

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

ADAM SULLIVAN, P.E., NEVADA STATE
ENGINEER, DIVISION OF WATER
RESOURCES, DEPARTMENT OF
CONSERVATION AND NATURAL
RESOURCES,

Appellant,

vs.

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

Respondents. _____/

SOUTHERN NEVADA WATER
AUTHORITY,

Appellant,

SUPREME COURT NO. 84739
District Court Case No. A816761
(Consolidated with Supreme
Court Cases 84741, 84742 and
84809)

SUPREME COURT NO. 84741
(Consolidated with Supreme
Court Cases 84739, 84742 and
84809)

vs.

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

Respondents. /

CENTER FOR BIOLOGICAL DIVERSITY,

Appellant,

vs.

LINCOLN COUNTY WATER DISTRICT;
VIDLER WATER COMPANY, INC.;
COYOTE SPRINGS INVESTMENT, LLC;
NEVADA COGENERATION ASSOCIATES
NOS. 1 AND 2; APEX HOLDING
COMPANY, LLC; DRY LAKE WATER,
LLC; GEORGIA-PACIFIC GYPSUM, LLC;
REPUBLIC ENVIRONMENTAL
TECHNOLOGIES INC.; SIERRA PACIFIC
POWER COMPANY d/b/a NV ENERGY;
NEVADA POWER COMPANY d/b/a NV

SUPREME COURT NO. 84742
(Consolidated with Supreme
Court Cases 84739, 84741 and
84809)

ENERGY; THE CHURCH OF JESUS
CHRIST OF LATTER-DAY SAINTS;
MOAPA VALLEY WATER DISTRICT;
WESTERN ELITE ENVIRONMENTAL,
INC.; BEDROC LIMITED, LLC; CITY OF
NORTH LAS VEGAS; AND LAS VEGAS
VALLEY WATER DISTRICT,

Respondents. /

MUDDY VALLEY IRRIGATION
COMPANY,

Appellant,

vs.

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

Respondents. /

SUPREME COURT NO. 84809
(Consolidated with Supreme
Court Cases 84739, 84741 and
84742)

RESPONDENTS' JOINT REQUEST FOR JUDICIAL NOTICE

Respondents Coyote Springs Investments, LLC; Lincoln County Water District; Vidler Water Company, Inc; Nevada Cogeneration Associates Nos. 1 and 2; Apex Holding Company, LLC; Dry Lake Water, LLC; Georgia-Pacific Gypsum, LLC; and Republic Environmental Technologies, Inc., by and through their respective counsel of record, respectfully request this Court to take judicial notice of the State Engineer's statements made in other proceedings that are inconsistent with the representations to this Court about the scope of his statutory authority. This Joint Request for Judicial Notice is made pursuant to NRS 47.150 and NRS 47.130(2)(b) and is based on the following Memorandum of Points and Authorities and exhibits attached hereto.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

This Court should take judicial notice of the many different positions that the State Engineer has taken in legislative, judicial, and administrative proceedings that are diametrically opposed to the position he argues in this appeal. These inconsistencies and contradictions are compelling and must be considered by this Honorable Court.

The State Engineer's office¹ told the Nevada Legislature that "there is no explicit authority bestowed upon the state engineer to conjunctively manage water resources." **Exhibit 1** (*Minutes of the Meeting of the Subcommittee on Pub. Lands of the Joint Interim Standing Committee on Nat. Resources*, May 23, 2022, at 21) (testimony of Micheline Fairbank)). Notwithstanding, the State Engineer tells this Court that "[t]he State Engineer has unambiguous and express statutory authority to conjunctively manage 'all water' and protect 'all existing rights' regardless of the source." Appellants' Opening Brief ("AOB") 47.

The State Engineer's office further told the Nevada Legislature that "it would help to give the express acknowledgement to the Office of the State Engineer to administer water rights based upon the resource of the water right, not artificial administrative boundaries." *Id.* at 24 (testimony of Micheline Fairbank). Nevertheless, the State Engineer represents to this Court that "[t]he Legislature intended for the State Engineer to use [aquifer study] information to define and manage each of Nevada's aquifers when it used the word basin." AOB 36.

This Court must be made aware of the inconsistent statements made by the State Engineer before this Court and in other proceedings. The State Engineer does

¹ The presentation to the Legislature was given by the State Engineer and Deputy Administrator Micheline Fairbank, who also served as presiding officer in the hearing that resulted in Order 1309. *See* 44 JA 17358 (identifying Micheline Fairbank as the hearing officer).

not want to manage water in the way the statutes dictate. Thus, he entered Order 1309 knowing that the law does not support the actions taken therein, continually asks the Legislature to change the laws, and now defends Order 1309 by asking this Court to adopt his unreasonable interpretations that are inconsistent with his statements to the Legislature. Accordingly, judicial notice of these public comments is appropriate.

STANDARD OF REVIEW

Pursuant to NRS 47.150, courts “shall take judicial notice if requested by a party and supplied with the necessary information.” *See also Occhiuto v. Occhiuto*, 97 Nev. 143, 145, 625 P.2d 568, 569 (1981) (“A judge or court may take judicial notice whether requested or not.”) (citing NRS 47.150). This Court can take judicial notice of court filings and publicly available documents. *See id.*

Moreover, this Court has taken judicial notice of information that is publicly available on government websites pursuant to NRS 47.130(2)(b). *See also Am. C.L. Union of Nevada v. Cnty. of Nye*, Docket No. 85507, WL 14285458 at *1 n.2 (Unpublished Disposition) (Order Granting in Part Petition for Writ of Mandamus, Oct. 21, 2022) (taking judicial notice of a County Clerk’s presentation as recorded and made available on the Nye County public website).

ARGUMENT

The first issue in this appeal is whether the State Engineer has statutory

authority to “delineate” multiple hydrographic basins as a single hydrographic basin for “joint administration” and “conjunctive management” as he purported to do in Order 1309. In the AOB, the State Engineer denies that Nevada law requires basin-by-basin management, contends that the terms “basin” and “aquifer” are synonymous, represents that priority rights are not determined in relation to other water right holders just within the same basin, and argues that he has express and unambiguous authority to consolidate the basins in an effort he refers to as “conjunctive management”. AOB 23-25, 36, 46-50.

However, in multiple other instances, the State Engineer has acknowledged that Nevada law provides for management based on the established administrative unit boundaries. *See Exhibit 1*, 24; *see also Exhibit 2* (Respondent Nevada State Engineer’s Answering Brief, filed in *Pyramid Lake Paiute Tribe of Indians v. Ricci*, Case No. CV01-05764, 9. In fact, in *Pyramid Lake Paiute Tribe of Indians*, the State Engineer argued that “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 contemplated by the Nevada Groundwater Code, which requires the State Engineer to take various acts on a basin-wide basis.” *See Exhibit 2*, 9. Moreover, the State Engineer recognized that the “basins” are the 232 hydrographic basins. *See id.* (“It is, in fact, under this authority that the State Engineer has identified the 232 Administrative Ground Water Basins in Nevada. It

is patently reasonable for the State Engineer to manage these basins in a manner consistent with his statutory authority.”).

Furthermore, the State Engineer has repeatedly conceded that there is no express authority for “conjunctive management” in Nevada’s water statutes. *See Exhibit 3*, (*Minutes of the Meeting of the Assembly Comm. on Nat. Res., Agric., and Mining*, Feb. 27, 2019, 2019 Leg., 80th Sess. (Nev. 2019) (testimony of Tim Wilson, Acting State Engineer)) (“[A]lthough the 2017 Legislative declaration [(NRS 533.024(1))(e)] recognizes the hydrological connection that often exists between groundwater and surface water sources, the *statute does not provide the framework necessary to effectively implement the Legislature’s policy direction.*”) (emphasis added); *Exhibit 1* (*Minutes of the Meeting of the Assembly Subcommittee on Public Lands*, May 23, 2022, Interim Legislature (Nev. 2022) at 21) (specifically referencing the District Court’s decision in this matter and lamenting the lack of clarity around his authority: “[conjunctive management] is the policy directive of the Legislature, but it is not explicit as to how we are to implement that policy directive, and there is no explicit authority bestowed upon the state engineer to conjunctively manage water resources.”); *Exhibit 4* (Order 1329) (However, in the 2019 Legislative session, *the statutory revisions required to give the State Engineer authority to implement the draft regulation [for conjunctive management] were unsuccessful.*”) (emphasis added).

The Nevada Legislature’s Subcommittee on Public Lands approved the request of a bill draft based on the State Engineer’s testimony. **Exhibit 5** (*Minutes of the Meeting of the Assembly Subcommittee on Public Lands*, August 22, 2022, 2022 Interim Legislature (Nev. 2022) at 11-12) (specifically requesting “a bill to clarify the processes and authority for the conjunctive management of surface and groundwater basins, including, without limitation, the public notification processes, appeals processes, and the role of science in modifying management practices within such basins.”); **Exhibit 6** (Summary of Recommendations, Joint Interim Standing Committee on Natural Resources and Subcommittee on Public Lands).

This Court should be made aware of the State Engineer’s inconsistent representations about the scope of his authority. Accordingly, Respondents respectfully request that this Court take judicial notice of the exhibits attached hereto.

CONCLUSION

The State Engineer simply does not have authority to issue Order 1309, as the State Engineer has admitted in other forums. This Court should be made aware of those inconsistent statements, concessions, and the State Engineer’s historical interpretation of Nevada’s water law when determining the scope of the State

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Engineer's authority in this case. Accordingly, the Respondents respectfully request that this Court take judicial notice of the exhibits attached hereto.

DATED this 9th day of January, 2022.

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CERTIFICATE OF SERVICE

I certify that on the 9th day of January 2023, I served a copy of **RESPONDENTS’ JOINT REQUEST FOR JUDICIAL NOTICE** upon all counsel of record:

 BY MAIL: I placed a true copy thereof enclosed in a sealed envelope addressed as follows:

 BY FACSIMILE: I transmitted a copy of the foregoing document this date via telecopier to the facsimile number shown below:

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DATED: This 9th day of January, 2023.

/s/ Christine O'Brien
An Employee of Robison, Sharp, Sullivan & Brust

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Exhibit 1

Exhibit 1



NEVADA LEGISLATURE SUBCOMMITTEE ON PUBLIC LANDS OF THE JOINT INTERIM STANDING COMMITTEE ON NATURAL RESOURCES

(Nevada Revised Statutes [NRS] 218E.510)

MINUTES

May 23, 2022

The second meeting of the Subcommittee on Public Lands of the Joint Interim Standing Committee on Natural Resources for the 2021–2022 Interim was held on Monday, May 23, 2022, at 9 a.m. in the City of Boulder City, Council Chambers, 401 California Avenue, Boulder City, Nevada.

The agenda, minutes, meeting materials, and audio recording of the meeting are available on the Subcommittee's [meeting page](#). The audio recording may also be found at <https://www.leg.state.nv.us/Video/>. Copies of the audio or video record can be obtained through the Publications Office of the Legislative Counsel Bureau (LCB) (publications@lcb.state.nv.us or 775/684-6835).

SUBCOMMITTEE MEMBERS PRESENT IN BOULDER CITY:

Assemblywoman Maggie Carlton, Chair
Senator Melanie Scheible, Vice Chair
Senator Ira Hansen (Alternate for Senator Pete Goicoechea)
Assemblywoman Alexis Hansen
Clifford Banuelos, Tribal-State Environmental Liaison, Inter-Tribal Council of Nevada, Inc.
Justin Jones, Clark County Commissioner

SUBCOMMITTEE MEMBER ABSENT:

Senator Pete Goicoechea (Excused)

OTHER LEGISLATORS PRESENT:

Howard Watts III, Assembly District 15

LEGISLATIVE COUNSEL BUREAU STAFF PRESENT:

Alysa M. Keller, Senior Principal Policy Analyst, Research Division

Jann Stinnesbeck, Senior Policy Analyst, Research Division

Maria Aguayo, Research Policy Assistant, Research Division

Allan Amburn, Senior Deputy Legislative Counsel, Legal Division

Kimbra Ellsworth, Senior Program Analyst, Fiscal Analysis Division

Mark Sharp, Officer, Nevada Legislative Police, Administrative Division

Chad Romero, Officer, Nevada Legislative Police, Administrative Division

Items taken out of sequence during the meeting have been placed in agenda order.
[Indicates a summary of comments.]

AGENDA ITEM I—OPENING REMARKS

[Chair Carlton called the meeting to order. She welcomed members, presenters, and the public to the second meeting of the Subcommittee on Public Lands of the Joint Interim Standing Committee on Natural Resources.]

Chair Carlton:

Good morning, everyone. Welcome to Boulder City. It is very nice to be out here today. We will begin with roll call. Can you please call the roll?

[Roll call reflected in Subcommittee Members Present.]

For those listening in today, we are meeting in the Council Chambers in Boulder City. We have a full agenda today and will be hearing several presentations regarding water. Unfortunately, Senator Goicoechea cannot be here with us, but we have Senator Hansen as his alternate for this meeting.

[Chair Carlton reviewed virtual meeting and testimony guidelines.]

AGENDA ITEM II—PUBLIC COMMENT

Chair Carlton:

Our first order of business this morning will be public comment. Members of the public may provide testimony in several different ways, all of which are listed on our agenda. Please remember to clearly state and spell your name and limit your comments to three minutes.

[Chair Carlton reviewed all options for providing public comment.]

Do we have anyone here in the Chamber wishing to make public comment this morning?
[There was none.]

Broadcast and Production Services (BPS), do you have anybody on the line who wishes to give public comment?

Jose Silva, Progressive Leadership Alliance of Nevada:

The Progressive Leadership Alliance of Nevada believes that everyone has the right to live in a clean and healthy environment regardless of their race, income, gender, or immigration status, yet for decades, communities of color have been neglected in the creation of sound environmental and land use policy.

Due to this, disparities in the quality of health and life between traditionally white communities and communities of color have surged, and increased development in the southern part of the Las Vegas Valley has raised several concerns amongst the community: Where will our water come from? How much more heat can our residents handle? What will happen to our Mojave Desert wildlife? How will this further the negative impacts on communities of color and lower-income households?

Nevada is the driest state in the nation, and it is important we take care of our most precious resource. While extensive water use in Nevada may be deemed inevitable due to growing populations and industries, acknowledgement of overallocation is long overdue. Our water basins, which are currently overallocated in Nevada, provide massive amounts of water to Nevada's supply for aeration, mining, and growing urban landscapes. One remnant of open pit mining is the massive pit lakes that result from mining below the water table. Generally, the water in pit lakes is substandard and of lower quality than surrounding groundwater.

If an operation results in pollution that will require treatment of 500 years or more, there are no specific regulations for this treatment in perpetuity of toxic waste, and at the federal level, the regulations for these kinds of pit lakes are determined by laws from 1872, which are over 150 years old and were enacted when Nevada was barely 10 years old.

This leaves Nevadans without strong protection against the harmful impacts of mining, including water overallocation, pit lakes, water that needs to be treated in perpetuity, destruction of indigenous sites, and negative public health outcomes. We have seen the tribal community suffer immensely from the consequences of this lack of protection, with some people even having to rely on bottled water after their wells were contaminated by mining waste.

The increasing demand for lithium puts our communities, environment, and resources at a greater risk. There are smarter ways for populations to grow than we are implementing right now. Extensive urban development in the north and south is expected to increase our respective heat island effect, ruin the region's natural defense at combating pollution in the air, and augment the consumption rate of our natural bodies of water.

We should look at examples of smart development in other cities in the southwest region: they are building up and high and focusing on conservation and the most important use of water—to sustain life. We urge this Committee to put people first in its decision making, not the well-being and profits of the mining corporations or developers. Only then can we ensure that the next seven generations of Nevadans all have the dignity to thrive.

Garrett Kingen, Private Citizen, Las Vegas, Nevada:

About 90 percent of the water in southern Nevada comes from the Colorado River. In January 2022, a study conducted in southern Nevada found that water allocation was reduced by 7 billion gallons, enough water to supplement 45,000 homes in Las Vegas.

I regularly speak with hundreds of thousands of people across Las Vegas who are in great fear of our water shortages, not so much for themselves, but for their children and grandchildren. According to the City of Las Vegas, southern Nevada will receive at least 7 percent less water from the Colorado River. [The Southern Nevada Economic Development and Conservation Act](#) (S.-567, 117th Congress), a bill that proposes adding about 820,000 residents to the southern Nevada area by the year 2060, would further the devastation on southern Nevada's water supply.

From what I have seen, and from people with whom I have been speaking, this systemic issue has been going on for years and years. I would like to think that here in Las Vegas and here in Boulder City we can come together to see what we can do on these issues. It is an idea that we all should grasp with both hands, because this is both a matter of life and death. Thank you so much.

Andie Davis, Private Citizen, Las Vegas, Nevada:

As a Nevada native, a Las Vegas resident, and an amateur gardener, I know firsthand that water means life. The one issue that needs to be addressed in this Subcommittee, especially since the topic of this meeting is dedicated to water, is the topic of mining, specifically lithium mining. The environmental impacts of lithium mining include not only water loss, ground destabilization, habitat degradation, loss of biodiversity, increased salinity of water and soils, and increased toxic waste.

All this leads to the increased desertification of the fragile Nevada ecosystem we reside in, including the contamination of both water and soil. On the issue of water loss, it takes over 500,000 gallons of water to mine one ton of lithium. With Lake Mead at record low levels and in the current state of drought, the question is: where would this water come from?

I realize that lithium is one of the main components capable of powering electric cars, a sustainable alternative to most vehicles that now rely on fossil fuels. However, is that enough to outweigh the cost of mining? I implore the Committee to consider alternatives: directing funds to fixing already existing public infrastructure and making public transportation more accessible to folks within my community, funding research that investigates more sustainable alternatives to mining, and possibly using gray water instead of fresh water for mining.

Additionally, as a young person who balances a 40-hour work week and attends a university, I do hope the Committee would consider scheduling these meetings for a different time than 9 a.m. on a Monday morning to make it more accessible for folks who would like to attend.

Chair Carlton:

Are there other folks in the Chamber who wish to give public comment? [There were none.] I believe we have some callers on the line; BPS, could you queue up the first caller please?

Joe Guild, Private Citizen:

I am testifying on behalf of myself and my ranching business. My comment relates to the last meeting of the Subcommittee in Ely, Nevada. I had a conversation with Assemblywoman Hansen about one of the things I thought was lacking in that meeting. There was a lot of testimony about wild horse impacts on the public ranges and the impacts on the multiple uses of the public range as a result of the overpopulation of horses, but it seemed to me there was no solution or action item presented to the Subcommittee.

I wrote and submitted a memo pointing out that there is a growing body of scientific evidence that horses and burros provide some damage to the ranges ([Agenda Item II](#)). The livestock industry is subject to permits and time and seasons of use restrictions, so we cannot completely blame livestock grazing. What the Subcommittee can do is help push this along. There is precedent for this from the Public Lands Committee prior to this Subcommittee's reorganization in sending a letter to all relevant agencies and the Congressional Delegation expressing the Legislature's concern about the overgrazing situation on the ranges.

Chair Carlton:

We have probably talked about horses for about 24 years now, so I do appreciate the memo. Thank you for your input, and we will move forward from there.

Do we have any other callers who wish to provide public comment?

BPS:

Chair, the line is open and working; however, there are no additional callers at this time.

AGENDA ITEM III—PRESENTATION ON WATER ISSUES CONCERNING THE COLORADO RIVER

Chair Carlton:

We can move on to item number three on our agenda, which is a presentation on water issues concerning the Colorado River. The first presentation today is from the Southern Nevada Water Authority.

A. SOUTHERN NEVADA WATER AUTHORITY

John J. Entsminger, General Manager, Las Vegas Valley Water District and Southern Nevada Water Authority (SNWA):

As most Subcommittee members are aware, southern Nevada is highly reliant upon the Colorado River for our water resources ([Agenda Item III A](#)). We get 90 percent of our water supply from the Colorado and the other 10 percent from the aquifer that underlies the Las Vegas Valley. Another way of looking at that is 90 percent of the water supply for 76 percent of the state's population comes from the Colorado River. This system is imperiled. There is no other way to say it.

If you look back to the turn of the century, red is below average, blue is above average. We had five years between the turn of the century and 2021 that were above average, but this period of record includes 2002, which is the driest year in recorded history. The years 2012 and 2013 were the driest back-to-back years in recorded history until 2020 and 2021, which have now eclipsed those as the driest back-to-back years in recorded history.

The ramifications can be seen in these three pictures. We went into this century with Lake Mead essentially full. In the first five years, we have dropped from full to less than half full, and we have kind of bumped along since then. The last two years have had a dramatic impact, and now we sit at 34 percent capacity in Lake Mead.

Locally, we are seeing the effects. This is a picture of the upper intake built by the federal government, which came online in 1971 and was the first access for Las Vegas from Lake Mead. I do not have an updated photo, but as Commissioner Jones is aware, we showed an updated photo at our board meeting last week and that intake is now about seven feet out of the water. In the span of time between April 25, 2022, and last weekend, the lake has gone down another six to seven feet.

This is a graphic of our water infrastructure in Lake Mead; the higher intake with the circle on it is that picture I just showed you of that infrastructure that was built in the 1970s. Fortunately, we now have online our low lake level pumping station and our third intake, which gives us access to pump 900 million gallons a day from an elevation of 875 feet in Lake Mead. We are sitting at about 1,050 feet today. That is a critical elevation, because an elevation of 895 feet—what is referred to as dead pool—is the level at which the United States Bureau of Reclamation cannot physically pass water through the Hoover Dam downstream to Arizona, California, and the country of Mexico. Even in the direst hydrologic

conditions, we are essentially guaranteed to always have 20 feet of water over our lowest intake.

Regarding the probabilities of where Lake Mead's elevation is going to be over the next 24 months, we are sitting a little below 1,050 feet today, and there is about a 43 percent chance we are going to be below 1,025 feet by the end of 2023. Conditions are not only getting worse, but the rate of deterioration is also accelerating. That has all led to the federal government declaring the first ever Level 1 shortage condition. Deb Haaland, Secretary, U.S. Department of the Interior (DOI), declared that condition in August of 2021.

What does a shortage condition for southern Nevada actually mean? Anywhere above an elevation of 1,090 feet, we have access to our full 300,000 acre-feet of legal entitlements, but for each elevation below 1,090 feet, we have a deduction from our legal entitlements. This does not mean we will have to use less water than we are using today—shortage is a legal definition within federal law. Today we are in that first year of shortage between 1,050 feet and 1,075 feet, so our legal allocation is reduced from 300,000 acre-feet to 279,000 acre-feet. We will almost certainly go into a Tier 2 declaration for 2023, so we will be reduced to 275,000 acre-feet. The good news is, last year we used 242,000 acre-feet. Again, "shortage" is a legal definition, and at least for southern Nevada, it means that for the immediate future, we have less extra water. Even with the shortages being declared by the federal government, we will be banking extra water in Lake Mead this year.

Turning our attention upstream, the most imperiled infrastructure in the last three to four months has been at Lake Powell, not at Lake Mead. In the last three weeks, the federal government took two actions: (1) reduce 500,000 acre-feet from Flaming Gorge Reservoir downstream into Powell; and (2) retain 480,000 acre-feet that was scheduled to be delivered from Powell to Mead, so 980,000-acre feet in total.

The goal is to protect power head at Glen Canyon Dam, which is the critical facility for our nation's black start capability on the western grid as well as 100 percent of the water supply for Page, Arizona, and some of the communities of the Navajo Nation. It is currently below 3,490 feet. It is very important to protect those elevations, and Nevada fully supported the secretarial action to do so in the immediate term.

In the last two decades, we have taken several actions and entered into cooperative agreements on the Lower Colorado. In 2019, we joined the Drought Contingency Plan in which Arizona, California, and Nevada all agreed to put additional water into Lake Mead in order to protect those elevations. Absent all the cooperative actions between the three states, water users, environmental communities, Native American tribes, and the country of Mexico, Lake Mead would be 67 feet lower than it is today. As dire as the hydrology is, it is important for us to keep in mind that we do have tools available to us to preserve these critical elevations if the region can continue to work together.

Another plan was completed in December of 2021 when the three states came together and agreed to leave another 500,000 acre-feet in the Lake this year, and an additional 500,000 acre-feet in 2023. Conditions are continually getting worse, but we are also continuing and ramping up cooperation efforts.

We have three types of water in SNWA's resource plan: (1) temporary water; (2) permanent supplies from our Colorado River; and (3) future resources. Our temporary resources are our bank supplies; we have banked water in Lake Mead, Arizona, and California, and have even gotten contributions from Mexico's treaty allocation. We have

2.2 million acre-feet of water in these temporary bank supplies, and since we used 242,000 acre-feet last year, we have eight to nine years of our current demands stored in these temporary supplies.

We also have new supplies on the way. We have engaged in a cooperative partnership with the Metropolitan Water District of Southern California. They plan to take all the wastewater California currently discharges in the Pacific Ocean, treat that wastewater, and recharge it into the aquifers in coastal California. Then they can take that out for use by their residents. Our board has already allocated a \$750 million contribution from Nevada to California, and in exchange for our capital contribution, they will leave a portion of California's Colorado River water in Lake Mead for our use.

If you look at our resource plan, the dark blue is our permanent supplies, the light blue is that California water, the green is our temporary supplies when we begin accessing those bank accounts, and the brown is where we could need future water supplies. Regarding the upper demand scenario, which outpaces projections by a couple percent, if we can hit our conservation goal of moving from 112 gallons per capita per day to 86 gallons per capita per day by 2035, we will continue to have a very solid water resource portfolio here in southern Nevada.

I could have spent my whole presentation and much longer talking about conservation, but for anybody who wants to know more about our conservation efforts, we have considered rising local temperatures and increased our projection to consider that if we do absolutely nothing, our gallons per capita per day will go up from 112 to 123 because of warmer local temperatures. We then fight downhill from 123 to 86 gallons per capita per day by taking every conservation initiative in our resource plan, quantifying and then achieving that initiative in a gallons-per-capita-per-day savings, and then showing the road map for how to get from 123 to 86 gallons per capita per day.

The single biggest item on there is fully implementing [Assembly Bill 356](#) (2021), which is the removal of nonfunctional turf. I saw Assemblyman Watts III in the audience, so tip of the hat for his leadership and getting that through the Legislature last session. When you start quantifying these, some are literally not even a full gallon per capita per day, and some are .7, but AB 356 is over 8 all by itself.

I will wrap up, and I am happy to answer any questions.

Chair Carlton:

Thank you, Mr. Entsminger. We will take the other presentations first and then open it up for individual questions. Next, we have Dr. Jim Prairie from the Bureau of Reclamation.

B. UNITED STATES BUREAU OF RECLAMATION

James Prairie, Ph.D., Group Chief, Upper Colorado Basin Research and Modeling, U.S. Bureau of Reclamation:

I am stationed at the Center for Advanced Decision Support in Water Environmental Systems at the University of Colorado, Boulder. I was asked to speak today about natural flow conditions in the Colorado River Basin, both in a historical and a plausible future context, and couple that with the impacts we are seeing with the current drought.

One of the tasks my team leads is extending and maintaining the Colorado River Basin's natural flow record, which represents stream flow in the Colorado River Basin if humans had not impacted the river. This record is available from 1906 to 2019 at 29 gauges throughout the Basin, and we have further produced a provisional natural flow estimate at the Colorado River at Lee's Ferry through the current year 2022.

Before the drought that began in 2000, natural flow at Lee's Ferry averaged about 15.23 million acre-feet. Now, given the 22-year drought from 2000 to 2022, that average has dropped to about 12.22 million acre-feet, which amounts to 3 million acre-feet less than the long-term average, or about a 20 percent reduction. This marked a change in our long-term record. The recent drought is one of the lowest 22-year periods over the last 600 years; we have compared it with reconstructed tree ring records developed for the Colorado River Basin at Lee's Ferry, and we can see that there have been maybe three periods in the last 600 years with drought as deep as this over a 22-year period.

The level of drought we have seen in the past 100 years is unprecedented. There are two climate variables strongly influencing this drought in relation to stream flow: precipitation and temperature. Historically, precipitation has varied over the decades, increasing and decreasing over time but not exhibiting any significant downward trend in precipitation. Temperature in the Basin is showing a very different signal. Beginning in the early century, temperature was like precipitation in that it varied over the decades, but beginning in about 1970, we have seen a significant upward trend in the 10-year average of temperature across the Colorado River Basin. This trend has remained stubbornly in place since then and has continued to increase each year.

Since about 1980, the Basin has also seen about a one degree Celsius or two degrees Fahrenheit increase in long-term average temperature. This may not sound that significant, but studies have shown that for each degree increase in temperature on average, we are experiencing about a 10 percent reduction in flow. Under this drought, we have already begun to experience the influence of temperature on flow, seeing similar precipitation as in the past but not realizing the stream flow from that precipitation due to this increasing temperature.

If we take this a step further, we can look at projection summaries for various future flow projections that came out of our 2020 *Colorado River Basin Climate and Hydrology: State of the Science* report. It provides ample information on how climate change is impacting the Basin along with observations in the Basin as a whole. Within this report are global climate model projections we can use to understand what the future climate may look like under this changing climate. A lot of work has relied on the historical record to predict what is going to happen in the future, but we now recognize that the historical record does not include this increasing temperature continuing in the future, so the global climate models are a tool we can use to look at that.

One key aspect that these models agree on is warming. They agree that the warming is happening across models, but they do not necessarily agree on how precipitation is going to respond to this warming. Will we see higher or lower precipitation? Generally, these models indicate a 2.5 to 5 degree Celsius increase by 2050, which will further reduce the flows from the Basin. On the temperature side, there is little agreement about what will occur regarding precipitation. We see a wide range of potential futures under precipitation.

When we couple precipitation and temperature, we see reductions of 10 to 20 percent on average, which is consistent with our current trend, but we also see a range of reductions up to 40 percent and potential increases up to 30 percent. These studies demonstrate the

wide range of what is plausible, but the possibilities are based on a moderate emission scenario, not the worst-case emission scenario.

What does this mean for planners in the Basin? In our view, there is a much wider range of plausible futures we could experience, but we cannot guarantee we are going to be at the high levels or the low levels. No risk estimates of what we are going to hit in the future are available now under this “nonstationary” climate, meaning a climate that is changing. We do not have a stable climate we can use to project risk in the future.

That reality leads to the need to develop alternatives that can work under a wide range of possible future flows. Traditionally, we have worked under the goal of 15 million acre-feet, and for the past 20 years, we have been sitting at a little over 12 million acre-feet on average. We should consider future levels of 11 or even 9 million acre-feet as possibilities and have plans in place for how to address that.

Chair Carlton:

Thank you. Our last presentation on this panel is from Eric Witkoski of the Colorado River Commission.

C. COLORADO RIVER COMMISSION OF NEVADA

Eric Witkoski, Executive Director, Colorado River Commission of Nevada (CRC):

My presentation is a little broader because every two years under the Public Lands Committee, we are supposed to give an update on the activities of the CRC. It is not lost on me to focus on the drought, but I do have a presentation that is slightly wider in scope, though I will touch on the drought and some of our activities to address that problem ([Agenda Item III C](#)).

Our organization was created in 1935 and we are tied to the Hoover Dam. We were created to secure hydropower for the Lincoln County Power District 1 created that same year, and about two years later, we were able to deliver hydropower up to Pioche, Nevada, to support mining activity. We have played a lot of roles over the years, but our purpose has always been to protect and hold hydropower and water rights for the greatest benefit of Nevada.

We have seven members: four appointed by the governor and three by the SNWA, and we focus on four areas. We oversee hydropower and its allocation, wherein we interact with federal agencies, and we also work with SNWA on water issues and environmental issues. We operate and maintain a high voltage system for certain customers, including SNWA, the city, and member agencies, and we assist Boulder City on various transmission projects. We also help staff the Silver State Energy Association (SSEA) along with the SNWA, and they provide purchase power for Boulder City, the SNWA, member agencies, and the CRC if we need it. Lincoln Power and Overton Power District 1 are also members; I do not think they currently take market power from us, but they have that option.

Next is an overview of Lake Powell and Lake Mead. You will hear the terms “Upper Basin” and “Lower Basin” throughout this presentation. The Upper Basin refers to Lake Powell, and there is a different hydropower system up there, while the Lower Basin encompasses the Hoover, Parker, and Davis Dams.

I would also like to give an overview of the contracts flow. The DOI operates the dams. They deliver the power to the Western Area Power Administration (WAPA), with whom we

have long-term contracts, and in turn we have contracts with our 23 customers. Some of our direct retail customers are legacy customers from World War II; one was an industrial park built during the War to develop magnesium and titanium. In June of 2020, a lot of that production was shut down and it was uncertain what the future might hold, but with the Russian invasion of Ukraine, production may ramp up. Boeing Aircraft gets about 30 percent of their titanium from Russia, and that is going to change, so we were notified the plant will step up production to probably double it over the next 6 months, then double it again in the next 24 months. That is significant because in June 2020, they had to lay off about 190 people.

We provide hydropower to NV Energy, Lincoln, Boulder City, Overton, and Valley Electric Association while our water customers are the cities and members of the SNWA. The state's agencies have had a small slice of Hoover Dam since the reallocation in 2013 in which 5 percent was shaved off; we have a credit mechanism they receive, and they are doing quite well right now.

As for our activities with the Bureau of Reclamation, we attend their meetings, work with them on their investments in the plant, and try to keep an eye on rates. This requires us to strike a balance, because you want to keep the rates low, but you also must make investments in the plant to maintain the plant. We engage in similar activities with WAPA by participating in their meetings and in discussions of rate charges. They operate more of the transmission, so we also look at their activities such as the Regional Transmission Organization (RTO).

Power is valuable. It is cost-based, so there is no markup and no return on equity, and the cost alone is passed on to customers. At least in Nevada, power is considered a renewable resource per [SB 358](#) (2019), so it helps meet the renewable portfolio standard (RPS) for a company like Nevada Power. It is flexible because it can be used to help offset instances when renewables may be going down. It can be loaded into the hours when that other power may not be available. It has black start capability; in the event of a huge outage, you can use it to bring the system back up.

The Bureau of Reclamation and WAPA have also been working on what the federal government refers to as renewable energy credits (RECs). Nevada calls them portfolio energy credits (PECs), while the Western Renewable Energy Generation Information System (WREGIS) refers to them simply as certificates. The WAPA is a third-party verifier, so they can verify that a certain amount of energy was created, and the state is entitled to a certain number of certificates. The WAPA transfers those into REGIS, and then we can transfer them to us onto the customers, which brings some confidence in the system.

The other hot topic in the West is the Regional Market Organizations. The Upper Basin is more up in Colorado, and they are looking at evaluating the Southwest Power Pool, which operates mostly in the center part of Colorado. Some of the utilities are also looking at going that way. In the Upper Basin, WAPA is looking at doing that as well. They are conducting studies right now, and we expect if they do it, it will happen in 2025.

In the Desert Southwest, which operates out of Phoenix, WAPA is currently joining the California Independent System Operator (CAISO), which operates the Energy Imbalance Market, a 5-minute market that, if you need balancing power, you can reach out and get it or you can sell into it, which helps to keep balancing the system. We also participate in the Governor's Regional Task Force. There is legislation for NV Energy to be part of an RTO by 2030. There are lots of discussions going on in the West about which direction to follow.

As far as drought operation discussions in the Upper Basin, we participate in the Colorado River Energy Distribution Association (CREDA). We have five meetings a year plus drought operations committees watching the drought, impacts on rates, and how we can manage those. In January, we started pushing the group to consider looking at alternative resources, because a lot of our customers are located all over the West, and they are small, their cities are rural electric, and they do not have big purchasing economies of scale. If they could either work with WAPA or the Bureau of Reclamation or among other customers to look for renewable resources that could be near WAPA's transmission line, that might be attractive. It is something we started talking about with them this year and there is a meeting next month to discuss that.

The Lower Basin deals with the Hoover Dam. For years, they have had an Engineering Operations Committee, and we recently pushed to form a subcommittee to explore with them not only drought operations, but possibly also alternative resources.

On the topic of water delivery, various efforts have been made to bolster low lakes, including both Lake Powell and Lake Mead. Regarding relations with Mexico, a 1944 treaty approved in 1945 states that Mexico received 1.5 million acre-feet of water, and we continue to work with Mexico to maintain that treaty by sharing in shortages and those kinds of things.

The Colorado River Basin Salinity Control Program aims to help reduce the naturally occurring salt in the river. There are two main environmental programs: the Multispecies Conservation Program (MSCP) in the Lower Colorado River Basin and the Glen Canyon Dam Adaptive Management Workgroup in the Upper Colorado River Basin. The MSCP program is a 50-year program that balances the use of the river with conservation and native species and habitat to meet the Endangered Species Act (16 U.S.C. § 1531 et seq. [1973]). The goal is to create 8,132 acres of new habitat, and so far, they have created 6,049 acres with over 13 mitigation sites. The program is also meant to augment the population of native fish. The Glen Canyon Dam Adaptive Management Workgroup is an advisory group for the reclamation operations at Glen Canyon Dam, and we have various stakeholders who can provide comment and input about the operations.

I believe I mentioned that we provide staffing along with the SNWA to the SSEA, which secures and hedges power for various entities. Our next group is the Power Delivery Project Group, a system used to deliver electricity to the SNWA in major cities and for wastewater treatment. We also work to maintain the substations owned by SNWA and three by Clark County Water Reclamation.

Chair Carlton:

Subcommittee members, does anyone have any questions for the Colorado River Commission? [There were none.]

I have a question. We keep hearing conversations about possible blackouts or brownouts this summer, so I think you might be one of the best people to ask about this. We know that our neighbors to the west need a lot of power and there are industries in this state that need power to keep going, but we all represent constituents who want to make sure the air conditioning and the refrigerator stay on. What have those conversations looked like?

Mr. Witkoski:

This summer, California could be in a situation where they are 1,700 megawatts short, but that depends on temperatures and how high the peak gets. They have been adding a lot of battery storage, so hopefully some of that will help, but it is worrisome.

I know Nevada Power is better positioned for that, and they could probably better speak to that. They have been adding resources, and they have a lot in the planning and development stages. There is some concern about the supply chain issues and whether they can get all those done in time, but it is a situation throughout the West.

Two years ago, California had some outages, and Nevada Power did a good job. They called us asking if they could pull anymore out of the Dam, and Reclamation did what they could at Glen Canyon Dam during those two or three days in August of 2020. It is a challenge. There is an effort to cut fossil fuel and carbon emissions because we foresee increased temperatures and their impact on the river. It is a tough issue to try to cut carbon, because we are not generating what we would call "conventional" power like natural gas or coal. We are trying to get there with solar and batteries, and hopefully we can.

Chair Carlton:

I did not mean to put you on the spot. I wanted to consider not just the individual NV Energy question, but also the bigger picture up and down the Basin and with our neighbors to the West.

Mr. Witkoski:

We think about it a lot.

Chair Carlton:

I can imagine. Are there any other questions from Subcommittee members?

Senator Hansen:

As the river level drops, the dams' ability to produce power drops proportionally, right? If that is the case, when do you reach a point where the water level is so low you cannot generate power?

Mr. Witkoski:

I think it is around 950 feet in elevation, but it is a slow decline. I have checked this and there are charts, but it comes down slowly. For Boulder City, the SSEA helps manage their portfolio, so as it slowly declines, they can add a little bit, and they have both added a solar contract. They are in pretty good shape, pretty full-on power and hedge. It comes down slowly, so you have time to respond. It does not drop off a cliff.

Senator Hansen:

What is the maximum power generation potential for the two major dams on the Colorado River? As far as you know, if we are going to eliminate natural gas and coal-fired plants, how much hydroelectric energy can we consistently rely on these two dams to produce?

Mr. Witkoski:

At the Hoover Dam, the nameplate capacity is about 2,000, but it has not been at that level since the 1980s. That is the maximum amount.

Senator Hansen:

That is megawatts?

Mr. Witkoski:

Yes. Megawatts of capacity, but we probably have not seen that since they had the overflows in the 1980s. In recent years, it has been less than that. The way to think about it, and the rule of thumb I use, is that if we get down to the level of 1,000, you have about 1,000 megawatts of capacity. When you look at the charts and the elevation is about 1,012, it means you are generating about half of the full capacity of the plant, but we have not been there in some time.

Senator Hansen:

And that is similar to Glen Canyon?

Mr. Witkoski:

We are not as familiar with that one, and we only have about 27 megawatts from that dam.

Senator Hansen:

So that dam is small, and Hoover provides the main power? At maximum, if everything works out perfectly, could you generate 2,000 megawatts?

Mr. Witkoski:

In a perfect world, and if the river was brimming at the top, yes.

Chair Carlton:

Subcommittee members, are there any questions for Dr. Prairie with the Bureau of Reclamation?

Mr. Jones:

We have been managing the river based on reservoir levels. Are we at a point where we need to be looking at them based on flows, given that there is much less flow right now?

Dr. Prairie:

I believe thinking about that is a part of this discussion. We are not doing that at this point; we are still operating under the 2007 Interim guidelines along with the job contingency planning, which are based on looking at reservoir levels to determine deliveries throughout the Basin.

Mr. Jones:

We have been managing them based on reservoirs. What happens if users start using up their allocations—their banked resources—in the reservoirs?

Dr. Prairie:

I think you are going to see activities like those that occurred this last month where Reclamation worked with the Basin states to agree on reduced releases through Lake Powell to protect the Glen Canyon Dam. You also saw reductions in the Lower Basin used to continue to protect Mead and Powell together. You are going to see continued efforts to recognize flow projections in the next few years and working to maintain uses that will not completely drain the system.

Chair Carlton:

Are there any other questions?

Senator Hansen:

Upstream use—obviously the flow rate is 15 million acre-feet. Is that measure starting at Lee's Ferry? Where do you measure from?

Dr. Prairie:

Yes, Lee's Ferry is the gauge above the compact point between the Upper and Lower Basins.

Senator Hansen:

I have been doing some homework, and it has been quite interesting. How much of an increase has there been among the upstream users? Are they typically tapping out the maximum capacity when you have low flow issues on the river?

Dr. Prairie:

I must be careful to make sure I understand what you mean when you say maximum capacity. Their allocated right is 7.5 like the Lower Basin, and right now they are using about 4.6 on average. They also include evaporation from reservoirs in the Upper Basin in that number, so they are well below their apportionment, and their uses have been fairly stable over the last decade. They have not been having a strong increase.

Senator Hansen:

That is kind of scary if they are only using half their capacity now and we are on the downstream side of things, and they decide to max out if the drought gets worse. You mentioned a 600-year window of study, but I saw one that I think was by the U.S. Geological Survey (USGS), DOI, going back 1,000 years that mentioned several multidecade periods of drought on the Colorado River where the flow dropped below about line 8.1 and remained there for years. You discussed worst case scenarios, but have you gone back to that level of worst-case scenarios? That is scary.

Dr. Prairie:

I was looking at the most recent reconstructions, both by Dr. David Meko at the University of Arizona; he has one that goes back to about 1762 and another one that does not go back

quite as far. This is a more skillful projection going back, and that is why we have been using this one, but yes, it is the medieval drought period of about 50 years with flows below what we have seen now.

It is good to know that even without climate change, there are these megadroughts that have occurred historically and spanned decades, and that is not with the warming we are seeing. We are trying to be cognizant right now that this warming is impacting this drought more than we have seen in the past. A key question we are asking right now is, are we in a new normal?

Senator Hansen:

The one you referred to from 2004 by that individual is the same one I mentioned. It is interesting to see how this is not a new phenomenon; the Colorado River has had some major long-term, serious droughts probably equal to or in some cases greater than we are currently seeing.

Dr. Prairie:

The key thing to keep remembering is that this temperature increase has not been seen in that historical or paleo record going back, and they have done that; what is unprecedented is the temperature increase, which exacerbates everything.

Senator Hansen:

But you did mention that according to your models, we may potentially see increased precipitation in some models. Is that correct?

Dr. Prairie:

It is wide-ranging, but yes, that is the key question, because the models do not agree on what the physics are going to do under our warming atmosphere as far as rain. As a planner and in talking with planners, I will say that we need to be ready for all these possibilities. It could be an increase in flow or a decrease, and we need to have contingencies for both.

Senator Hansen:

I pray for an increase. Thank you.

Chair Carlton:

The decrease is the scariest. If it increases, I would love to see it flow over again like it did before. Are there any questions for Mr. Entsminger and the SNWA?

Mr. Jones:

I have two questions for you. I know there are concerns about water affordability; what are your thoughts on that? Perhaps more importantly for this group—since the whole idea is to provide recommendations or ideas for legislation, and you worked very closely with Assemblyman Howard Watts III last time—is there anything else when you are looking at 15 different things that we need to do in order to get to 86 gallons per capita per day (GPCD) that would be beneficial from the legislature?

Mr. Entsminger:

I am happy to answer both questions. If you consider the affordability of water, you are almost inevitably talking about the difference in philosophy between water as a pure commodity and water as a public trust. We try to blend those within our retail service system and address affordability by having a four-tier system where the first tier of water—the first 5,000 gallons that people pay for each month—is significantly subsidized. It costs us about \$3.50 to provide 1,000 gallons of water to a tap. For those first 5,000 gallons, you are only paying about \$1.17 for 1,000 gallons, so you have a 65 percent subsidy to protect those at-risk communities within southern Nevada to make sure that the public trust is being met.

The second thing I would say in terms of the legislation is that we try very hard to achieve things on a regional basis down here, but there are some things that I think the Legislature may be able to cut through. First and foremost, the Las Vegas Valley Water District has already prohibited the use of Colorado River water for any use if we are not getting the wastewater back. If a home or a business is planning on having a septic and we are not going to get those return flow credits back to reuse and extend the resource, we will not hook them up, but some of the other municipalities have not taken that step. I think the Legislature could intervene and make the use of Colorado River water for new septic systems illegal.

There may well be a couple of other things related to AB 356. Frankly, we are hearing some saber-rattling from some homeowner's associations (HOA) that think there are some gray areas in that legislation, and they may not be willing to comply. There may be some small fixes to clarify. We do not believe there is any ambiguity in the statute, but in the event a judge disagrees, we may want to make some clarifications to AB 356 to make it abundantly clear.

Mr. Jones:

I am aware because I am on the SNWA board, but could you quickly walk us through what the SNWA did with the Nonfunctional Turf Removal Advisory Committee (NTRAC) in deciding on what the language would be used for nonfunctional turf.

Mr. Entsminger:

Over the past 20 years, we have regularly impaneled citizens' committees to do everything from setting conservation goals to deciding what capital projects to build, and ultimately how to pay for all that stuff. Assembly Bill 356 required the empanelment of what was ultimately called NTRAC, which met for about five months and did site visits to see exactly where turf in our community was being utilized by our citizens and where the turf was only being walked on by the people who mowed. They had different definitions for parks, schools, and businesses, and came up with the uniform definitions that are now in the process of being implemented across jurisdictional lines. There are the same rules of the road in Anthem, Summerlin, and Aliante for the implementation of that process.

Chair Carlton:

To expand on that regarding AB 356 and NTRAC, what are the HOAs up to here? I have been through too many HOA battles in my life, so thank God I will not be there for this one, but I am curious. I want to know what they are thinking.

Mr. Entsminger:

I wish I could answer that more precisely. Right now, they are grumbling, but I would also say that this calendar year, Green Valley Ranch has taken out, I believe, 300,000 square feet of turf. The Howard Hughes Corporation is leading the charge in Summerlin, and we have seen a couple of 6-figure artificial turf removals within the Summerlin area. We are hearing some of the pockets of—shockingly—the more affluent areas of town saying they think there are some avenues of challenge available, but because the law does not become fully enforceable and you are not required to take out your grass until the end of 2026, we have not seen exactly what their legal arguments would be yet. We have heard that they think they are special and should be able to keep their grass.

Chair Carlton:

I do not want to send people into a tizzy, but it might be time for a nonfunctional turf rate, and I would be happy to help you design that rate.

Are there any other questions?

Senator Hansen:

You used 242,000 acre-feet of water, you got 2.2 million acre-feet of water, and you have a chart here that shows all sorts of other areas that have bank water. At some point, if the river drops to a certain level, will the federal government force you to use your stored water rather than your Colorado River water?

Mr. Entsminger:

I do not think they would be forcing us. We have clear rules of the road down until an elevation of 1,025 and after that, there have not been agreements about how deep those shortages might become. In a scenario where we must take an additional 20,000 acre-feet of reduction and you could get to where our basic allocation is not covering us, that is when we would pull on those banks. But considering our available basic proportion after shortage cuts and our annual limitations to what you can withdraw—because you cannot take all that bank water out in one year—as long as those two things cover any one year’s worth of water use, frankly, I think the Bureau of Reclamation is going to have bigger fish to fry.

Senator Hansen:

Wow. I heard that upstream, they are currently only using half of their allocations, and if you start adding up these numbers, it is worrying if everybody started to use them at maximum capacity like they do in northern Nevada, which is a big problem because all our basins are over-allocated.

I think you deserve quite a compliment, though, considering you have 2.2 million acre-feet of water in storage through a severe drought window; that is a real compliment to you to be able to bank that in a time when the flows are down substantially in Southern Nevada. Everybody beats up on the SNWA all the time, and you are the bad guys on the block, but I must say there has been some excellent long-term planning to have that level of storage available for Las Vegas to use.

Chair Carlton:

It is their citizens' committee that did the hard work, and I can say that because I served on one.

AGENDA ITEM IV—PRESENTATION ON WATER ISSUES IN NEVADA

Chair Carlton:

Next, we again have water issues with a presentation from the Division of Water Resources (DWR) of the State Department of Conservation and Natural Resources (DCNR).

Adam Sullivan, P.E., State Engineer and Administrator, DWR, DCNR:

Good morning. With me is Micheline Fairbank, Deputy Administrator, and we are going to split this presentation between the two of us. We are going to give more of a statewide perspective on conservation, specifically the challenges and opportunities we are currently experiencing and observing ([Agenda Item IV A](#)).

There is a different set of rules than what we have been talking about with the Colorado River, which has an interstate compact defining how the river is administered. There are several analogous situations that hit me this morning as we were listening, but as the state agency charged with administering water law throughout the state, we look at conservation and its challenges and opportunities directly through the lens of Nevada water law, and that is where we are focusing our discussion this morning.

Although there are many efforts statewide to be realistic by working within the available water budget and implementing smart conservation measures, Nevada's water law has limitations, and in some ways, it has the potential to actually impede efforts to conserve water. Water law is effective for its core function of appropriating water for beneficial use. It is well established and largely unchanged since it was originally enacted, but today, now that our population is approximately 30 times larger than it was when water law was initially established, we are facing many different constraints and expectations.

There are different kinds of demands on the state to address the problems we face, but when we respond to those issues in the context of Nevada water law, there are limitations regarding managing shortages in groundwater, encouraging conservation, supporting localized solutions, maintaining sensitive environmental resources, and considering multigenerational, long-term sustainability well into the future. Principles are in place to support the intent of some of these efforts, like recognizing that water is a public resource and that we have a priority system that is not designed to be implemented where there is not enough water to go around. We will give some examples of where we are coming up short because of the limitations in water law.

The recent drought of the last two years has raised awareness of the need to prioritize conservation, but it has also highlighted the imminence and the consequences of having a short water supply.

The state is responsible for carrying out water law in a consistent manner statewide and maintaining records and data to support those efforts on a larger basis. Counties are responsible for developing county resource plans to meet their long-term needs, and while local communities are most directly affected by the consequences of these efforts, they are also the most equipped to know or understand the localized circumstances. It is critical to have effective influence implementation of all these levels working together. As a state

agency, we have made an effort to hold public meetings in various communities with different circumstances in which we discuss the data we have available, what the options are for responding to drought, declining water levels, and water shortages, and what the state can do to help implement reasonable local solutions.

As I see it, there is a lot of good news on this front. Las Vegas is a good example of a municipality implementing effective water conservation measures, and there are also a lot of good examples up north of current actions to implement conservation. For instance, in the Walker River Basin, irrigators understand their circumstances and are working together to implement voluntary conservation efforts to limit the rate of aquifer drawdown.

What the state can do, and what our staff are doing, is to help define targets of how much reduction would be able to make a difference. We can also support that by communicating that nonuse for short periods of time to respond to drought would not put them at risk of losing their water rights due to cancellation or forfeiture. We do not want to penalize people for conserving water.

In the Carson River Watershed, there is a good community-led effort to work within the available water budget, and within the Humboldt River, there is a substantial effort to be realistic about the effect of groundwater pumping on flow in the river and the senior decreed rights. We will hear more about that this afternoon. Another example is in Diamond Valley, which has implemented a community-based groundwater management plan to address chronic local water drawdown. These are all good examples of collective efforts to manage the common pool resource in a way that is supportive of the community and the local economy. The state needs to be supportive of these efforts rather than impeding local conservation.

We are now experiencing—and my concern is that it might get worse over time if we do not respond to it—that water law can impede innovative localized solutions. Despite the intent present in water law to work within a prior appropriation system and use the best available science to allow for groundwater management plans, the implementation and interpretation of those measures is problematic. We have disparate legal interpretations that leave uncertainty about the legislative intent, and in addition, the role and the authority of the DWR in implementing those measures. The absence of clear legislative direction invites differing interpretations. For example, statements of policy within NRS are called into question and whether they mean anything.

An additional element is that there is a culture of resistance to adapting Nevada's water laws to contemporary issues. It makes complete sense to be both cognizant and weary of unintended consequences, but without getting ahead of some of these problems, we are in a situation where we are forced to be reactive or resolve issues in the courts. Ultimately, the concern is that this is detrimental overall to public service and to water resources.

Lastly, we live with a legacy of distrust, partly related to our office, but also among other stakeholders who have different points of view. It is important for the state to overcome this so we as an agency can carry out our duties in accordance with law and with due respect to the water right holders and be realistic about the constraints we are facing with a limited water resource. I will now turn it over to Micheline.

Micheline Fairbank, Deputy Administrator, DWR, DCNR:

One of the issues we want to address is that there is uncertainty with respect to the state engineer's role within the legislative policy directives. This lack of a clear Legislative

directive leaves uncertainty with respect to how to execute policy directives, which are intended to direct our office on responsible resource management.

Recently, we received a judicial decision stating that statements of policy set forth by the Legislature are not operative statutory enactments ([Agenda Item IV B](#)). The court went on to say that the statute does not declare that the best available science should dictate the decisions, so the Office of the State Engineer's reliance on the best available science was not in conformity with the explicit authority given to the State Engineer's Office.

The same came into effect with respect to conjunctive management, which refers to management of all water in the state regardless of the source of supply; it is the policy directive of the Legislature, but it is not explicit as to how we are to implement that policy directive, and there is no explicit authority bestowed upon the state engineer to conjunctively manage water resources.

We are left with significant uncertainty about what our role is and a lack of clarity regarding a path for implementation. The Legislature has given us guidance, but when we try to go ahead and use our best efforts—the state engineer's best discretionary implementation of that policy directive—we are left to the courts interpreting what we can and cannot do based on explicit statements contained within Nevada's water law. Without clear definitions, we are left with that level of uncertainty regarding our role, because we do get differing viewpoints from different courts. We do not know exactly what the Legislature intends the state engineer to do and what the DWRs' ultimate responsibilities are.

[Inaudible] we are also left with limited [statutory tools]. This is not a new discussion in the Legislature. Nevada water law leaves the state engineer with very limited statutory tools to respond to an ever-changing and complex resource management environment. We can administratively cancel water rights, forfeit water rights, and undergo abandonment of water rights.

Cancellation and forfeiture take a lot of work and impute a lot of equity concerns on the part of the courts. A defensible abandonment decision is very challenging for our office, because we must show that the appropriator or user of the water right had an actual intent to abandon that water. If you have an unused right for a period of time that may not be subject to cancellation or forfeiture, making a showing of abandonment is extremely difficult, especially if you are dealing with prestatutory rights, because we might be trying to prove an intent to abandon decades upon decades later.

Curtailement by priority is another tool our office possesses, but it is not necessarily as easy as it appears. It seems simple to draw a line in the sand and say, "Anybody who is junior to this line does not have the opportunity to use their water," and on a surface water system, that is very easy, and people understand how to do that. But it is a much more complex discussion when we start talking about brown water resources and interconnected resources, and while the Legislature has given us the authority to designate critical management areas, those come with great consequences. That designation starts a 10-year clock on a particular basin, requiring them to identify and establish a groundwater management plan to be approved by the state engineer within ten years. If that is not accomplished, then we are left with curtailement by priority.

Nevada's water law may get in the way of localized solutions that meet the needs of these communities. As an example, I will use the Diamond Valley Groundwater Management Plan, the first groundwater management plan implemented in response to a critical management area designation. The community spent years developing what would be a sensible solution

for that community, but because the law is not explicit about what can and cannot be contained within the groundwater management plan—meaning whether that groundwater management plan has to strictly adhere to the doctrine of prior appropriation—that question is now before the Supreme Court to make the decision as to the Legislature’s intent. The Legislature did not clearly define what could and could not be instituted within a groundwater management plan. As a result, the localized solution may be impossible to implement due to Nevada’s statutory regime, and that is not necessarily in the best interest of the community at large.

Smith and Mason Valley irrigators have also come together and made collective efforts to limit their groundwater usage to try to preserve the resource through this time of drought, but if a senior water right holder says, “I do not want to play ball,” there is nothing in the law that requires them to do so, because prior appropriation entitles the most senior right holders to do whatever they want regardless of the overall conditions in the system.

That is why we say priority alone is not necessarily enough to manage shortages, and that is why I raised the issue regarding groundwater. On a surface water system, the water is either there or it is not, and senior system users can access that water while junior users cannot, but in a groundwater system it is not that simple. The water is still there, but groundwater level declining is what plays into effect. The timing of curtailment and the timing of nonuse may not be resulting in actual availability of water for generations to come.

Priority of managing a groundwater system or even interconnected hydrologic systems does not necessarily serve the purpose of the resource or the communities, and there needs to be some consideration of how to best manage these different resources within the confines of the law that provide flexibility for those local communities so they can then identify solutions that are appropriate for their needs.

Another challenge facing the DWR is underfunding. Absent appropriate resources, we are unable to meet our basic obligations, let alone be more proactively engaged in water conservation efforts. Like most of the state, the Division is currently experiencing pervasive vacancies and the inability to recruit and retain employees, and that is putting us behind even doing our core functions, let alone trying to get ahead of different issues within the state that demand our attention and time to appropriately create and manage reasonable solutions with our local communities.

As I stated before, our mission is uncertain. Despite court decisions, the lack of legislative directives and the lack of stakeholder support for guidance results in uncertainty for the agency and staff. Not only is the uncertainty difficult because it makes it challenging to try to identify appropriate management strategies, but it also has a significant impact on employee morale, further contributing to the challenges in retention and employment of new staff.

Finally, long-term resource management requires innovation to sustain a changing climate, including warming, drying soil conditions that absorb more runoff and lower flows than we have become accustomed to, and updating science. We need to update our water resource budgets for each of our basins, because they are between 50- and 70-years-old and are increasingly under attack in the court systems; it is not that they are not still appropriate, but because they are old, it is easy to attack them. We need to acknowledge the limitations in existing law and remove those impediments to community-led solutions that would allow for innovative water management. What may work for one community may not be the appropriate solution for another, but they need to have flexibility to work outside of

the strict prior appropriation doctrine to come up with solutions that will work for those individuals and those communities.

Chair Carlton:

I will now open it up to Subcommittee members for questions, and I do have some myself.

Assemblywoman Hansen:

We certainly know the difficult position that you are in while trying to do the work you do for the state, and it does not go unappreciated. You talked about the language in the latest court decision stating that “statements of policy set forth by the Legislature are not operative statutory enactments,” and “the statute does not declare that the best available science should dictate the decisions.” Could you clarify for me when that decision was rendered?

Ms. Fairbank:

That decision was rendered in April of this year, 2022.

Assemblywoman Hansen:

Which court handed down that decision?

Ms. Fairbank:

It was the 8th Judicial District Court, and it was the case involving Order 1309, which related to the Lower White River Flow System.

Assemblywoman Hansen:

We talk a lot about prior appropriations making it harder to navigate conservation efforts. I am putting you on the spot, but if you had a magic wand and you could enhance Nevada water law, what would that look like? What is the solution? If we are having this conversation and the courts are not a factor—in a dream—what would that solution be without impeding conservation efforts?

Mr. Sullivan:

A couple of reasonable options come to mind related to clarifying legislative intent where we have had conflicting interpretations. The specific areas I am talking about are conjunctive management, protecting environmental resources, and the strict curtailment by priority in groundwater systems. The latter was a principle written for surface water that has been adopted for groundwater systems but has never been implemented; how would that work? Another big solution is balancing the tenet of beneficial use with the need for long-term resource planning, and that is probably most prevalent in municipal systems, but it is a consideration with all manners of use. A couple other things are incentivizing conservation for irrigation and determining what the scope of groundwater management plans or critical management areas could or could not be.

Ms. Fairbank:

To build on what Adam stated, current law states that beneficial use shall be the basis measuring the limit of a right. Oftentimes, we engage in conversations with our other

western state colleagues, and when we talk about the difficulties we face with forfeitures and cancellations, they are mind-blown by how difficult it is for us to take unused water off the books.

In many western states, the policy is “use it or lose it,” and this loss is seriously considered, adhered to, and honored by the court systems. If we could have more effective authority where unused water is no longer part of the portfolio, that would provide significant help to get the first toehold on the problem.

We talk about conjunctive management to a degree, but it would help to give the express acknowledgement to the Office of the State Engineer to administer water rights based upon the resource of the water right, not artificial administrative boundaries. We must acknowledge the scientific interconnectivity of water basins, and that is relevant when we talk about disparate court decisions. One court made a finding that the potential impact hundreds of years in the future of an upgradient groundwater basin precluded the appropriation of additional rights because, at some indeterminate point in the future, that water was already appropriated in downgradient basins. Yet another court makes a finding based on clear scientific evidence that, used today, captures water approximately 100 miles away, and even though they are in different administrative hydrology units, we cannot consider them together, and thus we cannot manage the resource collectively and conjunctively.

Having the authority to honor the scientific bases of interconnectivity regardless of administrative boundaries is essential for responsible resource management. Understanding how we can do that would be extremely helpful in terms of trying to manage the resources responsibly to hit all those different pieces while still honoring existing rights.

We must come up with a solution to the problem of how to manage water rights that are part of that interconnected system that were not necessarily appropriated with that in mind. That is not our decision to figure it out; the Legislature needs to tell us how we should go ahead and unwind that ball of string.

Assemblywoman Hansen:

Thank you for being brave. I appreciate it, and I made lots of notes. We are all trying to find solutions.

Senator Hansen:

I am not as nice as Assemblywoman Hansen on this, because you are almost calling for a revolution in Nevada water law by talking about priority appropriation doctrine being either completely suppressed or turned over to you to do what you think is right in each basin based on the best scientific approach. My understanding is, if you are a senior water rights holder, those are your legal property rights. For you to come in and now say, “We are going to go to Diamond Valley and have a groundwater management plan, and whether you are a junior or senior water rights holder, everybody is going to be treated the same,” that is not the way the whole game was supposed to be played.

The bottom line—after watching this in the Legislature for 12 years now—is that, at some point, your agency over appropriated water rights in numerous basins across the state. I represent Lovelock, which is on the bottom of the Humboldt River System, but they have the most senior water rights on the entire system. The Rye Patch Reservoir goes dry about every ten years and the people who are the senior water rights holders do not get to have

any water in their ditches. I totally agree with what you are saying about beneficial use. We need to make it so if people are not properly using their water, you have some ability to get those back.

Your whole presentation scares me in that we are no longer treating the senior water rights as property rights, but rather as flexible things in a groundwater management plan. We are going to all come together and sing kumbaya, and we are going to have a groundwater management plan where everybody is going to behave the same, but that is not the way the law was supposed to be implemented.

I enjoyed your presentation, and I agree that you are underfunded. Adam, I always say that you have the toughest job in the state—you and the guy in charge of public education—because everybody expects miracles from you, and you have 100 years of precedent falling on your shoulders. Are you responsible for over appropriation in Diamond Valley or Pahrump? I do not think so. That stuff probably happened long before you were even born.

I respect where you are coming from, but I want to get on the record that the senior water rights holders I represent in so many areas of the state—and by the way, I represent Pyramid Lake, Walker Lake, and Lovelock, all on the bottom of communal water systems—are very upset with how the upstream folks are taking the water. It is a huge issue in my district, so I am very familiar with a lot of these things, and I am very uncomfortable with the idea of treating senior water rights as prior appropriation and something that we are going to turn over to you guys to adjudicate. We will have to see how that plays out.

Mr. Jones:

I have a question regarding beneficial use. Since we are trying to come up with solutions, are there other states that are doing it better or can serve as models that the Legislature could examine?

Ms. Fairbank:

It is not an easy answer, because a lot of the institutional history of other states has created a smoother pathway for them to be able to more effectively handle the beneficial use question. For example, in Wyoming, you use it or lose it, and nobody questions it when the water right goes away because of nonuse; it is an accepted fact. That is a historical and cultural perspective in that particular state.

Other states have grappled with similar issues; Idaho in the Eastern State Plains Aquifer has encountered significant challenges in terms of trying to manage the groundwater use and surface water impacts. It has not been easy, and it was the outcome of significant litigation, but the hydrologic system there is different than ours here in Nevada, so that creates its own unique challenges. It is also easy to point to the fact that Idaho has a lot more water than we do in Nevada, and those are frank realities that create distinctions between other states and Nevada, so that is the challenge that we have here.

Mr. Banuelos:

I have a couple questions. First, do you have any impediments to working with Nevada tribes regarding conjunctive water management?

Ms. Fairbank:

It is more about exchange of information. With some of our tribal communities and nations, we have relatively good relationships, and we can exchange water usage data, but that is probably the most important information for us. We recognize that particularly on surface water systems, the water rights of tribes that have been recognized are tribal and sovereign rights, but an area of opportunity that is probably underutilized is understanding the usage so we can help balance the entire system that is inclusive of resource use both within and outside of the reservations.

Mr. Banuelos:

That is a good segue into my second question. Chair Rupert Steele of the Confederated Tribes of the Goshute Reservation requested a response to a letter from Governor Sisolak regarding one of their water rights, and I think the Pyramid Lake Paiute Tribe has over time asked that question. I wonder if the DWR will be reviewing tribal water rights, and if so, will that result in a document that will be made available to the tribes?

Mr. Sullivan:

Regarding the Confederated Goshute Nation, we have been working and cooperating with the tribes, the State of Utah, and our federal partners to quantify the water resources for the tribal nation. That has been a positive experience, and it is in process, but it stands as a good example of how the state and the tribes can work together for a responsible solution.

Ms. Fairbank:

To build on that, the state is always interested in engaging with our tribal communities to achieve certainty with respect to Federal Reserve claims of water rights within tribal boundaries. We are committed to working collaboratively and cooperatively with our tribal nations as Adam recognized with the Confederated Tribes of the Goshute Nation, but we have also worked diligently to try to achieve resolutions. One example we like to highlight is the City of North Las Vegas Paiute Tribe and their Federal Reserve claims, which were finalized in the 1990s.

Chair Carlton:

I had a couple of questions. In relation to the quote that reads, "Statements of policy set forth by the Legislature are not operative statutory enactments," I want to understand what we are talking about when we refer to the term *statements of policy*. What is in the bill and NRS is the rule book, so when you use that term, what are you referring to?

Ms. Fairbank:

This is in [NRS 533.024](#) where there are legislative declarations. A couple of those are that the state engineer shall consider the best available science, and the state engineer shall conjunctively manage all waters in the state regardless of the source of supply; I believe that is subsections 1(c) and 1(e) of NRS 533.024. There are also policy declarations regarding domestic wells being protectible interests, and so, in this particular decision, the court found that those policy declarations are not specific enactments of authority to the state engineer; they are merely informative, but they do not control.

Chair Carlton:

They are in the NRS, correct? They have a citation because you just gave it to me, so that means that we—the royal “we,” as in the Legislature—have given them the actual power of guidance. I am confused why the court would not overlay that because in a lot of instances, we give that overarching policy statement and then everything else underneath needs to fit beneath that umbrella. It is my understanding that the court does not think that us giving guidance is strong enough to operate as statute. Does that guidance need to be firmer? Does it need to be clearer?

Ms. Fairbank:

My interpretation is that if the Legislature wants us to go ahead and utilize those different policy directives, it needs to be explicit about how and in what manner the state engineer of the DWR is to implement them.

Chair Carlton:

This is not meant to be argumentative, but I want to put some things on the record. We are only in session for 120 days every other year. You do not want us to get too precise, because you need room to move and adjust for ongoing changes. In the past, we have found that when we have been too prescriptive, it has come back to bite us in the butt because your hands have been tied.

In my own opinion, I believe a lot of times when we do these policy statements—and they are in the NRS, so they are statutory—that we are basically trying to say, “Operate within this certain world” and then everything else fits within it. If we get too prescriptive with you, then that can tie your hands. My next question would be, if those policy tools are not giving you what you need, what tools have you lost through this whole thing to be able to do the work you do?

Ms. Fairbank:

Obviously, we believe those policy directives do guide us, and that is why we have operated and tried to do things within the scope of those policy directives. Regarding your question about what tools we have lost, we certainly are not going to admit defeat. We still feel that those policy directives guide our decisions and operations, but in this judicial district and these particular facts, they constrain our ability to conjunctively manage water resources for the protection of senior decreed surface water rights.

If they are expanded, they could impact our ability to implement other management strategies that would be protective of senior decreed surface water rights. For example, Senator Hansen talked about the end of the Humboldt River System in his district, and if you were to transpose this particular decision on that system, we would be unable to regulate groundwater usage that directly impacted surface water deliveries. The real threat is that it creates that uncertainty.

Chair Carlton:

It is a very interesting conversation. I will go back to being a legislator—we wrote it down, we passed it, we voted on it, the Governor signed it, and it is in the NRS, so it is the law. Sometimes, even though we do that, we must go back and say, “By the way, we really mean it.” If we must go back and do a “we really mean it” bill, that is what we will have to do to make sure we are perfectly clear. Are there any other questions?

Assemblywoman Hansen:

Is there an example of a completed curtailment of water by priority?

Ms. Fairbank:

Virtually every surface water system in any given irrigation year would have completed curtailment, because in the absence of extreme flood years, not all water rights can be served on a surface water system. On the groundwater system in the State of Nevada, no.

Chair Carlton:

I have a lot more questions, so I will work with staff to work with you to make sure we get the information back to the Subcommittee as we move forward. We try to address every issue that we can and give you the tools or data you might be missing.

We will now move on to the next agenda item.

AGENDA ITEM V—PRESENTATION ON WALKER BASIN WATER CONSERVATION EFFORTS

Chair Carlton:

The next agenda item is a presentation on the Walker River Basin conservation efforts.

Peter Stanton, Executive Director, Walker Basin Conservancy:

I am here to report back on the first decade of progress with the Walker Basin Restoration Program. The Walker Basin Conservancy is tasked with implementing the Walker Basin Restoration Program, which aims to maintain and protect Walker Lake while protecting the agricultural, environmental, and recreational balances within the Basin. I am here to talk about the success of the program, which is one of the most ambitious freshwater acquisition projects for environmental benefit in North America, and to discuss some of the challenges that a decade of environmental water transactions and assisting in the creation of a new state park in Nevada has brought to light and to propose some solutions through policy and potential legislation ([Agenda Item V](#)).

For those who are not familiar, the Walker Basin is in western Nevada, straddling western Nevada and eastern California, beginning at the crest of the Sierra Nevada Mountains and flowing through Bridgeport and Antelope Valley in California. The western fork flows through Smith Valley, the east through the East Walker Canyon in Nevada, and they come together in Mason Valley. From there, they flow north and through the Walker River Paiute Reservation on to Walker Lake.

As recently as the 1980s, Walker Lake supported approximately 50 percent of the Mineral County economy through recreation and recreational tourism. It is also the traditional homeland of the Agai Dicutta or Walker River Paiute Tribe; the Numu words "agai dicutta" translate to mean "trout eaters," which speaks quite clearly to these waters' cultural importance. It has traditionally been home to a world-class fishery, and the fish in this photo are all Lahontan cutthroat trout caught in Hawthorne, Nevada, which hosts an annual loon festival.

Agricultural diversions throughout the Upper and Middle Walker River Basin have led to serious declines in the lake's levels and water quality and complete ecosystem collapse.

Since the 1850s, Walker Lake has declined in volume by more than 90 percent and in surface area by 50 percent. The lake used to be half the surface area of Lake Tahoe, but now it is approximately one-quarter of that.

Walker Lake is a desert terminus lake, meaning that the only outflows are through evaporation and groundwater intrusion, so as the in-flows to the lake have decreased, the concentration of salt, or salinity, of the lake has increased. It is now too saline to support fish life of any kind. The last Lahontan cutthroat trout came out of Walker Lake in 2009, the last loon festival was also held in Hawthorne in 2009, and the Lower Walker River that runs through the Walker River Paiute Reservation runs dry many years as well.

The Walker Basin Conservancy administers the Walker Basin Restoration Project, a federally funded project to protect and maintain flows to Walker Lake that was enacted originally in 2002 with appropriations in 2008, 2011, and 2014. We operate as an independent 501(c)(3) nonprofit headquartered in Reno with a field office in Yerington, Nevada. We buy water, protect that water in-stream, and in so doing, we protect the interests of agriculture throughout Smith and Mason Valleys and increase public access.

Our goal is to increase the average flows of Walker River into Walker Lake by 50,000 acre-feet per year. To date, we have acquired sufficient water to reach approximately 53 percent of that goal, which is about 120 cubic feet per second at full priority. In order to do that, we have implemented a variety of deal structures. We are in the third year of a temporary leasing program with the Walker River Irrigation District; we have completed permanent acquisitions of water and land; and we have made water-only purchases and three-party deals where we purchase water and another grower purchases the land. We have leased back land and water to sellers, and we have created life estates and boundary line adjustments to allow sellers to retain their homes throughout the project. We work only with willing sellers throughout the Walker Basin, and most transactions we have closed have been with farmers and ranchers who otherwise would be leaving agriculture because they do not have folks to take over the farms.

After we acquire water, we protect that water in-stream for environmental benefit. As a reminder, this is a federally adjudicated system that spans the California and Nevada state lines, and the first time we filed an application, it took nine years from the time we initiated the process to the time the first water reached Walker Lake. I am glad to say that we have since been able to shorten that time period after dealing with many of those concerns. Most recently, we filed an application and in less than 12 months were able to administer that water to Walker Lake.

It is important to note that we are currently administering only about 14 percent of our conservation goal in-stream, or about 25 percent of the water that we have purchased. That is because of these significant time delays in protecting water in-stream in the Walker River System, frankly because of the decreed interstate nature of that system.

As we made these acquisitions, we created significant public access throughout the Basin and donated more than 12,000 acres to the State of Nevada at the Mason Valley Wildlife Management Area. We created what is now the Walker River State Recreation Area, which is the newest recreation area or state park in Nevada. I am proud to say that sometime last summer, the 100,000th visitor to that state recreation area passed through the gates, and that is with only one of the three branches that were donated to the state open to the public. It is a golden opportunity because it serves as a gateway to more than 60 miles of the East Walker River and has some world-class fishing.

It has not been without its challenges, first and foremost in terms of collaborative planning with the Bureau of Land Management (BLM), DOI, and the Forest Service, U.S. Department of Agriculture (USDA). I think there are significant opportunities to further connect that state recreation area to Mason Valley and Yerington. Currently, you can go to Yerington and have no idea there is a 10,000-acre state park right around the corner, and vice versa you can go to a 10,000-acre state park and have no idea that Yerington is right around the corner. It is important to leverage the investments we make in outdoor recreations to benefit local communities.

To call attention to the state lands National Environmental Policy Act (NEPA) process, we function as an independent 501(c)(3) nonprofit organization, and we have brought federal money to bear in helping to develop the Walker River State Recreation Area. A good example of that is the Recreational Trails Program (RTP) grant, for which we were fully awarded and fully funded. We have been waiting three years for state NEPA clearance, and that all runs through Nevada's Department of Transportation (NDOT). Along those lines, I would suggest that we develop a proposal potentially within the Division of State Lands or DCNR for NEPA analysis on state lands.

Every year, the Conservancy brings up to 50 excited, passionate, and well-educated young people from around the country to work in the Walker Basin through our AmeriCorps program. Many of the leaders of our organization came to Nevada through this program, and indeed I moved to Nevada ten years ago to serve in the AmeriCorps program. The state faces the same staffing struggles that other employers are facing, but I dare venture to say that it is exaggerated within the state government. We have an opportunity to create a pipeline for Nevada conservation careers. For instance, the federal government offers noncompetitive hiring status to AmeriCorps members who complete a term of service; I think we can do something similar here in the State of Nevada. That would give the state an advantage in hiring a talented workforce of folks who otherwise would be coming to the region for six months to a year and then leaving after gaining a valuable conservation career experience.

One of the key challenges that we are facing and will continue to face in the Walker Basin as we move forward is the conflict between surface and groundwater users. Within the Basin, surface water rights are senior to groundwater rights, and surface water rights are also adjudicated by federal decree, while Nevada groundwater rights derive from the state. It is worth noting that the most senior surface water rights in the system are used at the end of the system by the Walker River Paiute Tribe. The Conservancy also owns senior decreed water rights that are administered to Walker Lake that date back to the 1860s.

Some recent USGS studies have indicated that the stream efficiency of the Walker River—how much water is not diverted and thus makes it through the course of the river—has declined on average by 1 percent per year for the last 50 years. Over that same time, the aquifers in Smith and Mason Valleys have both declined by more than 250,000 acre-feet. A USGS study also demonstrates that the water table closer to the river has declined less, suggesting surface water flows are supporting groundwater recharge.

In the last few years, there have been multiple times when water in the Walker River in Mason Valley has not made it to downstream to senior decreed water rights holders, while groundwater pumps have remained on in the Valley. As the variability and frequency of dry years increases, we expect there could be more years when groundwater pumping can be found to negatively impact or injure senior decreed water rights holders, especially at the end of the Walker River System.

The Nevada state engineer has a mandate to implement conjunctive management, which was called into question by a recent ruling, as we heard in the previous presentation, albeit with little clarity on how to implement that. I have seen firsthand and can attest to the need first and foremost to increase the availability of staffing within DWR in order to effectively implement conjunctive management. We are talking about protecting one of the state's most significant resources—its water—and the resources are not being invested in DWR to do that effectively or within any reasonable timeline. I would also like to call attention to the state's significant liability in this groundwater conflict as there are federal water rights at the end of the system.

I would also echo the DWR's emphasis on the need to protect and incentivize water conservation. The Walker Basin Restoration Program has made millions of dollars available to the Walker River Irrigation District and various ditch companies for efficiency improvements, but none of those water savings have been protected in-stream to benefit Walker Lake. The Basin is over-appropriated and water conservation savings lead to more land being irrigated with those conservation savings.

We have funds available to lease water saved through conservation; in other words, we can incentivize water conservation in the Walker Basin, but there is no provision in Nevada state law that provides for in-stream administration of that water. We can incentivize it, but we cannot rely on a statutory mechanism for in-stream administration. Multiple western states, including Montana, Texas, California, Oregon, and Washington have direct statutory authority to administer water conservation savings in-stream for environmental benefit, and I encourage the state to look at adopting similar legislation. From the Conservancy standpoint, that would give us the ability to increase flows to Walker Lake, increase payments to irrigators, and do that without taking land out of agricultural production, which is a win-win for us and for the communities we serve.

I am happy to take any questions or clarify anything in my presentation for the Subcommittee.

Chair Carlton:

I am curious. You are a 501(c)(3) nonprofit, correct?

Mr. Stanton:

Yes, that is correct.

Chair Carlton:

Who funds you?

Mr. Stanton:

Our money for acquisitions of water rights comes from the Desert Terminal Lakes appropriations through the National Fish and Wildlife Foundation.

Chair Carlton:

Are there any other questions from Subcommittee members?

Senator Hansen:

I love Walker Lake and I remember when it was a huge fishery. You are only proposing 50,000 acre-feet of water. Do you intend to raise the level of the lake or just maintain it? Right now, it is not anywhere near the levels necessary to reestablish the cutthroat trout that were once abundant in the lake.

Mr. Stanton:

That is correct. Our goal is to raise the level of the lake to a total dissolved solids concentration of 12,000 milligrams per liter, which would allow all the native fish that have traditionally lived in Walker Lake to come back. That will require flows over the current stasis of approximately 50,000 acre-feet per year.

Senator Hansen:

For how many years?

Mr. Stanton:

It depends on climate variability, but suffice to say, for decades.

Senator Hansen:

It took a long time to get it down to where it is now, and it is not like you are going to magically add 50,000 acre-feet of water and in two years have a reestablished cutthroat population. I represented Hawthorne until the reapportionment occurred, but Hawthorne basically died. All the sporting goods stores closed once that lake dropped to a level where there was no more fishery. I am anxious to see this happen, and I know you are still walking that delicate line of trying to protect the interests of the upstream users.

A question about Mason Valley—Nevada’s Department of Wildlife (NDOW) manages that, but does your organization have a relationship with them? Last time I was there, virtually every pond in the place was dry. Is that because the drought, or have you brought up the water rights there and are moving downstream?

Mr. Stanton:

We have not acquired any of the water rights that NDOW owns in Mason Valley. They are the largest decreed water rights owner in Mason Valley right now, and their water rights are subject to the priority dates of the decree like any other decree user. Over the last few years, there have been times when there has not been enough prior decree in priority to meet NDOW’s water rights in the Mason Valley Wildlife Management Area.

We are working with NDOW on a temporary water exchange where we would exchange several hundred acre-feet of groundwater for their decreed surface water, which would give them the ability to change the timing of when water is added to the wildlife management area and get more water for the program to send downstream.

Senator Hansen:

Schurz, Nevada, with the reservoir and Indian tribe there, uses a tremendous amount of the water on the river which is right upstream from the lake; are they cooperating with you?

Mr. Stanton:

We work closely with the Walker River Paiute Tribe. Our decreed water flows through the reservation and through Weber Reservoir, so we work with them on at least a weekly basis to administer that water through their reservoir for release through the Lower Walker River. They have senior decreed water rights to about 26 cubic feet per second, which in the grand scheme of the system does not make up a substantive portion of the water rights appropriated for irrigation within the system. Overall, our interests directly align in the sense that the more water is flowing through the Lower Walker system, the healthier the river corridor is through the reservation as well.

Senator Hansen:

Good. I hope it will be a win-win for everybody.

Chair Carlton:

Are there any other questions from Subcommittee members?

Seeing none, we will now move on to the next agenda item. Agenda Item VI, which is a presentation from the Great Basin Water Network.

AGENDA ITEM VI—PRESENTATION ON WATER CONSERVATION EFFORTS IN NEVADA

Chair Carlton:

We will now move on to the next agenda item, which is a presentation from the Great Basin Water Network.

Kyle Roerink, Executive Director, Great Basin Water Network:

I want to start my presentation with some good news. Yesterday, I drove through Gold Butte National Monument then through Grand Canyon-Parashant National Monument down to Lake Mead National Recreation Area. I went to Grand Wash Bay, which on my maps and even on Google is a big blue dot, but when I got there, it was gone—there was no blue there, but there were a bunch of dead tamarisks, quagga mussels, and zebra mussels. I wanted to use that as an example to talk about what is on paper versus what is happening in reality. On my maps, you see a big blue dot there, but if you go there, you see nothing. This is our challenge throughout the state (Agenda Item VI).

The other bit of good news is that SNWA, Commissioner Jones, and General Manager Entsminger worked with Assemblyman Howard Watts III to put forth great things last legislative session that are making a change down here. I want to thank them and the Legislature for taking that action. As it relates to our 256 groundwater basins, the folks in the State Engineer's Office have among the toughest jobs in the state, and I think there is a question of what we are going to do. Nevada can put a feather in its cap in a lot of areas, especially in southern Nevada, but we also must be conscious of what neighboring states are doing.

I am going to be talking about Utah, which is where my organization is doing a lot of work now, but I would be remiss not to also discuss the issues that we face here, because we are in a bit of a bind. Right now, we are seeing litigation all over the place, on the Humboldt River, in Diamond Valley, and now in the Lower White River flow system. I would

advise all lawmakers going into the upcoming session to read Order 1309 as well as the opinion that came out of the district court and be grounded in that as we go forward. There are going to be some difficult conversations, and I think the question is, what do we need to bolster the state engineer's ability to curtail? Whether you like it or not, we do work within the system of prior appropriation. It has been the system for more than a century, and if you are not able to curtail, what good is the system as it relates to protecting those senior rights and the public interest, which is also a provision of the law? I do not think it is spoken about enough.

Do we need to figure out ways to give the state engineer more ability to curtail? Do we need better perennial yield figures for our groundwater basins? Absolutely. Do we need to redefine basins, and can this be done equitably within the confines of the existing system? These are hard questions we must ask ourselves, and it needs to come back to the issue of whether we can do it equitably for existing rightsholders, the environment, and all other parties. That is going to be the challenge.

All that considered, I wanted to talk about what our neighbors in Utah are doing. If you look at the big picture, they have not faced the same reality check that we have experienced. I want to let you know what we are dealing with as an organization that works both in Nevada and Utah and what the effects could be in Nevada. Whether it be reduction in surface flows or reduction in groundwater flows, what happens there ultimately impacts Nevada communities.

I will first discuss the Cove Reservoir in the East Fork of the Virgin River. When you look at the King County Water District and working in partnership with Washington County, which is where St. George, Utah, is located, they want to put a reservoir there about six miles up north near Orderville, Utah. The East Fork of the Virgin runs through Zion National Park and ultimately flows into Nevada. It is an important Colorado River tributary. This project would create a reservoir that would hold about 6,500 acre-feet a year. It is currently being reviewed by NEPA at the federal level, with NEPA overseen by the Natural Resources Conservation Service within the USDA. I was up at the East Fork of the Virgin River this weekend and it seemed more like a babbling brook than the fork of a mighty river. For Nevada, I wonder what it means about those flows coming into the Virgin which serve our communities down here. This reservoir would serve residential communities in St. George.

Regarding the Lake Powell Pipeline, the project has stalled in federal permitting after major backlash during the draft environmental impact statement (DEIS) process in the summer of 2020. I do not think anyone believes right now that they are going to be moving forward this summer to stick a pipeline in Lake Powell to get water for St. George or Washington County, but one or two big winters can change peoples' mindsets, causing them to lose touch with reality. It is a massive project. The Bureau of Reclamation has yet to withdraw the application for the communities around St. George that have been pushing for this project, but I do not think anyone thinks that a spare 28 billion gallons exist annually on the Colorado River right now. I will tip my hat again to the SNWA, who submitted thoughtful comments on the DEIS, but I think as we can all understand that if you stick more straws in the reservoirs around here, you are going to see more declines of Lake Mead.

There are currently 18 new Washington County water rights applications, with all the proposed points of diversion following along I-15. This is a fully appropriated basin, meaning that it has gone through adjudications. They do adjudications a little differently in Utah, but parts of the basin have already been adjudicated, while there are other adjudications that have been going on since 1980. I call this the "hocus pocus" water, because they think

that a spare 12,900 acre-feet actually exists, and though there is not a lot of science to demonstrate that, it is being proposed by the Washington County Water District.

When we talk about groundwater, it is important to realize that it is likely already being used somewhere else, so if you were to start pumping that quantity of water—about 4.5 billion gallons every year—you need to consider what harm that may be causing. A couple points of diversion are near important tributaries to the Virgin River, so we must be cautious about that, and our organization is paying very close attention to tributaries like Ash Creek and LeVerkin Creek.

This speaks to a bigger trend, especially with the Lake Powell pipeline situation. There is going to be a push by southern Utah to get more water for their rapidly growing communities, but it is important to note here that Utah is not engaging in the sort of conservation efforts that are happening here in southern Nevada. I have been yelling and screaming about this, and we are working on it, but again, we are not seeing that effort statutorily. You see a lot of public relations and a lot of gimmicks, but when it comes down to brass tacks, it is not being done the way that it is done here. I do not think anyone would disagree that the way that it is being done here is world-class.

The Pine Valley Water Supply Project is near Great Basin National Park, south of Snake Valley. This would be a three-phase project: phase one is in Pine Valley, phase two is in Wah Wah Valley to the east, and the potential phase three is in Hamlin Valley. The blue arrows on the map indicate groundwater that flows northward all the way to the Great Salt Lake, which the USGS has demonstrated over the years through the Barcus Creek studies and other research papers.

What worries us about this proposed project is that phase one and phase two would pump about 27,000 acre-feet a year from along the Nevada-Utah borderline. The USGS modeling of this pumping shows major impacts to Nevada. White Pine County is involved, and they are fighting along with the Confederated Tribes of the Goshute Reservation. We are working with the Indian Peaks Band of the Paiute Indian Tribe of Utah and the Millard County, Juab County, and Tooele County, and both Salt Lake County and the Great Salt Lake Advisory Committee have also submitted comments, largely in opposition. We are working closely with Beaver County in rural Utah as well, and the project proponent is for Iron County in Cedar City.

There are new homes going up everywhere with green lawns, and voluntary conservation efforts are not always effective. If you politely ask someone to do something, they are not necessarily going to do it, but they have a model here in southern Nevada and they are not following that playbook.

The modeling done by the BLM has largely excluded Nevada. They have put the potential area of impact in a box, and this was a major part of our NEPA process. Comments were submitted by White Pine County, several grazing organizations, 22 nongovernment organizations (NGOs), many of them, like Patagonia, that are based in from Nevada.

The USGS data are showing up to 50 feet of drawdown in Snake Valley and Spring Valley. You can put a lot of numbers in models, and we have had experts review the USGS modeling to try to pinpoint the time it could take to see this amount of drawdown, but we do not know, and it gives you a lot of trepidation when you hear about that type of pumping. There are alternatives to a massive expensive project like this, but I think they are not willing to deal with that.

This is happening on the doorstep of the Great Basin National Park, Nevada's agricultural communities, and sacred tribal lands. It could be powerful if the Nevada Legislature put forward a resolution clearly opposing this project and standing up for Nevada communities and for our special places like Great Basin National Park.

I am happy to answer any questions you may have.

Chair Carlton:

Are there any questions from the Subcommittee?

Mr. Jones:

My dad lives in St. George, and it is a beautiful area with lots of functional turf and nice interconnecting parks and trails. I am jealous of that, but also, they are masters of watering sidewalks like nobody else. Every time I go there, I think, "Wow this sidewalk is going to grow because they water it so well." Is anyone in Salt Lake City listening to the cries for conservation?

Mr. Roerink:

There is a mindset crisis throughout the State of Utah. The most applaudable effort they put forth in the 2022 Legislative Session was what they call a "secondary metering effort" to start metering water coming out of creeks and streams high off the mountains. They were not doing any of that, but I think they put about \$5 million toward turf removal. We know it is expensive, but we also know the first, second, and third cheapest options for conservation are conservation, conservation, and conservation. That is what we are dealing with there, but there is hope, and there are a lot of people in Utah who want it. We are going to be out there on the front lines, and we will show them the playbook that you all are crafting.

Senator Hansen:

On the Lake Powell Pipeline, we heard a presentation earlier and it sounds like Utah, Colorado, and Wyoming are only using about half of their current legal allocation; would Lake Powell's 86,000 acre-feet fall within the parameters of what they are allowed to use anyway?

Mr. Roerink:

That is what they think. The gentleman from the Bureau of Reclamation prefaced his comments by saying this was complicated due to the difference between how rights work in the Upper and Lower Basin. Upper Basin rights are based off percentages, while in the Lower Basin, we have exact rights—we have our 300,000 acre-feet. The Upper Basin is already overusing the amount of water they have, and there has been great research done on this subject. I think the Lake Powell Pipeline's water right is nothing but a paper water right.

Senator Hansen:

I am curious because if I was a Utah guy, I would be saying, "Okay, you guys have three straws down there to get to your 300,000 acre-feet of water from Vegas, but now we have the equal legal right to a certain number of acre-feet. We are going to put a pipeline into Lake Powell, and you Nevada guys are bellyaching about it, but we are not even using half our current allocation off the Colorado River."

Mr. Roerink:

That is why I started out my presentation today talking about the gap between what is on paper and what is really happening. There are a lot of very strong arguments against a project like the Lake Powell Pipeline, and there are things that I can say that others who are at the table right now cannot, largely because we need collaboration right now. We do not need litigation, nor do we need everybody with knives out.

Chair Carlton:

We appreciate the fact that some folks in the room can say certain things other folks cannot. Being able to have a full record and an honest conversation about this is important, because if we had not had an honest conversation 20 years ago about digging that tunnel and putting in that third straw, look at where we would be today. We appreciate folks being willing to put their statements on the record.

Mr. Roerink:

For the record, I did thank former General Manager Pat Mulroy for her foresight on that, because, again, look where we are today.

Chair Carlton:

We will move on to the next agenda item. Agenda Item VII, which is a presentation on issues at Lake Mead.

AGENDA ITEM VII—PRESENTATION ON PUBLIC LANDS ISSUES AT LAKE MEAD

Chair Carlton:

The next agenda item is a presentation on issues at Lake Mead.

David Alberg, Chief of Resource Management, Interpretation, and Compliance, National Park Service, DOI:

I have been a Nevada resident and a National Park Service employee for a year and a half; prior to that, I lived in Virginia and worked with the National Oceanic and Atmospheric Administration, U.S. Department of Commerce, for about 15 years. Our family made the decision to move out West, and I certainly picked an interesting time to be joining the Lake Mead team.

Chair Carlton:

Welcome to Nevada.

Mr. Alberg:

I was asked to speak generally about what we are seeing in terms of the pace of recreation at Lake Mead and how that has been impacted both by shifting visitor use patterns and the ongoing low water, but I thought I would talk briefly about some of the things that make Lake Mead extraordinary beyond just the water [unintelligible] for boaters, which is, of course, what many people know us for.

The Park Service's mission is to preserve unimpaired the natural and cultural resources and values of the National Park System for the enjoyment, education, and inspiration of this and future generations. We have been involved with Lake Mead since the 1930s, and the Park Service has had a related role from the time the dam was constructed. In 1967, Lake Mojave was added, and Congress designated us as the first national recreation area in the country.

From the Park Service's perspective, the Colorado River, which has been the subject of this morning's discussion, has great importance. We have several Park Service units along the Colorado River: the Rocky Mountain National Park in Colorado, Dinosaur National Monument within Black Canyon of the Gunnison National Park, Curecanti National Recreation Area, Arches National Park, Canyonlands National Park, Glen Canyon National Recreation Area, Rainbow Bridge National Monument, Grand Canyon-Parashant National Monument, and, of course, Lake Mead. All told, these parks sit along over 1,000 miles of river, drawing over 26.8 million visitors a year and generating over \$2.33 billion in revenue. In terms of recreation, the Colorado River is very important, not just to Lake Mead, but to the larger park system.

At Lake Mead National Recreation Area, we average about 8 million visitors a year, making us the fifth most visited Park Service unit in the entire system, encompassing about 1.5 million acres with more and more becoming land each year. We are sandwiched between two states—Nevada and Arizona—and contain both Lake Mojave and Lake Mead. The construction of the Hoover Dam is what created Lake Mead, and the Hoover Dam and its visitation is certainly important, but beyond the water, looking landward towards the other places in the park, we have incredible opportunities for recreation that are unaffected by the declining lake levels. In the weeks and years to come, you will hear about the Park Service's efforts to shift gears to make sure that we do not abandon recreation as we have known it, but to further embrace opportunities that will be available as the water declines.

In terms of resource management and cultural resources, we have incredible archaeological sites, prehistoric and historic cultural landscapes, traditional cultural properties, ethnographic resources, and a significant museum collection. Although we do not have a museum ourselves in the Park Service, we support museums around the country. Our archaeological records and resources include 185,000 submerged acres and approximately 1,000 terrestrial archaeological sites, though only about 5 percent of the park has been fully surveyed; there are probably tens of thousands more, many of them currently underwater, that will reemerge as the lake level goes down.

We work with 18 tribal nations that have a history or current association with the areas within Lake Mead. The Park Service is working harder to shift from only working with those tribes when there is a complaint or a legal requirement to do so to recognizing that these lands belonged to other peoples long before the Park Service or Western settlers came into the area. Our goal is to learn from them as well, not just in terms of partnership, but in terms of recognizing how their traditional knowledge may be beneficial in our efforts to better understand and wrestle with the changes in the environment we are currently seeing.

I mentioned prehistoric resources, referring to everything from artifact scatters to rock art, rock shelters, pueblos, and in some cases even living resources. The grasses at Rogers and Blue Point Springs up near Overton, Nevada, are a relic community of grasses that existed when Tooele Springs had mastodons living and moving through that area. Although it is a very small area, it is an incredible place that we will be working to interpret more.

Historic resources include the Hoover Dam and sites that predate it: army forts; towns like St. Thomas, Nevada; ferry crossings; and ranches all still exist submerged under Lake Mead. We also have famous resources underwater like the B-29 Superfortress airplane that crashed into the lake in 1948, which has been protected since its discovery in 2000 by hundreds of feet of water, but is now less protected, probably within roughly 60 feet of resurfacing. These are all things that the Park Service is deeply concerned about.

Lake Mead National Recreation Area also protects modern era National Park Service sites. Our headquarters building in Boulder City is on the National Register, and we oversee Mission 66 sites, which were part of the efforts to rebrand the Park Service back in the 1950s and 1960s, and campgrounds that are preserved and interpreted by the Park Service. As I mentioned earlier, we also oversee museum collections containing over 100,000 objects, and we support university museums and other museums across the country.

The big issue for us of late is the declining water and its impact on water-based recreation. We have seen significant drops in the past two years; since 2000, we have averaged roughly 12 feet of drop a year, but in the past two years, that has accelerated closer to 25 to 30 feet of drop per year. The Park Service is working to deal with that, but one of our biggest challenges is the rapid rate of decline, because by the time a plan is developed and funding is secured, we run the risk of building bridges and ramps to nowhere. We may complete a project, but by the time it is completed, it may serve nobody.

Our short-term solution has been moving what we call "temporary launch facilities" to locations that we can access, which allows boaters access to areas like Hemenway Harbor, but if you look back to 2000, the Park Service had roughly 50 lanes of access into Lake Mead; today, we have two. We had ten launch ramp facilities in 2000, but today we have only one at Hemenway Harbor. We will be working to hopefully relocate places in Echo Bay and some other areas, but again, while we have good plans, the challenge is certainly the planning time needed to interface our plans with the speed with which the water is dropping and the reality of bathymetry and topography complicates things. We have people who see areas and say, "Why can you not extend the ramp further out?" The reality is that in many of those places, the angle at which the lakebed drops is too shallow, so you would have to drive in. You see it often at Hemenway Harbor, where people are flooding their cars trying to get out to the water as best they can. In contrast, there are areas created by the Colorado River gate areas that were once canyons, and now the lakebed drops off so much that it makes any potential construction significantly more difficult.

We may have less on the Nevada side than in Arizona, but communities like Mead View that have sprung up and see their identity as being tied to lake access have been impacted, and it poses challenges in those areas where that access is diminishing. It also impacts the local economy, harming concessionaires and business owners who operate the marinas, business owners in Clark County, boat manufacturers, boat sellers, and marine suppliers who provide recreational equipment for people.

From the resource management side, while many visitors access the lake on those authorized ramps, there are others who try to get in at unauthorized locations, which can cause significant damage and personal safety issues. We had a lady who was stuck up to her waist and sunburning, and we literally had to go out with ladders to get her unstuck. The shoreline may be here, and the mud might look dry, but the soil is so wet and damp that you could sink up to your waist, and when people are trying to get trailers into those

areas, it poses a risk for them but also a challenge for the Park Service to respond to those situations.

On the positive side, this is an incredible place with landscapes that cannot be seen anywhere else in the world. We have a rich cultural history, both current and historic, between the tribal nations that have occupied this area and our modern history. As the Park Service works to continue this access to water, we are looking for ways to bolster those recreational opportunities with new trails, trail enhancements, and new interpretations to bring people to this area. We want to make sure they have an enjoyable experience, and we hope we can begin to shift them away from the "traditional" view of access to the lake with big houseboats by promoting kayaking and smaller watercraft that can get onto the lake more easily and for a longer period of time.

I suspect you probably have some good questions, and I would be happy to answer them for you.

Chair Carlton:

Going back to the statement you made about the B-29 Superfortress. Could you elaborate on that a little bit more? I heard about this plane years and years ago, but I had totally forgotten about it.

Mr. Alberg:

In 1948, a B-29 Superfortress airplane was doing a very low flight on a military operation when the pilot was blinded by the glare off the lake and hit the water. The crew survived, but the plane was lost until the early 2000s. It is protected by several state and federal laws and is an important resource. When it was found in 2000, it was in pristine condition, but by 2005 or 2006, quagga mussels had begun to impact its condition.

What kept it a pristine archaeological site was its depth; at 250 feet below the lake's surface, only very skilled technical divers could get down to it. The public is not allowed on the site, but the Park Service issued a personal use authorization that allowed a couple of dive companies to escort divers to view the plane. We issue permits for about 200 divers a year to see it if they follow the old "leave only bubbles, take only pictures" policy, which has allowed us to monitor the site and keep it in good condition.

Now, more than 20 years since its discovery, the concern is that as the water level has dropped, the plane's location is better known than it was in 2000. A quick Internet search would probably give us the coordinates of that location pretty fast, and while we do not keep it a secret, we do not broadcast it either. In addition, with lower water levels comes increased temperature, increased oxygenation, and, ultimately, more rapid corrosion and decay of the site, not to mention the potential that once you are down within 50 to 60 feet of recreational dive depths, anybody with a boat can scoot out there very quickly and do what they are going to do.

The B-29 is a very high-profile resource on the lake, but I think it is important for me to communicate the message that it is one of thousands of resources that are beginning to be found. Most recently, there was the terrible discovery of an individual in a barrel, and within a week another private group—probably with all good intentions—put out word that they would offer a \$5,000 reward for anybody else who could go out there and look for other human remains.

The problem with that is there are literally hundreds of objects and artifacts, including 50-gallon drums, that were left over from the construction of the Hoover Dam; they are archaeological resources that, to the untrained eye, look no different from the barrel that was found down in Hemenway Harbor. From the Park Service's perspective, we do not want to see people trying to help us do advocational archaeology and potentially ruining sites.

Our staff are recovering hundreds of yards of shoreline every year as the lake level continues to drop, and Native American sites and other archaeological sites are reemerging back from the lake faster than the Park Service can survey them. Our concern is to make sure we are getting out the message that if the public finds sites they suspect may be important, that they do not touch them. Instead, they should notify the Park Service so we can get in there and document them properly. A lot of these sites are reemerging in areas below the lake level where people are, in some cases, operating all-terrain vehicles and ripping around, and it poses some challenges.

Chair Carlton:

I hope you can get the message out a little bit better. I have not seen a whole lot about it, but this conversation has been going on as we have watched how the bathtub ring expands all the way down into the lake. The public needs to understand this better and respect it to give us a chance to recuperate anything you find.

Mr. Alberg:

I agree. Another takeaway I want the public to understand is that the Park Service does not manage the water on Lake Mead—that is done by the Bureau of Reclamation—but we do manage the recreation on Lake Mead. We are at an elevation of about 1,048 feet today, and we anticipate that dropping closer to about 1,035 feet by the fall. Each month, the Bureau releases numbers indicating a most probable and a least probable lake level. These models diverge the further out you get in time, but what we have seen is that often the least probable is the most accurate number. It is possible that we could get down to 1,010 feet by the end of 2023.

When you start talking about dead pool and the ability to generate power, we are getting to unprecedented lake levels and some significant infrastructure investments to try to keep up with that. The biggest challenge is to make sure we are not wasting taxpayers' money and investing that money wisely so we can get more than six months' worth of water access in those places and then we are back high and dry.

Vice Chair Scheible:

I think we all understand if you are looking at an actual bathtub and you are draining the water it comes from the drain and the whole bathtub level decreases by an inch or a foot or whatever it is. I imagine that on Lake Mead it is much more complex than that because it is not a perfectly round container with an even bottom to it. Have there been challenges associated with predicting exactly where the water lines are going to shift? Is that science sound, allowing you to predict that this shoreline is going to increase by 10 feet and this other shoreline is going to increase by three feet? Or have you been surprised sometimes and thought that one area would be less affected, and it turned out to be more affected, or vice versa?

Mr. Alberg:

You hit on an important point that the lake is generally V-shaped; ten years ago, losing a foot of water did not result in the same shoreline that we are seeing now with a foot of water decline; it is accelerating more and more. We are working to try to find new technologies, because so much survey work would be required to get an accurate snapshot of that at any given time, that by the time you surveyed it, you would have to do it again. We have a group working with us to use current Landsat satellite imagery to take monthly snapshots so we can begin to adjust our maps, our public information, and ultimately feed both to places like Google so they have a more accurate representation of what we are seeing on the ground.

To your question, we can predict it well. We are not alone in this, but the big challenge is trying to predict where the lake level is going to be beyond 24 months. The plan for low water we included in one of our most recent environmental assessments could have resulted in hundreds of millions of dollars of investment. We thought that would last many years, but I do not think that is the case, and I believe that, had the trigger been pulled, we would see potentially large investments that would not get you that much time.

The challenge is trying to figure out where we can put the money to serve most members of the public. The shoreline is important, but it is less significant to us in terms of trying to predict the lake level, because we are trying to pinpoint where we can get enough angle for ramp extensions to get people into the water.

Chair Carlton:

Are there any other questions? Seeing none, thank you for being here. I know the lake is important to the Las Vegas Valley and a lot of the surrounding areas.

We will now take a break.

AGENDA ITEM VIII—PRESENTATION ON THE TRUCKEE MEADOWS WATER BASIN

Chair Carlton:

Our next agenda item is a presentation from the Truckee Meadows Water Authority.

John R. Zimmerman, Esq., Assistant General Manager, Truckee Meadows Water Authority (TMWA):

I would like to begin with a quick overview of the TMWA. Our annual water demand is about 83,000 acre-feet, and that is predominantly Truckee River water, but we also have groundwater resources. One thing unique to TMWA is that we have three operating run-of-river hydroelectric plants that reduce our customer cost by about \$3.5 million on an annual average basis, so it is a significant resource for us ([Agenda Item VIII](#)).

Next is an overview of the Truckee River system that highlights how fortunate we are in the Truckee Meadows to have significant upstream storage starting with Lake Tahoe. Donner and Independence Lakes are two of TMWA's privately owned storage reservoirs that we rely on when there is a drought on the system, and we also have the Stampede and Boca Reservoirs. On average, the Truckee River creates about 80 percent of TMWA's water supply, and about 20 percent is groundwater.

We are also investing in supplemental creek water. We finished the Mount Rose Water Treatment Plant, which will treat creek water and distribute it to customers in that area, and that will help because there was significant over pumping when Washoe County had the water system in that area, and it really drew down the groundwater levels. Since TMWA has taken over, we have pushed more surface water into that area, which has allowed us to rest those wells and that aquifer has really rebounded. The Mount Rose Water Treatment Plant will further that, because in the shoulder months when that plant is operating, we will be able to deliver that treated creek water to our customers and rest those wells.

We conduct groundwater aquifer storage and recovery, so in those shoulder months when there is plenty of Truckee River water and our demands are low, we are injecting treated Truckee River water into our aquifers. We operate in nine different groundwater basins and that helps us be able to keep those aquifers sustainable so that when there is a drought, we can use more of that water.

In a normal year, TMWA takes out about 3 percent net of the Truckee River's water, with the term "net" referring to consumptive use. We divert a little more than that from the river, but a portion of that water returns to the river through the wastewater and water reclamation facility east of town. In a drought year, however, that percentage goes up to about 9 percent, and that highlights the benefit of the Truckee River Operating Agreement (TROA) and its importance to the region, because it allows us to continue to draw the same amount of water we need. We are not drawing more water from the river; it is a higher percentage.

As you probably all know, we have experienced the third straight year of below average snowpack, and over the last 40 years, there has been this boom-and-bust cycle of wet years and then dry years. Part of the reason that TROA came into being was to help TMWA and other parties on the system operate and be able to rely on our upstream storage and groundwater recharge to get through those dry years.

The water year starts October 1, and we had good rainfall in October, a great December, and then all of a sudden, the storms spigot shut off. We came into the year at 225 percent of normal and proceeded to have the three driest months on record—January, February, and March. We had a little bit of extra snowpack building in April that helped us, and right now, we are projected to have normal Truckee River flows through September even into early October. We can rely on those normal river flows and not have to release upstream storage.

Looking at our upstream storage highlights that by mid-July, we estimate that we will have about 67,000 acre-feet in upstream storage, and when you consider that our annual diversion from the rivers is around 73,000 acre-feet, you realize that we have a lot of upstream storage. This is all credited to TROA, which allows us to store that water in dry periods, and when it turns into a wet period, that water spills over and becomes fish credit water available for the Pyramid Lake Paiute Tribe to use for their fisheries. That was TROA's grand compromise.

Even though we have all the upstream storage, it is helpful to have perspective on how much upstream storage we have relied on to meet our customer demand and how often we have to do that. It is not that frequent, so even though we have quite a bit of upstream storage, we do not rely on it that often. On the Truckee River system, we have been dealing with droughts for the entire history of the system. Before the Truckee River decree was adjudicated, we went through a severe drought between 1928 and 1934. The parties

involved at that time were going through drought and its attendant shortages, but this river did not begin as an overallocated system.

Since 2000, our customers have reduced their water use by 30 percent even though our system has grown by about 30 percent, which demonstrates how TMWA operates our system and how we provide water for new development. In 1977, there was another severe drought, and back then the utility was owned by the Sierra Pacific Power Company. They enacted a rule requiring all new development to dedicate water rights, and oftentimes in the Truckee Meadows, those are decreed Truckee River rights. If you have a project, no matter what it is, and you want water service from TMWA, you must dedicate sufficient water rights for that use, and there is only a finite supply of Truckee River water rights. It has helped allow TMWA to operate in a system that is sustainable, and along with our upstream storage reservoirs, it helps us get through those severe droughts.

The key takeaway here is that even though we are fortunate to have a very resilient water supply, we are not resting but continuing the hard work that our predecessors have done before us, like acquiring Donner Lake and Independence Lake or continuing with “forecast informed reservoir operations.” That is a fancy way of saying we are going to try to work with the Bureau of Reclamation and the U.S. Army Corps of Engineers to retime when we can capture runoff, because if climate models are correct, we might have more precipitation falling as rain instead of snow and falling sooner in the year than later. We want to be able to retime those reservoirs and be able to store water sooner, because right now, they double as flood protection reservoirs, and we generally cannot store water until the month of April. In the future, we are going to try to store water earlier in the season.

We are currently in the process of replacing all our old water meters with advanced metering infrastructure (AMI). Our service territory is pretty much fully metered at this point, but once they are installed in our system and up and operating, these AMI meters will allow customers to look at their water use in real time to be able to set leak alerts at a certain amount—say, more than 500 gallons in a couple days or a week. I think you will also see it drive down customer water use, because they will pay closer attention to their water use. Our customers can also call our water conservation consultants who will go out to their homes and help them investigate where they might have a water leak, whether it is a leaky toilet or a water leak in their irrigation system, and our customers find that helpful.

Other projects we are doing include the Tahoe-Reno Industrial Center (TRI) General Improvement District (GID) treated effluent pipeline. The TMWA is not a wastewater reclamation provider, but we are partnering with the cities of Reno and Sparks, which operate the largest water reclamation facility in the Truckee Meadows. They have entered into an agreement to provide up to 4,000 acre-feet of treated effluent to the TRI GID for industrial cooling purposes, and TMWA’s role in the project is to ensure there is sufficient other Truckee River water rights left in the river for instream flow.

One thing that is unique to northern Nevada in contrast to southern Nevada is that historically on the Truckee River, agricultural rights were not fully consumed. Some of that water got back to the river, and downstream users and downstream water right holders both count on that water. You cannot continue to reuse that water even though it is going back through the water reclamation process. The TMWA will ensure there is sufficient substitute water rights in the river to make it whole for downstream users.

We are working with the City of Reno on an advanced purification water treatment facility. It is planned in the North Valley, and it will take treated effluent from the Reno Water Reclamation Facility and run it through another advanced treatment process to treat it to a

higher standard than even drinking water. That water will then be recharged in that aquifer as a groundwater bank for future use. As it goes through that recharge process, it also goes through another natural filtering process. It has a dual purpose: providing drought resiliency to TMWA while also providing treated effluent reuse for Reno.

Another interesting project is the Palomino Valley Recycled Water Study. Palomino Valley is in the Warm Springs Groundwater Basin, and our goal is to assist Reno and Sparks with their water reclamation facility delivered treated effluent as a substitute for the native groundwater in that basin that is currently being used to irrigate alfalfa. The concept is to use treated effluent for that irrigation while we rest those wells and that groundwater resource and send potable water out into that valley as a groundwater bank. Our preliminary investigation shows that there is about a 40,000 acre-feet hole in that basin from over pumping over the years, which equates to a reservoir the size of Boca Reservoir, but located underground where it is protected from evaporation and loss. If that project comes to fruition, it will provide more potable water and more drought resiliency to TMWA's system.

I will end on a cheerful note with the Ladybug Project. We are working with our partners at the U.S. Forest Service, the National Forest Foundation, and others to help prevent forest thinning and decrease the chance of a substantial wildfire risk in our upper watershed. That is where our upstream storage is located, so we have to protect it. With Independence Lake, there is a very good synergy with TMWA and The Nature Conservancy because TMWA owns water rights in that lake, but the Nature Conservancy owns the land around it. They protect it from development and any pollution getting into the lake, so it is real win-win for both of us. I am happy to take any questions.

Chair Carlton:

Are there any questions from Subcommittee members?

Senator Hansen:

How many private companies still exist? You bought up almost all of them, but I think there is one in Sun Valley and one or two other water providers.

Mr. Zimmerman:

Sun Valley is our largest wholesale customer. You would be surprised that there are several hundred private water systems remaining, though some of them are one-well systems supplying a restaurant or a business. The TMWA policy is to be proactive, and as we see those systems in need of water to grow, we look at consolidating them and using state Revolving Funds to assist with that consolidation. The goal is for TMWA to be the regional water manager and be able to use those resources as efficiently as possible.

Senator Hansen:

You have done a great job. I am a little surprised there are still so many, because at one time there were a couple dozen bigger ones that were almost competitors. From what I can tell, everybody is very happy with TMWA and its performance.

You did not cover groundwater recharge in your presentation. You mentioned 40,000 acre-feet in Palomino Valley, but how much do you currently have? As I recall, you have recharged most of the current aquifers in the area. Do you have any idea if the overall quantity?

Mr. Zimmerman:

Since our recharge program began operation in the early 1990s, we have recharged upwards of 35,000 acre-feet in all our different basins. Our current recharge rate is about three to four acre-feet a year, and our goal is to increase that to about 9,000 acre-feet over time. It is difficult to find a basin that will accept enough of the water, and there is also an associated cost, because you must treat that water before you inject it, but through active recharge or injection, we are trying to increase the efficiency of those aquifers.

Another big issue is our conjunctive use, where we can rely on Truckee River flows in the shoulder months and rest a lot of our groundwater wells. We have over 89 production wells in our system, so resting them allows an aquifer to recover and be there for us when we need it in a drought.

Senator Hansen:

You have done an amazing job, and I was shocked how rarely you use your upstream storage; I thought those reservoirs were drained down every year. One last question about Swan Lake in Lemon Valley. It is in my district, and we had a huge problem with the lake overflowing. Treatment plants were being built there at the same time people's houses were being flooded. Is there any hope that somehow TMWA can develop a well system or something to utilize some of that water, even as reclaimed water?

Mr. Zimmerman:

That is related to the American Flat Project. Right now, the Reno Water Reclamation Facility has a permit to discharge a certain amount of that treated effluent into Swan Lake, so part of that American Flat Project will be to take that effluent treated to advanced purified water levels and reinject it into the aquifer. That will allow that water another place to go besides to Swan Lake. Once it is fully operational, that project will also net about 2,000 acre-feet annually.

Senator Hansen:

It is ironic that everywhere else in the state we are having drought issues, and here I have an overflowing basin of water that could be utilized. I cannot win here.

Chair Carlton:

Are there any other questions from the Subcommittee?

Seeing none, we will move on to the next agenda item.

AGENDA ITEM IX—PRESENTATION ON THE VIRGIN VALLEY WATER BASIN

Chair Carlton:

We will move on to the next agenda item, a presentation from the Virgin Valley Water District. We heard about the Virgin River earlier, and we would also like to hear their perspective.

Kevin W. Brown, General Manager, Virgin Valley Water District:

In the late 1980s and early 1990s, the Legislature carved up Clark County into three water district areas. The SNWA has the primary responsibility for the eastern and most populous parts of Clark County; the Moapa Valley Water District has the central part in the Moapa, Logandale, and Overton areas; and the Virgin Valley Water District has the eastern part of Clark County, which covers Mesquite and Bunkerville.

I am going to talk about our water rights portfolio, our water system, what we are doing regarding water conservation, whether we have enough water—which seems to be the big question nowadays—and a summary and pictorial history of how the valley has grown over the last 30 years ([Agenda Item IX](#)).

Our water rights portfolio is 50 percent groundwater rights amounting to 12,271 acre-feet of permitted groundwater rights available to us, and of that, we are currently pumping about 7,200 acre-feet. We have surface water rights on the Virgin River through the Mesquite Irrigation Company and the Bunkerville Irrigation Company that own the water rights on the Virgin River. Like a lot of other entities in the area, we are shareholders in those two companies. We have springs up on the Virgin Mountains that the pioneers historically used. We are not currently utilizing them, but we have the water rights available to us.

We operate in Groundwater Basin 222, which is a little different than a lot of the water basins in Nevada in that we share it with two other states, the northern part of Arizona and the southeastern part of Utah, but we have the lion's share of the basin's land mass in which 12,271 acre-feet of water are permitted. We are relatively unique because there are not many other basins in the State of Utah that have multistate jurisdictions involved in water rights.

We currently have 9 production wells for our groundwater; we recently drilled 2 more production wells and are now in the process of equipping them, so we will soon have 11 production wells in total.

As for our surface water, as shareholders in the Mesquite and Bunkerville Irrigation companies, we have 8,820 acre-feet of water in our water right portfolio in our shares on the river. The main takeaway here is that we do not rely on the Colorado River or Lake Mead for our water supply. The Virgin River is a tributary of the Colorado River, and we own water rights on that river, but we do not rely on Lake Mead.

We have a high growth rate, and we get phone calls from people from across the nation looking to relocate to Mesquite and they ask if we are running out of water like they are in Las Vegas. That is all the press that they see, because unfortunately, Mesquite does not have a local newspaper, and even if they did, there would not be a whole lot of press on water issues. The only press they get is what comes out of the *Las Vegas Review-Journal* or the *Las Vegas Sun*, and of course it is not very good news. The main issue is we do not rely on Lake Mead for our water supply, and we do have water rights available for us.

Regarding the 8,820 acre-feet of water we do have on the Virgin River, currently, we are not using our water rights for any of our culinary uses. We lease the lion's share of that to either golf courses or the SNWA, which is the major water rights holder on the Virgin River with a current holding of about 83 percent, plus or minus a percent or two because they have been making some transactions lately on the river. The water we lease to them is part

of their 2 million acre-feet of banked water. We also lease to local farmers and golf courses in the area.

Our spring water is up in the Virgin Mountains, and we have about 2,500 acre-feet of water rights that we own. We currently are not using them but intend to as our groundwater portfolio becomes fully developed.

We are in the eastern part of Clark County. Our northern boundary is the line between Lincoln and Clark Counties, our eastern boundary is the Arizona-Nevada border, and our southern boundary is the Virgin Mountains near the northern edge of Gold Butte National Monument.

Our system is complex for a small water system, and we serve a growing population of about 25,000 people. The biggest issue in our area is that our groundwater is full of arsenic, which is not a healthy thing for people to consume, so we must build expensive treatment plants to remove it to beneficially use that water for human consumption. We also have a lot of pressure differentiation and elevation differences in the Mesquite area, and it is therefore difficult to manage the pressures in the area.

Interestingly, in the summertime you basically do not need a hot water heater for your house because we have very warm underground water. It comes out of the ground at about 80 degrees, sits in the above-ground steel storage tanks and gets a little warmer, and then passes through pipes embedded only about 36 to 42 inches deep in the hot ground to reach residents' homes. A lot of people choose to turn off their hot water heater in the summertime.

The public expects to use water for irrigation, sanitary purposes, recreation, and so on, and it takes a lot of resources for a water company or water district to provide all that stuff. If our water system did not exist right now and we hired a contractor to come and build our water system from scratch today—and this does not count current supply chain inflation issues—they would need to build a quarter of a billion dollars' worth of infrastructure to meet our current demand.

In terms of well production, from 1990 until the mid-2000s, before the economy crashed in 2008, our well production in Mesquite was growing at a healthy rate. Right after the economy crashed, things remained steady, but over the past five years, our rate of well production has begun to steadily increase.

Over the last ten years, right after the 2008 to 2012 crash when things started to recover, our population has grown over almost 50 percent while our water production has only grown by 10 percent; that is because all the homes that are being built in Mesquite are xeriscaped or desert-landscaped, so there is very little turf. In addition, because of some aggressive rate increases we had to implement in 2011 and 2015 to get our budget to the right size, a lot of people started tearing out their turf themselves because of the higher cost of water to irrigate it. We do have a four-tier increasing rate structure, which means that if you use a lot of water, you pay a lot of money for it, and a lot of people did not want to do that.

Regarding water conservation, we are roughly at about 106 gallons per capita per day for a three-quarter inch house meter, and our goal by 2035 is to get down to 85 gallons per capita per day. In comparison, SNWA's 2030 goal is to reach 86 gallons per capita per day, so we want to be right there as well. Tucson, Arizona, is currently at 82 gallons per capita per day, and I am not sure how they got there so fast, but they have done a remarkable job of getting to where they need to be. There has been a lot of talk about what is or is not

going on in Utah, and they are currently consuming about 300 gallons per capita per day. They have a lot of work to do regarding water conservation, and if they took a hard look at what they need to do, this is a place where they could start.

Do we have enough water? We did a master plan update in 2020 showing that based on the growth rate we projected at the time, our 12,271 acre-feet of water will be exhausted in roughly the year 2034. At that time, we will start looking at developing our Virgin River rights and spring water and determine if we need to also seek out other water groundwater opportunities that might be available to us.

There have been a lot of studies done on our basin over the last 30 years. State Engineer Jason King was in Mesquite in 2015 and Deputy Administrator Micheline Fairbank was there last year, and both felt comfortable with the groundwater rights available to us and our rate of pumping. They do not feel that we have an issue at this point like some of the other basins in Nevada.

Someone mentioned earlier that there needed to be updates to a lot of the state engineer's perennial yield studies. We are in the process of conducting our own perennial yield study that should be completed in the next three to four years, and hopefully some good data comes out of that study that will be helpful for the State Engineer's Office.

How do we know that our aquifer is okay and that we are not over pumping? We have precipitation gauges in the mountains, and most of our aquifer's recharge comes from the precipitation that falls in the mountains around us. We have only begun to see the effects of climate change on our aquifer within the past two years; prior to that, even though the southwest part of the United States has been in a 20-year drought, we have had a good 16-year head start on a lot of folks in the area.

We monitor the water levels in our nine production wells, and when we rest those wells, we measure how fast the aquifer recovers. We also have 16 groundwater monitoring wells around the area; we monitor those, and our groundwater has not dropped at all since we have begun monitoring those over the last couple of decades.

If you look at satellite imagery, in 1992, there was basically nothing north of I-15, and everything south of the highway was mostly farmland. By 2006, six golf courses had been built north of I-15, a lot of the agriculture had disappeared, and a lot of houses had begun to pop up. By 2017, one more golf course had been added, most of the agriculture had disappeared, and even more houses had appeared. We are good at growing houses here in Mesquite.

Looking forward, we plan on staying ahead of the growth by continuing to develop our 12,271 acre-feet of water, and as that gets close, we will utilize our other water resources. We will continue to invest in our current and existing infrastructure. We keep our metered rates and rate increases at 2.5 percent or less annually. We are getting ready to update our master plan for 2023 and our water conservation plan, and we hope to stay vigilant on our physical and cybersecurity issues because here are a lot of issues out there with cybersecurity. We are also dealing with a golf course that is trying to abscond with some of our water rights.

Our takeaways are that we are growing fast at a rate of 5 to 6 percent, our water resources are strong and capable to handle that growth, and water conservation is happening in Mesquite.

I am happy to answer any questions you may have.

Chair Carlton:

We heard earlier about the situation in Utah regarding what is going on how and how it could possibly impact you. Could you please expand upon that?

Mr. Brown:

Yes. The St. George Washington County area is directly to the east of us. They are currently using 300 gallons per capita per day, and they are running short of available water. I know they have been banking on the Lake Powell Pipeline to bail them out, but I do not believe that is ever going to happen. That is my opinion for a variety of reasons: (1) it is very costly; and (2) we are hearing a lot about climate change and the availability of water at Lake Powell. I think the political folks in that area and in the State of Utah need to take a hard look at water usage in the state and in that area and, frankly, do a better job of water conservation. Kentucky bluegrass is a beautiful, nice thing to have under your feet, but in the desert, it is not a smart thing to have.

Chair Carlton:

Are there questions from any other Subcommittee members? Seeing none, we can move on to the next agenda item.

AGENDA ITEM X—PRESENTATION ON THE CARSON WATER BASIN

Chair Carlton:

The next agenda item is a presentation from the Carson Water Subconservancy District.

Edwin James, P.E., General Manager, Carson Water Subconservancy District (CWSD):

I am going to give you a little background on CWSD because we are a unique organization, and then I will talk about the watershed since it is important to understand what we are dealing with in our situation before moving on to discuss our future plans. We do many different things, but I am going to focus mostly today on the water resource issue ([Agenda Item X A-1](#)) ([Agenda Item X A-2](#)).

Back in 1989, the Nevada Legislature restructured CWSD's purpose and goals to start looking at regional water system planning for the Carson River. At that time, CWSD included Douglas County, Carson City, and Lyon County. In 1999, the Nevada Legislature added Churchill County to the Subconservancy, and in 2001, through a joint exercise of powers agreement, Alpine County joined CWSD as a partner in the watershed. Last year, in 2021, the Legislature brought in Storey County, so we now have the entire watershed working cooperatively in this region.

As a side note, Alpine County and our board have been considering moving them from a partner to be more recognized in the organization, so there is a proposal to bring in legislation see if Alpine County can become an official member of CWSD. It is going to be interesting. We are also talking with legislators in California to see if there needs to be anything done on that side, too.

What do we do? The CWSD's mission is to promote cooperative action with communities to protect the Carson River Watershed, including everything from flooding to water quality to water supply—basically everything that goes into the watershed. We have two forks that start in Alpine County, the East and the West forks. They flow out of Alpine County into Douglas County where they form the Carson River, which flows through the Carson Valley, Carson City, and Lyon County before it reaches Lahontan Reservoir. From there, water is released and moves down into Churchill County. Later, I will talk about Silver Springs, Nevada, the town adjacent to the reservoir, detailing the situations we are dealing with in that area.

To give you some parameters on the Carson Watershed, the Sierras typically get over 40 inches of precipitation, but Churchill County gets less than 4 inches. We have an extreme difference of water coming down, but it depends on what we get every year from Mother Nature. Our critical source of water is the snowpack. The river is 184 miles long, beginning up in the Sierras at an elevation of 11,460 feet and ending at an elevation of 3,000 feet. We have five major groundwater basins in the Watershed, but we have limited upstream storage, less than 10,000 acre-feet in total when you add all the small reservoirs together. Our largest reservoir is Lahontan, which, when full, can store about 300,000 acre-feet of water. The river is fully appropriated, which means every drop of water has already been allocated. It is unique to the federal Alpine Decree, and is monitored, so if you have a dry year, the water is allocated and if you have a wet year, the water is also allocated. It is a unique process in place.

I want to talk about the Truckee Canal because it is a critical piece of infrastructure that brings water from the Truckee River over into Lahontan Reservoir. It was constructed back in the early 1900s and has been a key element to the Newlands Project, one of the first that was ever developed. I want to show you how important that Truckee Canal is to the Newlands Project. In water year 2021, for the of amount of water that entered Lahontan, 26 percent came from the Carson River and 74 percent came from the Truckee River, so you can see that the Truckee River is a critical element during dry years. In wet years, the Carson River can handle the entire demand, but in a dry year, they take more water from the Truckee River than they do from the Carson.

I want to address some of the water issues we are dealing with. As I mentioned before, the river is fully appropriated, so there is no additional water, and 95 percent goes to agriculture. Droughts and climate change are impacting our agricultural community, a critical element of open and free use space and recharge in this area.

There are five groundwater basins and every one of them is over appropriated, but the good news is that all but four are not being over pumped, so we have some leeway there. There is one basin that is very close to being over pumped. We have no large upstream storage, so it depends on what Mother Nature gives us. We had flooding in 2017 and we are now in a major drought; in theory we could be flooding in January and be in a drought in July, so we must learn to adapt our plans to be able to handle those possibilities.

We have some water quality problems, because when the water gets this low in the river, it is hard to maintain even a fishery. Part of this is supposed to be a cold-water fishery, but when you do not have any water in the river, it is very hard to maintain that.

Later, I am going to go into more detail about wet water versus paper water, because this is a critical element in our watershed.

Surface and groundwater interaction has become a hot topic, and we recognize it on the Carson and will talk about how we will try to deal with this in the future.

Climate change is having an impact on us today and we anticipate that it will continue to do so in the future.

In terms of growth, we have many people coming to the area, so we must grapple with how we handle the growing demand for water.

In relation to groundwater basins, we talked about perennial yield and have had studies done on all five groundwater basins. In our watershed, perennial yield is a good start, but it is not a good indicator of how much water is freely available. We are concerned about that, especially when you have a river that goes right through the groundwater basins. If you start pumping a lot of the groundwater, do you impact surface flows? If you impact surface flows, are you taking someone else's water downstream? That is a real concern from the lower watershed.

We work with 13 major water purveyors, and they are going to be able to meet the water demands this summer. A lot of people talk about the climate, or how low the water is, but I will assure you that right now, unless a well goes out, every water purveyor has enough water to meet their demands. In fact, the water purveyors are using less water today than they did 20 years ago, like what happened in southern Nevada. We are seeing less water being used, so we can stretch those waters further.

Now I want to talk about wet versus paper water rights in the Churchill Valley Groundwater Basin located near Silver Springs. According to the pumping inventory released by the state engineer, the committed groundwater rights for irrigation total about 3,500 acre-feet of water; 145 acre-feet of water rights are reserved for stock-watering, industry, and commercial use; and about 5,300 acre-feet for the quasi-municipal. In total, the Basin has 9,045 acre-feet of water rights committed to these various interests.

In 2020, when the pumping occurred, irrigation used about 365 acre-feet, or about 10 percent of what they had available. The same goes for the industrial and commercial, which only used 44 acre-feet, and the quasi-municipal, which used less than 500 acre-feet. The biggest user of the groundwater basin in that watershed is domestic wells. Though they do not need a water right, they do consume water, and they used 1,307 acre-feet. The grand total of water used in 2020 was 2,194 acre-feet.

The problem with this is the perennial yield is only 1,600 acre-feet. We are already pushing that envelope right now, and yet, you have a whole bunch of people with permitted water rights. Regarding quasi-municipal, I have been going there for 20 years and giving the same speech reminding people that you may have water on paper, but you do not have wet water. If you start trying to develop that water, either you are going to need to be far enough away from the Carson River that you are not going to impact it—but there is no water there—or you will need to get close to the river to pump it. If you do that, people downstream are going to fight you on it. The takeaway is that in that Basin, they only have so much water available, and they have probably reached the upper level at this point, so if we want to develop that area, we are going to have to find alternative water sources to come to that community.

The Desert Research Institute (DRI) studied runoff change and climate change for us in 2010. They looked at stream flow records on the East Fork of the Carson River upstream from almost every diversion. There is some storage above this point, but all the agriculture

and diversions of the river are below. They took records from 1941 through 1974 and 1975 through 2009 and compared the fraction of the flows that came down by each month, and you can see that in the month of March, our flows are now coming off more quickly than they were historically. There is more water now coming off in March than you saw in the earlier part of the period, and when you get to June it switches, and there is historically more water coming down than we see today. We are already seeing climate change impact our runoff, which raises the question of how to plan for that and meet those supplies if we have no upstream storage.

Now, we are developing a 30-year water resource plan looking at sustainability, infrastructure needs, and how to deal with droughts. We have a working group comprised of every 1 of the 13 major water purveyors as well as state, federal, and county irrigation users and other interested parties. If we are going to develop a plan that serves the whole watershed, we need to make sure everyone can participate. We had our kickoff meeting in April and we are continuing to move forward with that process.

We are utilizing some of the tools that have been developed over the last couple of years. The USGS has the Upper and Middle Carson River models. They were developed for other purposes, but they look at groundwater pumping and the interaction of surface water, so we can predict how it will impact the surface water if you put a well out there somewhere and start pumping the water. As we start planning and as the entities upstream start developing their resources, this tool will help us to see if those changes have an adverse effect. If they do, we need to identify them.

This 30-year plan will look at shortfalls and potential conflicts, and once we have identified those, we will start working on the infrastructure we will need, such as more pipes to move new water around to meet those needs to ensure that future planning does not adversely affect a neighbor downstream.

After we develop this plan, we will then look at more climate change scenarios. The USGS developed a couple future "what if" scenarios, and we will put that in, run the models again, and see if our plan still holds water as we move forward. Even though I focused on municipal water demands, when we do a study, we look at all major users. It is a balancing act of water resources, because if you take water from one and give it to another, you are going to adversely affect them. I call it a three-legged stool, and we want to make sure we have a balanced three-legged stool, so even though we have these plans coming in place for municipalities, we look at the environment and our agriculture to make sure we do not have a plan that is going to adversely affect another party as we move forward. A lot is going on, and we will be working on this plan for the next three or four years.

Are there any questions?

Chair Carlton:

At the beginning, you mentioned that regardless of whether it is a wet year or a dry year, all the water is allocated. Do you not have the opportunity to save up for a rainy day? That struck me as new, because I always thought that you had an opportunity for storage.

Mr. James:

The problem is, with no upstream storage, the runoff flows down and is lost. In 2017, we had so much water going down the Carson that the Truckee-Carson Irrigation District in Churchill County apparently had to scramble, and even though Lahontan can store up to

300,000 acre-feet, they had to move almost 900,000 acre-feet through that system in about four months. A lot of water flowed out into the desert and was lost because that was the only way to avoid flooding Churchill County and the City of Fallon, Nevada, and there was no way to store it upstream.

We have had people in the past asking why we do not build upstream storage, but the problem is, if you have a reservoir that is dry 99 years out of 100, you cannot justify the cost. Additionally, the environmental impact to build a large reservoir on a river is prohibitive—you cannot do it. If you look at every major reservoir being built today in the West, none of them are on a major stream. They are all off channel, because the environmental impacts are huge. We started looking at off-stream storage, which would hold a maximum of maybe 4,000 or 5,000 acre-feet, so we do have to live within our means. In 2017, every farmer was able to irrigate the upper watershed throughout the entire irrigation season, which was rare. Typically, by June, you start having juniors already going out of production. The system has been built on this for 100 years, and that is how we live with it, so it is a year-to-year operation. We do not have a terminal lake at the bottom, so we do not have to worry about that impact.

Senator Hansen:

Regarding wet water versus paper water, you cited 1,300 acre-feet for domestic use. Is there any recharge credit given? If you pull water out of a well, at a certain point, it goes into a septic tank and there must be a certain percentage of that water that will percolate back into that aquifer. The SNWA says they use 240,000 acre-feet and receive a 200,000 acre-feet credit for the recharge. Do you do anything like that for the Silver Springs area?

Mr. James:

We have not looked at that in detail. I am sure there is some recharge. We have other communities in the upper watershed that are all on wells and septic tanks. Their water tables are dropping, and their nitrate levels are going up because of the septic tanks, but if you got rid of the septic tanks and connected everyone to a sewer, the water levels would drop even more quickly.

We are aware of those issues but have not done a study up here; this estimate is more from the State Engineer's Office. They are allowed two acre-feet per domestic well, and they estimate an acre-foot of water being used there. Even though we are upside down a little bit, we are probably not going to have an impact today but if you start getting much higher than 1,600, you are going to have a real problem. The main focus of this is that people own a lot of paper water rights that they will never be able to develop and use.

Senator Hansen:

That is an interesting dilemma, because obviously you are recharging the aquifer, but you are doing it with polluted water. Have you ever read the book *Conflict on the Carson*?

Mr. James:

Yes, I have.

Senator Hansen:

This has been going on a long time; they have been fighting about Carson City water since the Comstock days. Back then it was the mills versus the upstream water users, so there is nothing new on this watershed as far as conflict and litigation.

Mr. James:

Hopefully we are a little ahead of the curve now. I have been told by the state engineer that we have fewer conflicts today than other watersheds.

Senator Hansen:

Yes, you guys have done a magnificent job. I do not know how many years you have been doing this presentation, but most of the time I have been in the Legislature, you have been the man when it comes to Carson River. You are the expert.

Mr. James:

I have been doing this presentation for 24 years.

Senator Hansen:

It seems to me you are doing the best you can, but it is a shame you cannot come up with some upstream storage like TMWA has at Independence Lake. Is there any possibility of using recharge systems in any of the aquifers in your five groundwater basins?

Mr. James:

We are already reusing our water 100 percent. Every major wastewater treatment has storage ponds where water is stored during the winter, and they typically use the water for irrigation for parks, agriculture, and golf courses. We also import quite a bit of water from Lake Tahoe because they cannot discharge it. In total, we have three major wastewater facilities that pump water over into our watershed, and we utilize all of those.

What is interesting is that during the droughts back in 2014 or 2015, Carson City ran out of water, but they did not run out of potable water, they ran out of reclaimed water. They had to take the parks' water off the reclaimed water and put them back on potable water because they had plenty of potable water but not enough reclaimed water to irrigate all the parks. Because of conservation, the amount of water going to the wastewater plant had dropped significantly.

Chair Carlton:

Are there any other questions from other Subcommittee members? Seeing none, we can move on to the next agenda item.

AGENDA ITEM XI—PRESENTATION ON THE HUMBOLDT RIVER WATER BASIN

Chair Carlton:

We can move onto a presentation from the Humboldt River Basin Water Authority.

Jeff Fontaine, Executive Director, Humboldt River Basin Water Authority:

Palisade is the hydrological divide between the Upper and Lower Humboldt River; above the Palisade, constriction of the flows in the Humboldt increase, so it is a gaining river, and below the flows decrease, so it is a losing river. This gauge is one of many on the Humboldt River operated by USGS and others, and it is used for determining and scheduling the delivery amounts of Humboldt River decreed rights ([Agenda Item XI](#)).

The Humboldt River Basin Water Authority was established in 1995 by Elko, Eureka, Lander, Humboldt, and Pershing Counties pursuant to Nevada's Interlocal Cooperation Act. It was formed to oppose a proposed export project in excess of 300,000 acre-feet of groundwater from the Upper Humboldt River Basin to the Lower Carson River Basin, and that application was ultimately denied. For the past 27 years, the board of directors has continued to meet to discuss water issues in the Humboldt region.

In terms of geography, the Humboldt River Basin sits entirely within the State of Nevada, has a massive drainage area of over 7,410 square miles, and is about 330 miles long, although others put the length a lot higher because of its meandering nature. The river terminates in a sink near the Churchill-Pershing County line, which is protected as part of the Humboldt Wildlife Management Area. Geographically, it is divided into an upper, middle, and lower division, and hydrologically it is divided into two basins.

The history of the Humboldt River is well documented as far as the river and valleys and its importance to early migration and the history of the West. Historically, the high flows in Humboldt River were documented at over 300,000 acre-feet between 1905 and 1925, but immediately following that, there was a substantial decline in flows from 1925 through 1935. As a result of increased demand and conflict between agricultural users, the state engineer started putting together an Order of Determination with the court, and ultimately Bartlett Decree was entered in 1931 and subsequent amendments created the Edwards Decree in 1935. These were state decrees, so there is no federal element in the management of the Humboldt River except that it is considered a "Water of the United States" and regulated in such by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers. Those decrees were based on irrigated acreage during a time of plenty of water and the most senior Humboldt River System surface rights date back to 1861, so practically all the junior groundwater rights after that are junior to those surface decreed rights.

You are all familiar with the economy of the Humboldt River Basin. Water is extremely important to all those economic sectors like mining and agriculture and, of course, the corridor is important for key infrastructure.

Regarding the characteristics of the river, there are 469,000 acre-feet of perennial groundwater yield and approximately 758,000 acre-feet of community-run water rights. Very little if any groundwater remains, 23 of the 34 groundwater basins are over appropriated, and all the groundwater basins within Humboldt River Basin have been designated by the state engineer. The bottom line is that long-term over pumping of groundwater in those basins is impacting the base flow of the Humboldt River.

Many factors are contributing to diminished flow in the Humboldt River. The loss of functioning riparian areas is creating problems with erosion, undercutting banks, and meandering of the river while also reducing the amount of groundwater recharge, floodwater retention, and overall storage. Decades of groundwater pumping have led to

increased capture of Humboldt River water and its tributaries resulting in conflicts with rights of the Humboldt Decree.

Warming trends have been talked about a lot today and certainly the Humboldt River region is no exception, with reduced snowpack and earlier runoff as a result of warming weather. During the period between 2012 and 2015, the Humboldt region experienced one of the worst droughts since 1902, and the annual flow at that Palisade gauge for that four-year period averaged about 82,000 or maybe 83,000 acre-feet, which is 30 percent of the historical average flow. This year, the Lower Humboldt precipitation water year—from October 1, 2021, to April 30, 2022—measured 104 percent of the median for precipitation, but the snowpack was only 79 percent of the median. In the Upper Humboldt region, precipitation was 90 percent of the median, but snowpack was only 37 percent.

In October and December, we had atmospheric rivers. Rain is good, but snow is a lot better because how much total winter snowfall you get at the end of the winter, how fast that snow melts, and when it melts are all important to the operation of the system as you have heard from others. It is the reservoir in the Upper Humboldt region, so less snow means less storage and a lot less uncertainty for the river. On top of that, there is the possibility that a lot of the snowmelt is being lost through sublimation, so it goes from snowmelt to vapor and is lost to the entire system.

The stream flow of Palisade from 1902 to 2021 is represented in six-year blocks, and on May 20, the streamflow at Palisade was 99 cubic feet per second or 89 percent below average. That peak flow typically occurs between May and June, but based on our graph and others, it appears the peak flow may already occurred in early to mid-April.

As far as storage is concerned, the only significant storage on the system is at Rye Patch, which is used at the lower end of the system for irrigation in Pershing County. On May 1, 2021, the storage capacity at Rye Patch was 29 percent, and on May 1 of this year, the storage capacity at Rye Patch was 6 percent. Storage is a big issue, and because there is no storage in the Lower Humboldt Basin except for Rye Patch, you must have adequate flows in the upper region to move water to Rye Patch, which did not occur in 2014 or 2015, and it is unlikely to occur again this year.

In contrast, during years of average or better flows, we have no storage to capture those flows. In 2017, about 300,000 acre-feet flowed out in the sink, and I believe that was the first year in many where the Humboldt sink and the Carson sink actually merged because of those overflows. Little to no storage capacity results in little to no drought reserve within the Humboldt River Basin.

Conjunctive management is another big issue, and the Humboldt region is a big test case for how you apply or implement conjunctive management on a system-wide basis. Conjunctive management has been utilized a lot by the state engineer in the past when you talk about individual wells and groundwater impacts on a stream or a river, but in the case of a large, complex system like this, it takes a lot of work, discussion, and thought about how to do this. The state engineer did issue Interim Order 1329, which attempted to implement conjunctive management for the system. That has been appealed, but probably the most important thing I can tell you is that we are seeing efforts by the state engineer to work with USGS and the DRI to put together capture studies that will help guide the implementation of that order. We also have some recommendations in here that we will bring back to the Subcommittee at a later date.

Chair Carlton:

I was reading through the recommendations and conjunctive management statements, thank you. Are there any questions from Subcommittee members?

Seeing none, we will move on to the next agenda item.

AGENDA ITEM XII—PRESENTATION ON CENTRAL NEVADA REGIONAL WATER ISSUES

Chair Carlton:

We will have a presentation from the Central Nevada Regional Water Authority.

Jeff Fontaine, Executive Director, Central Nevada Regional Water Authority (CNRWA):

The CNRWA is a regional government established by nine member counties, which collectively cover about 80 percent of Nevada’s land area, and a 23-member board of directors consisting of a combination of county commissioners and community members. The mission statement is to protect the water resources in member counties so these counties will not only have an economic future, but their valued quality of life and natural environment will be maintained ([Agenda Item XII](#)).

For a county to be a member of the CNRWA, it must have a portion of the Central Hydrographic Region within its boundaries. Within this region, there are 78 groundwater basins within 12 Nevada counties, and it is the largest of Nevada’s 14 hydrographic regions, covering much of central, eastern, and southern Nevada. It is characterized by the absence of regional surface water flows, groundwater basins that are often interconnected by subsurface flow, deep bedrock aquifers, and some productive alluvial aquifers as well.

Much like the Humboldt River region, the economy in the central region consists largely of mining, agriculture, and tourism. I want to highlight that tourism, and specifically outdoor recreation, is becoming an important element for rural Nevada’s economic sector, including the nine CNRWA member counties. Bodies of water are a significant outdoor recreation asset, and providing those water-based activities like boating and fishing brings quite a bit of revenue into the state and makes Nevada a great place that people want to visit or move to. Protection of water resources is an important component of outdoor recreation, especially for the CNRWA member counties.

The issues in the central region are no different than any other region you heard from today, and that is balancing the demands among various users—domestic, municipal, agricultural, and industrial—in dealing with various conflicts. This is a statewide issue, but within the central region it has intensified as well.

Regarding the protection of existing water rights, you all know what NRS requires in terms of the state engineer’s decision on water rights and what types of protections those with water rights have, but it is important to CNRWA members that no new permits are issued for a new water appropriation or a change of existing appropriation if there is going to be a conflict. Even if there is some interest in approving a new appropriation or change to try to mitigate that conflict, there should be no conflict, and I think we are quite resolute on that particular position. We are also concerned about interbasin transfers of groundwater from rural Nevada to urban Nevada, and I think that speaks for itself.

There is no escape from the drought in the central region. Most of the region is currently in severe to extreme drought, and with those higher temperatures or leading increase evaporation demand and decrease in the yields of the alfalfa and hay fields, pasture conditions are very poor and fire activities are increasing.

We are concerned with “buy and dry,” which describes a class of water transactions that typically involve a municipality or other local government paying the owner or owners of a farm for some or all their available water rights and agricultural water transfers. I believe it is a slow and rather invisible flow of water from the region’s agricultural industry heritage to meet the demands of urban growth. I think this phrase was coined in Colorado where the same thing is taking place, and it is another thing we are very concerned about in the central region.

Evaporative pond extraction of lithium was discussed this morning. As you know, Nevada is home to the only operating lithium mine in the United States, in Platte Valley. According to the Division of Minerals, lithium exploration in Nevada has drastically increased the past couple of years. They estimate almost 15,000 active, filed, and submitted placer claims located in Nevada in 18 different hydrographic regions, most in the central region and presumably for lithium brine. There is some concern on behalf of the CNRWA about the potential negative impacts that evaporative techniques used in mining lithium could have on groundwater levels and quality, and we will be continuing to work with folks to try to address that as well.

Regarding the over appropriation of groundwater resources, almost half the groundwater basins in the region are designated, and Diamond Valley is the only basin currently designated as a Critical Management Area. I am not going to get into that because that was discussed very well this morning.

As far as recommendations, we support increased funding to the DWR to restore staffing, update water basin budgets, adjudicate basins, and digitize data. In addition, we would request a consideration to restore the Water Basin Account, which was used to offset some of the State General Fund dollars for DWS this biennium. We also urge support for need-based funding for counties to prepare and update water resource plans, the result of [SB 150](#) (2019), which required all counties to prepare a water resource plan over the course of about ten years and keep those updated, and there are those counties that need assistance to and complete those plans.

Lastly, we recommend establishing county groundwater boards for over-appropriated basins. We have been working on this issue with the state engineer and will continue to seek a way to authorize local groundwater boards in the counties for over-appropriated basins so we can be proactive in the management of those basements and avoid them becoming critical management areas.

Chair Carlton:

One of your concerns is listed as “buy and dry.” Could you expand on that please?

Mr. Fontaine:

In other states, particularly Colorado, as urban areas grow, the water purveyors will buy farms from willing sellers, and it is not one farm but multiple farms. There are cases where entire communities have lost their farming operations to the point where it has become an economic problem for the entire community. I know Colorado is looking for alternatives to

avoid those types of scenarios playing out, and we want to make sure that in Nevada, we can figure out a way to avoid that happening in some of our rural farming communities.

Chair Carlton:

This is not referencing what we were talking about with the Walker River-type project earlier today. Or is that within that universe, but not quite what you were talking about?

Mr. Fontaine:

Quite frankly, I had not thought about it in those terms, but I guess that potentially could be an example of a "buy and dry" scenario.

Chair Carlton:

That is more of a restoration project than an attempt to take it off the books.

Mr. Fontaine:

That is right, and in that case, it is more of an environmental restoration project and probably more a case of returning water to where it originally flowed in the first place.

Chair Carlton:

I wanted to make sure that I understood the term. I had not heard anyone proposing anything like this, so I wanted to make sure we were all on the same page.

Assemblywoman Hansen:

I have great regard for CNRWA and the Humboldt River Basin Water Authority and given that Humboldt is quite a large representation of the state, I am glad to see you are trying to work it out together.

When we talk about an example of "buy and dry," I am thinking Owens Valley; is that what we think of as "buy and dry" where the water literally did go down to Southern California, while maybe with the Walker River, it went to a lake? Mono Lake took the hit on that if I recall correctly. I am curious about that.

Mr. Fontaine:

Back in the early days, "buy and dry" was not a phrase, but today you could probably apply that terminology to what happened in Owens Valley.

Assemblywoman Hansen:

You mentioned establishing county groundwater boards for over-appropriated basins. You mentioned in your comments that maybe we could work with the state engineer; what is the impediment? I would like to understand what keeps us from being able to do that.

Mr. Fontaine:

Last session, CNRWA made a recommendation to the Public Lands Committee to authorize the establishment of local groundwater boards or county groundwater boards in counties that had basins that were designated. The state engineer had concerns about that, so we have been meeting with the state engineer to figure out how we could come to agreement

on our interest, which is to provide a better opportunity for local groundwater users, the community, county commissioners, and whoever needs to be involved in those discussions locally to discuss and have some input into decisions that are made by the state engineer so the state engineer can hear those voices. We thought it was a pretty good idea.

The impediment right now is that there is already authority to establish local groundwater boards, but the problem is we do not want to do it that way because it would require those local groundwater boards to do certain things; it is in the NRS. That is not the intent here, but that is the way the statute reads, and we do not want to create any more delays. We want to provide input and have more involvement in those decisions. I hope we can work through whatever the state engineer's remaining concerns might be on that topic and bring a recommendation back to this Subcommittee.

Senator Hansen:

When did you get Humboldt County to finally join?

Mr. Fontaine:

Humboldt County joined about three or four years ago, and we are very grateful that they did because they only have a very small portion of one basin within Humboldt County, but they felt it was important to be part of the part of the CNRWA.

Senator Hansen:

I was glad to see it. I have not followed up on that in a while, and I remember talking to them to try to get them to join. Regarding evaporative pond extraction of lithium, Albemarle Corporation has 20,000 acre-feet of water in Clayton Valley, and they are the only ones I know of that use the evaporative process. As I understand it, Ioneer and Thacker Pass are not brine-related at all. Are you aware of some future ones coming up? It seems like Albemarle is the lone wolf in that arena since they own almost all the water rights in Clayton Valley, and they have been doing that since World War II, if I remember correctly.

Mr. Fontaine:

We are fully aware of Albemarle's operations, their processes, and they have been in operation since 1967 or maybe even longer. We are aware of other claims, for example in Railroad Valley, although in that case, the indications are that there would be a lot less consumptive use. Quite frankly, when I saw the number of claims out there in those basins, out of 15,000 claims, but as of today, Albemarle is the only operation at all into that effort lithium extraction and they use brine evaporation.

Senator Hansen:

I wondered if I was missing something there because except for them, all the newer ones seem to be more traditional mining methods, not evaporative. Also, I assume if they do have an evaporative pond, they would have to get the water rights cleared through the state engineer and purchase from the local people. I think there is some checks and balances in there.

Chair Carlton:

Are there any other questions? Seeing none, we can move on to the next agenda item.

AGENDA ITEM XIII—PRESENTATION ON THE TRUCKEE-CARSON IRRIGATION DISTRICT

Chair Carlton:

Our next agenda item is a presentation from the Truckee-Carson Irrigation District.

Rusty D. Jardine, ESQ., General Manager and Counsel, Truckee-Carson Irrigation District:

We are proud of our district. It has existed since 1918. I am the general manager, and I have served in that capacity for 12 years, and in those 12 years, we have seen a lot of different things occur, as you can appreciate. We saw the breach of the Truckee Canal in 2008, and I came on board with the District in 2010, and I can say my mission was to help resolve all the conflict that arose from that catastrophic event.

One of the most startling photographs I present to you is the City of Fernley inundated with water during that flood event ([Agenda Item XIII](#)). That breach of the canal occurred, I believe, on January 5, 2008, and if you can visualize the amount of water in a canal at that time, it was flowing at about 750 cubic feet per second. That is a good rate, and because of the typography of the area, when that breached, the canal was very flat, so the water was flowing out of that breach area in both directions, compounding the effect upon those homes that were inundated.

After that occurred, we engaged in multiple studies, and the Truckee Canal has probably become one of the most studied canals you could possibly envision. When we talk about the Truckee Canal or the Carson and Truckee Rivers for that matter, I always apply the personal pronoun "my." I talk about "my Truckee River," "my Carson River," "my Truckee Canal," and "my Lahontan Reservoir". That is how we view it, and I am proud of everyone who has participated here because I have always viewed those of us involved in water matters as people with a mission. It is more than a job; it is important to us because water is precious, as we all know.

As a result of that breach of the Truckee Canal, innumerable studies and investigations have occurred in addition to our daily checks postbreach. It took several months to restore it to operating condition, and after that, everything changed, and it has been operated in a completely different fashion since the breach. We have 14 monitoring sites on the canal with alarms now that tell us when we exceed a certain stage elevation within the prism of that canal system. Things certainly have changed.

Now comes the time when we finally have the money before us with which to do something about it. Owing to the bill or the bipartisan infrastructure law that was passed most recently, we are among 46 projects throughout the West that have been approved to provide for repair to our Truckee Canal. It is still an incredible challenge for us, and we have been allocated \$35 million with which to do that.

The environmental impact statement (EIS) associated with this project and a record of decision that ensued from the regional director in Sacramento with the Bureau of Reclamation provided that the preferred alternative was to take 12 miles of the canal and line it, so we are talking about an 80-foot section of concrete overtopping a geomembrane lining. The cost of that exceeds \$10 million per mile, so that project has been downgraded and the scope of it has been reduced to approximately 3.56 miles of concrete-lined canal. We will also replace what is known as the "Fernley Check Structure," a large structure we

use with which to build up the bay with which to provide delivery of water in the area of Fernley.

Things have changed in Fernley; if I showed you a map of 1948, you would not find a home on it. These were all fields, and coincidentally, they were all flood irrigated. We did not anticipate that would happen in 2008, but things have changed, and so many homes are going up in this area. These fields have been taken out of production. Around 1948, we had probably in excess of 11,000 acres of irrigated lands, but now that is down to 1,500, so incredible change has occurred.

Since the breach, we have faced the problem of how to make it safe for people to live in this area, and that was the reason for going through the process of an EIS culminating in a record of decision. There are some collateral consequences to making it safe. The City of Fernley has a portfolio of approximately 10,000 acre-feet of surface water coupled with 10,000 acre-feet of groundwater and historically has relied upon the seepage from the Truckee Canal with which to charge those municipal and private wells in the area. There is litigation as we speak involving this particular issue.

After this record of decision was authorized and now that we are in the throes of deciding who receives this money and providing for this repair to the Truckee Canal, the City of Fernley has sued to enjoin that, I suppose, because of that historical reliance upon that groundwater seepage for which there is no water right associated and no precedent set. Relief has been sought through the U.S. District Court for the District of Nevada and passed onto the U.S. Court of Appeals for the Ninth Circuit, and we are hopeful that at some point, those issues can be resolved. I am not sure quite how yet—perhaps with the addition of other sources of water—but it is an incredible challenge for that community, and we are very in tune with that struggle. That is something to consider as you go through your deliberations and upcoming sessions, but we continue to work on that, and it is no small challenge for a little district.

A little history—we have approximately 3,000 water users in this project. The largest single water user is the U.S. Fish and Wildlife Service, DOI, serving the Stillwater National Wildlife Refuge out there in our neck of the woods. We have a tribe, a city, a county, NDOW, and the U. S. Navy. I would add it takes little water out there to float the Navy, so we do just fine, and we are proud of that association in our community. We have all these varied uses, and our mission remains constant, but we have a small user base, so when you take a \$35 million nonreimbursable bill to build this, that is a tough challenge for a small district like us. Consider that we have a \$7.5 million annual budget, and we are going to discharge debt on a \$35 million bill, and we are going to do that for 50 years. The reality is that as we do that, we apply those resources for that kind of repair, which is necessary. There is so much more to do over in the Lahontan Valley, in the Carson Division of the Newlands Federal Reclamation Project. That is what we are up to in our district, and we are proud of that opportunity, but it is going to be cumbersome.

All of what I have described has to go to election by water right holders, as well it should. Who pays the bill? Those 3,000 entities that I mentioned. We must get their permission, and we are hopeful that they will approve. What if we do not do this? We have been hoping to provide a permanent repair since 2008, but in the absence of that concrete lining I described, the permanent solution would be to limit flow in the Truckee Canal to 140 cubic feet per second, unchecked, with no ability to raise it against those check structures, and that water would flow through Fernley out to Lahontan and be stored there for use by the users below Lahontan Dam. That would be catastrophic; that is the equivalent of essentially

shutting it down. We are at a point where we must provide for this repair, and we are looking forward to doing that.

Chair Carlton:

Are there any questions from Subcommittee members?

Senator Hansen:

You have 3,000 people voting, but obviously, they all own different percentages of water rights. You mentioned the U.S. Fish and Wildlife Service has the highest ownership, so is the voting based on the percentage of ownership? For example, if half of the water rights are controlled by the U.S. Fish and Wildlife Service, do they control half of the vote? How do you work that out when you have 3,000 people there?

Mr. Jardine:

That is an important issue. Under Chapter 539 of NRS, we have a weighted voting system, but we do not allow those other governments to enter the fray. They are not deemed electors for purposes of voting and so our farmers typically will engage in that voting process.

Senator Hansen:

You have a weighted system. I wondered how you did that. I think it was 1993 when we had Question 2 on the ballot, which allowed NDOW to buy water rights to transfer that water down to Stillwater National Wildlife Refuge. I think that was a 30-year allocation or some amount that was set up as a tax based on something in the Reno-Sparks area. Are you familiar with that, and is that where NDOW got the water rights you are talking about being transferred out to Stillwater and so forth?

Mr. Jardine:

What you perhaps are referring to is the purchase of water rights by the United States for the benefit of Stillwater.

Senator Hansen:

I remember there was a question—and I think it was Question 3 in 1990—where it was a big deal and there was a tax put on something to purchase water rights, I think, for Stillwater, or the Carson Lake area, or somewhere out there. I do not know if I am mixing apples and oranges here or not, or did they transfer those water rights to the U.S. Fish and Wildlife Service for the Lahontan area, particularly the Stillwater area?

Mr. Jardine:

The federal government came up with money with which to provide for the acquisition of water rights. When we spoke earlier, we talked about “buy and dry,” and, well, we have had a little flavor of that in the Lahontan Valley. When we talk about Hazen, Nevada, and the Swingle Bench, water flows from Fernley through that area and goes on out to Lahontan. Through the acquisition or the provision of federal money, the Pyramid Lake Paiute Tribe purchased water rights off those areas, and that water was transferred back into the river for the benefit of the lake. The U.S. Fish and Wildlife Service accomplished much the same thing.

In former times, there was an overabundance of water, and litigation ensued on a widespread basis. We went through litigation that was called "recoupment," and it was destined to provide an order requiring the district to make recoupment for waters that have been over-appropriated. The need for water rights for the benefit of the refuge became apparent, a program developed with which to provide that, and they have had a very active program. As you indicate, it is about to the point of expiration, and I do not think that they have accomplished the goal of purchasing that which they had desired, but they are close.

Senator Hansen:

The big problem right now is that you have a canal that is about 30 to 35 miles long from Derby Dam all the way to where it discharges into Lahontan, but there is a four-mile section going through Fernley that the government wants you to spend \$35 million on to line canals, but that also recharges the aquifer the City of Fernley uses. Is that it in a nutshell? Surely, though, on each end of that, if you have that four-mile section of canal, there is still a great deal of a recharge that must occur outside of that. Is that insufficient for Fernley's needs?

Mr. Jardine:

I appreciate that question, because that is an important component of what we are trying to achieve here. In reducing the scope of this, yes, there is going to be a corresponding reduction in the impact had to the city from that, and again, there is no water right associated with it, but the practical concern is to turn off the water in a city. That is no small measure for the people who have come to rely upon it. We are sympathetic to that, but the canal must be repaired in the name of public safety, and it must discharge its mission of providing waters to all those water right holders that we have throughout the system.

Senator Hansen:

When you study that whole Newlands Project, the biggest problem was that the years they used to calculate the amount of water that could be taken off the Truckee River System and transferred to the Carson System were all exceptionally wet years. Since that time, the actual amount of available water coming out of the Truckee Watershed is substantially less than what they based those projections on, to the detriment of those poor farmers downstream in Fallon and Fernley who counted on that water. With time, they realized they were drying up Pyramid Lake, and that is when you had the Portage Decree and then Harry Reid's decision, which was especially beneficial to Pyramid Lake but hurt Fallon. The reality is water was not being allocated fairly and Pyramid Lake was very much in the same boat as Walker Lake is today, with levels dropping because so much water is being transferred to the Newlands Project. You have quite a job ahead of you.

Chair Carlton:

Are there any other questions? Seeing none, we will now move on to our second round of public comment.

AGENDA ITEM XIV—PUBLIC COMMENT

Chair Carlton:

I will first open it up for public comment here in the Chamber. Is there anyone in the room who would like to give public comment? [There was none.]

Broadcast Services, do we have anyone on the phone who wishes to give public comment?

BPS:

The public comment line is open and working; however, there are no callers this time.

Chair Carlton:

We will conclude public comment. If we missed anyone, you are more than welcome to email us or send in your public comment, however you prefer.

Our next and final meeting of the Subcommittee on Public Lands will be Monday, June 27, 2022. I look forward to seeing you all there.

AGENDA ITEM XV—ADJOURNMENT

There being no further business to come before the Subcommittee, the meeting was adjourned at 2:35 p.m.

Respectfully submitted,

Sarah Baker
Research Policy Assistant

Maria Aguayo
Research Policy Assistant

Jann Stinnesbeck
Senior Policy Analyst

APPROVED BY:

Assemblywoman Maggie Carlton, Chair

Date: _____

MEETING MATERIALS

AGENDA ITEM	PRESENTER/ENTITY	DESCRIPTION
<u>Agenda Item II</u>	Joseph Guild, Private Citizen	Written Comments
<u>Agenda Item III A</u>	John J. Entsminger, General Manager, Las Vegas Valley Water District and Southern Nevada Water Authority	Microsoft PowerPoint Presentation
<u>Agenda Item III C</u>	Eric Witkoski, Executive Director, Colorado River Commission of Nevada	Microsoft PowerPoint Presentation
<u>Agenda Item IV A</u>	Adam Sullivan, P.E., State Engineer and Administrator, Division of Water Resources (DWR), State Department of Conservation and Natural Resources (DCNR)	Microsoft PowerPoint Presentation
<u>Agenda Item IV B</u>	Micheline Fairbank, Deputy Administrator, DWR, DCNR	Order 1309 District Court Decision
<u>Agenda Item V</u>	Peter Stanton, Executive Director, Walker Basin Conservancy	Microsoft PowerPoint Presentation
<u>Agenda Item VI</u>	Kyle Roerink, Executive Director, Great Basin Water Network	Microsoft PowerPoint Presentation
<u>Agenda Item VIII</u>	John R. Zimmerman, Esq., Assistant General Manager, Truckee Meadows Water Authority	Microsoft PowerPoint Presentation
<u>Agenda Item IX</u>	Kevin W. Brown, General Manager, Virgin Valley Water District	Microsoft PowerPoint Presentation
<u>Agenda Item X A-1</u>	Edwin James, P.E., General Manager, Carson Water Subconservancy District (CWSD)	Microsoft PowerPoint Presentation
<u>Agenda Item X A-2</u>	Edwin James, P.E., General Manager, CWSD	2021 Activities and Accomplishments Annual Report

AGENDA ITEM	PRESENTER/ENTITY	DESCRIPTION
<u>Agenda Item XI</u>	Jeff Fontaine, Executive Director, Humboldt River Basin Water Authority	Microsoft PowerPoint Presentation
<u>Agenda Item XII</u>	Jeff Fontaine, Executive Director, Central Nevada Regional Water Authority	Microsoft PowerPoint Presentation
<u>Agenda Item XIII</u>	Rusty D. Jardine, Esq., General Manager and Counsel, Truckee-Carson Irrigation District	Microsoft PowerPoint Presentation

The Minutes are supplied as an informational service. All meeting materials are on file in the Research Library of the Legislative Counsel Bureau, Carson City, Nevada. For copies, contact the Library at (775) 684-6827 or <https://www.leg.state.nv.us/Division/Research/Library/About/Contact/feedbackmail.cfm>.

Exhibit 2

Exhibit 2

ORIGINAL

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6 Attorneys for Respondent,
7 Nevada State Engineer

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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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.).

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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

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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.

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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.¹ 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 ¹ 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.² 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 ² 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.³ 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.⁴ 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 ³ 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.

⁴ Although the State Engineer argues here that PLPT is not entitled to an implied federal reserved groundwater
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.⁵ *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 ⁵ 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.

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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
14 under Claims No. 1 and 2 would not be affected if the change applications
15 were approved.

16 ROA at 1994. There is substantial evidence supporting this conclusion both as to the Claim Nos. 1 and
17 2 water and PLPT's later acquired Truckee River right.

18 Ali Shahroody, expert witness for PLPT, testified that:

19 Q: The question is if the Duke changes were approved and they were
20 to use 2900 acre feet of water, do you have an opinion as to whether or not
21 that would cause the Tribe's Orr Ditch Decreed rights to not be satisfied in
22 any given year?

23 A: To the extent that there are depletions to the river which would
24 have met the Tribe's rights, that would not necessarily cause the Tribe's
25 right not to be satisfied.

26 The Tribe's right would be satisfied because its rights are paramount to the
27 river, but it would be at the expense of other parties, just strictly talking
28 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.

But to Answer your question straight, the Tribe's Claims 1 and 2 would not
be affected.

ROA Tab 92 at 1649, l. 17 through 1650, l. 7. As a consequence, there can be no argument that the
Applications as granted will conflict with PLPT's Claim Nos. 1 and 2 Orr Ditch rights.

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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 PLPT⁶ 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

⁶ 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).⁷ 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.⁸

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⁷ 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.

⁸ 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
17 them as separate units, even though there may be some hydrological
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.

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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

1 this court- must signal a departure from such a long recognized Nevada
water policy.

2 *Id.* at 749, 918 P.2d 700. It is in light of this interpretation of the “public interest” that Ruling 5079
3 must be analyzed.

4 PLPT has argued that Ruling 5079 threatens to prove detrimental to the public interest for four
5 reasons: (1) the Applications will impact existing wells, (2) the Applications will impact senior surface
6 water rights, (3) the Applications threaten to cause injury to Pyramid Lake’s protected fish, and (4) the
7 Ruling is silent as to the various agreements that are in place for the benefit of the protected fish and
8 Pyramid Lake. Petitioner’s Opening Brief at 24-26. The State Engineer addressed each of these issues,
9 and found that the proposed transfers did not threaten to be detrimental to the public interest.

10 PLPT’s argument that the applications threaten to prove detrimental to the public interest
11 because they will impact existing wells and senior surface water rights are no different factually from
12 the argument that the Applications will conflict with PLPT’s existing rights. The State Engineer
13 determined, however, that they will not conflict with existing rights. As has already been shown above,
14 there is substantial evidence to support the State Engineer’s conclusion that Applications as reduced and
15 approved will not impact existing rights or the flows of the Truckee River. *See* section V(B)(1) above.
16 In fact, the very reason that the State Engineer reduced the amounts requested for transfer by the
17 Applications by approximately one-half was to protect the public interest issues presented here.

18 There is likewise substantial evidence to support the State Engineer’s conclusion that the
19 Applications as approved do not threaten to cause injury to Pyramid Lake’s protected fish. As has been
20 noted above, the Applications as reduced and approved do not threaten to diminish the flows of the
21 Truckee River. *See* section V(B)(1) above. PLPT’s argument, however, merely assumes that there will
22 be reductions in flows, as does all of the testimony upon which PLPT relies. Not only is the
23 presumption that the flows of the Truckee River will be reduced incorrect, no evidence was offered that
24 there will be any harm to the threatened fish in any event. A review of the testimony of Mr. Chester
25 Buchanan of USFWS shows that his testimony is in fact “not at all conclusive” as to whether any
26 reduction in flows would be biologically significant. ROA at 1997-98.

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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.

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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.

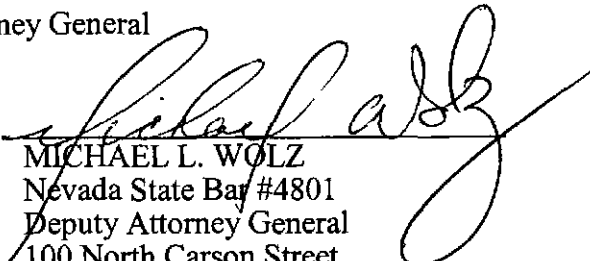
14 VI. CONCLUSION

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
22 Attorney General

23 By:


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Attorneys for Respondent,
Nevada State Engineer

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:

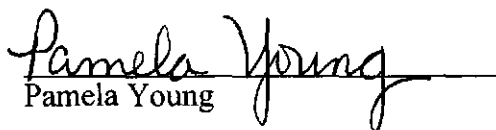
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Exhibit 3

Exhibit 3

**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.

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



STAFF MEMBERS PRESENT:

Jann Stinnesbeck, Committee Policy Analyst
Allan Amburn, Committee Counsel
Nancy Davis, Committee Secretary
Alejandra Medina, Committee Assistant

OTHERS PRESENT:

Bradley R. Crowell, Director, State Department of Conservation and Natural Resources
Tim Wilson, Acting State Engineer and Administrator, Division of Water Resources, State Department of Conservation and Natural Resources
Micheline Fairbank, Deputy Administrator, Division of Water Resources, State Department of Conservation and Natural Resources
Rupert Steele, Chairman, Confederated Tribes of the Goshute Reservation, Iapah, Utah
Robert McDougal, Commissioner, Board of Commissioners, Pershing County
Norman Harry, Environmental Director, Environmental Protection Department, Washoe Tribe of Nevada and California
Norman Frey, Private Citizen, Fallon, Nevada
Jeff Fontaine, Executive Director, Central Nevada Regional Water Authority and Humboldt River Basin Water Authority
Jake Tibbitts, Natural Resources Manager, Department of Natural Resources, Eureka County
Kyle Roerink, Executive Director, Great Basin Water Network
Doug Busselman, Executive Vice President, Nevada Farm Bureau Federation
Patrick Donnelly, Nevada State Director, Center for Biological Diversity
Tobi Tyler, Executive Committee Member, Toiyabe Chapter, Sierra Club
Laurel Saito, Nevada Water Program Director, The Nature Conservancy
Mark Butler, Executive Council Member, Coalition to Protect America's National Parks
Susan Juetten, Private Citizen, Reno, Nevada
Kenny Bent, Private Citizen, Pahrump, Nevada
John Hiatt, Conservation Chair – Press Liaison, Red Rock Audubon Society
Patti Jesinoski, Private Citizen, Henderson, Nevada
Ed James, General Manager, Carson Water Subconservancy District
Andrew M. Belanger, Director of Public Services, Southern Nevada Water Authority
Adam Sullivan, Deputy Administrator, Division of Water Resources, State Department of Conservation and Natural Resources
David G. Hillis, Jr., Principal Engineer, Turnipseed Engineering, LTD, Carson City, Nevada
Steve Walker, representing Douglas County; and Storey County
Bennie B. Hodges, Manager, Pershing County Water Conservation District
Rebekah Stetson, Private Citizen, Reno, Nevada

Anthony Sampson, Tribal Chairman, Pyramid Lake Paiute Tribe
Will Adler, representing Pyramid Lake Paiute Tribe

Chair Swank:

[Roll was called. Committee rules and protocol were reviewed.] Assembly Bill 62 will be heard on another day, in order to allow enough time for public participation. I will begin with a presentation by the Division of Water Resources, State Department of Conservation and Natural Resources.

Bradley R. Crowell, Director, State Department of Conservation and Natural Resources:

Thank you for holding this hearing today to discuss the important topic of how best to manage Nevada's most precious resource, our water. Before we provide some background for the Committee on Nevada's water statutes and the manner in which those statutes are implemented, I would like to introduce the leadership of our Division of Water Resources and then take a moment to offer the big picture of the challenges Nevada faces today in managing our limited water supply. I am joined by Mr. Tim Wilson, Acting State Engineer and Administrator of the Division of Water Resources as well as the two deputy administrators, Adam Sullivan and Micheline Fairbank. We are happy to answer any and all questions you have today.

To help set the stage for this hearing, I would like to highlight three indisputable facts: One, Nevada is the driest state in the nation. Two, Nevada has been one of the fastest growing states in the nation for the past two decades and is continuing to grow and diversify its economy. Three, climate change is real. The impacts are being felt in Nevada and it is our responsibility to take the impacts into account in managing Nevada's water resources. These three facts demand we take a proactive approach to responsibly manage our water in every corner of Nevada. It is imperative that we recognize these fundamental truths and exercise our collective responsibilities to protect the best interests of all Nevadans.

There is a fourth potential reality lurking just around the corner, which is the very real and growing possibility that the federal government will enact mandatory curtailment of our water supply from the Colorado River. If this reality comes to pass, our water challenges in Nevada will become magnified exponentially.

We are here today not to ignore these challenges, but to recognize them and to take action. Taking action will require both courage and shared sacrifice. There can be no winners and losers when there is a collective understanding of the challenges we face and the willingness to ensure a sustainable water future for all Nevadans. I am optimistic that we can and will rise to this challenge.

With regard to the bills we will discuss today, these are our neutral and good-faith attempts to address complex issues based on years of experience and expertise within the Office of the State Engineer which is within the Division of Water Resources. We have not cornered the market on the best ideas, and we welcome the informed views and suggestions of this

Committee and the many stakeholders who are here today. One thing is without question, the status quo is not an option. We look forward to your questions and discussing the legislation that is before us today.

Tim Wilson, Acting State Engineer and Administrator, Division of Water Resources, State Department of Conservation and Natural Resources:

I would like to provide an overview of Nevada water law, our agency, and some of our water issues. Most people know that our mission statement is to conserve, protect, manage and enhance the state's water resources for Nevada's citizens through the appropriation and reallocation of the public waters [page 2, ([Exhibit C](#))].

What we do is quite a bit more than that. Page 3 shows a short list of some of the many activities we perform—many are very important, such as well drilling, dam safety, innovative solutions like aquifer storage and recovery, and many others.

In recent years, the Division has also made a concerted effort to use advanced technology to improve our services to the public. We are utilizing modeling techniques in processing power, in cooperation with other agencies and the University of Nevada to better understand basin-scale hydrology. We are utilizing unmanned aerial vehicles for dam safety inspections and for mapping to complement, but not replace, boots on the ground for inspections. We use geographical information systems to improve mapping, public accessibility, and historic and current data. We have some really good Truckee-Carson Irrigation District mapping, Smith Valley and Mason Valley interactive monthly pumpage reports, and historic hydrologic data that was formerly only in paper records and is now all on interactive databases.

Page 5 shows a few quick facts about Nevada. We sometimes argue with New Mexico over who is the driest, but we think we still hold the moniker as the driest in the nation, averaging approximately 11 inches of precipitation annually. When I started with the state of Nevada, it does not seem very long ago but it was 1995, there were about 1.5 million people in this state. Our population is now over 3 million. I point that out because the amount of water we have is the same, obviously, about 4 million to 5 million acre-feet of surface water and about 2 million acre-feet of groundwater. We manage our water resources that are available through 14 hydrographic regions divided into 256 groundwater basins. We group those basins and assign them to water resource specialists. Any time you contact our office, if you tell us what groundwater basin you are in, you will be directed to a water resource specialist who is assigned to that basin and can personally assist you.

Page 6 shows who uses our water. Most of it is irrigation. Irrigation for surface water takes up about 64.9 percent. The second largest user of surface water is recreation and wildlife at almost 19 percent; this amount represents instream flow rights, recreational rights, and evaporation off of terminal lakes. Municipal use is third at about 16 percent; this includes Las Vegas' use of the Colorado River water and the Reno and Sparks use of the Truckee River water.

Page 7 shows groundwater use; irrigation use is the dominant use at about 67 percent, mining is at about 10 percent, and municipal use at about 9 percent.

Our water rights are committed through permits and vested claims. Page 8 is a chart comparing groundwater pumpage to the water that is actually committed for each manner of use in the state. If you were to add up both columns, the actual usage is about 50 percent of the committed rights for all manners of use.

Page 9 ([Exhibit C](#)) is a simple illustration showing that on a statewide scale, even though we use less than 50 percent of our total committed supply, we do exceed our committed resources in many localized areas. This map shows the ratio of committed groundwater resources—that is the addition of permits, certificates, claims, and domestic wells versus the amount of water we estimate is available through perennial yield. We estimate about 106 basins are over our estimated perennial yield. I would also like to point out that there are about 54 of the 256 basins for which commitments are more than double their perennial yield. These are some very serious issues.

Page 10 gives you an even better picture where actual groundwater pumpage exceeds the perennial yield on about 51 of our 256 basins. These are the basins that are most likely to be experiencing significant water level drawdown and conflict amongst users. In some cases, we have worked with local management very actively to prevent harmful effects: notably, Las Vegas Valley, Truckee Meadows area, and Diamond Valley.

I would like to discuss Nevada water law. We have three basic tenets of Nevada water law: the prior appropriation doctrine, which means if you are first in time—you are the senior user—you get your water first. Beneficial use is an expectation that you place your water to beneficial use, that is the limit of the right to use of water. Related to the beneficial use is that if you are not using your water, you can lose it to cancellation, abandonment, or forfeiture.

Page 12 describes a very important concept that comes up that some people do not realize. It is by statute that the public owns the water in the state of Nevada, above and below the ground. What people have through the statutory permitting process is the right to the use of the water. That is considered a type of property right. It is appurtenance to the property, it can pass from seller to buyer, it can be sold and leased, but it is still a permit.

Page 14 makes it look like it is very easy to obtain a permit. It can be a very complex process to file an application. If you meet all of those statutory criteria, you can be issued a water rights permit. As part of the permit terms, you will be required to do a proof of completion of work and proof of beneficial use. If you do so, then you will be allowed to have a water rights certificate, which is the last step in the process. If you were using your water prior to the enactment of Nevada water law, you can make a vested claim to water as well. We have an entire section that does the adjudication process to make a determination on those claims—prior to 1905 for surface water, 1913 for artesian wells, and 1939 for groundwater.

There is not a lot we can do when someone files an application. We are either going to approve it, approve it with conditions, or we are going to deny it [page 15]. Many times, in addition to the regular permit terms, we will condition permits on monitoring. We have conditioned permits on mitigation, pumpage reporting, the depth of the well as far as limitation, and reducing the rate of flow and volume that were requested in the application. Or we can deny the application. Any of our decisions in that regard can be appealed to district court.

Page 16 ([Exhibit C](#)) shows four basic conditions of approval. The ones we will be looking at today are part of *Nevada Revised Statutes* (NRS) 533.370, which deals with conflicting with existing rights. We also consider whether the use of the water will prove detrimental to public interest, whether there will be a conflict with existing domestic wells, and whether there is unappropriated water available.

We also consider legislative directives, which are in NRS 533.024. "Conjunctive use" was recently added. We will discuss [Assembly Bill 51](#) later, which attempts to address this part of the legislative declaration. "Conjunctive use" means managing the surface water and groundwater as a single source and recognizing the interaction between the two. Previously, under Nevada water law, we have treated surface water and groundwater separately, and we will talk about that when we discuss our bills.

We have another bill that is not going to be heard today. It really helps add to the antispeculation doctrines we have in statute. If you apply for a permit, you cannot just hold the spot, you have to actually diligently apply yourself to place your water to beneficial use—construct the works necessary, drill your well, construct your ditches, and actually use the water beneficially and in accordance with the terms of your permit. We have a lot of antispeculation doctrines to keep people from grabbing a spot. If they do not intend to use the water, they need to move aside and let the next person in line have that water.

Page 19 shows that we have a tenet that you can lose a water right permit through cancellation, forfeiture for five years of nonuse of certificated groundwater, and also abandonment.

We have many significant water management challenges. In 2017, the Legislature directed the Division to conjunctively manage all waters, regardless of their source. Since the water laws traditionally treated surface water and groundwater as separate sources, there is a lot of room for statutory changes to allow our office to fulfill this mandate. Concentrated areas of domestic wells are a continuing concern in dealing with conflicts, along with overappropriated basins and litigation are our largest challenges.

To tie this all together, the Division would like to have additional statutory authority. We have three bills this session and I look forward to explaining the bills and addressing any misconceptions about the intent of our bills that may be out there. We are all in this together and I hope we can all come together and work toward solutions. As Mr. Crowell mentioned, we may not have all the ideas, but we are willing to listen to everyone's ideas and bring

everyone together to work toward bringing some statutory structure and correcting some mistakes from our past, as you can see by the overappropriated basins.

Chair Swank:

Thank you for the presentation. We will now move to the bill hearings. I will open the hearing on Assembly Bill 30.

**Assembly Bill 30: Revises provisions governing the appropriation of water.
(BDR 48-214)**

**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 30. As I enter my testimony, it is imperative to stress that this—and every bill the Division of Water Resources, State Department of Conservation and Natural Resources has offered this session—is the product of extensive experience managing Nevada’s limited water resources (Exhibit D). To adapt to today’s water resource challenges, the Division of Water Resources needs opportunities for flexibility to best manage Nevada’s limited water resources and to fulfill its legal duties and responsibilities. As Nevada’s population grows, there will be an ever-increasing demand on our water resources. These demands will inevitably create conflicts, and therefore the responsibility to manage those conflicts is imperative.

Nevada’s water resources belong to all Nevadans, and it is the responsibility of the State Engineer through the Division of Water Resources to manage our shared water resources with consistency, in accordance with the law, and using the best available science. And to preemptively dispel any rumors that I have heard and to put to rest any perception that this, or any Division bill, is intended to, or is for the purpose of facilitating large water development projects, let me be clear: This is absolutely untrue. These bills are the Division’s best effort to address real challenges and issues the Division grapples with regularly in all parts of the state. The Division of Water Resources has heard an abundance of criticism of A.B. 30, much of which we believe misinterprets the bill, and we are open to an ongoing dialogue as to how to best achieve the purpose of this bill.

The intent of this bill is to bring needed consistency and clarity to Nevada’s water law. Assembly Bill 30 seeks to harmonize existing provisions of Nevada’s water law under *Nevada Revised Statutes* (NRS) Chapters 533 and 534. Specifically, the mandate within NRS 533.370 subsection 2 that applications conflicting with existing rights be denied in contrast with the express authority under NRS 533.024 subsection 1, paragraph (b) to mitigate conflicts with domestic wells and the additional express authorities under NRS 534.110 subsection 4, permitting the use of monitoring, management and mitigation plans (3M plans) as a condition on approval of water rights, and the allowance for the reasonable lowering of the groundwater table. These provisions currently provide conflicting guidance to the Division of Water Resources regarding the issuance of water rights and the ability to resolve potential conflicts among water rights holders. Assembly Bill 30 is intended to help resolve this discrepancy by providing the Division clear legislative direction to help avoid or

eliminate a potential conflict when deciding whether or not to grant a water rights application.

Nevada water law anticipates that any water appropriation may result in some degree of foreseen or unforeseen conflict or impact to existing water rights. And, while the terms “mitigation” and “3M plans” have been somewhat villainized due to conflict over a particular groundwater development project, the fact of the matter is that current law authorizes the State Engineer to resolve a conflict based on the principle that any impacted senior water rights holders are made whole and the overreaching public interest remains balanced.

This bill merely seeks to provide needed clarity and consistency in Nevada water law. The commitment of the Division of Water Resources is that harmonization of the law will be applied in a balanced, responsible manner through consultation with and contribution by affected water rights holders and domestic well owners, and based on the most current and best available hydrologic and engineering data.

In offering additional context within Nevada water law as to why this bill is both permissible and necessary, Nevada’s water resources are owned by all Nevadans, as enshrined in state law under NRS 533.025 since 1913. Whereas, a water right does not confer ownership, but merely the right to the use of water in a specified quantity and manner as allowed for under the terms of a water rights permit. For the purpose of this bill and today’s testimony, there are two important principles to keep in mind regarding the right to use water: Every new water rights permit is conditioned on and subject to existing water rights. If a new junior right is determined to impair a senior right in a manner that cannot be resolved, the junior right holder must cede to the senior right holder; any water right in Nevada, whether it is a prestatutory vested claim, a decreed right, or a statutory appropriation, carries with it the requirement that all water rights must be put to beneficial use. A water rights holder neither holds ownership nor title to the water itself, but only the particular beneficial use as approved according to the underlying water rights.

This is important because Nevada water law accounts for the fact that certain water rights appropriations may result in an adverse impact to existing rights. The Nevada Division of Water Resources has applied this statutory provision by seeking to minimize, avoid, or eliminate any existing or reasonably foreseeable impacts on all impacted water users. This basic principle is the foundation for managing Nevada’s limited water resources without undermining the responsible development of water to provide for the continued economic growth of our state.

Before I walk through the specific provisions of A.B. 30, I want to address certain perceptions and concerns regarding the Division’s water management practices. First, the Division routinely conducts, or requires holders of water rights to conduct, water monitoring to better understand local groundwater conditions and the effects of a particular project on the sustainability of groundwater development in a particular basin or region. Currently, the Division of Water Resources has approximately 90 groundwater monitoring plans in place as a condition of existing water right permits within one or more of Nevada’s 256 groundwater

basins. Monitoring is necessary because we cannot predict with absolute accuracy what the impacts of pumping will be, even utilizing the best available science. Accurate monitoring data improves the science, which in turn leads to better management. Second, 3M plans are not the panacea to achieving balanced water development in Nevada, and we recognize that. In fact, very few water rights permits have been granted with a requirement for a 3M plan, only one of which was developed by the applicant, accepted by the State Engineer, and implemented. In short, 3M plans may be applicable or useful in the future, and may be an appropriate proposal for the elimination or avoidance of a conflict, but 3M plans should not and will not be used to push through any questionable water development projects. With that, please allow me to provide a summary of A.B. 30.

Section 1 proposes to add a new section to NRS Chapter 533. This new statutory section would harmonize and bring consistency to Nevada's water statutes by clearly identifying the conditions under which the State Engineer may consider a proposal to avoid or eliminate a conflict. A proposal may only be considered if water is available for appropriation.

Section 1, subsection 1, paragraph (a) grants the State Engineer discretion to consider a proposal that would avoid or eliminate a conflict, and sets forth the criteria the State Engineer may consider within such a proposal. This includes an agreement between the water right applicant and the owner of an existing water right or domestic well, if there is concern that a conflict may manifest. An example could include the deepening of an existing well where the anticipated reasonable lowering of the groundwater level would interfere with the well's use. These types of agreements are only limited by the needs of the individual water rights holders.

Section 1, subsection 1, paragraph (b) allows for the development of a 3M plan. These plans should be viewed in their proper light as contingency plans, not as forgone conclusions to address conflicts that cannot be avoided. Depending on the known and unknown conditions of a groundwater aquifer and the inherent degree of uncertain response by a particular groundwater project, a 3M plan may be the most appropriate option. The Division of Water Resources will continue to use its technical expertise to require stringent standards, primarily focused on the first two "Ms" of monitoring and proactive project management, to be the mechanism to avoid conflicts. But because the exact effects of pumping are never certain, and environmental conditions will always be variable, a comprehensive and in-depth analysis of the possibilities with flexible responses aimed to avoid or eliminate conflicts is an important tool needed to facilitate the management of Nevada's water resources. Therefore, responsible management of our water resources requires this type of upfront, proactive management rather than after-the-fact conflict resolution.

The third option outlined in section 1, subsection 1, paragraph (c) is, "Any other plan to avoid or eliminate the conflict or replenish the source of supply impacted or depleted by the conflict." Again, providing the Division of Water Resources flexibility to consider alternative proposals and solutions that may be "out of the box" or creative alternatives is imperative as water conflicts become more prevalent, particularly when these solutions are proposed and agreed to by the impacted users themselves, which is always the Division's

preferred scenario. The concept of mitigation should not be universally maligned, and the Division welcomes any and all creative solutions to best manage our shared water resources in a manner consistent with the fundamental tenets of Nevada's water law.

Section 1, subsection 2 expressly authorizes the State Engineer to grant a water rights application if the proposal is found to avoid or eliminate the conflict, and to condition the appropriation on the applicant's performance of the measures or actions in the proposal determined to be necessary to avoid and eliminate the conflict.

The remainder of Assembly Bill 30, sections 2 through 10, contains conforming changes.

The Division of Water Resources recognizes and appreciates extensive feedback to A.B. 30; however, resolving the existing statutory conflict is imperative. Furthermore, despite many misplaced concerns regarding 3M plans, particularly the concept of mitigation, this effort is the Division's attempt to implement the direction of the Legislature to utilize tools such as 3M plans as a condition to appropriations. The Division believes there is, at some level, consensus that proposals to avoid or eliminate conflicts is good water policy in instances where water is available to appropriate. The Division is open to, and welcomes, alternative ideas as to how to address these issues. A constructive dialogue should be a priority for every stakeholder because the status quo is not, in the end, serving the interest of the public who owns Nevada's water. At this time, I am happy to take any questions from the members of the Committee.

Assemblywoman Cohen:

Looking at section 1, subsection 1, paragraph (c), can you give an example of what one of those agreements might look like?

Tim Wilson:

We have one approved 3M plan within our office. It is quite extensive. It lays out all of the monitoring requirements that will be necessary, it lays out pumping management, and it follows up with mitigation measures that could be used if conflicts arise. It is not a simple plan, it is very complex and it took a lot of effort to bring everyone together as much as possible to come to some type of consensus. It is difficult to get a consensus amongst everyone, but we thought we had the best plan we possibly could to set the applicant up front to have to be responsible for mitigation as a final contingency. That is the significant point to the 3M plan. When you have an applicant that only has to do monitoring and management, we can tell them to stop using the water. If they do not have a specific up-front responsibility for mitigation, then they are not on the hook for mitigation. We do not want them to walk away, we want them to be up front and responsible.

Assemblywoman Cohen:

Are you already able to develop a 3M plan?

Tim Wilson:

That is correct. In statute, we have a mention of monitoring, management, and mitigation plans and a requirement to consult with local counties as part of issuing those plans, and we have conditioned permits on the 3M plan. We have lesser versions of 3M plans also. As I mentioned, we have a significant number of conditioned permits on monitoring and management of pumping.

Bradley R. Crowell, Director, State Department of Conservation and Natural Resources:

The issue with the authorization of the 3M plans is that we have authorization to do 3M plans in instances where water is available. The 3M plan would be to mitigate a conflict, but there is also statute that says, when there is a conflict, you have to deny the application. Those two provisions are inconsistent. If we take one route, we get sued by people who think we should have taken the other route. If we take the "no" route, we get sued by people who think we should take the mitigation route. We are stuck in a lose-lose situation from a management perspective.

Chair Swank:

Will you please repeat the two pieces that conflict for me?

Bradley Crowell:

I would like to have Ms. Fairbank repeat that in a more articulate way.

Micheline Fairbank, Deputy Administrator, Division of Water Resources, State Department of Conservation and Natural Resources:

We have two statutory provisions under NRS 533.353: We have an allowance in which our office is authorized to approve an application to appropriate water, contingent on a monitoring, management, and mitigation plan. Yet, under NRS 533.370 subsection 2, as was spoken to earlier, we also have the requirement that if there is water available to appropriate and/or whether that new appropriation would conflict with existing rights. Inherent in the 3M plan is an anticipation of conflict, and we have a requirement to deny that application; on the other hand, we are guided by the Legislature to consider these plans in determining whether to appropriate water.

Chair Swank:

Would this bill, should it pass, solve that conflict currently in Nevada water law?

Micheline Fairbank:

Yes, this bill would resolve that conflict or at least bring harmonization to these different provisions with the state. We also have provisions that allow for our office to mitigate conflicts with domestic wells under certain conditions and to allow for reasonable lowering of the groundwater table in NRS Chapter 534. Again, in each of those is the inherent idea that there is conflict. We have provisions that allow us to mitigate conflict. We are trying to provide that harmonization so that we have a clear direction as to when and under what conditions that we proceed with applications.

Chair Swank:

Is it fair to say that there is not a lot in this bill that is new, and this bill is mostly a harmonization of things that we already have in statute?

Micheline Fairbank:

Yes, that is correct.

Assemblyman Watts:

Do you see the 3M plan as applying to mitigating the public interests, or in the case of interbasin groundwater transfers, environmental soundness? Or do you see this only applying to conflicts with water rights holders or interest in domestic wells?

Micheline Fairbank:

The idea behind 3M plans is not necessarily to mitigate conflicts to the public interest. Certainly, the idea of the public interest is out there in terms of the balancing of development of water and balancing that as to what those interests are with that particular project. To the extent that it talks about the interbasin transfers, within the statute we also have to have environmental soundness when it comes to interbasin transfers. It is a very in-depth and complex analysis that has to take place based upon each individual application and project. That is one of the challenges; there is not a universal one-size-fits-all solution. We have to look at each project, each application, the hydrographic basin, and the conditions within that basin on an individualized basis to provide the balance. Our office has denied applications on the basis that it is not in the public interest due to multiple considerations. We take great care, and we try to strive to do that balancing within the confines of the statute.

Assemblyman Watts:

Would a 3M plan apply to monitoring, management, and mitigation in those areas, or is it geared toward monitoring, managing, and mitigating conflict between water rights, only?

Bradley Crowell:

What we are seeking in this bill is the expressed authorization to build regulations governing 3M plans. Part of that process of building regulations is the stakeholder or public process. With that interaction, we hope to strike a balance between various interests, including the environmental concerns and the public interest. Instead of being overly prescriptive in the legislation, or having the State Engineer do it without the utmost transparency, we are asking for direction to undertake the regulatory process with stakeholders to strike that balance.

Assemblyman Watts:

I know that sometimes we have legislation that asks for regulations to be promulgated, so I appreciate the clarification of the intent. I want to make clear where my question was coming from and my concern. If we were to set the foundation in legislation, I am concerned that we can have a situation where conflict between water rights is being mitigated, but that the mitigation measures—which I know this legislative framework leaves wide open—could potentially result in harm to the public interest or to environmental soundness. I am concerned if this is focused on mitigating conflicts for water rights, we could end up with

things like aquifer decline, groundwater mining, or other things that have negative impacts in those other areas that would not be considered under the policy framework.

Bradley Crowell:

There are some environmental concerns and public interest determinations that cannot be either fully or partially mitigated.

Assemblywoman Titus:

I have an observation: using "harmony" and "water law" in the same sentence is a little bit of an oxymoron. In your presentation prior to the bill, you gave us a review on water law in the state. You mentioned that one of your tenets—one of the things you do not want to do—is upend decades of decisions. Then, looking at A.B. 30, section 1, begins, "If there is water available for appropriation in the proposed source of supply, before rejecting an application because the proposed use or change set forth in an application conflicts with existing rights." It seems that very first line upends the very tenet of our Nevada water law since its inception—the first in time is the first in rights.

Tim Wilson:

We feel that instead of an outright rejection of the application, there should be an opportunity to bring the parties together to resolve the conflict. We might even have an ability to avoid the conflict through management of the project. That management could be staged development, altering points of diversion, or reducing pumpage from certain wells. We think that in order to maximize our available water resources, and again, we are talking about when water is available for appropriation, that we need to have the opportunity to try to avoid conflict through a 3M plan and not outright reject an application.

Assemblywoman Titus:

Frankly, you did not answer my question. What I asked was this: Because you want to take permittees to arbitration or discussion, you are saying that the person with the senior right—which is the one this protects—you are forcing him into a negotiation or a conflict. By nature of doing that, it takes away his right to say, "I am the senior water rights holder, and this interferes with me." Is that not what this is trying to change?

Tim Wilson:

I think Ms. Fairbank might be able to assist me.

Micheline Fairbank:

I think the direct answer to your question is, the right to the use of water is merely to the use. It is not the actual ownership to the particles of the water; it is not even necessarily the place of diversion or the source of the water, so long as the senior water rights holder is made whole in some manner. Again, there are a lot of variables and different types of scenarios. That is why it is difficult because what might be an appropriate resolution to avoid or eliminate the conflict may be through the reasonable lowering of the groundwater table if someone has a shallow well. That well is no longer going to be functional, or the draw may not be sufficient based upon the lowering of the groundwater; therefore, that alternate plan

could be simply something as simple as deepening the well. You are still providing access and respecting the prior appropriation because you are ensuring that the senior water rights holder is being made whole in an appropriate manner which satisfies their manner of use and their beneficial use. You are also balancing the development of the available water without allowing a particular water rights holder to hold hostage available water that could be used for the development and economic growth of a particular area where water is available. It is a balancing of interest. There is not an easy dialogue because you must look at each one on a case-by-case basis. Overall, that fundamental tenet in the Nevada water law is that you have the right to the use of the water.

Assemblywoman Titus:

Would you agree that the water is a property right, a right of ownership?

Micheline Fairbank:

You have a right to the use of the water, but it does not give you the ownership over the particles of water because that belongs to the public.

Assemblywoman Bilbray-Axelrod:

You used the term "reasonable groundwater levels." How is "reasonable" defined?

Tim Wilson:

In NRS 534.110 subsection 4, all groundwater appropriations allow for reasonable lowering of the water table. There is no definition of "reasonable"; it is left to the State Engineer's discretion.

Assemblywoman Bilbray-Axelrod:

Did any outside agencies, such as the Southern Nevada Water Authority (SNWA), offer any language or advice or supply any help in drafting these bills?

Tim Wilson:

No, absolutely not. We did not meet with SNWA when we were drafting this legislation. These are bills that we feel are necessary to address unclear statutory language, in particular with this bill, to eliminate what we feel is a conflict in the statute. Our next bill is something that we feel goes straight to the directive of the Legislature on conjunctive management.

Assemblywoman Bilbray-Axelrod:

To be clear, no other agency has asked you to bring this forward?

Bradley Crowell:

The response to your question is an emphatic "no," be it the entity that you mentioned or any other stakeholder.

Chair Swank:

I would like Mr. Amburn to talk a little bit about both of these bills. We have received a lot of comments about a lack of due process. We have had our staff look at that, and I would like him to talk about those issues for both this bill and the next one.

Allan Amburn, Committee Counsel:

When we were drafting these bills, our office looked into whether these bills violate due process concerns or issues. Essentially, our conclusion was that there were no due process violations or issues coming as a result of these bills. There are procedures in place, either by regulatory action or in statute, that allow someone to be heard if there is an issue. We are also talking about a situation in which there is the taking of water, there is adequate compensation provided with replacement of water, or in Assembly Bill 51, financial compensation.

Chair Swank:

We have a lot of people who are sending in comments to that effect. I think it is important to have that cleared up.

Assemblywoman Hansen:

Along the lines of a 3M plan, if a senior water rights holder is injured, what does the remedy look like?

Tim Wilson:

We look to developing these plans when they are needed. It has been rare that we try to utilize the 3M plans. For the mitigation process, we need to know what source might be impacted. Is it a nearby well that is not drilled very deep and could easily be deepened? Is it an issue where it could be a conflict with a spring? Springs are more problematic, you cannot replace a spring if it has other intrinsic values to it. There are instances, one in particular, in which we have a spring that is basically a hole someone dug in a shallow water table. Someone put a piece of casing in it and called it a spring. It is very small and maybe produces one or two gallons per minute. It is not very useful, but there is a certificated water right on it. It could easily be mitigated and that water rights holder could be made whole with an even better water right that flows year round. In this particular case, there is nothing dependent on the spring. There is no obvious evidence of any flora or fauna or dependent species—considering that it was most likely a hand-dug hole and was not originally a spring. We think something like that can be mitigated with a replacement well, for instance.

Bradley Crowell:

Every water system is different, so every solution to address an impact or conflict is going to be different. The idea is that the burden for keeping that senior water rights holder whole is not on them: so if there is a deepening of a well, it is not at their expense; it is at the new water right applicant's expense. To the greatest degree possible, it is done with the consent and agreement of the senior water rights holder.

Micheline Fairbank:

To elaborate a little more, when you look at A.B. 30, section 1, subsection 1, paragraph (b), the emphasis is on "monitoring." The idea is that if you have a project that is going to be affecting groundwater, you are going to be monitoring the effects of that project so that you can get in front of potential impacts to those senior water rights holders. If you see that the monitoring is demonstrating that there may be an effect or that an adverse impact could occur, that is when "management" steps in. Management is that you manage that project either by reducing pumping or moving the location of pumping—or any other variables—to avoid getting to "mitigation." Again, mitigation has been characterized as the last resort, or the contingency plan, and that is if all the other things occur in an unanticipated way, then you have some form of recourse. The idea is that mitigation is the last resort, and monitoring and management should be the focal point that provides protection for those senior water rights holders.

Assemblywoman Hansen:

Is it agreed that because of the state we are in, if we implement this, there could be some severe hardships to current senior water rights holders? My concern is, it is not a matter of just deepening a well, it could have some severe impact to their ability to maintain their operation. What would the remedy be for them if this bill were to pass?

Tim Wilson:

Remember, we are talking about cases in which water is available. If there is obviously not enough water and you are going to impact the senior water rights holder, we are not going to approve the application. We would never get past the denial stage. It is in cases in which there is great uncertainty whether there will be any impact, and we would like to have the ability to try to avoid that impact through monitoring and management. Even then, if we see that it is not working, we can order the pumpage to stop. We only want mitigation to hold the applicant responsible just in case.

Assemblywoman Peters:

With regard to environmental protection, we really do not talk about water quality and ecosystem management in water law. Many of those things are rather new to water law in the state of Nevada. I have concerns with that not being explicitly within the language of this mitigation, that we have to consider those issues. I think Assemblyman Watts touched on that. I also have a dilemma with the idea of the authority for conflict determination. We have an opinion from our legal counsel that due process is not impacted by this, but I just do not understand how the process of determining that a conflict is avoided takes into account the complexities of water in Nevada. We have water use, water availability, history, and culture of the water use for the impacted user. We have primary water rights and senior water rights—all of those things that have play in the idea of a conflict. Just coming up with an engineered plan will not necessarily mitigate those conflicts, those emotionally attached conflicts. How do you envision this mitigation, or even management, to do that in addition to the general management of water and beneficial use in this state?

Bradley Crowell:

With regard to appropriately taking into account environmental concerns and public interest, which in many instances is the same, I would have no problem making that more explicit in this bill because our intention is to take into account all those considerations. What we are asking for here, as I mentioned to Assemblyman Watts, is to get the green light from the Legislature to undertake a process in which we can talk to stakeholders on all sides of an issue and hopefully come to an agreed upon resolution about what degree of environmental concern should be taken into account, whether it can be mitigated, on all of those issues. I know there has been concern that past decisions have not adequately taken that into account, but in putting together new regulations with transparent data and robust stakeholder participation, I am hoping we can get to that place. In terms of conflict, I will let Ms. Fairbank describe how they identify those issues.

Micheline Fairbank:

Again, when we are talking about trying to resolve the conflict, there is no easy answer. We all know that is why water law is not the most fun topic. When we are talking about trying to resolve all of these different variable conflicts—that is part of the stakeholder general process. That is what we strive to encourage and find manners and mechanisms to utilize that stakeholder input and process to guide and direct decisions that our office is making. We do engage with the stakeholders to try to come up with different types of plans to the extent possible, but these plans also have to be guided by science and by our existing law. To the extent that there are different interests that are not necessarily represented in the four corners of our existing water law, that is what our office is confined by. The opportunity to be able to have more options and more authority to engage in these different types of issues and create solutions is what is going to resolve those conflicts and move the process forward.

Assemblyman Wheeler:

As I read this, the end of section 1, subsection 1, says that "the State Engineer may instead consider a proposal to avoid or eliminate the conflict, which may include, without limitation:" and then paragraph (c) states, "Any other plan to avoid or eliminate the conflict." Given the answers we have heard here about "existing law" and "in the appropriate manner," what I am taking away from this bill is that the State Engineer will have unlimited power to give water and take water away from someone regardless of right. I am not saying that you would do that, I am saying that this particular bill gives you that power. Then we have to wait for the appropriate manner and existing law that might be usurped by this.

Tim Wilson:

I respectfully disagree that this gives me the power to take away water rights. This section goes to NRS 533.370, which currently says that if there is any type of conflict with an existing right, the State Engineer shall deny. This conflicts with other sections that allow for a 3M plan. What we are looking at here is an applicant who comes forward and meets all of the statutory criteria and there is water available at the source, which is the first criteria for approval. If it is a possibility, should they have the ability to avoid a conflict or mitigate a conflict? Should they have that ability or should we deny their water right outright? Those are the only two options I have. I have to do one or the other. I cannot take away the

existing water user. As I said, the whole point of this process is to keep the existing user whole, to keep the senior water rights holder protected. We have to protect senior water rights, which is a basic tenet of our water law—prior appropriation, first in time, first in rights. We feel that this gives us additional abilities to protect those existing water users. They may not get their water out of a one hundred foot well, maybe they need a two hundred foot well, but it is the applicant that drills the new well.

Assemblyman Wheeler:

Again, I understand and agree with what you are saying, to a point. That is not what the bill says. I think maybe some different language needs to be used. I believe that this law would usurp the statute you stated because this would be the newer law giving you the right, or your successor twenty years from now, the right to make up his own mind. It says right in the bill, any other plan "to avoid or eliminate the conflict."

Allan Amburn:

Looking at section 1, subsection 1, paragraph (c), it is essentially a catchall provision and it is very broad, as you have pointed out. The goal of that is, we are dealing with a situation where there is not an agreement among the parties as in paragraph (a)—it is not a 3M plan as in paragraph (b), it is something else. It essentially provides flexibility. When it comes to someone who has an issue with the plan being proposed, based on section 2, he can still protest that: He can still protest whether the application is approved or denied. There are other procedures that he can also appeal this plan with.

Assemblyman Ellison:

Will this impact wildlife and the environment? Right now we are looking at some of the endangered species in the desert. The Bureau of Land Management (BLM) within the U.S. Department of the Interior, estimates 305 springs and 112 miles of streams, 8,000 acres of wetlands and 191,000 acres of shrub habitat. I am asking if this bill passes, with the BLM study, you could endanger the wild horses, sage grouse, elk, big horn sheep, tortoises, not counting 20 threatened and endangered species.

Tim Wilson:

In short, I would say no.

Assemblyman Ellison:

Have you met with the Department of Wildlife?

Tim Wilson:

I have not met with the Department of Wildlife regarding Assembly Bill 30. However, this is for instances in which there is water available at the source. We are looking at potential impact that can be mitigated. If there is an impact that cannot be mitigated, the application does not meet our threshold for approval and would be denied. This cannot be used in any way to dry up springs. Those applications would be denied. This is for very specific instances where we might be able to come to an agreement where we think monitoring and management can avoid a conflict and have mitigation as a fail-safe. That is our goal.

Assemblyman Ellison:

By the time the springs start to dry up, it will then be a little too late.

Tim Wilson:

Monitoring is key. Having an aggressive monitoring plan in place will give us early warning of any potential impact. If we see, for instance, a propagation of drawdown headed toward a sensitive area that we are monitoring, we will be able to act before that impact takes place. That is the idea behind a 3M plan.

Assemblyman Ellison:

Is A.B. 30 necessary? Most of the new language attempts to codify the Supreme Court's decision in the *Eureka Cnty v. State Engineer*, 359 P.3d 1114 (2015).

Bradley Crowell:

It is necessary because without it, we are left with two conflicting directions under statute that, no matter which one we follow, we end up in court over our decision. I personally do not think that we should be abdicating the decisions on water policy to the courts. I think we should be clarifying the law so it could be implemented appropriately. I think it can be done, but as the law stands now, there is the inevitability of litigation, which is not the scenario that any of us want.

Assemblywoman Carlton:

What has been the cost of litigation that has gone on? Will this solve any of that so things are clearer so that no matter which way you rule, you will not end up in litigation?

Micheline Fairbank:

In terms of the costs, we pay an allocation for representation by the Office of the Attorney General. This last biennium, that cost allocation has gone up substantially based upon the hours that have been spent by the attorneys representing our office. I can say, having once been the attorney representing the Division of Water Resources, that the propensity and frequency of litigation is increasing. Is this bill an absolute bar to future litigation? The answer to that is no. What this bill does do is create a consistency and it provides resolution of conflicts within the statute that has that purpose and to at least remove that particular dispute from being litigated. This allows us the authority, explicitly, that we can consider these different alternatives where there is water available to appropriate. In the scenario that was addressed earlier, if we deny an application even though there is water available to appropriate, then we are challenged on the basis that we could have allowed mitigation or an alternative plan to avoid or eliminate the conflict. On the other hand, if we approve an application, then we are again subject to litigation because we did not deny it because it conflicts with existing rights. At least this bill takes that particular issue and claim out of the arena and we can move forward on other things. I do not foresee, in the near future, litigation going down extensively, but we have to start somewhere.

Assemblywoman Carlton:

That is only if you decide there is water available. If the decision is that there is no water available, that applicant is denied?

Micheline Fairbank:

That is correct.

Chair Swank:

With that, I will give everyone the lay of the land for testimony. Just to remind everyone that we may not always agree, but we can always be civil. I will allow 30 minutes for support, 30 minutes for opposition, and 30 minutes for neutral. If we do not use all of the 30 minutes for support, then we still only have 30 minutes for opposition. Each person will get two minutes. Also, if we have any currently elected officials who have come in today, please come forward first. We are going to start in Las Vegas. Is anyone in Las Vegas in support? Seeing no one, is there anyone in Carson City who would like to speak in support? Seeing no one, is there anyone in Elko who would like to speak in support? Seeing no one, I will go to opposition.

Rupert Steele, Chairman, Confederated Tribes of the Goshute Reservation, Ibapah, Utah:

[Opening remarks were spoken in Shoshone.] I come here to stand before you with a good cause and much respect that we ask you to vote no on A.B. 30 and A.B. 51. The language in bills sounds attractive, deceptively so. But behind the language is another side that would help lay ruin to one of Nevada's great cultural and historic resources, a national historic property called Swamp Cedar Natural Area, or "Bahsahwahbee."

We have been fighting a good fight to protect this special place. The SNWA aims to drain it—and water from other senior water rights holders—in order to pipe the water 310 miles to Las Vegas. Last summer, the State Engineer denied all of SNWA's groundwater applications but approved their monitoring and mitigation plan, one that the White Pine County District Court previously rejected due to serious and deceptive flaws. It was a sham. Now in their latest plan, SNWA would not mitigate impacts on Swamp Cedars until every last cedar tree is dead. They would be the sole decision-makers as to when and how to mitigate.

We believe this is very wrong. Wrong because, as the site of the largest Indian massacre in United States history, and two more that followed, it is a place to be protected. Wrong because Swamp Cedars is holy to us. It is a place where we pay our respects to our ancestors and where we go to pray and hold spiritual gatherings. The State Engineer agreed it was wrong. He denied certain water rights because it is in the public interest to preserve Swamp Cedars in perpetuity, rather than draining its medicinal waters and killing the sacred trees, both of which we use in our traditional ceremonies.

Assembly Bill 30 and Assembly Bill 51 would undo efforts to protect Swamp Cedars. The bills would pave a new way for SNWA's groundwater project while making rural Nevadans suffer. We would be left high and dry.

Please vote no on A.B. 30 and A.B. 51. [Additional material was provided ([Exhibit E](#)).]

Robert McDougal, Commissioner, Board of Commissioners, Pershing County:

I am here to encourage you to vote no on A.B. 30. One of the problems that I see with it is that it is a top-down approach that the State Engineer would be using when, in fact, where there are conflicts existing, it should be a cooperative effort on the part of the users. We are a small rural community in Pershing County. The Lovelock Valley is dependent on the existence of the prior appropriation doctrine. The farmers in that valley hold some of the oldest water rights on the Humboldt River. They have already felt the impact of conflicts due to over-pumping in certain areas upstream of the Humboldt River that have negatively impacted flows in the river. That study is ongoing and we look forward to its completion to find out exactly how much damage that has caused.

The State Engineer's solution in our case is a conjunctive management plan that would include mitigation. In all likelihood, it would mean money, not water, to the farmers of the Lovelock Valley. We have already seen, due to the drought, the loss of hundreds of residents who used to work on the farms. They left permanently because there was no work to be done. They went to the mines and other places.

I think we would like to see 3M plans implemented where existing conflicts happen. The difficulty in two conflicting statutes that the Division of Water Resources spoke to—the solution is to remove that portion of the statute that allows 3M plans in the granting of new water rights and rather restrict that to being used as a solution to existing problems.

**Norman Harry, Environmental Director, Environmental Protection Department,
Washoe Tribe of Nevada and California:**

I have worked with several tribes within Nevada addressing their groundwater and surface water rights negotiations. I would like to quickly state that there seems to be some major issues that could probably be clarified through language if this were to pass. What are the thresholds? Also looking at mitigations, since we are talking about mostly federal lands, does it require the U.S. Environmental Protection Agency involvement with something that is going to accompany and substantiate these concerns? I think those things should be included if this were to pass. On the other hand, the language that is being used generally is soft language. It talks about harmonizing and so forth. The bottom line is these valleys are overappropriated with groundwater. In review of the mitigation plans, what are the thresholds? Are they going to impact more than 100,000 acre-feet, or 20,000 acre-feet? There is no defined threshold. If the water right permittee is going to pay for that, I see the prospect of some industry coming, and, again, if they are impacting the senior water rights holder, the big company could throw \$1 million at you to deepen your well. According to the state, if the Division wants to appropriate almost every drop of water, there is nothing there for the future for all of us.

Chair Swank:

I would like to clarify that this does not apply to water on federal lands. The federal government does not have to tell us anything about how much water they have in Nevada.

Norman Frey, Private Citizen, Fallon, Nevada:

I am a farmer in the Fallon area. My family has been farming in this state since the mid-1850s. I was a county commissioner in Churchill County, and the president of the Nevada Association of Counties. I was embroiled in a battle over transferring water rights from one place to the other on my own property; it cost me a lot of money to do that. It gets very expensive for a senior water rights holder to be involved in the process of developing a 3M plan. We do not have the expertise; that has to be hired. For senior water rights holders, sometimes it makes the difference in making improvements to your operation or sending your kids to college, et cetera. It is very expensive and puts a hardship on the farmers that have been there. I am in opposition to the way this legislation is written; 3M plans can work. Many of the issues have been addressed by others in their testimony.

Jeff Fontaine, Executive Director, Central Nevada Regional Water Authority and Humboldt River Basin Water Authority:

Central Nevada Regional Water Authority and Humboldt River Basin Water Authority are units of local government; together they have nine Nevada counties. As members, these nine counties encompass 70 percent of the land in Nevada, including communities, agriculture, mines, and vast expanses of public lands. These authorities were formed to protect the water resources in the membered counties. These membered counties not only have an economic future, but their value of quality of life and natural environment is maintained. These authorities share Director Crowell's and Acting State Engineer Wilson's concerns and certain interests in addressing the substantial and critical water issues that are facing our state. We must oppose A.B. 30. Arguably, A.B. 30 undermines the prior appropriation doctrine and weakens protections for existing water rights. We believe A.B. 30 will create uncertainty for the future.

Jake Tibbitts, Natural Resources Manager, Department of Natural Resources, Eureka County:

Eureka County opposes A.B. 30 for many reasons similar to what we had with Assembly Bill 298 of the 79th Session. We would like to point the Committee to our input and testimony we provided then and ask you to consider that. [Continued to read from prepared testimony, ([Exhibit F](#))].

The language in A.B. 30 to allow plans to "avoid conflicts" is misleading and unnecessary. If a conflict is avoided, there is no conflict. Regardless of a plan or a private party agreement, the State Engineer would find that there is no conflict. Options to avoid conflicts are available today without a change in the law. These include what I consider the three best management practices of sound water policy. First, applicants need to configure their points of diversion and diversion rates to eliminate the conflict. Second, reduce the size of the project or improve water-use efficiency to eliminate the conflict. Third, work cooperatively

with existing water rights holders, including domestic well owners, to resolve conflicts by mutual agreement before an application is even considered by the State Engineer.

That is the best management practice that we follow in this state, where we put it on the applicants to do the necessary work to come forward before they ever apply for the water. This bill would bypass that process.

We do not support 3M plans in the way this bill proposes. If a conflict with existing rights is identified when the application is considered, then it is apparent that the applicant has not done the groundwork necessary. We believe this bill pays "lip service" to prior appropriation in name only.

Regarding 3M plans, the only reference to monitoring, management, and mitigation in the statute is due to a bill that Eureka County brought forward in two separate attempts in two separate sessions. In 2011 there was an extreme effort to shelve the bill and place it in the drawer and it was not even brought forward. Our second try in 2013 through Senate Bill 133 of the 77th Session resulted in the language that is in statute today. I find it a little ironic that we are now speaking about a bill that is granting authority for a 3M plan in a way that it was never intended.

Monitoring, management, and mitigation need to be part of the process. Eureka County does not disagree, but we need to look at it in a surgical manner and in a way that protects prior appropriation, or it will be prior appropriation in name only.

Vested rights are under a different statutory scheme. These are rights that were put to use prior to 1905. Much of the mitigation that we have seen is to replace vested surface water rights with groundwater. There are some major considerations that you need to take in looking at replacing water that is under a totally different statutory scheme in our water law.

Kyle Roerink, Executive Director, Great Basin Water Network:

We represent ranchers, farmers, indigenous communities, public land advocates, and businesses who call the Great Basin home. Although A.B. 30 purports to be about 3M plans, it is a bill to further empower the powerful. Simply put, the bill would give the State Engineer the unfettered discretion to skirt current laws in order to give somebody's property that is senior in right to someone who is junior in right. This bill upends Nevada water law as we know it and attacks the prior appropriations doctrine.

Essentially, all of section 1 in A.B. 30 would give the State Engineer the ability to allow applicants to spend and buy their way around the law to get permits for water, even if granting those permits harms someone else. Considering that there are no long-term protections or guidelines for public participation in this bill, it is clear what entities this bill has in mind. This bill may not explicitly say Las Vegas pipeline, but those implications are all over it. We are currently in litigation over SWNA 3M plans that were erroneously approved by the State Engineer. Clearly, this is not the time for this bill. Indigenous communities, environmentalists, farmers, ranchers, elected officials from rural counties, and

even former and current Clark County commissioners all agree with this assessment. We stand united against a bill that will harm Nevadans and the environment. We ask for bottom-up, stakeholder-driven opportunities to collectively work on water policy. This bill was written by a State Engineer who did no public outreach and who no longer serves. We want to be involved and we are ready to do the work. [A letter was also provided ([Exhibit G](#)).]

Chair Swank:

If you would like to be involved, please reach out to the Division of Water Resources.

Doug Busselman, Executive Vice President, Nevada Farm Bureau Federation:

The Nevada Farm Bureau Federation is opposed to A.B. 30. Simply put, our opposition is our concern over the way in which senior water rights holders will be impacted by a mitigation plan that may reduce their water availability. One of the points that we would like to make is section 1, subsection 1 where it mentions water available for appropriation. We would like to make sure there is a clarification that the water that is available matches what the application is actually calling for, versus just "having water available" that may or may not relate to that particular perspective.

The other point I would like to raise is a question. I have looked through A.B. 30, and I did not see, in my initial review, where the regulation provisions are identified for how mitigation might go forward. I think if there is going to be a promise of creating some type of a regulatory structure, that needs to be spelled out in order for stakeholders to effectively participate in that process. We are opposed to the bill and we urge that the Committee not pass it.

Patrick Donnelly, Nevada State Director, Center for Biological Diversity:

We are a nationwide nonprofit that has been active in Nevada for a decade. Our No. 1 issue has been fighting against the Las Vegas pipeline, which we have successfully litigated in federal court. The SNWA's pipeline would pump billions of gallons of groundwater per year from the aquifers in eastern Nevada and ship it 300 miles to Las Vegas. The BLM's own assessment showed the widespread drying of springs, wetlands, marshes, and the dying off of groundwater-dependent vegetation. The Nevada Department of Wildlife said it would result in the wholesale localized extinction of native fishes and the drying of water sources would cause collapses in mule deer and antelope populations. In short, it would be the most destructive project in the history of the Silver State's environment.

Assembly Bill 30 would enable the Las Vegas pipeline, make no mistake. The State Department of Conservation and Natural Resources may say that is not the intent of this bill, and I think we can take them at their word on that because there are broad challenges we need to address with Nevada water law. If they are serious that this bill is not intended to authorize the Las Vegas pipeline, they can take steps in that direction, such as carving out large-scale interbasin transfers from the language of this bill. As it stands right now, our attorneys, who are the experts on this issue and have been working on it for over a decade, are very clear—this would enable the pipeline. The pipeline has lost in court repeatedly because of the inadequacy of its mitigation. Indeed, as Mr. Crowell said, there are some

things that simply cannot be mitigated. Withdrawing 100,000 acre-feet of water a year—billions of gallons—from the basins of eastern Nevada cannot be mitigated. Those losses are permanent, irreversible, and unmitigatable. This law would change the requirements of mitigation to allow the State Engineer to dictate his own terms of that mitigation. You can see how this would enable the pipeline by moving the goalposts for what is adequate mitigation. We are strongly encouraging the scrapping of this bill and starting over with a stakeholder-driven process. All the people in this room who care about water oppose this bill. Not a single person stood up to support this. The people in this room are the ones who are going to be affected, they should be the ones helping to determine the water future in Nevada. [A letter was also provided ([Exhibit H](#)).]

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. 30. We urge the Assembly Committee on Natural Resources, Agriculture, and Mining to oppose and abandon this bill.

We oppose A.B. 30 because of the impacts it will have on Nevada's environment and its ability to facilitate a pumping and piping project that will siphon 58 billion gallons of water annually from eastern Nevada near Great Basin National Park to Las Vegas.

The bill allows the Nevada State Engineer to appropriate water when a conflict exists by giving junior water rights applicants the ability to negotiate away conflicts with senior water rights holders by any means, veering far from the current law and setting a dangerous precedent for the future. In the nation's driest state, it is most important for regulators to appropriate our limited water resources wisely.

Additionally, the bill allows replacement water as an acceptable tool for mitigating a conflict created by a junior rights holder against the environment or someone with senior rights. Replacement water is not an environmentally acceptable means of conflict resolution. Neither pipelines nor trucks full of water will ever make up for what Mother Nature naturally provides, nor will it ever guarantee that senior rights holders will be made whole with water of sufficient quality or quantity.

The aforementioned provisions would give life to disastrous projects like the Las Vegas pipeline and other water grabs in our state without providing sufficient long-term due process or public input.

Nevada's current water protections are among the most progressive in the West. All committee members must ask themselves: Why are we rushing to change a good thing? [A letter was also provided ([Exhibit I](#)).]

Laurel Saito, Nevada Water Program Director, The Nature Conservancy:

Our mission is to conserve the land and waters on which all life depends, and no issue is more important to protect the ecosystems and natural resources of Nevada than effectively managing the use and conservation of the state's limited water resources. Water is the

lifeblood of Nevada's residents and communities, and it is also essential for Nevada's natural environment—all plants, fish, wildlife, and people depend on freshwater resources.

We are testifying in opposition to A.B. 30 because we have concerns about this bill enabling the granting of applications where a known conflict exists with current water rights, domestic wells, and/or environmental resources in the public interest. In addition, we do not agree with using 3M plans to address known conflicts, and we do not believe that replacement water for environmental resources is a viable approach.

In addressing conflicts, The Nature Conservancy advocates applying the mitigation hierarchy for conflicts with water for the environment and existing water rights and domestic wells. The three tiers of the mitigation hierarchy are firstly, to seek to make water management decisions that avoid impacts to the environment and conflicts with existing water rights and domestic wells; secondly, to minimize impacts; and lastly, to mitigate, offset, or compensate impacts. Current Nevada water law is consistent with this hierarchy because it requires the State Engineer to deny applications with known impacts and conflicts, thereby avoiding them in the first place, and it serves to incentivize applicants to seek points of diversion that would not conflict with existing water rights or domestic wells or impact the environment.

Regarding section 1, subsection 1, paragraph (b) of A.B. 30, well-designed 3M plans are useful tools for protecting water for the environment in cases where it is uncertain if a conflict may occur. In the case presented in A.B. 30, however, 3M plans could be used where a known conflict occurs. In our view, this would put in statute a broader and riskier use of 3M plans that would weaken the incentives to avoid conflicts in the first place.

Finally, the replacement of water to replenish the source of supply is rarely ever adequate. Nevada is the driest state in the nation, yet it ranks eleventh in biodiversity with over 170 known endemic species; these are species found nowhere else in the world. The vast majority of these endemic species are associated with natural springs and other water resources on Nevada's landscape. We believe that it is highly unlikely that the unique geochemistry and physical habitat that species and ecosystems are adapted to can be replicated with water imported from elsewhere. [A letter was also provided ([Exhibit J](#)).]

Mark Butler, Executive Council Member, The Coalition to Protect America's National Parks:

I am also here on behalf of the National Parks Conservation Association to express our opposition to two bills before the Committee, Assembly Bill 30 and Assembly Bill 51.

We oppose A.B. 30 because of the potential to enable large-scale pumping projects that could cause irreparable harm to Great Basin National Park's unique water-dependent resources. Assembly Bill 30 would also expose Lake Mead National Recreation Area to harm by facilitating groundwater extraction from nearby aquifers where testing has shown that there has already been adverse impacts to the region's water resources from pumping at only one-third of current appropriations.

In our view, A.B. 30 would codify a "trust us" attitude rather than rely on sound science. The bill would give the State Engineer an overwhelming amount of discretion to continue appropriating our groundwater basins, even when the water does not exist for the taking. Those allocations will likely come at the expense of our parklands, public lands, and families who reside in these communities and regions.

Assembly Bill 51 would also enable large-scale pumping projects because it will alleviate the requirements to prove that water applicants' wants actually exist, by potentially masking or minimizing pumping impacts by using so-called conjunctive management. Conceivably, this bill could allow any applicant to sidestep the current groundwater protections that have worked in Nevada for decades.

Thanks to ongoing leadership in this Committee and others, Nevada offers spectacular outdoor recreational opportunities at many treasured destinations, including the Sierra Nevada Mountains, Great Basin National Park, Red Rock National Conservation Area, Lake Mead, and more than two dozen Nevada State Parks. These treasured destinations provide Nevadans with places to adventure and recharge while also bringing in billions of dollars into Nevada's economy. It is absolutely in line with the current preferences expressed by Nevadans as documented in a recent 2019 study, an astounding 81 percent of Nevadans believe that the outdoor recreation economy is important to the future of the state. An equally impressive 83 percent believe it is important to protect and restore the health of the state's rivers, lakes, and streams. Preserving our precious groundwater resources from overappropriation is the key to long-term health to many of the state's most wonderful outdoor recreational locations. Therefore, we urge members of this Committee to oppose this legislation. (A letter was also provided ([Exhibit K](#)).]

Susan Juetten, Private Citizen, Reno, Nevada:

I am representing Great Basin Resource Watch (GBRW), a Nevada-based nonprofit public interest organization which has been monitoring mining and extractive industries on our public lands since 1995. I will speak about both bills. Assembly Bill 30 proposes that the State Engineer may consider a proposal to avoid or eliminate the conflicts that occur between a new appropriation and an existing water right. The bill apparently provides no constraints or clear guidance on what is an acceptable proposal for conflict resolution. As a result this bill will give the State Engineer too much power, which has proved to be problematic in the past. For example, the State Engineer first approved water applications by Eureka Moly, LLC as Kobeh Valley Ranch, LLC (KVR) for the Mt. Hope Mine, a proposed molybdenum mine in Eureka County. However, these applications were in conflict with existing senior water rights, and it was necessary for the senior water rights holders to appeal the State Engineer's decision all the way to the Nevada Supreme Court. The Supreme Court overturned the decision of the State Engineer, stating in conclusion: "In sum, substantial evidence does not support the State Engineer's finding that KVR would be able to 'adequately and fully' mitigate the fact that its groundwater appropriations will cause Kobeh Valley springs that source existing rights to cease to flow."

In conclusion, Great Basin Resource Watch opposes A.B. 30. [A letter was also provided ([Exhibit L](#)).]

Kenny Bent, Private Citizen, Pahrump, Nevada:

I have to say our Assembly members asked some excellent questions. The public has given some brilliant testimony which helps me a lot. When I came in here, I was slightly nervous about this bill; now I am downright afraid. Assembly Bill 30 seeks to give the State Engineer even more undefined powers to use at his discretion. On its face, this type of power given to an unelected bureaucrat defies the established concept that laws should be clear, defined, and unambiguous. This bill allows him to approve water use that will very likely conflict with existing uses, including domestic use. It basically allows the State Engineer to create a future problem with the high hopes that the damaged parties will have to accept the outcome. It still feels likely that this bill was intended for a specific purpose not disclosed here.

These types of bills will likely lead to unintended consequences, including the type of court battles that inevitably end with the corporations with the most money prevailing over any opposition. The individual will almost always be the casualty. As far as the applicant paying the fees, if someone like Tesla moved in next to me, I do not think money would be an issue. I think applications that are in conflict should be denied, just as they are now. I do not see a reason to do this, it gives me a feeling that this is a 3M plan with an "M" for money.

Undefined powers are a very bad idea. This is what has led to the massive over-appropriation and a lot of the problems we have instead of following clear defined laws.

"Trust us" does not work for me.

John Hiatt, Conservation Chair – Press Liaison, Red Rock Audubon Society:

I would like to speak on behalf of the public interest and groundwater-dependent ecosystems which are not addressed in this bill and have historically been given short shrift by the State Engineer. We have many significantly overappropriated basins in Nevada. My concern is that we are going to do the same with additional basins, particularly places like Spring Valley which has a very vibrant groundwater-dependent ecosystem. There is nothing in this bill, or any other bill that I see, that will address those problems. Therefore, I have to oppose A.B. 30 and I think we need a much different process for resolving some of the conflicts in the Nevada water law. Looking to the future at how we actually preserve a living environment in the state of Nevada so that we do not repeat the problems we have in both Las Vegas and Reno, where vibrant groundwater-dependent ecosystems were essentially obliterated by development and no consideration, I am opposed to the bill and strongly suggest we go back and start over and come up with some legislation which really will address the problems and lead to sustainable groundwater development in the future.

Patti Jesinoski, Private Citizen, Henderson, Nevada:

I grew up in a small rural area in Minnesota, so I feel for the 16 counties outside of Clark County. At the budget meeting of the Henderson City Council last year, they were ecstatic of the 450 current permitted building projects going on at the same time. Building takes water.

The SNWA meeting last fall spoke to us about using our reclaimed water within budget—we were only using 10 percent.

However, these major building projects are not reclaimed water. Now we have the new Las Vegas Stadium that is being built. Last month, at a Henderson City Council meeting, it was stated that we may need to start looking for some other water conservation in our homes. We are only using 10 percent of what we are allowed to use in our homes. Our conflict at this time is too much building. I support the rural areas with a no on A.B. 30.

Chair Swank:

Is there anyone else who would like to testify in opposition? [There was no one.] Would anyone like to testify in neutral?

Ed James, General Manager, Carson Water Subconservancy District:

We are a multicounty, bistate organization dealing with water resources in the Carson watershed. We have had an opportunity to meet the State Engineer's staff and also many of the people in this room to talk about these various water bills. We applaud the State Engineer for being proactive in trying to take action, but sometimes you can hear the issues that need to be vetted a little more. We believe that with opportunities with this group and working with the State Engineer, we can make some better laws than this. Nevada has some very good, strong water laws today, but there is a need to look at some of these changes. We applaud the State Engineer in trying to do that, but again, I think we need to be working cooperatively with him. You will never hear consensus and water law in the same sentence, but I think we have a chance to work together to come up with better laws. If we do not move forward, we will start falling backward.

Chair Swank:

Is there anyone in Las Vegas who is speaking in neutral?

Andrew M. Belanger, Director of Public Services, Southern Nevada Water Authority:

I wanted to testify today in a neutral capacity. We at the SNWA are focused on three main things this year, as we indicated prior to session. We are focused on completing the low lake level pumping station at Lake Mead, completing the drought contingency plan on the Colorado River, and increasing water conservation in southern Nevada. Those are our priorities. While we worked on a 3M plan bill last year, and while we agree with the State Engineer's office that these issues are complex and that they require legislative action to solve, we also recognize that there is a lot of concern about what this bill will do.

We recognized that last session when we withdrew our bill, and we recognize that today. We encourage the Legislature to address the issues of the 3M plan. We cannot support the bill in its current form, but we do not oppose the bill in its current form. We do believe that if the Legislature does not act at some point in the future, you are going to spend a lot more money in the courts than you are today. This is just a fact. Southern Nevada uses 5 percent of the state's water supply, with 70 percent of the state's population. Over the 50-year planning horizon that we look at when we consider the future, the groundwater project moves our

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:

Nancy Davis
Committee Secretary

APPROVED BY:

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, Iapah, 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 4

Exhibit 4

IN THE OFFICE OF THE STATE ENGINEER
OF THE STATE OF NEVADA

ORDER

#1329

ESTABLISHING INTERIM PROCEDURES FOR MANAGING GROUNDWATER
APPROPRIATIONS TO PREVENT THE INCREASE OF CAPTURE AND CONFLICT
WITH RIGHTS DECREED PURSUANT TO THE HUMBOLDT RIVER
ADJUDICATION

I.

OVERVIEW

WHEREAS, it is well established that the source of water to a pumping well originates from three primary sources; first from groundwater storage, then increasing over time from capture of streamflow (where present in a hydrographic system) and evapotranspiration.^{1,2} The terms “stream capture” or simply “capture,” as used in this Order, refer to a reduction in streamflow caused by groundwater pumping. Decades of groundwater pumping in the Humboldt River Region (Region) has led to increasing capture of the Humboldt River and its tributaries, resulting in growing conflict with rights of the Humboldt Decree.

WHEREAS, there are a range of actions or strategies that may be implemented by water users, whether in cooperation with the State Engineer or through other means, to mitigate or avoid conflict. Regional groundwater models currently in development by the United States Geological Survey (USGS) and Desert Research Institute (DRI) are an important tool that will be used to demonstrate the effectiveness of different management strategies and possible administrative actions. Public participation throughout the process of developing a long-term management strategy is an essential component for communication, transparency, and successful implementation. Through the State Engineer’s engagement with the community of water users within the Humboldt Region, several viable strategies have come under consideration, and include:

- Prohibition on pumping within a determined capture zone under certain thresholds of predicted seasonal water supply;
- Credit systems that account for non-use or for return flow from artificial recharge;

¹ Charles V. Theis, 1940, *The Source of Water Derived from Wells -Essential factors controlling the response of an aquifer to development*, Civil Engineering, v. 10, no. 5, p. 277-280.

² Barlow, P.M., and Leake, S.A., 2012, *Streamflow Depletion by Wells – Understanding and Managing the Effects of Groundwater Pumping on Streamflow*, U.S. Geological Survey Circular (Dec. 1, 2021, 1:06 p.m.) 1376, 84 p., <https://doi.org/10.3133/cir1376>

- Enhanced storage capacity, including aquifer storage and recovery that benefits the Humboldt River system;
- Use of conservation funds to enact measures that benefit the Humboldt River such as purchase of groundwater rights that are in immediate/frequent conflict with the Humboldt decree;
- Other private party agreements to resolve conflict; and/or
- Withdrawal or abandonment of existing committed rights.³

WHEREAS, the primary mechanism available to the State Engineer to unilaterally address conflict among water right holders is to order that withdrawals of groundwater be restricted to conform to priority rights per NRS 534.110(6). However, it is also well established that groundwater use in the Humboldt River Region is fundamental to the Region's culture, communities and economic vitality. Strict curtailment would be a draconian measure resulting in significant and lasting economic harm. It is further recognized that permitted groundwater use is a beneficial use. Additionally, a varying amount of the source of water to pumping wells originates from sources other than stream capture and this use is not in conflict with the Humboldt Decree. For these reasons, among others, strict curtailment is not a preferred option. Rather, implementation of a management framework based on the quantifiable impact of each groundwater well's capture of streamflow will more precisely address harm from any conflict with Humboldt decreed rights.

WHEREAS, the State Engineer recognizes that any comprehensive solution will require extensive outreach to those impacted by any future decisions and management strategies, including water right holders, tribal communities, water users, representatives of conservation and environmental interests, and other interests (collectively referred to as "stakeholders"). The State Engineer seeks to collaborate with stakeholders on the development of long-term management strategies, supported by groundwater models that are currently in development, to address conflict caused by stream capture without arbitrary curtailment or other administrative restrictions on groundwater use. The State Engineer anticipates that any future management framework shall consider active water replacement plans carried out by groundwater right holders, local water resource plans developed in accordance with NRS 278.0228, implementation of Water Conservation Plans pursuant to NRS 540.131, preferred uses of water in the interest of public

³ See generally, comments received from the draft interim order; notes from Working Group meetings, notes from Humboldt River Basin Water Authority meetings, official records of the Nevada Division of Water Resources.

welfare pursuant to NRS 534.120(2), and domestic well protections under NRS 533.024(b). It is also anticipated that any such framework will be supported by the use of the USGS and DRI models to demonstrate effectiveness in preventing conflict resulting from groundwater use within the Humboldt River Region.

WHEREAS, the State Engineer recognizes that under the current conditions there are substantial implications for the water users in the Humboldt River Region. The State Engineer also acknowledges and appreciates that the water users understand the issue and share in the desire to see an effective management strategy that addresses the issues relating to groundwater use that conflicts with senior decreed rights and the need for a defensible outcome. While the science that will be used to inform those long-term management strategies is being finalized, an interim protocol is necessary to avoid exacerbating existing problems. This Order establishes the management framework that the State Engineer is adopting for this period to avoid additional harm to water rights above what is already occurring.

II.

BACKGROUND OF THE HUMBOLDT RIVER REGION

WHEREAS, the Humboldt River Region is delineated by the topographic boundary of the Humboldt River watershed, extending over 11,000 square miles, including 34 hydrographic basins in eight Nevada counties. Hydrographic basins within the Humboldt River Region include Marys River Area (042), Starr Valley Area (043), North Fork Area (044), Lamoille Valley (045), South Fork Area (046), Huntington Valley (047), Dixie Creek-Tenmile Creek Area (048), Elko Segment (049), Susie Creek Area (050), Maggie Creek Area (051), Marys Creek Area (052), Pine Valley (053), Crescent Valley (054), Carico Lake Valley (055), Upper Reese River Valley (056), Antelope Valley (057), Middle Reese River Valley (058), Lower Reese River Valley (059), Whirlwind Valley (060), Boulder Flat (061), Rock Creek Valley (062), Willow Creek Valley (063), Clovers Area (064), Pumpnickel Valley (065), Kelly Creek Area (066), Little Humboldt Valley (067), Hardscrabble Area (068), Paradise Valley (069), Winnemucca Segment (070), Grass Valley (071), Imlay Area (072), Lovelock Valley (073), Lovelock Valley-Oreana Subarea (073A), and White Plains (074).

WHEREAS, the Bartlett Decree⁴ dated October 20, 1931, in the Sixth Judicial Court of the State of Nevada, establishes relative rights to the use of the waters of the Humboldt River and setting forth the dates of priority and duties of water for the decreed claims. The Bartlett Decree determined the waters of the stream system to be fully appropriated, and that in an average year there existed no surplus water for irrigation. Subsequent decrees, orders and writs made corrections to the Bartlett Decree, collectively forming the Humboldt River Adjudication, hereafter referred to as the "Humboldt Decree." This process was complete by 1938. The most senior decreed surface water right in the Humboldt River system has a priority date of 1861 and the most junior right has a priority date of 1921.⁵ The Humboldt Decree does not include the Little Humboldt River adjudication or Reese River vested claims.

WHEREAS, Humboldt River flow measured at the Palisade gage is the primary tool utilized for determining and scheduling delivery amounts of Humboldt River decreed rights.⁶ Deliveries are scheduled during the irrigation season based on the daily flow measurement at the gage.⁷ When daily flows at the Palisade gage are sufficient to deliver all decreed rights on the Humboldt River and its tributaries, all water rights irrespective of location above or below the gage are scheduled to receive their full duty of water. When flows are not sufficient to deliver all decreed rights, those rights with senior priority dates are served first. In practice, actual deliveries over the expanse of the Humboldt River Region may be different than exact scheduled deliveries due to a wide range of variables including water distribution and management practices and climatic variations that affect riparian evapotranspiration rates, streambank storage, and baseflow.

WHEREAS, during the 2012–2015 period the Humboldt River Region experienced one of the worst droughts since 1902.⁸ Annual flow at the Palisade gage for that 4-year period averaged 82,872 acre-feet, which is 30% of the historical average annual flow of 287,846 acre-feet for the

⁴ Bartlett Decree, incorporated as Section 1 into the Decree entered *In the Matter of the Determination of the Relative Rights of Claimants and Appropriators of the Waters of the Humboldt River Stream System and its Tributaries*, Case No. 2804, Sixth Judicial District Court of the State of Nevada, In and For the County of Humboldt (October 20, 1931).

⁵ *In the Matter of the Determination of the Relative Rights of Claimants and Appropriators of the Waters of the Humboldt River Stream System and Tributaries*, Case No. 2804, Sixth Judicial District Court of the State of Nevada, In and For the County of Humboldt (October 20, 1931).

⁶ Bartlett Decree, the decreed irrigation season begins March 15th downstream of Palisade and April 15th upstream of Palisade and ends on varying dates depending on location and culture.

⁷ United States Geological Survey (USGS) Gage 10322500, Humboldt River at Palisade.

⁸ Period of record for the Palisade gage begins in 1902.

period of record spanning 112 years.⁹ At the headwaters of the Humboldt River system during 2012–2015, upstream of any significant groundwater pumping, Lamoille Creek also experienced its lowest 4-year flow since at least 1944 when continuous flow measurements on Lamoille Creek started.¹⁰ By the end of the irrigation seasons in 2014 and 2015 the Humboldt River at Imlay was dry and water was unavailable to allocate to downstream surface water users in the Lovelock area. In the midst of the unprecedented drought, senior decreed water right holders alleged that junior groundwater appropriators were capturing surface flows of the Humboldt River and that groundwater use conflicted with the delivery of their surface water rights. In a writ petition filed in the 11th Judicial District Court for Pershing County in 2015, senior water right holders requested that the Court require the State Engineer to take action within his statutory authority to address the alleged conflict.¹¹

WHEREAS, nearly all groundwater uses within the Humboldt River Region are junior to decreed surface water rights in the Humboldt River and its tributaries. There are only four active groundwater permits having a priority date earlier than 1921, the date of the most junior Humboldt Decree right.¹² Groundwater development began to increase more substantially in the 1960s and has gradually increased in the decades since. Groundwater is now extensively relied upon for all manners of use, supporting communities and industry throughout the Region. Groundwater rights were approved in accordance with existing Nevada law over the years by the State Engineer based upon findings that unappropriated water was available and its use would not conflict with existing rights or the public interest.

WHEREAS, it is scientifically understood that groundwater pumping has the potential to capture streamflow when surface water and groundwater are hydraulically connected, either by inducing greater infiltration losses from the stream channel or by reducing the amount of

⁹ For water years between 1902–1906 and 1912–2019.

¹⁰ USGS Gage 10316500, Lamoille Creek Near Lamoille. Note that flow measurements also exist for a period between 1915 and 1923.

¹¹ *Petition for Writ of Mandamus, or in the Alternative, Writ of Prohibition*, In the Eleventh Judicial District Court of the State of Nevada In and For the County of Pershing, (Case No. CV 15-12019), *Pershing County Conservation District v. Jason King, P.E., State Engineer of the State of Nevada, Division of Water Resources, Department of Conservation and Natural Resources*.

¹² See Permit 1843, Certificate 139; Permit 2397, Certificate 399; Permit 3520, Certificate 995; and Permit 4589, Certificate 749, Nevada Division of Water Resources' Water Rights Database, official records of the Nevada Division of Water Resources, <http://water.nv.gov/hydrographicabstract.aspx>

groundwater that would otherwise discharge as baseflow to the stream.¹³ The potential for hydraulic connectivity and capture by itself does not necessarily demonstrate that conflict is occurring or will occur in the future, or that surface water deliveries cannot be met. However, because stream capture due to pumping necessarily reduces streamflow, any amount of capture in a fully appropriated river system when not in full priority will reduce surface water that would otherwise have been delivered to surface water right holders. In addition, with climate models forecasting a continuing pattern of increasing frequency and intensity of droughts and flood events,¹⁴ drought-accentuated natural losses from the river, combined with the likelihood for greater drawdown due to increased reliance on groundwater during drought, may increase the future potential for insufficient surface flow to fully serve decreed rights. The hydrologic connection between surface water and groundwater was not a consideration in the Humboldt Decree, but these long-term dynamics underscore the difficulty in developing and implementing conjunctive management strategies for future administration of groundwater and surface water in the Humboldt River Region.

III.

ACTIONS TAKEN SINCE THE 2012–2015 DROUGHT

WHEREAS, a basic tenet of prior appropriation is that if there is not enough water to serve all users then senior water right holders are entitled to water before junior right holders.¹⁵ During the drought period of 2012–2015 available data were insufficient to identify to what extent groundwater pumping was causing the inadequacy of water supply for Humboldt River senior decreed right holders and to what extent it was the result of natural low flow because of drought.

¹³ *Charles v. Theis*, 1940, *The Source of Water Derived from Wells—Essential factors controlling the response of an aquifer to development*, *Civil Engineering*, v. 10, no. 5, p. 277-280.

¹⁴ USGCRP, 2017, *Climate Science Special Report: Fourth National Climate Assessment, Volume I* [Wuebbles, D.J., D.W. Fahey, K.A. Hibbard, D.J. Dokken, B.C. Stewart, and T.K. Maycock (eds.)]. U.S. Global Change Research Program, Washington, DC, USA, 470 pp., *See* Chapter 8, page 237.

¹⁵ *See* NRS 534.110, providing for curtailment by priority. *See also* *Wilson v. Pahrum Fair Water, LLC*, 481 P.3d 853, 860 (2021) (“That some water rights must necessarily acquiesce to senior water rights is a natural consequence of the prior appropriation doctrine” quoting *Fox v. Skagit Cty.*, 372 P.3d 784, 796 (Wash. App. 2016)); *U.S. v. Orr Water Ditch Co.*, 600 F.3d 1152, 1158-59 (9th Cir. 2010) (“Surface water contributes to groundwater, and groundwater contributes to surface water...[Surface rights granted by decree] cannot be defeated by allocation of water to others—whether by allocation of surface water or groundwater.”).

Analysis of the data at the time indicated that curtailing junior groundwater pumping to protect senior decreed rights would result in a negligible addition to flow in the River and that such action would not likely be legally defensible without additional data and scientific analysis. However, such action would have had devastating and severe impacts to the communities and economies throughout the Region that rely on groundwater.¹⁶ Consequently, no curtailment was imposed.

WHEREAS, in the years since the end of the 2012–2015 drought, the State Engineer initiated several measures to improve the available data in the Region and thus provide an informed and sound basis to render decisions with regard to avoiding potential conflict. Among these measures:

1. All non-designated basins within the Region were designated pursuant to NRS 534.030;
2. Totalizing meter installation and reporting were required by State Engineer's Order 1251;
3. Field investigations were completed to verify installation and meter data;
4. The Nevada Division of Water Resources enhanced its database capacity to maintain and manage the pumping data in a publicly accessible manner;
5. The State Engineer established a policy requiring water rights for pit lake evaporation; and,
6. Applications to appropriate groundwater or to change the point of diversion (POD) of existing groundwater rights were denied if granting the application would conflict with existing senior rights due to stream capture.

WHEREAS, in 2016, the State Engineer assembled the Humboldt River Working Group¹⁷ to assist in developing draft regulations to resolve future conflict between surface and groundwater rights. The Working Group members included both surface water and groundwater users representing municipalities, agriculture, mining, and other community interests across the Humboldt River Region. Over the course of the next three years, the Working Group developed a conjunctive management approach whose objective was to protect senior water interests while at the same time maximizing beneficial use of surface water and groundwater. This effort culminated in a set of draft regulations that relied on a combination of mitigation plans and financial compensation to avoid future conflict. However, in the 2019 Legislative session, the statutory

¹⁶ Nevada Division of Water Resources, public presentations on the Humboldt River in Lovelock, Winnemucca, and Elko, February 12–13, 2015. Analysis available in the files of the Nevada Division of Water Resources.

¹⁷ The Humboldt River Working Group consists of representatives from key stakeholder and water user groups from within the Humboldt River Region with the common purpose to propose, negotiate, and provide feedback on conjunctive use management regulations.

revisions required to give the State Engineer the authority to implement the draft regulations were unsuccessful.¹⁸ Surface water users expressed no interest in financial mitigation in lieu of water. Groundwater users likewise expressed no interest in being assessed fees for capture that had yet to be quantified by best available science.¹⁹

WHEREAS, since 2016, the State Engineer has worked with the USGS and DRI to develop improved groundwater budgets at the basin scale and to develop numerical groundwater capture models for the Humboldt River Region. These peer-reviewed products are intended to serve as a basis for determining the effect of groundwater pumping on flows in the Humboldt River and its tributaries.²⁰ When published, and made publicly available, this model study will provide a consistent basis and a scientifically sound measure to evaluate different management strategies. These products will allow for the development of capture maps, which identify the relative potential for the capture of surface water flow at any given well location and the potential for the capture of surface water flow over different durations of time. This study will also serve as a foundation for review of the perennial yield²¹ values for the Region, first estimated from the early USGS Reconnaissance Series Reports and Water Resource Bulletins, which are the primary guidelines used by the State Engineer to determine the water budget for any particular basin.²²

WHEREAS, while the completion of the Humboldt River Region groundwater model study is expected in 2022, preliminary findings from that effort provide insight into the dynamics of stream capture by groundwater pumping. These findings indicate that there may be important non-linear, climate-driven behaviors that influence interactions between the surface water and

¹⁸ AB 51 (2019).

¹⁹ See *Minutes of the Meeting of the Assembly Committee on Natural Resources, Agriculture and Mining*, February 27, 2019, (Dec. 2, 2021, 1:08 p.m.)

<https://www.leg.state.nv.us/Session/80th2019/Minutes/Assembly/NRAM/Final/309.pdf>

²⁰ See *Nevada Water Science Center: Evaluation of Streamflow Depletion Related to Groundwater Withdrawal, Humboldt River Basin*, (December 2, 2021, 1:10 p.m.)

<https://nevada.usgs.gov/humboldtdepletion/index.html>

²¹ Perennial yield is defined as the maximum amount of groundwater that can be withdrawn each year over the long term without depleting the groundwater reservoir. Perennial yield is ultimately limited to the maximum amount of natural discharge that can be utilized for beneficial use. The perennial yield cannot be more than the natural recharge to a groundwater basin and in some cases is less. See Office of the State Engineer, *Water for Nevada, State of Nevada Water Planning Report No. 3*, p. 13, Oct. 1971.

²² See, e.g. Hydrographic Area Summary for Marys River Area, (042), (December 2, 2021, 1:10 p.m.) https://nevada.usgs.gov/humboldtdepletion/HumboldtDepletionProposal_Public.pdf official records in the Nevada Division of Water Resources.

groundwater systems. These behaviors suggest that pumping-related capture of surface water tends to increase during wet years when excess water is available and decrease during dry years when the potential for conflict is greater.²³ Understanding these phenomena is necessary to accurately define both the timing and distribution of capture so that conflict attributable to groundwater pumping can be characterized and quantified. Long-term management strategy will rely on completion of the modeling effort and a process of public review and deliberation to determine best practices that satisfy legislative directives of prior appropriation, beneficial use and the public interest. Until then, the interim management practices described herein focus on statutorily available mechanisms for avoiding conflict due to increased capture caused by new appropriations or changes to existing groundwater permits.

WHEREAS, as of the date of this Order (Fall 2021) the Region is two years into a Severe to Extreme Drought.²⁴ Humboldt River flows for the summer of 2021 were running at or below 10th percentile flow levels,²⁵ very little decreed water was served during the 2021 irrigation season, and current Rye Patch Reservoir storage is approximately 7,000 acre-feet, which is 4% of the reservoir's capacity. This current condition highlights the difficult issues that face the water users in the Region, which are especially apparent during droughts like these.

IV.

AUTHORITY AND NECESSITY

WHEREAS, NRS 533.024(1)(c) directs the State Engineer "to consider the best available science in rendering decisions concerning the availability of surface and underground sources of water in Nevada."

WHEREAS, NRS 533.024(1) was amended in 2017 adding a new subsection declaring that it is the policy of Nevada "[t]o manage conjunctively the appropriation, use and administration of all waters of this State, regardless of the source of the water."²⁶

WHEREAS, NRS 532.120 authorizes the State Engineer to make such reasonable rules as

²³ Steven Jepsen, Kip Allander, and Kyle Davis, "Behavior and prediction of stream capture under varying streamflow conditions," presentation at Nevada Water Resources Association Annual Conference, Jan. 26, 2021, (Dec. 2, 2021 1:11 a.m.)

https://www.youtube.com/watch?v=2vLa1hesE_E

²⁴ U.S. Drought Monitor, Nevada Map, October 5, 2021, (Dec. 2, 2021, 1:12 p.m.)

https://droughtmonitor.unl.edu/data/pdf/20211005/20211005_nv_trd.pdf

²⁵ USGS gaging stations (10318500, 10321000, 10325000, 10327500, 10333000).

²⁶ NRS 533.024(1)(e).

may be necessary for the proper and orderly execution of the powers conferred by law.

WHEREAS, NRS 534.020 provides that all underground waters of the State belong to the public and are subject to all existing rights.

WHEREAS, NRS 533.370(2) requires that, in review of an application to appropriate water or to change water already appropriated, the State Engineer must consider whether there is unappropriated water in the source of supply, whether the uncommitted groundwater has been reserved pursuant to NRS 533.0241, whether the proposed use or change conflicts with existing rights or protectable interests in existing domestic wells, and whether it threatens to prove detrimental to the public interest.

WHEREAS, the State Engineer's procedures to evaluate applications to appropriate water or to change existing appropriations must be applied in a manner that is consistent and understandable to water right holders and their representatives.

WHEREAS, the State Engineer is responsible for establishing procedures to evaluate applications that provide clarity to water users about how to meet the needs of communities and local economies while avoiding conflict with senior decreed water rights.

WHEREAS, procedures established by this Order are intended to allow for efficient administration of groundwater rights, with provisions for in-stream replacement water and withdrawal or duty limitation of groundwater permits, when necessary. The intent is to provide needed flexibility for water right holders without increasing conflict by adding to any capture impacts above what is already occurring. In the short term, these procedures will make progress toward avoiding conflicts and preserving the availability of surface water in the Humboldt River Region to serve senior priority rights.

WHEREAS, during this interim period before the USGS and DRI models are published and while long-term strategies are being developed with involvement from the stakeholder community, the State Engineer may adopt further conjunctive management measures necessary to address capture impacts.

ORDER

NOW THEREFORE, IT IS HEREBY ORDERED, that in addition to those considerations required by NRS 533.370 and established by previous State Engineer's Orders discussed herein, the following procedures are being implemented by the State Engineer for the review of applications for groundwater rights in the Humboldt River Region:

1. Applications for groundwater rights will be reviewed for increases to stream capture,

and cannot increase conflict along the Humboldt River or its tributaries. Capture shall be determined by the State Engineer using established analytical or numerical methods along with any available knowledge of aquifer properties associated with the points of diversion. These rules apply to:

A. New appropriations of groundwater where annual capture is predicted to exceed 10% of duty for any year during 50 years of continual pumping.²⁷ Continual pumping is defined as the annualized duty amount requested under the application. Where there is a non-consumptive return flow component of the application, the annualized duty amount only applies to the consumptive portion.

B. Applications to change the point of diversion of existing rights that are predicted to result in an increase of net capture on the system or a tributary, defined as the difference between capture at the proposed POD and capture at the existing POD, and where annual capture at the proposed POD is predicted to exceed 10% of the permitted duty in any year during 50 years of continual pumping.

C. Temporary applications filed under NRS 533.345 to change the point of diversion of an existing groundwater right and applications for new groundwater appropriations filed under the provisions of NRS 533.371.

2. Capture shall be offset by not diverting an existing decreed right (in-stream replacement water), or by the withdrawal of an existing groundwater permit (meaning that the groundwater permit is no longer active, in part or in its entirety) so the resulting availability of streamflow is not less than it was prior to the appropriation or the change in the point of diversion.

A. In-stream replacement water or withdrawn groundwater rights shall be sufficient to equal or exceed the predicted annual capture amount if there is a reasonable probability that the replacement water will be available, in both time and quantity, as determined by the State Engineer. The State Engineer finds that "reasonable probability" would be an 80% probability threshold, which is established to ensure a replacement surface water right or a groundwater withdrawal right is of sufficient quantity and priority to reliably offset annual capture in 40 out of 50-years after an application is approved. In the case of replacement water, probabilities can be determined based on historical

²⁷ This threshold is considered to represent the range of certainty of the methods currently being used to calculate capture.

Humboldt River flow and diversion records. In the case of withdrawal of a groundwater right, probabilities can be determined based on analytical or numerical model predictions of recovered capture amounts.

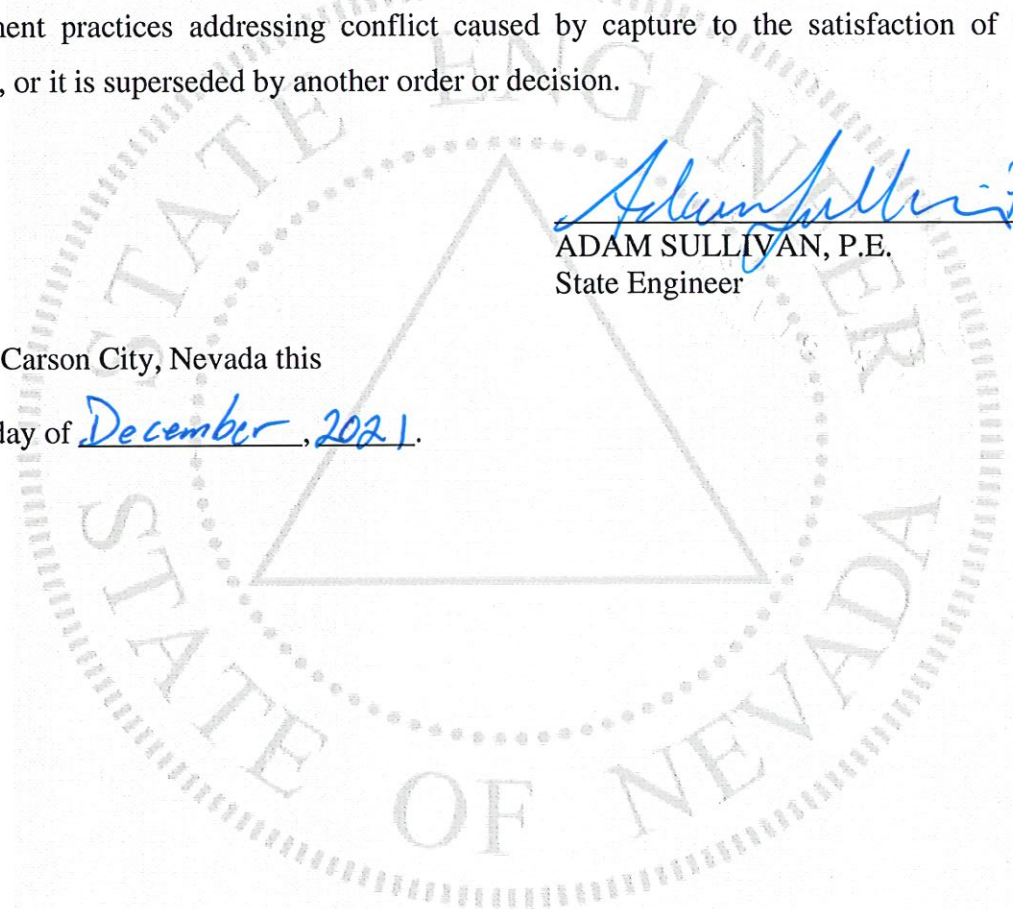
- B. If in-stream replacement water is used to offset capture, then the following applies:
 - i. If a decreed water right is the source of replacement water, it shall be for a crop-type, duty amount, and priority date that is sufficient to equal or exceed the predicted total capture amount of the new appropriation over a 50-year period of use, as determined by the State Engineer.
 - ii. Replacement water shall have an existing place of use that can and will be stripped of use. Water use on areas of natural flooding and other areas where water cannot be physically removed from the land will not be considered for replacement water.
 - C. If withdrawal of an existing groundwater right is used to offset capture, whether withdrawn in its entirety or an adequate portion of the existing right, the predicted total capture amount of the withdrawn right shall be sufficient to equal or exceed the predicted total capture amount of the new appropriation over a 50-year period of use, as determined by the State Engineer.
 - D. Where a change application moves an existing POD capture source from the Humboldt River or a tributary to either an upstream reach or to a different tributary, offset will be required for capture impacts on the new reach or tributary as well as for net capture on the Humboldt River. If capture impacts occur on a new reach or tributary, the applicant will have to offset the entire amount of capture on the new reach or tributary.
 - E. If either temporary in-stream replacement water or temporary withdrawal of a groundwater permit is used to offset capture, the predicted capture offset amount of the replacement water or withdrawn right must equal or exceed the predicted 50-year total capture amount of the temporary application within 10 years of the application's approval, as determined by the State Engineer.
3. These procedures do not apply:
- A. to any application where pumping at the proposed POD results in capture less than 10% of the permitted duty every year during 50 years of continual pumping.
 - B. to change applications where capture at the proposed POD is less than or equal to capture at the existing POD.
 - C. to any application for groundwater where annual capture associated with pumping at


the proposed place of use does not exceed 5 acre-feet during a 50-year period of use.²⁸

D. to temporary applications to change PODs within an area designated by State Engineer order allowing for multiple PODs from a single representative POD for mining, milling, and dewatering operations.

4. Uncommon or unforeseeable circumstances will be treated on a case-by-case basis, as determined by the State Engineer, with the same overall objective of preventing additional stream capture.

5. This order is in effect until it is replaced by a subsequent order establishing long term management practices addressing conflict caused by capture to the satisfaction of the State Engineer, or it is superseded by another order or decision.




ADAM SULLIVAN, P.E.
State Engineer

Dated at Carson City, Nevada this

7th day of December, 2021.

²⁸ This exemption is equivalent to a capture rate of less than 0.01 cfs and would effectively exempt all domestic use, much stockwater use, and other pumping resulting in nominal capture.

Exhibit 5

Exhibit 5



NEVADA LEGISLATURE
SUBCOMMITTEE ON PUBLIC LANDS OF THE
JOINT INTERIM STANDING COMMITTEE
ON NATURAL RESOURCES
(Nevada Revised Statutes [NRS] 218E.510)

MINUTES

August 22, 2022

The fourth and final meeting of the Subcommittee on Public Lands of the Joint Interim Standing Committee on Natural Resources (JISCNR) for the 2021–2022 Interim was held on Monday, August 22, 2022, at 9 a.m. in Room 4401, Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. The meeting was videoconferenced to Room 3138, Legislative Building, 401 South Carson Street, Carson City, Nevada.

The agenda, minutes, meeting materials, and audio or video recording of the meeting are available on the Subcommittee’s [meeting page](#). The audio or video recording may also be found at <https://www.leg.state.nv.us/Video/>. Copies of the audio or video record can be obtained through the Publications Office of the Legislative Counsel Bureau (publications@lcb.state.nv.us or 775/684-6835).

SUBCOMMITTEE MEMBER PRESENT IN LAS VEGAS:

Assemblywoman Maggie Carlton, Chair

SUBCOMMITTEE MEMBERS PRESENT IN CARSON CITY:

Senator Pete Goicoechea
Clifford Banuelos, Tribal-State Environmental Liaison, Inter-Tribal Council of Nevada, Inc.

SUBCOMMITTEE MEMBERS PRESENT VIA REMOTELY:

Senator Fabian Doñate (Alternate for Senator Melanie Scheible, Vice Chair)
Assemblywoman Alexis Hansen
Justin Jones, Clark County Commissioner

SUBCOMMITTEE MEMBER ABSENT:

Senator Melanie Scheible (Excused)

OTHER LEGISLATORS PRESENT:

John C. Ellison, Assembly District 33
Howard Watts III, Assembly District 15

LEGISLATIVE COUNSEL BUREAU STAFF PRESENT:

Jann Stinnesbeck, Senior Policy Analyst, Research Division
Maria Aguayo, Research Policy Assistant, Research Division
Allan Amburn, Senior Deputy Legislative Counsel, Legal Division
Kimbra Ellsworth, Senior Program Analyst, Fiscal Analysis Division

*Items taken out of sequence during the meeting have been placed in agenda order.
[Indicate a summary of comments.]*

AGENDA ITEM I—OPENING REMARKS

Chair Carlton:

Good morning, everyone. I am sorry for the delay. We had to make sure that everybody had the appropriate links. I believe we have folks participating from all over the state, which is wonderful to see. I would like to call this meeting to order. If I could please have the secretary call the roll.

[Roll call is reflected in Subcommittee Members Present.]

Welcome to the final meeting of the Subcommittee on Public Lands of the JISCNR. We have a work session on our agenda today. Subcommittee members who are joining us virtually, be sure to keep your video on so we have a quorum as we work through our business.

[Chair Carlton reviewed virtual meeting and testimony guidelines.]

AGENDA ITEM II—PUBLIC COMMENT

Chair Carlton:

I would be happy to open public comment. I would like to go to Carson City first. Do we have any public comment in Carson City? Please state your name for the record and try to keep your testimony within the three-minute time frame.

Doug Busselman, Executive Vice President, Nevada Farm Bureau Federation:

Good morning, Chair, and members of the Subcommittee. I would like to direct my comments to Recommendation B-4 regarding conjunctive management of surface and groundwater basins of the "Work Session Document" (WSD). We greatly appreciate the proposal for a bill draft on conjunctive management of surface and groundwater basins.

For the past several years, Farm Bureau members have expressed their concern over the lack of legislative direction and absence of specific parameters in regard to how conjunctive management is going to be carried out. In the development of the proposed legislation and establishment of a working framework, we believe that it should include a full public discussion of what conjunctive management of water resources means and how combining water rights from separate sections of state law will be implemented. We recognize the importance of including the role of science and modifying management practices within such basins, but we also believe that it is essential to take into account the prior appropriation foundation of our state law and the management practices needed to not seek to override senior water rights. Senior water right owners need to have their rights properly recognized, and they should not be forced to accept financial or other compensation as mitigation measures that they do not voluntarily agree to.

The interaction of water from various sources involves many different elements and these include the time frames and the degree to which connections take place. We believe that not all areas have the same connection and interaction throughout a system, and this warrants consideration and implementing active management that has consequences to different water rights. We look forward to working with legislators and other water stakeholders in an open and collaborative process to find workable solutions. Thank you.

Chair Carlton:

Thank you. Anyone else in Carson City?

Kyle Roerink, Executive Director, Great Basin Water Network:

I want to echo some of the comments we just heard from Mr. Busselman and expound upon the idea that we really should not be working to force mitigation provisions on water users. I think that could be a poison pill that would torpedo or tank what could be a good and healthy conversation in the upcoming session. Thank you.

Chair Carlton:

Thank you. Any other public comment?

I have public comment here in Las Vegas. Please introduce yourself and proceed.

Helen Foley, American Wild Horse Campaign:

In your WSD, Recommendation F-8, regarding the management of public lands, is to draft a position statement in the final report of the Subcommittee expressing support for outcome-based grazing practices on federally managed lands. While that sounds good, this was proposed by Rebekah Stetson and her group that want to remove, and eventually slaughter, wild horses. We do not think that there has been a lot of consideration about this. We have cooperative agreements with the State of Nevada as well as the federal government. We just received \$500,000 through U.S. Representative Dina Titus (D-Nevada) and U.S. Senator Catherine Cortez Masto (D-Nevada) to allow the Bureau of Land Management (BLM) and Nevada's Department of Wildlife (NDOW) to look more deeply into this, hire staff, and work on this. We are very proud of our porcine zona pellucida (PZP) program, which deals with fertility drugs. The foals have gone down substantially. There is a lot of misinformation in the [letter](#) that Ms. Stetson sent to the Subcommittee for the April 15, 2022, meeting, and we urge you to take this off of your agenda and not give it consideration. If further discussion needs to take place, let us do that next session of the Legislature. Thank you.

Bevan Lister, Nevada Resident:

The concept that you will be addressing in relation to conjunctive management of water resources is one that is both undefinable and indefensible. As a water right owner and water user, it is imperative that we have some level of certainty of the availability of that water and those water rights. Nevada, historically, has had the strongest and best water law in the nation. Over the last 25 to 30 years, we have diluted and diminished that prior appropriation doctrine, step-by-step, to a point where we are now through the pleas of the Division of Water Resources of the State Department of Conservation and Natural Resources (DCNR) that has been unwilling to follow the law as it is written. We need more tools in the toolbox, and I believe that is a false directive. The prior appropriation doctrine and the history of Nevada water law gives adequate and powerful tools for the management of water. Conjunctive management in managing surface water and groundwater, together, is the antithesis of the state law that is written. We have a chapter for surface water and a chapter for groundwater. Those two resources are connected but on a basin-by-basin approach. Any engineer can look at the perennial yield for the total system and manage, as directed, to that perennial yield.

If you are going to make a change to Nevada water law, then my request is to let us return it to what it should be. Why not repeal every change that has been made in the last 20 years? Take conjunctive management and the mention of it completely out of the books because it is already implied in the current law and chapters. I look forward to working with you through this session. Sound water law is imperative for us, and I hope that you will look at the long-term ramifications of the things that you are proposing to change. Thank you.

Jaina Moan, Director of External Affairs, The Nature Conservancy (TNC):

The Nature Conservancy supports Recommendations A-1, A-2, B-4, C-5, E-7, and F-8 of the WSD. Regarding Recommendations A-1 and A-2, there is a crisis on the Colorado River. We need to identify and implement a variety of tools to benefit our rivers, increase flexibility for water users, and bolster the Colorado River basin's resilience in the face of drought and climate change.

Regarding Recommendation B-4, conjunctively managed systems not only protect senior water rights, but also protect the health of the springs and surface water systems that people, plants, fish, and wildlife depend on. We support clarification of the use of science for management decisions. Without scientific evidence, decisions could be determined without evidentiary showing leaving assessments open-ended and arbitrary. Additionally, we recommend convening some stakeholder meetings to discuss and develop consensus language for potential legislation on conjunctive management.

We support Recommendation C-5. A Nevada Natural Resources Corps could help boost and diversify the conservation workforce in Nevada, and it will support resiliency for our public lands and Nevada's outdoor recreation economy.

We support Recommendation E-7 for NDOW to manage nonpest insects, and we suggest broadening the scope of management to include all nonpest and invertebrate animals. Maintaining invertebrate biodiversity is critical for healthy ecosystems and we support the management of invertebrates in the state wildlife management plan.

Regarding Recommendation F-8, TNC has partnered with ranchers in northeastern Nevada to design an outcome-based grazing permit for the Winecup Gamble Ranch and related allotments. The Nature Conservancy believes that in many cases flexible grazing permits that are based on sound ecological principles and simple, but effective, adaptive management approaches can lead to better outcomes for conservation and the livestock industry than the status quo. We are happy to share more information about this project that we are working on with Winecup Gamble Ranch.

We have also provided additional rationale in our written comment, which we submitted this morning ([Agenda Item II A](#)). Thank you for considering our comments and for the service to this Subcommittee.

Chair Carlton:

Okay, thank you. Is there any other public comment here in Las Vegas?

Seeing none, Broadcast and Production Services (BPS), do we have anyone wishing to make public comment on the line?

Jake Tibbitts, Natural Resources Manager, Eureka County Department of Natural Resources:

I appreciate the time this morning. First, I will note that the Eureka County Board of Commissioners provided a packet of recommendations and requests at the April 15, 2022, meeting. The Board wishes for the Subcommittee to consider those items. Second, there are many items in the WSD that we are not opposed to, but I will not be providing specific comment on today. We look forward to working with folks on these issues as they move forward through the upcoming session.

Regarding the recommendation on conjunctive management and the role of science and managing water resources, Eureka County shares the viewpoint that you have heard from the Nevada Farm Bureau Federation and the Great Basin Water Network, and we will not belabor those points. We are a bit concerned with the path the bill draft request (BDR) could take. Our concern is rooted in a previous legislative session when there was work to place conjunctive management in the statute, and there was an effort by some to include some language that would allow conjunctive management to be used to approve water rights applications that would conflict with existing rights. Some of these terms were "replacement water" and "augmentation plans." We are concerned about that process moving forward and opening the door for that mitigation to be forced on people.

Finally, regarding conjunctive management and use of science and managing water, these issues are currently in front of the Supreme Court of Nevada. While we do support this BDR moving forward, we believe it may be wise to get clarity from the Supreme Court on these issues before the Legislature moves forward with language; that way the bill language can be more focused and surgical after getting that direction from the Supreme Court.

Again, I want to thank you for the opportunity today and I look forward to listening in during your work session.

Chair Carlton:

Thank you. Is there anyone else on the line?

BPS:

Chair, the public line is open and working but there are no more callers.

Chair Carlton:

I believe we can proceed, keeping in mind that there will be another public comment section at the end of the meeting.

[Prior to the meeting, Patrick Donnelly, Great Basin Director, Center for Biological Diversity, submitted written testimony for the record (Agenda Item II B).]

AGENDA ITEM III—APPROVAL OF THE MINUTES FOR THE MEETINGS ON APRIL 15, 2022, AND MAY 23, 2022

Chair Carlton:

We will go to the next agenda item, which is the approval of the minutes. Currently, we have the minutes from May 23, 2022.

Members, are there any questions, comments, or corrections on the May 23, 2022, minutes?

Senator Goicoechea:

Chair, I will abstain. I was not present at that meeting.

Chair Carlton:

That is fine. Any other questions, comments, or corrections on the minutes?

Not seeing any, I will accept a motion to approve the minutes.

SENATOR DOÑATE MOVED TO APPROVE THE MINUTES OF THE MEETING HELD ON MAY 23, 2022.

ASSEMBLYWOMAN HANSEN SECONDED THE MOTION.

THE MOTION PASSED (SENATOR GOICOCHEA ABSTAINED).

AGENDA ITEM IV—WORK SESSION—DISCUSSION AND POSSIBLE RECOMMENDATIONS RELATING TO:

Chair Carlton:

That takes us to our main point of business today, which is the WSD. We have a list of proposed recommendations relating to water conservation, conjunctive management of surface and groundwater basins, natural resource workforce development, the Nevada State Board on Geographic Names, endangered species, management of public lands, and also the management of the Subcommittee on Public Lands.

Mr. Stinnesbeck is going to walk us through the WSD ([Agenda Item IV](#)). If we go too quick or someone needs us to slow down, please speak up. With all of us being in different spots across the state, we want to make sure that everyone is on the same page and has their questions or concerns addressed as we move through the WSD.

Mr. Stinnesbeck, would you please proceed?

Mr. Stinnesbeck:

Thank you, Chair. As nonpartisan staff, I can neither advocate nor oppose any measure that you will consider today. You should have the WSD in front of you and it is also online. The Chair and staff of the Subcommittee on Public Lands have prepared the WSD to assist the Subcommittee in determining which legislative measures it will request for the 2023 Session of the Nevada Legislature as well as other actions that the Subcommittee may endorse. Subcommittee staff has compiled and organized the proposals so that Subcommittee members can review them and decide whether they want to accept, reject, modify, or take no action on the recommendations. The WSD groups the proposals by topic, not in preferential order, for the Subcommittee's consideration.

The JISCNR is limited to 14 legislative measures, at least 4 of which must relate to matters relating to public lands based on the recommendations of the Subcommittee. Further, the

Subcommittee may vote to: (1) send as many statements or letters of recommendation or support as it chooses; and (2) include statements in its final report.

A. WATER CONSERVATION

Mr. Stinnesbeck:

The first recommendation in the WSD, under water conservation, is to request the drafting of a bill to address water conservation and the enhancement of return flow in southern Nevada, including, without limitation, the use of Colorado River water in septic systems and modifications to the nonfunctional turf program. This was recommended based on testimony during the May 23, 2022, meeting in Boulder City, Nevada.

Chair Carlton:

Thank you. Subcommittee members, we will open it up for discussion. Are there any questions or conversation on this recommendation before we move forward?

Senator Goicoechea:

We passed a bill last session on removing nonfunctional turf and the only thing that concerns me is there comes a point when we have to reach a balance between asphalt and cement. Is that turf nonfunctional or is it serving a purpose through cooling transfer evaporation? I know in southern Nevada, we are focusing on even limiting the size of swimming pools. That is going to have an impact on the environment in general.

Chair Carlton:

I appreciate that, Senator Goicoechea. My husband and I have had many comments about our small patch of front yard. We have done everything to conserve, but we have that one little piece left. When do we convert that? I still consider it functional because we live on it and the dogs live on it but eventually it will probably have to go. I think southern Nevada has an awakening that needs to happen when it comes to turf. We do live in a desert. As we move forward, those conversations will be evolving, especially here in southern Nevada.

Are there any other questions or comments on this recommendation?

Not seeing any, I will accept a motion for Recommendation A-1.

SENATOR DOÑATE MOVED TO APPROVE RECOMMENDATION A-1.

COMMISSIONER JONES SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

Chair Carlton:

Mr. Stinnesbeck, can we move on to the next recommendation?

Mr. Stinnesbeck:

Recommendation A-2 is to request a draft resolution addressing the management of the Colorado River where in this state: (1) sets forth the principals on water conservation relating to the Colorado River; and (2) shares various conservation efforts it has taken to conserve water in the Colorado River. This, again, was based on testimony during the May 23, 2022, meeting in Boulder City.

Chair Carlton:

Subcommittee members, are there any questions or comments on Recommendation A-2, along the same line of the conservation discussion we just had?

Senator Goicoechea:

Is this going to come in the form of a resolution supporting a draft position, more or less? Clearly, the Colorado River is under the Colorado River Commission of Nevada. We are saying we are going to set forth principles for water conservation. Do we have that authority?

Chair Carlton:

It is my impression that when the Legislature sends a resolution, it sends a message of how we feel about a particular issue. It has no weight or authority behind it; it just shares our viewpoints with those who wish to read the resolution or take it into consideration. We are not proposing a bill draft to actually change the NRS. This is more of a position statement as far as how we are looking at the Colorado River.

Senator Goicoechea:

I concur with that, and I would move for approval.

Chair Carlton:

Thank you, Senator Goicoechea. I appreciate that. Are there any other questions or comments?

I have a motion. Do we have a second?

SENATOR GOICOECHEA MOVED TO APPROVE RECOMMENDATION A-2.

SENATOR DOÑATE SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

Chair Carlton:

Mr. Stinnesbeck, could you go over Recommendation A-3?

Mr. Stinnesbeck:

Recommendation A-3 is to draft a position statement in the final report of the Subcommittee expressing opposition to proposed water development projects in southern Utah that would negatively impact groundwater and surface water flows in Nevada and supporting aggressive conservation alternatives. This was based on recommendations from the Great Basin Water Network during the May 23, 2022, meeting in Boulder City.

Chair Carlton:

Thank you, Mr. Stinnesbeck. Subcommittee members, I will just share with you that, historically, I have always been a little apprehensive of one state sending resolutions or other things to other states saying, "Hey, we do not like what you are up to"; however, the Colorado River is in a crisis right now. This is not a resolution. This is a position statement, which I believe a lot of folks understand where we are coming from. It will just carry the weight as a statement from this Subcommittee about concerns of future development on the river without conservation measures being taken at this time. That is where we are coming from. I wanted to put that on the record because I figured it was probably going to come up.

Are there any questions or comments from Subcommittee members on this position statement?

Assemblywoman Hansen:

Chair, thank you for your comments; I concur. I am not as familiar with position statements versus other ways of drafting. A lot of times we look for cooperative agreements or—I do not know if there is such a thing—a cooperative statement. Is there any chance to maybe look at it in that light instead of an opposition statement, per the comments that you made?

Chair Carlton:

I apologize, Assemblywoman, I am not quite sure what the question is. If I understood you correctly, you would like to change it from expressing opposition to the proposed development projects to trying to work cooperatively on the proposed projects?

Assemblywoman Hansen:

I am not necessarily asking us to change anything, just some clarification for me to understand in light of your comments, which I agreed with, that we have hesitancy in telling other states how to do things or that we are opposing certain things. In the spirit of cooperation, instead of an opposition statement, is there some other vernacular that we have used in the past? I agree with you on the Colorado River, things are in crisis.

This is more of a clarification for me. I am not looking to take this off the rails at all.

Senator Goicoechea:

I agree with where Assemblywoman Hansen is headed. We are going to express our opposition, but maybe we should follow up with, "We look forward to working with you on the impact to the Colorado" and soften the opposition?

Chair Carlton:

Sure, I absolutely understand where you are coming from. I think what might make everyone a little more comfortable is if we can change the word "opposition" to "concerns" and add that we look forward to working with them on addressing those concerns in the future. I believe we have a long list of data points that could be used to substantiate the concerns. I think the position statement will probably be interpreted as opposition, but we could use the word "concerns" if that makes members a little more comfortable. We are expressing our concern to that development and the adverse effects that it could have on southern Nevada. If that would make everyone more comfortable, I would be happy to just ask staff to change the word "opposition" to "concerns." Does that work for everybody?

Senator Goicoechea:

That is fine by me. We are going to have to work with them because they happen to be upstream.

Chair Carlton:

Well, it is a continuum.

Assemblywoman Hansen:

Thank you, Chair. Yes, that change to the position statement helps.

Chair Carlton:

Thank you, Assemblywoman. Therefore, the proposed amendment to Recommendation A-3 is to change the word "opposition" to "concerns."

I will accept a motion to process Recommendation A-3 with the amendment discussed.

ASSEMBLYWOMAN HANSEN MOVED TO APPROVE RECCOMENDATION A-3 WITH THE DISCUSSED AMENDMENT.

COMMISSIONER JONES SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

B. CONJUNCTIVE MANAGEMENT OF SURFACE AND GROUNDWATER BASINS

Chair Carlton:

Mr. Stinnesbeck, we can move on to Recommendation B-4.

Mr. Stinnesbeck:

Recommendation B-4 is to request the drafting of a bill to clarify the processes and authority for the conjunctive management of surface and groundwater basins, including, without limitation, the public notification processes, appeals processes, and the role of science in modifying management practices within such basins. This was based on testimony made during the May 23, 2022, meeting in Boulder City.

Chair Carlton:

Thank you, Mr. Stinnesbeck. I can tell this is going to be a very interesting BDR. We thought we had it right the first time, but we heard a lot of comments in Boulder City that some folks feel there are still some things that are left to interpretation within the NRS, even though we thought we said it pretty clearly. I guess, if we did not say it clearly enough the first time, we are going to have to make it even clearer the second time around.

Are there any questions or comments on Recommendation B-4, knowing that this BDR will be thoroughly vetted?

Not hearing any questions or comments, I will accept a motion on Recommendation B-4.

SENATOR DOÑATE MOVED TO APPROVE RECCOMENDATION B-4.

COMMISSIONER JONES SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

C. NATURAL RESOURCE WORKFORCE DEVELOPMENT

Chair Carlton:

Mr. Stinnesbeck, please go over Recommendation C-5.

Mr. Stinnesbeck:

Recommendation C-5 is to request the drafting of a bill to establish the Nevada Natural Resources Corps. This program would seek to help attract professionals to Nevada to work for certain state agencies. The program would provide a hiring advantage to a person who served with AmeriCorps in this state. Lastly, this measure would seek to promote outreach efforts by applicable state agencies to AmeriCorps volunteers so that such persons are aware of the natural resources job opportunities in this state. This recommendation was made by Peter Stanton, Executive Director of the Walker Basin Conservancy, during his presentation on May 23, 2022, in Boulder City.

Chair Carlton:

Thank you, Mr. Stinnesbeck. I find this to be a very interesting recommendation. It is all about growing our own. I really like the idea behind this.

Subcommittee members, are there any other thoughts on this recommendation?

Not seeing any, I will accept a motion on Recommendation C-5.

SENATOR DOÑATE MOVED TO APPROVE RECOMMENDATION C-5.

COMMISSIONER JONES SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

D. NEVADA STATE BOARD ON GEOGRAPHIC NAMES

Chair Carlton:

We will move on to Recommendation D-6.

Mr. Stinnesbeck:

Recommendation D-6 requests the drafting of a bill to amend applicable NRS to authorize members of the Nevada State Board of Geographic Names to receive reimbursement for incidental expenses and to be entitled to receive the per diem allowance and travel expenses provided for state officers and employees generally. This idea arose from the testimony during the Subcommittee's June 27, 2022, meeting in Nixon, Nevada.

Chair Carlton:

Thank you, Mr. Stinnesbeck. I have always been a firm believer that if we ask people to serve, the expenses should not come out of their own pockets. At least we should address it. The update we got from this Board is that there is a lot of work in front of them over the next couple of years to deal with some issues. I believe we need to be reasonable and compensate them for the work that they do. Public service is one thing, but we should not have anyone not serve because they cannot afford to financially. We want people to serve, and I think it is reasonable to deal with that.

Are there any questions or comments on Recommendation D-6?

Not seeing any, I will accept a motion.

SENATOR DOÑATE MOVED TO APPROVE RECCOMENDATION D-6.

COMMISSIONER JONES SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

E. ENDANGERED SPECIES

Chair Carlton:

We will move on to Recommendation E-7.

Mr. Stinnesbeck:

Recommendation E-7 is to request the drafting of a bill to authorize NDOW to manage nonpest insects, including, without limitation, endangered butterflies. This recommendation was based on testimony from a presentation from the Center for Biological Diversity during the June 27, 2022, meeting in Nixon, Nevada.

Chair Carlton:

Subcommittee members, are there any questions or comments on Recommendation E-7?

Senator Goicoechea:

I cannot support this particular BDR. I am concerned about nonpest insects, especially in the event that they are endangered, but I think there is an inherent conflict between NDOW managing game species on one side, and then having endangered species on the other. I am concerned about that.

Chair Carlton:

I understand, Senator Goicoechea; I asked some of those same questions. It is my understanding—and staff can correct me if I am wrong—that, currently, nonpest insects are not monitored by anyone at all; they are out there on their own. We are just trying to find a home for them, because we know it can be an issue as we move forward.

Subcommittee staff, is that correct?

Mr. Stinnesbeck:

That is the testimony we received during the meeting.

Chair Carlton:

Currently, nonpest insects are not monitored by anyone, so we are trying to figure out where their best “home” might be moving forward.

Assemblywoman Hansen:

I, too, have some reservations. At the meeting in Nixon, I asked whether NDOW had requested this and, as I recall, they had not. At least, they were not involved in the presentation that we heard from the Center for Biological Diversity at that meeting. While I understand that nonpests do not reside in any “home” per se, maybe that is something we need to look into a little bit more. I share Senator Goicoechea’s concerns about putting this on NDOW. For those reasons, at this point, I would have to be a “no.”

Chair Carlton:

I understand. We know that when we recommend a BDR to the JISCNR, the Committee will then draft the BDR, which may be heard before a committee during the legislative session. That committee will get a lot more information and decide whether this is the right place for it or whether there is another alternative. I think it is important that we have this conversation, and this BDR will start that conversation. Whether you support or oppose a BDR, I feel it is more about putting this on the table in front of the JISCNR and the next legislative session and have them address the issue and get the information needed for the full Legislature to make a decision on it. Even though I am a little uncomfortable with it, I would like to have that conversation proceed, so I will be supporting it strictly for that reason.

Any other questions or comments from Subcommittee members?

Seeing none, I will accept a motion on Recommendation E-7.

SENATOR DOÑATE MOVED TO APPROVE RECOMMENDATION E-7.

COMMISSIONER JONES SECONDED THE MOTION.

THE MOTION PASSED (SENATOR GOICOECHEA AND ASSEMBLYWOMAN HANSEN VOTED NO).

F. MANAGEMENT OF PUBLIC LANDS

Chair Carlton:

We will move on to Recommendation F-8.

Mr. Stinnesbeck:

Recommendation F-8 is to draft a position statement in the Subcommittee's final report expressing support for outcome-based grazing practices on federally managed lands. This recommendation was based on testimony during the April 15, 2022, meeting in Ely, Nevada.

Chair Carlton:

Thank you, Mr. Stinnesbeck. Unfortunately, I was unable to attend in Ely. We had some comments, and I believe there are some concerns about this position statement possibly having some impact on wild horses on the range. It is my understanding that this has nothing to do with that and this was strictly about those particular ranches that were being addressed. I want to put on the record that this statement is not directed at wild horses. The Subcommittee has kept wild horses out of the conversation for this interim. Nothing we have done addresses wild horses.

Are there any other questions or comments on this position statement?

Senator Goicoechea:

Chair, you are right on point with this. This is about outcome-based grazing and does not take the increase or reduction of wild horse herds into consideration for this recommendation whatsoever. It is not a wild horse management program.

Chair Carlton:

Thank you, Senator, I appreciate that.

Are there any other comments from the Subcommittee? I believe, with those statements, we have made the intent of the Subcommittee clear.

I will accept a motion on Recommendation F-8.

SENATOR DOÑATE MOVED TO APPROVE RECOMENDATION F-8.

ASSEMBLYWOMAN HANSEN SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

G. SUBCOMMITTEE ON PUBLIC LANDS

Chair Carlton:

That takes us to our last subcategory regarding the Subcommittee on Public Lands.

Mr. Stinnesbeck:

Recommendation G-9 is to send a letter to the Joint Interim Standing Committee on Legislative Operations and Elections through which the Subcommittee will propose certain statutory changes. Specifically, this letter will propose to:

- a. Amend subsection 6 of NRS 218E.510 so that the chair of the JISCNR, in consultation with the chair of the Subcommittee on Public Lands, will appoint alternate members of the Subcommittee. This action will occur during the first regular meeting of the Committee; and
- b. Amend paragraphs (a) and (b) of subsection 1 of NRS 218E.510 to ensure that one member of the Senate and one member of the Assembly are members of the majority parties of the Senate and Assembly, respectively, and one member of the Senate and one member of the Assembly are members of the minority parties of the Senate and Assembly, respectively.

This was recommended by Chair Carlton.

Chair Carlton:

I see this as typical cleanup language for the BDR to change around the committees and the interim structure. I lost the battle on having Public Lands be its own committee. If I could get away with a BDR to do that right now, I probably would, but I will not. This will address some of the technical issues and cleanup language that we need to make sure that the JISCNR and the Subcommittee on Public Lands can get its work done through the next legislative interim.

Are there any questions or comments on Recommendation G-9?

Assemblywoman Hansen:

Chair, I am the recipient of your bipartisanship and your efforts to make sure we stay balanced. I want to thank you for bringing this recommendation forward and codifying it. I appreciate that we have representation from both the Senate and the Assembly on this Subcommittee.

You will be missed. I have appreciated how you have been so open to all parts of the state, taking the time to hear others, and for being reasonable. I would have loved to have cosponsored that BDR to make Public Lands its own committee.

Chair Carlton:

Thank you, Assemblywoman Hansen. If they saw the two of us coming together, they would be a little bit scared, I believe.

Are there any other questions or comments on Recommendation G-9?

Seeing no questions or comments, I will accept a motion.

SENATOR DOÑATE MOVED TO APPROVE RECOMMENDATION G-9.

ASSEMBLYWOMAN HANSEN SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

Chair Carlton:

Thank you all for being prepared and doing your homework to make this work session flow smoothly.

AGENDA ITEM V—PUBLIC COMMENT

Chair Carlton:

As we get ready for the last public comment section, I would like to say it has been a pleasure. I thank the chair of the JISCNR for allowing me to chair this Subcommittee for the last time. The Public Lands Committee was chaired by Senator Dean Rhodes since its creation, and he was the only chair for over two decades, I believe. I was the first woman, Democrat, and southerner to ever chair the Public Lands Committee. It was my honor to do it back in the day. I learned a lot. We are a big state, and we all need to understand what our neighbors face every single day. With the state being controlled mostly by the federal government, it is very important that this Subcommittee stay in tune with everyone regarding public lands. It has been my pleasure, and I thank Assemblyman Howards Watts III, Chair of JISCNR, for allowing me to chair this Subcommittee this interim.

We can open up our last round of public comment.

Mr. Lister:

I will speak specifically to Recommendation E-7. Not knowing what kind of language will come out in a situation like this, I think it is important to understand that even though there might be the concept that nobody is looking at or monitoring our nonpest insects, especially endangered butterflies, anything that receives a protected status through the U.S. Fish and Wildlife Service, Department of the Interior, is monitored and managed by the U.S. Fish and Wildlife Service. Nevada's Department of Wildlife has lost its position and authority once that species been listed. Depending on how this BDR is worded, you could end up in a conflict with federal law regarding who has management authority or jurisdiction.

Along the same lines, and this is my personal opinion, NDOW is not now, and has not been for many decades, a wildlife management agency. They are simply an environmental advocacy organization. I think it is especially telling that it is being supported in this move by another environmental advocacy organization. "If" NDOW actually managed wildlife, then the situation with our wildlife would be very different. Just as a side note, if it is the purpose and wish of the Legislature to destroy all nonpest insects, including endangered butterflies, then, by all means, assign them to NDOW. They successfully destroyed mule deer herds and sage grouse populations.

Chair Carlton:

Is there any other public comment?

Not seeing anyone else, BPS, do we have anyone on the line wishing to participate in public comment?

BPS:

Chair, the public line is open and working, but nobody wishes to participate.

[Subsequent to the meeting, Scott H. Carey, AICP, State Lands Planner, Division of State Lands, DCNR, submitted written testimony for the record ([Agenda Item V](#)).]

Chair Carlton:

Subcommittee, thank you for your hard work. This meeting is adjourned.

AGENDA ITEM VI—ADJOURNMENT

There being no further business to come before the Subcommittee, the meeting was adjourned at 10:02 a.m.

Respectfully submitted,

Ali Sinone
Research Policy Assistant

Maria Aguayo
Research Policy Assistant

Jann Stinnesbeck
Senior Policy Analyst

APPROVED BY:

Assemblywoman Maggie Carlton, Chair
2021–2022 Legislative Interim

Date: _____

MEETING MATERIALS

AGENDA ITEM	PRESENTER/ENTITY	DESCRIPTION
<u>Agenda Item II A</u>	The Nature Conservancy	Public comment
<u>Agenda Item II B</u>	Patrick Donnelly, Great Basin Director, Center for Biological Diversity	Public comment
<u>Agenda Item IV</u>	Jann Stinnesbeck, Senior Policy Analyst, Research Division, Legislative Counsel Bureau	"Work Session Document"
<u>Agenda Item V</u>	Scott H. Carey, AICP, State Lands Planner, Division of State Lands, State Department of Conservation and Natural Resources	Public comment

The Minutes are supplied as an informational service. All meeting materials are on file in the Research Library of the Legislative Counsel Bureau, Carson City, Nevada. For copies, contact the Library at (775) 684-6827 or <https://www.leg.state.nv.us/Division/Research/Library/About/Contact/feedbackmail.cfm>.

Exhibit 6

Exhibit 6

SUMMARY OF RECOMMENDATIONS

JOINT INTERIM STANDING COMMITTEE ON NATURAL RESOURCES AND SUBCOMMITTEE ON PUBLIC LANDS

Nevada Revised Statutes 218E.320 and 218E.510

This summary presents the recommendations approved by the Joint Interim Standing Committee on Natural Resources at its meeting on August 22, 2022. The bill draft requests (BDRs) will be forwarded to the Legislative Commission for transmittal to the 82nd Session of the Nevada Legislature.

RECOMMENDATIONS FOR LEGISLATION

Water

1. Request the drafting of a bill to address water conservation and the enhancement of return flow in southern Nevada, including, without limitation, the use of Colorado River water in septic systems and modifications to the nonfunctional turf program. **(BDR –)**
2. Request the drafting of a resolution addressing the management and water conservation efforts of the Colorado River. **(BDR –)**
3. Request the drafting of a bill to clarify the processes and authority for the conjunctive management of surface and groundwater basins, including, without limitation, the public notification processes, appeals processes, and the role of science in modifying management practices within such basins. **(BDR –)**

Wildlife

4. Request the drafting of a bill to authorize Nevada's Department of Wildlife to manage nonpest insects. **(BDR –)**
5. Request the drafting of a bill to establish and fund an account with the purpose to identify, construct, and maintain wildlife crossings. **(BDR –)**
6. Request the drafting of a bill to adjust the predator fee and to remove the requirement to use 80 percent of the predator fee for the lethal management and control of predatory wildlife. **(BDR –)**

Natural Resources Agencies

7. Request the drafting of a bill to establish the Nevada Natural Resources Corps to help attract professionals to Nevada to work for certain state agencies. **(BDR –)**

8. Request the drafting of a bill to authorize members of the Nevada State Board on Geographic Names to receive reimbursement for incidental expenses and to be entitled to receive the per diem allowance and travel expenses provided for state officers and employees. **(BDR –)**
9. Request the drafting of a bill to require that during the 2023–2024 Interim, the Joint Interim Standing Committee on Natural Resources study state agencies that regulate natural resources. **(BDR –)**

Environmental Issues

10. Request the drafting of a bill to require local governments to include in their master plan a plan for heat mitigation during their urban planning and local code development efforts. **(BDR –)**
11. Request the drafting of a bill to create a working group to review environmental justice issues. **(BDR –)**

Tribal Issues

12. Request the drafting of a bill to establish qualifications for the tribal liaison position and to adjust state agency employment standards to help tribal members obtain state employment. **(BDR –)**

RECOMMENDATIONS FOR COMMITTEE ACTION

13. Draft a position statement in the Committee’s final report expressing concerns to proposed water development projects in southern Utah that would negatively impact groundwater and surface water flows in Nevada and supporting aggressive conservation alternatives.
14. Draft a position statement in the Committee’s final report expressing support for outcome-based grazing practices on federally managed lands.
15. Send a letter to the Joint Interim Standing Committee on Legislative Operations and Elections through which the Subcommittee will propose certain statutory changes to the Subcommittee on Public Lands.
16. Draft a position statement in the Committee’s final report expressing support for funding for the Desert Research Institute, within the Nevada System of Higher Education, and its programs.
17. Draft a position statement in the Committee’s final report expressing support for the concept of “Smart from the Start” planning to encourage renewable energy development on already disturbed lands and draft a letter to the U.S. Department of the Interior to the same effect.
18. Draft a position statement in the Committee’s final report expressing support for adequate funding for the Division of Water Resources, State Department of Conservation and Natural Resources, to update its data collection efforts, studies of water basins, and adjudication of water rights.