

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
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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)

RESPONDENT COYOTE SPRINGS INVESTMENT, LLC
ANSWERING BRIEF

Kent R. Robison, Esq. – Nevada Bar No. 1167
Hannah E. Winston, Esq. – Nevada Bar No. 14520
Robison, Sharp, Sullivan & Brust
71 Washington Street
Reno Nevada 89503

krobison@rssblaw.com / hwinston@rssblaw.com

Telephone: (775) 329-3151

Attorneys for Respondent Coyote Springs Investment, LLC

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INTRODUCTION

The notice and hearing procedure employed by the State Engineer resulting in Order 1309 violated CSI's due process rights. CSI was not given proper notice and therefore, could not be heard on crucial matters concerning its property rights.

Originally, the State Engineer tried to curtail CSI's water rights in May of 2018 with a letter that put a moratorium on construction and subdivision map applications. He did so without scientific or technical data to support the moratorium. CSI was not given notice or opportunity to be heard.

Then, in January of 2019, Interim Order 1303 put a moratorium on all of CSI's construction and subdivision map applications. It did so without scientific or technical data to support such an austere Order. CSI was not given notice or an opportunity to be heard.

The resulting Order 1309 is a curtailment of CSI's senior water rights (a property right) that was never subjected to the statutorily required curtailment procedures.

The District Court correctly found that the Order 1309 process violated the due process rights of the petitioners (all eight of them).

Neither the notice of hearing nor findings in Order 1309 pertain to CSI's intended use of its specific senior water rights. Instead, it is an omnibus pronouncement about other basins and other users in different basins.

By failing to give proper and adequate notice to CSI about the intended consequences of Order 1309, the State Engineer did not afford CSI a meaningful opportunity to be heard and present crucial evidence about its rights, its use of its permitted water, and how its use of its water would not adversely affect existing water right holders in other basins. Nor was CSI permitted to prove that its use of its permitted water rights would not affect the habitat of the Moapa dace or how it had already mitigated impacts to the dace.

Worse, CSI's senior water rights were effectively curtailed through the State Engineer's statutorily unauthorized disregard and violation of the prior appropriation doctrine.

The State Engineer is trying to mislead this Honorable Court. The State Engineer's reliance on statutes that regulate applications for **new** groundwater rights to adversely affect CSI's **existing** groundwater rights is disingenuous. The statutes that apply to the regulation of **existing** water rights do not in any way support Order 1309.

Due process requires notice and a reasonable opportunity to be heard. CSI was afforded neither. Had CSI received proper notice that water management criteria would be the crux of the administrative hearing and resulting Order, CSI could have presented specific and persuasive evidence that its use of its permitted

water rights would neither jeopardize the Moapa dace nor water right holders in Basin 210 or other basins.

The State Engineer and Las Vegas Valley Water District have refused to approve (or even consider) CSI's pre- and post- Order 1309 tentative map applications. Rather than hold a hearing or conduct an investigation into CSI's specific request to use a specific amount of its existing senior water rights, the State Engineer ordered a hearing involving all water right holders in seven distinct and separate hydrographic basins.

Before and during that hearing, the State Engineer admonished the participants that water management decisions would not be addressed. Therefore, CSI did not present evidence concerning how the State Engineer should manage the water in Coyote Spring Valley Hydrographic Basin (Basin 210) in relation to the other basins. CSI's evidence would have included extensive information about CSI's development, existing and planned use for its water rights, conservation design standards, and its development plans. This information and evidence would have included references to conservation measures, reuse water standards, reinjection wells, storm drain usage, sewer facilities that allow for use of recycled water, and a myriad of other prophylactic measures. CSI was prevented from presenting argument and evidence that would dissuade the State Engineer from trying to consolidate separate basins.

Due process was not part of the Order 1309 proceedings, and CSI remains without a remedy to address its grievances because Order 1309 is being used as a curtailment of CSI's water rights. Yet, there has never been a curtailment proceeding initiated in this matter.

The State Engineer's relentless effort to characterize Order 1309 as merely containing "factual determinations" must be rejected. Order 1309 is a management tool with far reaching consequences for all water right holders in the seven basins, including CSI. The District Court should be affirmed.

STATEMENT OF THE ISSUES

Whether the hearing provided by the State Engineer satisfied due process and afforded CSI 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".

STATEMENT OF THE CASE

CSI incorporates the Statement of Case set forth in the Respondents' Joint Answering Brief.

STATEMENT OF THE FACTS

1. CSI is the developer of the master planned community Coyote Springs Valley. 47 JA 19074, 19085; 32 JA 14871, 14872. It is a fully approved master planned community. CSI has certificated and permitted water rights ready to be

used in the amount of 4,140 acre-feet-annually (“afa”) in Coyote Springs Valley Hydrographic Basin (Basin 210). *Id.* at 19086-87; 32 JA 14872. CSI also holds 246.96 afa of permitted water rights in the Kane Springs Hydrographic Basin (Basin 206). *Id.* at 19087; 32 JA 14872.

2. For over **nineteen (19) years**, CSI relied on its senior water right status in developing its project, which has involved, among other things, CSI working with numerous state and federal agencies to obtain all necessary environmental and habitat protection permits and approvals, development entitlements, development agreements, improvement and development bonds, rights-of-ways, building and operating permits, maps, and plans for the development. 47 JA 19074, 19087. Additionally, CSI has planned, designed, and constructed a municipally equipped groundwater treatment plant and wastewater treatment plant, 3-megawatt electric substation, temporary wastewater package treatment plant, 2 mile long storm water retention basin (designed, permitted, built, approved, and inspected by the Nevada State Engineer’s office), streets and underground utilities, all designed and built to accommodate federal, state, and local requirements necessary to build the first home in the development.

3. Moreover, in 2006, CSI worked with several agencies to create the Clark County - Coyote Springs Water Resources General Improvement District (“GID”) under NRS Chapter 318. *See* 32 JA 14871-898. The GID is the water

and wastewater utility for the development. *Id.* at 14873. Las Vegas Valley Water District (“LVVWD”) is the general manager of the GID. *Id.* CSI has dedicated 2,000 afa of water rights to the GID to be used solely within the Coyote Springs development. *Id.* at 14878-79.

4. In 2017, CSI began seeking approvals for the first phase of its subdivision, 1 JA 30-31, and LVVWD sent a letter to the State Engineer seeking an opinion regarding “the extent to which subdivision maps for the Coyote Springs Development Project . . . would be executed by the [State Engineer].” *See* 32 JA 14899.

5. On May 16, 2018, the State Engineer responded by letter, stating:

Therefore, specific to the question raised in your November 16, 2017, letter, considering current pumping quantities as the estimated sustainable carbonate pumping limit, **pursuant to the provisions found in Nevada Revised Statutes Chapter 278, 533 and 534, the State Engineer cannot justify approval of any subdivision development maps based on the junior priority groundwater rights currently owned by CWSRGID (sic)[Coyote Springs Water Resources General Improvement District] or CSI unless other water sources are identified for development.**

Id. at 14901 (emphasis in original).

6. CSI filed a petition for judicial review of the May 16, 2018 letter. 47 JA 19092.

7. In August of 2018, the parties settled and dismissed the case. *Id.* In that settlement, the State Engineer agreed to rescind his May 16, 2018, letter and to

process “*in good faith any and all maps, or any other issues as requested by CSI, and/or its agents or affiliates, in accordance with the State Engineer’s ordinary course of business....*” *Id.*; 1 JA 32.

8. The State Engineer withdrew the May 16, 2018 letter as part of the settlement. After withdrawing the May 16, 2018 letter, the State Engineer held public workshops. 1 JA 32-33. At a September 2018 workshop, the State Engineer circulated a draft order (the “Draft Order”). Appellants’ Opening Brief (“AOB”) 17. The Draft Order included findings that were not substantiated by scientific or technical data, and it reinstated the moratorium. *See id.*; *see also* 1 JA 33-34. The Draft Order would have halted CSI’s subdivision map processing unless CSI demonstrated to the State Engineer’s satisfaction that an adequate supply of water was available “*in perpetuity*” for the subdivision. *Id.*

9. On October 5, 2018, CSI sent the State Engineer a series of comment letters regarding the Draft Order, noting the utter lack of technical information in the Draft Order. *Id.* at 34; *see also* AOB 18.

10. On January 11, 2019, the State Engineer issued Interim Order 1303 (“Interim Order 1303”). *See* 2 JA 394-412.

11. Interim Order 1303 also imposed a moratorium on submissions for subdivision map approvals pending yet another public process to determine the total quantity of groundwater available in the area. *See id.*

12. Interim Order 1303 provided an exception for subdivision approvals upon a showing that there was a sustainable supply of water to meet the anticipated needs for the “life of the subdivision.” *Id.* at 407. This exception was illusory because there is not a definition of the phrase “life of the subdivision” in Interim Order 1303 nor any Nevada statute. Furthermore, the State Engineer never addressed the fact that *even under the State Engineer’s analysis*, CSI and the GID hold more than sufficient water to support CSI’s subdivision plans.

13. Given that Interim Order 1303 suffered from the same defects as the May 26, 2018 letter and the Draft Order, CSI again filed a Petition for Judicial Review to challenge it. 47 JA 19095.

14. On June 13, 2019, CSI again submitted two subdivision maps to the State Engineer’s office for 575 lots and requiring an estimate use of 408.25 afa of its senior water rights. 1 JA 35.

15. As mentioned by Southern Nevada Water Authority (“SNWA”) in this appeal, in July 2022, CSI again submitted the subdivision map applications for the 575-unit subdivision requiring 408.25 afa.¹ *See* SNWA’s Emergency Motion for Stay, 2 (filed June 1, 2022). LVVWD opposed claiming the Order 1309 suggests that a sustainable water supply for CSI’s application does not exist. The Clark County Board of County Commissioners agreed and denied the application.

¹ SNWA represented that CSI sought 536 afa water for the first phase, but the correct number is 408.25 afa.

Yet Order 1309 says nothing about whether the 408.25 afa can be used without affecting other water users or the dace. It is a blanket indictment lacking specificity and clarity.

16. All parties concerned acknowledge and are aware that CSI's development plans require a phase-by-phase analysis, and that each application must be considered separately and on its own merits. 32 JA 14871. The State Engineer's effort to prejudice CSI's rights by repeated references to the magnitude of the Clark County approved project is inappropriate. Each application must stand or fall on its own and specific merits.

17. Here again, like in the May 2018 moratorium letter and the baseless Order 1303 moratorium on subdivision maps, CSI is effectively shut down by Order 1309 from all construction activities and from processing subdivision maps *regardless* of the sound science that supports those applications.

SUMMARY OF THE ARGUMENT

The notice and hearing procedure used by the State Engineer for the hearing that ultimately resulted in Order 1309 did not afford CSI due process because the State Engineer identified four specific issues upon which CSI should present evidence, which did not include management or policy decisions, and during the hearing, the hearing officer admonished the parties that the hearing should not address management decisions.

CSI did not have notice that the hearing would result in Basin 210 and Basin 206 being abolished or its status as a senior water right holder stripped. Had CSI known that the result of the hearing would be a management decision that the boundaries of the separate hydrographic basins would be erased, CSI would have presented party-specific information about CSI's specific use of the water, conservation measures, the phases of its subdivision, and argument as to why consolidating all basins is wholly inappropriate under Nevada law. There can be no doubt that the State Engineer violated CSI's due process rights. Thus, the District Court should be affirmed.

STANDARD OF REVIEW

CSI incorporates the Standard of Review on Due Process set forth in the Respondents' Joint Answering Brief.

ARGUMENT

The State Engineer did not give CSI notice and opportunity to be heard on the management decisions in Order 1309. The State Engineer specifically argues that CSI "fully participated in the administrative hearing and had an opportunity to address whether the State Engineer should include Kane Springs Valley in the LWRFS." AOB 74-75.

The State Engineer identified as one issue for the hearing, "geographic boundary". CSI understood that to be a factual question. Then, in Order 1309, the

State Engineer developed a new theory of Nevada water law. Under Order 1309, “geographic boundary” is synonymous with “administrative management boundary”. This was done without proper notice. The State Engineer changed his historical interpretation of Nevada’s water law statutes requiring a basin-by-basin management practice without giving proper notice to the Respondents. Until the AOB filed in this appeal, the State Engineer had never implemented an aquifer-by-aquifer water management practice, and CSI, notwithstanding years of litigation with the State Engineer, had likewise never heard of the State Engineer’s new aquifer-by-aquifer management theory. No one could have reasonably anticipated this strategical, self-serving change in philosophy.

CSI did not (and could not) present evidence on whether Kane Springs and any of the other basins should be combined into one for management purposes. Indeed, the State Engineer’s notices did not identify management decisions as issues for the hearing. *See* 2 JA 394, 406-07 (Order 1303), 464, 465 (Notice), 486, 487 (Amended Notice).

Worse, the hearing officer expressly told the parties that the fifth hearing issue (“any other matter believed to be relevant”) “is not intended to expand the scope of this hearing into making policy determinations with respect to management of the Lower White River Flow System *basin’s individual water rights*, those different types of things, because those are going to be decisions that

would have to be made in subsequent proceedings. . . .” 44 JA 17359 (emphasis added).

Thus, CSI did not have a meaningful opportunity to present evidence concerning the policy and management decisions related to CSI’s individual, existing, senior water rights in Coyote Springs Valley Hydrographic Basin (Basin 210) because the hearing officer effectively informed the parties that each party’s rights within their individual basins would not be impacted. *See id.*; *see also Eureka County v. Seventh Jud. Dist. Ct.*, 134 Nev. 275, 280-281, 417 P.3d 1121, 1125-26 (2018) (“Notice must be given at an appropriate stage in the proceedings to give parties meaningful input in the adjudication of their rights.”) (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004)).

Likewise, given the hearing officer’s comments, CSI had no reason to believe that the Coyote Spring Valley Hydrographic Basin (Basin 210) or Kane Springs Valley Hydrographic Basin (Basin 206) would be extinguished and that CSI would be relegated from a senior water right holder within its basin to a more junior water right holder in relation to water right holders in other basins. Had CSI received proper notice, CSI would have addressed the management implications and illegality of combining multiple basins into one. Before Order 1309, the individual and distinct basins were not referred to as the “LWRFS hydrographic basin”. They all had their individual and distinct basin numbers.

Had CSI known that the State Engineer would make the management decisions set forth in Order 1309, CSI would have presented evidence concerning the phases of its development, the impact of the limited amount of water CSI seeks to use for the first phase of its development, CSI's planned use for its water rights, conservation design standards, and its planned conservation measures, and reinjection wells, among other things.

Finally, the State Engineer is dismissive of the fact that CSI (and all other water right holders) have relied on basin-by-basin management for decades and the impact of this reliance on the hearing that resulted in Order 1309.² The State Engineer represents that the basins at issue have not been managed on a basin-by-basin basis. AOB 37. Citing to Rulings 6254-6261, the State Engineer argues that he denied applications for new water "across the LWRFS". *Id.* However, the State Engineer denied the applications on a basin-by-basin basis in separate rulings even while recognizing the interconnection of the regional carbonate aquifer. *See, e.g.*, 3 JA 891-919 (Ruling 6254) (denying applications in Coyote Spring Valley Hydrographic Basin (Basin 210)). Thus, given this historical practice of basin-by-

² *See* Respondents' Request for Judicial Notice (filed contemporaneously herewith), Exhibit 1 (State Engineer's office admitting that the basins are managed as administrative units and asking the Legislature to change the law so management is performed based on the water "resource"); Exhibit 2 (arguing that Nevada's water has historically been managed in a basin-by-basin basis and that Nevada has 232 hydrographic basins).

basin management, CSI did not have notice that the State Engineer would do away with Coyote Spring Valley Hydrographic Basin (Basin 210).

Had CSI known that management decisions were going to be made in a manner other than on a basin-by-basin basis, CSI would have presented the evidence detailing all of the State Engineer's false promises and efforts to stall CSI's development since 2017, including the May 2018 letter, Draft Order, the August 2018 settlement agreement, Order 1303, and the past petitions for judicial review CSI has filed. In effect, Order 1309 is the State Engineer's fourth moratorium on CSI's right and ability to develop its project.

In all these years of procedural machinations and concessions that his decisions were incorrect, the State Engineer has never articulated with particularity what the impact of CSI's use of 408.25 afa for the first phase of its subdivision map would be on any other water right holder or the Moapa dace. Instead, the State Engineer decided to combine seven basins into one to effectively destroy any chance of CSI's development moving forward. The State Engineer did so without notice and without opportunity to be heard. Thus, the District Court's order should be affirmed.

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CONCLUSION

For the foregoing reasons, CSI respectfully requests that this Court affirm the District Court.

Dated this 9th day of January, 2023.

Robison, Sharp, Sullivan & Brust
71 Washington Street
Reno Nevada 89503

/s/ Hannah E. Winston
KENT R. ROBISON
Nevada Bar No. 1167
HANNAH E. WINSTON
Nevada Bar No. 14520
Telephone: (775) 329-3151
***Attorneys for Respondent Coyote Springs
Investment, LLC***

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Answering Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word 16 in 14 font and Times New Roman type.

2. I further certify that this opening brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 3,105 words.

3. Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be

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subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 9th day of January, 2023.

Robison, Sharp, Sullivan & Brust
71 Washington Street
Reno Nevada 89503

BY: /s/ Hannah E. Winston
KENT R. ROBISON
Nevada Bar No. 1167
HANNAH E. WINSTON
Nevada Bar No. 4520
Telephone: (775) 329-3151
Attorneys for Respondent

CERTIFICATE OF SERVICE

I certify that on the 9th day of January 2023, I served a copy of **RESPONDENT COYOTE SPRINGS INVESTMENT, LLC ANSWERING BRIEF** 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:

 X BY EMAIL: By emailing a copy of the foregoing document on this date to the parties at the email addresses as follows:

PAUL G. TAGGART, ESQ.
TIMOTHY D. O’CONNOR, ESQ.
Taggart & Taggart, Ltd.
Email: paul@legaltnt.com; tim@legaltnt.com
Attorneys for LVVWD and SNWA

STEVEN C. ANDERSON, ESQ.
Las Vegas Valley Water District
Email: Sc.anderson@lvvwd.com
Attorneys for LVVWD and SNWA

SYLVIA HARRISON, ESQ.
McDonald Carano
Email: sharrison@mcdonaldcarano.com
Attorneys for Georgia-Pacific Gypsum LLC and Republic Environmental Technologies, Inc.

SCOTT LAKE. ESQ.
Center for Biological Diversity
Email: slake@biologicaldiversity.org
Attorney for Center for Biological Diversity

JULIE CAVANAUGH-BILL, ESQ.
Cavanaugh-Bill Law Offices, LLC
Email: julie@cblawoffices.org
Attorneys for Center for Biological Diversity

ROBERT A. DOTSON, ESQ.
JUSTIN C. VANCE, ESQ.
Email: rdotson@dotsonlaw.legal / jvance@dotsonlaw.legal
Attorneys for Muddy Valley Irrigation Company

STEVEN D. KING, ESQ.
Email: kingmont@charter.net
Attorneys for Muddy Valley Irrigation Company

JORDAN W. MONTET
Marquis Aurbach Coffing
Email: jmontet@maclaw.com
Attorneys for Apex Holding Company, LLC and Dry Lake Water, LLC

 X BY ELECTRONIC SERVICE: by electronically filing and serving the foregoing document with the Nevada Supreme Court's electronic filing system:

JAMES N. BOLOTIN, ESQ.
AARON D. FORD, ESQ.
STEVEN G. SHERORSKI, ESQ.
LAENA ST-JULES, ESQ.
KIEL B. IRELAND, ESQ.
OFFICE OF THE ATTORNEY GENERAL
Attorneys for Respondent State Engineer

BRADLEY J. HERREMA, ESQ.
BROWNSTEIN HYATT FARBER SCHRECK, LLP
Attorneys for Coyote Springs Investment, LLC

WILLIAM L. COULTHARD, ESQ.
COULTHARD LAW
Attorneys for Coyote Springs Investment, LLC

EMILIA K. CARGILL, ESQ.
Attorneys for Coyote Springs Investment, LLC

GREGORY H. MORRISON, ESQ.
PARSON BEHLE & LATIMER
Attorneys for Moapa Valley Water District

CHRISTIAN T. BALDUCCI, ESQ.
MARQUIS AURBACH COFFING
Attorneys for Apex Holding Company, LLC and Dry Lake Water, LLC

LUCAS FOLETTA, ESQ.
JANE E. SUSSKIND, ESQ.
*Attorneys for Georgia-Pacific Gypsum LLC
and Republic Environmental Technologies, Inc.*

FRANCIS C. FLAHERTY, ESQ.
SUE MATUSKA, ESQ.
Attorneys for Nevada Cogeneration Association Nos. 1 and 2

SEVERIN A. CARLSON, ESQ.
SIHOMARA L. GRAVES, ESQ.
Attorneys for The Church of Jesus Christ of Latter-Day Saints

JUSTINA A. CAVIGLIA, ESQ.
MICHAEL D. KNOX, ESQ.
NEVADA ENERGY
*Attorneys for Sierra Pacific Power Company, dba NV Energy
Nevada Power Company, dba NV Energy*

THERESE A. URE-STIX, ESQ.
LAURA A. SCHROEDER, ESQ.
CAITLIN R. SKULAN, ESQ.
Attorneys for Bedroc and City of North Las Vegas

KAREN A. PETERSON, ESQ.
ALLISON MacKENZIE
*Attorneys for Lincoln County Water District and Vidler Water
Company, Inc.*

DYLAN V. FREHNER, ESQ.
LINCOLN COUNTY DISTRICT ATTORNEY
*Attorneys for Lincoln County Water District and Vidler Water
Company, Inc.*

WAYNE O. KLOMP, ESQ.
GREAT BASIN LAW
*Attorneys for Lincoln County Water District and Vidler Water
Company, Inc.*

DATED: This 9th day of January, 2023.

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