Case No. 84739

IN THE SUPREME COURT OF THE STATE OF NEVADA

ADAM SULLIVAN, P.E., NEVADA STATE ENGINEER, et al.

Appellants,

vs.

LINCOLN COUNTY WATER DISTRICT, et al.

Respondents.

Consolidated with
Case Nos. 84741, 84742, and 84809

Appeal from the Eighth Judicial District Court, Clark County
District Court Case No. A-20-816761- C
(Consolidated with Case Nos. A-20-817765-P, A-20-818015-P, A-20-817977-P, A-20-818069-P, A-20-817840-P, A-20-817876-P, A-21-833572-J)

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RULE 26.1 DISCLOSURE - SNWA

The undersigned counsel of record certifies that the Southern Nevada Water Authority is a governmental agency and a political subdivision of the State of Nevada.

Dated this 8th day of December 2022.

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RULE 26.1 DISCLOSURE – STATE ENGINEER

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RULE 26.1 DISCLOSURE – CBD

The undersigned counsel of record certifies that the Center for Biological Diversity is a nonprofit organization that has no parent corporation, and that no publicly held corporation owns 10% or more of its stock.

Dated this 8th day of December 2022.

CENTER FOR BIOLOGICAL DIVERSITY

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RULE 26.1 DISCLOSURE – MVIC

The undersigned counsel of record certifies that MUDDY VALLEY IRRIGATION COMPANY is a Nevada Corporation. It has no parent corporations, and no public company owns 10% or more of its stock.

Dated this 8th day of December 2022.

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JURISDICTIONAL STATEMENT

This is an appeal of an administrative action brought under NRS 533.450 concerning determinations made in Nevada State Engineer Order 1309 ("Order 1309").[1] This appeal is from a final judgment of the district court, which vacated Order 1309. Under NRS 533.450(9), parties can appeal a district court's final judgment to this Court just as in other civil cases.[2]

Through two orders, the district court disposed of all petitions for judicial review. On April 19, 2022, after full briefing and oral argument, the district court issued its Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review, granting the petitions for judicial review filed by Coyote Springs Investment, LLC ("CSI"), Lincoln County Water District and Vidler Water Company ("Lincoln-Vidler"), Nevada Cogeneration Associates Numbers 1 and 2 ("Nevada Cogen"), Apex Holding Company, LLC and Dry Lake Water, LLC ("Apex") and Georgia-Pacific Gypsum LLC and Republic Technologies, Inc. ("Georgia-Pacific"). The first Notice of Entry of Order was served on April 19, 2022.[3]

On May 13, 2022, the district court issued an Addendum and Clarification to the Court's Findings of Fact, Conclusions of Law, and Order Granting Petitions for

[1] NRAP 17(a)(8).
[2] NRAP 3A(b)(1).
[3] J.A. Vol. 49, at JA_23294-23337.

Judicial Review Filed on April 19, 2022 ("Addendum"), granting in part and dismissing in part LVVWD and SNWA's petition for judicial review, and dismissing in their entirety Muddy Valley Irrigation Company's ("MVIC") and Center for Biological Diversity's ("CBD") petitions for judicial review. Notice of Entry of Order of the Addendum was served on May 16, 2022.[4]

These decisions were appealed by the State Engineer on May 13, 2022, as amended on May 19, 2022, by CBD on May 16, 2022, by SNWA on May 19, 2022, and by the MVIC on May 26, 2022.

ROUTING STATEMENT

Pursuant to NRAP 17(a)(8), this appeal is properly before this Court as it relates to an administrative agency case involving water.

ISSUES PRESENTED[5]

1. Whether the State Engineer had legal authority to delineate the Lower White River Flow System ("LWRFS") as a single hydrological unit for joint administration and conjunctive management of ground and surface water based on its interconnectivity and shared supply of water.

[4] J.A. Vol. 49, at JA_23338-23350.

[5] This Court directed the parties to brief the specific issues that are included in this Appellants' Joint Opening Brief. Order Modifying Caption and Setting Briefing Schedule, October 14, 2022, at 3-4; Order Clarifying Briefing Scheduling, October 27, 2022, at 4.

2. Whether the State Engineer, before issuing Order 1309, afforded adequate due process to parties below regarding (A) the notice and hearing procedure, (B) the decision to subject the LWRFS to conjunctive management and joint administration, and (C) the use of six criteria to evaluate evidence presented by stakeholders regarding hydrologic connectivity within the LWRFS.[6]

STATEMENT OF THE CASE

This appeal arises from a district court order vacating State Engineer Order 1309 ("Order 1309").[7] Order 1309 consists of factual findings that the State

[6] Appellants SNWA and MVIC were the only petitioners in the district court with even a colorable claim that they were deprived of an actual property interest. SNWA and MVIC asserted similar challenges to two paragraphs on pages 60-61 of Order 1309 about the absence of a conflict between current groundwater pumping and senior decreed rights in the Muddy River because those determinations constituted an adjudication of rights that exceeded the scope of the hearing notice. J.A. Vol. 1, at JA_6-7, 161-162. Despite SNWA and MVIC's presentation of similar challenges to the same provisions of Order 1309, the district court issued a contradictory ruling when it partially granted SNWA's petition on due process grounds but denied MVIC's petition in its entirety. J.A. Vol. 49, at JA_23346.

To the extent the challenged paragraphs can be read as an adjudication of the absence of a conflict with SNWA and MVIC's rights under the Muddy River Decree, the State Engineer agrees that such determination, as asserted by SNWA and MVIC, exceeded the scope of the hearing notice. Accordingly, the State Engineer, SNWA, and MVIC respectfully request the Court affirm the District Court's decision in the Addendum to the extent it granted SNWA's petition and reverse, in part, the denial of MVIC's petition on the basis that the challenged paragraphs on pages 60-61 exceeded the scope of the hearing notice. However, to the extent SNWA and MVIC assert any groundwater pumping within the LWRFS creates a *per se* conflict with rights adjudicated in the Muddy River Decree, the State Engineer reserves the right to address that issue when it is properly ripe for adjudication in future proceedings.

[7] J.A. Vol. 49, at JA_23338-50.

Engineer made regarding the over-appropriation of the LWRFS.[8] Order 1309 followed the investigative phase of a statutorily mandated, multi-phased administrative process, and was limited to establishing threshold factual findings that are critical to yet-to-be-made groundwater management decisions.[9]

Nevada law requires the State Engineer define groundwater aquifers in order to effectively manage Nevada's groundwater.[10] In Order 1309, the State Engineer relied on decades of scientific investigations to define the boundaries of the LWRFS, an area that overlies a *carbonate aquifer* that is underground.[11] He also confirmed the LWRFS aquifer is a significant source of water contributing to the flows of the Muddy River. That river is fully appropriated by senior decreed water rights and provides critical habitat for the endangered Moapa dace.[12] The findings were authorized, both expressly and implicitly, by numerous statutes.[13]

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[8] J.A. Vol. 2, at JA_367-91.

[9] J.A. Vol. 2, at JA_706 at 10:3 (Fairbank) ("And so, and I'm going to talk about this and we've spoken about this before, is that really this is a threshold reporting aspect, that this is part of a multi-tiered process in terms of determining the appropriate management strategy to the Lower River Flow System. And in order for the office to go ahead and start to engage in working with the -- with the community, working with water right holders and determining what an appropriate management strategy is, there's threshold matters that have to be decided and determined.").

[10] NRS 534.100(1); NRS 534.110(1).

[11] The *carbonate aquifer* is a regional groundwater system comprised of geologic formations that consist of, and are referred to as, carbonate rocks. J.A. Vol. 2, at JA_379.

[12] J.A. Vol. 2, at JA_329, 331.

[13] NRS 534.110(6); *See Wilson v. Pahrump Fair Water, LLC*, 137 Nev. 10, 13, 481 P.3d 853, 856 (2021) (State Engineer powers are expressly or implicitly delegated).

The State Engineer also found the LWRFS is over-appropriated because the annual replenishment of groundwater supply is not adequate to meet existing water rights.[14] Specifically, he found that over 38,000 acre-feet annum ("acre-feet") of groundwater permits have been issued in the LWRFS, but only 8,000 acre-feet can be sustainably pumped; pumping more than that threatens senior surface water rights and the endangered Moapa dace.[15]

Before issuing Order 1309, the State Engineer issued Interim Order 1303 to afford proper notice to all LWRFS groundwater right holders that the State Engineer was only investigating facts at this stage of a multi-phase management process.[16] The State Engineer clearly left policy decisions regarding *if, when or how* regulation or curtailment of existing rights should occur to the later, yet-to-occur, management phases.[17] His office provided more than adequate due process to all interested and potentially affected water rights holders and other persons by

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[14] *See* NRS 534.110(6).

[15] J.A. Vol. 2, at JA_367, 388, 390. Appellant CBD and MVIC agree with this statement and statements to this effect through this Opening Brief, to the extent that they properly describe the purpose and scope of the Order 1303 hearing and Order 1309. CBD and MVIC do not agree, however, that the actual pumping limit included in Order 1309 (8,000 afa) is sufficient to prevent impacts to senior existing surface water rights and the Moapa dace and reserves the right to challenge that specific factual determination in future proceedings.

[16] J.A. Vol. 2, at JA_487, 706 at 10:3-11:2 (Fairbank). *See* NRS 534.110(6) (mandating the State Engineer to conduct an investigation and make findings regarding whether annual replenishment is adequate for existing rights before making any curtailment decision).

[17] J.A. Vol. 2, at JA_706 at 10:3-11:2 (Fairbank).

conducting multiple public workshops, working group meetings, a pre-hearing conference, and an administrative hearing.[18] The administrative hearing was not an adversarial proceeding, but was a fact-finding exercise that gave all interested stakeholders a full and fair opportunity to be heard on a list of specific factual questions included in Interim Order 1303.[19]

The findings in Order 1309 are properly limited to Interim Order 1303's specific list of factual questions. That list certainly included, as did the stakeholders' evidence, references to joint and conjunctive management. The State Engineer articulated the specific criteria for delineating the LWRFS in Order 1309. Due process to stakeholders was proper because those criteria just organized the extensive evidence presented and relied upon by the stakeholders' experts. Also, the criteria summarized the factors – largely drawn from stakeholder experts' own reports and testimony – that the State Engineer found most persuasive in determining which sub-basins were closely connected enough to manage together.[20] In short, the "criteria" was not a new set of rules; rather, the criteria were the manner in which the State Engineer organized and condensed the natural

[18] J.A. Vol. 2, at JA_336, 703-36, Vol. 23 at JA_10532-90.
[19] J.A. Vol. 2, at JA_335-336 ("Reports submitted by interested stakeholders were intended to aid in the fact-finding goals of the Division"), 404, 406-407, 520 ("this matter is not an adversarial proceeding"); 706 at 10:3-11:2 (Fairbank).
[20] J.A. Vol. 2, at JA_406-07, 486, 706-07 at 10:3-16:3 (Fairbank); *see* NRS 534.110(6).

components of the Stakeholders arguments into an understandable analysis of the evidence.

Order 1309 was appealed to district court, the district court vacated Order 1309, and then this Court issued a stay of the district court's decision.[21] The district court ignored the clear purpose and express findings of Order 1309 which was only fact-finding. This fundamental error led to an incorrect review of State Engineer authority and due process based on presumptions of what is not in Order 1309.

Relevant to the issues identified by this Court's scheduling order, the district court should have only reviewed the State Engineer's authority to make factual findings regarding the delineation and maximum sustainable pumping limit for the LWRFS, and whether all petitioners had a full and fair opportunity to present their positions regarding those findings. Instead, the district court erroneously interpreted Order 1309 to be a reprioritization of LWRFS groundwater rights, which it expressly was not. The district court then improperly analyzed the authority and due process issues based on the non-existent reprioritization of water rights, which is well beyond the scope and findings of Order 1309.

When reviewed in the proper context – for only its factual findings – Order 1309 should be upheld because the State Engineer is clearly authorized to delineate

[21] J.A. Vol. 49, at JA_23294-337; Order Granting Stay, October 3, 2022, at 4-5.

aquifers and hydrologic systems in Nevada, and all parties had a full and fair opportunity to present their positions.

STATEMENT OF FACTS

Order 1309 is the latest step in the State Engineer's decades-long effort to manage groundwater in the LWRFS. These regulatory steps were necessary because the carbonate aquifer underlying a vast area northeast of Las Vegas is complex and required additional investigation. The LWRFS area has long been considered to have one shared primary water resource – the carbonate aquifer. In Order 1309 the State Engineer built on decades of data and observation to officially delineated the geographic boundary of the LWRFS as part of the investigation he is required to conduct by NRS 534.110(6). Specifically, he concluded the interconnected LWRFS carbonate aquifer encompasses Coyote Spring Valley, Kane Springs Valley, the Muddy River Springs Area, Garnet Valley, Hidden Valley, California Wash, and part of the Black Mountains Area.[22]

I. Connection Between LWRFS And The Muddy River

Scientists, the State Engineer, and LWRFS stakeholders have known the Muddy River is hydrologically connected to a groundwater aquifer underlying the LWRFS for over fifty years.[23] The river comes from high-flowing springs that exist

[22] J.A. Vol. 2, at JA_379, 390.
[23] J.A. Vol. 5, at JA_2303-54.

in the middle of the desert.[24] Since the river's historic flow is too high and consistent to come from surface runoff in its desert-surroundings, experts concluded long ago that the groundwater from the LWRFS is the Muddy River's source of supply.[25] Specifically, in 1966, unbiased scientists at the United States Geological Survey ("USGS") concluded that the Muddy River is "being supplied from a large regional groundwater system" that extends over one hundred miles to the north of the Muddy River.[26]

The entire flow of the Muddy River was fully appropriated prior to 1905.[27] Today, SNWA owns nearly half of the Muddy River's water rights, which provide a critical water supply for residents of Las Vegas.[28] Since Muddy River surface water rights have a senior priority date to any groundwater rights, groundwater pumping that intercepts Muddy River water has long been an issue of concern when applicants sought to appropriate groundwater in the LWRFS.[29]

A. The Regional Carbonate Aquifer

The regional groundwater system that supplies the Muddy River is also called the carbonate aquifer. This means the valleys in the system are connected by

[24] J.A. Vol. 2, at JA_331.
[25] J.A. Vol. 27, at JA_11842.
[26] J.A. Vol. 5, at JA_2907.
[27] J.A. Vol. 13, at JA_6634–80.
[28] J.A. Vol. 4, at JA_1935-2023; Vol. 44, at JA_17784 at 997:16-998:21.
[29] J.A. Vol. 3, at JA_920-1070; Vol. 32, at JA_14902-938; Vol. 46, at JA_18708-47.

a geologic feature (carbonate rock) that is deep underground, connects valleys, and transmits water.[30] Since 1964, the USGS and State Engineer have recognized that Coyote Spring Valley, Kane Springs Valley, and the Muddy River Springs Area share a perennial yield and are part of a larger groundwater system comprised of neighboring and upgradient valleys.[31] In other words, long ago the USGS concluded, and the State Engineer concurred, that the carbonate aquifer allows groundwater to flow under Coyote Spring and Kane Springs Valleys from areas farther north, to the Muddy River. The carbonate aquifer's unique nature means that the same groundwater from the northernmost boundary flows underground all the way south to the Muddy River's headwaters, demonstrating that the purportedly separate hydrographic basins were not, in fact, separate.

B. The Moapa Dace and the Muddy River Springs

The Moapa dace is a fish that is listed as endangered under the Federal Endangered Species Act.[32] The Moapa dace exists only in the headwater springs that form the Muddy River.[33] Habitat for the fish depends on spring flows from the carbonate aquifer.[34] In Order 1309, the State Engineer found that groundwater pumping in the LWRFS negatively impacts spring flows and, consequently, the

[30] J.A. Vol. 2, at JA_371.
[31] J.A. Vol. 5, at JA_2337.
[32] J.A. Vol. 2, at JA_329.
[33] J.A. Vol. 28, at JA_11970.
[34] J.A. Vol. 28, at JA_11970.

habitat for the Moapa dace, and maintaining spring flows above a critical level is necessary to prevent population losses and unlawful "take" of the species.[35]

II. Groundwater Applications In The LWRFS

In the 1980s, applications were filed to appropriate over 300,000 acre-feet of regional groundwater in Coyote Spring Valley and the surrounding interconnected basins.[36] But, already in 1964, the USGS concluded that without the water flowing in the carbonate aquifer, only 2,600 acre-feet of water was available in Coyote Spring Valley, Kane Springs Valley, and the Muddy River Springs Area.[37] By 1980, that 2,600 afa was already appropriated. All that remained was water from the carbonate aquifer.[38]

To address the new applications, the State Engineer had to determine whether additional water from the carbonate aquifer could be appropriated in Coyote Spring Valley and adjacent valleys.[39] For that purpose, in 1984 his office joined with the USGS to complete the Carbonate Terrane Study.[40] Since extensive pumping and drawdown data was not yet available, the USGS relied on

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[35] J.A. Vol. 2, at JA_370.
[36] J.A. Vol. 2, at JA_328.
[37] J.A. Vol. 5, at JA_2337.
[38] State Engineer Ruling 2524 (March 18, 1980), available at http://images.water.nv.gov/images/rulings/2524r.pdf (last visited December 7, 2022); State Engineer Ruling 2947 (April 19, 1984) available at http://images.water.nv.gov/images/rulings/2924r.pdf (last visited December 7, 2022).
[39] J.A. Vol. 2, at JA_327-28.
[40] J.A. Vol. 2, at JA_327; Vol. 46, at JA_18752-824.

groundwater budgets and other theoretical methods to estimate the amount of water available.[41] The estimates varied widely from a few thousand acre-feet based on local recharge, to over 50,000 acre-feet based on the underground carbonate flow from upgradient basins.[42] But the USGS cautioned that a full understanding of the regional system would take a lot of time and money, and "development of the carbonate water is risky, and the resultant effects may be disastrous for the developers and current users."[43] Because little was known about how much groundwater was available in the carbonate aquifer, the State Engineer granted applications cautiously, and in stages.[44]

A. Application 46777 and Stage 1 Applications

Application 46777 was one of the new appropriation applications that was filed in the 1980s to appropriate water from the regional carbonate aquifer from a well in Coyote Spring Valley.[45] Nevada Power filed the application, but today CSI

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[41] J.A. Vol. 3, at JA_825-27; Vol. 46, at JA_18766.
[42] J.A. Vol. 3, at JA_828, Vol. 5, at JA_2337. In 2001, the State engineer repeated this sentiment in Order 1169. *Id.*
[43] J.A. Vol. 3, at JA_830; Vol. 46, at JA_18752.
[44] J.A. Vol. 3, at JA_827; Vol. 32, at JA_14917-18.
[45] J.A. Vol. 32, at JA_14832, 14905 ("The Point of diversion under Application 46777 is within Coyote Springs Valley Groundwater Basin and just up gradient of the Muddy River Springs Area Groundwater Basin. However, Application 46777 does not seek water from the alluvial aquifer, but rather seeks to appropriate water from deep regional groundwater flow system referred to as the carbonate aquifer. The carbonate aquifer is part of a regional interbasin groundwater flow system identified as the White River System.").

and SNWA own the water right.[46] CSI seeks to use water rights originating from Application 46777 for its proposed housing development.[47] The United States and Nevada's Department of Wildlife filed protests against Application 46777 based on potential impacts to the Moapa dace.[48]

In 1997, the State Engineer conditionally granted Application 46777, after an evidentiary hearing, with specific permit terms protecting the Muddy River.[49] In Ruling 4542, the State Engineer stated that protests were withdrawn "on the understanding that *groundwater pumping would be stopped* should the project adversely affect the water table in the Muddy River Springs Area."[50] The State Engineer required an early warning monitoring system so that "if, at some future time, it is determined that pumping the [Permit 46777 wells] has adverse effects on the springs [and river . . .] *those effects would be detected early."*[51] Permit 46777 was issued "subject to existing rights" and with an express warning that the "State Engineer retains the right to regulate the use of the water herein granted *at any and all times*."[52] Similar language is in the other LWRFS groundwater permits.[53]

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[46] J.A. Vol. 32, at JA_14832, 14872.
[47] J.A. Vol. 32, at JA_14832-38, 14872.
[48] J.A. Vol. 32, at JA_14902-03.
[49] J.A. Vol. 32, at JA_14902-18.
[50] J.A. Vol. 32, at JA_14903 (emphasis added).
[51] J.A. Vol. 32, at JA_14911 (emphasis added).
[52] J.A. Vol. 32, at JA_14832-34 (emphasis added).
[53] *See*, J.A. Vol. 13, at JA_6764-69; Vol. 16, at 7490-95; Vol. 27, at JA_11762-81.

B. Order 1169

In 2000, over 250,000 acre-feet of new applications remained pending before the State Engineer in the LWRFS (i.e., Stage 2).[54] In the early 2000s, the State Engineer held a hearing to consider some of these pending applications for groundwater in Coyote Spring Valley and the LWRFS area.[55] He commented that little of the water he already approved has been developed,[56] and until it was, he could not act on the Stage 2 applications. He held the Stage 2 Applications in abeyance, and issued Order 1169, which jointly managed the LWRFS area by treating it as one aquifer and considering the impacts of groundwater pumping on the Muddy River's surface water flows.[57] He also ordered a test pursuant to NRS 534.110(2)(b) that required "at least 50% of the water rights then currently permitted in the Coyote Spring Valley be pumped for at least 2 consecutive years" to understand how much, if any, additional water could be pumped in the LWRFS without impacting the Muddy River and Moapa dace ("Aquifer Test").[58]

The Aquifer Test, conducted between 2010-2012, revealed that pumping even less than half of the *existing* rights significantly impacted the Muddy River

[54] J.A. Vol. 49, at JA_23307.
[55] J.A. Vol. 2, at JA_328.
[56] J.A. Vol. 3, at JA_829.
[57] J.A. Vol. 3, at JA_824.
[58] J.A. Vol. 3, at JA_824-34.

and Moapa dace's habitat within only two years.[59] The Aquifer Test demonstrated that groundwater in Coyote Spring Valley has a close hydrologic connection to groundwater in adjacent valleys, and that pumping in Coyote Spring Valley directly depletes Muddy River's flows and negatively impacts Moapa dace habitat.[60]

After the Aquifer Test, the State Engineer had data the USGS did not have in the 1960s-1980s.[61] Rather than simple theoretical estimates, new empirical data showed that the stress from the Aquifer Test pumping caused common groundwater level responses throughout the LWRFS region.[62] More importantly, monitoring wells near the Muddy River and critical Moapa dace habitat, as well as spring flow data in the Muddy River's headwaters, showed that Aquifer Test pumping in the LWRFS intercepted the flow of the Muddy River.[63]

C. Rulings 6254-6261

Based on the Aquifer Test evidence, expert reports, and an administrative hearing, the State Engineer issued Rulings 6254-6261 in 2014.[64] His office again

[59] J.A. Vol. 3, at JA_916.
[60] J.A. Vol. 3, at JA_942.
[61] J.A. Vol. 3, at JA_935.
[62] J.A. Vol. 3, at JA_942.
[63] J.A. Vol. 3, at JA_942.
[64] J.A. Vol. 3, at JA_891-1113.

treated the LWRFS (except Kane Springs Valley) as one aquifer.[65] The rulings, which are virtually identical, denied all pending water right applications subject to the Order 1169 proceedings.[66] Because the area "shares a unique and close hydrologic connection and virtually all of the same source and supply of water,"[67] the State Engineer jointly managed the area by setting one perennial yield for the Order 1169 area and the Muddy River.[68] The State Engineer found that the precise perennial yield remained unclear, but that overwhelming evidence showed that no water remained in the system to approve any new water rights.[69] Rulings 6254-6261 were not appealed by any of the parties involved in this appeal.

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[65] J.A. Vol. 2, at JA_376-379; Vol. 3, at JA_891-1113. Initially the State Engineer excluded Kane Springs Valley from the Order 1169 study area, and in 2007, *before* the Aquifer Test occurred, he issued Ruling 5712 that granted water rights to Lincoln-Vidler. J.A. Vol. 3, at JA_864-886. In Order 1309, the State Engineer determined that the data from *during and after* the Order 1169 Aquifer Test indicated Kane Springs Valley is interconnected with and shares its source of water with the LWRFS.

[66] J.A. Vol. 2, at JA_334.

[67] *See e.g.*, J.A. Vol. 2, at JA_ 379; Vol. 3, at JA_945.

[68] J.A. Vol. 3, at JA_945 ("The perennial yield of these basins cannot be more than the total annual supply of 50,000 acre-feet. Because the Muddy River and Muddy River springs also utilize this supply and are the most senior water rights in the region, the perennial yield is further reduced to an amount less than 50,000 acre-feet. The State Engineer finds that the amount and location of groundwater that can be developed without capture of and conflict with senior water rights on the Muddy River and springs remains unclear, but the evidence is overwhelming that unappropriated water does not exist.").

[69] J.A. Vol. 3, at JA_914.

III. Interim Order 1303 And Order 1309

A. Interim Order 1303

In 2019, intentions to use existing groundwater rights to support a large residential and commercial project in Coyote Spring Valley prompted the State Engineer to start addressing how to deal with the existing over-appropriation of the carbonate aquifer, and potential impacts for the headwater springs of the Muddy River.[70] As a result, the State Engineer issued Interim Order 1303.[71] Prior to issuing Interim Order 1303, the State Engineer held several public workshops where stakeholders were invited to provide input on water issues in the area, and how to investigate water availability and sustainably in the LWRFS.[72] At one workshop, the State Engineer circulated a proposed draft order that included a preliminary estimate on a pumping cap for the LWRFS. CSI responded with a letter that "commented on the total lack of technical information necessary to perform a comprehensive review of the State Engineer's conclusions" and

[70] J.A. Vol. 23, at JA_10581-85 (In 2017, CSI sought approval of subdivision maps using supported by water originally appropriated under Permit 46777, and the Las Vegas Valley Water District sought clarification of water availability for existing rights from the State Engineer.).
[71] J.A. Vol. 2, at JA_394–412.
[72] J.A. Vol. 23, at JA_10532-10590 (The public workshop history available on the State Engineer's web page in the Public Meetings folder available at http://www.water.nv.gov/news.aspx?news=LWRFS).

"requested that the State Engineer provide public access to the cited 30,000 pages of documentation used to support his conclusions in the draft order."[73]

After receiving and considering public input, the State Engineer issued Interim Order 1303, initiating the multi-phased process, starting with an investigation mandated by NRS 534.110(6). The State Engineer was explicit – he had to address hydrologic factual questions, with input from stakeholders and their experts, before management decisions could be made.[74] For Phase 1, the State Engineer asked all stakeholders to submit expert reports to address four specific factual matters: (1) the geographic boundary of the LWRFS, (2) aquifer recovery since the Aquifer Test, (3) the long-term annual quantity of groundwater that may be pumped from the LWRFS, and (4) the effects of moving water rights between the carbonate and alluvial systems to senior water rights on the Muddy River.[75]

The hearing procedures were fully noticed to stakeholders. Interim Order 1303 requested data from stakeholders in the LWRFS through initial reports and rebuttal reports.[76] Parties were put on notice that a hearing would commence in September 2019.[77] After extending the deadlines for expert reports,[78] on July 25,

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[73] J.A. Vol. 1, at JA_34.
[74] J.A. Vol. 2, at JA_405.
[75] J.A. Vol. 2, at JA_406-07. The State Engineer also include a fifth general request for "[a]ny other matter believed to be relevant to the State Engineer's analysis."
[76] J.A. Vol. 2, at JA_407.
[77] J.A. Vol. 2, at JA_407.
[78] J.A. Vol. 2, at JA_412.

2019, the State Engineer issued a notice of prehearing conference,[79] and held that prehearing conference on August 8, 2019.[80] Based on the Parties' requests, the State Engineer issued a hearing matrix dividing the hearing time between parties.[81] On August 23, 2019, the State Engineer issued a Notice of Hearing, and listed additional documents he would consider in addressing the factual questions identified in Interim Order 1303. Parties were on notice that they could submit any additional documents for the State Engineer to consider.[82] On August 26, 2019, the State Engineer issued an Amended Notice of Hearing.[83] On August 29, 2019, the State Engineer emailed all parties to clarify multiple procedural questions.[84]

B. State Engineer's Administrative Hearing

The State Engineer held an administrative hearing from September 23, 2019, until October 4, 2019, to take evidence on the Interim Order 1303 questions.[85] Respondents in this matter were provided notice of the administrative process, submitted reports and participated in a two-week hearing (with the exception of Apex and Dry Lake, who declined to participate despite receiving notice).

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[79] J.A. Vol. 2, at JA_697-702.
[80] J.A. Vol. 2, at JA_703-36.
[81] J.A. Vol. 2, at JA_737.
[82] J.A. Vol. 2, at JA_464-84; *see also* Vol. 3, at JA_819 through Vol. 13, at JA_6686 (State Engineer's exhibits).
[83] J.A. Vol. 2, at JA_486-503.
[84] J.A. Vol. 2, at JA_517-20.
[85] *See* J.A. Vol. 44, at JA_17341-18155.

Respondents presented expert testimony, including rebuttal testimony, had a full opportunity to cross-examine other stakeholders' experts and submitted thousands of pages of exhibits and written closing statements.[86] Lincoln-Vidler was heard on whether Kane Springs Valley should be included in the LWRFS.[87] The State Engineer considered the evidence presented by all parties, even if he ultimately disagreed with some their positions on the facts related to the boundaries of the LWRFS, and the sustainable quantity of groundwater that may be pumped from the LWRFS.

C. Order 1309

Based on the evidentiary hearing, Order 1309 set out three factual findings.[88] First, the State Engineer delineated the geographic extent of the LWRFS.[89] Second, the State Engineer determined that the maximum quantity of groundwater that can be pumped in the LWRFS is 8,000 acre-feet annually.[90] Third, the State Engineer found that the 8,000 acre-feet limit may be reduced if that pumping will impact the

[86] J.A. Vol. 2, at JA_371; Vol. 13, at JA_6749 through Vol. 43, at JA_17144 (stakeholder exhibits); Vol. 43 at JA_17154-356 (stakeholder closing statements); Vol. 44, at JA_17357-18155 (hearing transcripts).
[87] J.A. Vol. 2, at JA_376-378.
[88] J.A. Vol. 2, at JA_371-91.
[89] J.A. Vol. 2, at JA_390.
[90] J.A. Vol. 2, at JA_390.

endangered Moapa dace.[91] The State Engineer also rescinded all provisions of Interim Order 1303 that were not specifically addressed in Order 1309.[92]

IV. District Court Review Of Order 1309

Multiple parties appealed Order 1309.[93] The district court heard those appeals and vacated Order 1309.[94] The appeals before the district court arose from the factual findings in Order 1309, not groundwater management decisions that the State Engineer deferred to Phase 2 of the administrative process. Yet, the district court did not confine its review to the State Engineer's specific findings in Order 1309 and his authority to make such findings. Despite clear statements to the contrary in Order 1309, the district court concluded that the State Engineer changed water right priorities, and then based its remaining determinations on that error.[95]

The critical aspects of the district court's order for this stage of this appeal include the determination that (1) the State Engineer cannot jointly manage groundwater in hydrologically connected areas and cannot conjunctively manage

[91] J.A. Vol. 2, at JA_390.
[92] J.A. Vol. 2, at JA_391.
[93] J.A. Vol. 49, at JA_23300-01. This Court issued an unpublished opinion that directed the Lincoln-Vidler appeal to be heard in the Eighth Judicial District Court. *Lincoln Cnty. Water Dist. v. Wilson*, Case No. 81792, 485 P.3d 210 (Table), 2021 WL 1440402 (Nev. 2021) (unpublished disposition).
[94] J.A. Vol. 49, at JA_23333-34.
[95] J.A. Vol. 49, at JA_23326.

ground and surface water, and (2) the State Engineer did not afford adequate due process to water rights holders before issuing Order 1309.[96]

For the following reasons, the district court erred in making both determinations, and Appellants respectfully request reversal of its order.

STANDARD OF REVIEW

All issues in this case involve legal questions that are reviewed de novo.[97] Decisions of the State Engineer are "prima facie correct, and the burden of proof shall be upon the party attacking the same."[98] This Court has previously held that "[a]n agency charged with the duty of administering an act is impliedly clothed with power to construe it as a necessary precedent to administrative action' and that 'great deference should be given to the agency's interpretation when it is within the language of the statute.'"[99] While not controlling, an agency's interpretation of a statute is persuasive.[100]

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[96] J.A. Vol. 49, at JA_23317-34.
[97] *King v. St. Clair*, 134 Nev. 137, 139, 414 P.3d 314, 316 (2018).
[98] NRS 533.450(10).
[99] *State v. Morros*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988) (quoting *Clark Co. Sch. Dist. v. Local Gov't*, 90 Nev. 442, 446, 530 P.2d 114, 117 (1974)).
[100] *State v. Morros*, 104 Nev. at 713, 766 P.2d at 266 (citing *Nevada Power Co. v. Public Serv. Comm'n*, 102 Nev. 1, 4, 711 P.2d 867, 869 (1986)). *See also*, *Town of Eureka v. Office of State Eng'r of State of Nev., Div. of Water Res.*, 108 Nev. 163, 165-66, 826 P.3d 948, 950 (1992).

SUMMARY OF ARGUMENT

The State Engineer has broad authority to regulate the withdrawal of groundwater in the State of Nevada.[101] His office must determine whether groundwater is available, and whether the annual replenishment of groundwater is sufficient to meet all rights.[102] To accomplish this, the Legislature directed the State Engineer to consider the best available science to define groundwater aquifers, establish water budgets, and determine if water is available for appropriation.[103]

The first step – defining aquifers – requires the State Engineer to determine the boundaries within which groundwater is separated from groundwater in another basin, and if groundwater is connected to the same source of supply, where the connection terminates.[104] Each source of supply (aquifer) should be managed so pumping in one aquifer will not impact the availability of groundwater in another.

In Order 1309, the State Engineer defined the LWRFS by delineating its exterior boundaries. He did this because the individual basins within the LWRFS did not have separate sources of groundwater supply. Without this, the State Engineer could not fulfill his other duties for managing groundwater, such as quantifying the water available for appropriation. Since he was authorized by the

[101] NRS 532.110; NRS 532.120; NRS 532.165 through NRS 532.180; NRS 533.030(1).
[102] NRS 532.167; NRS 533.370; NRS 534.110.
[103] NRS 533.024; NRS 534.100(1); NRS 532.167.
[104] NRS 534.110(2).

Legislature to define aquifers like the carbonate aquifer of the LWRFS, the delineation of the LWRFS in Order 1309 should have been upheld.

Respondents argue that the State Engineer does not have the statutory authority to create the LWRFS or alter a hydrographic basin map that was developed in the late 1960s. This contention is baseless and would paralyze the Office of the State Engineer. The State Engineer was given the authority to promulgate a hydrographic basin map, but the original map for study purposes was not infallible or immune from revision. The initial hydrographic basin map was lawfully adopted, and the State Engineer has broad express and implied powers in addition to the statutory authority in NRS 532.120 to "make such reasonable rules and regulations as may be necessary for the proper and orderly execution of the powers conferred by law." Since the State Engineer could lawfully develop the original hydrographic basin map, he can amend it when empirical evidence requires. Otherwise, there would be absurd results, like trying to quantify groundwater in an individual hydrographic basin that shares the same groundwater supply as six other basins. That runs contrary to fundamental canons of statutory interpretation and would prevent the State Engineer from executing statutory directives.

Joint administration of the LWRFS is also authorized because the LWRFS is a definable aquifer, and the State Engineer has jointly managed the valleys and

basins in the LWRFS for decades, regardless of topographical divides. The Respondents, or their predecessors, knew this, and were always seeking water from the regional, carbonate rock water system. Order 1309 is simply the latest in a fifty-year series of LWRFS Orders and Rulings issued by the State Engineer acknowledging the system's interconnections and using the powers conferred by statute.

Conjunctive management of surface and groundwater is also authorized by Nevada law. Groundwater rights are subject to the same regulations regarding appropriation and use thereof as surface water rights.[105] The State Engineer has a duty to protect wildlife use of springs, particularly if an impact may be caused by groundwater pumping.[106] The State Engineer has a duty to not impair vested rights, and to protect senior rights and the public interest, when issuing and managing groundwater rights.[107] This Court's precedent is abundantly clear on this point.[108]

Further, the State Engineer did not violate the due process rights of any Respondent by making scientific findings delineating the LWRFS and the sustainable pumping limit therein. To the extent due process attached during the initial fact-finding phase that resulted in Order 1309, the district court erred in

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[105] NRS 534.080.
[106] NRS 533.367.
[107] NRS 533.085; NRS 533.370; NRS 533.430; NRS 534.020; NRS 534.110(6) ; *see Eureka Cnty. v. State Eng'r,* 131 Nev. 846, 359 P.3d 1114 (2015).
[108] *Eureka Cnty. v. State Eng'r*, 131 Nev. 846, 359 P.3d 1114 (2015).

finding that the State Engineer failed to provide the parties with adequate notice of the subject hearings. Stakeholders certainly knew from Interim Order 1303 that issues related to joint administration and conjunctive management would be considered. Also, the State Engineer's criteria for determining the LWRFS was not a surprise, as every stakeholder knew the State Engineer would rely on that type of information, had an opportunity to present their cases, and did. Accordingly, the Respondents had notice and a full and fair opportunity to be heard regarding the investigation that culminated in Order 1309.

For these reasons, the Appellants respectfully request that the district court's order that vacated Order 1309 be reversed.

ARGUMENT

I. State Engineer Has The Authority To Delineate LWRFS For Joint Administration And Conjunctive Management Based On The Interconnectivity And Shared Supply Of Water In The LWRFS.

The first step in any review of State Engineer authority is interpreting the comprehensive legislative structure "acquiring, changing and losing water rights in Nevada."[109] The State Engineer's powers under that scheme are those the "legislature expressly or implicitly delegated."[110] Here, the State Engineer's

[109] *Mineral Cnty. v. Lyon Cnty.*, 136 Nev. 503, 513, 473 P.3d 418, 426 (2020).
[110] *Wilson v. Pahrump Fair Water, LLC*, 137 Nev. 10, 13, 481 P.3d 853, 856 (2021).

authority to delineate the LWRFS comes from both expressly and implicitly delegated powers throughout the comprehensive scheme for water use in Nevada.

Nevada law gives the State Engineer numerous tools to administer groundwater and surface water. Those tools include the ones the State Engineer expressly relied on, such as NRS 532.120, NRS 534.030, NRS 534.110 and NRS 534.120.[111] Taken separately, each power relates to a specific condition for administering water use. Together, these statutes form a mosaic of powers with one primary objective – protect the public resource from being over-pumped so the resource can sustainably provide water for future generations.[112] If the State Engineer's authority is limited like the district court concluded, his office would be powerless to prevent over-appropriation, particularly in the LWRFS.

A. The State Engineer's broad authority over groundwater clearly includes the authority to delineate the LWRFS for joint administration.

The Legislature placed the duty of managing Nevada's groundwater on the State Engineer.[113] The State Engineer is required to manage groundwater in definable aquifers.[114] In this regard, the legislature expressly stated "the distinction as to whether water is in a definable aquifer [. . .] is a matter to be determined by

[111] J.A. Vol. 2, at JA_367-368.
[112] *See generally, Nat. Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1378 n. 19 (D.C. Cir. 1977).
[113] NRS Chapters 532 to 534.
[114] NRS 534.030(4); NRS 534.080(1); NRS 534.100.

the State Engineer."[115] Further, the State Engineer is required to supervise all wells in definable underground aquifers.[116] These express powers authorized the State Engineer, in Order 1309, to determine what water is in a definable aquifer – the LWRFS – so he can fulfill his responsibility to supervise wells in that aquifer.[117] That is what happened in Order 1309. The best available science, data, and years of observation showed that the LWRFS is the definable aquifer. Those seven basins were not definable aquifers, but the LWRFS is. Thus, Order 1309 "established . . . sub-basins within the Lower White River Flow System Hydrographic Basin.[118]

1. NRS 534.110(6)

The State Engineer's action in Order 1309 was also mandated by NRS 534.110(6) because the LWRFS is over-appropriated by almost five-fold. An investigation is required when "it appears that the average annual replenishment to the groundwater supply may not be adequate for the needs of all permittees and all

[115] NRS 534.100(1).
[116] NRS 534.030(4); *see* NRS 534.080(1).
[117] *See* NRS 532.120, 534.030, 534.110, 533.020, 534.120. *See generally*, J.A. Vol. 2, at JA_367 and NRS Chapters 532 through 534.
[118] J.A. Vol. 2, at JA_390.

vested-right claimants."[119] The State Engineer conducted the required investigation in Phase 1 of the LWRFS proceedings, to determine whether "annual replenishment" is adequate for the needs of all water rights holders.[120] Since the individual basins in the LWRFS share the same source of supply, the State Engineer could not comply with NRS 534.110(6) until he delineated that common water source.

After the delineation and other factual findings are made, NRS 533.110(6) indicates the State Engineer *may* limit groundwater withdrawals (i.e., curtailment).[121] No discretionary decisions have been made about *how* to address over-appropriation of the LWRFS, even though the district court incorrectly presumed it did. Thus, NRS 534.110 provides an example of express authority for the State Engineer to conduct fact-finding and aquifer delineation in Order 1309.

2. Managing the LWRFS requires delineation of the aquifer.

The State Engineer is required by many other statutory duties to conduct investigations to define the aquifers that contain groundwater for the purpose of

[119] NRS 534.110(6) ("Except as otherwise provided in subsection 7, the State Engineer shall conduct investigations in any basin or portion thereof where it appears that the average annual replenishment to the groundwater supply may not be adequate for the needs of all permittees and all vested-right claimants, and if the findings of the State Engineer so indicate, except as otherwise provided in subsection 9, the State Engineer may order that withdrawals, including, without limitation, withdrawals from domestic wells, be restricted to conform to priority rights.").
[120] NRS 534.110(6) .
[121] NRS 534.110(6) .

determining if water remains available for appropriation.[122] Those duties authorize approval of applications for groundwater only if: (1) groundwater remains available, (2) the appropriation does not conflict with existing water rights, and (3) the appropriation does not threaten to prove detrimental to the public interest.[123] Also, "the State Engineer *shall* determine whether there is unappropriated water in the *area affected* and may issue permits only if the determination is affirmative."[124]

Once the State Engineer grants groundwater rights, he is required to regulate those rights to protect existing water rights, including senior vested water rights.[125] He also must protect vested water rights from impairment, including vested rights in the Muddy River. Defining the LWRFS aquifer, based on the best available science, was the first necessary step for the State Engineer to meet his duties to effectively manage LWRFS groundwater.

Defining the aquifer in the LWRFS is also required by other parts of the comprehensive statutory scheme for water. The State Engineer is specifically required to supervise all wells in the LWRFS,[126] and NRS 534.110(2) specifically

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[122] NRS 533.024(1)(c); 533.364; 533.3705.
[123] NRS 533.370(2).
[124] NRS 534.110(3) (emphasis added).
[125] NRS 533.030(1).
[126] NRS 534.030(4). Initially, NRS Chapter 533 gave the State Engineer authority over all surface water rights within the State of Nevada. In 1913, the State Engineer gained authority over artesian groundwater aquifers, and in 1939, the State Engineer gained authority over all groundwater. *See* NRS 534.030(4). In 1985, the legislature amended NRS 533.030 to clarify the State Engineer had authority over "all water."

authorized the State Engineer to determine the specific yield of an aquifer and determine permeability characteristics.[127] Those aquifer characteristics were ascertained from the Aquifer Test to define the LWRFS, to determine if over-pumping is occurring, and to set a quantity of available water supply.[128] Delineation was necessary to carry out these management responsibilities.[129]

The State Engineer properly used these powers to clarify the LWRFS is not five or seven separate aquifers based on topography, but instead is appropriately defined by the long-standing and scientifically-proven, hydrologic understanding of the carbonate rock aquifer.[130] Since the 1960s, the USGS has consistently concluded the groundwater aquifer in the LWRFS is a regional groundwater flow system that supplies water to the Muddy River.[131] In 1984, the USGS proposed an additional study for the LWRFS regional aquifer because development of that water "is risky," and "the resultant effects may be disastrous for the developer and the

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[127] NRS 534.110(2)(b) ("Upon his or her own initiation, [the State Engineer may] conduct pumping tests to determine if overpumping is indicated, to determine the specific yield of the aquifers and to determine permeability characteristics").
[128] NRS 534.110(2) .
[129] *See* NRS 534.110(1) (authorized State Engineer to take steps necessary to implement water statutes).
[130] J.A. Vol. 2, at JA_371-379, 390.
[131] In 1964, the Coyote Spring, Kane Springs, and Muddy River Springs areas of the LWRFS were studied together to identify the availability of groundwater. J.A. Vol. 5, at JA_2303-2354.

current users."[132] These studies concluded the LWRFS is a regional system that shares the carbonate aquifer as a source of supply.

In Order 1169, the State Engineer recognized the regional nature of the aquifer in the LWRFS and required it to be managed as one unit through the Aquifer Test.[133] Then, during the administrative proceedings below, the State Engineer asked stakeholders to provide input on the exact boundaries and characteristics of the regional aquifer.[134] The State Engineer made this request to fulfill his ongoing duties.[135] Thus, the State Engineer's delineation of the LWRFS was proper.

3. **Delineation was authorized because delineation is essential for the welfare of the area**.

Based on the Order 1169 and Interim Order 1303 investigations, the State Engineer properly delineated the boundary of the LWRFS based on his statutory authority provided by NRS 534.030(1)-(2). There, the legislature expressly provided power to the State Engineer to "designate [an area in need of administration] by basin, or portion therein, and make an official order describing

[132] J.A. Vol 46, at JA_18752.
[133] J.A. Vol. 2, at JA_819-834.
[134] J.A. Vol. 2, at JA_394-412, 464, 486, 697, 706.
[135] Even in 2017, the legislature reiterated that the State Engineer must prepare water budgets, and quantify existing rights and the amount of unappropriated water; all of which required the delineation of aquifers like the LWRFS. NRS 532.167.

the boundaries by legal subdivision as nearly as possible."[136] After a designation is made, the State Engineer can adopt rules and regulations to administer the basins.

Here, the State Engineer already designated six of the seven basins in the LWRFS.[137] For those basins, Order 1309 was just a continuing regulation of the area that is authorized by NRS 534.120(1) because it is "essential for the welfare of the area."[138] Order 1309 then set a pumping limit for the area. Therefore, even if, for the sake of argument, the State Engineer lacked authority to delineate the LWRFS as a single management unit (though Appellants disagree that he lacks such authority), Order 1309 was authorized by NRS 534.120(1) in all the sub-basins of the LWRFS except Kane Springs because the State Engineer "deemed [it] essential for the welfare of the area involved."[139]

Importantly, NRS 534.030 does not suggest that once a basin is designated, additional orders cannot be adopted to manage the basin based on the best available science.[140] Still, the district court narrowly interpreted NRS 534.030(2) and held that the State Engineer cannot change the boundaries of existing groundwater

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[136] NRS 534.030.
[137] J.A. Vol. 3, at JA_835-863.
[138] NRS 534.120(1) ("Within an area that has been designated by the State Engineer, as provided for in this chapter, where, in the judgment of the State Engineer, the groundwater basin is being depleted, the State Engineer in his or her administrative capacity may make such rules, regulations and orders as are deemed essential for the welfare of the area involved.").
[139] NRS 534.120(1).
[140] *See generally*, NRS 534.030.

basins[141] for the purposes of joint management.[142] Reading this limitation into the statute ignored the intent of the legislature that granted the State Engineer the authority to ascertain which areas are in need of additional administration, and adopt additional rules that are essential for the welfare of the area.[143]

The district court's interpretation is illogical and greatly limits the authority of the State Engineer. Under the district court's interpretation of NRS 534.030(2) once a groundwater basin has been described in a report under NRS 532.170 or designated under NRS 533.030, the boundary must be maintained in perpetuity – even if doing so would be inconsistent with the best available science or the welfare of the area. Even more illogical is the fact that the district court also held that the State Engineer must administer and regulate these areas in isolation.[144] That limitation is not present in statute and unnecessarily limits the State Engineer's authority to administer water use across the entire state, particularly where it has long been understood that impacts may occur from one basin to another. Further, this limitation would force the State Engineer to manage Nevada's water resources

[141] Initial studies conducted under NRS 532.170 divided the investigation of groundwater resources in the State of Nevada to topographic areas based on surface features, such as mountain ranges. Much of our current basin numbering and naming system utilized the descriptions of these initial studies. Some, but not all, of the study areas have later been formally designated as areas of special administration, in whole or in part, under Orders authorized by NRS 534.030.
[142] J.A. Vol. 49, at JA_23325.
[143] NRS 534.120.
[144] J.A. Vol. 49, at JA_23325.

in a manner that ignores the scientific reality that hydrologic systems consist of interconnected surface water and groundwater.

4. Basin should not be narrowly defined.

The district court made several errors when it relied on its interpretation of the word *basin* in Nevada water statutes to conclude the State Engineer cannot jointly administer the LWRFS as one source of water. First, the district court concluded the plain meaning of the word *basin* is an administrative unit, which, in the district court's view is a legal construct defined by only geography. However, the term basin in the water law is ambiguous because it has separate meanings in separate contexts. Basin can refer to a definable aquifer, which is a single source of water supply, and a single "geological formation or structure that stores or transmits water, or both."[145] Basin can refer to a river basin, like the Truckee River Basin, or the Colorado River Basin which includes all the LWRFS.[146] Basin can refer to the 232 Hydrographic Areas that Nevada was divided into by the State Engineer and the USGS to study groundwater.[147] Basin can refer to the Great Basin which

[145] NRS 534.0105.
[146] *Water Words Dictionary, "B",* Nevada Division of Water Planning, at 25-26. Available at http://water.nv.gov/programs/planning/dictionary/wwords-B.pdf (last visited October 12, 2021).
[147] *Water Words Dictionary, "B",* Nevada Division of Water Planning, at 25-26. Available at http://water.nv.gov/programs/planning/dictionary/wwords-B.pdf (last visited October 12, 2021).

includes all of Nevada. Certainly, no plain meaning exists, as the district court concluded, for the use of *basin* in Nevada's statutory scheme.

Second, since *basin* is ambiguous, the district court should have reviewed legislative intent, giving meaning to all provisions of the comprehensive statutory scheme. That scheme has focused on *aquifers* since 1913. The Legislature directed the State Engineer distinguish those aquifers, with the help of the USGS.[148] In the 1960s, the State Engineer and USGS divided Nevada into groundwater study areas based on topographic divides because most aquifers are alluvial aquifers.[149] Even then, they understood the carbonate aquifer is not confined by topography, or simply geography. Specifically, in 1966, the carbonate aquifer was understood to be one of the "groundwater systems in certain valleys of eastern and southern Nevada [that] extend beyond the limits of the particular valley."[150] The Legislature intended for the State Engineer to use this information to define and manage each of Nevada's aquifers when it used the word basin.

Third, the district court believed too much reliance has been built-up around the individual basin designations in the LWRFS to allow joint administration.[151]

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[148] NRS 534.100(1); NRS 532.170.
[149] J.A. Vol. 5, at JA_2312, 2319, 2354, 2366, *see* Vol. 21, JA_9905 (alluvial is a shallow local aquifer above deeper regional carbonate aquifer consisting mostly of sand and clay).
[150] J.A. Vol. 5, at JA_2907.
[151] J.A. Vol. 49, at JA_23323.

This is not true. Clearly the interconnectedness of the LWRFS was understood before any groundwater rights were issued in the area, or the designation of individual basins. Since 1964, the State Engineer and the USGS have known that Coyote Spring Valley, Kane Springs Valley, and the Muddy River Springs Area are connected by the carbonate aquifer with neighboring valleys.[152] Every time the State Engineer was asked to issue new groundwater rights in the LWRFS area, the issue of potential impacts on the Muddy River was raised as a critical issue of concern.[153] For instance, the State Engineer issued water rights conditioned "on the understanding that *groundwater pumping would be stopped* should the project adversely affect the water table in the Muddy River Springs Area."[154] And since all stakeholders knew the LWRFS received most of its groundwater from the regional carbonate aquifer, when they sought water rights, they knew they were seeking water outside what the district court considered as immutable basin boundaries.

Fourth, the district court erroneously concluded that the State Engineer has historically managed the LWRFS on a basin-by-basin approach. The opposite is true. In Order 1169, the State Engineer ordered an Aquifer Test that treated the LWRFS as one aquifer. In Rulings 6254-6261, the State Engineer set one perennial yield for the LWRFS (excluding Kane Springs) and denied applications across the

[152] J.A. Vol. 5, at JA_2303, 2305, 2310, 2337-38.
[153] J.A. Vol. 3, at JA_920–1070; Vol. 32, at JA_14902-38; Vol. 46, at JA_18708-47.
[154] J.A. Vol. 32, at JA_14903 (emphasis added).

LWRFS based on the same rationale: that joint management required denial because the area "shares a unique and close hydrologic connection and virtually all of the same source and supply of water."[155] All of the parties in this case received notice and/or participated in the Order 1169 matter and its aftermath.

Even the State Engineer's initial designation of individual basins within the LWRFS did not signal that each basin contained a separate aquifer for management purposes, as the district court believed. The State Engineer issued those orders pursuant to NRS 534.030,[156] to "minimize overdraft of available ground-water supplies."[157] After initially issuing a designation order for a portion of the Muddy River Springs Area in 1971,[158] in 1985, the State Engineer designated Coyote Spring Valley only for the purpose of preferring non-irrigation uses over irrigation uses of water under new water right applications.[159] In 1989-1990, the State Engineer

[155] *See e.g.*, J.A. Vol. 2. at JA_ 379; Vol. 3, at JA_945.
[156] J.A. Vol. 3, at JA_835-863.
[157] Shamberger, Hugh A., *Evolution of Nevada's Water Laws, as Related to the Development and Evaluation of the State's Water Resources, From 1866 to About 1960, Water Resources Bulletin 46*, Prepared by the U.S. Department of the Interior, Geological Survey in cooperation with the Nevada Division of Water Resources, Department of Conservation and Natural Resources, 1991, at Page 58, available at http://images.water.nv.gov/images/publications/water%20resources%20bulletins/Bulletin46.pdf (last accessed December 6, 2022).
[158] J.A. Vol. 3, at JA_863.
[159] J.A. Vol. 3, at JA_852-56.

issued similar orders in Hidden Valley,[160] Garnet Valley,[161] California Wash,[162] the remainder of the Muddy River Springs Area,[163] and Black Mountain Area.[164] None of the orders addressed how much water was available for appropriation, or altered the understanding that each basin overlies the carbonate aquifer. Instead, the Orders added the regulatory oversight from NRS 534.050 and NRS 534.120 to any wells drilled in those basins. These orders were not intended to define separate aquifers, because clearly the individual basins are not. Nor were they intended to limit the State Engineer's ability to manage the underlying carbonate aquifer as one unit, and the stakeholders knew that at the time.

Fifth, the district court gave no deference to express legislative policy. The district court simply dismissed the Legislature's statement of policy in NRS 533.024(1)(c) that encourages the State Engineer to consider the best available science in rendering decisions.[165] To the district court, reliance on the best science is a "slippery slope."[166] But in the LWRFS, since the Aquifer Test confirmed what had always been understood by water holders, there is no slippery slope. The State Engineer followed the comprehensive statutory scheme by conducting a pump test

[160] J.A. Vol. 3, at JA_841-42.
[161] J.A. Vol. 3, at JA_838-40.
[162] J.A. Vol. 3, at JA_835-37.
[163] J.A. Vol. 3, at JA_844-46.
[164] J.A. Vol. 3, at JA_847-851.
[165] J.A. Vol. 49, at JA_23322.
[166] J.A. Vol. 49, at JA_23322.

to determine aquifer characteristics. That best available science should be the guiding principle when exercising his professional judgment in defining the boundaries of the aquifer and determining how much water is available for use. Otherwise, the State Engineer will be powerless to prevent another Diamond Valley-type problem before it happens.[167] Hence, the district court's approach completely rejected science and leads to an absurd result that was not the Legislature's intent.

Sixth, the district court ignored the State Engineer interpretation of his statutory powers, statutory interpretation guidance from the Legislature, and the historical development of Nevada's hydrographic basin map. Not only should the State Engineer's interpretation of statutes that refer to *basin* have been given deference,[168] the word basin should not be considered only singular, as the district court did. In the preamble to the NRS, the Legislature stated that "except as otherwise provided in particular statute or required by context . . . the singular includes the plural number, and the plural includes the singular."[169] Also, since no hydrographic basins existed when the water law was enacted, the Legislature gave the State Engineer the power to define basins (aquifers) and that power includes the

[167] *Diamond Nat. Res. Prot. & Conservation Ass'n v. Diamond Valley Ranch, LLC*, 138 Nev. Adv. Op. 43, 511 P.3d 1003, 1004-06 (2022).
[168] J.A. Vol. 49, at JA_23324.
[169] NRS 0.030(1)(a).

power to amend, modify or combine basins, in a case like this, where the individual basins were always understood to be part of the same underlying aquifer.[170]

5. Protecting Moapa dace from adverse pumping impacts

As the State Engineer acknowledged in Order 1309, delineation of the LWRFS boundary was necessary to fulfil his statutory duties to protect the public interest and the public trust. The district court's restrictive interpretation of State Engineer's authority is inconsistent with the broader statutory scheme puts those responsibilities on the State Engineer. In addition, the district court's interpretation of the statutes, under which the State Engineer would be prohibited from jointly and conjunctively managing interconnected ground and surface water, could expose the State of Nevada to liability under the federal Endangered Species Act ("ESA").[171]

Delineation of the LWRFS boundary and a determination of the aquifer's perennial yield are necessary here to protect the endangered Moapa dace from groundwater pumping.[172] The Moapa dace's habitat is entirely dependent upon spring flows that originate from the regional carbonate aquifer.[173] Groundwater pumping impacts those spring flows.[174] Consequently, it is necessary for the State

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[170] NRS 534.110.
[171] 16 U.S.C. 1531-1544 (1973).
[172] NRS 533.367; NRS 533.370(2); *Pyramid Lake Paiute Tribe of Indians v. Washoe Cnty.*, 112 Nev. 743, 746-48, 918 P.3d 697, 698-700 (1996).
[173] J.A. Vol. 28, at JA_11982-83.
[174] J.A. Vol. 28, at JA_11982-83.

Engineer to identify the location of the groundwater pumping that impacts those spring flows by delineating the area where the groundwater system is connected and is the source of supply for those spring flows. Without this delineation, the State Engineer cannot determine which groundwater pumping threatens to reduce the spring flow and harm the habitat of the Moapa dace.[175]

The protection of wildlife and establishment and maintenance of wetlands and fisheries are independent statutory mandates in Nevada water law.[176] In addition, the State Engineer is required to consider environmental factors, including the protection of fish and wildlife species, through his obligation to protect the public interest and the public trust.[177] The State Engineer's duty to protect the public interest is clear from this Court's precedent.[178] As for the public trust, in *Mineral*

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[175] J.A. Vol. 2, at JA_370 (Based on testimony at the Order 1303 hearing the State Engineer found that "it is clear that it is necessary for spring flow measured at Warm Springs West gage to flow at a minimum rate of 3.2 cfs in order to maintain habitat for the Moapa dace. A reduction of low below this rate may result in a decline in the dace population.").

[176] *See* NRS 533.023, NRS 533.367.

[177] *See Mineral Cnty. v. Lyon Cnty.*, 136 Nev. 503, 514, 518, 473 P.3d 418, 427, 430 (2020) (explaining that water rights are "subject to regulation for the public welfare").

[178] NRS 533.370(2); *See Pyramid Lake Paiute Tribe of Indians v. Washoe Cnty.*, 112 Nev. 743, 748, 918 P.2d 697, 700 (1996) ("the State Engineer reviewed Nevada's water appropriation statutes to develop guidelines for defining the public interest."); *see also U.S. v. Alpine Land & Reservoir Co.*, 341 F.3d. 1172, 1182 (9th Cir. 2003) ("[i]n defining the 'public interest' the State Engineer identified thirteen policy considerations contained in Nevada's water statutes that should guide any assessment of the public interest[.]").

County v. Lyon County, this Court held that the State Engineer has an affirmative duty to "maintain public trust resources," and certainly the Moapa dace is part of those trust resources.[179]

The State Engineer is also required to comply with federal law and avoid liability under the ESA.[180] Ever since the *Cappaert* case, the State Engineer's office has been on notice that it cannot sit idle while state-authorized groundwater pumping impacts federally protected species.[181] The State Engineer also correctly recognized that a state agency could be held liable for authorizing third-party actions that

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[179] *Mineral Cnty. v. Lyon Cnty.*, 136 Nev. 503, 513-14, 473 P.3d 418, 426-27 (2020).

[180] Contrary to Respondents' arguments to the district court, the State Engineer's acknowledgement of the requirements of federal law and potential liability for "take" under the ESA in Order 1309 did not constitute an assertion of jurisdiction over federally listed endangered species, or assumption of authority to administer the ESA's provisions. *See Strahan v. Coxe*, 127 F.3d 155, 164 (1st Cir. 1997) ("[Defendants] contend that the statutory structure of the ESA does not envision utilizing the regulatory structures of the states in order to implement its provisions, but that it instead leaves that implementing authority to [federal agencies]. The point that the defendants miss is that the district court's ruling does not impose positive obligations on the [State] by converting its regulation of commercial fishing operations into a tool of the federal ESA regulatory scheme. The [State] is not being compelled to enforce the provisions of the ESA. Instead, the district court's ruling seeks to end the [State]'s continuing violation of the Act.").

[181] *Cappaert v. U.S.*, 426 U.S. 128, 96 S. Ct. 2062 (1976). Although *Cappaert* involved a dispute over federal reserved water rights and not the ESA, the case illustrates the peril the State faces when it ignores the requirements of federal law in natural resource management, and the liabilities that may arise under federal environmental statutes.

proximately cause unlawful "take" under the ESA.[182] Preventing impacts to the public interest, degradation of the public trust, and unlawful "take" of the Moapa dace requires effective management of the common water source which, as explained above, necessarily requires delineation of the LWRFS aquifer and a determination of its perennial yield as first steps. The district court, however, wrongly concluded that the State Engineer lacks the statutory authority to take these actions. The district court's narrow view of the State Engineer's authority makes it virtually impossible for the State Engineer to fulfill his statutory duties to protect the public interest and the public trust and could expose the State Engineer's Office and the State of Nevada to liability under the ESA.[183]

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[182] *See Strahan*, 127 F.3d at 163 (explaining that "a governmental third party pursuant to whose authority an actor directly exacts a taking of an endangered species may be deemed to have violated the provisions of the ESA"); *see also Cascadia Wildlands v. Kitzhaber*, 911 F. Supp. 2d 1075, 1085 (D. Or. 2012) (finding that "state officials can indeed be liable for directly authorizing third-party activities . . . that are likely to result in take."); *Coalition for a Sustainable Delta v. John McCamman*, 725 F. Supp. 2d 1162, 1167 (E.D. Cal. 2010) (finding that "take" may "include acts of a third party that indirectly bring about a take by causing another to effect a take"); *Humane Soc'y of the United States v. Kienzle*, No. 16-cv-0724 WJ/SMV, 2017 WL 515305, at *3 (D.N.M. Nov. 2, 2017) ("[A] state licensing scheme can in fact be a proximate cause of a taking in violation of the ESA.").

[183] The Appellants also recognize this Court's holding in *Mineral County* that the public trust doctrine "does not permit reallocating water rights already adjudicated and settled under the doctrine of prior appropriation." 136 Nev. at 518 – 519, 473 P.3d at 430. Order 1309 operates in full compliance with *Mineral County* as it did not "reprioritize" anyone's water rights, despite Respondents arguments and the district court's conclusions to the contrary. As shown throughout this brief, Order

6. **The State Engineer did not reset priorities or violate prior appropriation**.

Despite being conspicuously absent from the State Engineer's findings, the district court held that "as a result of consolidation of the basins, the relative priority of all water rights within the seven affected basins will be reordered" and that the new priorities would be considered in relation to all water right holders in the newly consolidated basins.[184] In Order 1309, the State Engineer did not re-prioritize water rights in the LWRFS. Order 1309 rescinded any language in Interim Order 1303 that related to this question. The State Engineer did not address the issue of priorities within the LWRFS in Order 1309, but included the following language, "[a]ll other matters set forth in Interim Order 1303 that are not specifically addressed herein are hereby rescinded."[185] That being said, the State Engineer's fact-finding in Order 1309 was actually the first step in *complying* with prior appropriation, rather than violating the doctrine. The State Engineer must first determine water availability in a given source of supply before he can determine whether the supply is sufficient to serve the senior-most rights.

Moreover, the State Engineer was just as clear in Order 1309 that the enforcement of priority of water rights in the LWRFS will be addressed in later

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1309 only adjudicated factual determinations regarding the boundaries of the LWRFS and the sustainable amount of groundwater pumping that may occur therein.

[184] J.A. Vol. 49, at JA_23326:13-16.

[185] J.A. Vol. 2 at JA_391.

administrative phases — the management portion of the administrative process regarding the LWRFS.[186] The issue of priority of LWRFS water rights is not ripe and was irrelevant to the appeals of Order 1309.[187] For that reason, the district court also erred by determining that the priority of water rights in the LWRFS are based on a "relative" priority system rather than an absolute priority system.[188]

B. The State Engineer has authority to conjunctively manage groundwater and surface water.

Conjunctive management is a new term for an old principle in Nevada water law – when groundwater and surface water interact, they must be managed together to protect senior rights. Nevada's statutory scheme, as well as this Court's prior appropriation case law, demonstrates the existence of both explicit and implicit authority for the State Engineer to conjunctively manage connected water resources.

The district court purportedly agreed that it makes sense to take into account how certain groundwater rights may affect other surface water rights when managing water overall."[189] But then the district court erroneously concluded the State Engineer is powerless to manage surface and groundwater together because

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[186] J.A. Vol. 2, at JA_706 at 12:6-15 (Fairbank).

[187] *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986) ("litigated matters must present an existing controversy, not merely the prospect of a future problem"). As the State Engineer has not yet made a determination as to regulation of priority, this issue is not ripe for review under NRS 533.450.

[188] J.A. Vol. 49, at JA_23304:10-11, 23314:5-10 ("The priority of groundwater rights is determined relative to the water rights holder within the individual basins.").

[189] J.A. Vol. 49, at JA_23326:4-6.

"[h]istorically, surface water and ground water have been managed separately."[190] This is simply and clearly incorrect. Without authority, the district court implied that NRS Chapters 532, 533, or 534 provide no authority to conjunctively manage surface water and groundwater.[191] For the following reasons, this conclusion by the district court is without merit.

1. The State Engineer has unambiguous and express statutory authority to conjunctively manage "all water" and protect "all existing rights" regardless of the source.

The State Engineer is authorized to manage all water in Nevada. NRS 533.030 provides that, subject to existing rights, "*all water* may be appropriated for beneficial use,[192] meaning water from stream systems or underground.[193] Even though "[t]he water of all sources of water supply within the boundaries of the State whether above or beneath the surface of the ground, belongs to the public,"[194] an appropriation of water can only be authorized by the State Engineer.[195] The State Engineer clearly has the unambiguous and explicit authority when managing "all

[190] J.A. Vol. 49, at JA_ 23325:23-24.
[191] J.A. Vol. 49, at JA_23326:10-12.
[192] NRS 533.030(1) (emphasis added).
[193] NRS 533.030(2).
[194] NRS 533.025.
[195] NRS 533.030(1).

water" to conduct studies and inventories,[196] protect vested rights,[197] prevent conflict with existing rights,[198] and protect the public interest.[199]

Not only must the State Engineer manage both ground and surface water, he must manage them together. This is evident when NRS Chapters 533 and 534 are placed in their proper historical context. When the comprehensive water law was enacted for surface water in 1913, NRS Chapter 533 was adopted for the adjudication of vested water rights and appropriation of public waters.[200] In 1939, NRS Chapter 534 was enacted to address underground water and wells and this chapter was a functional extension of NRS Chapter 533. As NRS 534.080 states, a legal right to appropriate groundwater for beneficial use "can only be acquired by complying with the provisions of chapter 533 of NRS pertaining to the appropriation of water."[201] Thus, from the outset, it was contemplated that groundwater appropriations would follow the same procedure as set forth in NRS Chapter 533 for surface water appropriations.

What is significant about requiring groundwater appropriations to follow NRS Chapter 533 is that the State Engineer has clear obligations in that chapter to not

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[196] NRS 532.165(1), NRS 534.110(2) , NRS 534.110(6).
[197] NRS 533.085, NRS 533.430, NRS 534.100.
[198] NRS 533.370(2), NRS 534.120(1), NRS 534.110(6).
[199] NRS 533.370(2).
[200] *See Andersen Family Assocs. v. Hugh Ricci, P.E.*, 124 Nev. 182, 188, 179 P.3d 1201, 1204 (2008).
[201] NRS 534.080(1).

impair vested rights, and to prevent conflict between new appropriations and existing rights. NRS 533.085 (non-impairment) and NRS 533.370(2) clearly contain those directives. In the context of a groundwater application, the State Engineer *must* reject an application that *conflicts with existing rights* – including surface water rights. All groundwater permits are issued subject to existing rights – including surface water rights. If the State Engineer could not consider the interaction of groundwater and surface water, as the district court concluded, the State Engineer could not perform these explicit, statutorily mandated functions. This outcome is illogical and violates the prior appropriation doctrine's fundamental tenet: first in time is first in right.

One of the statutes the State Engineer relies on here – NRS 534.110 – also provides clear authority for conjunctive management.[202] The State Engineer's investigative mandate in NRS 534.110(6) is triggered when it appears "that the average annual replenishment to the groundwater supply may not be adequate for the needs of *all* permittees and *all* vested-right claimants." (emphasis added). By use of the word *all*, the Legislature intended the State Engineer, when investigating groundwater availability, to determine whether all surface water permittees or vested-right claimants have adequate water supplies. And even if that obligation

[202] *See* J.A. Vol. 2, at JA_368.

was not explicit, NRS 534.110(1) authorizes the State Engineer to take the necessary steps to fulfill this mandate.

Obviously, this is exactly the form of conjunctive management that had to occur here. To meet the mandate of NRS 534.110(6), the State Engineer had to determine the level of connection between LWRFS groundwater and the Muddy River to know if *all vested-right claimants* have adequate water.

These explicit statutory powers support the State Engineer's determination in this matter. The district court's holding would limit the State Engineer's ability to fulfill the statutory mandate to protect existing rights and prevent conflicts. Prohibiting the State Engineer from conjunctively managing groundwater and surface water, even across multiple basins where there is a hydrological connection would undermine the very purpose of the statutory scheme. In addition to ignoring the laws of Nevada, such a prohibition ignores the laws of nature and the long known and legally recognized fact that groundwater pumping has in fact been found to affect surface water. Since the district court's restriction on conjunctive management was without merit, and would lead to these absurd results, the district court should be reversed.[203]

[203] *Horizons at Seven Hills v. Ikon Holdings*, 132 Nev. 362, 368, 373 P.3d 66, 70 (2016), citing *Nev. Attorney for Injured Workers v. Nev. Self-Insurers Ass'n*, 126 Nev. 74, 84, 225 P.3d 1265, 1271 (2010).

2. This Court's precedent previously established the State Engineer's authority to conjunctively manage surface and groundwater.

The district court's holding is also inconsistent with this Court's precedent, as well as the Ninth Circuit and the United States Supreme Court's authority interpreting Nevada water law. In fact, only months ago, this Court affirmed that "hydrologically connected" surface and groundwater cannot be considered separately in a determination of relative rights, and the non-impairment doctrine for vested surface water rights applies to management of groundwater resources.[204] Other cases highlighted clearly establish the importance of conjunctive management as well. The statutory mandate of preventing conflicts with existing rights would simply not be effective if groundwater and surface water could not be managed conjunctively. Each of these decisions provides an example of the importance of conjunctive management and demonstrates that this principle has long been recognized and enforced by this Court and other courts.

a. *Eureka County v. State Engineer*

In *Eureka County v. State Engineer*, a mine owner sought to pump groundwater from the Kobeh Valley and Diamond Valley groundwater basins to

[204] *See Matter of Relative Rights in & to All Waters, Both Surface & Underground, Located Within Diamond Valley Hydrographic Basin 10-153, Eureka & Elko Cntys.*, 508 P.3d 886 (Table), 2022 WL 1421434 (Nev. 2022) (unpublished disposition).

support a proposed mine in Eureka County.[205] This Court found that the State Engineer must manage groundwater pumping to protect senior surface water right holders (i.e., conjunctive management). This Court held the State Engineer improperly approved groundwater pumping that could cause flows from existing surface sources to cease, which constituted a conflict with existing rights on those sources.[206] The statute at the forefront of the Court's analysis was NRS 533.370(2). The Court stated, "[t]he Legislature did not define exactly what it meant by the phrase 'conflicts with' as used in NRS 533.370(2), but if an appropriation that would completely deplete the source of existing water rights does not 'conflict with' those existing rights, then it is unclear what appropriation ever could."[207]

b. *Griffin v. Westergard*

Similarly, in *Griffin v. Westergard*, the State Engineer denied permits to property owners who wanted to divert underground water to supplement their decreed surface water rights in the West Walker River.[208] This Court affirmed the denial of groundwater appropriations because new groundwater development would impair existing surface water rights and would be detrimental to the public

[205] *Eureka Cnty. v. State Eng'r*, 131 Nev. 846, 359 P.3d 1114 (2015).
[206] *Eureka Cnty. v. State Eng'r*, 131 Nev. 846, 359 P.3d 1114 (2015).
[207] *Id.*, 131 Nev. at 852, 359 P.3d at 1118.
[208] *Griffin v. Westergard*, 96 Nev. 627, 615 P.2d 235 (1980).

welfare.[209] In fact, *Griffin* involved the application of one of the statutes identified above, NRS 533.370, which required the denial of applications where existing rights were impaired.[210] The existing rights that were threatened with conflict were surface water rights – demonstrating that before 1980, the State Engineer was engaging in what we now call conjunctive management, even before it became a part of the Legislature's stated policy, and his action was upheld by this Court.

c. ***Pyramid Lake Paiute Tribe of Indians v. Ricci***

In *Pyramid Lake Paiute Tribe of Indians v. Ricci*, this Court reviewed a decision by the State Engineer to grant a company's change application for water rights in the Dodge Flat Hydrologic Basin, which led to an appeal by the Pyramid Lake Paiute Tribe ("Tribe").[211] In particular, the water right holder had previously obtained permits to appropriate groundwater for temporary use in a mining and milling project.[212] The Tribe was concerned that groundwater pumping would

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[209] *Griffin v. Westergard*, 96 Nev. 627, 630, 615 P.2d 235, 237 (1980) ("The effect of granting any additional permits in the basin would either deplete the underground reservoir or the water would be replaced by infiltrating surface water from the West Walker River, which is overappropriated. If it depletes the underground reservoir, existing ground water rights will be impaired. If the additional water is replaced from the West Walker River, existing surface water rights will be impaired and it will be detrimental to the public welfare. Upon such findings, respondent was required by statute to deny all applications and ruled accordingly.").

[210] *Id.* at 630-631, 615 P.2d at 237, citing NRS 533.370.

[211] *Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. 521, 245 P.3d 1145 (2010).

[212] *Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. at 523, 245 P.3d at 1146.

conflict with existing surface water rights on the Truckee River.[213] However, the Court found that the State Engineer had appropriately limited the water right holder's pumping to the amount of the unappropriated perennial yield and that it imposed this limitation to protect the Truckee River water quality and fish habitats.[214] In other words, this Court approved the State Engineer's consideration of the impact of groundwater appropriations on surface water rights, and the fish habitat sustained by those waters. This action clearly evidence "conjunctive management" as used in NRS 534.024(1)(e).

d. ***Cappaert v. United States***

Even the United States Supreme Court has recognized Nevada's longstanding tendency to manage groundwater and surface water together. In *Cappaert v. United States*, the court evaluated the propriety of an injunction limiting pumping from designated wells to protect federal rights to surface water at Devil's Hole National Monument.[215] The State of Nevada argued that the doctrine of implied reservation

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[213] *Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. at 525, 245 P.3d at 1147 ("based on the hydrological connection between the Truckee River and Dodge Flat Basin, the Tribe argues that groundwater pumping would interfere with existing water rights to the Truckee River surface water.").

[214] *Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. 521, 527, 245 P.3d 1145, 1149 (2010).

[215] *Cappaert v. U.S.*, 426 U.S. 128, 96 S. Ct. 2062 (1976).

of water rights only applied to surface water, and the water in the pool at issue was surface water.[216]

The Court found that the pumping of ground water caused the water levels in Devil's Hole to drop, and recognized that "Nevada itself may recognize the potential interrelationship between surface and groundwater since Nevada applies the law of prior appropriation to both."[217] The court held that since the implied reservation of water rights doctrine is based on the necessity of water for the purpose of the federal reservation, "the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater."[218] Thus, even as of 1976, it was understood that groundwater and surface water management were significantly intertwined and that groundwater pumping could be limited to protect surface water rights. Again, this is what we now refer to as "conjunctive management."

e. *U.S. v. Orr Water Ditch Co.*

The Ninth Circuit, applying Nevada water law, has also clarified that the State Engineer must manage ground and surface water rights together. In *United States v. Orr Water Ditch Co.*, the court addressed a situation on the Truckee River which closely mirrors how the case at bar involves the Muddy River.[219] The Pyramid Lake

[216] *Cappaert*, 426 U.S. at 142, 96 S. Ct. at 2071.
[217] *Cappaert*, 426 U.S. at 142, 96 S. Ct. at 2071 (citing NRS 533.010 et seq., NRS 534.020, NRS 534.080, and NRS 534.090).
[218] *Cappaert*, 426 U.S. at 129, 96 S. Ct. at 2065.
[219] *U.S. v. Orr Water Ditch Co.*, 600 F.3d 1152 (9th Cir. 2010).

Paiute Tribe ("Tribe") owns the two most senior water rights on the Truckee River.[220] An issue arose after the State Engineer approved groundwater rights in the Tracy Segment Hydrological Basin over the opposition of the Tribe and Churchill County. Those parties claimed the new applications would reduce flow in the Truckee River and interfere with decreed rights in the Orr Ditch Decree.[221] In granting the applications, the State Engineer concluded that groundwater discharge to the Truckee River should not be counted as part of the Tribe's decreed surface water rights in the Truckee River.[222] That decision was reversed by the court.

The *Orr Water Ditch* case is particularly relevant here. That court recognized that "[t]he reciprocal hydraulic connection between groundwater and surface water has been known to both the legal and professional communities for many years," and found the Tribe's surface water rights should not be adversely affected by the new groundwater rights.[223] Likewise, here the State Engineer had significant concerns that pumping 8,050 acre-feet from the Coyote Spring Valley would adversely impact water resources at the Muddy River Springs.[224] He further observed, following the pumping test, that "[t]he resulting water-level decline encompassed 1,100 square miles and extended from northern Coyote Spring Valley

[220] *U.S. v. Orr Water Ditch Co.*, 600 F.3d 1152, 1155 (9th Cir. 2010).
[221] *Id.* at 1155-1156.
[222] *Id.* at 1156.
[223] *U.S. v. Orr Water Ditch Co.*, 600 F.3d at 1159.
[224] J.A. Vol. 2, at JA_396.

through the Muddy River Springs Area, Hidden Valley, Garnet Valley, California Wash, and the northwestern part of the Black Mountains Area."[225] Also, he also found that pumping in the various basins "caused sharp declines in groundwater levels and flows" in springs that are critical to the "overall condition of the Muddy River"[226] Just as the Ninth Circuit in *Orr Water Ditch* found that decreed rights in surface water extend to protections from groundwater allocations that would affect the flow of the surface water, this Court should recognize the same principle of conjunctive management applies to prevent excessive groundwater pumping in the LWRFS that would affect the flows of senior Muddy River water rights.[227]

3. **The Legislature stated its intent that State Engineer conjunctively manage ground and surface water**.

The Nevada Legislature has explicitly stated that it is the policy of the State of Nevada "[t]o *manage conjunctively* the appropriation, use and administration of all waters of this State, *regardless of the source* of the water."[228]

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[225] J.A. Vol. 2, at JA_331.
[226] J.A. Vol. 2, at JA_397-398.
[227] The language of the Muddy River Decree at issue here is far more specific and should, if anything, afford greater protection than the Orr Ditch Decree in that the Muddy River Decree specifically acknowledges the relationship to groundwater and appropriates "all said waters of said River, its headwaters, sources of supply and tributaries." J.A. Vol. 13, at JA_6639 (Muddy River Decree at p. 5) (emphasis added); *see* J.A. Vol. 13, at JA_6634-6680; *see also* J.A. Vol. 13, at JA_6654, (Muddy River Decree at p. 20) (stating that MVIC is entitled to divert and use "all the waters of said Muddy River, its head waters, sources of supply and tributaries…").
[228] NRS 533.024(1)(e) (emphasis added).

> It has often been said that the declaration of policy by the legislature, though not necessarily binding or conclusive upon the courts, *is entitled to great weight, and that it is neither the duty nor prerogative of the courts to interfere in such legislative finding unless it clearly appears to be erroneous and without reasonable foundation*.[229]

Even though the district court acknowledged this statement of policy, and the deference such statements are accorded in statutory interpretation,[230] the district court provided no amount of deference to this legislative declaration.

4. The State Engineer's conclusion that he is authorized to conjunctively manage ground and surface water is entitled to deference.

Administrative agencies have great discretion in interpreting the legislative authority that they have been delegated and the courts *should* provide deference towards these interpretations. This Court has recognized that it "defer[s] to an agency's interpretation of its governing statutes or regulations if the interpretation is within the language of the statute."[231] Accordingly, "courts should not substitute

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[229] *McLaughlin v. Hous. Auth. of Las Vegas*, 68 Nev. 84, 93, 227 P.2d 206, 210 (1951) (emphasis added).

[230] J.A. Vol. 49, at JA_23321:20-22.

[231] *Taylor v. Dep't of Health & Human Servs.*, 129 Nev. 928, 930, 314 P.3d 949, 951 (2013), citing *Dutchess Bus. Servs., Inc. v. Nev. State Bd. of Pharmacy*, 124 Nev. 701, 709, 191 P.3d 1159, 1165 (2008); *see also Int'l Game Tech., Inc. v. Second Jud. Dist. Ct. of Nev.*, 122 Nev. 132, 157, 127 P.3d 1088, 1106 (2006) ("we have repeatedly recognized the authority of agencies…to interpret the language of a statute that they are charged with administering; as long as that interpretation is reasonably consistent with the language of the statute, it is entitled to deference in the courts.").

their own construction of a statutory provision for a reasonable interpretation made by an agency."[232]

"While the State Engineer's interpretation of a statute is not controlling, it is persuasive,"[233] and the State Engineer has the implied authority to construe the applicable statutory schemed as necessary precedent to administrative action.[234] This Court has held when the State Engineer is charged with administering a statute, his office *has the implied power to construe the statute*.[235] In that same opinion, this Court noted that "great deference" is given to the State Engineer, and while not necessarily controlling, his office's "decision shall be presumed correct, and the party challenging the decision has the burden of proving error."[236]

The State Engineer's interpretation of the statutes described above, particularly when analyzed in the context of the stated policy of conjunctive management (NRS 533.024(1)(e)) and the proper historical context of NRS Chapter 534 and its dependence on NRS Chapter 533, is squarely within the language of the

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[232] *Collins Disc. Liquors & Vending v. State*, 106 Nev. 766, 768, 802 P.2d 4, 5 (1990).
[233] *Bacher v. Office of the State Eng'r of State of Nev.*, 122 Nev. 1110, 1118, 146 P.3d 793, 798 (2006).
[234] *See, e.g., Pyramid Lake Paiute Tribe of Indians v. Washoe Cnty.*, 112 Nev. 743, 747-48, 918 P.2d 697, 700 (1996).
[235] *U.S. v. State Eng'r*, 117 Nev. 585, 589, 27 P.3d 51, 53 (2001) (emphasis added); *see also Andersen Family Assocs. v. Hugh Ricci, P.E.*, 124 Nev. 182, 186, 179 P.3d 1201, 1203 (2008).
[236] *U.S. v. State Eng'r*, 117 Nev. at 589, 27 P.3d at 53.

statutory scheme and certainly not contrary to it. In fact, NRS 533.024(1)(e) is essentially a ratification and confirmation of this Court's and the State Engineer practices of conjunctive management of groundwater when it has a detrimental effect on senior surface water rights. As the State Engineer is the party charged with administering these statutes, the State Engineer has the power to construe them.

5. The State Engineer has implied authority to conjunctively manage groundwater and surface water.

Even if the State Engineer does not have express authority for conjunctive management, that authority is implicit in many of the express duties that the legislature placed on the State Engineer.[237] The express duties throughout the comprehensive statutory scheme for water resources would be meaningless without the implied power to conjunctively manage surface water and groundwater.

For example, NRS 533.085(1) provides that vested water rights are not to be impaired,[238] and NRS 534.020(1) requires groundwater permits to be issued "subject to all existing rights."[239] Since "existing rights" include surface water rights that were established before the issuance of groundwater permits, it is axiomatic that conjunctive management is *implicitly* required to protect senior surface water rights from impairment. As this Court's precedent makes clear, conjunctive management

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[237] *Wilson v. Pahrump Fair Water, LLC*, 137 Nev. 10, 13-14, 481 P.3d 853, 856-57 (2021) (emphasis added); *see also* NRS 532.120(1) and NRS 534.110(1).
[238] NRS 533.085(1).
[239] NRS 534.020(1).

is essential to the prior appropriation system, thereby making the State Engineer's power to conjunctively manage, at the very least, implicit.

II. To The Extent The Requirements Of Due Process Apply To The Investigative Inquiry The State Engineer Completed In Order 1309, Those Requirements Were Satisfied.

The district court erroneously concluded the State Engineer violated Respondents' right to due process because it misunderstood that Order 1309 only included factual findings related to the carbonate aquifer and deferred the decisions that could implicate constitutionally protected rights. However, to the extent due process attached to the issuance of Order 1309, the State Engineer clearly met the requirements of due process.

A. The State Engineer afforded all Respondents adequate due process.

What due process demands is "an elusive concept" that is incapable of being defined with precision and varies depending on "specific factual contexts."[240] "The level of due process that must be provided in a particular government proceeding depends on the effect that the proceeding will have on a constitutionally protected interest."[241] Here, given the extensive proceedings that led to issuance of Order 1309 and the limited fact-finding objective of Order 1309, the State Engineer provided

[240] *Hernandez v. Bennett-Haron*, 128 Nev. 580, 587, 287 P.3d 305, 310 (2012) (*quoting Hannah v. Larche*, 363 U.S. 420, 442, 80 S. Ct. 1502, 1514 (1960)) (internal quotation marks omitted).
[241] *Id*. (*citing Hannah*, 363 U.S. at 442).

Respondents with notice and an opportunity to be heard that far exceeded the flexible, context-specific demands of due process.

1. The State Engineer's notice and hearing procedures provided proper notice and opportunity to be heard.

Order 1309 was not written on a blank slate. For decades, experts proved the existence of a close hydrologic connection between the basins that constitute the LWRFS.[242] More recent prospects of residential and commercial development in the area heightened concerns about water availability and impacts of increased water development, which coincided with the decision to order a pumping test in Order 1169. That pumping test resulted in production of thousands of pages of data and reports, much of which was produced by stakeholders that participated in the proceedings below and was identified in the State Engineer's hearing notice.[243] After circulating a draft order for comment, the State Engineer issued Interim Order 1303 to provide notice on the subject of the hearing below. His office created extensive opportunities for stakeholders to present evidence on the factual inquiry into the characteristics of the LWRFS – including two rounds of expert reports, a two-week hearing with each participating stakeholder having an opportunity to present testimony from experts, cross-examine the other experts, submit

[242] *See*, *e.g.*, J.A. Vol. 5, at JA_2303-2354, 2907.
[243] J.A. Vol. 2, at JA_328-335, 470-481; Vol. 3, at JA_819-823.

documentary exhibits, and submit written closing arguments[244] – before exercising his discretion to make statutorily mandated scientific findings upon which the State Engineer is given great deference.[245] There was no violation of Respondents' due process rights here.

a. Interim Order 1303, the hearing notice and prehearing statements of the hearing officer gave Respondents proper notice.

Interim Order 1303 solicited expert reports from stakeholders on four specific points: (1) the geographic boundary of the LWRFS; (2) aquifer recovery following the conclusion of the Order 1169 pumping test; (3) the long-term annual quantity of groundwater that can be pumped from the LWRFS; and (4) the effect of moving water rights between the carbonate and alluvial systems to senior rights on the Muddy River.[246] The factual issues that the State Engineer sought assistance in developing align precisely what the State Engineer addressed in Order 1309: (1) the geographic boundary of the LWRFS, and (2) the availability of water for

[244] J.A. Vol. 13, at JA_6749 through Vol. 43 at JA_17144 (stakeholder exhibits); Vol. 43, at JA_17154-356 (stakeholder closing statements); Vol. 44, at JA_17357-18155 (hearing transcripts).
[245] *Diamond Nat. Res. Prot. & Conservation Ass'n*, 138 Nev. Adv. Op. 43, 511 P.3d at 1011 (citing *Pahrump Fair Water, LLC*, 137 Nev. at 16, 481 P.3d at 858 (explaining that the Court's deference to the State Engineer's judgment "is especially warranted" when "technical and scientifically complex" issues are involved)).
[246] J.A. Vol. 2, at JA_406-07.

groundwater pumping in the LWRFS that would avoid reduction in spring flows at the headwaters of the Muddy River.[247]

The district court's order recognizes that Interim Order 1303 solicited reports on "factual inquiries" on "four specific areas, none of which related to the management of the LWRFS."[248] Additionally, statements of the State Engineer's hearing officer at the prehearing conference and at the beginning of the hearing directed the parties to avoid the subject of policy considerations regarding management of the LWRFS.[249]

Despite this, the district court charged the State Engineer with issuing "a dramatic determination regarding management of the LWRFS."[250] Yet the district court's order cites no provision of Order 1309 that effectuates a management decision regarding the LWRFS. Instead, the district court prognosticated that the State Engineer reordered priority of rights across the entire LWRFS without identifying any provision of the Order 1309 that provides for such reprioritization and, in a footnote citing one party's written closing argument, the district court identified potential policy questions that participants and experts did not have the opportunity address during the Order 1303 hearing.[251]

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[247] J.A. Vol. 2, at JA_390-91.
[248] J.A. Vol. 49, at JA_23329.
[249] J.A. Vol. 49, at JA_23329-30.
[250] J.A. Vol. 49, at JA_23330.
[251] J.A. Vol. 29, at JA_23314, 23323, 23326-7.

Again, nothing in Order 1309 reorders the priority of any rights.[252] And the district court's point that various policy questions have yet to be decided only drives home the State Engineer's longstanding position in this case: the sole focus of the Order 1303 hearing – and ultimately Order 1309 – was to address factual questions about the boundaries of the LWRFS and how much groundwater can be pumped sustainably without decreasing the current flow of springs at the headwaters of the Muddy River.[253]

The notice the State Engineer provided in this case aligns with the precise fact-finding objectives that are accomplished through Order 1309. The State Engineer discouraged development of policy issues because those policy issues are still open questions that will be addressed in later proceedings.[254] For those reasons, the written notice that the State Engineer produced, along with the clarifying comments of the hearing officer, gave stakeholders full notice of the subject of the proceedings that produced Order 1309.

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[252] *See* NRS 534.080(3) ("the date of priority of all appropriations of water from an underground source mentioned in this section is the date when application is made in proper form and filed in the Office of the State Engineer pursuant to the provisions of chapter 533 of NRS").
[253] J.A. Vol 49, at JA_23330-31.
[254] J.A. Vol. 2, at JA_394-412, 464, 486, 697, 706.

b. The Order 1303 hearing satisfied the constitutional due process standard.

When engaging in a due process analysis under the balancing test established in *Mathews v. Eldridge*,[255] any attack on the sufficiency of the State Engineer's hearing process decidedly fails. After identifying the private interest affected by government action, *Mathews* requires consideration of "the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional procedural safeguards" and "the Government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail."[256] The process the State Engineer provided greatly exceeded the minimal due process that would be required in the context of the State Engineer making pure factual determinations of a scientific nature.

First, there was not a high risk of an erroneous deprivation of any property right that required additional safeguards. After holding public workshops wherein stakeholders requested an opportunity to provide a technical analysis of what the State Engineer stated in a draft order, the State Engineer issued Interim Order 1303.[257] The procedure the State Engineer provided thereafter allowed for the presentation of initial expert reports to address the issues the State Engineer

[255] *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S. Ct. 893, 903 (1976).
[256] *Id*. at 335.
[257] J.A. Vol. 2, at JA_394-408; Vol. 23, at JA_10532-90.

identified in Interim Order 1303, followed by an opportunity to provide another expert report in rebuttal to information provided by the other stakeholders.[258] Then the State Engineer held a two-week hearing with all stakeholders being given an opportunity to present documentary evidence and testimony from their own experts with an opportunity to cross-examine the other stakeholders' experts.[259] And after concluding the hearing, the State Engineer allowed each stakeholder to submit a written closing statement.[260] Finally, the State Engineer issued a detailed sixty-six page order explaining how he defined the LWRFS and identified a maximum capacity for pumping groundwater in the LWRFS without decreasing the current flow of the springs at the headwaters of the Muddy River.[261]

Despite the State Engineer's broad discretion when resolving questions of a scientific nature,[262] his office afforded all stakeholders an extensive opportunity to participate in a proceeding that, at the end of the day, involved a factual inquiry that falls squarely within the State Engineer's discretion when exercising his statutory

[258] J.A. Vol. 2, at JA_412.
[259] J.A. Vol. 2, at JA_407, 464-465.
[260] J.A. Vol. 43, at JA_17154-17356.
[261] J.A. Vol. 2, at JA_326-393.
[262] NRS 533.450(10); *Diamond Nat. Res. Prot. & Conservation Ass'n v. Diamond Valley Ranch, LLC*, 138 Nev. Adv. Op. 43, 511 P.3d 1003, 1011 (2022); *Sierra Pac. Indus. v. Wilson*, 135 Nev. 105, 108, 440 P.3d 37, 40 (2019)("[w]e review the State Engineer's factual findings for an abuse of discretion and will only overturn those findings if they are not supported by substantial evidence.").

authority–identifying the boundaries of an aquifer and determining how much water is available for use from that aquifer.

On the other end of the scale, the government's interest in this proceeding cannot be understated. The protection of water as a natural resource is amongst the highest of Nevada's priorities, and that interest is magnified by the State Engineer's obligation to manage water resources in a way that protects senior right holders and the public interest, which includes avoiding liability for a "take" under the ESA.[263]

2. The State Engineer properly notified stakeholders that joint administration and conjunctive management would be considered in the Order 1309 proceedings.

The district court erred when it held the State Engineer violated Respondents' due process rights by failing to provide adequate notice that Order 1309 might involve joint administration and conjunctive management. In an administrative setting "due process requirements of notice are satisfied where the parties are sufficiently apprised on the nature of the proceedings so that *there is no unfair surprise*.[264] Order 1309 contained no surprises.

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[263] *Mineral Cnty. v. Lyon Cnty.*, 136 Nev. 503, 511, 473 P.3d 418, 425 (2020); *see also, Home*, State of Nevada, Division of Water Resources, http://water.nv.gov (last visited December 7, 2022) ("The mission of the Nevada Division of Water Resources (NDWR) is to conserve, protect, manage and enhance the State's water resources for Nevada's citizens through the appropriation and reallocation of the public waters.").

[264] *Nevada State Apprenticeship Council v. Joint Apprenticeship and Training Committee for Elec. Indus.*, 94 Nev. 763, 765, 587 P.2d 1315, 1317 (1978)(emphasis added).

Interim Order 1303 and the notice of hearing clearly stated that joint administration of the LWRFS, and conjunctive management of LWRFS groundwater rights and Muddy River surface rights, were relevant considerations in the State Engineer's factual inquiry. Interim Order 1303 specifically designated the LWRFS as a "joint administrative unit for purposes of administration of water rights."[265] And prior orders and rulings clearly put the stakeholders on notice that the LWRFS was being jointly managed by the State Engineer. Conjunctive management was also specifically addressed when the State Engineer asked stakeholders for input on how the relationship between groundwater pumping on "the capture of Muddy River flow."[266] He also asked for information about "the effects of movement of water rights between alluvial wells and carbonate wells on deliveries of senior decreed rights to the Muddy River."[267] The State Engineer's findings in Order 1309 reflected the scope of Interim Order 1303.[268] The Respondents did not face "unfair surprise" by the State Engineer's findings in Order 1309.

In finding that the State Engineer violated Respondents' due process rights the district court found that the State Engineer had not allowed parties to address

[265] J.A. Vol. 2, at JA_406-407, 486.
[266] J.A. Vol. 2, at JA_395–412, 464, 486, 697, 706.
[267] J.A. Vol. 2, at JA_406-407, 486.
[268] J.A. Vol. 2, at JA_407.

the implications of joint administration and conjunctive management.[269] This misses the point and is not true. The findings that relate to joint administration or conjunctive management were all within the scope of Interim Order 1303 and addressed by parties.[270] And the implications of joint administration and conjunctive management are policy issues the State Engineer indicated he will address in further administrative hearings regarding the management scheme for the LWRFS.[271] Stakeholders will have the opportunity to provide input at that time. The district court ignored this fact.

3. The State Engineer's criteria in Order 1309 for evaluating hydrologic connection satisfied due process.

a. Use of criteria in LWRFS

The district court erred when it held that the State Engineer violated the Respondents' due process rights by not disclosing the criteria he used to evaluate hydrologic connection before the Order 1303 hearing.[272] In water cases, this Court

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[269] J.A. Vol. 49, at JA_23332:3-5 ("[w]ithout consideration of the implications of the management decision contained in the order, [Order 1309] cannot be based on a full consideration of the issues presented.").

[270] Vol. 2 at JA_337-366, 371-79. *See also* Vol. 2 at JA_739-750, Vol. 13 at JA_6749-6754, Vol. 15 at JA_7145-7148, JA_7149-7156, Vol. 16 at JA_7496-7535, Vol. 17 at JA_7887-7892, Vol. 18 at JA_7918-7926, JA_8332-8341, Vol. 23 at JA_10512-10517, Vol. 24 at JA_10872, JA_10878-10889, Vol. 27 at JA_11782-11785, Vol. 27 at JA_11798-11812, Vol. 32 at JA_14941-14951, Vol. 43 at JA_17145-17150; JA_17151-17356.

[271] J.A. Vol. 2, at JA_378, 706.

[272] J.A. Vol. 49, at JA_23332-33.

has stated the "the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation."[273] Also, "[n]otice must be given at an appropriate stage in the proceedings to give parties meaningful input in the adjudication of their rights."[274] Put simply, the State Engineer's hearing process must put parties on notice of the topic of the hearing and give those parties an opportunity to be heard. Interim Order 1303 put all parties on notice of what factual issues would be addressed at the administrative hearing, and the extent of hydrologic connection was one of the main issues.[275] Parties submitted expert reports, faced questioning from the State Engineer and his staff, and submitted closing briefs.[276] At no point did these parties object to the fact that they did not have enough direction on this issue.

The criteria were simply the State Engineer's way of summarizing what evidence his office found to be persuasive in delineating the boundaries of the

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[273] *Eureka Cnty. v. State Eng'r*, 131 Nev. 846, 855, 359 P.3d 1114, 1120 (2015) (quoting *Bowman Transp., Inc. v. Arkansas Best Freight Sys. Inc*., 419 U.S. 281, 288 n.4, 95 S. Ct. 438 (1974)).

[274] *Eureka Cnty. v. Seventh Jud. Dist. Ct. in & for the Cnty. of Eureka*, 134 Nev. 275, 280, 417 P.3d 1121, 1125 (2018).

[275] J.A. Vol. 2, at JA_406 ("Reports filed with the Office of the State Engineer should address the following matters: a) the geographic boundary of the hydrologically connected groundwater and surface water systems comprising the Lower White River Flow System"); *Id*. at 407 ("The State Engineer wills schedule an administrative hearing within the month of September 2019 to take comment on the submitted reports.").

[276] J.A. Vol. 2, at JA_337-66.

LWRFS. The evidence itself, presented by parties at the Order 1309, demonstrates that those parties were aware of the considerations in the criteria; even if they were not formally enumerated before Order 1309. For example, Lincoln-Vidler presented evidence that water levels demonstrate steep hydraulic gradients between groundwater basins are consistent with a basin boundary.[277] This is identical to the State Engineer's fourth criteria, "water level observations that demonstrate a relatively steep hydraulic gradient are consistent with a poor hydraulic connection and a potential boundary."[278] CSI presented evidence on geological structures that have caused a juxtaposition with the carbonate rock-aquifer.[279] This evidence directly relates to the State Engineer's fifth criteria, "[g]eologic structures that have caused a juxtaposition of the carbonate-rock aquifer with low permeability bedrock are consistent with a boundary."[280]

These evidentiary submissions demonstrate that the State Engineer's criteria were not a mystery to the stakeholders. The criteria that he found persuasive were

[277] J.A. Vol. 2, at JA_345 ("[Lincoln-Vidler] identified a distinct 'break,' or local increase, in water levels in the regional hydraulic variant between wells drilled in the LWRFS versus wells drilled in Kane Springs Valley and northern Coyote Spring Valley").
[278] J.A. Vol. 2, at JA_373.
[279] J.A. Vol. 2, at JA_341 ("CSI presented geologic and geophysical information in support of the idea that the LWRFS administrative unit is geophysically and hydrogeologically heterogeneous area, characterized by multiple flow paths defined by faults and structural elements that control occurrence and movement of regional and local groundwater along western side of Coyote Spring Valley.")
[280] J.A. Vol. 2, at JA_373.

the natural result of the State Engineer's factual inquiries and were not a surprise to the Order 1303 hearing participants who had a fair opportunity to present evidence, and did present evidence, that reflected the State Engineer's criteria.[281] The State Engineer, by putting parties on notice of the topics to be addressed at the Order 1303 hearing, provided all parties with a meaningful opportunity to be heard. The State Engineer's enumeration of his criteria in Order 1309 does not change that fact. Just as a court may issue a decision which sets forth tests, or multiple prongs, the State Engineer simply summarized the evidence is a format that could not have surprised the stakeholders because they analyzed the same information.

Furthermore, contrary to the district court's finding, the State Engineer did not state in Order 1309 that he had previously explicitly disclosed the criteria in Rulings 6254 – 6261. Rather, the State Engineer said in Order 1309 that the criteria were "*consistent with the original characteristics considered critical* in demonstrating a close hydrological connection requiring joint management in Rulings 6554 – 6261."[282] The State Engineer simply stated the criteria he used in Order 1309 were consistent with previous rulings and orders, specifically Rulings 6254 – 6261, and enumerated them accordingly. For instance, in discussing his evaluation of hydrological connection in Rulings 6254 – 6261, the State Engineer

[281] J.A. Vol. 2, at JA_336–66.
[282] J.A. Vol. 2, at JA_372.

referenced flat potentiometric surfaces, water level hydrographs, and well-to-well comparisons that demonstrated a similar temporal pattern.[283] These characteristics are either consistent or identical to the criteria the State Engineer described in Order 1309. The fact that the State Engineer enumerated criteria for the first time in Order 1309 is irrelevant because the criteria were consistent with previously used criteria and were within the scope of the factual inquiries identified in Order 1303 and the notice of hearing. The criteria were also consistent with the actual evidentiary submissions of the hearing participants considered by the State Engineer.

b. Specific use of criteria regarding Kane Springs

Lincoln-Vidler and CSI are the only Respondents that squarely raised this issue in their petitions for judicial review, challenging the application of the six criteria to include Kane Springs Valley within the LWRFS as a violation of due process.[284] But that argument fails based on what actually occurred during the Order 1303 hearing, and how Order 1309 specifically addressed Kane Springs Valley.

Lincoln-Vidler and CSI fully participated in the administrative hearing and had an opportunity to address whether the State Engineer should include Kane

[283] J.A. Vol. 3, at JA_941-942; *see also* J.A. Vol. 3, at JA_945 ("The Order 1169 pumping test further supports the conclusion that pumping from any of the five basins with a close hydrologic connection (Coyote Spring Valley, Muddy River Springs Area, Hidden Valley, Garnet Valley, and California Wash) will have a similar impact on water levels in the five-basin area and on the Muddy River spring flows.").

[284] J.A. Vol 1, at JA_147, 149-50; *see also* Vol. 47, at JA_19352-55.

Springs Valley in the LWRFS.[285] As Order 1309 summarized, stakeholders that advocated for the exclusion of Kane Springs Valley presented experts that "recommended exclusion of Kane Springs Valley based on their characterization of water level elevation data, temporal hydrographic response patterns, geochemistry, and/or the geophysically-inferred presence of structures that may act as flow barriers."[286] After noting a difference of 60 feet in water level elevations between the Kane Springs Valley and "the majority of carbonate-rock aquifer wells within the LWRFS to the south," Order 1309 also noted that "[s]ome experts suggested that the hydrographic response pattern exhibited in wells located in the southern edge of Kane Springs Valley is different compared to that exhibited in wells in the LWRFS, being muted, lagged, obscured by climate response, or compromised by low-resolution data."[287] The State Engineer acknowledged these points but found other evidence to be more persuasive on the need to include Kane Springs Valley within the LWRFS.[288]

[285] J.A. Vol. 2. at JA_340–47, 504–07, 512-516, 602–12, 616-622, 703-737, 751-756, 759-818; Vol. 6, at JA_3263–65; Vol. 13, at JA_6588-6589, 6608–16; Vol. 16–Vol. 17; Vol. 18 at JA_7918-8331; Vol. 43 at JA_17176–197, 17208-17231: Vol. 44.
[286] J.A. Vol. 2, at JA_376-77.
[287] J.A. Vol. 2, at JA_377
[288] J.A. Vol. 2, at JA_377.

Moreover, in concluding its analysis on the boundaries of the LWRFS, and specifically addressing the inclusion of Kane Springs Valley and part of the Black Mountain Area as a sub-basins of the LWRFS, the State Engineer stated:

> Their inclusion in the LWRFS provides the opportunity for conducting additional hydrologic studies in sub-basis such as these, to determine the degree to which water use would impact water resources in the LWRFS and to allow continued participation by holders of water rights in future management decisions. Thus, these sub-basins, and any other portions of the LWRFS that may benefit from additional hydrological study, can be managed more effectively and fairly within the LWRFS.[289]

This part of the concluding paragraph of the State Engineer's analysis on the boundaries of the LWRFS gives important context to the addition of Kane Springs Valley to LWRFS. It demonstrates that inclusion of the Kane Springs Valley in the LWRFS does not make any binding, definitive decisions about water resources within Kane Springs Valley as a sub-basin of the LWRFS. Instead, the State Engineer recognized that any management decision involving Kane Springs Valley is likely going to require additional study.

Although the State Engineer decided to include Kane Springs Valley within the LWRFS, how that decision will affect management of water resources within Kane Springs Valley remains undecided. For that reason, the State Engineer did not

[289] J.A. Vol. 2, at JA_379.

violate due process by not identifying the six factors he relied upon in delineating the boundaries of the LWRFS prior to issuing Order 1309.

B. Order 1309 did not implicate due process protections if because it adjudicated only factual issues in the LWRFS but did not adjudicate parties' property rights.

The starting point for procedural due process analysis is whether government action impacts a constitutionally protected private interest.[290] When government action involves the adjudication of a protected private interest, due process concerns are triggered, but the same is not true if government action only involves a fact-finding adjudication.[291]

Here, the district court's due process analysis was built on a false foundation. Consideration of due process claims is premature if Order 1309 did not adjudicate any constitutionally protected interest that would trigger the protections of the due process clause. The concept of procedural due process is intended ensure private individuals receive a fair procedure – adequate notice and an opportunity to be heard – when government action threatens the deprivation of private interests in life, liberty, and property.[292] But the Due Process Clause has no bearing on fact-finding

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[290] *See, e.g., Jones v. Nev. Comm'n on Jud. Discipline*, 130 Nev. 99, 105, 318 P.3d 1078, 1082 (2014) ("This court has recognized that 'commissioned judges in this state have a protected interest in their judicial offices under the Fourteenth Amendment [of the United States Constitution].'").

[291] *Id.*

[292] *See, e.g.*, *Eureka Cnty. v. Seventh Jud. Dist. Ct. in & for the Cnty. of Eureka*, 134 Nev. 275, 279, 417 P.3d at 1121, 1124 (2018).

adjudications made by a government agency that does not implicate the adjudication of a constitutionally protected private interest.[293]

1. Fact-Finding in Order 1309 may not trigger Due Process concerns.

Based on the foregoing principles, the Due Process Clause may not be triggered by the State Engineer's factual finding decisions in this case. Agency actions that only involve fact-finding do not trigger due process protections. This Court has recognized the difference between a fact-finding investigation decision and a proceeding that adjudicates a party's property rights on three occasions.[294]

For that reason, the Respondents' claims of due process deprivations ring hollow. Respondents' claims of a violation of due process are at best premature because a deprivation of due process cannot have occurred when Respondents have not been deprived of anything, let alone a constitutionally protected interest that triggers the protections of the due process clause.

The State Engineer has stated since the initiation of the challenged administrative proceedings that the sole purpose of Order 1309 was to engage in fact finding and make a determination on two points: (1) delineating the boundaries of the LWRFS, and (2) identifying a sustainable level of groundwater pumping that can

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[293] *Jones*, 130 Nev. at 105-06, 318 P.3d at 1082-83.
[294] *Safro v. Board of Med. Examiners*, 134 Nev. 709, 712-14, 429 P.3d 650, 652-54 (2018); *Jones*, 130 Nev. at 106, 318 P.3d at 1083; *Hernandez v. Bennett-Haron*, 128 Nev. 580, 592-93, 287 P.3d 305, 314 (2012).

occur within the LWRFS without reducing the flow of springs that are the headwaters of the Muddy River. Decisions on how to manage the LWRFS will take place in a proceeding that has yet to occur.

2. Unlike *Eureka County*, curtailment was not a possible outcome in Order 1309.

One point of error that led the district court to its conclusion that due process protections apply to the Order 1309 proceedings was its reliance on *Eureka County*. Relying on *Eureka County*,[295] the district court found a violation of due process because of "the *possibility*" that an interested party's rights will be curtailed.[296] But the district court put the cart before the horse in relying on *Eureka County*. Unlike in *Eureka County*, there was no possibility of curtailment in the Order 1303 hearing. Order 1309 has no enforcement mechanism that provides for curtailment because curtailment was not being considered in the challenged proceeding. As a result, *Eureka County* is inapposite.

When assessing procedural due process claims, context matters. In *Eureka County*, this Court determined that all affected water rights holders needed to receive notice and an opportunity to participate in a district court hearing that made "a judicial determination forcing curtailment to begin" a possible outcome of the

[295] J.A. Vol. 49, at JA_23328.
[296] J.A. Vol. 49, at JA_23328.

case.[297] This was so because the consequences of a district court's determination that the State Engineer abused its discretion by not initiating curtailment—i.e. that curtailment was necessary – would be to reduce the remedies available to all junior water rights holders to arguing "that the curtailment cutoff date should be below their priority level, rather than arguing for a solution other than curtailment at all."[298] Thus, *Eureka County* focused on the potential for the district court to impose a decision that required curtailment within the subject hearing, which would then be binding on junior rights holders that had no opportunity to participate in that hearing.

Here, the State Engineer has not addressed the topic of how to manage the LWRFS. The State Engineer simply made factual determinations delineating the boundaries of the LWRFS and identifying a sustainable limit for pumping within the LWRFS that will maintain existing flows at the headwaters of the Muddy River.[299]

Unlike this Court in *Eureka County*, the district court relied on its own, unfounded prediction or supposition that the State Engineer will order curtailment in a future proceeding. How the State Engineer will manage the LWRFS – by use of curtailment, or with other tools available to him under state law – remains a subject for future administrative proceedings. All holders of water rights within the

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[297] *Eureka Cnty. v. Seventh Jud. Dist. Ct. in & for the Cnty. of Eureka*, 134 Nev. 275, 280, 417 P.3d 1121, 1125 (2018).
[298] *Id.*
[299] J.A. Vol. 2, at JA_390-391.

LWRFS will receive notice of, and have an opportunity to participate in, those future proceedings addressing management of the LWRFS. For that reason, this case is very different from *Eureka County*, and the district court erred by relying on *Eureka County* to find a violation of due process. However, while not required to do so, the State Engineer followed the due process provisions in Eureka County by sending notice to all affected water right holders and allowing all interested parties to present their arguments and evidence at a full administrative hearing.[300]

3. **Order 1309 did not reprioritize LWRFS water rights**.

A second cause for error on this point was the district court's mischaracterization of Order 1309 as a reprioritization of seniority for water rights across the LWRFS. As is explained in addressing the State Engineer's authority for joint administration, Order 1309 did not adjudicate or change the priority of any LWRFS water rights.[301] Every water right has the same priority date after Order 1309 as it did before Order 1309. Order 1309 does not contain any enforcement mechanism that changes or alters water rights in any way. Instead, Order 1309 leaves management decisions regarding the water rights in the LWRFS for future in proceedings and only adjudicates the facts about the characteristics of a single water

[300] *Eureka Cnty. v. Seventh Judicial Dist. Court in & for Cnty. of Eureka*, 134 Nev. 275, 282, 417 P.3d 1121, 1126 (2018) ("water rights holders must be allowed to present their arguments and evidence.").
[301] *See supra* Argument I(A)(6).

resource that spans a significant geographic area of southeastern Nevada. The delineation of the LWRFS boundaries did not erase the lines of the pre-existing hydrographic basins but did define the boundaries of the shared aquifer. No administrative action disrupted the current status quo as to the priority of rights.

CONCLUSION

For the foregoing reasons, this Court should conclude that (1) State Engineer had the authority to delineate the LWRFS for joint management and conjunctive management purposes, and (2) the State Engineer did not violate the Respondents' right to due process by issuing Order 1309.

AFFIRMATION: The undersigned dos hereby affirm that the preceding document and attachments do not contain the social security number of any person.

Dated this 8th day of December 2022.

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ATTORNEY CERTIFICATE OF COMPLIANCE

Pursuant to NRAP 28.2, undersigned counsel certifies that:

1. I have read this entire Joint Opening Brief.

2. To the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose.

3. This Joint Opening Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

4. This Joint Opening Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced font using Microsoft Word in 14-point Times New Roman font.

5. The page-volume limitations of NRAP 32(a)(7) have been waived in this matter. This Joint Opening Brief complies with the Order Modifying Caption and Setting Briefing Schedule filed October 14, 2022, as it contains less than 21,000 words. The word-processing system (Microsoft Word) reports that the brief, excluding the disclosure statement, table of contents, table of authorities, and required certificates, consists of 19,705 words.

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I understand that I may be subject to sanctions in the event that the accompanying Joint Opening Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 8th day of December 2022.

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