

IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

COYOTE SPRINGS INVESTMENT, LLC,
Appellant,

vs.

ADAM SULLIVAN, P.E., NEVADA STATE
ENGINEER, DIVISION OF WATER
RESOURCES, DEPARTMENT OF
CONSERVATION AND NATURAL
RESOURCES,

Respondent.

No. 85137

Electronically Filed
Aug 29 2022 02:54 p.m.

DOCKETING Elizabeth A. Brown
CIVIL APPEALS Clerk of Supreme Court

GENERAL INFORMATION

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

WARNING

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

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

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

1. Judicial District Eighth Department 1

County Clark Judge Bitá Yeager

District Ct. Case No. A-20-817765-P, which was consolidated into A-20-816761-C

2. Attorney filing this docketing statement:

Attorney Hannah Winston Telephone 7753293151

Firm Robison, Sharp, Sullivan & Brust

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Client(s) Coyote Springs Investment, LLC

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

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

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Client(s) The Nevada State Engineer

Attorney JAMES N. BOLOTIN Telephone 7756841231

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Client(s) The Nevada State Engineer

(List additional counsel on separate sheet if necessary)

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

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

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

- Child Custody
- Venue
- Termination of parental rights

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

There was a prior appeal related to this case, Lincoln County Water District and Vidler Water Company, Inc. v. Tim Wilson, FE., Nevada State Engineer et al., Case No. 81792. Moreover, there are related pending appeals (Case Nos. 84741, 84742, and 84809) which have been consolidated into Case No. 84739.

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

- Coyote Springs Investment, LLC, et al. v. State of Nevada et al., Case No. A-20-820384-B (pending)
- Lincoln County Water District and Vidler Water Company v. State of Nevada, et al.; United States District Court for the District of Nevada Case No. 2:20-cv-01891-RFB-EJY
- Coyote Springs Investment LLC v. Jason King, State Engineer et al., Case No. A-18-775817-J
- Coyote Springs Investment LLC v. Tim Wilson, Acting State Engineer et al. Case No. A-19-789203-J

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

This lawsuit concerns the Nevada State Engineer's abuse of power and unlawful entry of Order 1309. Order 1309 improperly combined seven separate hydrographic basins into one for "joint administration". CSI challenged Order 1309 by way of a petition for judicial review, which the District Court granted, and which is the subject of the appeal in Case No. 84739. Thereafter, CSI moved for its attorney fees from the State Engineer pursuant to Nevada Revised Statute 18.010(2)(b) because the State Engineer's defense of Order 1309 was frivolous and without reasonable ground. The District Court denied CSI's motion for fees, concluding that NRS 533.450 precludes an award of attorney fees. This appeal follows.

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

1. Whether the District Court erred in interpreting NRS 533.450 by concluding that the statute precludes an award of attorney fees.
2. Whether the District Court abused its discretion in concluding that the State Engineer's defense of Order 1309 was not frivolous or without reasonable ground.

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

The undersigned is not aware of any other proceedings in this court raising the same or similar issues.

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

N/A

Yes

No

If not, explain:

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

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

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

A substantial issue of first impression

An issue of public policy

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

A ballot question

If so, explain: This Court has not determined whether NRS 533.450 allows a party to seek attorney fees pursuant to NRS 18.010(2)(b) when the State Engineer's defense of an order is without reasonable grounds. The law must be clear whether fees are available to deter the frivolous entry and defense of orders that impact water rights. The State Engineer holds great power and the ability to seriously impact water rights holders, like Coyote Springs Investment, LLC. The State Engineer should have the same exposure to liability for attorney fees as other litigants to deter the type of conduct that has occurred in this case.

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

This matter is presumptively assigned to the Court of Appeals as it is an appeal from a postjudgment order. See NRAP 17(b)(7). The Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals because the Supreme Court presumptively retains the related appeals, which are consolidated into Case No. 84739. The Supreme Court should decide all issues involved in Case No. 84739 and this appeal because this appeal concerns whether the State Engineer's defense of Order 1309 was without reasonable ground. To maintain uniformity in decision, the Supreme Court should decide both appeals. Moreover, this appeal presents an issue of first impression (as noted above) that should be decided by the Supreme Court.

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

Was it a bench or jury trial? _____

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

TIMELINESS OF NOTICE OF APPEAL

16. Date of entry of written judgment or order appealed from Jul 22, 2022

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

17. Date written notice of entry of judgment or order was served Jul 22, 2022

Was service by:

Delivery

Mail/electronic/fax

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

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

NRCP 50(b) Date of filing _____

NRCP 52(b) Date of filing _____

NRCP 59 Date of filing _____

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

(b) Date of entry of written order resolving tolling motion _____

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

Was service by:

Delivery

Mail

19. Date notice of appeal filed 8/9/2022

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal: Lincoln County Water District and Vidler Water Company, Inc. filed their Notice of Appeal on 8/15/2022.

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

NRAP 4(a)

SUBSTANTIVE APPEALABILITY

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

(a)

- | | |
|--|---------------------------------------|
| <input type="checkbox"/> NRAP 3A(b)(1) | <input type="checkbox"/> NRS 38.205 |
| <input type="checkbox"/> NRAP 3A(b)(2) | <input type="checkbox"/> NRS 233B.150 |
| <input type="checkbox"/> NRAP 3A(b)(3) | <input type="checkbox"/> NRS 703.376 |
| <input checked="" type="checkbox"/> Other (specify) <u>NRAP 3(A)(b)(8)</u> | |
-

(b) Explain how each authority provides a basis for appeal from the judgment or order: A post-judgment order denying a motion for attorney fees is generally appealable. See NRAP 3A(b)(8) (providing that “[a]n appeal may be taken from ... [a] special order entered after final judgment”).

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

(a) Parties:

See Attachment 2

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

All of the parties in the district court are not parties to this appeal because only Coyote Springs Investment, LLC, Lincoln County Water District, and Vidler Water Company, Inc. moved the district court for attorney fees against the Nevada State Engineer.

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

Several parties filed petitions for judicial review of the State Engineer's Order 1309. The petitions for judicial review filed by Coyote Springs Investment, LLC, Lincoln County Water District, and Vidler Water Company, Inc. were granted on April 19, 2022. The District Court entered an Addendum and Clarification to that Order on May 13, 2022. Thereafter, the motions for attorney fees filed by Coyote Springs Investment, LLC, Lincoln County Water District, and Vidler Water Company, Inc. were denied on July 22, 2022.

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

Yes

No

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

(a) Specify the claims remaining pending below:

The district court's April 19, 2022 Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review (and the May 13, 2022) Addendum and Clarification thereto) adjudicated the claims between all of the parties. The order appealed from in this case adjudicated the claims for fees by Coyote Springs Investment, LLC, Lincoln County Water District, and Vidler Water Company, Inc. against the State Engineer. No other claims remain.

(b) Specify the parties remaining below:

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

Yes

No

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

Yes

No

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

A post-judgment order denying a motion for attorney fees is generally appealable. See NRAP 3A(b)(8) (providing that “[a]n appeal may be taken from ... [a] special order entered after final judgment”).

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

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

VERIFICATION

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

Coyote Springs Investment, LLC
Name of appellant

Hannah Winston
Name of counsel of record

8/30/2022
Date

Signature of counsel of record

Washoe County Nevada
State and county where signed

CERTIFICATE OF SERVICE

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

- By personally serving it upon him/her; or
- By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

SEE FOLLOWING PAGE.

Dated this _____ day of _____, _____

Signature

CERTIFICATE OF SERVICE

I certify that on the 29th day of August 2022, I served a copy of **DOCKETING STATEMENT**, including all attachments, upon all counsel of record:

BY MAIL: I placed a true copy thereof enclosed in a sealed envelope addressed as follows:

BY FACSIMILE: I transmitted a copy of the foregoing document this date via telecopier to the facsimile number shown below:

BY ELECTRONIC SERVICE: by electronically filing the foregoing document with the Nevada Supreme Court's electronic filing system, which sends an electronic notification to the following parties at the email address on file with the Nevada Supreme Court:

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William L Coulthard (Coulthard Law PLLC)
Bradley J. Herrema (Brownstein Hyatt Farber Schreck,
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Lincoln County Water District

Dylan V. Frehner (Lincoln County District Attorney)
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///

///

Adam Sullivan, P.E.

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Laena St Jules (Attorney General/Carson City)

DATED this 29th day of August, 2022.

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

ATTACHMENT 1

ATTACHMENT 1

ATTACHMENT 1

DOCKETING STATEMENT QUESTION 3

3. Additional attorneys representing the Respondent Nevada State Engineer:

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ATTACHMENT 2

ATTACHMENT 2

ATTACHMENT 2
DOCKETING STATEMENT QUESTION 22
LIST OF PARTIES AND COUNSEL

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

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I. Georgia-Pacific Gypsum LLC and Republic Environmental
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- J. Sierra Pacific Power Company d/b/a NV Energy (“Sierra Pacific”) and Nevada Power Company d/b/a NV Energy (“Nevada Power” and, together with Sierra Pacific, “NV Energy”)

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

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

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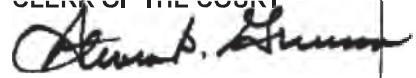
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ATTACHMENT 3

ATTACHMENT 3



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

13 STEVEN C. ANDERSON, ESQ.,
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19 *Attorneys for LVVWD and SNWA*

DISTRICT COURT
CLARK COUNTY, NEVADA

20 LAS VEGAS VALLEY WATER DISTRICT, and
21 SOUTHERN NEVADA WATER AUTHORITY

Petitioners,

Case No.

Dept. No.

vs.

**PETITION FOR JUDICIAL REVIEW OF
ORDER 1309**

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

Respondent.

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

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

3 **JURISDICTIONAL STATEMENT**

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

9 Further, the subject matter of the appeal involves decreed waters of the Muddy River Decree.
10 Under NRS 533.450(1), “on stream systems where a decree of court has been entered, the action must
11 be initiated in the court that entered the decree.” This court has proper jurisdiction of the Muddy River
12 Decree, *Muddy Valley Irrigation Company, et al, vs. Moapa Salt Lake Produce Company, et al*, Case
13 No. 377, which was entered in the Tenth Judicial District of the State of Nevada, in and for the County
14 of Clark in 1920.¹

15 **FACTUAL BACKGROUND**

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

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

26 //

27 //

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

1 **II. Order 1169 Pumping Tests**

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

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

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

24 **III. Public Workshops**

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

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

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

13 **IV. Order 1303**

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

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

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

25 ³ *Id.*

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

27 ⁵ Exhibit 2.

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

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

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

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

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

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

27
28 ⁷ Exhibit 2 at 7-11.

⁸ Exhibit 4 at 12:6-15.

⁹ August 23, 2019, Order on Objections.

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

6 **V. Order 1309**

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

10 **GROUNDS FOR THE PETITION**

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

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

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

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

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

28 ¹² Exhibit 1 at 61.

¹³ Exhibit 2 at 13.

¹⁴ Exhibit 4 at 12:6-15.

¹⁵ Exhibit 4 at 12:6-15.

¹⁶ Exhibit 1 at 61.

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

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

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

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

26 ¹⁷ Exhibit 1 at 61

27 ¹⁸ Exhibit 1 at 60.

¹⁹ Exhibit 1 at 60-61.

²⁰ Exhibit 2 at 7.

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

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

4 CONCLUSION

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

9 DATED this 17 day of June, 2020.

10 TAGGART & TAGGART, LTD.

11
12 By: 

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CERTIFICATE OF SERVICE

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

By **HAND-DELIVERY**:

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

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

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DATED this 18th day of June, 2020.



Employee of TAGGART & TAGGART, LTD.

EXHIBIT INDEX

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<u>Exhibit Number</u>	<u>Description</u>	<u>Page Count</u>
1.	Order 1309	68
2.	Order 1303	17
3.	Notice of Hearing dated August 23, 2019	26
4.	Transcript of Proceedings, Public Hearing, Pre-Hearing Conference, Thursday, August 8, 2019, pp. 11-13.	8

ATTACHMENT 4

ATTACHMENT 4



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ATTORNEYS FOR: PETITIONER COYOTE SPRINGS INVESTMENT, LLC

DISTRICT COURT
CLARK COUNTY, NEVADA

22	PETITION FOR JUDICIAL REVIEW)	CASE NO.
23	OF NEVADA STATE ENGINEER)	DEPT. NO.
24	ORDER 1309)	
25	COYOTE SPRINGS INVESTMENT,)	PETITION FOR JUDICIAL REVIEW OF
26	LLC)	NEVADA STATE ENGINEER ORDER
27) Petitioner,	1309
28	v.)	

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

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

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

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

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

4 **JURISDICTION AND PARTIES**

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

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

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

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FACTS

1
2 6. From water rights purchased in 1998, CSI owns 4600 acre feet annually ("afa") of
3 certificated and permitted Nevada water rights in the Coyote Spring Valley Hydrographic
4 Basin. CSI's groundwater rights in the Coyote Spring Valley are evidenced as follows:
5 CSI owned 1500 afa under Permit 70429 (Certificate 17035) of which 1250 afa was
6 conveyed to the Clark County Coyote Springs Water Resources General Improvement
7 District ("CS-GID") to be used for the Coyote Springs Development, with the remaining
8 250 afa still owned by CSI. CSI also owned 1000 afa under Permit 74094 of which 750
9 afa were conveyed to the CS-GID to be used for the Coyote Springs Development, with
10 the remaining 250 afa still owned by CSI. CSI also owned 1600 afa under Permit 70430
11 of which 460 afa was relinquished as approved and permitted by the State Engineer
12 and accepted by the United States Fish and Wildlife Service ("USFWS") as required
13 mitigation arising from the Coyote Springs Development and for the protection of the
14 Moapa dace fish, thus leaving 1140 afa that continues to be owned by CSI. Further,
15 CSI continues to own 500 afa under Permit 74095. Thus, the total amount of water
16 permits held by CSI as of the date of this Petition is 2140 afa, and the total amount of
17 water rights held by the CS-GID is 2000 afa all of which is to be used for the Coyote
18 Springs Development¹, with 460 afa relinquished by CSI for protection of the
19 endangered Moapa dace. CSI also owns a few additional rights in the LWRFS
20 Hydrographic Basin outside of the Coyote Springs Valley. Furthermore, through a
21 purchase and option agreement dated October 17, 2005, and as amended from time to
22 time ("KS-Agreement"), CSI purchased from Lincoln County Water District ("LCWD")

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 23. Subsequently, in communications by email between Albert Seeno III with the
23 State Engineer, on May 17, 2018, the State Engineer advised that he would neither

24
25 _____
26 ² The May 16, 2018 letter was rescinded pursuant to a settlement agreement between CSI and the State
27 Engineer. See paragraph 26 below.

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

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

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

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

22 27. Thereafter, the State Engineer began a public workshop process to review the
23 water available for pumping in an area that the State Engineer began calling the Lower
24 White River Flow System ("LWRFS") which includes the Coyote Spring Valley

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1 hydrographic basin³. This public process included public workshops, a working group
2 of stakeholders, and included facilitation of a meeting of the Hydrologic Review Team
3 ("HRT") established pursuant to that certain 2006 Memorandum of Agreement among
4 some of the parties involved in the new LWRFS process.⁴

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

16 29. Following this brief public input process, the State Engineer issued a draft order
17 at a public workshop held on September 19, 2018. The September 19, 2018, draft
18 order contained a preliminary determination that there were 9,318 afa of water rights
19 with a priority date of March 31, 1983, or earlier, that could be safely pumped from five-
20 basins composing the initial-LWRFS basins without affecting the flows in the Muddy
21

22 ³ The Lower White River Flow System as so named, was identified colloquially prior to January 2019, and in
23 Rescinded Order 1303 dated January 11, 2019 these same hydrographic basins were identified as a single
24 administrative unit, and then even further, in his June 15, 2020 Order#1309 the State Engineer specifically
25 named and identified the Lower White River Flow System Hydrographic Basin which is fully described in this
26 Petition.

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

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

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

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

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

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

25 34. On May 13, 2019 the State Engineer amended Rescinded Order 1303. In
26 Rescinded Order 1303, the State Engineer declared that Coyote Spring Valley, Muddy
27

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

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

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

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

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

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

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

23 41. Expert reports by interested parties were due July 3, 2019, and rebuttal reports
24 were due on August 16, 2019. CSI filed expert scientific, geophysical, hydrologic, and
25 hydrogeologic reports, and related rebuttal reports; all of which are reflected on the
26

1 State Engineer's administrative record supporting Rescinded Order 1303 on their
2 website.

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

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

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

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

17 46. Other than CSI and its team of experts in the fields of geology and hydrogeology,
18 water rights, climate, biology, and geophysics, from Stetson Engineering and Zonge
19 International, more than 15 additional other stakeholders were present and participated
20 at Rescinded Order 1303 Hearing, and each stakeholder presented expert witnesses⁵
21 to their previously submitted reports. All of this testimony, and all reports and rebuttal
22 reports submitted is a part of the State Engineer's files for Rescinded Order 1303
23 Hearing, and testimony preserved by a stenographer's transcript and video taken. CSI
24

25
26 ⁵ More than 25 experts presented testimony. See Nevada State Engineer website for LWRFS at
27 <http://water.nv.gov/news.aspx?news=LWRFS> and the tab "hearing documents."
28

1 disagrees with the summarization by the State Engineer of hearing testimony in Order
2 1309.

3 47. Order 1309 specifically delineated the following decisions⁶:

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

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

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

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

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

25

26 ⁶ Exhibit "A" at 65-66.

27

28

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

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

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

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

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

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

3 **PETITION FOR JUDICIAL REVIEW**

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

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

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

22 54. The State Engineer's determinations in his June 15, 2020 order regarding the
23 geographic boundary of the LWRFS, the aquifer recovery since completion of the Order
24 1169 aquifer test, the long-term annual quantity of groundwater that may be pumped
25 from the LWRFS, and the effects of movement of water rights between alluvial wells
26 and carbonate wells on deliveries of senior decreed rights to the Muddy River are

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

3 55. The State Engineer's Order 1309 is arbitrary⁷ and capricious⁸ due to the lack of
4 substantial evidence supporting its determination that the seven hydrographic basins
5 have a "close" hydraulic connection and must therefore be administered as a single
6 hydrographic basin. The State Engineer concluded in Order 1309 that there may be
7 discrete, local aquifers within the LWRFS with an uncertain hydrologic connection to the
8 Warm Springs Area.⁹ The State Engineer based this opinion on his recognition that
9 "The LWRFS has structural complexity and heterogeneity, and some areas have more
10 immediate and more complete connection than others"¹⁰. One basis for his findings was
11 from Bedroc who presented evidence that their groundwater wells in Coyote Spring
12 Valley are hydraulically disconnected from the regional carbonate aquifer of the
13 LWRFS.¹¹ The evidence and findings contained in Order 1309 are not sufficient to
14 support its designation of the basins as a *single* hydrographic basin.

15 56. In his June 15, 2020 Order 1309, the State Engineer inconsistently applies his
16 own criteria for determining those basins that should be included in the LWRFS based
17 on a "close hydraulic connection"¹². Order 1309 outlines six criteria that the State
18 Engineer relies on to support the finding of a close hydraulic connection, including
19 geologic structure and water level observations. The State Engineer's application of
20

21 ⁷ A finding is arbitrary if "it is made without consideration of or regard for facts, circumstances fixed by
22 rules or procedure." (Black's Law Dictionary, Arbitrary (10th ed. 2014).)

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

25 ⁹ Exhibit "A" at. 65.

26 ¹⁰ Exhibit "A" at 59.

27 ¹¹ Exhibit "A" at 39,

28 ¹² Exhibit "A" at 47.

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

3 57. For example, Order 1309 excludes from the LWRFS Hydrographic Basin the
4 entire Black Mountain Area due to, among other things, the lack of contiguity of
5 carbonate-rock aquifer and difference in groundwater levels. However, the substantial
6 evidence in the State Engineer's record shows contiguous carbonate rock extends
7 across the Muddy Mountain Thrust Fault between California Wash into the Black
8 Mountains Area¹³, similar to the occurrence of contiguous carbonate rock from Kane
9 Springs Valley into Coyote Spring Valley that is offset by a boundary fault¹⁴. Additional
10 evidence indicated a 150 foot difference in groundwater level between California Wash
11 and the Black Mountains Area, similar in magnitude to the 60 foot difference in
12 groundwater level between Kane Springs Valley and Coyote Spring Valley¹⁵.

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

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

23 ¹³ Exhibit "A" at 15-18.

24 ¹⁴ Exhibit "A" at 19-22.

25 ¹⁵ Exhibit "A" at 52.

26 ¹⁶ Exhibit "A" at 51, 52.

27 ¹⁷ Exhibit "A" at 42.

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

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

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

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26 ¹⁸ Exhibit "A" at 42, FN 244

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

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

19 63. The State Engineer's June 15, 2020 Order 1309 subjectively applies criteria for
20 determining whether the Lower Meadow Valley Wash should be included in the
21 LWRFS. In Order 1309, the State Engineer finds that "while carbonate rocks may
22 underlie the Lower Meadow Valley Wash and be contiguous with carbonate rocks to the
23 south and west, data are lacking to characterize the potential hydraulic connection that
24 may exist."¹⁹ The State Engineer further acknowledges that a connection exists, but
25

26 ¹⁹ Exhibit "A" at 50.

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

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

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

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

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

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

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

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

17 69. The State Engineer's determination in his June 15, 2020 Order 1309 that the
18 maximum quantity of groundwater that may be pumped from the LWRFS on an average
19 annual basis without causing further declines in Warm Springs area spring flow and flow
20 in the Muddy River cannot exceed 8,000 afa is further arbitrary and capricious and
21

22 ²¹ Order 1309 states "Groundwater level recovery reached completion approximately two to three years after
23 the Order 1169 aquifer test pumping ended" and pumping at that time averaged 9,318 afa. (Exhibit "A" at
24 55.) Order 1309's determination to then to base maximum pumping on 2018 when it finds that groundwater
25 levels had recovered by 2015-2016 is arbitrary and capricious and unsupported by substantial evidence.

26 ²² Exhibit "A" at 55.

27 ²³ Exhibit "A" at 64-65.

1 violates Nevada law as Order 1309 contains no mechanism for the implementation of
2 this limitation to ensure that the Nevada doctrines of prior appropriation²⁴ and that the
3 limit and definition of a water right is its reasonable use.²⁵

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

14 71. Throughout Order 1309, the State Engineer "*recognizes*" that Order 1309 will
15 serve as an initial step toward management of the newly defined LWRFS Hydrographic
16 Basin [emphasis added]. The word "recognize" is neither a finding nor a ruling, it is
17 simply the observation of something by the State Engineer. The State Engineer also
18 identifies the need for "an effective management scheme" to "provide for the flexibility to
19 adjust boundaries based on additional information, retain the ability to address unique
20 management issues on a sub-basin scale, and maintain partnership with water users
21 who may be affected by management actions throughout the LWRFS."²⁷ However, the
22

23 ²⁴ *Steptoe Livestock Co. v. Gulley*, 53 Nev 163, 171-173, 205 P.772 (1931); *Jones v. Adams* 19 Nev. 78,
24 87, (1885).

25 ²⁵ NRS 533.035.

26 ²⁶ Exhibit "A" at 64.

27 ²⁷ Exhibit "A" at 53.

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

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

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

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Dated: July 9, 2020

Brownstein Hyatt Farber Schreck, LLP

BY: /s/ Bradley J. Herrema
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CERTIFICATE OF SERVICE

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

[X]: Via HAND DELIVERY:

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

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

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Clark County Coyote Springs Water Resources GID 1001 S. Valley View Blvd. Las Vegas, NV 89153	Mary K. Cloud P.O. Box 31 Moapa, NV 89025
Don J. and Marsha L. Davis P.O. Box 400 Moapa, NV 89025	Dry Lake Water, LLC 2470 St. Rose Pkwy., Suite 107 Henderson, NV 89074
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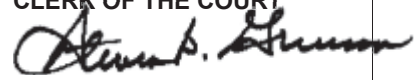
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Patrick Donnelly Center for Biological Diversity 7345 S. Durango Dr. B-107, Box 217 Las Vegas, NV 89113	Lisa Belenky Center for Biological Diversity 1212 Broadway, #800 Oakland, CA 94612

DATED this 9th day of July, 2020.

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

ATTACHMENT 5

ATTACHMENT 5



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

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Apex Holding Company, LLC and Dry Lake
6 *Water, LLC*

7 **DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

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

Case No.:
Dept. No.:

11
12 Petitioners,

13 vs.

PETITION FOR JUDICIAL REVIEW OF
ORDER 1309

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

17
18 Respondent.

19
20 Petitioners, APEX HOLDING COMPANY, LLC (“APEX”), and its wholly owned
21 subsidiary, DRY LAKE WATER, LLC (“DRY LAKE”), by and through the law firm of
22 Marquis Aurbach Coffing, hereby file this Petition for Judicial Review of Order 1309 issued on
23 June 15, 2020, by Respondent, TIM WILSON, P.E., Nevada State Engineer, DIVISION OF
24 WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL
25 RESOURCES. The full text of Order 1309 is attached hereto and incorporated herein. This
26 Petition for Judicial Review of Nevada State Engineer (“NSE”) Order 1309 is filed pursuant to
27 NRS 533.450.

28 ///

1 **I. JURISDICTIONAL STATEMENT**

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

7
8 Further, the subject matter of the appeal involves decreed waters of the Muddy River
9 Decree. Under NRS 533.450(I), “on stream systems where a decree of court has been entered,
10 the action must be initiated in the court that entered the decree.” This court has proper
11 jurisdiction of the Muddy River Decree, *Muddy Valley Irrigation Company, et al, vs. Moapa Salt*
12 *Lake Produce Company, et al*, Case No. 377, which was entered in the Tenth Judicial District of
13 the State of Nevada, in and for the County of Clark in 1920.¹

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

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

17
18 Petitioners, APEX and DRY LAKE, have standing to file this Petition as APEX is one of
19 the land owners, and DRY LAKE is one of the water rights owners and beneficial users of the
20 groundwater for providing the beneficial use of water by service to those lands, which are subject
21 of, adversely impacted by, and which were a party to the proceedings which resulted in NSE
22 Order 1309, and participating in those proceedings for the purpose of developing a
23 comprehensive water management program agreed to by all water rights owners in the Garnet
24 Valley and Black Mountain aquifers, and as necessary the Lower White River Flow System

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

1 (“LWRFS”).²

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

9
10 Other Parties to the proceedings which have resulted in NSE Order 1309 have been
11 notified of this Petition as required by law as evidenced by the certificate of service attached
12 hereto.

13 **II. FACTUAL BACKGROUND**

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

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

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

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

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

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

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

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

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

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

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

1 supply being provided to APEX by DRY LAKE.

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

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

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

1 **B. ORDER 1303.**

2 On January 11, 2019, the State Engineer issued Interim Order 1303 to obtain stakeholder
3 input on four specific factual matters: 1) the geographic boundary of the LWRFS, 2) aquifer
4 recovery since the 1169 pump test, 3) long-term annual quantity that may be pumped from the
5 LWRFS, and 4) effects of moving water rights between the carbonate and alluvial system to
6 senior water rights on the Muddy River.⁵ After factual findings were made on those questions,
7 the State Engineer was to evaluate groundwater management options for the LWRFS.
8

9 On May 13, 2019, the State Engineer amended Order 1303 and modified certain
10 deadlines for filing reports. On July 25, 2019, the State Engineer issued a Notice of Pre-Hearing
11 Conference. On August 23, 2019, the State Engineer held a prehearing conference. At the
12 prehearing conference, Hearing Officer Fairbank unequivocally stated that “the purpose of the
13 hearing is not to resolve or address allegations of conflict between groundwater pumping within
14 the LWRFS and Muddy River decreed rights.”⁶ On August 23, 2019, the State Engineer issued a
15 Notice of Hearing, and again clarified the limited scope of the hearing.
16

17 In July and August 2019, reports and rebuttal reports were submitted discussing the four
18 matters set forth in Order 1303. Several parties filed objections to witnesses and evidence. Most
19 of the objections were related to the scope of the topics in the submitted evidence. On August
20 23, 2019, the State Engineer issued an Order on Objections to Witnesses and Evidence. The
21 State Engineer agreed that “the evidence presented in the hearing is to be limited to the four
22 issues identified in the Notice of Hearing.” The State Engineer allowed all evidence to be
23 presented, but again warned that the “scope of the testimony shall be limited to the four issues
24

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

⁶ Exhibit 4, at 12:6-15.

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

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

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

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

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

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

20 The NSE confirmed the statement above that “Confidence in predictions of the effects of
21 development, however, is low;” unless there were additional studies, and as cited in NSE Order
22 1309 at pages 7-10 the evidence submitted by parties to the hearings and studies on Order 1303
23 and 1309 was conflicting and inconsistent with the finding of adverse impact of pumping in the

24 _____
25 ⁷ August 23, 2019, Order on Objections.

26 ⁸ Exhibit 1 at 61.

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

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

2 By its terms, the 2006 Memorandum of Agreement (“MOA”) between SNWA and other
3 parties¹⁰ and all actions, evidence and resulting NSE Order 1169 and its subsequent Orders
4 1169A, 1303, and 1309 developed by or because of such MOA, are binding only upon and
5 enforceable against the parties to the MOA, and to the NSE to the extent adopted by the NSE,
6 and are not binding upon or enforceable against APEX or DRY LAKE, *inter alios*.

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

14 Some water rights owners (i.e., SNWA and LVVWD, and the other parties to the MOA)
15 with water rights interests in both the LWRFS and MRFS, entered into the MOA which resulted
16 in NSE Order 1169, and its subsequent Orders 1169A, 1303, and 1309. Then, some water rights
17 owners, which are parties to the MOA, developed the Study¹² of the LWRFS and MRFS, in such
18 a way that NSE Order 1309 now seeks to apply limitations developed by the MOA and Study to
19 all water rights owners in the LWRFS. That application of the MOA and Study to all water
20 rights owners in the LWRFS restricts all water rights owners of their beneficial use of water
21 rights in the LWRFS to, and for, the benefit and protection of the natural springs, streams and
22

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

26 ¹¹ NSE Ex. 245, Hearing on Interim Order 1303, official records of the Division of Water Resources.

27 ¹² See MOA Pumping Study performed by the parties to the MOA pursuant to Order 1169,
28 http://water.nv.gov/mapping/order1169/Order_1169_Final_Reports/SNWA%20Order%201169%20Report.pdf.

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

7
8 Some water rights owners, as parties to the MOA and Study, admit that some water rights
9 owners as Petitioners now seek court orders modifying NSE Order 1309 in such a way as to
10 grant them more rights to water in the LWRFS and MRFS, at the expense of and direct and
11 immediate damage to all water rights owners in the LWRFS; especially damaging APEX, DRY
12 LAKE, and *inter alios*.

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

23
24 APEX and DRY LAKE take the factual and legal position that if any restrictions or
25 limitations on the use of ground or surface water in the LWRFS is determined to be necessary for
26 meeting the requirements of the Moapa Dace or senior surface or ground water rights in the
27

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

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

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

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

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

26
27
28 ¹⁴ Petition at lines 8-15, page 3.

1 voluntarily developed by 100% of all water rights owners of the LWRFS and MRFS as stated in
2 NSE Order 1303.¹⁵

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

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

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

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

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

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

28 ¹⁸ Petition, at lines 11-24, page 6, and Order 1309.

1 **III. GROUNDS FOR THE PETITION**

2 **A. ISSUES FOR RESOLUTION.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 _____
26 ¹⁹ See

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

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

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

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

H. DUE PROCESS AND EQUAL PROTECTION, DEPRIVATION AND VIOLATION.

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

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

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

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

8 **IV. CONCLUSION**

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

22 Dated this 10th day of July, 2020.

23 MARQUIS AURBACH COFFING

24
25 By /s/ Christian T. Balducci
26 Christian T. Balducci, Esq.
27 Nevada Bar No. 12688
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CERTIFICATE OF SERVICE

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

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Lake Las Vegas Parkway
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7181 Noon Rd.
Everson, WA 98247-9650

State of Nevada Department of
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Las Vegas, NV 89107

Technichrome
4709 Compass Bow Lane
Las Vegas, NV 89130

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

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

/s/ Cheryl Becnel
An employee of Marquis Aurbach Coffing

ATTACHMENT 6

ATTACHMENT 6

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STATE ENGINEER

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CASE NO: A-20-817876-P
Department 24

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19 *Attorneys for Petitioner*

20 **DISTRICT COURT**
21 **CLARK COUNTY, NEVADA**

22 CENTER FOR BIOLOGICAL DIVERSITY,

23 Petitioner,

24 vs.

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

Respondents.

Case No. _____

Dept No. _____

**PETITION FOR JUDICIAL REVIEW OF
ORDER 1309**

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

7 **PARTIES**

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

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

13 3. Petitioner, the CENTER FOR BIOLOGICAL DIVERSITY (“the Center”), is a
14 national, non-profit conservation organization incorporated in California and headquartered in
15 Tucson, Arizona. The Center has over 74,000 members including members who reside in Nevada.
16 The Center has offices throughout the United States and Mexico, including in Arizona, California,
17 Florida, Hawaii, Idaho, Minnesota, Nevada, New Mexico, New York, North Carolina, Oregon,
18 Washington, Washington D.C., and La Paz, Baja California Sur, Mexico. Many of the Center’s
19 members who reside in Nevada and neighboring states live, visit, or recreate in and near areas
20 directly affected by Order 1309. In particular, the Center and its members have educational,
21 scientific, biological, aesthetic and spiritual interests in the survival and recovery of the Moapa
22 dace, a small fish endemic to the Muddy River Springs Area within the Lower White River Flow
23 System. The Moapa dace is imperiled by diminishing spring flows caused by groundwater
24 pumping in the Lower White River Flow System, and is listed as endangered under the Federal
25 Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.* To protect its interests in the survival and
26 recovery of the Moapa dace the Center submitted technical reports pursuant to Nevada State
27 Engineer Order 1303 and participated in a public hearing before the State Engineer, held between
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1 September 23, 2019 and October 4, 2019, the ultimate outcome of which was Order 1309. The
2 Center is aggrieved by the State Engineer’s decision because the interests of the Center and its
3 members in the survival and recovery of the Moapa Dace will suffer long-term harmful impacts
4 from the groundwater drawdown and springflow reductions authorized under Order 1309.

5 **JURISDICTION AND VENUE**

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

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

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

15 7. In addition, the subject matter of the petition involves decreed waters of the Muddy
16 River Decree. Under NRS § 533.450(1), “on stream systems where a decree of court has been
17 entered, the action must be initiated in the court that entered the decree.” This court has proper
18 jurisdiction over the Muddy River Decree, *Muddy Valley Irrigation Company et al., v. Moapa Salt*
19 *Lake Produce Company*, Case No. 377, which was entered in the Tenth Judicial District of the
20 State of Nevada, in and for Clark County, in 1920.¹

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

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

1 **FACTUAL BACKGROUND**

2 **I. The Lower White River Flow System**

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

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

12 11. The interconnected, highly transmissive carbonate-rock aquifers of the Lower
13 White River Flow System ultimately discharge (*i.e.*, exit the aquifer) into the Colorado River.⁵ The
14 main points of discharge are the Muddy River Springs, located in the Muddy River Springs Area
15 within and adjacent to the Moapa National Wildlife Refuge in Clark County.⁶ The springs form
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17 ² In Order 1309, the State Engineer determined that Kane Springs Valley should be included within
18 the boundary of the Lower White River Flow System due to a “close hydraulic connection.”
19 Exhibit 1 at 52 (CBD000052) (exhibits referenced in this Petition are filed concurrently in a
20 separate Appendix, references to the bates stamped page numbers in the Appendix are provided
21 as “CBD___”). The Center agrees with and supports the State Engineer’s conclusion on this
22 issue as set forth in Order 1309.

23 ³ Exhibit 1 at 46, 51-54 (CBD000046, CBD000051-54).

24 ⁴ Exhibit 7 at 26 (CBD000170).

25 ⁵ *Id.* at 21 (CBD000165).

26 ⁶ *Id.*
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1 the headwaters of the Muddy River, which then flows from the Refuge area into the Colorado
2 River at Lake Mead.⁷ Significantly smaller quantities of groundwater may discharge from the
3 Lower White River Flow System through other springs near the shore of Lake Mead, or seep
4 directly into the Colorado River through a hydrologically distinct “basin-fill” aquifer in the Muddy
5 River Springs area.⁸

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

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

25 ⁹ *Id.* at 15 (CBD000159); Exhibit 8 at 29 (CBD000200).

26 ¹⁰ Exhibit 8 at 29 (CBD000200).

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

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

12 14. Springflows and groundwater levels in the Muddy River Springs Area began to
13 decline in the 1990s as carbonate groundwater pumping increased.¹⁶ From 2000 to 2010 carbonate
14 pumping rose from about 4,800 to about 7,200 acre-feet per year,¹⁷ while spring flows (as
15 measured at the Warm Springs West gauge in the Moapa National Wildlife Refuge) declined from
16 about 4.0 cubic feet per second (cfs) to as low as 3.4 cfs between the 1990s and mid-2000s.¹⁸ The
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19 ¹¹ *Id.*

20 ¹² *Id.*

21 ¹³ *Id.*

22 ¹⁴ *Id.*

23 ¹⁵ *Id.*; Exhibit 4 at 24 (CBD000108).

24 ¹⁶ Exhibit 7 at 24 (CBD000168).

25 ¹⁷ *Id.* at 22 (CBD000166).

26 ¹⁸ *Id.* at 16 (CBD000160).

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

3 **II. The Moapa Dace**

4 15. The Moapa dace (*Moapa coriacea*) is endemic to the Muddy River Springs Area.²⁰
5 The dace was federally listed as endangered in 1967.²¹

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

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

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

15 **III. Order 1169 Pump Test**

16 19. The State Engineer issued Order 1169 in March 2002 after receiving several
17 applications to appropriate groundwater from the Coyote Springs Valley, Black Mountains Area,
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20 ¹⁹ *Id.* at 22-24 (CBD000166-68).

21 ²⁰ Exhibit 1 at 4 (CBD000004).

22 ²¹ *Id.*

23 ²² Exhibit 4 at 24 (CBD000108).

24 ²³ *Id.*

25 ²⁴ *Id.* at 15 (CBD000099).

26 ²⁵ *Id.*

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

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

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

15 22. The Order 1169 pump test began in November 2010 and concluded in December
16 2012.³¹ During the test an average of 5,290 acre-feet per year was pumped from carbonate-aquifer
17 wells in Coyote Springs Valley and a cumulative total of 14,535 acre-feet per year was pumped
18 throughout the Order 1169 study basins.³²

20 ²⁶ Exhibit 1 at 3 (CBD000003).

21 ²⁷ *Id.*

22 ²⁸ *Id.*; Exhibit 2 at 7 (CBD000075).

23 ²⁹ Exhibit 1 at 3 (CBD000003).

24 ³⁰ *Id.*

25 ³¹ *Id.* at 5 (CBD000005).

26 ³² *Id.* at 6 (CBD000006).

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

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

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

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

22 ³³ Exhibit 3 at 7-11 (CBD000086-90); Exhibit 5 at 26 (CBD0000137).

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

24 ³⁵ Exhibit 5 at 26 (CBD0000137).

25 ³⁶ *Id.*

26 ³⁷ Exhibit 6 at 2 (CBD000142).

1 27. Carbonate groundwater levels have not recovered since the completion of the Order
2 1169 pump test and continue to decline despite a subsequent decrease in groundwater pumping.³⁸
3 Groundwater levels at the EH-4 monitoring well—a key location for evaluating pumping impacts
4 to the Muddy River springs—reached an all-time low point on November 9, 2018.³⁹ Groundwater
5 levels at other monitoring wells briefly recovered from the pump test but began trending downward
6 again in early 2016.⁴⁰

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

10 **IV. Order 1303**

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

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22 ³⁸ Exhibit 7 at 16 (CBD000160); Exhibit 8 at 3, 23-24 (CBD000174, CBD000194-95).

23 ³⁹ Exhibit 8 at 23 (CBD000194).

24 ⁴⁰ *Id.*

25 ⁴¹ *Id.*

26 ⁴² Exhibit 9 at 1519 (CBD000218).

27 ⁴³ Exhibit 1 at 10 (CBD000010).

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

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

13 32. Dr. Myers’s conclusions are based on the fundamental hydrologic principle that in
14 any groundwater system the amount of discharge (water flowing out of the system) must equal the
15 amount of recharge (water flowing into the system).⁴⁸ Pumping upsets this balance by removing
16 groundwater that would otherwise exit the system as springflow or some other form of discharge.⁴⁹
17 Over time, the system may reach a new equilibrium or “steady state” in which the reduction in
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21 ⁴⁴ Dr. Myers holds Masters and Doctorate degrees in hydrology/hydrogeology and has over thirty-
22 seven years of experience in this field. *See generally* Exhibit 10 (CBD000219-29).

23 ⁴⁵ *See generally* Exhibit 7 (CBD000145-71)

24 ⁴⁶ *See generally* Exhibit 8 (CBD000172-201)

25 ⁴⁷ Exhibit 7 at 25 (CBD000169); Exhibit 8 at 24 (CBD000195).

26 ⁴⁸ *See* Exhibit 7 at 17 (CBD000161); Exhibit 8 at 24-27 (CBD000195-198).

27 ⁴⁹ *See* Exhibit 8 at 24-27 (CBD000195-198).

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

6 33. Dr. Myers's reports and testimony explained that the Lower White River Flow
7 System has not reached a steady state because groundwater levels and springflows continue to
8 decline despite recent reductions in pumping and increasing annual precipitation rates.⁵³ After the
9 conclusion of the Order 1169 pump test, and especially since 2014, total pumping has decreased
10 and remained between 7,000 and 8,000 acre-feet per year—roughly equivalent to 1995-97 levels.⁵⁴
11 Precipitation, meanwhile, increased from 2014 through 2018.⁵⁵ Despite this reduction in pumping
12 and increase in precipitation, carbonate groundwater levels and springflows have steadily
13 declined.⁵⁶ As Dr. Myers explained, these decreases indicate that the system has not reached a
14 steady state, and that even with current pumping levels, "it is only a matter of time before the
15 spring flow on which the [Moapa] dace depends decreases significantly or is completely lost."⁵⁷

16 34. Dr. Myers explained that there is very little recharge in the Lower White River Flow
17 System, meaning that very little water enters the carbonate aquifer system from precipitation and
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19 ⁵⁰ *Id.* at 27 (CBD000198).

20 ⁵¹ *Id.*

21 ⁵² *Id.*

22 ⁵³ *See* Exhibit 9 at 1513-14 (CBD000212-13).

23 ⁵⁴ Exhibit 1 at 55 (CBD000055); Exhibit 8 at 22 (CBD000193).

24 ⁵⁵ Exhibit 8 at 3 (CBD000174).

25 ⁵⁶ *Id.* at 23 (CBD000194).

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

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

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

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

22 ⁵⁸ Exhibit 7 at 4, 17 (CBD000148, CBD000161).

23 ⁵⁹ Exhibit 8 at 28 (CBD000199).

24 ⁶⁰ Exhibit 7 at 26 (CBD000170).

25 ⁶¹ *Id.*

26 ⁶² Exhibit 8 at 27 (CBD000198).

1 **V. Order 1309**

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

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

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

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

21 ⁶⁴ Exhibit I at 57 (CBD000057).

22 ⁶⁵ *Id.*

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

26 ⁶⁷ *Id.* at 60 (CBD000060).
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1 carbonate aquifer without impacting the fully decreed water rights in the Muddy River, stating
2 “reductions in flow that have occurred because of groundwater pumping in the headwaters basins
3 is not conflicting with Decreed rights.”⁶⁸

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

6 **GROUNDS FOR THE PETITION**

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

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

21 ⁶⁸ Exhibit I at 61 (CBD000061).

22 ⁶⁹ *Id.*

23 ⁷⁰ *Id.* at 57 (CBD000057).

24 ⁷¹ *See id.*

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

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

19
20
21 ⁷³ Exhibit 1 at 45 (CBD000045). The Center agrees with and supports the State Engineer’s analysis
22 of potential ESA liability.

23 ⁷⁴ *Id.*

24 ⁷⁵ *See id.* at 59-61 (CBD000059-61).

25 ⁷⁶ *Id.* at 61 (CBD000061).

26 ⁷⁷ *Id.* at 63 (CBD000063).

27 ⁷⁸ *See, e.g.,* Exhibit 7 at 24 (CBD000168); Exhibit 8 at 25, 28 (CBD000196, CBD000199).

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

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

21
22
23 ⁷⁹ Exhibit 1 at 55 (CBD000055).

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

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

1 CONCLUSION

2 For the reasons stated above, and for others that may be raised during the pendency of this
3 appeal, Petitioner respectfully requests judgment as follows:

- 4 a. For an Order amending Order 1309 to remove or strike findings made therein
5 regarding the amount of water that can be sustainably pumped from the Lower
6 White River Flow System; amending Order 1309 to remove or strike the findings
7 and conclusions therein that pumping in the Lower White River Flow System will
8 not conflict with Muddy River decreed rights; directing the State Engineer to fully
9 consider the environmental consequences of groundwater pumping within the
10 Lower White River Flow System; and directing the State Engineer to prohibit all
11 carbonate groundwater pumping within the geographic boundary of the Lower
12 White River Flow System, including Kane Springs Valley, until a new sustainable
13 limit is determined by the State Engineer after remand.
- 14 b. For costs of suit and reasonable attorney's fees; and
- 15 c. For such other and further relief as this Court deems just and equitable.

16 Respectfully Submitted this 13th day of July, 2020.

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20 Julie Cavanaugh-Bill (NV Bar No. 11533)
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LIST OF EXHIBITS-FILED AS A SEPARATE APPENDIX

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

1 **CERTIFICATE OF SERVICE**

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

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11 By: /s/ Scott Lake
12 Scott Lake
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14 Center for Biological Diversity
15 PO Box 6205
16 Reno, NV 89513-6205
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18 Pursuant to NRCP 5(b), I, an employee of the Center for Biological Diversity, hereby
19 certify that on July 13, 2020, I served complete copies of the foregoing NOTICE OF AND
20 PETITION FOR JUDICAL REVIEW and the separate APPENDIX WITH EXHIBITS 1-10 by
21 placing true copies thereof in the United States mail, Certified Mail – Return Receipt Requested,
22 postage prepaid, addressed as follows:

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ATTACHMENT 7

ATTACHMENT 7

411 510

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1 Case No. CV0702520
2 Dept. No. _____

LISA C. LEWIS
LINCOLN COUNTY CLERK
CL
CLERK

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

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

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

Petitioners,

13 vs.

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

Respondent.

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

- 22 1. Petitioner, LINCOLN COUNTY WATER DISTRICT ("LINCOLN"), is a
- 23 political subdivision of the State of Nevada, created for the purpose of providing adequate and
- 24 efficient water service within Lincoln County, Nevada.
- 25 2. Petitioner, VIDLER WATER COMPANY, INC. ("VIDLER"), is a Nevada
- 26 corporation authorized to conduct business in the state of Nevada.
- 27 3. Petitioners, LINCOLN and VIDLER own groundwater permits with a priority
- 28 date of February 14, 2005 and jointly own groundwater right applications filed on April 10, 2006 to

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

28

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

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

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

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

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

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

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

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

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

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

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

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

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

3 WHEREFORE, Petitioners pray for judgment as follows:

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

11 **AFFIRMATION**

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

14 DATED this 13th day of July, 2020.

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

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP Rule 5(b), I hereby certify that I am an employee of ALLISON
3 MacKENZIE, LTD., Attorneys at Law, and that on this date, I caused the foregoing document to be
4 served on all parties to this action as follows:

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25	Pacific Coast Building Products, Inc. P.O. Box 364329 Las Vegas, NV 89036	Lake At Las Vegas Joint Venture, Inc. 1600 Lake Las Vegas Parkway Henderson, NV 89011
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7		
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9
10 DATED this 13th day of July, 2020.

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13 NANCY FONTENOT
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INDEX OF EXHIBITS

<u>Exhibit No.</u>	<u>Description</u>	<u>Number of Pages</u>
"1"	Order 1309	68

4848-8027-8210, v. 1

ATTACHMENT 8

ATTACHMENT 8



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17 Attorneys for Petitioner MVIC

DISTRICT COURT

CLARK COUNTY, NEVADA

MUDDY VALLEY IRRIGATION COMPANY,

Case No.:

Petitioner,

Dept. No.:

vs.

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

**PETITION FOR JUDICIAL REVIEW
OF ORDER 1309**

Respondent.

MUDDY VALLEY IRRIGATION COMPANY ("MVIC"), by and through its counsel,
STEVEN D. KING and DOTSON LAW, hereby files this Petition for Judicial Review of Order 1309
issued by Respondent TIM WILSON, P.E., Nevada State Engineer, DIVISION OF WATER
RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES on June
15, 2020. This Petition for Judicial Review is filed pursuant to NRS 533.450(1).

I. JURISDICTIONAL STATEMENT

NRS 533.450(1) provides that any order or decision of the State Engineer is subject to judicial
review "in the proper court of the county in which the matters affected or a portion thereof are

1 situated.” The real property to which the water at issue is appurtenant lies in Clark County, Nevada;
2 thus, the Eighth Judicial Court is the proper venue for this judicial review.

3 Additionally, the subject of this appeal involves decreed waters of the Muddy River Decree.
4 Under NRS 533.450(1), “on stream systems where a decree of court has been entered, the action must
5 be initiated in the court that entered the decree.” The Muddy River Decree, *Muddy Valley Irrigation*
6 *Company, et al. v. Moapa & Salt Lake Produce Company, et al.*, Case No. 377, was entered in the
7 Tenth Judicial District Court of the State of Nevada in and for Clark County in 1920.¹ This Decree is
8 attached hereto as **Exhibit 1**. Thus, this Court, without question, has jurisdiction over the instant
9 matter.

10 **II. FACTUAL BACKGROUND**

11 MVIC has been in existence as a Nevada corporation since 1895 for purposes which include
12 the acquisition of water rights and the construction, operation, and maintenance of their associated
13 irrigation works of diversion and distribution for MVIC’s and its shareholder’s “beneficial use” of
14 Muddy River water within the Moapa Valley.

15 Through the Muddy River Decree of 1920, it was determined that MVIC owns the majority of
16 the Muddy River decreed surface water rights and that those rights were appropriated and placed to
17 beneficial use prior to 1905 and are senior in priority to all Nevada groundwater rights within the
18 Lower White River Flow System (“LWRFS”). The Muddy River Decree states, in part:

19 [T]he Muddy Valley Irrigation Company is declared and decreed to
20 have acquired by valid appropriate and beneficial use and to be
21 entitled to divert and use upon the lands...all waters of said Muddy
22 River, its head waters, sources of supply and tributaries save and
except the several amounts and rights hereinbefore specified...

23 (See **Exhibit 1**, Muddy River Decree at 20:1-8, emphasis added.) The Muddy River Decree also
24 held that “the total aggregate volume of the several amounts and quantities of water awarded and
25 allotted...is the total available flow of said Muddy River and consumes and exhausts all of the
26 available flow of the said Muddy Valley River...” *Id.* at 22:28-23:1, emphasis added. MVIC’s
27 decreed rights were therefore entitled to protection from capture and depletion by other parties.

28 _____
¹ In 1920, the Tenth Judicial District included both Clark and Lincoln County. In 1945, Clark County was designated as the Eighth Judicial District.

1 In 2018, the State Engineer held several public workshops to review the status of groundwater
2 use and recovery following the conclusion of State Engineer Order 1169 from 2002, requiring a large
3 study to determine whether pumping in the LWRFS would have detrimental impacts on existing
4 water rights or the environment. Following the workshops, and as a result thereof, the State Engineer
5 drafted a proposed order and held a hearing on the proposed order on December 14, 2018.

6 On January 11, 2019, the State Engineer issued Interim Order 1303 to seek input on the
7 following specific matters: (1) the geographic boundary of the LWRFS, (2) aquifer recovery since
8 the pump test, (3) long-term annual quantity that may be pumped from the LWRFS, and (4) effects of
9 moving water rights between the carbonate and alluvial system to senior water rights on the Muddy
10 River. (See **Exhibit 2**, Interim Order 1303.) After factual findings were made on those questions, the
11 State Engineer was to evaluate groundwater management options for the LWRFS. The State
12 Engineer held a number of hearings, allowed the presentation of evidence and exchange of reports,
13 and eventually issued Order 1309 on June 15, 2020. (See **Exhibit 3**, Order 1309.)

14 MVIC took the position, and continues to take the position, that the Muddy River Decree
15 prevents the depletion of groundwater if that would reduce the flow of the Muddy River, as that
16 would conflict with MVIC's senior decreed rights. However, the State Engineer appears to have
17 taken a contrary position, stating that "reductions in flow that have occurred because of groundwater
18 pumping in the headwaters basins is not conflicting with Decreed rights." (**Exhibit 3**, Order 1309 at
19 p. 61.) Importantly, in making this determination, the State Engineer tacitly acknowledged that
20 groundwater pumping is in fact reducing flow and therefore conflicting with MVIC's senior decreed
21 rights.

22 **III. GROUNDS FOR THE PETITION**

23 The third inquiry the State Engineer sought input on was "[t]he long-term annual quantity of
24 groundwater that may be pumped from the Lower White River Flow System, including the relationships
25 between the location of pumping on discharge to the Muddy River Springs, and the capture of Muddy
26 River flow." (**Exhibit 2**, Order 1303 at p. 13.) The scope of the hearing was purportedly "not to
27 resolve or address allegations of conflict between groundwater pumping within the LWRFS and
28 Muddy River decreed rights;" rather, it was to determine what the impact is on decreed rights and

1 then address that at a future point in time. (**Exhibit 4**, Transcript of Proceedings, Public Hearing,
2 Pre-Hearing Conference, Thursday, August 8, 2019 at 12:6-15.) However, despite acknowledging
3 that current pumping is capturing Muddy River flows, the State Engineer went beyond the scope of
4 the hearing to determine that “capture or potential capture of flows of the waters of a decreed system
5 does not constitute a conflict.” (**Exhibit 3**, Order 1309 at p. 61.) The State Engineer stated that
6 “there is no conflict as long as the senior water rights are served.” (*Id.* at p. 60.) The State Engineer
7 then performed a coarse calculation to determine the consumptive use needs of the senior decreed
8 rights holders and concluded that the capture of 8,000 acre-feet of Muddy River flows by junior
9 groundwater users would not deprive the senior holders of any portion of their water rights.² (*Id.* at
10 pp. 60-61.)

11 One problem with the State Engineer’s analysis is that it contradicts the stated narrow purpose
12 of the hearing. As a result of this stated purpose, much of the evidence submitted was related to the
13 capture of the Muddy River water by junior groundwater pumpers. By making the findings it did
14 without MVIC having the opportunity to present evidence on that point, the State Engineer violated
15 MVIC’s due process rights. He also acted arbitrarily and capriciously because he ignored and/or
16 precluded the only evidence that existed related to conflicts and then applied an erroneous analysis
17 that no party had an opportunity to review or comment on. This is the classic definition of a violation
18 of due process rights.

19 Additionally, Order 1309 is contrary to law – particularly the Muddy River Decree. This is
20 because determining the consumptive needs of the senior decreed rights holders is irrelevant; as
21 MVIC’s senior decreed rights are not based on their alleged calculated needs. Rather, other than the
22 limited exceptions noted in the Muddy Valley Decree, MVIC is entitled to “all waters of said Muddy
23 River, its head waters, sources of supply and tributaries.” (*See Exhibit 1*, Decree at 20:1-8.) As the
24 Decree held that “the total aggregate volume of the several amounts and quantities of water awarded
25

26 ² The State Engineer’s analysis is contrary to the Muddy River Decree, and even if not it is
27 improperly premised upon inaccurate information as it did not correctly consider transmission losses,
28 or the gross amount of water necessary to apply to reach the fields in question, or operate those and
adequately flush salts. The analysis appears faulty in the applied acreage calculations and the net
irrigation water requirement.

1 and allotted...is the total available flow of said Muddy River and consumes and exhausts all of the
2 available flow of the said Muddy Valley River..." (*id.* at 22:28-23:1, emphasis added), a holding
3 which requires that MVIC's decreed rights were therefore entitled to protection from capture and
4 depletion by other parties. Order 1309 arrives at the conclusion that if all decreed acres were planted
5 with a high-water-use crop like alfalfa, the net irrigation requirement would be 28,300 afa based upon
6 a consumptive rate of 4.7 afa. (**Exhibit 3**, Order 1309 at p. 61.) However, MVIC's alleged
7 "requirement" is irrelevant to determining whether pumping interferes with MVIC's decreed rights
8 because MVIC has rights to the "total aggregate volume" independent of its alleged requirements.³
9 (**Exhibit 1**, Decree at 22:28-23:1.) Thus, the State Engineer's conclusion that reductions in flow
10 from groundwater pumping does not conflict with MVIC's rights is erroneous, as anything that
11 depletes the aggregate volume, which the State Engineer recognized groundwater pumping does,
12 conflicts with MVIC's rights as a matter of law.

13 **IV. CONCLUSION**

14 For the reasons described herein, MVIC respectfully requests that the Court order the State
15 Engineer to amend Order 1309 and strike the findings regarding conflicts with senior water rights.

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27 _____
28 ³ Though the State Engineer apparently believes MVIC's requirements are limited, they in fact are not and all water is actually used. The analysis disregards the application of Nevada law, including, but not limited to, NRS 533.0245 or the actual operation diversion, delivery, and use of the water by MVIC for its shareholders and other laws and circumstances applicable to these Muddy River water rights.

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Affirmation Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 14th day of July, 2020.

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1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I hereby certify that I am an employee of DOTSON LAW and that on
3 this date I caused to be served a true and correct copy of the foregoing by:

- 4 (BY MAIL) on all parties in said action, by placing a true copy thereof enclosed in a
5 sealed envelope in a designated area for outgoing mail, addressed as set forth below.
6 At Dotson Law, mail placed in that designated area is given the correct amount of
7 postage and is deposited that same date in the ordinary course of business, in a United
8 States mailbox in the City of Reno, County of Washoe, Nevada.
- 9 By electronic service by filing the foregoing with the Clerk of Court using the Tyler
10 Technologies E-filing system, which will electronically mail the filing to the below
11 listed individuals registered on the Court's E-Service Master List.
- 12 (BY PERSONAL DELIVERY) by causing a true copy thereof to be hand delivered
13 this date to the address(es) at the address(es) set forth below.
- 14 (BY FACSIMILE) on the parties in said action by causing a true copy thereof to be
15 telecopied to the number indicated after the address(es) noted below.
- 16 Email.

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DATED this 14th day of July, 2020.

/s/ L. MORGAN BOGUMIL
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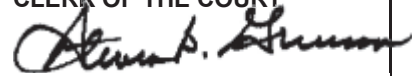
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ATTACHMENT 9

ATTACHMENT 9



CASE NO: A-20-818069-P
Department 18

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15 **DISTRICT COURT**
16 **CLARK COUNTY, NEVADA**

17 * * * *

18 GEORGIA-PACIFIC GYPSUM LLC,
19 AND REPUBLIC ENVIRONMENTAL
20 TECHNOLOGIES, INC.

21 Petitioners,

22 vs.

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

27 Respondent.

28 CASE NO.:

DEPT. NO.:

**PETITION FOR JUDICIAL REVIEW OF
ORDER 1309**

1. Petitioners Georgia-Pacific Gypsum LLC (“Georgia-Pacific”) and Republic Environmental Technologies, Inc. (“Republic”) (collectively, “Petitioners”), by and through counsel Sylvia Harrison, Esq., Lucas Foletta, Esq., and Sarah Ferguson, Esq. of the law firm of McDonald Carano LLP, hereby submit this Petition for Judicial Review of Order 1309 (“Petition”) issued by Respondent Tim Wilson, P.E. Nevada State Engineer, Division of Water Resources, Department of Conservation and Natural Resources on June 15, 2020, Ex. 1 (“Order 1309”). This Petition is filed pursuant to NRS 533.450(1).

///
///

1 **JURISDICTIONAL STATEMENT**

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

7 **FACTUAL BACKGROUND**

8 **Petitioners’ Interests Affected by Order 1309**

9 3. Both Georgia-Pacific and Republic are long-established businesses located in
10 Garnet Valley that use and rely on certificated, proven or otherwise fully used groundwater rights
11 to support their operations. Both Georgia-Pacific and Republic participated in the proceedings
12 before the State Engineer that resulted in the issuance of the Order 1309.

13 4. Georgia-Pacific has gypsum wallboard, gypsum plaster and polymer extrusion
14 manufacturing operations located twenty miles north of the City of Las Vegas, Nevada, along U.S.
15 Highway 91, in Apex, Nevada (the “Facility”), which has been in operation for four decades. The
16 Facility currently employs approximately 150 people. The Facility has one permitted on-site well
17 which is the only source of water available for production and domestic water usage. The Facility
18 is permitted to withdraw 47 million gallons per year. The majority of the permitted water is used
19 in wallboard production with the remainder being used in the polymer extrusion process as well
20 as the site’s domestic water uses.

21 5. Republic’s Apex Regional Landfill complex (“Apex Landfill”) is located at 13550
22 N Highway 93, Las Vegas, Nevada and encompasses over 2,200 acres. Apex Landfill performs
23 the critical task of providing environmentally safe and reliable daily waste disposal services for
24 nearly 3 million residents and hundreds of businesses in the cities of Las Vegas, North Las Vegas,
25 and Henderson, as well as Clark County. Additionally, the Apex Landfill site includes a sand and
26 gravel operation operated by Las Vegas Paving Corp. which is Nevada’s top heavy civil
27 construction company. To perform the daily operations, the site utilizes approximately 150
28 million gallons of water per year from its six permitted wells. A predictable and stable water

1 supply is critical to allow Apex Landfill to continue to provide uninterrupted service for its
2 millions of customers, as well as plan for meeting the increasing demand for future disposal
3 capacity.

4 6. As discussed below, the State Engineer’s issuance of Order 1309 will
5 impermissibly limit Petitioners’ right to appropriate water, long established under Nevada law,
6 immediately deprives Petitioners’ of the relative priority of their water rights, and will seriously
7 jeopardize the viability of their operations and threaten the loss of the significant benefits they
8 provide to the State and local economies. Petitioners are therefore aggrieved by the Order.

9 **Background to Issuance of Order 1309**

10 7. The general rule in Nevada is that one acquires a water right by filing an application
11 to appropriate water with the Nevada Division of Water Resources (“DWR”). If DWR approves
12 the application, a “Permit to Appropriate” issues. Nevada has adopted the principle of “first in
13 time, first in right,” also known as “priority.” The priority of a water right is determined by the
14 date a permit is applied for (the “Application Date”). If there is not enough water to serve all
15 water right holders in a particular hydrographic unit, “senior” appropriators are satisfied first in
16 order of priority: the rights of “junior” appropriators may be curtailed. The amount of
17 groundwater available for appropriation historically has been administered in Nevada based upon
18 “hydrographic basins,” which are generally defined by topography, more or less reflecting
19 boundaries between watersheds. The priority of groundwater rights is determined relative to the
20 water rights holder within the individual basins.

21 8. At issue in the instant matter is the administration of several hydrographic basins
22 which lie roughly along the southern (lower) course of the White River. The White River is a
23 small, partially ephemeral stream in Eastern Nevada. It is part of a hydrologic system generally
24 referred to as the Lower White River Flow System (“LWRFS”). Water resources in this area
25 include groundwater in alluvial valley-fill sediments, the so-called Carbonate Aquifer, and the
26 Muddy River.

27 9. Significant pumping of the Carbonate Aquifer in the LWRFS began in the 1980s
28 and 1990s. Initial assessments of the water available in the Carbonate Aquifer suggested it would

1 provide a new abundant source of water for Southern Nevada. By 2001, the State Engineer had
2 granted more than 40,000 acre feet of applications in the LWRFS. However, concerned over the
3 lack of information regarding the sustainability of water resources from the Carbonate Aquifer,
4 the State Engineer began hearings in July and August 2001 on water rights applications, leading
5 to the issuance of Order 1169 on November 15, 2010. Order 1169 held water rights applications
6 in abeyance in the LWRFS pending further studies and set up an ambitious test to “stress” the
7 Carbonate Aquifer through two years of aggressive pumping, combined with examination of water
8 levels in monitoring wells located throughout the LWRFS. The State Engineer’s conclusions from
9 the pump test found an “unprecedented decline” in high-altitude springs, an “unprecedented
10 decline” in water levels, and that additional pumping in the central part of Coyote Spring Valley
11 or the Muddy River Spring Area could not occur without conflict with existing senior rights,
12 including decreed surface water rights on the Muddy River, or potential impact to the habitat of
13 the Moapa Dace.

14 **Interim Order 1303 Proceedings**

15 10. Faced with the problem of resolving the competing interests for water resources in
16 the over-allocated basins, then-State Engineer Jason King issued Interim Order 1303 on January
17 11, 2019, Ex. 2. The ordering provisions in Interim Order 1303 provide in pertinent part:

18 1. The Lower White River Flow System consisting of the Coyote Spring Valley,
19 Muddy River Springs Area, California Wash, Hidden Valley, Garnet Valley, and
20 the portion of the Black Mountains Area as described in this Order, is herewith
21 designated as a joint administrative unit for purposes of administration of water
22 rights. *All water rights within the Lower White River Flow System will be*
23 *administered based upon their respective date of priorities in relation to other*
24 *rights within the regional groundwater unit.*

25 Any stakeholder with interests that may be affected by water right development
26 within the Lower White River Flow System may file a report in the Office of the
27 State Engineer in Carson City, Nevada, no later than the close of business on
28 Monday, June 3, 2019.

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;
- b. The information obtained from the Order 1169 aquifer test and subsequent to the aquifer test and Muddy River headwater spring flow as it relates to aquifer recovery since the completion of the aquifer test;

- c. The long-term annual quantity of groundwater that may be pumped from the Lower White River Flow System, including the relationships between the location of pumping on discharge to the Muddy River Springs, and the capture of Muddy River flow;
- d. The effects of movement of water rights between alluvial wells and carbonate wells on deliveries of senior decreed rights to the Muddy River; and,
- e. Any other matter believed to be relevant to the State Engineer's analysis.

Interim Ord. 1303 at 13-14, Ex. 2.

11. In July and August 2019, reports and rebuttal reports were submitted discussing the four matters set forth in Interim Order 1303. On July 25, 2019, the State Engineer issued a Notice of Pre-Hearing Conference. On August 9, 2019, the State Engineer held a prehearing conference. On August 23, 2019, the State Engineer issued a Notice of Hearing (amended on August 26, 2019), which included the following summary:

On August 9, 2019, the State Engineer held a pre-hearing conference regarding the hearing on the submission of reports and evidence as solicited in Order 1303.... The State Engineer established that the purpose of the hearing on the Order 1303 reports was to provide the participants an opportunity to explain the positions and conclusions expressed in the reports and/or rebuttal reports submitted in response to the Order 1303 solicitation. The State Engineer directed the participants to limit the offer of evidence and testimony to the salient conclusions, including directing the State Engineer and his staff to the relevant data, evidence and other information supporting those conclusions. *The State Engineer further noted that the hearing on the Order 1303 reports was the first step in determining to what extent, if any, and in what manner the State Engineer would address future management decisions, including policy decisions, relating to the Lower White River Flow System basins.* On that basis, the State Engineer then addressed other related matters pertaining to the hearing on the Order 1303 reports, including addressing the date and sequence of the hearing, as set forth in this Notice of Hr'g. Not. Of Hearing and Am. Notice of Hr'g, Ex. 3 (emphasis added).

The State Engineer conducted a hearing on the reports submitted under Order 1303 between September 23, 2019 and October 4, 2019.

12. As the Hearing Officer advised during the August 9, 2019 Pre-Hearing Conference, the Hearing was to be limited to the four questions “solicited in the Order 1303 report. This larger substantive policy determination is not part of the particular proceeding. *That’s part of later*

1 *proceedings....*” August 9, 2019 Pre-Hr’g. Conf. Trans. at 10:18-20, Ex.4. This was reiterated in
2 the Hearing Officer’s opening remarks at the hearing:

3 I want to just reiterate, and we've been trying to make this clear, that this is
4 not a contested or adversarial proceeding. The *scope of this proceeding is for the*
5 *limited purpose of addressing those four issues plus the fifth.*

6 And while that fifth issue is [] not intended to expand the scope of this
7 hearing into making policy determinations with respect to management of the
8 Lower White River Flow System basin’s individual water rights, those different
9 types of things, *because those are going to be decisions that would have to be*
10 *made in subsequent proceedings* should they be necessary. Sept. 23, 2019 Hr’g.
11 Trans. Excerpt at 6:4-15, Ex. 5.

12 Participants submitted closing statements due on December 3, 2019.

13 Order 1309

14 13. The State Engineer issued Order 1309 on June 15, 2020. *See* Ord. 1309, Ex. 1.
15 Notably, following the submission by the participating stakeholders of closing statements at the
16 beginning of December, 2019, the State Engineer engaged in no additional public process
17 whatsoever and solicited no additional input regarding “future management decisions, including
18 policy decisions, relating to the Lower White River Flow System basins.” *See* Not. Of Hearing,
19 Ex. 3. Thus, the Order 1303 Hearing was not just the first step in the State Engineer’s decisions
20 concerning the LWRFS basin management set forth in Order 1309, it was the *only* step.

21 The first three ordering paragraphs state as follows:

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

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

3. The maximum quantity of water that may be pumped from the Lower White
River Flow System Hydrographic Basin may be reduced if it is determined that
pumping will adversely impact the endangered Moapa dace. Ord. 1309 at 65, Ex
1.

- (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; and
- (f) Arbitrary and capricious or characterized by abuse of discretion.

More specifically, and as will be articulated in more detail in Petitioners' Memorandum of Points and Authorities supporting this Petition, the Order should be set aside for the following reasons:

The State Engineer Has Not Provided Appropriate Statutory Authority To Support Consolidation Of The LWRFS Into A Single Hydrographic Basin.

17. The State Engineer found authority to delineate the LWRFS as a single hydrographic basin in NRS 533.024(1)(e). Ord. 1309 at 42. However, because NRS 533.024(1)(e) is a statement of policy and not a grant of authority, it does not support the action taken by the State Engineer to completely upend the priority of certificated and proven water rights whose priorities have been in place for up to nearly 39 years.

18. NRS 533.024(1)(e) declares that it is the policy of the state to “[t]o manage conjunctively the appropriation, use and administration of all waters of this State, regardless of the source of the water.” NRS 533.024(1)(e). As a statement of policy, NRS 533.024(1)(e) does not constitute a grant of authority to the State Engineer. Statements of policy from the Legislature do not serve as a basis for government action, but rather inform the interpretation of specific statutes that authorize specific action. *See e.g., Pawlik v. Deng*, 412 P.3d 68, 71 (2018) quoting *J.E. Dunn Nw., Inc. v. Corus Constr. Venture, LLC*, 127 Nev. 72, 79, 249 P.3d 501, 505 (2011) (noting that “if the statutory language is subject to two or more reasonable interpretations, the statute is ambiguous, and we then look beyond the statute to the legislative history and interpret the statute in a reasonable manner ‘in light of the policy and the spirit of the law.’”). And while such statements of policy are accorded deference, the Nevada Supreme court has specifically held that they are not binding. *See e.g., McLaughlin v. Housing Authority of the City of Las Vegas*, 227 P.2d 206, 93 (1951) (“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

1 it is neither the duty nor prerogative of the courts to interfere in such legislative finding unless it
2 clearly appears to be erroneous and without reasonable foundation.”).

3 19. Thus, because NRS 533.024(1)(e) is a statement of policy and not a statutory grant
4 of authority, it does not confer upon the State Engineer the authority to delineate the LWRFS as a
5 single hydrographic basin. The authority to take that action must be rooted in a specific statutory
6 grant. However, in this case the State Engineer failed to identify any such grant, and there is no
7 such authority in Nevada’s water law. Consequently, it is unclear to Petitioners where authority
8 has been granted to the State Engineer to support the consolidation of the LWRFS into a single
9 hydrographic basin.

10 **The State Engineer’s Order Provides No Policies For Management Of LWRFS Nor Were**
11 **Petitioners’ Provided Opportunity To Provide Comment on Such Policies, Violating**
12 **Petitioners’ Due Process Rights**

13 20. In addition, the State Engineer’s decision in Order 1309 included no policies,
14 regulations, or administrative procedures to address the effects of the reordering of priorities that
15 will be the consequence of the administrative consolidation of the basin. *See* Ord. 1309, Ex. 1.

16 21. The hearing, guided by the Hearing Officer, focused on factual findings regarding
17 the LWRFS hydrographic basin. The Hearing Officer explicitly said that there would be further
18 proceedings to address the administration of the LWRFS. *See* August 9, 2019 Pre-Hr’g. Trans.,
19 10:18-20, Ex. 4; Sept. 23, 2019 Hr’g. Trans. Excerpt, Ex. 5. Consequently, participants and
20 experts did not have the opportunity to, and were actively discouraged from addressing policy
21 issues critical to the management of the LWRFS, including, but not limited to: whether Nevada
22 law allows the State Engineer to conjunctively manage multiple hydrographic basins in a manner
23 that modifies the relative priority of water rights due to the administration consolidation of basins;
24 whether the State Engineer would establish a “critical management area” pursuant to NRS 534.110
25 and, if so, whether he would develop a groundwater management plan or defer to the stakeholders
26 to develop one; whether Nevada law gives the State Engineer authority to designate a management
27 area that encompasses more than one basin; whether “safe-yield” discrete management areas
28 should be established within the proposed administrative unit; whether water rights holders enjoy
a “property right” in the relative priority of their water rights such that impairing that right may

1 constitute a “taking”; whether unused (or only sporadically used) senior water rights take
2 precedence over certificated or fully used junior rights, particularly where these junior rights are
3 in continuous use to support economically significant enterprises; whether States compel
4 quantification of federal reserved rights by a date certain; and whether the State Engineer should
5 approach the legislature to seek different or additional management tools or authority. *See* Dec.
6 2, 2019, Closing Arg. of Georgia Pacific and Republic Environmental Technologies, Inc., Ex. 6
7 (outlining policy questions for consideration by the State Engineer at later proceedings,
8 proceedings that never took place).

9 22. Then, without notice or providing additional proceedings for the participants,
10 including Petitioners, to address these critical questions, the State Engineer issued Order 1309. In
11 it, the State Engineer acknowledged Petitioners’ concerns:

12 Georgia-Pacific and Republic asserted that boundaries are premature
13 without additional data and without a legally defensible policy and management
14 tools in place. They expressed concern that creating an administrative unit at this
15 time inherently directs policy without providing for due process. The State
16 Engineer has considered these concerns and agrees that additional data and
17 improved understanding of the hydrologic system is critical to the process. He also
18 believes that the data currently available provide enough information to delineate
19 LWRFS boundaries, and that an *effective management scheme* will provide for
20 the flexibility to adjust boundaries based on additional information, retain the
21 ability to address unique management issues on a sub-basin scale, and maintain
22 partnership with water users who may be affected by management actions
23 throughout the LWRFS. Ord. 1309 at 53, Ex. 1.

24 23. Yet, despite the far-reaching impact of the consolidation of the basin and the State
25 Engineer’s admission that an “effective management scheme” is necessary for the administration
26 of the LWRFS, Order 1309 included no such scheme. *Id.* It implicates, but does not meaningfully
27 address, complex policy questions, nor were Petitioners’ given the opportunity to address these
28 issues, as promised. This is in clear violation of Petitioners’ procedural due process rights. *See*
e.g., Dutchess Business Services Inc. v. Nevada State Bd. of Pharmacy, 124 Nev. 701, 711, 191
P.3d 1159, 1166 (2008) (“Although proceedings before administrative agencies may be subject to
more relaxed procedural and evidentiary rules, due process guarantees of fundamental fairness

1 still apply. Administrative bodies must follow their established procedural guidelines and give
2 notice to the defending party of ‘the issues on which decision will turn and . . . the factual material
3 on which the agency relies for decision so that he may rebut it.’”) (internal citations omitted)
4 quoting *Bowman Transp. v. Ark.-Best Freight System*, 419 U.S. 281, 288–89 n. 4, 95 S.Ct. 438,
5 42 L.Ed.2d 447 (1974).

6 **The State Engineer Provided Inadequate Analysis and Factual Support for his**
7 **Determination of the Maximum Sustainable Pumping from the LWRFS, And Therefore,**
8 **The Factual Underpinning Of The Order Is Arbitrary, Capricious, And The Order Was**
9 **Made Upon Unlawful, Unconstitutional Procedure.**

10 24. Order 1309 includes no clear analysis as to the basis for the 8000 afa number for
11 the maximum sustainable yield set forth in Ordering Paragraph 2. As the Order acknowledges,
12 “the evidence and testimony presented at the 2019 hearing did not result in a consensus among
13 experts of the long-term annual quantity of groundwater that can be pumped. Recommendations
14 range from zero to over 30,000 afa.... There is a near consensus that the exact amount that can
15 be continually pumped for the long term-term cannot be absolutely determined with the data
16 available and that to make that determination will require monitoring of spring flow, water levels,
17 and pumping over time” Ord. 1309 at 57,Ex. 1.

18 25. The Order repeats this acknowledgement: ...“there is almost unanimous
19 agreement among experts that data collection is needed to further refine with certainty the extent
20 of groundwater development that can continually pumped over the long term.” Ord. 1309 at 62,
21 Ex. 1. However, the State Engineer discounts this uncertainty and finds “that the current data are
22 adequate to establish an approximate limit on the amounts of pumping that can occur within the
23 system, but [further data are] essential to refine and validate this limit.” *Id.* But Order 1309 does
24 not present the 8000 afa limitation as a temporary “approximation” subject to validation, but as
25 an absolute limitation with immediate weighty consequences and, further, keeps the Petitioners
26 and all other stakeholders in suspense as to what exactly those weighty consequences might be.
27 As discussed above, the Order is devoid of any direction or guidance as to any future refinement
28 or modification of this limitation. *See* Ord. 1309 Ex. 1.

1 26. Equally troubling is the cursory support for the 8000 afa limitation. Most of the
2 Order consists of selective and imprecise summaries of the participants’ presentations. There is
3 no technical analysis, no detailed consideration of the weight of evidence, nor discussion of the
4 numerous models proposed or challenged by the participants relevant to this issue. As to the
5 basis for the sustainable supply, the Order cites a number of estimations from other participants
6 that exceed this number, a few that are less, and then simply lands on 8000 afa, apparently based
7 on amounts of current pumping from the carbonate aquifer and the possibility that the spring
8 flow “may be approaching steady state.” Ord. 1309 at 63, Ex. 1.

9 27. Underscoring the arbitrariness of the conclusion in Ordering Paragraph 2, the
10 Order (Ex. 1) adds the Kane Springs Valley hydrographic basin to the joint administrative unit
11 but fails to acknowledge the additional water resources available from the Kane Springs basin.
12 Since Interim Order 1303 did not include the Kane Springs Valley hydrographic basin, the
13 participants’ assessment of the sustainable water resources of the LWRFS generally did not
14 consider Kane Springs water resources and the State Engineer made no effort to collect evidence
15 on this issue. According to the Division’s Hydrographic Basin Abstract, the Kane Springs Valley
16 Hydrographic Basin (Basin 206) has a perennial yield of 1000 afa (Nevada Division of Water
17 Resources, Hydrographic Area Summary, <http://water.nv.gov/DisplayHydrographicGeneralReport.aspx?basin=206>
18 (last visited July 14, 2020)); the contribution to the LWRFS may be more than 4000 afa.²
19 Nothing in the Order indicates that the State Engineer considered this resource in determining
20 the LWRFS limitation.

21 28. Given the immediate and far-reaching consequences of Order 1309, the public
22 deserves a careful and considered analysis of the limitation imposed supported by substantial
23

24
25 ² “SNWA (2007) assessed local and regional flow in southeastern Nevada and found regional
26 inflow to Coyote Spring Valley was 50,700AFY of whichKane Springs Valley contributes
27 4,190 AFY....SNWA estimated local recharge to be 2,130 AFY... ” Coyote Springs Investment,
28 LLC *Report Submitted Pursuant to Nevada State Engineer Interim Order 1303* (July 2019) at 44
(citing Southern Nevada Water Authority, *Water-Resources Assessment and Hydrologic Report
for Cave, Dry Lake, and Delmar Valleys* (June 2007)).

1 evidence and not an arbitrary “guestimate,” or, in the alternative, the State Engineer should
2 provide a process for determining a limitation that can be adequately supported by empirical
3 evidence.

4 **The State Engineer Does Not Have Authority To Make A Ruling On The Endangered**
5 **Species Act and Failed to Provide Adequate Notice; Therefore, The Factual Underpinning**
6 **Of The Order Is Arbitrary, Capricious, And The Order Was Made Upon Unlawful,**
7 **Unconstitutional Procedure.**

8 29. Ordering Paragraph 3 states “The maximum quantity of water that may be pumped
9 from the Lower White River Flow System Hydrographic Basin may be reduced if it is determined
10 that pumping will adversely impact the endangered Moapa dace.” Ord. 1309 at 64, Ex. 1. This
11 portion of the Order is underpinned by the following specific findings:

12 **WHEREAS**, based upon the testimony and evidence offered in response to Interim
13 Order 1303, it is clear that it is necessary for spring flow measured at the Warm Springs
14 West gage to flow at a minimum rate of 3.2 cfs in order to maintain habitat for the
15 Moapa dace.²⁶¹ A reduction of flow below this rate may result in a decline in the dace
16 population. This minimum flow rate is not necessarily sufficient to support the
17 rehabilitation of the Moapa dace.

18 **WHEREAS**, the ESA prohibits any loss of Moapa dace resulting from actions that
19 would impair habitat necessary for its survival. Some groundwater users are signatories
20 to an MOA that authorizes incidental take of the Moapa dace; however, the State
21 Engineer and many other groundwater users are not covered by the terms of the
22 MOA.²⁶³ Not only would liability under the ESA for a “take” extend to groundwater
23 users within the LWRFS, but would so extend to the State of Nevada through the
24 Division as the government agency responsible for permitting water use.

25 **WHEREAS**, the State Engineer concludes that it is against the public interest to allow
26 groundwater pumping from the LWRFS that will reduce spring flow in the Warm
27 Springs area to a level that would impair habitat necessary for the survival of the Moapa
28 dace and could result in take of the endangered species. Ord. 1309 at 45-46, Ex. 1.

29 30. In other words, Ordering Paragraph 3 is based upon the State Engineer’s
30 unauthorized and unsupported conclusion that groundwater users, the State Engineer, and the State
31 of Nevada would be liable for a take under the Endangered Species Act (“ESA”) if flow levels at
32 the Warm Springs West gage to flow fall below a minimum rate of 3.2 cfs. The ESA, of course,
33 is a federal law, administered by the U.S. Fish Wildlife Service (“USFWS”). *See* ESA 16 USC §
34 1537a. The State Engineer has not provided (and could not provide) the basis for his authority to

1 determine when and under what circumstances a “take” of the Moapa dace would occur.³ Notably,
2 during the hearing, the USFWS expressly *declined* to endorse the conclusions stated in the State
3 Engineer’s findings quoted above. Sept. 24, 2019, Hr’g Tr. Vol. II at 483:10-484:15. Ex 7.

4 31. Moreover, the State Engineer’s “factual” conclusion that “it is necessary to
5 maintain flow at minimum rate of 3.2 cfs in order to maintain habitat for the Moapa dace” is far
6 from “clear.” The USFWS has reached agreements with several parties for implementation of
7 mitigation measures triggered by much lower flow rates at the Warm Springs West gage, Order
8 1303 Hearing Documents, NSE Ex 244, MOA triggers, Ex. 8, and evidence was introduced at the
9 Hearing of factors such as temperature and presence of predators that may be more determinative
10 of dace success. It has certainly not been conclusively established that groundwater pumping
11 anywhere in the LWRFS will impact Warm Springs flows, particularly pumping in the far distal
12 locations of Petitioners’ wells.

13 32. Including these findings and order in Order 1309 is a completely *ultra vires* act;
14 nothing empowers the State Engineer to make a determination when a “take” has occurred under
15 the ESA.

16 33. In addition to the State Engineer’s lack of authority under the ESA, no notice was
17 provided to the public or to the Interim Order 1303 Hearing participants that the State Engineer
18 intended to determine the flow levels at the springs purportedly necessary to maintain the dace,
19 that this would be a purpose of the proceeding, or that the State Engineer intended to prioritize
20 protection of the dace over other competing uses of water resources with the LWRFS. Moreover,
21 as discussed above, all questions of policy or procedure were off-limits during the Hearing
22 according to the State Engineer’s and Hearing Examiner’s ground rules, and no opportunity has
23 been afforded the participants to comment on such findings.

24
25 _____
26 ³ 16 U.S.C.A. §1536, cited by the State Engineer as authority for “shared [ESA] responsibility”
27 with the federal government, confers no authority or responsibility to States whatsoever, except
28 in the context of consideration of *exemptions* from application of the ESA. The “shared
responsibility” cited by the State Engineer is expressly referred to in the code as required
cooperation between federal agencies to enforce the ESA.

1 34. As a result of the lack of notice, the State Engineer failed to gather factual evidence
2 or develop an adequate record to support his findings. Notably, the U.S. Fish and Wildlife Service
3 has not issued a biological opinion based on analysis of the effects on Moapa dace from
4 groundwater pumping by users within the Garnet Valley hydrographic basin or other portions of
5 the LWRFS beyond three specific users in Coyote Spring Valley and California Wash, and in the
6 Muddy River Spring Area. SNWA Ex 008, SNWA 2019 Assessment of Moapa Dace. Ex. 9. The
7 State Engineer, however, made no distinction regarding the location of groundwater pumping
8 within the new administrative unit as it relates to his findings of potential take or curtailment. Yet
9 his own findings require consideration of this factor:

10 The State Engineer finds that data support the conclusion that pumping
11 from locations within the LWRFS that are distal from the Warm Springs area can
12 have a lesser impact on spring flow than pumping from locations more proximal
13 to the springs. The LWRFS system has structural complexity and heterogeneity,
14 and some areas have more immediate and more complete connections than others.
15 ... [T]here remains some uncertainty as to the extent that distance and location
16 relative to other capturable sources of discharge either delay, attenuate, or reduce
17 capture from the springs. Ord. 1309 at 59.

18 35. In short, the State Engineer has no authority to determine when and whether a
19 “take” could occur under the ESA, failed to provide due process regarding this issue and regarding
20 factual findings affecting the dace, and arbitrarily applied those findings to all groundwater use
21 and users within the consolidated basin, regardless of location.

22 **The Order substantially Prejudices Petitioners’ Rights**

23 36. The defects in Order 1309 substantially prejudice Petitioners’ rights. As stated
24 above, the delineation of the LWRFS as a single hydrographic basin will result in the relative
25 priority of all water rights within the seven affected basins being reordered and the priorities
26 considered in relation to of all water rights holders in the consolidated basins (as proposed by
27 Interim Order 1303), rather than in relation only to the other users within the original separate
28 basins. This reordering immediately deprives Petitioners’ of the secure priority position they
enjoyed within the Garnet Valley Hydrographic Basin for between 32 and 39 years. This loss of
priority taken together with the State Engineer’s arbitrary determination of the maximum pumping

1 volume in the LWRFS will subject Georgia-Pacific’s water rights and a majority of Republic’s
2 water rights to curtailment, jeopardizing the viability of their business operations and the
3 significant benefits they provide to the State and local economies. Accordingly, that the State
4 Engineer acted without authority, failed to afford due process, abused his discretion, acted
5 contrary to law and arbitrarily and capriciously, substantially prejudices Petitioners’ rights.

6 **RELIEF REQUESTED**

7 WHEREFORE, Petitioner requests that this Court review the Order, the underlying
8 administrative record and other evidence, and prays for the following relief:

- 9 A. That the Order be set aside in its entirety;
- 10 B. That, in the event any portion of the Order stands, Ordering Paragraph 2 and the
11 supporting findings be stricken:
- 12 C. That, in the event any portion of the Order stands, Ordering Paragraph 3 and the
13 supporting findings be stricken;
- 14 D. That the Court issue such other relief as it deems necessary and proper; and
- 15 E. That the Court enter judgment in favor of Petitioners and against the State
16 Engineer, the Division of Water Resources and the Department of Conservation and Natural
17 Resources.

18 DATED: July 15, 2020.

19 McDONALD CARANO LLP

20 /s/ Sylvia Harrison
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22 Lucas Foletta NV Bar No. 12154
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*Attorneys for Georgia-Pacific Gypsum LLC
and Republic Environmental Technologies, Inc.*

CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury, that I am an employee of McDonald Carano LLP and that on July 15, 2020, a true and correct copy of PETITION FOR JUDICIAL REVIEW was electronically served with the Clerk of the Court by using CM/ECF and served on the following parties on the same date via the manner indicated below:

VIA HAND DELIVERY:

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

Aaron Ford
 Nevada Attorney General
 100 N. Carson Street
 Carson City, NV 89701

VIA U.S. MAIL, POSTAGE PRE-PAID

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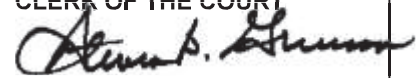
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---	--

/s/ Andrea Black
An Employee of McDonald Carano LLP

4819-3183-8915, v. 1
4819-3183-8915, v. 1

ATTACHMENT 10

ATTACHMENT 10



1 **PTJR**
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CASE NO: A-20-818015-P
Department 8

6 *Attorney for Nevada Cogeneration Associates Nos. 1 and 2*

7 **DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

9 NEVADA COGENERATION ASSOCIATES
NOS. 1 AND 2,

10
11 Petitioner,

Case No.:

Dept. No.:

12 vs.

13 Tim Wilson, P.E., Nevada State
Engineer, DIVISION OF WATER
RESOURCES, DEPARTMENT OF
14 CONSERVATION AND NATURAL
RESOURCES,

PETITION FOR JUDICIAL REVIEW

15 Respondent.

16
17 Petitioner, NEVADA COGENERATION ASSOCIATES NOS. 1 AND 2, (hereinafter
18 collectively “NCA” and separately “NCA 1” and “NCA 2”), by and through its attorney of
19 record, ALEX J. FLANGAS, ESQ., of the law firm of KAEMPFER CROWELL, hereby
20 petitions the Court pursuant to NRS 533.450(1) to reverse or remand a portion of “Order
21 #1309” issued by Respondent TIM WILSON, P.E., Nevada State Engineer, dated June 15,
22 2020, (hereinafter the “Order #1309”).¹ A copy of Order #1309 is attached hereto as **Exhibit 1**.

23
24 ¹ Order #1309 is fully entitled, “Order Delineating the Lower White River Flow System Hydrographic Basin with the Kane Springs Valley Basin (206), Coyote Spring Valley Basin (210), a Portion of the Black Mountains Area Basin (215), Garnet Valley Basin (216), Hidden Valley Basin (217), California Wash Basin (218), and Muddy River Springs Area (aka Upper Moapa Valley) Basin (219) Established as Sub-Basins, Establishing a Maximum

1 Among other things, Order #1309 identifies a new boundary for the recognition of an
2 area that the Nevada State Engineer has designated as the Lower White River Flow System
3 (“LWRFS”), which is essentially a carbonate-rock underlain area that the State Engineer
4 contends requires “joint management” essentially as one, single *super basin*. Following the
5 entry of Order #1309, the LWRFS is now comprised of seven previously identified, previously
6 separate, hydrographic basins that have been determined to share a “close hydrologic
7 connection” that now requires joint management of those basins rather than individual basin
8 management. The LWRFS, as it is now designated following the entry of Order #1309, purports
9 to set a new limit on the amount of groundwater pumping that will be allowed on an annual
10 basis from the larger area that is the LRWFS without regard to the cumulative totals of the
11 various individual basins because, in the State Engineer’s opinion following a lengthy hearing
12 process, each of these various basins is “interconnected” hydrologically.

13 This Petition for Judicial Review is taken in the nature of an appeal pursuant to NRS
14 533.450 and specifically challenges that portion of Order #1309 that intends to move the
15 southern boundary of the LWRFS even further south and east to a new, arbitrarily-identified
16 location in order to maintain the inclusion of NCA’s production water wells *within* the boundary
17 of the LWRFS. Order #1309, by its terms, intends to maintain the inclusion of NCA’s
18 certificated water rights and the pumping of groundwater made pursuant to those water rights as
19 being *inside* the LWRFS boundary, rather than excluding NCA from the LWRFS entirely as
20 was the position taken by NCA during the hearing and in the filing of NCA’s post-hearing
21 brief/argument (and which is most consistent with the evidence adduced at the hearing).

22 //

23 //

24 _____
Allowable Pumping in the Lower White River Flor System Within Clark and Lincoln Counties, Nevada, and
Rescinding Interim Order 1303.” Order #1309 may also be referred to as the “Final Order.”

1 **I. JURISDICTIONAL STATEMENT**

2 Pursuant to NRS 533.450(1), “any person feeling aggrieved by any order or decision of
3 the State Engineer ... affecting the person’s interests, when the order or decision related to the
4 administration of determined rights or is made pursuant to NRS 533.270 to 533.455, inclusive,
5 or NRS 533.481, 534.193, 535.200, or 536.200, may have the same reviewed by a proceeding
6 for that purpose, insofar as may be in the nature of an appeal, which must be initiated in the
7 proper court of the county in which the matters affected or a portion thereof are situated...”
8 Pursuant to Subsection 2 of NRS 533.450, the proceedings in every case must be heard by the
9 court and must be informal and summary, “but full opportunity to be heard must be had before
10 judgment is pronounced.” Subsection 8 further explains that “[t]he practice in civil cases applies
11 to the informal and summary character of such proceedings, as provided in this section.”²

12 The real property to which the water at issue in this Petition is appurtenant lies within
13 Clark County, and both the points of diversion for the water rights of NCA and the places of use
14 of those water rights is located in a hydrographic basin in Clark County. Therefore, the Eighth
15 Judicial District Court of the State of Nevada in and for Clark County is the proper venue for
16 judicial review of this Petition involving Order #1309.

17 _____
18 ² Notably, petitions for judicial review pursuant to NRS 533.450 taken from orders or decisions
19 of the Nevada State Engineer are *not* governed by Chapter 233B, the Nevada Administrative
20 Procedures Act, as many other administrative agency appeals might be. NRS 233B.039(1)(j)
21 provides as follows: “The following agencies are entirely exempted from the requirements of
22 this chapter: ... (j) Except as otherwise provided in NRS 533.365, the Office of the State
23 Engineer.”

24 Consequently, it is likely that a Senior Attorney General assigned to represent the Nevada State
Engineer in this matter will confer with the undersigned and submit a proposed, stipulated
briefing schedule for this Court’s consideration, as that is typical in virtually every water rights
petition for judicial review taken in which the undersigned has participated over the last 30 years.

It is likely the parties will submit timing and briefing recommendations to this Court for
consideration and approval similar to those outlined in the Nevada Rules of Appellate Procedure
governing civil appeals. Briefing would necessarily follow after the submission of the transcript
of the record that is required to be made pursuant to NRS 533.450(4).

1 **II. FACTUAL BACKGROUND**

2 **1. Nevada Cogeneration’s water rights and interest in this proceeding.**

3 Nevada Cogeneration Associates Nos. 1 and 2 operate combined cycle gas-fired
4 cogeneration facilities located near the southern boundary of the LWRFS. The points of
5 diversion for the *permitted* and *certificated* water rights owned and utilized by NCA are located
6 entirely within a narrow part of the Black Mountains Area in hydrographic Basin 215, which
7 location was originally identified by the State Engineer as being very near the southern
8 boundary of the LWRFS as that boundary existed prior to the hearings that led to the issuance of
9 the Final Order.³

10 NCA 1 and NCA 2 began commercial operations in June 1992 and February 1993,
11 respectively. Collectively, the two plants account for 170 MW in baseload generation capacity.
12 NCA sells 100% of its electric output to NV Energy under the terms of a long-term Power
13 Purchase Agreement, and both facilities supply hot exhaust gas and chilled water (via a closed
14 loop system) to Georgia Pacific and Pacific Coast Building Products’ gypsum facilities under
15 the terms of an Energy Purchase Agreement. *Reference: Rebuttal Report Pertaining to Interim
16 Order 1303*, prepared on behalf of Nevada Cogeneration Associates, August 16, 2019,
17 “Overview” at p. 1.

18 The NCA facilities have played an integral role in economic output in the region for
19 more than 25 years. NCA’s water rights have been placed to continuous use since construction
20 of facilities in 1992 and 1993. The continued access of their certificated water rights is critical
21 for NCA’s sustained operations.

22 Notably, a permitted water right holder obtains a “certificate” only after that permitted
23 holder has proven to the State Engineer that it has complied with the terms of its permit and has
24

³ NCA holds the following water rights: Permit 55269/Certificate 17123; Permit 58031/Certificate 17124; Permit 58032/Certificate 17125, all of which have a point of diversion within the Black Mountains Area, Basin 215. NCA 1 does hold one Permit, that being Permit 76862, for the storage of effluent in Garnet Valley Basin, which is Basin 216, but that Permit was not the focus of Order #1309 as that Order relates to the inclusion of the “production wells” of NCA within the newly-identified southern boundary of the LWRFS and was not concerned with the storage permit.

1 actually put water obtained pursuant to the permit to a “beneficial use” consistent with NRS
2 533.035. The permit holder must file *proof* of its beneficial use with the State Engineer
3 sufficient to “perfect” the appropriation of the water right, and must do so demonstrating that it
4 has proceeded in good faith and with reasonable diligence to perfect the appropriation; failure to
5 do so will result in the cancellation of the permit rather than the issuance of a certificate. *NRS*
6 *533.395(1)*. In this situation, NCA has long-since demonstrated its use of the permitted water
7 rights, sufficiently so that it was granted certificates establishing that it had already placed the
8 water appropriated under those permits to a beneficial use consistent with those permits.

2. Order 1169 Pumping Tests.

9 On March 8, 2002, a prior State Engineer, Hugh Ricci, believing there may be a
10 hydrologic connection between hydrographic basins located in the area that is now identified as
11 the LWRFS, issued Order 1169 holding pending groundwater applications in abeyance and
12 requiring an aquifer test of the carbonate-rock aquifer system to better determine whether the
13 pending applications and future appropriations could be safely developed from the carbonate-
14 rock aquifer. The express purpose of 1169 was to determine, to the extent possible, the
15 hydrologic connection between the basins such that groundwater pumping in one basin would
16 have a direct effect on the level of groundwater on adjacent basins; as explained in Order #1309
17 at p. 3, the State Engineer “did not believe that it was prudent to issue additional water rights to
18 be pumped from the carbonate-rock aquifer until a significant portion of the then existing water
19 rights were pumped [tested] for a substantial period of time to determine whether the pumping
20 of those water rights would have a detrimental impact on existing water rights or the
21 environment.”

22 Because of certain concerns of various parties involved with the flows of water that
23 might affect a particular spring and the potential effect on an endangered species of fish, several
24 years passed before the pump tests were actually conducted. On November 15, 2010, the Order
1169 aquifer test began, and, pursuant to the direction of the Nevada State Engineer, the
pumping continued from the MX-5 well for a period of slightly more than two years. That
pumping provided both the State Engineer and the affected water right holders with data for use

1 in assessing the effects of groundwater withdrawals from the LWRFS; the tests allowed the
2 affected water right holders in the hydrographic basins identified as potentially interconnected
3 to obtain and provide data to their respective experts from which those experts then could
4 prepare reports analyzing the effects and present those reports and comments to the State
5 Engineer for consideration on how best to manage the LWRFS moving forward.

6 **3. Interim Rulings and the Interim Order #1303.**

7 Following the conclusion of the pump tests, the State Engineer issued additional rulings
8 that continued to restrict the appropriation of new groundwater within the LWRFS, but allowed
9 existing water right holders such as NCA to continue to use their water rights consistent with
10 their existing permits and certificates. Beginning in 2018, the State Engineer conducted several
11 public workshops to review and discuss the results of the pump tests and to review the status of
12 groundwater use within the LWRFS. The State Engineer elicited comments from the
13 participants at those workshops regarding how to best develop the water resources involved in
14 the LWRFS, acknowledging the apparent close, hydrologic connection between the various
15 basins involved in the pump tests.

16 In the summer of 2018, the State Engineer drafted and made public a proposed order
17 directed to address several issues involved in the future management of the LWRFS, and
18 conducted public workshops between July and the end of the year, taking “comments” verbally
19 during those meetings and in writing following each such meeting from interested participants.
20 The last such meeting was conducted on December 14, 2018, when the State Engineer
21 conducted a hearing and received comments from participants regarding that proposed order.

22 Then, on January 11, 2019, the State Engineer at that time, Jason King, P.E., issued
23 Interim Order #1303⁴ (the “Interim Order”) which identified specific elements for which the
24

⁴ The full title of Order #1303, the “Interim Order,” is “Interim Order Designating the Administration of All Water Rights Within Coyote Spring Valley Hydrographic Basin (210), a Portion of Black Mountains Area Basin (215), Garnet Valley Basin (216), Hidden Valley Basin (217), California Wash Basin (218), and Muddy River Springs Area (aka Upper Moapa Valley) Basin (219) as a Joint Administrative Unit, Holding in Abeyance Applications to Change Existing Groundwater Rights, and Establishing a Temporary Moratorium on the Review of Final Subdivision Maps.”

1 State Engineer was seeking input from the affected water right holders and interested parties.
2 Order #1303 identified four, specific elements, and one catch-all element, about which it sought
3 expert “reports” from the various interested parties and participants:

- 4 a. The geographic boundary of the hydrologically connected groundwater and surface
water systems comprising the Lower White River Flow System;
- 5 b. The information obtained from the Order 1169 aquifer test and Muddy River
6 headwater spring flow as it relates to aquifer recovery since the completion of the
aquifer test;
- 7 c. The long-term annual quantity of groundwater that may be pumped from the Lower
White River Flow System, including the relationships between the location of
8 pumping on discharge to the Muddy River Springs, and the capture of Muddy River
flow;
- 9 d. The effects of movement of water rights between alluvial wells and carbonate wells
on deliveries of senior decreed rights to the Muddy River; and
- 10 e. Any other matter believed to be relevant to the State Engineer’s analysis.

11 The State Engineer further indicated that following the submission of such expert reports, a
12 hearing would be conducted wherein evidence would be taken by the State Engineer in
13 connection with the reports, cross-examination would likely be allowed by the interested
14 parties, and the State Engineer would then render a final determination on the four, specific
15 points identified. Importantly, it was repeatedly stressed that this was only “Stage 1” of the
LWRFS process – the hydrologic analysis – and that this was *not* the policy analysis that will
16 identify which water rights are allowed by the State Engineer to be actually put to use in each
17 individual basin; that proceeding, which will be a “Stage 2” proceeding, will follow the
18 completion of the determinations rendered in the Final Order (#1309).

19 In response to Order #1303, many of the participants submitted initial reports. NCA,
20 however, chose to wait and submit only a Rebuttal Report, which it did on the required deadline
21 for submission of Rebuttal Reports, August 16, 2019, a bit more than a month before the
22 hearings commenced in September of 2019. Parties were also required to file lists of witnesses
23 and exhibits, and were required to identify objections to those witnesses and exhibits of others,
24 which they did in August of 2019. The State Engineer conducted hearings concerning those

1 witness and evidentiary objections prior to commencement of the hearing, and the hearings
2 commenced in September of 2019, lasting approximately two weeks.

3 During the hearing, the State Engineer restricted questioning significantly for time
4 constraints, and further restricted questioning for anything that was beyond the scope of the
5 four, specifically identified issues outlined in the conclusion of the Interim Order, #1303.

6 **The Final Order, #1309.**

7 The hearings: Hearings commenced on September 23, 2019, and were conducted for
8 two weeks before Nevada State Engineer Tim Wilson, P.E., and members of his staff at the
9 Division of Water Resources to consider the comments, objections and recommendations
10 lodged by several affected and interested parties, including NCA, outlined in the initial and
11 rebuttal expert reports. The various reports and the testimony during the two weeks of hearings
12 focused on the four, specific elements outlined for determination in the Interim Order, #1303,
13 and in the Addendum issued by the State Engineer on May 13, 2019 (hereinafter the
14 “Addendum”)⁵ clarifying the Interim Order. Importantly, the hearing officer who was managing
15 the hearing, Deputy Administrator Micheline Fairbank, emphasized repeatedly before and
16 during the hearings that the scope of the September, 2019, hearings and the presentations made
17 by the various participants therein would be limited to the hydrologic examination of the four,
18 specific elements identified in the Interim Order and in the Addendum and would *not* be
19 extended to include policy determinations regarding which water right holders were entitled to
20 the use of groundwater or surface water in the individual basins.⁶

21 ⁵ The full title of the Addendum is “Addendum to Interim Order 1303 Designating the
22 Administration of All Water Rights Within Coyote Spring Valley Hydrographic Basin (210), a
23 Portion of Black Mountains Area Basin (215), Garnet Valley Basin (216), Hidden Valley Basin
24 Basin (217), California Wash Basin (218), and Muddy River Springs Area (aka Upper Moapa Valley)
Basin (219) as a Joint Administrative Unit, Holding in Abeyance Applications to Change
Existing Groundwater Rights, and Establishing a Temporary Moratorium on the Review of Final
Subdivision Maps.”

⁶ It was made clear to the participants that the policy determinations, including determinations of
which water right holders have priority to use groundwater within the LWRFS once any revised
boundary has been firmly established, will not be made until after this first phase of the
proceedings has been completed.

1 NCA was allowed only a few hours during the two-week hearing period to make its
2 presentation. NCA focused a significant portion of its presentation on evidence and analysis
3 actually found in the Rebuttal Report of the Southern Nevada Water Authority (“SNWA”)
4 which identified a specific hydrologic finding that strongly supported the factual conclusion that
5 the production wells owned and operated by NCA in the southern portion of the Black
6 Mountains Area, Basin 215, do *not* share a “close hydrologic connection” with the other wells
7 located inside the LWRFS. The analysis and conclusion independently conducted and reached
8 by SNWA found that the production wells belonging to NCA – which are the water wells from
9 which NCA pumps its certificated water rights -- should *not* be included within the boundary of
the LWRFS. *See Order #1309, Exhibit 1*, at pp. 50 and 51.

10 Prior to the September 2019 hearings, the State Engineer’s office issued rulings on
11 objections raised by interested parties regarding the exclusion of witnesses and evidence. One
12 such objection was raised as to the credentials of one of NCA’s expert witnesses who had
13 worked on NCA’s Rebuttal Report, former State Engineer Hugh Ricci, P.E., who had been
14 instrumental in beginning the entire LWRFS process by issuing Order 1169 in 2002 as the State
15 Engineer at that time. Order 1169 held pending water right applications in abeyance until further
16 information was obtained by stressing the aquifer; it also ordered the pump tests from which all
17 of the conclusions now reached regarding the inter-connectivity of the various hydrographic
18 basins included within the boundary of the LWRFS could be made. As a result of that objection,
19 and even though former State Engineer Ricci clearly exhibited the hydrologic understanding of
20 the LWRFS system sufficiently to exercise the requisite caution in regard to pending
21 applications and to order the pump tests that form the basis for determinations made by the
22 current State Engineer, Tim Wilson, P.E., to support Order #1309 (the Final Order), the hearing
23 officers from the State Engineer’s office who were authorized on behalf of Mr. Wilson with
24 ruling on Mr. Ricci’s qualifications as an expert declared – surprisingly, at least to NCA -- that
Mr. Ricci was “not qualified” to testify as an expert in hydrology during the presentation of
NCA’s case in chief.

1 Notably, however, though Mr. Ricci, P.E., was disqualified by the present State
2 Engineer to testify as a hydrologist and to provide any direct testimony for NCA’s case, Mr.
3 Ricci was allowed to provide some answers to questions presented on cross examination,
4 though not specifically on his opinions on hydrology as would relate to the four, specific areas
5 in question raised in the Interim Order and in the Addendum. Most importantly, Mr. Ricci was
6 not allowed to testify regarding his opinion regarding the establishment of the boundary of the
7 LWRFS in the Black Mountains Area as it pertains to NCA’s production wells, nor was he
8 allowed to present his opinions regarding his analysis of and his consideration, if any, of
9 SNWA’s evidence and conclusions regarding whether NCA’s production wells should be
10 considered as *included within* the LWRFS boundary or excluded therefrom.⁷ Also during the
11 hearing it was established that Hugh Ricci, P.E., was the State Engineer who made the
12 determinations for the purposes of the issuance of Order 1169 which basins were subject to and
13 which were not subject to Order 1169 (which governed, essentially, inclusion in the newly
14 identified LWRFS) *based on his understanding and his application of hydrologic principles*
15 *affecting those basins which would in turn affect the water rights in those basins*. Despite this
16 understanding, Mr. Ricci, P.E., was not allowed to opine as to the boundary condition affecting
17 NCA’s rights or their production wells.

18 On June 15, 2020, the current State Engineer, Tim Wilson, P.E., issued the Order #1309
19 -- the Final Order -- addressing the four, specific hydrologic elements identified as the focus of
20 the hearing in Order #1303 and the Addendum. In that Order at pages 50 and 51, the State
21 Engineer concluded that NCA’s production wells should be included in the boundary of the
22 LWRFS despite the fact that “the State Engineer finds logic in NCA’s position” to exclude
23 those wells from the boundary. Heading into the hearings, NCA had criticized the prior LWRFS
24 boundary identified as the southern boundary in the Black Mountains Area that the State
Engineer used in Interim Order #1303 which incorporated the NCA production wells, in part
because it was drawn as a straight line. NCA maintained a straight-line boundary was arbitrary

1 as no such hydrologic boundaries occur in nature; water does not follow a perfectly straight line
2 on a map, but instead would follow a naturally occurring geologic structure. During the
3 hearings, NCA provided testimony about a very nearby geologic structure and the different
4 hydrologic response in reported NCA monitoring wells (when compared to other wells in the
5 LWRFS) that explained why NCA's production wells were located where they were, why
6 SNWA's experts reached their conclusion regarding NCA's production wells, and why it made
7 hydrologic sense that NCA's wells would be *disconnected* from the remaining wells in the
8 LWRFS.

9 Nonetheless, at page 51 of Order #1309, even though the State Engineer stated
10 expressly that he "finds logic in NCA's position" to exclude the NCA wells from the LWRFS,
11 the State Engineer for the first time identified a new boundary for the southern portion of the
12 LWRFS *right in the area where NCA's production wells are located*. The State Engineer
13 explained that this new boundary, "better honors the State Engineer's criteria by acknowledging
14 uncertainty in the data while reflecting a recognized physical boundary in the carbonate-rock
15 aquifer." *See Ex. 1*, at p. 51. As such, the State Engineer recognized NCA's criticism that the
16 prior "straight-line" boundary of the LWRFS that was utilized heading into the hearings was
17 likely arbitrary and unsupportable, but rather than accept NCA's identified, natural structure
18 that was nearest to the production wells and conformed with the evidence actually presented at
19 the hearing, the State Engineer simply looked on a geologic map in an attempt to identify a new,
20 unverified physical boundary and – arbitrarily – *moved the straight-line boundary further south*
21 to more-assuredly include NCA's production wells. The new boundary is, again, a straight line,
22 merely relocated further south and east, with no more support than the initial straight-line
23 boundary.

24 Moreover, the State Engineer made this move despite the fact that no testimony or
expert witness discussion had been made, and no questions had been raised, about this new,
arbitrary straight-line boundary during the two weeks of hearings conducted. No one even
attempted to establish – during the hearing - a technical reason why this newly identified
southern boundary for the LWRFS better explained the available data involving NCA's

1 boundary was made evident to NCA for its consideration in the Interim Order (#1303) or the
2 Addendum that formed the basis for the retention of experts and the creation of expert reports
3 about which the two-weeks of hearings would be conducted, and despite the fact that there was
4 no discussion of this newly identified boundary during the hearings themselves.

5 As such, NCA was not given sufficient notice and an opportunity to be heard before the
6 State Engineer to satisfy general principles of due process and fairness in any manner sufficient
7 to prepare and present evidence, analysis or conclusions regarding this apparently newly
8 claimed “boundary” that the State Engineer has somehow magically divined in the interim
between the close of the hearings and the issuance of Order #1309.

9 Additionally, the State Engineer recognized the logic in NCA’s position, yet chose to
10 suggest that other testimony questioning SNWA’s analysis, which made no factual or scientific
11 reference to the arbitrary boundary (or any boundary for that matter), justified a contrary
12 conclusion despite an acknowledged lack of information and in the face of uncertainty. *See Ex.*
13 *1*, p. 51. In Order #1309, the State Engineer does not identify an alternate theory explaining the
14 factual and scientific findings described by both SNWA or NCA and does not point to any other
15 expert whose testimony explained the anomalies identified by NCA’s and SNWA’s experts
16 relative to NCA’s production wells. Instead, Order #1309 suggests that it is better to err on the
17 side of “a more inclusive approach that places the boundary to the south of the NCA production
18 Thrust,” without an explanation of why this is not an arbitrary determination.

19 The State Engineer’s decision to identify a boundary to include NCA in the LWRFS,
20 knowing that the inclusion could result in the potential restriction of NCA’s use of its full
21 allocation of water rights and despite also knowing that there is at least significant uncertainty
22 as to whether NCA should be included, is arbitrary – not unlike the establishment of the original
23 straight-line boundary that now appears to have been created for the same reason: to include
24 NCA’s production wells within the LWRFS, regardless whether the evidence, analysis or logic
compels a different conclusion.

1 And, by making NCA subject to the LWRFS, Order #1309 injuriously affects NCA in
2 that NCA’s certificated water rights could well be impacted by the limitation imposed by the
3 overall development figure of 8,000 afa for the entirety of the LWRFS. While it is currently
4 uncertain how the State Engineer will implement his decisions moving forward regarding who
5 will be allowed to pump and who will not among the various stakeholders, the real possibility
6 exists that NCA’s full use of its water rights could be limited. Thus, the “injury” to NCA is real
7 and could be substantial, and NCA is entitled under NRS 533.450(1) and (3) to have this matter
8 considered and heard by this Court now, prior to the implementation of any Stage 2 proceedings
9 involving the LWRFS.

9 **IV. CONCLUSION**

10 For the reasons explained above, and others that may be discovered and raised during
11 the pendency of this appeal, NCA respectfully requests that this Court reverse the decision of the
12 Nevada State Engineer to move the boundary to an area even further south in the Black
13 Mountains Area to arbitrarily include NCA’s production wells within the LWRFS when the
14 evidence and analysis suggests that such wells should have been excluded. Alternatively, NCA
15 requests that this Court remand this matter back to the Nevada State Engineer for further
16 proceedings to allow NCA to present evidence and analysis regarding this newly identified
17 boundary – “the boundary to the south of the NCA production wells to a geological location that
18 coincides with the Muddy Mountain Thrust” – because NCA has not yet been afforded due
19 process to make such presentation to the State Engineer for his consideration in this matter.

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CERTIFICATE OF MAILING

I certify that I am an employee of Kaempfer Crowell, and that on July 15, 2020, I electronically filed the **PETITION FOR JUDICIAL REVIEW** with the Clerk of the Court by using the Eighth Judicial District Court’s Electronic Filing system and a true and correct copy was served on the following persons:

VIA HAND DELIVERY BY MESSENGER SERVICE:

Tim Wilson, P.E., State Engineer
 Nevada Division of Water Resources
 Dept. of Conservation and Natural resources
 901 S. Stewart Street, Suite 2002
 Carson City, NV 89702

VIA U.S. POSTAL SERVICE CERTIFIED MAIL, RETURN RECEIPT

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15	Mark D. Stock Global Hydrologic Services, Inc. 561 Keystone Avenue, #200 Reno, NV 89503-4331	Kyle Roerink Great Basin Water Network P.O. Box 75 Baker, NV 89311
16		
17		
18	Dry Lake Water, LLC 2470 St. Rose Parkway, Suite 107 Henderson, NV 89074	Lake At Las Vegas Joint Venture, Inc. 1600 Lake Las Vegas Parkway Henderson, NV 89011
19		
20	Casa De Warm Springs, LLC 1000 North Green Valley Parkway, #440-350 Henderson, NV 89074	Laker Plaza, Inc. 7181 Noon Road Everson, WA 98247-9650
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22	William O'Donnell 2780 S. Jones Blvd., Suite 210 Las Vegas, NV 89146	Pacific Coast Building Products, Inc. P.O. Box 364329 Las Vegas, NV 89036
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/s/ Sharon Stice
An employee of Kaempfer Crowell

ATTACHMENT 11

ATTACHMENT 11

FFCO

**DISTRICT COURT
CLARK COUNTY, NEVADA**

LAS VEGAS VALLEY WATER DISTRICT,
and SOUTHERN NEVADA WATER
AUTHORITY,

Case No. A-20-816761-C
Dept. No. I

Petitioners,

Consolidated with Cases:

vs.

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

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

Respondent.

And All Consolidated Cases.

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PETITIONS
FOR JUDICIAL REVIEW**

This matter comes before this Court on consolidated petitions for judicial review of State Engineer's Order 1309 filed by Petitioners:

- Southern Nevada Water Authority and Las Vegas Valley Water District
- Coyote Spring Investment, LLC
- Apex Holding Co. and Dry Lake Water, LLC
- The Center for Biological Diversity
- Muddy Valley Irrigation Company
- Nevada Cogeneration Associates Nos. 1 and 2
- Georgia-Pacific Gypsum LLC and Republic Environmental Technologies, Inc.
- Lincoln County Water District and Vidler Water Company.

Bitia Yeager
Eighth Judicial District Court
Clark County, Nevada
Department I

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The parties stipulated to permit the following Intervenors into this matter:

- Sierra Pacific Power Company d/b/a NV Energy and Nevada Power Company d/b/a NV Energy
- Moapa Valley Water District
- The Church of Jesus Christ of Latter-Day Saints
- City of North Las Vegas
- Western Elite Environmental, Inc. and Bedroc Limited, LLC.

In addition, some Petitioners intervened to respond to other petitions for judicial review. The Parties appeared by and through their respective counsels of record. The Court held oral argument from February 14, 2022 to February 17, 2022.

The Court having considered the evidence, the pleadings, together with opening and closing arguments presented at the hearing for these matters, and good cause appearing therefor, makes the following Findings of Fact, Conclusions of Law, and Order:

I.

PROCEDURAL HISTORY

On June 15, 2020, the Nevada State Engineer issued Order No. 1309 as his latest administrative action regarding the Lower White River Flow System (“LWRFS”)¹.

On June 17, 2020, the Las Vegas Valley Water District and the Southern Nevada Water Authority (collectively, “SNWA”) filed a petition for judicial review of Order 1309 in the Eighth Judicial District Court in Clark County, Nevada.² Subsequently, the following petitioners filed petitions for judicial review in the Eighth Judicial District Court: Coyote Spring Investments, LLC (“CSI”); Apex Holding Company, LLC and Dry Lake Water LLC (collectively, “Apex”); the Center Biological Diversity (“CBD”); Muddy Valley Irrigation Company (“MVIC”); Nevada

¹ SE ROA 2 – 69. The LWRFS refers to an area in southern Nevada made up of several hydrological basins that share the same aquifer as their source of groundwater. The Nevada State Engineer determined that this encompasses the area that includes Coyote Spring Valley, Muddy River Springs Area, California Wash, Hidden Valley, Garnet Valley, Kane Springs Valley and the northwest portion of the Black Mountains Area.

² LVVWD and SNWA Petition for Judicial Review, filed June 17, 2020.

1 Cogeneration Associates Numbers 1 and 2 (“Nevada Cogen”); and Georgia-Pacific Gypsum LLC,
2 and Republic Technologies, Inc. (collectively, “Georgia-Pacific”). All petitions were consolidated
3 with SNWA’s petition.³

4 Later, Sierra Pacific Power Company d/b/a NV Energy (“Sierra Pacific”) and Nevada
5 Power Company d/b/a NV Energy (“Nevada Power” and, together with Sierra Pacific, “NV
6 Energy”), Moapa Valley Water District (“MVWD”), the Church of Jesus Christ and of Latter-Day
7 Saints (the “Church”), the City of North Las Vegas (“CNLV”), and Western Elite Environmental,
8 Inc. and Bedroc Limited (collectively, “Bedroc”) ⁴ were granted intervention status in the
9 consolidated petitions for judicial review of Order 1309.

10 On July 13, 2020, Lincoln County Water District and Vidler Water Co. (collectively,
11 “Vidler”) timely filed their Petition for Judicial Review of State Engineer Order 1309 in the
12 Seventh Judicial District Court in Lincoln County, Nevada, identified as Case No. CV-0702520.
13 On August 26, 2020, the Seventh Judicial District Court issued an Order Granting Motion to
14 Change Venue, transferring this matter to the Eighth Judicial District Court in Clark County,
15 Nevada. Vidler appealed the Order Granting Motion to Change Venue to the Nevada Supreme
16 Court, and on April 15, 2021, the Nevada Supreme Court entered its Order of Affirmation. On
17 May 27, 2021, per verbal stipulation by the parties, the Court ordered this matter consolidated into
18 Case No. A-20-816761-C. When transferred to the Eighth Judicial District Court, Vidler’s action
19 was assigned Case No. A-21-833572-J. Notwithstanding the consolidation of all of the cases, each
20 case retained its individual and distinct factual and legal issues.

21 Petitioners in all the consolidated actions filed their Opening Briefs on or about August 27,
22 2021. Respondents State Engineer, Intervenors, and Petitioners who were Respondent-Intervenors
23 filed their Answering Briefs on or about November 24, 2021. Petitioners filed their Reply Briefs on
24 or about January 11, 2022.

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27 ³ Stipulation for Consolidation, A-20-816761-C, May 26, 2021.

28 ⁴ Bedroc and CNLV did not file briefs and did not participate in oral argument.

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II.

FACTUAL HISTORY

A. The Carbonate Groundwater Aquifer and the Basins

Much of the bedrock and mountain ranges of Eastern Nevada are formed from a sequence of sedimentary rocks laid down during the Paleozoic Era. These formations are limestones or dolomites, commonly referred to as “carbonates,” due to the chemical composition of the minerals composing the rocks. These formations have been extensively deformed through folding and faulting caused by geologic forces. This deformation has caused extensive fracture and fault systems to form in these carbonate rocks, with permeability enhanced by the gradual solution of minerals. The result is an aquifer system that over time has accumulated large volumes of water with some apparent degree of connection throughout the much of area.⁵ The valley floors in the basins of Eastern Nevada are generally composed of alluvium comprised largely of relatively young (<5 million years) unconsolidated sands, gravels, and clays. This sequence is loosely referred to as the “Alluvial Aquifer,” the aquifer for most shallow wells in the area. Most of the water in the Carbonate Aquifer is present due to infiltration of water thousands of years ago; recent recharge from present day precipitation may represent only a fraction of the water stored.

Approximately 50,000 square miles of Nevada sits atop of this geologic layer of carbonate rock, which contains significant quantities of groundwater.⁶ This carbonate-rock aquifer system contains at least two major “regional flow systems” - continuous, interconnected, and transmissive geologic features through which water flows underground roughly from north to south: the Ash Meadows-Death Valley regional flow system; and the White River-Muddy River Springs system.⁷ These flow systems connect the groundwater beneath dozens of topographic valleys across distances exceeding 200 miles.⁸ The White River-Muddy River Springs flow system, stretching approximately

⁵ State Engineer Record on Appeal (“SE ROA”) 36062-67, Ex. 14; SE ROA 661, Ex. 8.

⁶ SE ROA 659.

⁷ SE ROA 661.

⁸ SE ROA 661.

1 240 miles from southern Elko County in the north to the Muddy River Springs Area in the south,
2 was identified as early as 1966.⁹ The area designated by Order 1309 as the LWRFS consists
3 generally of the southern portion of the White River-Muddy River Springs flow system.¹⁰

4 The Muddy River runs through a portion of the LWRFS before cutting southeast and
5 discharging into Lake Mead.¹¹ Many warm-water springs, including the Muddy River Springs at
6 issue in this litigation, discharge from the regional carbonate groundwater aquifer.¹² The series of
7 springs, collectively referred to as the “Muddy River Springs” in the Muddy River Springs Area
8 hydrographic basin form the headwaters of the Muddy River and provide the only known habitat for
9 the endangered Moapa dace.¹³

10 The Muddy River Springs are directly connected to, and discharge from, the regional
11 carbonate aquifer.¹⁴ Because of this connection, flows from the springs are dependent on the
12 elevation of groundwater within the carbonate aquifer, and can change rapidly in direct response to
13 changes in carbonate groundwater levels.¹⁵ As carbonate groundwater levels decline, spring flows
14 decrease, beginning with the highest-elevation springs.¹⁶

15 As early as 1989, there were concerns that sustained groundwater pumping from the
16 carbonate-rock aquifer would result in water table declines, substantially deplete the water stored in
17 the aquifer, and ultimately reduce or eliminate flow from the warm-water springs that discharge
18 from the aquifer.¹⁷

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⁹ SE ROA 11349-59.

21 ¹⁰ See SE ROA 11350.

22 ¹¹ SE ROA 41943.

23 ¹² SE ROA 660-61, 53056, 53062.

24 ¹³ SE ROA 663-664, 41959, 48680.

25 ¹⁴ SE ROA 73-75, 34545, 53062.

26 ¹⁵ SE ROA 60-61, 34545.

27 ¹⁶ SE ROA 46, 34545.

28 ¹⁷ See SE ROA 661.

1 The general rule in Nevada is that one acquires a water right by filing an application to
2 appropriate water with the Nevada Division of Water Resources (“DWR”). If the DWR approves
3 the application, a “Permit to Appropriate” issues. Nevada has adopted the principle of “first in
4 time, first in right,” also known as “priority.” The priority of a water right is determined by the
5 date a permit is applied for. Nevada’s water resources are managed through administrative units
6 called “hydrographic basins,” which are generally defined by topography, more or less reflecting
7 boundaries between watersheds. Nevada is divided into 232 hydrographic basins (256
8 hydrographic basins and sub-basins, combined) based upon the surface geography and subsurface
9 flow.

10 The priority of groundwater rights is determined relative to the water rights holder within
11 the individual basins. If there is not enough water to serve all water right holders in a particular
12 basin, “senior” appropriators are satisfied first in order of priority: the rights of “junior”
13 appropriators may be curtailed. Historically, The Nevada State Engineer has managed
14 hydrographic basins in a basin-by-basin manner for decades,¹⁸ and administers and manages each
15 basin as a discrete hydrologic unit.¹⁹ The State Engineer keeps and maintains annual pumping
16 inventories and records on a basin-by-basin basis.²⁰

17 This administrative structure has worked reasonably well for basins where groundwater is
18 pumped from “basin fill” aquifers or alluvium, where the annual recharge of the groundwater
19 historically has been estimated based upon known or estimated precipitation data - establishing the
20 amount of groundwater that is recharged annually and can be extracted sustainably from a basin,
21 known as the “perennial yield.” In reality, many hydrographic basins are severely over-appropriated,
22 due to inaccurate estimates, over pumping, domestic wells, changing climate conditions, etc.

23 Administration of groundwater rights is made particularly complex when the main source of
24

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26 ¹⁸SE ROA 654, 659, 699, 726, 755.
27 ¹⁹ SE ROA 949-1069.
28 ²⁰ SE ROA 1070-1499.

1 groundwater is not “basin fill” or alluvium, but aquifers found in permeable geologic formations
2 lying beneath the younger basin fill, and which may underlie large regions that are not well defined
3 by the present-day hydrographic basins. This is the case with Nevada’s “Carbonate Aquifer.”

4 When necessary, the State Engineer may manage a basin that has been designated for
5 administration. NRS 534.030 outlines the process by which a particular basin can be designated for
6 administration by the State Engineer. In the instant case, six of the seven basins affected by Order
7 No. 1309 had already been designated for management under NRS 534.030, including:

- 8 a. Coyote Spring Valley Hydrographic Basin (“Coyote Spring Valley”), Basin No. 210, since
9 1985;
- 10 b. Black Mountains Area Hydrographic Basin (“Black Mountains Area”), Basin No. 215, since
11 November 22, 1989;
- 12 c. Garnet Valley Hydrographic Basin (“Garnet Valley”), Basin No. 216, since April 24, 1990;
- 13 d. Hidden Valley Hydrographic Basin (“Hidden Valley”), Basin No. 217, since October 24,
14 1990;
- 15 e. California Wash Hydrographic Basin (“California Wash”), Basin No. 218, since August 24,
16 1990; and
- 17 f. Muddy River Springs Area Hydrographic Basin (“Muddy River Springs Area”), Basin No.
18 219, since July 14, 1971.²¹

19 Kane Springs Valley (“Kane Springs Valley”), Basin 206, which was also affected by
20 Order No. 1309, had not been designated previously for administration.²²
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23 ²¹ See SE ROA 2-3, 71-72.

24 ²² The Court takes judicial notice of Kane Springs Valley Basin’s status of not being designated for administration per
25 NRS 534.030. <http://water.nv.gov/StateEngineersOrdersList.aspx> (available online at the Division of Water Resources.
26 “Mapping& Data” tab, under “Water Rights” tab, “State Engineer’s Orders List and Search”). Facts that are subject to
27 judicial notice “are facts in issue or facts from which they may be inferred.” NRS 47.130(1). To be judicially noticed, a
28 fact must be “[g]enerally known” or “capable of accurate and ready determination by resort to sources whose accuracy
cannot reasonably be questioned.” NRS 47.130(2); *Andolino v. State*, 99 Nev. 346, 351, 662 P.2d 631, 633-34 (1983)
(courts may take judicial notice of official government publications); *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir.
1994) (courts may take judicial notice of documents obtained from administrative agencies); *Greeson v. Imperial Irr.*
Dist., 59 F.2d 529, 531 (9th Cir.1932) (courts may take judicial notice of “public documents”).

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B. The Muddy River Decree

Over one hundred years ago, this Court issued the Muddy River Decree of 1920 (sometimes referred to herein as the “Decree” or “Muddy River Decree”), which established water rights on the Muddy River.²³ The Muddy River Decree recognized specific water rights,²⁴ identified each water right holder on the Muddy River, and quantified each water right.²⁵ MVIC specifically owns certain rights “. . . to divert, convey, and use all of said waters of said River, its head waters, sources of supply and tributaries, save and except the several amounts and rights hereinbefore specified and described . . . and to divert said waters, convey and distribute the same to its present stockholders, and future stockholders, and other persons who may have acquired or who may acquire temporary or permanent rights through said Company. . .”²⁶. The Decree appropriates all water of the Muddy River at the time the Decree was entered, which was prior to any other significant development in the area. The predevelopment flow averaged approximately 33,900 acre feet per annum (“afa”).²⁷ The rights delineated through The Muddy River Decree are the oldest and most senior rights in the LWRFS.

C. The Moapa Dace

The Moapa dace (*Moapa coriacea*) is a thermophilic minnow endemic to the upper spring-fed reaches Muddy River, and has been federally listed as endangered since 1967.²⁸ Between 1933

²³ See Judgment and Decree, *Muddy Valley Irrigation Co. v. Moapa and Salt Lake Produce Co.* (the “Muddy River Decree” or “Decree”) (March 11, 1920) (SE ROA 33770-33816).

²⁴ SE ROA 33770-816. Specifically, the Muddy River Decree finds “[t]hat the aggregate volume of the several amounts and quantities of water awarded and allotted to the parties . . . is the total available flow of the said Muddy River and consumes and exhausts all of the available flow of the said Muddy River, its headwaters, sources of supply and tributaries.” SE ROA 33792-33793.

²⁵ SE ROA 33798-806.

²⁶ SE ROA 33775.

²⁷ See SNWA Report (June 2019) (SE ROA 41930 – 42072) at § 3.4.1 (SE ROA 41962) describing the predevelopment flows as measured in 1946 as 33,900 afa and the average flow measured from July 1, 1913 to June 30, 1915 and October 1, 1916 to September 30, 1917 as 34,000 afa. The NSE further recognizes 33,900 afa as the predevelopment flow. See Order 1309 (SE ROA 2-69) at p. 61 (SE ROA 62).

²⁸ SE ROA 5.

1 and 1950, the Moapa dace was abundant in the Muddy River and was estimated to inhabit as many
2 as 25 individual springs and up to 10 miles of stream habitat. However, by 1983, the species only
3 occurred in springs and two miles of spring outflows. Currently, approximately 95 percent of the
4 total Moapa dace population occurs within 1.78 miles of one major tributary system that flows from
5 three high-elevation spring complexes within the Muddy River Springs Area.²⁹

6 Threats to the Moapa Dace include non-native predatory fishes, habitat loss from water
7 diversions and impoundments, wildfire risk from non-native vegetation, and reductions to surface
8 spring-flows resulting from groundwater development.³⁰ Because the Moapa dace is entirely
9 dependent on spring flow, protecting the dace necessarily involves protecting the warm spring
10 sources of the Muddy River.³¹

11 **D. Order 1169**

12 Significant pumping of the Carbonate Aquifer in the LWRFS began in the 1980s and
13 1990s. Initial assessments of the water available in the Aquifer suggested it would provide a new
14 abundant source of water for Southern Nevada. Because the prospective water resources of the
15 LWRFS carbonate appeared to be substantial, nearly 100 water right applications for over 300,000
16 acre feet were filed in State Engineer's office.³²

17 By 2001, the State Engineer had granted more than 40,000 acre feet of applications in the
18 LWRFS. The State Engineer considered additional applications for groundwater in Coyote Spring
19 Valley and adjacent hydrographic basins. However, concerned over the lack of information
20 regarding the sustainability of water resources from the Carbonate Aquifer, the State Engineer
21 began hearings in July and August 2001 on water right applications.³³

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24 _____
25 ²⁹ SE ROA 47169.

26 ³⁰ SE ROA 47160.

27 ³¹ SE ROA 42087.

28 ³² SE ROA 4, Ex. 1.

³³ *Id.*

1 On March 8, 2002, the State Engineer issued Order 1169 to delay consideration of new
2 water right applications and require the pumping of existing groundwater to determine what impact
3 increased groundwater pumping would have on senior water rights and the environment at the
4 Muddy River (“Aquifer Test”).³⁴ Order 1169 held in abeyance all applications for the
5 appropriation of groundwater from the carbonate-rock aquifer system located in the Coyote Spring
6 Valley Basin (Basin 210), Black Mountains Area Basin (Basin 215), Garnet Valley Basin (Basin
7 216), Hidden Valley Basin (Basin 217), Muddy River Springs aka Upper Moapa Valley Basin
8 (Basin 210), and Lower Moapa Valley Basin (Basin 220).³⁵ California Wash (Basin 218) was
9 subsequently added to this Order.³⁶

10 Notably, Kane Springs was not included in the Order 1169 study area. In Ruling 5712, the
11 State Engineer specifically determined Kane Springs would not be included in the Order 1169
12 study area because there was no substantial evidence that the appropriation of a limited quantity of
13 water in Kane Springs would have any measurable impact on the Muddy River Springs that
14 warranted the inclusion of Kane Springs in Order 1169.³⁷ The State Engineer specifically rejected
15 the argument that the Kane Springs rights could not be appropriated based upon senior
16 appropriated rights in the down gradient basins.³⁸

17 Order 1169A, issued December 21, 2012, set up a test to “stress” the Carbonate Aquifer
18 through two years of aggressive pumping, combined with examination of water levels in monitoring
19 wells located throughout the LWRFS.³⁹ Participants in the Aquifer test were Southern Nevada
20 Water Authority (“SNWA”), Las Vegas Valley Water District (“LVVWD”), Moapa Valley Water
21 District, Coyote Springs Investments, LLC (“Coyote Springs”), Moapa Band of Paiutes, and Nevada
22

23 ³⁴ SE ROA 654-669.

24 ³⁵ See SE ROA 659, 665.

25 ³⁶ SE ROA 659-69, Ex. 8; see also SE ROA 654, Ex. 7.

26 ³⁷ SE ROA 719.

27 ³⁸ SE ROA 713.

28 ³⁹ SE ROA 654-58, Ex. 7.

1 Power Company. Pumping included 5,300 afa in Coyote Spring Valley, 14,535 afa total carbonate
2 pumping, and 3,840 afa alluvial pumping.⁴⁰ Pumping tests effects were examined at 79 monitoring
3 wells and 11 springs and streamflow monitoring sites.⁴¹ The Kane Springs basin was not included in
4 the Order 1169 aquifer testing, and Kane Springs basin water right holders were not involved, not
5 provided notice, and did not participate in the aquifer testing, monitoring or measurements,
6 submission of reports, proceedings and actions taken by the State Engineer pursuant to Order 1169.⁴²

7 The State Engineer’s conclusions from the pump test found an “unprecedented decline” in
8 high-altitude springs, an “unprecedented decline” in water levels, and that additional pumping in
9 the central part of Coyote Spring Valley or the Muddy River Spring Area could not occur without
10 conflict with existing senior rights, including decreed surface water rights on the Muddy River, or
11 the habitat of the Moapa Dace. The State Engineer attributed observed decreases in water levels in
12 other areas of the basins to the pumping during the Order 1169 test and concluded that the test
13 demonstrated connectivity within the Carbonate Aquifer of the LWRFS. On this basis, the State
14 Engineer determined that the five basin LWRFS should be jointly managed.

15 In 2014, and based on the results of the Aquifer Test, the State Engineer issued Rulings
16 6254–6261 on January 29, 2014 denying all the pending groundwater applications in Coyote
17 Springs Valley, Muddy River Springs Area, California Wash, Hidden Valley, Garnet Valley, and
18 certain portions of the Black Mountains Area.⁴³ His rationale in each ruling was the same:
19 “because these basins share a unique and close hydrologic connection and share virtually all of the
20 same source and supply of water, unlike other basins in Nevada, these five basins will be jointly
21 managed.”⁴⁴

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24 ⁴⁰ The Order uses the term acre-foot per year (afy), but for consistency with common usage, this Court uses the
equivalent term acre feet per annum.
25 ⁴¹ SE ROA 6, Ex. 1.
26 ⁴² SE ROA 36230 - 36231.
27 ⁴³ SE ROA 726 – 948.
28 ⁴⁴ See e.g., SE ROA 479.

1 **E. Interim Order 1303 and proceedings**

2 On January 11, 2019 -- nearly 17 years after issuing Order 1169, then-State Engineer Jason
3 King issued Interim Order 1303 to start a two-phased administrative process to resolve the
4 competing interests for water resources in the LWRFS.⁴⁵ He created the LWRFS as a joint
5 administrative unit and invited stakeholders to participate in an administrative hearing to address
6 the factual questions of what the boundary of the LWRFS should be, and what amount of
7 groundwater could be sustainably pumped in the LWRFS.⁴⁶ The LWRFS is the first multi-basin
8 area that the Nevada State Engineer has designated in state history. The ordering provisions in
9 Interim Order 1303 provide in pertinent part:

- 10 1. The Lower White River Flow System consisting of the Coyote Spring Valley,
11 Muddy River Springs Area, California Wash, Hidden Valley, Garnet Valley,
12 and the portion of the Black Mountains Area as described in this Order, is
13 herewith designated as a joint administrative unit for purposes of
14 administration of water rights. All water rights within the Lower White River
15 Flow System will be administered based upon their respective date of
16 priorities in relation to other rights within the regional groundwater unit.

17 Any stakeholder with interests that may be affected by water right
18 development within the Lower White River Flow System may file a report in
19 the Office of the State Engineer in Carson City, Nevada, no later than the
20 close of business on Monday, June 3, 2019.

21 Reports filed with the Office of the State Engineer should address the
22 following matters:

- 23 a. The geographic boundary of the hydrologically connected groundwater
24 and surface water systems comprising the Lower White River Flow
25 System;
- 26 b. The information obtained from the Order 1169 aquifer test and
27 subsequent to the aquifer test and Muddy River headwater spring flow as
28 it relates to aquifer recovery since the completion of the aquifer test;
- c. The long-term annual quantity of groundwater that may be pumped
from the Lower White River Flow System, including the relationships
between the location of pumping on discharge to the Muddy River
Springs, and the capture of Muddy River flow;

27 ⁴⁵ SE ROA 635-53, Ex. 6.

28 ⁴⁶ SE ROA 82-83.

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- d. The effects of movement of water rights between alluvial wells and carbonate wells on deliveries of senior decreed rights to the Muddy River; and,
- e. Any other matter believed to be relevant to the State Engineer's analysis.

SE ROA 647-48, Ex. 6.

The State Engineer identified the LWRFS as including the following hydrographic basins: Coyote Spring Valley, a portion of Black Mountains Area, Garnet Valley, Hidden Valley, California Wash, and the Muddy River Springs Area.⁴⁷ Kane Springs continued to be excluded as part of the LWRFS multi-basin area in Interim Order 1303.⁴⁸

In July and August 2019, reports and rebuttal reports were submitted discussing the four matters set forth in Interim Order 1303. On July 25, 2019, the State Engineer issued a Notice of Pre-Hearing Conference, and on August 9, 2019, the State Engineer held a prehearing conference. On August 23, 2019, the State Engineer issued a Notice of Hearing (which it amended on August 26, 2019), noting that the hearing would be “the first step” in determining how to address future management decisions, including policy decisions, relating to the LWRFS.⁴⁹ He also indicated that the legal question of whether groundwater pumping in the LWRFS conflicts with senior water rights would be addressed in Phase 2 of the LWRFS administrative process.⁵⁰

The Hearing Officer made it clear that “any other matter believed to be relevant” as specified in ordering paragraph 1(e) of Order 1303 would not include discussion of the administrative impacts of consolidating the basins or any policy matters affected by its decision. The State Engineer conducted a hearing on the reports submitted under Order 1303 between September 23, 2019, and October 4, 2019. At the start of the administrative hearing, the State Engineer reminded the parties the public administrative hearing was not a “trial-type” proceeding,

⁴⁷ SE ROA 70-88.
⁴⁸ *Id.*
⁴⁹ SE ROA 263, Ex. 2 (Notice); SE ROA 285, Ex. 3 (Amended Notice).
⁵⁰ SE ROA 522.

1 not a contested adversarial proceeding.⁵¹ Cross-examination was limited to between 4-17 minutes
2 per participant depending on the length of time given to a participant to present its reports.⁵²

3 Following the submission by the participating stakeholders of closing statements at the
4 beginning of December 2019, the State Engineer engaged in no additional public process and
5 solicited no additional input regarding “future management decisions, including policy decisions,
6 relating to the Lower White River Flow System basins.”⁵³

7 **F. Order 1309**

8 On June 15, 2020, the State Engineer issued Order 1309.⁵⁴ The first three ordering
9 paragraphs state as follows:

- 10 1. The Lower White River Flow System consisting of the Kane Springs Valley,
11 Coyote Spring Valley, Muddy River Springs Area, California Wash, Hidden
12 Valley, Garnet Valley, and the northwest portion of the Black Mountains Area
13 as described in this Order, is hereby delineated as a single hydrographic basin.
14 The Kane Springs Valley, Coyote Spring Valley, Muddy River Springs Area,
15 California Wash, Hidden Valley, Garnet Valley and the northwest portion of
16 the Black Mountains Area are hereby established as sub-basins within the
17 Lower White River Flow System Hydrographic Basin.
- 18 2. The maximum quantity of groundwater that may be pumped from the Lower
19 White River Flow System Hydrographic Basin on an average annual basis
20 without causing further declines in Warm Springs area spring flow and flow in
21 the Muddy River cannot exceed 8,000 afa and may be less.
- 22 3. The maximum quantity of water that may be pumped from the Lower White
23 River Flow System Hydrographic Basin may be reduced if it is determined
24 that pumping will adversely impact the endangered Moapa dace.

25 SE ROA 66, Ex. 1.

26 The Order does not provide guidance about how the new “single hydrographic basin” will
27 be administered and provided no clear analysis as to the basis for the 8000 afa number for the
28 maximum sustainable yield.

25 ⁵¹ SE ROA 52962, Transcript 6:4-6, 24 to 7:1 (Sept. 23, 2019) (Hearing Officer Fairbank).

26 ⁵² SE ROA 52962, Transcript 7:5-7 (Sept. 23, 2019) (Hearing Officer Fairbank).

27 ⁵³ See SE ROA 285, Ex. 3.

28 ⁵⁴ SE ROA 2-69.

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In its Order, the State Engineer indicated that it “considered this evidence and testimony [regarding basin inclusion and basin boundary] on the basis of a common set of criteria that are consistent with the original characteristics considered critical in demonstrating a close hydrologic connection requiring joint management in Rulings 6254-6261.”⁵⁵ However, the State Engineer did not disclose these criteria to the stakeholders before or during the Order 1303 proceedings. Instead, he disclosed them for the first time in Order 1309, after the stakeholders had engaged in extensive investigations, expert reporting, and factual hearing requested by Order 1303. The criteria are:

1. Water level observations whose spatial distribution indicates a relatively uniform or flat potentiometric surface are consistent with a close hydrologic connection.
2. Water level hydrographs that, in well-to-well comparisons, demonstrate a similar temporal pattern, irrespective of whether the pattern is caused by climate, pumping, or other dynamic is consistent with a close hydrologic connection.
3. Water level hydrographs that demonstrate an observable increase in drawdown that corresponds to an increase in pumping and an observable decrease in drawdown, or a recovery, that corresponds to a decrease in pumping, are consistent with a direct hydraulic connection and close hydrologic connection to the pumping location(s).
4. Water level observations that demonstrate a relatively steep hydraulic gradient are consistent with a poor hydraulic connection and a potential boundary.
5. Geological structures that have caused a juxtaposition of the carbonate-rock aquifer with low permeability bedrock are consistent with a boundary.
6. When hydrogeologic information indicate a close hydraulic connection (based on criteria 1-5), but limited, poor quality, or low resolution water level data obfuscate a determination of the extent of that connection, a boundary should be established such that it extends out to the nearest mapped feature that juxtaposes the carbonate-rock aquifer with low-permeability bedrock, or in the absence of that, to the basin boundary.

⁵⁵ SE ROA 48-49, Ex. 1.

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After consideration of the above criteria, the State Engineer decided to finalize what was preliminarily determined in Interim Order 1303, and consolidated several administrative units into a single hydrographic basin, designated as the “Lower White River Flow System” or “LWRFS.” The State Engineer also added the previously excluded Kane Springs Hydrographic Basin to the LWRFS,⁵⁶ and modified the portion of the Black Mountains area that is in the LWRFS. Although Order 1309 did not specifically address priorities or conflict of rights, as a result of the consolidation of the basins, the relative priority of all water rights within the seven affected basins will be reordered and the priorities will be considered in relation to all water rights holders in the consolidated basins, rather than in relation only to the other users within the original separate basins.

G. Petitioners and Their Respective Water Rights or Interests

- a. Southern Nevada Water Authority and Las Vegas Valley Water District are government agencies serving Southern Nevada’s water needs, and own water rights in Coyote Springs Valley, Hidden Valley, Garnet Valley, and a significant portion of the Muddy River decreed rights.
- b. Coyote Spring Investments, LLC is a developer who owns water rights in Coyote Spring Valley, Kane Springs Valley, and California Wash;
- c. Apex Holding Company, LLC and Dry Lake Water LLC own real estate and water rights to the area of land commonly referred to as the Apex Industrial Park, in Garnet Valley and Black Mountains Area;
- d. The Center Biological Diversity is a national nonprofit conservation organization which does not hold any water rights, but has educational, scientific, biological, aesthetic and spiritual interests in the survival and recovery of the Moapa Dace;
- e. Muddy Valley Irrigation Company is a private company that owns most of the decreed rights

⁵⁶ The Court notes that the Nevada State Engineer determined that Kane Springs should be included in this joint management area, even though the Kane Springs Basin had not been designated previously for management through the statutory process delineated in under NRS 534.030.

- 1 in the Muddy River;
- 2 f. Nevada Cogeneration Associates Numbers 1 and 2, who operate gas-fired facilities at the
- 3 south end of the LWRFS and have water rights in the Black Mountain Area;
- 4 g. Georgia-Pacific Gypsum LLC, and Republic Technologies, Inc. are industrial companies that
- 5 have water rights in the Garnet Valley Hydrographic Basin;
- 6 h. Lincoln County Water District and Vidler Water Co. are a public water district and a private
- 7 company, respectively, and own water rights in Kane Springs Valley.

8 **III.**

9 **DISCUSSION**

10 **STANDARD OF REVIEW**

11 An aggrieved party may appeal a decision of the State Engineer pursuant to NRS 533.450(1).
12 The proceedings, which are heard by the court, must be informal and summary, but must afford the
13 parties a full opportunity to be heard. NRS 533.450(2). The decision of the State Engineer is
14 considered to be prima facie correct, and the burden of proof is on the party challenging the
15 decision. NRS 533.450(10).

16 **A. Questions of Law**

17 Questions of statutory construction are questions of law which require de novo review.
18 The Nevada Supreme Court has repeatedly held courts have the authority to undertake an
19 independent review of the State Engineer’s statutory construction, without deference to the State
20 Engineer’s determination. *Andersen Family Assoc. v. Ricci*, 124 Nev. 182, 186, 179 P.3d 1201,
21 1203 (2008) (citing *Bacher v. State Engineer*, 122 Nev. 1110, 1115, 146 P.3d 793, 798 (2006) and
22 *Kay v. Nunez*, 122 Nev. 1100, 1103, 146 P.3d 801, 804 (2006)).

23 Any “presumption of correctness” of a decision of the State Engineer as provided by NRS
24 533.450(10), “does not extend to ‘purely legal questions,’ such as ‘the construction of a statute,’
25 as to which ‘the reviewing court may undertake independent review.’” *In re State Engineer*
26 *Ruling No. 5823*, 128 Nev. 232, 238-239, 277 P.3d 449, 453 (2012) (quoting *Town of Eureka v.*
27 *State Engineer*, 108 Nev. 163, 165, 826 P.2d 948, 949 (1992)). At no time will the State
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1 Engineer’s interpretation of a statute control if an alternative reading is compelled by the plain
2 language of the statute. *See Andersen Family Assoc.*, 124 Nev. at 186, 179 P.3d at 1203.

3 Although “[t]he State Engineer’s ruling on questions of law is persuasive... [it is] not
4 entitled to deference.” *Sierra Pac. Indus. v. Wilson*, 135 Nev. Adv. Op. 13, 440 P.3e 37, 40
5 (2019). A reviewing court is free to decide legal questions without deference to an agency
6 determination. *See Jones v. Rosner*, 102 Nev. 215, 216-217, 719 P.2d 805, 806 (1986); *accord*
7 *Pyramid Lake Paiute Tribe v. Ricci*, 126 Nev. 521, 525, 245 P.3d 1145, 1148 (2010) (“[w]e
8 review purely legal questions without deference to the State Engineer’s ruling.”).

9 **B. Questions of Fact**

10 The Court’s review of the Order 1309 is “in the nature of an appeal” and limited to the
11 record before the State Engineer. *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979). On
12 appeal, a reviewing court must “determine whether the evidence upon which the engineer based
13 his decision supports the order.” *State Engineer v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205
14 (1991) (citing *State Engineer v. Curtis Park*, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985)).

15 As to questions of fact, the State Engineer’s decision must be supported by “substantial
16 evidence in the record [.]” *Eureka Cty. v. State Engineer*, 131 Nev. 846, 850, 359 P.3d 1114, 1117
17 (2015) (quoting *Town of Eureka*, 108 Nev. at 165, 826 P.2d at 949). Substantial evidence is “that
18 which a reasonable mind might accept as adequate to support a conclusion.” *Bacher*, 122 Nev. at
19 1121, 146 P.3d at 800 (finding that a reasonable person would expect quantification of water
20 rights needed and no evidence of such quantification or calculations by the State Engineer is
21 included in the record). The Court may not substitute its judgment for that of the State Engineer,
22 “pass upon the credibility of the witness nor reweigh the evidence.” *Revert*, 95 Nev. at 786, 603
23 P.2d at 264.

24 Where a decision is arbitrary and capricious it is not supported by substantial evidence.
25 *See Clark Cty. Educ. Ass’n v. Clark Cty. Sch. Dist.*, 122 Nev. 337, 339-40, 131 P.3d 5, 7 (2006)
26 (concluding that an arbitrator’s award was “supported by substantial evidence and therefore not
27 arbitrary, capricious, or unsupported by the arbitration agreement”).

28 In *Revert*, 95 Nev. at 787, 603 P.2d at 264–65, the Nevada Supreme Court noted:

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The applicable standard of review of the decisions of the State Engineer, limited to an inquiry as to substantial evidence, presupposes the fullness and fairness of the administrative proceedings: all interested parties must have had a ‘full opportunity to be heard,’ *See* NRS 533.450(2); the State Engineer must clearly resolve all the crucial issues presented, *See Nolan v. State Dep’t. of Commerce*, 86 Nev. 428, 470 P.2d 124 (1970) (on rehearing); the decisionmaker must prepare findings in sufficient detail to permit judicial review, *Id.*; *Wright v. State Insurance Commissioner*, 449 P.2d 419 (Or.1969); *See also* NRS 233B.125. When these procedures, grounded in basic notions of fairness and due process, are not followed, and the resulting administrative decision is arbitrary, oppressive, or accompanied by a manifest abuse of discretion, this court will not hesitate to intervene. *State ex rel. Johns v. Gragson*, 89 Nev. 478, 515 P.2d 65 (1973).

Thus, in order to survive review, Order 1309 must be statutorily authorized, resolve all crucial issues presented, must include findings in detail to permit judicial review, and must be based on substantial evidence.

CONCLUSIONS OF LAW

A. The State Engineer Did Not Have the Authority to Jointly Administrate Multiple Basins by Creating the LWRFS “Superbasin,” Nor Did He Have the Authority to Conjunctively Manage This Superbasin.

The powers of the State Engineer are limited to those set forth in the law. *See, e.g., City of Henderson v. Kilgore*, 122 Nev. 331, 334, 131 P.3d 11, 13 (2006); *Clark Cty. School Dist. v. Clark Cty. Classroom Teachers Ass’n*, 115 Nev. 98, 102, 977 P.2d 1008, 1011 (1999) (*en banc*) (An administrative agency’s powers “are limited to those powers specifically set forth by statute.”); *Clark Cty. v. State, Equal Rights Comm’n*, 107 Nev. 489, 492, 813 P.2d 1006, 1007 (1991)); *Wilson v. Pahrump Fair Water, LLC*, 137 Nev. Adv. Op. 2, 481 P.3d 853, 856(2021) (The State Engineer’s powers thereunder are limited to “only those . . . which the legislature expressly or implicitly delegates.”); *Andrews v. Nevada State Bd. of Cosmetology*, 86 Nev. 207, 208, 467 P.2d 96, 97 (1970) (“Official powers of an administrative agency cannot be assumed by the agency, nor can they be created by the courts in the exercise of their judicial function. The grant of authority to an agency must be clear.”) (*internal citation omitted*).

The Nevada Supreme Court has made clear that the State Engineer is a creature of statute and his or her actions must be within a statutory grant of authority. *Pahrump Fair Water LLC*, 481 P.3d

1 at 856 (explaining that “[t]he State Engineer’s powers thereunder are limited to ‘only those . . .
2 which the legislature expressly or implicitly delegates’” (quoting *Clark Cty.*, 107 Nev. at 492, 813
3 P.2d at 1007)); *see also Howell v. Ricci*, 124 Nev. 1222, 1230, 197 P.3d 1044, 1050 (2008) (holding
4 that the State engineer cannot act beyond his or her statutory authority).

5 The State Engineer’s authority is outlined in NRS Chapters 532, 533 and 534. Chapter 533
6 deals generally with “water rights,” which addresses surface water as well as groundwater, and
7 chapter 534 is limited to groundwater, dealing specifically with “underground water and wells.”

8 In the instant case, the State Engineer relied on the following specific statutes as authority for
9 combining prior independently designated basins as a superbasin newly named the LWRFS, and
10 then conjunctively managing⁵⁷ this superbasin:

- 11 • NRS 533.024(1)(c), which is a legislative declaration “encourag[ing] the State Engineer to
12 consider the best available science in rendering decisions concerning the available surface
13 and underground sources of water in Nevada.”⁵⁸
- 14 • NRS 534.024(1)(e), another legislative declaration that states the policy of Nevada is “[t]o
15 manage conjunctively the appropriation, use and administration of all waters of this State,
16 regardless of the source of the water.”⁵⁹
- 17 • NRS 534.020, which provides that all waters of the State belong to the public and are subject
18 to all existing rights.⁶⁰
- 19 • NRS 532.120, which allows the State Engineer to “make such reasonable rules and
20 regulations as may be necessary for the proper and orderly execution of the powers conferred
21 by law.”⁶¹

22 ⁵⁷ The Nevada Water Words Dictionary, defines “Conjunctive (Water) Use” in part, as “the integrated use and
23 management of hydrologically connected groundwater and surface water.” *Water Words Dictionary, Nevada Division of
24 Water Planning* (2022) (available online at <http://water.nv.gov/WaterPlanDictionary.aspx>) The same dictionary
25 separately defines “Conjunctive Management” as, “the integrated management and use of two or more water resources,
26 such as a (groundwater) aquifer and a surface body of water.” *Id.*

27 ⁵⁸ SE ROA 43.

28 ⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ SE ROA 44.

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- NRS 534.110(6), which allows the State Engineer to conduct investigations into any basin where average annual replenishment is not adequate for the needs of all water rights holders, and then subsequently restrict withdrawals to conform to priority rights.⁶²
- NRS 534 and specifically NRS 534.120, which allows the State Engineer to make such rules, regulations and orders as are deemed essential for the welfare of an area where the groundwater basin is being depleted.”⁶³

However, as further discussed below, the State Engineer’s reliance on these statutes for authority is misplaced, and his actions upend the bedrock principles of the prior appropriation doctrine.

1. **The Prior Appropriation Doctrine**

The doctrine of prior appropriation has been part of Nevada’s common law since the 1800’s, and is a fundamental principle of water law in Nevada. *See Lobdell v. Simpson*, 2 Nev. 274, 277-78 (1866). “An appropriative right ‘may be described as a state administrative grant that allows the use of a specific quantity of water for a specific beneficial purpose if water is available in the source free from the claims of others with earlier appropriations.’” *Desert Irr., Ltd. v. State*, 113 Nev. 1049, 1051 n.1, 944 P.2d 835, 837 (1997) (quoting Frank J. Trelease & George A. Gould, *Water Law Cases and Materials* 33 (4th ed. 1986)).

“Water rights are given ‘subject to existing rights,’ NRS 533.430(1), given dates of priority, NRS 533.265(2)(b), and determined based on relative rights, NRS 533.090(1)-(2).” *Mineral Cty. v. Lyon Cty.*, 136 Nev. 503,513, 473 P.3d 418, 426 (2020). Thus, “[i]n Nevada, the doctrine of prior appropriation determines the priority of both pre-1905 vested water rights and modern statutory water law.” *Rand Properties, LLC v. Filippini*, 484 P.3d 275, Docket 78319 at 2 (Nev. 2021) (unpublished disposition). It is universally understood that the priority of a water right is its most valuable component. *See Gregory J. Hobbs, Jr., Priority: The Most Misunderstood Stick in the Bundle*, 32 *Envtl. L.* 37, 43 (2002) (“Priority determines the value of a water right”).

“A priority in a water right is property in itself”; therefore, “to deprive a person of his

⁶² *Id.*

⁶³ *Id.*

1 priority is to deprive him of a most valuable property right.” *Colorado Water Conservation*
2 *Bd. v. City of Cent.*, 125 P.3d 424, 434 (Colo. 2005) (internal quotation marks omitted). “A loss of
3 priority that renders rights useless ‘certainly affects the rights’ value’ and ‘can amount to a de facto
4 loss of rights.”” *Wilson v. Happy Creek, Inc.*, 135 Nev. 301, 313, 448 P.3d 1106, 1115 (2019)
5 (quoting *Andersen Family Assocs.*, 124 Nev. at 190-1, 179 P.3d at 1201).

6 Nevada’s statutory water law reflects the importance of priority. Not only did the
7 Legislature choose not to bestow the State Engineer with discretion to alter priority rights, but it also
8 affirmatively requires the State Engineer to preserve priority rights when performing the State
9 Engineer’s statutory duties. *See, e.g.*, NRS 534.110(6) (providing that any curtailment “be restricted
10 to conform to priority rights”); NRS 534.110(7) (same); NRS 533.040(2) (“If at any time it is
11 impracticable to use water beneficially or economically at the place to which it is appurtenant, the
12 right may be severed from the place of use and be simultaneously transferred and become
13 appurtenant to another place of use, in the manner provided in this chapter, without losing priority of
14 right.”).

15 The prior appropriation doctrine in Nevada, “the driest state in the Nation”⁶⁴ becomes
16 particularly critical when, as in the instant case, there is not enough water to satisfy all of the
17 existing rights of the current water right holders, and the threat of curtailment looms ominously in
18 the near future. One of the greatest values of a senior priority right is the assurance that the holder
19 will be able to use water even during a time of water shortage because junior water right holders will
20 be curtailed first. Thus, senior right holders rely on their senior priority rights when developing
21 businesses, entitling and permitting land development, negotiating agreements, making investments,
22 obtaining permits and various approvals from State and local agencies, and generally making
23 financial and other decisions based on the relative certainty of their right.

24 Priority in time of a right is only as valuable as where the holder stands in relation to others
25 in the same situation, or more specifically in this case, in the same basin. As the statutes are written,
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28 ⁶⁴ *United States v. State Engineer*, 117 Nev. 585, 592, 27 P.3d 51, 55 (2001)(Becker, J., concurring in part and
dissenting in part).

1 water right holders only compete in time for their “place in line” with other water right holders in
2 their same basin. Therefore, the year that one acquires a priority right is only as important as the
3 year that other water right holders in your basin acquired theirs. It is in this setting that State
4 Engineer has issued Order 1309.

5 **2. Joint Administration**

6 The State Engineer’s position is that the “best available science” demonstrates that the
7 seven⁶⁵ named hydrographic basins are so hydrologically interconnected that science dictates they
8 must be managed together in one superbasin. However, NRS 533.024(1)(c) is a policy declaration
9 of the Legislature’s intent that simply “encourages” the State Engineer “to consider the best
10 available science in rendering decisions” that concern water he has authority to manage. NRS
11 533.024(1)(c).

12 Statements of policy from the Legislature do not serve as a basis for government action, but
13 rather inform the interpretation of statutes that authorize specific action. *See, Pawlik v. Deng*, 134
14 Nev. 83, 85, 412 P.3d 68, 71 (2018). In *Pawlik*, the Nevada Supreme Court expressed the relevance
15 of statements of policy in terms as follows: “if the statutory language is subject to two or more
16 reasonable interpretations, the statute is ambiguous, and we then look beyond the statute to the
17 legislative history and interpret the statute in a reasonable manner ‘in light of the policy and the
18 spirit of the law.’” *Id.* (quoting *J.E. Dunn Nw., Inc. v. Corus Constr. Venture, LLC*, 127 Nev. 72, 79,
19 249 P.3d 501, 505 (2011)).

20 While such statements of policy are accorded deference in terms of statutory interpretation,
21 the Nevada Supreme Court has specifically held that they are not binding. *See McLaughlin v. Hous.*
22 *Auth. of the City of Las Vegas*, 227 P.2d 206, 93 (1951) (“It has often been said that the declaration
23 of policy by the legislature, though not necessarily binding or conclusive upon the courts, is entitled
24 to great weight, and that it is neither the duty nor prerogative of the courts to interfere in such
25 legislative finding unless it clearly appears to be erroneous and without reasonable foundation.”); *see*
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⁶⁵ More accurately, the LWRFS is comprised of six hydrographic basins and a portion of a seventh.

1 also *Clean Water Coal. v. M Resort, LLC*, 127 Nev. 301, 313, 255 P.3d 247, 255 (2011) (“The State
2 acknowledges that when legislative findings are expressly included within a statute, those findings
3 should be accorded great weight in interpreting the statute, but it points out that such findings are not
4 binding and this court may, nevertheless, properly conclude that section 18 is a general law despite
5 the Legislature's declaration to the contrary.”).

6 Statements of policy set forth by the Legislature are therefore not operative statutory
7 enactments, but rather tools to be used in interpreting operative statutes—and only then where such
8 statutes are ambiguous on their face. *See Pawlik*, 134 Nev. at 85, 412 P.3d at 71; *see also Cromer v.*
9 *Wilson*, 126 Nev. 106, 109-10, 225 P.3d 788, 790 (2010) (if the plain language of a statute “is
10 susceptible of another reasonable interpretation, we must not give the statute a meaning that will
11 nullify its operation, and we look to policy and reason for guidance”).

12 This statement of policy is not, in and of itself, a grant of authority that allows the State
13 Engineer to change boundaries of established hydrographic basins as science dictates. This Court
14 certainly acknowledges that since the time the 256 hydrographic basins and sub-basins were
15 delineated, that science and technology have made great strides. While certain navigable waters and
16 topography were more easily identifiable at the time the basins were established, the complexity lies
17 in the less obvious interconnectivity and formations of sub-surface structures that were more
18 difficult to detect at that time. There is no doubt that scientific advancements allow experts to more
19 accurately assess sub-surface formations and groundwater than they have in the past, and certainly
20 technology will continue to improve accuracy in the future. However, this Court notes that the
21 Legislature specifically used the word “encourages” to describe how the Nevada State Engineer
22 should utilize the best available science. NRS 533.024(1)(c). The statute does not declare that the
23 best available science should dictate the decisions.

24 Indeed, if science was the sole governing principle to dictate the Nevada State Engineer’s
25 decisions, there would be a slippery slope in the changes that could be made in the boundaries of the
26 basins and how they are managed; each time scientific advancements and discoveries were made
27 regarding how sub-surface water structures are situated or interconnected, under this theory of
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1 authority, the Nevada State Engineer could change the boundaries of the existing basins. Each
2 boundary change would upend the priority of water right holders as they relate to the other water
3 right holders in the new, scientifically-dictated “basin.” This would lead to an absurd result as it
4 relates to the prior appropriation doctrine. Every water right holder would be insecure in their
5 priority, as their relative priority could change at any moment that science advances in determining
6 further interconnectivity of water below the surface. In the administration of water rights, the
7 certainty of those rights is particularly important and prior appropriation is “largely a product of the
8 compelling need for certainty in the holding and use of water rights.” *Mineral Cty. v. Lyon Cty.*, 136
9 Nev. at 518, 473 P.3d at 429 (quoting *Arizona v. California*, 460 U.S. 605, 620 (1983)). Science in
10 and of itself cannot alter common law and statutes. Thus, the State Engineer’s reliance on NRS
11 533.024(1)(c) for giving him authority to create a superbasin out of seven existing basins is
12 misplaced.

13 While NRS 532.120 allows the State Engineer to make reasonable rules and regulations as
14 may be necessary for proper and orderly execution, this authority is not without its limits, and is
15 only authorized for those “powers conferred by law.” Nothing in Chapters 532, 533 or 534 gives the
16 State Engineer direct authority to eliminate, modify, or redraw the boundaries of existing
17 hydrographic basins, or to consolidate multiple, already established, hydrographic basins into a
18 single hydrographic superbasin. For at least 50 years, holders of groundwater rights in Nevada have
19 understood a “hydrographic basin” to be an immutable administrative unit. This has been the case
20 regardless of whether the boundaries of the unit accurately reflected the boundaries of a particular
21 water resource. The Nevada Legislature has adopted a comprehensive scheme that provides the
22 framework for the State Engineer to administer surface water and groundwater. Moreover, the State
23 Engineer has, for decades, administered water on the basis of hydrographic basins identified,
24 described, and released to the public and relied upon by the Legislature, former State Engineers, and
25 the public. Applications to appropriate water are and have been on the basis of each hydrographic
26 basin. Protests, agreements, and resolutions of water applications have been on the basis of each
27 basin. Furthermore, statutes require that the State Engineer consider available water and
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1 appropriations based on the basins already defined.

2 It is interesting to note that in the statutes that *do* confer authority on the Nevada State
3 Engineer to manage water, they specifically mention the management as being done on a basin-by-
4 basin (or a sub-basin within a basin) basis. NRS 534.030 is the original source of authority for the
5 State Engineer’s designation of an “administrative area” by “basin.” NRS 534.030. Through NRS
6 534.030 and NRS 534.011, the State Engineer has authority to designate “any groundwater basin, or
7 portion therein” an “area of active management,” which refers to an area “[i]n which the State
8 Engineer is conducting particularly close monitoring and regulation of the water supply because of
9 heavy use of that supply.” Under the statute’s plain meaning, a *basin* is intended to be an
10 *administrative unit*, defined by boundaries described by “legal subdivision as nearly as possible.”
11 NRS 534.030(1)(b). In other words, a hydrographic basin so designated was synonymous with an
12 administrative unit—a *legal* construct, defined thereafter by a *geographic* boundary. Water rights
13 within these basins are to be administered according to the laws set forth in NRS Chapters 533 and
14 534, and the principles of prior appropriation are applied to water uses *within* each basin.

15 Moreover, the Legislature consistently refers to a singular basin throughout the statute. *See*,
16 *e.g.*, 534.030(1) (describing a petition under NRS Chapter 534 as one that requests the State
17 Engineer “to administer the provisions of this chapter as relating to designated areas, ... in any
18 particular basin or portion therein”); NRS 534.030(2) (“a groundwater basin”); NRS 534.030(2)
19 (“the basin”). In fact, in the State Engineer’s prior rulings and orders, including Order 1169, Order
20 1169A, and Rulings 5712 and 6455, the State Engineer employs a basin-by-basin management
21 approach.

22 NRS 534.110(6) sets forth the State Engineer’s ability to make basin-specific determinations
23 and provides the authority to curtail water rights where investigations into specific basins
24 demonstrate that there is insufficient groundwater to meet the needs of all permittees and all vested-
25 right claimants. NRS 534.110 plainly applies to investigations concerning administration and
26 designation of critical management areas within a basin. If the State Engineer conducts an
27 investigation as set forth in NRS 534.110(6) and determines that the annual replenishment to the
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1 groundwater supply is not adequate for the permittees and vested-right claimants, he has the
2 authority to either (1) order that withdrawals from domestic wells be restricted to conform to priority
3 rights, or (2) designate as a critical management area the basin in which withdrawals of groundwater
4 consistently exceed the perennial yield. NRS 534.110(6)-(7). It is important to note, however, that
5 the statute does not provide authority to change the boundaries of established basins, combine
6 multiple basins into one unit or superbasin, and then modify or curtail groundwater rights based
7 upon restructured priority dates in this newly created superbasin.

8 The Court acknowledges that the State Engineer can and should take into account how water
9 use in one basin may affect the water use in an adjoining or closely related basin when determining
10 how best to “actively manage” a basin. However, this is much different than how the State Engineer
11 defines “joint management”: erasing the borders of seven already established legal administrative
12 units and creating one legal superunit in the LWRFS superbasin. If the Legislature intended for the
13 State Engineer to designate areas across multiple basins for “joint administration,” it would have so
14 stated. *See Slade v. Caesars Entm’t Corp.*, 132 Nev. 374, 380-81, 373 P.3d 74, 78 (2016) (citing
15 Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 107 (2012)
16 (“The expression of one thing implies the exclusion of others.”)). Thus, under NRS 534.030, while
17 the State Engineer can administer basins individually, the statute does not allow the State Engineer
18 to combine basins for joint administration, nor do NRS 532.120, NRS 533.024, or NRS 534.110(6)
19 confer express authority on the State Engineer to do so.

20 **3. Conjunctive Management**

21 The Nevada State Engineer relies on NRS 534.024(1)(e), as the source of authority that
22 allows him to manage both surface and groundwater together through “conjunctive management.”⁶⁶
23 Historically, surface water and ground water have been managed separately. In fact, the term
24 “conjunctive management” was only introduced in the statutes in the 2017 session of the Nevada
25 Legislature when it added subsection 1(e) to NRS 533.024. However, as discussed previously, this
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⁶⁶ SE ROA 43.

1 statute is a declaration of legislative intent, and as a statement of policy, it does not constitute a grant
2 of authority to the State Engineer, nor is it a water management tool in and of itself.

3 In fact, there is no authority or guidance whatsoever in the statutes as to how to go about
4 conjunctively managing water and water rights. While the Court agrees that it makes sense to take
5 into account how certain groundwater rights may affect other surface water rights when managing
6 water overall, as this Court noted previously, the powers of the State Engineer are limited to those
7 set forth in the law. While Nevada law provides certain tools for the management of water rights in,
8 for example, over appropriated basins, *e.g.*, NRS 534.110(7) (authorizing the State Engineer to
9 “designate as a critical management area any basin in which withdrawals of groundwater
10 consistently exceed the perennial yield of the basin”), nothing in Chapters 532, 533 or 534 gives the
11 State Engineer express authority to conjunctively manage, in this proceeding, both the surface and
12 groundwater flows he believes are occurring in the LWRFS superbasin.

13 This Court finds that as a result of the consolidation of the basins, the relative priority of all
14 water rights within the seven affected basins will be reordered and the priorities will be considered
15 in relation to all water rights holders in the consolidated basins, rather than in relation only to the
16 other users within the original separate basins.⁶⁷ By redefining and combining seven established
17 basins for “joint administration,” and “conjunctive management,” the State Engineer essentially
18 strips senior right holders of their priority rights by deciding that all water rights within the LWRFS
19 superbasin should be administered based upon their respective dates of priority in relation to other
20 rights “within the regional groundwater unit.”

21 The State Engineer’s position is that the determination of conflicts and priorities has not yet
22 occurred since that is to occur in the second step of the proceeding. However, by the very nature of
23 erasing the existing basins and putting all of the water rights holders in one superbasin, he has
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26 ⁶⁷ This Court rejects the State Engineer’s argument that Order 1309 did not change priorities merely because it did not
27 change priority dates. His argument conflates the meaning of *priority* as defined by the date of a water right application,
28 and the common meaning of *priority*, as defined by one’s “place in line.” While it is true that the Order does not change
priority dates, this Court finds that it *does* change the relative priorities, as petitioners who previously held the most
senior rights within their singular basin may now be relegated to more junior status within the “superbasin.”

1 already reprioritized certain rights as they relate to one another, even if their priority dates remain
2 the same.⁶⁸ As a result of creating this superbasin, water rights holders with some of the most senior
3 priority rights within their basin are now relegated to a much a lower priority position than some
4 water right holders in basins outside of their own. Such a loss of priority would potentially render
5 certain water rights valueless, given the State Engineer’s restrictions on pumping in the entire
6 LWRFS. The Court concludes that the State Engineer does not have authority to redefine Nevada
7 basins so as to reorder the priority rights of water right holders through conjunctive management
8 within those basins. Accordingly, Order 1309 stands at odds with the prior appropriation doctrine.

9 The Court determines that the question of whether the State Engineer has *authority* to change
10 the boundaries of basins that have been established for decades, or subject that newly created basin
11 to conjunctive management, or not, is a legal question, not a factual one. The State Engineer has
12 failed to identify a statute that authorizes him to alter established basin boundaries or engage in
13 conjunctive management. Based upon the plain language of the applicable statutes, the Court
14 concludes that the State Engineer acted outside the scope of his authority in entering Order 1309.

15 **B. The State Engineer Violated Petitioners’ Due Process Rights in Failing to Provide**
16 **Notice to Petitioners or an Opportunity to Comment on the Administrative Policies Inherent**
17 **in the Basin Consolidation.**

18 The Nevada Constitution protects against the deprivation of property without due process of
19 law. Nev. Const. art. 1, § 8(5). “Procedural due process requires that parties receive notice and an
20 opportunity to be heard.” *Eureka Cty. V. Seventh Jud. Dist. Ct.*, 134 Nev. 275, 279, 417 P.3d 1121,
21 1124 (2018)(internal quotation marks omitted). “In Nevada, water rights are ‘regarded and
22 protected as real property.’” *Id.*(quoting *Application of Filippini*, 66 Nev. 17, 21-22, 202 P.2d 535,
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24 ⁶⁸ Although this Court refrains from analyzing whether or not 1309 is supported by substantial evidence, the Court notes
25 that part of the State Engineer’s 1309 decision of limiting use to 8,000afa or less is based on the concern of adversely
26 impacting the endangered Moapa Dace, located in the Muddy River Springs. This decision does not appear to take into
27 account more nuanced effects of how pumping in each separate basin affects the Muddy River flows, no matter how far
28 away the basin is from the river. In other words, reprioritization of each water rights holder in relation to the other (by
prioritization date in the newly created superbasin) means that their standing (and more importantly, their potential for
curtailment) is only by date. Water use in one basin may not have the same effect as another in reducing Muddy River
flows; however, these distinguishing factors are all erased by combining all of the basins together for joint
administration.

1 537 (1949)). Therefore, holders of water rights in Nevada are entitled to constitutional protections
2 regarding those property rights, including procedural due process. *See id.*

3 The Nevada Supreme Court has held that “[a]lthough proceedings before administrative
4 agencies may be subject to more relaxed procedural and evidentiary rules, due process guarantees of
5 fundamental fairness still apply.” *Dutchess Bus. Serv.’s, Inc. v. Nev. State Bd. of Pharmacy*, 124
6 Nev. 701, 711, 191 P.3d 1159, 1166 (2008). In *Dutchess*, the Nevada Supreme Court noted further
7 that “[a]dministrative bodies must follow their established procedural guidelines and give notice to
8 the defending party of ‘the issues on which decision will turn and . . . the factual material on which
9 the agency relies for decision so that he may rebut it.” *Id.*

10 With respect to notice and hearing, the Nevada Supreme Court has held that “[i]nherent in
11 any notice and hearing requirement are the propositions that the notice will accurately reflect the
12 subject matter to be addressed and that the hearing will allow full consideration of it.” *Public Serv.*
13 *Comm’n of Nev. v. Southwest Gas Corp.*, 99 Nev. 268, 271, 772 P.2d 624, 626 (1983). “Notice must
14 be given at an appropriate stage in the proceedings to give parties meaningful input in the
15 adjudication of their rights.” *Seventh Jud. Dist. Ct.*, 134 Nev. at 280-81, 417 P.3d at 1125-26 (citing
16 *Hamdi v. Rumsfeld*, 542 U.S. 507, 533, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) (“It is equally
17 fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful
18 time and in a meaningful manner.”). A party’s due process rights attach at the point at which a
19 proceeding holds the *possibility* of curtailing water rights, and due process necessitates notice of that
20 possibility to the party potentially affected.⁶⁹

21 For the reasons that follow, this Court concludes that (a) the notice and hearing procedure
22 employed by the State Engineer failed to satisfy the requirements of due process because the notice
23 failed to put the parties on notice that the State Engineer would decide on a management protocol for
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25 ⁶⁹ “[B]ecause the language in the show cause order [indicates that the district court may enter an order forcing curtailment
26 to begin, junior water rights holders must be given an opportunity to make their case for or against the option of
27 curtailment. Notice must be given at an appropriate stage in the proceedings to give parties meaningful input in the
28 adjudication of their rights... Thus, junior water rights holders must be notified before the curtailment decision is made,
even if the specific “how” and “who” of curtailment is decided in a future proceeding.” *Seventh Jud. Dist. Ct.*, 134 Nev.
275, 280–81, 417 P.3d 1121, 1125 (2018).

1 the LWRFS at the conclusion of the proceeding; (b) the hearing itself failed to satisfy due process
2 because the parties were not afforded a full and complete opportunity to address the implications of
3 the State Engineer’s decision to subject the LWRFS to conjunctive management and joint
4 administration, and (c) the State Engineer’s nondisclosure, before or during the Order 1303
5 proceedings of the six criteria he would use in evaluating the connectivity of the basins and
6 determining the new consolidated basin boundary, failed to satisfy the requirements of due process.

7 Specifically, the notice of hearing and amended notice of hearing (“Notice”) noticed an
8 opportunity for the parties that submitted Order 1303 reports to explain their positions and
9 conclusions with respect to the questions posed for consideration in Order 1303.^{70 71} But the
10 questions posed in Order 1303 did not relate to management of the LWRFS, such as issues of
11 conjunctive or joint administration, but rather related to factual inquiries. Instead, Order 1303
12 specifically authorized stakeholders to file reports addressing four specific areas, none of which
13 related to the management of the LWRFS.⁷²

14 In noticing the hearing to consider the reports submitted pursuant to Order 1303, there was
15 no mention of consideration of the prospective management of the LWRFS, *i.e.*, whether it would be
16 appropriately managed conjunctively and as a joint administrative unit. Indeed, this was consistent
17 with the Hearing Officer’s opening remarks at the August 8, 2019, prehearing conference in which
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19 ⁷⁰ See SE ROA 262-82, Ex. 2; SE ROA 284-301, Ex. 3

20 ⁷¹ The Notice included the following summary:

21 On August 9, 2019, the State Engineer held a pre-hearing conference regarding the hearing on the
22 submission of reports and evidence as solicited in Order 1303.... The State Engineer established that
23 the purpose of the hearing on the Order 1303 reports was to provide the participants an opportunity to
24 explain the positions and conclusions expressed in the reports and/or rebuttal reports submitted in
25 response to the Order 1303 solicitation. The State Engineer directed the participants to limit the offer of
26 evidence and testimony to the salient conclusions, including directing the State Engineer and his staff
27 to the relevant data, evidence and other information supporting those conclusions. ***The State Engineer
further noted that the hearing on the Order 1303 reports was the first step in determining to what
extent, if any, and in what manner the State Engineer would address future management decisions,
including policy decisions, relating to the Lower White River Flow System basins. On that basis, the
State Engineer then addressed other related matters pertaining to the hearing on the Order 1303
reports, including addressing the date and sequence of the hearing, as set forth in this Notice of
Hearing.*** SE ROA 285, Ex. 3 (emphasis added).

28 ⁷² SE ROA 647-48. Ex. 6.

1 the State Engineer actively discouraged participants from providing input regarding that very
2 question. The hearing officer stated as follows at the August 8 prehearing conference:

3 And so, and I'm going to talk about this and we've spoken about this before, is
4 that really this is a threshold reporting aspect, that this is part of a multi-tiered
5 process in terms of determining the appropriate management strategy to the
6 Lower River Flow System.

7 This larger substantive policy determination is not part of the particular
8 proceeding. That's part of later proceedings....

9 SE ROA 522, Ex. 5 (Hr'g Tr. at 10:6-20).

10 The hearing officer gave additional consistent guidance at the outset of the September 23
11 hearing, further directing the parties not to address policy issues even in relation to the fact that
12 Order 1303 authorized stakeholders to include in their reports "[a]ny other matter believed to be
13 relevant to the State Engineer's analysis."⁷³ Specifically, the Hearing Officer directed as follows:

14 And while that fifth issue is [as set forth in Ordering Paragraph 1(e) of Order
15 1303] not intended to expand the scope of this hearing into making policy
16 determinations with respect to management of the Lower White River Flow
17 System basin's individual water rights, those different types of things, because
18 those are going to be decisions that would have to be made in subsequent
19 proceedings should they be necessary.

20 SE ROA 52962, Ex. 26 (Hr'g Tr. 6:4-15).

21 Not only did the notice not adequately notify the parties of the possibility of the
22 consideration and resolution of policy issues, but the Hearing Officer consistently
23 directed the parties to avoid the subject, compounding the due process violation.

24 Notwithstanding the Hearing Officer's admonitions and the plain language of the notice, the
25 State Engineer ultimately issued a dramatic determination regarding management of the LWRFS. In
26 doing so, the State Engineer precluded the participants from providing input that would have
27 allowed for the full consideration of the issue. Specifically, participants and experts did not have the
28 opportunity to, and were actively discouraged from addressing policy issues critical to the

⁷³ SE ROA 648, Ex. 6.

1 management of the LWRFS.⁷⁴ The refusal to consider these issues ensured that the State Engineer’s
2 decision was not based on a fully developed record.

3 The State Engineer acknowledged as much in Order 1309 itself. There, the State Engineer
4 noted the fact that Georgia-Pacific and Republic raised concerns over the sufficiency of the scope of
5 the proceedings at hearing but inexplicably asserted that a to-be-determined management scheme
6 would be developed to address “management issues” in the LWRFS:

7 Georgia-Pacific and Republic asserted that boundaries are premature without
8 additional data and without a legally defensible policy and management tools in
9 place. They expressed concern that creating an administrative unit at this time
10 inherently directs policy without providing for due process. The State Engineer
11 has considered these concerns and agrees that additional data and improved
12 understanding of the hydrologic system is critical to the process. He also believes
13 that the data currently available provide enough information to delineate LWRFS
14 boundaries, and that an effective management scheme will provide for the
15 flexibility to adjust boundaries based on additional information, retain the ability
16 to address unique management issues on a sub-basin scale, and maintain
17 partnership with water users who may be affected by management actions
18 throughout the LWRFS.

19 SE ROA 54, Ex. 1.

20 This language reflects a serious misunderstanding of the effect of Order 1309. Insofar as
21 Order 1309 subjects the LWRFS to conjunctive management and joint administration, resulting in
22 effectively reordering of priority of water rights in the LWRFS superbasin, the order effectuates a
23 management scheme with far reaching consequences. Thus, agreeing on the one hand that an
24 “effective management scheme” will be necessary to address challenges in the LWRFS, but
25

26 ⁷⁴ These issues include, but are not limited to: whether Nevada law allows the State Engineer to conjunctively manage
27 multiple hydrographic basins in a manner that modifies the relative priority of water rights due to the administration
28 consolidation of basins; whether the State Engineer would establish a “critical management area” pursuant to NRS
534.110 and, if so, whether he would develop a groundwater management plan or defer to the stakeholders to develop
one; whether Nevada law gives the State Engineer authority to designate a management area that encompasses more than
one basin; whether “safe-yield” discrete management areas should be established within the proposed administrative
unit; whether water rights holders enjoy a “property right” in the relative priority of their water rights such that impairing
that right may constitute a “taking”; whether unused (or only sporadically used) senior water rights take precedence over
certificated or fully used junior rights, particularly where these junior rights are in continuous use to support
economically significant enterprises; whether States compel quantification of federal reserved rights by a date certain;
and whether the State Engineer should approach the legislature to seek different or additional management tools or
authority. See SE ROA 52801-8, Ex. 25 (Georgia Pacific and Republic Closing Argument, outlining policy questions
for consideration by the State Engineer at later proceedings, proceedings that never took place).

1 contending it will be developed in the future, reveals a lack of appreciation of the implications of the
2 order to the detriment of not only the participants but all water rights holders in the LWRFS basins.
3 Without consideration of the implications of the management decision contained in the order, it
4 cannot be based on a full consideration of the issues presented. In affirmatively limiting the scope of
5 the proceeding to include a full consideration of the issues, the State Engineer violated the
6 stakeholders' due process rights. Both the notice and the hearing procedures employed failed to
7 comport with due process.

8 Finally, as noted above, the State Engineer did not give notice or disclose before or during
9 the Order 1303 proceedings, the six specific criteria that he would use in evaluating the connectivity
10 of the basins and determining the new consolidated basin boundary. Although the State Engineer
11 asserted that he considered the evidence and testimony presented in the public hearing "on the basis
12 of a common set of criteria that are consistent with the original characteristics conserved critical in
13 demonstrating a close hydrologic connection requiring joint management in Rulings 6254-6261,"⁷⁵
14 a review of these rulings reveals that none of the six criteria or characteristics were previously
15 identified, examined in the hydrological studies and subsequent hearing that followed the
16 completion of the Order 1169 aquifer test, or expressly disclosed in Rulings 6254-6261.⁷⁶ These
17 criteria were instead explicitly disclosed for the first time in Order 1309, which means the
18 participants had no opportunity to directly address these criteria in their presentations, or critically,
19 to address the appropriateness of these criteria.

20 This Court is unpersuaded by the State Engineer's argument that it could develop the criteria
21 only after it heard all the evidence at the hearing. Even if it did, this does not justify a deprivation of
22 the right to due process. In order to provide the parties due process and a meaningful opportunity to
23 present evidence on these issues, the State Engineer should have included these factors in the Notice
24 of Pre-Hearing Conference. *See Eureka Cty.*, 131 Nev. at 855, 359 P.3d at 1120; *Revert*, 95 Nev. at
25 787, 603 P.2d at 265 (criticizing the state engineer for engaging in post hoc rationalization). This
26

27 ⁷⁵ *See* SE ROA 48.

28 ⁷⁶ SE ROA 726-948.

1 due process violation is particularly harmful to water rights holders in Kane Springs, the sole basin
2 that had not been previously designated for management under NRS 534.030, had not been included
3 in the Order 1169 aquifer test, and had not been identified as a basin to be included in the LWRFS
4 superbasin in Order 1303.

5 Accordingly, this Court concludes that revealing the criteria only after stakeholders had
6 engaged in the extensive investigations, expert reporting, and the intense factual hearing requested
7 by Order 1303 further violates the participants' due process rights.

8 As this Court has determined that the Nevada State Engineer exceeded his statutory authority
9 and violated the participants' due process rights in issuing Order 1309, it declines to reach further
10 analysis on whether his factual findings in Order 1309 were supported by substantial evidence.

11 **IV.**
12 **CONCLUSION**

13 The Court FINDS that the Nevada State Engineer exceeded his statutory authority and had
14 no authority based in statute to create the LWRFS superbasin out of multiple distinct, already
15 established hydrographic basins. The Nevada State Engineer also lacked the statutory authority to
16 conjunctively manage this LWRFS superbasin.

17 The Court ALSO FINDS that the Nevada State Engineer violated the Petitioners'
18 Constitutional right to due process by failing to provide adequate notice and a meaningful
19 opportunity to be heard.

20 As a result, Order 1309 is arbitrary, capricious, and therefore void.

21 Good cause appearing, based upon the above Findings of Fact and Conclusions of Law, the
22 Court ORDERS, ADJUDGES AND DECREES as follows:

23 IT IS HEREBY ORDERED that the petition for review of the Nevada State Engineer's
24 Order No. 1309 filed by Petitioners Lincoln County Water District and Vidler Water Company, Inc.
25 is GRANTED.

26 IT IS FURTHER ORDERED that the petition for review of the Nevada State Engineer's
27 Order No. 1309 filed by Petitioners Coyote Springs Investment, LLC is GRANTED.
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IT IS FURTHER ORDERED that the petition for review of the Nevada State Engineer’s Order No. 1309 filed by Petitioners Apex Holding Company, LLC and Dry Lake Water, LLC is GRANTED.

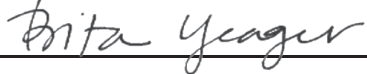
IT IS FURTHER ORDERED that the petition for review of the Nevada State Engineer’s Order No. 1309 filed by Petitioners Nevada Cogeneration Associates Nos. 1 and 2 is GRANTED.

IT IS FURTHER ORDERED that the petition for review of the Nevada State Engineer’s Order No. 1309 filed by Petitioners Georgia-Pacific Gypsum LLC, and Republic Environmental Technologies, Inc. is GRANTED.

IT IS FURTHER ORDERED that the State Engineer’s Order 1309 is VACATED in its entirety.

IT IS SO ORDERED.

Dated this 19th day of April, 2022



**66B 24A E875 2549
Bitia Yeager
District Court Judge**

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Southern Nevada Water
Authority, Plaintiff(s)

CASE NO: A-20-816761-C

7 vs.

DEPT. NO. Department 1

8
9 Nevada State Engineer, Division
of Water Resources,
10 Defendant(s)

11
12 **AUTOMATED CERTIFICATE OF SERVICE**

13 This automated certificate of service was generated by the Eighth Judicial District
14 Court. The foregoing Findings of Fact, Conclusions of Law and Order was served via the
15 court's electronic eFile system to all recipients registered for e-Service on the above entitled
case as listed below:

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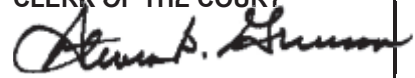
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ATTACHMENT 12

ATTACHMENT 12



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25 WATER DISTRICT and VIDLER WATER
26 COMPANY, INC.

27 **DISTRICT COURT**
28 **CLARK COUNTY, NEVADA**

19 LAS VEGAS VALLEY WATER DISTRICT,
20 and SOUTHERN NEVADA WATER
21 AUTHORITY, et al.,

Case No. A-20-816761-C

Dept. No. 1

21 Petitioners,

Consolidated with Cases:

22 vs.

A-20-817765-P

A-20-818015-P

A-20-817977-P

23 ADAM SULLIVAN, P.E., Acting
24 Nevada State Engineer, et al.,

A-20-818069-P

A-20-817840-P

A-20-817876-P

25 Respondent.

A-21-833572-J

26 **NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW,**
27 **AND ORDER GRANTING PETITIONS FOR JUDICIAL REVIEW**

28 ///

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YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the *Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review* was entered on the 19th day of April, 2022 in the above captioned and consolidated cases, a copy of which is attached hereto.

DATED this 19th day of April, 2022.

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CERTIFICATE OF SERVICE

Pursuant to NRCp 5(b), I hereby certify that I am an employee of ALLISON MacKENZIE, LTD., Attorneys at Law, and that on this date, I caused a true and correct copy of the foregoing document to be served on all parties to this action by electronic service to the participates in this case who are registered with the Eighth Judicial District Court’s Odyssey eFileNV File & Service system to this matter.

DATED this 19th day of April, 2022.

/s/ Nancy Fontenot
NANCY FONTENOT

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INDEX OF EXHIBITS

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<u>Exhibit No.</u>	<u>Description</u>	<u>Number of Pages</u>
"1"	Findings of Fact, Conclusions of Law, And Order Granting Petitions for Judicial Review	40

4857-5859-8684, v. 1

EXHIBIT “1”

FFCO

**DISTRICT COURT
CLARK COUNTY, NEVADA**

LAS VEGAS VALLEY WATER DISTRICT,
and SOUTHERN NEVADA WATER
AUTHORITY,

Case No. A-20-816761-C
Dept. No. I

Petitioners,

Consolidated with Cases:

vs.

- 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

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

Respondent.

And All Consolidated Cases.

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PETITIONS
FOR JUDICIAL REVIEW**

This matter comes before this Court on consolidated petitions for judicial review of State Engineer's Order 1309 filed by Petitioners:

- Southern Nevada Water Authority and Las Vegas Valley Water District
- Coyote Spring Investment, LLC
- Apex Holding Co. and Dry Lake Water, LLC
- The Center for Biological Diversity
- Muddy Valley Irrigation Company
- Nevada Cogeneration Associates Nos. 1 and 2
- Georgia-Pacific Gypsum LLC and Republic Environmental Technologies, Inc.
- Lincoln County Water District and Vidler Water Company.

Bitia Yeager
Eighth Judicial District Court
Clark County, Nevada
Department I

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The parties stipulated to permit the following Intervenors into this matter:

- Sierra Pacific Power Company d/b/a NV Energy and Nevada Power Company d/b/a NV Energy
- Moapa Valley Water District
- The Church of Jesus Christ of Latter-Day Saints
- City of North Las Vegas
- Western Elite Environmental, Inc. and Bedroc Limited, LLC.

In addition, some Petitioners intervened to respond to other petitions for judicial review. The Parties appeared by and through their respective counsels of record. The Court held oral argument from February 14, 2022 to February 17, 2022.

The Court having considered the evidence, the pleadings, together with opening and closing arguments presented at the hearing for these matters, and good cause appearing therefor, makes the following Findings of Fact, Conclusions of Law, and Order:

I.

PROCEDURAL HISTORY

On June 15, 2020, the Nevada State Engineer issued Order No. 1309 as his latest administrative action regarding the Lower White River Flow System (“LWRFS”)¹.

On June 17, 2020, the Las Vegas Valley Water District and the Southern Nevada Water Authority (collectively, “SNWA”) filed a petition for judicial review of Order 1309 in the Eighth Judicial District Court in Clark County, Nevada.² Subsequently, the following petitioners filed petitions for judicial review in the Eighth Judicial District Court: Coyote Spring Investments, LLC (“CSI”); Apex Holding Company, LLC and Dry Lake Water LLC (collectively, “Apex”); the Center Biological Diversity (“CBD”); Muddy Valley Irrigation Company (“MVIC”); Nevada

¹ SE ROA 2 – 69. The LWRFS refers to an area in southern Nevada made up of several hydrological basins that share the same aquifer as their source of groundwater. The Nevada State Engineer determined that this encompasses the area that includes Coyote Spring Valley, Muddy River Springs Area, California Wash, Hidden Valley, Garnet Valley, Kane Springs Valley and the northwest portion of the Black Mountains Area.

² LVVWD and SNWA Petition for Judicial Review, filed June 17, 2020.

1 Cogeneration Associates Numbers 1 and 2 (“Nevada Cogen”); and Georgia-Pacific Gypsum LLC,
2 and Republic Technologies, Inc. (collectively, “Georgia-Pacific”). All petitions were consolidated
3 with SNWA’s petition.³

4 Later, Sierra Pacific Power Company d/b/a NV Energy (“Sierra Pacific”) and Nevada
5 Power Company d/b/a NV Energy (“Nevada Power” and, together with Sierra Pacific, “NV
6 Energy”), Moapa Valley Water District (“MVWD”), the Church of Jesus Christ and of Latter-Day
7 Saints (the “Church”), the City of North Las Vegas (“CNLV”), and Western Elite Environmental,
8 Inc. and Bedroc Limited (collectively, “Bedroc”) ⁴ were granted intervention status in the
9 consolidated petitions for judicial review of Order 1309.

10 On July 13, 2020, Lincoln County Water District and Vidler Water Co. (collectively,
11 “Vidler”) timely filed their Petition for Judicial Review of State Engineer Order 1309 in the
12 Seventh Judicial District Court in Lincoln County, Nevada, identified as Case No. CV-0702520.
13 On August 26, 2020, the Seventh Judicial District Court issued an Order Granting Motion to
14 Change Venue, transferring this matter to the Eighth Judicial District Court in Clark County,
15 Nevada. Vidler appealed the Order Granting Motion to Change Venue to the Nevada Supreme
16 Court, and on April 15, 2021, the Nevada Supreme Court entered its Order of Affirmation. On
17 May 27, 2021, per verbal stipulation by the parties, the Court ordered this matter consolidated into
18 Case No. A-20-816761-C. When transferred to the Eighth Judicial District Court, Vidler’s action
19 was assigned Case No. A-21-833572-J. Notwithstanding the consolidation of all of the cases, each
20 case retained its individual and distinct factual and legal issues.

21 Petitioners in all the consolidated actions filed their Opening Briefs on or about August 27,
22 2021. Respondents State Engineer, Intervenors, and Petitioners who were Respondent-Intervenors
23 filed their Answering Briefs on or about November 24, 2021. Petitioners filed their Reply Briefs on
24 or about January 11, 2022.

25 _____
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27 ³ Stipulation for Consolidation, A-20-816761-C, May 26, 2021.

28 ⁴ Bedroc and CNLV did not file briefs and did not participate in oral argument.

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II.

FACTUAL HISTORY

A. The Carbonate Groundwater Aquifer and the Basins

Much of the bedrock and mountain ranges of Eastern Nevada are formed from a sequence of sedimentary rocks laid down during the Paleozoic Era. These formations are limestones or dolomites, commonly referred to as “carbonates,” due to the chemical composition of the minerals composing the rocks. These formations have been extensively deformed through folding and faulting caused by geologic forces. This deformation has caused extensive fracture and fault systems to form in these carbonate rocks, with permeability enhanced by the gradual solution of minerals. The result is an aquifer system that over time has accumulated large volumes of water with some apparent degree of connection throughout the much of area.⁵ The valley floors in the basins of Eastern Nevada are generally composed of alluvium comprised largely of relatively young (<5 million years) unconsolidated sands, gravels, and clays. This sequence is loosely referred to as the “Alluvial Aquifer,” the aquifer for most shallow wells in the area. Most of the water in the Carbonate Aquifer is present due to infiltration of water thousands of years ago; recent recharge from present day precipitation may represent only a fraction of the water stored.

Approximately 50,000 square miles of Nevada sits atop of this geologic layer of carbonate rock, which contains significant quantities of groundwater.⁶ This carbonate-rock aquifer system contains at least two major “regional flow systems” - continuous, interconnected, and transmissive geologic features through which water flows underground roughly from north to south: the Ash Meadows-Death Valley regional flow system; and the White River-Muddy River Springs system.⁷ These flow systems connect the groundwater beneath dozens of topographic valleys across distances exceeding 200 miles.⁸ The White River-Muddy River Springs flow system, stretching approximately

⁵ State Engineer Record on Appeal (“SE ROA”) 36062-67, Ex. 14; SE ROA 661, Ex. 8.

⁶ SE ROA 659.

⁷ SE ROA 661.

⁸ SE ROA 661.

1 240 miles from southern Elko County in the north to the Muddy River Springs Area in the south,
2 was identified as early as 1966.⁹ The area designated by Order 1309 as the LWRFS consists
3 generally of the southern portion of the White River-Muddy River Springs flow system.¹⁰

4 The Muddy River runs through a portion of the LWRFS before cutting southeast and
5 discharging into Lake Mead.¹¹ Many warm-water springs, including the Muddy River Springs at
6 issue in this litigation, discharge from the regional carbonate groundwater aquifer.¹² The series of
7 springs, collectively referred to as the “Muddy River Springs” in the Muddy River Springs Area
8 hydrographic basin form the headwaters of the Muddy River and provide the only known habitat for
9 the endangered Moapa dace.¹³

10 The Muddy River Springs are directly connected to, and discharge from, the regional
11 carbonate aquifer.¹⁴ Because of this connection, flows from the springs are dependent on the
12 elevation of groundwater within the carbonate aquifer, and can change rapidly in direct response to
13 changes in carbonate groundwater levels.¹⁵ As carbonate groundwater levels decline, spring flows
14 decrease, beginning with the highest-elevation springs.¹⁶

15 As early as 1989, there were concerns that sustained groundwater pumping from the
16 carbonate-rock aquifer would result in water table declines, substantially deplete the water stored in
17 the aquifer, and ultimately reduce or eliminate flow from the warm-water springs that discharge
18 from the aquifer.¹⁷

20 ⁹ SE ROA 11349-59.

21 ¹⁰ *See* SE ROA 11350.

22 ¹¹ SE ROA 41943.

23 ¹² SE ROA 660-61, 53056, 53062.

24 ¹³ SE ROA 663-664, 41959, 48680.

25 ¹⁴ SE ROA 73-75, 34545, 53062.

26 ¹⁵ SE ROA 60-61, 34545.

27 ¹⁶ SE ROA 46, 34545.

28 ¹⁷ *See* SE ROA 661.

1 The general rule in Nevada is that one acquires a water right by filing an application to
2 appropriate water with the Nevada Division of Water Resources (“DWR”). If the DWR approves
3 the application, a “Permit to Appropriate” issues. Nevada has adopted the principle of “first in
4 time, first in right,” also known as “priority.” The priority of a water right is determined by the
5 date a permit is applied for. Nevada’s water resources are managed through administrative units
6 called “hydrographic basins,” which are generally defined by topography, more or less reflecting
7 boundaries between watersheds. Nevada is divided into 232 hydrographic basins (256
8 hydrographic basins and sub-basins, combined) based upon the surface geography and subsurface
9 flow.

10 The priority of groundwater rights is determined relative to the water rights holder within
11 the individual basins. If there is not enough water to serve all water right holders in a particular
12 basin, “senior” appropriators are satisfied first in order of priority: the rights of “junior”
13 appropriators may be curtailed. Historically, The Nevada State Engineer has managed
14 hydrographic basins in a basin-by-basin manner for decades,¹⁸ and administers and manages each
15 basin as a discrete hydrologic unit.¹⁹ The State Engineer keeps and maintains annual pumping
16 inventories and records on a basin-by-basin basis.²⁰

17 This administrative structure has worked reasonably well for basins where groundwater is
18 pumped from “basin fill” aquifers or alluvium, where the annual recharge of the groundwater
19 historically has been estimated based upon known or estimated precipitation data - establishing the
20 amount of groundwater that is recharged annually and can be extracted sustainably from a basin,
21 known as the “perennial yield.” In reality, many hydrographic basins are severely over-appropriated,
22 due to inaccurate estimates, over pumping, domestic wells, changing climate conditions, etc.

23 Administration of groundwater rights is made particularly complex when the main source of
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26 ¹⁸SE ROA 654, 659, 699, 726, 755.
27 ¹⁹ SE ROA 949-1069.
28 ²⁰ SE ROA 1070-1499.

1 groundwater is not “basin fill” or alluvium, but aquifers found in permeable geologic formations
2 lying beneath the younger basin fill, and which may underlie large regions that are not well defined
3 by the present-day hydrographic basins. This is the case with Nevada’s “Carbonate Aquifer.”

4 When necessary, the State Engineer may manage a basin that has been designated for
5 administration. NRS 534.030 outlines the process by which a particular basin can be designated for
6 administration by the State Engineer. In the instant case, six of the seven basins affected by Order
7 No. 1309 had already been designated for management under NRS 534.030, including:

- 8 a. Coyote Spring Valley Hydrographic Basin (“Coyote Spring Valley”), Basin No. 210, since
9 1985;
- 10 b. Black Mountains Area Hydrographic Basin (“Black Mountains Area”), Basin No. 215, since
11 November 22, 1989;
- 12 c. Garnet Valley Hydrographic Basin (“Garnet Valley”), Basin No. 216, since April 24, 1990;
- 13 d. Hidden Valley Hydrographic Basin (“Hidden Valley”), Basin No. 217, since October 24,
14 1990;
- 15 e. California Wash Hydrographic Basin (“California Wash”), Basin No. 218, since August 24,
16 1990; and
- 17 f. Muddy River Springs Area Hydrographic Basin (“Muddy River Springs Area”), Basin No.
18 219, since July 14, 1971.²¹

19 Kane Springs Valley (“Kane Springs Valley”), Basin 206, which was also affected by
20 Order No. 1309, had not been designated previously for administration.²²
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23 ²¹ See SE ROA 2-3, 71-72.

24 ²² The Court takes judicial notice of Kane Springs Valley Basin’s status of not being designated for administration per
25 NRS 534.030. <http://water.nv.gov/StateEngineersOrdersList.aspx> (available online at the Division of Water Resources.
26 “Mapping& Data” tab, under “Water Rights” tab, “State Engineer’s Orders List and Search”). Facts that are subject to
27 judicial notice “are facts in issue or facts from which they may be inferred.” NRS 47.130(1). To be judicially noticed, a
28 fact must be “[g]enerally known” or “capable of accurate and ready determination by resort to sources whose accuracy
cannot reasonably be questioned.” NRS 47.130(2); *Andolino v. State*, 99 Nev. 346, 351, 662 P.2d 631, 633-34 (1983)
(courts may take judicial notice of official government publications); *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir.
1994) (courts may take judicial notice of documents obtained from administrative agencies); *Greeson v. Imperial Irr.*
Dist., 59 F.2d 529, 531 (9th Cir.1932) (courts may take judicial notice of “public documents”).

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B. The Muddy River Decree

Over one hundred years ago, this Court issued the Muddy River Decree of 1920 (sometimes referred to herein as the “Decree” or “Muddy River Decree”), which established water rights on the Muddy River.²³ The Muddy River Decree recognized specific water rights,²⁴ identified each water right holder on the Muddy River, and quantified each water right.²⁵ MVIC specifically owns certain rights “. . . to divert, convey, and use all of said waters of said River, its head waters, sources of supply and tributaries, save and except the several amounts and rights hereinbefore specified and described . . . and to divert said waters, convey and distribute the same to its present stockholders, and future stockholders, and other persons who may have acquired or who may acquire temporary or permanent rights through said Company. . .”²⁶. The Decree appropriates all water of the Muddy River at the time the Decree was entered, which was prior to any other significant development in the area. The predevelopment flow averaged approximately 33,900 acre feet per annum (“afa”).²⁷ The rights delineated through The Muddy River Decree are the oldest and most senior rights in the LWRFS.

C. The Moapa Dace

The Moapa dace (*Moapa coriacea*) is a thermophilic minnow endemic to the upper spring-fed reaches Muddy River, and has been federally listed as endangered since 1967.²⁸ Between 1933

²³ See Judgment and Decree, *Muddy Valley Irrigation Co. v. Moapa and Salt Lake Produce Co.* (the “Muddy River Decree” or “Decree”) (March 11, 1920) (SE ROA 33770-33816).

²⁴ SE ROA 33770-816. Specifically, the Muddy River Decree finds “[t]hat the aggregate volume of the several amounts and quantities of water awarded and allotted to the parties . . . is the total available flow of the said Muddy River and consumes and exhausts all of the available flow of the said Muddy River, its headwaters, sources of supply and tributaries.” SE ROA 33792-33793.

²⁵ SE ROA 33798-806.

²⁶ SE ROA 33775.

²⁷ See SNWA Report (June 2019) (SE ROA 41930 – 42072) at § 3.4.1 (SE ROA 41962) describing the predevelopment flows as measured in 1946 as 33,900 afa and the average flow measured from July 1, 1913 to June 30, 1915 and October 1, 1916 to September 30, 1917 as 34,000 afa. The NSE further recognizes 33,900 afa as the predevelopment flow. See Order 1309 (SE ROA 2-69) at p. 61 (SE ROA 62).

²⁸ SE ROA 5.

1 and 1950, the Moapa dace was abundant in the Muddy River and was estimated to inhabit as many
2 as 25 individual springs and up to 10 miles of stream habitat. However, by 1983, the species only
3 occurred in springs and two miles of spring outflows. Currently, approximately 95 percent of the
4 total Moapa dace population occurs within 1.78 miles of one major tributary system that flows from
5 three high-elevation spring complexes within the Muddy River Springs Area.²⁹

6 Threats to the Moapa Dace include non-native predatory fishes, habitat loss from water
7 diversions and impoundments, wildfire risk from non-native vegetation, and reductions to surface
8 spring-flows resulting from groundwater development.³⁰ Because the Moapa dace is entirely
9 dependent on spring flow, protecting the dace necessarily involves protecting the warm spring
10 sources of the Muddy River.³¹

11 **D. Order 1169**

12 Significant pumping of the Carbonate Aquifer in the LWRFS began in the 1980s and
13 1990s. Initial assessments of the water available in the Aquifer suggested it would provide a new
14 abundant source of water for Southern Nevada. Because the prospective water resources of the
15 LWRFS carbonate appeared to be substantial, nearly 100 water right applications for over 300,000
16 acre feet were filed in State Engineer's office.³²

17 By 2001, the State Engineer had granted more than 40,000 acre feet of applications in the
18 LWRFS. The State Engineer considered additional applications for groundwater in Coyote Spring
19 Valley and adjacent hydrographic basins. However, concerned over the lack of information
20 regarding the sustainability of water resources from the Carbonate Aquifer, the State Engineer
21 began hearings in July and August 2001 on water right applications.³³

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24 _____
25 ²⁹ SE ROA 47169.

26 ³⁰ SE ROA 47160.

27 ³¹ SE ROA 42087.

28 ³² SE ROA 4, Ex. 1.

³³ *Id.*

1 On March 8, 2002, the State Engineer issued Order 1169 to delay consideration of new
2 water right applications and require the pumping of existing groundwater to determine what impact
3 increased groundwater pumping would have on senior water rights and the environment at the
4 Muddy River (“Aquifer Test”).³⁴ Order 1169 held in abeyance all applications for the
5 appropriation of groundwater from the carbonate-rock aquifer system located in the Coyote Spring
6 Valley Basin (Basin 210), Black Mountains Area Basin (Basin 215), Garnet Valley Basin (Basin
7 216), Hidden Valley Basin (Basin 217), Muddy River Springs aka Upper Moapa Valley Basin
8 (Basin 210), and Lower Moapa Valley Basin (Basin 220).³⁵ California Wash (Basin 218) was
9 subsequently added to this Order.³⁶

10 Notably, Kane Springs was not included in the Order 1169 study area. In Ruling 5712, the
11 State Engineer specifically determined Kane Springs would not be included in the Order 1169
12 study area because there was no substantial evidence that the appropriation of a limited quantity of
13 water in Kane Springs would have any measurable impact on the Muddy River Springs that
14 warranted the inclusion of Kane Springs in Order 1169.³⁷ The State Engineer specifically rejected
15 the argument that the Kane Springs rights could not be appropriated based upon senior
16 appropriated rights in the down gradient basins.³⁸

17 Order 1169A, issued December 21, 2012, set up a test to “stress” the Carbonate Aquifer
18 through two years of aggressive pumping, combined with examination of water levels in monitoring
19 wells located throughout the LWRFS.³⁹ Participants in the Aquifer test were Southern Nevada
20 Water Authority (“SNWA”), Las Vegas Valley Water District (“LVVWD”), Moapa Valley Water
21 District, Coyote Springs Investments, LLC (“Coyote Springs”), Moapa Band of Paiutes, and Nevada
22

23 ³⁴ SE ROA 654-669.

24 ³⁵ See SE ROA 659, 665.

25 ³⁶ SE ROA 659-69, Ex. 8; see also SE ROA 654, Ex. 7.

26 ³⁷ SE ROA 719.

27 ³⁸ SE ROA 713.

28 ³⁹ SE ROA 654-58, Ex. 7.

1 Power Company. Pumping included 5,300 afa in Coyote Spring Valley, 14,535 afa total carbonate
2 pumping, and 3,840 afa alluvial pumping.⁴⁰ Pumping tests effects were examined at 79 monitoring
3 wells and 11 springs and streamflow monitoring sites.⁴¹ The Kane Springs basin was not included in
4 the Order 1169 aquifer testing, and Kane Springs basin water right holders were not involved, not
5 provided notice, and did not participate in the aquifer testing, monitoring or measurements,
6 submission of reports, proceedings and actions taken by the State Engineer pursuant to Order 1169.⁴²

7 The State Engineer’s conclusions from the pump test found an “unprecedented decline” in
8 high-altitude springs, an “unprecedented decline” in water levels, and that additional pumping in
9 the central part of Coyote Spring Valley or the Muddy River Spring Area could not occur without
10 conflict with existing senior rights, including decreed surface water rights on the Muddy River, or
11 the habitat of the Moapa Dace. The State Engineer attributed observed decreases in water levels in
12 other areas of the basins to the pumping during the Order 1169 test and concluded that the test
13 demonstrated connectivity within the Carbonate Aquifer of the LWRFS. On this basis, the State
14 Engineer determined that the five basin LWRFS should be jointly managed.

15 In 2014, and based on the results of the Aquifer Test, the State Engineer issued Rulings
16 6254–6261 on January 29, 2014 denying all the pending groundwater applications in Coyote
17 Springs Valley, Muddy River Springs Area, California Wash, Hidden Valley, Garnet Valley, and
18 certain portions of the Black Mountains Area.⁴³ His rationale in each ruling was the same:
19 “because these basins share a unique and close hydrologic connection and share virtually all of the
20 same source and supply of water, unlike other basins in Nevada, these five basins will be jointly
21 managed.”⁴⁴

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24 ⁴⁰ The Order uses the term acre-foot per year (afy), but for consistency with common usage, this Court uses the
equivalent term acre feet per annum.
25 ⁴¹ SE ROA 6, Ex. 1.
26 ⁴² SE ROA 36230 - 36231.
27 ⁴³ SE ROA 726 – 948.
28 ⁴⁴ *See e.g.*, SE ROA 479.

1 **E. Interim Order 1303 and proceedings**

2 On January 11, 2019 -- nearly 17 years after issuing Order 1169, then-State Engineer Jason
3 King issued Interim Order 1303 to start a two-phased administrative process to resolve the
4 competing interests for water resources in the LWRFS.⁴⁵ He created the LWRFS as a joint
5 administrative unit and invited stakeholders to participate in an administrative hearing to address
6 the factual questions of what the boundary of the LWRFS should be, and what amount of
7 groundwater could be sustainably pumped in the LWRFS.⁴⁶ The LWRFS is the first multi-basin
8 area that the Nevada State Engineer has designated in state history. The ordering provisions in
9 Interim Order 1303 provide in pertinent part:

- 10 1. The Lower White River Flow System consisting of the Coyote Spring Valley,
11 Muddy River Springs Area, California Wash, Hidden Valley, Garnet Valley,
12 and the portion of the Black Mountains Area as described in this Order, is
13 herewith designated as a joint administrative unit for purposes of
14 administration of water rights. All water rights within the Lower White River
15 Flow System will be administered based upon their respective date of
16 priorities in relation to other rights within the regional groundwater unit.

17 Any stakeholder with interests that may be affected by water right
18 development within the Lower White River Flow System may file a report in
19 the Office of the State Engineer in Carson City, Nevada, no later than the
20 close of business on Monday, June 3, 2019.

21 Reports filed with the Office of the State Engineer should address the
22 following matters:

- 23 a. The geographic boundary of the hydrologically connected groundwater
24 and surface water systems comprising the Lower White River Flow
25 System;
- 26 b. The information obtained from the Order 1169 aquifer test and
27 subsequent to the aquifer test and Muddy River headwater spring flow as
28 it relates to aquifer recovery since the completion of the aquifer test;
- 29 c. The long-term annual quantity of groundwater that may be pumped
30 from the Lower White River Flow System, including the relationships
31 between the location of pumping on discharge to the Muddy River
32 Springs, and the capture of Muddy River flow;

33 ⁴⁵ SE ROA 635-53, Ex. 6.

34 ⁴⁶ SE ROA 82-83.

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- d. The effects of movement of water rights between alluvial wells and carbonate wells on deliveries of senior decreed rights to the Muddy River; and,
- e. Any other matter believed to be relevant to the State Engineer's analysis.

SE ROA 647-48, Ex. 6.

The State Engineer identified the LWRFS as including the following hydrographic basins: Coyote Spring Valley, a portion of Black Mountains Area, Garnet Valley, Hidden Valley, California Wash, and the Muddy River Springs Area.⁴⁷ Kane Springs continued to be excluded as part of the LWRFS multi-basin area in Interim Order 1303.⁴⁸

In July and August 2019, reports and rebuttal reports were submitted discussing the four matters set forth in Interim Order 1303. On July 25, 2019, the State Engineer issued a Notice of Pre-Hearing Conference, and on August 9, 2019, the State Engineer held a prehearing conference. On August 23, 2019, the State Engineer issued a Notice of Hearing (which it amended on August 26, 2019), noting that the hearing would be “the first step” in determining how to address future management decisions, including policy decisions, relating to the LWRFS.⁴⁹ He also indicated that the legal question of whether groundwater pumping in the LWRFS conflicts with senior water rights would be addressed in Phase 2 of the LWRFS administrative process.⁵⁰

The Hearing Officer made it clear that “any other matter believed to be relevant” as specified in ordering paragraph 1(e) of Order 1303 would not include discussion of the administrative impacts of consolidating the basins or any policy matters affected by its decision. The State Engineer conducted a hearing on the reports submitted under Order 1303 between September 23, 2019, and October 4, 2019. At the start of the administrative hearing, the State Engineer reminded the parties the public administrative hearing was not a “trial-type” proceeding,

⁴⁷ SE ROA 70-88.
⁴⁸ *Id.*
⁴⁹ SE ROA 263, Ex. 2 (Notice); SE ROA 285, Ex. 3 (Amended Notice).
⁵⁰ SE ROA 522.

1 not a contested adversarial proceeding.⁵¹ Cross-examination was limited to between 4-17 minutes
2 per participant depending on the length of time given to a participant to present its reports.⁵²

3 Following the submission by the participating stakeholders of closing statements at the
4 beginning of December 2019, the State Engineer engaged in no additional public process and
5 solicited no additional input regarding “future management decisions, including policy decisions,
6 relating to the Lower White River Flow System basins.”⁵³

7 **F. Order 1309**

8 On June 15, 2020, the State Engineer issued Order 1309.⁵⁴ The first three ordering
9 paragraphs state as follows:

- 10 1. The Lower White River Flow System consisting of the Kane Springs Valley,
11 Coyote Spring Valley, Muddy River Springs Area, California Wash, Hidden
12 Valley, Garnet Valley, and the northwest portion of the Black Mountains Area
13 as described in this Order, is hereby delineated as a single hydrographic basin.
14 The Kane Springs Valley, Coyote Spring Valley, Muddy River Springs Area,
15 California Wash, Hidden Valley, Garnet Valley and the northwest portion of
16 the Black Mountains Area are hereby established as sub-basins within the
17 Lower White River Flow System Hydrographic Basin.
- 18 2. The maximum quantity of groundwater that may be pumped from the Lower
19 White River Flow System Hydrographic Basin on an average annual basis
20 without causing further declines in Warm Springs area spring flow and flow in
21 the Muddy River cannot exceed 8,000 afa and may be less.
- 22 3. The maximum quantity of water that may be pumped from the Lower White
23 River Flow System Hydrographic Basin may be reduced if it is determined
24 that pumping will adversely impact the endangered Moapa dace.

25 SE ROA 66, Ex. 1.

26 The Order does not provide guidance about how the new “single hydrographic basin” will
27 be administered and provided no clear analysis as to the basis for the 8000 afa number for the
28 maximum sustainable yield.

25 ⁵¹ SE ROA 52962, Transcript 6:4-6, 24 to 7:1 (Sept. 23, 2019) (Hearing Officer Fairbank).

26 ⁵² SE ROA 52962, Transcript 7:5-7 (Sept. 23, 2019) (Hearing Officer Fairbank).

27 ⁵³ See SE ROA 285, Ex. 3.

28 ⁵⁴ SE ROA 2-69.

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In its Order, the State Engineer indicated that it “considered this evidence and testimony [regarding basin inclusion and basin boundary] on the basis of a common set of criteria that are consistent with the original characteristics considered critical in demonstrating a close hydrologic connection requiring joint management in Rulings 6254-6261.”⁵⁵ However, the State Engineer did not disclose these criteria to the stakeholders before or during the Order 1303 proceedings. Instead, he disclosed them for the first time in Order 1309, after the stakeholders had engaged in extensive investigations, expert reporting, and factual hearing requested by Order 1303. The criteria are:

1. Water level observations whose spatial distribution indicates a relatively uniform or flat potentiometric surface are consistent with a close hydrologic connection.
2. Water level hydrographs that, in well-to-well comparisons, demonstrate a similar temporal pattern, irrespective of whether the pattern is caused by climate, pumping, or other dynamic is consistent with a close hydrologic connection.
3. Water level hydrographs that demonstrate an observable increase in drawdown that corresponds to an increase in pumping and an observable decrease in drawdown, or a recovery, that corresponds to a decrease in pumping, are consistent with a direct hydraulic connection and close hydrologic connection to the pumping location(s).
4. Water level observations that demonstrate a relatively steep hydraulic gradient are consistent with a poor hydraulic connection and a potential boundary.
5. Geological structures that have caused a juxtaposition of the carbonate-rock aquifer with low permeability bedrock are consistent with a boundary.
6. When hydrogeologic information indicate a close hydraulic connection (based on criteria 1-5), but limited, poor quality, or low resolution water level data obfuscate a determination of the extent of that connection, a boundary should be established such that it extends out to the nearest mapped feature that juxtaposes the carbonate-rock aquifer with low-permeability bedrock, or in the absence of that, to the basin boundary.

⁵⁵ SE ROA 48-49, Ex. 1.

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After consideration of the above criteria, the State Engineer decided to finalize what was preliminarily determined in Interim Order 1303, and consolidated several administrative units into a single hydrographic basin, designated as the “Lower White River Flow System” or “LWRFS.” The State Engineer also added the previously excluded Kane Springs Hydrographic Basin to the LWRFS,⁵⁶ and modified the portion of the Black Mountains area that is in the LWRFS. Although Order 1309 did not specifically address priorities or conflict of rights, as a result of the consolidation of the basins, the relative priority of all water rights within the seven affected basins will be reordered and the priorities will be considered in relation to all water rights holders in the consolidated basins, rather than in relation only to the other users within the original separate basins.

G. Petitioners and Their Respective Water Rights or Interests

- a. Southern Nevada Water Authority and Las Vegas Valley Water District are government agencies serving Southern Nevada’s water needs, and own water rights in Coyote Springs Valley, Hidden Valley, Garnet Valley, and a significant portion of the Muddy River decreed rights.
- b. Coyote Spring Investments, LLC is a developer who owns water rights in Coyote Spring Valley, Kane Springs Valley, and California Wash;
- c. Apex Holding Company, LLC and Dry Lake Water LLC own real estate and water rights to the area of land commonly referred to as the Apex Industrial Park, in Garnet Valley and Black Mountains Area;
- d. The Center Biological Diversity is a national nonprofit conservation organization which does not hold any water rights, but has educational, scientific, biological, aesthetic and spiritual interests in the survival and recovery of the Moapa Dace;
- e. Muddy Valley Irrigation Company is a private company that owns most of the decreed rights

⁵⁶ The Court notes that the Nevada State Engineer determined that Kane Springs should be included in this joint management area, even though the Kane Springs Basin had not been designated previously for management through the statutory process delineated in under NRS 534.030.

- 1 in the Muddy River;
- 2 f. Nevada Cogeneration Associates Numbers 1 and 2, who operate gas-fired facilities at the
- 3 south end of the LWRFS and have water rights in the Black Mountain Area;
- 4 g. Georgia-Pacific Gypsum LLC, and Republic Technologies, Inc. are industrial companies that
- 5 have water rights in the Garnet Valley Hydrographic Basin;
- 6 h. Lincoln County Water District and Vidler Water Co. are a public water district and a private
- 7 company, respectively, and own water rights in Kane Springs Valley.

8 **III.**

9 **DISCUSSION**

10 **STANDARD OF REVIEW**

11 An aggrieved party may appeal a decision of the State Engineer pursuant to NRS 533.450(1).
12 The proceedings, which are heard by the court, must be informal and summary, but must afford the
13 parties a full opportunity to be heard. NRS 533.450(2). The decision of the State Engineer is
14 considered to be prima facie correct, and the burden of proof is on the party challenging the
15 decision. NRS 533.450(10).

16 **A. Questions of Law**

17 Questions of statutory construction are questions of law which require de novo review.
18 The Nevada Supreme Court has repeatedly held courts have the authority to undertake an
19 independent review of the State Engineer’s statutory construction, without deference to the State
20 Engineer’s determination. *Andersen Family Assoc. v. Ricci*, 124 Nev. 182, 186, 179 P.3d 1201,
21 1203 (2008) (citing *Bacher v. State Engineer*, 122 Nev. 1110, 1115, 146 P.3d 793, 798 (2006) and
22 *Kay v. Nunez*, 122 Nev. 1100, 1103, 146 P.3d 801, 804 (2006)).

23 Any “presumption of correctness” of a decision of the State Engineer as provided by NRS
24 533.450(10), “does not extend to ‘purely legal questions,’ such as ‘the construction of a statute,’
25 as to which ‘the reviewing court may undertake independent review.’” *In re State Engineer*
26 *Ruling No. 5823*, 128 Nev. 232, 238-239, 277 P.3d 449, 453 (2012) (quoting *Town of Eureka v.*
27 *State Engineer*, 108 Nev. 163, 165, 826 P.2d 948, 949 (1992)). At no time will the State
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1 Engineer’s interpretation of a statute control if an alternative reading is compelled by the plain
2 language of the statute. *See Andersen Family Assoc.*, 124 Nev. at 186, 179 P.3d at 1203.

3 Although “[t]he State Engineer’s ruling on questions of law is persuasive... [it is] not
4 entitled to deference.” *Sierra Pac. Indus. v. Wilson*, 135 Nev. Adv. Op. 13, 440 P.3e 37, 40
5 (2019). A reviewing court is free to decide legal questions without deference to an agency
6 determination. *See Jones v. Rosner*, 102 Nev. 215, 216-217, 719 P.2d 805, 806 (1986); *accord*
7 *Pyramid Lake Paiute Tribe v. Ricci*, 126 Nev. 521, 525, 245 P.3d 1145, 1148 (2010) (“[w]e
8 review purely legal questions without deference to the State Engineer’s ruling.”).

9 **B. Questions of Fact**

10 The Court’s review of the Order 1309 is “in the nature of an appeal” and limited to the
11 record before the State Engineer. *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979). On
12 appeal, a reviewing court must “determine whether the evidence upon which the engineer based
13 his decision supports the order.” *State Engineer v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205
14 (1991) (citing *State Engineer v. Curtis Park*, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985)).

15 As to questions of fact, the State Engineer’s decision must be supported by “substantial
16 evidence in the record [.]” *Eureka Cty. v. State Engineer*, 131 Nev. 846, 850, 359 P.3d 1114, 1117
17 (2015) (quoting *Town of Eureka*, 108 Nev. at 165, 826 P.2d at 949). Substantial evidence is “that
18 which a reasonable mind might accept as adequate to support a conclusion.” *Bacher*, 122 Nev. at
19 1121, 146 P.3d at 800 (finding that a reasonable person would expect quantification of water
20 rights needed and no evidence of such quantification or calculations by the State Engineer is
21 included in the record). The Court may not substitute its judgment for that of the State Engineer,
22 “pass upon the credibility of the witness nor reweigh the evidence.” *Revert*, 95 Nev. at 786, 603
23 P.2d at 264.

24 Where a decision is arbitrary and capricious it is not supported by substantial evidence.
25 *See Clark Cty. Educ. Ass’n v. Clark Cty. Sch. Dist.*, 122 Nev. 337, 339-40, 131 P.3d 5, 7 (2006)
26 (concluding that an arbitrator’s award was “supported by substantial evidence and therefore not
27 arbitrary, capricious, or unsupported by the arbitration agreement”).

28 In *Revert*, 95 Nev. at 787, 603 P.2d at 264–65, the Nevada Supreme Court noted:

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The applicable standard of review of the decisions of the State Engineer, limited to an inquiry as to substantial evidence, presupposes the fullness and fairness of the administrative proceedings: all interested parties must have had a ‘full opportunity to be heard,’ *See* NRS 533.450(2); the State Engineer must clearly resolve all the crucial issues presented, *See Nolan v. State Dep’t. of Commerce*, 86 Nev. 428, 470 P.2d 124 (1970) (on rehearing); the decisionmaker must prepare findings in sufficient detail to permit judicial review, *Id.*; *Wright v. State Insurance Commissioner*, 449 P.2d 419 (Or.1969); *See also* NRS 233B.125. When these procedures, grounded in basic notions of fairness and due process, are not followed, and the resulting administrative decision is arbitrary, oppressive, or accompanied by a manifest abuse of discretion, this court will not hesitate to intervene. *State ex rel. Johns v. Gragson*, 89 Nev. 478, 515 P.2d 65 (1973).

Thus, in order to survive review, Order 1309 must be statutorily authorized, resolve all crucial issues presented, must include findings in detail to permit judicial review, and must be based on substantial evidence.

CONCLUSIONS OF LAW

A. The State Engineer Did Not Have the Authority to Jointly Administrate Multiple Basins by Creating the LWRFS “Superbasin,” Nor Did He Have the Authority to Conjunctively Manage This Superbasin.

The powers of the State Engineer are limited to those set forth in the law. *See, e.g., City of Henderson v. Kilgore*, 122 Nev. 331, 334, 131 P.3d 11, 13 (2006); *Clark Cty. School Dist. v. Clark Cty. Classroom Teachers Ass’n*, 115 Nev. 98, 102, 977 P.2d 1008, 1011 (1999) (*en banc*) (An administrative agency’s powers “are limited to those powers specifically set forth by statute.”); *Clark Cty. v. State, Equal Rights Comm’n*, 107 Nev. 489, 492, 813 P.2d 1006, 1007 (1991)); *Wilson v. Pahrump Fair Water, LLC*, 137 Nev. Adv. Op. 2, 481 P.3d 853, 856(2021) (The State Engineer’s powers thereunder are limited to “only those . . . which the legislature expressly or implicitly delegates.”); *Andrews v. Nevada State Bd. of Cosmetology*, 86 Nev. 207, 208, 467 P.2d 96, 97 (1970) (“Official powers of an administrative agency cannot be assumed by the agency, nor can they be created by the courts in the exercise of their judicial function. The grant of authority to an agency must be clear.”) (*internal citation omitted*).

The Nevada Supreme Court has made clear that the State Engineer is a creature of statute and his or her actions must be within a statutory grant of authority. *Pahrump Fair Water LLC*, 481 P.3d

1 at 856 (explaining that “[t]he State Engineer’s powers thereunder are limited to ‘only those . . .
2 which the legislature expressly or implicitly delegates’” (quoting *Clark Cty.*, 107 Nev. at 492, 813
3 P.2d at 1007)); *see also Howell v. Ricci*, 124 Nev. 1222, 1230, 197 P.3d 1044, 1050 (2008) (holding
4 that the State engineer cannot act beyond his or her statutory authority).

5 The State Engineer’s authority is outlined in NRS Chapters 532, 533 and 534. Chapter 533
6 deals generally with “water rights,” which addresses surface water as well as groundwater, and
7 chapter 534 is limited to groundwater, dealing specifically with “underground water and wells.”

8 In the instant case, the State Engineer relied on the following specific statutes as authority for
9 combining prior independently designated basins as a superbasin newly named the LWRFS, and
10 then conjunctively managing⁵⁷ this superbasin:

- 11 • NRS 533.024(1)(c), which is a legislative declaration “encourag[ing] the State Engineer to
12 consider the best available science in rendering decisions concerning the available surface
13 and underground sources of water in Nevada.”⁵⁸
- 14 • NRS 534.024(1)(e), another legislative declaration that states the policy of Nevada is “[t]o
15 manage conjunctively the appropriation, use and administration of all waters of this State,
16 regardless of the source of the water.”⁵⁹
- 17 • NRS 534.020, which provides that all waters of the State belong to the public and are subject
18 to all existing rights.⁶⁰
- 19 • NRS 532.120, which allows the State Engineer to “make such reasonable rules and
20 regulations as may be necessary for the proper and orderly execution of the powers conferred
21 by law.”⁶¹

22 ⁵⁷ The Nevada Water Words Dictionary, defines “Conjunctive (Water) Use” in part, as “the integrated use and
23 management of hydrologically connected groundwater and surface water.” *Water Words Dictionary, Nevada Division of
24 Water Planning* (2022) (available online at <http://water.nv.gov/WaterPlanDictionary.aspx>) The same dictionary
25 separately defines “Conjunctive Management” as, “the integrated management and use of two or more water resources,
26 such as a (groundwater) aquifer and a surface body of water.” *Id.*

27 ⁵⁸ SE ROA 43.

28 ⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ SE ROA 44.

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- NRS 534.110(6), which allows the State Engineer to conduct investigations into any basin where average annual replenishment is not adequate for the needs of all water rights holders, and then subsequently restrict withdrawals to conform to priority rights.⁶²
- NRS 534 and specifically NRS 534.120, which allows the State Engineer to make such rules, regulations and orders as are deemed essential for the welfare of an area where the groundwater basin is being depleted.”⁶³

However, as further discussed below, the State Engineer’s reliance on these statutes for authority is misplaced, and his actions upend the bedrock principles of the prior appropriation doctrine.

1. **The Prior Appropriation Doctrine**

The doctrine of prior appropriation has been part of Nevada’s common law since the 1800’s, and is a fundamental principle of water law in Nevada. *See Lobdell v. Simpson*, 2 Nev. 274, 277-78 (1866). “An appropriative right ‘may be described as a state administrative grant that allows the use of a specific quantity of water for a specific beneficial purpose if water is available in the source free from the claims of others with earlier appropriations.’” *Desert Irr., Ltd. v. State*, 113 Nev. 1049, 1051 n.1, 944 P.2d 835, 837 (1997) (quoting Frank J. Trelease & George A. Gould, *Water Law Cases and Materials* 33 (4th ed. 1986)).

“Water rights are given ‘subject to existing rights,’ NRS 533.430(1), given dates of priority, NRS 533.265(2)(b), and determined based on relative rights, NRS 533.090(1)-(2).” *Mineral Cty. v. Lyon Cty.*, 136 Nev. 503,513, 473 P.3d 418, 426 (2020). Thus, “[i]n Nevada, the doctrine of prior appropriation determines the priority of both pre-1905 vested water rights and modern statutory water law.” *Rand Properties, LLC v. Filippini*, 484 P.3d 275, Docket 78319 at 2 (Nev. 2021) (unpublished disposition). It is universally understood that the priority of a water right is its most valuable component. *See Gregory J. Hobbs, Jr., Priority: The Most Misunderstood Stick in the Bundle*, 32 *Envtl. L.* 37, 43 (2002) (“Priority determines the value of a water right”).

“A priority in a water right is property in itself”; therefore, “to deprive a person of his

⁶² *Id.*

⁶³ *Id.*

1 priority is to deprive him of a most valuable property right.” *Colorado Water Conservation*
2 *Bd. v. City of Cent.*, 125 P.3d 424, 434 (Colo. 2005) (internal quotation marks omitted). “A loss of
3 priority that renders rights useless ‘certainly affects the rights’ value’ and ‘can amount to a de facto
4 loss of rights.”” *Wilson v. Happy Creek, Inc.*, 135 Nev. 301, 313, 448 P.3d 1106, 1115 (2019)
5 (quoting *Andersen Family Assocs.*, 124 Nev. at 190-1, 179 P.3d at 1201).

6 Nevada’s statutory water law reflects the importance of priority. Not only did the
7 Legislature choose not to bestow the State Engineer with discretion to alter priority rights, but it also
8 affirmatively requires the State Engineer to preserve priority rights when performing the State
9 Engineer’s statutory duties. *See, e.g.*, NRS 534.110(6) (providing that any curtailment “be restricted
10 to conform to priority rights”); NRS 534.110(7) (same); NRS 533.040(2) (“If at any time it is
11 impracticable to use water beneficially or economically at the place to which it is appurtenant, the
12 right may be severed from the place of use and be simultaneously transferred and become
13 appurtenant to another place of use, in the manner provided in this chapter, without losing priority of
14 right.”).

15 The prior appropriation doctrine in Nevada, “the driest state in the Nation”⁶⁴ becomes
16 particularly critical when, as in the instant case, there is not enough water to satisfy all of the
17 existing rights of the current water right holders, and the threat of curtailment looms ominously in
18 the near future. One of the greatest values of a senior priority right is the assurance that the holder
19 will be able to use water even during a time of water shortage because junior water right holders will
20 be curtailed first. Thus, senior right holders rely on their senior priority rights when developing
21 businesses, entitling and permitting land development, negotiating agreements, making investments,
22 obtaining permits and various approvals from State and local agencies, and generally making
23 financial and other decisions based on the relative certainty of their right.

24 Priority in time of a right is only as valuable as where the holder stands in relation to others
25 in the same situation, or more specifically in this case, in the same basin. As the statutes are written,
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28 ⁶⁴ *United States v. State Engineer*, 117 Nev. 585, 592, 27 P.3d 51, 55 (2001)(Becker, J., concurring in part and
dissenting in part).

1 water right holders only compete in time for their “place in line” with other water right holders in
2 their same basin. Therefore, the year that one acquires a priority right is only as important as the
3 year that other water right holders in your basin acquired theirs. It is in this setting that State
4 Engineer has issued Order 1309.

5 **2. Joint Administration**

6 The State Engineer’s position is that the “best available science” demonstrates that the
7 seven⁶⁵ named hydrographic basins are so hydrologically interconnected that science dictates they
8 must be managed together in one superbasin. However, NRS 533.024(1)(c) is a policy declaration
9 of the Legislature’s intent that simply “encourages” the State Engineer “to consider the best
10 available science in rendering decisions” that concern water he has authority to manage. NRS
11 533.024(1)(c).

12 Statements of policy from the Legislature do not serve as a basis for government action, but
13 rather inform the interpretation of statutes that authorize specific action. *See, Pawlik v. Deng*, 134
14 Nev. 83, 85, 412 P.3d 68, 71 (2018). In *Pawlik*, the Nevada Supreme Court expressed the relevance
15 of statements of policy in terms as follows: “if the statutory language is subject to two or more
16 reasonable interpretations, the statute is ambiguous, and we then look beyond the statute to the
17 legislative history and interpret the statute in a reasonable manner ‘in light of the policy and the
18 spirit of the law.’” *Id.* (quoting *J.E. Dunn Nw., Inc. v. Corus Constr. Venture, LLC*, 127 Nev. 72, 79,
19 249 P.3d 501, 505 (2011)).

20 While such statements of policy are accorded deference in terms of statutory interpretation,
21 the Nevada Supreme Court has specifically held that they are not binding. *See McLaughlin v. Hous.*
22 *Auth. of the City of Las Vegas*, 227 P.2d 206, 93 (1951) (“It has often been said that the declaration
23 of policy by the legislature, though not necessarily binding or conclusive upon the courts, is entitled
24 to great weight, and that it is neither the duty nor prerogative of the courts to interfere in such
25 legislative finding unless it clearly appears to be erroneous and without reasonable foundation.”); *see*
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⁶⁵ More accurately, the LWRFS is comprised of six hydrographic basins and a portion of a seventh.

1 also *Clean Water Coal. v. M Resort, LLC*, 127 Nev. 301, 313, 255 P.3d 247, 255 (2011) (“The State
2 acknowledges that when legislative findings are expressly included within a statute, those findings
3 should be accorded great weight in interpreting the statute, but it points out that such findings are not
4 binding and this court may, nevertheless, properly conclude that section 18 is a general law despite
5 the Legislature's declaration to the contrary.”).

6 Statements of policy set forth by the Legislature are therefore not operative statutory
7 enactments, but rather tools to be used in interpreting operative statutes—and only then where such
8 statutes are ambiguous on their face. *See Pawlik*, 134 Nev. at 85, 412 P.3d at 71; *see also Cromer v.*
9 *Wilson*, 126 Nev. 106, 109-10, 225 P.3d 788, 790 (2010) (if the plain language of a statute “is
10 susceptible of another reasonable interpretation, we must not give the statute a meaning that will
11 nullify its operation, and we look to policy and reason for guidance”).

12 This statement of policy is not, in and of itself, a grant of authority that allows the State
13 Engineer to change boundaries of established hydrographic basins as science dictates. This Court
14 certainly acknowledges that since the time the 256 hydrographic basins and sub-basins were
15 delineated, that science and technology have made great strides. While certain navigable waters and
16 topography were more easily identifiable at the time the basins were established, the complexity lies
17 in the less obvious interconnectivity and formations of sub-surface structures that were more
18 difficult to detect at that time. There is no doubt that scientific advancements allow experts to more
19 accurately assess sub-surface formations and groundwater than they have in the past, and certainly
20 technology will continue to improve accuracy in the future. However, this Court notes that the
21 Legislature specifically used the word “encourages” to describe how the Nevada State Engineer
22 should utilize the best available science. NRS 533.024(1)(c). The statute does not declare that the
23 best available science should dictate the decisions.

24 Indeed, if science was the sole governing principle to dictate the Nevada State Engineer’s
25 decisions, there would be a slippery slope in the changes that could be made in the boundaries of the
26 basins and how they are managed; each time scientific advancements and discoveries were made
27 regarding how sub-surface water structures are situated or interconnected, under this theory of
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1 authority, the Nevada State Engineer could change the boundaries of the existing basins. Each
2 boundary change would upend the priority of water right holders as they relate to the other water
3 right holders in the new, scientifically-dictated “basin.” This would lead to an absurd result as it
4 relates to the prior appropriation doctrine. Every water right holder would be insecure in their
5 priority, as their relative priority could change at any moment that science advances in determining
6 further interconnectivity of water below the surface. In the administration of water rights, the
7 certainty of those rights is particularly important and prior appropriation is “largely a product of the
8 compelling need for certainty in the holding and use of water rights.” *Mineral Cty. v. Lyon Cty.*, 136
9 Nev. at 518, 473 P.3d at 429 (quoting *Arizona v. California*, 460 U.S. 605, 620 (1983)). Science in
10 and of itself cannot alter common law and statutes. Thus, the State Engineer’s reliance on NRS
11 533.024(1)(c) for giving him authority to create a superbasin out of seven existing basins is
12 misplaced.

13 While NRS 532.120 allows the State Engineer to make reasonable rules and regulations as
14 may be necessary for proper and orderly execution, this authority is not without its limits, and is
15 only authorized for those “powers conferred by law.” Nothing in Chapters 532, 533 or 534 gives the
16 State Engineer direct authority to eliminate, modify, or redraw the boundaries of existing
17 hydrographic basins, or to consolidate multiple, already established, hydrographic basins into a
18 single hydrographic superbasin. For at least 50 years, holders of groundwater rights in Nevada have
19 understood a “hydrographic basin” to be an immutable administrative unit. This has been the case
20 regardless of whether the boundaries of the unit accurately reflected the boundaries of a particular
21 water resource. The Nevada Legislature has adopted a comprehensive scheme that provides the
22 framework for the State Engineer to administer surface water and groundwater. Moreover, the State
23 Engineer has, for decades, administered water on the basis of hydrographic basins identified,
24 described, and released to the public and relied upon by the Legislature, former State Engineers, and
25 the public. Applications to appropriate water are and have been on the basis of each hydrographic
26 basin. Protests, agreements, and resolutions of water applications have been on the basis of each
27 basin. Furthermore, statutes require that the State Engineer consider available water and
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1 appropriations based on the basins already defined.

2 It is interesting to note that in the statutes that *do* confer authority on the Nevada State
3 Engineer to manage water, they specifically mention the management as being done on a basin-by-
4 basin (or a sub-basin within a basin) basis. NRS 534.030 is the original source of authority for the
5 State Engineer’s designation of an “administrative area” by “basin.” NRS 534.030. Through NRS
6 534.030 and NRS 534.011, the State Engineer has authority to designate “any groundwater basin, or
7 portion therein” an “area of active management,” which refers to an area “[i]n which the State
8 Engineer is conducting particularly close monitoring and regulation of the water supply because of
9 heavy use of that supply.” Under the statute’s plain meaning, a *basin* is intended to be an
10 *administrative unit*, defined by boundaries described by “legal subdivision as nearly as possible.”
11 NRS 534.030(1)(b). In other words, a hydrographic basin so designated was synonymous with an
12 administrative unit—a *legal* construct, defined thereafter by a *geographic* boundary. Water rights
13 within these basins are to be administered according to the laws set forth in NRS Chapters 533 and
14 534, and the principles of prior appropriation are applied to water uses *within* each basin.

15 Moreover, the Legislature consistently refers to a singular basin throughout the statute. *See*,
16 *e.g.*, 534.030(1) (describing a petition under NRS Chapter 534 as one that requests the State
17 Engineer “to administer the provisions of this chapter as relating to designated areas, ... in any
18 particular basin or portion therein”); NRS 534.030(2) (“a groundwater basin”); NRS 534.030(2)
19 (“the basin”). In fact, in the State Engineer’s prior rulings and orders, including Order 1169, Order
20 1169A, and Rulings 5712 and 6455, the State Engineer employs a basin-by-basin management
21 approach.

22 NRS 534.110(6) sets forth the State Engineer’s ability to make basin-specific determinations
23 and provides the authority to curtail water rights where investigations into specific basins
24 demonstrate that there is insufficient groundwater to meet the needs of all permittees and all vested-
25 right claimants. NRS 534.110 plainly applies to investigations concerning administration and
26 designation of critical management areas within a basin. If the State Engineer conducts an
27 investigation as set forth in NRS 534.110(6) and determines that the annual replenishment to the
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1 groundwater supply is not adequate for the permittees and vested-right claimants, he has the
2 authority to either (1) order that withdrawals from domestic wells be restricted to conform to priority
3 rights, or (2) designate as a critical management area the basin in which withdrawals of groundwater
4 consistently exceed the perennial yield. NRS 534.110(6)-(7). It is important to note, however, that
5 the statute does not provide authority to change the boundaries of established basins, combine
6 multiple basins into one unit or superbasin, and then modify or curtail groundwater rights based
7 upon restructured priority dates in this newly created superbasin.

8 The Court acknowledges that the State Engineer can and should take into account how water
9 use in one basin may affect the water use in an adjoining or closely related basin when determining
10 how best to “actively manage” a basin. However, this is much different than how the State Engineer
11 defines “joint management”: erasing the borders of seven already established legal administrative
12 units and creating one legal superunit in the LWRFS superbasin. If the Legislature intended for the
13 State Engineer to designate areas across multiple basins for “joint administration,” it would have so
14 stated. *See Slade v. Caesars Entm’t Corp.*, 132 Nev. 374, 380-81, 373 P.3d 74, 78 (2016) (citing
15 Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 107 (2012)
16 (“The expression of one thing implies the exclusion of others.”)). Thus, under NRS 534.030, while
17 the State Engineer can administer basins individually, the statute does not allow the State Engineer
18 to combine basins for joint administration, nor do NRS 532.120, NRS 533.024, or NRS 534.110(6)
19 confer express authority on the State Engineer to do so.

20 **3. Conjunctive Management**

21 The Nevada State Engineer relies on NRS 534.024(1)(e), as the source of authority that
22 allows him to manage both surface and groundwater together through “conjunctive management.”⁶⁶
23 Historically, surface water and ground water have been managed separately. In fact, the term
24 “conjunctive management” was only introduced in the statutes in the 2017 session of the Nevada
25 Legislature when it added subsection 1(e) to NRS 533.024. However, as discussed previously, this
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⁶⁶ SE ROA 43.

1 statute is a declaration of legislative intent, and as a statement of policy, it does not constitute a grant
2 of authority to the State Engineer, nor is it a water management tool in and of itself.

3 In fact, there is no authority or guidance whatsoever in the statutes as to how to go about
4 conjunctively managing water and water rights. While the Court agrees that it makes sense to take
5 into account how certain groundwater rights may affect other surface water rights when managing
6 water overall, as this Court noted previously, the powers of the State Engineer are limited to those
7 set forth in the law. While Nevada law provides certain tools for the management of water rights in,
8 for example, over appropriated basins, *e.g.*, NRS 534.110(7) (authorizing the State Engineer to
9 “designate as a critical management area any basin in which withdrawals of groundwater
10 consistently exceed the perennial yield of the basin”), nothing in Chapters 532, 533 or 534 gives the
11 State Engineer express authority to conjunctively manage, in this proceeding, both the surface and
12 groundwater flows he believes are occurring in the LWRFS superbasin.

13 This Court finds that as a result of the consolidation of the basins, the relative priority of all
14 water rights within the seven affected basins will be reordered and the priorities will be considered
15 in relation to all water rights holders in the consolidated basins, rather than in relation only to the
16 other users within the original separate basins.⁶⁷ By redefining and combining seven established
17 basins for “joint administration,” and “conjunctive management,” the State Engineer essentially
18 strips senior right holders of their priority rights by deciding that all water rights within the LWRFS
19 superbasin should be administered based upon their respective dates of priority in relation to other
20 rights “within the regional groundwater unit.”

21 The State Engineer’s position is that the determination of conflicts and priorities has not yet
22 occurred since that is to occur in the second step of the proceeding. However, by the very nature of
23 erasing the existing basins and putting all of the water rights holders in one superbasin, he has
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26 ⁶⁷ This Court rejects the State Engineer’s argument that Order 1309 did not change priorities merely because it did not
27 change priority dates. His argument conflates the meaning of *priority* as defined by the date of a water right application,
28 and the common meaning of *priority*, as defined by one’s “place in line.” While it is true that the Order does not change
priority dates, this Court finds that it *does* change the relative priorities, as petitioners who previously held the most
senior rights within their singular basin may now be relegated to more junior status within the “superbasin.”

1 already reprioritized certain rights as they relate to one another, even if their priority dates remain
2 the same.⁶⁸ As a result of creating this superbasin, water rights holders with some of the most senior
3 priority rights within their basin are now relegated to a much a lower priority position than some
4 water right holders in basins outside of their own. Such a loss of priority would potentially render
5 certain water rights valueless, given the State Engineer’s restrictions on pumping in the entire
6 LWRFS. The Court concludes that the State Engineer does not have authority to redefine Nevada
7 basins so as to reorder the priority rights of water right holders through conjunctive management
8 within those basins. Accordingly, Order 1309 stands at odds with the prior appropriation doctrine.

9 The Court determines that the question of whether the State Engineer has *authority* to change
10 the boundaries of basins that have been established for decades, or subject that newly created basin
11 to conjunctive management, or not, is a legal question, not a factual one. The State Engineer has
12 failed to identify a statute that authorizes him to alter established basin boundaries or engage in
13 conjunctive management. Based upon the plain language of the applicable statutes, the Court
14 concludes that the State Engineer acted outside the scope of his authority in entering Order 1309.

15 **B. The State Engineer Violated Petitioners’ Due Process Rights in Failing to Provide**
16 **Notice to Petitioners or an Opportunity to Comment on the Administrative Policies Inherent**
17 **in the Basin Consolidation.**

18 The Nevada Constitution protects against the deprivation of property without due process of
19 law. Nev. Const. art. 1, § 8(5). “Procedural due process requires that parties receive notice and an
20 opportunity to be heard.” *Eureka Cty. V. Seventh Jud. Dist. Ct.*, 134 Nev. 275, 279, 417 P.3d 1121,
21 1124 (2018)(internal quotation marks omitted). “In Nevada, water rights are ‘regarded and
22 protected as real property.’” *Id.*(quoting *Application of Filippini*, 66 Nev. 17, 21-22, 202 P.2d 535,
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24 ⁶⁸ Although this Court refrains from analyzing whether or not 1309 is supported by substantial evidence, the Court notes
25 that part of the State Engineer’s 1309 decision of limiting use to 8,000afa or less is based on the concern of adversely
26 impacting the endangered Moapa Dace, located in the Muddy River Springs. This decision does not appear to take into
27 account more nuanced effects of how pumping in each separate basin affects the Muddy River flows, no matter how far
28 away the basin is from the river. In other words, reprioritization of each water rights holder in relation to the other (by
prioritization date in the newly created superbasin) means that their standing (and more importantly, their potential for
curtailment) is only by date. Water use in one basin may not have the same effect as another in reducing Muddy River
flows; however, these distinguishing factors are all erased by combining all of the basins together for joint
administration.

1 537 (1949)). Therefore, holders of water rights in Nevada are entitled to constitutional protections
2 regarding those property rights, including procedural due process. *See id.*

3 The Nevada Supreme Court has held that “[a]lthough proceedings before administrative
4 agencies may be subject to more relaxed procedural and evidentiary rules, due process guarantees of
5 fundamental fairness still apply.” *Dutchess Bus. Serv.’s, Inc. v. Nev. State Bd. of Pharmacy*, 124
6 Nev. 701, 711, 191 P.3d 1159, 1166 (2008). In *Dutchess*, the Nevada Supreme Court noted further
7 that “[a]dministrative bodies must follow their established procedural guidelines and give notice to
8 the defending party of ‘the issues on which decision will turn and . . . the factual material on which
9 the agency relies for decision so that he may rebut it.” *Id.*

10 With respect to notice and hearing, the Nevada Supreme Court has held that “[i]nherent in
11 any notice and hearing requirement are the propositions that the notice will accurately reflect the
12 subject matter to be addressed and that the hearing will allow full consideration of it.” *Public Serv.*
13 *Comm’n of Nev. v. Southwest Gas Corp.*, 99 Nev. 268, 271, 772 P.2d 624, 626 (1983). “Notice must
14 be given at an appropriate stage in the proceedings to give parties meaningful input in the
15 adjudication of their rights.” *Seventh Jud. Dist. Ct.*, 134 Nev. at 280-81, 417 P.3d at 1125-26 (citing
16 *Hamdi v. Rumsfeld*, 542 U.S. 507, 533, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) (“It is equally
17 fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful
18 time and in a meaningful manner.”). A party’s due process rights attach at the point at which a
19 proceeding holds the *possibility* of curtailing water rights, and due process necessitates notice of that
20 possibility to the party potentially affected.⁶⁹

21 For the reasons that follow, this Court concludes that (a) the notice and hearing procedure
22 employed by the State Engineer failed to satisfy the requirements of due process because the notice
23 failed to put the parties on notice that the State Engineer would decide on a management protocol for
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25 ⁶⁹ “[B]ecause the language in the show cause order [indicates that the district court may enter an order forcing curtailment
26 to begin, junior water rights holders must be given an opportunity to make their case for or against the option of
27 curtailment. Notice must be given at an appropriate stage in the proceedings to give parties meaningful input in the
28 adjudication of their rights... Thus, junior water rights holders must be notified before the curtailment decision is made,
even if the specific “how” and “who” of curtailment is decided in a future proceeding.” *Seventh Jud. Dist. Ct.*, 134 Nev.
275, 280–81, 417 P.3d 1121, 1125 (2018).

1 the LWRFS at the conclusion of the proceeding; (b) the hearing itself failed to satisfy due process
2 because the parties were not afforded a full and complete opportunity to address the implications of
3 the State Engineer’s decision to subject the LWRFS to conjunctive management and joint
4 administration, and (c) the State Engineer’s nondisclosure, before or during the Order 1303
5 proceedings of the six criteria he would use in evaluating the connectivity of the basins and
6 determining the new consolidated basin boundary, failed to satisfy the requirements of due process.

7 Specifically, the notice of hearing and amended notice of hearing (“Notice”) noticed an
8 opportunity for the parties that submitted Order 1303 reports to explain their positions and
9 conclusions with respect to the questions posed for consideration in Order 1303.^{70 71} But the
10 questions posed in Order 1303 did not relate to management of the LWRFS, such as issues of
11 conjunctive or joint administration, but rather related to factual inquiries. Instead, Order 1303
12 specifically authorized stakeholders to file reports addressing four specific areas, none of which
13 related to the management of the LWRFS.⁷²

14 In noticing the hearing to consider the reports submitted pursuant to Order 1303, there was
15 no mention of consideration of the prospective management of the LWRFS, *i.e.*, whether it would be
16 appropriately managed conjunctively and as a joint administrative unit. Indeed, this was consistent
17 with the Hearing Officer’s opening remarks at the August 8, 2019, prehearing conference in which
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19 ⁷⁰ See SE ROA 262-82, Ex. 2; SE ROA 284-301, Ex. 3

20 ⁷¹ The Notice included the following summary:

21 On August 9, 2019, the State Engineer held a pre-hearing conference regarding the hearing on the
22 submission of reports and evidence as solicited in Order 1303.... The State Engineer established that
23 the purpose of the hearing on the Order 1303 reports was to provide the participants an opportunity to
24 explain the positions and conclusions expressed in the reports and/or rebuttal reports submitted in
25 response to the Order 1303 solicitation. The State Engineer directed the participants to limit the offer of
26 evidence and testimony to the salient conclusions, including directing the State Engineer and his staff
27 to the relevant data, evidence and other information supporting those conclusions. ***The State Engineer
further noted that the hearing on the Order 1303 reports was the first step in determining to what
extent, if any, and in what manner the State Engineer would address future management decisions,
including policy decisions, relating to the Lower White River Flow System basins. On that basis, the
State Engineer then addressed other related matters pertaining to the hearing on the Order 1303
reports, including addressing the date and sequence of the hearing, as set forth in this Notice of
Hearing.*** SE ROA 285, Ex. 3 (emphasis added).

28 ⁷² SE ROA 647-48. Ex. 6.

1 the State Engineer actively discouraged participants from providing input regarding that very
2 question. The hearing officer stated as follows at the August 8 prehearing conference:

3 And so, and I'm going to talk about this and we've spoken about this before, is
4 that really this is a threshold reporting aspect, that this is part of a multi-tiered
5 process in terms of determining the appropriate management strategy to the
6 Lower River Flow System.

7 This larger substantive policy determination is not part of the particular
8 proceeding. That's part of later proceedings....

9 SE ROA 522, Ex. 5 (Hr'g Tr. at 10:6-20).

10 The hearing officer gave additional consistent guidance at the outset of the September 23
11 hearing, further directing the parties not to address policy issues even in relation to the fact that
12 Order 1303 authorized stakeholders to include in their reports "[a]ny other matter believed to be
13 relevant to the State Engineer's analysis."⁷³ Specifically, the Hearing Officer directed as follows:

14 And while that fifth issue is [as set forth in Ordering Paragraph 1(e) of Order
15 1303] not intended to expand the scope of this hearing into making policy
16 determinations with respect to management of the Lower White River Flow
17 System basin's individual water rights, those different types of things, because
18 those are going to be decisions that would have to be made in subsequent
19 proceedings should they be necessary.

20 SE ROA 52962, Ex. 26 (Hr'g Tr. 6:4-15).

21 Not only did the notice not adequately notify the parties of the possibility of the
22 consideration and resolution of policy issues, but the Hearing Officer consistently
23 directed the parties to avoid the subject, compounding the due process violation.

24 Notwithstanding the Hearing Officer's admonitions and the plain language of the notice, the
25 State Engineer ultimately issued a dramatic determination regarding management of the LWRFS. In
26 doing so, the State Engineer precluded the participants from providing input that would have
27 allowed for the full consideration of the issue. Specifically, participants and experts did not have the
28 opportunity to, and were actively discouraged from addressing policy issues critical to the

⁷³ SE ROA 648, Ex. 6.

1 management of the LWRFS.⁷⁴ The refusal to consider these issues ensured that the State Engineer’s
2 decision was not based on a fully developed record.

3 The State Engineer acknowledged as much in Order 1309 itself. There, the State Engineer
4 noted the fact that Georgia-Pacific and Republic raised concerns over the sufficiency of the scope of
5 the proceedings at hearing but inexplicably asserted that a to-be-determined management scheme
6 would be developed to address “management issues” in the LWRFS:

7 Georgia-Pacific and Republic asserted that boundaries are premature without
8 additional data and without a legally defensible policy and management tools in
9 place. They expressed concern that creating an administrative unit at this time
10 inherently directs policy without providing for due process. The State Engineer
11 has considered these concerns and agrees that additional data and improved
12 understanding of the hydrologic system is critical to the process. He also believes
13 that the data currently available provide enough information to delineate LWRFS
14 boundaries, and that an effective management scheme will provide for the
15 flexibility to adjust boundaries based on additional information, retain the ability
16 to address unique management issues on a sub-basin scale, and maintain
17 partnership with water users who may be affected by management actions
18 throughout the LWRFS.

19 SE ROA 54, Ex. 1.

20 This language reflects a serious misunderstanding of the effect of Order 1309. Insofar as
21 Order 1309 subjects the LWRFS to conjunctive management and joint administration, resulting in
22 effectively reordering of priority of water rights in the LWRFS superbasin, the order effectuates a
23 management scheme with far reaching consequences. Thus, agreeing on the one hand that an
24 “effective management scheme” will be necessary to address challenges in the LWRFS, but
25

26 ⁷⁴ These issues include, but are not limited to: whether Nevada law allows the State Engineer to conjunctively manage
27 multiple hydrographic basins in a manner that modifies the relative priority of water rights due to the administration
28 consolidation of basins; whether the State Engineer would establish a “critical management area” pursuant to NRS
534.110 and, if so, whether he would develop a groundwater management plan or defer to the stakeholders to develop
one; whether Nevada law gives the State Engineer authority to designate a management area that encompasses more than
one basin; whether “safe-yield” discrete management areas should be established within the proposed administrative
unit; whether water rights holders enjoy a “property right” in the relative priority of their water rights such that impairing
that right may constitute a “taking”; whether unused (or only sporadically used) senior water rights take precedence over
certificated or fully used junior rights, particularly where these junior rights are in continuous use to support
economically significant enterprises; whether States compel quantification of federal reserved rights by a date certain;
and whether the State Engineer should approach the legislature to seek different or additional management tools or
authority. See SE ROA 52801-8, Ex. 25 (Georgia Pacific and Republic Closing Argument, outlining policy questions
for consideration by the State Engineer at later proceedings, proceedings that never took place).

1 contending it will be developed in the future, reveals a lack of appreciation of the implications of the
2 order to the detriment of not only the participants but all water rights holders in the LWRFS basins.
3 Without consideration of the implications of the management decision contained in the order, it
4 cannot be based on a full consideration of the issues presented. In affirmatively limiting the scope of
5 the proceeding to include a full consideration of the issues, the State Engineer violated the
6 stakeholders' due process rights. Both the notice and the hearing procedures employed failed to
7 comport with due process.

8 Finally, as noted above, the State Engineer did not give notice or disclose before or during
9 the Order 1303 proceedings, the six specific criteria that he would use in evaluating the connectivity
10 of the basins and determining the new consolidated basin boundary. Although the State Engineer
11 asserted that he considered the evidence and testimony presented in the public hearing "on the basis
12 of a common set of criteria that are consistent with the original characteristics conserved critical in
13 demonstrating a close hydrologic connection requiring joint management in Rulings 6254-6261,"⁷⁵
14 a review of these rulings reveals that none of the six criteria or characteristics were previously
15 identified, examined in the hydrological studies and subsequent hearing that followed the
16 completion of the Order 1169 aquifer test, or expressly disclosed in Rulings 6254-6261.⁷⁶ These
17 criteria were instead explicitly disclosed for the first time in Order 1309, which means the
18 participants had no opportunity to directly address these criteria in their presentations, or critically,
19 to address the appropriateness of these criteria.

20 This Court is unpersuaded by the State Engineer's argument that it could develop the criteria
21 only after it heard all the evidence at the hearing. Even if it did, this does not justify a deprivation of
22 the right to due process. In order to provide the parties due process and a meaningful opportunity to
23 present evidence on these issues, the State Engineer should have included these factors in the Notice
24 of Pre-Hearing Conference. *See Eureka Cty.*, 131 Nev. at 855, 359 P.3d at 1120; *Revert*, 95 Nev. at
25 787, 603 P.2d at 265 (criticizing the state engineer for engaging in post hoc rationalization). This
26

27 ⁷⁵ See SE ROA 48.

28 ⁷⁶ SE ROA 726-948.

1 due process violation is particularly harmful to water rights holders in Kane Springs, the sole basin
2 that had not been previously designated for management under NRS 534.030, had not been included
3 in the Order 1169 aquifer test, and had not been identified as a basin to be included in the LWRFS
4 superbasin in Order 1303.

5 Accordingly, this Court concludes that revealing the criteria only after stakeholders had
6 engaged in the extensive investigations, expert reporting, and the intense factual hearing requested
7 by Order 1303 further violates the participants' due process rights.

8 As this Court has determined that the Nevada State Engineer exceeded his statutory authority
9 and violated the participants' due process rights in issuing Order 1309, it declines to reach further
10 analysis on whether his factual findings in Order 1309 were supported by substantial evidence.

11 **IV.**
12 **CONCLUSION**

13 The Court FINDS that the Nevada State Engineer exceeded his statutory authority and had
14 no authority based in statute to create the LWRFS superbasin out of multiple distinct, already
15 established hydrographic basins. The Nevada State Engineer also lacked the statutory authority to
16 conjunctively manage this LWRFS superbasin.

17 The Court ALSO FINDS that the Nevada State Engineer violated the Petitioners'
18 Constitutional right to due process by failing to provide adequate notice and a meaningful
19 opportunity to be heard.

20 As a result, Order 1309 is arbitrary, capricious, and therefore void.

21 Good cause appearing, based upon the above Findings of Fact and Conclusions of Law, the
22 Court ORDERS, ADJUDGES AND DECREES as follows:

23 IT IS HEREBY ORDERED that the petition for review of the Nevada State Engineer's
24 Order No. 1309 filed by Petitioners Lincoln County Water District and Vidler Water Company, Inc.
25 is GRANTED.

26 IT IS FURTHER ORDERED that the petition for review of the Nevada State Engineer's
27 Order No. 1309 filed by Petitioners Coyote Springs Investment, LLC is GRANTED.
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IT IS FURTHER ORDERED that the petition for review of the Nevada State Engineer’s Order No. 1309 filed by Petitioners Apex Holding Company, LLC and Dry Lake Water, LLC is GRANTED.

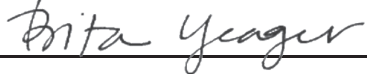
IT IS FURTHER ORDERED that the petition for review of the Nevada State Engineer’s Order No. 1309 filed by Petitioners Nevada Cogeneration Associates Nos. 1 and 2 is GRANTED.

IT IS FURTHER ORDERED that the petition for review of the Nevada State Engineer’s Order No. 1309 filed by Petitioners Georgia-Pacific Gypsum LLC, and Republic Environmental Technologies, Inc. is GRANTED.

IT IS FURTHER ORDERED that the State Engineer’s Order 1309 is VACATED in its entirety.

IT IS SO ORDERED.

Dated this 19th day of April, 2022



**66B 24A E875 2549
Bitia Yeager
District Court Judge**

1 **CSERV**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 Southern Nevada Water
7 Authority, Plaintiff(s)

CASE NO: A-20-816761-C

8 vs.

DEPT. NO. Department 1

9 Nevada State Engineer, Division
10 of Water Resources,
11 Defendant(s)

12 **AUTOMATED CERTIFICATE OF SERVICE**

13 This automated certificate of service was generated by the Eighth Judicial District
14 Court. The foregoing Findings of Fact, Conclusions of Law and Order was served via the
15 court's electronic eFile system to all recipients registered for e-Service on the above entitled
16 case as listed below:

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ATTACHMENT 13

ATTACHMENT 13

FFCO

**DISTRICT COURT
CLARK COUNTY, NEVADA**

LAS VEGAS VALLEY WATER DISTRICT,
and SOUTHERN NEVADA WATER
AUTHORITY,

Case No. A-20-816761-C
Dept. No. I

Petitioners,

Consolidated with Cases:

vs.

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

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

Respondent.

And All Consolidated Cases.

**ADDENDUM AND CLARIFICATION TO COURT'S FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER GRANTING PETITIONS FOR JUDICIAL
REVIEW FILED ON APRIL 19, 2022**

This matter came before this Court on consolidated petitions for judicial review of State Engineer's Order 1309 filed by Petitioners:

- Southern Nevada Water Authority and Las Vegas Valley Water District
- Coyote Spring Investment, LLC
- Apex Holding Co. and Dry Lake Water, LLC
- The Center for Biological Diversity
- Muddy Valley Irrigation Company
- Nevada Cogeneration Associates Nos. 1 and 2
- Georgia-Pacific Gypsum LLC and Republic Environmental Technologies, Inc.
- Lincoln County Water District and Vidler Water Company.

Bitia Yeager
Eighth Judicial District Court
Clark County, Nevada
Department I

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In the Order filed April 19, 2022, the Court determined that the Nevada State Engineer exceeded his statutory authority and violated the participants' due process rights in issuing Order 1309, and declined to reach further analysis on whether his factual findings in Order 1309 were supported by substantial evidence.

The Petitions filed by petitioners Southern Nevada Water Authority and Las Vegas Valley Water District, Muddy Valley Irrigation Company, and The Center for Biological Diversity supported the Nevada State Engineer's position that Order 1309 did not exceed the State Engineer's statutory authority nor violated participant's due process rights in issuing Order 1309. However, each of these three petitioners challenged the factual findings as not being supported by substantial evidence.

IV.
CONCLUSION

To the extent that the petition for review of the Nevada State Engineer's Order No. 1309 filed by Southern Nevada Water Authority and Las Vegas Valley Water District seeks relief for violating their due process rights, IT IS HEREBY ORDERED that the petition is GRANTED IN PART. The remaining portion of the petition that support the position that the Nevada State Engineer did not exceed his statutory authority in issuing Order 1309 is DISMISSED.

To the extent that the remaining petitions support the position that Nevada State Engineer did not exceed his statutory authority and provided due process in issuing Order 1309;

IT IS FURTHER ORDERED that the petition for review of the Nevada State Engineer's Order No. 1309 filed by Petitioner Muddy Valley Irrigation Company is DISMISSED.

IT IS FURTHER ORDERED that the petition for review of the Nevada State Engineer's Order No. 1309 filed by Petitioner The Center for Biological Diversity is DISMISSED.

IT IS SO ORDERED.

Dated this 13th day of May, 2022

Bita Yeager

EE8 27A A594 AF7E
Bita Yeager
District Court Judge

1 **CSERV**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 Southern Nevada Water
7 Authority, Plaintiff(s)

8 vs.

9 Nevada State Engineer, Division
10 of Water Resources,
11 Defendant(s)

CASE NO: A-20-816761-C

DEPT. NO. Department 1

12 **AUTOMATED CERTIFICATE OF SERVICE**

13 This automated certificate of service was generated by the Eighth Judicial District
14 Court. The foregoing Findings of Fact, Conclusions of Law and Judgment was served via the
15 court's electronic eFile system to all recipients registered for e-Service on the above entitled
16 case as listed below:

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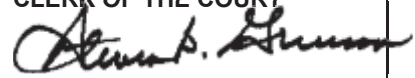
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ATTACHMENT 14

ATTACHMENT 14



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**DISTRICT COURT
CLARK COUNTY, NEVADA**

18 LAS VEGAS VALLEY WATER DISTRICT,
19 and SOUTHERN NEVADA WATER
20 AUTHORITY, et al.

21 Petitioners,

22 vs.

23 ADAM SULLIVAN, P.E., Acting Nevada State
24 Engineer, DIVISION OF WATER RESOURCES,
25 DEPARTMENT OF CONSERVATION AND
26 NATURAL RESOURCES,

27 Respondents,

Case No. A-20-816761-C

Dept. No. 1

Consolidated with Cases:

- 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

**NOTICE OF ENTRY OF ADDENDUM
AND CLARIFICATION TO COURT'S
FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER GRANTING
PETITIONS FOR JUDICIAL REVIEW**

28 //

//

CERTIFICATE OF SERVICE

I certify that I am an employee of Taggart & Taggart, LTD, and that on this 13th day of May 2022, I served a true and correct copy of the foregoing document by electronic service to the participants in this case who are registered with the Eighth Judicial District Court's Odyssey eFile NV File & Serve system to this matter:

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EXHIBIT INDEX

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<u>Exhibit</u>	<u>Description</u>	<u>Pages</u>
1.	Addendum and Clarification to Court’s Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review Filed on April 19, 2022	6

EXHIBIT 1

EXHIBIT 1

FFCO

**DISTRICT COURT
CLARK COUNTY, NEVADA**

LAS VEGAS VALLEY WATER DISTRICT,
and SOUTHERN NEVADA WATER
AUTHORITY,

Case No. A-20-816761-C
Dept. No. I

Petitioners,

Consolidated with Cases:

vs.

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

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

Respondent.

And All Consolidated Cases.

**ADDENDUM AND CLARIFICATION TO COURT'S FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER GRANTING PETITIONS FOR JUDICIAL
REVIEW FILED ON APRIL 19, 2022**

This matter came before this Court on consolidated petitions for judicial review of State Engineer's Order 1309 filed by Petitioners:

- Southern Nevada Water Authority and Las Vegas Valley Water District
- Coyote Spring Investment, LLC
- Apex Holding Co. and Dry Lake Water, LLC
- The Center for Biological Diversity
- Muddy Valley Irrigation Company
- Nevada Cogeneration Associates Nos. 1 and 2
- Georgia-Pacific Gypsum LLC and Republic Environmental Technologies, Inc.
- Lincoln County Water District and Vidler Water Company.

Bitia Yeager
Eighth Judicial District Court
Clark County, Nevada
Department I

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In the Order filed April 19, 2022, the Court determined that the Nevada State Engineer exceeded his statutory authority and violated the participants' due process rights in issuing Order 1309, and declined to reach further analysis on whether his factual findings in Order 1309 were supported by substantial evidence.

The Petitions filed by petitioners Southern Nevada Water Authority and Las Vegas Valley Water District, Muddy Valley Irrigation Company, and The Center for Biological Diversity supported the Nevada State Engineer's position that Order 1309 did not exceed the State Engineer's statutory authority nor violated participant's due process rights in issuing Order 1309. However, each of these three petitioners challenged the factual findings as not being supported by substantial evidence.

IV.
CONCLUSION

To the extent that the petition for review of the Nevada State Engineer's Order No. 1309 filed by Southern Nevada Water Authority and Las Vegas Valley Water District seeks relief for violating their due process rights, IT IS HEREBY ORDERED that the petition is GRANTED IN PART. The remaining portion of the petition that support the position that the Nevada State Engineer did not exceed his statutory authority in issuing Order 1309 is DISMISSED.

To the extent that the remaining petitions support the position that Nevada State Engineer did not exceed his statutory authority and provided due process in issuing Order 1309;

IT IS FURTHER ORDERED that the petition for review of the Nevada State Engineer's Order No. 1309 filed by Petitioner Muddy Valley Irrigation Company is DISMISSED.

IT IS FURTHER ORDERED that the petition for review of the Nevada State Engineer's Order No. 1309 filed by Petitioner The Center for Biological Diversity is DISMISSED.

IT IS SO ORDERED.

Dated this 13th day of May, 2022

Bita Yeager

EE8 27A A594 AF7E
Bita Yeager
District Court Judge

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Southern Nevada Water
Authority, Plaintiff(s)

CASE NO: A-20-816761-C

7 vs.

DEPT. NO. Department 1

8
9 Nevada State Engineer, Division
of Water Resources,
10 Defendant(s)

11
12 **AUTOMATED CERTIFICATE OF SERVICE**

13 This automated certificate of service was generated by the Eighth Judicial District
14 Court. The foregoing Findings of Fact, Conclusions of Law and Judgment was served via the
15 court's electronic eFile system to all recipients registered for e-Service on the above entitled
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ATTACHMENT 15

ATTACHMENT 15

1 **ORDD**

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4 **DISTRICT COURT**
5 **CLARK COUNTY, NEVADA**

6 LAS VEGAS VALLEY WATER
7 DISTRICT, and SOUTHERN NEVADA
8 WATER AUTHORITY,

Case No. A-20-816761-C

Dept. No. 1

Petitioners,

9 vs.

Consolidated with:

- 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

10 ADAM SULLIVAN, P.E., Nevada
11 State Engineer, DIVISION OF
12 WATER RESOURCES, DEPARTMENT
13 OF CONSERVATION AND NATURAL
14 RESOURCES,

Respondent.

And All Consolidated Cases.

15
16 **ORDER DENYING COYOTE SPRINGS INVESTMENT, LLC'S AND**
17 **LINCOLN COUNTY WATER DISTRICT AND VIDLER WATER COMPANY, INC.'S**
18 **MOTIONS FOR ATTORNEY'S FEES**

19 This matter came before this Court pursuant to two Motions for Attorney's Fees filed
20 by Petitioner Coyote Springs Investment, LLC ("CSI"), and Petitioners Lincoln County
21 Water District and Vidler Water Company, Inc. (collectively "Lincoln/Vidler") on May 5,
22 2022, and May 10, 2022, respectively. The State Engineer filed an Omnibus Opposition to
23 Respective Motions for Attorney's Fees on May 19, 2022. After the conclusion of briefing
24 on the Motions, the Court held a hearing on July 5, 2022. The Court having reviewed these
25 filings and the briefing related thereto, and holding a hearing, hereby **DENIES** CSI's and
Lincoln/Vidler's Motions for Attorney's Fees as set forth in further detail below.

26 **A. Standard for Recovering Attorney's Fees**

27 Nevada follows the American rule that attorney's fees may not be awarded absent a
28 statute, rule, or contract authorizing such an award. *Thomas v. City of N. Las Vegas,*

1 122 Nev. 82, ~~91~~, 127 P.3d 1057, 1063 (2006) (citing *Bobby Berosini, Ltd. v. PETA*, 114 Nev.
2 1348, 1356, 971 P.2d 383, 388 (1998); *Consumers League v. Southwest Gas*, 94 Nev. 153,
3 156, 576 P.2d 737, 738 (1978)). CSI and Lincoln/Vidler cite two statutory bases under
4 which they seek to recover attorney's fees in this action: NRS 18.010(2)(a) and
5 NRS 18.010(2)(b). First, NRS 18.010(2)(a) provides that the court may award attorney's
6 fees to a prevailing party "when the prevailing party has not recovered more than \$20,000."
7 Second, NRS 18.010(2)(b) provides that the court may award attorney's fees to a prevailing
8 party:

9 Without regard to the recovery sought, when the court finds that
10 the claim, counterclaim, cross-claim or third-party complaint or
11 defense of the opposing party was brought or maintained without
12 reasonable ground or to harass the prevailing party. The court
13 shall liberally construe the provisions of this paragraph in favor
14 of awarding attorney's fees in all appropriate situations. It is the
15 intent of the Legislature that the court award attorney's fees
16 pursuant to this paragraph and impose sanctions pursuant to
Rule 11 of the Nevada Rules of Civil Procedure in all appropriate
situations to punish for and deter frivolous or vexatious claims
and defenses because such claims and defenses overburden
limited judicial resources, hinder the timely resolution of
meritorious claims and increase the costs of engaging in business
and providing professional services to the public.

17 NRS 533.450, under which this proceeding was commenced, expressly provides costs must
18 be paid as in civil cases brought in the district court, except by the State Engineer and the
19 State but is silent on fees. *See* NRS 533.450(7).

20 The Nevada Supreme Court has held that a money judgment is a prerequisite to
21 recover attorney's fees under NRS 18.010(2)(a). *Thomas*, 122 Nev. at 93–94, 127 P.3d
22 at 1065–66. Where a party does not recover a monetary judgment, they are not entitled to
23 attorney's fees under NRS 18.010(2)(a). *Id.*

24 Further, the Nevada Supreme Court has also held that attorney's fees are not
25 recoverable under NRS 18.010(2)(b) in petitions for judicial review of agency actions filed
26 under the Administrative Procedure Act. *Zenor v. State, Dep't of Transp.*, 134 Nev. 109,
27 110–11, 412 P.3d 28, 30 (2018). The Court has "repeatedly refused to imply provisions not
28 expressly included in the legislative scheme." *Id.*, 134 Nev. at 110, 412 P.3d at 30 (citing

1 *State Indus. Ins. Sys. v. Wrenn*, 104 Nev. 536, 539, 762 P.2d 884, 886 (1988)). For example,
2 in *Wrenn*, the Court refused to award attorney’s fees because “the legislature has not
3 expressly authorized an award of attorney’s fees in worker’s compensation cases. ... [And]
4 we decline to allow a claimant recovery of attorney’s fees in a worker’s compensation case
5 absent express statutory authorization.” 104 Nev. at 539, 762 P.2d at 886. The Nevada
6 Supreme Court has likewise declined to award attorney’s fees in a water law case (albeit
7 brought under NRS 533.190(1) and NRS 533.240(3) rather than NRS 533.450) because
8 “attorney fees are not mentioned anywhere in the statute.” *Rand Props., LLC v. Filippini*,
9 2016 WL 1619306, Docket No. 66933, filed April 21, 2016, *6 (unpublished disposition)
10 (holding that if fees are not expressly provided in NRS Chapter 533 they are unavailable).

11 **B. CSI and Lincoln/Vidler Are Not Entitled to Recover Attorney’s Fees**

12 First, in applying NRS 18.010(2)(a), the Court finds the *Thomas* case controlling and
13 on point. This is a consolidated action involving multiple Petitions for Judicial Review filed
14 pursuant to NRS 533.450 challenging the State Engineer’s Order 1309, in whole or in part.
15 By their very nature, these are not actions whereby parties did, or could, seek a monetary
16 judgment. Accordingly, although CSI and Lincoln/Vidler did “prevail” on the merits, they
17 did not seek nor did they recover a monetary judgment in this case. In fact, NRS 533.450
18 does not provide for monetary judgments but rather simply provides that an aggrieved
19 party may have a court review an order or decision of the State Engineer, in the nature of
20 an appeal, where the order or decision relates to the administration of determined rights
21 or is made pursuant to NRS 533.270 to 533.445, inclusive, or NRS 533.481, 534.193,
22 535.200 or 536.200. NRS 533.450(1). Because CSI and Lincoln/Vidler did not recover a
23 monetary judgment, they may not recover attorney’s fees under NRS 18.010(2)(a).

24 Second, in applying NRS 18.010(2)(b), while the State Engineer is entirely exempted
25 from NRS Chapter 233B under NRS 233B.039(1)(i), the reasoning in *Zenor* is controlling
26 here. Like the provisions of NRS Chapter 233B in *Zenor*, NRS 533.450 is the exclusive
27 means of judicial review of a final decision or order of the State Engineer. NRS 533.450 is
28 entirely silent on attorney’s fees. It is not the role of this Court to imply provisions into

1 NRS 533.450 that are not expressly included in the legislative scheme, particularly where
2 the Legislature expressly stated that costs are not recoverable from the State Engineer but
3 did not mention attorney's fees anywhere in the statute. *See Smith v. Crown Fin. Servs.*
4 *of Am.*, 111 Nev. 277, 287, 890 P.2d 769, 776 (1995) (attorney fees are not considered costs).
5 Furthermore, although it is unpublished and not controlling, the Court finds the *Rand* case
6 to be persuasive. Like *Rand*, this case deals with water law and attorney's fees are not
7 mentioned anywhere in NRS 533.450, the statute providing the authority for the Petitions
8 for Judicial Review filed in this case. Accordingly, the Court declines to allow a party to
9 recover attorney's fees under NRS 18.010(2)(b) in a judicial review proceeding under
10 NRS 533.450 absent express statutory authorization. Since NRS 533.450 does not provide
11 for attorney's fees, they are precluded and may not be awarded under NRS 18.010(2)(b)

12 Lastly, even if NRS 18.010(2)(b) did apply to NRS 533.450 (which it does not), the
13 Court finds that the State Engineer's defense of Order 1309 was not brought or maintained
14 without reasonable ground or to harass the prevailing parties. Order 1309, and the defense
15 maintained by the State Engineer, presented substantial issues of public policy and issues
16 of first impression that are now pending on appeal at the Nevada Supreme Court. The
17 Court finds that the State Engineer's defense of Order 1309 was not made without
18 reasonable grounds, nor was it frivolous or vexatious as required by NRS 18.010(2)(b).
19 Therefore, even in the event NRS 18.010(2)(b) could apply to this action, the Court finds
20 that attorney's fees would not be warranted under NRS 18.010(2)(b).

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1 Therefore, CSI and Lincoln/Vidler are not entitled to recover attorney's fees under
2 either NRS 18.010(2)(a) or NRS 18.010(2)(b) as alleged in their Motions. Accordingly, the
3 Court **DENIES** the Motions for Attorney's fees filed by CSI and Lincoln/Vidler.

4 **IT IS SO ORDERED.**

Dated this 22nd day of July, 2022

Bitia Yeager

7 **9F9 0BE E0F9 4C97**
8 **Bitia Yeager**
9 **District Court Judge**

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16 **Submitted this 18th day of July, 2022, and approved as to form and content by:**

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18 Attorney General

/s/ James N. Bolotin

19 **STEVE SHEVORSKI** (Bar No. 8256)

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1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Southern Nevada Water
Authority, Plaintiff(s)

CASE NO: A-20-816761-C

7 vs.

DEPT. NO. Department 1

8
9 Nevada State Engineer, Division
of Water Resources,
10 Defendant(s)

11
12 **AUTOMATED CERTIFICATE OF SERVICE**

13 This automated certificate of service was generated by the Eighth Judicial District
14 Court. The foregoing Order Denying was served via the court's electronic e' file system to all
15 recipients registered for e-Service on the above entitled case as listed below:

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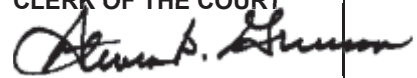
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ATTACHMENT 16

ATTACHMENT 16



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7 Senior Deputy Attorney General
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20 *Attorneys for Respondent State Engineer*

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12 **DISTRICT COURT**
13 **CLARK COUNTY, NEVADA**

14 LAS VEGAS VALLEY WATER
15 DISTRICT, and SOUTHERN NEVADA
16 WATER AUTHORITY,

16 Petitioners,

17 vs.

18 ADAM SULLIVAN, P.E., Nevada
19 State Engineer, DIVISION OF
20 WATER RESOURCES, DEPARTMENT
21 OF CONSERVATION AND NATURAL
22 RESOURCES,

21 Respondent.

22 And All Consolidated Cases.

Case No. A-20-816761-C

Dept. No. 1

Consolidated with:

A-20-817765-P
A-20-818015-P
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A-20-818069-P
A-20-817840-P
A-20-817876-P
A-21-833572-J

23
24 **NOTICE OF ENTRY OF ORDER**
25 **DENYING COYOTE SPRINGS INVESTMENT, LLC'S AND**
26 **LINCOLN COUNTY WATER DISTRICT AND VIDLER WATER COMPANY, INC.'S**
27 **MOTIONS FOR ATTORNEY'S FEES**

27 ///

28 ///

1 TO: ALL INTERESTED PARTIES AND THEIR ATTORNEYS OF RECORD:

2 YOU, AND EACH OF YOU, please take notice that an Order Denying Coyote
3 Springs Investment, LLC's and Lincoln County Water District and Vidler Water Company,
4 Inc.'s Motions for Attorney's Fees was entered in the above-entitled matter on the 22nd day
5 of July, 2022. A copy of said Order is attached hereto as Exhibit 1.

6 **AFFIRMATION**

7 The undersigned does hereby affirm that the foregoing Notice of Entry of Order does
8 not contain the social security number of any person.

9 DATED this 22nd day of July, 2022.

10 AARON D. FORD
11 Attorney General

12 By: /s/ James N. Bolotin

13 STEVE SHEVORSKI

14 Chief Litigation Counsel

15 JAMES N. BOLOTIN

16 Senior Deputy Attorney General

17 KIEL B. IRELAND

18 Deputy Solicitor General

19 LAENA ST-JULES

20 Deputy Attorney General

21 *Attorneys for Respondent State Engineer*

22 **CERTIFICATE OF SERVICE**

23 I certify that I am an employee of the State of Nevada, Office of the Attorney General,
24 and that on this 22nd day of July, 2022, I served a true and correct copy of the foregoing
25 NOTICE OF ENTRY OF ORDER DENYING COYOTE SPRINGS INVESTMENT, LLC'S
26 AND LINCOLN COUNTY WATER DISTRICT AND VIDLER WATER COMPANY, INC.'S
27 MOTIONS FOR ATTORNEY'S FEES, by electronic service to the participants in this case
28 who are registered with the Eighth Judicial District Court's Odyssey eFileNV File & Serve
system to this matter.

/s/ Dorene A. Wright

INDEX OF EXHIBITS

EXHIBIT No.	EXHIBIT DESCRIPTION	NUMBER OF PAGES
1.	Order Denying Coyote Springs Investment, LLC's and Lincoln County Water District and Vidler Water Company, Inc.'s Motions for Attorney's Fees filed July 22, 2022	10

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EXHIBIT 1

EXHIBIT 1

1 **ORDD**

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4 **DISTRICT COURT**
5 **CLARK COUNTY, NEVADA**

6 LAS VEGAS VALLEY WATER
7 DISTRICT, and SOUTHERN NEVADA
8 WATER AUTHORITY,

Case No. A-20-816761-C

Dept. No. 1

Petitioners,

9 vs.

Consolidated with:

- 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

10 ADAM SULLIVAN, P.E., Nevada
11 State Engineer, DIVISION OF
12 WATER RESOURCES, DEPARTMENT
13 OF CONSERVATION AND NATURAL
14 RESOURCES,

Respondent.

And All Consolidated Cases.

15
16 **ORDER DENYING COYOTE SPRINGS INVESTMENT, LLC'S AND**
17 **LINCOLN COUNTY WATER DISTRICT AND VIDLER WATER COMPANY, INC.'S**
18 **MOTIONS FOR ATTORNEY'S FEES**

19 This matter came before this Court pursuant to two Motions for Attorney's Fees filed
20 by Petitioner Coyote Springs Investment, LLC ("CSI"), and Petitioners Lincoln County
21 Water District and Vidler Water Company, Inc. (collectively "Lincoln/Vidler") on May 5,
22 2022, and May 10, 2022, respectively. The State Engineer filed an Omnibus Opposition to
23 Respective Motions for Attorney's Fees on May 19, 2022. After the conclusion of briefing
24 on the Motions, the Court held a hearing on July 5, 2022. The Court having reviewed these
25 filings and the briefing related thereto, and holding a hearing, hereby **DENIES** CSI's and
Lincoln/Vidler's Motions for Attorney's Fees as set forth in further detail below.

26 **A. Standard for Recovering Attorney's Fees**

27 Nevada follows the American rule that attorney's fees may not be awarded absent a
28 statute, rule, or contract authorizing such an award. *Thomas v. City of N. Las Vegas,*

1 122 Nev. 82, ~~91~~, 127 P.3d 1057, 1063 (2006) (citing *Bobby Berosini, Ltd. v. PETA*, 114 Nev.
2 1348, 1356, 971 P.2d 383, 388 (1998); *Consumers League v. Southwest Gas*, 94 Nev. 153,
3 156, 576 P.2d 737, 738 (1978)). CSI and Lincoln/Vidler cite two statutory bases under
4 which they seek to recover attorney's fees in this action: NRS 18.010(2)(a) and
5 NRS 18.010(2)(b). First, NRS 18.010(2)(a) provides that the court may award attorney's
6 fees to a prevailing party "when the prevailing party has not recovered more than \$20,000."
7 Second, NRS 18.010(2)(b) provides that the court may award attorney's fees to a prevailing
8 party:

9 Without regard to the recovery sought, when the court finds that
10 the claim, counterclaim, cross-claim or third-party complaint or
11 defense of the opposing party was brought or maintained without
12 reasonable ground or to harass the prevailing party. The court
13 shall liberally construe the provisions of this paragraph in favor
14 of awarding attorney's fees in all appropriate situations. It is the
15 intent of the Legislature that the court award attorney's fees
16 pursuant to this paragraph and impose sanctions pursuant to
Rule 11 of the Nevada Rules of Civil Procedure in all appropriate
situations to punish for and deter frivolous or vexatious claims
and defenses because such claims and defenses overburden
limited judicial resources, hinder the timely resolution of
meritorious claims and increase the costs of engaging in business
and providing professional services to the public.

17 NRS 533.450, under which this proceeding was commenced, expressly provides costs must
18 be paid as in civil cases brought in the district court, except by the State Engineer and the
19 State but is silent on fees. *See* NRS 533.450(7).

20 The Nevada Supreme Court has held that a money judgment is a prerequisite to
21 recover attorney's fees under NRS 18.010(2)(a). *Thomas*, 122 Nev. at 93–94, 127 P.3d
22 at 1065–66. Where a party does not recover a monetary judgment, they are not entitled to
23 attorney's fees under NRS 18.010(2)(a). *Id.*

24 Further, the Nevada Supreme Court has also held that attorney's fees are not
25 recoverable under NRS 18.010(2)(b) in petitions for judicial review of agency actions filed
26 under the Administrative Procedure Act. *Zenor v. State, Dep't of Transp.*, 134 Nev. 109,
27 110–11, 412 P.3d 28, 30 (2018). The Court has "repeatedly refused to imply provisions not
28 expressly included in the legislative scheme." *Id.*, 134 Nev. at 110, 412 P.3d at 30 (citing

1 *State Indus. Ins. Sys. v. Wrenn*, 104 Nev. 536, 539, 762 P.2d 884, 886 (1988)). For example,
2 in *Wrenn*, the Court refused to award attorney’s fees because “the legislature has not
3 expressly authorized an award of attorney’s fees in worker’s compensation cases. ... [And]
4 we decline to allow a claimant recovery of attorney’s fees in a worker’s compensation case
5 absent express statutory authorization.” 104 Nev. at 539, 762 P.2d at 886. The Nevada
6 Supreme Court has likewise declined to award attorney’s fees in a water law case (albeit
7 brought under NRS 533.190(1) and NRS 533.240(3) rather than NRS 533.450) because
8 “attorney fees are not mentioned anywhere in the statute.” *Rand Props., LLC v. Filippini*,
9 2016 WL 1619306, Docket No. 66933, filed April 21, 2016, *6 (unpublished disposition)
10 (holding that if fees are not expressly provided in NRS Chapter 533 they are unavailable).

11 **B. CSI and Lincoln/Vidler Are Not Entitled to Recover Attorney’s Fees**

12 First, in applying NRS 18.010(2)(a), the Court finds the *Thomas* case controlling and
13 on point. This is a consolidated action involving multiple Petitions for Judicial Review filed
14 pursuant to NRS 533.450 challenging the State Engineer’s Order 1309, in whole or in part.
15 By their very nature, these are not actions whereby parties did, or could, seek a monetary
16 judgment. Accordingly, although CSI and Lincoln/Vidler did “prevail” on the merits, they
17 did not seek nor did they recover a monetary judgment in this case. In fact, NRS 533.450
18 does not provide for monetary judgments but rather simply provides that an aggrieved
19 party may have a court review an order or decision of the State Engineer, in the nature of
20 an appeal, where the order or decision relates to the administration of determined rights
21 or is made pursuant to NRS 533.270 to 533.445, inclusive, or NRS 533.481, 534.193,
22 535.200 or 536.200. NRS 533.450(1). Because CSI and Lincoln/Vidler did not recover a
23 monetary judgment, they may not recover attorney’s fees under NRS 18.010(2)(a).

24 Second, in applying NRS 18.010(2)(b), while the State Engineer is entirely exempted
25 from NRS Chapter 233B under NRS 233B.039(1)(i), the reasoning in *Zenor* is controlling
26 here. Like the provisions of NRS Chapter 233B in *Zenor*, NRS 533.450 is the exclusive
27 means of judicial review of a final decision or order of the State Engineer. NRS 533.450 is
28 entirely silent on attorney’s fees. It is not the role of this Court to imply provisions into

1 NRS 533.450 that are not expressly included in the legislative scheme, particularly where
2 the Legislature expressly stated that costs are not recoverable from the State Engineer but
3 did not mention attorney's fees anywhere in the statute. *See Smith v. Crown Fin. Servs.*
4 *of Am.*, 111 Nev. 277, 287, 890 P.2d 769, 776 (1995) (attorney fees are not considered costs).
5 Furthermore, although it is unpublished and not controlling, the Court finds the *Rand* case
6 to be persuasive. Like *Rand*, this case deals with water law and attorney's fees are not
7 mentioned anywhere in NRS 533.450, the statute providing the authority for the Petitions
8 for Judicial Review filed in this case. Accordingly, the Court declines to allow a party to
9 recover attorney's fees under NRS 18.010(2)(b) in a judicial review proceeding under
10 NRS 533.450 absent express statutory authorization. Since NRS 533.450 does not provide
11 for attorney's fees, they are precluded and may not be awarded under NRS 18.010(2)(b)

12 Lastly, even if NRS 18.010(2)(b) did apply to NRS 533.450 (which it does not), the
13 Court finds that the State Engineer's defense of Order 1309 was not brought or maintained
14 without reasonable ground or to harass the prevailing parties. Order 1309, and the defense
15 maintained by the State Engineer, presented substantial issues of public policy and issues
16 of first impression that are now pending on appeal at the Nevada Supreme Court. The
17 Court finds that the State Engineer's defense of Order 1309 was not made without
18 reasonable grounds, nor was it frivolous or vexatious as required by NRS 18.010(2)(b).
19 Therefore, even in the event NRS 18.010(2)(b) could apply to this action, the Court finds
20 that attorney's fees would not be warranted under NRS 18.010(2)(b).

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1 Therefore, CSI and Lincoln/Vidler are not entitled to recover attorney's fees under
2 either NRS 18.010(2)(a) or NRS 18.010(2)(b) as alleged in their Motions. Accordingly, the
3 Court **DENIES** the Motions for Attorney's fees filed by CSI and Lincoln/Vidler.

4 **IT IS SO ORDERED.**

Dated this 22nd day of July, 2022

Bitia Yeager

7 **9F9 0BE E0F9 4C97**
8 **Bitia Yeager**
9 **District Court Judge**

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16 **Submitted this 18th day of July, 2022, and approved as to form and content by:**

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18 Attorney General

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CLARK COUNTY, NEVADA

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6 Southern Nevada Water
Authority, Plaintiff(s)

CASE NO: A-20-816761-C

7 vs.

DEPT. NO. Department 1

8
9 Nevada State Engineer, Division
of Water Resources,
10 Defendant(s)

11
12 **AUTOMATED CERTIFICATE OF SERVICE**

13 This automated certificate of service was generated by the Eighth Judicial District
14 Court. The foregoing Order Denying was served via the court's electronic e' file system to all
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