

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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

Appellants,

vs.

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

Respondents.

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**Case No. 84739**  
(consolidated with Case Nos. 84741,  
84742, and 84809)

**STATE ENGINEER’S SUPPLEMENT TO PARTIAL JOINDER OF  
EMERGENCY MOTIONS FOR STAY UNDER NRAP 27(E)**

Respondent Adam Sullivan, P.E., in his capacity as the Nevada State Engineer, Department of Conservation and Natural Resources, Division of Water Resources (hereafter “State Engineer”), by and through counsel, Nevada Attorney General Aaron D. Ford, Solicitor General Heidi Parry Stern, Deputy Solicitor General Jeffrey M. Conner, Deputy Solicitor General Kiel B. Ireland, and Senior Deputy Attorney General James N. Bolotin, hereby files this Supplement to Partial Joinder of Emergency Motions for Stay Under NRAP 27(E).

**I. INTRODUCTION**

These consolidated appeals challenge the district court’s order vacating the State Engineer’s Order 1309. After reviewing motions for stay pending appeal filed by appellants Southern Nevada Water Authority (SNWA) and the Center for Biological Diversity (CBD), this Court issued a temporary stay and directed the State Engineer to further explain his partial joinder in those motions. In particular, this Court directed the State Engineer to address the “argument that the district court’s order limits his ability to proceed with balancing the various interest in the subject water resource.”

This supplement further explains the preclusive effect of the district court’s order on his ability to consider water availability and the public interest when acting on existing water rights and making other decisions based upon resource allocation,

availability and impacts within the geographic area addressed by Order 1309. A stay of the district court's order is essential to maintaining the State Engineer's ability to exercise his technical expertise and professional judgment to manage and protect Nevada's water.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

A pumping test conducted between 2010 and 2012 under Order 1169 confirmed decades-long suspicion that groundwater pumped from wells across various geographically separate hydrographic basins in southeastern Nevada is drawn from a universal groundwater aquifer now known as the Lower White River Flow System (LWRFS). Exhibit 18 to Joint Motion to Consolidate Appeals at 4–5, 10–11 (June 1, 2022) (Doc. 2022-17433) (hereinafter Exhibit 18). The results of the Order 1169 pumping test identified water-level declines occurring over an area of 1,100 square miles that envelopes or overlaps with seven previously established hydrographic basins. Exhibit 2 to Joint Motion to Consolidate Appeals at 6 (June 1, 2022) (Doc. 2022-17427) (hereinafter Exhibit 2).

Those declines directly impacted the flow of warm water springs in the Muddy River Springs Area Hydrographic Basin. Exhibit 18 at 11. The flow of the affected Muddy River Springs is important here because those springs (1) are the headwaters of the Muddy River, a source of decreed surface water rights dating back to the 1920 Muddy River Decree; and (2) create the natural habitat for the Moapa Dace—an

endangered species of minnow that is endemic to headwaters of the Muddy River. Exhibit 18 at 8–9, 11.

After completion of the pumping test and solicitation of evidence addressing the impact of the test, the State Engineer held a hearing between September 23, 2019, and October 4, 2019, to address the LWRFS. Exhibit 18 at 13. Order 1309 is the product of that hearing. More specifically, after thorough consideration of the evidence presented at the hearing, Order 1309 defines the boundary of the groundwater aquifer and a sustainable pumping limit of the LWRFS. Exhibit 2 at 46–54, 57–63, 65; Exhibit 18 at 14–16. Importantly, Order 1309 intentionally excludes any enforcement mechanism regarding development of permitted water rights within the LWRFS. Exhibit 2 at 65–66.

Even so, the Eighth Judicial District Court vacated Order 1309, along with its factual and scientific conclusions. The district court reasoned that the State Engineer exceeded his statutory authority when designating the boundaries and a sustainable pumping limit for the LWRFS because (1) the State Engineer lacks statutory authority to conjunctively manage surface and ground water rights, and (2) the State Engineer lacks statutory authority to jointly manage multiple established hydrographic basins. Exhibit 18 at 23–29.<sup>1</sup>

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<sup>1</sup> The district court also determined that the State Engineer violated procedural due process when issuing Order 1309, Exhibit 18 at 29–25, but the State Engineer’s

This Court has consolidated appeals from the State Engineer and various other parties. Order (June 7, 2022) (Doc. 2022-18101). Appellants SNWA and the CBD have moved this Court for a stay pending appeal. Order at 3, 6 (Aug. 29, 2022) (Doc. 2022-26979). The State Engineer joined those motions, in part. Partial Joinder (June 8, 2022) (Doc. 2022-18239), and this Court, in reviewing the motions for stay, directed the State Engineer to supplement his partial joinder in those motions, seeking more particular argument on the State Engineer’s position “that the district court’s order limits his ability to proceed with balancing the various interest in the subject water resource.” Order at 7 (Aug. 29, 2022) (Doc. 2022-26979).

### **III. LEGAL ARGUMENT**

The district court expressly found that large areas of southeastern Nevada sit atop a carbonate aquifer with an interconnected groundwater system now known as the LWRFS. Exhibit 18 at 4–5. Further, the district court expressly recognized that the area the State Engineer identified as the LWRFS envelops or overlaps with numerous previously established hydrographic basins. Exhibit 18 at 7, 13–14. Also, the district court recognized the direct, interconnected relationship between groundwater levels and the flow of warm water springs that become the headwaters

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analysis here focuses on the preclusive effect of the district court’s determination that the State Engineer exceeded his statutory authority.

of the Muddy River. Exhibit 18 at 5. No party disputes the existence of the connection between the LWRFS and the Muddy River Springs generally.

But the district court jettisoned Order 1309, and its accompanying factual and scientific determinations, after determining that the State Engineer lacks statutory authority to (1) jointly administer rights from more than one hydrographic basin that share a common water resource, and (2) conjunctively manage groundwater rights and surface water rights that also share a common water resource. Exhibit 18 at 23–29, 35–36. The district court’s order is incorrect, misapplies the facts and law, and consequently must be reversed. During the pendency of this appeal, this Court should stay the order to ensure that the State Engineer is authorized to consider the interconnectivity of the LWRFS, including the impact of the groundwater level on the flow of the Muddy River Springs, when addressing interests in the LWRFS.

Rather than appropriately granting deference to the State Engineer’s expertise on complex, technical issues, *see Wilson v. Pahrump Fair Water, LLC*, 137 Nev. 10, 16, 481 P.3d 853, 858 (2021), the district court’s order forces the State Engineer to ignore scientific reality and to perform his duties under the scientific and legal fiction that the LWRFS is divided into separate units with illusory impermeable barriers where water use or development has no meaningful impact on adjacent senior rights. The result of the district court’s decision improperly reorders priority of water rights

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in the LWRFS and sets precedent in the district court and throughout southeastern Nevada.

For instance, the effect of the district court's order is that holders of surface water rights memorialized in the 1920 Muddy River Decree lose the priority of their rights over anyone other than holders of junior surface water rights with a diversion point in the same hydrographic basin. First, they lose priority over otherwise junior permitted groundwater rights with a diversion point in the same basin because the district court rejects the notion that the State Engineer can conjunctively manage surface water and groundwater. Second, they lose priority over otherwise junior groundwater rights in neighboring hydrographic basins in the LWRFS because the boundary lines of the basins—according to the district court—eliminate consideration of inter-basin priority.

The district court's order is at odds with controlling doctrinal principles of Nevada water—namely the principle of prior appropriation and the need for the State Engineer to protect vested surface water rights that predate any permitted groundwater rights<sup>2</sup>—and must be reversed. But as this Court is undertaking the

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<sup>2</sup> The district court purported to rely on the principle of prior appropriation in its order. Exhibit 18 at 22–23. But by confining the determination of priority to individual basins, without regard for the commonality of a water resource that spans multiple basins, the district court turned the principle of prior appropriation on its head. The State Engineer's actions in establishing basin boundaries in the past cannot be treated as a mechanism to degrade the priority of rights predating the State Engineer's establishment of those boundaries—decreed surface water rights in

time-consuming task of resolving these appeals, this Court should stay the district court's order because the preclusive effect of the order has immediate consequences.

As some of the appellees correctly note when opposing SNWA and CBD's motions, Order 1309 does not include an enforcement mechanism that directly limits the development of any existing water rights within the LWRFS. *See, e.g.*, Church's Opposition to SNWA's Motion for Stay at 5 (June 9, 2022) (Doc. 2022-18320). What Order 1309 accomplishes is to review the results of the Order 1169 pumping test, along with monitoring data and evidence produced by various stakeholders, to (1) delineate the boundaries of the LWRFS, and (2) identify a sustainable level of groundwater pumping based upon the interconnectivity of the LWRFS and the seven hydrographic basins it comprises. Exhibit 2 at 65. And then those factual determinations will serve as the basis for future decisions involving management of interests within the LWRFS.

This point is crucial to understanding the impact of the district court's order. When the State Engineer acts on the use of any water right, he must consider various factors, including: (1) the availability of water; and (2) the public interest. *See, e.g.*, NRS 533.380(2); *Mineral Cty. v. Lyon Cty.*, 136 Nev. 503, 473 P.3d 418 (2020). Both of these factors are implicated by the State Engineer's factual and scientific

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particular. *Cf. Mineral Cty. v. Lyon Cty.*, 136 Nev. 503, 517–19, 473 P.3d 418, 429–30 (2020). But that is exactly what the district court's order does.



determinations on the LWRFS—the interconnectivity of the LWRFS impacts the State Engineer’s ability to address (1) water availability, which includes his obligation to protect decreed surface water rights in the Muddy River, and (2) the public interest, which includes protection of the natural habitat of the endangered Moapa Dace. Exhibit 2 at 42–43; Exhibit 18 at 8–9.

But the district court’s order forces the State Engineer into a fictional world where he must divorce his decisions from the reality that scientific evidence establishes (1) the existence of the LWRFS, and (2) the impact of groundwater pumping within the LWRFS on the flow of the Muddy River Springs. And absent a stay, the district court’s order on the scope of the State Engineer’s statutory authority has preclusive effect under the doctrine of issue preclusion. *LaForge v. State, Univ. Sys.*, 116 Nev. 415, 419, 997 P.2d 130, 133 (2000) (defining a three-part test for issue preclusion).

In other words, if the State Engineer must take action on any business placed before him involving the development of water rights within the area he identified as the LWRFS, the district court’s order precludes the State Engineer from considering the interconnectivity of the hydrographic basins that compose the LWRFS and the relationship between the groundwater level within the LWRFS and the flow of the Muddy River Springs.

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This concern is not merely hypothetical. Coyote Springs Investment, LLC (CSI) acknowledges that they are actively seeking approval of subdivision maps for a residential development that will require ongoing water service in perpetuity. Opposition to Emergency Motion to Stay at 7 (June 6, 2022) (Doc. 2022-17883). And the negative consequences of forcing the State Engineer to make decisions on permanent change applications or pending subdivision maps but depriving him of the ability to rely upon the scientific and technical determinations from Order 1309 when making those decisions, will be far reaching and likely irreversible. *See, e.g.*, Exhibit 2 at 55 (noting that “following conclusion of the aquifer test, there was a recovery of ground water levels” but “the carbonate-rock aquifer has not recovered to pre-Order 1169 test levels”). Those bearing the burden of this consequence will be the irrigators with senior decreed surface water rights, existing and future homeowners who are left without water, and existing water users whose livelihoods are reliant on their current and longstanding water use.

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#### IV. CONCLUSION

For the foregoing reasons, this Court should stay the district court's order pending the outcome of this appeal.

RESPECTFULLY SUBMITTED this 8th day of September, 2022.

AARON D. FORD  
Attorney General

By: /s/ Jeffrey M. Conner  
HEIDI PARRY STERN (No. 8873)  
Solicitor General  
JEFFREY M. CONNER (No. 11543)  
Deputy Solicitor General  
KIEL B. IRELAND (No. 15368)  
Deputy Solicitor General  
JAMES N. BOLOTIN (No. 13829)  
Senior Deputy Attorney General  
100 North Carson Street  
Carson City, NV 89701-4717  
T: (775) 684-1100  
E: [hstern@ag.nv.gov](mailto:hstern@ag.nv.gov)  
[jconner@ag.nv.gov](mailto:jconner@ag.nv.gov)  
[kireland@ag.nv.gov](mailto:kireland@ag.nv.gov)  
[jbolotin@ag.nv.gov](mailto:jbolotin@ag.nv.gov)  
*Attorneys for Respondent  
State Engineer*

## **CERTIFICATE OF SERVICE**

I certify that I am an employee of the Office of the Attorney General and that on this 8th day of September, 2022, I served a copy of the foregoing STATE ENGINEER'S SUPPLEMENT TO PARTIAL JOINDER OF EMERGENCY MOTIONS FOR STAY UNDER NRAP 27(E), by electronic service to the participants in this case who are registered with the Nevada Supreme Court's EFlex Electronic Filing System.

*/s/ Dorene A. Wright* \_\_\_\_\_