

# IN THE SUPREME COURT OF THE STATE OF NEVADA

## INDICATE FULL CAPTION:

ADAM SULLIVAN, P.E., NEVADA STATE  
ENGINEER, ET AL.,  
VS.  
LINCOLN COUNTY WATER DISTRICT;  
VIDLER WATER COMPANY, INC; COYOTE  
SPRINGS INVESTMENT, LLC; ET AL

No. 84739 (Consolidated with Case Nos. 84741,  
84742, and 84809)  
Electronically Filed  
Jun 08 2022 02:26 p.m.  
DOCKETING Elizabeth N. Brown  
CIVIL APPEALS Clerk of Supreme Court

## GENERAL INFORMATION

Appellants must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

## WARNING

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

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

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

1. Judicial District Eighth Department 1

County Clark Judge Bita Yeager

District Ct. Case No. A-20-816761-C (and consolidated cases)

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

Attorney James N. Bolotin, Esq. Telephone 775-684-1231

Firm Office of the Nevada Attorney General

Address 100 North Carson Street  
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Client(s) Appellant, Adam Sullivan, P.E., in his capacity as Nevada State Engineer

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

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

Attorney See Attachment 1 Telephone \_\_\_\_\_

Firm \_\_\_\_\_

Address \_\_\_\_\_

Client(s) \_\_\_\_\_

Attorney \_\_\_\_\_ Telephone \_\_\_\_\_

Firm \_\_\_\_\_

Address \_\_\_\_\_

Client(s) \_\_\_\_\_

(List additional counsel on separate sheet if necessary)



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

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

**5. Does this appeal raise issues concerning any of the following?**

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

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

- Southern Nevada Water Authority v. Coyote Springs Investment, LLC - Case No. 84741
- Center for Biological Diversity v. Sullivan, P.E. - Case No. 84742
- Muddy Valley Irrigation Co. v. Sullivan, P.E. - Case No. 84809
- Lincoln County Water District and Vidler Water Company v. Wilson, P.E. - Case No. 81792

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

- Coyote Springs Investment, LLC, et al. v. State of Nevada e et al. - 8th JD Case No. A-20-820384-B - Pending
- Lincoln County Water District and Vidler Water Company v. State of Nevada, et al. - United States District Court - 2:20-cv-01891-RFB-EJY - Pending
- Coyote Springs Investment LLC v. Jason King, State Engineer et al. - 8th JD Case No. A-18-775817-J - Stipulated dismissal 9/25/2018
- Coyote Springs Investment LLC v. Tim Wilson, Acting State Engineer et al. - 8th JD Case No. A-19-789203-J - Stipulated dismissal 9/3/2020

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

The State Engineer is appealing the district court's decision to grant various Petitioners' Petitions for Judicial Review, and vacating the State Engineer's Order 1309. Order 1309 delineated the Lower White River Flow System ("LWRFS") as a single hydrographic basin consisting of Kane Springs Valley, Coyote Springs Valley, Muddy River Springs Area, California Wash, Hidden Valley, Garnet Valley, and the northwest portion of the Black Mountains Area and found that the maximum quantity of groundwater that may be pumped from the LWRFS on an average annual basis without causing further declines in Warm Springs area spring flow and the Muddy River cannot exceed 8,000 acre-feet annually or less and may be reduced if pumping will adversely impact endangered Moapa dace. Order 1309 also held that applications for movement of existing groundwater rights would be processed in accordance with NRS 533.370, terminated the temporary moratorium on construction and map submissions in Interim Order 1303 and rescinded all other matters in Interim Order 1303 not specifically addressed in Order 1309. District Court held that State Engineer exceeded his authority and violated due process, but did not reach substantial evidence issue

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

1. Whether the State Engineer has legal authority to delineate the LWRFS as a single hydrographic basin for joint administration based on its interconnectivity and shared supply of water?
2. Whether the State Engineer has legal authority to conjunctively manage groundwater and surface water where substantial evidence shows an interconnection?
3. Whether the State Engineer provided adequate due process to the Petitioners whose petitions the district court granted, where he held multiple workshops culminating in a 2-week long administrative hearing?
4. Whether substantial evidence supports the factual findings made by the State Engineer in Order 1309, including the boundaries of the LWRFS and the 8,000 acre-foot annual sustainable perennial yield?

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

Nevada Gold Mines, LLC v. State, Dep't of Conservation & Nat. Res. - Nevada Supreme Court Case No. 84764 - Extraordinary Writ challenging the State Engineer's authority to engage in conjunctive management (i.e. managing interconnected groundwater and surface water sources together under prior appropriation).

**11. Constitutional issues.** If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

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

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☒ A substantial issue of first impression

☒ An issue of public policy

☒ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain: This may be the first time an appeal has focused squarely on the State Engineer's authority to delineate and jointly administer an area consisting of what were previously considered separate groundwater basins but that, through scientific advancements, was determined to be a single aquifer sharing a single supply of groundwater and surface water. Similarly, this may be the first time an appeal has focused squarely on the State Engineer's authority to engage in conjunctive management (i.e. the integrated management and use of two or more water resources, such as a groundwater aquifer and a surface water body).

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

This matter is presumptively retained by the Supreme Court pursuant to NRAP 17(a)(8) as an administrative agency case involving a water determination.

**14. Trial.** If this action proceeded to trial, how many days did the trial last? \_\_\_\_\_

Was it a bench or jury trial? N/A (No trial, but 4 day appellate oral argument)

**15. Judicial Disqualification.** Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?  
No.

## TIMELINESS OF NOTICE OF APPEAL

### 16. Date of entry of written judgment or order appealed from Apr 19, 2022

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

NOTE: State Engineer, out of an abundance of caution, also filed amended notice of appeal following issuance of the district court's Addendum and Clarification to Court's Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review ("Addendum"). The Addendum was filed by the district court on May 13, 2022. Written notice of entry of the Addendum was filed on May 16, 2022.

### 17. Date written notice of entry of judgment or order was served Apr 19, 2022

Was service by:

☐ Delivery

☒ Mail/electronic/fax

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

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b)      Date of filing \_\_\_\_\_

☐ NRCP 52(b)      Date of filing \_\_\_\_\_

☐ NRCP 59      Date of filing \_\_\_\_\_

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

(b) Date of entry of written order resolving tolling motion \_\_\_\_\_

(c) Date written notice of entry of order resolving tolling motion was served \_\_\_\_\_

Was service by:

☐ Delivery

☐ Mail

**19. Date notice of appeal filed** May 13, 2022

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

NOTE: Amended Notice of Appeal filed May 19, 2022 to Addendum

The Center for Biological Diversity - Notice of Appeal filed May 16, 2022

Southern Nevada Water Authority - Notice of Appeal filed May 19, 2022

Muddy Valley Irrigation Company - Notice of Appeal filed May 26, 2022

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

NRAP 4(a)(1)

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**SUBSTANTIVE APPEALABILITY**

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

(a)

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

(b) Explain how each authority provides a basis for appeal from the judgment or order: This is an appeal from a final decision of the Eighth Judicial District Court based upon multiple petitions for judicial review commenced in, or that had their venue transferred to, the court where the order granting the petitions for judicial review was rendered.

Further, pursuant to NRS 533.450(9), this appeal originated from a case brought pursuant to NRS 533.450 and therefore an appeal may be taken to the appellate court of competent jurisdiction pursuant to the rules fixed by the Supreme Court pursuant to Section 4 of Article 6 of the Nevada Constitution from the judgment of the district court in the same manner as in other civil cases.

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

(a) Parties:

See list on Attachment 1.

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

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

The respondents (i.e. petitioners who had their petitions for judicial review granted) each argued to different degrees that Order 1309 exceeded the State Engineer's legal authority, was not supported by substantial evidence, and violated their due process rights. The State Engineer countered these arguments, as did the other Appellants to a certain degree. The district court entered a written order granting 5 petitions for judicial review on April 19, 2022, holding Order 1309 exceeded the State Engineer's authority and violated due process, but did not reach substantial evidence issue.

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

☒ Yes

☐ No

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

(a) Specify the claims remaining pending below:

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

NOTE 2: Motions of attorneys fees and costs remain pending at district court



(b) Specify the parties remaining below:

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

☐ Yes

☐ No

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

☐ Yes

☐ No

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

N/A

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

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



## VERIFICATION

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

Adam Sullivan, P.E., State Engineer  
Name of appellant

James N. Bolotin, Esq.  
Name of counsel of record

June 8, 2022  
Date

/s/ James N. Bolotin, Sr. Deputy AG  
Signature of counsel of record

Carson City, NV  
State and county where signed

## CERTIFICATE OF SERVICE

I certify that on the 8th day of June, 2022, I served a copy of this completed docketing statement upon all counsel of record:

☒ By personally serving it upon him/her; or

☐ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

Sent via e-filing system and/or email

Dated this 8th day of June, 2022

/s/ Dorene A. Wright  
Signature

**INDEX OF ATTACHMENTS TO  
STATE ENGINEER'S DOCKETING STATEMENT**

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3.	Coyote Springs Investment, LLC's Petition for Judicial Review of Nevada State Engineer Order 1309 filed July 9, 2020	33
4.	Apex Holding Company, LLC and Dry Lake Water, LLC's Petition for Judicial Review of Order 1309 filed July 10, 2020	20
5.	Center for Biological Diversity's Petition for Judicial Review of Order 1309 filed July 13, 2020	25
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7.	Muddy Valley Irrigation Company's Petition for Judicial Review of Order 1309 filed July 14, 2020	11
8.	Georgia-Pacific Gypsum LLC and Republic Environmental Technologies, Inc.'s Petition for Judicial Review of Order 1309 filed July 15, 2020	21
9.	Nevada Cogeneration Associates Nos. 1 and 2's Petition for Judicial Review filed July 15, 2020	20

<b>No.</b>	<b>EXHIBIT DESCRIPTION</b>	<b>NUMBER OF PAGES</b>
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11.	Notice of Entry of Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review filed April 19, 2022	45
12.	Addendum and Clarification to Court's Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review Filed on April 19, 2022, filed May 13, 2022	7
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ATTACHMENT 1

ATTACHMENT 1

**LIST OF PARTIES AND COUNSEL**  
**DOCKETING STATEMENT QUESTIONS 3 and 22**

- A. Adam Sullivan, P.E., in his capacity as the Nevada State Engineer, Department of Conservation and Natural Resources, Division of Water Resources (“State Engineer”)

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- B. The Las Vegas Valley Water District (“LVVWD”) and Southern Nevada Water Authority (“SNWA”)

The attorneys for LVVWD and SNWA:

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G. Nevada Cogeneration Associates Nos. 1 and 2

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J. Sierra Pacific Power Company d/b/a NV Energy (“Sierra Pacific”) and Nevada Power Company d/b/a NV Energy (“Nevada Power” and, together with Sierra Pacific, “NV Energy”)

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- K. The Church of Jesus Christ of Latter-day Saints, a Utah corporation  
sole (the “Church Corporation”)

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- L. Moapa Valley Water District

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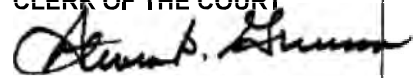
- M. Western Elite Environmental, Inc., Bedroc Limited, LLC, and  
City of North Las Vegas

The attorneys for Western Elite Environmental, Inc.,  
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ATTACHMENT 2

ATTACHMENT 2



CASE NO: A-20-816761-C  
Department 19

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*Attorneys for LVVWD and SNWA*

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

LAS VEGAS VALLEY WATER DISTRICT, and  
SOUTHERN NEVADA WATER AUTHORITY

Petitioners,

vs.

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

Respondent.

Case No.

Dept. No.

**PETITION FOR JUDICIAL REVIEW OF  
ORDER 1309**

Petitioners SOUTHERN NEVADA WATER AUTHORITY ("SNWA") and LAS VEGAS VALLEY WATER DISTRICT ("LVVWD"), by and through its counsel, PAUL G. TAGGART, ESQ. and TIMOTHY D. O'CONNOR, ESQ., of the law firm of TAGGART & TAGGART, LTD., hereby files this Petition for Judicial Review of Order 1309 issued by Respondent TIM WILSON, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND

1 NATURAL RESOURCES on June 15, 2020, attached hereto as Exhibit 1. This Petition for Judicial  
2 Review is filed pursuant to NRS 533.450(1).

3 **JURISDICTIONAL STATEMENT**

4 Under NRS 533.450(1), any order or decision of the State Engineer is subject to judicial review  
5 “in the proper court of the county in which the matters affected or a portion thereof are situated.” The  
6 real property to which the water at issue in this appeal is appurtenant lies within Clark County, Nevada;  
7 therefore, the Eighth Judicial District Court of the State of Nevada in and for Clark County is the proper  
8 venue for judicial review.

9 Further, the subject matter of the appeal involves decreed waters of the Muddy River Decree.  
10 Under NRS 533.450(1), “on stream systems where a decree of court has been entered, the action must  
11 be initiated in the court that entered the decree.” This court has proper jurisdiction of the Muddy River  
12 Decree, *Muddy Valley Irrigation Company, et al, vs. Moapa Salt Lake Produce Company, et al*, Case  
13 No. 377, which was entered in the Tenth Judicial District of the State of Nevada, in and for the County  
14 of Clark in 1920.<sup>1</sup>

15 **FACTUAL BACKGROUND**

16 **I. SNWA and LVVWD have substantial interests in the Lower White River Flow System.**

17 SNWA is a not-for-profit political subdivision of the State of Nevada consisting of seven  
18 member agencies (local municipalities and political subdivisions in Clark County) and is a wholesale  
19 water provider serving approximately 74 percent of Nevada’s population. SNWA’s water resource  
20 portfolio includes approximately 20,000 afa of senior Muddy River decreed water rights, 9,000 afa of  
21 groundwater in Coyote Spring Valley, and 2,200 afa of groundwater in Garnet and Hidden valleys.  
22 SNWA conducted the Order 1169 pumping test and is one of the primary participants in the 2006  
23 Memorandum of Agreement concerning the Moapa dace. Clark County designated SNWA’s largest  
24 member purveyor, LVVWD, to be the operating entity for the Coyote Springs Water Resources General  
25 Improvement District.

26 //

27 //

28 <sup>1</sup> In 1920, the Tenth Judicial District consisted of Clark County and Lincoln County. In 1945, Clark County was designated  
as the Eighth Judicial District.

## 1     **II.     Order 1169 Pumping Tests**

2             On March 8, 2002, the State Engineer issued Order 1169 to hold in abeyance all pending  
3 groundwater applications filed in Coyote Spring Valley, Black Mountains Area, Garnet Valley, Hidden  
4 Valley, Muddy River Springs Area, and Lower Moapa Valley. The California Wash was later added to  
5 the study area, making Order 1169 apply to the entire Lower White River Flow System ("LWRFS").  
6 The purpose of Order 1169 was to require a large pumping study to determine whether pumping in the  
7 LWRFS would have detrimental impacts on existing water rights or the environment.

8             In 2006, a Memorandum of Agreement ("MOA") was signed among the Southern Nevada Water  
9 Authority ("SNWA"), Coyote Springs Investments ("CSI"), the United States Fish and Wildlife Service  
10 ("USFWS"), the Moapa Valley Water District ("MVWD"), and the Moapa Valley Band of Paiute  
11 Indians ("MBOP"). The MOA was created to ensure water usage in the LWRFS did not interfere with  
12 measurable progress toward protection and recovery of the endangered Moapa Dace and its habitat. The  
13 MOA contained triggers and actions for the various parties to take if flow levels in the Muddy River  
14 declined. Through the MOA, all parties recognized that pumping in Coyote Spring Valley could have  
15 a detrimental impact on existing water rights and the environment.

16             The State Engineer issued Order 1169A on December 21, 2012, in which he declared that the  
17 Order 1169 pump test was complete. Ultimately, the State Engineer concluded that the pumping had a  
18 direct connection to the fully appropriated Muddy River which is part of the source of water for the  
19 endangered Moapa Dace, and the decreed senior rights of the Muddy River. The State Engineer issued  
20 Rulings 6254-6258 on January 29, 2014, in which he denied all pending water right applications in the  
21 LWRFS basins. The State Engineer ruled in Rulings 6254-6258 that pumping of existing rights in the  
22 1169 pump tests measurably reduced flows in headwater springs of the Muddy River. While the State  
23 Engineer denied the pending applications, he took no action to limit or reduce the existing water rights.

## 24     **III.     Public Workshops**

25             Starting in 2018, the State Engineer held several public workshops review the status of  
26 groundwater use and recovery following the conclusion of the State Engineer Order 1169 pumping tests.  
27 The purpose of the workshops was to update the public on development in the LWRFS, address concerns  
28 relating to the effect of groundwater pumping, and to provide an opportunity to comment on how to

1 proceed in developing the water resources in the LWRFS.<sup>2</sup> In the 2018 Notice of Public Workshop, the  
2 State Engineer noted that pumping only 10,200 afa of the over 50,000 afa of permitted rights during the  
3 Order 1169 pumping test “yielded an unacceptable loss in spring flow and aquifer storage within the  
4 LWRFS.” The State Engineer found that “only a small portion of the permitted water rights in the  
5 LWRFS may be fully developed without negatively affecting the endangered Moapa Dace and its habitat  
6 or the senior decreed rights on the Muddy River.”<sup>3</sup>

7 As a result of the workshops, on August 30, 2018, the State Engineer drafted a proposed order.  
8 On December 14, 2018, the State Engineer held a hearing on the proposed order. The State Engineer  
9 received comments on the proposed order. On January 11, 2019, the State Engineer issued Interim  
10 Order 1303 as a result of the workshop and proposed order process. The State Engineer continued to  
11 hold several more workshops and meetings relating to the potential development of a conjunctive  
12 management plan on the LWRFS.<sup>4</sup>

#### 13 **IV. Order 1303**

14 On January 11, 2019, the State Engineer issued Interim Order 1303 to obtain stakeholder input  
15 on four specific factual matters: 1) the geographic boundary of the LWRFS, 2) aquifer recovery since  
16 the 1169 pump test, 3) long-term annual quantity that may be pumped from the LWRFS, and 4) effects  
17 of moving water rights between the carbonate and alluvial system to senior water rights on the Muddy  
18 River.<sup>5</sup> After factual findings were made on those questions, the State Engineer was to evaluate  
19 groundwater management options for the Lower White River Flow System (“LWRFS”).<sup>6</sup>

20 In Order 1303, the State Engineer made sound factual findings based on the Order 1169 pumping  
21 test. He found that groundwater rights within the LWRFS should be jointly managed because of a  
22 “unique” and “direct hydraulic connection” among basins that encompass over 1,100 square miles. He  
23

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24 <sup>2</sup> June 14, 2018, Notice of Public Workshop at 2. Available at Available at <http://water.nv.gov/news.aspx?news=LWRFS>  
(Public Meetings, July 24, 2018). Last visited 6/17/2020.

25 <sup>3</sup> *Id.*

26 <sup>4</sup> See LWRFS Working Group Meeting Agenda for February 6, 2019, and Notice of Public Workshop on July 17, 2019, dated  
June 10, 2019. Available at <http://water.nv.gov/news.aspx?news=LWRFS> (Public Meetings). Last visited 6/17/2020.

27 <sup>5</sup> Exhibit 2.

28 <sup>6</sup> Exhibit 3 at 2 (“The State Engineer directed the participants to limit the offer of evidence and testimony to the salient  
conclusions, including directing the State Engineer and his staff to the relevant data, evidence and other information  
supporting those conclusions. The State Engineer further noted that the hearing on the Order 1303 reports was the first step  
in determining to what extent, if any, and in what manner the State Engineer would address future management decisions,  
including policy decisions relating to the [LWRFS] basins.”)



1 also determined water was not available for additional applications and denied all the pending  
2 applications in the LWRFS through Rulings 6254-6260. The State Engineer also found that:

- 3 1. pumping has a direct interrelationship with the flow of the decreed and  
4 fully appropriated Muddy River, which are the most senior rights;
- 5 2. the Muddy River had a pre-development flow of approximately 34,000  
6 acre-feet annually;
- 7 3. pumping from the test caused “sharp declines in groundwater levels and  
8 flows in the Pederson and Pederson East springs,” and throughout the  
LWRFS; and
4. pumping in the LWRFS must be less than occurred during the test,  
otherwise pumping will conflict with senior Muddy River rights or  
adversely impact the Moapa dace.<sup>7</sup>

9 Order 1303 was issued to solicit input from experts on discrete issues to build on these foundational  
10 findings from Rulings 6254-6260 – not to “start over.”

11 On May 13, 2019, the State Engineer amended Order 1303 and modified certain deadlines for  
12 filing reports. On July 25, 2019, the State Engineer issued a Notice of Pre-Hearing Conference. On  
13 August 23, 2019, the State Engineer held a prehearing conference. At the prehearing conference,  
14 Hearing Officer Fairbank unequivocally stated that “the purpose of the hearing is not to resolve or  
15 address allegations of conflict between groundwater pumping within the LWRFS and Muddy River  
16 decreed rights.”<sup>8</sup> On August 23, 2019, the State Engineer issued a Notice of Hearing, and again clarified  
17 the limited scope of the hearing.

18 In July and August 2019, reports and rebuttal reports were submitted discussing the four matters  
19 set forth in Order 1303. Several parties filed objections to witnesses and evidence. Most of the  
20 objections were related to the scope of the topics in the submitted evidence. On August 23, 2019, the  
21 State Engineer issued an Order on Objections to Witnesses and Evidence. The State Engineer agreed  
22 that “the evidence presented in the hearing is to be limited to the four issues identified in the Notice of  
23 Hearing.” The State Engineer allowed all evidence to be presented, but again warned that the “scope  
24 of the testimony shall be limited to the four issues identified in Order 1303” and cautioned that while  
25 some evidence could be submitted outside the specific scope but that the State Engineer “may order a  
26 line of questioning to cease or to remain limited to the relevant issues that are the subject of the hearing.”<sup>9</sup>

27  
28 <sup>7</sup> Exhibit 2 at 7-11.

<sup>8</sup> Exhibit 4 at 12:6-15.

<sup>9</sup> August 23, 2019, Order on Objections.

1 Between September 23, 2019, and October 4, 2019, the State Engineer held a hearing on the  
2 reports submitted under Order 1303. As part of that hearing, SNWA offered very limited evidence of  
3 conflicts with its senior water rights.<sup>10</sup> SNWA repeatedly indicated that this evidence was limited  
4 because of the prior directions of the State Engineer, and because the question of conflicts was to be  
5 addressed at a latter administrative stage of the proceedings.<sup>11</sup>

6 **V. Order 1309**

7 On June 15, 2020, the State Engineer issued Order 1309. In Order 1309, the State Engineer  
8 determined that “reductions in flow that have occurred because of groundwater pumping in the  
9 headwaters basins is not conflicting with Decreed rights.”<sup>12</sup>

10 **GROUNDNS FOR THE PETITION**

11 The third factual inquiry the State Engineer sought input on was: “The long-term annual quantity  
12 of groundwater that may be pumped from the Lower White River Flow System, including the relationships  
13 between the location of pumping on discharge to the Muddy River Springs, and the capture of Muddy River  
14 flow.”<sup>13</sup> The State Engineer specifically limited the evidence he would consider on this matter, stating  
15 that this hearing was not to address allegations of conflict.<sup>14</sup> During a prehearing conference, the State  
16 Engineer’s staff stated that

17 the purpose of the hearing is not to resolve or address allegations of  
18 conflict between groundwater pumping within the LWRFS and Muddy  
19 River decreed rights. That is not the purpose of this hearing and that’s not  
20 what we are going to be deciding at this point in time. The purpose of the  
21 hearing is to determine what the sustainability is, what the impact is on  
22 decreed rights, and then addressing and resolving allegations of conflict  
23 should that be a determination that will be addressed in, at a future point  
24 in time.<sup>15</sup>

22 Thus, the majority of the evidence submitted related to the capture of Muddy River water by junior  
23 groundwater pumpers. The State Engineer agreed in Order 1309 that current pumping is capturing  
24 Muddy River flows.<sup>16</sup>

25 <sup>10</sup> See e.g., Hr’g on Order 1303 Tr. vol. 5, 942 (Burns), SNWA Ex.7 at 7-5 to 7-6. (SNWA has suffered a loss of approximately  
26 12,040 afa over the last 10 years, equating to over \$2 million in costs for replacement supplies.)

27 <sup>11</sup> Hr’g on Order 1303 Tr. 2019-09-07 at 1049:20-1050:3(Taggart); Tr. 2019-09-27 at 1072:9-23(Pellegrino).

28 <sup>12</sup> Exhibit 1 at 61.

<sup>13</sup> Exhibit 2 at 13.

<sup>14</sup> Exhibit 4 at 12:6-15.

<sup>15</sup> Exhibit 4 at 12:6-15.

<sup>16</sup> Exhibit 1 at 61.

1           However, the State Engineer incorrectly went beyond the scope of the hearing to determine that  
2           “capture or potential capture of flows of the waters of a decreed system does not constitute a conflict.”<sup>17</sup>  
3           The State Engineer stated that “there is no conflict as long as the senior water rights are served.”<sup>18</sup> The  
4           State Engineer then performed a coarse calculation to determine the consumptive use needs of the senior  
5           decreed rights holders and concluded that the capture of 8,000 acre-feet of Muddy River flows by junior  
6           groundwater users would not deprive the seniors of any portion of their water rights.<sup>19</sup> The calculation  
7           did not include consideration of water losses through the river system, such as losses in conveying the  
8           water or losses on water reservoirs.

9           By making these findings in Order 1309, the State Engineer violated the due process rights of  
10          SNWA and other senior water right owners because he indicated before the hearing that he would not  
11          be making a finding on this point, and evidence on this point would not be accepted. He also acted  
12          arbitrarily and capriciously because he ignored the only evidence that existed related to conflicts  
13          (SNWA’s), and then applied an erroneous analysis that no party had an opportunity to review or  
14          comment on. Further, the State Engineer’s method is contrary to law – particularly the Muddy River  
15          Decree.

16          SNWA owns and leases substantial water rights on the Muddy River and the capture of flow by  
17          junior groundwater pumping has deprived SNWA of use of its senior decreed water rights. Prior to  
18          groundwater development in the LWRFS, Muddy River flows were approximately 34,000 afa, and every  
19          acre-foot is apportioned in the Decree.<sup>20</sup> Since groundwater development began, Muddy River flows  
20          have declined by over 3,000 afa. This is an impermissible conflict with existing rights that can only  
21          continue if effective mitigation occurs for the impacts to senior water rights holders.

22          The difference between predevelopment flows and annual post-development flows represents  
23          the impacts from pumping, and the conflict with SNWA’s rights, because SNWA is being deprived of  
24          the full beneficial use of its senior water rights at a significant cost to the organization.<sup>21</sup> The State  
25          Engineer failed to consider the impacts to non-irrigation uses and failed to consider direct evidence of

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26          <sup>17</sup> Exhibit 1 at 61

27          <sup>18</sup> Exhibit 1 at 60.

28          <sup>19</sup> Exhibit 1 at 60-61.

<sup>20</sup> Exhibit 2 at 7.

<sup>21</sup> Hr’g on Order 1303 Tr. vol. 5, 942 (Burns), SNWA Ex.7 at 7-5 to 7-6. (SNWA has suffered a loss of approximately 12,040  
afa over the last 10 years, equating to over \$2 million in costs for replacement supplies.)

1 conflict outside his hypothetical analysis. Current pumping has already conflicted with existing rights.  
2 Continued pumping at the current levels will only continue to conflict with existing rights and harm  
3 SNWA.

4 **CONCLUSION**

5 For the foregoing reasons, and for others that may be discovered and raised during the pendency  
6 of this Petition for Judicial Review, LVVWD and SNWA request that the Court order the State Engineer  
7 to amend Order 1309 to remove or strike findings made therein regarding conflicts with senior water  
8 rights. LVVWD and SNWA do not seek relief from any other portion of Order 1309.

9 DATED this 17 day of June, 2020.

10 TAGGART & TAGGART, LTD.

11  
12 By: 

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**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I hereby certify that I am an employee of TAGGART & TAGGART, LTD., and that on the 18<sup>th</sup> day of June, 2020, I served, or caused to be served, a true and correct copy of the foregoing as follows:

[X] By **HAND-DELIVERY**:

Tim Wilson P.E., State Engineer  
Nevada Division of Water Resources  
Department of Conservation and Natural Resources  
901 South Stewart Street, Suite 2002  
Carson City, Nevada 89701

[ X ] By **U.S. POSTAL SERVICE, CERTIFIED, RETURN RECEIPT REQUESTED**, by placing a true and correct copy of the foregoing document in an envelope, with postage prepaid, in Carson City, Nevada, addressed as follows:

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14  
15 DATED this 18th day of June, 2020.

16  
17 

18 Employee of TAGGART & TAGGART, LTD.  
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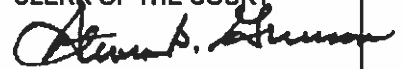
EXHIBIT INDEX

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3.	Notice of Hearing dated August 23, 2019	26
4.	Transcript of Proceedings, Public Hearing, Pre-Hearing Conference, Thursday, August 8, 2019, pp. 11-13.	8



ATTACHMENT 3

ATTACHMENT 3



CASE NO: A-20-817765-P  
Department 1

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ATTORNEYS FOR: PETITIONER COYOTE SPRINGS INVESTMENT, LLC

DISTRICT COURT  
CLARK COUNTY, NEVADA

PETITION FOR JUDICIAL REVIEW )  
OF NEVADA STATE ENGINEER )  
ORDER 1309 )

CASE NO.  
DEPT. NO.

COYOTE SPRINGS INVESTMENT, )  
LLC )

PETITION FOR JUDICIAL REVIEW OF  
NEVADA STATE ENGINEER ORDER  
1309

Petitioner, )  
v. )

RECEIVED  
2020 JUL -9 PM 1:34  
STATE ENGINEER'S OFFICE

1 TIM WILSON, State Engineer, State )  
2 of Nevada, Department of )  
3 Conservation and Natural )  
4 Resources, Division of Water )  
Resources, )  
Respondent. )

---

5  
6 1. Petitioner Coyote Springs Investment, LLC ("CSI"), by and through the  
7 undersigned counsel, hereby petitions this Court for judicial review of a June 15, 2020  
8 decision entitled "Order # 1309 DELINEATING THE LOWER WHITE RIVER FLOW  
9 SYSTEM HYDROGRAPHIC BASIN WITH THE KANE SPRINGS VALLEY BASIN (206),  
10 COYOTE SPRING VALLEY BASIN (210). A PORTION OF BLACK MOUNTAINS AREA  
11 BASIN (215), GARNET VALLEY BASIN (216), HIDDEN VALLEY BASIN (217),  
12 CALIFORNIA WASH BASIN (218), AND MUDDY RIVER SPRINGS AREA (AKA  
13 UPPER MOAPA VALLEY) BASIN (219) ESTABLISHED AS SUB-BASINS,  
14 ESTABLISHING A MAXIMUM ALLOWABLE PUMPING IN THE LOWER WHITE RIVER  
15 FLOW SYSTEM WITHIN CLARK AND LINCOLN COUNTIES, NEVADA, AND  
16 RESCINDING INTERIM ORDER 1303" by Tim Wilson, Nevada State Engineer ("Order  
17 1309"). A true and correct copy of Order 1309 is attached as Exhibit "A".

18 2. In Order 1309, Nevada State Engineer ("State Engineer"), Tim Wilson, ordered  
19 the delineation of six, and part of a seventh, previously separately delineated  
20 hydrographic basins, into a single hydrographic basin called the "Lower White River  
21 Flow System", *and ordered* designated a maximum quantity of 8000 acre-feet-annually  
22 of groundwater that may be pumped from the Lower White River Flow System  
23 Hydrographic Basin, *and ordered* that the 8000 acre-foot maximum may be reduced if it  
24 is determined that pumping adversely affects the Moapa dace, *and ordered* that the  
25 previously issued moratorium regarding any final subdivision submitted to the State  
26 Engineer for review set forth in State Engineer Interim Order 1303 dated January 11,

1 2019 ("Rescinded Order 1303") be terminated, *and ordered* that all other matters set  
2 forth in Rescinded Order 1303 that are not specifically addressed in Order 1309 were  
3 rescinded.

#### 4 JURISDICTION AND PARTIES

5 3. This Court has jurisdiction to address this petition pursuant to N.R.S. 533.450(1),  
6 which provides that "any person feeling aggrieved by any order or decision of the State  
7 Engineer, . . . may have the same reviewed by a proceeding for that purpose, insofar as  
8 may be in the nature of an appeal, which must be initiated in the proper court of the  
9 county in which the matters affected or a portion thereof are situated. . . ." Coyote  
10 Springs Investment LLC, master developer of the Coyote Springs Development, which  
11 is subject to the State Engineer's June 15, 2020 decision, has over 21,000 acres of fee-  
12 owned land for development in Lincoln County, Nevada, and holds a leasehold interest  
13 to over 7,500 acres of conservation land in Lincoln County, Nevada; and over 6,800  
14 acres of fee-owned land for development in Clark County, Nevada, and holds a  
15 leasehold interest to over 6,200 acres of conservation land in Clark County, Nevada.

16 4. CSI is a limited liability company, formed under the laws of the State of Nevada,  
17 and is the original developer of Coyote Springs Development in both Lincoln and Clark  
18 Counties, Nevada.

19 5. Tim Wilson is, as of the date of this Petition, the State Engineer, Nevada Division  
20 of Water Resources, is an agent of the State of Nevada, and is appointed by and  
21 responsible to the Director of the State Department of Conservation and Natural  
22 Resources ("Department"). NRS 532.020. The State Engineer issued the June 15,  
23 2020 decision, Order 1309, which is the subject of this Petition.

## FACTS

6. From water rights purchased in 1998, CSI owns 4600 acre feet annually ("afa") of certificated and permitted Nevada water rights in the Coyote Spring Valley Hydrographic Basin. CSI's groundwater rights in the Coyote Spring Valley are evidenced as follows: CSI owned 1500 afa under Permit 70429 (Certificate 17035) of which 1250 afa was conveyed to the Clark County Coyote Springs Water Resources General Improvement District ("CS-GID") to be used for the Coyote Springs Development, with the remaining 250 afa still owned by CSI. CSI also owned 1000 afa under Permit 74094 of which 750 afa were conveyed to the CS-GID to be used for the Coyote Springs Development, with the remaining 250 afa still owned by CSI. CSI also owned 1600 afa under Permit 70430 of which 460 afa was relinquished as approved and permitted by the State Engineer and accepted by the United States Fish and Wildlife Service ("USFWS") as required mitigation arising from the Coyote Springs Development and for the protection of the Moapa dace fish, thus leaving 1140 afa that continues to be owned by CSI. Further, CSI continues to own 500 afa under Permit 74095. Thus, the total amount of water permits held by CSI as of the date of this Petition is 2140 afa, and the total amount of water rights held by the CS-GID is 2000 afa all of which is to be used for the Coyote Springs Development<sup>1</sup>, with 460 afa relinquished by CSI for protection of the endangered Moapa dace. CSI also owns a few additional rights in the LWRFS Hydrographic Basin outside of the Coyote Springs Valley. Furthermore, through a purchase and option agreement dated October 17, 2005, and as amended from time to time ("KS-Agreement"), CSI purchased from Lincoln County Water District ("LCWD")

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<sup>1</sup> And pursuant to that certain Amended and Restated Coyote Springs Water and Wastewater Multi-Party Agreement, dated July 7, 2015, regarding operation and management of the CS-GID, if the Coyote Springs Development ceases to develop, then the water rights revert to CSI. Meaning, the CS-GID executes deeds and other related instruments necessary to effectuate that reversion.

1 and Vidler Water Company ("Vidler") 246.96 acre feet of permitted water rights in Kane  
2 Springs Valley and a contractual commitment from Lincoln County Water District to  
3 provide CSI with 253.04 afa that CSI purchased and dedicated to Lincoln County Water  
4 District (for an available total quantity of water equal to 500 afa) as evidenced by  
5 Permits 72220 and 72221. Further subject to the KS-Agreement, CSI holds an option to  
6 purchase from Vidler, an additional 500 afa of permitted Kane Springs Valley water  
7 rights.

8 7. Directly relevant to CSI's interests, the total amount of water rights affected by  
9 the State Engineer's decision is 4140 afa in Coyote Spring Valley and 1000 afa in the  
10 Kane Spring Valley, in Clark and Lincoln Counties, Nevada, respectively.

11 8. The Southern Nevada Water Authority ("SNWA"), USFWS, CSI, Moapa Band of  
12 Paiutes, and the Moapa Valley Water District ("MVWD") entered into a Memorandum of  
13 Agreement dated April 20, 2006 and as amended from time to time (as amended, the  
14 "2006 MOA") as a result of the State Engineer's Order 1169 and their respective  
15 proposed development needs. The purpose of the 2006 MOA was to protect Muddy  
16 River's flow rates for protection of the Moapa dace initially during the Order 1169 pump  
17 test and then beyond. The 2006 MOA set forth certain rights and obligations of the  
18 parties to the agreement. Among other things, CSI agreed to dedicate ten percent of its  
19 initial water rights (4600 afa), which was a quantity of 460 afa, to the survival and  
20 recovery of the Moapa dace pursuant to Section 3(a) of the MOA. The Biological  
21 Opinion issued by USFWS described in File Nos. 84320-2008-F-0113 and 84320-2008-  
22 I-0499, dated October 22, 2008] confirm CSI's obligation to dedicate this water as  
23 appropriate mitigation for any take of the Moapa dace related to the development of  
24 Coyote Springs community. USFWS determined that the best use of this 460 afa of  
25 dedicated water would be for it to remain in the groundwater system in reliance on the  
26 premise that the water makes its way in the underground system to the Muddy River

1 and the Muddy River Springs area, and thus also eventually to Lake Mead. In  
2 accordance with Nevada water law, CSI recorded an Affidavit to Relinquish Water  
3 Rights in Clark County and Lincoln County. The Affidavits were filed with the State  
4 Engineer on May 24, 2016. These documents ensure the 460 afa will not be pumped  
5 and remain in the State Engineer's count of appropriated water rights to prevent re-  
6 appropriation in the future.

7 9. Since just before the year 2000, over 20 years ago, CSI commenced  
8 development efforts of its property in the Coyote Spring Valley. CSI's first development  
9 agreement in Clark County was dated September 2004, and since that time CSI has  
10 prepared and processed permits and approvals for community infrastructure, maps and  
11 plans, and recorded maps. CSI's development efforts include zoning entitlements for  
12 golf course, resort, residential, multi-family, commercial, industrial, gaming enterprise,  
13 among others. These efforts include recorded large parcel, parent final maps for  
14 purpose of subsequent residential subdivision maps, all of which were for the  
15 development of the community and master plan known as the Coyote Springs  
16 Development. These efforts were engaged with many agencies, including, without  
17 limitation, Clark County, Lincoln County, the Las Vegas Valley Water District  
18 ("LVVWD"), Lincoln County Water District, Clark County Water Reclamation District,  
19 Nellis Air Force Base, Nevada Department of Wildlife, USFWS, US Army Corp. of  
20 Engineers, Bureau of Land Management, Clark County Regional Flood Control District,  
21 Nevada Department of Transportation, Nevada Division of Environmental Protection,  
22 Department of Air Quality, Southern Nevada Water Authority, Southern Nevada Health  
23 District, and the State Engineer. CSI holds and has been issued, a variety of permits,  
24 entitlements, bonds, improvements, maps and plans.

25 10. Based on those permits, entitlements, bonds, and approved plans, CSI  
26 constructed significant infrastructure improvements to support the Coyote Springs

1 Development. CSI constructed a Jack Nicklaus Signature Golf Course ("Golf Course") at  
2 a cost of \$40,000,000. The Golf Course was constructed to support future residential  
3 development and the overall Coyote Springs Development; but for the full development  
4 of Coyote Springs Development pursuant to its entitlements, the Golf Course would not  
5 have been built as a stand-alone business; golf courses are built to sell homes. The  
6 Golf Course was designed to also serve as natural storm water drainage for the Coyote  
7 Springs Development.

8 11. The Golf Course opened in May 2008, and has operated since opening at a  
9 monetary loss, and operations at a loss continue to the present. The Golf Course has  
10 just over 25,000 rounds of golf played per year. Prior to COVID-19 over 60 full time  
11 employees were employed; post-COVID-19, there remain just 25 personnel employed  
12 in connection with the Coyote Springs Golf Club and the Coyote Springs Development.  
13 Many more employees would be activated and employed if CSI were allowed to  
14 proceed with its entitled and permitted development efforts.

15 12. CSI's many improvements for the Coyote Springs Development include the  
16 \$40,000,000 Jack Nicklaus Signature Golf Course; a 325 acre flood control detention  
17 basin (subject of a dam permit issued and renewed by the State Engineer); a  
18 groundwater treatment plant permitted by Nevada Department of Environmental  
19 Projection and to specifications required by the LVVWD and the CS-GID which includes  
20 two 1,000,000 gallon water storage tanks designed and constructed to culinary water  
21 standards; a wastewater treatment plant permitted by the Nevada Department of  
22 Environmental Protection and to specifications required by the LVVWD and the CS-GID  
23 and initial package treatment plant; and a 3-megawatt electrical substation and  
24 appurtenant equipment operated by Lincoln County Power District.

25 13. The Coyote Springs Development drilled and operated four groundwater  
26 production wells, two of which are fully equipped to LVVWD and CS-GID standards,



1 municipal water wells, all of which have been overseen, approved, and permitted by the  
2 State Engineer. The two wells equipped to municipal standards were done so at a cost  
3 greater than Twenty Million Dollars (\$20,000,000). Based on, and in reliance on these  
4 approvals, and other approvals by the relevant government agencies, including the  
5 State Engineer, CSI constructed miles of roadways, curbs, and installed associated  
6 underground utilities, including water, sewer, gas and electricity in the Coyote Springs  
7 Development. The total cost of construction and acquisitions for these improvements  
8 and associated processing is well over Two Hundred Million Dollars (\$200,000,000).

9 14. CSI relied upon the approvals granted by the relevant agencies, some of which  
10 are listed above, but most particularly the State Engineer, to proceed with these  
11 construction projects. CSI, in particular has relied on the approvals of the State  
12 Engineer recognizing that CSI must use its certificated and permitted water rights in the  
13 Coyote Springs Development in order to support operation of the existing and operating  
14 golf course and related facilities, and all of its residential subdivision development and  
15 construction efforts in order to open a homebuilding center to the public and sell  
16 residential homes, among other customary southern Nevada master planned  
17 community commercial and public facility support amenities.

18 15. Eighteen years ago, prior State Engineer Hugh Ricci issued an order which held  
19 in abeyance certain applications pending or to be filed for additional water rights in the  
20 Coyote Spring Valley Basin 210 (and other basins), known as Order 1169 ("Order  
21 1169"). At the time of Order 1169, various parties, including CSI, MVWD, SNWA,  
22 among others, had water right applications pending for determination. The State  
23 Engineer determined there was insufficient information and data concerning the deep  
24 carbonate aquifer underlying the hydrographic basins in question. Based on the need  
25 for additional information and data, the State Engineer exercised his authority under  
26 NRS 533.368 to order a hydrological study of the basins in question. In taking this step,

1 the State Engineer studied available water to issue a permit for pending applications,  
2 and in so doing the State Engineer determined that certain applicants, including CSI,  
3 already had a vested interest in water rights permitted from the carbonate aquifer  
4 system, thereby acknowledging the existence and validity of CSI's 4600 afa referenced  
5 in paragraph 6 above. The study requested was to occur over a five-year period and  
6 fifty-percent (50%) of the water rights then permitted in the Coyote Springs Valley Basin  
7 were to be pumped for at least two consecutive years. The applicants, which included  
8 CSI, were to pay for the studies and were to file a report with the State Engineer within  
9 180 days of the end of the fifth (5<sup>th</sup>) consecutive year following commencement of the  
10 test.

11 16. CSI, SNWA, MVWD, among others, thereafter performed the required pump  
12 tests on the wells in the Coyote Springs Valley Basin from 2010 to 2012 and filed their  
13 reports in 2013.

14 17. On January 29, 2014, State Engineer Jason King issued Ruling 6255 ("Ruling  
15 6255") out of the Order 1169 pump tests. In Ruling 6255, the State Engineer ruled that  
16 pumping groundwater in Coyote Spring Valley Basin for new applications would  
17 decrease flows at existing springs and could impact existing water rights held by parties  
18 such as CSI's then existing 4600 afa of permitted water rights. The State Engineer also  
19 found that the Muddy River and Muddy River Springs were fully appropriated and  
20 pumping of groundwater could, in the future, potentially reduce flows in the Muddy River  
21 that might cause a conflict with existing water rights. The State Engineer decided this  
22 conflict with existing rights was not in the public interest and allowing appropriation of  
23 additional groundwater resources could impair protection of springs and the habitat of  
24 the Moapa dace that lives in the headwaters of the Muddy River. Based on those  
25 findings, the State Engineer denied the then-pending new water right applications.  
26 Ruling 6255 protects existing water rights (such as CSI's then owned 4600 afa) from

1 any new appropriations by denying the pending applications on the basis that existing  
2 water rights must be protected.

3 18. CSI's existing water rights in what is now designated "Lower White River Flow  
4 System Hydrographic Basin" are part of the rights the State Engineer ruled must be  
5 protected in Ruling 6255. CSI has historically pumped, and continues to pump,  
6 between 1400 afa and 2000 afa from its wells in the Coyote Spring Valley Basin. Golf  
7 Course operations use, on average, 1100 afa, and beyond that water is used to support  
8 construction activity in the Coyote Springs Development. Irrigation of Golf Course  
9 Operations and other landscaping areas will be replaced by grey-reclaimed water in the  
10 future after residential development is underway.

11 19. Through the specific plan, development agreement, entitlement and zoning  
12 process, and creation of the CS-GID, CSI adopted aggressive water conservation plans  
13 that it stands ready to implement. These plans include reuse of groundwater once it  
14 makes its ways through the residential infrastructure, including grey-water use on golf  
15 courses, common areas, and public parks. Coyote Springs Development's water  
16 conservation target is for each equivalent-residential-unit to achieve 0.36 afa. Treated  
17 effluent from CSI's wastewater treatment plant will be recycled within the development  
18 and any portion not reused is designed to recharge the aquifer and flow to the Muddy  
19 River and ultimately to Lake Mead.

20 20. Of the 4140 afa CSI has available for immediate development of the Coyote  
21 Springs Development, CSI intends to support its existing entitled residential units within  
22 its subdivisions, plus related resort, commercial and industrial development. Return  
23 flows from the subdivision and effluent from its treatment plants will be returned to the  
24 aquifer or recycled.

25 21. As CSI processed the final governmental approvals of what would be its first  
26 residential subdivision map for 575 units in "Village A" of the Coyote Spring

1 Development, on May 16, 2018, State Engineer Jason King sent a letter to LVVWD  
2 regarding Coyote Spring Valley Basin Water Supply, with a copy to CSI's  
3 representative, Mr. Albert Seeno III.<sup>2</sup> The State Engineer stated that the pump tests  
4 from Order 1169 through the present clearly indicate that pumping at the level during  
5 the two year pump test caused unprecedented declines in groundwater levels.

6 22. In the State Engineer's May 16, 2018 letter, he stated (for the first time), that any  
7 groundwater to be pumped across a *five-basin area* [emphasis in original] would be  
8 limited to ensure no conflict with Muddy River Springs or the Muddy River as they are  
9 the most senior rights in the then-identified five-basin area. The State Engineer further  
10 said that carbonate pumping will be limited to a fraction of the 40,300 acre feet already  
11 appropriated in the identified five-basin area. Following that sweeping statement, the  
12 State Engineer specifically addressed the purpose of the then instant letter by stating:

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

22 This May 16, 2018 letter went on to close with a desire that the water rights holders in  
23 the area plus the Nevada Division of Water Resources work together to reach a  
24 resolution for the entirety of the five basin area.

25 23. Subsequently, in communications by email between Albert Seeno III with the  
26 State Engineer, on May 17, 2018, the State Engineer advised that he would neither  
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<sup>2</sup> The May 16, 2018 letter was rescinded pursuant to a settlement agreement between CSI and the State Engineer. See paragraph 26 below.

1 sign-off nor approve any subdivision map submitted by CSI if they were based on  
2 water rights CSI owned or had dedicated to the CS-GID.

3 24. On May 18, 2018, in a conversation with Albert Seeno III, the State Engineer  
4 advised CSI not to spend one dollar more on the Coyote Springs Development Project  
5 and that processing of CSI's maps had stopped. The State Engineer stated that he  
6 was going to prepare a new draft order that would supersede or dramatically modify  
7 Order 1169 and Ruling 6255, in approximately 30 days. The State Engineer admitted  
8 to Albert Seeno III that this was uncharted territory and further, that his office has  
9 never granted rights and then just taken them away.

10 25. Following his conversation with State Engineer Jason King, on May 18, 2018,  
11 Albert Seeno III emailed Jason King and asked if anyone had filed an impairment claim  
12 or any type of grievance with regard to CSI's and/or CS-GID's water rights and/or the  
13 pumping CSI had performed over the prior 12 years. On May 21, 2018, the State  
14 Engineer responded that no one had asserted a conflict or impairment regarding CSI's  
15 pumping of the CS-GID and CSI's water rights.

16 26. On June 8, 2018, CSI filed a Petition for Review of the State Engineer's May 16,  
17 2018, letter challenging the State Engineer's decision to place a moratorium on  
18 processing CSI's subdivision maps. After a court-ordered settlement meeting on  
19 August 29, 2018,, the parties agreed to settle and dismiss the case. In that settlement  
20 agreement dated August 29, 2018, the State Engineer agreed to rescind his May 16,  
21 2018, letter and to process CSI's subdivision maps without prejudice.

22 27. Thereafter, the State Engineer began a public workshop process to review the  
23 water available for pumping in an area that the State Engineer began calling the Lower  
24 White River Flow System ("LWRFS") which includes the Coyote Spring Valley  
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1 hydrographic basin<sup>3</sup>. This public process included public workshops, a working group  
2 of stakeholders, and included facilitation of a meeting of the Hydrologic Review Team  
3 ("HRT") established pursuant to that certain 2006 Memorandum of Agreement among  
4 some of the parties involved in the new LWRFS process.<sup>4</sup>

5 28. On September 7, 2018, the Office of the State Engineer issued two conditional  
6 approvals of subdivision maps submitted for review by CSI. The first conditional  
7 approval was for the Large Lot Coyote Springs—Village A, consisting of eight lots,  
8 common area, and rights of way totaling approximately 643 acres in Clark County and  
9 requiring the statutory 2.0 afa per lot, for a total of 16 afa. The second conditional  
10 approval was for the Coyote Springs—Village A subdivision map, consisting of 575  
11 lots, common areas and rights of way for approximately 142.71 acres in Clark County  
12 and requiring an estimate demand of 408.25 afa of water annually based on .71 afa per  
13 residential unit. The two subdivision maps were conditionally approved subject to a  
14 showing by CSI (or its agent) that sufficient water was available without affecting senior  
15 water rights in the Muddy River and the Muddy River Springs.

16 29. Following this brief public input process, the State Engineer issued a draft order  
17 at a public workshop held on September 19, 2018. The September 19, 2018, draft  
18 order contained a preliminary determination that there were 9,318 afa of water rights  
19 with a priority date of March 31, 1983, or earlier, that could be safely pumped from five-  
20 basins composing the initial-LWRFS basins without affecting the flows in the Muddy  
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22 <sup>3</sup> The Lower White River Flow System as so named, was identified colloquially prior to January 2019, and in  
23 Rescinded Order 1303 dated January 11, 2019 these same hydrographic basins were identified as a single  
24 administrative unit, and then even further, in his June 15, 2020 Order#1309 the State Engineer specifically  
25 named and identified the Lower White River Flow System Hydrographic Basin which is fully described in this  
Petition.

26 <sup>4</sup> On July 24, 2018, the State Engineer held a Public Workshop and on August, 23, 2018 facilitated the  
27 meeting of the HRT.

1 River and without affecting the endangered Moapa dace fish. The draft order included  
2 a moratorium on processing of subdivision maps unless demonstrated to the State  
3 Engineer's satisfaction that an adequate supply of water was available "in perpetuity"  
4 for the subdivision proposed to be mapped.

5 30. On October 5, 2018, CSI submitted a series of comment letters to the State  
6 Engineer regarding the September 19, 2018, draft order. CSI commented on the total  
7 lack of technical information necessary to perform a comprehensive review of the State  
8 Engineer's conclusions in the draft order. CSI requested that the State Engineer  
9 provide public access to the cited 30,000 pages of documentation used to support his  
10 conclusions in the draft order.

11 31. In the October 5, 2018 CSI comment letters from CSI and its qualified expert,  
12 CSI also pointed out to the State Engineer that his use of the 9318 afa limit for pumping  
13 in the basin was not supported by substantial evidence and that the State Engineer's  
14 own data supported a figure of at least 11,400 afa that could be pumped without any  
15 effect on the flows in the Muddy River or any effects on the Moapa dace. CSI also  
16 criticized reliance on only three-years of pump data to establish the limitation of 9318  
17 afa when data from more than three years was available.

18 32. On October 23, 2018, CSI provided additional comments on the September 19,  
19 2018 draft order. CSI noted again that the State Engineer's own data supported a  
20 determination that the correct amount of pumping that could be sustained in the  
21 LWRFS was at least 11,400 afa and not 9,318 afa. However, even assuming that  
22 9,318 afa was the correct number, CSI was still entitled to at least 1,880 afa of water  
23 for its subdivisions.

24 33. On January 11, 2019, State Engineer Jason King issued Rescinded Order 1303.

25 34. On May 13, 2019 the State Engineer amended Rescinded Order 1303. In  
26 Rescinded Order 1303, the State Engineer declared that Coyote Spring Valley, Muddy

1 River Springs Area, Hidden Valley, Garnet Valley, California Wash, and the  
2 northwestern part of the Black Mountains Area were designated as a joint  
3 administrative unit for purposes of administration of water rights, known as the Lower  
4 White River Flow System or the Six-Basin Area. Rescinded Order 1303 also declared  
5 a temporary moratorium on approvals regarding any final subdivision or other  
6 submissions concerning development and construction submitted to the State Engineer  
7 for review. According to Rescinded Order 1303, any such submittal shall be held in  
8 abeyance pending the conclusion of the public process to determine the total quantity  
9 of groundwater that may be developed within the Lower White River Flow System.  
10 Rescinded Order 1303 did provide an exception to the moratorium, that the State  
11 Engineer could review and grant approval if a showing of an adequate and sustainable  
12 supply of water to meet the anticipated "life of the subdivision" was made to his  
13 satisfaction.

14 35. Rescinded Order 1303 raised five questions for stakeholders to review and to  
15 which they could respond with technical, scientific data: (a) the geographic boundary  
16 of the LWRFS, (b) aquifer recovery subsequent to the Order 1169 aquifer test, (c) the  
17 long-term annual quantity and location of groundwater that may be pumped from the  
18 LWRFS, (d) the effect of movement of water rights between alluvial and carbonate  
19 wells within the LWRFS and (e) any other matter believed to be relevant to the State  
20 Engineer's analysis (the "Five Topics Noticed for Determination").

21 36. In issuing Order 1309, the State Engineer went well beyond the scope of issues  
22 within the Rescinded Order 1303's Five Topics Noticed for Determination.

23 37. Former State Engineer Jason King retired the same day that Rescinded Order  
24 1303 was issued, January 11, 2019. Thereafter, Tim Wilson was appointed as Acting  
25 State Engineer; and on December 12, 2019, Tim Wilson was appointed as the full  
26 State Engineer.



1 38. On June 13, 2019, CSI submitted two-maps for signature and approval subject to  
2 the exception written into Rescinded Order 1303: (i) its previously described Large Lot  
3 Coyote Springs—Village A, consisting of eight lots, common area, and rights of way  
4 totaling approximately 643 acres in Clark County and on the face of the map requiring  
5 the statutory 2.0 afa per lot, for a total of 16 afa, and (ii) its Coyote Springs—Village A  
6 subdivision map, consisting of 575 lots, common areas and rights of way for  
7 approximately 142.71 acres in Clark County and requiring an estimate demand of  
8 408.25 afa of water annually based on .71 afa per residential unit. These maps were  
9 accompanied by a cover letter describing a request approval based on an attached  
10 technical report which evidenced support for approval and identifying the technical and  
11 hydrogeologic analysis supporting CSI's request for 2000 afa to be approved and  
12 assigned to these maps for development within the Coyote Springs master planned  
13 community.

14 39. The State Engineer held several workshops and meetings regarding Rescinded  
15 Order 1303, on February 6, March 22, April 23, and July 24, 2019. These meetings  
16 were workshops and held in anticipation and preparation for the scheduled hearing on  
17 Rescinded Order 1303 scheduled for the end of September, early October, 2019.

18 40. The State Engineer identified dates for a hearing to be held on Rescinded Order  
19 1303, to allow all interested parties to submit technical reports and studies in response  
20 to the five questions raised by the State Engineer in Rescinded Order 1303, and cross  
21 examine the others' experts, following which the State Engineer would take under  
22 advisement all of the reports and testimony and render a decision in a new order.

23 41. Expert reports by interested parties were due July 3, 2019, and rebuttal reports  
24 were due on August 16, 2019. CSI filed expert scientific, geophysical, hydrologic, and  
25 hydrogeologic reports, and related rebuttal reports; all of which are reflected on the  
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1 State Engineer's administrative record supporting Rescinded Order 1303 on their  
2 website.

3 42. The hearing on Rescinded Order 1303 took place in Carson City, Nevada  
4 between September 23, 2019, and October 4, 2019.

5 43. Following the hearing on Rescinded Order 1303, the State Engineer allowed for  
6 closing reports, which were due on or before December 3, 2019.

7 44. Initial reports and expert opinions and rebuttal reports, submitted by interested  
8 parties, including those that demanded that the Kane Spring Valley be included within  
9 the Lower White River Flow System (thus, turning a Six-Basin area into a Seven-Basin  
10 area).

11 45. In addition to CSI's hydrogeologist and other experts at Stetson Engineering,  
12 CSI, LCWD, and Vidler retained an expert in the area of geophysics, Zonge  
13 International, to review underground faulting in the Coyote Spring and Kane Springs  
14 hydrographic basins and identify faults that could act as barriers to flow from the Kane  
15 Springs and Coyote Spring valleys east to the Muddy River and the Muddy River  
16 Springs area.

17 46. Other than CSI and its team of experts in the fields of geology and hydrogeology,  
18 water rights, climate, biology, and geophysics, from Stetson Engineering and Zonge  
19 International, more than 15 additional other stakeholders were present and participated  
20 at Rescinded Order 1303 Hearing, and each stakeholder presented expert witnesses<sup>5</sup>  
21 to their previously submitted reports. All of this testimony, and all reports and rebuttal  
22 reports submitted is a part of the State Engineer's files for Rescinded Order 1303  
23 Hearing, and testimony preserved by a stenographer's transcript and video taken. CSI  
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25 <sup>5</sup> More than 25 experts presented testimony. See Nevada State Engineer website for LWRFS at  
26 <http://water.nv.gov/news.aspx?news=LWRFS> and the tab "hearing documents."

disagrees with the summarization by the State Engineer of hearing testimony in Order 1309.

47. Order 1309 specifically delineated the following decisions<sup>6</sup>:

*1. The Lower White River Flow System consisting of the Kane Springs Valley, Coyote Spring Valley, Muddy River Springs Area, California Wash, Hidden Valley, Garnet Valley, and the northwest portion of the Black Mountains Area as described in this Order, is hereby delineated as a single hydrographic basin. The Kane Springs Valley, Coyote Spring Valley, Muddy River Springs Area, California Wash, Hidden Valley, Garnet Valley and the northwest portion of the Black Mountains Area are hereby established as sub-basins within the Lower White River Flow System Hydrographic Basin.*

*2. The maximum quantity of groundwater that may be pumped from the Lower White River Flow System Hydrographic Basin on an average annual basis without causing further declines in the Warm Springs area spring flow in the Muddy River cannot exceed 8,000 afa and may be less.*

*3. The maximum quantity of water that may be pumped from the Lower White River Flow System Hydrographic Basin may be reduced if it is determined that pumping will adversely impact the endangered Moapa dace.*

*4. All applications for the movement of existing groundwater rights among sub-basins of the Lower White River Flow System Hydrographic Basin will be processed in accordance with NRS 533.370.*

*5. The temporary moratorium on the subdivision of final subdivision or other submission concerning development and construction submitted to the State Engineer for review established under Interim Order 1303 is hereby terminated.*

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<sup>6</sup> Exhibit "A" at 65-66.

1                               6. *All other matters set forth in Interim Order 1303 that are not*  
2 *specifically addressed herein are hereby rescinded.*

3 48. Order 1309 neither delivers evidence in support of, nor analysis to support, any  
4 of the order and rulings the State Engineer made in Order 1309, Section X, Orders,  
5 items 1, 2, 3, and 4, including, without limitation, the addition of Kane Springs Valley into  
6 the newly designated Lower White River Flow System Hydrographic Basin.

7 49. In Order 1309, Section X, Orders, items 5 and 6, the State Engineer correctly  
8 terminates the improper, arbitrary, and capricious Rescinded Order 1303 in its entirety,  
9 including, without limitation, specifically terminating the improper moratorium instituted  
10 in Rescinded Order 1303.

11 50. On June 17, 2020, 371 days following written submittal of a request for review  
12 and approval for an exception pursuant to Rescinded Order 1303, and two days  
13 following issuance of Order 1309, Steve Shell, Water Resource Specialist II, signed a  
14 letter addressed to Coyote Springs Nevada at an address that the entity has not used  
15 for over ten (10) years, and recommended disapproval for water service to be provided  
16 by the CS-GID to the Coyote Springs Development ("Subdivision Map Denial Letter"). A  
17 true and correct copy of the Subdivision Map Denial Letter is attached as Exhibit "B".  
18 The request at issue was for review and approval of a final subdivision map for eight  
19 large parcels intended to be further subdivided. This denial was premised on Order  
20 1309 and a statement that "[CSI] groundwater permits have priority dates which may  
21 exceed the threshold of allowable pumping within the definition of [Order 1309]".

22 51. The June 17, 2020 Subdivision Map Denial Letter received by CSI did not include  
23 analysis or review of any facts or circumstances or analysis as to why the State  
24 Engineer's office refused to process the request for map approval pursuant to the  
25 exception provided in Rescinded Order 1303. The State Engineer's office did not  
26

1 explain why other request made under the exception to the moratorium under  
2 Rescinded Order 1303 were processed and CSI's was not.

### 3 PETITION FOR JUDICIAL REVIEW

4 52. This Petition is filed on the grounds that CSI is an aggrieved party by the decision  
5 of the State Engineer on June 15, 2020 and the water rights owned or optioned by CSI,  
6 in which CSI has a contractual interest, and the water rights CSI dedicated to the CS-  
7 GID will be injured as a result of these decisions.

8 53. The purpose of the State Engineer's hearing leading to its Order 1309 was to  
9 address the Five Topics Noticed for Determination:

- 10 a. The geographic boundary of the hydrologically connected  
11 groundwater and surface water systems comprising the  
12 Lower White River Flow System;
- 13 b. The information obtained from the Order 1169 aquifer test  
14 and subsequent to the aquifer test and Muddy River  
15 headwater spring flow as it relates to aquifer recovery since  
16 the completion of the aquifer test;
- 17 c. The long-term annual quantity of groundwater that may be  
18 pumped from the Lower White River Flow System, including  
19 the relationships between the location of pumping on  
20 discharge to the Muddy River Springs, and the capture of  
21 Muddy River flow;
- 22 d. The effects of movement of water rights between alluvial  
23 wells and carbonate wells on deliveries of senior decreed  
24 rights to the Muddy River; and,
- 25 e. Any other matter believed to be relevant to the State  
26 Engineer's analysis.

27 54. The State Engineer's determinations in his June 15, 2020 order regarding the  
28 geographic boundary of the LWRFS, the aquifer recovery since completion of the Order  
1169 aquifer test, the long-term annual quantity of groundwater that may be pumped  
from the LWRFS, and the effects of movement of water rights between alluvial wells  
and carbonate wells on deliveries of senior decreed rights to the Muddy River are

1 arbitrary, capricious, an abuse of discretion and devoid of supporting facts and  
2 substantial evidence.

3 55. The State Engineer's Order 1309 is arbitrary<sup>7</sup> and capricious<sup>8</sup> due to the lack of  
4 substantial evidence supporting its determination that the seven hydrographic basins  
5 have a "close" hydraulic connection and must therefore be administered as a single  
6 hydrographic basin. The State Engineer concluded in Order 1309 that there may be  
7 discrete, local aquifers within the LWRFS with an uncertain hydrologic connection to the  
8 Warm Springs Area.<sup>9</sup> The State Engineer based this opinion on his recognition that  
9 "The LWRFS has structural complexity and heterogeneity, and some areas have more  
10 immediate and more complete connection than others"<sup>10</sup>. One basis for his findings was  
11 from Bedroc who presented evidence that their groundwater wells in Coyote Spring  
12 Valley are hydraulically disconnected from the regional carbonate aquifer of the  
13 LWRFS.<sup>11</sup> The evidence and findings contained in Order 1309 are not sufficient to  
14 support its designation of the basins as a single hydrographic basin.

15 56. In his June 15, 2020 Order 1309, the State Engineer inconsistently applies his  
16 own criteria for determining those basins that should be included in the LWRFS based  
17 on a "close hydraulic connection"<sup>12</sup>. Order 1309 outlines six criteria that the State  
18 Engineer relies on to support the finding of a close hydraulic connection, including  
19 geologic structure and water level observations. The State Engineer's application of  
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21 <sup>7</sup> A finding is arbitrary if "it is made without consideration of or regard for facts, circumstances fixed by  
22 rules or procedure." (Black's Law Dictionary, Arbitrary (10th ed. 2014).)

23 <sup>8</sup> A decision is capricious if it is "contrary to the evidence or established rules of law," (Black's Law  
24 Dictionary, Capricious (10th ed 2014).)

25 <sup>9</sup> Exhibit "A" at. 65.

26 <sup>10</sup> Exhibit "A" at 59.

27 <sup>11</sup> Exhibit "A" at 39,

28 <sup>12</sup> Exhibit "A" at 47.

1 these criteria to his decision regarding the Black Mountains Area, Kane Springs Valley,  
2 and Lower Meadow Wash appears subjective, and is thus arbitrary and capricious.

3 57. For example, Order 1309 excludes from the LWRFS Hydrographic Basin the  
4 entire Black Mountain Area due to, among other things, the lack of contiguity of  
5 carbonate-rock aquifer and difference in groundwater levels. However, the substantial  
6 evidence in the State Engineer's record shows contiguous carbonate rock extends  
7 across the Muddy Mountain Thrust Fault between California Wash into the Black  
8 Mountains Area<sup>13</sup>, similar to the occurrence of contiguous carbonate rock from Kane  
9 Springs Valley into Coyote Spring Valley that is offset by a boundary fault<sup>14</sup>. Additional  
10 evidence indicated a 150 foot difference in groundwater level between California Wash  
11 and the Black Mountains Area, similar in magnitude to the 60 foot difference in  
12 groundwater level between Kane Springs Valley and Coyote Spring Valley<sup>15</sup>.

13 58. While both the Black Mountains Area-California Wash and Kane Springs Valley-  
14 Coyote Spring Wash boundaries exhibit the same physical expression reflective of a low  
15 permeability boundary, the State Engineer's Order 1309 includes one, but not the other,  
16 in the LWRFS Hydrographic Basin based on perceived "general hydrographic pattern".<sup>16</sup>  
17 The State Engineer's reliance on these subjective criteria instead of objectively applied  
18 criteria is arbitrary and capricious.

19 59. Order 1309 states "the LWRFS exhibits a direct hydraulic connection that  
20 demonstrates that conjunctive management and joint administration of these  
21 groundwater basins is necessary and supported by the best available science"<sup>17</sup> and at  
22

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23 <sup>13</sup> Exhibit "A" at 15-18.

24 <sup>14</sup> Exhibit "A" at 19-22.

25 <sup>15</sup> Exhibit "A" at 52.

26 <sup>16</sup> Exhibit "A" at 51, 52.

27 <sup>17</sup> Exhibit "A" at 42.

1 the same time cites numerous documents that do not support this statement. For  
2 example, the Order 1169 Aquifer Test Reports cited variously describe potential barriers  
3 and flow paths within the LWRFS, while others postulate that the LWRFS is  
4 hydraulically connected, and some address the entire LWRFS, while other reports only  
5 address portions of the LWRFS.<sup>18</sup> The underlying technical analyses in these cited  
6 documents are admittedly unreliable and therefore Order 1309's findings regarding the  
7 hydraulic connection within the LWRFS are arbitrary and capricious.

8 60. The State Engineer's determination in his June 15, 2020 order to include the  
9 Kane Springs Valley Hydrographic Basin as part of the LWRFS Hydrographic Basin  
10 relies on standards regarding hydrologic connections, hydraulic connections, and  
11 "close" connections that were not previously known to those submitting evidence in  
12 response to Rescinded Order 1303. Inclusion of the Kane Springs Valley Hydrographic  
13 Basin into the LWRFS in Order 1309 was a violation of CSI's due process rights. CSI's  
14 due process rights were violated because the State Engineer neither provided the  
15 standards nor procedures nor analysis describing the method of making such a  
16 determination. Therefore, pursuant to Nevada law, as a result, Order 1309 should be  
17 voided.

18 61. Further the State Engineer's determination on June 15, 2020 in Order 1309 to  
19 include the Kane Springs Valley Hydrographic Basin in the LWRFS Hydrographic Basin  
20 is not supported by substantial evidence. See *Bacher v. Office of State Eng'r of State of*  
21 *Nevada*, 122 Nev. 1110, 1121 (2006) ("This court has defined substantial evidence as  
22 that which a reasonable mind might accept as adequate to support a conclusion.")  
23 (internal quotation marks omitted). Furthermore, the State Engineer has not provided  
24 "findings in sufficient detail to permit judicial review" as required. *Revert v. Ray*, 95 Nev.

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25  
26 <sup>18</sup> Exhibit "A" at 42, FN 244



1 782, 787 (1979) ("When these procedures, grounded in basic notions of fairness and  
2 due process, are not followed, and the resulting administrative decision is arbitrary,  
3 oppressive, or accompanied by a manifest abuse of discretion, this court will not  
4 hesitate to intervene."). In his February 2, 2007 Ruling 5712, the State Engineer stated  
5 that the then-available evidence supported the probability of a low-permeability structure  
6 or change in lithology between Kane Springs Valley and the southern part of Coyote  
7 Spring Valley and there was not substantial evidence that the appropriation of a limited  
8 quantity of water in Kane Springs Valley Hydrographic Basin will have any measurable  
9 impact on the Muddy River Springs. (5712, p. 21.) The State Engineer's determination  
10 in his June 15, 2020 Order 1309 to include the Kane Springs Valley Hydrographic Basin  
11 in the LWRFS Hydrographic Basin is not based on substantial evidence contrary to the  
12 evidence supporting his determinations in Ruling 5712.

13 62. Finally, the State Engineer's determination in his June 15, 2020 order to include  
14 the Kane Springs Valley Hydrographic Basin in the LWRFS Hydrographic Basin is  
15 arbitrary and capricious as the substantial evidence, as viewed through the State  
16 Engineer's own proposed standards regarding hydrologic connections, hydraulic  
17 connections, and "close" connections that it uses in Order 1309, does not satisfy his  
18 own standards for the purposes of creating a LWRFS Hydrographic Basin.

19 63. The State Engineer's June 15, 2020 Order 1309 subjectively applies criteria for  
20 determining whether the Lower Meadow Valley Wash should be included in the  
21 LWRFS. In Order 1309, the State Engineer finds that "while carbonate rocks may  
22 underlie the Lower Meadow Valley Wash and be contiguous with carbonate rocks to the  
23 south and west, data are lacking to characterize the potential hydraulic connection that  
24 may exist."<sup>19</sup> The State Engineer further acknowledges that a connection exists, but  
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26 <sup>19</sup> Exhibit "A" at 50.

1 determines that the Lower Meadow Valley Wash may be managed outside the LWRFS.  
2 Accordingly, Order 1309's exclusion of the Lower Meadow Valley Wash from the  
3 LWRFS is inconsistent with his decision to include the Kane Springs Valley, as both  
4 basins are upgradient of the Muddy River Springs Area, and based on the State  
5 Engineer's findings in Order 1309, both basins have a hydraulic connection to the  
6 LWRFS. Additional record evidence demonstrates that groundwater from the Lower  
7 Meadow Wash directly support streamflow in the Muddy River and groundwater  
8 resources in the carbonate aquifer. Further, both Kane Springs Valley and Meadow  
9 Valley Wash have relatively little or no groundwater development. Given the similarities  
10 between the Lower Meadow Valley Wash and Kane Springs Valley, the inconsistent  
11 treatment of the two in regard to their incorporation into the LWRFS is inconsistent and  
12 accordingly arbitrary and capricious.

13 64. The State Engineer's determination that pumping groundwater in the Coyote  
14 Springs Basin will have an adverse impact on flows in the Muddy River or on the Moapa  
15 dace lacks substantial supporting record evidence and is thus arbitrary and capricious.  
16 As described above, the State Engineer relied on outdated and inadequate data in  
17 making these determinations. The record evidence before the State Engineer  
18 demonstrates that he failed to account for factors such as the effect of faults,  
19 groundwater barriers, and hydrogeologic parameters between Coyote Spring Valley  
20 pumping and the Muddy River Spring Area.

21 65. The State Engineer's determination in his June 15, 2020 order that the maximum  
22 quantity of groundwater that may be pumped from the LWRFS Hydrographic Basin on  
23 an average annual basis without causing further declines in Warm Springs area spring  
24 flow and flow in the Muddy River cannot exceed 8,000 afa is not supported by  
25 substantial evidence. This is the case as the State Engineer also misinterprets the  
26 evidence from the hearing following Rescinded Order 1303 regarding the effect of

1 groundwater pumping within the LWRFS on the Moapa dace. Furthermore, CSI has  
2 already performed and completed its required mitigation for development of Coyote  
3 Springs as required by USFWS. CSI was required to set aside 460 afa to protect the  
4 endangered Moapa dace and USFWS deemed this dedication as appropriate mitigation  
5 for any take of the Moapa dace related to development of the Coyote Springs  
6 Development. Ignoring these significant considerations was arbitrary and capricious,  
7 rendering Order 1309 unlawful.

8 66. Order 1309's use of the term "maximum quantity" of groundwater that may be  
9 pumped is further confused by the Order's qualifier "on an average annual basis".<sup>20</sup> The  
10 use of the "average annual basis" suggests that pumping may be less than 8,000 afa in  
11 some years and more than 8,000 afa in others. Accordingly, Order 1309's pumping  
12 limitations is vague and lacks direction for how the average annual basis will be used to  
13 enforce the maximum quantify of groundwater that may be pumped. Order 1309 further  
14 does not distinguish the quantity of pumping that can occur from each of the two  
15 aquifers that compose the LWRFS, the Basin Fill and Carbonate aquifers. Accordingly,  
16 Order 1309 is arbitrary and capricious as it "lacks specific standards, thereby  
17 encouraging, authorizing, or even failing to prevent arbitrary and discriminatory  
18 enforcement." *Silvar v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 122 Nev. 289,  
19 293 (2006).

20 67. Further, the State Engineer's determination in his June 15, 2020 Order 1309 that  
21 the maximum quantity of groundwater that may be pumped from the LWRFS on an  
22 average annual basis without causing further declines in Warm Springs area spring flow  
23 and flow in the Muddy River cannot exceed 8,000 afa is not supported by substantial  
24 evidence as there is no evidence in the record regarding the effects of this quantity of  
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26 <sup>20</sup> Exhibit "A" at 65.

1 water being pumped within the newly defined LWRFS.<sup>21</sup> Absent such evidence, the  
2 State Engineer refers to "Pumpage inventories for 2018 that were published after the  
3 completion of the hearing report a total of 8,300 afa."<sup>22</sup> Further, the State Engineer  
4 identifies that additional inquiry and evidence is still necessary to support this  
5 conclusion. Accordingly, the State Engineer's determination regarding the maximum  
6 quantity of groundwater that may be pumped from the LWRFS on an average annual  
7 basis is not supported by substantial record evidence.

8 68. The State Engineer's determination in his June 15, 2020 Order 1309 that the  
9 maximum quantity of groundwater that may be pumped from the LWRFS on an average  
10 annual basis without causing further declines in Warm Springs area spring flow and flow  
11 in the Muddy River cannot exceed 8,000 afa is not supported by substantial evidence as  
12 the State Engineer recognizes that there may be discrete, local aquifers within the  
13 LWRFS with an uncertain hydrologic connection to the Warm Springs area and that  
14 determination of the effect of moving water rights into these areas may require  
15 additional scientific data and analysis.<sup>23</sup> However, Order 1309 does not include any  
16 plan to gather such data or conduct such analysis.

17 69. The State Engineer's determination in his June 15, 2020 Order 1309 that the  
18 maximum quantity of groundwater that may be pumped from the LWRFS on an average  
19 annual basis without causing further declines in Warm Springs area spring flow and flow  
20 in the Muddy River cannot exceed 8,000 afa is further arbitrary and capricious and  
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22 <sup>21</sup> Order 1309 states "Groundwater level recovery reached completion approximately two to three years after  
23 the Order 1169 aquifer test pumping ended" and pumping at that time averaged 9,318 afa. (Exhibit "A" at  
24 55.) Order 1309's determination to then to base maximum pumping on 2018 when it finds that groundwater  
25 levels had recovered by 2015-2016 is arbitrary and capricious and unsupported by substantial evidence.

26 <sup>22</sup> Exhibit "A" at 55.

27 <sup>23</sup> Exhibit "A" at 64-65.

1 violates Nevada law as Order 1309 contains no mechanism for the implementation of  
2 this limitation to ensure that the Nevada doctrines of prior appropriation<sup>24</sup> and that the  
3 limit and definition of a water right is its reasonable use.<sup>25</sup>

4 70. The State Engineer's determination in Order 1309 regarding the movement of  
5 water rights within the LWRFS is inconsistent, arbitrary, and capricious. The statement  
6 in Order 1309 stating "The State Engineer also finds that any movement of water rights  
7 into carbonate-rock aquifer and alluvial aquifer wells in the Muddy River Springs Area  
8 that may increase the impact to Muddy River decreed rights is disfavored"<sup>26</sup> implies that  
9 the some water rights in LWRFS have less impact than others. If there are water rights  
10 within the LWRFS that have less impact than others, then the system cannot be  
11 homogeneous and be considered as one administrative unit. Accordingly, Order 1309's  
12 determination regarding the boundaries of the LWRFS are arbitrary and capricious and  
13 not supported by substantial evidence.

14 71. Throughout Order 1309, the State Engineer "*recognizes*" that Order 1309 will  
15 serve as an initial step toward management of the newly defined LWRFS Hydrographic  
16 Basin [emphasis added]. The word "recognize" is neither a finding nor a ruling, it is  
17 simply the observation of something by the State Engineer. The State Engineer also  
18 identifies the need for "an effective management scheme" to "provide for the flexibility to  
19 adjust boundaries based on additional information, retain the ability to address unique  
20 management issues on a sub-basin scale, and maintain partnership with water users  
21 who may be affected by management actions throughout the LWRFS."<sup>27</sup> However, the  
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23 <sup>24</sup> *Steptoe Livestock Co. v. Gulley*, 53 Nev 163, 171-173, 205 P.772 (1931); *Jones v. Adams* 19 Nev. 78,  
24 87, (1885).

25 <sup>25</sup> NRS 533.035.

26 <sup>26</sup> Exhibit "A" at 64.

27 <sup>27</sup> Exhibit "A" at 53.

1 State Engineer's Order 1309 provides for neither a management scheme nor a plan for  
2 the development of such a management scheme. Accordingly, the State Engineer's  
3 Order 1309 is incomplete and as a result, his issuance of Order 1309 is both arbitrary  
4 and capricious.

5 72. In his Order 1309, the State Engineer repeatedly identifies that additional  
6 information is necessary to administer the newly created LWRFS Hydrographic Basin  
7 the manner that he proposes – as a single hydrographic basin from which only 8,000  
8 afa may be pumped. As such additional information is not part of the record underlying  
9 Order 1309, the State Engineer's Order 1309 is incomplete, is not supported by  
10 substantial evidence, and his issuance of Order 1309 is both arbitrary and capricious.

11 73. THEREFORE, for the foregoing reasons, and for others that may be discovered  
12 and raised during the pendency of this Petition for Judicial Review, Petitioner Coyote  
13 Springs Investment, LLC hereby requests that this Court reverse the decision of the  
14 State Engineer made on June 15, 2020 regarding the geographic boundary of the  
15 LWRFS, the aquifer recovery since completion of the Order 1169 aquifer test, the long-  
16 term annual quantity of groundwater that may be pumped from the LWRFS, and the  
17 effects of movement of water rights between alluvial wells and carbonate wells on  
18 deliveries of senior decreed rights to the Muddy River for the reasons discussed in this  
19 Petition.

20  
21 Dated: July 9, 2020

Brownstein Hyatt Farber Schreck, LLP

22 BY: /s/ Bradley J. Herrema  
23 BRADLEY J. HERREMA  
24 Bar No. 10368  
25 100 North City Parkway, Suite 1600  
26 Las Vegas, NV 89106  
27 Email: bherrema@bhfs.com  
28 *Attorneys for Coyote Springs*  
*Investment, LLC* 21256970

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Brownstein Hyatt Farber Schreck, LLP, and that on the 9th day of July, 2020, I served, or caused to be served, a true and correct copy of the foregoing PETITION FOR JUDICIAL REVIEW OF NEVADA STATE ENGINEER ORDER 1309, to the following:

[X]: Via HAND DELIVERY:

Tim Wilson, P.E., State Engineer  
Nevada Division of Water Resources  
Department of Conservation and Natural Resources  
901 South Stewart Street, Suite 2002  
Carson City, NV 89701

[X]: Via U.S. Postal Service Certified Mail, Return Receipt Requested, by placing a true and correct copy of the foregoing document in an envelope, postage prepaid, and properly addressed, to the following:

Robert O. Kurth, Jr. 3420 North Buffalo Drive Las Vegas, NV 89129	Laura A. Schroeder Theresa A. Ure 10615 Double R Blvd., Suite 100 Reno, NV 89521
Kent R. Robison Therese M. Shanks Robison, Sharp, Sullivan & Brust 71 Washington Street Reno, NV 89503	Paulina Williams Baker Botts, L.L.P. 98 San Jacinto Blvd., Suite 1500 Austin, TX 78701
Sylvia Harrison Sarah Ferguson McDONALD CARANO LLP 100 W. Liberty Street, 10th Floor Reno, NV 89501	Severin A. Carlson Kaempfer Crowell, Ltd. 50 West Liberty Street, Suite 700 Reno, NV 89511
Karen Peterson ALLISON MacKENZIE, LTD. 402 North Division Street Carson City, NV 89703	Dylan V. Frehner Lincoln County District Attorney P.O. Box 60 Pioche, NV 89043
Alex Flangas 50 West Liberty Street, Suite 700 Reno, NV 89501	Beth Baldwin Richard Berley ZIONTZ CHESTNUT Fourth and Blanchard Building 2101 Fourth Ave., Suite 1230 Seattle, WA 98121-2331

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	Steve King, Esq. 227 River Road Dayton, NV 89403	Greg Morrison 50 W. Liberty Street, Suite 750 Reno, NV 89501
	Justina Caviglia 6100 Neil Road Reno, NV 89511	Luke Miller Office of Regional Solicitor U.S. Dept. of the Interior 2800 Cottage Way, Suite E1712 Sacramento, CA 95825
	Karen Glasgow Office of the Regional Solicitor U.S. Dept. of the Interior 333 Bush Street, Suite 775 San Francisco, CA 94104	Larry Brundy P.O. Box 136 Moapa, NV 89025
	Casa De Warm Springs, LLC 1000 N. Green Valley Pkwy., #440-350 Henderson, NV 89074	Clark County 500 S. Grand Central Pkwy. Sixth Floor Las Vegas, NV 89155-1111
	Clark County Coyote Springs Water Resources GID 1001 S. Valley View Blvd. Las Vegas, NV 89153	Mary K. Cloud P.O. Box 31 Moapa, NV 89025
	Don J. and Marsha L. Davis P.O. Box 400 Moapa, NV 89025	Dry Lake Water, LLC 2470 St. Rose Pkwy., Suite 107 Henderson, NV 89074
	Kelly Kolhoss P.O. Box 232 Moapa, NV 89025	Lake and Las Vegas Joint Venture 1600 Lake Las Vegas Parkway Henderson, NV 89011
	Laker Plaza, Inc. 7181 Noon Rd. Everson, WA 98247-9650	State of Nevada Dept. of Transportation 1263 S. Stewart Street Carson City, NV 89712
	State of Nevada Dept. of Conservation and Natural Res. 901 S. Stewart Street, Suite 5005 Carson City, NV 89701	Pacific Coast Building Products, Inc. P.O. Box 364329 Las Vegas, NV 89036
	S & R, Inc. 808 Shetland Road Las Vegas, NV 89107	Technichrome 4709 Compass Bow Lane Las Vegas, NV 89130



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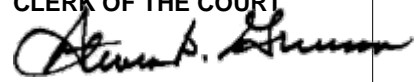
William O'Donnell 2780 S. Jones Blvd., Suite 210 Las Vegas, NV 89146	Global Hydrologic Services, Inc. Mark D. Stock 561 Keystone Avenue, #200 Reno, NV 89503-4331
Patrick Donnelly Center for Biological Diversity 7345 S. Durango Dr. B-107, Box 217 Las Vegas, NV 89113	Lisa Belenky Center for Biological Diversity 1212 Broadway, #800 Oakland, CA 94612

DATED this 9th day of July, 2020.

/s/ Paula Kay  
an employee of Brownstein Hyatt Farber  
Schreck, LLP

ATTACHMENT 4

ATTACHMENT 4

CASE NO: A-20-817840-P  
Department 28

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*Attorneys for Petitioners*  
*Apex Holding Company, LLC and Dry Lake*  
*Water, LLC*

**DISTRICT COURT****CLARK COUNTY, NEVADA**

APEX HOLDING COMPANY, LLC, a Nevada  
 limited liability company; DRY LAKE WATER,  
 LLC, a Nevada limited liability company,

Case No.:  
 Dept. No.:

Petitioners,

vs.

**PETITION FOR JUDICIAL REVIEW OF  
ORDER 1309**

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

Respondent.

Petitioners, APEX HOLDING COMPANY, LLC (“APEX”), and its wholly owned subsidiary, DRY LAKE WATER, LLC (“DRY LAKE”), by and through the law firm of Marquis Aurbach Coffing, hereby file this Petition for Judicial Review of Order 1309 issued on June 15, 2020, by Respondent, TIM WILSON, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES. The full text of Order 1309 is attached hereto and incorporated herein. This Petition for Judicial Review of Nevada State Engineer (“NSE”) Order 1309 is filed pursuant to NRS 533.450.

///

1     **I.     JURISDICTIONAL STATEMENT**

2             Under NRS 533.450, any order or decision of the State Engineer is subject to judicial  
3 review “in the proper court of the county in which the matters affected or a portion thereof are  
4 situated.” The real property to which the water at issue in this appeal is appurtenant lies within  
5 Clark County, Nevada; therefore, the Eighth Judicial District Court of the State of Nevada in and  
6 for Clark County is the proper venue for judicial review.

7             Further, the subject matter of the appeal involves decreed waters of the Muddy River  
8 Decree. Under NRS 533.450(I), “on stream systems where a decree of court has been entered,  
9 the action must be initiated in the court that entered the decree.” This court has proper  
10 jurisdiction of the Muddy River Decree, *Muddy Valley Irrigation Company, et al, vs. Moapa Salt*  
11 *Lake Produce Company, et al*, Case No. 377, which was entered in the Tenth Judicial District of  
12 the State of Nevada, in and for the County of Clark in 1920.<sup>1</sup>

13             The NSE Order 1309 was entered on June 15, 2020, based in whole or part on prior NSE  
14 Orders 1169, 1169A, 1303, and the evidence and law offered at hearing upon each Order.

15             This Petition is timely filed and will be timely served as required under NRS 533.450.

16             Petitioners, APEX and DRY LAKE, have standing to file this Petition as APEX is one of  
17 the land owners, and DRY LAKE is one of the water rights owners and beneficial users of the  
18 groundwater for providing the beneficial use of water by service to those lands, which are subject  
19 of, adversely impacted by, and which were a party to the proceedings which resulted in NSE  
20 Order 1309, and participating in those proceedings for the purpose of developing a  
21 comprehensive water management program agreed to by all water rights owners in the Garnet  
22 Valley and Black Mountain aquifers, and as necessary the Lower White River Flow System  
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27     <sup>1</sup> In 1920, the Tenth Judicial District consisted of Clark County and Lincoln County. In 1945, Clark  
28 County was designated as the Eighth Judicial District.

1 (“LWRFS”).<sup>2</sup>

2 Apex and Dry Water acknowledge that another Petition concerning the same order was  
3 filed on or around June 17, 2020, by LAS VEGAS VALLEY WATER DISTRICT (“LVVWD”)  
4 and SOUTHERN NEVADA WATER AUTHORITY (“SNWA”). Apex and Dry Water are  
5 informed and believe that other petitions challenging that same order have been or will be filed  
6 as well. However, this Petition raises for judicial review different parts of NSE Order 1309 and  
7 substantial different and additional matters of law and evidence than that prior Petition by  
8 LVVWD and SNWA.  
9

10 Other Parties to the proceedings which have resulted in NSE Order 1309 have been  
11 notified of this Petition as required by law as evidenced by the certificate of service attached  
12 hereto.

## 13 **II. FACTUAL BACKGROUND**

### 14 **A. SUBSTANTIAL INTERESTS IN THE LWRFS BY PETITIONERS APEX 15 AND DRY LAKE.**

16 APEX is the owner of lands in the LWRFS groundwater basin area, which is the subject  
17 of NSE Order 1309, and for that reason APEX formed DRY LAKE to be the owner of water  
18 rights in the Garnet Valley and Black Mountain aquifers of the LWRFS, which are critical and  
19 essential for the service of water supply to those APEX lands.

20 The APEX lands were carved out of the sovereign lands of the United States of America

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21 <sup>2</sup> DRY LAKE owns 178 acre feet of Garnet Basin water rights, base permit numbers 66784 (131.16 AF) and 66785  
22 (46.84 AF). These base permits have designated points of diversion in various locations within Apex Industrial Park  
23 under some or all of the Permit Numbers 66784 for 156.84 AF with Priority date 3/6/1987, 66785 for 46.84 AF with  
24 Priority date 8/25/2000, 72098 for 13.16 AF with Priority date 8/25/2000, 77389 for 80 AF with Priority date  
25 8/25/2000, 79948 for 30 AF with Priority date 8/25/2000, 81344 for 8 AF with Priority date 8/25/2000, 84041 for 40  
26 AF with Priority date 7/21/2014. Permit number 72098 for 13.17 acre feet has been moved to the Loves Well,  
27 79948 for 30.00 acre feet moved to Loves Well, 81344 for 8.00 acre feet moved to Loves Well, 84041 for  
28 40.00 acre feet moved to Loves Well, 77389 for 80.00 acre feet moved to Solo Mountain, and  
Straggler 6.83 acre feet. DRY LAKE owns 1,392.06 acre feet of Black Mountain water rights, base permit  
numbers 68350 (119.44 AF), 68351 (542.98 AF), 68352 (137.58 AF) and 68353 (592.06 AF). The Black Mountain  
water rights were successfully moved by the NSE into the Garnet Basin to three different locations within the Apex  
Industrial Park under Permit Numbers 88873T, 88874T, 88875T, 88876T, and 88877T for Permits No. 68350 for  
119.44 Acre Feet with Priority Date 10/18/88, 68351 for 542.98 Acre Feet with Priority Date 6/21/88, 68352 for  
137.58 Acre Feet with Priority Date 10/18/88 and 68353 for 592.06 Acre Feet with Priority Date 10/10/90.

1 and managed by the Bureau of Land Management (“BLM”), to fulfill the purposes of the “Apex  
2 Project, Nevada Land Transfer and Authorization Act of 1989,” Public Law 101-67, 101st  
3 Congress, 103 STAT 168 (“Act of Congress”).<sup>3</sup>

4 The lands owned by APEX, and by necessary implication the water rights owned by  
5 DRY LAKE required to serve those lands, were impressed with a public trust, and carved out of  
6 the USA public domain, and sold to APEX by the authority of the Act of Congress for the  
7 specific intent and purpose of serving the crucial national security interest, and the public health,  
8 safety, and welfare interests of the citizens of the United States of America, Clark County and  
9 the State of Nevada.

10 The specific intent and purpose of the Act of Congress would be totally frustrated and  
11 defeated without the water supply by DRY LAKE provided to APEX.

12 The Act of Congress occurred during the same contemporaneous time that the NSE  
13 issued Order 1309 and the predecessor orders leading up to Order 1309, Orders 1169, 1169A,  
14 1303, and other relevant proceedings, studies and hearings relating thereto, and also referred to  
15 herein below.

16 The NSE, SNWA and LVVWD and other relevant governmental and private parties were  
17 knowledgeable of, and at all relevant times informed participants in the process leading up to the  
18 Act of Congress, acquisition of the lands by APEX, and formation of DRY LAKE and its  
19 acquisition of water rights to serve APEX, and commencement of DRY LAKE service of water  
20 to those APEX lands.

21 The NSE by Order 1309, and the other orders resulting in Order 1309, and to some  
22 demonstrable extent SNWA, LVVWD and other relevant governmental and private parties, have  
23 repeatedly taken actions which have had the deleterious effect of interfering with the intent and  
24 purpose of the Act of Congress, and otherwise defeat, frustrate, delay, prevent or avoid any water  
25

26  
27 <sup>3</sup> See <https://www.govinfo.gov/content/pkg/STATUTE-103/pdf/STATUTE-103-Pg168.pdf>.

1 supply being provided to APEX by DRY LAKE.

2 The NSE has taken the proper statutory and factual action granting temporary permit  
3 transfer status of Black Mountain water rights to the Garnet Valley of the LWRFS owned by  
4 DRY LAKE to serve APEX and fulfill the intent and purpose of the Act of Congress. That  
5 proper action by the NSE has been opposed by the SNWA and other relevant governmental and  
6 private parties that own senior water rights in the LWRFS and the Muddy River Flow System  
7 (“MRFS”), or which have an interest in the protection of the habitat for the Moapa Dace.  
8

9 This Petition raises for consideration by the Court the following factual evidence and  
10 legal issues: first, fully implementing the intent and purpose of the Act of Congress. Second, this  
11 Petition also raises for the Court the factual evidence and law disputing Order 1309 evidence that  
12 there is an interrelationship and tributary nature of the groundwater pumping in the LWRFS by,  
13 *inter alios*, APEX and DRY LAKE with the MRFS. Third, this Petition also raises for the Court  
14 the LWRFS tributary or non-tributary interconnection to the natural springs, surface water and  
15 groundwater of the MRFS which would have the effect of subjecting LWRFS water rights to  
16 regulation and curtailment under the laws, rules and regulations governing the Colorado River  
17 Flow System pursuant to the Colorado River Compact 1922 and Boulder Canyon Project Act  
18 1928, and *et. seq.* eleven or more laws, rules, treaties, regulations, or minutes (“Law of the  
19 River”).<sup>4</sup> Fourth, this Petition also raises to the Court the resulting facts alleged by NSE Order  
20 1309 requiring a limitation on groundwater pumping and permission to maintain and utilize  
21 temporary permits of transfer groundwater rights from Black Mountain Basin to Garnet Valley  
22 Basin of the LWRFS, by, *inter alios*, APEX and DRY LAKE. Fifth, this Petition raises the legal  
23 and factual issues arising from the NSE limiting and preventing evidence and facts at the hearing  
24 resulting in NSE Order 1309. Finally, this Petition also may relate to the other factual or legal  
25 positions which may be developed in the hearing conducted by the Court.  
26

27  
28 <sup>4</sup> See, for example, <https://www.usbr.gov/lc/region/pao/lawofrvr.html>.

**B. ORDER 1303.**

On January 11, 2019, the State Engineer issued Interim Order 1303 to obtain stakeholder input on four specific factual matters: 1) the geographic boundary of the LWRFS, 2) aquifer recovery since the 1169 pump test, 3) long-term annual quantity that may be pumped from the LWRFS, and 4) effects of moving water rights between the carbonate and alluvial system to senior water rights on the Muddy River.<sup>5</sup> After factual findings were made on those questions, the State Engineer was to evaluate groundwater management options for the LWRFS.

On May 13, 2019, the State Engineer amended Order 1303 and modified certain deadlines for filing reports. On July 25, 2019, the State Engineer issued a Notice of Pre-Hearing Conference. On August 23, 2019, the State Engineer held a prehearing conference. At the prehearing conference, Hearing Officer Fairbank unequivocally stated that “the purpose of the hearing is not to resolve or address allegations of conflict between groundwater pumping within the LWRFS and Muddy River decreed rights.”<sup>6</sup> On August 23, 2019, the State Engineer issued a Notice of Hearing, and again clarified the limited scope of the hearing.

In July and August 2019, reports and rebuttal reports were submitted discussing the four matters set forth in Order 1303. Several parties filed objections to witnesses and evidence. Most of the objections were related to the scope of the topics in the submitted evidence. On August 23, 2019, the State Engineer issued an Order on Objections to Witnesses and Evidence. The State Engineer agreed that “the evidence presented in the hearing is to be limited to the four issues identified in the Notice of Hearing.” The State Engineer allowed all evidence to be presented, but again warned that the “scope of the testimony shall be limited to the four issues

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<sup>5</sup> Exhibit 3 at 2 (“The State Engineer directed the participants to limit the offer of evidence and testimony to the salient conclusions, including directing the State Engineer and his staff to the relevant data, evidence and other information supporting those conclusions. The State Engineer further noted that the hearing on the Order 1303 reports was the first step in determining to what extent, if any, and in what manner the State Engineer would address future management decisions, including policy decisions relating to the [LWRFS] basins.”)

<sup>6</sup> Exhibit 4, at 12:6-15.



1 identified in Order 1301” and cautioned that while some evidence could be submitted outside the  
2 specific scope but that the State Engineer “may order a line of questioning to cease or to remain  
3 limited to the relevant issues that are the subject of the hearing.”<sup>7</sup>

4 **C. NSE ORDER 1309 FACTS SUPPORTING THIS PETITION.**

5 On June 15, 2020, the NSE Order 1309 determined that “reductions in flow that have occurred  
6 because of groundwater pumping in the headwaters basins (i.e., LWRFS) is not conflicting with  
7 the Decreed rights (i.e., the senior rights of SNWA, LVVWD and others).”<sup>8</sup>

8 A study by the United States Department of the Interior, Geologic Survey (“USGS”) in  
9 1989, which is contemporaneous with the Act of Congress referred to above,<sup>9</sup> concluded at page  
10 2 of that 1989 report by the USGS as follows:

11  
12 Large-scale development (sustained withdrawals) of water from the carbonate-  
13 rock aquifers would result in water-level declines and cause the depletion of large  
14 quantities of stored water. Ultimately, these declines would cause reductions in  
15 the flow of warm-water springs that discharge from the regional aquifers. Storage  
16 in other nearly aquifers also might be depleted, and water levels in those other  
17 aquifers could decline. In contrast, isolated smaller ground-water developments,  
18 or developments that withdraw ground water for only a short time, may result in  
19 water-level declines and springflow reductions of manageable or acceptable  
20 magnitude.

21 Confidence in predictions of the effects of development, however, is low; and it  
22 will remain low until observations of the initial hydrologic results of development  
23 are analyzed. A strategy of staging developments gradually and adequately  
24 monitoring the resulting hydrologic conditions would provide information that  
25 eventually could be used to improve confidence in the predictions.

26 The NSE confirmed the statement above that “Confidence in predictions of the effects of  
27 development, however, is low;” unless there were additional studies, and as cited in NSE Order  
28 1309 at pages 7-10 the evidence submitted by parties to the hearings and studies on Order 1303  
and 1309 was conflicting and inconsistent with the finding of adverse impact of pumping in the

24  
25 <sup>7</sup> August 23, 2019, Order on Objections.

26 <sup>8</sup> Exhibit 1 at 61.

27 <sup>9</sup> Memorandum dated August 3, 1984, from Terry Katzer, Nevada Office Chief, Water Resources  
28 Division, United States Department of Interior Geologic Survey, Carson City, Nevada to Members of the  
Carbonate Terrane Study.

1 LWRFS to the natural springs, and surface water of the MRFS.

2 By its terms, the 2006 Memorandum of Agreement (“MOA”) between SNWA and other  
3 parties<sup>10</sup> and all actions, evidence and resulting NSE Order 1169 and its subsequent Orders  
4 1169A, 1303, and 1309 developed by or because of such MOA, are binding only upon and  
5 enforceable against the parties to the MOA, and to the NSE to the extent adopted by the NSE,  
6 and are not binding upon or enforceable against APEX or DRY LAKE, *inter alios*.

7  
8 There is a factual admission against interest by the NSE, SNWA and LVVWD, and the  
9 other parties to the MOA, that they deliberately designed and started a study process with the  
10 NSE entitled Southern Nevada Water Authority Order 1169 Report (“Study”),<sup>11</sup> which actually  
11 reached a conclusion directly and immediately beneficial to the interests of senior water rights  
12 owners in the LWRFS and MRFS, and the Moapa Dace, and directly and immediately  
13 detrimental to the interests of APEX, DRY LAKE, and *inter alios*.

14 Some water rights owners (i.e., SNWA and LVVWD, and the other parties to the MOA)  
15 with water rights interests in both the LWRFS and MRFS, entered into the MOA which resulted  
16 in NSE Order 1169, and its subsequent Orders 1169A, 1303, and 1309. Then, some water rights  
17 owners, which are parties to the MOA, developed the Study<sup>12</sup> of the LWRFS and MRFS, in such  
18 a way that NSE Order 1309 now seeks to apply limitations developed by the MOA and Study to  
19 all water rights owners in the LWRFS. That application of the MOA and Study to all water  
20 rights owners in the LWRFS restricts all water rights owners of their beneficial use of water  
21 rights in the LWRFS to, and for, the benefit and protection of the natural springs, streams and  
22

23 <sup>10</sup> NSE Ex. 236, 2006 Memorandum of Agreement between the Southern Nevada Water Authority,  
24 United States Fish and Wildlife Service, Coyote Springs Investment LLC, Moapa Band of Paiute Indians,  
25 and Moapa Valley Water District, Hearings on Interim Order 1303, official records of the Division of  
26 Water Resources.

27 <sup>11</sup> NSE Ex. 245, Hearing on Interim Order 1303, official records of the Division of Water Resources.

28 <sup>12</sup> See MOA Pumping Study performed by the parties to the MOA pursuant to Order 1169,  
[http://water.nv.gov/mapping/order1169/Order\\_1169\\_Final\\_Reports/SNWA%20Order%201169%20Report.pdf](http://water.nv.gov/mapping/order1169/Order_1169_Final_Reports/SNWA%20Order%201169%20Report.pdf).

groundwater tributary to the MRFS. That action started by NSE Order 1169, implemented by the MOA and Study, and culminated in NSE Order 1309, which exclusively benefits some water rights owners, which are the parties to the MOA, and specifically and exclusively damages all water rights owners in the LWRFS, all without protections of due process, equal protection, and other Constitutional and legal rights accorded for all water rights owners in the LWRFS; especially damaging APEX, DRY LAKE, and *inter alios*.

Some water rights owners, as parties to the MOA and Study, admit that some water rights owners as Petitioners now seek court orders modifying NSE Order 1309 in such a way as to grant them more rights to water in the LWRFS and MRFS, at the expense of and direct and immediate damage to all water rights owners in the LWRFS; especially damaging APEX, DRY LAKE, and *inter alios*.

APEX and DRY LAKE do not support any conclusion of fact or law, which due to the MOA and Study, and all actions, evidence and resulting NSE Order 1169, and its subsequent Orders 1169A, 1303, and 1309 developed by or because of such MOA and Study, which would have the effect of: first, that thereby subjects the DRY LAKE water rights to the adverse restriction or limitation on beneficial use of groundwater due to the alleged tributary nature of such groundwater pumping in the LWRFS to the natural springs, streams and groundwater tributary to the MRFS, and thus, second, because of that tributary Order 1309, finds that the LWRFS is tributary to the Colorado River Flow System, and thus, third, subjects the LWRFS to severe restrictions imposed by the allocation methods of water use between states by restrictions and limitations pursuant to the Law of the River.<sup>13</sup>

APEX and DRY LAKE take the factual and legal position that if any restrictions or limitations on the use of ground or surface water in the LWRFS is determined to be necessary for meeting the requirements of the Moapa Dace or senior surface or ground water rights in the

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<sup>13</sup> See, for example, <https://www.usbr.gov/lc/region/pao/lawofrvr.html>.

1 MRFS or the Colorado River Flow System, it is the sole and exclusive obligation and  
2 responsibility of some water rights owners, who are the parties to the MOA, Study and NSE,  
3 who agreed between themselves to the exclusion of all water rights owners, that there was a  
4 detrimental impact on existing water rights and the environment by pumping of groundwater in  
5 the LWRFS.<sup>14</sup>

6 The NSE issued Order 1303, based upon the MOA, and Order 1169, which started a  
7 hearing process resulting in Order 1309 before the Court today, where only four factual issues  
8 (and no legal issues) could be addressed. This is based upon the factual assumption and  
9 conclusion of the MOA and resulting Study pumping tests of the LWRFS that groundwater use  
10 in the LWRFS was tributary to the MRFS, and, thus, the LWRFS had to be limited and restricted  
11 on beneficial use of water rights to protect the Moapa Dace and the senior water rights of the  
12 parties to the MOA; which is thereby detrimental to the property rights in water by all water  
13 rights owners in the LWRFS; especially damaging APEX, DRY LAKE, and *inter alios*..

14 By written admission of the NSE and parties to the MOA, the limitation against APEX  
15 and DRY LAKE to submit additional evidence and law other than to the four factual issues, was  
16 and is arbitrary and capricious, and a denial of the protections of due process, equal protection,  
17 and other Nevada Constitutional and legal rights for the APEX and DRY LAKE water rights,  
18 and also, incidentally, all water rights owners in the LWRFS.

19 To the extent that APEX and/or DRY LAKE did or did not participate in the process by  
20 the NSE and MOA parties resulting in Order 1309, APEX and/or DRY LAKE so acted to avoid  
21 being complicit in, or a party to, the denial of the protections of due process, equal protection,  
22 and other Constitutional and legal rights for the APEX and DRY LAKE water rights, and also,  
23 incidentally, all water rights owners in the LWRFS. APEX and DRY LAKE only participated to  
24 the extent necessary to be a part of any comprehensive or conjunctive use management plan  
25

26  
27  
28 <sup>14</sup> Petition at lines 8-15, page 3.

1 voluntarily developed by 100% of all water rights owners of the LWRFS and MRFS as stated in  
2 NSE Order 1303.<sup>15</sup>

3 The NSE and parties to the MOA knew, and have known at all relevant times, that neither  
4 the NSE or MOA parties have the right, duty, power or responsibility to impose a comprehensive  
5 or conjunctive use management plan or any other management plan, which thereby would erase  
6 the protection of prior appropriation for all water rights owners in the LWRFS, in favor of the  
7 prior rights of appropriation of some water rights owners, SNWA, and the parties to the MOA.<sup>16</sup>

8 As stated in Order 1309, all factual calculations of groundwater water usage and the  
9 resulting impact of that groundwater usage on LWRFS or MRFS water rights or the Moapa Dace  
10 were “estimates,” “assumptions,” “considered to be,” and other words connoting approximation  
11 and guess to the extent that the range of values testified to were between 4,000 acre feet per year  
12 (“AFY”) or less and 10,000 AFY or more.<sup>17</sup>

13 The NSE stated that the hearings which resulted in Order 1309 were “... not to resolve or  
14 address allegations of conflict between groundwater pumping within the LWRFS and ... MRFS  
15 ... decreed rights.” However, by Order 1309, the NSE then went forward and found and ordered  
16 upon that finding in Order 1309 that LWRFS groundwater pumping did, in fact, capture MRFS  
17 flows and therefore must be limited to 8,000 AFY, pending further investigations.<sup>18</sup>

18  
19  
20  
21  
22 <sup>15</sup> Petition, lines 18-19, page 4. See, for example, the guidance of the reasoning in the contemporaneous  
23 *Diamond Valley Aquifer* case striking down as arbitrary and capricious, pursuant to NRS 533.325 and  
24 NRS 533.345, the NSE Order 1302, (*Bailey vs. Wilson*, Case No. CV-1902-348 consolidated with case  
25 nos. CV-1902-349 and CV-1902-350, Seventh Judicial District, April 27, 2020 [*Bailey vs. Wilson*].)

26 <sup>16</sup> See *Bailey vs. Wilson*, and see also, *Ormsby County v. Kearny*, 37 Nev. 314, 142 P. 803, 820 (1914).

27 <sup>17</sup> Order 1309 at pages 57 and 61. See also, for example, the MOA Pumping Study performed by the  
28 parties to the MOA pursuant to Order 1169,  
[http://water.nv.gov/mapping/order1169/Order\\_1169\\_Final\\_Reports/SNWA%  
20Order%201169%20Report.pdf](http://water.nv.gov/mapping/order1169/Order_1169_Final_Reports/SNWA%20Order%201169%20Report.pdf).

<sup>18</sup> Petition, at lines 11-24, page 6, and Order 1309.

1     **III.       GROUNDS FOR THE PETITION**

2             **A.     ISSUES FOR RESOLUTION.**

3             This matter involves resolving fundamental issues of the State of Nevada Constitutional  
4     law, statutory law, facts, findings and orders by the NSE, rights, duties and responsibilities of the  
5     NSE, and conforming NSE Order 1309 to the Constitution of the United States of America and  
6     Constitution of Nevada, and related acts of Congress and Nevada, statutes, treaties, laws, and  
7     regulations of America and Nevada.

8             **B.     ARBITRARY AND CAPRICIOUS, AND UNCONSTITUTIONAL**  
9             **VIOLATION OF NEVADA CONSTITUTION AND LAW NRS 533.025.**

10            The NSE determined and issued Order 1309 upon a frail reed of evidence, which is  
11     highly controverted, directly conflicting, internally inconsistent, unsupported in many contexts  
12     and inconsistent with prior orders of the NSE, and evidence submitted by all parties to the  
13     hearings and proceeding resulting in Order 1309, that the LWRFS is tributary to the natural  
14     sources of springs, surface water and groundwater tributary to the MRFS. Thus, NSE Order  
15     1309 directly and immediately caused the water rights and water supply of the entire LWRFS  
16     (and ultimately potentially the entire White River Flow System [“WRFS”]) to be subject to  
17     curtailment for the benefit of the other states and other states’ water rights holders under the Law  
18     of the River. By Order 1309, finding the waters of the LWRFS to be tributary to the Colorado  
19     River Flow System, the NSE thereby deprived the public of the State of Nevada of the beneficial  
20     use of the surface and groundwaters of the State of Nevada, which surface and underground  
21     waters belong to the public, subject to prior appropriation for beneficial use, and which waters  
22     have been awarded and owners thereof are requesting the award of a decree of appropriation, and  
23     permit to utilize the appropriated waters. The Order 1309 finding is beyond the rights, duties,  
24     and responsibilities of the NSE and is an arbitrary, capricious, and unconstitutional violation of  
25     Nevada Constitution and law.

26            **C.     ARBITRARY AND CAPRICIOUS AND DIRECT UNENFORCEABLE**  
27            **VIOLATION OF THE ACT OF CONGRESS.**

28            The land owned by APEX, and by necessary implication the water rights owned by DRY  
   LAKE required to serve those lands, were carved out of the USA public domain by an Act of

1 Congress for the purpose of serving the crucial national interest, and the public health, safety,  
2 and welfare interests of Clark County and the State of Nevada. As such, to the extent that NSE  
3 Order 1309 defeats or interferes with achieving the intent and purposes of the Act of Congress,  
4 NSE Order 1309 is invalid and unenforceable.

5 **D. THE NSE ORDER 1309 CONFLICTS WITH A PRIOR CONTROLLING**  
6 **DECISION AND REGULATION AND IS VIOLATIVE OF NEVADA**  
7 **CONSTITUTION AND LAW.**

8 The LWRFS previously has been declared as water eligible for “Intentionally Created  
9 Surplus Credits” for the Colorado River System, as being not tributary to the MRFS, except by  
10 importation. Thus, the findings of the tributary nature of the LWRFS to the MRFS, and thence  
11 to the Colorado River Flow System in NSE Order 1309, is contrary to prior studies and  
12 regulations under the Law of the River.

13 **E. THE SEO HAS NO AUTHORITY TO REGULATE OR RESTRICT**  
14 **LWRFS WATER USE FOR PROTECTION OF THE MOAPA DACE AS**  
15 **PARTIES TO NSE ORDER 1169 AND THE MOA VOLUNTARILY HAVE**  
16 **ALREADY ADDRESSED AND RESOLVED THE ISSUE.**

17 *See, for example the following quote from the MOA Study conducted under Order 1169:*

18 “SNWA conducts biological resource monitoring and habitat restoration in  
19 accordance with a 2006 Memorandum of Agreement (MOA) and associated  
20 Biological Opinion to conserve the endangered Moapa dace during development  
21 of its permitted groundwater rights Coyote Spring Valley. In April 2006, the  
22 MOA was entered into by the following five parties: SNWA, USFWS, CSI,  
23 MBPI, and MVWD, to conserve and recover the Moapa dace while developing  
24 and using permitted water rights.” Paragraph N of the MOA states: “... the  
25 Parties have identified certain conservation measures with the objective of making  
26 measurable progress toward the conservation and recovery of the Moapa dace,  
27 and have agreed to coordinate the monitoring, management, and mitigation  
28 measures ....” As of 2013, all efforts associated with the MOA have been or are  
being implemented. In addition to the trigger elevations established under the  
MOA at the USGS 09415920 Warm Springs West near Moapa, Nevada (Warm  
Springs West) gage, under which groundwater development by the section  
3.0203.0 Order 1169 Monitoring and Related Studies Parties would be  
incrementally curtailed if flows declined to specific levels, the MOA Parties  
agreed to a series of conservation measures for the Moapa dace. These measures  
included contributions of roughly \$1.275 million for Moapa dace habitat  
restoration, the development of an ecological model of Moapa dace habitat,  
installation of fish barriers, and eradication of non-native fish. To date, the  
Parties have provided the identified funds; completed habitat restoration specified  
under the MOA with additional restoration ongoing; substantially completed the  
ecological model; installed one fish barrier with another planned; and efforts to

1 eradicate non-native fish have been implemented and are continuing as needed.  
2 In 2007, SNWA purchased the 1,220-acre parcel formally known as the "Warm  
3 Springs Ranch," which was the largest tract of private property along the Muddy  
4 River and contains the majority of the historical habitat for the endangered Moapa  
5 dace. SNWA renamed the property the Warm Springs Natural Area (WSNA) and  
6 is managing it as a natural area for the benefit of native species and for the  
7 recovery of the endangered Moapa dace, as described in the WSNA Stewardship  
8 Plan dated June 2011. Stream restoration activities on the WSNA began in late  
9 2008 and continued through 2012, resulting in improvements to habitat where the  
10 Moapa dace currently are present. The population count of the Moapa dace is a  
11 key indicator of species well-being in the headwaters of the Muddy River. Recent  
12 population counts indicate the Moapa dace population began to rise during 2010  
13 and 2011 and nearly doubled in 2012. Thus, the MOA conservation actions have  
14 resulted in measurable progress towards conservation and recovery of the Moapa  
15 dace, during which groundwater development for beneficial use and to meet the  
16 objectives of the Order 1169 Study has occurred. Figure10 shows the population  
17 of the Moapa dace from 1994 to the present."<sup>19</sup>

11 **F. THE DUTIES OF THE NSE DO NOT EXTEND TO THE ACTIONS**  
12 **TAKEN UNDER NSE ORDER 1309, AND THEREFORE NSE ORDER**  
13 **1309 IS ARBITRARY AND CAPRICIOUS AND CONTRARY TO**  
14 **NEVADA CONSTITUTION AND LAW.**

15 "The mission of the Nevada Division of Water Resources (NDWR) is to  
16 conserve, protect, manage and enhance the State's water resources for Nevada's  
17 citizens through the appropriation and reallocation of the public waters. In  
18 addition, the Division is responsible for quantifying existing water rights;  
19 monitoring water use; distributing water in accordance with court decrees;  
20 reviewing water availability for new subdivisions and condominiums; reviewing  
21 the construction and operation of dams; appropriating geothermal water; licensing  
22 and regulating well drillers and water rights surveyors; reviewing flood control  
23 projects; monitoring water resource data and records; and providing technical  
24 assistance to the public and governmental agencies."<sup>20</sup>

25 Nothing said therein permits the NSE to make a determination of tributary connection,  
26 which would have the immediate effect of making waters of the public of Nevada and water  
27 rights of the LWRFS subject to the Law of the River, and, thus, subject to curtailment for the  
28 benefit of other states in the Colorado River Flow System.

25 <sup>19</sup> See

26 [http://water.nv.gov/mapping/order1169/Order\\_1169\\_Final\\_Reports/SNWA%20Order%201169%20Repo](http://water.nv.gov/mapping/order1169/Order_1169_Final_Reports/SNWA%20Order%201169%20Report.pdf)  
27 [rt. pdf](http://water.nv.gov/mapping/order1169/Order_1169_Final_Reports/SNWA%20Order%201169%20Report.pdf) at Section 3.4.2, page 19.

28 <sup>20</sup> See <http://water.nv.gov/> and see also <https://www.leg.state.nv.us/NRS/NRS-532.html>.



1           **G.     THE NSE ORDER 1309 WAS ISSUED ON A FLAWED FACTUAL BASIS**  
2           **OF THE CONNECTION BETWEEN LWRFS PUMPING AND MRFS**  
3           **SENIOR WATER RIGHTS, WHICH IS DIRECTLY CONTRARY TO THE**  
4           **FINDINGS OF THE MOA PUMPING STUDY.**

5           “This clearly demonstrates that nearby carbonate pumping is not influencing  
6           Muddy River flows at the Moapa gage and is therefore not influencing senior  
7           Muddy River surface-water rights.” “Thus, the conclusions drawn in the previous  
8           section regarding the lack of influence of carbonate pumping on flows in the  
9           Muddy River are supported, as is the conclusion that NVE alluvial pumping is  
10          capturing water that would have otherwise constituted Muddy River water  
11          apportioned under the 1920 Muddy River decree.”

12           **H.     DUE PROCESS AND EQUAL PROTECTION, DEPRIVATION AND**  
13           **VIOLATION.**

14          The SEO restricted the presentation of all forms of evidence by APEX and DRY LAKE,  
15          inter alios, including facts and law, as evidence in arriving at NSE Order 1309. NSE Order 1309  
16          was based solely upon four factual issues, which already had presumed that the waters of the  
17          LWRFS were tributary to the MRFS.

18           **I.     VIOLATION OF THE PRECEDENTIAL RULING AGAINST THE NSE**  
19           **IN THE DIAMOND VALLEY CASE (*BAILEY VS. WILSON*).**

20          The well-reasoned and substantial contemporaneous District Court case of *Bailey vs.*  
21          *Wilson* is instructive regarding the exercise of powers by the NSE. Simply, what Order 1309  
22          does is subvert the priority of the appropriation system of Nevada, which the case of *Bailey vs.*  
23          *Wilson* holds as arbitrary and capricious and contrary to Nevada law. There is no law authorizing  
24          the NSE to voluntarily give to the other Colorado Basin States non-tributary waters of the  
25          LWRFS in Nevada, which belongs to the people of Nevada subject to the doctrine of prior  
26          appropriation. Instead by Order 1309, the NSE adopts the words and arguments of the  
27          Department of the Interior (USFWS, NPS, Bu Rec and etc. federal agencies), which are in  
28          charge of administering the Law of the River, and, thus, have adverse interests to the public of  
Nevada, who otherwise would enjoy the sole and exclusive use of the waters of the LWRFS. As  
*Bailey vs. Wilson* holds, the sole right, duty and responsibility of the NSE is to work toward the  
jointly created comprehensive and conjunctive management plan by all water rights owners in  
the LWRFS or have the Legislature of Nevada create the basis for the NSE to declare a Critical  
Management Area, pursuant to NRS 534.037.100. And even then, no law can be passed which

1 would make the LWRFS tributary to the MRFS and, thus, subject to curtailment for the benefit  
2 of other states of the Colorado River Flow System under the Law of the River. The NSE cannot  
3 be heard to state that Nevada would suffer liability for failure to protect the Moapa Dace because  
4 the case of *Strahan vs. Coxe*, 127 F.3d 155 (1st Circuit, 1997), cert. den. 525 U.S. 830 (1998)  
5 holds that no such liability attaches due to the NSE issuing permits which withdraw water that  
6 reduces the flow of springs that form the habitat of the Moapa Dace or otherwise cause harm to  
7 the Moapa Dace.

#### 8 **IV. CONCLUSION**

9 For the foregoing reasons, and for other reasons that may be discovered and raised during  
10 the pendency of the hearing on the original Petition, this Petition for Judicial Review, and other  
11 similar Petition or Cross-Petition filed in this proceeding or consolidated with this proceeding,  
12 APEX and DRY LAKE request that the Court order the NSE to withdraw, amend or otherwise  
13 strike findings made in NSE Order 1309, regarding the tributary connection and nature of the  
14 LWRFS to the natural springs, headwaters and water supplies for, and to, the MRFS, so as to not  
15 deprive APEX and DRY LAKE of its land use, water rights, duties and responsibilities to  
16 comply with the national interest and interests of Clark County and the State of Nevada provided  
17 for in the Act of Congress, and also seek a Court order such that APEX and DRY LAKE may  
18 exercise their Black Mountain Basin and Garnet Basin groundwater rights and temporary permits  
19 in the LWRFS as non-tributary groundwater to the MRFS without limitation, interference,  
20 restrictions or delay, and specifically exempting those water rights from reductions due to the  
21 Moapa Dace, MRFS senior water rights, or the Law of the River.

22 Dated this 10th day of July, 2020.

23 MARQUIS AURBACH COFFING

24  
25 By /s/ Christian T. Balducci  
26 Christian T. Balducci, Esq.  
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**CERTIFICATE OF SERVICE**

I hereby certify that I served foregoing **PETITION FOR JUDICIAL REVIEW OF ORDER 1309** with a copy of this document by mailing via US Postal Service, Certified, on the 10<sup>th</sup> day of July, 2020, addressed to:

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I hereby further certify that I issued and caused to be served the foregoing **PETITION**  
**FOR JUDICIAL REVIEW OF ORDER 1309** with a copy of this document via process server  
on the 13<sup>th</sup> day of July, 2020:

Tim Wilson P.E., State Engineer  
Nevada Division of Water Resources Dept. of Conservation and Natural Resources  
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Carson City, NV 89701

/s/ Cheryl Becnel  
An employee of Marquis Aurbach Coffing

ATTACHMENT 5

ATTACHMENT 5

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Steven D. Grierson  
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2020 JUL 13 PM 3:24

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16 *Attorneys for Petitioner*

18 DISTRICT COURT

19 CLARK COUNTY, NEVADA

20 CENTER FOR BIOLOGICAL DIVERSITY,

21 Petitioner,

22 vs.

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

27 Respondents.

Case No. \_\_\_\_\_

Dept No. \_\_\_\_\_

PETITION FOR JUDICIAL REVIEW OF  
ORDER 1309

1 Petitioner, the CENTER FOR BIOLOGICAL DIVERSITY, by and through its counsel,  
2 Julie Cavanaugh-Bill of CAVANAUGH-BILL LAW OFFICES, LLC, hereby requests, pursuant  
3 to NRS § 533.450(1), that this Court review Order 1309, issued by Respondents TIM WILSON,  
4 P.E., Nevada State Engineer, and DIVISION OF WATER RESOURCES, DEPARTMENT OF  
5 CONSERVATION AND NATURAL RESOURCES on June 15, 2020, and attached hereto as  
6 Exhibit 1. Petitioner alleges as follows:

7 **PARTIES**

8 1. Respondent TIM WILSON, P.E. is the State Engineer of the State of Nevada,  
9 Division of Water Resources, and is sued in his official capacity.

10 2. Respondent DIVISION OF WATER RESOURCES, DEPARTMENT OF  
11 CONSERVATION AND NATURAL RESOURCES is a governmental division of the State of  
12 Nevada.

13 3. Petitioner, the CENTER FOR BIOLOGICAL DIVERSITY ("the Center"), is a  
14 national, non-profit conservation organization incorporated in California and headquartered in  
15 Tucson, Arizona. The Center has over 74,000 members including members who reside in Nevada.  
16 The Center has offices throughout the United States and Mexico, including in Arizona, California,  
17 Florida, Hawaii, Idaho, Minnesota, Nevada, New Mexico, New York, North Carolina, Oregon,  
18 Washington, Washington D.C., and La Paz, Baja California Sur, Mexico. Many of the Center's  
19 members who reside in Nevada and neighboring states live, visit, or recreate in and near areas  
20 directly affected by Order 1309. In particular, the Center and its members have educational,  
21 scientific, biological, aesthetic and spiritual interests in the survival and recovery of the Moapa  
22 dace, a small fish endemic to the Muddy River Springs Area within the Lower White River Flow  
23 System. The Moapa dace is imperiled by diminishing spring flows caused by groundwater  
24 pumping in the Lower White River Flow System, and is listed as endangered under the Federal  
25 Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.* To protect its interests in the survival and  
26 recovery of the Moapa dace the Center submitted technical reports pursuant to Nevada State  
27 Engineer Order 1303 and participated in a public hearing before the State Engineer, held between  
28



1 September 23, 2019 and October 4, 2019, the ultimate outcome of which was Order 1309. The  
2 Center is aggrieved by the State Engineer's decision because the interests of the Center and its  
3 members in the survival and recovery of the Moapa Dace will suffer long-term harmful impacts  
4 from the groundwater drawdown and springflow reductions authorized under Order 1309.

5 **JURISDICTION AND VENUE**

6 4. This Court has jurisdiction over this action pursuant to NRS § 533.450 (Orders and  
7 decisions of the State Engineer subject to judicial review).

8 5. The Court has the authority to review the State Engineer's Order, and grant the  
9 relief requested, pursuant to NRS § 533.450. All requirements for judicial review have been  
10 satisfied.

11 6. Venue is proper before this Court pursuant to NRS § 533.450. Clark County is a  
12 "county in which the matters affected or a portion thereof are situated." NRS § 533.450(1).  
13 Therefore, the Eighth Judicial District Court of the State of Nevada in and for Clark County is the  
14 proper venue for judicial review.

15 7. In addition, the subject matter of the petition involves decreed waters of the Muddy  
16 River Decree. Under NRS § 533.450(1), "on stream systems where a decree of court has been  
17 entered, the action must be initiated in the court that entered the decree." This court has proper  
18 jurisdiction over the Muddy River Decree, *Muddy Valley Irrigation Company et al., v. Moapa Salt*  
19 *Lake Produce Company*, Case No. 377, which was entered in the Tenth Judicial District of the  
20 State of Nevada, in and for Clark County, in 1920.<sup>1</sup>

21 8. The State Engineer's order and the matters affected by it are the subject of related  
22 litigation pending before this Court. *See* Petition for Judicial Review of Order 1309, *Las Vegas*  
23 *Valley Water Dist. & S. Nev. Water Auth. v. Nev. State Eng'r*, Case No. A-20-816761-C (June 17,  
24 2020).

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25  
26 <sup>1</sup> In 1920, the Tenth Judicial District consisted of Clark County and Lincoln County. In 1945, Clark  
27 County was designated as the Eighth Judicial District.  
28

## FACTUAL BACKGROUND

### I. The Lower White River Flow System

9. The Lower White River Flow System (“LWRFS”) is a geographically vast complex of hydrologically connected groundwater aquifers in Southern Nevada. The groundwater in these aquifers is contained within and flows through a fairly continuous layer of carbonate rock that extends below several geographically distinct basins or valleys in Clark and Lincoln counties, including Coyote Springs valley, the Black Mountains region, Garnet Valley, the California Wash basin, Hidden Valley, Kane Springs Valley,<sup>2</sup> and the Muddy River Springs Area (“MRSA”).<sup>3</sup>

10. This carbonate-rock aquifer complex is “highly transmissive,” meaning that pumping from anywhere within the carbonate aquifer system rapidly affects groundwater levels and spring flows throughout the entire Lower White River Flow System.<sup>4</sup>

11. The interconnected, highly transmissive carbonate-rock aquifers of the Lower White River Flow System ultimately discharge (*i.e.*, exit the aquifer) into the Colorado River.<sup>5</sup> The main points of discharge are the Muddy River Springs, located in the Muddy River Springs Area within and adjacent to the Moapa National Wildlife Refuge in Clark County.<sup>6</sup> The springs form

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<sup>2</sup> In Order 1309, the State Engineer determined that Kane Springs Valley should be included within the boundary of the Lower White River Flow System due to a “close hydraulic connection.” Exhibit 1 at 52 (CBD000052) (exhibits referenced in this Petition are filed concurrently in a separate Appendix, references to the bates stamped page numbers in the Appendix are provided as “CBD\_\_\_”). The Center agrees with and supports the State Engineer’s conclusion on this issue as set forth in Order 1309.

<sup>3</sup> Exhibit 1 at 46, 51-54 (CBD000046, CBD000051-54).

<sup>4</sup> Exhibit 7 at 26 (CBD000170).

<sup>5</sup> *Id.* at 21 (CBD000165).

<sup>6</sup> *Id.*

1 the headwaters of the Muddy River, which then flows from the Refuge area into the Colorado  
2 River at Lake Mead.<sup>7</sup> Significantly smaller quantities of groundwater may discharge from the  
3 Lower White River Flow System through other springs near the shore of Lake Mead, or seep  
4 directly into the Colorado River through a hydrologically distinct “basin-fill” aquifer in the Muddy  
5 River Springs area.<sup>8</sup>

6 12. The Muddy River springs are thus directly connected to the regional carbonate-rock  
7 aquifers of the Lower White River Flow System.<sup>9</sup> Because of this connection, flows from the  
8 springs can change rapidly in direct response to changes in carbonate groundwater levels.<sup>10</sup> Put  
9 differently, groundwater withdrawals from anywhere within the carbonate aquifer complex  
10 intercept, or “capture,” water that would otherwise flow from the Muddy River springs and into  
11  
12  
13  
14

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15 <sup>7</sup> See generally *id.*

16 <sup>8</sup> *Id.* at 25-26 (CBD000169-70). The “basin-fill” and carbonate aquifers in the Lower White River  
17 Flow system exist within different geologic layers and are fed by different sources of water.  
18 Data on the effects of groundwater pumping indicates that the basin fill aquifers in the Muddy  
19 River Springs area are connected to the carbonate aquifer, while the basin fill aquifers in  
20 Coyote Springs Valley to the northwest are separate from the carbonate. *Id.* at 13  
21 (CBD000157). Consequently, the carbonate aquifer near the Muddy River Springs feeds water  
22 into, or “recharges,” the basin fill aquifer, but there is no such connection between the  
23 carbonate and basin fill in the Coyote Springs Valley. *Id.* There is no evidence that the basin  
24 fill recharges the carbonate anywhere in the Lower White River Flow system. *Id.*

25 <sup>9</sup> *Id.* at 15 (CBD000159); Exhibit 8 at 29 (CBD000200).

26 <sup>10</sup> Exhibit 8 at 29 (CBD000200).  
27  
28

1 the Muddy River.<sup>11</sup> Over the long term, pumping from the carbonate aquifer captures discharge—  
2 including spring flow—at nearly a one-to-one ratio.<sup>12</sup>

3 13. Springflows in the Muddy River Springs Area are dependent on the elevation of  
4 groundwater within the carbonate aquifer; as carbonate groundwater levels decline, springflows  
5 decrease, beginning with the highest-elevation springs.<sup>13</sup> Over time, as groundwater levels  
6 continue to decline, pumping will gradually and increasingly affect lower-elevation discharge as  
7 well.<sup>14</sup> The higher-elevation Muddy River springs are therefore more rapidly and more severely  
8 affected by carbonate groundwater pumping than lower-elevation springs and other sources of  
9 discharge, and the higher-elevation springs—which harbor the vast majority of Moapa dace—will  
10 dry up before flows are significantly reduced in the lower-elevation springs or the Muddy River  
11 system more generally.<sup>15</sup>

12 14. Springflows and groundwater levels in the Muddy River Springs Area began to  
13 decline in the 1990s as carbonate groundwater pumping increased.<sup>16</sup> From 2000 to 2010 carbonate  
14 pumping rose from about 4,800 to about 7,200 acre-feet per year,<sup>17</sup> while spring flows (as  
15 measured at the Warm Springs West gauge in the Moapa National Wildlife Refuge) declined from  
16 about 4.0 cubic feet per second (cfs) to as low as 3.4 cfs between the 1990s and mid-2000s.<sup>18</sup> The

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19 <sup>11</sup> *Id.*

20 <sup>12</sup> *Id.*

21 <sup>13</sup> *Id.*

22 <sup>14</sup> *Id.*

23 <sup>15</sup> *Id.*; Exhibit 4 at 24 (CBD000108).

24 <sup>16</sup> Exhibit 7 at 24 (CBD000168).

25 <sup>17</sup> *Id.* at 22 (CBD000166).

26 <sup>18</sup> *Id.* at 16 (CBD000160).

1 smaller, high-altitude Muddy River springs are currently flowing at little more than half of their  
2 1990s average.<sup>19</sup>

### 3 **II. The Moapa Dace**

4 15. The Moapa dace (*Moapa coriacea*) is endemic to the Muddy River Springs Area.<sup>20</sup>  
5 The dace was federally listed as endangered in 1967.<sup>21</sup>

6 16. The Moapa dace is found only in the upper tributaries of the Muddy River.<sup>22</sup>  
7 Approximately 95 percent of the total population occurs within 1.78 miles of one major tributary  
8 that flows from three high-elevation spring complexes within the Muddy River Springs area.<sup>23</sup>

9 17. Threats to the Moapa Dace include non-native predatory fishes, habitat loss from  
10 water diversions and impoundments, wildfire risk from non-native vegetation, and groundwater  
11 development in the Lower White River Flow System which, as noted, decreases spring flows in  
12 the Muddy River Springs area.<sup>24</sup>

13 18. The Moapa Dace is vulnerable to unpredictable catastrophic events due to its  
14 limited distribution and small population size.<sup>25</sup>

### 15 **III. Order 1169 Pump Test**

16 19. The State Engineer issued Order 1169 in March 2002 after receiving several  
17 applications to appropriate groundwater from the Coyote Springs Valley, Black Mountains Area,  
18  
19

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20 <sup>19</sup> *Id.* at 22-24 (CBD000166-68).

21 <sup>20</sup> Exhibit 1 at 4 (CBD000004).

22 <sup>21</sup> *Id.*

23 <sup>22</sup> Exhibit 4 at 24 (CBD000108).

24 <sup>23</sup> *Id.*

25 <sup>24</sup> *Id.* at 15 (CBD000099).

26 <sup>25</sup> *Id.*

1 Garnet Valley, Hidden Valley, California Wash, and Muddy River Springs Area hydrographic  
2 basins.<sup>26</sup>

3 20. Order 1169 held in abeyance all pending groundwater applications in the Coyote  
4 Springs Valley, Black Mountains Area, Garnet Valley, Hidden Valley, Muddy River Springs Area,  
5 and Lower Moapa Valley hydrographic basins pending a test of the regional carbonate aquifer  
6 system.<sup>27</sup> The State Engineer explained that he did not believe it prudent to issue additional  
7 groundwater rights in the regional carbonate aquifer complex until a significant portion of then-  
8 existing groundwater rights were pumped for a substantial period of time to determine whether  
9 development of those water rights would adversely impact senior water rights or the  
10 environment.<sup>28</sup>

11 21. Order 1169 required that at least 50 percent, or 8,050 acre-feet per year, of then-  
12 existing water rights in Coyote Spring Valley be pumped for at least two consecutive years.<sup>29</sup> In  
13 April 2002 the State Engineer added the California Wash basin to the Order 1169 pump test  
14 basins.<sup>30</sup>

15 22. The Order 1169 pump test began in November 2010 and concluded in December  
16 2012.<sup>31</sup> During the test an average of 5,290 acre-feet per year was pumped from carbonate-aquifer  
17 wells in Coyote Springs Valley and a cumulative total of 14,535 acre-feet per year was pumped  
18 throughout the Order 1169 study basins.<sup>32</sup>

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20 <sup>26</sup> Exhibit 1 at 3 (CBD000003).

21 <sup>27</sup> *Id.*

22 <sup>28</sup> *Id.*; Exhibit 2 at 7 (CBD0000075).

23 <sup>29</sup> Exhibit 1 at 3 (CBD000003).

24 <sup>30</sup> *Id.*

25 <sup>31</sup> *Id.* at 5 (CBD000005).

26 <sup>32</sup> *Id.* at 6 (CBD000006).

1           23.     The Order 1169 pump test results demonstrated that there is a “unique” and “direct  
2 hydraulic connection” between the regional carbonate aquifer complex and the Muddy River  
3 springs, and that pumping from anywhere within the carbonate aquifer complex captures flows  
4 that would otherwise ultimately discharge from the Muddy River springs.<sup>33</sup> The pump test caused  
5 “sharp declines” in groundwater levels and flows from the highest-elevation Muddy River springs,  
6 which are considered the “canary in the coalmine” regarding the impacts of pumping on  
7 streamflow and Moapa dace habitat.<sup>34</sup>

8           24.     On January 29, 2014, after reviewing the pump test results, the State Engineer  
9 found that “pumping under the Order 1169 test measurably reduced flows in headwater springs of  
10 the Muddy River,” and that, “if pending water right applications were permitted and pumped in  
11 addition to existing groundwater rights in Coyote Spring Valley and the other Order 1169 basins,  
12 headwater spring flows would be reduced in tens of years or less to the point that there would be  
13 a conflict with existing rights.”<sup>35</sup>

14           25.     The State Engineer also found that, “to permit the appropriation of additional  
15 groundwater resources in the Coyote Spring Valley . . . would impair protection of these springs  
16 and the habitat of the Moapa dace and therefore threatens to prove detrimental to the public  
17 interest.”<sup>36</sup>

18           26.     Finally, the State Engineer concluded that “only a small portion” of existing water  
19 rights, “may be fully developed without negatively affecting the endangered Moapa dace and its  
20 habitat or the senior decreed rights on the Muddy River.”<sup>37</sup>

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21  
22 <sup>33</sup> Exhibit 3 at 7-11 (CBD000086-90); Exhibit 5 at 26 (CBD0000137).

23 <sup>34</sup> Exhibit 3 at 7-11 (CBD000086-90); Exhibit 5 at 25 (CBD0000136).

24 <sup>35</sup> Exhibit 5 at 26 (CBD0000137).

25 <sup>36</sup> *Id.*

26 <sup>37</sup> Exhibit 6 at 2 (CBD000142).

1        27. Carbonate groundwater levels have not recovered since the completion of the Order  
2 1169 pump test and continue to decline despite a subsequent decrease in groundwater pumping.<sup>38</sup>  
3 Groundwater levels at the EH-4 monitoring well—a key location for evaluating pumping impacts  
4 to the Muddy River springs—reached an all-time low point on November 9, 2018.<sup>39</sup> Groundwater  
5 levels at other monitoring wells briefly recovered from the pump test but began trending downward  
6 again in early 2016.<sup>40</sup>

7        28. Spring flows have also exhibited a declining trend in recent years. Flows at the  
8 Warm Springs West gauge briefly recovered after the pump test from 3.3 to 3.6 cfs, but have been  
9 declining ever since.<sup>41</sup> As of fall 2019, flows at Warm Springs West were approximately 3.2 cfs.<sup>42</sup>

10 **IV. Order 1303**

11        29. On January 11, 2019, the State Engineer issued Interim Order 1303 to obtain  
12 stakeholder input on four specific factual matters related to information obtained during and after  
13 Order 1169 pump test: (1) the geographic boundary of the Lower White River Flow System, (2)  
14 aquifer recovery since the Order 1169 pump test, (3) the long-term annual quantity of groundwater  
15 that may be pumped from the Lower White River Flow System, and (4) effects on senior water  
16 rights of moving water rights between the carbonate and alluvial (or basin-fill) system.<sup>43</sup>

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21 <sup>38</sup> Exhibit 7 at 16 (CBD000160); Exhibit 8 at 3, 23-24 (CBD000174, CBD000194-95).

22 <sup>39</sup> Exhibit 8 at 23 (CBD000194).

23 <sup>40</sup> *Id.*

24 <sup>41</sup> *Id.*

25 <sup>42</sup> Exhibit 9 at 1519 (CBD000218).

26 <sup>43</sup> Exhibit 1 at 10 (CBD000010).



1        30.     On July 3, 2019, the Center submitted a technical report prepared by Dr. Tom  
2 Myers,<sup>44</sup> outlining responses to the four Order 1303 questions.<sup>45</sup> On August 16, 2019, the Center  
3 submitted a rebuttal report prepared by Dr. Myers, offering rebuttals to positions that other parties  
4 to the Order 1303 proceedings put forward in their July reports.<sup>46</sup> Dr. Myers's analysis of pumping  
5 rates, groundwater levels, and springflow demonstrated that current carbonate pumping rates are  
6 unsustainable, and that any pumping from the carbonate aquifer would ultimately reduce  
7 springflow in the Muddy River Springs Area and harm the Moapa dace.<sup>47</sup>

8        31.     Between September 23, 2019, and October 4, 2019, the State Engineer held a  
9 hearing on the stakeholder reports submitted pursuant to Order 1303. During the hearing, the  
10 Center presented expert testimony from Dr. Myers explaining further the basis for his conclusion  
11 that any additional carbonate pumping would reduce both groundwater levels and flows from the  
12 Muddy River Springs, thus adversely affecting the Moapa dace and senior decreed water rights.

13        32.     Dr. Myers's conclusions are based on the fundamental hydrologic principle that in  
14 any groundwater system the amount of discharge (water flowing out of the system) must equal the  
15 amount of recharge (water flowing into the system).<sup>48</sup> Pumping upsets this balance by removing  
16 groundwater that would otherwise exit the system as springflow or some other form of discharge.<sup>49</sup>  
17 Over time, the system may reach a new equilibrium or "steady state" in which the reduction in  
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19

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20        <sup>44</sup> Dr. Myers holds Masters and Doctorate degrees in hydrology/hydrogeology and has over thirty-  
21 seven years of experience in this field. *See generally* Exhibit 10 (CBD000219-29).

22        <sup>45</sup> *See generally* Exhibit 7 (CBD000145-71)

23        <sup>46</sup> *See generally* Exhibit 8 (CBD000172-201)

24        <sup>47</sup> Exhibit 7 at 25 (CBD000169); Exhibit 8 at 24 (CBD000195).

25        <sup>48</sup> *See* Exhibit 7 at 17 (CBD000161); Exhibit 8 at 24-27 (CBD000195-198).

26        <sup>49</sup> *See* Exhibit 8 at 24-27 (CBD000195-198).

1 discharge equals the amount being pumped.<sup>50</sup> But unless and until this occurs pumping will  
2 continue to reduce the amount of water that exits the system.<sup>51</sup> In the context of the Lower White  
3 River Flow system, the application of this principle is that carbonate groundwater pumping will  
4 reduce springflows in the Muddy River Springs Area unless and until the system reaches a steady  
5 state.<sup>52</sup>

6 33. Dr. Myers's reports and testimony explained that the Lower White River Flow  
7 System has not reached a steady state because groundwater levels and springflows continue to  
8 decline despite recent reductions in pumping and increasing annual precipitation rates.<sup>53</sup> After the  
9 conclusion of the Order 1169 pump test, and especially since 2014, total pumping has decreased  
10 and remained between 7,000 and 8,000 acre-feet per year—roughly equivalent to 1995-97 levels.<sup>54</sup>  
11 Precipitation, meanwhile, increased from 2014 through 2018.<sup>55</sup> Despite this reduction in pumping  
12 and increase in precipitation, carbonate groundwater levels and springflows have steadily  
13 declined.<sup>56</sup> As Dr. Myers explained, these decreases indicate that the system has not reached a  
14 steady state, and that even with current pumping levels, "it is only a matter of time before the  
15 spring flow on which the [Moapa] dace depends decreases significantly or is completely lost."<sup>57</sup>

16 34. Dr. Myers explained that there is very little recharge in the Lower White River Flow  
17 System, meaning that very little water enters the carbonate aquifer system from precipitation and  
18

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19 <sup>50</sup> *Id.* at 27 (CBD000198).

20 <sup>51</sup> *Id.*

21 <sup>52</sup> *Id.*

22 <sup>53</sup> *See* Exhibit 9 at 1513-14 (CBD000212-13).

23 <sup>54</sup> Exhibit 1 at 55 (CBD000055); Exhibit 8 at 22 (CBD000193).

24 <sup>55</sup> Exhibit 8 at 3 (CBD000174).

25 <sup>56</sup> *Id.* at 23 (CBD000194).

26 <sup>57</sup> Exhibit 7 at 25 (CBD000169); *see also* Exhibit 8 at 27-28 (CBD000198-99).

1 other sources.<sup>58</sup> Springflows will, therefore, not recover significantly even if pumping is stopped,  
2 and any damage done to the Moapa dace and its habitat from excessive pumping rates will be long-  
3 term and possibly irreversible.<sup>59</sup>

4 35. Dr. Myers also explained that carbonate pumping impacts Muddy River flows:  
5 “carbonate pumping would eventually dry the Muddy River Springs, but carbonate groundwater  
6 flow also supports basin fill water through direct discharge from the carbonate to the basin fill and  
7 secondary recharge of springflow into the basin fill. The long-term decline of flow in the Muddy  
8 River indicates there is a limit to the amount of even basin fill groundwater that can be pumped  
9 without affecting Muddy River flows. . . . Because the spring flow is directly responsible for  
10 Muddy River flows, preventing any additional carbonate pumpage is also necessary for protecting  
11 downstream water rights.”<sup>60</sup>

12 36. Several other stakeholders presented hydrological analyses that agreed with Dr.  
13 Myers. The Southern Nevada Water Authority, for instance, stated that “any groundwater  
14 production from the carbonate system within the [Lower White River Flow System] will ultimately  
15 capture discharge to the [Muddy River Springs Area].”<sup>61</sup> Modeling presented by National Park  
16 Service, meanwhile, “confirm[ed] that [groundwater] drawdown will increase and springflow  
17 [will] decrease regardless of pumping rate.”<sup>62</sup>

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22 <sup>58</sup> Exhibit 7 at 4, 17 (CBD000148, CBD000161).

23 <sup>59</sup> Exhibit 8 at 28 (CBD000199).

24 <sup>60</sup> Exhibit 7 at 26 (CBD000170).

25 <sup>61</sup> *Id.*

26 <sup>62</sup> Exhibit 8 at 27 (CBD000198).

1     **V.     Order 1309**

2           37.     On June 15, 2020, the State Engineer issued Order 1309, which set forth the State  
3 Engineer's conclusions regarding the four factual matters on which the State Engineer sought  
4 stakeholder input.<sup>63</sup>

5           38.     Order 1309 acknowledged that groundwater levels in the regional carbonate aquifer  
6 have "not recovered to pre-Order 1169 test levels," and that insufficient data exist to determine  
7 whether groundwater levels were approaching a "steady state."<sup>64</sup> Nevertheless, the State Engineer  
8 "agreed" with a minority of stakeholders who argued that water levels in the Muddy River Springs  
9 Area "may be approaching steady state."<sup>65</sup>

10          39.     In order 1309, the State Engineer also acknowledged that current pumping is  
11 capturing Muddy River flows, noting that Muddy River flows in headwaters at the Moapa Gage  
12 have declined by over 3,000 afy.<sup>66</sup> The State Engineer made a finding that "capture or potential  
13 capture of the waters of a decreed system does not constitute a conflict with decreed right holders  
14 if the flow of the source is sufficient to serve decreed rights."<sup>67</sup> The State Engineer provided a  
15 discussion of how those rights could potentially be met even with reduced headwater flows and  
16 then concluded that up to 8,000 acre-feet per year could continue to be pumped from the regional  
17

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18           <sup>63</sup> The Center agrees with and supports the State Engineer's conclusions on criteria 1 (the  
19 geographic boundary of the Lower White River System). The Center takes no position on the  
20 State Engineer's conclusions regarding criteria 4 (movement of water rights).

21           <sup>64</sup> Exhibit I at 57 (CBD000057).

22           <sup>65</sup> *Id.*

23           <sup>66</sup> Exhibit I at 61 (CBD000061) ("Flow in the Muddy River at the Moapa Gage has averaged  
24 approximately 30,600 afa since 2015, which is less than the predevelopment baseflow of about  
25 33,900." (Footnotes omitted).

26           <sup>67</sup> *Id.* at 60 (CBD000060).  
27  
28

1 carbonate aquifer without impacting the fully decreed water rights in the Muddy River, stating  
2 “reductions in flow that have occurred because of groundwater pumping in the headwaters basins  
3 is not conflicting with Decreed rights.”<sup>68</sup>

4 40. The state engineer’s decision does not consider the impacts of 8,000 acre-feet/yr of  
5 pumping on the Moapa dace or its habitat.

#### 6                     **GROUNDS FOR THE PETITION**

7 41. The State Engineer’s determination that up to 8,000 acre-feet per year (afy) may be  
8 sustainably pumped from the Lower White River Flow System is arbitrary, capricious, irrational  
9 and not supported by substantial evidence.<sup>69</sup> As noted, the 8,000 afy figure is based on the  
10 assumption that groundwater levels in the Muddy River Springs Area are approaching a “steady  
11 state” after the Order 1169 pump test.<sup>70</sup> However, the State Engineer acknowledged that  
12 insufficient data currently exist to determine whether this “steady-state” hypothesis is in fact  
13 accurate.<sup>71</sup> Moreover, the State Engineer’s determination ignored and/or arbitrarily dismissed  
14 compelling expert evidence proffered by multiple other stakeholders that groundwater levels  
15 continue to decline despite recent decreases in pumping, and thus indicating that the aquifer is not  
16 approaching equilibrium.<sup>72</sup>

17 42. The State Engineer failed to properly consider the environmental consequences of  
18 groundwater pumping in the Lower White River Flow System when determining the amount of  
19 groundwater that could be sustainably pumped. In Order 1309, the State Engineer acknowledged  
20

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21 <sup>68</sup> Exhibit 1 at 61 (CBD000061).

22 <sup>69</sup> *Id.*

23 <sup>70</sup> *Id.* at 57 (CBD000057).

24 <sup>71</sup> *See id.*

25 <sup>72</sup> *See id.* at 62 (CBD000062); Exhibit 7 at 24 (CBD000168); Exhibit 8 at 25, 28 (CBD000196,  
26 CBD000199).

1 that “issuing a permit to withdraw groundwater that reduces the flow” of the Muddy River Springs  
2 would harm the Moapa dace and violate the ESA.<sup>73</sup> The State Engineer further determined that a  
3 minimum spring flow of 3.2 cfs is necessary to maintain adequate habitat for the Moapa dace, and  
4 that more than 3.2 cfs may be required to support the recovery of the species.<sup>74</sup> However, in  
5 determining the amount of groundwater that could be sustainably pumped, the State Engineer  
6 failed to adequately consider how pumping would affect Moapa dace populations and habitat.<sup>75</sup>  
7 The State engineer’s determination regarding the long-term annual quantity of water that can be  
8 sustainably pumped is based on two conclusions: first, that “reductions in flow that have occurred  
9 because of groundwater pumping . . . [are] not conflicting with Decreed rights,”<sup>76</sup> and second, that  
10 “spring discharge may be approaching a steady state.”<sup>77</sup> As noted, the “steady-state” hypothesis is  
11 not consistent with the available data, which show a continuing decline in groundwater levels and  
12 springflow.<sup>78</sup> And neither the alleged “steady state” of the carbonate aquifer, nor the alleged  
13 absence of conflicts with senior decreed rights relate to whether the level of groundwater pumping  
14 ultimately selected (or any particular level of groundwater pumping) will provide sufficient flow  
15 from the Muddy River springs to ensure the long-term survival and recovery of the Moapa dace.  
16 Thus, the State Engineer failed to explain the basis for his conclusion that pumping at current  
17 levels will adequately protect the Moapa dace, and failed to comply with Nevada water law, which  
18 requires him to consider environmental impacts as a component of the public interest.

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20 <sup>73</sup> Exhibit 1 at 45 (CBD000045). The Center agrees with and supports the State Engineer’s analysis  
21 of potential ESA liability.

22 <sup>74</sup> *Id.*

23 <sup>75</sup> *See id.* at 59-61 (CBD000059-61).

24 <sup>76</sup> *Id.* at 61 (CBD000061).

25 <sup>77</sup> *Id.* at 63 (CBD000063).

26 <sup>78</sup> *See, e.g.,* Exhibit 7 at 24 (CBD000168); Exhibit 8 at 25, 28 (CBD000196, CBD000199).

1        43.     The State Engineer also failed to properly consider the public interest because,  
2 based on the evidence in the record, the 8,000 afy permitted under Order 1309 is excessive and  
3 allows too much pumping to adequately protect the Moapa dace. As explained above, spring flows  
4 at the Muddy River springs continue to decline, even though groundwater pumping from the  
5 carbonate aquifer in the Lower White River Flow System has averaged 7,000-8,000 afy since the  
6 Order 1169 pump test.<sup>79</sup> Allowing this level of pumping to continue will result in additional and  
7 sustained spring flow declines and associated reductions in Moapa dace habitat. Even though the  
8 Order requires that additional data be obtained and commits to reassessing the pumping limit in  
9 the future, that approach poses unacceptable risks for the Moapa dace because declines in spring  
10 flows are not easily restored. Experience from the pump test and other evidence provided at the  
11 Order 1303 hearing show that even if pumping is reduced in the future, recovery of spring flows  
12 can take many years or even decades.<sup>80</sup> Accordingly, the State Engineer's conclusion that  
13 maintaining pumping at current levels will adequately protect the Moapa dace is arbitrary,  
14 capricious, irrational, and not supported by substantial evidence.

15        44.     The evidence in the record also shows that groundwater development anywhere  
16 within Lower White River Flow System ultimately captures a portion of fully-decreed Muddy  
17 River Flow and that since groundwater development began, Muddy River flows in the headwaters  
18 at the Moapa Gage have declined by over 3,000 afy.<sup>81</sup> Therefore, the State Engineer's conclusion  
19 that pumping up to 8,000 afy from the regional carbonate aquifer does not constitute a conflict  
20 with decreed right holders is unsupported.

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23 <sup>79</sup> Exhibit 1 at 55 (CBD000055).

24 <sup>80</sup> See, e.g., Exhibit 7 at 23-24 (CBD000167-68); Exhibit 8 at 28 (CBD000199).

25 <sup>81</sup> Exhibit 1 at 61 (CBD000061) ("Flow in the Muddy River at the Moapa Gage has averaged  
26 approximately 30,600 afa since 2015, which is less than the predevelopment baseflow of about  
27 33,900." (Footnotes omitted).

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1 /s/ Douglas Wolf

2 Douglas Wolf (NM Bar No. 7473) (*Pro Hac Vice to be submitted*)

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**LIST OF EXHIBITS-FILED AS A SEPARATE APPENDIX**

<b><u>Exhibit Number</u></b>	<b><u>Description</u></b>	<b><u>Page Count</u></b>
1	Nevada State Engineer, Order No. 1309 (June 15, 2020)	68
2	Nevada State Engineer, Order No. 1169 (March 8, 2002)	11
3	Nevada State Engineer, Interim Order No. 1303 and Addendum (May 15, 2019)	17
4	U.S. Fish & Wildlife Service, Intra-Service Programmatic Biological Opinion for the Proposed Muddy River Memorandum of Agreement, File No. 1-5-05-FW-536 (Excerpt) (Jan. 30, 2016)	15
5	Nevada State Engineer, Ruling No. 6254 (Jan. 29, 2014)	29
6	State of Nevada, Department of Conservation and Natural Resources, Division of Water Resources, Notice Re: Public Workshop Regarding Existing Water Right Use and Groundwater Pumping in the Lower White River Flow System (June 14, 2018)	4
7	Tom Myers, Ph.D., Technical Memorandum Re: Groundwater Management and the Muddy River Springs, Report in Response to State Engineer Order 1303 (June 1, 2019)	27
8	Tom Myers, Ph.D., Technical Memorandum Re: Groundwater Management and the Muddy River Springs, Rebuttal in Response to Stakeholder Reports Filed with Respect to Nevada State Engineer Order 1309 (August 16, 2019)	30
9	Transcript of Proceedings, Public Hearing Regarding Existing Water Right Use and Groundwater Pumping in the Lower White River Flow System (Excerpt) (Oct. 2, 2019)	17
10	Curriculum Vitae of Tom Myers, Ph.D	11

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I, an employee of the Center for Biological Diversity, hereby  
3 certify that on July 13, 2020, I served complete copies of the foregoing NOTICE OF AND  
4 PETITION FOR JUDICAL REVIEW and the separate APPENDIX WITH EXHIBITS 1-10 by  
5 personally delivering true copies thereof to the following addresses:

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18 Pursuant to NRCP 5(b), I, an employee of the Center for Biological Diversity, hereby  
19 certify that on July 13, 2020, I served complete copies of the foregoing NOTICE OF AND  
20 PETITION FOR JUDICAL REVIEW and the separate APPENDIX WITH EXHIBITS 1-10 by  
21 placing true copies thereof in the United States mail, Certified Mail – Return Receipt Requested,  
22 postage prepaid, addressed as follows:

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ATTACHMENT 6

ATTACHMENT 6

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LISA C. LESTER  
LINCOLN COUNTY CLERK

Case No. CV0702520

Dept. No. \_\_\_\_\_

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF LINCOLN

LINCOLN COUNTY WATER DISTRICT,  
a political subdivision of the State of Nevada,  
and VIDLER WATER COMPANY, INC.,  
a Nevada corporation,

Petitioners,

vs.

TIM WILSON, P.E., NEVADA STATE ENGINEER,  
DIVISION OF WATER RESOURCES,  
DEPARTMENT OF CONSERVATION AND  
NATURAL RESOURCES,

Respondent.

PETITION FOR JUDICIAL REVIEW  
(Exempt from Arbitration: Judicial  
Review of Administrative Decision)

Petitioners, LINCOLN COUNTY WATER DISTRICT, a political subdivision of the State of Nevada, by and through its attorney, DYLAN V. FREHNER, ESQ., LINCOLN COUNTY DISTRICT ATTORNEY, and VIDLER WATER COMPANY, INC., a Nevada corporation, by and through its attorneys, ALLISON, MacKENZIE, LTD., petition and allege as follows:

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

3. Petitioners, LINCOLN and VIDLER own groundwater permits with a priority date of February 14, 2005 and jointly own groundwater right applications filed on April 10, 2006 to



1 appropriate water in the Kane Springs Valley Hydrographic Basin (206) ("Kane Springs") for  
2 municipal use purposes with a place of use in the Coyote Spring Valley Hydrographic Basin (210).  
3 The permits and pending applications are more specifically described below. The Kane Springs  
4 hydrographic basin and the points of diversion in the permits and applications are located entirely in  
5 Lincoln County, Nevada. Petitioners, LINCOLN and VIDLER are senior water right permit holders  
6 and jointly hold senior groundwater right applications in Kane Springs.

7           4.     Respondent, TIM WILSON P.E., NEVADA STATE ENGINEER, DIVISION  
8 OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL  
9 RESOURCES ("STATE ENGINEER"), is empowered to act pursuant to the provisions of Chapters  
10 533 and 534 of the Nevada Revised Statutes. The Nevada Legislature has provided that, subject to  
11 existing rights, all underground waters within the boundaries of the state of Nevada are subject to  
12 appropriation for beneficial use under the laws of the state and it is the charge of the STATE  
13 ENGINEER to put water to beneficial use for the economic benefit of the state of Nevada. The  
14 Office of the State Engineer is a creature of statute; it has no inherent power and its powers and  
15 jurisdiction are limited as provided by statute.

16           5.     This Petition is brought pursuant to the procedures authorized and provided in  
17 NRS 533.450. Specifically, Petitioners are aggrieved by an order of the STATE ENGINEER that  
18 affects Petitioners' interests and Petitioners may obtain judicial review in the proper court of the  
19 county in which the matters affected are situated. Petitioners' interests and the matters affected by  
20 the STATE ENGINEER's Order 1309, including the Kane Springs basin, are situated entirely in  
21 Lincoln County, Nevada. Jurisdiction and venue of Petitioners' Petition for Judicial Review are  
22 properly before this Court pursuant to NRS 533.450. A true and correct of Order 1309 is attached  
23 hereto as **Exhibit "1"**.

24           6.     A Notice of this Petition has been served on the STATE ENGINEER and all  
25 persons affected by Order 1309 of the STATE ENGINEER as required by NRS 533.450(3).

26           7.     The STATE ENGINEER's administration of the Lower White River Flow  
27 System Basins started with Order 1169 issued in March 2002. Order 1169 required all pending  
28 applications in certain basins be held in abeyance pending an aquifer test of the carbonate-rock

1 aquifer system to better determine whether the pending applications and future applications could be  
2 developed from the carbonate-rock aquifer. Kane Springs was not included in Order 1169 in March  
3 2002 as part of the administration of the Lower White River Flow System Basins.

4 8. On February 14, 2005, LINCOLN/VIDLER filed Applications 72218, 72219,  
5 72220 and 72221 to appropriate groundwater in Kane Springs.

6 9. On August 1, 2006, LINCOLN/VIDLER and the UNITED STATES  
7 DEPARTMENT OF THE INTERIOR, FISH AND WILDLIFE SERVICE ("USFWS") entered into  
8 an Amended Stipulation for Withdrawal of Protests for Applications 72218, 72219, 72220 and  
9 72221 ("Amended Stipulation for Withdrawal of Protests"). The Amended Stipulation for  
10 Withdrawal of Protests contains among other things, triggers acceptable to USFWS to reduce  
11 Petitioners' groundwater pumping for protection of the Moapa dace. From 2006 to date, Petitioners  
12 and USFWS have performed and continue to perform under the terms of the Amended Stipulation  
13 for Withdrawal of Protests.

14 10. On February 2, 2007, the STATE ENGINEER issued Ruling 5712, which  
15 partially approved Applications 72218, 72219, 72220 and 72221, granting LINCOLN/VIDLER  
16 1,000 acre feet annually ("afa") of water rights in Kane Springs. In Ruling 5712, the STATE  
17 ENGINEER specifically determined Kane Springs would not be included in the Order 1169 study  
18 area because there was no substantial evidence that the appropriation of a limited quantity of water  
19 in Kane Springs will have any measurable impact on the Muddy River Springs that warrants the  
20 inclusion of Kane Springs in Order 1169. The STATE ENGINEER denied the request to hold the  
21 LINCOLN/VIDLER applications in abeyance and include Kane Springs within the provisions of  
22 Order 1169. The STATE ENGINEER specifically rejected the argument that the Kane Springs  
23 rights could not be appropriated based upon senior appropriated rights in the down gradient basins.  
24 None of the parties to the Memorandum of Understanding ("MOU") entered into on April 20, 2006  
25 by certain water right holders in the Coyote Spring Valley and California Wash hydrographic basins  
26 and none of the Order 1169 study participants objected to or appealed the STATE ENGINEER's  
27 determinations that Kane Springs would not be included in Order 1169 and Petitioners could  
28

1 appropriate and develop their water rights notwithstanding senior appropriated rights in the down  
2 gradient basins.

3 11. LINCOLN/VIDLER filed a Petition for Judicial Review with the Seventh  
4 Judicial District Court on March 1, 2007, challenging the validity of the STATE ENGINEER's  
5 decision in Ruling 5712.

6 12. Following the filing of the Petition for Judicial Review, LINCOLN/VIDLER  
7 met with the STATE ENGINEER on March 15, 2007, regarding their pending Applications 74147,  
8 74148, 74149 and 74150. LINCOLN/VIDLER requested that they perform additional data  
9 collection, testing and study in Kane Springs to support the pending applications. The STATE  
10 ENGINEER informed LINCOLN/VIDLER he would consider granting to LINCOLN/VIDLER  
11 additional unappropriated water rights in Kane Springs pursuant to their pending Applications  
12 74147, 74148, 74149 and 74150 if LINCOLN/VIDLER collected the additional data upgradient in  
13 the Kane Springs basin and performed the testing and additional study to support the pending  
14 applications.

15 13. LINCOLN/VIDLER and the STATE ENGINEER thereafter stipulated to the  
16 dismissal of the Petition for Judicial Review regarding Applications 72218, 72219, 72220 and 72221  
17 and Ruling 5712.

18 14. The rights the STATE ENGINEER granted to LINCOLN/VIDLER in Ruling  
19 5712 and now held by LINCOLN/VIDLER were and are rights vested under Nevada law.

20 15. On April 29, 2009, the Acting STATE ENGINEER issued Ruling 5987  
21 summarily denying Applications 74147, 74148, 74149 and 74150 without holding a hearing or  
22 contacting LINCOLN/VIDLER to get any information about the additional data collection, testing  
23 and study the STATE ENGINEER stated he would review.

24 16. LINCOLN/VIDLER filed a Petition for Judicial Review with the Seventh  
25 Judicial District Court on May 29, 2009 challenging the validity of the STATE ENGINEER's  
26 decision in Ruling 5987.

27 17. On April 27, 2010, LINCOLN/VIDLER and the STATE ENGINEER entered  
28 into a settlement agreement to resolve LINCOLN/VIDLER's Petition for Judicial Review

1 challenging Ruling 5987. The settlement agreement required, among other things, the STATE  
2 ENGINEER to reinstate 74147, 74148, 74149 and 74150 with the same priority as their original  
3 application date.

4 18. LINCOLN/VIDLER and the STATE ENGINEER thereafter stipulated to the  
5 dismissal of the Petition for Judicial Review regarding Applications 74147, 74148, 74149 and 74150  
6 and Ruling 5987.

7 19. On October 29, 2008, LINCOLN/VIDLER obtained a Biological Opinion  
8 from the USFWS that pumping of groundwater pursuant to Applications 72218, 72219, 72220 and  
9 72221 for their Kane Springs groundwater project was not likely to jeopardize the continued  
10 existence of the endangered Moapa dace; the project could contribute to groundwater level declines  
11 and spring flow reductions, however, implementation of the project's conservation actions will  
12 minimize these impacts. With regard to incidental take, the Biological Opinion stated the level of  
13 anticipated take is not likely to result in jeopardy to the Moapa dace based in part on the  
14 implementation of the conservation measures for the project. Since 2008, Petitioners has spent  
15 substantial sums, including the direct payment of \$50,000, to the USFWS as part of the project's  
16 conservation measures in reliance on the Biological Opinion, Ruling 5712 and the settlement  
17 agreements entered into with the STATE ENGINEER to resolve Petitioners' appeals of Rulings  
18 5712 and 5987 involving Petitioners' water rights and applications in Kane Springs. None of the  
19 parties to the April 20, 2006 Memorandum of Understanding and none of the Order 1169 study  
20 participants objected to or appealed the Biological Opinion issued by the USFWS for the  
21 LINCOLN/VIDLER groundwater applications in Kane Springs.

22 20. In reliance on the STATE ENGINEER's approval of Applications 72218,  
23 72219, 72220 and 72221, Ruling 5712, the issuance of permits to Petitioners and the settlement with  
24 the STATE ENGINEER, LINCOLN/VIDLER have expended significant time and money since  
25 2005 in furtherance of perfecting their water rights in the Kane Springs basin in the approximate  
26 sum of \$4,237,000.

27 21. In reliance upon the STATE ENGINEER's representations regarding the  
28 additional data collection, testing and study, and his statements that he would consider any new data

1 and results regarding the basin, LINCOLN/VIDLER have expended significant time and money to  
2 collect data, test and study the Kane Springs basin and to prepare the data and information to be  
3 presented to the STATE ENGINEER to support pending Applications 74147, 74148, 74149 and  
4 74150 in the approximate sum of \$543,000.

5           22.     Petitioners were not and have never been an Order 1169 study participant.  
6 Petitioners are not and have never been a party to the Memorandum of Understanding entered into  
7 on April 20, 2006 by certain water right holders in the Coyote Spring Valley and California Wash  
8 hydrographic basins whereby such parties voluntarily agreed to certain groundwater pumping  
9 restrictions, among other things, to further their shared common interest in the conservation and  
10 recovery of the Moapa dace and its habitat, an endangered species under the Endangered Species  
11 Act.

12           23.     Between 2010 and 2014, the Order 1169 basins were studied and tested, and  
13 the Order 1169 study participants were involved and participated in aquifer tests, the submission of  
14 reports, proceedings and actions taken by the STATE ENGINEER pursuant to Order 1169. The  
15 basins that were included in the Order 1169 aquifer test were acknowledged to have a unique  
16 hydrologic connection and share the same supply of water. The Kane Springs basin was not  
17 included in the Order 1169 aquifer testing, monitoring or measurements and Kane Springs basin  
18 water right holders, including Petitioners, were not involved and did not participate in the aquifer  
19 testing, submission of reports, proceedings and actions taken by the STATE ENGINEER pursuant to  
20 Order 1169 from 2010 to 2014. After the aquifer test, no Order 1169 study participants  
21 recommended that Kane Springs be included in the Order 1169 study area nor did the STATE  
22 ENGINEER make a determination that Kane Springs should be included in the Order 1169 study  
23 area based upon the Order 1169 testing and proceedings. One study participant's report (Southern  
24 Nevada Water Authority) noted there "was a lack of pumping responses north of the Kane Springs  
25 Fault and west of the MX-5 and CSI wells near the eastern front of the Las Vegas Range."

26           24.     On January 11, 2019, the STATE ENGINEER issued Interim Order 1303  
27 designating the Lower White River Flow System ("LWRFS"), a multi-basin area known to share a  
28 close hydrologic connection, as a joint administrative unit for purposes of administration of water

1 rights. Pursuant to Interim Order 1303, all water rights within the LWRFS were to be administered  
2 based upon their respective dates of priority in relation to other rights within the regional  
3 groundwater unit. Kane Springs was not included as part of the LWRFS multi-basin area in Interim  
4 Order 1303.

5           25. After an administrative hearing, the STATE ENGINEER issued Order 1309  
6 on June 15, 2020 delineating the Lower White River Flow System Hydrographic Basin to include  
7 those certain hydrographic basins subject to Order 1169 and Order 1303 and for the first time  
8 included the Kane Springs basin as part of the Lower White River Flow System Hydrographic  
9 Basin.

10           26. In Order 1309, the STATE ENGINEER stated it was necessary for spring  
11 flow measured at the Warm Springs West gage to flow at a minimum rate in order to maintain  
12 habitat for the Moapa dace. The STATE ENGINEER determined in Order 1309 that liability under  
13 the Endangered Species Act for a "take" would extend to groundwater users within the LWRFS and  
14 would so extend to the State of Nevada through the Division of Water Resources as the government  
15 agency responsible for permitting water use. The STATE ENGINEER concluded that it was against  
16 the public interest to allow groundwater pumping that will reduce spring flow in the Warm Springs  
17 area to a level that would impair habitat necessary for the survival of the Moapa dace and could  
18 result in take of the endangered species.

19           27. In Order 1309, the STATE ENGINEER relied upon six criteria from Rulings  
20 6254-6261 as the standard of general applicability for inclusion into the geographic boundary of the  
21 LWRFS, thereby adopting policies in Order 1309 that the STATE ENGINEER then expanded for  
22 general application.

23           28. Order 1309 is in excess of the jurisdiction and statutory authority of the  
24 STATE ENGINEER because Nevada law does not authorize the STATE ENGINEER to designate a  
25 multi-basin area and effectively reprioritize basin specific water rights by administering them based  
26 upon their respective dates of priority in relation to other rights within the multi-basin groundwater  
27 area or designate a multi-basin area via an *ad hoc* ruling. By including Kane Springs in the LWRFS  
28 in Order 1309 and limiting pumping in the LWRFS to 8,000 afa, the STATE ENGINEER has made

1 exercising Petitioners' water rights impracticable for no legitimate government reason by  
2 reprioritizing Petitioners' water rights holding senior status in Kane Springs to the most junior water  
3 rights in the multi-basin LWRFS, destroying Petitioners' property rights, denying Petitioners all  
4 viable economic use of their property and eviscerating contractual rights related to the water rights,  
5 and interfering with Petitioners' investment backed expectations, all in violation of and to the  
6 prejudice of Petitioners' constitutional rights.

7           29. Order 1309 is arbitrary and capricious and constitutes an abuse of discretion  
8 in violation of Petitioners' rights because in the Ruling 5712 contested proceedings, the STATE  
9 ENGINEER denied the request to hold the LINCOLN/VIDLER applications in abeyance and  
10 include Kane Springs within the provisions of Order 1169 determining there was no substantial  
11 evidence that the appropriation of the water granted to Petitioners in Kane Springs will have any  
12 measurable impact on the Muddy River Springs that warranted the inclusion of Kane Springs in  
13 Order 1169. The STATE ENGINEER specifically rejected the argument that Petitioners' Kane  
14 Springs rights could not be appropriated based upon senior appropriated rights in the down gradient  
15 basins. The STATE ENGINEER is precluded from re-adjudicating and relitigating issues already  
16 determined in a contested proceeding and resolved by settlement agreements with Petitioners  
17 resulting from Petitioners' appeals of Rulings 5712 and 5987. In addition, there was no evidence  
18 presented in the proceedings leading up to the issuance of Order 1309 that appropriation of  
19 Petitioners' water rights in Kane Springs will have any impact on the Muddy River Springs that  
20 warrants inclusion of Kane Springs in the LWRFS as defined in Order 1309.

21           30. Order 1309 is arbitrary and capricious and constitutes an abuse of discretion  
22 because the STATE ENGINEER failed to consider or address the Amended Settlement Agreement  
23 entered into between Petitioners and USFWS and the Biological Opinion issued by the USFWS that  
24 Petitioners' groundwater pumping project in Kane Springs was not likely to jeopardize the continued  
25 existence of the endangered Moapa dace and the level of anticipated take is not likely to result in  
26 jeopardy to the Moapa dace based in part on the implantation of the conservation measures for  
27 Petitioners' project. In issuing Order 1309, the STATE ENGINEER failed to consider the unrefuted  
28 expert opinion testimony in the record of the former USFWS Field Supervisor who signed the

1 Biological Opinion and helped negotiate the Amended Stipulation for Withdrawal of Protests that  
2 Petitioners, as parties holding a Biological Opinion and the Amended Stipulation for Withdrawal of  
3 Protests, are compliant with the Endangered Species Act. The STATE ENGINEER's determination  
4 that liability under the Endangered Species Act for a "take" would extend to groundwater users  
5 within the LWRFS not parties to the MOU and would so extend to the State of Nevada through the  
6 Division of Water Resources as the government agency responsible for permitting water use is not  
7 supported by substantial evidence or any evidence in the record, is contrary to the substantial  
8 evidence of record and is contrary to law with respect to Petitioners' water rights and groundwater  
9 pumping project in Kane Springs.

10 31. Order 1309 is arbitrary, capricious and constitutes an abuse of discretion  
11 because it adopts, effects and defines the STATE ENGINEER's policy of general application for  
12 creating a multi-area basin and inclusion into the geographic boundary of the LWRFS and  
13 constitutes unlawful *ad hoc* rulemaking in violation of the STATE ENGINEER's statutory authority  
14 thereby making Order 1309 void.

15 32. Petitioners were not given notice before the STATE ENGINEER applied the  
16 *ad hoc* rule developed from Rulings 6255-6261 in Order 1309. LINCOLN/VIDLER were not  
17 parties to those rulings and were unable to present evidence or arguments as to why the *ad hoc* rule  
18 should not be applied to Petitioners and their water rights in Kane Springs because the *ad hoc* rule of  
19 general applicability was announced after the hearing and after Petitioners had the opportunity to  
20 present evidence on the issue before the STATE ENGINEER. Rulings from other proceedings  
21 cannot be used to bind unrelated parties in later proceedings.

22 33. The STATE ENGINEER abused his discretion by failing to consider the best  
23 available science presented to support the continued exclusion of Kane Springs from the boundaries  
24 of the LWRFS and applying criteria or standards which intentionally ignore the best available  
25 science to include Kane Springs in the boundaries of the LWRFS.

26 34. Order 1309 is arbitrary, capricious and constitutes an abuse of discretion  
27 because it applies the *ad hoc* rule criteria subjectively and in an inconsistent manner.  
28



1           35. Order 1309 is arbitrary, capricious, unlawful and constitutes an abuse of  
2 discretion because the water right holders pumping closest to Warm Springs and impacting the  
3 endangered Moapa dace are not affected by Order 1309 and are allowed to continue to pump their  
4 water rights, while Petitioners' water rights, located the furthest distance from Warm Springs with  
5 no evidence in the record that pumping of their water rights will impact the endangered Moapa dace,  
6 are destroyed and rendered useless by Order 1309.

7           36. The STATE ENGINEER, like all administrative officers, is required to  
8 provide due process of law to all parties. The STATE ENGINEER violated LINCOLN/VIDLER's  
9 due process rights pursuant to both the Nevada and United States Constitutions.

10          37. Order 1309 violated LINCOLN/VIDLER's due process rights by applying the  
11 criteria or standards from other contested administrative proceedings before the STATE ENGINEER  
12 in which Petitioners were not parties, after the evidentiary hearing held to determine whether Kane  
13 Springs and Petitioners' water rights were to be included within the boundaries of the LWRFS.  
14 Petitioners received no prior notice the STATE ENGINEER would apply the criteria or standards  
15 and were deprived of an opportunity to address the newly developed criteria or standards applied by  
16 the STATE ENGINEER in Order 1309 to include Kane Springs and Petitioners' water rights in the  
17 boundaries of the LWRFS.

18          38. In Order 1309, the STATE ENGINEER considered and relied upon evidence  
19 submitted after the hearing in the parties' simultaneously submitted written closing statements for  
20 which Petitioners had no opportunity to address, respond or refute, all in violation of Petitioners' due  
21 process rights.

22          39. The Order 1309 proceedings violated Petitioners' due process rights because  
23 certain former Division of Water Resource employees who participated in and were decision makers  
24 in the STATE ENGINEER's proceedings and determinations resulting in Ruling 5712 and Order  
25 1169, which excluded Kane Springs from the LWRFS and appropriated Kane Springs water rights  
26 notwithstanding senior appropriated rights in the down gradient basins, testified as private  
27 consultants and presented the same evidence relied upon by previous STATE ENGINEERs to  
28 exclude Kane Springs from multi-basin joint administration to support the inclusion of Kane Springs

1 in the LWRFS. The STATE ENGINEER erred as a matter of law when he reweighed evidence  
2 previously relied upon to exclude Kane Springs from the LWRFS and used the reweighed evidence  
3 to include Kane Springs in the LWRFS, all in violation of Petitioners' due process rights.

4 40. The substantial rights of LINCOLN/VIDLER have been prejudiced because  
5 Order 1309 violates constitutional and statutory provisions, is in excess of the statutory authority of  
6 the STATE ENGINEER, is clearly erroneous in view of the reliable, probative and substantial  
7 evidence, and is characterized by an abuse of discretion.

8 41. Order 1309 of the STATE ENGINEER is arbitrary and capricious, contrary to  
9 and affected by error of law, without any rational basis, beyond the legitimate exercise of power and  
10 authority of the STATE ENGINEER, all to the detriment and damage of Petitioners LINCOLN and  
11 VIDLER.

12 42. The determinations in Order 1309 that 8,000 afa is the long terms annual  
13 quantity of water that can be pumped and that Kane Springs should be included within the  
14 boundaries of the LWRFS, among other determinations, are not supported by substantial evidence in  
15 the record before the STATE ENGINEER and are without consideration of all the facts and  
16 circumstances.

17 43. Petitioners LINCOLN and VIDLER have exhausted their administrative  
18 remedies.

19 44. Petitioners have been required to engage the services of counsel to pursue  
20 their rights, and as a proximate and necessary result of the STATE ENGINEER's illegal conduct  
21 alleged above, Petitioners are entitled to reasonable attorney's fees and costs as special and  
22 foreseeable damages, or in the alternative, as costs of suit.

23 45. For all the foregoing reasons, the STATE ENGINEER acted improperly as a  
24 matter of law and did not and cannot conduct a fair assessment of the scientific evidence presented  
25 and the facts and circumstances previously relied upon to exclude Kane Springs from the LWRFS  
26 multi-basin area. The STATE ENGINEER's actions are inequitable under all the facts and  
27 circumstances and the evidence presented, and equitable relief is warranted in the form of direction  
28

1 by this Court to the STATE ENGINEER to exclude Kane Springs from the boundaries of the  
2 LWRFS as defined in Order 1309.

3 WHEREFORE, Petitioners pray for judgment as follows:

- 4 1. That the Court vacate Order 1309;
- 5 2. That the Court exclude Kane Springs from the LWRFS;
- 6 3. That the Court restore currently held water right priorities and the perennial  
7 yield determined for Kane Springs;
- 8 4. That the Court award Petitioners their attorney's fees and costs; and
- 9 5. That the Court award such other and further relief as seems just and proper in  
10 the premises.

11 **AFFIRMATION**

12 The undersigned does hereby affirm that the preceding document **DOES NOT**  
13 contain the social security number of any person.

14 DATED this 13<sup>th</sup> day of July, 2020.

15 KAREN A. PETERSON, ESQ.  
16 Nevada State Bar No. 366  
17 ALLISON MacKENZIE, LTD.  
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19 Carson City, Nevada 89703  
20 Telephone: (775) 687-0202  
21 Email: [kpeterson@allisonmackenzie.com](mailto:kpeterson@allisonmackenzie.com)

22 ~ and ~

23 LINCOLN COUNTY DISTRICT ATTORNEY  
24 181 North Main Street, Suite 205  
25 P.O. Box 60  
26 Pioche, Nevada 89043  
27 Telephone: (775) 962-8073  
28 Email: [dfrehner@lincolncountynv.gov](mailto:dfrehner@lincolncountynv.gov)

BY: 

DYLAN V. FREHNER, ESQ.  
Nevada State Bar No. 9020

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

**CERTIFICATE OF SERVICE**

Pursuant to NRCP Rule 5(b), 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 as follows:

**Via Hand-Delivery to:**

Tim Wilson, P.E. State Engineer  
Nevada Division of Water Resources  
Department of Conservation and Natural Resources  
901 South Stewart Street, Suite 2002  
Carson City, NV 89701

**Via Certified Mail, Return Receipt Requested to:**

Robert O. Kurth, Jr. 3420 North Buffalo Drive Las Vegas, NV 89129 <i>Attorney for 3335 Hillside, LLC</i>	Paulina Williams Baker Botts, L.L.P. 98 San Jacinto Boulevard, Suite 1500 Austin, TX 78701 <i>Attorney for Georgia Pacific Corporation</i>
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Kent R. Robison, Esq. Therese M. Shanks, Esq. Robison, Sharp, Sullivan & Brust 71 Washington Street Reno, NV 89503 <i>Attorney for Coyote Springs Investment, LLC</i>	Paul G. Taggart, Esq. Timothy D. O'Connor, Esq. Taggart & Taggart, Ltd. 109 North Minnesota Street Carson City, NV 89703 <i>Attorneys for LVVWD and SNWA</i>
Steven C. Anderson, Esq. Las Vegas Valley Water District 1001 S. Valley View Blvd. Las Vegas, NV 89153 <i>Attorneys for LVVWD and SNWA</i>	Karen Glasgow Office of the Regional Solicitor San Francisco Field Office U.S. Department of the Interior 333 Bush Street, Suite 775 San Francisco, CA 94104 <i>Attorney for National Park Service</i>

1	Alex Flangas 50 West Liberty Street, Suite 700 Reno, NV 89501 <i>Attorney for Nevada Cogeneration Associates Nos. 1 and 2</i>	Larry Brundy P.O. Box 136 Moapa, NV 89025
4	Beth Baldwin Richard Berley Ziontz Chestnut Fourth And Blanchard Building 2101 Fourth Avenue, Suite 1230 Seattle, WA 98121-2331 <i>Attorneys for Moapa Band of Paiute Indians</i>	Casa De Warm Springs, LLC 1000 N. Green Valley Pkwy, #440-350 Henderson, NV 89074
8	Steve King, Esq. 227 River Road Dayton, NV 89403 <i>Attorney for Muddy Valley Irrigation Company</i>	Clark County 500 S. Grand Central Pkwy, 6th Fl. Las Vegas, NV 89155-1111
11	Greg Morrison 50 W. Liberty St., Suite 750 Reno, NV 89501 <i>Attorney for Moapa Valley Water District</i>	Clark County Coyote Springs Water Resources GID 1001 S. Valley View Blvd. Las Vegas, NV 89153
13	Justina Caviglia 6100 Neil Road Reno, NV 89511 <i>Attorney for Nevada Power Company d/b/a NV Energy</i>	Mary K. Cloud P.O. Box 31 Moapa, NV 89025
16	Luke Miller Office of the Regional Solicitor U.S. Department of the Interior 2800 Cottage Way, Suite E1712 Sacramento, CA 95825 <i>Attorney for U.S. Fish and Wildlife Service</i>	Don J. & Marsha L. Davis P.O. Box 400 Moapa, NV 89025
20	State of Nevada Department of Transportation 1263 S. Stewart Street Carson City, NV 89712	Dry Lake Water, LLC 2470 St. Rose Pkwy., Ste. 107 Henderson, NV 89074
22	State of Nevada, Dept. of Conservation And Natural Resources Division of State Parks 901 S. Stewart Street, Suite 5005 Carson City, NV 89701	Kelly Kolhoss P.O. Box 232 Moapa, NV 89025
25	Pacific Coast Building Products, Inc. P.O. Box 364329 Las Vegas, NV 89036	Lake At Las Vegas Joint Venture, Inc. 1600 Lake Las Vegas Parkway Henderson, NV 89011
27	S & R, Inc. 808 Shetland Road Las Vegas, NV 89107	Laker Plaza, Inc. 7181 Noon Rd. Everton, WA 98247-9650

1	Technichrome	William O'Donnell
2	4709 Compass Bow Lane	2780 S. Jones Blvd., Ste. 210
	Las Vegas, NV 89130	Las Vegas, NV 89146
3	Global Hydrologic Services, Inc.	Patrick Donnelly
4	Mark D. Stock	Center for Biological Diversity
5	561 Keystone Avenue, #200	7345 S. Durango Dr.
	Reno, NV 89503-4331	B-107, Box 217
		Las Vegas, NV 89113
6	Lisa Belenky	
7	Center for Biological Diversity	
8	1212 Broadway #800	
	Oakland, CA 94612	

9  
10 DATED this 13<sup>th</sup> day of July, 2020.

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13 NANCY FONTENOT  
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