IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

vs.

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

Respondents.
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District Court
Case No.
A816761

RESPONDENTS' LINCOLN COUNTY WATER DISTRICT AND VIDLER WATER COMPANY, INC.'S ANSWERING BRIEF
RE DUE PROCESS ISSUE B

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certify that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the Court may evaluate possible disqualification or recusal.

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

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

3. All parent corporations and publicly held companies owning 10 percent or more of any of Respondent, Vidler's stock:

Vidler's parent company is D.R. Horton, Inc., a Delaware corporation and a publicly held company that owns 10% or more of Vidler's stock.

4. Names of all law firms whose attorneys have appeared for Respondents Lincoln and Vidler in this case:

Lincoln County District Attorney, Snell & Wilmer, L.L.P., and Great Basin Law have appeared for Lincoln. Allison MacKenzie, Ltd. has appeared for Vidler. Snell & Wilmer, L.L.P. has been substituted out of this case and no longer represents Lincoln.

5. If any litigant is using a pseudonym, the litigant's true name:

Not applicable.

DATED this 9th day of January, 2023.

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Respondents LINCOLN COUNTY WATER DISTRICT ("Lincoln") and VIDLER WATER COMPANY, INC. ("Vidler"), submit this Answering Brief addressing Part B of the due process issues in accordance with the Court's Order Modifying Caption and Setting Briefing Schedule issued October 14, 2022.

I.

INTRODUCTION

The District Court correctly found the State Engineer's due process violations in the Order 1309 proceedings were especially harmful to water right holders in the Kane Springs Valley Hydrographic Basin (206) ("Kane Springs"). 49 JA 23332-33. The State Engineer failed to provide Lincoln and Vidler any notice or an opportunity to be heard that he would disregard determinations made in a prior Ruling that had already been adjudicated, litigated, appealed, and finally settled. Specifically, the State Engineer provided no notice and held no adequate hearing that he would: (1) overturn his findings in Ruling 5712 issued February 2, 2007, in which he granted Lincoln and Vidler's applications to appropriate groundwater in Kane Springs; (2) reconsider the evidence from the Order 1169 pump test to include Kane Springs in the Lower White River Flow System ("LWRFS") five years after his review of the same evidence led to the continued exclusion of Kane Springs from the LWRFS; and (3) develop six criteria after the evidence had been submitted and hearing held

in the Order 1303 proceedings to include Kane Springs in the LWRFS area delineated in Order 1309.

Particularly egregious is the State Engineer's failure to notify Lincoln and Vidler or hold any appropriate hearing that he was considering overturing prior findings of fact and adjudications in Ruling 5712 including: (1) Kane Springs would not be included in the Order 1169 proceedings; (2) granting Lincoln and Vidler 1,000 acre feet annually ("afa") of water rights (vested property rights) would not have any measurable impact on the Muddy River Springs; and (3) the appropriation would not conflict with senior appropriated rights in the down gradient basins.

The State Engineer's determinations in Order 1309 reprioritized Lincoln and Vidler's senior water rights in Kane Springs to junior water rights in the LWRFS and made Lincoln and Vidler's water rights subject to joint administration and a conjunctive management plan, implemented by Order 1309, without notice and the meaningful opportunity to be heard. Lincoln and Vidler were never given notice of or an opportunity to address joint administration and conjunctive management of Lincoln and Vidler's groundwater rights in Kane Springs by hydrographic basin consolidation or erasing basin boundaries to delineate one super basin subject to a maximum pumping cap with water rights in six other down gradient basins.[1]

[1] Lincoln and Vidler incorporate the due process arguments in Respondents' Joint Answering Brief in this brief and do not repeat them here. Respondents incorporate the Statement of the Case and Statement of Facts in Respondents' Joint Answering

In addition, the hearing provided by the State Engineer improperly limited the time Lincoln and Vidler had to present their experts and evidence and cross examine other witnesses. Moreover, contrary to the express instructions given by the hearing officer prior to the hearing, experts were allowed to change or expand their written expert opinions related to Kane Springs live on the stand after Lincoln and Vidler's presentation or in closing argument with no opportunity for Lincoln and Vidler to rebut or cross examine the new opinions. Despite these violations, there was never any ruling on Lincoln and Vidler's motion to strike some of the late-filed evidence. Thus, the hearing provided by the State Engineer did not afford Lincoln and Vidler a meaningful opportunity to address the ultimate decision of the State Engineer to create the LWRFS and subject the LWRFS to conjunctive management and joint administration in violation of Lincoln's and Vidler's due process rights.

II.

STATEMENT OF THE ISSUES

1. Whether the hearing provided by the State Engineer satisfied due process and afforded Lincoln and Vidler a full and complete opportunity to address the implications of the State Engineer's decision to subject the LWRFS to conjunctive management and joint administration.

Brief and provide additional information specifically related to Kane Springs and Lincoln and Vidler in the Statement of Case and Statement of Facts in this brief.

III.

STATEMENT OF THE CASE

Although the Order 1169 proceedings commenced in 2002, Lincoln and Vidler have only been involved in the LWRFS proceedings since 2019. In fact, the State Engineer purposefully excluded Kane Springs from all of the proceedings that led to Interim Order 1303. 2 JA 328-35. From 2002 to 2020, every State Engineer determined that Kane Springs should not be included in the multi-basin LWRFS or Order 1169 aquifer test.

On January 11, 2019, the State Engineer issued Interim Order 1303. In Interim Order 1303, the State Engineer designated for joint administration six (6) individual hydrographic basins as the LWRFS multi-basin unit and, again, excluded Kane Spring. 2 JA 406. The State Engineer invited stakeholders in the then defined LWRFS (not including Kane Springs or Lincoln and Vidler) to submit reports to the State Engineer addressing four specific areas: (1) the geographic boundary of the LWRFS; (2) aquifer recovery subsequent to the Order 1169 aquifer test; (3) the long-term annual quantity and location of groundwater that may be pumped from the LWRFS; and (4) the effect of movement of water rights between the alluvial and carbonate wells in the LWRFS; and (5) any other matter believed to be relevant to the State Engineer's analysis. *Id.* at 406-07. The reports were intended to help the State Engineer subsequently "make a determination as to the appropriate long-term

management of groundwater pumping that may occur in the LWRFS by existing holders of water rights without conflicting with existing senior decreed rights or adversely affecting the endangered Moapa dace." *Id.* at 405.

A public hearing was held in Carson City between September 23, 2019 and October 4, 2019. 2 JA 336. "The purposes of this hearing were to afford stakeholder participants who submitted reports pursuant to the solicitation in Interim Order 1303 an opportunity to provide testimony on the scientific data collected and analyzed regarding the five topics and to test the conclusions offered by other stakeholder participants." *Id.*

In late 2018 Southern Nevada Water Authority ("SNWA") belatedly requested the State Engineer consider whether Kane Springs should be included in the boundaries of the LWRFS. 18 JA 7940-41, 44 JA 17849 [Tr. 1176:8-14]. Because they had no choice but to protect their senior vested rights, Lincoln and Vidler participated in the proceedings. 18 JA 7927-8224, *see particularly* 7965. Specifically, Lincoln and Vidler submitted expert reports showing Kane Springs should continue to be excluded from the LWRFS as expressed in Ruling 5712 and based on new scientific data. 18 JA 7919-23; *see also generally* 44 JA 17894-911.

On June 15, 2020, then State Engineer, Tim Wilson, issued Order 1309 including Kane Springs in the LWRFS for the first time. Lincoln and Vidler filed a petition for judicial review challenging Order 1309.

The District Court granted Lincoln and Vidler's petition for judicial review concluding that: (1) the State Engineer does not have statutory authority to jointly administer multiple basins by creating the LWRFS "Superbasin;" (2) the State Engineer does not have legal authority to conjunctively manage the "Superbasin;" (3) Order 1309 violates the prior appropriation doctrine; and (4) the State Engineer violated the Respondents' due process rights in failing to provide notice or an opportunity to comment on the administrative policies inherent in the basin consolidation. 49 JA 23317-33. The District Court noted the State Engineer's "due process violation is particularly harmful to water rights holders in Kane Springs, the sole basin that had not been previously designated for management under NRS 534.030, had not been included in the Order 1169 aquifer test, and had not been identified as a basin to be included in the LWRFS superbasin in Order 1303." *Id.* at 23332-33.

IV.

STATEMENT OF RELEVANT FACTS

A. Lincoln and Vidler Water Rights, Kane Springs Rulings and Biological Opinion

Lincoln is a political subdivision created to provide water service within Lincoln County. Vidler is a Nevada corporation. Lincoln and Vidler own senior

groundwater permits in Kane Springs with a priority date of February 14, 2005,[2] and jointly own groundwater right applications filed on April 10, 2006, to appropriate water in Kane Springs for municipal use. 3 JA 864-65,1157-59. The Kane Springs basin and points of diversion in the permits and applications are located entirely in Lincoln County, Nevada. *Id.* at 864-65.

Initially, the United States Department of the Interior, Fish and Wildlife Service ("USFWS") protested Lincoln and Vidler's applications filed on February 14, 2005 and requested that the State Engineer include Kane Springs in the Order 1169 study area. 3 JA 866 – 67. However, on August 1, 2006, Lincoln, Vidler and the USFWS entered into an Amended Stipulation for Withdrawal of Protests ("Stipulation"). 18 JA 8262-73. The Stipulation contains triggers acceptable to USFWS to reduce groundwater pumping for protection of the Moapa dace, and payment of $50,000 by Lincoln and Vidler to USFWS for dace habitat restoration. *Id.* at 8271-73. USFWS withdrew with prejudice its request to include Kane Springs in the Order 1169 proceedings. *Id.* at 8262. From 2006 to date, the parties have performed and continue to perform under the terms of the Stipulation. *See* 1 JA 143.

[2] A portion of Lincoln and Vidler's water rights are now owned by Coyote Springs Investment, LLC ("CSI"). References to water rights granted or owned by Lincoln and Vidler are not intended to ignore the current ownership of the water rights. CSI's specific due process arguments are contained in its Issue B Answering Brief.

The National Parks Service ("NPS") also protested Lincoln and Vidler's applications, contending Kane Springs should be included in the Order 1609 pump test, the applications should be held in abeyance, and no appropriations should be granted in Kane Springs based upon senior down-gradient water rights. 3 JA 865-67, 883.

On February 2, 2007, the State Engineer issued Ruling 5712, which granted Lincoln and Vidler 1,000 afa of water rights in Kane Springs. 3 JA 885. The State Engineer specifically determined Kane Springs would not be included in the Order 1169 study area because there was no substantial evidence that the appropriation of a limited quantity of water in Kane Springs will have any measurable impact on the Muddy River Springs. *Id.* at 884. The State Engineer thus overruled the NPS protest. *Id.* The State Engineer specifically rejected the argument that groundwater in Kane Springs could not be appropriated based upon senior appropriated rights in the down gradient basins. *Id.* at 878. Neither the NPS nor any of the Order 1169 study participants objected to or appealed the State Engineer's determinations made in Ruling 5712 including the conclusion that Lincoln and Vidler could develop their water rights notwithstanding appropriated water rights in the down-gradient basins.

Although Ruling 5712 granted some senior rights to Lincoln and Vidler, they filed a petition for judicial review challenging portions of Ruling 5712. *See* 1 JA 144. Lincoln, Vidler, and the State Engineer resolved the litigation by settlement

based upon the State Engineer's promise he would consider granting Lincoln and Vidler additional water rights in Kane Springs pursuant to their pending applications if Lincoln and Vidler collected additional data and performed the testing and study to support the pending applications. *Id.*

Despite his promises, on April 29, 2009, the Acting State Engineer issued Ruling 5987 summarily denying Lincoln and Vidler's applications without holding a hearing or contacting Lincoln or Vidler to get any information about the additional data collection and testing. 3 JA 887-90. Lincoln and Vidler again challenged the State Engineer's Ruling 5987 in Court. And again, Lincoln, Vidler, and the State Engineer entered into a settlement agreement to resolve the litigation. *See* 13 JA 6590-601. The settlement agreement required the State Engineer to reinstate the pending applications in Kane Springs with the same priority as their original application date subject to the data collection and study terms described above. *Id.* at 6597-98.

On October 29, 2008, Lincoln and Vidler obtained a Biological Opinion from the USFWS that groundwater pumping pursuant to their permitted rights in Kane Springs was not likely to jeopardize the continued existence of the Moapa dace. 33 JA 15476-543. None of the Order 1169 study participants objected to or appealed the Biological Opinion.

The State Engineer has never designated Kane Springs as a groundwater basin or area needing additional administration pursuant to NRS 534.030. All other basins the State Engineer included in the LWRFS had been designated between 1971 and 1985 as groundwater basins in need of further administration. 3 JA 395-96, 835-863.

B. Proceedings after Order 1169 Pump Test and Rulings 6254-6261

Between 2010 and 2014, the Order 1169 studies took place, and the Order 1169 study participants (but not Lincoln or Vidler) performed aquifer tests, submitted reports, and participated in proceedings with the State Engineer pursuant to Order 1169. 2 JA 328-35. Kane Springs was not included in the Order 1169 aquifer pumping or testing consistent with the State Engineer's adjudications in Ruling 5712. 18 JA 7964-65.

Even after the aquifer test results were compiled, no Order 1169 study participants recommended inclusion of Kane Springs in the Order 1169 study area, and the State Engineer continued to exclude Kane Springs. 3 JA 819-23. In fact, the State Engineer initially ordered SNWA to submit model simulation results showing predicted effects of pumping both existing rights and current applications in numerous basins, including Kane Springs. *Id.* at 820, 831. However, based upon the information provided after the Order 1169 aquifer test, the State Engineer rescinded the requirement. *Id.* at 820. However, SNWA's report noted: "the

presence of boundaries and spatial variations in hydraulic connectivity affect the carbonate's response depending on location. For example, **no discernible responses were observed north of the Kane Springs Fault and west of the MX-5 and CSI wells near the eastern front of the Las Vegas Range**." 27 JA 11832 (emphasis added). The entire Kane Springs basin, including Lincoln and Vidler's wells, is located north of the Kane Springs Fault. 18 JA 7992 (map).

As a result of the Order 1169 aquifer test, the State Engineer issued Rulings 6254-6261 on January 29, 2014, denying all the pending groundwater applications in Coyote Spring Valley, Muddy River Springs Area, California Wash, Hidden Valley, Garnet Valley, and certain portions of the Black Mountains Area. 3 JA 891-1113. Lincoln and Vidler were not parties to any of the proceedings involving Rulings 6255-6261.

C. Notice Provided of the Order 1303 Hearing

On July 25, 2019, the State Engineer issued a Notice of Pre-Hearing Conference, which occurred August 8, 2019. *See* 2 JA 697, 697-736. Participants were told the larger substantive policy determination was not part of this proceeding, it was part of later proceedings in the multi-tiered process. 2 JA 703, 706. On August 23, 2019, the State Engineer issued a Notice of Hearing (amended August 26, 2019), noting the hearing would be "the first step" in determining how to address future management decisions, including policy decisions, relating to the LWRFS

basins. (emphasis added). *See* 2 JA 465 (Notice); *see also* 2 JA 487 (Amended Notice). The Hearing Officer stated that management or policy issues were not part of Order 1303 paragraph 1(e) topic "any other matter believed to be relevant . . . ." 2 JA 394, 407, 44 JA 17357, 17359 [Sept. 23, 2019 Tr. 6:9-15]. The State Engineer conducted a two-week evidentiary hearing on the four topics listed in Interim Order 1303 (the "1303 Hearing").

D. The 1303 Hearing.

At the start of the administrative hearing, the State Engineer reiterated the public administrative hearing was not a "trial-type" or contested adversarial proceeding. *See Id.* at 17359 [Sept. 23, 2019 Tr. 6:4-8]. The hearing consisted of expert testimony presented by most of the parties in this appeal.

Because Kane Springs was considered to be a minor issue, the State Engineer gave Lincoln and Vidler much less time to present their experts and reports in the two weeks—4 hours total of which 2 hours was for cross examination. 2 JA 488, 707 [Aug. 8, 2019 Tr. 16:18-24], 708 [Aug. 8, 2019 Tr. 17:1-3], 737. Cross examination was limited to between 4-17 minutes per participant. 44 JA 17359 [Sept. 23, 2019 Tr. 7:5-7]. Notably, CSI submitted a Request for Reconsideration and Revision of the State Engineer's Notice of Hearing to allow all parties "an equal opportunity to present its case." 2 JA 508 – 509. The State Engineer denied this request. *Id.* at 581 – 582.

The Hearing Officer indicated during the prehearing conference that the experts would be limited to the opinions they expressed in their reports. 2 JA 710 [Tr. 35:6-24]. However, throughout the hearing, experts were allowed to express new opinions that were contrary to their reports or based upon testimony they heard at the hearing. *See* 44 JA 17860 [Sept. 30, 2019 Tr. 1223:3-18 (Lazarus Testimony)]; 44 JA 18119, 18124, 18126 [Oct. 4, 2019 Tr. 1761:20-24, 1782:6-20, 1787:7-9 & 20-24, 1789:11-19 (Felling Testimony)]. Certain participants included new opinions and evidence in their closing statements which did not allow for review and cross-examination by other parties. 43 JA 17280-308. Lincoln and Vidler filed a motion to strike that information. That motion and associated pleadings were not included by the State Engineer in his submission of the record on appeal to the District Court and was never decided by the State Engineer. Rather, Lincoln and Vidler had to supplement the record on appeal. 47 JA 19392-415.

In December 2019, following closing statements by the participating stakeholders, the State Engineer neither engaged in any additional public process nor solicited additional input regarding "future management decisions, including policy decisions, relating to the [LWRFS] basins." *See* 2 JA 487. Thus, the Order 1303 Hearing was not just the first step in the State Engineer's decisions concerning the basin management set forth in Order 1309, it was the only step.

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E. State Engineer Order 1309

Order 1309 combined seven formerly separate hydrographic basins into one basin, delineating the single basin as the LWRFS, and set a total combined 8,000 afa pumping cap for the new single basin. 2 JA 390. The Order does not provide guidance about any further administration of the new "single hydrographic basin" and provides no clear analysis to support the 8,000 afa number for the maximum sustainable yield.

In Order 1309, the State Engineer indicated he "considered this evidence and testimony [regarding basin inclusion and basin boundary] on the basis of a common set of criteria that are consistent with the original characteristics considered critical in demonstrating a close hydrologic connection requiring joint management in Rulings 6254-6261." 2 JA 372. However, the State Engineer did not disclose these criteria to the stakeholders before or during the Order 1303 proceedings. Instead, he disclosed them for the first time in Order 1309, after the stakeholders had engaged in extensive investigations, expert reporting, and the Order 1303 Hearing.

Based upon these undisclosed criteria, the State Engineer combined the separate hydrographic basins into a single hydrographic basin, including Kane Springs. *See id*. As a result of the consolidation of the basins, the relative priority of all water rights within the seven affected basins are reordered and the priorities are considered in relation to all water rights holders in the consolidated basins, rather

than in relation only to the other users within the original separate basins, significantly altering the nature of the vested property rights.

The implications of Order 1309 and the State Engineer's decision to subject the LWRFS (now including Kane Springs) to conjunctive management and joint administration are that Lincoln and Vidler's groundwater rights went from the most senior priority rights in Kane Springs to close to the most junior groundwater rights in the LWRFS. 3 JA 881 (Ruling 5712 stating at the time of the Ruling there were no other permitted or certificated groundwater rights in Kane Springs); *see also* 3 JA 864-65, 881, 1157-59. Under the 8,000 afa pumping cap imposed by the State Engineer, the last rights in the LWRFS allowed to be pumped have a priority date of March 31, 1983. 3 JA 1666. Now, 38,804.73 afa of existing rights in the LWRFS have priority dates ahead of Lincoln and Vidler's rights and would have to be pumped before Lincoln and Vidler can pump their February 14, 2005 priority rights. *Id.* at 1667.

V.

STANDARD OF REVIEW

Constitutional challenges, including violation of due process rights challenges, are reviewed de novo. *Eureka County v. Seventh Jud. Dist. Court, Cnty of Eureka,* 134 Nev. 275, 279, 417 P.3d 1121, 1124 (2018) (citing *Callie v. Bowling,* 123 Nev. 181, 183, 160 P.3d 878 (2007)) (hereinafter "*Eureka County*").

VI.

ARGUMENT

From 2002 to 2020, every State Engineer determined that Kane Springs should not be included in the multi-basin LWRFS or the multi-basin Order 1169 aquifer test. The 2020 State Engineer abruptly changed course and included Kane Springs water rights in the area he unlawfully determined to be the "LWRFS" without due process of law.

A. Lincoln and Vidler were deprived of due process in the hearing provided by the State Engineer.

The District Court properly applied the Nevada Constitution's protection against deprivation of property without due process of law to water rights. 49 JA 23327. Lincoln and Vidler's existing water rights are entitled to constitutional due process protections. *Eureka County*, 134 Nev. at 281, 417 P.3d at 1126 (recognizing that existing water rights are vested property rights subject to constitutional due process protections).

Every vested or permitted water right is assigned a priority date, and the priority date is an essential component of the water right that cannot be stripped away without damaging the right itself. *Wilson v. Happy Creek, Inc.*, 135 Nev. 301, 312, 448 P.3d 1106, 1115 (2019). The Court has stated that "a loss of priority that renders rights useless 'certainly affects the rights' value' and 'can amount to a de

facto loss of rights.'" *Andersen Family Assocs. v. Ricci*, 124 Nev. 182, 190-91, 179 P.3d 1201, 1206 (2008).

Order 1309 changed the relative priority of Lincoln and Vidler's water rights. Without notice and an opportunity to be heard, the State Engineer combined seven separate groundwater basins into one "superbasin" and reallocated and reprioritized all water rights within this superbasin as though the vested water rights of each appropriation within the individual basins had been granted in a hypothetical single basin. Counsel for SNWA stated in its argument before the District Court that water rights holders should be concerned about their seniority based on Order 1309. 49 JA 22660-61. SNWA's counsel admitted it is possible that senior rights may have moved down in priority. 49 JA 22661.

First, Lincoln and Vidler had no notice and no opportunity to address the impacts on the relative priority of their water rights or the implications of the State Engineer's determination to conjunctively manage and jointly administer seven previously separate basins as one "LWRFS basin". Kane Springs was not even listed as a basin under consideration in Interim Order 1303 for conjunctive management and joint administration. On its face, Interim Order 1303 was deficient in providing notice and an opportunity for all water right holders in Kane Springs (not just Lincoln and Vidler) that their water rights would be impacted by the Order 1303 hearing proceedings.

Second, there was no notice to permit holders in Kane Springs, just as there was no notice to the other water right holders in the six other basins, that the State Engineer was considering erasing established legal subdivision basin boundaries to create one new overarching superbasin as his conjunctive management and joint administration policy.

While Lincoln and Vidler participated in the Order 1303 proceedings (and even if the State Engineer could legally combine separate basins into one superbasin which Lincoln and Vidler do not concede), there was no notice and opportunity provided for Lincoln and Vidler to address the six criteria the State Engineer determined he would use to evaluate the connectivity of the basins or in determining the new purported consolidated basin boundary. 2 JA 372-73. If Lincoln and Vidler had known the criteria prior to submission of their expert reports and the hearing, they would have addressed the criteria and specifically provided information to address new criteria 5 and 6. 2 JA 373.

In Order 1309, the State Engineer admitted he developed the six "new" criteria from Rulings 6254-6261 based upon the Order 1169 aquifer test as the standard of general applicability for inclusion into the geographic boundary of the LWRFS. 2 JA 372-73. The State Engineer should have articulated that standard in Interim Order 1303 if that was the standard he was going to apply. Lincoln and Vidler (for example) were not parties to the Order 1169 test or Rulings 6255-6261. Criteria 4,

5, and 6 were not contained in Rulings 6254-6261,[3] and criteria 4 was specifically relied upon by the State Engineer to exclude Kane Springs from the LWRFS area in Ruling 5712. *See* 3 JA 884. It appears criteria 5 and 6 were created after the submission of evidence and after the hearing and were used to specifically include Kane Springs in the new LWRFS.

The State Engineer's Order 1309 violates due process because it adopted a standard to be applied to Lincoln and Vidler's water rights in Kane Springs after the presentation of evidence and after the hearing. Lincoln and Vidler never had an opportunity in the hearing to address the State Engineer's six criteria and show why Kane Springs should not be included in the LWRFS.

Third, the State Engineer made management and policy decisions in Order 1309 when he erased basin boundaries and created one superbasin, reprioritized all priorities of the seven-basin groundwater right holders, and imposed an 8,000 afa pumping cap. In the Order 1303 Hearing, the hearing officer specifically told the parties not to address management and policy issues related to conjunctive management and joint administration. And the parties could not have understood what the LWRFS area even comprised. How could Lincoln and Vidler address the implications of the State Engineer's decision to combine numerous basins into one

[3] It is not clear criteria 2 was explicitly discussed in Rulings 6254-6261.

basin subject to conjunctive management and joint administrative if they did not even know if Kane Springs was going to be included in the superbasin?

The same holds true for the State Engineer's reversal of his previous determinations to keep Kane Springs out of the Order 1169 proceedings including Ruling 5712 in 2007, Order 1169A in 2012, and Interim Order 1303 in 2019. First, Kane Springs was not a basin designated by the State Engineer as a basin in need of administration under NRS 534.030. The Order 1303 Hearing did not even address whether Kane Springs was a basin in need of administration, and the State Engineer skipped the required steps in NRS 534.030. *See* 2 JA 395-96.

Second, previous State Engineers consistently determined Kane Springs would not be jointly administered with the other Order 1169 basins. 2 JA 406; 3 JA 820, 830-31, 884; 2 JA 406. (Ricci in Order 1169, Taylor in Ruling 5712, King in Order 1169A and Order 1303). Interim Order 1303 provided no notice in the five topics that the State Engineer would disregard prior rulings granting vested property rights and include Kane Springs in the LWRFS and the Order 1169 study area. Nor was there notice given that Lincoln and Vidler would be subject to criteria used by the State Engineer to reject applications in other basins in his Rulings issued in 2014. Lincoln and Vidler were not parties to those proceedings. Appellants admit the State Engineer "treated the LWRFS (except Kane Springs Valley) as one aquifer" when issuing these orders. AOB at 15-16.

Lincoln and Vidler had not participated in any of the previous Order 1169 investigation and analysis because Kane Springs was specifically excluded. To hold the Kane Springs basin (and Lincoln and Vidler) to findings the State Engineer made years before in proceedings to which they (and any other Kane Springs water right holders) were specifically excluded is particularly egregious. And, if the State Engineer were going to consider reversing previous contested findings in a ruling awarding vested property rights (Ruling 5712), due process mandates notice and a meaningful opportunity be heard. *Eureka County*, 134 Nev. at 280, 417 P.3d at 1125. Here, the State Engineer failed to provide either notice or a meaningful hearing to Lincoln and Vidler.

Vested water rights are property rights and notice of the issues on which a decision will turn must be provided to water right holders prior to the hearing so they have a meaningful opportunity to address those issues. "A party is entitled, of course, to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 288 n.4 (1974) cited with approval in *Eureka Cty. v. State Engineer,* 131 Nev. 846, 855, 359 P.3d 1114, 1120 (2015). This Court quoted *Bowman Transp., Inc.*: "[T]he Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation." *Id.*; *see also Eureka County*, 134 Nev.

at 280, 417 P.3d at 1125 ("It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner." (internal citations omitted)).

It is undisputed that the State Engineer excluded Lincoln and Vidler from the Order 1169 proceedings—a fact pointed out to the State Engineer by Lincoln and Vidler in their hearing report: "Lincoln/Vidler are not a party to, nor have ever been a participant of the Order No. 1169 aquifer test proceedings. The [Nevada State Engineer] never requested that Lincoln/Vidler provide a report on the outcome of the Order No. 1169 aquifer test results; hence none was ever developed." 18 JA 7937. Furthermore, one of Vidler's experts reiterated Kane Springs was not in Order 1169 and not a LWRFS area basin. 44 JA 17960 [Oct. 1, 2019 Tr. 1408:1-4].

The State Engineer violated Lincoln and Vidler's due process rights and the District Court's order voiding Order 1309 should be upheld.

B. Without notice and an opportunity to be heard, the State Engineer improperly reweighed the evidence and data and changed his findings made in the Order 1169 proceedings to include Kane Springs in the LWRFS area.

The State Engineer cannot disregard vested property rights without due process of law, yet he provided no notice to Lincoln and Vidler that he would reconsider the evidence and data from the Order 1169 proceedings, reweigh the same evidence to the opposite result, and use that evidence as a basis to include Kane

Springs in the Order 1303 proceedings. *Compare* 2 JA 331 n 21-22, *with* 2 JA 387 n 2-3. Interim Order 1303 topics (a) and (b) for expert reports were:

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

2 JA 406.

Topic (a) gave no notice the State Engineer was going to use Order 1169 aquifer test results to redefine the LWRFS. Topic (b) related to aquifer recovery based on the Order 1169 aquifer data, not a reanalysis of the Order 1169 data upon which Kane Springs was excluded as part of the LWRFS. The State Engineer denied Lincoln and Vidler due process in the hearing and decision to reweigh the Order 1169 data to now include Kane Springs in the Order 1169 study area and subject it to conjunctive management and joint administration.

The State Engineer, USFWS, NPS, and the other participants to the Order 1169 proceedings are not entitled to a do-over after failing to include Kane Springs in the LWRFS based upon the proceedings, evidence, and data they analyzed from 2002 to 2014. *See State Eng'r v. Eureka Cty.*, 133 Nev. 557, 559–60, 402 P.3d 1249, 1251 (2017) (water right applicant not entitled to a do over when it failed to submit substantial evidence to support its applications). Lincoln and Vidler were not involved in those proceedings. No participant wanted Kane Springs included in the

LWRFS at that time. Now, based upon the same evidence and data, Kane Springs is being included in the LWRFS. It is highly prejudicial and in violation of Lincoln and Vidler's due process rights for the State Engineer to ignore prior rulings and orders, reweigh evidence and now come to a different (and opposite) conclusion, i.e., that Kane Springs should be included in the LWRFS.

Lincoln and Vidler are not asking the Court to review the evidence—only the procedure used by the State Engineer. If Order 1309 is upheld, including the procedure used, the State Engineer could simply ignore other vested property rights and reverse course for other basins underlain by the carbonate aquifer system, using decades old data to re-evaluate basin boundaries for alleged conjunctive management and joint administration. The State Engineer acknowledged in Order 1169 the thick carbonate aquifer underlies Southern Nevada, north and east to White Pine County, and the Utah border. *See* 3 JA 826. Thus, under the State Engineer's unlawful procedures used in this proceeding, any basin in this expansive area could someday be subject to future conjunctive management and joint administration in the "LWRFS area".

C. The State Engineer violated Lincoln and Vidler's due process rights by overturning his findings made in Ruling 5712.

The State Engineer averred in his Answering Brief in the lower court that he did not have to follow Ruling 5712. 47 JA 19753. This is the first time Lincoln and Vidler heard the State Engineer indicate he did not have to follow Ruling 5712 which

granted senior groundwater rights in Kane Springs and adjudicated protests. The State Engineer never informed Lincoln and Vidler either before or after the issuance of Interim Order 1303 (or in even issuing Order 1309) that he was taking the position he did not have to follow Ruling 5712 in relation to the Order 1169 proceedings or including Kane Springs in the LWRFS area. The State Engineer provided no notice or hearing that he would overturn determinations made in Ruling 5712 which is what Order 1309 effectively did. The State Engineer's failure violated Lincoln and Vidler's due process rights.

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonable calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 314 (1950).

Nothing in Order 1303 put Lincoln and Vidler on notice that their appropriated water rights in Kane Springs were in jeopardy of losing their priority granted in Ruling 5712. Nothing in Order 1303 put Lincoln and Vidler on notice that the State Engineer would take the position that he did not have to follow previous State Engineer's determinations in a contested proceeding which adjudicated Lincoln and Vidler's water rights applications and granted them property rights. And the State Engineer already knew of the hydrologic connection between Kane Springs and the

carbonate aquifer—he acknowledged this in Ruling 5712. 3 JA 713. Yet Order 1303 said nothing about Kane Springs, and all previous orders and rulings from the State Engineer (including Ruling 5712, Order 1169, and Order 1169A) specifically excluded Kane Springs from the LWRFS.

Appellants argue Ruling 5712 predates the 1169 pump test results and it was therefore within the State Engineer's authority to include Kane Springs in the LWRFS after analyzing the results. AOB 16, n.65. The State Engineer expressly excluded Kane Springs from a test that later provided the basis for its inclusion in the LWRFS area and did not even include Kane Springs in Order 1169A or Interim Order 1303, thus giving Kane Springs water right holders no notice the State Engineer would re-evaluate his determinations in Ruling 5712. Lincoln and Vidler were entitled to certainty and finality knowing what their rights were after they were granted by the State Engineer in 2007. *See Mineral Cty. v. Lyon Cty.*, 136 Nev. 503, 520, 473 P.3d 418, 431 (2020) (Nevada's water right statutes do not permit reallocation of adjudicated rights when implementing the public trust doctrine; allocations of water rights must have ***certainty and finality*** so that rights holders may effectively direct water usage to its beneficial use, without undue uncertainty or waste). The State Engineer's attempt by Order 1309 to ignore Ruling 5712 and unlawfully reprioritize Lincoln and Vidler's rights under the guise of conjunctive

management and joint administration violated Lincoln and Vidler's due process rights.

D. Appellants' argument completely ignores due process notice requirements.

Appellants argue the decision to include Kane Springs in the LWRFS did not violate due process because Lincoln and Vidler fully participated in the Order 1303 hearing and Order 1309 specified the reasons for its inclusion. AOB 74. They focus on what they term "what actually happened during the Order 1303 hearing." *Id.* But what actually happened during the hearing was that the Hearing Officer stated that the proceeding was not a trial-type proceeding, that it was in the nature of a fact-finding proceeding, and that no determinations would be made that could affect vested rights. Contrary to those representations, Lincoln and Vidler were stripped of their senior priority—the most important aspect of their water rights. Due process is not satisfied if there is inadequate notice of what the subject matter of the hearing is and there is no full and fair opportunity to address all matters to be considered at a hearing.

This Court has held that "[a]lthough proceedings before administrative agencies may be subject to more relaxed procedural and evidentiary rules, due process guarantees of fundamental fairness still apply." *Dutchess Bus. Serv.'s, Inc. v. Nev. State Bd. of Pharmacy*, 124 Nev. 701, 711, 191 P.3d 1159, 1166 (2008). "Administrative bodies must follow their established procedural guidelines and give

notice to the defending party of 'the issues on which decision will turn and . . . the factual material on which the agency relies for decision so that he may rebut it.'" *Id.* With respect to notice and hearing, the Court has held that "[i]nherent in any notice and hearing requirement are the propositions that the notice will accurately reflect the subject matter to be addressed and that the hearing will allow full consideration of it." *Public Serv. Comm'n of Nev. v. Southwest Gas Corp.*, 99 Nev. 268, 271, 772 P.2d 624, 626 (1983). "Notice must be given at an appropriate stage in the proceedings to give parties meaningful input in the adjudication of their rights." *Eureka County*, 134 Nev. at 280-81, 417 P.3d at 1125-26 (internal citation omitted).

Appellants' argument the State Engineer recognized any management decision involving Kane Springs will require additional study is without merit. AOB 76. One expert testified "***management***" of the LWRFS by including Kane Springs meant Lincoln and Vidler would not be able to pump their rights because they would be junior to most other LWRFS basin rights and among the first subject to curtailment. 44 JA 18065 [Oct. 3, 2019 Tr. 1638:14-24; 1639:1-7].

For all the reasons set forth above, Lincoln and Vidler were not afforded the constitutional due process requirements of notice and an opportunity to be heard regarding the implications of the State Engineer's decision to include Kane Springs in the LWRFS area and to subject the LWRFS to conjunctive management and joint

administration. The District Court's determination that Order 1309 is void should be upheld.

E. Other due process violations.

There were numerous other due process violations that occurred during the administrative hearing process resulting in the State Engineer's decision to subject the LWRFS to conjunctive management and joint administration. *See supra* § IV.D (including appendix citations). As illustrated above, those due process violations include:

- The Hearing Officer confirming during the prehearing conference that the experts would be held to the opinions they expressed in their written reports, and subsequently allowing the experts to express new or contrary opinions based upon other testimony they heard.
- The State Engineer allowed participants to present new opinions and evidence in their closing statements which did not allow for review and cross-examination by other parties. The State Engineer never decided a motion to strike that information and excluded the pleadings from the State Engineer's record on appeal.
- The hearing provided only limited opportunity for parties to present information and limited cross-examination.

These procedures certainly violated Lincoln and Vidler's due process rights because the hearing procedures were not fair as required by *Revert v. Ray*, 95 Nev. at 787, 603 P.2d at 264.

VII.

CONCLUSION

The District Court's determination that the State Engineer's violation of due process was particularly harmful to water right holders in Kane Springs should be affirmed. The due process violations are particularly egregious because Kane Springs had never been designated as a basin in need of administration and had been explicitly excluded from the Order 1169 pump test, the results of which provided the basis for Order 1309.

Moreover, Lincoln and Vidler had no notice or opportunity to be heard on the State Engineer overruling his previous determinations in Ruling 5712 wherein he granted Lincoln and Vidler senior, vested property rights.

Finally, as set forth in this Brief and Respondents' Joint Answering Brief, Lincoln and Vidler had no notice and no meaningful opportunity to present evidence and be heard in the Order 1303 proceedings on the criteria the State Engineer would use to purportedly determine connectivity and the LWRFS basin boundary or policy and management issues. This Court should uphold the District Court's

determinations that the State Engineer violated Lincoln and Vidler's due process rights and that Order 1309 is void.

DATED this 9th day of January, 2023.

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CERTIFICATE OF COMPLIANCE (BASED UPON NRAP FORM 9)

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14 point Times New Roman type style.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(1)(c), I hereby certify that I am an employee of ALLISON MacKENZIE, LTD., Attorneys at Law, and that on this date, I caused the foregoing document to be served on all parties to this action by:

✓ Court's electronic notification system

~ and ~

✓ Via E-Mail as follows:

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DATED this 9th day of January, 2023.

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