply that has been fully appropriated through the Muddy River Decree  
11 and subsequent groundwater appropriation permits. Because the LWRFS carbonate aquifer is  
12 exceptionally interconnected and transmissive, it does not matter whether a well is in Kane Springs  
13 Valley or elsewhere in the LWRFS—if the well draws from the carbonate aquifer it will affect  
14 existing water rights and the Muddy River Springs. Because Georgia-Pacific focuses exclusively  
15 on the intra-basin water budget of Kane Springs Valley, and ignores the impacts of pumping in  
16 Kane Springs Valley, its argument for a higher cap on groundwater pumping fails.

#### 17 **CONCLUSION AND REQUEST FOR RELIEF**

18 As the Center explained in its answering brief, most of Order 1309 is correct and should  
19 be upheld. Specifically, the State Engineer was correct, and fully within his statutory authority, to  
20 combine the seven LWRFS basins for joint management based on the close and unique hydraulic  
21 connection that exists throughout the LWRFS carbonate aquifer. The State Engineer was also  
22 correct to consider the ESA, and potential impacts to the Moapa dace, as part of his ongoing  
23 obligation to consider the public interest in the administration of water rights. And, the State  
24 Engineer was correct to limit pumping in the LWRFS based on the evidence in the record and his  
25 statutory obligations. The Court should uphold these aspects of Order 1309.

26 However, as explained above, as well as in the Center’s previous briefing, the State  
27 Engineer’s pumping limit of 8,000 acre-feet per year is too high, and not supported by substantial  
28

1 evidence because: (1) there is very little evidence in the record supporting the “steady-state”  
2 hypothesis; and (2) what little evidence that does exist is characterized primarily by uncertainty,  
3 and promises to address this uncertainty in the future do not amount to substantial evidence  
4 sufficient to support a decision. Further, the State Engineer’s selection of 8,000 acre-feet per year,  
5 and the analysis in Order 1309 supporting that decision, reveal that the State Engineer failed to  
6 adequately consider the public interest, particularly the reductions in springflow that, based on  
7 evidence in the record acknowledged by both the State Engineer and SNWA, are likely to occur  
8 at “current” rates of groundwater pumping. For all of these reasons, the State Engineer’s  
9 determination of the amount of water that can be safely pumped from the LWRFS is arbitrary,  
10 capricious, and not supported by substantial evidence.

11         However, the Center recognizes that Order 1309, despite its flaws, represents a positive  
12 step forward in the management of scarce groundwater resources in Southern Nevada. Without the  
13 protections afforded by Order 1309, impacts to the Muddy River Springs and the Moapa dace  
14 would undoubtedly be more severe and, in light of the amount of carbonate groundwater currently  
15 appropriated, may represent an existential threat to both the springs and the fish. Therefore, the  
16 Center requests that the Court remand, but not vacate, Order 1309 pending a revised, evidence-  
17 based determination from the State Engineer regarding the amount of groundwater that can be  
18 pumped from the LWRFS.

19         **Affirmation:** The undersigned do hereby affirm that the preceding document and/or  
20 attachments do not contain the social security number of any person.

21  
22 Dated this 11th day of January, 2022.

23                     /s/ Scott Lake  
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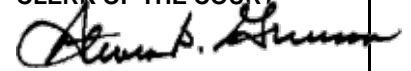


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**CERTIFICATE OF SERVICE**

I certify that I am an employee of the Center for Biological Diversity, and that on this 11th day of January, 2022 I served a true and correct copy of the foregoing by electronic service to the participants in this case who are registered with the Eighth Judicial District Court’s Odyssey eFileNV File & Serve system to this matter.

/s/ Scott Lake  
Scott Lake



1 **APEN**

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14 **IN THE EIGHTH JUDICIAL DISTRICT COURT**  
15 **IN AND FOR THE COUNTY OF CLARK, STATE OF NEVADA**

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

19 Petitioners,

20 vs.

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

26 Respondent.

Case No. A-20-816761-C

Dept. 1

Consolidated with Cases:

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

**THE CENTER FOR BIOLOGICAL  
DIVERSITY'S EXCERPTS OF RECORD**

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28 ///  
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17			

18 Dated this 11th day of January 2022.

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1 **CERTIFICATE OF SERVICE**

2 I certify that I am an employee of the Center for Biological Diversity, and that on this 11th  
3 day of January, 2022, I served a true and correct copy of the foregoing by electronic service to the  
4 participants in this case who are registered with the Eighth Judicial District Court's Odyssey  
5 eFileNV File & Serve system to this matter.

6  
7 /s/ Scott Lake  
8 Scott Lake  
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TABLE OF JA LOCATION TO AVOID DUPLICATES

Exhibit Number	Description	SE ROA	JA VOL	JA BATES	
1	The Center for Biological Diversity's Opening Brief				
2	The Center for Biological Diversity's Answering Brief				
3	Nevada State Engineer's Order 1309 (June 15, 2020)	2-69	2	JA_326	JA_393
4	Nevada State Engineer's Ruling 5712 (Feb. 2, 2007)	699-721	3	JA_864	JA_886
5	Nevada State Engineer's Ruling 6254 (Jan. 29, 2014)	726-54	3	JA_891	JA_919
6	U.S. Department of the Interior, Test Impacts and Availability of Water Pursuant to Applications Pending Under Order 1169, Presentation to the Office of the Nevada State Engineer (June 28, 2019) (Selected Pages)	10883, 10889	8	JA_3645	JA_3736
7	Tom Myers, Ph.D., Technical Memorandum Re: Groundwater Management and the Muddy River Springs, Report in Response to Nevada State Engineer Order 1303 (June 1, 2019)	34490-34516	15	JA_7088	JA_7114
8	Tom Myers, Ph.D., Technical Memorandum Re: Groundwater Management and the Muddy River Springs, Rebuttal in Response to Stakeholder Reports Filed with Respect to Nevada State Engineer Order 1303 (August 16, 2019)	34517-34546	15	JA_7115	JA_7144
9	John Bredehoeft, "It Is the Discharge," Ground Water (2007)	36948	19	JA_8454	JA_8454
10	Southern Nevada Water Authority and Las Vegas Valley Water District, Assessment of Lower White River Flow System Water Resource Conditions and Aquifer Response, Presentation to the Office of the Nevada State Engineer (June 2019) (Selected Pages)	41930, 41995	27	JA_11813	JA_11955
11	Southern Nevada Water Authority and Las Vegas Valley Water District, Response to Stakeholder Reports Submitted to the Nevada State Engineer with Regards to Interim Order 1303 (Aug. 2019) (Selected Pages)	42165, 42187-89	28	JA_12048	JA_12097

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12	U.S. Fish and Wildlife Service, Programmatic Biological Opinion for the 2006 LWRFS MOA (Jan. 30, 2006)	47146-47213	22	JA_10328	JA_10445
13	Stephen T. Kirk and Michael E. Campana, A Deuterium-Calibrated Groundwater Flow Model of a Regional Carbonate-Alluvial System, 119 Journal of Hydrology 357-88 (1990)	49533-64	33	JA_15392	JA_15423
14	U.S. Fish and Wildlife Service Biological Opinion re: Request for Formal and Informal Consultation on the Kane Springs Valley Groundwater Development Project in Lincoln County, Nevada (October 29, 2008)	49906-73	33	JA_15476	JA_15543
15	Charles V. Theis, The Relation Between the Lowering of the Piezometric Surface and the Rate and Duration of Discharge of a Well Using Ground-Water Storage (1935)	50133-38	33	JA_15545	JA_15550
16	National Park Service, Prediction of the Effects of Changing the Spatial Distribution of Pumping in the Lower White River Flow System (July 3, 2019) (Selected Pages)	51439, 51449, 51464-65	41	JA_16570	JA_16662
17	National Park Service's Response to July 2019 Interim Order 1303 Reports (August 16, 2019) (Selected Pages)	51532, 51547-54	41	JA_16663	JA_16753
18	National Park Service's Closing Statement in Response to Interim Order 1303 (Dec. 2, 2019)	52883-52888	43	JA_17280	JA_17285
19	Hearing Transcript from September 24, 2019 (Selected Pages)	53054-55, 53071	44	JA_17450	JA_17510
20	Hearing Transcript from September 24, 2019 (Selected Pages)	53114-15, 53117-18, 53140	44	JA_17511	JA_17557
21	Hearing Transcript from September 25, 2019 (Selected Pages)	53161-62, 53183	44	JA_17558	JA_17608
22	Hearing Transcript from September 30, 2019 (Selected Pages)	53430-31, 53436, 53443, 53459	44	JA_17827	JA_17887
23	Hearing Transcript from October 2, 2019 (Selected Pages)	53611-12, 53618	44	JA_18008	JA_18053

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24	Hearing Transcript from October 4, 2019 (Selected Pages)	53709- 10, 53729	44	JA_18106	JA_18155
25	U.S. Geological Survey, Distribution of Carbonate-Rock Aquifers in Southern Nevada and the Potential for their Development, Summary of Findings, 1985-88	54946, 54953	46	JA_18783	JA_18824





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18 **DISTRICT COURT**  
19 **CLARK COUNTY, NEVADA**

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

23 Petitioners,  
v.

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

27 Respondent.  
28 \_\_\_\_\_/

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

**COYOTE SPRINGS INVESTMENT, LLC'S**  
**REPLY IN SUPPORT OF OPENING BRIEF**

**DATE OF HEARING: February 14, 2022**  
**TIME OF HEARING: 9:00 a.m.**

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1 IN THE MATTER OF THE PETITION OF  
 2 COYOTE SPRINGS INVESTMENT, LLC  
 \_\_\_\_\_ /  
 3  
 4 IN THE MATTER OF THE PETITION OF  
 5 APEX HOLDING COMPANY, LLC  
 \_\_\_\_\_ /  
 6  
 7 IN THE MATTER OF THE PETITION OF  
 8 CENTER FOR BIOLOGICAL DIVERSITY  
 \_\_\_\_\_ /  
 9  
 10 IN THE MATTER OF THE PETITION OF  
 11 MUDDY VALLEY IRRIGATION COMPANY  
 \_\_\_\_\_ /  
 12  
 13 IN THE MATTER OF THE PETITION OF  
 14 NEVADA COGENERATION ASSOCIATES  
 15 NOS. 1 AND 2  
 \_\_\_\_\_ /  
 16  
 17 IN THE MATTER OF THE PETITION OF  
 18 GEORGIA-PACIFIC GYPSUM, LLC AND  
 19 REPUBLIC ENVIRONMENTAL  
 20 TECHNOLOGIES, INC.  
 \_\_\_\_\_ /  
 21  
 22 IN THE MATTER OF THE PETITION OF  
 23 LINCOLN COUNTY WATER DISTRICT AND  
 24 VIDLER WATER COMPANY, INC.

**CONSOLIDATED WITH:**  
 Case No.: A-20-817765-P (Sub Case)  
 Dept. No.: 1  
  
 Case No.: A-20-817840-P (Sub Case)  
 Dept. No.: 1  
  
 Case No.: A-20-817876-P (Sub Case)  
 Dept. No.: 1  
  
 Case No.: A-20-817977-P (Sub Case)  
 Dept. No.: 1  
  
 Case No.: A-20-818015-P (Sub Case)  
 Dept. No.: 1  
  
 Case No.: A-20-818069-P (Sub Case)  
 Dept. No. 1  
  
 Case No.: A-21-833572-J  
 Dept. No. 1

**COYOTE SPRINGS INVESTMENT, LLC'S**  
**REPLY IN SUPPORT OF OPENING BRIEF**

Coyote Springs Investment, LLC (“CSI”), by and through its counsel of record, replies in support of its Opening Brief as follows.

**I. Introduction**

“First, it is undisputed that Nevada’s ground water resources have long been managed on a perennial yield basis for the entire Hydrographic **basin**. Such a system is specifically

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1 contemplated by the Nevada Groundwater Code, which provides the State Engineer to take  
2 various acts on a **basin-wide basis**. See NRS 534.030 (method for designation of groundwater  
3 **basins**), 534.035 (establishment of groundwater boards for **individual basins**), 534.050 (permit  
4 required before well may be drilled in a **designated groundwater basin**), 534.120 (State  
5 Engineer may make regulations for the welfare of a **designated basin**). It is, in fact, under this  
6 authority that the State Engineer has identified the 232 Administrative Ground Water Basins in  
7 Nevada. It is patently reasonable for the State Engineer to manage these basins in a manner  
8 consistent with his statutory authority. This approach is also reasonable for the reason that  
9 managing a basin on the basis of its perennial yield ensures that **the basin** will remain in  
10 balance.” See **EXHIBIT 34** (Respondent Nevada State Engineer’s Answering Brief, filed in  
11 *Pyramid Lake Paiute Tribe of Indians v. Ricci*, Case No. CV01-05764), p. 9 (emphasis added).<sup>1</sup>  
12

13  
14 These are not the words of CSI or any other Petitioner. These are the exact words  
15 authored by the NSE in *Pyramid Lake Paiute Tribe of Indians v. Ricci*. Obviously, and as  
16 explained more fully herein, judicial estoppel rears its persuasive and binding presence. The  
17 NSE is not free to argue that groundwater management is done in a basin-by-basin manner in one  
18 judicial proceeding and then reverse its position in another judicial proceeding. Such selectivity  
19 is improper, and the hypocrisy is self-evident.  
20

21 The thrust of the NSE’s Answering Brief is based on self-serving semantics concerning  
22 the word “basin” and the NSE’s declaration of his unlimited authority. No one disputes that the  
23 United States Geological Survey (“USGS”) together with the NSE originally indexed the 232  
24 hydrographic basins in the State of Nevada in 1968. For over three decades of litigation,  
25 regulatory challenges and management of these hydrographic basins, water users, the NSE, and  
26 courts have referred to these hydrographic basins.<sup>2</sup> Now, for the first time, the NSE professes  
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<sup>1</sup> CSI numbers its exhibits consecutively with the exhibits attached to its Opening Brief and Brief in Intervention.

<sup>2</sup> Indeed, and as discussed herein, the NSE has previously taken the position in litigation that water management in

1 confusion over CSI's use of the term "basin".

2           Aside from trying to distract the Court from its previous practices, statements, and  
3 terminology, the NSE now contends that it has the omnipotent power to do whatever he chooses  
4 to do regarding water management that is not expressly prohibited by statute— and that this Court  
5 cannot question it. The strategy is to convince the Court that if the Legislature has not said that  
6 the NSE cannot do something, then the NSE can do it.

7           This case represents an example of tortured statutory construction. The NSE does not  
8 identify any statutes that allow him to re-define the established Nevada basins. Rather, the NSE  
9 argues that because there is no specific statute that prevents the NSE from creating a "Mega  
10 Basin", he is permitted to do so even though all statutes involved in this action use the singular  
11 term basin. Nowhere in the statutory framework is the NSE empowered to combine multiple  
12 basins into a "Mega Basin". And no statute or combination of statutes, permit the NSE to  
13 deviate from basin-by-basin water management.

14           The NSE issued CSI the right to use 4,140 afa of groundwater per year in the Coyote  
15 Spring Valley basin (CSV), a specific basin. When CSI obtained its water rights, they were  
16 given a definitive priority within the basin in which the NSE granted those permits— CSV. The  
17 NSE would now have the Court believe that the priority established can be extinguished,  
18 modified, or eliminated because the NSE can —at any time— combine multiple basins. Under the  
19 NSE's position, CSI's priority is diluted because of priorities that may have been established in  
20 other basins with different permitted users and different hydrological circumstances, including  
21 different perennial yields. To subject water users to such an arbitrary process is a fundamental  
22 violation of due process.

23           The Court is the gatekeeper of legal rights and entitlements and the ultimate enforcer of  
24 the fundamental right to due process. The State is required to honor the prior appropriation  
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the State of Nevada is to be performed on a basin-by-basin basis.

1 doctrine and if it is unwilling to do so, this Court must implement the appropriate remedy. The  
2 prior appropriation doctrine establishes CSI's priority, and the NSE has violated that mandate by  
3 utilizing hydrological issues in other basins to curtail and jeopardize CSI's established priority  
4 rights.

5  
6 The NSE is just another state agency with limited and restricted authority who can only  
7 act where the Legislature expressly authorizes him to do so. If the NSE is permitted to ignore or  
8 abandon the basin-by-basin water management policy, the future for all Nevada users becomes  
9 dangerously unpredictable. Neither the Legislature nor the Nevada Supreme Court accepts or  
10 condones this application of the NSE's omnipotence. Order 1309 is clearly void. Accordingly,  
11 CSI respectfully requests that this Court grant its Petition for Judicial Review.

12  
13 **II. The Appropriate Standard of Review Does Not Require Deference to the NSE's**  
14 **Interpretation of the Law or Findings of Fact**

15 The NSE's recitation of the appropriate standard of review in this matter reads as though  
16 the NSE is the sole arbiter and that this Court does not play any role in reviewing Order 1309  
17 and *must* defer to the NSE on all issues of fact and law; this is untrue. *See* NSE Answering  
18 Brief, p. 19, 31-32. Contrary to the NSE's self-serving contention that the interpretation of  
19 Nevada law and the unsupported factual determinations in Order 1309 cannot be meaningfully  
20 reviewed by this Court, this Court is not required to simply rubber stamp the NSE's orders.  
21 Indeed, doing so would be contrary to all fundamental rules of applicable law. The process of  
22 judicial review of the NSE's decisions is fundamental to due process and to ensure that agencies,  
23 like the NSE, do not act in excess of their limited, statutory authority.

24  
25 The Nevada Supreme Court has clarified the important role of the judiciary in water law  
26 cases noting that "despite that Nevada often follows its arid Western sister states in codifying  
27 and modifying the law of prior appropriation, 'consideration of equity or fairness in access and  
28

1 distribution is one of the cardinal principles underlying every enduring water management  
2 system.” *Wilson v. Happy Creek, Inc.*, 135 Nev. 301, 304, 448 P.3d 1106, 1109 (2019) (quoting  
3 Stephen P. Mumme, *From Equitable Utilization to Sustainable Development: Advancing Equity*  
4 *in U.S.-Mexico Border Water Management*, Water, Place, and Equity, at 117 (John M. Whiteley  
5 et al. eds., 2008). Thus, the Court recognized the courts’ role in ensuring the proper  
6 implementation of the State’s water rights regime: “although states have modified water rights  
7 by statute, ‘in all jurisdictions, judge-made law remains crucial to the understanding of water  
8 allocation legislation’”. *Id.* at 304, 448 P.3d at 1110 (quoting Anthony Dan Tarlock & Jason  
9 Anthony Robison, *Law of Water Rights and Resources* § 1:1 (2018)).  
10  
11

12 Accordingly, this Court’s consideration of the legal and factual issues presented in the  
13 Petitioners’ Opening Briefs is neither as limited nor perfunctory as characterized by the NSE.  
14 Moreover, the issues raised by the Petitioners require applying different standards of review,  
15 each affording a different level of deference.

16 First, several opening briefs raise significant and important issues about the scope of the  
17 NSE’s statutory authority. The NSE argues that whether the NSE has authority to combine  
18 multiple basins for “conjunctive management” is truly a factual issue and that the Court must  
19 therefore defer to his findings. *See* NSE Answering Brief, p. 32-33 (arguing that Petitioners  
20 “misclassify a factual dispute as a legal one”). The NSE’s attempt to conflate legal and factual  
21 issues to persuade this Court to completely defer to his interpretation of the scope of his legal  
22 authority must be rejected.<sup>3</sup>  
23

24 Indeed, the NSE argues that “When discussing the persuasive character of the State  
25 Engineer’s interpretation of Chapters 533 and 534, the Nevada Supreme Court has been mindful  
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27  
28 <sup>3</sup> Notably, even if this issue involved questions of fact and law, de novo review would still apply because the legal  
issue concerning the scope of the NSE’s statutory authority predominate. *See Bower v. Harrah’s Laughlin, Inc.*, 125  
Nev. 470, 480, 215 P.3d 709, 717 (2009) (explaining that the Nevada Supreme Court reviews mixed questions of  
law and fact de novo when legal issues predominate).

1 of NRS 533.450(9)”<sup>4</sup> NSE Answering Brief, p. 32. But, to the contrary, the Nevada Supreme  
2 Court has explained that the interpretation and construction of a statute is a “purely legal  
3 question” not subject to the presumption in NRS 533.450(1). *In re Nevada State Eng’r Ruling*  
4 *No. 5823*, 128 Nev. 232, 239, 277 P.3d 449, 453 (2012) (“A decision of the State Engineer  
5 enjoys a presumption of correctness. NRS 533.450(10). The presumption does not extend to  
6 purely legal questions, such as the construction of a statute, as to which the reviewing court may  
7 undertake independent review.”) (internal quotation marks omitted).

9 Purely legal questions, such as whether the NSE has statutory authority to enter Order  
10 1309, are subject to this Court’s *de novo* review. *Id.* at 238, 277 P.3d at 453. Because the NSE  
11 has familiarity with water law, “the State Engineer’s interpretation of a statute [may be]  
12 persuasive, [but] it is not controlling.” *Id.* at 239, 277 P.3d at 453 (first alteration in original)  
13 (quoting *Town of Eureka v. State Engineer*, 108 Nev. 163, 165-66, 826 P.2d 948, 950 (1992)).  
14 Therefore, this Court “is free to decide purely legal questions... without deference to the  
15 agency’s decision.” *Town of Eureka*, 108 Nev. at 165, 826 P.2d at 949. This Court is certainly  
16 empowered to (and should) completely disregard the NSE’s interpretation of statutes where, as  
17 here, the NSE’s interpretation of the scope of his statutory authority is not found within the  
18 language of any relevant statutes. *See State v. Morros*, 104 Nev. 709, 713, 766 P.2d 263, 266  
19 (1988) (explaining that an agency’s interpretation can be persuasive “when it is within the  
20 language of the statute”); *Wilson v. Pahrump Fair Water, LLC*, 137 Nev. Adv. Op. 2, 481 P.3d  
21 853, 856 (“[T]he scope of the State Engineer’s authority... is a question of statutory  
22 interpretation, subject to *de novo* review.”).

23  
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26 Second, while the NSE’s factual findings are afforded more deference than the NSE’s  
27 legal conclusions, this Court must still review the NSE’s factual findings to ensure they are  
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<sup>4</sup> It appears that the NSE incorrectly cites NRS 533.450(9), which is an outdated version of the statute. The current version of the statute is NRS 533.450(10).

1 supported by substantial evidence in order to determine whether the NSE abused his discretion.  
2 *See King v. St. Clair*, 134 Nev. 137, 139, 414 P.3d 314, 316 (2018); *Bacher v. Off. of State Eng’r*  
3 *of State of Nevada*, 122 Nev. 1110, 1122, 146 P.3d 793, 801 (2006). Moreover, even where  
4 issues involve technical or complex scientific issues, the NSE’s orders “must be sufficiently  
5 explained and supported to allow for judicial review.” *Eureka Cnty v. State Eng’r*, 131 Nev.  
6 846, 856, 359 P.3d 1114, 1120-21 (2015). Accordingly, “even under deferential substantial  
7 evidence review, courts must not merely ‘rubber stamp’ agency action: they must determine that  
8 the ‘agency articulated a rational connection between the facts presented’ and the decision”. *Id.*  
9 at 856, 359 P.3d at 1121 (quoting *Port of Jacksonville Mar. Ad Hoc Comm., Inc. v. U.S. Coast*  
10 *Guard*, 788 F.2d 705, 708 (11th Cir.1986)).  
11  
12

13 It is these principles– not the NSE’s mischaracterization of the applicable standards of  
14 review– that must guide this Court’s analysis of the legal and factual issues presented by the  
15 Petitioners regarding Order 1309.

### 16 **III. Nevada Requires and has Historically Implemented a Basin-By-Basin Approach to** 17 **Managing Water**

18 Several Petitioners Opening Briefs discussed that Order 1309 is contrary to Nevada law  
19 because the NSE, for the first time in Nevada history, combined seven established hydrographic  
20 basins into one for “joint administration,” even though the Nevada statutes and historical practice  
21 require managing basins individually and separately.<sup>5</sup> The NSE responds as though this is a  
22 novel concept that has not been understood by all water rights holders and the Nevada Supreme  
23 Court for the past several decades. *See* NSE Answering Brief, pp. 31 (“Manufacturing a new  
24 ‘basin-by-basin’ management rule would have no basis in Nevada water law and be contrary to  
25  
26

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27 <sup>5</sup> Indeed, the NSE has recognized as much in other cases. *See* **EXHIBIT 34** (Respondent Nevada State Engineer’s  
28 Answering Brief, filed in *Pyramid Lake Paiute Tribe of Indians v. Ricci*, Case No. CV01-05764), p. 9. In that case,  
the NSE specifically represented to the Court that “it is undisputed that Nevada’s groundwater resources have long  
been managed on perennial yield basis for the entire hydrographic basin. Such a system is specifically contemplated  
by the Nevada groundwater Code, which provides for the State Engineer to take various acts on a basin-wide basis.”



1 the policy of conjunctive management.”).<sup>6</sup> In fact, the NSE feigns confusion at what the  
2 Petitioners even mean when they refer to the term “basin”. *See id.* at pp. 33-34.

3 In order to demonstrate the inordinate nature of Order 1309, CSI sets forth the following  
4 detailed explanation of (1) what a basin is; (2) how the Nevada basins were originally indexed  
5 and defined; (3) and how groundwater rights are allocated and managed.

7 **A. The NSE’s Interpretation of the Word “Basin” in NRS Chapters 533 and 534  
8 is Absurd.**

9 The NSE does not conduct a statutory interpretation analysis of the word “basin” as used  
10 throughout NRS Chapter 533 and 534, nor does the NSE argue that the word “basin” is  
11 ambiguous. Notwithstanding, the NSE feigns confusion as to what the word “basin” means by  
12 arguing that the Petitioners have their own “concept” of what a basin is. *See* NSE Answering  
13 Brief, p. 32. But Petitioners’ understanding of what a basin is is rooted in Nevada law and the  
14 NSE’s long-standing precedent.

15 The NSE argues that “[i]t is found nowhere in the Nevada Revised Statutes to constrain  
16 the State Engineer’s view of what constitutes a basin.” *Id.* at p. 33. But the NSE’s “view of  
17 what constitutes a basin” is irrelevant. It is the *Legislature’s* view of what constitutes a basin  
18

19  
20 *Id.*

21 <sup>6</sup> The NSE should be judicially estopped from taking inconsistent positions on this issue. *Kaur v. Singh*, 136 Nev.  
22 Adv. Op. 77, 477 P.3d 358, 362 (2020) (“Judicial estoppel prevents a party from stating a position in one proceeding  
23 that is contrary to his or her position in a previous proceeding.”). Well-established caselaw sets forth a five-factor  
24 test for courts to consider when determining whether judicial estoppel applies: whether (1) the same party has taken  
25 two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was  
26 successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two  
27 positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.

28 *Id.* at 362-63 (internal quotation marks omitted).

Each of these factors is clearly met here because (1) the NSE is the same party in both cases and has taken two  
positions (2) in judicial proceedings. Moreover, (3) the District Court and Nevada Supreme Court accepted the  
NSE’s representation as true by denying the Petition for Judicial Review. *See Pyramid Lake Paiute Tribe of Indians*  
*v. Ricci*, 126 Nev. 521, 527, 245 P.3d 1145, 1149 (2010) (affirming NSE’s ruling). Finally, (4) the positions are  
totally inconsistent given that the NSE represents to this Court that CSI has “manufactured” a new basin-by-basin  
management rule, and (5) the NSE did not set forth that argument as a result of fraud, ignorance, or mistake. The  
NSE’s problematic and inconsistent positions should be rejected by this Court.

1 that matters because the *Legislature* specifically used the term throughout NRS Chapters 533 and  
2 534 to describe how the NSE can allocate, prioritize, and manage water in Nevada.

3 The NSE fails to conduct a statutory analysis of what the term “basin” means in Nevada’s  
4 water law statutes because doing so demonstrates that the NSE does not have statutory authority  
5 to redefine established Nevada basins. Rather, the NSE reasons that because “there is no  
6 language in any statute explaining how each basin came to be identified and determined” then  
7 the Legislature *must have* intended the NSE to define what a basin is.<sup>7</sup> *Id.* at p. 34. This is not  
8 how statutory interpretation works.  
9

10 Statutory analysis begins with the plain language of the statute. *Pahrump Fair Water,*  
11 *LLC*, 137 Nev. Adv. Op. 2, 481 P.3d at 856 (2021). “If a statute’s language is clear and  
12 unambiguous, this court will apply its plain language.” *Gold Ridge Partners v. Sierra Pac.*  
13 *Power Co.*, 128 Nev. 495, 500-01, 285 P.3d 1059, 1062-63 (2012). As noted above, the NSE  
14 does not contend that the word “basin” is ambiguous— because it is not.  
15

16 Because the Legislature did not define the term “basin”, this Court should “give the word  
17 its ordinary meaning, which can be ascertained through contemporaneous dictionary definitions.”  
18 *Advanced Pre-Settlement Funding LLC v. Gazda & Tadayon*, Docket No. 74802 (Unpublished  
19 Disposition) WL 1422713 (Order of Affirmance, March 28, 2019). A basin is “[a] geographic  
20 area drained by a single major stream”. *Water Words Dictionary by Letter*, B at 25.<sup>8</sup> Basins are  
21 simply geologic features akin to valleys; there are not competing “concepts” of what is a “basin”.  
22 *See id.* In Nevada, there are 232 distinct hydrographic basins. *Id.* at 25-26. Therefore, when the  
23 Nevada Legislature refers to a “basin” in Nevada’s water law statutes, the only reasonable  
24  
25

26 \_\_\_\_\_  
27 <sup>7</sup> If the term “basin” as used throughout NRS Chapters 533 and 534 means whatever the NSE decides a basin is,  
28 then Nevada’s entire water law statutory scheme is vague, arbitrary, and meaningless and entirely subject to the  
NSE’s ultimate determination.

<sup>8</sup> This *Water Words Dictionary* is most obviously known to the NSE as it is found on the NSE’s own website. *See*  
<http://water.nv.gov/WaterPlanDictionary.aspx> (last visited January 9, 2022). For the NSE to even argue that the

1 interpretation is that the Legislature is referring to the 232 hydrographic basins established in  
2 1968 and relied on for over 5-decades.

3 The NSE's argument that because the statutes do not define "basin", then a "basin" is  
4 whatever the NSE decides it should be, is absurd and underhanded. *See Great Basin Water*  
5 *Network*, 126 Nev. at 196, 234 P.3d at 918 (explaining that "[a]n ambiguous statute is one that is  
6 capable of more than one *reasonable* interpretation") (emphasis added). The NSE's  
7 interpretation is categorically the antithesis to all principles of statutory construction.  
8

9 The NSE seizes on the fact that in the definition of "basin" in the Water Words  
10 Dictionary, it is explained that "[t]he U.S. Geological Survey (USGS) and the Nevada Division  
11 of Water Resources, Department of Conservation and Natural Resources, *have divided* the state  
12 into discrete hydrological units for water planning and management purposes" to argue that "it is  
13 up to Nevada Division of Water Resources to make that determination [of what constitutes a  
14 basin]". *Id.* at p. 33 (emphasis added). But just because the NSE was involved in the original  
15 indexing of the hydrographic basins in Nevada (which process is more fully described below)  
16 does not mean that the NSE has *statutory authority* to, on an ongoing, indefinite, and unlimited  
17 basis, change and alter those established Nevada basins. The NSE's attempt to obfuscate the  
18 clear meaning of what a "basin" is, as used by the Legislature throughout Nevada's water law  
19 statutes, must be rejected by this Court.  
20  
21

22 **B. How the 252 Nevada Basins Were Originally Indexed and Defined.**

23 The NSE argues that "there is no language in any statute explaining how each basin came  
24 to be identified and determined." NSE Answering Brief, p. 34. However, there is no reason  
25 such information would be included in a Nevada *statute*. And, as discussed above, the absence  
26 of such information does not mean that "[t]he Legislature left it to the State Engineer to identify  
27 basins as a management and planning tool" as the NSE contends. *See id.* To the contrary,  
28

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word "basin" is anything other than clearly known to the NSE is disingenuous at best.

1 Nevada statutes neither authorize the NSE to “identify basins” nor to change the boundaries of  
2 the Nevada basins *because the basins have already been identified and established*.

3 As referenced in the Water Words Dictionary, the United States Geological Survey  
4 (“USGS”) office, with cooperation from the NSE’s office, originally indexed and identified  
5 Nevada’s 232 hydrographic basins in 1968. *See* Rush, F.E., 1968, Index of hydrographic areas  
6 in Nevada: Nevada Division of Water Resources Information Report 6, 38 p, *available at*  
7 <http://images.water.nv.gov/images/publications/Information%20series/6.pdf> (the “Rush  
8 Report”).  
9

10 **i. Scope and Purpose of the Report**

11 Rush’s explanation of the purpose and scope of the Rush Report demonstrates why the  
12 NSE’s decisions in Order 1309 and arguments in the NSE’s Answering Brief are incorrect.  
13

14 Rush explains that “Nevada is composed of more than 200 valleys bounded by mostly  
15 northtrending mountain ranges.” *Id.* at p. 2. “Each valley is partly filled with alluvium, mostly  
16 derived by weathering and erosion from surrounding mountains.” *Id.* Rush confirms that “[t]he  
17 alluvium is the principal storage reservoir for ground water.” *Id.* Important to understanding the  
18 reason water rights are allocated and managed in a basin-by-basin manner, Rush acknowledges  
19 that “[t]he valley floors are the principal ground-water and surface-water use areas.” *Id.* “Thus,  
20 the valley commonly has become the basic unit of social, economic, and water-development  
21 activity in Nevada.” *Id.*  
22

23 “For the study, research, development, management, and administration of water  
24 resources, a need for a systematic identification of “valleys,” or preferably “hydrographic areas,”  
25 of Nevada was recognized by both the U.S. Geological Survey and the State Engineer’s office.”  
26 *Id.* Therefore, the USGS and NSE’s office compiled a map showing the hydrographic areas in  
27 Nevada. *Id.* Rush explains that the Rush Report includes a revised map and that, “[t]he *primary*  
28

1 *purpose* for the report and map is to *define and describe specifically the hydrographic regions,*  
2 *basins, and areas so that these descriptions and map can be available as an official guide to all*  
3 *water-resources and other natural-resources agencies.”* *Id.* (emphasis added).

4  
5 Demonstrably then, the Rush Report established what the State and Federal governments  
6 consider to be Nevada’s hydrographic basins. *See id.*<sup>9</sup> The NSE’s professed confusion about  
7 how the Nevada basins were first established is indicative of the overall lack of merit in the  
8 NSE’s Answering Brief.

9 **ii. How the Rush Report Identified the Nevada Basins.**

10 In the Rush Report, Rush notes that “[t]he general term “hydrographic area” is used  
11 mostly in place of “valley” but it also applies to areas that are called flat, desert, basin, meadow,  
12 area, segment, plains, wash, canyon, and mesa.” *Id.* at p. 4.<sup>10</sup> Rush named the hydrographic  
13 areas, in most cases, using the names used by those who lived in the area. *Id.*

14  
15 To determine where the boundaries for each basin should be, the hydrologists used  
16 topographic maps and drew the lines “along topographic ridges”. *Id.* Rush further explains that  
17 “[i]n some localities, the lines are drawn across nearly flat alluvial terrain. Low divides were  
18 located with the aid of aerial photographs (scale about 1:60,000).” *Id.* However, “[i]n other  
19 areas, hydrographic-area boundaries were drawn on the basis of boundary decisions in published  
20 hydrologic reports or on the basis of the collective judgment of the authors of the map and others  
21 identified in the acknowledgments section of this report.” *Id.* Before capitalizing on self-  
22 imposed confusion, the NSE comfortably relied on and used the term basin throughout the  
23

24  
25 \_\_\_\_\_  
26 <sup>9</sup> Indeed, the Water Words Dictionary relies on the Report without identifying it. *See Water Words Dictionary by*  
*Letter - B*, at 25-26.

27 <sup>10</sup> Rush’s interchangeable use of the terms “hydrographic area” and “basin” demonstrates that SNWA’s argument  
28 that the term “basin” in NRS Chapters 533 and 534 does not refer to the 232 “Hydrographic areas” but instead to the  
14 hydrographic regions is deceptive. *See* SNWA Answering Brief, p. 18. SNWA admits that the term “basin” in  
Nevada’s water statutes refers to the index of basins, but SNWA neglected to continue the analysis of which it  
(SNWA) is certainly aware (meaning, SNWA should have included the Rush Report in its history and a description  
of how those basins were identified). SNWA’s failure to do so renders SNWA’s argument incomplete and incorrect.

1 1303/1309 process (and other NSE rulings and Orders), referring to the basins established in the  
2 Rush Report. Hypocrisy permeates the NSE's newly formulated confusion.

3 **C. How Groundwater Rights are Allocated, Prioritized, and Managed.**

4 Neither the USGS nor the NSE's office has altered or modified the index of basins in the  
5 Rush Report since it was published in 1968.<sup>11</sup> Rather, both State and Federal agencies have used  
6 the identification of Nevada's basins in the Rush Report for the study, management, and  
7 administration of Nevada water since 1968, 54 years ago.

8  
9 The Rush Report's index of basins is how water rights holders, the NSE, other Nevada  
10 agencies and political subdivisions, Nevada State and Federal courts, and all persons in Nevada  
11 who have anything to do with water law, refer to basins in Nevada. The NSE provides no  
12 explanation for his theory that Nevada's water law statutes do not refer to the same basins. For  
13 example, Chapters 533 and 534 reference water rights as being located in a basin. *See, e.g.*, NRS  
14 533.371 (*"In any basin in which an application to appropriate water is approved pursuant to*  
15 *subsection 1, the State Engineer may act upon any other pending application to appropriate water*  
16 *in that basin that the State Engineer concludes constitutes the use of a minimal amount of*  
17 *water."*) (emphasis added); NRS 534.090(3)-(4) (requiring water rights holders seeking  
18 extensions of time to work a forfeiture to provide specific information about the basin in which  
19 "the water right is located"). When water rights holders obtain permits to appropriate  
20 groundwater, those water rights are permitted in a specific hydrographic basin, such as CSI's  
21 water rights being located in CSV.

22 Because water rights are granted in specific basins, they are also managed based on the  
23 basin in which they are located. *See EXHIBIT 34*, p. 9. As a result, the priority rights for water  
24 rights holders are ordered based on the dates of priority within a specific basin. This concept is  
25 reflected in the Nevada water law statutes, which require, for example, curtailment based on the  
26  
27  
28

1 date of priority of a water right in a specific basin. *See, e.g.*, NRS 534.110 (allowing under  
2 specific circumstances curtailment conforming to priority rights in a basin); NRS 534.090(3)(g)  
3 (referring to “[t]he date of priority of the water right as it relates to the potential curtailment of  
4 water use in the basin”). Therefore, no water rights holder in Nevada would expect, or even  
5 consider it a possibility, that its priority right would be determined in consideration of the  
6 priority dates of water right holders *in different basins* because under Nevada’s statutes, priority  
7 rights are determined in relation to other water rights in the specific basin in which the rights are  
8 located. No provision of Nevada water law allows for a curtailment across multiple basins that  
9 would result in causing senior rights holders in certain basins to become junior rights holders to a  
10 water right holder in a different basin, based on moving, modifying, combining, or removing any  
11 particular basin’s boundaries.  
12

13  
14 **D. The Nevada Supreme Court’s Discussion of Nevada Basins and Priority**  
15 **Rights is Consistent with CSI’s Analysis Herein.**

16 The NSE argues that “[t]here is no language in any prior appropriation case that limits  
17 existing rights by Petitioners’ concept of a basin.” NSE Answering Brief, p. 32. While the  
18 Nevada Supreme Court has not directly addressed this issue because the NSE has never  
19 attempted to re-define Nevada’s established basins, the Court’s analysis and discussion in other  
20 water rights cases demonstrates that the order of priority is established by the basin, basin by  
21 basin.  
22

23 For example, in *Eureka Cty. v. Seventh Jud. Dist. Ct. in & for Cty. of Eureka*, 134 Nev.  
24 275, 276, 417 P.3d 1121, 1122-23 (2018), the Nevada Supreme Court discussed the fact that  
25 water in Diamond Valley Hydrographic Basin (Basin No. 153) is over-appropriated and has been  
26 pumped “at a rate exceeding its perennial yield for over four decades.” The issue in *Eureka*  
27 involved “[a] vested, senior water rights holder... ask[ing] the district court to order the State  
28

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<sup>11</sup> Except, of course, for the NSE’s unilateral, unauthorized, and unsupported attempt to do so in Order 1309.

1 Engineer to curtail junior water rights in the Diamond Valley Hydrographic Basin No. 153  
2 (Diamond Valley).” *Id.*

3 The Court’s discussion is important to this case for several reasons. First, it demonstrates  
4 that the Court refers to basins by their identification in the Rush Report. *See id.* (referring  
5 specifically to the Diamond Valley Hydrographic Basin and its corresponding Basin Number,  
6 153). Second, the Court’s analysis shows that junior and senior water rights holders are  
7 determined in a basin-by-basin manner. To be sure, the Court references only those water rights  
8 holders in the Diamond Valley Hydrographic Basin– not the entire State of Nevada as the NSE  
9 now contends would have to be the case. *Id.* at 282, 417 P.3d at 1126 (“[W]e conclude that all  
10 Diamond Valley water rights holders should be given notice of the upcoming show cause hearing  
11 regardless of whether the district court is deciding only a ‘pure question of law.’”).  
12

13  
14 The Court’s discussion is completely contrary to the NSE’s unprecedented understanding  
15 of a basin, which the NSE contends is whatever he decides a basin is at any given point in time.  
16 Moreover, the NSE’s interpretation would render Nevada’s water right statutes vague and  
17 arbitrary. Indeed, if a basin is simply whatever the NSE determines it should be, there can be no  
18 certainty in Nevada’s water law. Such result would be directly contrary to the prior  
19 appropriation doctrine, which requires certainty in the holding and use of water rights. *See Min.*  
20 *Cty. v. Lyon Cty.*, 136 Nev. 503, 518, 473 P.3d 418, 429 (2020) (“In *Arizona v. California*, the  
21 United States Supreme Court recognized that ‘[c]ertainty of rights is particularly important with  
22 respect to water rights in the Western United States,’ and ‘[t]he doctrine of prior appropriation ...  
23 is itself largely a product of the compelling need for certainty in the holding and use of water  
24 rights.’) (citing *Arizona v. California*, 460 U.S. 605, 620, 103 S.Ct. 1382, 75 L.Ed.2d 318  
25 (1983)).  
26  
27

28 ///



1 **IV. The NSE Does Not Identify Any Authority Authorizing the NSE to Combine**  
2 **Multiple Basins into One Basin for Conjunctive Management.**

3 Despite admitting that the NSE’s authority is statutory, the NSE neither refers to nor cites  
4 any statute that allows the NSE to combine multiple basins into one for joint administration. *See*  
5 NSE Answering Brief, p. 30-35. Rather, the NSE makes vague, generalized commentary that  
6 “Order 1309 is firmly rooted in the text of Chapters 533 and 534 and prior appropriation  
7 doctrine”, *id.* at 30, even though the NSE cannot pinpoint any actual statutory text that gives the  
8 NSE the authority to enter Order 1309.  
9

10 Because the NSE cannot identify a statute that supports Order 1309’s unprecedented  
11 terms<sup>12</sup>, the NSE attempts to justify Order 1309 by arguing that there is no statute that *prohibits*  
12 the NSE from combining multiple basins into one for joint administration. NSE Answering  
13 Brief, p. 30. But the NSE cannot establish his authority in the negative because the NSE only  
14 has the authority to act where the Legislature has so determined. *See Wilson v. Pahrump Fair*  
15 *Water, LLC*, 137 Nev. Adv. Op. 2, 481 P.3d 853, 856 (2021). The NSE’s analysis of his  
16 authority is contrary to basic notions of statutory interpretation, which principles must guide the  
17 Court in determining the scope of the NSE’s *statutory* authority. *See id.* (explaining that in  
18 determining the scope of the NSE’s statutory authority, “the plain meaning of the relevant text  
19 guides the answer”).  
20  
21

22 The NSE does not even conduct a statutory interpretation analysis.<sup>13</sup> Rather, the NSE  
23 attempts to blur all of the statutes in NRS Chapters 533 and 534 together to argue that these  
24 chapters provide him the authority to combine and “jointly administer” multiple basins.<sup>14</sup> The  
25

26 <sup>12</sup> Because no such statute exists.

27 <sup>13</sup> Again, the NSE can’t conduct a statutory analysis because there are no statutes to analyze; the NSE is simply  
28 waving a wand and saying “it is so” which it is not allowed to do.

<sup>14</sup> SNWA takes the same approach in its Answering Brief by conceding that each statute upon which the NSE relies  
pertains to a specific function (none of which are at issue in Order 1309), but contending that taking the statutes as a

1 NSE's failure to identify any statute that gives him the authority to issue Order 1309  
2 demonstrates that it is an unlawful order.

3 **A. There is No Statutory Authority for the NSE to Redefine Hydrographic**  
4 **Basins.**

5 The NSE avers that “[s]everal sections of Nevada statutory water law support the State  
6 Engineer’s power to issue Order 1309.” NSE Answering Brief, p. 30. The NSE cites NRS  
7 533.0245, NRS 533.024(1)(c)<sup>15</sup>, NRS 534.110(6), NRS 533.024(1)(e), NRS 533.430(1), and  
8 NRS 534.020(1) to argue that the NSE has authority to redefine established basins and combine  
9 them into one, new basin for joint administration. *Id.* at 30-35. However, none of these statutes  
10 support the NSE’s argument that it could redefine hydrographic basins in Nevada as it did in  
11 Order 1309.

12  
13 **i. NRS 533.0245 Does Not Provide the NSE Authority to Issue 1309.**

14 In the NSE Answering Brief, the NSE contends that he is not constrained to act based on  
15 individual basins. NSE Answering Brief, p. 30. In fact, the NSE argues that the Petitioners have  
16 “[m]anufactur[ed] a new ‘basin-by-basin’ management rule” that has “no basis in Nevada water  
17 law and [is] contrary to the policy of conjunctive management”. NSE Answering Brief, p. 31.  
18 But Nevada basins have been managed in a basin-by-basin manner for decades. *See EXHIBIT*  
19 **34**, p. 9. This is supported by the plain language of the statutes, by Nevada caselaw, and by the  
20 NSE’s own website.  
21

22 The NSE relies on NRS 533.0245 in support of this argument; however, this statute  
23 simply provides that the NSE is prohibited from carrying out duties in a manner that conflicts  
24 with decrees, orders, compacts or agreements. *See Min. Cty.*, 136 Nev. at 517-18, 473 P.3d at  
25

26  
27  
28  

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whole, the statutes “form a mosaic of powers” that empowers the NSE to enter Order 1309. Under these vague  
analyses, the NSE’s power would be unlimited.

<sup>15</sup> The NSE incorrectly cites “NRS 533.0241(c)”. NSE Answering Brief, p. 30. However, the language the NSE  
quotes is from NRS 533.024(1)(c).

1 429 (2020) (citing NRS 533.0245 and explaining that the NSE is expressly prohibited from  
2 reallocating adjudicated water rights). NRS 533.0245 does not empower the NSE to redefine  
3 established hydrographic basins.

4 The NSE contends that NRS 533.0245 “does not constrain the State Engineer’s fealty to  
5 decrees and vested rights depending on a basin-by-basin approach.” NSE Answering Brief, p.  
6 30. The NSE’s argument ignores the fact that water rights can be held for surface flows and  
7 groundwater flows, and the process to acquire and manage each type of water right is different in  
8 certain ways. Consequently, decrees, orders, compacts, and agreements can govern water rights  
9 for both surface flows *and* groundwater flows.  
10

11 Water rights for surface flows include rights to divert water from stream systems, such as  
12 the Muddy River, which systems can cross several basins as the water flows downstream. Water  
13 rights for surface flows are therefore not allocated by the basin but instead, based on a right to  
14 divert water at the place of diversion in a stream. Thus, the statutes governing surface flow  
15 water rights discuss those rights in relation to the stream system. *See, e.g.*, NRS 533.090(3) (“A  
16 water user upon or from any stream or body of water shall be held and deemed to be a water user  
17 upon the stream system of which such stream or body of water is a part or tributary.”); NRS  
18 533.100(1) (“The State Engineer shall begin an investigation of the flow of the stream and of the  
19 ditches diverting water, and of the lands irrigated therefrom, and shall gather such other data and  
20 information as may be essential to the proper determination of the water rights in the stream.”).  
21

22 In contrast, groundwater rights *are* allocated in a basin-by-basin manner and as a result,  
23 the statutes governing groundwater rights authorize the NSE to take action based on the basin in  
24 which the rights are held. *See, e.g.*, NRS 533.0241 (“For *each basin* in which there is  
25 groundwater that has not been committed for use, including, without limitation, pursuant to a  
26 permit, certificate or by any other water user in the basin, as of June 5, 2019, the State Engineer  
27  
28

1 shall reserve 10 percent of the total remaining groundwater that has not been committed for use  
2 in the basin.”) (emphasis added); NRS 534.030(1) (describing a petition under NRS Chapter 534  
3 as one that requests the NSE “to administer the provisions of this chapter as relating to  
4 designated areas, ... in any particular basin or portion therein”).

5  
6 The different types of water rights require different management tools. Therefore, as  
7 shown above by the description of the different statutes that apply to surface water and  
8 groundwater, where the Legislature meant to address one of those types of water rights, the  
9 Legislature did so. But where the statute could equally apply to both groundwater rights and  
10 surface water rights, such as NRS 533.0245, the Legislature did not identify the location of the  
11 permitted water right, i.e. stream or basin. Accordingly, the NSE’s argument that NRS 533.0245  
12 means that groundwater rights are not managed and allocated in a basin-by-basin manner is  
13 incorrect because adjudicated water rights can include both surface and groundwater rights. The  
14 Legislature’s intent is clear from the plain language of the statutes. The NSE’s reliance on NRS  
15 533.0245 is misplaced and only confirms that the NSE is required to manage water in a basin-by-  
16 basin manner.

17  
18  
19 **ii. The NSE Concedes that NRS 533.024 Provides Statements of Policy,  
20 Not Statutory Authority.**

21 NRS 533.024 sets forth the Legislative declaration of policy, and, as conceded by the  
22 NSE, it does not authorize any particular action. *See* NSE Answering Brief, p. 34 (“The State  
23 Engineer does not argue that NRS 533.024 serves as an independent source of statutory  
24 authority.”). Notwithstanding, the NSE contends that the Petitioners “attempt to junk” the  
25 statement of policy and further argues, “Petitioners never explain how using the ‘best available  
26 science’ could be contrary to any statute” and that “Petitioners never explain how managing  
27 waters conjunctively could conceivably violate any statute”. *Id.* The NSE intentionally  
28 mischaracterizes the Petitioners’ arguments.

1           CSI specifically argued that these statements of policy do not provide statutory authority  
2 for the NSE to combine multiple basins together as one for joint administration. CSI Opening  
3 Brief, pp. 17-22. CSI expressly contended that the NSE could not rely on these statutes for  
4 authorization to issue Order 1309 and that even if he could, he did not rely on the best available  
5 science. *See id.* at 17-22, 28-30. CSI agrees that the Legislature’s statements of policy are  
6 important. The NSE’s total disregard of Nevada legislative policy in Order 1309 is egregious,  
7 egregious to CSI, and an affront to the Nevada legislature. The NSE can and should implement  
8 these Legislative policies but only where he actually has authority to do so.

9  
10                           **iii.           Order 1309 is not Based on NRS 534.110(6) as the NSE Now Argues.**

11           The NSE argues that he conducted an investigation pursuant to NRS 534.110(6) and  
12 “show[ed] as a matter of fact the LWRFS is one basin”. NSE Answering Brief, p. 31. The NSE  
13 contends that this “investigation” was done “pursuant to an express power from the Legislature”.  
14 *Id.* However, NRS 534.110(6) does not authorize the actions the NSE attempts to take by way of  
15 Order 1309.

16  
17           Primarily, neither NRS 534.110(6) nor any other Nevada statute allows the NSE to  
18 conduct investigations into multiple basins to determine if their boundaries should be removed so  
19 that they are instead one basin. Whether the NSE has *authority* to change the boundaries of  
20 basins that have been established for decades is a legal question, not factual. The NSE’s attempt  
21 to reconstruct a legal issue into a factual one is obvious and telling of the NSE’s understanding  
22 that Order 1309 far exceeds the scope of his authority.

23  
24           Second, there is no language in NRS 534.110(6) that authorizes the NSE to conduct an  
25 investigation into multiple basins. In fact, the statute only permits the NSE to conduct  
26 investigations in “any basin or portion thereof”, not across multiple basins. *See* NRS 534.110(6).  
27 Therefore, the NSE’s attempt to justify Order 1309 as merely constituting an investigation into  
28

1 the LWRFS under NRS 534.110(6) fails.

2 Third, the NSE ignores the purpose of the investigation contemplated by NRS 534.110.  
3 The investigation authorized by NRS 534.110 is not a broad investigation for *any reason*, nor  
4 does it include an investigation to alter the boundaries of established basins. Rather, the plain  
5 language of NRS 534.110(6) authorizes investigations into “any basin or portion thereof where it  
6 appears that the average annual replenishment to the groundwater supply may not be adequate  
7 for the needs of all permittees and all vested-right claimants”.

8  
9 The statute further provides that if such investigation confirms that the annual  
10 replenishment to the groundwater supply is not adequate for the permittees and vested-right  
11 claimants, the NSE has authority to take two specific actions: (1) order that withdrawals from  
12 domestic wells be restricted to conform to priority rights, or (2) designate as a critical  
13 management area the basin in which withdrawals of groundwater consistently exceed the  
14 perennial yield. *See* NRS 534.110(6)-(7). The Legislature did not include in those options the  
15 ability for the NSE to alter the boundaries of established basins. *See id.* The proper conduct for  
16 the NSE would have been to analyze each individual basin, determine the perennial yield of each  
17 and, assess if their yields interact with other adjacent basins, and then, if appropriate, engage in  
18 basin-by-basin management. If the Legislature intended for the NSE to have the authority to  
19 alter basin boundaries or combine them as a result of the investigation contemplated by NRS  
20 534.110(6), the Legislature would have so indicated. *See Slade v. Caesars Entm’t Corp.*, 132  
21 Nev. 374, 380-81, 373 P.3d 74, 78 (2016) (citing Antonin Scalia & Bryan A. Garner, *Reading*  
22 *Law: The Interpretation of Legal Texts* 107 (2012) (“The expression of one thing implies the  
23 exclusion of others.”)).  
24  
25  
26

27 Fourth, the NSE’s argument ignores that NRS 534.030 provides the preliminary process  
28 that must occur *prior* to the NSE conducting an investigation under NRS 534.110. NRS 534.030

1 provides that an investigation can only occur if either the appropriators “*in any particular basin*  
2 *or portion therein*” file a petition requesting administration or after a public hearing held by the  
3 NSE “*within the basin*” or “*within the county where the basin lies*”. See NRS 534.030(1)-(2)  
4 (emphasis added). There was never a petition filed under NRS 534.030, and the 1303 Hearing  
5 was not conducted pursuant to NRS 534.030. Thus, 534.030 is inapplicable.

7 SNWA also attempts to justify Order 1309 by referring to NRS 534.030(2) and arguing  
8 that the NSE employed NRS 534.030(2) to “designate” the entire LWRFS as an area in need of  
9 administration. See SNWA Answering Brief, pp. 15-16. SNWA’s argument is belied by Order  
10 1309 itself, which does not include any analysis under NRS 534.030. See generally Exh. 2.<sup>16</sup>  
11 Interim (and rescinded) Order 1303 also contradicts SNWA’s characterization of Order 1309  
12 because Interim Order 1303 explains that several of the basins now included in the LWRFS  
13 (including Coyote Spring Valley Hydrographic Basin, Black Mountains Area Hydrographic  
14 Basin, Garnet Valley Hydrographic Basin, California Wash Hydrographic Basin, Hidden Valley  
15 Hydrographic Basin, and part of the Muddy River Springs Area)<sup>17</sup> have already been designated  
16 pursuant to NRS 534.030. See Exh. 16, pp. 2-3. This fact alone demonstrates that the NSE has  
17 previously construed and implemented these statutes by the specific hydrographic basin.  
18 Regardless, Order 1303 identifies the orders that previously designated the individual basins  
19 under NRS 534.030. It is illogical that Order 1309 was intended to repeat that process.

22 Finally, SNWA’s contention that the NSE’s “due investigation” under NRS 534.110 began  
23 with Order 1169 and the 1169 Pump Tests is contradicted by the NSE’s own description of Order  
24 1169 and the related pump tests.<sup>18</sup> For example, in Ruling 5712, the NSE explains that “Order

26 \_\_\_\_\_  
27 <sup>16</sup> When referring to exhibits that were attached to CSI’s Opening Brief, CSI refers to them herein as “Exh.”

28 <sup>17</sup> Notably, Kane Spring Valley has *not* been designated under NRS 534.030.

<sup>18</sup> Moreover, to the extent Order 1309 could at all be interpreted as originating in NRS 534.030 or NRS 534.110, combining seven established basins into one is not merely a reasonable rule or regulation because it impacts CSI’s

1 No. 1169 was issued to address the requests for the additional appropriation of water filed in  
2 Coyote Spring Valley, but the focus of the additional study ordered is the Muddy River Springs  
3 Area.” Exh.7, p.40589.<sup>19</sup> Indeed, in Order 1169, the NSE expressly ordered the parties to  
4 conduct the 1169 Pump Tests pursuant to NRS 533.370 and NRS 533.368. *See* Exh. 4, p. 664.<sup>20</sup>  
5

6 The NSE’s and SNWA’s disingenuous attempts to characterize Order 1309 as being  
7 authorized by NRS 534.110 must be rejected by this Court. NRS 534.110 does not authorize the  
8 NSE to conduct investigations in order to combine basins or modify basin boundaries. NRS  
9 534.110 plainly applies to investigations concerning administration and designation of critical  
10 management areas within a basin. Order 1309 neither stems from such investigation, nor does  
11 NRS 534.110 authorize the NSE to issue Order 1309. Accordingly, Order 1309 is void.  
12

13 **V. Order 1309 is Unconstitutional Because It Re-Prioritizes Water Rights.**<sup>21</sup>

14 The NSE avers that Order 1309 is constitutional because he has not yet initiated  
15 curtailment proceedings nor actually implemented a plan to do so. NSE Answering Brief, p. 39.  
16 Indeed, the NSE argues that “Order 1309 does not identify any party as having junior rights that  
17 need to be curtailed” and that because the NSE has not curtailed any rights, CSI (and other  
18 Petitioners) mischaracterize Order 1309.<sup>22</sup> *Id.* The NSE’s argument again ignores that priority  
19

20  
21 property rights.

22 <sup>19</sup> This expansion to the Muddy River Springs Area was still conducted to determine whether additional water was  
available for appropriation. *See* Exh. 8, p. 654.

23 <sup>20</sup> Now, in the NSE’s Answering Brief, the NSE dismisses the caselaw discussing NRS 533.070 because according  
24 to the NSE, “Those authorities have no relevance to Order 1309, which did not consider any water-rights  
25 applications.” NSE Answering Brief, p. 27. The NSE and SNWA cannot have it both ways. The 1169 Pump Tests  
(which concluded in 2012) were clearly not meant to decide the issues in Order 1309 (issued in 2020). Therefore,  
26 the NSE’s almost exclusive reliance upon the 1169 Pump Tests in Order 1309 is irrelevant, arbitrary and capricious.

27 <sup>21</sup> Both the NSE and SNWA contend that the NSE did not re-prioritize water rights. SNWA contends that water  
rights will still be administered “based upon their respective date priorities in relation to other rights within the  
regional groundwater unit.” SNWA Answering Brief, p. 21 n.65. Given the numerous Petitioners who do contend  
28 the NSE’s Order 1309 re-prioritizes water rights, it cannot be disputed that Order 1309 is vague and lacks due  
process.

<sup>22</sup> However, the NSE states on page 12 of the Answering Brief that “Order 1309 gives force to that rule [of prior  
appropriation] by determining the amount of water that can be pumped by holders of junior rights without  
interfering with senior rights.”



1 rights are identified by ordering the dates of water rights in a basin. Therefore, even though the  
2 NSE has neither implemented a management plan nor initiated the curtailment process, CSI's  
3 arguments are not premature because the effect and consequence of Order 1309 is that CSI's  
4 water rights are now called into question because other water right holders with older priority in  
5 different hydrographic basins have displaced CSI's seniority in the Coyote Spring Valley basin  
6 when considered along with the completely arbitrary and capricious limitation of 8000 afa  
7 imposed by the NSE.  
8

9 The consequence of Order 1309, which indisputably reprioritizes water rights, is  
10 exemplified by the impact of Order 1309 to CSI's water rights. Prior to Order 1309, CSI's  
11 priority in Coyote Spring Valley was second only to Bedroc's priority right, and CSI's priority in  
12 Kane Spring Valley, along with Vidler and LCWD, was the most senior. After Order 1309,  
13 however, CSI's priorities in Coyote Spring Valley and Kane Spring Valley are now challenged  
14 against the 8000 afa limitation wrongfully established in Order 1309. CSI's senior rights are  
15 now being denied by the State of Nevada and CSI is not allowed to use its senior rights to  
16 finalize subdivision maps. Yet, other users such as Moapa Valley Water District, whose water  
17 rights are junior in date to CSI, and fall below the 8000 afa limitation, are allowed to continue to  
18 pump thousands of acre feet a year. Furthermore, other water right holders elsewhere in the  
19 LWRFS, and outside of the Coyote Spring Valley basin with priority dates older than CSI's, and  
20 who previously, never before had any effect on whether CSI could use or rely on its water rights,  
21 now "step in front of" CSI's senior water rights and push CSI down to the artificial 8000 afa  
22 limitation. Thus, the impact of Order 1309 results in a monumental loss to CSI's property rights,  
23 CSI's priority rights, and CSI's water rights, which is a taking and which violates CSI's due  
24 process rights.<sup>23</sup>  
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<sup>23</sup> The NSE summarily dismisses CSI's argument that Order 1309 violates the Takings Clause of the Nevada and United States Constitutions. See NSE Answering Brief, p. 44. The NSE misses the point. CSI is not suing the NSE

1           The NSE’s position that he can combine multiple basins and later develop a management  
2 plan is akin to the NSE’s approach in *Eureka Cnty v. State Eng’r*, 131 Nev. 846, 359 P.3d 1114  
3 (2015), which was rejected by the Nevada Supreme Court. In that case, an applicant filed  
4 numerous applications to appropriate water and change the use of its existing water rights. *Id.* at  
5 848, 359 P.3d at 1116. Senior right holders in the basin protested, arguing that the sought after  
6 groundwater appropriations would conflict with existing rights under NRS 533.370(2). *Id.* at  
7 848-49, 359 P.3d at 1116. Despite concluding that granting the applications would deplete the  
8 water source, the NSE ruled that any conflict with existing water rights could be mitigated  
9 through a monitoring, management, and mitigation plan (3M Plan). *Id.* at 852, 359 P.3d at 1118.  
10

11           Similar to the NSE’s lack of a management plan in this case, the NSE failed to create a  
12 monitoring, management, and mitigation plan in *Eureka Cnty*. *Id.* at 853, 359 P.3d at 1119  
13 (“Nowhere in the ruling, however, does the State Engineer articulate what mitigation will  
14 encompass, even in the most general sense.”). The Nevada Supreme Court expressly rejected the  
15 NSE’s theory that he “may leave for a later day, namely the day the 3M Plan is before him, the  
16 determination of exactly what [the applicant]’s mitigation would entail.” *Id.* at 855, 359 P.3d at  
17 1120.  
18

19           The Court explained that the NSE’s determination under NRS 533.370(2) “must be made  
20 upon presently known substantial evidence, rather than information to be determined in the  
21 future, for important reasons.” *Id.* The first of those important reasons is to afford water rights  
22 holders due process. *See id.* The Court noted that “those who protest an application to  
23 appropriate or change existing water rights must have a full opportunity to be heard, a right that  
24 includes the ability to challenge the evidence upon which the State Engineer’s decision may be  
25 based.” *Id.* Therefore, due process requires that water rights holders have the opportunity to  
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for a taking and seeking damages by way of its Petition for Judicial Review. Rather, CSI argues that Order 1309 must be declared void because it violates the Takings Clause.

1 challenge the evidence relied upon by the NSE prior to the NSE's determination. *Id.*

2 Although *Eureka Cnty.* involved the grant of water right applications, the Court's  
3 analysis applies here. Under Order 1309, the NSE attempts to combine seven established  
4 Nevada basins into one for "joint administration". But the NSE seeks to delay to another day  
5 what that administration, management, and curtailment will be. CSI cannot be forced to wait and  
6 challenge a future management plan because at that point, the only remedy available would be  
7 vacating the management plan. *See id.* at 855-56, 359 P.3d at 1120. Allowing the NSE to alter  
8 established basin boundaries for "joint administration" without an actual management plan  
9 violates CSI's due process rights. *See id.* ("In other words, challenging the sufficiency of a later  
10 developed mitigation plan cannot undo a decision to grant applications for a proposed use or  
11 change that may have been erroneous. And allowing the State Engineer to grant applications  
12 conditioned upon development of a future 3M Plan when the resulting appropriations would  
13 otherwise conflict with existing rights, could potentially violate protestants' rights to a full and  
14 fair hearing on the matter, a rule rooted in due process.").

15 The NSE's argument that the NSE cannot be challenged for engaging in ad hoc  
16 rulemaking is false. As noted by the Court in *Eureka Cnty.*, the NSE must afford water rights  
17 holders notice and a full and fair hearing on the matter at issue. *See id.* The NSE's reliance on  
18 factors that are not found in Nevada statutes, Nevada caselaw, nor the Notice of the 1303  
19 Hearing means that the Petitioners did not have notice of such criteria nor opportunity to fully  
20 challenge the same. The NSE's characterization of these criteria as the "lodestar in determining  
21 whether an area should be included for joint management as part of the LWRFS" is entirely  
22 unsupported by fact or law.<sup>24</sup> Therefore, the NSE did not provide CSI with due process in  
23 including Kane Spring Valley in the "Mega Basin".

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1 **VI. The NSE Has Failed to Identify Substantial Evidence Supporting Order 1309.**

2 Given the utter lack of authority for the NSE to enter Order 1309, this Court need not  
3 even reach the issue of whether substantial evidence supports the NSE's conclusions in Order  
4 1309. Notwithstanding, in the event this Court determines that the NSE had statutory authority  
5 to combine the seven basins into one, the NSE's conclusions are arbitrary and capricious as they  
6 are not supported by substantial evidence.  
7

8 **A. The NSE Does Not Demonstrate that the Inclusion of KSV in the LWRFS is**  
9 **Supported by Substantial Evidence.**

10 NSE argues that National Parks testified that groundwater levels in KSV increased and  
11 decreased in a similar manner as the other basins in the LWRFS before, during, and after the  
12 1169 Pump Tests. NSE Answering Brief, p. 14. However, the NSE ignores the National Parks  
13 full testimony, which clarified that while there were "similar responses... they are greatly  
14 attenuated compared to the others." **EXHIBIT 35** (SE ROA 53170). Moreover, the witness  
15 testified that while there was "an initial trend of declining water levels... during the period of the  
16 Order 1169 testing", he was not going to "claim" that the water levels were increasing when the  
17 pumping of MX-5 well ceased. *Id.* at 53173.  
18

19 The witness further confirmed that National Parks was "in agreement with CSI that  
20 there's faulting in this area and that those faults may impede flow through Kane Spring Valley in  
21 to Coyote Spring Valley" and that there is a barrier that causes "the different hydrographic  
22 response we see in CSVM-5 than we see in these two wells at the mouth of the Kane Spring  
23 Valley." *Id.* at 53174-175. This directly refutes the NSE's statement in the Answering Brief that  
24 "[t]here was no known geological structure causing a hydrologic barrier between Kane Springs  
25 Valley and the rest of the LWRFS." NSE Answering Brief, p. 14.  
26  
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28 Therefore, the testimony the NSE cites as constituting "substantial evidence" of Kane

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<sup>24</sup> Indeed, this "lodestar" criteria was not used in the Rush Report to establish the Nevada basins.

1 Spring Valley's inclusion in the LWRFS poignantly illustrates the extreme arbitrary and  
2 capriciousness of the NSE's finding.

3         Additionally, the NSE argues that CSI has "conceded" that the NSE relied on substantial  
4 evidence because CSI noted the NSE's citation to the FWS' SerieSEE analysis. *Id.* at p. 21. The  
5 NSE misconstrues CSI's argument. The 1169 Pump Tests and the FWS' SerieSEE, which  
6 interprets those pump test results, cannot constitute substantial evidence because no reasonable  
7 mind can accept that two isolated years of pump tests that were not even conducted in KSV nor  
8 implemented in a manner that provides an understanding of how specific wells impact particular  
9 water levels could support the determination that KSV should be included in the LWRFS. The  
10 NSE's results driven approach is not based on substantial evidence because neither the 1169  
11 Pump Test results nor the SerieSEE support including KSV in the LWRFS.

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14         Finally, the NSE is dismissive of the fact that in Ruling 5712, he excluded KSV from the  
15 LWRFS based on the differences in hydraulic head. NSE Answering Brief, p. 22. The NSE  
16 argues that Ruling 5712 is outdated and not based on comprehensive data. *Id.* The NSE  
17 reiterates that the 1169 Pump Tests confirmed that flows in KSV were affected in a similar  
18 manner to those in the LWRFS and emphasizes that in Order 5712, he recognized the "strong  
19 hydrologic connection" between Kane Springs Valley. *Id.* Of course, the NSE again omits from  
20 his analysis that the testimony upon which he relies includes the conclusion that impact to KSV  
21 was "greatly attenuated" from the other basins in the LWRFS. The NSE's argument  
22 demonstrates that he, again, relies solely on the 1169 Pump Tests to include KSV in the LWRFS  
23 even though KSV was not even part of the study. Accordingly, the NSE's inclusion of KSV is  
24 arbitrary and capricious.

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1           **B.     The NSE Does Not Identify Any Evidence to Support the Conclusion that**  
2           **8,000 afa is the Maximum Allowable Pumping that Can Occur in the**  
3           **LWRFS.**

4           Absent from the NSE's brief is any evidence that supports the NSE's conclusion that  
5           8,000 afa is the maximum that can be pumped from the entire LWRFS. *See* NSE Answering  
6           Brief, pp. 16-17, 24-26. Rather, the NSE admits that the Petitioners recommended various  
7           amounts of pumping, ranging from 30,000 afa to zero. *Id.* at 16. The NSE's remaining analysis  
8           demonstrates that the NSE simply picked the number 8,000 at random from that broad range.

9           To be sure, the NSE argues that the amount of pumping that has occurred since the 1169  
10          Pump Tests concluded decreased from 12,635 to 8,300 and that "at or around that amount of  
11          pumping", the rate of decline of groundwater has stabilized although neither groundwater nor  
12          surface flow have returned to pre-test levels. *Id.* This information is not contained in the cited  
13          portion of SNWA's report, as represented by the NSE. *See id.*; *see also* ROA 41992. But  
14          regardless, this information does not provide substantial evidence to support the NSE's random  
15          selection that 8,000 afa is the maximum amount that can be pumped.

16          The NSE additionally admits that his determination of 8,000 afa is based on speculative  
17          and incomplete information. *See* NSE Answering Brief, pp. 16-17 (stating that downward trends  
18          in groundwater "*could* be a leading indicator of declines that will be observed closer to the  
19          Muddy River- and eventually in the amount of spring flow into the river" and explaining that "*If*  
20          conditions became drier, the current amount of pumping *could* cause groundwater levels and  
21          spring flow to decline again"). The NSE argues that the "record shows that despite an overall  
22          drought, nearby basins with little pumping have shown *increasing* groundwater levels." *Id.* at p.  
23          26. Therefore, the NSE concludes that Order 1309 "properly accounted for the fact that  
24          conditions could become drier going forward". *Id.* But CSI presented evidence that conditions  
25          could become wetter going forward. The NSE's random reference to drought conditions in other  
26          27          28

1 basins is not substantial evidence to support 8,000 afa.

2 The NSE argues that CSI's analysis would impose an incorrect burden on the NSE to  
3 disprove that every other number in the broad range is wrong. See NSE Answering Brief, pp.  
4 24-25. But CSI's point is the opposite. If the NSE's pronouncement that 8000 afa is the magic  
5 number, then there must be substantial evidence in the record that 8,000 afa is in fact the  
6 maximum that can be pumped in the LWRFS. That evidence simply does not exist in this case.  
7 In fact, the only citation the NSE provides to any source that identifies 8,000 afa as the correct  
8 number is Order 1309, which itself cannot form the basis for substantial evidence. Accordingly,  
9 it is clear that the NSE's determination of 8,000 afa is arbitrary and capricious.  
10

11 **VII. Conclusion and Remedy Sought**

12 Based on the foregoing, and as described in CSI's Opening Brief, it is clear that the NSE  
13 lacked authority to issue Order 1309 and that the NSE violated CSI's constitutional and due  
14 process rights in the development and issuance of Order 1309. Order 1309 additionally is  
15 contrary to Nevada law. Accordingly, CSI respectfully requests that this Court grant CSI's  
16 Petition for Judicial Review and enter an Order declaring Order 1309 void.  
17

18 CSI additionally requests that this Court grant CSI's Petition for Judicial Review and  
19 enter an Order determining that Order 1309 is neither supported by substantial evidence nor the  
20 best available science, and as such, is arbitrary, capricious, and must be reversed. Accordingly,  
21 CSI requests that if this Court determines the NSE had authority to issue Order 1309, that this  
22 Court enter an Order declaring Order 1309 arbitrary and capricious.  
23

24 **AFFIRMATION:** The undersigned does hereby affirm that the preceding document  
25 and/or attachments do not contain the social security number of any person.  
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DATED this 11th day of January, 2022.

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**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Robison, Sharp, Sullivan & Brust, and that I served, or caused to be served, a true and correct copy of the foregoing **COYOTE SPRINGS INVESTMENT, LLC'S REPLY IN SUPPORT OF OPENING BRIEF** to be served on all parties to this action by:

placing an original or true copy thereof in a sealed, prepaid delivery package via United States Mail at Reno, Nevada, addressed to:

Clark County District Court  
Attn: Honorable Bitu Yeager – District Court, Dept. 1  
Court Administration – 2<sup>nd</sup> Floor  
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Las Vegas, NV 89101

emailing an attached Adobe Acrobat PDF version of the document to the email addresses below/facsimile (fax) and/or E-Filing pursuant to Section IV of the District of Nevada Electronic Filing Procedures:

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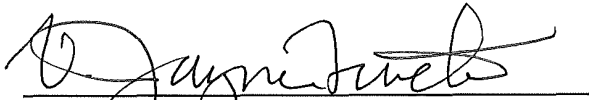
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DATED: This 11th day of January, 2022.



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**EXHIBIT LIST**

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<b><u>Exhibit No.</u></b>	<b><u>Description</u></b>	<b><u>Pages</u></b>
34	Respondent Nevada State Engineer's Answering Brief Case No. CV-01-05764 -2 <sup>nd</sup> Judicial District (5/3/2002)	32
35	Excerpts of Transcript of 9/25/2019 Public Hearing Order 1303	7

# **EXHIBIT 34**

# **EXHIBIT 34**

**ORIGINAL**

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BY *[Signature]*  
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8 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

9 **IN AND FOR THE COUNTY OF WASHOE**

10  
11 In the Matter of Applications 66555, 66556 )  
12 and 66567 Filed To Change the Manner and )  
13 Place Of Use of Water Previously )  
14 Appropriated from an Underground Source )  
15 Within the Dodge Flat Hydrographic Basin )  
16 (082), Washoe County, Nevada. )

Case No. CV-01-05764

Department No. 3

15 PYRAMID LAKE PAIUTE TRIBE OF  
16 INDIANS,

16 Petitioner,

17 v.

18 HUGH RICCI, STATE ENGINEER,  
19 STATE OF NEVADA, DEPARTMENT OF  
20 CONSERVATION AND NATURAL  
21 RESOURCES, DIVISION OF WATER  
22 RESOURCES,

21 Respondent.

23 **RESPONDENT NEVADA STATE ENGINEER'S ANSWERING BRIEF**

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CV01-05764 DC-9900029508-012  
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District Court 05/03/2002 04 10 PM  
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1 I. ISSUES PRESENTED FOR REVIEW

2 1. Whether there is substantial evidence in the record supporting the State Engineer's  
3 conclusion that 1,428 acre-feet of water annually is available for permanent use from the perennial yield  
4 at the Dodge Flat Groundwater Basin under Applications 66555, 66556, and 66557.

5 2. Whether there is substantial evidence in the record supporting the State Engineer's  
6 conclusion that Applications 66555, 66556, and 66557 will not conflict with existing rights.

7 3. Whether there is substantial evidence in the record supporting the State Engineer's  
8 conclusion that Applications 66555, 66556, and 66557 do not threaten to prove detrimental to the  
9 public interest.

10 II. STATEMENT OF THE CASE

11 A. Nature of the Case.

12 This case is an appeal of State Engineer's Ruling No. 5079 (Ruling 5079) in which the State  
13 Engineer granted in part three applications to change the place and manner of use of three existing  
14 groundwater rights within the Dodge Flat Groundwater Basin.

15 B. Course of Proceedings.

16 On July 13, 2000, Nevada Land and Resource Co., LLC (Nevada Land), filed Applications  
17 66555, 66556, and 66557 to change the manner and place of use of water previously appropriated under  
18 Permit Nos. 46908, 57310, and 52763. Those applications were timely protested by Washoe County,  
19 the Pyramid Lake Paiute Tribe (PLPT), the Town of Fernley, and Northern Nevada Placer Resources,  
20 Inc. A public administrative hearing was held to consider Applications 66555, 66556, and 66557 (the  
21 Applications) on June 19-21, 2001, in Carson City, Nevada. Record on Appeal (ROA) at 1985; Tabs  
22 91, 92, and 93. The State Engineer entered Ruling 5079 on September 27, 2001. ROA at 2003. PLPT  
23 served a Notice of Appeal and Petition for Judicial Review on October 25, 2001.

24 C. Disposition Below.

25 In Ruling 5079 the State Engineer held that the three Applications were seeking to change a  
26 temporary use to a permanent use and that only a portion of the requested applications would be  
27 granted.

28 ///

1     III.     STATEMENT OF FACTS

2             Applications 66555, 66556, and 66557 were filed on July 13, 2000, by Nevada Land to change  
3 the manner and place of use of water previously appropriated under Permit Nos. 46908, 57310, and  
4 52763, respectively. ROA at 1982-84; Tabs 2, 3, and 4. Permit Nos. 46908, 57310, and 52763 were all  
5 issued in the Dodge Flat Groundwater Basin (Basin) for mining, milling, and domestic purposes for a  
6 total annual consumptive use of 943.6 million gallons per year (2,896 acre-feet annually). *Id.* Nevada  
7 Land sought to change the manner of use to industrial power generation purposes and the place of use to  
8 a new location within the Basin. ROA at 1982-85; Tabs 2, 3, and 4.

9             Washoe County protested the Applications on the grounds that: the Applications constituted a  
10 change of a temporary use to a permanent use, the proposed use would adversely impact Washoe  
11 County's water systems at Stampmill Estates and Wadsworth, the Applications would interfere with  
12 efforts to obtain water or water rights for instream/water quality on the lower Truckee River, and  
13 decreased flows in the Truckee River might result in an Endangered Species Act Jeopardy Opinion.  
14 ROA at 1983; Tab 6.

15             The Town of Fernley opposed the Applications on the grounds that they could have a potential  
16 adverse impact on a proposed regional water system source of supply for the Fernley/Wadsworth area.  
17 ROA at 1984.

18             Northern Nevada Placer Resources, Inc., protested only Application 66557 on the grounds that  
19 the proposed change threatened the future success of the Olinghouse Mining District. ROA at 1984-85.

20             PLPT set forth eleven different grounds of protest to the Applications. These were: (1) the  
21 Applications would take water from the Truckee River and conflict with water rights of PLPT under  
22 Claim Nos. 1 and 2 of the *Orr Ditch* Decree and other water rights of PLPT, (2) the Applications  
23 request a change from a temporary to a permanent use, (3) the water rights being sought to be changed  
24 have not been put to a beneficial use, showing a lack of diligence, (4) the Applications will intercept  
25 regional groundwater recharge and reduce Truckee River flows, (5) Truckee River water quality will be  
26 diminished, (6) regional groundwater levels will be adversely impacted, (7) groundwater quality will be  
27 diminished, (8) the proposed changes would interfere with the conservation or recovery of the  
28 endangered cui-ui and the threatened Lahontan cutthroat trout, (9) the proposed changes would

1 adversely affect the recreational value of Pyramid Lake, (10) the Applications would interfere with the  
2 purposes for which the Pyramid Lake Indian Reservation was established, and (11) the Applications  
3 would adversely affect the interests of PLPT.

4 In Ruling 5079 the State Engineer addressed each of the protests raised and made a number of  
5 findings relevant to the issues raised by the Applications. The State Engineer first held that the  
6 groundwater resources have been managed on a perennial yield basis of the entire hydrographic basin  
7 and that the amount available for appropriation would be limited to the perennial yield. ROA at 1987-  
8 88. The State Engineer likewise held that the surface waters of the Truckee River and the groundwater  
9 of the Basin have been separately quantified and allocated in the past and that no portion of the  
10 underground water of the Basin would now be considered as surface water rights. ROA at 1987-89.  
11 The State Engineer then concluded that the perennial yield of the Dodge Flat Basin is approximately  
12 2,100 acre-feet and that under state law 672 acre-feet of that was currently committed to permanent use.  
13 ROA at 1986-89. As part of this analysis, the State Engineer rejected Nevada Land's argument that the  
14 proposed use of the water rights constitutes a temporary use and held that "the use of water for 35 years  
15 by a power-generating facility is not a temporary use of water." ROA at 1992. The State Engineer, as a  
16 result, also limited the quantity of water that can be used by approximately one-half of that requested in  
17 the Applications so that the use does not exceed the perennial yield of the Basin. ROA at 1992. The  
18 State Engineer then concluded that 1,428 acre-feet annually is available from the Basin for permanent  
19 use by Nevada Land, which was calculated by subtracting the current legal permanent use of  
20 groundwater from the Basin from the total perennial yield. ROA at 1989, 1993, 2002.

21 The protests of Washoe County, the Town of Fernley and Northern Nevada Placer Resources,  
22 Inc., were rejected by the State Engineer and have not been appealed by those entities. ROA at 1993-  
23 94. The protest of PLPT was likewise addressed, and in response thereto, the State Engineer reduced  
24 the quantity requested to be changed in recognition that there was insufficient water in the Basin to  
25 allow the full quantity of the mining rights to be converted to a permanent water right since such use  
26 would interfere with existing rights and threaten to prove detrimental to the public interest. ROA at  
27 1993-99.

28 ////

1 In addressing PLPT's various protest claims the State Engineer made among many others the  
2 following significant findings of fact or law. First, he found that the applications would not withdraw  
3 water from the Truckee River and conflict with PLPT's water rights that had been granted under Claim  
4 Nos. 1 and 2 of the *Orr Ditch Decree*, ROA at 1994, and that subsurface groundwater flows under the  
5 Truckee River are not part of PLPT's decreed surface water rights but are part of the waters belonging  
6 to the perennial yield of the Basin. ROA at 1994-95. Second, the State Engineer likewise found that  
7 the water proposed for appropriation by Nevada Land is not part of the unappropriated water of the  
8 Truckee River granted to PLPT in State Engineer's Ruling No. 4683 (Ruling 4683). ROA at 1996.  
9 Third, the State Engineer also specifically found that "the State of Nevada does not subscribe to the  
10 federal implied reserved right to ground water theory; therefore, use of ground water on the reservation  
11 is without benefit of a permit." ROA at 1996. Fourth, the State Engineer found that there was no  
12 evidence that the proposed appropriations would affect either surface or groundwater quality. ROA at  
13 1996-97. Fifth, the State Engineer specifically noted that there was not substantial evidence to support  
14 the claim of a potential Endangered Species Act jeopardy opinion or interference with the recovery of  
15 the endangered or threatened fish in Pyramid Lake, interference with the recreational value of Pyramid  
16 Lake, or interference with the purpose for which the Pyramid Lake Indian Reservation was established.  
17 ROA at 1998. Sixth, the State Engineer found that the water rights were in good standing as the  
18 necessary extensions of time had been appropriately filed. ROA at 1999.

19 Based on these various findings the State Engineer concluded that the amount available for use  
20 by Nevada Land was 1,428 acre-feet annually, that the proposed use as limited will not conflict with the  
21 existing rights of PLPT or Washoe County, and that the proposed uses will not be detrimental to the  
22 water quality of the groundwater basin or the Truckee River or risk injury to the endangered cui-ui or  
23 threatened Lahontan cutthroat trout. ROA at 2002.

24 IV. STANDARD OF REVIEW

25 The State Engineer is appointed by and is responsible to the Director of the Nevada Department  
26 of Conservation and Natural Resources and performs duties prescribed by law and by the Director of the

27 ////

28 ////



1 Department. NRS 532.020, 532.110. Those duties include administering the appropriation and  
2 management of Nevada's public water, both surface and groundwater, under NRS chapters 533 and  
3 534.

4 Pursuant to NRS 533.450(9), "[t]he decision of the State Engineer shall be prima facie correct,  
5 and the burden of proof shall be upon the party attacking the same." The function of this Court, as well  
6 as the District Court, is to review the evidence on which the State Engineer based his decision to  
7 ascertain whether the evidence supports the decision, and if so, the Court is bound to sustain the State  
8 Engineer's decision. *State Engineer v. Curtis Park*, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985). Stated  
9 somewhat differently, "[a] district court is not free to substitute its judgment for that of the  
10 Engineer . . ." *Id.*

11 Review of a decision of the State Engineer is in the nature of an appeal and is, consequently,  
12 limited in nature. NRS 533.450(1) states in pertinent part:

13 Any person feeling himself aggrieved by any order or decision of the  
14 state engineer, acting in person or through his assistants or the water  
15 commissioner, affecting his interests, when such order or decision relates  
16 to the administration of determined rights or is made pursuant to NRS  
17 533.270 to 533.445, inclusive, may have the same reviewed by a  
18 proceeding for that purpose, insofar as may be in the nature of an  
19 appeal . . . .

20 This Court has interpreted these provisions to mean that a petitioner does not have a right to *de*  
21 *novo* review or to offer additional evidence at the district court.

22 Contrary to appellants' suggestion, a party aggrieved by a decision of the  
23 State Engineer in an appropriation hearing is not entitled to a *de novo*  
24 hearing in the district court. The relevant statutes specifically provide that  
25 any such review shall be "in the nature of an appeal" and that the  
26 proceedings in the district court shall be "informal and summary." NRS  
27 533.450(1) and (2). Moreover, while the legislature originally provided  
28 for such a *de novo* review, 1913 Nev. Stats., ch. 140, § 75, that provision  
was explicitly repealed during the next legislative session, 1915 Nev.  
Stats., ch. 243, § 75.

29 *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979). *See also Kent v. Smith*, 62 Nev. 30, 32, 140  
30 P.2d 357, 358 (1943) (a court may construe a prior judgment, but cannot properly consider extrinsic  
31 evidence); *State Engineer v. Curtis Park*, 101 Nev. at 32, 692 P.2d at 497 (function of court is to review  
32 evidence relied upon and ascertain whether evidence supports order); *State Engineer v. Morris*, 107  
33 Nev. 699, 701, 819 P.2d 203, 205 (1991) (court should not substitute its judgment for that of the State

1 Engineer); *Town of Eureka v. State Engineer*, 108 Nev. 163, 165, 826 P.2d 948, 949 (1992) (reviewing  
2 court must limit itself to question of whether there is substantial evidence in the record); *United States*  
3 *v. Alpine Land & Reservoir Co.*, 919 F. Supp. 1470, 1474 (D. Nev. 1996) (court should sustain ruling if  
4 substantial evidence supports State Engineer's decision).

5 The Supreme Court has explained its function in reviewing a decision of the State Engineer by  
6 stating that "neither the district court nor this court will substitute its judgment for that of the State  
7 Engineer: we will not pass upon the credibility of the witnesses nor reweigh the evidence, but limit  
8 ourselves to a determination of whether substantial evidence in the record supports the State Engineer's  
9 decision." *State Engineer v. Morris*, 107 Nev. at 701, 819 P.2d at 205. This Court has likewise defined  
10 substantial evidence as that which a "reasonable mind might accept as adequate to support a  
11 conclusion." *State Employment Security Dept. v. Hilton Hotels Corp.*, 102 Nev. 606, 608, 729 P.2d  
12 497, 498 (1986).

13 While this Court is free to decide purely legal issues or questions without deference to an agency  
14 determination, the agency's conclusions of law, which will necessarily be closely related to the agency's  
15 view of the facts, are entitled to deference and will not be disturbed if they are supported by substantial  
16 evidence. *Jones v. Rosner*, 102 Nev. 215, 217, 719 P.2d 805, 806 (1986); *Town of Eureka v. State*  
17 *Engineer*, 108 Nev. 163, 826 P.2d 948 (1992). Likewise, while not controlling, an agency's view of or  
18 its own interpretation of its statutory authority is persuasive. *State Engineer v. Morris*, 107 Nev. at 701,  
19 819 P.2d at 205 (quoting *State v. State Engineer*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988)).  
20 Additionally, any review of the State Engineer's interpretation of his legal authority must be made with  
21 the thought that "[a]n agency charged with the duty of administering an act is impliedly clothed with  
22 power to construe it as a necessary precedent to administrative action." *Pyramid Lake Paiute Tribe of*  
23 *Indians v. Washoe County*, 112 Nev. 743, 747, 918 P.2d 697, 700 (1996), citing *State v. State Engineer*,  
24 104 Nev. at 713, 766 P.2d at 266 (1988). See also *Chevron U.S.A., Inc. v. N.R.D.C.*, 467 U.S. 837  
25 (1984) (deference promotes uniformity in the law because it makes various courts less likely to adopt  
26 differing readings of a statute. Instead, the view taken by a single centralized agency will usually  
27 control.).

28 ////

1 It should be remembered that it is the trier of fact who determines the weight to be given the  
2 evidence. *United States v. Vaccaro*, 816 F.2d 443 (9th Cir. 1987), *rev'd on other grounds, Huddleston*  
3 *v. United States*, 485 U.S. 681 (1988). The weight of the evidence is its weight in probative value, not  
4 the quantity or amount of evidence. It is not determined by mathematics but depends on its effect in  
5 inducing belief. The probative force of evidence is to be estimated, not only by its intrinsic weight, but  
6 also in view of the evidence which it is in the power of one side to produce and the other to contradict.  
7 *Travelers' Ins. Co. v. Pomerantz*, 246 N.Y. 63, 158 N.E. 21 (1927). When weighing the evidence, the  
8 trier of fact is not required to accept entirely either party's account of the facts. The trier of fact may  
9 reject that which it finds implausible, but accept other parts which it finds to be believable, and is free to  
10 choose among reasonable constructions of the evidence. See *United States v. Rothrock*, 806 F.2d 318  
11 (1st Cir. 1986); *United States v. Pruneda-Gonzalez*, 953 F.2d 190 (5th Cir. 1992), *cert. denied*, 504 U.S.  
12 978 (1992).

13 V. ARGUMENT

14 NRS 533.370(3) sets forth the standards under which the State Engineer is required to consider  
15 change applications such as those presented in this appeal. That section states in relevant part:  
16 "[W]here there is no unappropriated water in the proposed source of supply, or where its proposed use  
17 or change conflicts with existing rights . . . or threatens to prove detrimental to the public interest, the  
18 state engineer shall reject the application and refuse to issue the requested permit." NRS 533.370(3). In  
19 Ruling 5079 the State Engineer addressed each of these questions in conjunction with Nevada Land's  
20 Applications and concluded that in light of these standards the Applications could be granted in part.  
21 There is substantial evidence in the record to support each of the State Engineer's findings. This Court  
22 must therefore affirm Ruling 5079.

23 A. The State Engineer Correctly Concluded That There Is Unappropriated Water in the  
24 Basin.

25 The first question before the State Engineer in considering the Applications was whether there  
26 was "unappropriated water in the proposed source of supply . . ." NRS 533.370(3). Ruling 5079  
27 specifically finds that there was 1,428 acre-feet annually available in the Basin for use by Nevada Land  
28

////

1 and that the Applications seek to change permitted groundwater rights in good standing. ROA at 1989,  
2 1990, 1993, and 2002. There is substantial evidence in the record to support this conclusion.

3 1. There Is Substantial Evidence in the Record to Support the State Engineer's  
4 Findings in Regard to the Perennial Yield of the Basin And the Amount of Other  
5 Permanent Permitted Rights in the Basin.

6 The State Engineer specifically found that the perennial yield of the Basin was 2,100 acre-feet.  
7 ROA at 1989 and 2002. This finding was supported by a report from the United States Geological  
8 Survey admitted into evidence by the State Engineer, Ground-Water Quality in Nevada – A Proposed  
9 Monitoring Program, ROA Tab 24 at 112-13, ROA Tab 77 at 986, as well as other reports admitted into  
10 evidence, including the State of Nevada Planning Report, ROA Tab 88, the Hydrogeologic Evaluation  
11 and Groundwater Model of the Wadsworth-Dodge Flat Area Washoe County, Nevada, ROA Tab 64 at  
12 569, and Water Resources – Reconnaissance Series, Report 57, ROA Tab 25 at 115. Several witnesses  
13 for the protestants also testified that the perennial yield of the Basin is approximately 2,100 acre-feet  
14 annually, including Michael Widmer of the Washoe County Department of Water Resources, ROA, Tab  
15 91 at 1355, 1362-64, 1380-93, and George Ball, consulting water engineer for the Town of Fernley,  
16 ROA Tab 91 at 1400, 1411. In fact, PLPT does not dispute this fundamental finding or the finding that  
17 700 acre-feet of subsurface groundwater flow comes into the Basin. Petitioner's Opening Brief at 3.  
18 Likewise, there is no evidence contradicting the State Engineer's finding that only 672 acre-feet of  
19 water from the Basin have been committed to permanent use by permit under state law, ROA Tabs 12  
20 and 13, and PLPT has not asserted that other permitted groundwater rights exist in the Basin. As a  
21 consequence, there can be little argument that there is substantial evidence supporting the State  
22 Engineer's conclusion that the perennial yield of the Basin is 2,100 acre-feet annually and that there are  
23 existing permitted permanent groundwater rights valid pursuant to state law in the Basin of 672 acre-  
24 feet, leaving a total of 1,428 acre-feet annually for appropriation in the Basin.

25 At hearing, PLPT asserted that the State Engineer should not consider the recharge of the entire  
26 Basin in determining the amount of water available for appropriation, but should, rather, only consider  
27 recharge to the sub-basin. ROA at 1987; ROA Tab 92 at 1516-20. This argument was properly rejected  
28 by the State Engineer.

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1 First, it is undisputed that Nevada's groundwater resources have long been managed on  
2 perennial yield basis for the entire hydrographic basin. Such a system is specifically contemplated by  
3 the Nevada Groundwater Code, which provides for the State Engineer to take various acts on a basin-  
4 wide basis. See NRS 534.030 (method for designation of groundwater basins), 534.035 (establishment  
5 of groundwater boards for individual basins), 534.050 (permit required before well may be drilled in a  
6 designated groundwater basin), 534.120 (State Engineer may make regulations for the welfare of a  
7 designated basin). It is, in fact, under this authority that the State Engineer has identified the 232  
8 Administrative Ground Water Basins in Nevada. It is patently reasonable for the State Engineer to  
9 manage these basins in a manner consistent with his statutory authority. This approach is also  
10 reasonable for the reason that managing a basin on the basis of its perennial yield ensures that the basin  
11 will remain in balance. In those instances where more water may be pumped from one sub-basin within  
12 a groundwater basin, less will be allowed to be taken from other sub-basins, thereby resulting in an  
13 overall long-term balance in the groundwater basin.

14 Second, many of the relevant studies that were admitted into evidence and much of the expert  
15 testimony in this proceeding analyzed the perennial yield for the entire Basin. See Ground-Water  
16 Quality in Nevada – A Proposed Monitoring Program, ROA Tab 24 at 113, Tab 77 at 986; State of  
17 Nevada Planning Report, Ex. 88; Water Resources – Reconnaissance Series, Report 57, Tab 25 at 115-  
18 16; ROA Tab 91 at 1355, 1362-64, 1380-93; ROA Tab 91 at 1400, 1411. These reports and testimony  
19 clearly constitute substantial evidence supporting the State Engineer's conclusion that the Applications  
20 should be addressed on a basin-wide analysis. In this regard it is important to remember that the  
21 question on review is not whether there is a conflict in the evidence, but whether there is substantial  
22 evidence in the record to support the State Engineer's decision. *State Engineer v. Morris*, 107 Nev.  
23 699, 701, 819 P.2d 203, 205 (1991). With this in mind, it is clear that the reports and testimony relied  
24 upon by the State Engineer are sufficient support for his conclusion that the question of perennial yield  
25 will be analyzed on a basin-wide basis, even though PLPT may have offered evidence in support of an  
26 alternative approach.

27 ////

28 ////

1                   2.     No Controlling Jurisdiction Has Recognized a Federal Implied Reserved  
2                   Groundwater Right.

3                   PLPT's assertion that there is no water available for appropriation in the Basin, and for that  
4 matter, that the Applications will conflict with its existing rights, is completely dependent on its  
5 argument that it is entitled to, and currently holds, an implied federal reserved water right to  
6 groundwater in the Basin.<sup>1</sup> The State Engineer found in Ruling 5079, however, that "the State of  
7 Nevada does not subscribe to the federal implied reserved right to ground water theory; therefore, use of  
8 ground water on the reservation is without the benefit of a permit." ROA at 1996. A review of the case  
9 law shows that the State Engineer was correct in concluding that no controlling jurisdiction has ever  
10 held that there is an implied federal reserved groundwater right.

11                   The United States Supreme Court has defined the Reserved Water Rights Doctrine as follows:

12                                 This court has long held that when the Federal Government withdraws its  
13                                 land from the public domain and reserves it for a federal purpose, the  
14                                 Government, by implication, reserves appurtenant water then  
15                                 unappropriated to the extent needed to accomplish the purpose of the  
16                                 reservation. In so doing the United States acquires a reserved right in  
                                  unappropriated water which vests on the date of the reservation and is  
                                  superior to the rights of future appropriators. . . . The doctrine applies to  
                                  Indian reservations and other federal enclaves, *encompassing water rights*  
                                  *in navigable and nonnavigable streams.*

17                   *Cappaert v. United States*, 426 U.S. 128, 138 (1976) (emphasis added). Although numerous courts  
18 have applied this doctrine to appurtenant surface water, no controlling jurisdiction has ever applied it to  
19 groundwater, PLPT's arguments to the contrary notwithstanding.

20                   PLPT cites a number of cases that simply do not address the question of whether there is an  
21 implied federal reserved groundwater right. Foremost among these is *Shamberger v. United States*, 165  
22 F. Supp. 600 (D. Nev. 1958). The question addressed in that case was this:

23                                 [C]an the State of Nevada, at the instance of its State Engineer, enjoin the  
24                                 Federal government from the use of the waters of its wells because of the  
25                                 fact that its officers, agents and representatives failed and refused to  
                                  comply with the statutory *procedural* law and regulation in force covering  
                                  the field of appropriation and use of water.

26 \_\_\_\_\_  
27                   <sup>1</sup> Although PLPT asserts that it has an implied federal reserved groundwater right in the Basin, the fact that it  
28 asserts this right for purposes of "background" only shows that PLPT is making use of the groundwater of the Basin without  
any actual "right" to do so at all. In addition, PLPT has failed to identify which of the approximately 3,000 acre-feet it  
claims to currently pump from the Basin constitutes use under what it asserts is its implied federal reserved groundwater  
right. Petitioner's Opening Brief at 4.

1 *Id.* at 601 (emphasis added). In that case the court analyzed no question other than the jurisdictional  
2 authority of the State Engineer. This is made clear by the court's reliance on *McCulloch v. Maryland*, 4  
3 Wheat. 316, 4 L. Ed. 579 (1819), and other cases that stand for the proposition that Federal law is  
4 supreme in matters of federal concern, especially matters of national defense. It is a gross  
5 overstatement to say that *Shamberger* establishes the existence of a reserved groundwater right when  
6 the issue of federal reserved groundwater rights is nowhere raised in the decision.

7 Just as importantly, the *Shamberger* case is not controlling precedent since the Ninth Circuit  
8 Court of Appeals subsequently determined that the suit was barred by the sovereign immunity of the  
9 defendant. *Shamberger v. United States*, 279 F.2d 699, 700 (9th Cir. 1960). *Shamberger* was therefore  
10 dismissed without the issue of the implied federal reserved water right ever having been reached.  
11 *Shamberger* may not, as a consequence, be relied upon as precedent in the issue at hand.

12 Likewise, the cases of *Colville Confederated Tribes v. Walton*, 460 F. Supp. 1320 (E.D. Wash.  
13 1978), and *Tweedy v. Texas Co.*, 286 F. Supp. 383 (D. Mont. 1986), and *Reynolds v. Aamodt*, 618 F.  
14 Supp. 993 (D.N.M. 1985), do not recognize a federal reserved groundwater right, a fact that was  
15 expressly noted in *The General Adjudication of All Rights to Use Water In The Big Horn River*, 753  
16 P.2d 76, 99-100 (Wyo. 1988), *overruled on other grounds by Vaughn v. State*, 962 P.2d 149, 151 (Wyo.  
17 1998) (*Big Horn I*). Also, *United States v. Cappaert*, 508 F.2d 313 (9th Cir. 1974), may not be cited for  
18 the proposition that there is a federal implied reserved right to groundwater since the Supreme Court  
19 specifically held that the body of water at issue was surface water and not groundwater, thereby  
20 avoiding the question in its entirety. *Cappaert v. United States*, 426 U.S. at 143 ("The doctrine applies  
21 to Indian reservations and other federal enclaves, encompassing water rights in navigable and  
22 nonnavigable streams."). *See also Big Horn I*, 753 P.2d at 99. The case of *Gila River Pima Maricopa*  
23 *Indian Community v. United States*, 9 Cl. Ct. 660, 699 (1986), although purporting to address the issue  
24 of reserved water rights, cannot be considered to have any serious precedential value here, not only  
25 because it is not controlling as a matter of jurisdiction, but because it primarily addresses the issue of  
26 the United States' obligations under the fair and honorable dealings standard and its duty to protect  
27 tribal resources. That court makes little attempt to identify the nature of a reserved groundwater right  
28 and no attempt to set forth how such a right would be quantified. In addition, by stating that "ground

1 water under the Gila River Reservation is impliedly reserved for the Indians,” *Id.* at 700, the court  
2 significantly misinterprets the holding of *Winters v. United States*, 207 U.S. 564 (1908), and its  
3 progeny. *Gila River Pima Maricopa Indian Community* falls far short of establishing a reserved  
4 groundwater right that must be recognized by the courts of Nevada.

5 In the end, only two courts have squarely addressed the issue of a federal implied reserved  
6 groundwater right: *Big Horn I* and *In re the General Adjudication of all Rights to Use Water in the*  
7 *Gila River System and Source*, 989 P.2d 739, 747 (Ariz. 1999) (*Gila River III*). The *Big Horn I* court  
8 found that “the District court did not err in deciding there was no reserved groundwater right.” *Big*  
9 *Horn I*, 753 P.2d at 100. *Gila River III* did recognize a federal reserved groundwater right but only  
10 under limited factual circumstances that, as will be discussed below, do not exist here. Neither of these  
11 cases is controlling or binding on the State Engineer.<sup>2</sup> The State Engineer was correct when he  
12 concluded that no controlling Court has ever established an implied federal reserved groundwater right.

13 3. Not Only Is the Arizona Supreme Court’s Decision in *Gila River III* Not  
14 Controlling in Nevada, but PLPT Is Not Entitled to an Implied Federal Reserved  
15 Groundwater Right Under the Holding of That Case And the United States  
16 Supreme Court’s Holding in *Nevada v. United States*.

17 Ultimately, this Court is not required to determine whether or not there is an implied federal  
18 reserved groundwater right since PLPT is not entitled to a reserved groundwater right regardless of the  
19 authority followed. Even if it is assumed for the sake of argument that there is what may be referred to  
20 as an implied federal reserved groundwater right, such a right does not exist simultaneous with or in  
21 addition to a reserved surface water right. No court has held that a federal reservation can be said to  
22 have a separate and independently quantifiable reserved right in both a surface source and a

23 <sup>2</sup> PLPT cites the case of *Confederated Salish and Kootenai Tribes v. Clinch*, 992 P.2d 244 (Mont. 1999), for the  
24 proposition that no appropriations may be approved from the Basin until PLPT’s alleged reserved groundwater rights have  
25 been quantified. Petitioner’s Opening Brief at 15 n.14. The *Clinch* decision is clearly not controlling, however, since it is  
26 based exclusively on the interpretation of MONT. CODE ANN. § 85-2-311(1)(e), which has no analogy in the Nevada water  
27 statutes. In addition, as will be discussed in detail below, PLPT does not have a reserved groundwater right here. The  
28 *Clinch* court based its decision at least in part on its finding that it was “undisputed that the Tribes possess reserved water  
rights which the Tribes were then attempting to quantify.” *Id.* at 452. The fact that PLPT asserts that no groundwater may  
be appropriated in the Basin until its rights are quantified and that no action may be taken by this Court to quantify its rights,  
Petitioner’s Opening Brief at 11 n.10, while it nonetheless makes use of groundwater substantially in excess of the perennial  
yield without proceeding on its own accord to quantify its alleged reserved groundwater rights shows the inherent inequity of  
its position. *Clinch* simply does not provide authority for PLPT to hold the Basin hostage.



1 groundwater source. The *Gila River III* decision can at best be read to hold that a reservation has a  
2 single reserved water right and that when sufficient water is available from a surface source to  
3 accomplish the purposes of the reservation, no additional right exists in groundwater.<sup>3</sup> Since the  
4 Pyramid Lake Indian Reservation's reserved water right has been fully provided for from Truckee River  
5 surface water rights as adjudicated in the *Orr Ditch Decree*, PLPT cannot be said to have any rights,  
6 contingent or otherwise, in the groundwater of the Basin. The State Engineer was therefore correct in  
7 refusing to recognize and account for PLPT's use of groundwater in the Basin since that use is without  
8 right under federal or state law.

9 As was noted above, the implied federal reserved water rights doctrine provides that water is  
10 impliedly reserved for federal reservations "to the extent needed to accomplish the purpose of the  
11 reservation." *Cappaert v. United States*, 426 U.S. 128, 138 (1976). As a result, even if it is assumed  
12 that there exists an implied reserved groundwater right, it is limited to such amounts as are "needed to  
13 accomplish the purpose of the reservation," and no more.

14 As was also noted above, only one court, the Supreme Court of Arizona, has expressly  
15 recognized a federally reserved groundwater right.<sup>4</sup> The court did not, however, find that the reserved  
16 groundwater right existed in addition to a federal reserved surface water right. Rather, the Arizona  
17 Supreme Court held that the reserved water right exists only where other sources of water are  
18 unavailable or insufficient to fulfill the purposes of the reservation.

19 In summary, the cases we have cited lead us to conclude that if the United  
20 States implicitly intended, when it established reservations, to reserve  
21 sufficient unappropriated water to meet the reservations' needs, it must  
22 have intended that reservation of water to come from whatever particular  
23 sources each reservation had at hand. The significant question for the  
24 purpose of the reserved rights doctrine is not whether the water runs above  
25 or below the ground but whether it is necessary to accomplish the purpose  
26 of the reservation.

25 <sup>3</sup> The *Gila River III* decision must also be differentiated from the case at hand because that decision was based at  
26 least in part on Arizona law which varies from Nevada law in such important respects as its willingness to allow  
27 appropriation of water in excess of the perennial yield, thereby resulting in "mining" of groundwater, and its rule that  
28 groundwater is a correlative right, i.e. a landowner has certain rights to the groundwater found underneath his or her  
property.

27 <sup>4</sup> Although the State Engineer argues here that PLPT is not entitled to an implied federal reserved groundwater  
28 right under the facts of this case and the holding of *Gila River III*, the State Engineer does not admit, and expressly denies,  
that *Gila River III* is controlling in any way, regardless of the factual circumstances presented.

1 *Gila River III*, 989 P.2d 739, 747 (Ariz. 1999). The *Gila River III* court then specifically noted: "We  
2 do not, however, decide that any particular federal reservation, indian or otherwise, has a reserved right  
3 to groundwater. A reserved right to groundwater may only be found *where other waters are inadequate*  
4 *to accomplish the purpose of a reservation.*" *Id.* at 748 (emphasis added).

5 PLPT cannot assert here that it is entitled to a reserved groundwater right since it cannot show,  
6 *as a matter of law*, that the other waters in which it does have reserved rights, i.e. the Truckee River, are  
7 inadequate to accomplish the purposes of its reservation since the United States Supreme Court  
8 expressly held in *Nevada v. United States*, 463 U.S. 110 (1983), that PLPT's entire reserved water right  
9 was presented and addressed in the *Orr Ditch Decree*. No further adjudications are needed, under the  
10 McCarran Amendment or otherwise, for the State Engineer and this Court to conclude that PLPT has no  
11 reserved right to the groundwater of the Basin.

12 In *Nevada v. United States*, the Supreme Court was presented with the question of whether the  
13 United States could partially undo the *Orr Ditch Decree* which was entered after it had sued to  
14 adjudicate water rights to the Truckee River for the benefit of the Pyramid Lake Indian Reservation as  
15 well as others. *Id.* at 113. In March of 1913 the United States filed a complaint in the United States  
16 District Court for the District of Nevada, which became known as the *Orr Ditch* litigation, seeking to  
17 adjudicate water rights in the Truckee River. As part of that case, the United States asserted a reserved  
18 right on behalf of PLPT. *Id.* at 116. The case proceeded slowly until a settlement was reached in 1935  
19 which allocated to PLPT sufficient water to irrigate approximately 5,875 acres of reservation land.<sup>5</sup> *Id.*  
20 at 117-18. In the *Nevada v. United States* complaint, the United States did not purport to challenge the  
21 rights established and set forth in the *Orr Ditch Decree*, but alleged that the Decree had only addressed  
22 waters for irrigation and not for the maintenance and preservation of Pyramid Lake and the lower  
23 reaches of the Truckee River. *Id.* at 119. The District Court rejected the United States' claim on behalf  
24 of PLPT on principles of *res judicata*, holding that the United States and PLPT could not litigate  
25 various reserved rights in a piecemeal fashion. *Id.* at 120. The Ninth Circuit affirmed in part and

26  
27 <sup>5</sup> The issue presently before the State Engineer is whether PLPT has an implied federal reserved right to  
28 groundwater. In an unrelated matter currently pending before the State Engineer certain protestants have asserted that  
PLPT's *Orr Ditch Decree* Claim No. 2 water is not a federal reserved water right. The State Engineer has made no findings  
or decisions in regard to that issue and does not assert in this brief that the Claim No. 2 water is or is not a reserved right, but  
reserves that issue for decision in the appropriate proceeding.

1 reversed in part, holding that the suit could proceed because there were new parties, the Newlands  
2 Project water users, who had not been a party in the previous action. *Id.* at 120-21. The Supreme Court  
3 reversed and held that the *Orr Ditch* Decree was a final judgment and that the United States and PLPT  
4 were barred from relitigating the issue of the amount of water to which PLPT was entitled under the  
5 federal reserved water rights doctrine. *Id.* at 130-33. The Court stated:

6 We find it unnecessary in these cases to parse any minute differences  
7 which these differing tests might produce, because whatever standard may  
8 be applied the only conclusion allowed by the record in the *Orr Ditch* case  
9 is that the Government was given an opportunity to litigate the  
Reservation's entire water rights to the Truckee, and that the Government  
intended to take advantage of that opportunity.

10 *Id.* at 131. The Court then held, given the United States' express intent to reserve the water necessary to  
11 accomplish the purposes of the Pyramid Lake Indian Reservation, that "[t]his cannot be construed as  
12 anything less than a claim for the full 'implied-reservation-of-water' rights that were due the Pyramid  
13 Lake Indian Reservation." *Id.* at 133 (emphasis added).

14 The holding of *Nevada v. United States* read in conjunction with *Gila River III* leads to only one  
15 reasonable conclusion: PLPT has no reserved right to the groundwater of the Basin. *Nevada v. United*  
16 *States* made it abundantly clear that PLPT's entire reserved right was adjudicated as part of the *Orr*  
17 *Ditch* Decree. *Gila River III* is as equally clear that the reserved groundwater right exists only in those  
18 instances where other waters are inadequate to accomplish the purpose of the reservation. As a result,  
19 there is simply no legitimate argument here that PLPT has a reserved water right in the groundwater of  
20 the Basin, be it quantified or not. The State Engineer was therefore correct in refusing to consider  
21 PLPT's use of water in the Basin to be a "right" entitled to recognition.

22 Substantial evidence supports the State Engineer's conclusion that there is 1,428 acre-feet  
23 available annually for use under the Applications. PLPT's use of water within the Basin is without right  
24 and, therefore, need not be considered by the State Engineer as part of the existing rights within the  
25 Basin.

26 ///

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28 ///

1           B.     There Is Substantial Evidence in the Record Supporting the State Engineer's Conclusion  
2                 That Applications 66555, 66556, and 66557 Will Not Conflict With Existing Rights.

3           Consistent with the requirements of NRS 533.370(3), the State Engineer concluded that the  
4 changes proposed by Applications 66555, 66556, and 66557 as permitted in the reduced quantity will  
5 not interfere with existing rights. This conclusion is supported by substantial evidence and must  
6 therefore be affirmed by this Court.

7                 1.     Evidence Shows That the Proposed Pumping Will Not Interfere With PLPT's  
8                         Surface Water Rights.

9           In Ruling 5079 the State Engineer specifically noted that:

10                    The PLPT claimed that the applications would withdraw water from the  
11                    Truckee River and conflict with the water rights of the Tribe under Claims  
12                    No. 1 and 2 of the Orr Ditch Decree and other water rights of the Tribe.  
13                    The PLPT's own witness admitted, however, that the Tribe's water rights  
                      under Claims No. 1 and 2 would not be affected if the change applications  
                      were approved.

14           ROA at 1994. There is substantial evidence supporting this conclusion both as to the Claim Nos. 1 and  
15           2 water and PLPT's later acquired Truckee River right.

16           Ali Shahroody, expert witness for PLPT, testified that:

17                    Q:     The question is if the Duke changes were approved and they were  
18                    to use 2900 acre feet of water, do you have an opinion as to whether or not  
19                    that would cause the Tribe's Orr Ditch Decreed rights to not be satisfied in  
                      any given year?

20                    A:     To the extent that there are depletions to the river which would  
21                    have met the Tribe' rights, that would not necessarily cause the Tribe's  
                      right not to be satisfied.

22                    The Tribe's right would be satisfied because its rights are paramount to the  
23                    river, but it would be at the expense of other parties, just strictly talking  
24                    about under the Orr Ditch Decree, other parties upstream, meaning that  
                      other Orr Ditch rights holders would be affected by this approach of this  
                      application for pumping by Duke.

25                    But to Answer your question straight, the Tribe's Claims 1 and 2 would not  
                      be affected.

26           ROA Tab 92 at 1649, l. 17 through 1650, l. 7. As a consequence, there can be no argument that the  
27           Applications as granted will conflict with PLPT's Claim Nos. 1 and 2 *Orr Ditch* rights.

28           ////

1           There is likewise substantial evidence to support the State Engineer's conclusion that the  
2 Applications will not interfere with PLPT's other surface water right, "the unappropriated water right"  
3 granted PLPT in Ruling 4683, ROA Tab 10. It is important for the analysis here to understand the  
4 nature of the rights granted in that Ruling. Ruling 4683 described the right granted as follows:

5           The Protestant's argument seems to ignore the facts of the reality of the  
6 flows being applied for under Applications 48061 and 48494. The PLPT  
7 under these applications is requesting in essence an instream/in situ right  
8 to the high flows in excess of decreed or existing water rights on the  
9 system in order to sustain the threatened and endangered fishery at  
10 Pyramid Lake. In many years these flows will not exist at all and in other  
11 very rare years there may be more than a million acre-feet of excess flow.  
12 It is convenient to work with the average flows as long as it is clear that  
13 the entire quantity of unappropriated water is not available in most years.

14           Pyramid Lake on the Pyramid Lake Reservation is a terminal lake at the  
15 end of the Truckee River System. It is downstream from all other water  
16 rights and water uses. There is uncontroverted evidence in the record that  
17 the amount of Truckee River water that reaches Pyramid Lake exceeds the  
18 amount of water recognized in the Orr Ditch Decree. The State Engineer  
19 finds there is unappropriated water in the Truckee River in quantities that  
20 vary significantly from year to year, but in some years is sufficient to  
21 satisfy the amount applied for under these applications.

22           ROA Tab 10 at 36-37. The rights granted PLPT in Ruling 4683, which are state law water rights and  
23 not federally reserved water rights, ROA Tab 10 at 38, are what are commonly referred to as flood  
24 rights from surface water flows. As a result, the nature of that right is contingent on existing conditions  
25 and has nothing to do with groundwater.

26           As was noted by the State Engineer, the flood water right held by PLPT<sup>6</sup> under Ruling 4683  
27 does not include, and was not intended to include, any groundwater allocated to the perennial yield of  
28 the Basin. As a consequence, no beneficial use of the groundwater of the Basin can be considered as  
conflicting with that right. To hold otherwise would be to significantly expand the flood right beyond  
amounts intended in Ruling 4683. ROA at 1995-96.

          Even if we were to assume that PLPT's Ruling 4683 flood water right could be impacted by  
groundwater use, there is substantial evidence in the record here to show that the use of groundwater as  
approved in part under Ruling 5079 will not conflict with the flood water right or any other surface right

<sup>6</sup> The actual permits have not been issued since that ruling has been stayed on appeal.

1 in the Truckee River since the perennial yield of the Basin by definition excludes water that contributes  
2 to the flow of the Truckee River.

3 Perennial yield has been defined by the Division of Water Resources as:

4 The maximum amount of ground water that can be salvaged each year  
5 over the long term without depleting the ground water reservoir. Perennial  
6 yield is ultimately limited to the maximum amount of natural discharge  
7 that can be salvaged for beneficial use. Perennial yield cannot be more  
8 than the natural recharge to a ground water Basin and in some cases less.

9 ROA Tab 88 at 13. The measurement of the perennial yield excludes amounts that discharge to the  
10 river. This fact is clearly illustrated by the following:

11 Estimated elements of inflow, in addition to that of the Truckee River,  
12 include ground-water recharge (about 1,400 acre feet per year; table 12)  
13 and ground-water inflow from other hydrographic areas (at least 2,800 acre  
14 feet per year; table 13).<sup>7</sup> Irrigated and phreatophyte areas total about 3,200  
15 acres (table 15), and probably consumes less than 5,000- acre-feet per  
16 year, which approximately balances the inflow quantities listed above.  
17 Despite this approximate balance, *the river apparently gains an average of  
18 at least 5,000 acre-feet per year within the hydrographic area (p. 37).*

19 Water Resources—Reconnaissance Series, Report 57, ROA Tab 25 at 116 (emphasis added). As this  
20 data makes apparent, the State Engineer's finding of a perennial yield of 2,100 acre-feet from the Basin  
21 excludes by definition the 5,000 acre-feet gained by the river in the same section. Consequently, the  
22 finding that the perennial yield of the Basin is 2,100 acre-feet per year, a finding for which there is  
23 substantial evidence, ROA Tab 24 at 112-13; Tab 88; Tab 64 at 569; Tab 25 at 115; Tab 91 at 1355,  
24 1362-64, 1380-93; Tab 91 at 1400, 1411, together with the finding that the Applications must be limited  
25 to the uncommitted portion of the perennial yield, constitutes substantial evidence supporting the State  
26 Engineer's ultimate conclusion that the Applications as reduced and approved will not conflict with  
27 PLPT's Truckee River surface water rights.<sup>8</sup>

28 ////

<sup>7</sup> The 2,800 acre-feet of groundwater inflow is made up of 700 acre-feet from the Tracy segment and 2,100 acre-  
feet from the Fernley Area. Water Resources—Reconnaissance Series, Report 57, Table 13, ROA Tab 25.

<sup>8</sup> PLPT implies that remand would be appropriate in this case since it did not offer evidence as to the impacts of the  
1,428 acre-feet of groundwater approved for use in Ruling 5079. This argument is unavailing. PLPT was afforded every  
opportunity to offer evidence at the hearing, and the State Engineer is not alleged to have refused to admit any evidence  
relevant to any issue before this Court. PLPT cannot now be heard to complain that it wishes to offer different or additional  
evidence.

1 PLPT attempts to make much of their assertion that the State Engineer has denied that there is a  
2 hydrographic connection between the Basin and the Truckee River. This argument is largely irrelevant  
3 and both misstates the holding of Ruling 5079 by misinterpreting what is meant by "managing" the  
4 Basin and ignores the long-standing system that is in place for the allocation and management of water  
5 in Nevada.

6 Ruling 5079 states that Nevada's groundwater resources:

7 [H]ave been managed on a perennial yield basis of the entire hydrographic  
8 basin. Each ground-water basin in Nevada was defined and a perennial  
9 yield figure calculated based on a recharge/discharge relationship, which  
10 keeps the basin in balance . . . There is no logical reason to deviate from  
the management scheme now in place and accept the PLPT's proposal that  
the ground-water basin should be managed drainage by drainage.

11 ROA at 1988. This management system reflects the nature of the Nevada Water Code that establishes  
12 unique rules of law for groundwater and surface water. *See* NRS 533.010—533.545, 534.010—  
13 534.350. In fact, Ali Shahroody, PLPT's own witness, noted that Nevada manages its ground and  
14 surface water under distinct systems.

15 Q: It is my understanding that Nevada through its State Engineer as  
16 far as administering surface and groundwater has basically administered  
them as separate units, even though there may be some hydrological  
17 connection. Is that your understanding?

A: That's correct.

18 ROA Tab 92 at 1650, ll. 8-13. The assertion of PLPT that groundwater and surface water should be  
19 managed as one unified system would result in a significant change to Nevada law and would alter years  
20 of past practice for no other purpose than to expand the nature of PLPT's floodwater right beyond the  
21 limitations set by Ruling 4683.

22 The primary error in PLPT's argument, however, is that they misinterpret the term "manage" as  
23 used by the State Engineer and concludes without support that he has failed to recognize a hydrographic  
24 connection between the Truckee River and the groundwater basin. PLPT's lengthy discussion in this  
25 regard is, as a result, irrelevant to the question at hand since the State Engineer has not disagreed that  
26 there can be a hydrologic connection between surface and groundwater sources. His discussion in  
27 regard to existing rights in Ruling 5079 clearly shows this. ROA at 1994. The point raised by the State  
28 Engineer, which is not countered by PLPT, is that the Applications as approved will not conflict with

1 PLPT's Claim Nos. 1 and 2 *Orr Ditch* rights or its state law "flood waters" right since those rights when  
2 granted were not intended to include any of the groundwater of the Basin. To conclude otherwise  
3 would be to ignore the testimony of PLPT's own witness and significantly expand the right granted by  
4 the State Engineer in Ruling 4683. The State Engineer has not ignored the hydrologic connection  
5 between the river and the Basin. It has been addressed and adequately protected by limiting the  
6 Applications to the perennial yield of the Basin. There is substantial evidence supporting the State  
7 Engineer's conclusion that the Applications as approved do not conflict with any of PLPT's surface  
8 water rights. ROA Tab 24 at 112-13; Tab 88; Tab 64 at 569; Tab 25 at 115-16; Tab 91 at 1355, 1362-  
9 64, 1380-93; Tab 91 at 1400, 1411; Tab 25 at 116.

10 2. PLPT Holds No Right to Groundwater With Which the Applications Can  
11 Interfere.

12 PLPT has asserted that the proposed changes at issue here will conflict with its groundwater  
13 rights as well as its surface water rights. Petitioner's Opening Brief at 16-17, 22-23. The State  
14 Engineer was correct in concluding that the Applications as approved would not conflict with any  
15 groundwater rights held by PLPT in the Basin.

16 As was discussed above in sections V(A)(2) and (3) of this brief, PLPT has no "right" in the  
17 groundwater of the Basin under the federal implied reserved right doctrine. The Applications here  
18 cannot conflict with an "existing right" when there is no right. PLPT does have some groundwater  
19 rights in the Basin that are permitted under state law, ROA Tab 13, but those rights were accounted for  
20 as part of the 672 acre-feet of water found by the State Engineer to be committed to permanent uses in  
21 the Basin. ROA at 1989. Since the amount of water available for use under the Applications was  
22 reduced for the very purpose of protecting the permanent permitted groundwater rights in the Basin, the  
23 Applications cannot be said to conflict with these rights either. Finally, it would be disingenuous for  
24 PLPT to argue that the State Engineer erred in ruling that the Applications as approved would conflict  
25 with the groundwater rights of Washoe County when that protestant chose not to appeal the State  
26 Engineer's Ruling. There is substantial evidence supporting the State Engineer's findings that the  
27 Applications will not conflict with existing groundwater rights, and PLPT has failed to show otherwise.

28 ////



1 C. Substantial Evidence Supports the State Engineer's Finding That the Applications Do  
2 Not Threaten To Be Detrimental to the Public Interest.

3 NRS 533.370(3) requires that the State Engineer determine whether an application to change the  
4 place of use, point of diversion, or manner of use "threatens to prove detrimental to the public interest"  
5 prior to approving the Application. The standard for such a determination was set forth by the Nevada  
6 Supreme Court in *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 112 Nev. 743, 918 P.2d  
7 697 (1996). In that case PLPT and Lassen County, California, protested applications that would have  
8 changed the place and manner of use of water from the Honey Lake Groundwater Basin to Reno and  
9 Sparks for municipal uses. Specifically, PLPT protested those change applications on the grounds that  
10 each application "was not economically feasible or desirable in light of negotiations that were occurring  
11 over water rights in Lake Tahoe, Pyramid Lake, and Truckee River and the Carson River. At the time  
12 of the hearings, California, Nevada, and various Indian tribes (including the Pyramid Lake Paiute Tribe)  
13 were attempting to reach a settlement that would greatly impact water rights on the Truckee River." *Id.*  
14 at 745, 918 P.2d at 698. The case was originally remanded by the District Court with instructions to  
15 consider whether the applications threatened to prove detrimental to the public interest. The State  
16 Engineer issued two supplemental rulings that set forth the policy considerations as defined by  
17 Nevada's water statutes to define the public interest. *Id.* at 746, 918 P.2d 698-99. PLPT challenged  
18 these supplemental rulings on the basis that the analysis of public interest was insufficient. The District  
19 Court affirmed the supplemental rulings, as did the Nevada Supreme Court. *Id.* at 747, 918 P.2d 699.

20 In so doing, the Supreme Court specifically held that it was appropriate for the State Engineer to  
21 glean the public interest from the policies established by the Nevada Legislature. The Court specifically  
22 rejected the argument that it would be appropriate to judicially adopt policies from other sources. The  
23 Court noted:

24 The legislature has the power to decide what the policy of law shall be,  
25 and if it has intimated its will, however indirectly, that will should be  
26 recognized and obeyed. [Citation omitted]. The Nevada Legislature,  
27 presumably aware of the broad definition of the public interest enacted by  
28 other states (particularly Alaska and Nebraska), demonstrated through its  
silence that Nevada's water law statutes should remain as they have been  
for over forty-five years. We recognize that some people may argue that  
the prior appropriation doctrine is not well suited to solve the modern  
demands for water across our arid state. However, the legislature – not

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this court- must signal a departure from such a long recognized Nevada water policy.

*Id.* at 749, 918 P.2d 700. It is in light of this interpretation of the “public interest” that Ruling 5079 must be analyzed.

PLPT has argued that Ruling 5079 threatens to prove detrimental to the public interest for four reasons: (1) the Applications will impact existing wells, (2) the Applications will impact senior surface water rights, (3) the Applications threaten to cause injury to Pyramid Lake’s protected fish, and (4) the Ruling is silent as to the various agreements that are in place for the benefit of the protected fish and Pyramid Lake. Petitioner’s Opening Brief at 24-26. The State Engineer addressed each of these issues, and found that the proposed transfers did not threaten to be detrimental to the public interest.

PLPT’s argument that the applications threaten to prove detrimental to the public interest because they will impact existing wells and senior surface water rights are no different factually from the argument that the Applications will conflict with PLPT’s existing rights. The State Engineer determined, however, that they will not conflict with existing rights. As has already been shown above, there is substantial evidence to support the State Engineer’s conclusion that Applications as reduced and approved will not impact existing rights or the flows of the Truckee River. *See* section V(B)(1) above. In fact, the very reason that the State Engineer reduced the amounts requested for transfer by the Applications by approximately one-half was to protect the public interest issues presented here.

There is likewise substantial evidence to support the State Engineer’s conclusion that the Applications as approved do not threaten to cause injury to Pyramid Lake’s protected fish. As has been noted above, the Applications as reduced and approved do not threaten to diminish the flows of the Truckee River. *See* section V(B)(1) above. PLPT’s argument, however, merely assumes that there will be reductions in flows, as does all of the testimony upon which PLPT relies. Not only is the presumption that the flows of the Truckee River will be reduced incorrect, no evidence was offered that there will be any harm to the threatened fish in any event. A review of the testimony of Mr. Chester Buchanan of USFWS shows that his testimony is in fact “not at all conclusive” as to whether any reduction in flows would be biologically significant. ROA at 1997-98.

///  
///

1 Q: So are you saying then in order – that even though the reduction of  
2 three to three and a half cfs may not be hydrologically significant, it could  
3 be biologically significant over time, cumulatively?

4 A: It could be, It could be. *I'm not saying it would or would not be,*  
5 but my suspicion is that it would be, and this will all be brought out when  
6 we do our consultation with BLM under section 7 of the Endangered  
7 Species Act on the Tuscarora pipeline expansion.”

8 ROA Tab 92 at 1697, ll. 13-21 (emphasis added). “Q: And based upon your familiarity with the  
9 Truckee River and with these species and with their conditions, would you consider those impacts under  
10 the assumption that you’ve made to be biologically significant? A: I’ll leave that to the consultation.”

11 ROA Tab 92 at 1700, ll. 16-20.

12 So because of this discrepancy [between two studies of the Basin] we  
13 could no longer support the conclusion that it would not have an adverse  
14 impact. We were, at the point that we were not sure because of the  
15 discrepancies of the model, so therefore, we had informed BLM that we  
16 wanted to consult on this and try to get the whole thing straightened out  
17 and try to figure out what is the biological impact.

18 ROA Tab 92 at 1701, l. 22 through 1702, l. 3. Mr. Buchanan’s testimony does not show that the  
19 Applications threaten the public interest, only that USFWS wished to review the potential impacts of  
20 the Applications more closely. This testimony supports rather than contradicts the State Engineer’s  
21 finding.

22 In addition, Mr. Buchanan’s testimony shows that the role of the State Engineer differs from that  
23 of USFWS and that it is the obligation of the USFWS, not the State Engineer, to analyze the  
24 appropriateness of the project under the Endangered Species Act. This is made clear by USFWS’s  
25 intent to consult with BLM under section 7 of the Endangered Species Act. Pursuant to the holding of  
26 *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 112 Nev. 743, 918 P.2d 697 (1996), the State  
27 Engineer does not have the duty to independently review a function that is statutorily delegated to  
28 another governmental agency. *Id.* at 749-75, 918 P.2d at 701.

29 However, to the extent that Mr. Buchanan’s testimony can be said to show a threat to the  
30 protected fish of Pyramid Lake, it is given under hypothetical facts which the State Engineer has found  
31 do not exist—a reduction in flow to the Truckee River. ROA Tab 92 at 1697 (Buchanan asked to opine  
32 on impact if flow of river is reduced by three to three and a half cfs). As has been noted now numerous  
33 times, the State Engineer has found that the Applications as reduced and approved will not reduce the

1 flows of the Truckee River, and there is substantial evidence to support that finding. *See* section  
2 V(B)(1) above. The State Engineer was correct in concluding that the Applications as approved do not  
3 threaten to be detrimental to the protected fish.

4 There is also substantial evidence to support the conclusion that the various agreements that are  
5 in place for the benefit of the protected fish and Pyramid Lake will not be violated by the Applications  
6 as approved.

7 As was noted by PLPT, the Memorandum of Understanding (MOU) provided a mechanism to  
8 allow PLPT to assert a claim for the unappropriated water of the Truckee River. The MOU was  
9 fulfilled in part by the State of Nevada when the State Engineer granted PLPT the unappropriated water  
10 of the Truckee River in Ruling 4683, and Ruling 5079 in no way impacts the implementation of that  
11 agreement. PLPT has also not indicated that the 1996 Water Quality Settlement Agreement has been in  
12 any way violated, and it cannot do so since it provides for the purchase of Truckee River surface water  
13 rights and no such rights are implicated here. All of the other agreements referred to are likewise not  
14 impacted by Ruling 5079 since the State Engineer specifically found that the proposed appropriations  
15 would not impact the flows of the Truckee River, a finding supported by substantial evidence. *See*  
16 section V(B)(1) above. Since none of these various agreements have been violated, were not raised as  
17 protest issues before the State Engineer, and are not impacted by Ruling 5079, that Ruling cannot be  
18 said to threaten to be detrimental to the public interest as a result.

19 It must also be noted that none of the agreements referred to by PLPT directly address changes  
20 in place and manner of use of groundwater. By PLPT's own admission these agreements deal with  
21 direct appropriations from the Truckee River. Petitioner's Opening Brief at 5-6. PLPT and the other  
22 parties to those agreements cannot be allowed to expand the terms of those agreements under the  
23 auspices of the public interest. Likewise, the State Engineer is not responsible for the enforcement or  
24 interpretation of any of the referred to agreements. Since the State Engineer does not have the duty to  
25 independently review or enforce any of these agreements, their terms may not be elevated to the level of  
26 the public policy of the State of Nevada. *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 112  
27 Nev. at 749-50, 918 P.2d at 701.

28 ////

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1 PLPT also argues that the State Engineer failed to reconcile Rulings 4683 and 4659 with Ruling  
2 5079. The "need" to reconcile these rulings, however, is based on both factual and legal inaccuracies.  
3 First, both Ruling 4683 and 4659 address applications to appropriate surface water from the Truckee  
4 River, which is not the case here. ROA Tabs 10 and 11. Second, there has been a specific finding that  
5 the Applications as approved in this case will not result in a reduction of flows to the Truckee River.  
6 Finally, as a matter of law, the State Engineer is under no obligation to reconcile his findings with  
7 previous rulings, whether they are factually on all fours or whether, as is the case here, they are not.  
8 *Desert Irrigation, Ltd. v. State of Nevada*, 113 Nev. 1049, 1058, 944 P.2d 835, 841 (1997); *Motor*  
9 *Cargo v. Public Service Commission*, 108 Nev. 335, 337, 830 P.2d 1328, 1330 (1992).

10 The State Engineer correctly concluded that the Applications as approved do not threaten to  
11 prove detrimental to the public interest. Each of PLPT's objections in this regard assumes that the  
12 Applications will cause a significant decrease in Truckee River flows. The State Engineer specifically  
13 found, however, that this will not be the case, and there is substantial evidence supporting this finding.

14 VI. CONCLUSION

15 The State Engineer specifically found that Applications 66555, 66556, and 66557, as reduced  
16 and approved, do not conflict with existing rights or threaten to prove detrimental to the public interest.  
17 He likewise found that there is unappropriated water in the Basin. There is substantial evidence in the  
18 record supporting each of the State Engineer's findings in this regard. This Court must therefore affirm  
19 State Engineer's Ruling No. 5079 and dismiss PLPT's Petition for Judicial Review.

20 DATED this 3rd day of May, 2002.

21 FRANKIE SUE DEL PAPA  
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CERTIFICATE OF MAILING

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 3rd day of May, 2002, I deposited for mailing at Carson City, Nevada, postage prepaid, a true and correct copy of the foregoing document, addressed to the following:

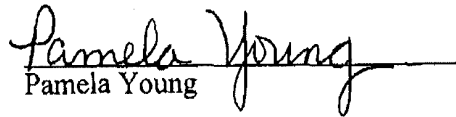
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# **EXHIBIT 35**

# **EXHIBIT 35**

**In The Matter Of:**

*DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES*

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*Vol. III*

*September 25, 2019*

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 2 DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES  
 3 DIVISION OF WATER RESOURCES  
 4 BEFORE MICHELINE FAIRBANK, HEARING OFFICER  
 5 ---oOo---  
 6 IN THE MATTER OF THE ADMINISTRATION  
 AND MANAGEMENT OF THE LOWER  
 7 WHITE RIVER FLOW SYSTEM WITHIN  
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 14 TRANSCRIPT OF PROCEEDINGS  
 15 PUBLIC HEARING  
 16 HEARING ON ORDER 1303  
 17 VOLUME III  
 (A.M. SESSION, Pages 489 - 598)  
 18 WEDNESDAY, SEPTEMBER 25, 2019  
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1 MX-4, the initiation of MX-5 testing, which increased the  
 2 slope of decline. And then shut off of the well, we see  
 3 recovery. And then it looks like we've got declining water  
 4 levels going on again.  
 5 And what I was going to try to show on the other  
 6 slide was that during the Order 1169 test, pumping stopped  
 7 for a fairly short period of time, as I understand, to do  
 8 some work on the arsenic treatment facility. But it resulted  
 9 in a pretty sharp increase in water levels. And then when  
 10 the pumping started again there was decline in one of those.  
 11 It shows up nicely in the transducer data. So this is  
 12 another part of the signature of the MX-5 pumping.  
 13 So in these two examples, you see the seasonal  
 14 pumping, you see the Order 1169 pumping. MX-4 we saw Arrow  
 15 Canyon pumping. I would turn these wells being well  
 16 connected with the source of the stresses, those sources  
 17 being Muddy River Springs area and -- Well, let's just say  
 18 Muddy River Springs area for the seasonal signal and then  
 19 MX-5 for the Order 1169. So it's well connected to both  
 20 areas.  
 21 Same kind of story on CSVM-6, shown again pretty  
 22 close to MX-5. We see similar types of responses. The  
 23 seasonal pumping, the decline prior to initiation of MX-5  
 24 pumping, the shutdown of the well about halfway through the

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1 testing, recovery at the end of the test. And now it looks  
 2 like water levels are starting to decline again after that  
 3 recovery.  
 4 Another well, CSV-2, looks similar to what we saw  
 5 with MX-4. So a fairly stable water levels early on, a lot  
 6 of noise in the measurements. Measurement protocols were  
 7 being worked on, developed, to improve those or perhaps  
 8 getting new equipment that responded better. And transducer  
 9 data that shows the seasonal effects, shows the 2005 recharge  
 10 event, the decline in water levels following that event.  
 11 Order 1169 pumping recovery and now water levels appearing to  
 12 start downward again.  
 13 Okay. This is a well, CSVM-2, which is located  
 14 quite a bit to the south along the highway. MX-5 is in this  
 15 general location. CSI testified that that well penetrates  
 16 the fault on the east side of the structural block and that  
 17 the reason it's so productive is because of faults or  
 18 fracturing faulting -- fracturing associated with that  
 19 faulting.  
 20 And, according to the model of the permeability  
 21 associated with faults, that permeability runs parallel to  
 22 the strike of the fault, the high permeability. And then the  
 23 low permeability perpendicular to it. And, again, this  
 24 structural block is one that CSI has interpreted as being a

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1 low permeability.  
 2 So here we see seasonal effects and transducer  
 3 data indicating connection with the Muddy River Springs area.  
 4 We see the increase in slope with MX-5 pumping. We see the  
 5 recovery that takes place after that and then a decline  
 6 starting to appear in the more recent record. And this well  
 7 is quite a bit to the south.  
 8 I'm not going to present hydrographs from  
 9 California Wash or from Garnet, but they have similar  
 10 responses to these, showing that those areas are well  
 11 connected.  
 12 CSV-3 -- The other wells that I presented are all  
 13 on carbonate. And CSV-3 is completed alluvium. And it shows  
 14 similar but attenuated responses. So, fairly flat hydrograph  
 15 up until initiation of Arrow Canyon pumping where we start  
 16 seeing water levels decline. We see the 2004-2005 wet winter  
 17 creating an increase in water levels, the decline in water  
 18 levels following that until initiation of MX-5 pumping, at  
 19 which time the slope of the decline increases. We see the  
 20 recovery from MX-5 towards the end of this record and then  
 21 water levels starting to go down.  
 22 So what this shows us is that at least at this  
 23 location the basin fill aquifer is also connected with these  
 24 areas. When that means is that if you wanted to go in and

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1 pump from the basin fill in this area, you would obviously  
 2 get different responses because of the different properties  
 3 in the basin fill compared with the carbonates. But the  
 4 water level changes in the basin fill will be transmitted  
 5 downward in to the carbonate aquifer. And because of the  
 6 connectedness both with Muddy River Springs area and MX-5,  
 7 those effects will be transmitted to those areas.  
 8 CSVM-4 is one that is of interest with respect to  
 9 the connectedness with Kane Spring Valley. We still see  
 10 similar responses, although, they are greatly attenuated  
 11 compared to the others. Now, we see an increase in water  
 12 levels associated with 2004-2005 wet winter recharge event.  
 13 We see a decline in water levels that kind of matches the  
 14 slope that we've seen in others. We see an increase in the  
 15 slope associated with Order 1169 pumping. We see recovery  
 16 following cessation of MX-5 pumping. And then we see water  
 17 levels start to go down again.  
 18 So I would term this, instead of being well  
 19 connected, I say this is connected. We're not seeing the  
 20 seasonal effect of the pumping in ET in the Muddy River  
 21 Springs area. But we are seeing all the other  
 22 characteristics of the hydrographs that we've seen. And, you  
 23 know, obviously there are reasons for why this is attenuated  
 24 that CSI has discussed and Vidler has in their reports. And

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1 where you've got faulting associated with carbonate blocks.  
 2 Because if the carbonate comes up high enough that it's  
 3 within the depth of investigation of the technique. You see  
 4 a very definite change in the measured resistivity from the  
 5 lower resistivity of the carbonate block to the higher  
 6 resistivity basin fill. Yeah, I got that backwards. Higher  
 7 resistivity of the carbonate rock and the lower resistivity  
 8 basin fill. So it is very good at that.  
 9 It does not measure hydraulic properties.  
 10 There's nothing in that technique -- It's responding to the  
 11 rock matrix. It's not responding to the fractures. It does  
 12 not provide you information on the hydraulic properties of  
 13 the rock. It shows you where there's fault and displacements  
 14 very well if you have good contracts. And, in general, I  
 15 think it's a good technique and provides various flow  
 16 information.  
 17 I think there is a high degree of connectivity  
 18 that's been demonstrated across this block. MX-5 was said to  
 19 be penetrating, getting productivity out of the fault, on the  
 20 eastern side of the block.  
 21 CSVM-2, the well to the south and on the west  
 22 side of the block, is highly connected with both MX-5 and the  
 23 Muddy River Spring area. That signal is being transmitted  
 24 across the structural block that is reported to be

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1 impermeable. I think that indicates it is not impermeable.  
 2 And my comment here is that if there's going to  
 3 be a claim that a block or whatever is impermeable, that  
 4 needs to be demonstrated. The CSAMT does not provide you  
 5 information on that. You just can't make the assumption  
 6 because it has a high resistivity that it has low  
 7 permeability. That's an invalid interpretation.  
 8 So how do you get that? You can do aquifer  
 9 tests. I mentioned the response that you see across the  
 10 block between MX-5 and CSVM-2. If hydrology is correct, you  
 11 can maybe measure hydraulic gradients across the block. But,  
 12 you know, you can have low gradients across a block that do  
 13 not show that it's permeable. That may be due to just the  
 14 geometry of the flow system. So you have to be careful on  
 15 how you interpret stuff. And I'll show you an example a  
 16 little later, I think, that also provides information this  
 17 structural block has permeability.  
 18 So let's get back to the geographic boundary of  
 19 the flow system. I'm going to talk about three different  
 20 areas: Kane Spring Valley, which is one that others said  
 21 should be included. Las Vegas Valley. I mentioned early in  
 22 the presentation that there's one that I recommend kind of  
 23 tongue in cheek. That's Las Vegas Valley. And then the  
 24 remainder of the Black Mountains area. And I'll talk about

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1 Rogers and Blue Point Spring in the context of that.  
 2 So Kane Spring Valley I've already discussed.  
 3 The hydrograph, this is just another set of those. The  
 4 presentation provided by Lincoln County, Vidler produced the  
 5 diagram on the left. And this is that CSVM-4 and Kane Vidler  
 6 1 in it. And the same information is shown on the right  
 7 presented in a slightly different form. It's the same data.  
 8 And one of the things that Lincoln County Vidler  
 9 did on theirs was draw a line in here which talks about --  
 10 Let me look at that. I think the long term water level trend  
 11 line. And that kind of draws your eye to there's this  
 12 declining water level in there, at least it drew my eye to  
 13 that, and drew it away from the fact that we have an increase  
 14 in the slope of the decline associated with the Order 1169  
 15 test.  
 16 And so on the right what we had done is to break  
 17 the lineup in to different segments, three different  
 18 segments, and run regressions on those. I know you can't  
 19 read the numbers on the slide. But it is in the report as  
 20 well. And what we see in both of these wells is an initial  
 21 trend of declining water levels, an increase in the slope of  
 22 declining water levels during the period of the Order 1169  
 23 testing and then at the cessation of MX-5 pumping either a  
 24 trend that is shown as being slightly increasing -- I'm not

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1 going to claim that it is increasing. This may be the data  
 2 set. We see that in Kane W-1. And then in the other well  
 3 which is located to the southwest in Coyote Spring Valley  
 4 return to declining water levels. And note that the slope  
 5 post Order 1169 record is basically the same as what the  
 6 slope was prior to that.  
 7 Lincoln County, Vidler, also performed CSAMT  
 8 testing. I think it provides useful information. Again, I  
 9 think it's a good technique that provides you information on  
 10 the structure, especially where you have carbonates shallow  
 11 enough to be picked up by the technique. If they're too  
 12 deep, you can't see them.  
 13 I didn't say a while ago, but in these profiles  
 14 that were produced, and I think they mentioned this, if you  
 15 see blue up near the surface, it's indicative of unsaturated  
 16 sediments. There's not water in the sediments to increase  
 17 the conductivity or decrease the resistivity of the rocks.  
 18 And that shows up as blue. It looks like it might be  
 19 carbonate, but it's not. It's dry sediment. You can see in  
 20 the basin fill where the sediments are saturated. They show  
 21 up as red. So you can get some hydrologic information on  
 22 water content and that kind of stuff as well as the location  
 23 of carbonates.  
 24 So Vidler, Lincoln County, ran CSAMT surveys.

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1 One is shown here. The trends from this outcrop area in the  
 2 southeastern side of Kane Spring Wash across the wash to the  
 3 northwest. Another line that has a similar trend, just to  
 4 locate it a little bit further to the southwest, and then  
 5 across the line. And the two lines that trend from southeast  
 6 to northwest have a different response. They show different  
 7 geology. That was their interpretation. That's my  
 8 interpretation.

9 And on the basis of that difference between those  
 10 two lines, they say there must be a fault in between those  
 11 two. And that's the fault that's shown on their diagram as a  
 12 red dash line and they have named that fault -- Let me make  
 13 sure I get it right -- the northern LWFSX boundary fault. So  
 14 in their interpretation, this is the boundary of the flow  
 15 system. And normally a geologist wouldn't say, you know,  
 16 give it a name like that. You know, they might say, you  
 17 know -- I know geologist who has done a lot of work in the  
 18 area and he likes naming his stuff after women that he knows.  
 19 So he might call that the Susan fault or something like that.  
 20 So it could be the Weiser or the Kane Spring Valley  
 21 termination fault or something like that. But not, you know,  
 22 indicating it's the fault, it's the boundary for the flow  
 23 system.

24 And I don't necessarily disagree that there's a

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1 fault in this area. I provided in my report -- And this is  
 2 referred to by CSI -- a gravity interpretation that was  
 3 published by Phelps and others for Coyote Spring Valley. And  
 4 CSI had discussed these lines further to the south and the  
 5 results from those.

6 And I want to concentrate a little bit on what's  
 7 going on further to the north near Kane Spring Valley. And  
 8 basically what this shows is that on the eastern side of Kane  
 9 Spring Valley there is a gravity low in this area that  
 10 indicates that carbonate rocks are deeper than they are  
 11 further to the west. And there is an area of high gradient  
 12 on the eastern side of that gravity level. And one of their  
 13 profiles in two goes across that, not in the middle of it,  
 14 because they didn't know where the middle of it was at the  
 15 time they were in the survey. But their interpretation of  
 16 N-2 is that there's a fault on the eastern end of that  
 17 profile. And you see closely spaced contour lines in that  
 18 area leading down in to the basin. The gravity data had  
 19 picked up a fault in that location.

20 Similarly, further to the south and closer to  
 21 where CSI was looking, we see another area of high gradient.  
 22 The contour lines are close together. And here we have  
 23 gravity profiles that again picked up faulting in that area  
 24 to that gravity level in that location. And these are data

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1 that have been available for years and are very useful. We  
 2 use data, these data and other data, when we constructed our  
 3 flow model.

4 Between N-2 and N-1, two of the survey profiles,  
 5 there is an area of moderate gradient in the contour lines  
 6 that extends from southeast toward northwest over to an  
 7 outcrop area in the northwestern corner of the right panel on  
 8 this figure that is carbonate outcrop. And this indicates  
 9 that there is also likely to be some faulting in this area,  
 10 something that is causing the carbonate to be deeper on the  
 11 southwestern side of that moderate gradient gravity signature  
 12 than to the northeast.

13 And this is in the same general area where  
 14 Lincoln, Vidler County(sic) has interpreted a fault to be  
 15 present. So I think that the location might be somewhat  
 16 uncertain. This third east/west profile that they ran did  
 17 not really pick up the location of that fault, but it's  
 18 because the carbonate rock is too deep to be picked up by the  
 19 technique.

20 So, you know, there's likely to be faulting in  
 21 that area. We don't know specifically where it is. And  
 22 based upon this conceptual model that normal faults, which  
 23 these would be, produce an impediment to flow -- I like to  
 24 use the term impediment as opposed to barrier, because

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1 barrier sounds pretty absolute. Impediment allows flow to go  
 2 across it. So I'm going to try to say impediment, but I'm  
 3 going to forget sometimes and say barrier. I'll try to be  
 4 clear, when I say barrier, I'm talking about a significant  
 5 barrier. Here I'll say these faults are likely to be  
 6 impediments to flow.

7 So we're basically in agreement with CSI that  
 8 there's faulting in this area and that those faults may  
 9 impede flow through Kane Spring Valley in to Coyote Spring  
 10 Valley.

11 I had mentioned gradients earlier and this has  
 12 been an argument that data set that's been available for  
 13 quite a long time. And, in fact, in a previous order from  
 14 the State Engineer's office pertaining to whether or not Kane  
 15 Spring Valley should be included -- I don't know the  
 16 terminology at that time, but, you know, their area of  
 17 concern I guess for the carbonate aquifer. They had noted  
 18 that -- or you had noted -- I don't know if any of you were  
 19 part of that process -- but that there is water that's moving  
 20 from Kane Spring Valley in to Coyote Spring Valley, that  
 21 there's an area of higher gradients in northern Coyote Spring  
 22 Valley than what we find to the south. So in our figure  
 23 there are gradients listed in such a small font that they're  
 24 difficult to read on the printed page. I put those in

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1 scientific notation in boxes so that you can read those.  
 2 So, up to the north between Kane W-1 and CSVM-4,  
 3 we had measured a gradient that is indicated here as five E  
 4 minus three. That's L-4 tran terminology. It means five  
 5 times ten to the minus three. And the units would be feet  
 6 per foot or meters per meter or whatever. But five times ten  
 7 to the minus three is what that indicates.  
 8 A little bit further to the southwest, moving  
 9 between CSVM-4 and CVF-2, the gradient is somewhat lower, but  
 10 recognize that it is calculated over a much larger area and  
 11 there may be higher gradient areas along that profile. We're  
 12 looking at the average between those two wells. But that's  
 13 four times ten to the minus four.  
 14 Another area up in the north, again, a long  
 15 distance between wells, you're looking at a gradient of five  
 16 times ten to the minus three. These are all reasonable  
 17 gradient that you see in groundwater systems everywhere. If  
 18 you saw these numbers for a gradient in, say, a basin study,  
 19 your response would be that's pretty typical, you know,  
 20 that's not a high gradient. That's a pretty common gradient.  
 21 When they move further to the south -- And I'll  
 22 skip on down to the gradient calculated between I think that  
 23 says CSVM-5 but I'm not sure, and EH-4, this well that's  
 24 close to the Muddy River Spring area that Tim Mayer talked

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1 about, we see gradients considerably lower, three times ten  
 2 to the minus five. So we're about two orders of magnitude in  
 3 this area lower than what we see in the northern part of the  
 4 Coyote Spring Valley.  
 5 So the argument that it's less permeable to the  
 6 north I think is substantiated by the gradients that we see.  
 7 We have a very good idea of how much water is moving through  
 8 this area because of the discharge measurements in the Muddy  
 9 River Spring area. And, you know, we know that this is very  
 10 transmissive. This area to the north is less transmissive.  
 11 And I think Sue Braumiller yesterday was using language like  
 12 it's much, much lower or something like that.  
 13 You know, the transmissivity is potentially a  
 14 couple of order of magnitude lower than what we see in this  
 15 area even though you have to take in to consideration that  
 16 the cross-section, the area across which the flow is  
 17 occurring is larger than it is in this corridor between  
 18 Coyote Spring Valley leading to the southeast down to EH-4.  
 19 CSVM-5, which I had classified as not connected  
 20 to either the MX-5 pumping or to the seasonal pumping in the  
 21 spring area, we see six times ten to the minus three. But,  
 22 again, that is averaged over this distance.  
 23 We don't know what causes this to have a higher  
 24 head and a separate hydrograph response than the other wells.

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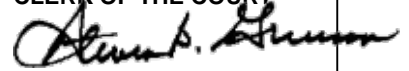
1 But there's likely a structure on the east side of the elbow  
 2 range in here which provides the barrier effect. And I use  
 3 the word barrier here. I didn't say impediment. It doesn't  
 4 mean that it does not flow across it. But it's more  
 5 significant than what we see in this area. And I make that  
 6 statement based upon the different hydrographic response we  
 7 see in CSVM-5 than we see in these two wells at the mouth of  
 8 the Kane Spring Valley.  
 9 Interestingly enough, down here to the south,  
 10 which I think is CSVM-2 -- I can't read it either. But these  
 11 data show a gradient -- a gradient for flow back to the  
 12 north. Water levels are lower in the central part of the  
 13 Coyote Spring Valley than they are to the south down where  
 14 there's this little break in the range between Arrow Canyon  
 15 range and the Elbow range. So water levels are higher here  
 16 and they decrease to the north. We see a low gradient, you  
 17 know, approximately ten to the minus four, but a little bit  
 18 lower than that between those wells.  
 19 And just an aside here, the conceptual model  
 20 generally has been that water is moving to the south through  
 21 Coyote Spring Valley and continuing further down in to Hidden  
 22 and Garnet Valley, just kind of as a continuous pathway. I  
 23 haven't done an in-depth study of what's going on in this  
 24 well, but that conceptual model may be a little bit of an

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1 error, it may be that that groundwater divide in the southern  
 2 part of Coyote Spring Valley at least in the shallow part of  
 3 the aquifer, maybe the depth we would have an underflow to  
 4 the south. You know, we don't know.  
 5 It doesn't really affect this question of  
 6 connectivity. This is a -- If this is a divide, it's a  
 7 divide based on water levels. It's not a divide based on a  
 8 barrier between the two basins.  
 9 To the west in the Sheep range, we have a divide  
 10 in both water levels. You know, when water levels are  
 11 highest and associated with the springs and the kind of stuff  
 12 we see here and measured levels either to the east or west.  
 13 And, in addition, we've got low permeability rock that's  
 14 present in here, what's been termed by Ike Winograd as the  
 15 lower class to defining unit. That's a permeability barrier  
 16 as well. We have no evidence of permeability down in this  
 17 area of CSVM-5.  
 18 So Vidler's argument is that the lower hydraulic  
 19 gradients in the northern part of Coyote Spring Valley are  
 20 indicative of lower transmissivities in the northern part of  
 21 the valley. And I agree with that one on that. Something  
 22 had resulted in lower permeability and lower transmissivity  
 23 in the northern part of the Coyote Spring Valley than what we  
 24 find in the central and southern part.

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1 And in areas -- And this is getting in to Rogers and Blue	1
2 Point, we know that there's not a strong connection between	2
3 those two, but it's a very important resource. And	3
4 monitoring will be needed to make sure that resource isn't	4
5 affected.	5
6 Next conclusion is that water levels are	6
7 declining in the carbonate aquifer, a large area, while	7
8 they're rising in other areas in the same climatic regime. I	8
9 think this is because of existing pumping from the carbonate	9
10 aquifer and needs to be recognized in decisions.	10
11 I kind of already stated this. Rogers and Blue	11
12 Point are fed by water from the carbonate aquifer. They're	12
13 connected but not a strong connection to the aquifer in	13
14 California Wash and Garnet Valley. But monitoring is needed	14
15 to see if there are changes that might impact those springs.	15
16 And then, finally, moving pumping from the	16
17 sensitive areas, the Muddy River Springs area and the Muddy	17
18 River, is going to help for a short period of time, but	18
19 eventually the impacts will be the same. Thank you.	19
20 MS. GLASGOW: Thank you. That concludes our	20
21 presentation.	21
22 HEARING OFFICER FAIRBANK: Okay. Thank you. So,	22
23 let's see, we will go ahead and take a lunch break and we	23
24 will reconvene at 1:00 p.m. Thank you.	24

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1 (Lunch recess was taken)	
2 STATE OF NEVADA )	
3 )ss.	
4 COUNTY OF WASHOE )	
5 I, CHRISTY Y. JOYCE, Official Certified Court	
6 Reporter for the State of Nevada, Department of Conservation	
7 and Natural Resources, Division of Water Resources, do hereby	
8 certify:	
9 That on Wednesday, the 25th day of September,	
10 2019, I was present at the Legislative Counsel Bureau, Carson	
11 City, Nevada, for the purpose of reporting in verbatim	
12 stenotype notes the within-entitled public hearing;	
13 That the foregoing transcript, consisting of	
14 pages 489 through 597, inclusive, includes a full, true and	
15 correct transcription of my stenotype notes of said public	
16 hearing.	
17	
18 Dated at Reno, Nevada, this 26th day of	
19 September, 2019.	
20	
21	
22	
23	
24	
	CHRISTY Y. JOYCE, CCR #625



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**DISTRICT COURT  
CLARK COUNTY, NEVADA**

\* \* \* \*

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

Petitioners,

vs.

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

Respondent.

CASE NO.: A-20-816761-C (Lead Case)

DEPT. NO.: 1

**Consolidated with:**

- A-20-817765-P
- A-20-818015-P
- A-20-817977-P
- A-20-818069-P
- A-20-817840-P
- A-20-817876-P
- A-21-833571-J

**REPLY BRIEF**

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1                   **I. INTRODUCTION**

2                   Petitioners Georgia-Pacific Gypsum LLC (“Georgia-Pacific”) and Republic  
3 Environmental Technologies, Inc. (“Republic”) (collectively, “Petitioners” and for convenience  
4 and clarity, referred to sometimes herein as “GP-R”), by and through counsel Sylvia Harrison,  
5 Esq., Lucas Foletta, Esq., and Sarah Ferguson, Esq. of the law firm of McDonald Carano LLP,  
6 hereby submit this Reply Brief (“Reply”). This Reply responds to certain answering briefs  
7 filed by the parties to the instant litigation. This Reply also supports GP-R’s Opening Brief  
8 (Points and Authorities) filed on August 27, 2021, and their Petition for Judicial Review filed  
9 on July 15, 2021 of Order 1309 issued by Respondent Tim Wilson, P.E. Nevada State  
10 Engineer, Division of Water Resources, Department of Conservation and Natural Resources on  
11 June 15, 2020 (ROA 2-69, Ex. 1).<sup>1</sup>

12                   As articulated in GP-R’s Opening Brief, the State Engineer’s consolidation of the  
13 Lower White River Flow System (“LWRFS”) was done without legal authority and in violation  
14 of GP-R’s due process rights. What’s more, the factual conclusions drawn by the State  
15 Engineer were arbitrary and capricious and the product of selective conclusions, ignoring  
16 substantial evidence.

17                   In his answering brief, the State Engineer validates GP-R’s concerns, erroneously  
18 asserting application of a heightened standard of review and a novel reading of his authority to  
19 designate new basins and re-designate old basins. For its part, Southern Nevada Water  
20 Authority (“SNWA”) and Las Vegas Valley Water District (“LVVWD”) attempt to support the  
21 State Engineer’s consolidation of the LWRFS and ignore the practical effect of the State  
22 Engineer’s actions.

23                   The Court should reject these efforts as meritless. If affirmed, these views will create  
24 uncertainty and confusion in the application of Nevada’s prior appropriation doctrine and  
25 countenance a flawed regulatory process, all to the detriment of water rights holders in the area.

26  
27  
28 <sup>1</sup> Each citation to the record includes both a citation to the bates range from the Record on Appeal (“ROA”) and a citation to the exhibit number from the Appendix of Exhibits, filed concurrently with GP-R’s Opening Brief.

1 In considering the arguments presented, the Court should be careful not to become  
2 fixated on the articulation of the issues reflected in the list of issues put forward by the various  
3 parties. The list was put forward as a guide for structuring reply briefs and oral argument.  
4 However, each petitioner articulated the issues presented in their respective petitions for  
5 judicial review in a specific way. As such, though an attempt has been made to provide a  
6 general list of issues for organizational purposes, the list does not necessarily accurately reflect  
7 each party’s articulation of the issues they have raised. The Court must be careful to consider  
8 each issue complete with whatever nuance was provided in the petitions for judicial review and  
9 briefs. GP-R articulated the basis of their appeal in their petition for judicial review and  
10 opening brief, and this reply brief is intended to respond to the issues raised by the State  
11 Engineer and certain other answering briefs, including that filed by SNWA and LVVWD. The  
12 Court should be wary of attempts by one party to characterize the issues raised by another party  
13 in any way that deviates from the propounding party’s characterization. Due process requires  
14 that each party be given the opportunity to put forward their case as they have articulated it, not  
15 as others would have them articulate it.

16 **II. STANDARD OF REVIEW (PEAK DEFERENCE)**

17 In his answering brief, the State Engineer attempts to persuade the Court that it must be  
18 extra-deferential to his findings of fact. (SE Answering Brief at 19.) Specifically, he contends  
19 that his findings of fact are entitled to “peak deference” and that the Court must be “at its most  
20 deferential” in considering the petitioners’ contentions that his decision is not supported by  
21 substantial evidence. (*Id.*) The State Engineer’s characterization of the standard of review is  
22 incorrect.

23 Nothing in the applicable case law affords the State Engineer “peak deference.” Indeed,  
24 that State Engineer provides no citation to support his claim, and his characterization of the  
25 standard of review is not supported by the applicable case law. The Nevada Supreme Court has  
26 clearly articulated the appropriate standard of review on multiple occasions. The State  
27 Engineer’s factual findings may be overturned where they are not based on substantial  
28 evidence. *E.g., Eureka Cty. v. State Eng’r of Nev.*, 131 Nev. 846, 850, 359 P.3d 1114, 1117

1 (2015) (quoting *Town of Eureka v. Office of State Eng’r of State of Nev., Div. of Water Res.*,  
2 108 Nev. 163, 165, 826 P.2d 948, 949 (1992)). A decision is not supported by substantial  
3 evidence where it is arbitrary and capricious. See *Clark County Educ. Ass’n v. Clark Cty. Sch.*  
4 *Dist.*, 122 Nev. 337, 339-40, 131 P.3d 5, 7 (2006). Indeed, not only has the Nevada Supreme  
5 Court clearly set forth the appropriate standard, but that standard is consistent with the standard  
6 of review applicable to administrative decisions pursuant to Nevada’s Administrative  
7 Procedures Act (“APA”). NRS 233B.135(3)(e) (authorizing a court to set aside the decision of  
8 an administrative agency where the final decision of the agency is “[c]learly erroneous in view  
9 of the reliable, probative and substantial evidence on the whole record”). Thus, the standard is  
10 both clearly articulated and consistent with the scheme for reviewing administrative agency  
11 decisions generally.

12         The State Engineer contends that his decisions are prima facie correct and thus this  
13 Court’s purview on appeal has been “sharply” limited. (SE Answering Brief at 19.) This is not  
14 the case. While the State Engineer is correct that NRS 533.450 provides that a decision “of the  
15 State Engineer is prima facie correct,” it does so only in the context of clarifying that “the  
16 burden of proof is upon the party attacking the same.” NRS 533.450(10). This is no different  
17 than the review of decisions under the APA. NRS 233B.135(2) provides that “[t]he final  
18 decision of the agency shall be deemed reasonable and lawful until reversed or set aside in  
19 whole or in part by the court. The burden of proof is on the party attacking or resisting the  
20 decision to show that the final decision is invalid . . . .” NRS 233B.135(2).

21         The fact that the State Engineer’s decisions are prima facie correct does not create an  
22 extra-deferential standard of review; indeed, it does not relate to the standard of review at all.  
23 It merely reflects the fact that decisions will not be set aside until a reviewing court has  
24 determined that a petitioner has met its burden *under the appropriate standard*.

25         The State Engineer further contends that this Court’s review must be “at its most  
26 deferential” here because the review involves an evaluation of scientific determinations. (SE  
27 Answering Brief at 19.) In support of this claim, the State Engineer cites *Wilson v. Pahrump*  
28 *Fair Water, LLC*, 137 Nev., Adv. Op. 2, 481 P.3d 853, 858 (2021). However, in that case the

1 Nevada Supreme Court articulated the appropriate standard of review, concluding that “the  
2 State Engineer’s decision must be supported by substantial record evidence” and noted that  
3 “[t]he evidence supporting this finding is substantial if a reasonable mind would accept it as  
4 adequate support for the conclusion.” *Id.* The Court further noted that the deference reflected  
5 in the substantial evidence standard is “especially warranted under these circumstances”  
6 because the factual questions were “technical and scientifically complex.” *Id.* However, in  
7 doing so the Court did not articulate a heightened standard for certain decisions of the State  
8 Engineer—*i.e.*, those involving scientific and technical information. Instead, the Court simply  
9 articulated the rationale for the deference reflected in the substantial evidence standard.

10 For these reasons, the Court should reject the State Engineer’s characterization of the  
11 standard of review. The Nevada Supreme Court has been clear that a decision of the State  
12 Engineer may be reversed where it is not supported by substantial evidence regardless of the  
13 technical nature of the issues on appeal.

14 **III. AUTHORITY FOR CREATION OF THE LWRFS UNIT AND EFFECT**  
15 **ON PRIORITIES**

16 The State Engineer in his Answering Brief and other parties favoring the Order support  
17 the State Engineer’s authority for the creation of the LWRFS Hydrographic Unit. (*E.g.*, SE  
18 Answering Brief at 32.) GP-R in their Opening Brief argued that he lacked this authority.  
19 (GP-R Opening Brief at 20-22.) This Reply supplements those arguments, based upon the  
20 State Engineer’s Answering Brief and other parties’ contentions supporting the Order.

21 Whether the State Engineer has authority to create the LWRFS “Hydrographic Basin”  
22 turns on the recognition of what he has actually done. He has created a new administrative unit  
23 by consolidating previously established administrative units within which clear priorities of  
24 water rights had been established. Nothing in Nevada law, either implicitly or explicitly, gives  
25 him the authority for such consolidation. In fact, the very foundations of Nevada law that he  
26 purports to rely on actually prohibit this action.

27 The State Engineer responds to arguments that he lacked authority to create the  
28 consolidated basin by contending Petitioners confuse legal questions with factual ones, and that

1 nothing in Nevada law defines what constitutes a “basin.” (SE Answering Brief at 33.)  
2 Furthermore, he contends “there is no language in any statute explaining how each basin came  
3 to be identified and determined.” (*Id.* at 34.) This is not the case.

4 NRS 534.030 is the original source of authority for the State Engineer’s designation of  
5 an “administrative area” by “basin.” NRS 534.030.<sup>2</sup> It is clear from the plain meaning of this  
6 statute that the legislature intended a designated *basin* to be an *administrative unit*, defined by  
7 boundaries described by “legal subdivision as nearly as possible.” NRS 534.030(1)(b). In  
8 other words, a hydrographic basin so designated was synonymous with an administrative  
9 unit—a *legal* construct, defined thereafter by a *geographic* boundary. Water rights within these  
10 basins are to be administered according to the laws set forth in NRS Chapters 533 and 534, in  
11 other words, the principles of prior appropriation are applied to water uses *within* each basin.  
12 For at least 50 years, holders of groundwater rights in Nevada have understood a “hydrographic  
13 basin” to be an immutable administrative unit. This has been the case regardless of whether the  
14 boundaries of the unit accurately reflected the boundaries of a particular water resource.

15 The State Engineer and SNWA cite this statute as authority for the consolidation of the  
16 LWRFS. (*See* ROA 44, Ex. 1; SNWA Answering Brief at 13-14.) But they ignore the fact that  
17 the hydrographic basins within the LWRFS *were already designated*. Nothing in NRS 534.030

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18  
19 <sup>2</sup> **NRS 534.030 Administration by State Engineer: Petition by appropriators in basin; hearing in absence**  
20 **of petition; certain artesian water, underground aquifers and percolating water; advisory services of**  
21 **governing bodies of water districts and water conservation boards.**

22 1. Upon receipt by the State Engineer of a petition requesting the State Engineer to administer the provisions  
23 of this chapter as relating to designated areas, signed by not less than 40 percent of the appropriators of record in  
24 the Office of the State Engineer, in any particular basin or portion therein, the State Engineer shall:

(a) Cause to be made the necessary investigations to determine if such administration would be justified.

(b) If the findings of the State Engineer are affirmative, designate the area by basin, or portion therein, and  
25 make an official order describing the boundaries by legal subdivision as nearly as possible.

(c) Proceed with the administration of this chapter.

26 2. In the absence of such a petition from the owners of wells in a groundwater basin which the State Engineer  
27 considers to be in need of administration, the State Engineer shall hold a public hearing:

(a) If adequate facilities to hold a hearing are available within the basin; or

(b) If such facilities are unavailable, hold the hearing within the county where the basin lies or within the  
28 county, where the major portion of the basin lies,

→ to take testimony from those owners to determine whether administration of that basin is justified. If the basin  
is found, after due investigation, to be in need of administration the State Engineer may enter an order in the same  
manner as if a petition, as described in subsection 1, had been received.

1 can be read to authorize the State Engineer to modify the boundaries of these basins or to  
2 consolidate them into a single administrative unit.

3 The examples cited by the State Engineer and SNWA of other types of basins  
4 recognized by the State Engineer are not applicable. (See SE Answering Brief at 33; SNWA  
5 Answering Brief at 18.) The LWRFS Hydrographic Basin as designated by the State Engineer  
6 is a *geographic* unit, not a hydrologic one. This is a critical distinction.

7 The State Engineer now argues in his Answering Brief that the act of designating the  
8 new LWRFS Hydrographic Basin does not reorder the priorities of water rights holders within  
9 the consolidated basins (at least explicitly). (E.g., SE Answering Brief at 35.) The arguments  
10 advanced by the State Engineer, LVVWD, and SNWA insisting that Order 1309 did not reorder  
11 priorities depends on a conflation of the meaning of *priority* as defined by the date of a water  
12 right application, and the common meaning of *priority*, as defined by one's "place in line."  
13 The State Engineer, LVVWD, and SNWA insist that Order 1309 did not change priorities  
14 because priority dates were not changed. It is true that the Order does not change priority  
15 dates, but to further insist Order 1309 did not change the *relative priorities* (the place in line) is  
16 simply not accurate. The State Engineer argues he has not changed priorities because he has  
17 not yet developed a plan for the administration of the administrative unit. But he insists that  
18 "senior rights" within the LWRFS must be protected and prior appropriation be respected. (SE  
19 Answering Brief at 32.) He has never addressed how these goals can be accomplished without  
20 a de facto reordering of the relative priorities of water rights within the LWRFS. In fact, his  
21 brief explicitly defends such a reordering across the former basin boundaries. He states:

22 Does it matter under the prior appropriation doctrine in which hydrographic area  
23 the junior right holder stakes its claim versus the senior right holder? The  
24 answer is, of course, no. Water rights are granted subject to existing rights and  
25 always determined based on who has the prior right. *Lobdell*, 2 Nev. at 277;  
26 *accord Mineral Cty.*, 136 Nev. at 513, 473 P.3d at 427. There is nothing in these  
27 statutes that limits the State Engineer's duty to protect senior rights. Due to the  
close hydrological connection that the State Engineer has scientifically  
determined as a matter of fact, Vidler's rights, as an example, were *always*  
subject to older (more senior) existing rights.

28 (SE Answering Brief at 35.) This is a confusing interpretation of the prior appropriation  
doctrine. It is hard to imagine how the doctrine could ever have functioned if the relative

1 seniority of water rights could change based upon an unpredictable wholesale scrambling of the  
2 geographic areas or administrative units within which the priority of water rights was first  
3 established.

4 Echoing the State Engineer’s defense that he has not changed priorities, SNWA asserts  
5 that the issue of priority of LWRFS water rights is “not ripe and is irrelevant to the present  
6 appeals of Order 1309.” (SNWA Answering Brief at 2.) The Court should not defer  
7 consideration of the State Engineer’s authority to reorder priorities on the basis that he did not  
8 yet explicitly change priorities, but instead has kicked the can down the road for some future  
9 proceedings. Water rights holders within the newly created LWRFS unit are justified in  
10 assuming their rights will be “reordered,” if not explicitly in Order 1309, then as a de facto or  
11 inevitable consequence of the creation of the new administrative unit. Indeed, most parties  
12 supporting Order 1309 are those with the most senior rights in the LWRFS (ROA 35556-58,  
13 Ex. 11), whose rights will be unaffected by reordering priorities, and who stand to realize  
14 significant financial benefit from the enhanced value of these rights. These parties apparently  
15 presume the priority scheme in the consolidated basins has been or will be modified to their  
16 benefit.

17 If this question is not ripe, then it seems clear that Order 1309 was issued prematurely,  
18 and the State Engineer has created an administrative unit without a plan for its administration.  
19 This is precisely the circumstance Petitioners warned against. As the Order acknowledges,  
20 Petitioners argued the designation of the LWRFS unit was “premature ... without a legally  
21 defensible policy and effective management tools in place...” and that creation “of an  
22 administrative unit at this time inherently directs policy without providing due process.” (ROA  
23 54, Ex. 1.)

24 **IV. EVIDENCE FOR THE CONSOLIDATION OF THE LRWFS AND DUE**  
25 **PROCESS**

26 In their Opening Brief, GP-R presented compelling factual evidence that called into  
27 question the State Engineer’s reliance on six criteria for determining the “connection” between  
28 the former hydrographic basins making up the LRWFS Hydrographic Unit. (GP-R Opening



1 Brief at 14-17.) In his Answering Brief, the State Engineer obfuscates these factual questions  
2 by characterizing them as a difference of opinion of experts and relying on his purported  
3 “deference” as an adequate response. (SE Answering Brief at 19-20.)

4 Notably, the State Engineer does not defend against GP-R’s assertion that he violated  
5 due process by presenting the six criteria he relied on for determining basin connectivity only  
6 “after the fact,” long after the hearing, simply asserting his “determination is entitled to peak  
7 deference.” (*Id.* at 20.) However, the six factors he considered arguably were those that  
8 supported his preferred conclusion and were not the product of a comprehensive analysis.

9 As illustrated in GP-R’s Opening Brief, the State Engineer’s criteria ignore much of the  
10 technical evidence presented in two weeks of hearing in favor of a simplistic and unsupported  
11 interpretation of water level data and surface geologic maps. The State Engineer makes no  
12 attempt to respond to GP-R’s presentation of *factual* issues that could render water level data  
13 unreliable. (GP-R Opening Brief at 20). Instead, he dismisses GP-R’s criticisms on procedural  
14 grounds, stating he is entitled to credit some witnesses over others. (SE Answering Brief at  
15 20). GP-R did not present witness opinions: rather they pointed out an indisputable fact that  
16 barometric pressure alone could result in the small difference in water levels observed and the  
17 indisputable fact that different, uncalibrated devices were used to take the well level  
18 measurements. (GP-R Opening Brief at 20.) In addition, GP-R pointed out expert testimony  
19 that clearly demonstrated a significant factual error in pumping records relied on by SNWA’s  
20 expert to develop a model of basin connectivity. (*Id.*) This error invalidated the model. The  
21 State Engineer does not respond to, or take account of, this critical fact.

22 Barometric pressure has an inverse relationship to water levels; high atmospheric  
23 pressure can depress water levels and thus could account for some of the incremental changes  
24 in levels detected without any influence of pumping. With respect to instrumentation, a  
25 fundamental scientific rule requires that when one is relying on different measurements, one  
26 must ensure that the devices employed must accurately measure things in the same way. GP-R  
27 pointed out that the State Engineer had not considered these issues affecting the reliability of  
28 groundwater measurements. (GP-R Opening Brief at 15, citing ROA 53574-75, Ex. 28.) GP-R

1 is unaware of any witnesses that disputed these factual observations, and the State Engineer  
2 references no testimony or facts that contradict them. That the State Engineer does not support  
3 the reliability of water level data fundamental to the application of four of his six criteria  
4 completely undermines these criteria.

5 With respect to GP-R’s due process concerns, SNWA attempts to support the State  
6 Engineer by asserting the strange argument that his six criteria could not have been developed  
7 until the State Engineer heard all of the evidence at hearing. (SNWA Answering Brief at 44.)  
8 It offers a nonsensical analogy to measuring the height of a building, suggesting that different  
9 methods of measuring an absolute height are somehow analogous to the vast array of scientific  
10 techniques that provide significant evidence in the complex (and definitively unanswerable)  
11 questions presented here. After all, the height of a building can be definitively determined by a  
12 high school student with a protractor and tape measure. A more apt analogy would be an essay  
13 contest where the judges announce after the essays had been submitted that only essays shorter  
14 than four pages would be considered, or, to bring the point home, a decision by the Court in  
15 this case that it would only read the first 32 pages of a brief.

16 **V. THE STATE ENGINEER’S IMPROPER ASSUMPTION OF**  
17 **AUTHORITY UNDER THE ENDANGERED SPECIES ACT**

18 In their Opening Brief, GP-R took issue with the State Engineer’s presumption that he  
19 had authority to interpret and enforce the Endangered Species Act (“ESA”), substituting his  
20 judgment for that of the federal agency exclusively empowered under the Act with that role.  
21 (GP-R Opening Brief at 28-29.) The State Engineer clearly found that the agency, the State,  
22 and groundwater users could be liable for a “take” if groundwater pumping were determined to  
23 harm the dace. (ROA 47, Ex. 1.) GP-R demonstrated that the State Engineer’s “authority”  
24 was derived from a clearly erroneous interpretation of federal law. (GP-R Opening Brief at  
25 29.) GP-R also argued that the State Engineer’s factual conclusion of the spring flow rate  
26 necessary to sustain the dace was not supported by substantial evidence; the State Engineer  
27 provided no notice that he intended to make this determination and thus failed to gather  
28 evidence sufficient to support this finding. (*Id.* at 30.)

1 Notably, the State Engineer makes no effort in his Answering Brief to address any of  
2 the arguments of GP-R. The only reference in the entire brief to the Endangered Species Act is  
3 a single sentence stating, “None of Petitioners can use the State Engineer’s “reference in Order  
4 1309 to the Endangered Species Act to undermine it.” (SE Answering Brief at 35.)

5 Given that the State Engineer has failed even to attempt to rebut GP-R’s contentions  
6 regarding his authority and findings under the ESA, he has conceded the merits of those  
7 arguments. Accordingly, Section V of the Order (ROA 44-47, Ex. 1) should be stricken in its  
8 entirety. And while several answering parties have attempted to support the State Engineer’s  
9 findings in Section V of Order 1309, their arguments lack merit and cannot overcome the State  
10 Engineers’ concession of these points.

11 SNWA attempts to rebut GP-R by mischaracterizing both their argument and the State  
12 Engineer’s findings. In its Answering Brief, SNWA states that [in their opening brief] GP-R  
13 “argue the State Engineer was not authorized to consider the Endangered Species Act (“ESA”)  
14 in Order 1309.” (SNWA Answering Brief at 27.) In fact, nowhere in GP-R’s Opening Brief is  
15 any suggestion made that it is inappropriate to “consider” the ESA or the endangered status of  
16 the dace. As discussed above, their arguments go solely to the State Engineer’s presumption of  
17 authority to *enforce and interpret* the Act. SNWA spends nearly three pages “rebutting” an  
18 argument GP-R did not make. SNWA also contends the State Engineer did not determine  
19 when a “take” would occur. He did. The first paragraph on page 46 of Order 1309 cannot be  
20 interpreted any other way. (ROA 46, Ex. 1.)

21 Similarly, Nevada Power Company argues the “Endangered Species Act” cannot be  
22 ignored. (NPC Answering Brief at 9-11.) None of Petitioners argue it should be ignored. The  
23 Center for Biologic Diversity parrots the State Engineer’s erroneous derivation of authority  
24 under the ESA and similarly conflates the State Engineer’s duty to *consider* the public interest  
25 with an unsubstantiated authority to *enforce* the ESA. As stated in GP-R’s Opening Brief, the  
26 US Fish & Wildlife Service, the agency empowered to enforce the ESA, expressly declined to  
27 endorse a conclusion that groundwater pumping within the LWRFS could constitute a “take.”  
28 (GP-R Opening Brief at 29, citing ROA 53140-41, Ex. 27.) The State Engineer has no

1 authority to substitute his judgment for that of the USFWS.

2 To be clear, GP-R takes no issue with the State Engineer’s concern for the protection of  
3 the Moapa dace, and agree that this concern falls within his duty to consider the public interest.  
4 Indeed, there is no question that sustaining the dace has been a significant factor in all the  
5 proceedings commencing with and flowing from Order 1169. GP-R, however, believe that the  
6 State Engineer’s interpretation of federal law and conclusions as to his duty to enforce the ESA  
7 create a precedent that cannot be legally sustained and should be stricken from the Order.  
8 Similarly, his conclusion as to the absolute volume of spring flow necessary to support the dace  
9 is not supported by substantial evidence and should be reevaluated based upon a proceeding  
10 that provides appropriate notice to interested parties.

11 **VI. CONCLUSION**

12 The State Engineer lacked legal authority to consolidate the LWRFS, and his failure to  
13 consider the inevitable ramifications of this step violated due process. The factual findings  
14 were not based on substantial evidence, and instead resulted from a selective, and arbitrary and  
15 capricious analysis. In light of the foregoing, the Court should grant the relief requested by GP-  
16 R.

17 DATED this 11th day of January, 2022.

18 MCDONALD CARANO LLP

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**AFFIRMATION**

(Pursuant to NRS 239B.030)

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

/s/Lucas Foletta

Date: January 11, 2022

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that I have read this **PETITIONER’S REPLY BRIEF** and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of Nevada Rules of Appellate Procedure.

DATED this 11th day of January, 2022.

/s/Lucas Foletta  
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**CERTIFICATE OF SERVICE**

I hereby certify, under penalty of perjury, that I am an employee of McDonald Carano LLP and that on January 11, 2022, a true and correct copy of **PETITIONER’S REPLY BRIEF** was electronically submitted to the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification. The parties below were also served via U.S. Mail, postage-prepaid:

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