

IN THE SUPREME COURT OF THE STATE OF NEVADA

COYOTE SPRINGS INVESTMENT, LLC;
LINCOLN COUNTY WATER DISTRICT;
AND VIDLER WATER COMPANY, INC.,

Appellants,

vs.

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

Respondent.

Electronically Filed
Dec 27 2022 03:08 PM
Elizabeth A. Brown
Clerk of Supreme Court

Supreme Court No. 85137

District Court Case No.

A816761

JOINT APPENDIX

VOLUME 3

APPENDIX – CHRONOLOGICAL TABLE OF CONTENTS

DOCUMENT	DATE FILED or ADMITTED	VOL. NO.	PAGE NO.
Coyote Springs Investment LLC’s Petition for Judicial Review of Nevada State Engineer Order 1309	07/09/2020	1	JA_000001- 000032
Lincoln County Water District and Vidler Water Company, Inc.’s Petition for Judicial Review	07/13/2020	1	JA_000033- 000117
State Engineer Record on Appeal Documents	11/09/2020	1	
Order 1309		1	JA_000118- 000185
Order 1303		1	JA_000186- 000204
Notice of Hearing		1	JA_000205- 000225
Amended Notice of Hearing		1	JA_000226- 000243
Notice of Pre-Hearing Conference		1	JA_000244- 000249
Transcripts of Proceedings – Public Hearing Pre-Hearing Conference on 08/08/2019		2	JA_000250- 000283
Order 1169A		2	JA_000284-

			000288
Order 1169		2	JA_000289- 000299
Ruling 5712		2	JA_000300- 000322
Ruling 5987		2	JA_000323- 000326
Ruling 6255		2	JA_000327- 000357
A Regional Interbasin Ground-Water System in the White River Area, Southeastern Nevada		2	JA_000358- 000381
Settlement agreement Among the State Engineer, State of Nevada, Tracy Taylor, P.E., Nevada State Engineer, Jason King, P.E., Acting Nevada State Engineer, Lincoln County Water District and Vidler Water Company		2	JA_000382- 000397
Excerpt from Center for Biological Diversity. Groundwater Management and the Muddy River		2	JA_000398

Springs, Report in Response to Nevada State Engineer Order 1303. Tom Meyers.			
Excerpts from Rebuttal Report – Tom Meyers		2	JA_000399-000404
Amended Stipulation for Withdrawal of Protests		2	JA_000405-000416
Coyote Spring Valley Water Supply		2	JA_000417-000419
US Dept. of Interior Memorandum Request for Formal and Informal Consultation on the Kane Springs Valley Groundwater Development Project in Lincoln County		2	JA_000420-000487
Excerpts of Testimony of Richard K. Waddell on Behalf of U.S. National Park Service		2	JA_000488
Excerpts of Testimony of Richard K. Waddell on Behalf of U.S. National Park Service		2	JA_000489
Excerpt of Post-Hearing Brief of Nevada		2	JA_000490

Cogeneration Associates Nos. 1 and 2 pertaining to Amended Notice of Hearing Interim Order #1303 Following the Hearing Conducted September 23, 2019, Through October 4, 2019, Before the Nevada State Engineer			
Excerpts of Hearing for 1303 on 09/23/2019		3	JA_000491- 000494
Excerpts of Hearing for 1303 on 09/24/2019		3	JA_000495- 000500
Excerpts of Hearing for 1303 on 09/25/2019		3	JA_000501- 000505
Excerpts of Hearing for 1303 on 09/26/2019		3	JA_000506- 000510
Excerpts of Hearing for 1303 on 09/27/2019		3	JA_000511- 000515
Excerpts of Hearing for 1303 on 09/30/2019		3	JA_000516- 000521
Excerpts of Hearing for 1303 on 10/01/2019		3	JA_000522- 000526
Excerpts of Hearing for 1303 on 10/02/2019		3	JA_000527- 000531
Excerpts of Hearing for 1303		3	JA_000532-

on 10/03/2019			000536
Excerpts of Hearing for 1303 on 10/04/2019		3	JA_000537- 000541
Orders Granting Motions to Intervene	02/26/2021	3	JA_000542- 000545
Coyote Springs Investment, LLC's Opening Brief on Petition for Judicial Review	08/27/2021	3	JA_000546- 000614
Lincoln County Water District and Vidler Water Company, Inc.'s Opening Brief	08/27/2021	3	JA_000615- 000709
Respondents' Answering Brief	11/23/2021	4	JA_000710- 000762
Minute Order	12/03/2021	4	JA_000763- 000764
Coyote Springs Investment, LLC's Reply in Support of Opening Brief	01/11/2022	4	JA_000765- 000802
Lincoln County Water District and Vidler Water Company, Inc.'s Reply Brief	01/11/2022	4	JA_000803- 000866
Transcript re: Petition for Judicial Review	02/14/2022	5	JA_000867- 001056
Transcript re: Petition for Judicial Review	02/15/2022	5-7	JA_001057- 001382
Transcript re: Petition for Judicial Review	02/16/2022	7-8	JA_001383- 001678

Transcript re: Petition for Judicial Review	02/17/2022	8-9	JA_001679-001938
Findings of Fact, Conclusions or Law, and Order Granting Petitions for Judicial Review	04/19/2022	9	JA_001939-001978
Coyote Springs Investment, LLC's Motion for Attorney Fees	05/05/2022	9	JA_001979-001998
Appendix of Exhibits to Coyote Springs Investment, LLC's Motion for Attorney Fees	05/05/2022	10	JA_001999-002220
Lincoln County Water District's and Vidler Water Company, Inc.'s Motion for Attorneys' Fees	05/10/2022	11	JA_002221-002386
Errata Providing Exhibit to Declaration of Karen A. Peterson in Support of Lincoln County Water District's and Vidler Water Company, Inc.'s Motion for Attorney's Fees	05/11/2022	11	JA_002387-002401
State Engineer's Omnibus Opposition to Respective Motions for Attorney's Fees	05/19/2022	12	JA_002402-002507
Lincoln County Water District's and Vidler Water Company, Inc.'s Reply in Support of Motion for Attorneys' Fees	06/27/2022	12	JA_002508-002518

Coyote Springs Investment, LLC's Reply in Support of Motion for Attorney Fees	06/27/2022	12	JA_002519-002528
Recorder's Transcript re: Lincoln County Water District's and Vidler Water Company, Inc.'s Motion for Attorney Fees; Coyote Springs Investment, LLC's Motion for Attorney Fees; State Engineer's Motion to Retax Petitioners Apex Holding Company, LLC and Dry Lake Water, LLC's Costs	07/05/2022	12	JA_002529-002554
Order Denying Coyote Springs Investment, LLC's and Lincoln County Water District and Vidler Water Company, Inc.'s Motions for Attorney's Fees	07/22/2022	12	JA_002555-002564
Notice of Entry of Order Denying Coyote Springs Investment, LLC's and Lincoln County Water District and Vidler Water Company, Inc.'s Motions for Attorney's Fees	07/22/2022	12	JA_002565-002578
Coyote Springs Investment, LLC's Notice of Appeal	08/04/2022	12	JA_002579-002584
Lincoln County Water District's and Vidler Water Company, Inc.'s	08/09/2022	12	JA_002585-002587

Notice of Appeal			
------------------	--	--	--

APPENDIX – ALPHABETICAL TABLE OF CONTENTS

DOCUMENT	DATE FILED or ADMITTED	VOL. NO.	PAGE NO.
A Regional Interbasin Ground-Water System in the White River Area, Southeastern Nevada		2	JA_000358-000381
Amended Notice of Hearing		1	JA_000226-000243
Amended Stipulation for Withdrawal of Protests		2	JA_000405-000416
Appendix of Exhibits to Coyote Springs Investment, LLC’s Motion for Attorney Fees	05/05/2022	10	JA_001999-002220
Coyote Spring Valley Water Supply		2	JA_000417-000419
Coyote Springs Investment LLC’s Petition for Judicial Review of Nevada State Engineer Order 1309	07/09/2020	1	JA_000001-000032
Coyote Springs Investment, LLC’s Motion for Attorney Fees	05/05/2022	9	JA_001979-001998
Coyote Springs Investment, LLC’s Notice of Appeal	08/04/2022	12	JA_002579-002584
Coyote Springs Investment, LLC’s Opening Brief on Petition for Judicial Review	08/27/2021	3	JA_000546-000614

Coyote Springs Investment, LLC's Reply in Support of Motion for Attorney Fees	06/27/2022	12	JA_002519-002528
Coyote Springs Investment, LLC's Reply in Support of Opening Brief	01/11/2022	4	JA_000765-000802
Errata Providing Exhibit to Declaration of Karen A. Peterson in Support of Lincoln County Water District's and Vidler Water Company, Inc.'s Motion for Attorney's Fees	05/11/2022	11	JA_002387-002401
Excerpt from Center for Biological Diversity. Groundwater Management and the Muddy River Springs, Report in Response to Nevada State Engineer Order 1303. Tom Meyers.		2	JA_000398
Excerpt of Post-Hearing Brief of Nevada Cogeneration Associates Nos. 1 and 2 pertaining to Amended Notice of Hearing Interim Order #1303 Following the Hearing Conducted September 23, 2019, Through October 4, 2019, Before the Nevada State Engineer		2	JA_000490
Excerpts from Rebuttal Report –		2	JA_000399-

Tom Meyers			000404
Excerpts of Hearing for 1303 on 09/23/2019		3	JA_000491- 000494
Excerpts of Hearing for 1303 on 09/24/2019		3	JA_000495- 000500
Excerpts of Hearing for 1303 on 09/25/2019		3	JA_000501- 000505
Excerpts of Hearing for 1303 on 09/26/2019		3	JA_000506- 000510
Excerpts of Hearing for 1303 on 09/27/2019		3	JA_000511- 000515
Excerpts of Hearing for 1303 on 09/30/2019		3	JA_000516- 000521
Excerpts of Hearing for 1303 on 10/01/2019		3	JA_000522- 000526
Excerpts of Hearing for 1303 on 10/02/2019		3	JA_000527- 000531
Excerpts of Hearing for 1303 on 10/03/2019		3	JA_000532- 000536
Excerpts of Hearing for 1303 on 10/04/2019		3	JA_000537- 000541
Excerpts of Testimony of Richard K. Waddell on Behalf of U.S. National Park Service		2	JA_000488
Excerpts of Testimony of Richard K. Waddell on Behalf of U.S.		2	JA_000489

National Park Service			
Findings of Fact, Conclusions or Law, and Order Granting Petitions for Judicial Review	04/19/2022	9	JA_001939-001978
Lincoln County Water District and Vidler Water Company, Inc.'s Opening Brief	08/27/2021	3	JA_000615-000709
Lincoln County Water District and Vidler Water Company, Inc.'s Petition for Judicial Review	07/13/2020	1	JA_000033-000117
Lincoln County Water District and Vidler Water Company, Inc.'s Reply Brief	01/11/2022	4	JA_000803-000866
Lincoln County Water District's and Vidler Water Company, Inc.'s Motion for Attorneys' Fees	05/10/2022	11	JA_002221-002386
Lincoln County Water District's and Vidler Water Company, Inc.'s Reply in Support of Motion for Attorneys' Fees	06/27/2022	12	JA_002508-002518
Lincoln County Water District's and Vidler Water Company, Inc.'s Notice of Appeal	08/09/2022	12	JA_002585-002587
Minute Order	12/03/2021	4	JA_000763-000764
Notice of Entry of Order Denying	07/22/2022	12	JA_002565-

Coyote Springs Investment, LLC's and Lincoln County Water District and Vidler Water Company, Inc.'s Motions for Attorney's Fees			002578
Notice of Hearing		1	JA_000205-000225
Notice of Pre-Hearing Conference		1	JA_000244-000249
Order 1169		2	JA_000289-000299
Order 1169A		2	JA_000284-000288
Order 1303		1	JA_000186-000204
Order 1309		1	JA_000118-000185
Order Denying Coyote Springs Investment, LLC's and Lincoln County Water District and Vidler Water Company, Inc.'s Motions for Attorney's Fees	07/22/2022	12	JA_002555-002564
Orders Granting Motions to Intervene	02/26/2021	3	JA_000542-000545
Recorder's Transcript re: Lincoln County Water District's and Vidler Water Company, Inc.'s Motion for	07/05/2022	12	JA_002529-002554

Attorney Fees; Coyote Springs Investment, LLC's Motion for Attorney Fees; State Engineer's Motion to Retax Petitioners Apex Holding Company, LLC and Dry Lake Water, LLC's Costs			
Respondents' Answering Brief	11/23/2021	4	JA_000710-000762
Ruling 5712		2	JA_000300-000322
Ruling 5987		2	JA_000323-000326
Ruling 6255		2	JA_000327-000357
Settlement agreement Among the State Engineer, State of Nevada, Tracy Taylor, P.E., Nevada State Engineer, Jason King, P.E., Acting Nevada State Engineer, Lincoln County Water District and Vidler Water Company		2	JA_000382-000397
State Engineer Record on Appeal Documents	11/09/2020	1	
State Engineer's Omnibus Opposition to Respective Motions for Attorney's Fees	05/19/2022	12	JA_002402-002507

Transcript re: Petition for Judicial Review	02/14/2022	5	JA_000867-001056
Transcript re: Petition for Judicial Review	02/15/2022	5-7	JA_001057-001382
Transcript re: Petition for Judicial Review	02/16/2022	7-8	JA_001383-001678
Transcript re: Petition for Judicial Review	02/17/2022	8-9	JA_001679-001938
Transcripts of Proceedings – Public Hearing Pre-Hearing Conference on 08/08/2019		2	JA_000250-000283
US Dept. of Interior Memorandum Request for Formal and Informal Consultation on the Kane Springs Valley Groundwater Development Project in Lincoln County		2	JA_000420-000487

CERTIFICATE OF SERVICE

I certify that on the 27th day of December 2022, I served a copy of **JOINT APPENDIX** 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:

Coyote Springs Investment, LLC

Emilia Cargill (Wingfield Nevada Group)
William L Coulthard (Coulthard Law PLLC)
Bradley J. Herrema (Brownstein Hyatt Farber Schreck,
LLP/Las Vegas)
Kent R. Robison (Robison, Sharp, Sullivan & Brust)
Hannah E. Winston (Robison, Sharp, Sullivan & Brust)

Lincoln County Water District

Dylan V. Frehner (Lincoln County District Attorney)
Wayne O. Klomp (Great Basin Law)
Vidler Water Company, Inc.
Karen A. Peterson (Allison MacKenzie, Ltd.)

///

///

Adam Sullivan, P.E.

James N. Bolotin (Attorney General/Carson City)

Jeffrey M. Conner (Attorney General/Carson City)

Aaron D. Ford (Attorney General/Carson City)

Steven G. Shevorski (Attorney General/Las Vegas)

Laena St Jules (Attorney General/Carson City)

DATED this 27th day of December, 2022.

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

In The Matter Of:

*DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES
DIVISION OF WATER RESOURCES*

*Vol. I
September 23, 2019*

*Capitol Reporters
123 W. Nye Lane, Ste 107

Carson City, Nevada 89706*

Original File 9-23-19VolumeIFINALFINALSE_1.txt
Min-U-Script® with Word Index

Page 1

1 STATE OF NEVADA
 2 DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES
 3 DIVISION OF WATER RESOURCES
 4 BEFORE MICHELINE N. FAIRBANK, HEARING OFFICER
 5
 6
 7 IN THE MATTER OF THE ADMINISTRATION
 AND MANAGEMENT OF THE LOWER
 8 WHITE RIVER FLOW SYSTEM WITHIN
 COYOTE SPRING VALLEY HYDROGRAPHIC
 9 BASIN (210), A PORTION OF BLACK
 MOUNTAINS AREA HYDROGRAPHIC
 10 BASIN (215), GARNET VALLEY
 HYDROGRAPHIC BASIN (216), HIDDEN
 11 VALLEY HYDROGRAPHIC BASIN (217),
 CALIFORNIA WASH HYDROGRAPHIC BASIN
 12 (218), AND MUDDY RIVER SPRINGS AREA
 (AKA UPPER MOAPA VALLEY HYDROGRAPHIC
 13 BASIN (219)).
 _____ /
 14
 15 TRANSCRIPT OF PROCEEDINGS
 16 PUBLIC HEARING
 17 HEARING ON ORDER 1303
 18 VOLUME I
 19 MONDAY, SEPTEMBER 23, 2019
 20
 21
 22
 23
 24 Reported by: Michel Loomis, RPR

Page 3

1 APPEARANCES:
 2 For Lincoln County
 Water District
 3 -and-
 Vidler Water Company: Allison MacKenzie
 4 By: Karen Peterson, Esq.
 Carson City, Nevada
 5
 For Moapa Band of Paiutes: Beth Baldwin, Esq.
 6
 7 For NCA: Alex Flangas, Esq.
 Reno, Nevada
 8
 9 For Moapa Valley
 Water District: Greg Morrison, Esq.
 10
 11 For Bedroc: Schroeder Law
 By: Laura Schroeder, Esq.
 12
 For City of North Las Vegas: Schroeder Law
 13 By: Laura Schroeder, Esq.
 14 For National Park Service: Karen Glasgow
 15 For Center for Biologic
 Diversity: Patrick Donnelly
 16
 17
 18
 19
 20
 21
 22
 23
 24

Page 2

1 APPEARANCES:
 2 Micheline N. Fairbank,
 Hearing Officer
 3
 Tim Wilson,
 4 Acting State Engineer
 Adam Sullivan,
 5 Deputy State Engineer
 6
 Melissa Flatley,
 7 Chief of the Hearing Officer Section
 Michelle Barnes,
 8 Supervising Professional Engineer
 9
 Levi Kryder,
 10 Chief of the Hydrology Section
 Jon Benedict,
 11 Hydrologist
 12
 Christi Cooper,
 13 Geologist
 Bridget Bliss,
 14 Basin Engineer
 15
 16 For SNWA: Taggart & Taggart, Ltd.
 By: Paul G. Taggart, Esq.
 Carson City, Nevada
 17 -and-
 Tim O'Connor, Esq.
 18 For CSI: Robison, Belaustegui, Sharp
 & Low
 19 By: Kent R. Robison, Esq.
 Reno, Nevada
 20
 21
 22 For CSI: Brownstein Hyatt Farber Schreck
 By: Brad Herrema, Esq.
 Los Angeles, California
 23
 24 For NV Energy: Justina Caviglia, Esq.

Page 4

1 INDEX
 2 THE PANEL: DIRECT CROSS REDIRECT EXAMINATION
 3 By Mr. Herrema: 12 224
 4 By Mr. Robison: 100
 5 By Ms. Glasgow: 132
 6 By Ms. Baldwin: 139
 7 By Mr. Taggart: 141,192,
 212
 8 By Mr. Morrison: 152
 9 By Ms. Peterson: 159
 10 By Mr. Donnelly: 162,201
 11 By Ms. Schroeder: 177
 12 By Mr. Flangas: 172
 13 By Ms. Caviglia: 181
 14 By Ms. Cooper: 186
 15 By Mr. Benedict: 209,232
 16
 EXHIBITS: MARKED ADMITTED
 17
 1 229
 18
 2 230
 19
 20
 21
 22
 23
 24

Page 5

1 CARSON CITY, NEVADA, MONDAY, SEPTEMBER 23, 2019, A.M. SESSION
2 -o0o-
3
4 HEARING OFFICER FAIRBANK: Let's go ahead and go
5 on the record. Good morning. So this is the time and place
6 set for the hearing in the matter of Lower White River Flow
7 System in the Order 1303 proceedings.
8 My name is Micheline Fairbank, I will be the
9 hearing officer today. And with me is the staff from the
10 Division of Water Resources. We have Tim Wilson, acting State
11 Engineer. We have Adam Sullivan, Deputy State Engineer. Levi
12 Kryder who is our chief of our hydrology section. Jon
13 Benedict who is one of our hydrologists. Christi Cooper who's
14 staffed out of our Las Vegas office who's a geologist and
15 familiar with and works quite extensively in the Lower White
16 River Flow System area.
17 With me also is Melissa Flatly who is the chief
18 of our hearing section. Michelle Barnes, the supervising
19 professional engineer of our hearing section. And
20 Bridget Bliss who is the basin engineer for the Lower White
21 River Flow System basins.
22 Just as a couple preliminary remarks. I wish to
23 go ahead and remind everyone that this proceeding is for the
24 express purpose of providing the State Engineer a concise

Page 6

1 summary of the salient conclusions set forth in the Order 1303
2 reports and rebuttal reports and to direct our office to the
3 evidence and analysis that is supportive of that testimony.
4 I want to just reiterate, and we've been trying
5 to make this clear, that this is not a contested or
6 adversarial proceeding. The scope of this proceeding is for
7 the limited purpose of addressing those four issues plus the
8 fifth.
9 And while that fifth issue is we're on it is not
10 intended to expand the scope of this hearing into making
11 policy determinations with respect to management of the Lower
12 White River Flow System basin's individual water rights, those
13 different types of things, because those are going to be
14 decisions that would have to be made in subsequent proceedings
15 should they be necessary.
16 Additionally, just to go ahead and provide some
17 procedural matters. This morning we'll be starting with
18 Coyote Springs Investments, they were going to have half of
19 the time today and today we have a total of about seven hours.
20 So they're going to have approximately three and
21 a half hours today to go through all of the presentation of
22 the conclusions and reports and evidence on behalf of CSI as
23 well as for cross-examination.
24 And again the opportunity for cross-examination

Page 7

1 is not for an adversarial or contested proceeding, it's to
2 provide the State Engineer a robust record in which to analyze
3 all of the data and conclusions that are being provided to our
4 office.
5 Cross-examination this afternoon will be limited
6 to 14 minutes for the participants and we will have an audible
7 alarm at the end of that time period. We're going to go ahead
8 and take two breaks today, the first one will be about two
9 hours in around 10:30 and then we'll take another ten-minute
10 break this afternoon.
11 Additionally, time left this afternoon after
12 those -- the participants are provided their time for
13 questioning will be reserved for the State Engineer and his
14 staff to ask questions.
15 And if there's additional time remaining at the
16 end of the day before we have to conclude at 4:30, then we may
17 open that up for additional questions by participants and
18 cross-examination. But we do have to conclude at 4:30. We
19 have to be -- everyone has to be out of the legislative
20 building no later than 5:00 today and that's pursuant to LCB's
21 requirements.
22 Additionally, if you plan on leaving documents or
23 materials in the office at the conclusion of -- excuse me, in
24 the hearing room the conclusion today, if there's anything

Page 8

1 that you -- is confidential or is something that you don't
2 want to have publicly accessible you will need to take that
3 with you. While the room is locked up there's no guarantee of
4 security or anything of that nature.
5 Let's see, finally, when it comes to the
6 cross-examination of the witnesses, I just want to go ahead
7 and just make it very clear, the expectation on behalf of the
8 State Engineer and staff is that the witnesses are being
9 responsive and courteous to the time during those that are
10 cross-examining.
11 We understand that this is a limited time period
12 and so we want to have -- we are going to conduct this hearing
13 in a manner to allow a fair opportunity for individuals to ask
14 questions of witnesses.
15 And if there's any perceived effort to stall or
16 to draw out the time of a cross-examining party, then we're
17 going to go ahead and address those matters. Because those --
18 this is intended to be a fair opportunity and really the focus
19 of this is to provide the State Engineer with the most
20 comprehensive evaluation of the data.
21 Also as a reminder, the proceedings are available
22 to be viewed on the internet via the legislative website. And
23 we also have it being cast down to the Las Vegas legislative
24 offices as well.

1 similar enough to be 100 percent sure that it's the same
2 structure.

3 We feel it is based on the fact that we have the
4 continuation of this fault. We see it clearly on both lines,
5 this fault clearly on both lines, and this one was at the same
6 orientation as those.

7 So, yes, we are interpolating across from line B
8 up to line A. There's no way that we can say geophysically
9 that it's absolutely the same feature, but true.

10 MR. REICH: That's all I have.

11 HEARING OFFICER FAIRBANK: All right. Having no
12 other questions from our staff, we can go ahead and conclude
13 today's hearing. And so just to get everyone aware for
14 tomorrow, we'll practice the same procedures again.

15 But, again, if people are expedient and efficient
16 with their use of their time, which is much appreciated by the
17 State Engineer and our staff here, we certainly appreciate
18 that. And we will begin tomorrow with the United States Fish
19 and Wildlife Service. So we'll see you tomorrow. Thank you
20 very much.

21 MR. ROBISON: Thank you.

22 (Proceedings concluded at 3:36 p.m.)

23
24

1 STATE OF NEVADA)
2) ss.

3 CARSON CITY)
4

5 I, MICHEL LOOMIS, a Certified Court Reporter, do
6 hereby certify;

7 That on the 24th of September, 2019, in Carson
8 City, Nevada, I was present and took stenotype notes of the
9 hearing held before the Nevada Department of Conservation and
10 Natural Resources, Division of Water in the within entitled
11 matter, and thereafter transcribed the same into typewriting
12 as herein appears;

13 That the foregoing transcript, consisting of
14 pages 1 through 237 hereof, is a full, true and correct
15 transcription of my stenotype notes of said hearing to the
16 best of my ability.

17 Dated at Carson City, Nevada, this 24th day of
18 September, 2019.

19
20
21

22 _____
MICHEL LOOMIS, RPR
23 NV CCR #228
24

In The Matter Of:

*DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES
DIVISION OF WATER RESOURCES*

*Vol. II
September 24, 2019*

*Capitol Reporters
123 W. Nye Lane, Ste 107

Carson City, Nevada 89706*

Original File 9-24-19a.m.VolumeIIfinalSE_1.txt
Min-U-Script® with Word Index

Page 239

1 STATE OF NEVADA
 2 DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES
 3 DIVISION OF WATER RESOURCES
 4 BEFORE MICHELINE N. FAIRBANK, HEARING OFFICER
 5
 6
 7 IN THE MATTER OF THE ADMINISTRATION
 AND MANAGEMENT OF THE LOWER
 8 WHITE RIVER FLOW SYSTEM WITHIN
 COYOTE SPRING VALLEY HYDROGRAPHIC
 9 BASIN (210), A PORTION OF BLACK
 MOUNTAINS AREA HYDROGRAPHIC
 10 BASIN (215), GARNET VALLEY
 HYDROGRAPHIC BASIN (216), HIDDEN
 11 VALLEY HYDROGRAPHIC BASIN (217),
 CALIFORNIA WASH HYDROGRAPHIC BASIN
 12 (218), AND MUDDY RIVER SPRINGS AREA
 (AKA UPPER MOAPA VALLEY HYDROGRAPHIC
 13 BASIN (219)).
 _____ /
 14
 15 TRANSCRIPT OF PROCEEDINGS
 16 PUBLIC HEARING
 17 HEARING ON ORDER 1303
 18 VOLUME II
 19 (A.M. SESSION, PAGES 239-379)
 20 TUESDAY, SEPTEMBER 24, 2019
 21
 22
 23
 24 Reported by: Michel Loomis, RPR

Page 241

1 APPEARANCES:
 2 For Lincoln County
 Water District
 3 -and-
 Vidler Water Company: Allison MacKenzie
 4 By: Karen Peterson, Esq.
 Carson City, Nevada
 5
 6 For Moapa Band of Paiutes: Beth Baldwin, Esq.
 7 For NCA: Alex Flangas, Esq.
 Reno, Nevada
 8
 9 For Moapa Valley
 Water District: Greg Morrison, Esq.
 10
 11 For Bedroc: Schroeder Law
 By: Laura Schroeder, Esq.
 12
 13 For City of North Las Vegas: Schroeder Law
 By: Laura Schroeder, Esq.
 14 For National Park Service: Karen Glasgow
 15 For Center for Biologic
 Diversity: Patrick Donnelly
 16
 17
 18
 19
 20
 21
 22
 23
 24

Page 240

1 APPEARANCES:
 2 Micheline N. Fairbank,
 Hearing Officer
 3
 4 Tim Wilson,
 Acting State Engineer
 5 Adam Sullivan,
 Deputy State Engineer
 6
 7 Melissa Flatley,
 Chief of the Hearing Officer Section
 8 Michelle Barnes,
 Supervising Professional Engineer
 9
 10 Levi Kryder,
 Chief of the Hydrology Section
 11 Jon Benedict,
 Hydrologist
 12
 13 Christi Cooper,
 Geologist
 14 Bridget Bliss,
 Basin Engineer
 15
 16 For SNWA: Taggart & Taggart, Ltd.
 By: Paul G. Taggart, Esq.
 Carson City, Nevada
 17 -and-
 18 Tim O'Connor, Esq.
 19 For CSI: Robison, Belaustegui, Sharp
 & Low
 20 By: Kent R. Robison, Esq.
 Reno, Nevada
 21
 22 For CSI: Brownstein Hyatt Farber Schreck
 By: Brad Herrema, Esq.
 Los Angeles, California
 23
 24 For NV Energy: Justina Caviglia, Esq.

Page 242

1 INDEX
 2 THE PANEL: DIRECT CROSS REDIRECT EXAMINATION
 3 By Mr. MILLER: 245
 4 By Mr. Herrema: 324
 5 By Ms. Glasgow: 336
 6 By Ms. Baldwin: 337
 7 By Mr. Taggart: 349
 8 By Mr. Morrison: 360
 9 By Ms. Peterson: 366
 10
 11 EXHIBITS: MARKED ADMITTED
 12 5 247
 13 7 247
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24

Page 243

1 CARSON CITY, NEVADA, TUESDAY, SEPTEMBER 24, 2019, A.M. SESSION
 2 -o0o-
 3
 4 HEARING OFFICER FAIRBANK: Good morning. We'll
 5 go ahead and go back on the record, and this is the second day
 6 of the hearing in the administration of Lower White River Flow
 7 System hearing on Order 1303. We'll go ahead and get started
 8 this morning with the U.S. Fish and Wildlife Service.
 9 But just before we get going, again, just to
 10 reiterate, this is an opportunity for the participants to go
 11 ahead and present their salient conclusions and point us in
 12 the direction of the evidence that supports those conclusions,
 13 and yesterday I thought was a very -- went well.
 14 And so keep it in that path that we've been
 15 proceeding. And we appreciate everybody being succinct and
 16 making, you know, efficient use of their time. So with that,
 17 we'll go ahead and turn it over.
 18 MR. MILLER: Hello to everybody, and good
 19 morning. My name is Luke Miller. I'm with the Department of
 20 the Interiors, Office of the Solicitor and I'm here on behalf
 21 of the Fish and Wildlife Service.
 22 Today is our special day to bring forward our
 23 authors and experts who took part of drafting the reports on
 24 behalf of Fish and Wildlife Service that were filed with the

Page 244

1 State Engineer in response to Order 1303.
 2 As you'll note, we have three authors. They each
 3 took part in drafting a specific section, a distinct section
 4 of the primary report filed on July 3rd, and we have one
 5 author who filed the rebuttal or drafted the rebuttal in
 6 whole.
 7 They will each be providing today a summarization
 8 presentation that is distinct and precise to their particular
 9 section, and so hopefully you'll get it mixed up and see their
 10 own styles as well.
 11 The reports, themselves, the Fish Wildlife
 12 Service believes are very robust, well rounded, rational,
 13 reasonable presentations of good information. They are solid
 14 and dense, so they took your recommendation to heart and they
 15 are trying their hardest to focus on the salient points and
 16 conclusions, and just trying to put some good useful
 17 information in front of you folks today so we can have a good
 18 discussion.
 19 To that end, I'll just go ahead and have them
 20 introduce themselves, maybe we can start on the far end, get
 21 your name and spell your last name for the record and just
 22 tell them what you do.
 23 MS. BRAUMILLER: Yeah, Sue Braumiller. I'm a
 24 groundwater hydrologist. The last name is spelled

Page 245

1 B-R-A-U-M-I-L-L-E-R, and I authored sections 1.1 through 1.5
 2 and 1.7.
 3 MR. MAYER: Hello, I'm Tim Mayer, that's
 4 M-A-Y-E-R. I'm a supervisor hydrologist of the water
 5 resources branch in the regional office of the U.S. Fish and
 6 Wildlife in Portland, Oregon and I think that's it.
 7 DR. SCHWEMM: My name is Mike Schwemm,
 8 S-C-H-W-E-M-M, and I'm the Senior Fish Biologist for the
 9 Southern Nevada Fish and Wildlife Service office in Las Vegas,
 10 and I coordinate recovery efforts for the Moapa Dace.
 11 HEARING OFFICER FAIRBANK: Okay.
 12 MR. MILLER: Oh, just, we'll --
 13 HEARING OFFICER FAIRBANK: And so at this point
 14 in time, we can go ahead and have the witnesses sworn in.
 15 MR. MILLER: Yeah, that's a great idea. Sorry
 16 about that.
 17 (The Panel sworn.)
 18 DIRECT EXAMINATION
 19 BY MR. MILLER:
 20 Q. I would note just for the record that these three
 21 individuals were qualified in this proceeding as experts in
 22 their respective fields. And I'll go ahead and ask them now.
 23 Sue, just starting down there with you -- I'm
 24 sorry, Ms. Braumiller, can you verify that you're familiar

Page 246

1 with Fish and Wildlife Service Exhibit 5, the report titled,
 2 "issues related to conjunctive managements of the Lower White
 3 River Flow System," filed July 3rd, 2019?
 4 ANSWERS BY MS. BRAUMILLER:
 5 A. Yes, um-hum.
 6 Q. And can you attest that you personally prepared
 7 any part or parts thereof?
 8 A. Oh, yes.
 9 Q. Can you identify those one more time?
 10 A. Yeah, sections 1.1 through 1.5 and 1.7.
 11 Q. Okay. Mr. Mayer, same question for you. Are you
 12 familiar with the Fish and Wildlife Service Exhibit 5, the
 13 report filed July 3rd?
 14 ANSWERS BY MR. MAYER:
 15 A. Yes, I am.
 16 Q. And can you attest that you personally prepared
 17 any part or parts thereof?
 18 A. Yes, I prepared Section 1.6.
 19 Q. All right. And, Mr. Schwemm, same question to
 20 you. Are you familiar with Fish and Wildlife Service
 21 Exhibit 5, the report filed July 3rd?
 22 ANSWERS BY MR. SCHWEMM:
 23 A. Yes.
 24 Q. And can you attest that you personally prepared

Page 363

1 exclude Kane Springs from this management area as you have it
2 included in your map up there?
3 A. Well, you could always hypothesize any number of
4 such things. But what I noted is that water level
5 fluctuations in CSVM-6 or MX-5, there's 4 or 5 wells in
6 central monitor -- carbonate wells in central Coyote Springs
7 Valley.
8 In any of those, you saw the same water level
9 fluctuations as CSVM-4. They were of different magnitude, but
10 there's clearly a hydraulic -- this is where -- don't touch
11 that thing.
12 This is where it does make a sense to look at
13 time series, right, as a hydrologist or hydrogeologist, okay?
14 So there's a clear hydraulic connection. It's just the
15 transmissivity is much less between central Coyote Spring
16 Valley and southern Kane Springs Valley, but it is still
17 transmissive.
18 Q. All right.
19 A. Right.
20 Q. Thanks.
21 A. Yeah.
22 Q. All right. And this generally is directed to
23 Mr. Mayer, but I think any or all of you might be qualified to
24 answer it. So if anyone feels more comfortable, please.

Page 364

1 You concluded that the triggers from the 2006
2 Memorandum of Understanding based on Warm Springs West flows,
3 those are valid and important for protecting the springs in
4 the Pederson Unit or the Pederson Unit?
5 ANSWERS BY MR. MAYER:
6 A. Yes, I concluded that.
7 Q. Okay. And you're familiar with the amended
8 stipulation between the Fish and Wildlife Service and Lincoln
9 County, Vidler? It's on the record as Fish and Wildlife
10 Service Exhibit 57.
11 A. Yes, I'm familiar with that.
12 Q. Does that agreement also have some trigger levels
13 based on Warm Springs West flows?
14 A. Yes, it does.
15 Q. Would you say that those trigger levels -- those
16 trigger levels are also valid and important to protect
17 Pederson Unit Springs?
18 A. Yes, I would agree, they are.
19 Q. All right. I want to dig a little deeper into
20 that stipulation with Lincoln Vidler. So that stipulation
21 requires the formation of a technical review team, TRT; is
22 that correct?
23 A. Yes. Is this more you, Sue or --
24 ANSWERS BY MS. BRAUMILLER:

Page 365

1 A. I think you're right.
2 MR. MAYER: Yeah, it was. Yeah --
3 ANSWERS BY MS. BRAUMILLER:
4 A. And that team was never formed and never met,
5 um-hum.
6 Q. That was my question. Great. Thank you.
7 When did it last meet is another. Has the
8 stipulation, to your knowledge, has it ever been modified or
9 cancelled according to its terms over the years?
10 ANSWERS BY MR. MAYER:
11 A. Well, it was -- there was a provision that
12 required a monitoring well in the northern part of Coyote
13 Spring Valley, two actually. One on Kane, one in Coyote
14 Spring, one --
15 ANSWERS BY MS. BRAUMILLER:
16 A. One on --
17 MR. MAYER: I can't remember. Yeah, anyway, so
18 that was modified. There was an agreement by the Fish and
19 Wildlife Service to allow -- was it CSVM-4 to still be
20 substituted?
21 MS. BRAUMILLER: I don't remember.
22 MR. MAYER: There was another well that was
23 drilled that was substituted by SNWA that was substituted for
24 the well that was required in the stipulation. But that was

Page 366

1 just the one well. There was never anything addressed as far
2 as the other wells as far as I know.
3 Q. So your knowledge then was one well was
4 substituted and the second one was never drilled?
5 A. As far as I know, yes.
6 Q. All right. Was there ever -- so there was never
7 any agreement obviously from the TRT that those monitoring
8 wells wouldn't be required because the TRT didn't meet?
9 ANSWERS BY MS. BRAUMILLER:
10 A. Never met.
11 MR. MORRISON: All right. That's all I have.
12 Thank you.
13 HEARING OFFICER FAIRBANK: And next up is Lincoln
14 County with Vidler Water Company.
15 CROSS-EXAMINATION
16 MS. PETERSON: Good morning, panel, Karen
17 Pederson representing Lincoln County Water District and Vidler
18 Water Company. And I just had a question for Dr. Schwemm.
19 Are you familiar with the biological opinion U.S.
20 Fish and Wildlife Exhibit 59?
21 ANSWERS BY MR. SCHWEMM:
22 A. Not really. I didn't really address the -- this
23 is Mike Schwemm. Not really. I didn't address the biological
24 opinion in my report. I just spoke of what the triggers

Page 371

1 degree, I have been doing hydrogeology for 24 years.
2 Q. Would you agree, though, if your assumptions
3 about structural geology were wrong or if you had no
4 assumptions about geology in your flow analysis, that your
5 opinions could be wrong?
6 A. No, I don't, and here's the reason. Everywhere
7 where I cited the likely existence of geologic
8 discontinuities, I said subject to hydraulic confirmation.
9 And there is not everywhere, hydraulic confirmation for those
10 no-flow boundaries, if that's what you're specifically
11 referring to. But at many locations, there are.
12 And so my approach is to first look at geology,
13 look for geologic discontinuities that are very significant,
14 and then look for hydraulic confirmation. I don't believe you
15 can infer hydraulic connections or a lack thereof just based
16 on geology.
17 Q. Directing your attention to pages 15 and 16 of
18 your report, which is the Fish and Wildlife Exhibit 5?
19 A. Okay.
20 Q. You make some conclusions about 12 wells on those
21 pages, that they're in the carbonate; do you recall that?
22 A. Let's see. Wait a minute. Oh, there were
23 several -- there were 14, yeah, several of the carbonate wells
24 that were the water level records for some of the carbonate

Page 372

1 wells that were analyzed using SeriesSEE in 2013 are not part
2 of the regional aquifer. So maybe you have to clarify your
3 question a little bit.
4 Q. Well, directing your attention to the 12 wells
5 that you have on pages 15 and 16; do you see those?
6 A. I see there are -- there's 1, 2 -- yeah. Okay,
7 yeah, I see them.
8 Q. All right. You used a geologic map to determine
9 which geologic units the wells represent; is that correct?
10 A. Not only geologic maps, but also the well logs.
11 Q. You did look at the well logs?
12 A. Absolutely.
13 Q. Did you note that in your report?
14 A. I don't know. If you want me to read the text,
15 I'll do it right now. But I can tell you I looked at the well
16 logs and the geologic mapping, of course.
17 Q. For all the wells listed on pages 15 and 16?
18 A. Correct, um-hum. Right, um-hum.
19 Q. And then directing your attention to page 14 of
20 your report?
21 A. Um-hum.
22 Q. Exhibit 5?
23 A. Uh-huh, right.
24 Q. You talk about the parameters of the Theis

Page 373

1 transforms. Do you see that? It's in the third paragraph
2 down.
3 A. Um-hum.
4 Q. You're familiar with that sentence?
5 A. Which sentence are you talking about?
6 Q. It starts with "the parameters of the Theis
7 transforms as applied in SeriesSEE analysis"?
8 A. Yeah, okay.
9 Q. Do you see that?
10 A. Right, right.
11 Q. That they're not intended or -- to represent or
12 serve as estimates of aquifer parameters?
13 A. Correct, um-hum.
14 Q. Are you saying that the SeriesSEE analysis allows
15 you to ignore structural geology and well construction?
16 A. It doesn't take those things into account because
17 it's a Curve-fitting tool, Curve-fitting tool. You're fitting
18 analytical approximations of various stresses that account for
19 changes in water level in the well to document water level
20 records for wells. That's the nature of it.
21 Q. And would you agree -- and this might have been
22 asked already, so I apologize if it's a repeat. Would you
23 agree that the SeriesSEE analysis does not incorporate
24 recharge due to weather events, such as high precipitation in

Page 374

1 2005 or 2010?
2 A. It could be made to do that, but that is not the
3 way it was applied to interpret the Order 1169 pumping test,
4 because our purpose was to characterize the aerial extent of
5 the drawdown created by the test pumping.
6 And then secondarily, we were surprised to see
7 how uniform it was over such a large area. It was not the
8 purpose. This was pure application of SeriesSEE.
9 Q. Did the SeriesSEE analysis drawdown impacts
10 extend from the Order 1169 pumping to Kane Springs Valley,
11 which is about over 15 miles away?
12 A. You know, I don't believe KMW-1 was officially
13 one of the water monitoring wells for the Order 1169 study,
14 although there was monitoring. I found the hydrographs, of
15 course, in the State Engineer's data basis. And it was not
16 officially -- oh, I'm sorry, I'm getting to my point here.
17 It was not -- in fact, there was an explicit
18 decision in 2007 not to include it in the Order 1169 pumping
19 test. I know it was -- there was a decision not to include it
20 in the pumping test. I think it was based on the 2007 ruling
21 5217. But there is groundwater level data for KMW-1 through
22 the pumping tests and I think the monitoring started in about
23 2007 perhaps, something like that. So it's there, um-hum.
24 Q. Right. But I think I was asking you about -- and

1 STATE OF NEVADA)
) ss.

2 CARSON CITY)

3

4 I, MICHEL LOOMIS, a Certified Court Reporter, do
5 hereby certify;

6 That on the 24th of September, 2019, in Carson
7 City, Nevada, I was present and took stenotype notes of the
8 hearing held before the Nevada Department of Conservation and
9 Natural Resources, Division of Water in the within entitled
10 matter, and thereafter transcribed the same into typewriting
11 as herein appears;

12 That the foregoing transcript, consisting of
13 pages 239 through 379 hereof, is a full, true and correct
14 transcription of my stenotype notes of said hearing to the
15 best of my ability.

16

17 Dated at Carson City, Nevada, this 25th day of
18 September, 2019.

19

20

21

22

MICHEL LOOMIS, RPR
NV CCR #228

23

24

25

In The Matter Of:

*DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES
DIVISION OF WATER RESOURCES*

*Vol. III
September 25, 2019*

*Capitol Reporters
123 W. Nye Lane, Ste 107

Carson City, Nevada 89706*

Original File 092519waterFINAL pm.txt
Min-U-Script® with Word Index

Page 599

1 STATE OF NEVADA
 2 DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES
 3 DIVISION OF WATER RESOURCES
 4 BEFORE MICHELINE N. FAIRBANK, HEARING OFFICER
 5
 6
 7 IN THE MATTER OF THE ADMINISTRATION
 AND MANAGEMENT OF THE LOWER
 8 WHITE RIVER FLOW SYSTEM WITHIN
 COYOTE SPRING VALLEY HYDROGRAPHIC
 9 BASIN (210), A PORTION OF BLACK
 MOUNTAINS AREA HYDROGRAPHIC
 10 BASIN (215), GARNET VALLEY
 HYDROGRAPHIC BASIN (216), HIDDEN
 11 VALLEY HYDROGRAPHIC BASIN (217),
 CALIFORNIA WASH HYDROGRAPHIC BASIN
 12 (218), AND MUDDY RIVER SPRINGS AREA
 (AKA UPPER MOAPA VALLEY HYDROGRAPHIC
 13 BASIN (219)).

14
 15
 16 TRANSCRIPT OF PROCEEDINGS
 17 PUBLIC HEARING
 18 HEARING ON ORDER 1303
 19 VOLUME III
 (P.M. SESSION, PAGES 599-693)
 20
 21 WEDNESDAY, SEPTEMBER 25, 2019
 22
 23
 24 Reported by: Kathy Terhune, RPR

Page 601

1 APPEARANCES:
 2 For NV Energy: Justina Caviglia, Esq.
 Reno, Nevada
 3
 For Lincoln County
 4 Water District
 -and-
 5 Vidler Water Company: Allison MacKenzie
 By: Karen Peterson, Esq.
 6 Carson City, Nevada
 7 For Moapa Band of Paiutes: Beth Baldwin, Esq.
 8 For NCA: Alex Flangas, Esq.
 Reno, Nevada
 9
 For Moapa Valley
 10 Water District: Greg Morrison, Esq.
 11
 For Bedroc: Schroeder Law
 12 By: Laura Schroeder, Esq.
 13 For City of North Las Vegas: Schroeder Law
 By: Laura Schroeder, Esq.
 14
 For National Park Service: Karen Glasgow, Esq.
 15
 For Center for Biologic
 16 Diversity: Patrick Donnelly, Esq.
 17 For U.S. Fish and Wildlife: Luke Miller, Esq.
 Ass. Regional Solicitor
 18 Sacramento, CA
 19 For Muddy Valley Irrigation
 Company: Steve King, Esq.
 20
 21
 22
 23
 24

Page 600

1 APPEARANCES:
 2 Micheline N. Fairbank,
 Hearing Officer
 3
 Tim Wilson,
 4 Acting State Engineer
 5 Adam Sullivan,
 Deputy State Engineer
 6
 Melissa Flatley,
 7 Chief of the Hearing Officer Section
 8 Michelle Barnes,
 Supervising Professional Engineer
 9
 Levi Kryder,
 10 Chief of the Hydrology Section
 11 John Benedict,
 Hydrologist
 12
 Christi Cooper,
 13 Geologist
 14 Bridget Bliss,
 Basin Engineer
 15
 16 For SNWA: Taggart & Taggart, Ltd.
 By: Paul G. Taggart, Esq.
 17 Carson City, Nevada
 -and-
 18 Tim O'Connor, Esq.
 19 For CSI: Robison, Belaustegui, Sharp
 & Low
 20 By: Kent R. Robison, Esq.
 Reno, Nevada
 21
 For CSI: Brownstein Hyatt Farber
 22 Schreck
 By: Brad Herrema, Esq.
 23 Los Angeles, California
 24

Page 602

1
 2
 3
 4
 5 By Mr. Herrema 604
 6 By Ms. Baldwin 615
 7 By Mr. Taggart 624
 8 By Ms. Peterson 636
 9 By Ms. Schroeder 645
 10 By Mr. Donnelly 651
 11 By Mr. King 658
 12 By Ms. Caviglia 660
 13 By Ms. Barnes 661
 14 By Ms. Cooper 663
 15 By Mr. Benedict 664
 16 By Mr. Sullivan 668
 17 RECROSS
 18 By Mr. Herrema 672
 19 By Ms. Baldwin 675
 20 By Mr. Taggart 681
 21 By Mr. Morrison 687
 22 By Ms. Peterson 689
 23
 24

Page 603

1 SEPTEMBER 25, 2019; 1:00 P.M.; CARSON CITY, NEVADA.
2
3 -000-
4
5 HEARING OFFICER FAIRBANK: Okay. Let's go
6 ahead and go back on the record. And so, we'll go
7 ahead and start the opportunity for cross-examination
8 and questions.
9 And we will commence -- start with Coyote
10 Springs Investments.
11 And again, we've had several parties that have
12 indicated that they're not going to be participating in
13 cross-examination today, and so, I've adjusted the time
14 schedule so each of the participants will have
15 16 minutes for their cross-examination. And then,
16 again, if there's time at the end of today, then we can
17 go ahead and see about maybe allowing a second round of
18 questions.
19 Go ahead and proceed, Mr. Herrema.
20
21 RICHARD K. WADDELL, JR.,
22 called as a witness herein by the National
23 Park Service, having been previously duly
24 sworn, was examined and testified as follows:

Page 604

1 CROSS-EXAMINATION
2 BY MR. HERREMA:
3 Q. Good afternoon, Dr. Waddell.
4 A. Good afternoon.
5 Q. I'm Brad Herrema. I'm counsel for CSI. I have
6 with me at the table Emilia Cargill who is a General
7 Counsel for CSI. And I have handful of questions. I'm
8 going to try to do as much as I can with my 16 minutes.
9 So, I'm going to try to move quickly. But, I would
10 like to get your full answers to each of the questions.
11 First, you stated in your presentation that
12 discharge has the smallest -- excuse me -- has the
13 smallest amount of uncertainty.
14 What do you use to measure groundwater outflow
15 from a system? Can --
16 A. I want to make sure I understand your question.
17 When you talk about groundwater outflow, are you
18 talking about outflow across a boundary, or you talking
19 about outflow to the surface?
20 Q. How would you measure either?
21 A. Well, the outflow across a boundary really
22 can't be measured. You can estimate it based upon
23 estimates of the transmissivity of the aquifer and
24 gradient. But, there's a lot of uncertainty in the

Page 605

1 transmissivity values. Same answer for inflows. But,
2 whereas say discharge to a spring, you can, depending
3 on that, the discharge rate from the spring, use
4 different techniques. If it's a large capacity spring
5 that results in spring flow, you can build a flume or
6 other type of measurement, strike them on the stream
7 and measure the flow with that technique.
8 If it's a very small stream -- a very small
9 discharging spring, you can estimate it -- I'm sorry --
10 measure it through a bucket and stopwatch method, if
11 you will, where you capture the discharge from the
12 spring over a certain period of time, measure that
13 volume, and divide it by the amount of time.
14 So, you know, it depends really on what the
15 characteristics of that spring discharge are. If
16 you're interested in discharge into a river, you would
17 do like the USGS did with their synoptic study that
18 they performed on the river where you set up stations
19 along the river and make measurements at those stations
20 either by measuring water velocity cross-sectional area
21 and integrating that to get a value, or you -- if you
22 have a gauging station with a flume or weir or
23 something like that, you can use those data. But, you
24 do that at different points along the stream so that

Page 606

1 you can see changes. And the concept typically is to
2 measure those several times and average out the years.
3 Q. Okay. Thank you. I'd like to move on to some
4 questions about your model.
5 Looking at the 2012 report on development of
6 your model, there's a table 3-4. It's average annual
7 evapotranspiration discharge by hydrographic area. Do
8 you recall that?
9 A. I do not, but I think I've got a copy of it
10 here.
11 Q. Okay. The report states that -- or that table
12 states that there's 4000-acre-feet per year of
13 evapotranspiration in Muddy River Springs area, there's
14 2000-acre-feet per year of evapotranspiration in Black
15 Mountains area, 6000-acre-feet per year of
16 evapotranspiration in California Wash which totals
17 12,000-acre-feet per year. And this references a 2008
18 USGS study.
19 Do you know if these were predevelopment
20 evapotranspiration rates, or they were current in 2008?
21 A. They were current in 2008.
22 Q. Your 2012 report also states that flow in
23 Coyote Spring Valley comes from a combination of
24 recharging in Delamar Mountains and underflow at the

Page 639

1 A. I believe there is, yes.
2 Q. And what is that?
3 A. I think it's the observed water level response
4 in those two wells to pumping of MX-5 during the 1169
5 testing.
6 Q. Okay. And we'll get to that.
7 I did want to ask you a question about your
8 model. The model, did you simulate Kane Spring's
9 pumping in your model?
10 A. We did.
11 Q. And was it a thousand acre-feet?
12 A. I think so. But I would have to check. On the
13 order of that, yes.
14 Q. And there was drawdown at Muddy -- the Muddy
15 River Springs area from the Kane pumping?
16 A. I did not investigate that.
17 Q. So, your model simulated the Kane pumping, but
18 you did not investigate whether there was any impact or
19 drawdown at the Muddy River Springs area from the Kane
20 Spring's pumping?
21 A. We did not simulate that. Now, we could have
22 done that by running simulation with that pumping, and
23 then a second simulation absent that pumping, and then
24 comparing the two results, but we did not do that.

Page 640

1 Q. Did you do any simulations of Kane pumping for
2 drawdown at Rogers and Blue Point?
3 A. No.
4 Q. And then direct your attention to slide 23.
5 You just had some questions about what you -- what you
6 have showing here in your hydrograph.
7 The MX-5 test started November 2010, and ended
8 in March 2013; is that correct?
9 A. I don't recall the exact dates, but that sounds
10 correct.
11 Q. All right. And your yellow dots that you show
12 in your hydrograph here, they start approximately nine
13 months after the MX pumping starts?
14 A. Correct.
15 Q. And what is the explanation for that delay?
16 A. There was testimony yesterday by Ms. Braumiller
17 and then testimony by me today that we both believe
18 that there's a decrease in transmissivity as you move
19 further north in Coyote Spring Valley, and that lower
20 transmissivity delays the transmission of affects to
21 the location of these wells.
22 Q. And then you show water levels don't start
23 recovery until the beginning of 2015; is that correct?
24 A. I don't believe that's correct, no. It looks

Page 641

1 like it occurs -- starts to occur before that.
2 Q. And when do you have it occurring?
3 A. For KW-1, early in 2014. And for the other
4 well there's a gap in the data at that location. It
5 looks like based on a limited number of data points,
6 recovery was occurring later in 2014, but then changed
7 into a declining trend.
8 Q. Is there any reason why drawdown and recovery
9 responses would be different?
10 A. Yes.
11 Q. And what is that?
12 A. When pumping occurs for a period of time, you
13 get a response curve that shows faster drawdown and
14 slower recovery. It's because of the depletion in
15 amount of water stored in the aquifer, and the lower
16 gradient that exists during the recovery phase.
17 There was a paper prepared by Stan Leake of the
18 USGS in Arizona that evaluated this through a modeling
19 exercise and showed very significant affects. We saw
20 those same affects in our model of the aquifer in that
21 Black Mesa area in Arizona. Because it's a function at
22 how long the well is pumped in terms of the different
23 apparent behavior in the draw -- initial drawdown and
24 the late recovery responses.

Page 642

1 Q. Did you do any analysis of the affects of
2 pumping the Arrow Canyon wells?
3 A. No.
4 Q. And in Appendix B of your report you -- well,
5 on page 15 of your report you indicate there was
6 pumping and you included for Kane, Tule, and Virgin
7 River Valley. Do you recall that in your report?
8 A. I do.
9 Q. And in Appendix B, we don't see any rate of
10 pumping for Kane, Tule, and Virgin River Valley?
11 A. You're referring to the table that we provided?
12 Q. Yes.
13 A. That's correct. I believe it's correct. I
14 haven't -- reviewed that. But this table was intended
15 to provide with the changes in pumping for the three
16 scenarios. And the pumping in those other valleys was
17 maintained I believe at the rates that we used for
18 scenario one in our, approximately -- I think 2012
19 report on affects of pumping that had seven different
20 scenarios. But, it was not modified in this report,
21 and would not have impacted results from this report.
22 Q. The Kane -- the Kane, the Tule, and the Virgin
23 River Valley pumping would not have impacted the
24 results of your report?

1 questions.
 2 Georgia Pacific. Thank you. No additional
 3 questions.
 4 Muddy Valley Irrigation Company?
 5 MR. KING: No questions.
 6 HEARING OFFICER FAIRBANK: So being no
 7 additional questions, Nevada Energy, see no additional
 8 questions.
 9 Okay. Then at this point I'll go ahead and
 10 open it back up to the State Engineer staff if there's
 11 any additional questions. All right.
 12 All right. So we'll go ahead and open it back
 13 up just for few extra minutes for other participants.
 14 If they haven't any additional questions, I'll go ahead
 15 and go back to Coyote Spring Investments. Did you guys
 16 have any additional questions?
 17 MR. HERREMA: Not at this time.
 18 HEARING OFFICER FAIRBANK: Not at this time.
 19 And the Tribe, do you have any additional
 20 questions at this time?
 21 MS. BALDWIN: No.
 22 HEARING OFFICER FAIRBANK: Southern Nevada
 23 Water Authority, do you have any additional questions?
 24 MR. TAGGERT: No.

1 HEARING OFFICER FAIRBANK: Maybe I'm going to
 2 just make this easy. Does anybody have any additional
 3 questions?
 4 All right. Nobody's jumping up, so we're going
 5 to go ahead and conclude today's hearing. Thank you
 6 very much for everyone. All right. We will see you
 7 tomorrow morning.
 8
 9
 10 (3:35 p.m. conclusion.)
 11
 12
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24

1
 2 CERTIFICATE
 3
 4 STATE OF NEVADA)
 5)SS.
 6 CARSON CITY)
 7
 8 I, Kathy Terhune, CCR 209, do hereby certify
 9 that I reported the foregoing proceedings; that the
 10 same is a true and correct rough draft as reflected by
 11 my original machine shorthand notes taken at said time
 12 and place, Pages 599-693.
 13
 14 Dated at Carson City, Nevada, this
 15 26th day of September, 2019.
 16
 17
 18
 19 _____
 19 CCR #209
 20
 21
 22
 23
 24

In The Matter Of:

*DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES
DIVISION OF WATER RESOURCES*

*Vol. IV
September 26, 2019*

*Capitol Reporters
123 W. Nye Lane, Ste 107

Carson City, Nevada 89706*

Original File 9-26-19A.M.VolumeIVfinalSE_1.txt
Min-U-Script® with Word Index

Page 694

1 STATE OF NEVADA
 2 DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES
 3 DIVISION OF WATER RESOURCES
 4 BEFORE MICHELINE N. FAIRBANK, HEARING OFFICER
 5
 6
 7 IN THE MATTER OF THE ADMINISTRATION
 AND MANAGEMENT OF THE LOWER
 8 WHITE RIVER FLOW SYSTEM WITHIN
 COYOTE SPRING VALLEY HYDROGRAPHIC
 9 BASIN (210), A PORTION OF BLACK
 MOUNTAINS AREA HYDROGRAPHIC
 10 BASIN (215), GARNET VALLEY
 HYDROGRAPHIC BASIN (216), HIDDEN
 11 VALLEY HYDROGRAPHIC BASIN (217),
 CALIFORNIA WASH HYDROGRAPHIC BASIN
 12 (218), AND MUDDY RIVER SPRINGS AREA
 (AKA UPPER MOAPA VALLEY HYDROGRAPHIC
 13 BASIN (219)).
 _____ /
 14
 15 TRANSCRIPT OF PROCEEDINGS
 16 PUBLIC HEARING
 17 HEARING ON ORDER 1303
 18 VOLUME IV, A.M. SESSION
 19 (Pages 694-830)
 20 THURSDAY, SEPTEMBER 26, 2019
 21
 22
 23
 24 Reported by: Michel Loomis, RPR

Page 696

1 APPEARANCES:
 2 For Lincoln County
 Water District
 3 -and-
 Vidler Water Company: Allison MacKenzie
 4 By: Karen Peterson, Esq.
 Carson City, Nevada
 5
 For Moapa Band of Paiutes: Beth Baldwin, Esq.
 6
 7 For NCA: Alex Flangas, Esq.
 Reno, Nevada
 8
 9 For Moapa Valley
 Water District: Greg Morrison, Esq.
 10
 11 For Bedroc: Schroeder Law
 By: Laura Schroeder, Esq.
 12
 For City of North Las Vegas: Schroeder Law
 13 By: Laura Schroeder, Esq.
 14 For National Park Service: Karen Glasgow
 15 For Center for Biologic
 Diversity: Patrick Donnelly
 16
 17
 18
 19
 20
 21
 22
 23
 24

Page 695

1 APPEARANCES:
 2 Micheline N. Fairbank,
 Hearing Officer
 3
 Tim Wilson,
 4 Acting State Engineer
 5 Adam Sullivan,
 Deputy State Engineer
 6
 Melissa Flatley,
 7 Chief of the Hearing Officer Section
 8 Michelle Barnes,
 Supervising Professional Engineer
 9
 Levi Kryder,
 10 Chief of the Hydrology Section
 11 Jon Benedict,
 Hydrologist
 12
 Christi Cooper,
 13 Geologist
 14 Bridget Bliss,
 Basin Engineer
 15
 16 For SNWA: Taggart & Taggart, Ltd.
 By: Paul G. Taggart, Esq.
 Carson City, Nevada
 17 -and-
 Tim O'Connor, Esq.
 18 For CSI: Robison, Belaustegui, Sharp
 & Low
 19 By: Kent R. Robison, Esq.
 Reno, Nevada
 20
 21
 22 For CSI: Brownstein Hyatt Farber Schreck
 By: Brad Herrema, Esq.
 Los Angeles, California
 23
 24 For NV Energy: Justina Caviglia, Esq.

Page 697

1 INDEX
 2 DR. CADY JOHNSON: DIRECT CROSS REDIRECT EXAMINATION
 3 By Ms. Baldwin: 701
 4 By Mr. Herrema: 755
 5 By Mr. Miller: 763
 6 By Mr. Taggart: 771
 7 By Ms. Peterson: 786
 8 By Mr. Donnelly: 7797
 9 By Ms. Cooper: 811
 10 By Mr. Benedict: 813
 11 By Mr. Kryder: 818
 12 By Hearing Officer Fairbank: 819
 13
 14 EXHIBITS: ADMITTED
 15 MBOP 2 703
 16 MBOP 3 703
 17
 18
 19
 20
 21
 22
 23
 24

Page 698

1 CARSON CITY, NV, THURSDAY, SEPTEMBER 26, 2019, A.M. SESSION
 2 -o0o-
 3
 4 HEARING OFFICER FAIRBANK: Good morning. This is
 5 a continuation of the hearing in the matter of a Lower White
 6 River Flow System Order 1303 proceedings. And so today, we're
 7 going to go ahead and hear from the Moapa Band of Paiute
 8 Indians. And we might have additional -- more time for
 9 cross-examination today based upon conversations I've had with
 10 the Tribal representative.
 11 So once we get through the initial presentation
 12 by the Tribe, then we'll go ahead and make a determination of
 13 how much time to assign, and then we'll go from there.
 14 And so I'll go ahead and let you guys start in,
 15 Ms. Baldwin.
 16 MS. BALDWIN: Thank you, Mr. King, Ms. Fairbank,
 17 Ms. Flatley, the Division of Water Resources staff. My name
 18 is Beth Baldwin. I'm an attorney for the Moapa Band of
 19 Paiutes. With me is Debbie Leonard, our local counsel.
 20 Before we put Dr. Johnson on to testify today, we
 21 have two things that we want to put into the record.
 22 The first is a general objection to the State
 23 Engineer's authority to engage in the proceedings based on the
 24 absence of an express legislative direction. The only

Page 699

1 statutory provision cited authorizing Order 1303 is Nevada
 2 Revised Statute 533.024, which is a legislative declaration of
 3 policy to conjunctively manage the waters of the State.
 4 It does not expressly authorize the State
 5 Engineer to manage distinct basins is one, and secondly, even
 6 if that does provide statutory authority, this proceeding is
 7 an ad hoc rule making in the absence of any regulations
 8 regarding conjunctive management in multiple hydrographic
 9 basins that until now, were managed as the State, therefore,
 10 it's arbitrary and capricious. We just want to make this
 11 objection known on the record. Thank you.
 12 Secondly, the Tribe chose not to put on any
 13 witnesses as to policy matters because we understood those to
 14 be outside of the scope of this proceeding. We only have a
 15 technical expert. But we understand that other parties may be
 16 putting on witnesses describing the extent of their water
 17 rights or hypothetical interference with their water rights.
 18 So for that, we'd like to just point out three
 19 things for the record:
 20 The Tribe possesses federally reserved rights to
 21 surface and groundwater appurtenant to the original 1,000-acre
 22 reservation with an 1873 priority date and groundwater rights
 23 to the 70,000-acre expansion with a 1980 priority date.
 24 Those rights are an asset held in trust by the

Page 700

1 United States for the benefit of the Tribe, and the United
 2 States has a money mandating responsibility to manage those
 3 rights for the Tribe's benefit.
 4 Those rights are unadjudicated and unquantified
 5 as of yet, but the Tribe has the right to invoke those rights
 6 and ask that they be adjudicated in Nevada State Court.
 7 The Tribe leases 3,700-acre-feet annually of
 8 Muddy River surface water from the Muddy Valley Irrigation
 9 Company, and those rights are contractually senior to all
 10 other Muddy Valley Irrigation Company rights per the 2006
 11 lease, which is Nevada State Engineer's Exhibit Number 242.
 12 And one housekeeping matter. I brought about 30
 13 copies, paper copies of the PowerPoint presentation. That's
 14 probably enough for every party, but maybe not every person.
 15 So if someone didn't get one, if you could share with your
 16 neighbors, that would be appreciated.
 17 And now I'll stop talking and let Dr. Cady
 18 Johnson, the Tribe's hydrogeologist begin.
 19 HEARING OFFICER FAIRBANK: And before you start
 20 speaking, Mr. Johnson, let's go ahead and have you sworn in.
 21 DR. CADY JOHNSON,
 22 called as a witness in this matter,
 23 having been first duly sworn,
 24 testified as follows:

Page 701

1 DIRECT EXAMINATION
 2 BY MS. BALDWIN:
 3 Q. Dr. Johnson, can you spell you name -- say your
 4 name and spell it for the record, please?
 5 A. Cady Johnson, C-A-D-Y --
 6 Q. And turn your microphone on?
 7 A. Thank you. C-A-D-Y, Johnson, J-O-H-N-S-O-N.
 8 Q. And are you currently employed as a
 9 hydrogeologist?
 10 A. I'm an associate with Mifflin and Associates,
 11 practicing as a hydrogeologist, self employed.
 12 Q. How long have you been working in this field?
 13 A. 47 years.
 14 Q. How long have you been focusing on the
 15 hydrogeology of southern Nevada?
 16 A. 47 years.
 17 Q. We've already presented Dr. Johnson's CV as MBOP
 18 Exhibit 1. So I believe it's already in the record. What
 19 were you asked to do for this proceeding?
 20 A. Quite specifically, offer our analysis of the
 21 most appropriate boundaries, administrative boundaries for
 22 the -- what's presently designated the Lower White River Flow
 23 System. Try to estimate the flux through that system.
 24 Address issues related to transfers of water rights from

Page 790

1 15 centimeters a year of recharge into the carbonate rocks.
 2 So that's the conceptual model.
 3 That's a conceptual model and it's easily
 4 recorded or documented in our submittal. So that's what a
 5 submittal does. It's not a calculation tool, it's an
 6 illustration of how we think about the problem.
 7 Q. So would you agree it's not a -- it's not a
 8 calibrated model, you said if it's an illustration?
 9 A. Well, it's calibrated because we have a
 10 calibration point. We have a temperature and a head at Tule
 11 Springs that we're trying to match. And so we matched it as
 12 closely as we could with the uniform transmissivity.
 13 See, our -- part of the -- part of the reason we
 14 did it this way is what does this system look like in the
 15 absence of features? It's uniform -- uniformly anisotropic --
 16 how should I say? There's no faults, there's no faults.
 17 There's no heterogeneity, it's all the same transmissivity,
 18 just the orientations are different.
 19 So you take out all that stuff that the others
 20 build into -- or typically we build into a framework and we
 21 don't have that. So our model is really simple. It's not
 22 a -- it's not a calculation tool.
 23 It's an illustration of how we think about the
 24 system with the potential for being calibrated, depending on

Page 791

1 what your purpose might be, because this is a -- it's
 2 a powerful software that can do lots of different things that
 3 we haven't tried to do.
 4 We just tried to set out the geometry and answer
 5 the question, why is this recommended flow domain so big,
 6 because that's where the physical boundaries are. And what
 7 are the -- what are the properties of this great big thing?
 8 Well, transmissivity pretty much has to be what it takes to
 9 get the water and the heat at the right place at the right
 10 temperature.
 11 And so it's a beginning. It's a beginning and
 12 it's not calibrated in the sense that management tool would be
 13 calibrated, not even close. But there was a period of time
 14 devoted to calibration just as there was a period of time
 15 prior to that developing the mesh, dealing with the anisotropy
 16 angles, you know, a number of things before we could even
 17 think about calibrating in the last couple of days before
 18 sending the thing.
 19 So it illustrates how we're thinking about it,
 20 and if we ever get back into it or someone else does, they can
 21 start making it work better.
 22 Q. Do you -- is it a tool or calibrated in any
 23 fashion that impacts could be -- impacts could be shown that
 24 would be reliable?

Page 792

1 A. Well, I -- at this point, and depending where, I
 2 think you could use it for first approximation of impacts.
 3 You know, something you might -- might help you design an
 4 aquifer test maybe, maybe in terms of how much area might I
 5 need for this aquifer test, because if it's tight rock, you
 6 need to be enclosed if it's like we have, you know, you'll get
 7 responses possibly miles away.
 8 So it could be useful for test design, for
 9 identifying areas where we're less confident about the
 10 relationships, but not in a quantitative sense to -- it's not
 11 a management tool, but perhaps could be grown to be one.
 12 Q. And so directing your attention to page 59 of
 13 Appendix 3 in your Exhibit 2?
 14 A. Um-hum.
 15 Q. You make a statement there at the bottom of the
 16 page with regard to pumping in Kane Springs Valley?
 17 A. I'm sorry. I'm looking for the page.
 18 Q. Yes.
 19 A. Okay. Okay. 59?
 20 Q. Yes, 59 on the bottom?
 21 A. Okay.
 22 Q. The very last paragraph?
 23 A. Um-hum. Right. Those are the time of travel
 24 capture zones that the program computes.

Page 793

1 Q. Correct. But do you agree that that should --
 2 that's, I guess -- well, sorry.
 3 Did you calculate the propagation of drawdown
 4 from assumed pumping in Kane Springs Valley?
 5 A. Well, the model is a steady state model, so no.
 6 Q. All right. And how about in Delamar Valley?
 7 A. Well, it's a steady state model, so it's all
 8 constant in time.
 9 Q. And then, Dr. Johnson, I'm going to direct you to
 10 Lincoln County, Vidler, Exhibit 19, and I have a copy for you
 11 here and I have a copy for your counsel.
 12 MS. PETERSON: And may I approach?
 13 HEARING OFFICER FAIRBANK: Yes.
 14 BY MS. PETERSON:
 15 Q. Are you familiar with that, Dr. Johnson?
 16 A. I wrote it, at least part -- no, I'm sorry. I
 17 wrote it with Marty Mifflin.
 18 Q. Yes. And if I could direct your attention to
 19 Table 1, which is on page -- well, it's page 31 on the bottom?
 20 A. Yes.
 21 Q. And could you read -- do you see the -- on the
 22 left-hand side, there's a column that says "far field
 23 controls," and under V-12, it says, "Kane Springs Wash Fault
 24 fault". Do you see that?

1 STATE OF NEVADA)
) ss.

2 CARSON CITY)

3

4 I, MICHEL LOOMIS, a Certified Court Reporter, do
5 hereby certify;

6 That on the 26th of September, 2019, in Carson
7 City, Nevada, I was present and took stenotype notes of the
8 hearing held before the Nevada Department of Conservation and
9 Natural Resources, Division of Water in the within entitled
10 matter, and thereafter transcribed the same into typewriting
11 as herein appears;

12 That the foregoing transcript, consisting of
13 pages 694 through 830 hereof, is a full, true and correct
14 transcription of my stenotype notes of said hearing to the
15 best of my ability.

16

17 Dated at Carson City, Nevada, this 27th day of
18 September, 2019.

19

20

21

22

23

24

MICHEL LOOMIS, RPR
NV CCR #228

In The Matter Of:

*DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES
DIVISION OF WATER RESOURCES*

*Vol. v
September 27, 2019*

*Capitol Reporters
123 W. Nye Lane, Ste 107

Carson City, Nevada 89706*

Original File 9-27-19a.m.VolumeVFINALSE_1.txt
Min-U-Script® with Word Index

Page 864

1 STATE OF NEVADA
 2 DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES
 3 DIVISION OF WATER RESOURCES
 4 BEFORE MICHELINE N. FAIRBANK, HEARING OFFICER
 5
 6
 7 IN THE MATTER OF THE ADMINISTRATION
 AND MANAGEMENT OF THE LOWER
 8 WHITE RIVER FLOW SYSTEM WITHIN
 COYOTE SPRING VALLEY HYDROGRAPHIC
 9 BASIN (210), A PORTION OF BLACK
 MOUNTAINS AREA HYDROGRAPHIC
 10 BASIN (215), GARNET VALLEY
 HYDROGRAPHIC BASIN (216), HIDDEN
 11 VALLEY HYDROGRAPHIC BASIN (217),
 CALIFORNIA WASH HYDROGRAPHIC BASIN
 12 (218), AND MUDDY RIVER SPRINGS AREA
 (AKA UPPER MOAPA VALLEY HYDROGRAPHIC
 13 BASIN (219)).
 _____ /
 14
 15 TRANSCRIPT OF PROCEEDINGS
 16 PUBLIC HEARING
 17 HEARING ON ORDER 1303
 18 VOLUME V, A.M. SESSION
 19 (Pages 864-986)
 20 FRIDAY, SEPTEMBER 27, 2019
 21
 22
 23
 24 Reported by: Michel Loomis, RPR

Page 866

1 APPEARANCES:
 2 For Lincoln County
 Water District
 3 -and-
 Vidler Water Company: Allison MacKenzie
 4 By: Karen Peterson, Esq.
 Carson City, Nevada
 5
 For Moapa Band of Paiutes: Beth Baldwin, Esq.
 6
 7 For NCA: Alex Flangas, Esq.
 Reno, Nevada
 8
 9 For Moapa Valley
 Water District: Greg Morrison, Esq.
 10
 11 For Bedroc: Schroeder Law
 By: Laura Schroeder, Esq.
 12
 For City of North Las Vegas: Schroeder Law
 13 By: Laura Schroeder, Esq.
 14 For National Park Service: Karen Glasgow
 15 For Center for Biologic
 Diversity: Patrick Donnelly
 16
 17
 18
 19
 20
 21
 22
 23
 24

Page 865

1 APPEARANCES:
 2 Micheline N. Fairbank,
 Hearing Officer
 3
 Tim Wilson,
 4 Acting State Engineer
 5 Adam Sullivan,
 Deputy State Engineer
 6
 Melissa Flatley,
 7 Chief of the Hearing Officer Section
 8 Michelle Barnes,
 Supervising Professional Engineer
 9
 Levi Kryder,
 10 Chief of the Hydrology Section
 11 Jon Benedict,
 Hydrologist
 12
 Christi Cooper,
 13 Geologist
 14 Bridget Bliss,
 Basin Engineer
 15
 16 For SNWA: Taggart & Taggart, Ltd.
 By: Paul G. Taggart, Esq.
 Carson City, Nevada
 17 -and-
 Tim O'Connor, Esq.
 18 For CSI: Robison, Belaustegui, Sharp
 & Low
 19 By: Kent R. Robison, Esq.
 Reno, Nevada
 20
 21
 22 For CSI: Brownstein Hyatt Farber Schreck
 By: Brad Herrema, Esq.
 Los Angeles, California
 23
 24 For NV Energy: Justina Caviglia, Esq.

Page 867

1 INDEX
 2 THE PANEL: DIRECT CROSS REDIRECT EXAMINATION
 3 By Mr. Taggart: 869
 4 By Mr. Herrema: 955
 5 By Ms. Baldwin: 965
 6 By Mr. Morrison: 973
 7 By Ms. Peterson: 974
 8
 9
 10
 11 EXHIBITS: ADMITTED
 12 SNWA 85, corrected Figure 6-2 916
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24

1 CARSON CITY, NEVADA, FRIDAY, SEPTEMBER 27, 2019, A.M. SESSION
2 -o0o-

3
4 HEARING OFFICER FAIRBANK: Good morning. So we
5 will go ahead and get started this morning. This is a
6 continuation of the hearing regarding the Lower White River
7 Flow System and Order 1303.

8 And this morning, we will be starting with
9 Southern Nevada Water Authority and Las Vegas Valley Water
10 District. And, Mr. Taggart, you may go ahead and proceed.

11 MR. TAGGART: Good morning. As was said, my name
12 is Paul Taggart. I represent the Southern Nevada Water
13 Authority and Las Vegas Valley Water District.

14 We've assembled a panel this morning to provide
15 you with the information -- hydrologic information related to
16 the 1303 order, and we will also have a panel to describe the
17 biological issues that we have -- that we plan to present,
18 that will be on Monday.

19 So with me here today is Ms. Colby Pellegrino,
20 Mr. Andrew Burns, and Ms. Warda Drici. And after we swear
21 them in, I'll have them introduce themselves to the panel.

22 HEARING OFFICER FAIRBANK: Okay. If we can go
23 ahead and swear in the witnesses. Thank you.

24 (Panel sworn.)

1 A. Okay. So very briefly, the Southern Nevada Water
2 Authority is essentially a wholesale water provider with seven
3 member agencies, the largest of which is the Las Vegas Valley
4 Water District. We were originally created in 1991 to manage
5 the State's Colorado River allocation, but our
6 responsibilities now include regional water supply planning.

7 So we have a myriad of water rights in this area
8 and I'm going to go through those very briefly. The SNWA
9 controls about 20,000-acre-feet of decreed surface water on
10 the Muddy River, about half of that is through the Muddy
11 Valley Irrigation Company shares that we own and lease.

12 We also have 9,000-acre-feet of water from Coyote
13 Spring Valley that was originally owned by the Las Vegas
14 Valley Water District. 2200-acre-feet of water in Garnet and
15 Hidden Valley that are used to meet the needs of the power
16 plants and the future needs of the City of north Las Vegas.

17 As I mentioned, the district is the largest
18 member agency of SNWA. The two agencies share common staff,
19 and in addition to the district owning the groundwater rights
20 in the Las Vegas Valley, they are also the operator of the
21 Coyote Springs Water Resources General Improvement District,
22 which is responsible for the water -- which is responsible for
23 the water system that serves the Coyote Spring Development.
24 Q. Is SNWA also a party to the MOA and could you

1 DIRECT EXAMINATION
2 BY MR. TAGGART:

3 Q. Good morning. And could each of you, for the
4 record, state your name and spell it for the record, and also
5 what is your position at the Southern Nevada Water Authority.

6 MS. PELLEGRINO: I'm Colby Pellegrino,
7 P-E-L-L-E-G-R-I-N-O, Director of Water Resources for the
8 Southern Nevada Water Authority and Las Vegas Valley Water
9 District.

10 MR. BURNS: I'm Andrew Burns, A-N-D-R-E-W,
11 B-U-R-N-S, and I'm the Manager of the Water Resource Division
12 for SNWA and Las Vegas Valley Water District.

13 MS. DRICI: Good morning. I'm Warda Drici,
14 Warda, W-A-R-D, as in David, A. Drici, D, as in David,
15 R-I-C-I. I am a hydrologist with the Southern Nevada Water
16 Authority.

17 BY MR. TAGGART:

18 Q. Thank you. And my first questions will be for
19 you, Ms. Pellegrino.

20 Could you provide the State Engineer briefly with
21 an explanation of the role SNWA has in the Lower White River
22 Flow System, why SNWA and the Las Vegas Valley Water District
23 is a stakeholder in these proceedings?

24 ANSWERS BY MS. PELLEGRINO:

1 describe their role in that way?

2 A. Yes. So there's a series of agreements that were
3 implemented post Order 1169 to allow the pump test to
4 continue. One of those was a memorandum agreement with the
5 Moapa Band of Paiutes. It's actually a series of agreements.

6 The Muddy Valley Irrigation Company, the Moapa
7 Valley Water District, ourselves, the Fish and Wildlife
8 Service all related to the compliance and settling claims to
9 groundwater associated with these basins.

10 Q. And could you describe the role SNWA has played
11 in the activities that have led us to where we are here today?

12 A. Okay. I think I'm going to go back and talk a
13 little bit historically to do that.

14 One of the things that the Water Authority in
15 every -- and the Water District in every proceeding before the
16 State Engineer has said, is that our conceptual models cannot
17 be validated until we have not only significant pumping
18 stresses, but also recovery data.

19 So in 2001, we went before the State Engineer on
20 applications in this area, and I want to read two quotes that
21 were Mr. Ricci summarizing our testimony in that hearing.

22 And the first one says, "while testimony
23 presented indicated that belief that significant quantities of
24 water may be available for capture from storage, it is unknown

Page 972

1 within a month. But as far as recharge from other areas
2 located farther, I can't tell you.
3 I did a lot of theories about that. I think that
4 they come in pulses, like every year, you know, the
5 precipitation of the mountains infiltrates down and creates
6 like a recharge pulse and it moves down.
7 So this is probably a bunch of those coming down.
8 So people think like recharge from thousands of years ago, you
9 know, are coming down. So it's like a continuous and we
10 cannot really -- we can't see that from, identify them from
11 the record.
12 BY MS. BALDWIN:
13 Q. So water levels could be responding to all sorts
14 of climate variability going back tens, hundreds, thousands of
15 years?
16 A. It could be. But like in the analysis that I
17 showed for the period since we've been pumping from the
18 carbonate aquifer, the effect of recharge during that time
19 period is much smaller than the effects of pumping.
20 It was probably like maximum 1.4 foot due --
21 changing the water level at EH-4 due to recharge changes
22 versus four feet changed from like the early '90's to 2018 due
23 to groundwater production to the carbonate aquifer.
24 Q. And that -- so that period, early 90's to 2018,

Page 973

1 that's only about 30 years?
2 A. Yeah.
3 Q. So the water levels could be responding to
4 something happening before that 30-year period?
5 A. Yeah, sure. In that recharge within the
6 residual, it's like the effects of all of it. I can't
7 separate it.
8 MS. BALDWIN: Okay. That's all. Thank you.
9 MS. DRICI: You're welcome.
10 HEARING OFFICER FAIRBANK: Next is the Moapa
11 Valley Water District.
12 CROSS-EXAMINATION
13 BY MR. MORRISON:
14 Q. Morning, everybody. I'm Greg Morrison with Moapa
15 Valley Water District. I just wanted to follow up on a couple
16 questions regarding the efforts SNWA put into preparing its
17 Order 1303 report.
18 So whoever would like to answer, feel free. I'll
19 direct these at Mr. Burns, but if there's someone better.
20 So in your role as the water resources division
21 manager, did you oversee and/or coordinate SNWA's efforts in
22 preparing the Order 1303 report?
23 ANSWERS BY MR. BURNS:
24 A. Yes, I did.

Page 974

1 Q. All right. And you're aware of SNWA's
2 scientific, be it, geologic or geohydrological efforts that
3 resulted in the reports' conclusions?
4 A. Yes.
5 Q. And in between October 2018 and July 2019, did
6 SNWA conduct or contract to have conducted on its behalf any
7 geohydrological studies specific to boundary flows between
8 Kane Springs Valley and Coyote Springs Valley?
9 A. Not to my recollection, no.
10 Q. And SNWA didn't conduct or contract to have
11 conducted on its behalf any geohydrological studies in
12 northern Coyote Springs Valley?
13 A. No.
14 MR. MORRISON: Okay. That's all I have. Thank
15 you.
16 HEARING OFFICER FAIRBANK: Lincoln County and
17 Vidler Water Company.
18 CROSS-EXAMINATION
19 BY MS. PETERSON:
20 Q. Good morning, panel. Karen Peterson here,
21 representing Lincoln County Water District and Vidler Water
22 Company.
23 And, Mr. Burns, I just put in front of you a page
24 from Nevada State Engineer Exhibit 245, which is -- it's

Page 975

1 page 36 of the SNWA June 27, 2013, Order 1169 report.
2 And do you have that in front of you, the
3 one-page document I gave you?
4 ANSWERS BY MR. BURNS:
5 A. Yes, ma'am.
6 Q. And at the top of the paragraph there, there is a
7 statement having to do with CSVM-4; do you see that?
8 A. Yes.
9 Q. And is it true that this report -- your report --
10 SNWA's report, sorry, lets everybody know that the transducer
11 in CSVM-4 has had a high failure rate due to the high water
12 temperature in the well, so fluctuations of a foot or less
13 should not be used to infer an absolute response.
14 Do you see that?
15 A. I see that.
16 Q. And do you -- I'm going to show you the thick
17 document I gave you was State Engineer's Exhibit 115, which is
18 the water level data from that CSVM-4?
19 A. (Nodded head.)
20 Q. Do you have that?
21 A. Yes, ma'am.
22 Q. Okay. And if you could look at the second page,
23 it looks like the transducer was removed 10/14/2013; do you
24 see that?

1 figures that Ms. Drici talked about?
 2 ANSWERS BY MS. DRICI:
 3 A. Yes.
 4 HEARING OFFICER FAIRBANK: You can finish this
 5 question and then we'll move on.
 6 MS. PETERSON: Okay. Thank you.
 7 BY MS. PETERSON:
 8 Q. So I'm looking at your P values there in that
 9 table. Do you have that figure A-1?
 10 A. Yes.
 11 Q. Okay. And Garnet Valley's the only low -- the
 12 P value I see?
 13 A. Well, the way I see it, all of them are below the
 14 .05 threshold, except for Black Mountain area and the Muddy
 15 River Springs area.
 16 So for the Black Mountain area, it's 0.69, which
 17 is larger than 0.05. But we already showed the results that
 18 we think that Black Mountain area production wells probably
 19 should not be within the Lower White River Flow System
 20 boundary.
 21 As for the Muddy River Springs area, I do not
 22 just go by the statistical results. I have to use facts and
 23 like what I know. Does anybody think that production from the
 24 carbonate aquifer in the MRSA does not affect EH-4 water

1 levels.
 2 So this value is a little bit higher than the
 3 .05, but I still believe and I know that production in the
 4 Muddy River Springs area does affect water levels in EH-4
 5 because they're in the same basin.
 6 MS. PETERSON: Thank you. Sorry. I'm out of
 7 time.
 8 MS. DRICI: Sorry. Bye.
 9 HEARING OFFICER FAIRBANK: Okay. So we've
 10 reached the noon hour and let's go ahead and reconvene at --
 11 let's go ahead and do five after 1:00, and we'll get back
 12 going after lunch. Thank you.
 13 (Lunch recess at 12:01 p.m.)
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24

1 STATE OF NEVADA)
) ss.
 2 CARSON CITY)
 3
 4 I, MICHEL LOOMIS, a Certified Court Reporter, do
 5 hereby certify;
 6 That on the 27th of September, 2019, in Carson
 7 City, Nevada, I was present and took stenotype notes of the
 8 hearing held before the Nevada Department of Conservation and
 9 Natural Resources, Division of Water in the within entitled
 10 matter, and thereafter transcribed the same into typewriting
 11 as herein appears;
 12 That the foregoing transcript, consisting of
 13 pages 864 through 985 hereof, is a full, true and correct
 14 transcription of my stenotype notes of said hearing to the
 15 best of my ability.
 16
 17 Dated at Carson City, Nevada, this 28th day of
 18 September, 2019.
 19
 20
 21
 22 _____
 23 MICHEL LOOMIS, RPR
 24 NV CCR #228

In The Matter Of:

*DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES
DIVISION OF WATER*

*Vol. VI
September 30, 2019*

*Capitol Reporters
123 W. Nye Lane, Ste 107

Carson City, Nevada 89706*

Original File 9-30-19A.M.VolumeVIFINALFINALSE_1.txt
Min-U-Script® with Word Index

Page 1092

1 STATE OF NEVADA
 2 DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES
 3 DIVISION OF WATER RESOURCES
 4 BEFORE MICHELINE N. FAIRBANK, HEARING OFFICER
 5
 6
 7 IN THE MATTER OF THE ADMINISTRATION
 AND MANAGEMENT OF THE LOWER
 8 WHITE RIVER FLOW SYSTEM WITHIN
 COYOTE SPRING VALLEY HYDROGRAPHIC
 9 BASIN (210), A PORTION OF BLACK
 MOUNTAINS AREA HYDROGRAPHIC
 10 BASIN (215), GARNET VALLEY
 HYDROGRAPHIC BASIN (216), HIDDEN
 11 VALLEY HYDROGRAPHIC BASIN (217),
 CALIFORNIA WASH HYDROGRAPHIC BASIN
 12 (218), AND MUDDY RIVER SPRINGS AREA
 (AKA UPPER MOAPA VALLEY HYDROGRAPHIC
 13 BASIN (219)).
 _____ /
 14
 15 TRANSCRIPT OF PROCEEDINGS
 16 PUBLIC HEARING
 17 HEARING ON ORDER 1303
 18 VOLUME VI, A.M. SESSION
 19 (Pages 1092-1230)
 20 MONDAY, SEPTEMBER 30, 2019
 21
 22
 23
 24 Reported by: Michel Loomis, RPR

Page 1093

1 APPEARANCES:
 2 Micheline N. Fairbank,
 Hearing Officer
 3
 4 Tim Wilson,
 Acting State Engineer
 5 Adam Sullivan,
 Deputy State Engineer
 6
 7 Melissa Flatley,
 Chief of the Hearing Officer Section
 8 Michelle Barnes,
 Supervising Professional Engineer
 9
 10 Levi Kryder,
 Chief of the Hydrology Section
 11 Jon Benedict,
 Hydrologist
 12
 13 John Guillory,
 PE Supervisor
 14 Bridget Bliss,
 Basin Engineer
 15
 16 For SNWA: Taggart & Taggart, Ltd.
 By: Paul G. Taggart, Esq.
 Carson City, Nevada
 -and-
 18 Tim O'Connor, Esq.
 19 For CSI: Robison, Belaustegui, Sharp
 & Low
 20 By: Kent R. Robison, Esq.
 Reno, Nevada
 21
 22 For CSI: Brownstein Hyatt Farber Schreck
 By: Brad Herrema, Esq.
 Los Angeles, California
 23
 24 For NV Energy: Justina Caviglia, Esq.

Page 1094

1 APPEARANCES:
 2 For Lincoln County
 Water District
 3 -and-
 Vidler Water Company: Allison MacKenzie
 4 By: Karen Peterson, Esq.
 Carson City, Nevada
 5
 6 For Moapa Band of Paiutes: Richard Berley, Esq.
 7 For Moapa Valley
 Water District: Greg Morrison, Esq.
 8
 9 For Bedroc:
 -and-
 10 For City of North Las Vegas: Schroeder Law
 By: Therese Ure, Esq.
 11
 12 For National Park Service: Karen Glasgow
 13 For Center for Biologic
 Diversity: Patrick Donnelly
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24

Page 1095

1 INDEX
 2 THE PANELS: DIRECT CROSS REDIRECT RECROSS
 3 By Mr. Taggart: 1098 1217 1158
 4 By Mr. Herrema: 1130,1207 1148
 5 By Mr. Burley: 1133, 1213 1150
 6 By Mr. Morrison: 1167 1137
 7 By Ms. Peterson: 1138
 8 By Mr. Frehner: 1222
 9 By Mr. Donnelly: 1142 1152,1155
 10 By Ms. Caviglia: 1146
 11 By Ms. Ure: 1228
 12
 13 EXAMINATION
 14
 15 By Mr. Wilson: 1155
 16
 17
 18
 19
 20
 21
 22
 23
 24

Page 1096

1 CARSON CITY, NEVADA, MONDAY, SEPTEMBER 30, 2019, A.M. SESSION
2 -o0o-
3
4 HEARING OFFICER FAIRBANK: Good morning. Welcome
5 back.
6 This is the time and place set for the --
7 regarding the Lower White River Flow System and Order 1303
8 hearing in the proceedings arising out of that particular
9 order.
10 And so this morning we want to go ahead and
11 just -- we're going to have a continuation of the Southern
12 Nevada Water Authority's presentation, and then we're going to
13 go ahead and proceed with our next -- with the Moapa Valley
14 Water District, and then this afternoon Lincoln County and
15 Vidler Water Company.
16 Just as a quick reminder, these proceedings,
17 again, are with respect to those four questions, and kind of
18 that fits with regards to the solicitations of information
19 from the State Engineer in Order 1303.
20 And so how I'm going to go ahead and do these
21 this morning is Southern Nevada Water Authority has been
22 allocated time for two hours this morning, and so they'll be
23 given an hour for the presentation of their biologic panel,
24 and then there will be one hour for questions of the

Page 1097

1 participants and the State Engineer's office, then we'll go
2 ahead and move right into the Moapa Valley Water District.
3 And so this week is going to be a little bit more
4 fast pace with respect that we're going to have multiple
5 parties on any given day, and on that particular day when
6 we're completed with the party, then we're going to move right
7 next into the next participant.
8 And so with that, we will go ahead and get
9 started with the Southern Nevada Water Authority.
10 Mr. Taggart?
11 MR. TAGGART: Thank you.
12 Good morning. Paul Taggart for the Southern
13 Nevada Water Authority and the Las Vegas Water District.
14 For the record, on Friday we did an errata to our
15 Exhibit 7, and we provided a copy of that over on the stand
16 over there. And that's Figure 6-2, page 6-7 of that document.
17 And so we -- we presented our hydrology experts
18 on Friday. This morning we'll be talking to our biological
19 resource experts.
20 So with that, I'm going to call our witnesses,
21 Mr. Bob Williams and Mr. Zane Marshall and -- and ask them to
22 be sworn.
23 HEARING OFFICER FAIRBANK: All right. Thank you.
24 And real quick before we swear the witnesses, I

Page 1098

1 just wanted to go ahead and also introduce. So today we have
2 a different member of our staff with us from our Las Vegas
3 office, John Guillory, and Christi Cooper will be observing
4 from afar this week.
5 And so go ahead and swear in the witnesses.
6 Thank you.
7 (Panel sworn.)
8 MR. TAGGART: And also for the record, both
9 witnesses have been qualified in this proceeding through our
10 prequalification procedure that we developed.
11 Mr. Marshall in the area of biological resources,
12 including conservation biology, environmental compliance, and
13 environmental monitoring.
14 Mr. Williams with respect to environmental
15 resources in the Lower White River Flow System conservation
16 efforts to protect the Moapa Dace and ongoing compliance with
17 the MOA and Endangered Species Act; and also both will testify
18 about the report that they prepared.
19 So, I'm going to start with you, Mr. Williams.
20 Good morning.
21 DIRECT EXAMINATION
22 ANSWERS BY MR. WILLIAMS:
23 A. Good morning.
24 Q. Could you -- could you just briefly describe for

Page 1099

1 the State your background and experience with respect to the
2 Endangered Species Act, compliance with that act, and also
3 with the Moapa Dace in the Lower White River Flow System?
4 A. Yes. Thank you. I'd like to begin telling you
5 about my career as it unfolded over the last four years. I
6 started in 1979 after graduating from Brigham Young University
7 with a degree in fisheries and aquatic ecology.
8 I was hired that same year by the U.S. Fish and
9 Wildlife Service in the Salt Lake City endangered species
10 office as their Section 7 biologist -- Section 7 fishing
11 biologist.
12 I worked there for a couple of years specifically
13 working on Section 7 consultation with the Bureau of
14 Reclamation. I was in the process of completing the Central
15 Utah Project, as well as operation of main stem Colorado River
16 Project, such as Flaming Gorge, Glen Canyon Dam, and the way
17 and Aspen and all that.
18 The requirements of Section 7 and the regulations
19 that accompanied Section 7 that were finalized in 1978
20 required the federal agencies to fund research and to conduct
21 or basically go through the consultation process to ensure
22 that their actions and their funding of actions did not
23 jeopardize the species that were occurring in the Colorado
24 River and Duchesne River; that being the pikeminnow, humpback

Page 1136

1 ongoing temperature monitoring in the springs?
2 A. I'm not aware of Fish and Wildlife Services
3 conducting temperature monitoring.
4 I know that SNWA is looking at installing a
5 network of publications through the system to begin monitoring
6 temperature.
7 Q. What about chemical or isotopic monitoring?
8 A. I'm not aware.
9 Q. Okay. So the only active monitoring that you
10 know about is flow monitoring; is that -- is that fair?
11 A. Flow monitoring and monitoring of the Moapa Dace
12 population.
13 Q. Okay. Were either of you involved in the design
14 of the 1169 pump test?
15 A. I was not.
16 MR. BURLEY: Is that my time being up?
17 HEARING OFFICER FAIRBANK: That is your time, but
18 if we have time --
19 MR. BURLEY: Okay.
20 HEARING OFFICER FAIRBANK: -- at the end, we'll
21 circle back around. Thank you.
22 MR. BURLEY: No more questions. Thank you.
23 HEARING OFFICER FAIRBANK: Next is the Moapa
24 Valley Water District.

Page 1137

1 MR. MORRISON: Good morning. Greg Morrison for
2 Moapa Valley Water District.
3 CROSS-EXAMINATION
4 BY MR. MORRISON:
5 Q. Mr. Marshall, I just want to clarify one thing.
6 I wasn't sure if I heard it correctly.
7 Did you say that the MOA was or was not intended
8 to apply in perpetuity?
9 ANSWERS BY MR. MARSHALL:
10 A. I believe the MOA was intended for the long-term
11 development of the 16,100 acre-feet of water rights that --
12 that -- that the parties that signed the MOA had identified at
13 the time.
14 So, I believe it was for the test. There were
15 elements of the MOA that were specific to the test, but I
16 believe the MOA overall was intended for the long-term
17 development of the -- of the -- of those water rights.
18 Q. All right. And you're aware of the Moapa Valley
19 Water District's dedication of its join springs water right
20 pursuant to the MOA?
21 A. Yes.
22 Q. Was that dedication intended in any way to be
23 temporary or is that a permanent dedication?
24 A. It's a permanent dedication, and it's very

Page 1138

1 important to the conservation of Moapa Dace.
2 MR. MORRISON: Thanks a lot.
3 HEARING OFFICER FAIRBANK: Next is Lincoln
4 County, Vidler Water Company.
5 CROSS-EXAMINATION
6 MS. PETERSON: Good morning. Karen Peterson
7 representing Lincoln County Water District and Vidler Water
8 Company.
9 BY MS. PETERSON:
10 Q. Mr. Williams, I had a couple questions for you.
11 I'm showing you -- or I had provided to you Fish and Wildlife
12 Service Exhibit 59. It's a biological opinion dated October
13 29th, 2008 for Kane Springs Valley.
14 Do you see that in front of you?
15 ANSWERS BY MR. WILLIAMS:
16 A. Yes, I do.
17 Q. And it was signed on page 50 by Robert D.
18 Williams, Field Supervisor?
19 A. Yes.
20 Q. Do you see that?
21 A. Yes.
22 Q. Was that you?
23 A. That was me. Still is me.
24 Q. Okay. And do you -- sorry. Do you remember --

Page 1139

1 or if you could turn to page 37, there -- there was a
2 statement there regarding the Dace.
3 Do you see that?
4 A. In the middle of -- in the middle of the page?
5 Q. Yes.
6 A. Yes.
7 Q. And it was the service's biological opinion that
8 the action as proposed and analyzed the Kane Springs Valley
9 Groundwater Development Project is not likely to jeopardize
10 the continued existence of the endangered Moapa Dace.
11 Do you see that?
12 A. Yes.
13 Q. And then also implementation of the project's
14 conservation action will minimize any potential impacts.
15 Do you agree with that?
16 A. Yes.
17 Q. And then directing your attention to the other
18 document I provided to you, it's an amended stipulation for
19 withdrawal of protests. It's Fish and Wildlife Service
20 Exhibit 57 and Lincoln County-Vidler Exhibit 16.
21 Do you see that in front of you?
22 A. Yes, I see the Exhibit.
23 Q. Do you remember the negotiations regarding the
24 monitoring, management, and mitigation plan for this

Page 1140

1 stipulation?
 2 A. Yes, I do. I do remember those negotiations with
 3 Vidler and Lincoln County.
 4 Q. And you were involved in those?
 5 A. Yes, I was.
 6 Q. And there's a trigger that set forth the action
 7 criteria under page 3 and 4 of Exhibit A to the amended
 8 stipulation.
 9 Do you see that?
 10 A. Yes.
 11 Q. And under paragraph 2, do you see that the
 12 trigger for the -- for the flows is 3.2 CFS?
 13 A. Yes, I believe that's correct.
 14 Q. And then in paragraph 1 it indicates it's for
 15 flow measurements at the Warm Springs west flume.
 16 Do you see that?
 17 A. Yes.
 18 Q. All right. Would you agree -- I think you had a
 19 question from your attorney that indicated that signatories to
 20 the MOU were compliant, I think -- I think -- I believe you
 21 said, with the Endangered Species Act.
 22 Is that what you said?
 23 A. Repeat your question, please.
 24 Q. Did -- you indicate in response to a question

Page 1141

1 from Mr. Taggart that signatories to the MOU and on the basis
 2 of the biological opinion, that those signatories were
 3 compliant with the Endangered Species Act?
 4 Is that what you said?
 5 A. I think Mr. Taggart's question was asking me if
 6 parties outside of the MOU did not have Endangered Species Act
 7 compliance, and I think I said yes.
 8 I would like to correct that statement by saying
 9 that the parties of the Kane Springs agreement and
 10 stipulation, the biological opinion, are clearly covered under
 11 ESA.
 12 MS. PETERSON: Okay. Thank you. No further
 13 questions.
 14 HEARING OFFICER FAIRBANK: City of North Las
 15 Vegas?
 16 MS. URE: No questions.
 17 HEARING OFFICER FAIRBANK: Thank you.
 18 Seeing no questions, Center for Biological
 19 Diversity.
 20 MR. DONNELLY: Good morning. Patrick Donnelly
 21 with the Center for Biological Diversity. I'll try to be
 22 quick here because I do have a number of questions.
 23
 24

Page 1142

1 CROSS-EXAMINATION
 2 BY MR. DONNELLY:
 3 Q. I'll start with Mr. Williams.
 4 The definition of "Take" in Section 3 of the ESA
 5 is to "harass, harm, pursue, hunt, shoot, wound, kill, trap,
 6 capture or collect or attempt to engage in any such conduct";
 7 is that accurate?
 8 ANSWERS BY MR. WILLIAMS:
 9 A. That sounds very accurate.
 10 Q. And regulation in 50 CFR Section 17-3 defines
 11 that harm includes habitat, modification, or degradation where
 12 it kills or injures wildlife by significantly impairing
 13 essential behavior patterns, including breeding, feeding, or
 14 sheltering; is that accurate?
 15 A. That's correct.
 16 Q. Is it true that Section 9 of the ESA prohibits
 17 unpermitted take?
 18 A. Yes.
 19 Q. Might individuals or agencies taking action which
 20 result in unpermitted take be in violation of Section 9?
 21 A. Yes.
 22 Q. That you are aware of, are citizens able to file
 23 lawsuits to enforce the ESA, including Section 9, suits
 24 against entities responsible for an unauthorized take?

Page 1143

1 A. Yes.
 2 Q. We heard testimony that carbonate pumping in the
 3 Lower White River Flow System causes spring flow declines,
 4 including on reports you were apart of from the Southern
 5 Nevada Water Authority; is that correct?
 6 A. Yes.
 7 Q. And spring declines cause a loss in habitat,
 8 correct?
 9 A. Yes.
 10 Q. And a loss in habitat can cause a loss in overall
 11 Dace numbers; is that correct?
 12 A. Yes.
 13 Q. Therefore, can we make the connection that
 14 carbonate pumping causes take of Moapa Dace?
 15 A. Yes.
 16 Q. And, thus, carbonate pumping would be a violation
 17 of Section 9 of the Endangered Species Act if it was not
 18 permitted through MOA's and other agreements?
 19 A. If it was not permitted, that's correct.
 20 Q. Would entities authorizing water withdrawals
 21 causing take that is not permitted take be in violation of
 22 Section 9?
 23 A. Potentially. But I'm not an attorney, nor do I
 24 do law enforcement. I've never --

1 A. I can't speak for the district on this, but I'd
 2 say my opinion is that, no, I would not do it from Kane
 3 because that would just accelerate the drawdowns at the Muddy
 4 River Springs area and accelerate the point at which trigger
 5 levels would be hit.
 6 MR. FREHNER: Thank you.
 7 HEARING OFFICER FAIRBANK: City of North Las
 8 Vegas.
 9 CROSS-EXAMINATION
 10 BY MS. URE:
 11 Q. Good morning, Therese Ure, representing the City
 12 of North Las Vegas, and I have more of a point or a question
 13 for clarification.
 14 In -- in one of your slides, you requested as
 15 part of your recommendation that the State Engineer grant the
 16 right to the district to divert 6,791-acre-feet per year; is
 17 that correct?
 18 A. Yes.
 19 Q. Would that 6,79 -- or 6,791-acre-feet constitute
 20 an increase of carbonate pumping than what the district is
 21 currently pumping?
 22 A. Yes.
 23 MS. URE: Okay. Thank you.
 24 HEARING OFFICER FAIRBANK: All right. We'll go

1 ahead and take a break for lunch. So, let's go ahead and
 2 we'll be pack at 1:00 p.m.
 3 Thank you.
 4 (Lunch recess at 11:58 a.m.)
 5
 6
 7
 8
 9
 10
 11
 12
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24

1 STATE OF NEVADA)
) ss.
 2 CARSON CITY)
 3
 4 I, MICHEL LOOMIS, a Certified Court Reporter, do
 5 hereby certify;
 6 That on the 30th of September, 2019, in Carson
 7 City, Nevada, I was present and took stenotype notes of the
 8 hearing held before the Nevada Department of Conservation and
 9 Natural Resources, Division of Water in the within entitled
 10 matter, and thereafter transcribed the same into typewriting
 11 as herein appears;
 12 That the foregoing transcript, consisting of
 13 pages 1092 through 1230 hereof, is a full, true and correct
 14 transcription of my stenotype notes of said hearing to the
 15 best of my ability.
 16
 17 Dated at Carson City, Nevada, this 1st day of
 18 October, 2019.
 19
 20
 21
 22 _____
 MICHEL LOOMIS, RPR
 NV CCR #228
 23
 24

In The Matter Of:

*DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES
DIVISION OF WATER*

*Vol. VII
October 1, 2019*

*Capitol Reporters
123 W. Nye Lane, Ste 107

Carson City, Nevada 89706*

Original File 10-1-19volumeVIIFINALSE_1.txt
Min-U-Script® with Word Index

Page 1370

1 STATE OF NEVADA
 2 DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES
 3 DIVISION OF WATER RESOURCES
 4 BEFORE MICHELINE N. FAIRBANK, HEARING OFFICER
 5
 6
 7 IN THE MATTER OF THE ADMINISTRATION
 AND MANAGEMENT OF THE LOWER
 8 WHITE RIVER FLOW SYSTEM WITHIN
 COYOTE SPRING VALLEY HYDROGRAPHIC
 9 BASIN (210), A PORTION OF BLACK
 MOUNTAINS AREA HYDROGRAPHIC
 10 BASIN (215), GARNET VALLEY
 HYDROGRAPHIC BASIN (216), HIDDEN
 11 VALLEY HYDROGRAPHIC BASIN (217
 CALIFORNIA WASH HYDROGRAPHIC BASIN
 12 (218), AND MUDDY RIVER SPRINGS AREA
 (AKA UPPER MOAPA VALLEY HYDROGRAPHIC
 13 BASIN (219).
 _____ /
 14
 15 TRANSCRIPT OF PROCEEDINGS
 16 PUBLIC HEARING
 17 HEARING ON ORDER 1303
 18 VOLUME VII
 19 (Pages 1370-1498)
 20 TUESDAY, OCTOBER 1, 2019
 21
 22
 23
 24 Reported by: Michel Loomis, RPR

Page 1372

1 APPEARANCES:
 2 For Lincoln County
 Water District
 3 -and-
 Vidler Water Company: Allison MacKenzie
 4 By: Karen Peterson, Esq.
 Carson City, Nevada
 5
 6 For Moapa Band of Paiutes: Richard Berley, Esq.
 7 For Moapa Valley
 Water District: Greg Morrison, Esq.
 8
 9 For Bedroc:
 -and-
 10 For City of North Las Vegas: Schroeder Law
 By: Therese Ure, Esq.
 11
 12 For National Park Service: Karen Glasgow
 13 For Center for Biologic
 Diversity: Patrick Donnelly
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24

Page 1371

1 APPEARANCES:
 2 Micheline N. Fairbank,
 Hearing Officer
 3
 4 Tim Wilson,
 Acting State Engineer
 5 Adam Sullivan,
 Deputy State Engineer
 6
 7 Melissa Flatley,
 Chief of the Hearing Officer Section
 8 Michelle Barnes,
 Supervising Professional Engineer
 9
 10 Levi Kryder,
 Chief of the Hydrology Section
 11 Jon Benedict,
 Hydrologist
 12
 13 John Guillory,
 PE Supervisor
 14 Bridget Bliss,
 Basin Engineer
 15
 16 For SNWA: Taggart & Taggart, Ltd.
 By: Paul G. Taggart, Esq.
 Carson City, Nevada
 17 -and-
 18 Tim O'Connor, Esq.
 19 For CSI: Robison, Belaustegui, Sharp
 & Low
 20 By: Kent R. Robison, Esq.
 Reno, Nevada
 21
 22 For CSI: Brownstein Hyatt Farber Schreck
 By: Brad Herrema, Esq.
 Los Angeles, California
 23
 24 For NV Energy: Justina Caviglia, Esq.

Page 1373

1 INDEX
 2 THE PANEL: DIRECT CROSS REDIRECT RECROSS
 3 By Ms. Glasgow: 1374 1395
 4 By Mr. Taggart: 1378 1398
 5 By Mr. Morrison: 1383
 6 By Mr. Flangas: 1388 1403
 7 EXAMINATION
 8 By Mr. Benedict: 1393
 9 By Ms. Peterson: 1405
 10
 11 DWIGHT SMITH: DIRECT CROSS REDIRECT RECROSS
 12 By Therese Ure: 1416
 13 By Mr. Herrema: 1467
 14 By Ms. Glasgow: 1470 1492
 15 By Mr. Taggart: 1474
 16 By Mr. Morrison: 1479
 17 By Ms. Petersen: 1481
 18 By Mr. Flangas: 1482
 19 EXAMINATION
 20 By Mr. Benedict: 1485, 1494
 21 By Mr. Sullivan: 1488
 22 By Ms. Barnes: 1490
 23 EXHIBITS: ADMITTED
 24 2-4, 7 1417

Page 1374

1 CARSON CITY, NEVADA, TUESDAY, OCTOBER 1, 2019, A.M. SESSION
2 -o0o-
3
4 HEARING OFFICER FAIRBANK: Good morning. So this
5 is the continuation of the hearing regarding the Lower White
6 River Flow System and Order 1303, and so we're going to go
7 ahead and continue this morning with cross-examination.
8 We have just under one hour left for
9 cross-examination, and so we'll go ahead and reopen the time
10 period to the participants to ask questions.
11 And at this point, we're going to go ahead and
12 limit that time frame to five minutes per participant for the
13 continuation of cross-examination, and so we'll start with
14 Coyote Springs Investments.
15 MR. HERREMA: We have no questions at this time.
16 HEARING OFFICER FAIRBANK: Okay. So seeing no
17 further questions from Coyote Springs Investments, United
18 States Fish and Wildlife Service.
19 Seeing no questions, National Park Service.
20 CROSS-EXAMINATION
21 BY MS. GLASGOW:
22 Q. Good morning. Karen Glasgow with the Solicitor's
23 Office, Department of Interior representing the National Park
24 Service.

Page 1375

1 Good morning, gentlemen. Can we see -- could you
2 put up Mr. Umstot's Slide Number 15. Mr. Umstot. Sorry.
3 Thank you. On this slide, you indicate that
4 CSVM-2 did not show a response to MX-5 pumping.
5 Is this why you stated that this well would be a
6 good well to use for seeing short-term climactic events for
7 separating out pumping effects?
8 ANSWERS BY MR. UMSTOT:
9 A. I don't recall testifying that you'd use CSVM-2
10 for that purpose.
11 Q. Do you recall what well you did identify as being
12 one that would be good for showing short-term climatic
13 effects?
14 A. At the moment, I don't recall which well I used
15 for it.
16 Q. Do you recall that you identified a well as being
17 one that would be good for seeing short-term climatic effects
18 for separating out pumping effects?
19 A. I don't recall.
20 Q. I'd like to show you -- I don't know if you have
21 them. I've got their Appendix A and Appendix B from our
22 rebuttal report.
23 MS. GLASGOW: Do you have copies there with you?
24 MR. UMSTOT: No.

Page 1376

1 MS. GLASGOW: Well, let me hand these to you.
2 That's just for you to look at, but that's what I'm handing
3 him.
4 HEARING OFFICER FAIRBANK: Sounds good. Thank
5 you.
6 BY MS. GLASGOW:
7 Q. Now, you testified that the MPS provided
8 hydrographs which included records with rising water levels,
9 declining water levels, and some showing the short-term
10 climatic effects.
11 Can you look through our Appendixes B and A or A
12 and B as I just handed to you and could you tell us which
13 hydrographs for wells in and near the Lower White River Flow
14 System and the USGS PowerPoint that shows many other
15 hydrographs and identify the wells that have a similar
16 hydrograph to the well that you identified as being actually
17 indicative of short-term climatic effects?
18 MS. PETERSON: I guess I have to ask for
19 clarification because I think he testified that he couldn't
20 remember which well that was.
21 BY MS. GLASGOW:
22 Q. Well, how about any well. Any well that you see
23 on any of our hydrographs or the USGS PowerPoint that show
24 short-term climatic effects.

Page 1377

1 ANSWERS BY MR. UMSTOT:
2 A. I haven't analyzed all of the wells shown in
3 these appendices. I would need to spend some time to go
4 through and look at these hydrographs and do some analysis to
5 determine which ones have a -- short-term responses to
6 climatic effects.
7 Q. Okay. Well, unfortunately, they gave me five
8 minutes, so I can't let you do that. Let's move along, then.
9 Isn't it true that well CSVM-5 does not show
10 effects of the short-term climatic changes that you testified
11 about?
12 A. Yes, at the scale that is plotted on here, I
13 don't discern any short-term effects.
14 Q. Isn't it also true that CSVM-5 does not exhibit
15 declining water levels, which is a common characteristic of
16 nearly all of the other hydrographs in the Lower White River
17 Flow System?
18 A. Yes, CSVM-5 does not show a declining water
19 level.
20 Q. Are your answers the same for the hydrograph for
21 BMONCO-2, which is located in the Black Mountain area, I
22 think?
23 A. I haven't analyzed this hydrograph before. It
24 looks a little odd to me, and that is a completely straight

Page 1478

1 A. I do.
 2 Q. Okay. And do you agree that the -- well -- well,
 3 let me strike that, please.
 4 You had some criticism of the MLR analysis at
 5 SNWA; correct?
 6 A. Yes.
 7 Q. Okay. And you also are aware that SNWA did an
 8 analysis of how much groundwater can be pumped from the
 9 carbonate system while maintaining a 3.2 flow at the Warm
 10 Springs West Gage; correct?
 11 A. I recall that testimony.
 12 Q. Okay. Do you recognize that that analysis and
 13 the MLR analysis are two distinctly separate analyses?
 14 A. Yes.
 15 Q. Okay. So your critique of the MLR approach does
 16 not apply to the approach that SNWA used to determine the
 17 control in order to protect 3.2 CFS in the Warm Springs West
 18 Gage; is that true?
 19 A. That's true.
 20 Q. Okay. And most -- your -- your testimony
 21 indicated that the -- the conclusions and analysis that you
 22 conclude -- that you prepared were based upon the idea that
 23 additional carbonate pumping in Garnet Valley by the City of
 24 North Las Vegas would be temporary until a pipeline is built

Page 1479

1 to bring water to North Las Vegas from the Las Vegas Valley;
 2 is that correct?
 3 A. I would say initially. I think ultimately,
 4 through additional stress testing, whether it's pumping or
 5 injection testing, will arrive at the proper amount to
 6 perpetuate from the carbonate aquifer from Garnet Valley. I
 7 don't think we've established that yet.
 8 Q. Is the City of North Las Vegas prepared to pay
 9 for the costs of those types of stress testing that you have
 10 described?
 11 A. I can't answer that.
 12 Q. Okay.
 13 MR. TAGGART: Thank you.
 14 HEARING OFFICER FAIRBANK: The Moapa Valley Water
 15 District.
 16 CROSS-EXAMINATION
 17 BY MR. MORRISON:
 18 Q. Greg Morrison for Moapa Valley Water District for
 19 the record.
 20 Good morning, Mr. Smith. How are you?
 21 ANSWERS BY MR. SMITH:
 22 A. Good morning.
 23 Q. I just got a couple questions about you spoke
 24 about the City's long-term strategy, and one of those

Page 1480

1 strategies was bringing in senior groundwater rights.
 2 A. Correct.
 3 Q. Does -- has the City identified or targeted any
 4 specific senior water rights to date?
 5 A. Yes. The senior -- excuse me. The City has
 6 entered into a Memorandum of Understanding with the Church of
 7 Jesus Christ of Latter-Day Saints, the LDS Church, to initiate
 8 discussions on leasing with possible long-term option to
 9 purchase water rights from -- that are utilized along the
 10 alluvium in the Muddy River Springs area.
 11 Q. And are those -- are those rights currently being
 12 pumped?
 13 A. Since the decommissioning of the Reid Gardner
 14 Station power plant in 2017, these water rights were under
 15 lease for the past few decades to the power company for -- to
 16 Nevada Energy for that -- that facility.
 17 So since the decommissioning in 2017, I do not
 18 believe they've been pumped, or if they have been, they have
 19 not been pumped to a great amount.
 20 Q. Okay. And you said those were alluvial rights?
 21 A. The -- they are water rights at wells that have
 22 historically pumped from the alluvium.
 23 Q. Okay. The City's Kapex and Playa wells, are
 24 those alluvial rights or are those carbonate right -- or

Page 1481

1 wells, excuse me?
 2 A. The wells are completed in the carbonate aquifer.
 3 Q. Okay. So would it be fair to say that the
 4 movement of the senior permit rights that the City currently
 5 has targeted for acquisition, beginning to pump those would
 6 increase pumping in the carbonate aquifer?
 7 A. That's correct.
 8 MR. MOORE: Okay. Thanks.
 9 HEARING OFFICER FAIRBANK: Lincoln County-Vidler
 10 Water Company.
 11 CROSS-EXAMINATION
 12 BY MS. PETERSON:
 13 Q. Hi, Mr. Smith. Karen Peterson --
 14 ANSWERS BY MR. SMITH:
 15 A. Good morning.
 16 Q. -- representing Lincoln County Water District and
 17 Vidler Water Company. I just had a couple questions for you.
 18 Is there any recommendation by your client to
 19 include Kane Springs Valley into the Lower White River Flow
 20 System?
 21 A. No. Again, we have not done any assessment on
 22 the other regions of the flow system.
 23 Q. But in this proceeding, there is no
 24 recommendation by your client based on the work that they've

1 STATE OF NEVADA)
) ss.

2 CARSON CITY)

3

4 I, MICHEL LOOMIS, a Certified Court Reporter, do
5 hereby certify;

6 That on the 1st of October, 2019, in Carson City,
7 Nevada, I was present and took stenotype notes of the hearing
8 held before the Nevada Department of Conservation and Natural
9 Resources, Division of Water in the within entitled matter,
10 and thereafter transcribed the same into typewriting as herein
11 appears;

12 That the foregoing transcript, consisting of
13 pages 1370 through 1497 hereof, is a full, true and correct
14 transcription of my stenotype notes of said hearing to the
15 best of my ability.

16

17 Dated at Carson City, Nevada, this 1st day of
18 October, 2019.

19

20

21

MICHEL LOOMIS, RPR
NV CCR #228

22

23

24

In The Matter Of:

*DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES
DIVISION OF WATER RESOURCES*

*Vol. VIII
October 02, 2019*

*Capitol Reporters
123 W. Nye Lane, Ste 107

Carson City, Nevada 89706*

Original File 100219amfinalWater.txt
Min-U-Script® with Word Index

Page 1499

1 STATE OF NEVADA
 2 DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES
 3 DIVISION OF WATER RESOURCES
 4 BEFORE MICHELINE FAIRBANK, HEARING OFFICER
 5 ---oOo---
 6 IN THE MATTER OF THE ADMINISTRATION
 AND MANAGEMENT OF THE LOWER
 7 WHITE RIVER FLOW SYSTEM WITHIN
 COYOTE SPRING VALLEY HYDROGRAPHIC
 8 BASIN (210), A PORTION OF BLACK
 MOUNTAINS AREA HYDROGRAPHIC
 9 BASIN (215), GARNET VALLEY
 HYDROGRAPHIC BASIN (216), HIDDEN
 10 VALLEY HYDROGRAPHIC BASIN (217),
 CALIFORNIA WASH HYDROGRAPHIC BASIN
 11 (218), AND MUDDY RIVER SPRINGS AREA
 (AKA UPPER MOAPA VALLEY HYDROGRAPHIC
 12 BASIN (219).
 _____ /
 13
 14 TRANSCRIPT OF PROCEEDINGS
 15 PUBLIC HEARING
 16 HEARING ON ORDER 1303
 17 VOLUME VIII
 (A.M. SESSION, Pages 1499 - 1596)
 18
 WEDNESDAY, OCTOBER 2, 2019
 19
 20
 21 REPORTED BY: CAPITOL REPORTERS
 Certified Shorthand Reporters
 22 BY: CHRISTY Y. JOYCE, CCR
 Nevada CCR #625
 23 123 W. Nye Lane Suite 107
 Carson City, Nevada 89706
 24 (775)882-5322

Page 1500

1 A P P E A R A N C E S
 2
 3 Micheline N. Fairbank,
 Hearing Officer
 4
 Tim Wilson,
 5 Acting State Engineer
 6 Adam Sullivan,
 Deputy State Engineer
 7
 Melissa Flatley,
 8 Chief of the Hearing Officer Section
 9 Michelle Barnes,
 Supervising Professional Engineer
 10
 Levi Kryder,
 11 Chief of the Hydrology Section
 12 Jon Benedict,
 Senior Hydrologist
 13
 Christi Cooper,
 14 Well Supervisor
 15 Bridget Bliss,
 Basin Engineer
 16
 17
 18
 19
 20
 21
 22
 23
 24

Page 1501

1 A P P E A R A N C E S
 (Continued)
 2
 3 For SNWA: Taggart & Taggart, Ltd.
 By: Paul G. Taggart, Esq.
 4 Carson City, Nevada
 -and-
 5 Tim O'Connor, Esq.
 6 For CSI: Robison, Belaustegui, Sharp
 & Low
 7 By: Kent R. Robison, Esq.
 Reno, Nevada
 8
 For CSI: Brownstein Hyatt Farber Schreck
 9 By: Bradley J. Herrema, Esq.
 Los Angeles, California
 10
 For NV Energy: Justina Caviglia, Esq.
 11 Reno, Nevada
 12 For Lincoln County
 Water District/
 13 Vidler Water Company: Allison MacKenzie
 By: Karen Peterson, Esq.
 14 Carson City, Nevada
 15 For NCA: Alex Flangas, Esq.
 Reno, Nevada
 16
 For Moapa Band of Paiutes: Richard Berley, Esq.
 17
 For Moapa Valley
 18 Water District: Greg Morrison, Esq.
 19 For Muddy Valley Irrigation: Steve King
 For Bedroc: Therese Ure, Esq.
 21 For City of North Las Vegas: Therese Ure, Esq.
 22 For National Park Service: Karen Glasgow
 23 For Center for Biologic
 Diversity: Patrick Donnelly
 24

Page 1502

1 I N D E X
 2 WITNESS PAGE
 3 TOM MYERS
 4 Direct Examination by Mr. Donnelly 1507
 5 Cross-Examination by Mr. Herrema 1546
 6 Cross-Examination by Mr. Taggart 1552
 7 Cross-Examination by Mr. Morrison 1557
 8 Cross-Examination by Ms. Peterson 1560
 9 Cross-Examination by Mr. King 1566
 10 Examination by Mr. Benedict 1569
 11 Examination by Mr. Kryder 1571
 12 Examination by Mr. Sullivan 1572
 13 Examination by Ms. Barnes 1574
 14 Cross-Examination by Mr. Taggart 1576
 15 Cross-Examination by Ms. Peterson 1580
 16 Redirect Examination by Mr. Donnelly 1586
 17 JONATHAN BELL
 18 Direct Examination by Ms. Williams 1588
 19 Cross-Examination by Mr. Herrema 1591
 20 Examination by Mr. Benedict 1593
 21
 22
 23
 24

Page 1503

1 CARSON CITY, WEDNESDAY, OCTOBER 2, 2019, A.M. SESSION
2 ---oOo---
3 HEARING OFFICER FAIRBANK: This is a continuation
4 of the Order 1303 hearing regarding the Lower White River
5 Flow System and the administration of the basins as a joint
6 administrative unit.
7 And we will continue our presentations by the
8 participants starting today with Center for Biological
9 Diversity. And so we'll go ahead and kick it off with
10 Mr. Donnelly.
11 MR. DONNELLY: Thank you. Good morning. Patrick
12 Donnelly for the Center for Biological Diversity. And our
13 expert witness today is Dr. Tom Myers, a hydrologist, who has
14 appeared in front of the Nevada State Engineer in numerous
15 proceedings. His CV is available on CBD Exhibit 1.
16 We appreciate the opportunity to present today.
17 The Center for Biological Diversity was founded in 1989 and
18 our mission is very simple. It's to save life on earth. In
19 particular, we focus on the protection of endangered species
20 and the habitats upon which they rely.
21 And I just want to provide the briefest of
22 remarks about the context of Dr. Myers' presentation. We
23 have been advocating for the protection of the Moapa dace for
24 over a decade, focusing on securing a long-term permanent

Page 1504

1 water supply for the fish. And as parties in this room are
2 doubtless aware, we unsuccessfully litigated Fish and
3 Wildlife Services section seven consultation on the MOA some
4 ten years ago.
5 As we've been eliciting in cross-examination over
6 the past two weeks, we believe that withdrawals from the
7 carbonate aquifer that cause a reduction in habitat quantity
8 for the dace are a take under the Endangered Species Act and
9 thus prohibited.
10 And while that implies that individual pumpers
11 may be potentially violating the Act, we believe that
12 responsibility lies with the Division of Water Resources.
13 Rather than running to court to litigate this,
14 we're participating in this proceeding because we believe
15 that the State Engineer's office is taking the right approach
16 to addressing this matter. With almost 40,000 acre-feet of
17 groundwater rights and 37,000 acre-feet of surface water
18 rights, the basin is extremely over-allocated and the dace's
19 habitat is in danger of drying up, even at current pumping
20 levels, as Dr. Myers will demonstrate.
21 Order 1303, Section 6-2-C asks about the
22 long-term annual quantity of groundwater that may be pumped
23 from the Lower White River Flow System. While this is a
24 technical evidentiary proceeding we're involved in involving

Page 1505

1 scientific experts presenting and interpreting data, Order
2 1303 asks a subjective question. What is the amount that may
3 be pumped? And the question that's implicit there is that
4 may be pumped within what constraints.
5 Different parties have had different
6 conceptualizations about what the constraints on pumping are
7 and thus have reached very different conclusions.
8 We feel that the Endangered Species Act is the
9 primary limiting factor on the overall quantity of allowable
10 pumping within the Lower White River Flow System and thus we
11 geared our analysis toward that goal of protecting the dace.
12 However, other testimony has made it clear that
13 certain types and locations of pumping will also impact
14 senior surface water rights. As such, while our report
15 focuses on what actions are necessary to save the dace, our
16 report should not be considered exclusive of conclusions
17 raised by other parties as to requisite actions to protect
18 senior surface water rights.
19 The findings in our report and other reports
20 instead may compliment one another, which is, of course, up
21 to the State Engineer's office to determine.
22 Dr. Myers presents in his conclusion a number of
23 potentially allowable alluvial pumping. However, if the goal
24 of this proceeding's outcome is both to protect the dace and

Page 1506

1 to protect in-stream water rights, we all need to consider
2 that the idea that all pumping must cease or at least that
3 needs to be part of the evaluation.
4 We would respectfully request of the State
5 Engineer's office the opportunity to present a brief written
6 closing argument after the termination of this hearing.
7 I'd like to move to have our Exhibits 1 through 4
8 admitted for the record.
9 HEARING OFFICER FAIRBANK: Those exhibits will be
10 admitted.
11 MR. DONNELLY: Thank you. I want to note for
12 everyone that our presentation today differs slightly from
13 the presentation provided to the parties as CBD Exhibit 4.
14 We chose to highlight a couple of different elements from our
15 reports to ensure it's relevant to the ongoing discussions
16 we've had, but we haven't reached any new substantive
17 conclusions or anything in the presentation today.
18 Could we please swear in the witness?
19 (The witness was sworn in)
20
21 TOM MYERS
22 Called as a witness on behalf of the
23 Center for Biological Diversity, having been first duly sworn
24 Was examined and testified as follows:

Page 1559

1 its customers entirely using groundwater from the Arrow
2 Canyon wells?
3 A. Yeah, I think I know that.
4 Q. So I guess my question for you is what should
5 those 8500 people do for water?
6 MR. DONNELLY: Objection. That's not relevant to
7 the facts and data and interpretation that Dr. Myers
8 prepared.
9 HEARING OFFICER FAIRBANK: Can you relate your
10 question to the four critical issues, the boundary, the flow
11 of --
12 MR. MORRISON: We're talking --
13 HEARING OFFICER FAIRBANK: I understand that this
14 is a policy issue as far as I'm understanding your question,
15 so if you can relate it to those four questions or how within
16 that five catch-all it relates back to those four specific
17 questions, then --
18 MR. MORRISON: I'll try.
19 Q. (By Mr. Morrison) Dr. Myers, did you see
20 Dr. Schwemm's presentation for the Fish and Wildlife Service?
21 A. Yeah, yes, I did.
22 Q. Do you recall seeing his slides detailing the
23 number of Moapa dace month over month and year over year?
24 A. Yes.

Page 1560

1 Q. Do you remember seeing month over month and/or
2 year over year increases in dace numbers during certain
3 months and years?
4 A. Yes.
5 Q. Was carbonate pumping occurring during those
6 months of increase?
7 A. There was -- I mean, those increases -- there
8 were increases that occurred during the last 15 years. And,
9 yes, there was carbonate pumping, so yes.
10 MR. MORRISON: All right. Thank you.
11 HEARING OFFICER FAIRBANK: Lincoln County, Vidler
12 Water Company?
13 CROSS-EXAMINATION
14 By Ms. Peterson:
15 Q. Hi, Dr. Myers.
16 A. Good morning.
17 Q. Good morning. Karen Peterson representing
18 Lincoln County Water District and Vidler Water Company. Did
19 you calculate drawdown to the Muddy River Spring area from
20 pumping Kane Spring Valley wells?
21 A. No.
22 Q. You indicate on page 19 of your original report
23 that Kane Springs Valley pumping will reverse the gradient
24 and draw water from Coyote Springs Valley. Do you recall

Page 1561

1 that?
2 A. Can you refer me to a section? I've got my
3 report right in front of me.
4 Q. It's on page 19.
5 A. Okay.
6 Q. Middle paragraph.
7 A. Okay. And what was the statement again? I'm
8 sorry.
9 Q. That Kane Springs Valley pumping will reverse the
10 gradient and draw water from Coyote Spring Valley.
11 A. I say pumping in Kane Springs Valley that
12 decreases that gradient would decrease flow in the CSV. Do I
13 then say --
14 Q. About middle of the way, middle of the way down.
15 A. Well, I would say -- I would say that pumping in
16 Kane Springs Valley, considering it's only five feet higher
17 than in Coyote Spring Valley, if it pumped enough could
18 reverse the gradient, yes.
19 Q. And did you -- how much pumping?
20 A. I don't know.
21 Q. So you didn't run any kind of model or do any
22 kind of analysis to support that conclusion; is that correct?
23 A. There is not sufficient transmissivity data with
24 which to run a model of that.

Page 1562

1 Q. Did you look at the information that Lincoln
2 County and Vidler have supplied with regard to their pump
3 test?
4 A. I don't recall looking at that, no.
5 Q. Do you have the URS report from 2006?
6 A. I didn't review the URS report.
7 Q. And then going to slide 23. The conclusion that
8 Kane Spring Valley should be managed as part of the Lower
9 White River Flow System. And you conclude with there the
10 high likelihood that water pumped from Kane Springs Valley
11 would quickly contribute to the depletion of the carbonate
12 aquifer in Coyote Spring Valley in the Muddy River Springs
13 area. Do you see that?
14 A. Yes.
15 Q. And, again, did you run any kind of model or do
16 any kind of analysis to support that conclusion?
17 A. The analysis I did was qualitative because we are
18 talking -- I mean, the overall results of the Order 1169 pump
19 test were that we were removing water from a carbonate well
20 that showed a drawdown of over about a five-basin area and
21 thus my analysis of what -- of Kane Springs Valley affecting
22 that is that -- is just another way of removing or preventing
23 water from being in that five -- in that really high
24 transmissive zone in the Lower White River Flow System.

1 with Nevada Cogeneration and Associates and then we will
2 finish the day with Muddy Valley Irrigation Company. And so
3 we will start tomorrow at 12:30 and we will see everyone
4 then. Thank you.

5 (Hearing concluded at 11:15 a.m.)

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

1 STATE OF NEVADA)
)ss.

2 COUNTY OF WASHOE)
3

4 I, CHRISTY Y. JOYCE, Official Certified Court
5 Reporter for the State of Nevada, Department of Conservation
6 and Natural Resources, Division of Water Resources, do hereby
7 certify:

8 That on Wednesday, the 2nd day of October,
9 2019, I was present at the Legislative Counsel Bureau, Carson
10 City, Nevada, for the purpose of reporting in verbatim
11 stenotype notes the within-entitled public hearing;

12 That the foregoing transcript, consisting of
13 pages 1499 through 1595, inclusive, includes a full, true and
14 correct transcription of my stenotype notes of said public
15 hearing.

16
17
18
19
20
21

Dated at Reno, Nevada, this 2nd day of
October, 2019.

CHRISTY Y. JOYCE, CCR #625

22
23
24

In The Matter Of:

*DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES
DIVISION OF WATER RESOURCES*

*Vol. IX
October 03, 2019*

*Capitol Reporters
123 W. Nye Lane, Ste 107

Carson City, Nevada 89706*

Original File 100319finalWater.txt

Min-U-Script® with Word Index

1 STATE OF NEVADA
2 DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES
3 DIVISION OF WATER RESOURCES
4 BEFORE MICHELINE FAIRBANK, HEARING OFFICER
5 ---oOo---
6 IN THE MATTER OF THE ADMINISTRATION
7 AND MANAGEMENT OF THE LOWER
8 WHITE RIVER FLOW SYSTEM WITHIN
9 COYOTE SPRING VALLEY HYDROGRAPHIC
10 BASIN (210), A PORTION OF BLACK
11 MOUNTAINS AREA HYDROGRAPHIC
12 BASIN (215), GARNET VALLEY
13 HYDROGRAPHIC BASIN (216), HIDDEN
14 VALLEY HYDROGRAPHIC BASIN (217),
15 CALIFORNIA WASH HYDROGRAPHIC BASIN
16 (218), AND MUDDY RIVER SPRINGS AREA
17 (AKA UPPER MOAPA VALLEY HYDROGRAPHIC
18 BASIN (219)).

13
14 TRANSCRIPT OF PROCEEDINGS
15 PUBLIC HEARING
16 HEARING ON ORDER 1303
17 VOLUME IX
18 (P.M. SESSION, Pages 1597 - 1712)

19 THURSDAY, OCTOBER 3, 2019

20
21 REPORTED BY: CAPITOL REPORTERS
22 Certified Shorthand Reporters
23 BY: CHRISTY Y. JOYCE, CCR
24 Nevada CCR #625
123 W. Nye Lane Suite 107
Carson City, Nevada 89706
(775)882-5322

1 A P P E A R A N C E S
(Continued)
2
3 For SNWA: Taggart & Taggart, Ltd.
4 By: Paul G. Taggart, Esq.
5 Carson City, Nevada
6 -and-
7 Tim O'Connor, Esq.
8 For CSI: Robison, Belaustegui, Sharp
& Low
9 By: Kent R. Robison, Esq.
10 Reno, Nevada
11 For CSI: Brownstein Hyatt Farber Schreck
12 By: Bradley J. Herrema, Esq.
13 Los Angeles, California
14 For NV Energy: Justina Caviglia, Esq.
15 Reno, Nevada
16 For Lincoln County
17 Water District/
18 Vidler Water Company: Allison MacKenzie
19 By: Karen Peterson, Esq.
20 Carson City, Nevada
21 For NCA: Alex Flangas, Esq.
22 Reno, Nevada
23 For Moapa Band of Paiutes: Richard Berley, Esq.
24
25 For Moapa Valley
26 Water District: Greg Morrison, Esq.
27 For Muddy Valley Irrigation: Steve King
28 For Bedroc: Therese Ure, Esq.
29 For City of North Las Vegas: Therese Ure, Esq.
30 For National Park Service: Karen Glasgow
31 For Center for Biologic
32 Diversity: Patrick Donnelly

1 A P P E A R A N C E S
2
3 Micheline N. Fairbank,
4 Hearing Officer
5
6 Tim Wilson,
7 Acting State Engineer
8 Adam Sullivan,
9 Deputy State Engineer
10
11 Melissa Flatley,
12 Chief of the Hearing Officer Section
13 Michelle Barnes,
14 Supervising Professional Engineer
15
16 Levi Kryder,
17 Chief of the Hydrology Section
18 Jon Benedict,
19 Senior Hydrologist
20
21 Christi Cooper,
22 Well Supervisor
23 Bridget Bliss,
24 Basin Engineer

1 I N D E X	PAGE
2 WITNESS	
3 JAY DIXON	
4 Direct Examination by Mr. Flangas	1604
5 ROBERT COACHE	
6 Direct Examination by Mr. Flangas	1605
7 HUGH RICCI	
8 Direct Examination by Mr. Flangas	1607
9 THE FOLLOWING QUESTIONS ARE OF THE ABOVE 3-MEMBER PANEL	
10 Cross-Examination by Mr. Herrema	1650
11 Cross-Examination by Mr. Taggart	1654
12 Cross-Examination by Mr. Morrison	1658
13 Cross-Examination by Ms. Peterson	1661
14 Cross-Examination by Ms. Ure	1666
15 Cross-Examination by Mr. Donnelly	1667
16 Cross-Examination by Ms. Caviglia	1670
17 Examination by Mr. Benedict	1672
18 Examination by Mr. Kryder	1677
19 Examination by Mr. Sullivan	1678
20 Cross-Examination by Mr. Taggart	1680
21 Cross-Examination by Ms. Peterson	1682
22 Examination by Mr. Sullivan	1685
23 Redirect Examination by Mr. Flangas	1686
24	

Page 1601

1 I N D E X
(Continued)

2

3 WITNESS PAGE

4 TODD ROBISON

5 Direct Examination by Mr. King 1691

6 Cross-Examination by Mr. Herrema 1704

7 Cross-Examination by Mr. Taggart 1706

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

Page 1603

1 to make sure that we had our time down so that -- We had sort
2 of prepared to do a one-hour presentation with a ten-minute
3 redirect. But if I have it wrong, that's fine. We'll just
4 have to speed it up. I just want to make sure.

5 Okay, guys.

6 HEARING OFFICER FAIRBANK: Well, it looks like I
7 made a typographic error, so hopefully we can try to work
8 around it. But we'll make sure that we give everybody an
9 equal opportunity. Because all of the other participants who
10 submitted rebuttal reports were allotted two hours. And so
11 that's what happens when you give lawyers calculators.

12 MR. FLANGAS: Okay. Guys. Would you do me a
13 favor then, if you can just let us know when we're at 50
14 minutes so we don't go over our time, so we can reserve just
15 a little bit of time.

16 HEARING OFFICER FAIRBANK: We'll do that. And
17 we'll also work to accommodate. I think we can probably have
18 a little bit of time to accommodate due to that error in the
19 state hearing notice.

20 MR. FLANGAS: No problem.

21 HEARING OFFICER FAIRBANK: We didn't recognize
22 that prior to this moment. Thank you.

23 MR. FLANGAS: Thank you very much. Well, thank
24 you. Nevada Cogeneration Associates Number 1 and 2. I'm

Page 1602

1 CARSON CITY, THURSDAY, OCTOBER 3, 2019, P.M. SESSION
2 ---oOo---

3 HEARING OFFICER FAIRBANK: This is the
4 continuation of the hearing regarding the administration of
5 the Lower White River Flow System in Order 1303. And today
6 we are going to go ahead and hear presentations from Nevada
7 Cogeneration Associates and then from the Muddy Valley
8 Irrigation Company. And so we will go ahead and get started
9 this morning.

10 And so, Mr. Flangas, you have one hour for the
11 presentation of your evidence and testimony from your experts
12 and witnesses with respect to the Order 1303 matters. And
13 then after the expiration of the hour or if you finish
14 earlier, then we'll go ahead and open that up for
15 cross-examination.

16 MR. FLANGAS: Just for clarification, I thought
17 we had -- Yeah. I thought we had two and a half hours total,
18 so I was thinking we had an hour with a little bit of time
19 for redirect. Was I wrong on that?

20 HEARING OFFICER FAIRBANK: We divided it up in to
21 two hours.

22 MR. FLANGAS: Okay.

23 MR. COACHE: The order says two and a half.

24 MR. FLANGAS: I'm sorry. I was -- We just wanted

Page 1604

1 here with three witnesses that are all authors of the NCA
2 report. And we will use NCA as an abbreviation. I have with
3 me here today Mr. Hugh Ricci, Mr. Jay Dixon, and Mr. Bob
4 Coache. I'll begin with Mr. Dixon. Mr. Dixon, could you
5 tell us --

6 (The court reporter interrupts)
7 (The three witnesses were sworn in)

8

9 JAY DIXON
10 Called as a witness on behalf of
11 Nevada Cogeneration Associates, having been first duly sworn,
12 Was examined and testified as follows:

13

14 DIRECT EXAMINATION
15 By Mr. Flangas:
16 Q. Mr. Dixon, could you give us a little bit of your
17 background, please.
18 A. My name is Jay Dixon for the record. So I've
19 been a practicing hydrologist for over 25 years. I've got a
20 Master's degree in civil engineering from the University of
21 Nevada, Las Vegas. And, specifically, I've been working on
22 various projects in what is now the Lower White River Flow
23 System for about 15 years in the capacity of a consultant.
24 Q. Mr. Dixon, were you one of the authors of the NCA

Page 1661

1 CROSS-EXAMINATION
2 By Ms. Peterson:
3 ANSWERS BY MR. RICCI:
4 Q. Gentlemen, Karen Peterson here representing
5 Lincoln County and Vidler Water Company.
6 So, Mr. Ricci, just following up on that last
7 statement that you made. Mr. Coache indicated that I guess
8 it was his recommendation that Kane not be included right now
9 in terms of the boundary at this stage. So you disagree with
10 that?
11 A. Hugh Ricci. No. What I said had I -- if I were
12 to issue Order 1169 again and had the information that I had
13 available then as there is enough information today I would
14 have included it.
15 Q. Right. But is it your testimony today that the
16 boundary should not be changed? As we are now in this
17 proceeding, the last bullet point on slide 40, says that the
18 recommendation is, I assumed of Nevada Cogen, that the
19 boundaries not be changed.
20 A. You know, when we -- Hugh Ricci again. When we
21 did this, this was a collaboration among the three of us, and
22 there were certain things that we thought of and two to one
23 or whatever, however it was ruled, we put it in it. But the
24 answer to my question originally that you asked is what I

Page 1662

1 would do then if I knew what I do know today.
2 Q. So do you support that bullet point or not?
3 A. Since my name is on the report I would say yes.
4 Q. Did any of the three of you calculate drawdown to
5 the Muddy River Springs area from pumping Kane Spring Valley
6 wells?
7 MR. COACHE: I first want to clarify the bullet
8 point, the previous bullet point. My position hasn't changed
9 in that I believe Kane Springs Valley should be included. I
10 don't believe this is the venue for which to discuss that.
11 And that's why that bullet point says what it does in
12 relation to the next phase.
13 The answer to your question is that I did not
14 calculate drawdowns of the Muddy River Springs area from Kane
15 Springs pumpage.
16 MS. PETERSON: Mr. Dixon?
17 MR. DIXON: So.
18 MS. PETERSON: Did you calculate drawdown to the
19 Muddy River Spring area from pumping Kane Spring Valley
20 wells?
21 MR. DIXON: No. And that wasn't the purpose of
22 that regression analysis.
23 MS. PETERSON: Mr. Ricci?
24 MR. RICCI: No.

Page 1663

1 MS. PETERSON: All right. Did any of the three
2 of you calculate drawdown to the wells owned or controlled by
3 NCA from pumping Kane Spring Valley wells?
4 MR. DIXON: No.
5 MR. RICCI: You're asking each us of us again,
6 Ms. Peterson?
7 MS. PETERSON: Yes.
8 MR. RICCI: No. The answer to that question is
9 no.
10 MR. COACHE: I'm sorry. I didn't follow that
11 question.
12 ANSWERS BY MR. COACHE:
13 Q. Mr. Coache, did you calculate drawdown to the
14 wells owned or controlled by NCA from pumping Kane Spring
15 Valley wells?
16 A. No, I did not.
17 Q. Mr. Coache, did you review the hydrograph of the
18 KSVM during the Kane Springs pump test? KSVM-4, sorry, well.
19 A. I'm sorry. What did you ask?
20 Q. Sorry. It was bad. Did you review the
21 hydrograph of the KSVM-4 well during the Kane Springs pump
22 test, the aquifer test?
23 A. I did.
24 Q. And do you agree that the pump test was for 1800

Page 1664

1 gallons per minute?
2 A. I can't -- I believe that's the number but I
3 can't say for sure.
4 Q. And do you agree that from that well where the
5 pump test was conducted that Lincoln-Vidler was awarded 500
6 acre-feet which when pumped would be much less than the 1800
7 gallons per minute?
8 A. Well, it depends on over what time you pump the
9 water.
10 Q. Well, do you understand that 1800 gallons per
11 minute that was a continuous pump test?
12 A. Yeah, absolutely. But if you want to take your
13 water out over a one-month period it might be 1800 gallons a
14 minute.
15 Q. Right. But you would have no idea what the plan
16 is for the development of the water out of that well, the 500
17 acre-feet, do you?
18 A. But you didn't ask me that.
19 Q. Do you have any idea?
20 (The court reporter interrupts)
21 THE WITNESS: No.
22 Q. (By Ms. Peterson) And you indicate on pages --
23 page 18, I think, Mr. Coache, you wrote this section of the
24 report, NCA number one. The last sentence there right before

Page 1709

1 flow in the summer months decreased that well siting, we --
 2 Well, let me back up. In the early 1960s, the irrigation
 3 company took on a huge task of creating a reservoir to store
 4 water that was not mostly benefitted in the winter months to
 5 be able to supplement the summer months. And over the period
 6 of time, as the stream flows diminish or go back up, we
 7 constantly are adjusting from an operational standpoint the
 8 flow coming out of Bowman Reservoir to maintain a level of
 9 consistency for our shareholders. Obviously it was
 10 shareholder water that went in there and the benefit was back
 11 to the shareholders.
 12 Since the pumping, the alluvial pumping, has
 13 stopped, then that frequency of adjustment seems to have
 14 leveled out a little bit. Did I answer your question?
 15 Q. Yes. I mean, do you think there's more water in
 16 the river now?
 17 A. No.
 18 MR. TAGGART: Okay. Great. I have no further
 19 questions. Thank you.
 20 HEARING OFFICER FAIRBANK: Moapa Valley Water
 21 District? Seeing no questions.
 22 Lincoln County, Vidler? Seeing no questions.
 23 City of Las Vegas?
 24 MS. URE: No questions.

Page 1710

1 HEARING OFFICER FAIRBANK: Center for Biological
 2 Diversity? No questions.
 3 Georgia Pacific Republic? Seeing no questions.
 4 Nevada Cogeneration Associates? Seeing no
 5 questions.
 6 Bedroc?
 7 MS. URE: No questions.
 8 HEARING OFFICER FAIRBANK: And Nevada Energy?
 9 MS. CAVIGLIA: No questions.
 10 HEARING OFFICER FAIRBANK: No questions.
 11 I will open it up to the Division of Water
 12 Resources staff and the State Engineer. Okay. Seeing no
 13 questions on our end, Coyote Springs Investments, do you have
 14 any further questions?
 15 And Southern Nevada Water Authority?
 16 All right. Well, thank you very much. We'll
 17 conclude the proceedings with the Muddy Valley Irrigation
 18 Company.
 19 Before we conclude for the day, I wanted to go
 20 ahead and address a couple of just kind of procedural
 21 administrative matters. So tomorrow morning we will go ahead
 22 and get started with Bedroc. And then at the conclusion of
 23 the two hours allocated for Bedroc and for cross-examination,
 24 then we'll get started with Nevada Energy. And then if we

Page 1711

1 are done before lunch, then we'll go ahead and open it up for
 2 public comment. If we're not done until the lunch time, then
 3 we'll return after lunch for public comment. But public
 4 comment will follow the conclusion of the presentation by
 5 stakeholders who have submitted rebuttal reports. And at
 6 that time then we'll also address any other administrative or
 7 procedural matters that we have remaining. And so we'll see
 8 everyone tomorrow morning. Thank you.
 9 (Hearing concluded at 3:19 p.m.)
 10
 11
 12
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24

Page 1712

1 STATE OF NEVADA)
)ss.
 2 COUNTY OF WASHOE)
 3
 4 I, CHRISTY Y. JOYCE, Official Certified Court
 5 Reporter for the State of Nevada, Department of Conservation
 6 and Natural Resources, Division of Water Resources, do hereby
 7 certify:
 8 That on Thursday, the 3rd day of October,
 9 2019, I was present at the Legislative Counsel Bureau, Carson
 10 City, Nevada, for the purpose of reporting in verbatim
 11 stenotype notes the within-entitled public hearing;
 12 That the foregoing transcript, consisting of
 13 pages 1597 through 1711, inclusive, includes a full, true and
 14 correct transcription of my stenotype notes of said public
 15 hearing.
 16
 17 Dated at Reno, Nevada, this 4th day of
 18 October, 2019.
 19
 20
 21
 22
 23
 24

CHRISTY Y. JOYCE, CCR #625

In The Matter Of:

*DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES
DIVISION OF WATER RESOURCES*

*Vol. x
October 04, 2019*

*Capitol Reporters
123 W. Nye Lane, Ste 107

Carson City, Nevada 89706*

Original File 100419finalWater.txt

Min-U-Script® with Word Index

Page 1713

1 STATE OF NEVADA
 2 DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES
 3 DIVISION OF WATER RESOURCES
 4 BEFORE MICHELINE FAIRBANK, HEARING OFFICER
 5 ---oOo---
 6 IN THE MATTER OF THE ADMINISTRATION
 AND MANAGEMENT OF THE LOWER
 7 WHITE RIVER FLOW SYSTEM WITHIN
 COYOTE SPRING VALLEY HYDROGRAPHIC
 8 BASIN (210), A PORTION OF BLACK
 MOUNTAINS AREA HYDROGRAPHIC
 9 BASIN (215), GARNET VALLEY
 HYDROGRAPHIC BASIN (216), HIDDEN
 10 VALLEY HYDROGRAPHIC BASIN (217),
 CALIFORNIA WASH HYDROGRAPHIC BASIN
 11 (218), AND MUDDY RIVER SPRINGS AREA
 (AKA UPPER MOAPA VALLEY HYDROGRAPHIC
 12 BASIN (219). /

13
 14 TRANSCRIPT OF PROCEEDINGS
 15 PUBLIC HEARING
 16 HEARING ON ORDER 1303
 17 VOLUME X
 (A.M. SESSION, Pages 1713 - 1823)
 18
 19 FRIDAY, OCTOBER 4, 2019
 20
 21 REPORTED BY: CAPITOL REPORTERS
 Certified Shorthand Reporters
 22 BY: CHRISTY Y. JOYCE, CCR
 Nevada CCR #625
 23 123 W. Nye Lane Suite 107
 Carson City, Nevada 89706
 24 (775)882-5322

Page 1714

1 A P P E A R A N C E S
 2
 3 Micheline N. Fairbank,
 Hearing Officer
 4
 5 Tim Wilson,
 Acting State Engineer
 6 Adam Sullivan,
 Deputy State Engineer
 7
 8 Melissa Flatley,
 Chief of the Hearing Officer Section
 9 Michelle Barnes,
 Supervising Professional Engineer
 10
 11 Levi Kryder,
 Chief of the Hydrology Section
 12 Jon Benedict,
 Senior Hydrologist
 13
 14 Christi Cooper,
 Well Supervisor
 15 Bridget Bliss,
 Basin Engineer
 16
 17
 18
 19
 20
 21
 22
 23
 24

Page 1715

1 A P P E A R A N C E S
 (Continued)
 2
 3 For SNWA: Taggart & Taggart, Ltd.
 By: Paul G. Taggart, Esq.
 4 Carson City, Nevada
 -and-
 5 Tim O'Connor, Esq.
 6 For CSI: Robison, Belaustegui, Sharp
 & Low
 7 By: Kent R. Robison, Esq.
 Reno, Nevada
 8
 9 For CSI: Brownstein Hyatt Farber Schreck
 By: Bradley J. Herrema, Esq.
 Los Angeles, California
 10
 11 For NV Energy: Justina Caviglia, Esq.
 Reno, Nevada
 12 For Lincoln County
 Water District/
 13 Vidler Water Company: Allison MacKenzie
 By: Karen Peterson, Esq.
 Carson City, Nevada
 14
 15 For NCA: Alex Flangas, Esq.
 Reno, Nevada
 16
 17 For Moapa Band of Paiutes: Richard Berley, Esq.
 18 For Moapa Valley
 Water District: Greg Morrison, Esq.
 19 For Muddy Valley Irrigation: Steve King
 20 For Bedroc: Therese Ure, Esq.
 21 For City of North Las Vegas: Therese Ure, Esq.
 22 For National Park Service: Karen Glasgow
 23 For Center for Biologic
 Diversity: Patrick Donnelly
 24

Page 1716

1 I N D E X	PAGE
2 WITNESS	
3 JAY DIXON	
4 Direct Examination by Ms. Ure	1718
5 Cross-Examination by Mr. Robison	1742
6 Cross-Examination by Mr. Taggart	1745
7 Cross-Examination by Ms. Peterson	1749
8 Examination by Ms. Barnes	1752
9 Cross-Examination by Mr. Taggart	1753
10 Examination by Ms. Cooper	1756
11 Examination by Ms. Barnes	1757
12 RICHARD FELLING	
13 Direct Examination by Ms. Caviglia	1758
14 Cross-Examination by Mr. Herrema	1793
15 Cross-Examination by Mr. Taggart	1797
16 Cross-Examination by Ms. Peterson	1803
17 Cross-Examination by Mr. Donnelly	1803
18 Cross-Examination by Ms. Harrison	1805
19 Cross-Examination by Mr. King	1806
20 Examination by Mr. Sullivan	1808
21 Examination by Ms. Barnes	1809
22 Examination by Ms. Cooper	1810
23 Cross-Examination by Mr. Taggart	1815
24 Examination by Mr. Sullivan	1817

Page 1717

1 CARSON CITY, FRIDAY, OCTOBER 4, 2019, A.M. SESSION
 2 ---oOo---
 3 HEARING OFFICER FAIRBANK: Good morning. So this
 4 is the continuation of the hearing regarding the
 5 administration of the Lower White River Flow System and Order
 6 1303. And this morning we're going to go ahead and proceed
 7 with our final two participants and their presentations as
 8 well as cross-examination of those participants.
 9 And we'll start the day off with Bedroc. And so
 10 at this point I'll go ahead and turn it over to Ms. Ure.
 11 But before we get started, when we're concluded
 12 with the presentation of the participants, we'll go ahead and
 13 address some final administrative matters before we proceed
 14 to public comment.
 15 So, Ms. Ure.
 16 MS. URE: Thank you. Good morning. Thank you.
 17 Therese Ure representing Bedroc. And today Mr. Dixon is also
 18 here with me, so if we could swear him in, that would be
 19 great.
 20 (The witness was sworn in)
 21 ///
 22 ///
 23 ///
 24 ///

Page 1718

1 JAY DIXON
 2 Called as a witness on behalf of
 3 Bedroc, having been first duly sworn,
 4 Was examined and testified as follows:
 5
 6 DIRECT EXAMINATION
 7 By Ms. Ure:
 8 Q. Good morning, Mr. Dixon. Can you please, turning
 9 to Bedroc Exhibit 1, give us a brief background of yourself?
 10 A. As I mentioned yesterday, I've got a Master's
 11 degree in civil engineering from the University of Nevada,
 12 Las Vegas. Over 25 years experience as a hydrologist here in
 13 Nevada. I got a Nevada PE, a Nevada hydrologist, and I only
 14 work on Nevada projects.
 15 Q. And, Mr. Dixon, were you offered as an expert in
 16 hydrology and waters rights in this proceeding?
 17 A. Yes.
 18 Q. Have you been qualified before the State
 19 Engineer?
 20 A. Yes.
 21 MS. URE: Okay. And so we would offer to qualify
 22 for this proceeding Mr. Dixon as an expert in hydrology and
 23 water rights.
 24 HEARING OFFICER FAIRBANK: And as there were no

Page 1719

1 objections, I think we've resolved all of that, and so he'll
 2 be admitted.
 3 MS. URE: Thank you.
 4 Q. (By Ms. Ure) Mr. Dixon, turning to Bedroc
 5 Exhibit 2, did you assist in preparing the report on behalf
 6 of Bedroc?
 7 A. I did.
 8 Q. Okay. And did you prepare a presentation for
 9 today's proceeding?
 10 A. Yes.
 11 Q. Can you please walk us through that?
 12 A. Yes. Turning to slide two. I want to start off
 13 by tying this presentation to the rebuttal report issues that
 14 were identified in the Bedroc rebuttal report. I'll go in
 15 order as they are listed in the report.
 16 First off, exclusion of the White River Flow
 17 System north of Coyote Spring Valley. I'm not going to spend
 18 much time on that. It's been discussed by plenty of other
 19 stakeholders. I think it's pretty clear that there's no
 20 reason to include. Hydrology data doesn't support it. I
 21 think that was a recommendation based purely on an agenda to
 22 impede the SNWA project. There's really no basis for it.
 23 Moving on to the content that I'm going to spend
 24 most of my time talking about today in this presentation, as

Page 1720

1 identified in my rebuttal report. Number two, management
 2 considerations for certain areas with access to alluvial
 3 aquifers. Alluvial pumpage in the Muddy River Springs area
 4 versus basin fill alluvial pumpage in north Coyote Spring
 5 Valley. There is a difference and I will discuss that.
 6 Effects from carbonate in Muddy River Springs
 7 area alluvial pumping on basin fill alluvial wells on north
 8 Coyote Spring Valley.
 9 And, finally, I'll mention just in closing, I'll
 10 discuss in closing, movement of water rights between the
 11 Muddy River Spring area alluvial and carbonate wells in the
 12 LWRFS.
 13 Slide three. Quick overview for Bedroc. In
 14 terms of location, it is located just north of the Clark
 15 County line. We're in Lincoln County. Three parcels
 16 totalling 560 acres, obviously in Coyote Spring Valley, what
 17 we consider the northern part. Specifically it's situated
 18 near the western edge of the Pahranaagat Wash about a thousand
 19 feet north of the confluence of Pahranaagat and Kane Springs
 20 Washes.
 21 Slide four. Overview map. You see where we are
 22 relative to the northern part of the LWRFS, Coyote Spring
 23 Valley, specifically. And you'll see the magenta-colored
 24 outline. That is the three parcels totalling 560 acres

Page 1801

1 your view on whether the State Engineer needs a groundwater
2 model constructed now in order to make the determinations
3 that are required or that are asked under Order 1303? Can
4 the 1303 increase be answered without a groundwater model and
5 just based upon the stress data from the Order 1169 pumping
6 test and the recovery data from that pumping test?
7 A. So there is a groundwater flow model that was
8 constructed by federal agencies. And, try as they might,
9 they really weren't able to replicate the system very well.
10 They underestimated a lot of the effects. And it wasn't
11 because they didn't try. I just think it's a very difficult
12 system to model. I think at this stage our observations are
13 enough to make future decisions. And so, no, I don't agree
14 that a model is necessary.
15 Q. Okay. Could you turn to slide number 32, please.
16 And just quickly, you made a comment during your testimony
17 that the -- And I don't remember exactly what it was. But I
18 wanted -- it had to do with the difference between these two
19 charts and the values depicted on the charts. Do you
20 recognize that in the lower pane, which is Figure 6-3,
21 there's a symbology there that indicates MRSA discharge
22 capture. And so this is showing discharge, which is more
23 than just stream flow. And then do you notice that up in the
24 top panel that that is just showing stream flow? Does that

Page 1802

1 make sense?
2 A. I see that.
3 Q. One last question at least for now is on the
4 slide before that. Do I get to ask it?
5 HEARING OFFICER FAIRBANK: Ask your question.
6 MR. TAGGART: Okay.
7 You testified about slide number 15 and I want to
8 ask you, you indicated that a trend line should be based upon
9 a -- using the same value from each month if you want to
10 develop a trend line. And so I have two questions, I guess.
11 Well, I can't have two questions. Did you do that and did --
12 and would it be appropriate in your view if the high point in
13 the hydrograph in a given year were used as the recovery
14 point, if you will, in that year and then the trend line
15 based upon that high point in the data set in a given year?
16 THE WITNESS: So, I'll answer the first question
17 first, did I do it. I drew the line in general through the
18 middle of the data. Perhaps I should have angled it up more
19 I think to match that data.
20 And your second question, could you draw a line
21 across the high point is no more valid than drawing a line
22 across the low point, in which case you would have opposing
23 trend lines. So you can draw the line anywhere you want.
24 When you have a short period of record and a high period of

Page 1803

1 estimates like this, I think the actual data are somewhat
2 ambiguous and then you need a longer period of record.
3 MR. TAGGART: Thank you.
4 HEARING OFFICER FAIRBANK: Moapa Valley Water
5 District? Seeing no questions.
6 Lincoln County, Vidler?
7 CROSS-EXAMINATION
8 By Ms. Peterson:
9 Q. Thank you. Mr. Felling, Karen Peterson
10 representing Lincoln County Water District and Vidler Water
11 Company. Did you calculate drawdown to the Muddy River
12 Spring area from pumping Kane Spring Valley wells?
13 A. No, I did not.
14 MS. PETERSON: Thank you. That's all the
15 questions I have.
16 HEARING OFFICER FAIRBANK: Center for Biological
17 Diversity?
18 MR. DONNELLY: Thank you.
19 CROSS-EXAMINATION
20 By Mr. Donnelly:
21 Q. Patrick Donnelly, Center for Biological
22 Diversity. Mr. Felling, is there a commonly-accepted
23 definition of steady state?
24 A. I have never really thought about it in those

Page 1804

1 terms of whether there's a commonly-accepted definition or
2 not.
3 Q. Is there any definition that you use to define
4 steady state?
5 A. Well, I would use the definition of that things
6 are steady, that they are neither increasing nor decreasing.
7 Q. What things would be neither increasing or
8 decreasing?
9 A. Whatever is -- Whatever you're trying to assign
10 that term to.
11 Q. So, in this case in your usage of it, in your
12 presentation, what did you mean?
13 A. That in this particular case of the Warm Springs
14 West area that we were no longer seeing the change in water
15 levels, we were no longer seeing a change in Warm Springs
16 West discharge, and we were no longer seeing a appreciable
17 change in flows of the Muddy River over the last two or three
18 years.
19 Q. How long of a steady measurement would be
20 necessary to qualify as steady state?
21 A. I don't know.
22 Q. But it is less than three years worth of data?
23 Let me rephrase the question. You were using less than three
24 years worth of data to say this system is in a steady state?

1 anything.
2 MR. DONNELLY: Did you say there's archive video
3 available that I can look up?

4 HEARING OFFICER FAIRBANK: Yes. So the video
5 archives from these proceedings are also available on that
6 same folder where the power point presentations will be
7 located. So that's the LWRFS tab under the news tab in the
8 Order 1303 hearing documents folder. And that document is
9 titled LWRFS recording links. And it's a PDF document. And
10 then imbedded in the PDF document are hyperlinks to the video
11 recordings.

12 And 60 days. So that will extend the time for
13 the submission of the written closing statements to December
14 3rd. So close of business on December 3rd. And we'll do
15 that for both written public comment as well as those written
16 closing statements.

17 And so, finally, before we conclude this
18 proceeding, we will go ahead and open it to public comment.
19 Ask we'll start by asking Ms. Christi Cooper in Las Vegas if
20 there is anyone present in Las Vegas for public comment.

21 MS. COOPER: There is no one present.

22 HEARING OFFICER FAIRBANK: Is there anyone
23 present in Carson City for public comment? Not seeing
24 anybody jumping up for such.

1 Then we will go ahead and conclude these
2 proceedings. And we thank everyone for their cooperation and
3 participation and we appreciate the time. Thank you.
4 (Hearing concluded at 11:18 a.m.)
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

1 STATE OF NEVADA)
)ss.
2 COUNTY OF WASHOE)
3

4 I, CHRISTY Y. JOYCE, Official Certified Court
5 Reporter for the State of Nevada, Department of Conservation
6 and Natural Resources, Division of Water Resources, do hereby
7 certify:

8 That on Friday, the 4th day of October, 2019,
9 I was present at the Legislative Counsel Bureau, Carson City,
10 Nevada, for the purpose of reporting in verbatim stenotype
11 notes the within-entitled public hearing;

12 That the foregoing transcript, consisting of
13 pages 1713 through 1822, inclusive, includes a full, true and
14 correct transcription of my stenotype notes of said public
15 hearing.

16
17 Dated at Reno, Nevada, this 4th day of
18 October, 2019.
19
20
21

CHRISTY Y. JOYCE, CCR #625

1 **ORDR**

2 **DISTRICT COURT**

3 **CLARK COUNTY, NEVADA**

4
5 **LAS VEGAS VALLEY WATER**
6 **DISTRICT, and) SOUTHERN NEVADA**
7 **WATER AUTHORITY**

8 **Petitioner,**

9 **vs.**

10 **TIM WILSON, P.E., Nevada State**
11 **Engineer,) DIVISION OF WATER**
12 **RESOURCES,) DEPARTMENT OF**
13 **CONSERVATION NATURAL**
14 **RESOURCES,**

15 **Respondent.**

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

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

16 **ORDER GRANTING MOTIONS TO INTERVENE**

17 This case coming on for hearing on November 17, 2020 on Motions to Intervene before the
18 Honorable William D. Kephart. The Court being fully advised in the premises, orders as follows:

19 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that the Motions to Intervene is
20 GRANTED.

Dated this 26th day of February, 2021



21
22 **6D8 3D7 8641 92B1**
23 **Bita Yeager**
24 **District Court Judge**

25
26
27 **BITA YEAGER**
28 **DISTRICT JUDGE**
DEPARTMENT 1

1
2 **CSERV**

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 Order Granting Motion was served via the court's electronic eFile
15 system to all recipients registered for e-Service on the above entitled case as listed below:

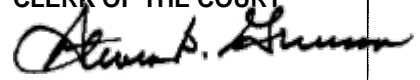
16 Service Date: 2/26/2021

17	Merrilyn Marsh	mmarsh@kcnvlaw.com
18	Sev Carlson	scarlson@kcnvlaw.com
19	Dorene Wright	dwright@ag.nv.gov
20	James Bolotin	jbolotin@ag.nv.gov
21	Mike Knox	mknox@nvenergy.com
22	Christian Balducci	cbalducci@maclaw.com
23	Justina Caviglia	jcaviglia@nvenergy.com
24	Bradley Herrema	bherrema@bhfs.com
25	Kent Robison	krobison@rssblaw.com
26	Therese Shanks	tshanks@rssblaw.com
27		
28		

1	William Coulthard	wlc@coulthardlaw.com
2	Emilia Cargill	emilia.cargill@coyotesprings.com
3	Kathleen Wilde	kwilde@maclaw.com
4	Laena St-Jules	lstjules@ag.nv.gov
5	Karen Easton	keaston@ag.nv.gov
6	Therese Ure	counsel@water-law.com
7	Sharon Stice	sstice@kcnvlaw.com
8	Alex Flangas	aflangas@kcnvlaw.com
9	Derek Muaina	DerekM@WesternElite.com
10	Andy Moore	moorea@cityofnorthvegas.com
11	Steven Anderson	Sc.anderson@lvvwd.com
12	Steven Anderson	Sc.anderson@lvvwd.com
13	Lisa Belenky	lbelenky@biologicaldiversity.org
14	Julie Cavanaugh-Bill	julie@cblawoffices.org
15	Douglas Wolf	dwolf@biologicaldiversity.org
16	Robert Dotson	rdotson@dotsonlaw.legal
17	Justin Vance	jvance@dotsonlaw.legal
18	Steven King	kingmont@charter.net
19	Sylvia Harrison	sharrison@mcdonaldcarano.com
20	Sylvia Harrison	sharrison@mcdonaldcarano.com
21	Lucas Foletta	lfoletta@mcdonaldcarano.com
22	Lucas Foletta	lfoletta@mcdonaldcarano.com
23	Sarah Ferguson	sferguson@mcdonaldcarano.com
24		
25		
26		
27		
28		

1	Sarah Ferguson	sferguson@mcdonaldcarano.com
2	Alex Flangas	aflangas@kcnvlaw.com
3	Kent Robison	krobison@rssblaw.com
4	Bradley Herrema	bherrema@bhfs.com
5	Emilia Cargill	emilia.cargill@coyotesprings.com
6	William Coulthard	wlc@coulthardlaw.com
7	Gregory Morrison	gmorrison@parsonsbehle.com
8	Paul Taggart	paul@legaltnt.com
9	Therese Shanks	tshanks@rssblaw.com
10	Christian Balducci	cbalducci@maclaw.com
11	Christian Balducci	cbalducci@maclaw.com
12	Andrew Moore	moorea@cityofnorthlasvegas.com
13	Robert Dotson	rdotson@dotsonlaw.legal
14	Justin Vance	jvance@dotsonlaw.legal
15	Steve King	kingmont@charter.net
16	Emily Woods	ewoods@kcnvlaw.com

20
21
22
23
24
25
26
27
28



1 **PTOB**
BRADLEY J. HERREMA #10368
2 BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
3 Las Vegas, Nevada 89106
TELEPHONE (702) 382-2101
4 FAX NUMBER (702) 382-8135
BHERREMA@BHFS.COM

5 KENT R. ROBISON #1167
6 KROBISON@RSSBLAW.COM
HANNAH E. WINSTON #14520
7 HWINSTON@RSSBLAW.COM
ROBISON, SHARP, SULLIVAN & BRUST
8 71 Washington Street
Reno, Nevada 89503
9 TELEPHONE (775) 329-3151
FAX NUMBER (775) 329-7941

10 WILLIAM L. COULTHARD #3927
11 COULTHARD LAW
840 South Ranch Drive, #4-627
12 Las Vegas, Nevada 89106
WLC@COULTHARDLAW.COM
13 TELEPHONE: (702) 898-9944

14 EMILIA K. CARGILL #6493
3100 State Route 168
15 P.O. Box 37010
Coyote Springs, Nevada 89037
16 TELEPHONE: (725) 210-5433
EMILIA.CARGILL@WINGFIELDNEVADAGROUP.COM
17 Attorneys for Petitioner Coyote Springs Investment, LLC

18 **DISTRICT COURT**

19 **CLARK COUNTY, NEVADA**

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

22 Petitioners,

23 v.

24 ADAM SULLIVAN, P.E., Acting Nevada
25 State Engineer, DIVISION OF WATER
26 RESOURCES, DEPARTMENT OF
CONSERVATION AND NATURAL
RESOURCES

27 Respondent.

28 _____ /
IN THE MATTER OF THE PETITION OF
COYOTE SPRINGS INVESTMENT, LLC

Case No.: A-20-816761-C (Lead Case)
Dept. No.: 19

**COYOTE SPRINGS INVESTMENT, LLC'S
OPENING BRIEF ON PETITION FOR
JUDICIAL REVIEW**

**DATE OF HEARING: February 14, 2022
TIME OF HEARING: 9:00 a.m.**

CONSOLIDATED WITH:
Case No.: A-20-817765-P
Case No.: A-20-817840-P
Case No.: A-20-817876-P
Case No.: A-20-817977-P
Case No.: A-20-818015-P
Case No.: A-20-818069-P
Case No.: A-21-833572-J

I. TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
--

	<u>Page</u>
I. TABLE OF CONTENTS.....	i
II. TABLE OF AUTHORITIES.....	iv
III. SUMMARY OF ARGUMENT.....	1
IV. STATEMENT OF ISSUES.....	4
V. STATEMENT OF THE CASE.....	5
1. The “Mega Basin”.....	5
2. CSI Holds Senior Water Rights in CSV and KSV.....	6
A. CSI Has Relied on Its Senior Water Rights in Planning and Developing the Community.....	6
B. CSI Has Incorporated Water Conservation Measures in Developing the Community.....	8
3. In 2001, the NSE Enters Order 1169 to Investigate the Amount of Water Available for New Water Rights in Basins in the LWRFS.....	9
4. Following the 1169 Pump Tests, the NSE Entered Ruling 6255, which Protected Senior Water Rights in CSV.....	11
5. After Protecting CSI’s Senior Rights in Ruling 6255, the NSE Issues Several Incorrect, Inconsistent, and Unsupported Letters and Orders that Have Severely Delayed CSI’s Development of the Community.....	11
A. The NSE Prohibits CSI From Processing Its Subdivision Maps....	11
B. CSI Challenges the May 16, 2018 Letter, and the NSE Withdraws It, Agreeing to Process CSI’s Maps in Good Faith.....	12
C. One Month After the Settlement, the NSE Issues the September 2018 Tentative Draft Order, Again Prohibiting the Processing of CSI’s Maps.....	12
D. The NSE Ignores CSI’s Comments and Enters Interim Order 1303, Officially Placing a Moratorium on Processing CSI’s Maps	14
E. The NSE Ignores the Evidence Presented at the 1303 Hearing, Rescinds Interim Order 1303, and Enters Order 1309, Which is Inconsistent with the NSE’s Prior Orders, Rulings, and Letters...	16
VI. ARGUMENT.....	16
1. Order 1309 Is Void As It Is Contrary to Law.....	17

Robison, Sharp,
Sullivan & Brust
71 Washington St.
Reno, NV 89503
(775) 329-3151

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
--

- A. Standard of Review..... 17
- B. The NSE Does Not Have Authority to Create a “Mega Basin” For “Joint Administration”..... 17
 - i. NRS 534.030 Does Not Authorize the State Engineer to Combine Multiple Basins for “Joint Administration”..... 18
 - ii. NRS 534.110(6) Does Not Authorize the NSE to Combine Multiple Basins into One “Unit” and Reassign Established Priority Rights Based On the “Unit” as a Whole..... 19
 - iii. NRS 534.120 Does Not Authorize the NSE to Designate Areas of Active Management Across Multiple Basins for “Joint Administration”..... 21
 - iv. NRS 533.024(1)(e) is a Legislative Declaration that Does Not Provide the NSE to Change Basin Boundaries for “Joint Administration”..... 22
- C. Order 1309 Violates the Prior Appropriation Doctrine..... 22
 - i. The Prior Appropriation Doctrine, which is the Foundation of Nevada’s Water Law Statutes, Determines the Priority of a Water Right..... 22
 - ii. Losing the Priority of a Water Right is Akin to Losing the Water Right..... 23
 - iii. The NSE’s Attempt to Reassign Priority Dates Violates Nevada Law..... 25
- D. Order 1309 is Contrary to Law Because it Violates CSI’s Constitutional Rights..... 26
 - i. Order 1309 Violates the Takings Clause of the Nevada and United States Constitutions..... 26
 - ii. Order 1309 is Contrary to Law Because the NSE Did Not Afford CSI Due Process in Taking its Priority Rights..... 27
- 2. If the NSE has Authority to Create and Jointly “Administer” the “Mega Basin”, Order 1309 is Not Based on Substantial Evidence..... 29
 - A. Standard of Review..... 29
 - B. The Fundamental Flaw Underlying Order 1309 is NSE’s Impractical and Unreasonable Reliance on the 1169 Pump Test to the Exclusion of All Other Evidence..... 29
 - i. The Pump Tests Were Designed to Determine How Much Water Was Available for *Additional* Appropriation for *New* Water Applications..... 30

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
--

- ii. The 1169 Pump Tests Were Not Designed to Test the Hydraulic Connection Between Certain Wells or Basins.. 31
- iii. The 1169 Pump Test Results Do Not Provide a Comprehensive View of the Water System in the Mega Basin..... 32
- C. NSE’s Determination of Geographic Boundaries of the Mega Basin is Not Supported by Substantial Evidence..... 35
 - i. NSE’s Conclusion that KSV has a Close Hydraulic Connection with the Other Basins is Not Supported by Substantial Evidence..... 36
 - ii. NSE’s Determination of the Geologic and Structural Boundaries of the Mega Basin is Not Supported by Substantial Evidence 41
- D. NSE’s Determination of the Aquifer Recovery Subsequent to the Order 1169 Pump Test is Not Supported by Substantial Evidence..... 45
- E. NSE’s Conclusion that Only 8,000 afa Can be Pumped from the Mega Basin Not Supported by Substantial Evidence..... 48
- F. NSE’s Conclusion Regarding the Effect of Movement of Water Between Alluvial and Carbonate Wells Within the Mega Basin is Not Supported by Substantial Evidence..... 50
- VII. CONCLUSION AND REMEDY SOUGHT..... 54
- CERTIFICATE OF SERVICE
- EXHIBIT LIST

II. - TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
--

<u>CASE LAW</u>	<u>Page</u>
<i>Andersen Family Assocs. v. State Eng’r.</i> 124 Nev. 182, 190, 191, 179 P.3d 1201 (2008)	23,24
<i>Application of Filippini</i> , 66 Nev. 17, 21-22, 202 P.2d 535, 537 (1949).....	26
<i>Bacher v. Off. of State Eng’r of State of Nevada</i> , 122 Nev. 1110, 1117, 146 P.3d 793, 798 (2006).....	17,35,38,49
<i>City of Reno v. Estate of Wells</i> , 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994).....	29
<i>City of Reno v. Reno Police Protective Ass’n</i> , 118 Nev. 889, 899, 59 P.3d 1212, 1219 (2002).....	42
<i>Clark Cty. v. State, Equal Rights Comm’n</i> , 107 Nev. 489, 492, 813 P.2d 1006, 1007 (1991).....	17
<i>Clements v. Airport Auth. of Washoe Cty.</i> , 111 Nev. 717, 722, 896 P.2d 458, 461 (1995).....	43,51
<i>Coast Hotels & Casinos, Inc. v. Nev. State Labor Comm’n</i> , 117 Nev. 835, 840, 34 P.3d 546, 550 (2001).....	18
<i>Colorado Water Conservation Bd. v. City of Cent.</i> , 125 P.3d 424, 434 (Colo. 2005).....	23
<i>Doolin v. Dep’t of Corr.</i> , 134 Nev. 809, 811, 440 P.3d 53, 55 (Nev. App. 2018).....	18
<i>Eureka Cty. v. Seventh Jud. Dist. Ct.</i> , 134 Nev. 275, 279, 417 P.3d 1121, 1124 (2018).....	26,27,28
<i>Hamdi v. Rumsfeld</i> , 542 U.S. 507, 533, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004).....	28
<i>Howell v. Ricci</i> , 124 Nev. 1222, 1230, 197 P.3d 1044, 1050 (2008).....	17
<i>Lobdell v. Simpson</i> , 2 Nev. 274, 277–78 (1866).....	22
<i>Mineral Cty. v. Lyon Cty.</i> , 136 Nev. Adv. Op. 58, 473 P.3d 418, 426 (2020).....	17,22,23
<i>Office of State Engineer, Division of Water Resources v. Curtis Park Manor Water Users Ass’n</i> , 101 Nev. 30, 692 P.2d 495, 497 (1985).....	29
<i>Ormsby County v. Kearny</i> , 37 Nev. 314, 142 p. 803, 820.....	3
<i>Pahrump Fair Water, LLC</i> , 137 Nev. Adv. Op. 2, 481 P.3d at 856.....	17,18
<i>Pyramid Lake Paiute Tribe of Indians v. Ricci</i> , 126 Nev. 521, 525, 245 P.3d 1145, 1148 (2010).....	29,31
<i>Rand Properties, LLC v. Filippini</i> , Docket No. 78319.....	23

1	<i>Revert v. Ray</i> , 95 Nev. 782, 787, 603 P.2d 262, 265 (1979).....	28
2	<i>Slade v. Caesars Entm't Corp.</i> , 132 Nev. 374, 380-81, 373 P.3d 74, 78 (2016).....	19,21
3	<i>Tighe v. Von Goerken</i> , 108 Nev. 440, 442-43, 833 P.2d 1135, 1136 (1992).....	29
4	<i>United States v. Alpine Land & Reservoir Co.</i> , 919 F. Supp. 1470, 1474 (D. Nev. 1996).....	29
5	<i>Wilson v. Happy Creek, Inc.</i> , 135 Nev. 301, 313, 448 P.3d 1106, 1115 (2019).....	23
6	<i>Wilson v. Pahrump Fair Water, LLC</i> , 137 Nev. Adv. Op. 2, 481 P.3d 853, 856 (2021).....	17
7		
8	<u>NEVADA STATUTES</u>	
9	NRS Chapter 318.....	7
10	NRS 532.167.....	34
11	NRS 533.024.....	22,23
12	NRS 533.024(1)(c).....	29,30
13	NRS 533.024(1)(e).....	22
14	NRS 533.040(2).....	24
15	NRS 533.090(1)-(2).....	23
16	NRS 533.265(2)(b).....	23
17	NRS 533.430(1).....	23
18	NRS 534.011.....	19
19	NRS 534.024(1)(e).....	17
20	NRS 534.030.....	17,18,19
21	NRS 534.030(1).....	19
22	NRS 534.030(1)(b).....	18
23	NRS 534.030(2).....	19
24	NRS 534.110(6).....	17,19,20,21,24
25	NRS 534.110(7).....	24
26	NRS 534.120.....	17,21,22

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
--

SECONDARY SOURCE

Antonin Scalia & Bryan A. Garner, <i>Reading Law: The Interpretation of Legal Texts</i> 107 (2012).....	19
Gregory J. Hobbs, Jr., <i>Priority: The Most Misunderstood Stick in the Bundle</i> , 32 <i>Envtl. L.</i> 37, 43 (2002).....	23,24

U.S. CONSTITUTION

Nev. Const. art. 1, §8(5).....	26,27,28
Nev. Const. art. 1,§8(6).....	26
Nev. Const. art. I, §22.....	26
U.S. CONST. AMEND. V.....	26

1 **III. SUMMARY OF ARGUMENT**

2 For years, the Nevada State Engineer (“NSE”) has struggled to make
3 definitive decisions about groundwater production in what the NSE refers to as one
4 hydrographic “unit”.¹ The NSE’s confusion confirms that Order 1309 is an
5 arbitrary determination. In nearly every Order or Ruling that has been issued by
6 the NSE since 2002, the NSE concedes that his decisions therein require more
7 technical data and scientific analysis.
8

9
10 Order 1309 is primarily predicated on an interpretation of the Order 1169
11 Pump Tests. The NSE Rulings based on the 1169 Pump Tests confirm that more
12 technical and scientific research is needed. Without receiving additional technical
13 and scientific data, the NSE arbitrarily placed a moratorium on construction and
14 development within the Mega Basin in 2018. Then, in September of 2018, the
15 NSE issued a Draft Order confirming, again, that the NSE had insufficient
16 technical and scientific data upon which he could enter a final order. Then, the
17 NSE issued Interim Order 1303, which, once again, confirmed that the NSE did
18 not have sufficient technical information upon which to base a final order. Order
19 1309 is based on the 1169 Pump Test results, which have been repeatedly
20 characterized by the NSE as insufficient results in need of additional, more precise
21 scientific technical data.
22

23
24
25
26
27 The NSE’s concession that Order 1309 is based primarily on the 1169 Pump
28

¹ For terms that are not otherwise defined herein, CSI provides a glossary of commonly used water terms as **Exhibit 1**.

1 Tests is an admission that Order 1309 is an arbitrary and capricious determination
2 that is neither based on substantial evidence nor the best science available.

3
4 Nevada’s water law is built on the doctrine of prior appropriation, or “first in
5 time, first in right”. Thus, those water right holders who were “first in time” have
6 senior water rights with priority status to exercise those water rights before junior
7 water rights holders with lower priority status-- especially in times of a water
8 shortage. Water rights are issued and given a priority status relative to the other
9 water rights and corresponding priority dates in each individual basin. In fact,
10 Nevada’s statutory water law requires that all decisions regarding appropriation
11 and regulation of water rights are made on a basin-by-basin determination.
12 Therefore, for over the past century, all determinations regarding the issuance and
13 management of water rights have been made based on considerations of each
14 unique basin.
15
16
17
18

19 Notwithstanding, in Order 1309, the NSE entirely disregards the established
20 statutory regulation of individual basins and attempts to redefine seven Nevada
21 hydrographic basins—that were established as distinct hydrographic basins for 100
22 years ago—and combine them into one “unit” for “joint administration”. *See*
23 **Exhibit 2** (Order 1309). Worse, the NSE purports to reassign the priority status of
24 each of the water rights based on this new, combined basin. As a result, senior
25 water right holders, such as CSI, have been relegated to a junior position and
26 directed to yield to other water right holders that are in a different basin.
27
28

1 This same principle was recently addressed by the Honorable Judge Fairman
2 related to a critical management plan in Diamond Valley in Case No. CV-1902-
3 348 in the Seventh Judicial District Court in Eureka County (the “Diamond Valley
4 Case”). See **Exhibit 3** (Findings of Fact, Conclusions of Law, Order Granting
5 Petitions for Judicial Review). Judge Fairman struck down the NSE approved
6 plan, which required senior water right holders to relinquish a portion of their
7 rights to allow more junior water right holders to continue pumping. See *id.* at pp.
8 4-10, 25-27. Judge Fairman explained that the plan’s attempt to “reduce[] the
9 amount of water it allocates to senior rights’ holders... effectively ignor[es] 150
10 years of the principle of ‘first in time, first in right’ which has allowed a senior
11 right holder to beneficially use all of water allocated in its right before any junior
12 right holder can use its water right.” *Id.* at pp. 26-27 (footnote omitted) (quoting
13 *Ormsby County v. Kearny*, 37 Nev. 314, 142 P. 803, 820).
14
15
16
17
18

19 As confirmed by Judge Fairman, the NSE can act only when a specific
20 statute authorizes the action. Relevant to this case, there is no Nevada statute that
21 authorizes the NSE to redefine or combine hydrographic basins in Nevada. There
22 is no Nevada water statute that allows the NSE to conduct “joint administration”
23 across several basins. There is no Nevada law that allows the NSE to delineate,
24 regulate, or manage basins in any manner other than on a basin-by-basin basis.
25 Finally, there is no Nevada statute that allows the NSE to take water rights from a
26 water right holder in one basin and reallocate such water rights to other water right
27
28

1 holders in *different* basins. The absence of statutory authorization for these
2 mandates renders Order 1309 void as it is contrary to law and entirely beyond the
3 scope of the NSE's authority.
4

5 However, even if the NSE had statutory authority to enter Order 1309 (he
6 does not), the factual determinations in Order 1309 are not supported by substantial
7 evidence. Rather, the NSE primarily based Order 1309 on pump tests that were
8 conducted to determine whether additional or unappropriated water not previously
9 assigned was available in the Coyote Spring Valley Hydrographic Basin (Basin
10 210) ("CSV") and five other nearby basins. *See Exhibit 4* (Order 1169).
11

12 Notwithstanding, the NSE now relies almost exclusively on those pump test (the
13 "1169 Pump Test") results to diminish the senior water right holders' interests
14 across seven basins. It is difficult to imagine a better example of an arbitrary and
15 capricious decision.
16
17

18 Accordingly, as discussed more fully herein, Order 1309 must be declared
19 void as it is contrary to law. However, even if this Court determines that the NSE
20 had statutory authorization to enter Order 1309, it still cannot stand because it is
21 not supported by substantial evidence and is therefore, arbitrary and capricious.
22
23

24 IV. STATEMENT OF ISSUES

25
26 1. Whether Order 1309 is void for being contrary to law because the NSE acted
27 far beyond and exceeded the scope of his statutory authority, and it violates CSI's
28 constitutional rights.

2. If the NSE has authority to create and jointly "administer" the Mega Basin,
whether the NSE's determination regarding the boundary of the Mega Basin is

1 arbitrary and capricious because it is not based on substantial evidence nor the best
2 science available.

3 3. If the NSE has authority to create and jointly “administer” the Mega Basin,
4 whether the NSE’s determination concerning aquifer recovery subsequent to the
5 1169 Pump Test is arbitrary and capricious because it is not based on substantial
6 evidence nor the best science available.

7 4. If the NSE has authority to create and jointly “administer” the Mega Basin,
8 whether the NSE’s decision that only 8,000 acre feet annually can be pumped from
9 the mega basin is arbitrary and capricious because it is not based on substantial
10 evidence nor the best science available.

11 5. If the NSE is found to have authority to create and jointly “administer” the
12 Mega Basin, whether the NSE’s determination concerning aquifer recovery
13 subsequent to the 1169 Pump Test is arbitrary and capricious because it is not
14 based on substantial evidence nor the best science available.

15 6. If the NSE has authority to create and jointly “administer” the Mega Basin,
16 whether the NSE’s determination of the effect of movement of water between
17 alluvial and carbonate wells within the Mega Basin is arbitrary and capricious
18 because it is not based on substantial evidence nor the best science available.

19 7. If the NSE has authority to create and jointly “administer” the Mega Basin,
20 whether 1309 is arbitrary and capricious because it does not set forth a
21 management plan.

22 **V. STATEMENT OF THE CASE**

23 **1. The “Mega Basin”**

24 This case arises from Order 1309, wherein the NSE purports to combine
25 seven basins into one Mega Basin, which includes Kane Springs Valley
26 Hydrographic Basin (“KSV”), even though KSV was not one of the basins
27 involved in the 1169 Pump Tests.² The basins impacted by Order 1309 are shown

28 ² Order 1309 is the first time the NSE has included KSV in the area he has referred to as the Lower White River Flow System (“LWRFS”). Not only has the NSE given this area of basins different labels, but the NSE has also varied in what basins should be included in this “joint administration”. For example, in the NSE’s May 16, 2018 Letter, the NSE referred to the area as the “five-basin area”. Notwithstanding, in the

1 in dark brown and red on the following map:

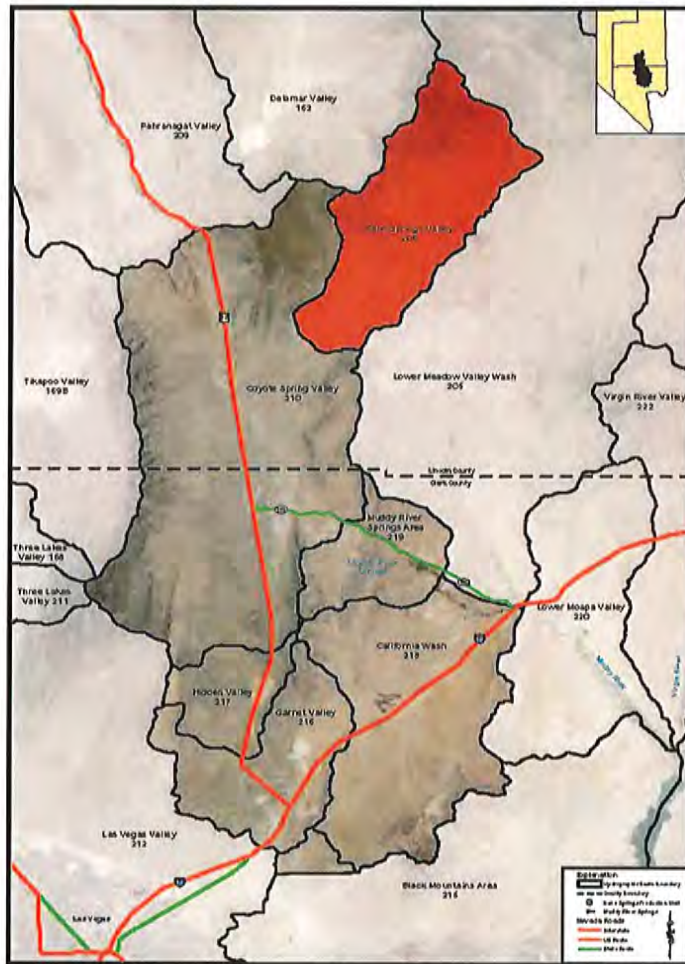


Exhibit 5 (Figure 2-1. Location Map of the Mega Basin (KSV shown in red; what was previously referred to as the LWRFS include the basins shown in dark brown)).

2. **CSI Holds Senior Water Rights in CSV and KSV.**

A. **CSI Has Relied on Its Senior Water Rights in Planning and Developing the Community.**

CSI is the developer of the master planned community Coyote Springs (the “Community”). The Community spans two counties and over 42,000 acres, including entitlements to build 49,600 residential units in Clark County and 110,000 residential units in Lincoln County. CSI has certificated and permitted

NSE’s September 18, 2018 “draft order”, he included six basins in the area and referred to it as the LWRFS. Therefore, when discussing the NSE’s previous orders and letters that apply to the area composing the “Mega Basin”, CSI will specify by footnote the basins included by the NSE at that particular time.

1 water rights in the amount of 4,140 afa in the CSV. CSI also holds 246.96 afa of
2 permitted water rights in the KSV in Lincoln County, Nevada.³

3
4 For over **nineteen (19) years**, CSI has relied on its senior water right status
5 in developing the Community, which has involved, among other things, CSI
6 working with numerous state and federal agencies to obtain all necessary
7 approvals, rights-of-ways, permits, maps, and plans for the Community.
8 Additionally, CSI has constructed streets and installed underground utilities,
9 including water, sewer, and electricity in the Community.⁴

10
11
12 Moreover, in 2006, CSI worked with several agencies to create the Clark
13 County - Coyote Springs Water Resources General Improvement District (“GID”)
14 under NRS Chapter 318. The GID is the water and wastewater utility for the
15 Community. CSI conveyed 2,000 afa of water rights to the GID to be used solely
16 for the development of the Community. CSI’s development, construction, and
17 substantial investment in this infrastructure has been pursued in reliance on its
18 senior water rights. After completing massive infrastructure and utilities, CSI was
19 ready to begin constructing residential homes within the Community. Order 1309
20 has stalled further development of the Community.

21
22
23
24 ///

25
26
27 ³ Moreover, through an agreement with Lincoln County Water District (“LCWD”) and Vidler Water
28 Company (“Vidler”), LCWD is obligated to provide CSI 253.04 afa of water. Further, CSI has an option
to purchase an additional 500 afa of permitted water rights from Vidler. These 1,000 afa of water rights
are permitted for use in the Community.

⁴ The total cost of construction and acquisition for these improvements is well over \$200,000,000, and
through all this the Community remains debt-free.

1 **B. CSI Has Incorporated Water Conservation Measures in**
2 **Developing the Community.**

3 CSI has been mindful of including meaningful conservation measures in its
4 development plans for the Community. For example, recycled water will
5 eventually be used to irrigate the existing golf course, common-area landscaping,
6 and public parks. Any remaining recycled water will be conserved and used to
7 help recharge the underlying aquifer.
8

9
10 Further, in 2006, CSI entered a memorandum of agreement (the “MOA”)
11 with Moapa Valley Water District (“MVWD”), United States Fish and Wildlife
12 Service (“FWS”), Southern Nevada Water Authority (“SNWA”), and the Moapa
13 Band of Paiutes (the “Paiutes”), which adopted mitigation policies to support the
14 Moapa dace, a protected species, while CSI continued developing the Community.
15 See **Exhibit 6** (MOA). The MOA anticipated, but did not authorize, possible
16 future groundwater withdrawals of up to 16,100 afa of NSE-approved groundwater
17 rights in the CSV. *See id.* at pp. 142-43.
18

19
20
21 The MOA detailed mitigation measures each party would take to reduce
22 potential adverse effects to the Moapa dace or its habitat. *Id.* at p. 55. These
23 measures included, among other things, financial payments by SNWA and CSI,
24 and CSI’s dedication of 460 afa of its water rights to remain in the deep aquifer.
25 CSI’s financial obligations have been satisfied and CSI relinquished 460 afa of
26 water. The parties continue to work together to preserve and protect the Moapa
27 dace.
28

1 **3. In 2001, the NSE Enters Order 1169 to Investigate the Amount of**
2 **Water Available for New Water Rights in Basins in the LWRFS.**

3 In 2001, several parties filed applications for new and additional
4 groundwater rights in the CSV, Black Mountains Area Hydrographic Basin (Basin
5 215), Garnet Valley Hydrographic Basin (Basin 216), Hidden Valley (north)
6 Hydrographic Basin (Basin 217), Muddy River Springs Area a.k.a. Upper Moapa
7 Valley Hydrographic Basin (Basin 219), and Lower Moapa Valley Hydrographic
8 Basin (Basin 220). *See Exhibit 4.* In response, the NSE issued Order 1169 on
9 March 8, 2002, explaining that the applications would be “held in abeyance” due to
10 insufficient information to determine if additional water was available for
11 appropriation under these new applications. *Id.*

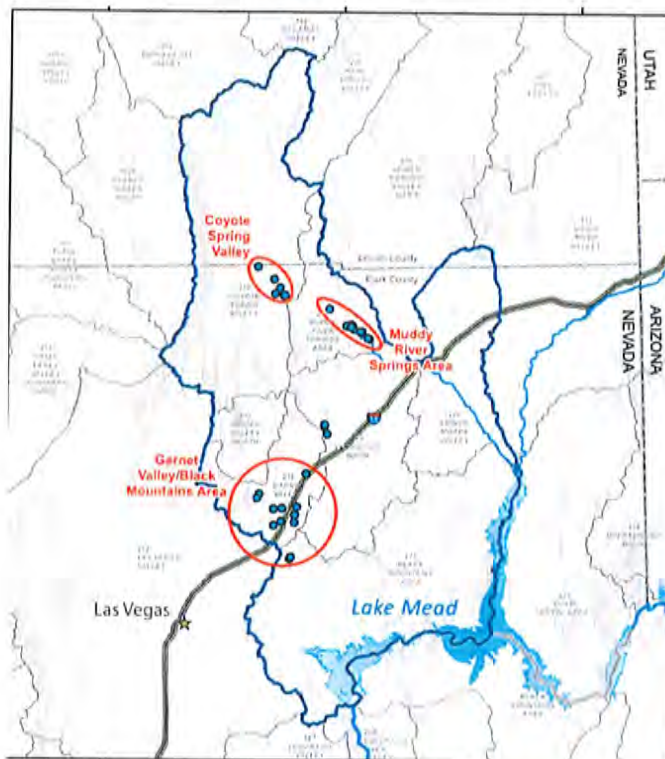
12 Among the parties submitting applications for additional water were SNWA,
13 MVWD, and CSI. At or about the time of Order 1169, SNWA owned 9,000 afa in
14 CSV (having purchased much of it from CSI), MVWD owned no water in CSV,
15 and CSI owned 4,600 afa in CSV. *Id.*

16 In Order 1169, the NSE described the thick layers (nearly 10,000 feet in
17 many areas) of the dense carbonate-rock aquifer system that underlies Southern
18 Nevada, north and east to White Pine County and the Utah border. *Id.* at pp. 1-2.
19 The NSE acknowledged significant research had already been done but explained
20 that several complicated factors needed to be addressed to better understand the
21 availability of additional water in these basins. *Id.* Thus, the NSE ordered the
22 applicants to conduct a study covering a five-year period of time during which at

1 least 50% of the water rights then-permitted in CSV be pumped for at least two
2 consecutive years. *Id.* at pp. 7-8.

3
4 The 1169 Pump Test was designed to try to quantify the availability of
5 unallocated groundwater for *additional* appropriation, not to determine whether
6 existing water rights, such as CSI's permitted rights, should be curtailed. The NSE
7 expressly excluded KSV from participation in the 1169 Pump Tests because the
8 physical characteristics of the aquifers in KSV showed no hydraulic connection
9 with the remaining basins. **Exhibit 7** (Ruling 5712), p. 21 (the NSE explaining
10 that "marked difference in head supports the probability of a low-permeability
11 structure or change in lithology between [KSV] and the southern part of [CSV]").
12
13
14

15 The applicants engaged in the 1169 Pump Tests from 2010 to 2012.



16 **Exhibit 9** (The 1169 Pump Test wells are circled in red); **Exhibit 23**
17 (SNWA Expert Report), p. 28
18
19
20
21
22
23
24
25
26
27
28

The participants submitted their pump test results in 2013. *See* **Exhibit 8**

1 (Order 1169A).

2 **4. Following the 1169 Pump Tests, the NSE Entered Ruling 6255, which**
3 **Protected Senior Water Rights in CSV.**

4 In January 2014, the NSE issued Ruling 6255, which denied *pending*
5 applications in CSV. *See Exhibit 10* (Ruling 6255). Relying on the 1169 Pump
6 Test results, the NSE found that granting additional water rights in CSV could
7 cause a decline in down gradient water levels that would conflict with senior water
8 rights. *See id.* Thus, Ruling 6255 protected *existing* water right holders, such as
9 CSI.
10
11

12 **5. After Protecting CSI's Senior Rights in Ruling 6255, the NSE Issues**
13 **Several Incorrect, Inconsistent, and Unsupported Letters and Orders**
14 **that Have Severely Delayed CSI's Development of the Community.**

15 **A. The NSE Prohibits CSI From Processing Its Subdivision Maps.**

16 In a May 16, 2018 letter, the NSE indicated for the first time that the amount
17 of groundwater pumping that would be allowed in the Mega Basin⁵ would be
18 limited to a fraction of the already appropriated 40,300 afa. *See Exhibit 11* (Jason
19 King, NSE, Letter to LVVWD). The NSE explained:
20
21

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

⁵ At this time, the NSE referred to this area as a “five-basin area”, which he identified as including CSV, MRSA, California Wash Basin, Hidden Valley Basin, and Garnet Valley Basin.

1
2 *Id.* at p. 3 (emphasis in original).

3 Following this letter, the NSE and LVVWD refused to approve any
4 subdivision maps within the Community, thereby halting all residential
5 construction, development, and sales in the Community.
6

7 **B. CSI Challenges the May 16, 2018 Letter, and the NSE Withdraws**
8 **It, Agreeing to Process CSI’s Maps in Good Faith.**

9 CSI filed a Petition for Review of the NSE’s May 16, 2018, letter with this
10 Court to challenge the unlawful moratorium on the processing of CSI’s subdivision
11 maps. *See Exhibit 12* (CSI’s Petition for Judicial Review of May 16, 2018,
12 Letter). In August 2018, the parties settled and dismissed the case. **Exhibit 13**
13 (Settlement Agreement between CSI and Jason King, NSE). In that settlement, the
14 NSE agreed to rescind his May 16, 2018, letter and to process “*in good faith any*
15 *and all maps, or any other issues as requested by CSI, and/or its agents or*
16 *affiliates, in accordance with the State Engineer’s ordinary course of business....*”
17
18
19
20 *Id.* at p. 1:4. It now appears that this promise was false and misleading.

21
22 **C. One Month After the Settlement, the NSE Issues the September**
23 **2018 Tentative Draft Order, Again Prohibiting the Processing of**
24 **CSI’s Maps.**

25 After withdrawing the May 16, 2018, letter, the NSE held public workshops
26 to review the water available for pumping in the Mega Basin.⁶ During a September
27 18, 2018, public workshop, the NSE distributed a draft order for comment. *See*
28

⁶ At this point, KSV was not included in the Mega Basin.

1 **Exhibit 14** (the “Draft Order”). The Draft Order contained a preliminary
2 determination that there were 9,318 afa of water rights within a *six*-basin area⁷
3 holding a priority date on or before March 31, 1983 that could be safely pumped
4 from the area without affecting Muddy River flows and the Moapa Dace. The
5 Draft Order reinstated the moratorium halting CSI’s subdivision map processing
6 unless demonstrated to the NSE’s satisfaction that an adequate supply of water was
7 available “*in perpetuity*” for the subdivision.
8

9
10
11 On October 5, 2018, CSI sent the NSE a series of comment letters regarding
12 the Draft Order. *See Exhibit 15* (CSI October 5, 2018 Comment Letters). CSI
13 noted the utter lack of technical information in the Draft Order. *Id.* Given that the
14 NSE represented that there were 30,000 pages of documents to support the Draft
15 Order, CSI requested the NSE to release that data to the public. *See id.*⁸
16

17
18 CSI further pointed out that there was no evidence to support the NSE’s
19 determination that only 9,318 afa could be pumped from the Mega Basin.⁹ *Id.* To
20 the contrary, CSI informed the NSE that the NSE’s own data supported a quantity
21 of at least 11,400 afa that could be pumped without effect on the flows in the
22 Muddy River and without effect on the Moapa dace. *See id.* CSI additionally
23 criticized the NSE’s reliance on the 1169 Pump Test results given the availability
24 of substantial evidence beyond those results.
25
26

27
28 ⁷ September 18, 2018 draft order identified six (6) basins for the first time: CSV, a portion of the Black Mountain Area basin 215, Garnet Valley basin 216, Hidden Valley basin 217, California Wash basin 218, and the MRSA.

⁸ This did not occur until after the Draft Order was vitiated.

⁹ At this point, the Mega Basin did not include KSV.

1 Notably, CSI explained to the NSE that even if the NSE were correct that
2 9,318 afa was the maximum amount available for pumping, the moratorium on
3 map processing was invalid because CSI's water rights fell within the priority date
4 grouping in the Draft Order. As such, even under the Draft Order, CSI should
5 have been allowed to pump at least 1,880 afa of water. Indeed, this 1,880 afa was
6 sufficient to support phase one of the Community, so there was no need to halt CSI
7 from processing its maps.
8
9

10
11 **D. The NSE Ignores CSI's Comments and Enters Interim**
12 **Order 1303, Officially Placing a Moratorium on Processing**
13 **CSI's Maps.**

14 On January 11, 2019, the NSE issued Interim Order 1303 (referred to herein
15 as "Rescinded 1303").¹⁰ See **Exhibit 16** (Interim Order 1303). In Rescinded 1303,
16 the NSE designated CSV, MRSA, Hidden Valley, Garnet Valley, California Wash,
17 and a portion of the Black Mountains Area as a joint administrative unit. See *id.* at
18 p. 13. Rescinded 1303 also imposed a temporary moratorium on approvals for
19 subdivisions pending yet another public process to determine the total quantity of
20 groundwater available in the Mega Basin.¹¹ See *id.*
21

22
23 Rescinded 1303 provided an exception for subdivision approvals upon a
24
25

26
27 ¹⁰ The NSE at the time was Jason King. The same day Jason King entered Interim Order 1303, he
28 retired. CSI, within the past week learned that Mr. Jason King, former NSE who issued many of the
instrumental documents, rulings, and orders in this matter, is now, through an entity of which he is the
managing member (Holds Water LLC), a consultant to LVVWD. Mr. King, former NSE, was retained on
May 13, 2020, to provide professional services on matters he oversaw and ruled upon within the LWRFS
and Mega-Basins, all of which are central to this case.

¹¹ The NSE did not include KSV in the Mega Basin at this time.

1 showing that there was a sustainable supply of water to meet the anticipated needs
2 for the “life of the subdivision.” *Id.* at p. 14, ¶5(b). This exception was illusory
3 because there is not a definition of the phrase “life of the subdivision” in
4 Rescinded 1303 nor any Nevada statute. Furthermore, the NSE never addressed
5 the fact that *even under the NSE’s analysis*, there was more than sufficient water in
6 the Mega Basin to support CSI’s subdivision plans.
7

8
9 Given that Rescinded 1303 suffered from the same defects as the NSE’s
10 May 26, 2018, letter and the Draft Order, CSI again filed a Petition for Judicial
11 Review to challenge it. *See Exhibit 17* (CSI’s Petition for Judicial Review of
12 Rescinded 1303). The adjudication of CSI’s petition was significantly delayed due
13 to procedural motion practice. To avoid further delay, the parties stayed the case
14 to proceed with a hearing on the issues identified in Rescinded 1303, which
15 included:
16
17
18

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

1 See **Exhibit 16**, p. 13. The NSE ordered the parties to participate in a two-
2 week evidentiary hearing related to these issues (the “1303 Hearing”).
3

4 **E. The NSE Ignores the Evidence Presented at the 1303 Hearing,
5 Rescinds Interim Order 1303, and Enters Order 1309, Which is
6 Inconsistent with the NSE’s Prior Orders, Rulings, and Letters.**

7 The 1303 Hearing was conducted for two weeks in the fall of 2019. The
8 hearing consisted of expert testimony presented by the participants CSI, FWS,
9 National Park Service (“NPS”), the Paiutes, SNWA and LVVWD, MVWD,
10 Lincoln County Water District and Vidler Water Company, the City of North Las
11 Vegas, the Center for Biological Diversity (“CBD”), Georgia Pacific Corporation
12 and Republic, Nevada Cogeneration Associates Nos. 1 and 2, Muddy Valley
13 Irrigation Company (MVIC), Western Elite Environmental, Inc. and Bedroc
14 Limited, LLC (collectively “Bedroc”), and NV Energy. The State Engineer issued
15 Order 1309 on June 15, 2020. *See Exhibit 2*. This Petition for Judicial Review
16 followed.
17
18
19

20 **VI. ARGUMENT**

21 As set forth below, Order 1309 is void because it is contrary to law. The
22 NSE does not have statutory authority to enter Order 1309. Moreover, Order 1309
23 violates the prior appropriation doctrine and CSI’s constitutional rights.
24 Notwithstanding these fatal defects, the NSE did not comply with the statutes upon
25 which Order 1309 relies, nor is Order 1309 supported by substantial evidence.
26 Accordingly, CSI respectfully requests that this Court grant judicial review and
27
28

1 declare Order 1309 void.

2 **1. Order 1309 is Void As it is Contrary to Law**

3
4 **A. Standard of Review**

5 “The Legislature has established a comprehensive statutory scheme
6 regulating the procedures for acquiring, changing, and losing water rights in
7 Nevada.” *Mineral Cty. v. Lyon Cty.*, 136 Nev. Adv. Op. 58, 473 P.3d 418, 426
8 (2020). “The State Engineer’s powers thereunder are limited to ‘only those . . .
9 which the legislature expressly or implicitly delegates.’” *Wilson v. Pahrump Fair*
10 *Water, LLC*, 137 Nev. Adv. Op. 2, 481 P.3d 853, 856 (2021) (quoting *Clark Cty. v.*
11 *State, Equal Rights Comm’n*, 107 Nev. 489, 492, 813 P.2d 1006, 1007 (1991));
12 *Howell v. Ricci*, 124 Nev. 1222, 1230, 197 P.3d 1044, 1050 (2008) (explaining that
13 the NSE cannot act beyond the scope of applicable statutory authority).
14
15
16
17

18 “[T]he scope of the State Engineer’s authority... is a question of statutory
19 interpretation, subject to de novo review.” *Pahrump Fair Water, LLC*, 137 Nev.
20 Adv. Op. 2, 481 P.3d at 856; *Bacher v. Off. of State Eng’r of State of Nevada*, 122
21 Nev. 1110, 1117, 146 P.3d 793, 798 (2006) (“The district court may decide purely
22 legal questions without deference to an agency’s determination.”).
23

24 **B. The NSE Does Not Have Authority to Create a Mega Basin for**
25 **“Joint Administration”.**

26 The NSE relies on NRS 534.030, NRS 534.110(6), NRS 534.120, and NRS
27 534.024(1)(e) as providing authority for Order 1309. See **Exhibit 2**, p. 43. As
28 discussed below, none of these statutes provide the NSE with authority to redefine

1 established Nevada basins for “joint administration”. To determine whether the
2 NSE has statutory authority to enter Order 1309, “the plain meaning of the relevant
3 text guides the answer.” *Pahrump Fair Water, LLC*, 137 Nev. Adv. Op. 2, 481
4 P.3d at 856 (citing *Coast Hotels & Casinos, Inc. v. Nev. State Labor Comm’n*, 117
5 Nev. 835, 840, 34 P.3d 546, 550 (2001)); *Doolin v. Dep’t of Corr.*, 134 Nev. 809,
6 811, 440 P.3d 53, 55 (Nev. App. 2018) (“To ascertain the Legislature’s intent, we
7 first focus our inquiry on the statute’s plain language, avoid[ing] statutory
8 interpretation that renders language meaningless or superfluous.”) (alteration in
9 original) (internal quotation marks omitted).

10
11
12
13 **i. NRS 534.030 Does Not Authorize the State Engineer to**
14 **Combine Multiple Basins for “Joint Administration”.**

15 NRS 534.030 does not provide the NSE with authority to combine multiple
16 basins into one “unit” for “joint administration”. Rather, under NRS 534.030 and
17 NRS 534.011, the NSE has authority to designate “*a* groundwater basin” an “area
18 of active management”, which refers to an area “[i]n which the [NSE] is
19 conducting particularly close monitoring and regulation of the water supply
20 because of heavy use of that supply”. (Emphasis added.) Thus, under NRS
21 534.030, the NSE can administer basins individually, but the statute does not allow
22 the NSE to combine basins for joint administration.

23
24
25
26 Here, the Legislature has specifically provided that if the NSE designates an
27 area of active management, such designation must be “by basin, or portion
28 therein”. NRS 534.030(1)(b). If the Legislature intended for the NSE to designate

1 areas across multiple basins for “joint administration”, it would have so stated. *See*
2 *Slade v. Caesars Entm’t Corp.*, 132 Nev. 374, 380-81, 373 P.3d 74, 78 (2016)
3 (citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of*
4 *Legal Texts* 107 (2012) (“The expression of one thing implies the exclusion of
5 others.”)).
6

7
8 Moreover, the Legislature consistently refers to a singular basin throughout
9 the statute. *See, e.g.*, 534.030(1) (describing a petition under NRS Chapter 534 as
10 one that requests the NSE “to administer the provisions of this chapter as relating
11 to designated areas, ... *in any particular basin or portion therein*”) (emphasis
12 added); NRS 534.030(2) (“a groundwater basin”); NRS 534.030(2) (“the basin”).
13 Therefore, the plain language of the statute makes clear that the Legislature
14 intended for the NSE, where justified, to designate areas of active management by
15 the basin or by a portion of the basin therein. NRS 534.030 does not allow the
16 NSE to designate multiple basins as areas of active management as the NSE
17 attempts to do in Order 1309 (and as he attempted in Rescinded 1303).
18
19
20
21

22 **ii. NRS 534.110(6) Does Not Authorize the NSE to Combine**
23 **Multiple Basins into One “Unit” and Reassign Established**
24 **Priority Rights Based On the “Unit” as a Whole.**

25 The NSE further relies on NRS 534.110(6) as providing authority for Order
26 1309. The NSE’s reliance on NRS 534.110(6) is misplaced. NRS 534.110(6)
27 provides, in relevant part:
28

the State Engineer shall conduct investigations in *any basin or portion thereof* where it appears that the average annual replenishment to the

1 groundwater supply may not be adequate for the needs of all permittees and
2 all vested-right claimants, and if the findings of the State Engineer so indicate,
3 except as otherwise provided in subsection 9, the State Engineer may order
4 that withdrawals, including, without limitation, withdrawals from domestic
wells, be restricted to conform to priority rights.

5 (Emphasis added.) This provision again confirms the Legislature’s intent for the
6 NSE to make basin-specific determinations. Thus, under subsection 6, the NSE
7 has discretion to curtail water rights where investigations into specific basins
8 demonstrate that there is insufficient groundwater to meet “the needs of all
9 permittees and all vested-right claimants”. NRS 534.110(6) does not provide the
10 NSE with authority to combine multiple basins into one “unit” and then modify or
11 curtail groundwater rights based upon priority dates in this combined “Mega
12 Basin”, as the NSE has attempted to do in Order 1309.

16 Notably, even if the NSE had authority under NRS 534.110(6) to curtail
17 water rights across multiple basins, the NSE still has to follow the statutory
18 procedure to impose such curtailment, which requires the NSE to conduct
19 investigations into a basin where it “appears that the average annual replenishment
20 to the groundwater supply may not be adequate for the needs of all permittees and
21 all vested-right claimants.” Only *if* the investigation confirms that the annual
22 replenishment is insufficient to meet such needs is the NSE authorized to conduct
23 curtailment. *See* NRS 534.110(6). The NSE certainly did not follow the
24 procedural steps in NRS 534.110(6) in this case. Indeed, the NSE has never
25 conducted an investigation in KSV to determine whether the “average annual
26
27
28

1 replenishment to the groundwater supply may not be adequate for the needs of all
2 permittees and all vested-right claimants.” See NRS 534.110(6). Therefore, even
3 if NRS 534.110(6) were applicable, the NSE did not follow the statute’s required
4 procedure to conduct any curtailment in KSV.
5

6 **iii. NRS 534.120 Does Not Authorize the NSE to Designate**
7 **Areas of Active Management Across Multiple Basins for**
8 **“Joint Administration”.**

9 The NSE additionally cites NRS 534.120 as supplying authority for Order
10 1309’s proposed Joint Administration and this newly created Mega Basin.
11 However, NRS 534.120 does not authorize the NSE to designate areas of active
12 management across multiple basins. Rather, NRS 534.120 provides that “[w]ithin
13 *an area* that has been designated by the NSE, as [an area of active management],
14 where, in the judgment of the NSE, the groundwater basin is being depleted, the
15 NSE in his or her administrative capacity may make such rules, regulations and
16 orders as are deemed essential for the welfare of the area involved.”
17
18

19 The plain language of the statute explicitly permits the NSE to make rules,
20 regulations and orders *within* the area that has been designated an area of active
21 management, which designation, as explained above, is only appropriate for an
22 individual basin, not across multiple basins jointly administered. If the Legislature
23 intended for such “rules, regulations and orders” to apply jointly to multiple basins
24 or even multiple areas of active management, the Legislature would have so stated.
25
26 See *Slade*, 132 Nev. at 380-81, 373 P.3d at 78. Therefore, the NSE does not have
27
28

1 authority under NRS 534.120 to combine multiple basins for “joint
2 administration”.

3
4 **iv. NRS 533.024(1)(e) is a Legislative Declaration that Does Not**
5 **Provide the NSE to Change Basin Boundaries for “Joint**
6 **Administration”.**

7 The NSE additionally cites NRS 533.024(1)(e) for authority supporting
8 Order 1309 to change multiple basin boundaries, create a Mega Basin, and order
9 Joint Administration of such newly created Mega Basin. NRS 533.024(1)(e)
10 provides, in relevant part, that “It is the policy of this State... To manage
11 conjunctively the appropriation, use and administration of all waters of this State,
12 regardless of the source of the water.” The plain language of this statute does not
13 provide the NSE authority to combine multiple basins for “joint administration”.
14 Indeed, NRS 533.024 does not provide the NSE with authority to do anything.
15 Rather, it is merely a Legislative declaration as to water policy in this State. NRS
16 533.024 provides no support for the radical NSE decisions outlined in Order 1309.

17
18
19
20 **C. Order 1309 Violates the Prior Appropriation Doctrine.**

21
22 **i. The Prior Appropriation Doctrine, which is the Foundation**
23 **of Nevada’s Water Law Statutes, Determines the Priority of**
24 **a Water Right.**

25 “Like most western states, Nevada is a prior appropriation state.” *Min. Cty.*
26 *v. Lyon Cty.*, 136 Nev. Adv. Op. 58, 473 P.3d 418, 423 (2020). The doctrine of
27 prior appropriation has been part of Nevada’s common law since the 1800’s. *See*
28 *Lobdell v. Simpson*, 2 Nev. 274, 277–78 (1866).

1 As recently explained by the Nevada Supreme Court, “Nevada’s water
2 statutes embrace prior appropriation as a fundamental principle. Water rights are
3 given ‘*subject to existing rights*,’ NRS 533.430(1), given dates of priority, NRS
4 533.265(2)(b), and determined based on relative rights, NRS 533.090(1)-(2).” *Min.*
5 *Cty.*, 136 Nev. Adv. Op. at 426, 473 P.3d at 426 (emphasis added). Thus, “[i]n
6 Nevada, the doctrine of prior appropriation determines the priority of both pre-
7 1905 vested water rights and modern statutory water law.” *Rand Properties, LLC*
8 *v. Filippini*, Docket No. 78319 (Order Affirming in Part and Reversing in Part,
9 April 9, 2021).

10
11
12
13 **ii. Losing the Priority of a Water Right is Akin to Losing the**
14 **Water Right.**

15 It is universally understood that the priority of a water right is its most
16 valuable component. *See* Gregory J. Hobbs, Jr., *Priority: The Most Misunderstood*
17 *Stick in the Bundle*, 32 *Envtl. L.* 37, 43 (2002) (“Priority determines the value of a
18 water right”). In fact, courts have explained that “[a] priority in a water right is
19 property in itself”; therefore, “to deprive a person of his priority is to deprive him
20 of a most valuable property right.” *Colorado Water Conservation Bd. v. City of*
21 *Cent.*, 125 P.3d 424, 434 (Colo. 2005) (internal quotation marks omitted).

22 The Nevada Supreme Court agrees and has reiterated that “a loss of priority
23 that renders rights useless ‘certainly affects the rights’ value’ and ‘can amount to a
24 de facto loss of rights.’” *Wilson v. Happy Creek, Inc.*, 135 Nev. 301, 313, 448 P.3d
25 1106, 1115 (2019) (quoting *Andersen Family Assocs. v. State Eng’r.* 124 Nev. 182,

1 190, 191, 179 P.3d 1201 (2008); *see also* Gregory J. Hobbs, Jr., *Priority: The Most*
2 *Misunderstood Stick in the Bundle*, 32 *Envtl. L.* 37, 43 (2002) (“The priority of a
3 water right is ... its most important ... feature.”).

4
5 Nevada’s statutory water law reflects the importance of priority. Not only
6 did the Legislature choose not to afford the NSE with discretion to alter priority
7 rights, but it also affirmatively requires the NSE to preserve priority rights when
8 performing the NSE’s statutory duties. *See, e.g.*, NRS 534.110(6) (providing that
9 any curtailment “be restricted to conform to priority rights”); NRS 534.110(7)
10 (same); NRS 533.040(2) (“If at any time it is impracticable to use water
11 beneficially or economically at the place to which it is appurtenant, the right may
12 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*
14 *losing priority of right.*”).

15
16 As Judge Fairman emphasized in the Diamond Valley Case, the prior
17 appropriation doctrine, which determines the priority date of a water right,
18 “becomes critically important during times of water scarcity, whether temporary,
19 or as a result of prolonged drought.” **Exhibit 3**, p. 26:8-10. Indeed, one of the
20 greatest values of a senior priority date is the assurance that the holder will be able
21 to use water even during a time of water shortage because junior water right
22 holders will be curtailed first. *See id.* at pp. 26:5-8.

23
24 Thus, senior right holders, like CSI, rely on their senior priority rights when
25
26
27
28

1 entitling and permitting development agreements, plans, making investments, and
2 obtaining permits, maps, and various approvals from State and local agencies. *See*
3 *id.* at pp. 26:10-14 (“With the security attached to a senior priority right to
4 beneficially use all of the water associated with the right also comes obvious
5 financial value not only to the current water right holder, but to any future owner
6 of that senior right.”).

9 **iii. The NSE’s Attempt to Reassign Priority Dates Violates**
10 **Nevada Law.**

11 In redefining and combining seven disparate basins for “joint
12 administration”, the NSE stripped senior right holders of their priority rights by
13 ordering that all water rights within the Mega Basin should be administered based
14 upon their respective dates of priority in relation to other rights “within the
15 regional groundwater unit.” *See Exhibit 2*, p. 10. But for Order 1309, CSI’s
16 priority in CSV is second only to certain vested alluvial water rights held by
17 Bedroc. Moreover, but for Order 1309 arbitrarily and capriciously re-ordering the
18 hierarchy of priority, CSI’s priority in KSV is, along with Vidler and LCWD, the
19 most senior.
20
21
22
23

24 Following Order 1309, CSI’s senior rights have a lower priority than water
25 right holders in basins outside of CSV and KSV. Such loss of priority would
26 render CSI’s water rights valueless in CSV and KSV given the NSE’s severe
27 restrictions on pumping in the entire Mega Basin. *See Exhibit 3*, p. 26:13-14
28 (“The loss or reduction of any water associated with the senior right can

1 significantly harm the holder.”). The NSE has no authority to strip CSI’s water
2 rights of their established priorities by arbitrarily and capriciously re-ordering
3 priority dates in a manner akin to tossing all the water rights into a hat, pulling
4 them out one at a time, and assigning priority rights based on the order in which
5 they were pulled (except, of course, with a politically motivated guarantee that
6 certain water rights holders will be assigned the highest priority). Order 1309 is
7 clearly void.

8
9
10
11 **D. Order 1309 is Contrary to Law Because it Violates CSI’s
12 Constitutional Rights.**

13 “In Nevada, water rights are ‘regarded and protected as real property.’”
14 *Eureka Cty. v. Seventh Jud. Dist. Ct.*, 134 Nev. 275, 279, 417 P.3d 1121, 1124
15 (2018) (quoting *Application of Filippini*, 66 Nev. 17, 21-22, 202 P.2d 535, 537
16 (1949)). Therefore, holders of water rights in Nevada are entitled to constitutional
17 protections regarding those property rights.

18
19
20 **i. Order 1309 Violates the Takings Clause of the Nevada and
21 United States Constitutions.**

22 Under Nevada and federal law, a state agency is prohibited from taking
23 property from a private party for public use. Nev. Const. art. 1, §8(6) (“Private
24 property shall not be taken for public use without just compensation having first
25 been made”); U.S. CONST. AMEND. V (“nor shall private property be taken for
26 public use, without just compensation.”). Nev. Const. art. 1, § 8(5). Moreover, the
27 Nevada Constitution prohibits a state agency from taking property from a private
28 party and transferring it to another private party. Nev. Const. art. I, §22.

1 Yet that is exactly what the NSE has done in Order 1309. Under Order
2 1309, the NSE takes CSI's senior water rights without compensation and
3 effectively redistributed them to water rights holders in other basins by elevating
4 the other water rights' priorities above CSI's. In so doing, the NSE stripped CSI of
5 the benefit and value that it had as a senior rights holder, which ensured that CSI
6 would have water even in the event of a potential future groundwater shortage.
7
8 The NSE has no authority to enter an order that redistributes established water
9 rights by removing them of their respective priorities. Moreover, even if the NSE
10 had such authority, no compensation was provided for the taking of these valuable
11 real property rights. By taking these water rights, the NSE destroyed any viable
12 economic use of the Community. Accordingly, Order 1309 constitutes a taking in
13 violation of Nevada and federal law.
14
15
16

17 **ii. Order 1309 is Contrary to Law Because the NSE Did Not**
18 **Afford CSI Due Process in Taking its Priority Rights.**

19 The Nevada Constitution protects against the deprivation of property without
20 due process of law. Nev. Const. art. 1, § 8(5). "Procedural due process requires
21 that parties receive notice and an opportunity to be heard." *Eureka Cty.*, 134 Nev.
22 at 279, 417 P.3d at 1124 (internal quotation marks omitted).
23

24 In the NSE's Notice of Pre-Hearing Conference, he set forth five specific
25 topics to be addressed at the hearing on Rescinded 1303. See **Exhibit 18** (Notice
26 of Pre-hearing Conference), p. 1. The first topic was "the geographic boundary of
27 the hydrologically connected groundwater and surface-water systems comprising
28

1 the LWRFS". *Id.* The NSE did not provide the parties with notice that the
2 evidence presented would be used to curtail *senior water rights*, which is a clear
3 violation of CSI's due process rights. *Eureka Cty.*, 134 Nev. at 280-81, 417 P.3d at
4 1125-26 ("Notice must be given at an appropriate stage in the proceedings to give
5 parties meaningful input in the adjudication of their rights.") (citing *Hamdi v.*
6 *Rumsfeld*, 542 U.S. 507, 533, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) ("It is
7 equally fundamental that the right to notice and an opportunity to be heard must be
8 granted at a meaningful time and in a meaningful manner.")).
9

10
11
12 Moreover, the NSE clearly engaged in *ad hoc* decision making. To establish
13 that KSV should be included in the Mega Basin, the NSE applied a set of factors
14 that he did not give the parties notice of prior to the hearing. *See Exhibit 2*, p. 47-
15 48 (setting forth six factors that were not included in the Notice of Pre-Hearing
16 Conference); *see also Exhibit 18*. Further, the issues of whether to include KSV
17 and the established water rights therein into the Mega Basin are not found in the
18 Notice of Pre-Hearing Conference. In order to provide the parties due process and
19 a meaningful opportunity to present evidence on these issues, the NSE should have
20 included these factors in the Notice of Pre-Hearing Conference. *See Eureka Cty.*,
21 131 Nev. at 855, 359 P.3d at 1120; *Revert v. Ray*, 95 Nev. 782, 787, 603 P.2d 262,
22 265 (1979) (criticizing the state engineer for engaging in post hoc rationalization).
23 Accordingly, Order 1309 is void as a matter of law.
24
25
26
27
28

///

1 **2. If the NSE has Authority to Create and Jointly “Administer” the “Mega**
2 **Basin”, Order 1309 is Not Based on Substantial Evidence.**

3 **A. Standard of Review**

4 This Court reviews the NSE’s factual findings for abuse of discretion.

5
6 *United States v. Alpine Land & Reservoir Co.*, 919 F. Supp. 1470, 1474 (D. Nev.
7 1996), citing *Office of State Engineer, Division of Water Resources v. Curtis Park*
8 *Manor Water Users Ass’n*, 101 Nev. 30, 692 P.2d 495, 497 (1985). An abuse of
9 discretion exists where the State Engineer’s decision is arbitrary or capricious. An
10 order is arbitrary or capricious where it is “baseless” or where there is “an apparent
11 absence of any grounds or reason for the decision,” *City of Reno v. Estate of Wells*,
12 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994) (quoting *Tighe v. Von Goerken*,
13 108 Nev. 440, 442-43, 833 P.2d 1135, 1136 (1992)).

14
15 The NSE’s findings must be supported by substantial evidence, which is
16 “evidence that a reasonable mind might accept as adequate to support a
17 conclusion.” *Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. 521, 525,
18 245 P.3d 1145, 1148 (2010) (internal quotations omitted). Moreover, in “rendering
19 decisions concerning the available surface and underground sources of water in
20 Nevada”, the NSE should rely on the best available science. NRS 533.024(1)(c).

21 **B. The Fundamental Flaw Underlying Order 1309 is NSE’s**
22 **Impractical and Unreasonable Reliance on the 1169 Pump Test to**
23 **the Exclusion of All Other Evidence.**

24 As a preliminary note, the overarching problem with Order 1309 is the
25 NSE’s overemphasis and unreasonable reliance on the 1169 Pump Test results.
26
27
28

1 Not only does the NSE's narrow focus on the 1169 Pump Test results demonstrate
2 that Order 1309 is not based on substantial evidence, but it also makes clear that
3 the NSE did not heed the Legislature's instruction to use the best available science
4 for its decision making. *See* NRS 533.024(1)(c).

5
6 The 1169 Pump Tests were conducted over a two-year period, which
7 occurred at the end of a drought. *See* **Exhibit 19** (CSI expert report). Moreover,
8 the 1169 Pump Tests were conducted using 30 wells simultaneously without
9 coordination over 1,100 square miles. *See* **Exhibit 9**. The 1169 Pump Tests did
10 not include wells in KSV. *See* **Exhibit 7**. The NSE's heavy reliance on two years
11 of information that is not representative of the average conditions of the area to the
12 exclusion of decades of research shows that the NSE did not base his decisions on
13 the best available science but instead, made arbitrary choices that no reasonable
14 mind could accept as reasonable.
15
16
17
18

19 **i. The Pump Tests Were Designed to Determine How Much**
20 **Water Was Available for *Additional* Appropriation for New**
21 **Water Applications.**

22 The NSE ignores that the 1169 Pump Tests were designed and implemented
23 to determine how much *more* water was available to support the applications for
24 new water rights—not to provide a comprehensive assessment of hydraulic
25 connection and water availability across the entire Mega Basin. *See* **Exhibit 4**.
26 The NSE's attempt to use the results to make such a determination now makes
27 clear that Order 1309 is not supported by substantial evidence nor the best science
28

1 available. *See Ricci*, 126 Nev. at 525, 245 P.3d at 1148.

2 **ii. The 1169 Pump Tests Were Not Designed to Test the**
3 **Hydraulic Connection Between Certain Wells or Basins.**

4 There was no mechanism involved in the 1169 Pump Tests that would allow
5 the parties to identify specific relationships among any of the wells or basins. *See*
6 **Exhibit 19**, p. 7-8, 57-58. Therefore, the results cannot distinctly pertain to any
7 individual well or basin. The NSE (and other parties) have incorrectly interpreted
8 the results as though all 30 wells have a “like” or similar effect on groundwater
9 levels, spring flow, and surface flow in the MRSA. *See id.* They do not. *See id.*

10 The math is the simplest way to explain the technical derailment from the
11 almost 50 years of scientific knowledge collected prior to the 1169 Pump Test. If
12 14,000 acre-feet of pumping during the 1169 Pump Test only resulted in a 500
13 acre-foot decrease in spring flow and did not have a measurable decrease in
14 streamflow of the Muddy River, then it is not possible that all pumping in the
15 NSE’s “Mega Basin” (which did not even occur in the 1169 Pump Tests because
16 KSV was not included in Order 1169) affects the MRSA. Certainly, as described
17 in the scientific literature previously recognized in Order 1169, there are other
18 areas of groundwater discharge (*i.e.* Blue Point Springs, Rogers Springs, Lower
19 Moapa Valley, Colorado River) that are not connected to springs and surface flow
20 in the MRSA. *See Exhibit 4*, p. 4 n. 12.

21 Within southeastern Nevada, groundwater in the carbonate aquifer flows in a
22 general north to south direction. *See Exhibit 19*, p. 54-55. This water flows in
23
24
25
26
27
28

1 fractures and cavities located along subsurface geologic structures. *Id.* at p. 15. As
2 indicated by the NSE in Order 1169, between 16,000 and 17,000 afa flows from
3 northern basins through CSV, *bypassing* the MRSA. *See Exhibit 4*, pp. 5-6.
4
5 Because this water bypasses the MRSA, it neither contributes to nor impact the
6 water levels in the MRSA. *See id.* The 1169 Pump Test results cannot account for
7
8 nor reflect this 16,000-17,000 afa of water that bypasses the MRSA and therefore,
9
10 cannot provide a comprehensive understanding of the water availability in the
11 Mega Basin.

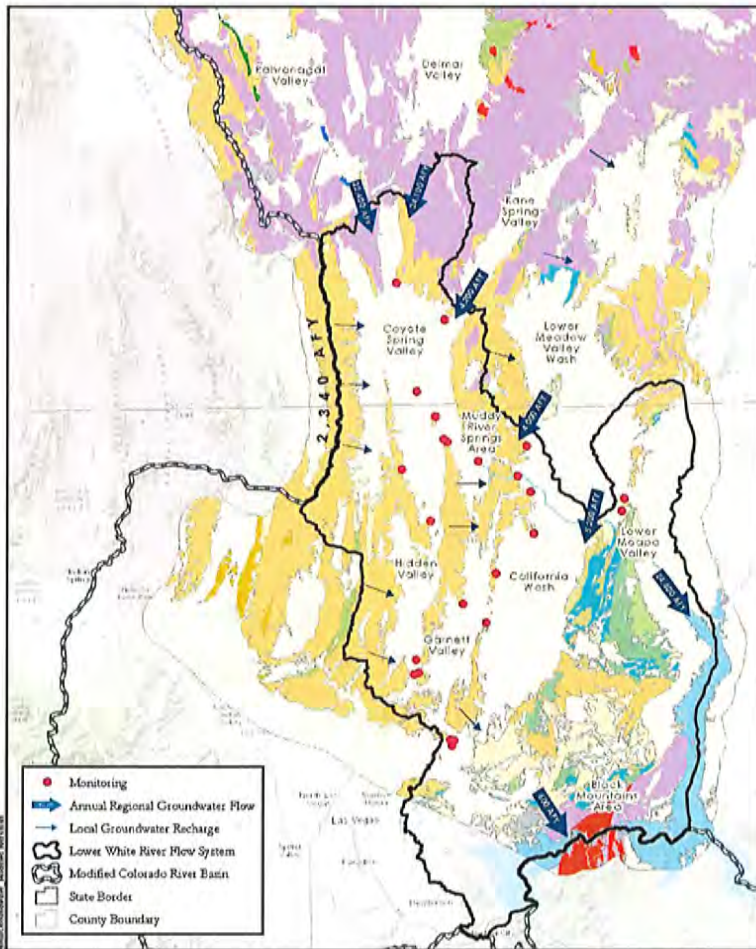
12 **iii. The 1169 Pump Test Results Do Not Provide a**
13 **Comprehensive View of the Water System in the Mega**
14 **Basin.**

15 The NSE views the 1169 Pump Test results as showing a cause-and-effect
16 relationship demonstrating hydraulic connection between all of the basins in the
17 Mega Basin. However, the 1169 Pump Test results do not reflect the collection of
18
19 substantial research referenced in Order 1169 that discussed flow paths,
20
21 geochemical isotope studies, and field investigations showing the occurrence and
22
23 movement of groundwater through southeastern Nevada. *See Exhibit 19*, pp. 2-4.
24
25 Given that the pump test results show only a two-year snapshot during a dry
26
27 period, the results cannot reflect climate factors, such as the period of wetness
28
29 occurring from 2004-2005. *See id.* at pp. 4-5. Moreover, the results neither allow
30
31 for consideration of how the structural barriers involved in this complex area of
32
33 land impact pumping, nor identification of the specific relationship between basins.

1 *Id.* at pp. 25-26.

2 A groundwater budget would have allowed the NSE to consider objective
3 data rather than arbitrarily choosing one party's subjective interpretation of the
4 pump test results over another's. A groundwater budget is an inventory or
5 accounting of inflows and outflows, including recharge, spring flow,
6 evapotranspiration, groundwater pumping, and other factors that are part of the
7 water balance of a basin or group of basins.
8
9
10

11 The following map depicts a part of the water budget that includes local and
12 regional groundwater inflow and outflow under pre-development conditions.
13



14 **Exhibit 19**, p. 46.

15
16
17
18
19
20
21
22
23
24
25
26
27
28
These values are based on geologic and geochemical analyses carried out by

1 multiple parties over decades of investigations. *See Exhibit 19*, §4.2. When these
2 inflows and outflows are combined with natural and anthropogenic stresses such as
3 evapotranspiration, spring flow, and pumping, an estimate of water available for
4 development can be made.

5
6 NDWR and the NSE have used groundwater budgets throughout the State to
7 assess water resources and determine safe yield. In fact, the Legislature requires
8 the NSE to “prepare a water budget and calculate and maintain an inventory of
9 water” for each basin in the State of Nevada. *See NRS 532.167*. Ironically, the
10 NSE even recognized the importance of a water budget to fully understand the
11 hydrology of the Mega Basin as a whole. *See Exhibit 2*, p. 58. Notwithstanding,
12 the NSE refused to rely on the water budgets for individual basins like KSV or
13 CSV and refused to consider a water budget for the entire Mega Basin in Order
14 1309.
15
16
17
18

19 Instead, the NSE chose to rely only on a cause-and-effect analysis that the
20 NSE perceived as resulting from the 1169 Pump Test, which, notably, was
21 interpreted differently by multiple parties. At best, the two-year aquifer test
22 represents a narrow glimpse of a groundwater system that cycles between wet and
23 dry hydrologic conditions over a period of decades. At worst, the pump test results
24 are applied to an unrepeatable and unverifiable analytical analysis (SerieSEE)
25 relied upon by the NSE (*see Exhibit 20* pp. 324-28, 342-46, 372-76 (Excerpts of
26 Transcript of Sue Braumiller’s Testimony at the 1303 Hearing describing the
27
28

1 SerieSEE)), which suggests that all pumping in an 1,100 square-mile area affects
2 one set of springs in the MRSA.

3
4 The 1169 Pump Test is of limited value in analyzing or determining the
5 Mega Basin's boundaries or the availability of water therein without taking the
6 next step suggested in Order 1169 - the development of a groundwater flow model.
7
8 Comparing the voluminous research referenced in Order 1169, which the NSE
9 drafted in 2002, with the data relied upon by the NSE in drafting Order 1309 in
10 2020, demonstrates that the NSE ignored millions of dollars in scientific studies,
11 developed by the USGS, NDWR, and others. The NSE disregarded this significant
12 body of work in favor of certain parties' (with specific interests and goals)
13 interpretations of the pump test results when multiple parties presented differing
14 interpretations.
15
16

17
18 Accordingly, the 1169 Pump Test results constitute only an insignificant
19 fraction of the total available research on the water system in the Mega Basin. The
20 NSE's reliance on the 1169 Pump Test results has rendered Order 1309
21 unsupported by substantial evidence, arbitrary, and capricious. *See Bacher v. Off.*
22 *of State Eng'r of State of Nevada*, 122 Nev. 1110, 1122-23, 146 P.3d 793, 801
23 (2006).
24
25

26 **C. NSE's Determination of Geographic Boundaries of the Mega**
27 **Basin is Not Supported by Substantial Evidence.**

28 The NSE concluded that "the available information requires Kane Springs
Valley be included within the geographic boundary of the LWRFS." **Exhibit 2**, p.

1 53. As discussed in detail herein, the NSE’s conclusion is not supported by
2 substantial evidence.

3
4 **i. NSE’s Conclusion that KSV has a Close Hydraulic
5 Connection with the Other Basins is Not Supported by
6 Substantial Evidence.**

7 The primary reason the NSE includes KSV in the Mega Basin is due to a
8 subjective characterization of the hydraulic connection between KSV and CSV
9 being “close”. To determine that KSV has a “close hydraulic connection” with the
10 remainder of the Mega Basin, the NSE relied upon the results of the 1169 Pump
11 Test and found what he perceived to be a “cause and effect” relationship between
12 pumping in the LWRFS and KSV. **Exhibit 2**, p. 52 (explaining that “while
13 attenuated, the general hydrographic pattern observed in southern [KSV] reflects a
14 response to Order 1169 pumping, consistent with a close hydraulic connection with
15 the LWRFS.”). As noted above, the 1169 Pump Test results cannot be used to
16 determine the hydraulic connection between KSV and the LWRFS because the
17 tests were not designed to show the individual relationship between particular
18 basins or wells. Therefore, there is no way to determine what amount of pumping
19 from which wells impacted the MRSA.
20
21
22
23

24 Moreover, the NSE applied certain criteria to the 1169 Pump Test results
25 and then labeled the degree of connection on a scale from “weak connection” to
26 “close connection”. *See Exhibit 2*, p. 47-49. The NSE’s criteria and method of
27 determining the “closeness” of a hydraulic connection are completely subjective
28

1 and result in arbitrary assignment of degree of “closeness” that cannot be
2 replicated with any scientific certainty.

3
4 To be sure, one need only review the NSE’s own discussion of hydraulic
5 connection in Order 1309. The NSE sets forth a set of criteria that he believes are
6 important in assessing the “closeness” of a hydraulic connection. *See id.* at pp. 47-
7 48. But the NSE applied these criteria to the 1169 Pump Test results, which the
8 NSE has already determined show a cause and effect result in the Mega Basin
9 (particularly, in CSV) had on KSV during the 1169 Pump Tests (which were not
10 even designed to test for hydraulic connectivity). *See id.*; *see also id.* at p. 47 n.
11 265.

12
13
14
15 Ironically, even the NSE recognizes the slippery slope that this subjective
16 methodology for hydraulic connection creates. In rejecting NPS’ proposal that all
17 adjacent hydrographic areas “where a hydraulic interconnection exists, whether
18 weak or strong, be included in the [Mega Basin]”, the NSE explains that “there
19 must be reasonable and technically defensible limits to the geographic boundary.
20 Otherwise, if management were to be based on the entire spectrum of weak to
21 strong hydraulic interconnection, then exclusion of an area from the [Mega Basin]
22 would require absolute isolation from the [Mega Basin]”. *Id.* at p. 49. But given
23 the subjectivity of the NSE’s labeling method to describe the varying hydraulic
24 connections (i.e. close, weak, strong, direct), there are no “reasonable” or
25 “technically defensible limits” to the geographic boundary. Under the NSE’s
26
27
28

1 standards, every basin could be combined into one for management across the
2 entire state of Nevada. The determination of the boundary of the Mega Basin
3 should not be subjective nor dependent on who the NSE is.
4

5 Even more problematic, the NSE indicates that additional data is required to
6 demonstrate the relative strength of the hydraulic connections in the Mega Basin.
7

8 **Exhibit 2**, page 48. This is an admission that the NSE's determination of
9 hydraulic connection is not based on substantial evidence. *See Bacher*, 122 Nev.
10 at 122-23, 146 P.3d at 801 (holding that a determination by the NSE is not
11 supported by substantial evidence where it lacks specific calculations and
12 supporting evidence).
13
14

15 But worse, even though the NSE makes a decision while acknowledging that
16 he does not have sufficient information to make that decision, the NSE chooses not
17 to consider (1) a groundwater budget to determine the inventory of water, (2) a
18 groundwater model to consider the flow paths of the water (which includes 16,000-
19 17,000 afa of water that bypasses the MRSA),¹² or (3) evidence concerning
20 seasonal variability or the impact that extended periods of drought over widespread
21 areas would have on water levels throughout the region.
22
23
24

25 ¹² For example, numerical groundwater models can assess the relative connection, if any, between
26 pumping from specific wells in the MRSA and spring and surface flows in the MRSA. *See Exhibit 19*
27 (CSI Expert Report), pp. 31-41. Therefore, a groundwater model can be used to identify the flow paths of
28 groundwater that bypass the MRSA and those that contribute to the spring and surface flows therein. *See*
id.; *see also Exhibit 8* (Order 1169A), pp. 2 (acknowledging that the NSE specifically ordered SNWA to
submit such groundwater models for the basins involved in the 1169 Pump Tests). Despite knowing that
16,000-17,000 afa bypasses the MRSA, (*see Exhibit 4* (Order 1169), pp. 5-6, the NSE chose not to use a
numerical groundwater model to assess these flows and instead, relied only on the 1169 Pump Test results
which cannot track this 16,000-17,000 afa. Thus, the NSE's determinations are not based on substantial
evidence.

1 Most glaringly, the NSE's conclusory determination that the 1169 Pump
2 Test results show a cause-and-effect relationship between pumping and water
3 levels in KSV and the balance of the LWRFS is entirely arbitrary because it does
4 not reflect the fact that there were multiple pumping zones located throughout the
5 six basins, including pumping in 1) CSV, 2) MRSA, and 3) Garnet Valley and the
6 Black Mountains Area. During the 1169 Pump Test, an average of 5,290 afa was
7 pumped from CSV wells, and a cumulative reported total of 14,535 afa was
8 pumped in the Order 1169 study basins. **Exhibit 2**, page 5. In total, more than 30
9 wells were pumping at uncoordinated rates and schedules throughout six basins
10 during the 1169 Pump Test. The NSE's conclusion does not identify or distinguish
11 the results based on the distinct wells and unique relationships between the
12 different wells.
13

14
15
16
17 While the largest volume of pumping occurred within CSV (5,290 afa)
18 during the 1169 Pump Test, approximately 2,000 afa of carbonate pumping and
19 3,840 afa of alluvial pumping was occurring within the MRSA. *See id.* at p. 55;
20 *see also* **Exhibit 23** (SNWA Expert Report), p. 55. Different pumping rates affect
21 groundwater levels differently when measured at a fixed observation point; a
22 higher pumping rate results in greater drawdown given the same physical
23 parameters. *See* **Exhibit 19**, pp. 10-14. If the distance between the pumping well
24 and observation point varies, then the effect of the pumping on that observation
25 point also varies. Because CSV is 11.5 miles from the Pederson Spring complex
26
27
28

1 (the observation point) and MRSA pumping is only 2.5 miles from the observation
2 point, the assessment of relative impact is more complicated. *Id.*
3

4 Evidence was provided at the 1303 Hearing to show that the pumping well at
5 a lower pumping rate, located 2.5 miles away from the observation point, had a
6 greater impact (i.e. decrease in groundwater level) than a pumping well with a
7 higher pumping rate, located 11.5 miles from the observation point. *Id.* This
8 evidence was ignored by the NSE in favor of unverified and unrepeatable
9 analytical analysis by the FWS known as the SeriesSEE analysis. *See Exhibit 2*, p.
10 16, p. 50; *see also Exhibit 20* (Excerpts of Transcript of Sue Braumiller's
11 Testimony at the 1303 Hearing), pp. 324-28, 342-46, 372-76.
12
13
14

15 The NSE's focus on the 1169 Pump Test results, to the exclusion of all other
16 evidence, to determine the degree of hydrologic connection is highly unusual. It is
17 common sense that scientific determinations should be based on a consideration of
18 all relevant factors. Clearly, in rendering Order 1309 the NSE did not rely on the
19 best available science.
20

21 Finally, the NSE's analysis of hydrologic connection is internally
22 inconsistent for the different basins he considers for inclusion in the Mega Basin.
23 As a result, Order 1309 is arbitrary in that certain basins with higher degrees of
24 hydrologic connection are excluded from the Mega Basin, while those with lower
25 degrees of hydrologic connection, such as KSV, are included in the Mega Basin.
26 For example, the Lower Meadow Valley Wash abuts the MRSA and has
27
28

1 undisputed flows into the MRSA and into the Muddy River. *See Exhibit 21*
2 (Ruling 6254); *see also Exhibit 19*, Appendix C. Nevertheless, the Lower
3 Meadow Valley Wash was excluded from the Mega Basin without any
4 explanation, let alone any scientific, geologic, or hydrologic evidence to support its
5 exclusion.
6

7
8 **ii. NSE’s Determination of the Geologic and Structural**
9 **Boundaries of the Mega Basin is Not Supported by**
10 **Substantial Evidence.**

11 One of the factors the NSE considered in concluding that KSV should be
12 included in the Mega Basin is whether the boundary between KSV and the
13 remainder of the Mega Basin is separated by faults or geographic features that
14 inhibit groundwater flow. Specifically, the rock underlying the Mega Basin is
15 carbonate-rock. *See Exhibit 4*, p. 1. In contrast, the northern portion of KSV
16 consists of non-carbonate rock or low permeability bedrock. The NSE explains in
17 Order 1309 that the “occurrence of the carbonate-rock aquifer in the southern Kane
18 Springs Valley indicates that there is no known geologic feature at or near the
19 southern Kane Springs Valley border that serves to juxtapose the carbonate-rock
20 aquifer within the LWRFS with low permeability rocks in Kane Springs Valley.”
21 **Exhibit 2**, p. 52. However, the NSE admits that he does not know whether there is
22 a boundary between KSV and the remaining basins:
23
24
25
26

27 “[W]hile geologic mapping indicates that the carbonate-rock aquifer
28 does not extend across the northern portion of the Kane Springs
Valley, there is insufficient information available to determine
whether the non-carbonate bedrock interpreted to underlie the

1 northern part of the Kane Springs Valley represents low-permeability
2 bedrock that would define a hydraulic boundary to the carbonate-
3 rock aquifer.” *Id.*

4 Therefore, the NSE admits that this decision is not based on substantial
5 evidence. *See City of Reno v. Reno Police Protective Ass’n*, 118 Nev. 889, 899, 59
6 P.3d 1212, 1219 (2002) (“If the Agency’s decision lacks substantial evidentiary
7 support, the decision is unsustainable as being arbitrary or capricious.”).

9 In making this determination, the NSE completely disregarded the new
10 geologic data Vidler and CSI obtained from field investigations conducted in 2019.
11 *See Exhibit 2*, pp. 51-53. These data demonstrated that geologic faults may act as
12 complete or partial barriers to groundwater flow and that a “close” hydraulic
13 connection does not exist where heterogeneities (*i.e.* faults) occur within the Mega
14 Basin. *See Exhibit 19*. Specifically, the geophysical investigation of northern
15 CSV mapped the location of the Kane Springs Wash fault zone that explained a
16 5.5-foot change in groundwater elevation between two nearby monitoring wells.
17 *See Exhibit 22* (LCWD and Vidler’s Expert Report). Similarly, CSI mapped a
18 series of faults parallel to Highway 93 within the Mega Basin that explained why
19 changes in groundwater levels occur across faults and why multiple flow paths
20 exist within the Mega Basin. *See Exhibit 19*. Although the NSE called for new
21 data in response to Order 1303, and although Vidler, LCWD and CSI provided
22 new data, the NSE largely ignored the new data in favor of the decades-old
23 limited-use 1169 Pump Test results.
24
25
26
27
28

1 Further, the NSE does not explain how the 1169 Pump Test Results (which
2 were not conducted in KSV) support a departure from the NSE's conclusions in
3 Ruling 5712 that KSV should not be included in the Mega Basin. Indeed, in
4 Ruling 5712, the NSE relied on the carbonate water levels near the boundary
5 between KSV and CSV were 1,875 feet in elevation, and in southern CSV and
6 throughout most of the other basins in the Mega Basin, the carbonate water levels
7 are mostly between 1,800 and 1,825 feet to determine that this "marked difference
8 in head supports the probability of a low-permeability structure or change in
9 lithology between [KSV] and the southern part of [CSV]". **Exhibit 19**, p. 21.
10
11

12 The 1169 Pump Test results do not refute these facts. The NSE's decision to
13 include KSV in the Mega Basin is arbitrary as he dismisses the difference in
14 hydraulic head that the NSE found to be conclusive evidence that KSV should not
15 be included in the Mega Basin in Ruling 5712. Thus, the 1169 Pump Test results
16 neither provide nor constitute substantial evidence to support the NSE's
17 conclusion. *See Clements v. Airport Auth. of Washoe Cty.*, 111 Nev. 717, 722, 896
18 P.2d 458, 461 (1995) ("Substantial evidence is that quantity and *quality* of
19 evidence which a reasonable [person] could accept as adequate to support a
20 conclusion.") (internal quotation marks omitted) (emphasis added).
21
22
23
24
25

26 Notably, subsequent studies have confirmed that the NSE's conclusions in
27 Ruling 5712 were correct. For example, SNWA's Order 1169 Report stated that
28 there was a lack of pumping response north of the Kane Springs Fault, **Exhibit 23**

1 (SNWA Order 1169 Report, page 57), indicating that there is a low degree of
2 hydraulic connectivity between KSV and CSV. Subsequent data presented by
3 Vidler in 2019 additionally showed distinct differences in hydraulic gradients and
4 groundwater elevations between KSV and CSV. *See Exhibit 22.* Furthermore,
5 geophysical mapping performed by Vidler in response to Rescinded 1303 mapped
6 a geologic fault explaining the difference in groundwater levels observed in nearby
7 monitoring wells. *See id.* The hydrologic and geophysical data collected by Vidler
8 and CSI in 2019 represent best available science that was ignored by the NSE in
9 Order 1309 in preference of the 1169 Pump Test results.
10
11
12

13 Additionally, the NSE's set forth in Order 1309 do not provide an objective
14 measure for determining when joint management should be implemented. The
15 NSE's fourth criteria ("Criteria No. 4") is "Water level observations that
16 demonstrate a relatively steep hydraulic gradient are consistent with a poor
17 hydraulic connection and a potential boundary." **Exhibit 2**, p. 48. But the NSE,
18 again, applies this Criteria No. 4 in a subjective, results driven manner. For
19 example, the NSE admits that he "recognizes these differences" in groundwater
20 levels, gradients, and climatic factors, but simply dismisses these facts in
21 preference of the 1169 Pump Test results without any explanation as to why a
22 gradient generated from a 60-foot difference in groundwater levels does not
23 exclude KSV from the Mega Basin - when compared to a 0.5-foot change in water
24 level over two years during the Order 1169 Pump Test supports including KSV in
25
26
27
28

1 the Mega Basin. *See id.* at pp. 24, 52.

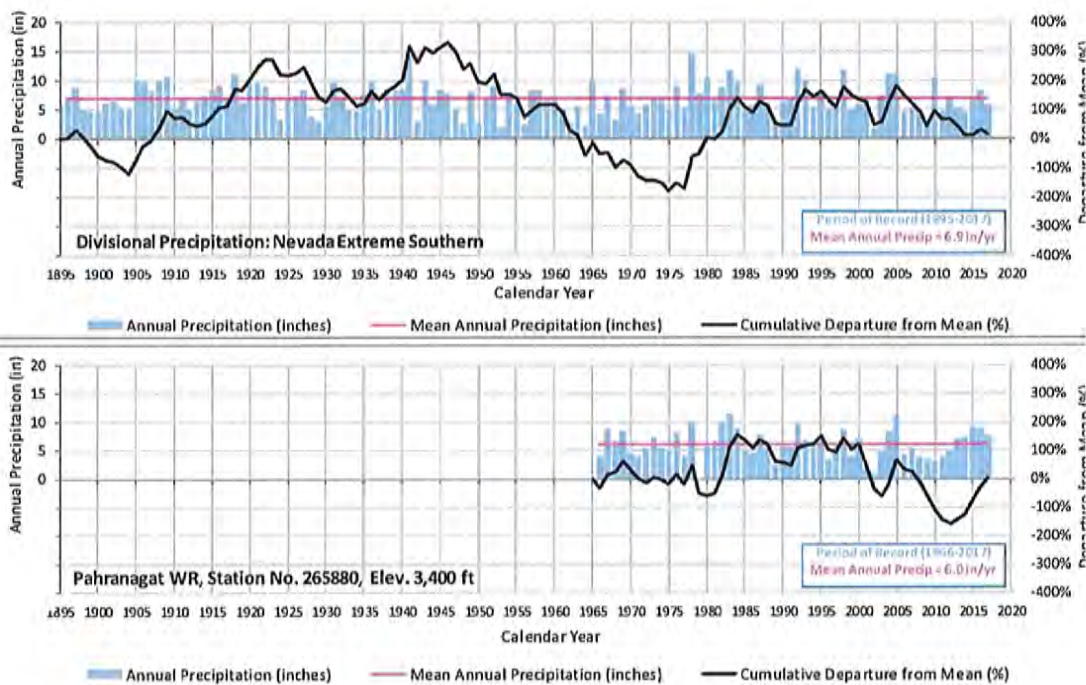
2 Of the six criteria listed by the NSE, none are focused on geologic structures
3 alone. Instead, the NSE picks from the vast record to support its predetermined
4 decision (e.g., to include KSV); instead of analyzing all of the facts, data, and best
5 science available to reach an accurate conclusion. For instance, Criterion No. 5
6 suggests exclusion from the Mega Basin would require a juxtaposition of
7 carbonate-rock aquifer with low permeability bedrock, but there are other types of
8 geologic structures with similar properties. For example, faults can create
9 impermeable boundaries between rocks of similar compositions (i.e. carbonate
10 rock against carbonate rock) that result in steep hydraulic gradients (**Exhibit 19**
11 (Section 3.3 “Impact of Structural Features and Faults on Groundwater Flow”).
12 Thus, newly mapped faults, such as those at the mouth of Kane Springs Valley
13 constitute a basin boundary (**Exhibit 22**), they are excluded from consideration
14 since the fault does not include “low permeability bedrock”. The specificity of
15 Criterion No. 5 suggests that NSE’s criteria are predetermined to include Kane
16 Springs Valley in the Mega Basin.
17
18
19
20
21
22

23 **D. NSE’s Determination of the Aquifer Recovery Subsequent to the**
24 **Order 1169 Pump Test is Not Supported by Substantial Evidence.**

25 The NSE identified aquifer recovery subsequent to the 1169 Pump Test as
26 one of the topics for the 1303 Hearing. In the context of Order 1309, aquifer
27 recovery simply refers to whether groundwater levels, after the cessation of 1169
28 Pump Test, returned to the same elevations observed prior to the commencement

1 of the test.

2 The NSE concludes in Order 1309 that aquifer recovery following the 1169
3 Pump Test has not returned to pre-test levels. **Exhibit 2**, p. 55. The NSE's
4 conclusion improperly assumes, without any supporting evidence, that aquifer
5 recovery *should* reach pre-1169 levels. But, as explained above, the 1169 Pump
6 Test was only conducted for two years, and that two-year period occurred at the
7 end of a dry period. See **Exhibit 19**. The graph below shows the varying
8 precipitation levels for the past several decades for the area underlying the Mega
9 Basin:
10
11
12



13
14
15
16
17
18
19
20
21
22
23
24 See **Exhibit 19**, p. 6.

25 Despite acknowledging that water levels are impacted by climate, the NSE
26 decided to exclude climatic factors from his determination of aquifer recovery
27 without valid justification. Therefore, the NSE's decision neither accounts for nor
28

1 addresses the impact of the wetter cycles experienced in the late 1990's and again
2 from 2004-2005 prior to the drier period that began in 2006 and continued to occur
3 through the 2011-2012 period when the 1169 Pump Test occurred. *See Exhibit*
4 **19**, pp. 3-7. These wetter periods demonstrate that the NSE's focus on water levels
5 occurring prior to the 1169 Pump Test as the sole measurement of what aquifer
6 recovery *should* be is arbitrary and capricious.
7

8
9 Indeed, under the NSE's logic, the measurement of aquifer recovery, and
10 therefore, the positive or negative attribute assigned to it by the NSE, is
11 conclusively determined by the groundwater levels in 2010 when the pump tests
12 began. As a result, if the pump tests had been conducted in 2004-2007 (a wetter
13 cycle), then the measurement of aquifer recovery would be vastly different. The
14 NSE's focus on information related to a two-year period of time to the exclusion of
15 decades of research on the many factors impacting groundwater levels is arbitrary
16 and capricious.
17
18

19
20 A general fallacy exists in the argument that pre- and post- 1169 Pump Test
21 levels should be the same to suggest that aquifer recovery is complete. For
22 example, drought conditions contribute to an overall decline in groundwater levels,
23 so one would expect groundwater levels to be less after two years regardless of
24 pumping. Additionally, the location of pumping by specific wells also affects
25 aquifer recovery, such that a change in pumping rates by some wells might mask
26 observations of recovery. Because the best scientific analysis was not used to
27
28

1 assess aquifer recovery, it cannot be used as a metric for quantifying sustainable
2 yield. Without analytically accounting for hydrologic and geologic variables, as
3 well as the proximity of pumping wells to the Warm Springs area, the NSE cannot
4 state whether groundwater levels would have remained constant at pumping levels
5 of 14,000 afa, 4,000 afa, or 8,000 afa as stated in Order 1309.
6
7

8 **E. NSE’s Conclusion that Only 8,000 afa Can be Pumped from the**
9 **Mega Basin Not Supported by Substantial Evidence.**

10 In Order 1309, the NSE arbitrarily determines that only 8,000 afa of water
11 can be pumped across the entire Mega Basin. *See Exhibit 2*, p. 63. However, no
12 participant in the hearing provided evidence to support this figure, nor even argued
13 that 8,000 afa was the appropriate amount of water to be pumped in the Mega
14 Basin. Rather, each participant argued that the evidence supported a different
15 amount. *See, e.g., id.* at pp. 13-14, 17, 31, 38, 57 (describing the amounts
16 suggested by each party).
17
18

19 The NSE randomly selected 8,000 afa because in the years following the
20 1169 Pump Tests, 7,000-8,000 afa of water was pumped in the MRSA without
21 showing a decline in groundwater levels or spring flows. *See id.* at 55, 63. But
22 7,000-8,000 afa is a wide range. The NSE fails to explain why 8,000 afa of water
23 is the “maximum amount of groundwater that can continue to be developed over
24 the long term in the [Mega Basin]” as opposed to any other number within that
25 range, such as 7,000 afa or 7,500 afa. *Id.* at pp. 62-63.
26
27
28

Worse, simply because 7,000-8,000 afa was randomly pumped following the

1 1169 Pump Test without a decline in water levels does not mean that this amount is
2 determinative. For example, if 4,000 afa was the amount that had been pumped
3 following the 1169 Pump Tests, there would be no decline in groundwater levels
4 because there was no decline when 7,000-8,000 afa was pumped. But if pumping
5 stopped at 4,000 afa, then it would not be known that 7,000-8,000 afa could be
6 pumped without causing a decline in water levels. On the other hand, if the
7 amount pumped following the 1169 Pump Tests was 14,000 afa without decline,
8 then, under the NSE's logic, the total availability of water would be 14,000 afa.
9

12 Given that the 7,000-8,000 afa is the amount that just happened to be
13 pumped after the 1169 Pump Test concluded, the NSE's selection of the number
14 8,000 afa is completely random and arbitrary. *See Bacher*, 122 Nev. at 1122-23,
15 146 P.3d at 801 (finding that the NSE's allocation of 415 afa of water was not
16 supported by substantial evidence where the NSE did not provide a specific
17 breakdown of the amount of water needed for each of the applicant's projects nor
18 an explanation of how the 415 afa met the applicant's needs).
19
20

22 Similarly, the NSE does not support with any evidence, let alone substantial
23 evidence, his determination that pumping in excess of 8,000 afa "will cause
24 conditions that harm the Moapa dace and threaten to conflict with Muddy River
25 decreed rights." *Id.* This conclusion is based on pumping from 30 wells across
26 1,100 square miles of land. There is no basis to conclude that all pumping from
27 these 30 wells equally affects the Muddy River. To the contrary, pumping from
28

1 particular wells may have a bigger impact on water levels in certain areas while
2 affecting water levels in other areas less, a fact acknowledged but disregarded by
3 the NSE. Without consideration of how individual wells impact the Muddy River,
4 the NSE's conclusion that 8,000 afa is the maximum amount of water that can be
5 pumped across seven basins is arbitrary and capricious.
6
7

8 **F. NSE's Conclusion Regarding the Effect of Movement of Water**
9 **Between Alluvial and Carbonate Wells Within the Mega Basin is**
10 **Not Supported by Substantial Evidence.**

11 Order 1309 states that there was strong consensus among the parties that
12 alluvial aquifer pumping in the MRSA affects Muddy River discharge but
13 misrepresents the evidence that all carbonate aquifer pumping throughout the
14 Mega Basin affects spring flow. **Exhibit 2**, p. 64. Order 1309 further conflates the
15 issue by suggesting that "the relative degree of hydrologic connectedness in the
16 LWRFS will be a principal factor in determining the impact of movement of water
17 rights". *Id.* at p. 65. In another section of Order 1309, it states: "the Order 1169
18 aquifer test demonstrated that impacts from the test along with concurrent pumping
19 was widespread within the LWRFS encompassing 1,100 square miles and
20 supported the conclusion of a close hydrologic connection among the basins." *Id.*
21 at p. 64. Therefore, Order 1309 is internally inconsistent. On the one hand, the
22 NSE includes KSV in the Mega Basin because he finds that all pumping affects
23 spring flow, but on the other hand, the NSE indicates that some locations affect
24 spring flow less than others. These internal inconsistencies are not adequate to
25
26
27
28

1 support the NSE's decision. *See Clements v. Airport Auth. of Washoe Cty.*, 111
2 Nev. 717, 722, 896 P.2d 458, 461 (1995) ("Substantial evidence is that quantity
3 and quality of evidence which a reasonable [person] could accept as adequate to
4 support a conclusion.") (internal quotation marks omitted).
5

6 Order 1309's assessment of the impact of carbonate pumping throughout the
7 Mega Basin on spring flow in the MRSA is misleading since it does not rely on the
8 best science available. Much of this is due to the avoidance of adopting a water
9 budget and numerical groundwater model that could be used to quantify the
10 impacts of carbonate pumping on both the springs and streamflow in the MRSA.
11 For example, the total carbonate and alluvial pumping during the 2011-2012 1169
12 Pump Test was close to 14,535 afa, resulting in approximately a 300 acre-foot drop
13 in streamflow at the Warm Springs West gage and a 150 acre-foot in streamflow at
14 the Pederson Springs complex. At the same time, there was no impact to flow at
15 the Big Muddy Spring and no perceivable impact to the flow of the Muddy River
16 at Moapa. Given the large amount of pumping and relatively small amount of
17 impact, common sense suggests that there are other factors affecting the flow and
18 movement of groundwater in the carbonate rock aquifer.
19
20
21
22
23

24 The greatest factor affecting the flow and movement of groundwater in the
25 Mega Basin are heterogeneities associated with geologic faults and structures that
26 create multiple flow paths. *See Exhibit 19*, p. 25, 54-55. While Order 1309
27 recognizes that these structures exist, it ignores their impact on the movement of
28

1 groundwater through the Mega Basin aquifer system. Evidence presented during
2 the Order 1303 hearing that indicates flow is controlled by geologic structure and
3 heterogeneities in the aquifer that include:
4

- 5 1. 2019 CSAMT Geophysical Survey conducted by CSI.
- 6 2. 2019 CSAMT Geophysical Survey conducted by Vidler.
- 7 3. Differences in groundwater level responses across geologic
8 boundaries.
- 9 4. Water budget identified in Order 1169.
- 10 5. Proposed water budget provided by CSI.
- 11 6. Analytical analysis of pumping impact on springs.
- 12 7. Supporting published data by USGS, Desert Research Institute
13 (“DRI”), SNWA, and others.
14
15
16
17

18 *See Exhibit 24* (CSI Closing Statement); **Exhibit 25** (Vidler Closing
19 Statement). The data listed above represents the best available science that would
20 allow the NSE to assess groundwater movement and occurrence in the Mega
21 Basin. It is not difficult to understand that 14,535 acre-feet of pumping during the
22 1169 Pump Test, of which 5,290 acre-feet occurred in CSV, only resulted in a 300
23 acre-foot to 450-acre-foot impact on spring flow in the MRSA because there are
24 other factors controlling the flow of groundwater in the carbonate aquifer. *See*
25 **Exhibit 19**, p. 47-52. These other factors include the geologic faults and structures
26 that may act as either a barrier or conduit to groundwater flow and support
27
28

1 previous interpretations that indicate not all groundwater in an 1,100 square mile
2 basin flows to the MRSA. *See id.* at pp. 47-48.

3
4 Local recharge to the Mega Basin that occurs from the Sheep Range located
5 along the west side of CSV is an example of the impact of geologic structure. *See*
6 **Exhibit 26** (Excerpts of Transcript of CSI's expert (Steve Reich) testimony
7 presented at the 1303 Hearing), pp. 20-23. Both Bedroc (with alluvial rights in
8 CSV) and CSI presented evidence that this recharge, local to CSV, is not part of
9 the regional flow system that supports the water resources in the MRSA. *See id.*;
10 *see also* **Exhibit 19**, pp. 31-42. While the NSE appears to recognize that pumping
11 by Bedroc has little hydraulic connectivity to the MRSA, the NSE fails to address
12 how local recharge affects regional groundwater flow. The same mechanisms
13 controlling recharge in northern CSV also occur in central CSV and KSV. *See id.*
14 Faults identified by recent geophysical studies performed in 2019 by CSI and
15 Vidler, as well as offsets in groundwater levels, provide the best available science
16 that show not all water flows to the MRSA. *See id.*; *see also* **Exhibit 22**. Again, it
17 is inconsistent that the NSE acknowledges multiple flow paths in one area, but not
18 in another.

19
20 Order 1309 does not distinguish between the groundwater available in the
21 alluvial aquifer compared to that of the deeper carbonate aquifer, nor does it
22 distinguish between local recharge and regional recharge. Moreover, the NSE
23 ignores the evidence demonstrating that the water in the MRSA has a different
24
25
26
27
28

1 geochemical make up as shown by the isotope studies. *See Exhibit 19*, p. 25.

2 Instead, it suggests that there may be discrete, local aquifers within the Mega Basin
3 with an uncertain hydrologic connection to the MRSA. **Exhibit 2**, p. 65.

4
5 This reference in Order 1309 demonstrates that the NSE understands the
6 following but chose to ignore it: 1) not all pumping in the Mega Basin affects the
7 MRSA; 2) multiple flow paths exist due to faults and geologic boundaries; and 3)
8 some portions of CSV are distinct from other portions. The NSE's choice to
9 ignore these facts and focus only on the 1169 Pump Test results is purely results
10 driven and therefore, arbitrary and capricious.
11
12

13 **VIII. CONCLUSION AND REMEDY SOUGHT**

14
15 Based on the foregoing, it is clear that the NSE lacked authority to issue
16 Order 1309. Moreover, Order 1309 violates CSI's constitutional rights because it
17 constitutes a taking without due compensation. Further, Order 1309 violates CSI's
18 due process rights because the NSE employed *post hoc* rulemaking for which CSI
19 was never given notice. Accordingly, CSI respectfully requests that this Court
20 grant CSI's Petition for Judicial Review and enter an Order declaring Order 1309
21 void.
22
23

24 Alternatively, CSI requests that this Court grant CSI's Petition for Judicial
25 Review and enter an Order determining that Order 1309 is neither supported by
26 substantial evidence nor the best available science, and as such, is arbitrary,
27 capricious, and must be reversed. Accordingly, CSI requests that if this Court
28

1 determines the NSE had authority to issue Order 1309, that this Court enter an
2 Order declaring Order 1309 arbitrary and capricious.
3

4 **AFFIRMATION:** The undersigned does hereby affirm that the preceding
5 document and/or attachments do not contain the social security number of any
6 person.

7 DATED this 27th day of August, 2021.

8 ROBISON, SHARP, SULLIVAN & BRUST
9 71 Washington Street
10 Reno, Nevada 89503

11 /s/ Kent R. Robison
12 KENT R. ROBISON #1167
13 HANNAH E. WINSTON #14520

14 **IN ASSOCIATION WITH:**

15 BRADLEY J. HERREMA #10368
16 BROWNSTEIN HYATT FARBER
17 SCHRECK, LLP
18 100 North City Parkway, Suite 1600
19 Las Vegas, Nevada 89106

20 WILLIAM L. COULTHARD #3927
21 COULTHARD LAW
22 840 South Ranch Drive, #4-627
23 Las Vegas, Nevada 89106

24 EMILIA K. CARGILL #6493
25 3100 State Route 168
26 P.O. Box 37010
27 Coyote Springs, Nevada 89037
28 *Attorneys for Petitioner*
Coyote Springs Investment, LLC

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
--

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Robison, Sharp, Sullivan & Brust, and that I served, or caused to be served, a true and correct copy of the foregoing **COYOTE SPRINGS INVESTMENT, LLC'S OPENING BRIEF ON PETITION FOR JUDICIAL REVIEW** to be served on all parties to this action by:

_____ placing an original or true copy thereof in a sealed, postage prepaid, envelope in the United States mail at Reno, Nevada, addressed to:

 X emailing an attached Adobe Acrobat PDF version of the document to the email addresses below/facsimile (fax) and/or E-Filing pursuant to Section IV of the District of Nevada Electronic Filing Procedures:

PAUL G. TAGGART, ESQ.
TIMOTHY D. O'CONNOR, ESQ.
THOMAS P. DUENSING, ESQ.
Taggart & Taggart, Ltd.
108 North Minnesota Street
Carson City, NV 89703
Email: paul@legaltnt.com; tim@legaltnt.com; tom@legaltnt.com
Attorneys for LVVWD and SNWA

STEVEN C. ANDERSON, ESQ.
Las Vegas Valley Water District
1001 S. Valley View Blvd.
Las Vegas, NV 89153
Email: Sc.anderson@lvvwd.com
Attorneys for LVVWD and SNWA

JAMES N. BOLOTIN, ESQ.
LAENA ST-JULES, ESQ.
Office of the Attorney General
100 North Carson
Carson City, NV 89701
Email: jbolotin@ag.nv.gov; lstjules@ag.nv.gov
Attorneys for Respondent State Engineer

BRADLEY J. HERREMA, ESQ.
BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106
Email: bherrema@bhfs.com
Attorneys for Coyote Springs Investment, LLC

WILLIAM L. COULTHARD, ESQ.
COULTHARD LAW
840 South Ranch Drive, #4-627
Las Vegas, NV 89106
Email: wlc@coulthardlaw.com
Attorneys for Coyote Springs Investment, LLC

EMILIA K. CARGILL, ESQ.
3100 State Route 168
P.O. Box 37010
Coyote Springs, NV 89037
Email: emilia.cargill@coyotesprings.com
Attorneys for Coyote Springs Investment, LLC

1 GREGORY H. MORRISON, ESQ.
Parson Behle & Latimer
2 50 West Liberty Street, Suite 750
Reno, NV 89501
3 Email: gmorrison@parsonsbehle.com
Attorneys for Moapa Valley Water District

4 CHRISTIAN T. BALDUCCI, ESQ.
5 Marquis Aurbach Coffing
10001 Park Run Drive
6 Las Vegas, NV 89145
7 Email: cbalducci@maclaw.com
Attorneys for Apex Holding Company, LLC and Dry Lake Water, LLC

8 SYLVIA HARRISON, ESQ.
LUCAS FOLETTA, ESQ.
9 SARAH FERGUSON, ESQ.
McDonald Carano LLP
10 100 W. Liberty Street, 10th Floor
Reno, NV 89501
11 Email: sharrison@mcdonaldcarano.com
lfoletta@mcdonaldcarano.com
12 sferguson@mcdonaldcarano.com
*Attorneys for Georgia-Pacific Gypsum LLC
and Republic Environmental Technologies, Inc.*

14 LISA BELENKY, ESQ.
15 Center for Biological Diversity
1212 Broadway, #800
16 Oakland, CA 94612
17 Email: lbelenky@biologicaldiversity.org
Attorneys for Center for Biological Diversity (pro hac vice)

18 JULIE CAVANAUGH-BILL, ESQ.
Cavanaugh-Bill Law Offices, LLC
19 Henderson Bank Building
401 Railroad Street, Suite 307
20 Elko, NV 89801
21 Email: julie@cblawoffices.org
Attorneys for Center for Biological Diversity

22 DOUGLAS WOLF, ESQ.
Center for Biological Diversity
23 3201 Zafarano Drive, Suite C, #149
Santa Fe, NM 87507
24 Email: dwolf@biologicaldiversity.org
Attorneys for Center for Biological Diversity

25 ROBERT A. DOTSON, ESQ.
26 JUSTIN C. VANCE, ESQ.
Dotson Law
-- 5355 Reno Corporate Drive, Suite #100
Reno, NV 89511
Email: rdotson@dotsonlaw.legal / jvance@dotsonlaw.legal
Attorneys for Muddy Valley Irrigation Company

1 STEVEN D. KING, ESQ.
227 River Road
2 Dayton, NV 89403
3 Email: kingmont@charter.net
4 Attorneys for Muddy Valley Irrigation Company

4 ALEX FLANGAS, ESQ.
Kaempfer Crowell
5 50 West Liberty Street, Suite 700
Reno, NV 89501
6 Email: aflangas@kcnvlaw.com
7 Attorneys for Nevada Cogeneration Association Nos. 1 and 2

8 SEVERIN A. CARLSON, ESQ.
Kaempfer Crowell
9 50 W. Liberty Street, Suite 700
Reno, NV 89501
10 Email: scarlson@kcnvlaw.com
11 Attorneys for The Church of Jesus Christ of Latter-Day Saints

11 JUSTINA A. CAVIGLIA, ESQ.
12 MICHAEL D. KNOX, ESQ.
Nevada Energy
13 6100 Neil Road
Reno, NV 89510
14 Email: jcaviglia@nvenergy.com; mknox@nvenergy.com
15 Attorneys for Sierra Pacific Power Company, dba NV Energy
Nevada Power Company, dba NV Energy

16 THERESE A. URE STIX, ESQ.
17 LAURA A. SCHROEDER, ESQ.
Schroeder Law Offices, P.C.
18 10615 Double R Blvd., Suite 100
Reno, NV 89521
19 Email: counsel@water-law.com
Attorneys for Bedroc and City of North Las Vegas

20 KAREN A. PETERSON, ESQ.
Allison MacKenzie, Ltd.
21 402 N. Division Street
Carson City, NV 89703
22 Email: kpeterson@allisonmackenzie.com / nfontenot@allisonmackenzie.com
23 Attorneys for Lincoln County Water District and Vidler Water Company, Inc.

24 DYLAN V. FREHNER, ESQ.
Lincoln County District Attorney
P.O. Box 60
25 Pioche, NV 89403
26 Email: dfrehner@lincolncountynv.gov
Attorneys for Lincoln County Water District and Vidler Water Company, Inc.

-- WAYNE O. KLOMP, ESQ.
Snell & Wilmer L.L.P.
50 West Liberty Street, Suite 510
Reno, NV 89501
Email: wklomp@swlaw.com
Attorneys for Lincoln County Water District and Vidler Water Company, Inc.

1 __X__ by Federal Express/UPS or other overnight delivery addressed to:

2 Clark County District Court
3 Attn: Honorable Bitia Yeager – District Court, Dept. 1
4 Court Administration – 2nd Floor
5 200 Lewis Avenue
6 Las Vegas, NV 89101

7 DATED: This 27th day of August, 2021.

8 

9 V. Jayne Ferretto
10 An Employee of Robison, Sharp, Sullivan & Brust

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
--

Robison, Sharp,
Sullivan & Brust
71 Washington St.
Reno, NV 89503
(775) 329-3151

EXHIBIT LIST

COYOTE SPRINGS INVESTMENT, LLC'S OPENING BRIEF

ON PETITION FOR JUDICIAL REVIEW

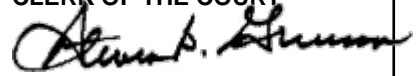
(Case No. A-20-816761-C (Lead Case))

EXHIBIT NO.	DATE	DESCRIPTION	PAGES
1		Glossary	8
2	06/15/2020	Order 1309	68
3	04/23/2020	Findings of Fact, Conclusions of Law, Order Granting Petitions for Judicial Review	40
4	03/08/2002	Order 1169	11
5		Figure 2-1. Location Map of the Mega Basin (KSV shown in Red)	1
6	04/20/2006	Memorandum of Agreement ("MOA")	35
7	02/02/2007	Ruling 5712	23
8	12/21/2012	Order 1169A	5
9		The 1169 Pump Test wells are circled in red.	1
10	01/29/2014	Ruling 6255	31
11	05/16/2018	Jason King, NSE, Letter to LVVWD	3
12	06/7/2018	CSI's Petition for Judicial Review of May 16, 2018, Letter	24
13	07/29/2018	Settlement Agreement between CSI and Jason King, NSE	2
14	9/19/2018	The "Draft Order"	13
15	10/05/2018	CSI October 5, 2018 Comment Letters	35
16	05/15/2019	Interim Order 1303	17
17	02/08/2019	CSI's Petition for Judicial Review of Rescinded Order 1303	55
18	07/25/2019	Notice of Pre-hearing Conference	6
19	07/03/2019	CSI's Expert Report	113
20	09/24/2019	Excerpts of Transcript of Sue Braumiller's Testimony at the 1303 Hearing describing the SerieSEE	22

21	01/29/2014	Ruling 6254	29
22	07/03/2019	LCWD and Vidler's Expert Report	50
23	06/27/2013	SNWA Expert Report	19
24	12/03/2019	CSI's Closing Statements	22
25	12/03/2019	Vidler Closing Statement	24
26	09/23/2019	Excerpts of Transcripts of CSI's Expert (Steve Reich) Testimony Presented at the 1303 Hearing	24

Exhibits 1-26 Excluded
from Appendix

Exhibits 1-26 Excluded
from Appendix



1 **PTOB**

2 DYLAN V. FREHNER, ESQ.
3 Nevada State Bar No. 9020
4 **LINCOLN COUNTY DISTRICT ATTORNEY**
5 181 North Main Street, Suite 205
6 P.O. Box 60
7 Pioche, Nevada 89043
8 Telephone: (775) 962-8073
9 Email: dfrehner@lincolncountynv.gov

6 WAYNE O. KLOMP, ESQ.
7 Nevada State Bar No. 10109
8 **GREAT BASIN LAW**
9 1783 Trek Trail
10 Reno, Nevada 89521
11 Telephone: (775) 770-0386
12 Email: wayne@greatbasinlawyer.com

11 KAREN A. PETERSON, ESQ.
12 Nevada State Bar No. 366
13 **ALLISON MacKENZIE, LTD.**
14 402 North Division Street
15 Carson City, Nevada 89703
16 Telephone: (775) 687-0202
17 Email: kpeterson@allisonmackenzie.com

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

17 **DISTRICT COURT**
18 **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

A-20-818069-P

A-20-817840-P

A-20-817876-P

A-21-833572-J

23 ADAM SULLIVAN, P.E., Acting
24 Nevada State Engineer, et al.,

25 Respondent.

26 **LINCOLN COUNTY WATER DISTRICT AND**
27 **VIDLER WATER COMPANY, INC.'S OPENING BRIEF**

28 ///

TABLE OF CONTENTS

1

2 NRAP 26.1 DISCLOSURE viii

3 I. INTRODUCTION 1

4 II. STATEMENT OF THE ISSUES 3

5 III. STATEMENT OF THE CASE 3

6 IV. STATEMENT OF RELEVANT FACTS 5

7 A. LINCOLN/VIDLER WATER RIGHTS, RULING 5712,
 8 RULING 5987 AND BIOLOGICAL OPINION..... 5

9 B. MUDDY RIVER DECREE 9

10 C. ORDER 1169 AQUIFER TEST 10

11 D. INTERIM ORDER 1303 AND ORDER 1309 11

12 V. STANDARD OF REVIEW 13

13 VI. ARGUMENT 15

14 A. THE STATE ENGINEER HAS NO STATUTORY
 15 AUTHORITY TO CREATE A SUPER BASIN TO MANAGE
 16 INDIVIDUAL BASINS COLLECTIVELY AND MODIFY
 17 THE PRIORITY OF VESTED WATER RIGHTS 15

18 B. THE STATE ENGINEER’S DETERMINATION TO
 19 INCLUDE KANE SPRINGS IN THE SUPER BASIN
 20 VIOLATED LINCOLN/VIDLER’S DUE PROCESS
 21 RIGHTS, CONSTITUTES UNLAWFUL *AD HOC*
 22 RULEMAKING, AND UNAUTHORIZED DELEGATION
 23 OF THE POWER TO LEGISLATE..... 21

24 1. Determining the six criteria used to include basins in the super
 25 basin after the introduction of evidence and after the hearing
 26 violates LINCOLN/VIDLER’s due process rights and constitutes
 27 unlawful *ad hoc* rulemaking..... 22

28 2. Creation of the six criteria amounts to unlawful usurpation of
 legislative power and violates the Nevada Constitution’s
 separation of powers 24

1 3. The State Engineer failed to analyze the six criteria he developed
 2 post hearing in determining Kane Springs should be included in
 3 the “super basin”26
 4 4. The evidence relied upon—for the few factors the State Engineer
 5 did analyze—does not support the inclusion of Kane Springs in the
 6 super basin, nor is the State Engineer’s determination supported by
 7 substantial evidence29
 8 5. Order 1309 improperly reweighed the Order 1169 pump test
 9 results to include Kane Springs in the super-basin33
 10 C. THE STATE ENGINEER’S DETERMINATION THAT
 11 8,000 AFA IS THE MAXIMUM AMOUNT OF
 12 GROUNDWATER THAT CAN BE DEVELOPED FROM
 13 THE SUPER BASIN WAS NOT SUPPORTED BY
 14 SUBSTANTIAL EVIDENCE AND WAS ARBITRARY
 15 AND CAPRICIOUS.....35
 16 D. THE STATE ENGINEER’S DETERMINATIONS
 17 REGARDING THE MANAGEMENT OF THE SUPER
 18 BASIN ARE INCONSISTENT WITH HIS OTHER FINDINGS,
 19 ARE NOT BASED UPON SUBSTANTIAL EVIDENCE AND
 20 ARE ARBITRARY AND CAPRICIOUS.....38
 21 E. OTHER DUE PROCESS VIOLATIONS.....40
 22 VII. CONCLUSION40
 23 CERTIFICATE OF COMPLIANCE44
 24 CERTIFICATE OF SERVICE46
 25 ADDENDUM Attached

TABLE OF AUTHORITIES

Cases:

1
 2
 3
 4 *Andersen Family Associates v. Ricci*,
 124 Nev. 182, 179 P.3d 1201 (2008)..... 13, 14, 19
 5
 6 *Andrews v. Nevada State Board of Cosmetology*,
 86 Nev. 207, 467 P.2d 96 (1970)..... 14, 16
 7
 8 *Arizona v. California*,
 460 U.S. 605, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983).....20
 9
 10 *Bacher v. State Engineer*,
 122 Nev. 1110, 146 P.3d 793 (2006)..... 14, 15, 27, 31
 11
 12 *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*,
 419 U.S. 281 (1974).....23
 13
 14 *City of Henderson v. Kilgore*,
 122 Nev. 331, 131 P.3d 11 (2006)..... 15
 15
 16 *Clark Cty. v. State, Equal Rights Comm’n*,
 107 Nev. 489, 813 P.2d 1006 (1991)..... 15
 17
 18 *Clark Cty. School Dist. v. Clark Cty. Classroom Teachers Ass’n*,
 115 Nev. 98, 977 P.2d 1008 (1999)..... 15
 19
 20 *Colo. Water Conservation Bd. v. City of Central*,
 125 P.3d 424 (Colo. 2005)..... 19
 21
 22 *Eureka Cnty. v. State Engineer*,
 131 Nev. 846, 359 P.3d 1114 (2015).....23, 29, 36, 38, 39
 23
 24 *Eureka Cty. v. Seventh Jud. Dist. Ct. in & for Cty. of Eureka*,
 134 Nev. 275, 417 P.3d 1121 (2018)..... 19, 23
 25
 26 *Ex rel. Ginocchio v. Shaughnessy*,
 47 Nev. 129 (1923).....25
 27
 28 *Fuentes v. Shevin*,
 407 U.S. 67 (1972).....23
Hamdi v. Rumsfeld,
 542 U.S. 507, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004).....23

1 *Helms v. State Environmental Protection Division,*
 2 109 Nev. 310, 849 P.2d 279 (1993).....37

3 *In re State Engineer Ruling No. 5823,*
 4 128 Nev. 232, 277 P.3d 449 (2012)..... 14

5 *Jones v. Rosner,*
 6 102 Nev. 215, 719 P.2d 805 (1986)..... 14

7 *Kay v. Nunez,*
 8 122 Nev. 1100, 146 P.3d 801 (2006)..... 14

9 *Lobdell v. Simpson,*
 10 2 Nev. 274 (1866)..... 19

11 *Mack v. Estate of Mack,*
 12 125 Nev. 80, 206 P.3d 98 (2009)..... 10

13 *Min. Cty. v. Lyon Cty.,*
 14 136 Nev. Adv. Op. 58, 473 P.3d 418 (2020)..... 16, 20, 41

15 *Nichols v. McIntosh,*
 16 34 P. 278 (Colo. 1893)..... 19

17 *Nolan v. State Dep’t. of Commerce,*
 18 86 Nev. 428, 470 P.2d 124 (1970)..... 15

19 *Port of Jacksonville Mar. Ad Hoc Comm., Inc. v. U.S. Coast Guard,*
 20 788 F.2d 705 (11th Cir.1986)29

21 *Pub. Serv. Comm’n of Nevada v. Sw. Gas Corp.,*
 22 99 Nev. 268, 662 P.2d 624 (1983).....24

23 *Pyramid Lake Paiute Tribe v. Ricci,*
 24 126 Nev. 521, 245 P.3d 1145 (2010)..... 14

25 *Pyramid Lake Paiute Tribe of Indians v. Washoe County,*
 26 112 Nev. 743, 918 P.2d 697 (1996).....37

27 *Revert v. Ray,*
 28 95 Nev. 782, 603 P.2d 262 (1979)..... 14, 15, 23, 27, 29, 33, 36, 40

S. Nev. Operating Eng’rs Contract Compliance Tr. v. Johnson,
 121 Nev. 523, 119 P.3d 720 (2005).....24

1 *Sheriff v. Luqman*,
 2 101 Nev. 149, 697 P.2d 107 (1985).....24, 25

3 *State Engineer v. Curtis Park*,
 4 101 Nev. 30, 692 P.2d 495 (1985)..... 14

5 *State Engineer v. Morris*,
 6 107 Nev. 699, 819 P.2d 203 (1991)..... 14

7 *State ex rel. Johns v. Gragson*,
 8 89 Nev. 478, 515 P.2d 65 (1973)..... 15

9 *Town of Eureka v. State Engineer*,
 10 108 Nev. 163, 826 P.2d 948 (1992)..... 14

11 *United States v. Alpine Land & Reservoir, Co.*,
 12 984 F.2d 1047 (9th Cir. 1993)20

13 *Whitmore v. Murray City*,
 14 154 P.2d 748 (Utah 1944)..... 19

15 *Wilson v. Happy Creek, Inc.*,
 16 135 Nev. 301, 448 P.3d 1106 (2019)..... 19

17 *Wilson v. Pahrump Fair Water, LLC*,
 18 481 P.3d 853, 137 Nev. Adv. Op. 2 (2021) 15, 16

19 *Wright v. State Insurance Commissioner*,
 20 449 P.2d 419 (Or.1969) 15

21 **Rules:**

22 Nevada Rules of Appellate Procedure44

23 NRAP 26.1..... viii

24 NRAP 26.1(a) viii

25 NRAP 28(e) 44

26 NRCP 5(b)46

27 **Statutes:**

28 NRS Chapters 532 16

NRS Chapter 533 16, 18

1	NRS Chapter 534.....	16, 17
2	NRS 233B.125.....	15
3	NRS 532.110.....	16
4	NRS 532.120.....	16
5	NRS 533.007.....	17
6	NRS 533.024(1).....	16
7	NRS 533.024(1)(c)	33
8	NRS 533.024(1)(e)	16, 19, 25
9	NRS 533.364.....	17
10	NRS 533.370(3).....	17
11	NRS 533.450.....	5
12	NRS 533.450(2).....	15, 23
13	NRS 533.450(10).....	14
14	NRS 534.020.....	16
15	NRS 534.025.....	16
16	NRS 534.030.....	16, 17
17	NRS 534.030(5).....	16
18	NRS 534.035.....	16, 17
19	NRS 534.037.....	16, 17
20	NRS 534.040.....	16, 17
21	NRS 534.050.....	16, 17
22	NRS 534.070.....	16
23	NRS 534.080(3).....	18
24	NRS 534.090.....	16
25	NRS 534.100.....	16
26	NRS 534.110.....	16, 19
27	NRS 534.110(6).....	16
28	NRS 534.110(7).....	17

1 NRS 534.110(8).....17
2 NRS 534.120.....16, 19
3 NRS 534.180.....16
4 NRS 534.185.....16
5 NRS 534.250.....16
6 NRS 534.260.....16
7 NRS 534.350.....16
8 **Other Authorities:**
9 1 American Land Planning Law, sec. 32.6 (2020 update).....19
10 51 Am.Jr.2d, Licenses and Permits, sec. 51 (2021 Supp.)19
11 Article 3, § 1, Nevada Constitution24
12 Merriam Webster’s Collegiate Dictionary, 74 (10th ed. 1994)13
13 Water Words Dictionary by Letter18
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ALLISON MacKENZIE, LTD.
402 North Division Street, P.O. Box 646, Carson City, NV 89702
Telephone: (775) 687-0202 Fax: (775) 882-7918
E-Mail Address: law@allisonmackenzie.com

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certify that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the Court may evaluate possible disqualification or recusal.

1. Petitioner, LINCOLN COUNTY WATER DISTRICT, is a political subdivision of the State of Nevada, created for the purpose of providing adequate and efficient water service within Lincoln County, Nevada.

2. Petitioner, VIDLER WATER COMPANY, INC., is a Nevada corporation authorized to conduct business in the state of Nevada.

3. All parent corporations and publicly-held companies owning 10 percent or more of any of Petitioners' stock:

Vidler Water Company, Inc.'s parent company is Vidler Water Resources, Inc. There is no publicly held company that owns 10% or more of Vidler Water Company, Inc.'s stock.

4. Names of all law firms whose attorneys have appeared for Petitioners in this case:
Lincoln County District Attorney, Snell & Wilmer, L.L.P., Great Basin Law and Allison MacKenzie, Ltd. Snell & Wilmer, L.L.P. has been substituted out of this case and no longer represents any of the Petitioners.

5. If any litigant is using a pseudonym, the litigant's true name:
Not applicable.

DATED this 27th day of August, 2021.

LINCOLN COUNTY DISTRICT ATTORNEY
181 North Main Street, Suite 205
P.O. Box 60
Pioche, Nevada 89043
Telephone: (775) 962-8073

/s/ Dylan V. Frehner
DYLAN V. FREHNER, ESQ.
Nevada State Bar No. 9020
Email: dfrehner@lincolncountynv.gov

~ and ~

///

ALLISON MacKENZIE, LTD.
402 North Division Street, P.O. Box 646, Carson City, NV 89702
Telephone: (775) 687-0202 Fax: (775) 882-7918
E-Mail Address: law@allisonmackenzie.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

GREAT BASIN LAW
1783 Trek Trail
Reno, Nevada 89521
Telephone: (775) 770-0386

/s/ Wayne O. Klomp
WAYNE O. KLOMP, ESQ.
Nevada State Bar No. 10109
Email: wayne@greatbasinlawyer.com

Attorneys for Petitioner, **LINCOLN COUNTY
WATER DISTRICT**

ALLISON MacKENZIE, LTD.
402 North Division Street
Carson City, NV 89703
Telephone: (775) 687-0202

/s/ Karen A. Peterson
KAREN A. PETERSON, ESQ.
Nevada State Bar No. 366
Email: kpeterson@allisonmackenzie.com

Attorneys for Petitioner **VIDLER WATER
COMPANY, INC.**

1 Petitioners, LINCOLN COUNTY WATER DISTRICT (“LINCOLN”) and VIDLER WATER
2 COMPANY, INC. (“VIDLER”), submit their Opening Brief in support of their Petition for Judicial
3 Review in accordance with the Court’s minute order issued May 27, 2021.

4 **I.**

5 **INTRODUCTION**

6 This case arises from a Petition for Judicial Review (“Petition”) filed by Petitioners
7 LINCOLN/VIDLER challenging the lawfulness and propriety of Order 1309 (“Order”) issued by the
8 State Engineer on June 15, 2020. Without substantial evidence or accurate analysis, Order 1309
9 improperly included the Kane Springs Valley Hydrographic Basin (“Kane Springs”) in the Lower
10 White River Flow System (“LWRFS”) after many years of purposeful exclusion from the LWRFS.

11 For decades the State Engineer has followed Nevada law by determining and managing water
12 appropriations in each individual hydrographic basin. Based on the doctrine of “prior appropriation,”
13 water users could and did determine their seniority based on the other permitted water rights in that
14 specific basin. This is and remains the law in Nevada.

15 Pursuant to Nevada water law, Petitioners’¹ water rights are the most senior vested municipal
16 rights granted by the State Engineer in the Kane Springs basin. Contrary to Nevada water law, the
17 State Engineer issued Order 1309 and included Kane Springs in the LWRFS, an ever-changing, multi-
18 basin area designated by the State Engineer for the joint management and administration of water
19 rights within the multi-basin area. The LWRFS is the first such multi-basin area designated by the
20 State Engineer in Nevada. The State Engineer’s inclusion of Kane Springs in the LWRFS has
21 effectively reprioritized Petitioners’ senior water rights to the most junior rights in the multi-basin
22 LWRFS. The State Engineer has no authority under Nevada law to administer and manage a multi-
23 basin area nor to reprioritize Petitioners’ senior water rights to the most junior water rights in the multi-
24 basin LWRFS. Further, the State Engineer violated Petitioners’ due process rights when he included
25 Kane Springs in the LWRFS based upon a new six factor criteria which was only adopted *after* the
26

27 _____
28 ¹ A portion of Petitioners’ water rights are now owned by Coyote Springs Investment, LLC (“CSI”). CSI has filed its own
challenge to Order 1309. Petitioners’ references to water rights granted or owned by them is not intended to ignore the
current ownership of the water rights. CSI’s arguments supporting its challenge of Order 1309 are contained in its Opening
Brief.

1 hearing was held leading up to Order 1309 and *after* Petitioners had presented their evidence in
2 response to Interim Order 1303.

3 In Order 1309, the 2020 State Engineer reversed determinations made by the 2007 State
4 Engineer in Ruling 5712 which specifically excluded Kane Springs from the multi-basin Order 1169
5 test pump proceedings, the predecessor to the LWRFS. In issuing Ruling 5712, the 2007 State
6 Engineer granted 1,000 acre feet annually (“afa”) of senior water rights to LINCOLN/VIDLER in
7 Kane Springs. The State Engineer specifically determined that LINCOLN/VIDLER’s Kane Springs
8 water rights would not be included in the multi-basin Order 1169 test pump proceedings. The State
9 Engineer further determined that the pumping of the 1,000 afa in Kane Springs would have no impact
10 on Muddy River senior water rights or the Moapa dace. One State Engineer cannot reverse a decision
11 of a prior State Engineer which impacts the priority of vested rights.

12 The State Engineer did not rely upon substantial evidence, which is evidence upon which a
13 reasonable person might accept as adequate to support a conclusion, to support the reversal of his
14 predecessor’s previous determination to exclude Kane Springs from the LWRFS. Instead, the State
15 Engineer applied his newly adopted six factor criteria and freely admitted in Order 1309 that the
16 evidence he relied upon and applied to his new criteria was “muted, lagged, obscured by climate
17 response, or compromised by low-resolution data” and “attenuated”. Further, the State Engineer
18 acknowledged there would be further hydrologic study necessary to determine the degree to which
19 water use in Kane Springs would impact water resources in the LWRFS, thereby admitting there was
20 no evidence of record to show how pumping in Kane Springs would affect any water resources in the
21 LWRFS.

22 The State Engineer cannot reprioritize Petitioner’s water rights for the protection of an
23 endangered species. The Nevada Supreme Court has recently held that the statutory water scheme in
24 Nevada expressly prohibits re-allocating water rights established under the doctrine of prior
25 appropriation and that public interest type considerations such as the protection of the Moapa dace and
26 senior Muddy River rights are determined in the application approval process.

1 As shown in this brief, the State Engineer committed numerous errors in issuing Order 1309.
2 Order 1309’s findings as to Kane Springs must be vacated. Kane Springs should continue to be
3 administered in accordance with the basin specific statutory scheme set out by the Legislature.

4 **II.**

5 **STATEMENT OF THE ISSUES**

6 1. Whether the State Engineer has statutory authority to create a super basin such as the
7 LWRFS, to manage water rights granted in individual basins collectively and effectively modify the
8 priority of vested rights.

9 2. Whether the State Engineer’s determination to include Kane Springs in the super basin
10 based upon newly created criteria violated LINCOLN/VIDLER’s due process rights, was not
11 supported by substantial evidence, and whether the decision was arbitrary and capricious.

12 3. Whether the State Engineer’s determination that only 8,000 afa can be pumped from
13 the LWRFS was supported by substantial evidence and whether the pumping limit was arbitrary and
14 capricious.

15 4. Whether the State Engineer’s determination that Kane Springs can be managed more
16 effectively in the super basin is inconsistent with the State Engineer’s other findings in Order 1309,
17 was not based upon substantial evidence, and whether that determination was arbitrary and capricious.

18 **III.**

19 **STATEMENT OF THE CASE**

20 LINCOLN/VIDLER have only been involved in the LWRFS proceedings since 2019 although
21 the Order 1169 proceedings started seventeen years earlier in 2002. LINCOLN/VIDLER were not
22 involved in the Order 1169 aquifer test proceedings which started in March 2002, and they were
23 purposefully excluded from all of the proceedings that led to Interim Order 1303. ROA at 4-11. From
24 2002 to 2020, every State Engineer determined that Kane Springs should not be included in the multi-
25 basin LWRFS or the multi-basin Order 1169 aquifer test.

26 On January 11, 2019, the State Engineer issued Interim Order 1303. In Interim Order 1303,
27 the State Engineer designated for joint administration six (6) individual hydrographic basins as the
28 LWRFS, including the Coyote Spring Valley, Muddy River Springs Area, California Wash, Hidden

1 Valley, Garnet Valley, and a portion of the Black Mountains Area. ROA at 82. Pursuant to the Interim
2 Order, the LWRFS hydrographic basins shared a close hydrologic connection and were to be
3 administered based upon their respective dates of priority in relation to other rights within the LWRFS
4 as a regional groundwater unit. ROA at 82. Interim Order 1303 recognized the need for further
5 analysis of the LWRFS because there were 72,000 acre feet of water rights issued (34,000 acre feet of
6 surface water rights from the Muddy River system and 38,000 acre feet of underground water rights)
7 and not more than 50,000 acre feet of water available in the six (6) basin LWRFS. ROA at 76-77.
8 The State Engineer invited stakeholders in the LWRFS (not initially including Petitioners) to submit
9 reports to the State Engineer addressing the following four specific areas: 1) the geographic boundary
10 of the LWRFS, 2) aquifer recovery subsequent to the Order 1169 aquifer test, 3) the long-term annual
11 quantity and location of groundwater that may be pumped from the LWRFS, and 4) the effect of
12 movement of water rights between the alluvial and carbonate wells in the LWRFS and any other matter
13 believed to be relevant to the State Engineer’s analysis. ROA at 82-83. The reports were intended to
14 aid in the fact-finding goals of the Division and “make a determination as to the appropriate long-term
15 management of groundwater pumping that may occur in the LWRFS by existing holders of water
16 rights without conflicting with existing senior decreed rights or adversely affecting the endangered
17 Moapa dace.” ROA at 81. A public hearing was held in Carson City between September 23, 2019,
18 and October 4, 2019. ROA at 12. The purposes of the hearing were to afford stakeholder participants
19 who submitted reports pursuant to the solicitation in Interim Order 1303 an opportunity to provide
20 testimony on the scientific data collected and analyzed regarding the topics in Interim Order 1303 and
21 to test the conclusions offered by other stakeholder participants. ROA at 12.

22 Although LINCOLN/VIDLER were not LWRFS stakeholders or Order 1169 study
23 participants, in 2018 Southern Nevada Water Authority (“SNWA”) had belatedly requested that the
24 State Engineer consider whether Kane Springs should be included in the boundaries of the LWRFS.
25 ROA at 36206-36207. There is no evidence in the record that the State Engineer ever notified
26 LINCOLN/VIDLER he was considering changing his determinations made in Ruling 5712 excluding
27 Kane Springs from the LWRFS area, that he was reconsidering the Order 1169 pump test results or
28 that he was going to adopt new criteria for determining inclusion in the LWRFS. Because they had

1 no choice but to protect their senior vested rights, LINCOLN/VIDLER performed new geophysical
2 work, submitted reports to the State Engineer and participated in the public hearing showing the State
3 Engineer that Kane Springs should not be included within the LWRFS. ROA at 36193-36496 and see
4 specifically ROA at 36231. *See also generally* Hearing Transcripts at ROA 52960-53758 (not
5 reproduced in LINCOLN/VIDLER’s Record on Appeal).

6 On June 15, 2020, then State Engineer, Tim Wilson, issued Order 1309 including Kane Springs
7 in the LWRFS for the first time. LINCOLN/VIDLER timely filed their petition for judicial review of
8 the Order 1309 pursuant to NRS 533.450 challenging the determinations of the State Engineer.

9 **IV.**

10 **STATEMENT OF RELEVANT FACTS**

11 **A. LINCOLN/VIDLER WATER RIGHTS, RULING 5712, RULING 5987 AND**
12 **BIOLOGICAL OPINION.**

13 Petitioners, LINCOLN and VIDLER own groundwater permits with a priority date of February
14 14, 2005, and jointly own groundwater right applications filed on April 10, 2006 to appropriate water
15 in the Kane Springs for municipal use purposes with a place of use in the Coyote Spring Valley
16 Hydrographic Basin (210) (“Coyote Springs Valley”). ROA at 699-700. The Kane Springs
17 hydrographic basin and the points of diversion in the permits and applications are located entirely in
18 Lincoln County, Nevada. ROA at 699-700. Petitioners, LINCOLN and VIDLER are senior water
19 right permit holders and jointly hold senior groundwater right applications in Kane Springs. ROA at
20 716, 992-994, 1063.

21 On February 14, 2005, LINCOLN/VIDLER filed Applications 72218, 72219, 72220 and
22 72221 to appropriate groundwater in Kane Springs. ROA at 699-700. On August 1, 2006,
23 LINCOLN/VIDLER and the United States Department of the Interior, Fish and Wildlife Service
24 (“USFWS”) entered into an Amended Stipulation for Withdrawal of Protests for Applications 72218,
25 72219, 72220 and 72221 (“Amended Stipulation for Withdrawal of Protests”). ROA at 36689-36700.
26 The Amended Stipulation for Withdrawal of Protests contains among other things, triggers acceptable
27 to USFWS to reduce Petitioners’ groundwater pumping for protection of the Moapa dace. ROA at
28 36698-36699. USFWS agreed to groundwater pumping from Kane Springs subject to certain

1 conditions notwithstanding the Order 1169 proceedings including the direct payment of \$50,000 to
2 USFWS for the restoration of the Moapa dace habitat. ROA at 36696-36700. The Stipulation for
3 Withdrawal of Protests addressed USFWS’ concerns to include Kane Springs in the Order 1169
4 proceedings with regard to LINCOLN/VIDLER’S applications. ROA at 36689. USFWS’ request to
5 include Kane Springs in the Order 1169 proceedings was specifically withdrawn with prejudice based
6 upon the conditions governing LINCOLN/VIDLER’s pumping in the Amended Stipulation for
7 Withdrawal of Protests. ROA at 36689. From 2006 to date, Petitioners and USFWS have performed
8 and continue to perform under the terms of the Amended Stipulation for Withdrawal of Protests. *See*
9 Affidavit of Dorothy Timian Palmer filed August 6, 2020 in support of Opposition to Motion to
10 Change Venue at ¶18.

11 On February 2, 2007, the State Engineer issued Ruling 5712, which partially approved
12 Applications 72218, 72219, 72220 and 72221, granting LINCOLN/VIDLER 1,000 afa of water rights
13 in Kane Springs. ROA at 699-721. In Ruling 5712, the State Engineer specifically determined Kane
14 Springs would not be included in the Order 1169 study area because there was no substantial evidence
15 that the appropriation of a limited quantity of water in Kane Springs will have any measurable impact
16 on the Muddy River Springs that warrants the inclusion of Kane Springs in Order 1169. ROA at 719.
17 The State Engineer denied the request to hold the LINCOLN/VIDLER applications in abeyance and
18 refused to include Kane Springs within the LWRFS study area and subject to the provisions of Order
19 1169. ROA at 719. The State Engineer specifically rejected the argument that the Kane Springs rights
20 could not be appropriated based upon senior appropriated rights in the down gradient basins. ROA at
21 713. The State Engineer found that the groundwater elevations in Kane Springs were significantly
22 higher (between 50 and 75 feet higher) than the groundwater elevations in the Coyote Springs basin
23 to the south and this elevation difference was strong support for a low permeable structure or change
24 in lithology (barrier to flow) between Kane Springs and the southern part of Coyote Spring Valley.
25 ROA at 719. Neither the parties to the Memorandum of Understanding² (“MOU”) entered into on
26 April 20, 2006 by certain water right holders in the Coyote Spring Valley and California Wash
27

28 ² The parties to the Memorandum of Understanding are the Southern Nevada Water Authority (“SNWA”) United States
Fish and Wildlife Service (“USFWS”), CSI, the Moapa Band of Paiute Indians and the Moapa Valley Water District. ROA
at 9921-9946.

1 hydrographic basins nor any of the Order 1169 study participants objected to or appealed the State
2 Engineer's determinations that: (1) Kane Springs would not be included in Order 1169, and (2)
3 Petitioners could appropriate and develop their water rights notwithstanding appropriated water rights
4 in the down-gradient basins. NPS was a protestant in the Kane Springs application proceedings and
5 requested that Kane Springs be included in the Order 1169 study. ROA at 700-701, 718. The NPS
6 did not appeal the State Engineer's determination to exclude Kane Springs from the Order 1169 study.

7 Although Ruling 5712 granted some senior rights to Petitioners, they filed a Petition for
8 Judicial Review with the Seventh Judicial District Court on March 1, 2007, challenging portions of
9 the State Engineer's decision in Ruling 5712. Following the filing of the Petition for Judicial Review,
10 LINCOLN/VIDLER met with the State Engineer on March 15, 2007, regarding their pending
11 Applications 74147, 74148, 74149 and 74150. LINCOLN/VIDLER requested that they perform
12 additional data collection, testing and study in Kane Springs to support the pending applications. The
13 State Engineer informed LINCOLN/VIDLER he would consider granting LINCOLN/VIDLER
14 additional unappropriated water rights in Kane Springs pursuant to their pending Applications 74147,
15 74148, 74149 and 74150 if LINCOLN/VIDLER collected the additional data upgradient in the Kane
16 Springs basin and performed the testing and additional study to support the pending applications.
17 Based upon the above agreement, LINCOLN/VIDLER and the State Engineer thereafter stipulated to
18 the dismissal of the Petition for Judicial Review regarding Applications 72218, 72219, 72220 and
19 72221 and Ruling 5712.

20 On April 29, 2009, the Acting State Engineer issued Ruling 5987 summarily denying
21 Applications 74147, 74148, 74149 and 74150 without holding a hearing or contacting
22 LINCOLN/VIDLER to get any information about the additional data collection, testing and study the
23 State Engineer stated he would review. ROA at 722-725. LINCOLN/VIDLER filed a Petition for
24 Judicial Review with the Seventh Judicial District Court on May 29, 2009 challenging the validity of
25 the State Engineer's decision in Ruling 5987.

26 On April 27, 2010, LINCOLN/VIDLER and the State Engineer entered into a settlement
27 agreement to resolve LINCOLN/VIDLER's Petition for Judicial Review challenging Ruling 5987.
28 See ROA at 33678-33679. The settlement agreement required, among other things, the State Engineer

1 to reinstate 74147, 74148, 74149 and 74150 with the same priority as their original application date.
2 ROA at 33678-33679. LINCOLN/VIDLER and the State Engineer thereafter stipulated to the
3 dismissal of the Petition for Judicial Review regarding Applications 74147, 74148, 74149, and 74150
4 and Ruling 5987.

5 On October 29, 2008, LINCOLN/VIDLER obtained a Biological Opinion from the USFWS
6 that pumping of groundwater pursuant to Applications 72218, 72219, 72220, and 72221 in Kane
7 Springs was not likely to jeopardize the continued existence of the endangered Moapa dace. ROA at
8 49906-49973. Further, the Biological Opinion found that the project could contribute to groundwater
9 level declines and spring flow reductions however, implementation of the project's conservation
10 actions will minimize these impacts. ROA at 49942. With regard to incidental take, the Biological
11 Opinion stated the level of anticipated take is not likely to result in jeopardy to the Moapa dace based
12 in part on the implementation of the conservation measures for the project. ROA at 49944-49945.
13 Since 2008, Petitioners have spent substantial sums, including the direct payment of \$50,000, to the
14 USFWS as part of the project's conservation measures in reliance on the Biological Opinion, Ruling
15 5712, and the various settlement agreements entered into with the State Engineer to resolve
16 Petitioners' appeals of Rulings 5712 and 5987 involving Petitioners' water rights and applications in
17 Kane Springs. ROA at 36689-36700. None of the parties to the April 20, 2006 Memorandum of
18 Understanding and none of the Order 1169 study participants objected to or appealed the Biological
19 Opinion issued by the USFWS for the LINCOLN/VIDLER groundwater applications in Kane Springs.

20 As alleged in their Petition for Judicial Review, in reliance on the State Engineer's approval of
21 Applications 72218, 72219, 72220 and 72221, Ruling 5712, the issuance of permits to Petitioners and
22 the settlement with the State Engineer, LINCOLN/VIDLER have expended significant time and
23 money since 2005 in furtherance of perfecting their water rights in the Kane Springs basin in the
24 approximate sum of \$4,237,000. LINCOLN/VIDLER Petition for Judicial Review at ¶ 20. In
25 addition, in reliance upon the State Engineer's representations regarding the additional data collection,
26 testing and study, and his statements that he would consider any new data and results regarding the
27 basin, and the settlement agreement that set forth a methodology for the parties to follow in
28 establishing additional water that could be appropriated in Kane Springs, LINCOLN/VIDLER have

1 expended significant time and money to collect data, test and study the Kane Springs basin and to
2 prepare the data and information to be presented to the State Engineer to support pending Applications
3 74147, 74148, 74149 and 74150 in the approximate sum of \$543,000. LINCOLN/VIDLER Petition
4 for Judicial Review at ¶ 21.

5 The Kane Springs monitoring well KMW-1 located in southern Kane Springs is approximately
6 22 miles as the crow flies from the Muddy River Springs Area. ROA at 36243 (well location map).
7 To put this distance in perspective, approximately 22 miles as the crow flies from the Clark County
8 Courthouse is the Boulder City High School.

9 **B. MUDDY RIVER DECREE.**

10 The Muddy River adjudication proceedings involved water rights, including headwaters and
11 tributaries, to the Muddy River in Clark County, Nevada. See ROA at 33770, 33771, 33786, 33815.
12 The Muddy River adjudication proceedings did not involve waters in Lincoln County or Kane Springs.

13 The headwaters and tributaries of the Muddy River were described in those proceedings as
14 only the springs and waters developed by the claimants and as adjudicated in the Decree. ROA at
15 33796, 33812. The appropriators and the appropriation sources which are tributary to the Muddy
16 River are named in the Decree. ROA at 33799-33801, 33809. The tributaries recognized in the Decree
17 were: Bloedel Spring, Big Spring, Jones Spring, High Springs, Rock Cabin Spring, Cox Spring and
18 Baldwin Spring.³ ROA at 33799-33801, 33809. The appropriators with tributary sources are:
19 Bloedel, Moapa & Salt Lake Produce Co., Isaiah Cox and Anna Cox, George Baldwin, Sadie George,
20 Joseph Perkins, D.H. Livingston and Richard Smith and G.S. Holmes and Julie May Knox. ROA at
21 33799-33801, 33809. The Muddy Valley Irrigation Company is not listed as an appropriator in the
22 Muddy River Decree *with tributary sources*. ROA at 33801-33806. The only basin mentioned in the
23 Muddy River Decree adjudication proceedings as contributing water to the Muddy River during an
24 extreme storm event was Meadow Valley Wash, not any basins or waters in Lincoln County. See
25
26
27

28 ³ LINCOLN/VIDLER believe Bloedel Spring is now known as the Pederson Spring Complex and Plummer Spring
Complex, Rock Cabin Spring is known as Stone Cabin Spring complex, and today, Baldwin Spring is called the Baldwin
Spring Complex composed of Cardy Lamb Spring, Twin Springs, and Baldwin Springs.

1 Addendum, Answer of Defendants G.S. Holmes and Julia May Knox, ¶ V, p. 9:18-20, from the Muddy
2 River adjudication.⁴

3 Contrary to the State Engineer’s findings, Petitioners’ groundwater rights are not headwaters
4 or tributaries to the Muddy River, a river system entirely within Clark County which was adjudicated
5 as surface water rights pursuant to the Muddy River Decree.

6 **C. ORDER 1169 AQUIFER TEST.**

7 As previously stated, Petitioners were not and have never been an Order 1169 study participant
8 since the Order 1169 proceedings were instituted by the State Engineer in March, 2002. ROA at 654-
9 669. Petitioners are not and have never been a party to the Memorandum of Understanding entered
10 into on April 20, 2006, by certain water right holders in the Coyote Spring Valley and California Wash
11 hydrographic basins whereby such parties voluntarily agreed to certain groundwater pumping
12 restrictions, among other things, to further their shared common interest in the conservation and
13 recovery of the Moapa dace and its habitat, an endangered species under the Endangered Species Act.
14 ROA at 9921-9946.

15 Between 2010 and 2014, the Order 1169 basins were studied and tested, and the Order 1169
16 study participants were involved and participated in aquifer tests, the submission of reports,
17 proceedings and actions taken by the State Engineer pursuant to Order 1169. ROA at 4-11. The basins
18 that were included in the Order 1169 aquifer test were acknowledged to have a unique hydrologic
19 connection and share the same supply of water. ROA at 75. The Kane Springs basin was not included
20 in the Order 1169 aquifer testing, monitoring or measurements and Kane Springs basin water right
21 holders, including Petitioners, were not involved and did not participate in the aquifer testing,
22 submission of reports, proceedings and actions taken by the State Engineer pursuant to Order 1169
23 from 2010 to 2014. ROA at 36230-36231. After the aquifer test, no Order 1169 study participants
24 recommended that Kane Springs be included in the Order 1169 study area nor did the State Engineer
25 make a determination that Kane Springs should be included in the Order 1169 study area based upon
26 the Order 1169 testing and proceedings. ROA at 654-658. In fact, SNWA had been ordered to submit
27

28 _____
⁴ The Court may take judicial notice of public records from another case that are a reliable source. *Mack v. Estate of Mack*,
125 Nev. 80, 91, 206 P.3d 98, 106 (2009).

1 model simulations results showing predicted effects of pumping both existing rights and current
2 applications in numerous basins, including Kane Springs, after the Order 1169 aquifer test. ROA at
3 655, 666. Based upon the information already provided after the Order 1169 aquifer test, the State
4 Engineer rescinded the requirement that SNWA update Exhibit 54, its model – which would have
5 modeled predicted effects of pumping in Kane Springs. ROA at 655, 666. One study participant’s
6 report (Southern Nevada Water Authority) noted in response to Order 1169 pumping: “However, the
7 presence of boundaries and spatial variations in hydraulic connectivity affect the carbonate’s response
8 depending on location. For example, **no discernible responses were observed north of the Kane
9 Springs Fault and west of the MX-5 and CSI wells near the eastern front of the Las Vegas
10 Range.**” ROA at 41949. The entire Kane Springs basin is located north of the Kane Springs Fault
11 and Petitioners’ wells are located north of the Kane Springs Fault. ROA at 36258.

12 As a result of the Order 1169 aquifer test, the State Engineer issued Rulings 6254-6261 on
13 January 29, 2014 denying all the pending groundwater applications in Coyote Spring Valley, Muddy
14 River Springs Area, California Wash, Hidden Valley, Garnet Valley, and certain portions of the Black
15 Mountain Area. ROA at 726-948 (not reproduced in LINCOLN/VIDLER’s Record on Appeal).
16 LINCOLN/VIDLER were not parties to any of the proceedings involving Rulings 6255-6261.

17 **D. INTERIM ORDER 1303 AND ORDER 1309.**

18 On January 11, 2019—nearly 17 years after issuing Order 1169—the State Engineer issued
19 Interim Order 1303 designating the LWRFS, a multi-basin area known to share a close hydrologic
20 connection, as a joint administrative unit for purposes of administration of water rights. ROA at 70-
21 88. Pursuant to Interim Order 1303, all water rights within the LWRFS were to be administered based
22 upon their respective dates of priority in relation to other rights within the regional groundwater unit.
23 ROA at 82. Thus, after the 17 years of testing and proceedings, Kane Springs was not included as part
24 of the LWRFS multi-basin area in Interim Order 1303. More detail from Interim Order 1303 was set
25 forth above.

26 ///
27 ///
28 ///

1 After a public administrative hearing (which was not a trial type proceeding according to the
2 State Engineer)⁵, the State Engineer issued Order 1309 on June 15, 2020 delineating the Lower White
3 River Flow System Hydrographic Basin to include not only those certain hydrographic basins subject
4 to Order 1169 and Order 1303, but for the first time included Kane Springs as part of the Lower White
5 River Flow System Hydrographic Basin. ROA at 52-54. In Order 1309, the State Engineer stated it
6 was necessary for spring flow measured at the Warm Springs West gage (in the Muddy River Springs
7 Area) to flow at a minimum rate in order to maintain habitat for the Moapa dace. ROA at 46. The
8 State Engineer determined in Order 1309 that liability under the Endangered Species Act for a “take”
9 would extend to groundwater users within the LWRFS and would so extend to the State of Nevada
10 through the Division of Water Resources as the government agency responsible for permitting water
11 use. ROA at 47. The State Engineer concluded that it was against the public interest to allow
12 groundwater pumping that will reduce spring flow in the Warm Springs area to a level that would
13 impair habitat necessary for the survival of the Moapa dace and could result in take of the endangered
14 species. ROA at 47.

15 In Order 1309, the State Engineer pronounced six criteria purportedly from Rulings 6254-6261
16 issued by the State Engineer on January 29, 2014 based upon the Order 1169 aquifer test as the
17 standard of general applicability for inclusion into the geographic boundary of the LWRFS. ROA at
18 48-49. These criteria were not disclosed before the proceedings leading to Order 1309, but were
19 disclosed for the first time in the publication of Order 1309.

20 The State Engineer recognized the evidence regarding hydrographic response pattern in wells
21 located in the southern edge of Kane Springs was different compared to that exhibited by wells in the
22 LWRFS. ROA at 53. The Kane Springs well’s hydrographic response pattern was “muted, lagged,
23 obscured by climate response or compromised by low-resolution data”.⁶ ROA at 53. The State
24

25 ⁵ At the start of the administrative hearing, the State Engineer reminded the parties the public administrative hearing was
26 not a “trial-type” proceeding, not a contested adversarial proceeding. ROA at 52962. [09-23-19 Tr. 6:4-6, 24 to 7:1
(Hearing Officer Fairbank)]. Cross-examination was limited to between 4-17 minutes per participant depending on the
27 length of time given to a participant to present its reports. ROA at 52962 [09-23-19 Tr. 7:5-7 (Hearing Officer Fairbank)].

28 ⁶ Muted, lagged, obscured by climate response refers to not being able to tell what the actual response is due to the over-
arching response in the hydrographs due to a climate event, i.e., the intense precipitation event of 2005. ROA at 53, n.285
citing to ROA at 52816-52817 (LC-V Closing, pp. 5-6); 36211-36212 (LC-V Ex. 1, pp. 3-3 – 3-4); and 52783-52784 (CSI
Closing, pp. 5-6). LINCOLN/VIDLER believe the State Engineer was referring to the one (1) foot error in the data from
CSVM-4 as the “compromised by low resolution data”. ROA at 53.

1 Engineer stated he “recognizes these differences.” ROA at 53. In addition, the State Engineer
2 recognized that the physically measured evidence continued to show that the groundwater elevation
3 in Kane Springs was 60 feet higher than the groundwater level in Coyote Springs “consistent with a
4 zone of lower permeability.” ROA at 53. However, now in 2020, the State Engineer found the
5 evidence and testimony supporting a similarity in hydrographic patterns and response as provided by
6 expert witnesses like that of the NPS to be persuasive. ROA at 53. The State Engineer concluded:
7 “Namely, that while attenuated⁷, the general hydrographic pattern observed in southern Kane Spring
8 Valley reflects a response to Order 1169 pumping, consistent with a close hydraulic connection with
9 the LWRFS.” ROA at 53.

10 The State Engineer also arbitrarily limited pumping in the LWRFS to 8,000 afa without support
11 of any evidence in the record. ROA at 64. The State Engineer determined that including Kane Springs
12 in the LWRFS provides the opportunity for conducting additional hydrologic study “to determine the
13 degree to which water use would impact water resources in the LWRFS and to allow continued
14 participation by holder of water rights in future management decisions. Thus, these sub-basins, and
15 any other portions of the LWRFS that may benefit from additional hydrological study, can be managed
16 more effectively and fairly within the LWRFS.” ROA at 55. Again, these determinations by the State
17 Engineer that Kane Springs may “benefit from additional hydrologic study” and “can be managed
18 more effectively and fairly within the LWRFS” were made without citing to any evidence in the
19 record. There was no management plan for the LWRFS put forth by the State Engineer in Order 1309.

20 **V.**

21 **STANDARD OF REVIEW**

22 Questions of statutory construction presented in this appeal are questions of law which require
23 de novo review by this Court. The Nevada Supreme Court has repeatedly held courts have the
24 authority to undertake an independent review of the State Engineer’s statutory construction, without
25 deference to the State Engineer’s determination. *Andersen Family Associates v. Ricci*, 124 Nev. 182,
26
27

28 _____
⁷ “Attenuated” means “having been reduced in force, effect, or value.” *See generally*, Merriam Webster’s Collegiate Dictionary, 74 (10th ed. 1994).

1 186, 179 P.3d 1201, 1203 (2008) (citing *Bacher v. State Engineer*, 122 Nev. 1110, 1115, 146 P.3d
2 793, 798 (2006) and *Kay v. Nunez*, 122 Nev. 1100, 1103, 146 P.3d 801, 804 (2006).

3 Any “presumption of correctness” of a decision of the State Engineer as provided by NRS
4 533.450(10), “does not extend to ‘purely legal questions,’ such as ‘the construction of a statute,’ as to
5 which ‘the reviewing court may undertake independent review.’” *In re State Engineer Ruling No.*
6 *5823*, 128 Nev. 232, 238-239, 277 P.3d 449, 453 (2012) (quoting *Town of Eureka v. State Engineer*,
7 *108 Nev. 163, 165, 826 P.2d 948, 949 (1992)*). At no time will the State Engineer’s interpretation of
8 a statute control if an alternative reading is compelled by the plain language of the statute. *See*
9 *Andersen Family Associates*, 124 Nev. at 186, 179 P.3d at 1203.

10 The questions presented here are legal questions, including whether the State Engineer
11 exceeded his authority: in creating a multi-basin administrative unit and including Kane Springs in the
12 LWRFS; in relying on future hydrologic study to determine the degree that Petitioners’ water use
13 would impact the Muddy River and the Moapa dace; and in reliance on a future, undetermined
14 management plan. Therefore, this Court should undertake independent review without deference to
15 the State Engineer’s Order. *See Jones v. Rosner*, 102 Nev. 215, 216-217, 719 P.2d 805, 806 (1986)
16 (reviewing court is free to decide legal questions without deference to an agency determination);
17 *accord Pyramid Lake Paiute Tribe v. Ricci*, 126 Nev. 521, 525, 245 P.3d 1145, 1148 (2010) (“[w]e
18 review purely legal questions without deference to the State Engineer’s ruling.”). Accordingly,
19 LINCOLN/VIDLER’s Opening Brief highlights the errors made in statutory authority and
20 construction by the State Engineer in Order 1309.

21 The Court’s review of the Order 1309 is “in the nature of an appeal” and limited to the record
22 before the State Engineer. *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979). On appeal, a
23 reviewing court must “determine whether the evidence upon which the engineer based his decision
24 supports the order.” *State Engineer v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991) (citing
25 *State Engineer v. Curtis Park*, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985)). The Court determines
26 only whether the State Engineer’s decision is supported by substantial evidence in the record. *Revert*,
27 95 Nev. at 786, 603 P.2d at 264. Substantial evidence is “that which a reasonable mind might accept
28 as adequate to support a conclusion.” *Bacher v. State Engineer*, 122 Nev. 1110, 1121, 146 P.3d 793,

1 800 (2006) (a reasonable person would expect quantification of water rights needed and no evidence
2 of such quantification or calculations by the State Engineer is included in the record). The Court may
3 not substitute its judgment for that of the State Engineer, “pass upon the credibility of the witness or
4 reweigh the evidence.” *Id.*

5 In *Revert v. Ray*, 95 Nev. 782, 787, 603 P.2d 262, 264–65 (1979), the Nevada Supreme Court
6 noted:

7 “The applicable standard of review of the decisions of the State Engineer, limited to an
8 inquiry as to substantial evidence, **presupposes the fullness and fairness of the**
9 **administrative proceedings: all interested parties must have had a ‘full opportunity**
10 **to be heard,’** See NRS 533.450(2); **the State Engineer must clearly resolve all the**
11 **crucial issues presented,** See *Nolan v. State Dep’t. of Commerce*, 86 Nev. 428, 470 P.2d
12 124 (1970) (on rehearing); **the decisionmaker must prepare findings in sufficient detail**
13 **to permit judicial review,** *Id.*; *Wright v. State Insurance Commissioner*, 449 P.2d 419
14 (Or.1969); See also NRS 233B.125. **When these procedures, grounded in basic notions**
15 **of fairness and due process, are not followed, and the resulting administrative**
16 **decision is arbitrary, oppressive, or accompanied by a manifest abuse of discretion,**
17 **this court will not hesitate to intervene.** *State ex rel. Johns v. Gragson*, 89 Nev. 478, 515
18 P.2d 65 (1973).” (Emphasis added).

19 In addition to the errors of law made by the State Engineer, the State Engineer’s determinations in
20 Order 1309 are not supported by substantial evidence, did not resolve all crucial issues presented nor
21 did the State Engineer prepare findings in sufficient detail to permit judicial review. For all these
22 reasons, this Court should not hesitate to intervene and Order 1309 as it relates to Kane Springs must
23 be vacated by the Court.

24 **VI.**
25 **ARGUMENT**

26 **A. THE STATE ENGINEER HAS NO STATUTORY AUTHORITY TO CREATE**
27 **A SUPER BASIN TO MANAGE INDIVIDUAL BASINS COLLECTIVELY**
28 **AND MODIFY THE PRIORITY OF VESTED WATER RIGHTS.**

The powers of the State Engineer, like other state administrative agencies, are limited to those
set forth in the law. See *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. Pahrum Fair Water, LLC*, 481 P.3d 853, 856, 137 Nev. Adv. Op. 2 (2021)

1 (The State Engineer’s powers thereunder are limited to “only those ... which the legislature expressly
2 or implicitly delegates.”); *Andrews v. Nevada State Board of Cosmetology*, 86 Nev. 207, 208, 467 P.2d
3 96, 97 (1970) (“Official powers of an administrative agency cannot be assumed by the agency, nor
4 can they be created by the courts in the exercise of their judicial function. The grant of authority to an
5 agency must be clear.”) (*internal citation omitted*).

6 The State Engineer has no jurisdiction or powers over issues not within his statutory authority.
7 See NRS 532.110 (“[t]he State Engineer shall perform such duties as are or may be prescribed by
8 law”). The Nevada Legislature has enacted a comprehensive statutory scheme outlined in NRS
9 Chapters 532, 533 and 534 that regulates the procedures by which water rights may be acquired,
10 changed, or lost. See *Wilson*, 481 P.3d at 859, 137 Nev. Adv. Op. at *3 (citing *Mineral Cty. v. Lyon*
11 *Cty.*, 473 P.3d 418, 426, 136 Nev. Adv. Op. 58 (2020)).

12 The State Engineer cites NRS 532.120, NRS 533.024(1), NRS 533.024(1)(e), NRS 534.020,
13 NRS 534.030, NRS 534.110 and NRS 534.110(6) and NRS 534.120 as authority and necessity for
14 Order 1309. ROA at 43-44. There is nothing contained in those statutory provisions – either expressly
15 or implicitly – that authorizes the State Engineer to manage multiple individual basins collectively as
16 one administrative unit and reprioritize the seniority of vested rights. The comprehensive statutory
17 scheme enacted by the Nevada Legislature allows the State Engineer to manage and take action in *a*
18 groundwater basin or any portion thereof, as deemed essential for the welfare of the area involved. In
19 NRS Chapter 534, the term “basin” is used sixty-nine (69) times. See NRS 534.025, NRS 534.030,
20 NRS 534.035, NRS 534.037, NRS 534.040, NRS 534.050, NRS 534.070, NRS 534.090, NRS
21 534.110, NRS 534.120, NRS 534.180, NRS 534.185, NRS 534.250, NRS 534.260, NRS 534.350. In
22 NRS Chapter 534, the term “basins” is used five (5) times. See NRS 534.030(5), NRS 534.050, NRS
23 534.100; NRS 534.350. None of the references to “basins” authorizes administration and management
24 of a multi-basin unit or super-basin.

25 For example, NRS 534.110(6) cited in Order 1309 as authority states the State Engineer shall
26 conduct investigations “in any *basin* or portion thereof” NRS 534.120 cited in Order 1309 as
27 authority states “[w]ithin an area that has been designated by the State Engineer, as provided for in
28 this chapter, where, in the judgment of the State Engineer, the groundwater *basin* is being depleted . .

1 . .” Both statutes use the word “basin” to describe the powers and authority of the State Engineer.
2 The same is true for the powers and authorities granted to the State Engineer in the rest of the statutory
3 scheme set up by the Legislature for basin administration and management: NRS 534.030 (“in any
4 particular basin or portion therein, the State Engineer shall”); NRS 534.035 (“In each area
5 designated as a groundwater basin by the State Engineer pursuant to the provisions of NRS 534.030,”);
6 NRS 534.037 (“In a basin that has been designated as a critical management area by the State Engineer
7 pursuant to subsection 7 of NRS 534.110,”); NRS 534.040 (“Upon the initiation of the administration
8 of this chapter in any particular basin, and where the investigations of the State Engineer have shown
9 the necessity for the supervision over the waters of that basin,”); NRS 534.050 (“every person desiring
10 to sink or bore a well in any basin or portion therein in the State designated by the State Engineer, as
11 provided for in this chapter,”); NRS 534.110(7) (“(a) May designate as a critical management area any
12 basin in which withdrawals of groundwater consistently exceed the perennial yield of the basin. (b)
13 Shall designate as a critical management area any basin in which withdrawals of groundwater
14 consistently exceed the perennial yield of the basin upon receipt of a petition for such a designation
15 which is signed by a majority of the holders of certificates or permits to appropriate water in the basin
16 that are on file in the Office of the State Engineer.”); and NRS 534.110(8) (“In any basin or portion
17 thereof in the State designated by the State Engineer, the State Engineer may restrict drilling of wells
18 in any portion thereof if the State Engineer determines that additional wells would cause an undue
19 interference with existing wells.”). NRS 533.007 provides an “‘Interbasin transfer of groundwater’
20 means a transfer of groundwater for which the proposed point of diversion is in a different basin than
21 the proposed place of beneficial use.” The Legislature has determined certain factors must be met for
22 approval of an interbasin transfer of groundwater as provided in NRS 533.370(3) and NRS 533.364.
23 All the factors in NRS 533.370(3) and NRS 533.364 are based upon analysis of the basin into which
24 the water is to be imported or from which the water is to be exported. It is a basin-to-basin analysis
25 required by law to be performed before water can be transferred between basins—specifically
26 recognizing the basin-by-basin management scheme adopted by the Legislature.

27 All administration and management powers granted to the State Engineer in NRS Chapter 534
28 are based upon basin-by-basin management and not a multi-basin or a super basin joint administrative

1 unit. This is critical because of the prior appropriation doctrine and the priority of underground water
2 rights as set by NRS 534.080(3): “. . . the date of priority of all appropriations of water from an
3 underground source mentioned in this section is the date when application is made in proper form and
4 filed in the Office of the State Engineer pursuant to the provisions of chapter 533 of NRS.” The point
5 of diversion for each application filed with the State Engineer is located in a hydrographic basin and
6 the application has priority in that basin based upon the date it was filed. As set forth in the State
7 Engineer’s Exhibits 22-37, he administers and manages each basin as a discrete hydrologic unit. ROA
8 at 949-1069. The same holds true for annual pumping inventories – the records are kept and
9 maintained by the State Engineer basin by basin. *See* State Engineer Exhibits 38-88. ROA at 1070-
10 1499 (not reproduced in Petitioners’ Record on Appeal).

11 The Water Words Dictionary on the State Engineer’s website defines “basins” as follows:

12 Basins [Nevada] — The U.S. Geological Survey (USGS) and the Nevada Division of
13 Water Resources, Department of Conservation and Natural Resources, have divided the
14 state into discrete hydrologic units for water planning and management purposes. These
15 have been identified as 232 Hydrographic Areas (256 areas and sub-areas, combined)
16 within 14 major Hydrographic Regions or Basins.

17 *Water Words Dictionary by Letter, B* at 25-26.

18 As set forth in the definition above, there are 232 discrete hydrologic units for water planning
19 and management purposes. One of those discrete hydrologic units is Kane Springs (206). The caption
20 of Order 1309 itself sets forth the seven (7) specific discrete hydrologic units recognized by the USGS
21 and the State Engineer. Even the State Engineer’s records introduced as evidence in the Order 1309
22 proceedings recognize the perennial yield of each basin, the water rights permitted and certificated in
23 each basin by priority date along with the current owners of the water right and orders designating
24 and/or limiting use of water in a specific basin. ROA at 949-1069 (State Engineer’s Exhibits 22-37).

25 Neither the statement of policy nor the legislative history of NRS 533.024(1)(e) provides
26 support for the State Engineer’s action in Order 1309. The policy of the state is for conjunctive
27 management⁸ of water sources; there is nothing in the conjunctive management policy that authorizes
28 the creation of super basins or changing water right priorities nor any indication that the conjunctive

⁸ The State Engineer’s *Water Words Dictionary by Letter, C* at 61 defines “conjunctive management” as: “The integrated management and use of two or more water resources, such as a (groundwater) aquifer and a surface body water.”

1 management of water sources supersedes NRS 534.110 and NRS 534.120 that provide for basin-by-
2 basin groundwater administration and management in Nevada.

3 Indeed, legislative statements of policy or purpose cannot serve as the basis for government
4 action because they do not provide the adequate guidelines to form the basis of agency action. *See,*
5 *e.g.*, 1 American Land Planning Law § 32.6 (2020 update) (“a broad statement of legislative purpose
6 does not provide adequate guidelines . . .”). “Although discretionary power may be delegated by the
7 Legislature to a permitting authority, it is essential that reasonable guidelines be provided.” 51
8 Am.Jur.2d, Licenses & Permits § 51 (2021 Supp.).

9 In its statement of policy, the Nevada Legislature has not provided adequate or reasonable
10 guidelines for either conjunctive management of water resources or the creation of super-basins. *See*
11 NRS 533.024(1)(e). There are no guidelines or standards to govern the State Engineer and nothing to
12 notify owners of previously appropriated water rights. Rather, the comprehensive statutory scheme
13 identifies guidelines, protocols, and standards for appropriating and managing water resources basin-
14 by-basin based on prior appropriation.

15 Prior appropriation has been the basis of Nevada’s water law since statehood. This doctrine
16 applies a “first in time, first in right” principle to all appropriations of water. *Lobdell v. Simpson*, 2
17 Nev. 274, 277 (1866). Every vested or permitted water right is assigned a priority date and the priority
18 date is an essential component of the water right that cannot be stripped away without damaging the
19 right itself. *Wilson v. Happy Creek, Inc.*, 135 Nev. 301, 312, 448 P.3d 1106, 1115 (2019). “[T]o
20 deprive a person of his priority is to deprive him of a most valuable property right.” *Whitmore v.*
21 *Murray City*, 154 P.2d 748, 751 (Utah 1944). Courts have viewed “a priority in a water right [as]
22 property in itself.” *Colo. Water Conservation Bd. v. City of Central*, 125 P.3d 424, 434 (Colo. 2005),
23 *Nichols v. McIntosh*, 34 P. 278, 280 (Colo. 1893). The Nevada Supreme Court has stated that “a loss
24 of priority that renders rights useless ‘certainly affects the rights’ value’ and ‘can amount to a de facto
25 loss of rights.’” *Andersen Family Assocs.*, 124 Nev. at 190-91, 179 P.3d at 1206; *see also Happy*
26 *Creek, Inc.*, 135 Nev. at 312, 448 P.3d at 1115. *Eureka Cty. v. Seventh Jud. Dist. Ct. in & for Cty. of*
27 *Eureka*, 134 Nev. 275, 281, 417 P.3d 1121, 1126 (2018) (recognizing that existing water rights are
28 vested property rights subject to constitutional due process protections).

1 The Nevada Supreme Court determined the state’s water statutes recognize the importance of
2 finality in water rights and therefore do not permit reallocation of adjudicated water rights. *Min. Cty.*
3 *v. Lyon Cty.*, 136 Nev. Adv. Op. 58, 473 P.3d 418, 429 (2020). The Nevada Supreme Court stated:

4 **The statutory water scheme in Nevada therefore expressly prohibits reallocating**
5 **adjudicated water rights that have not been abandoned, forfeited, or otherwise lost**
6 **pursuant to an express statutory provision.**

7 **We note that such recognition of finality is vital in arid states like Nevada.** In *Arizona*
8 *v. California*, the United States Supreme Court recognized that “[c]ertainty of rights is
9 particularly important with respect to water rights in the Western United States,” and “[t]he
10 doctrine of prior appropriation . . . is itself largely a product of the compelling need for
11 certainty in the holding and use of water rights.” 460 U.S. 605, 620, 103 S.Ct. 1382, 75
12 L.Ed.2d 318 (1983); see *United States v. Alpine Land & Reservoir, Co.*, 984 F.2d 1047,
13 1050 (9th Cir. 1993) (“Participants in water adjudications are entitled to rely on the finality
14 of decrees as much as, if not more than, parties to other types of civil judgments.”).

15 **Municipal, social, and economic institutions rely on the finality of water rights for**
16 **long-term planning and capital investments.** Likewise, agricultural and mining
17 industries rely on the finality of water for capital and output, which derivatively impacts
18 other businesses and influences the prosperity of the state. **To permit reallocation would**
19 **create uncertainties for future** development in Nevada and undermine the public interest
20 in finality and thus also the management of these resources consistent with the public trust
21 doctrine. (Emphasis added.)

22 *Id.*

23 LINCOLN/VIDLER’s water rights in the Kane Springs basin had senior status as reflected in
24 State Engineer’s Exhibit 23. ROA at 992-994. The State Engineer’s own Exhibit 31 reflects that the
25 perennial yield of Kane Springs is 1,000 acre feet as determined in Ruling 5712 and Ruling 5712
26 recognized in granting Petitioners’ applications that no water had been appropriated in Kane Springs.
27 ROA at 716, 1063. LINCOLN/VIDLER’s water rights had a priority of February 14, 2005. ROA at
28 699-700. On the other hand, State Engineer Exhibits 224 and 227 show underground water rights by
priority based upon the LWRFS super basin created by the State Engineer. ROA at 8215-8227, 8511-
8513. Pursuant to Order 1309, LINCOLN/VIDLER’s water rights are reprioritized from the most
senior rights in Kane Springs to close to the last water rights in priority in the LWRFS with their
February 14, 2005 priority date. ROA at 8217, 8513.

Because the State Engineer has no authority to administer and manage groundwater basins
collectively in Nevada and reprioritize vested water rights, Order 1309 must be vacated and Kane
Springs must continue to be administered and managed by the State Engineer in accordance with the
basin specific statutory scheme established and required by the Legislature.

///

1 **THE STATE ENGINEER'S DETERMINATION TO INCLUDE KANE**
2 **SPRINGS IN THE SUPER BASIN VIOLATED LINCOLN/VIDLER'S DUE**
3 **PROCESS RIGHTS, CONSTITUTES UNLAWFUL AD HOC RULEMAKING,**
4 **AND UNAUTHORIZED DELEGATION OF THE POWER TO LEGISLATE.**

5 In Order 1309, without notice or an opportunity to be heard, the State Engineer created six
6 criteria to govern inclusion into the LWRFS. ROA at 48-49. Without notice or an opportunity to be
7 heard the State Engineer admitted he considered the evidence and testimony presented in the public
8 hearing “on the basis of a common set of criteria that are consistent with the original characteristics
9 considered critical in demonstrating a close hydrologic connection requiring joint management in
10 Rulings 6254-6261” issued on January 29, 2014. See ROA at 48. The State Engineer incorrectly
11 stated each of these characteristics were previously identified and examined in the hydrological studies
12 and subsequent hearing that followed the completion of the Order 1169 aquifer test and were the
13 foundational basis for the State Engineer’s determinations in Rulings 6254-6261. ROA at 47. The
14 new six factor criteria created by the State Engineer in Order 1309 are:

15 1) Water level observations whose spatial distribution indicates a relatively uniform or
16 flat potentiometric surface and consistent with a close hydrologic connection.

17 2) Water level hydrographs that, in well-to-well comparisons, demonstrate a similar
18 temporal pattern, irrespective of whether the pattern is caused by climate, pumping, or other dynamic
19 is consistent with a close hydrologic connection.

20 3) Water level hydrographs that demonstrate an observable increase in drawdown that
21 corresponds to an increase in pumping and an observable decrease in drawdown, or a recovery, that
22 corresponds to a decrease in pumping, are consistent with a direct hydraulic connection and close
23 hydrologic connection to the pumping location(s).

24 4) Water level observations that demonstrate a relatively steep hydraulic gradient are
25 consistent with a poor hydraulic connection and a potential boundary.

26 5) Geological structures that have caused a juxtaposition of the carbonate-rock aquifer
27 with low permeability bedrock are consistent with a boundary.

28 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

1 the extent of that connection, a boundary should be established such that it extends out to the nearest
2 mapped feature that juxtaposes the carbonate-rock aquifer with low-permeability bedrock, or in the
3 absence of that, to the basin boundary.

4 ROA 48-49.

5 The State Engineer developed and implemented these six criteria without notice in violation
6 of Petitioners’ due process rights and constituted unlawful *ad hoc* rulemaking. Further because the
7 complete statutory scheme does not include—or authorize the creation of—the six criteria, their
8 creation amounts to an unlawful usurpation of legislative power prohibited by the Nevada
9 Constitution. Finally, even if the six criteria were appropriate and lawful, the State Engineer failed to
10 properly analyze the criteria or apply the available facts and information in his analysis.

11 **1. Determining the six criteria used to include basins in the super basin after the**
12 **introduction of evidence and after the hearing violates LINCOLN/VIDLER’s due**
13 **process rights and constitutes unlawful *ad hoc* rulemaking.**

14 In Order 1309, the State Engineer admitted he developed the six “new” criteria from Rulings
15 6254-6261 based upon the Order 1169 aquifer test as the standard of general applicability for inclusion
16 into the geographic boundary of the LWRFS. ROA at 48-49. The State Engineer should have
17 articulated that standard in Interim Order 1303 if that was the standard he was going to apply to the
18 reports submitted by the parties in response to Order 1303 and prior to the public administrative
19 hearing. LINCOLN/VIDLER were not parties to Rulings 6255-6261 based upon the Order 1169
20 aquifer test. LINCOLN/VIDLER note that criteria 4, 5, and 6 were not contained in Rulings 6254-
21 6261.⁹ Criteria 4 would not apply to Rulings 6254-6261 and was specifically relied upon by the State
22 Engineer in Ruling 5712 to exclude Kane Springs from the LWRFS area. It appears criteria 5 and 6
23 were created after the submission of evidence and after the hearing to include Kane Springs into the
24 LWRFS. The State Engineer’s Order 1309 violates due process because it adopted a standard to be
25 applied to LINCOLN/VIDLER’s water rights in Kane Springs after the presentation of evidence and
26 after the hearing. LINCOLN/VIDLER never had an opportunity to address the State Engineer’s six
27

28 _____
⁹ It is not clear that criteria 2 was explicitly discussed in Rulings 6254-6261.

1 criteria and show why Kane Springs should not be included in the LWRFS and/or comply with the
2 criteria requirement such as new criteria 6.

3 Due process requires that all interested parties must have notice and a full opportunity to be
4 heard. *See* NRS 533.450(2); *Revert v. Ray*, 95 Nev. 782, 787, 603 P.2d 262, 264–65 (1979). Vested
5 water rights are property rights and notice of the criteria that will be used to make a decision must be
6 provided to water right holders prior to the hearing so they have a meaningful opportunity to address
7 the criteria used by the State Engineer to make his decision. The United States Supreme Court has
8 noted: “A party is entitled, of course, to know the issues on which decision will turn and to be apprised
9 of the factual material on which the agency relies for decision so that he may rebut it.” *Bowman*
10 *Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 288 n. 4 (1974) cited with approval in
11 *Eureka Cnty. v. State Engineer*, 131 Nev. 846, 855, 359 P.3d 1114, 1120 (2015). The Nevada Supreme
12 Court quoted *Bowman Transp., Inc.*: “[T]he Due Process Clause forbids an agency to use evidence in
13 a way that forecloses an opportunity to offer a contrary presentation.” *Id.*

14 In *Eureka Cty. v. Seventh Jud. Dist. Ct. in & for Cty. of Eureka*, 134 Nev. 275, 280, 417 P.3d
15 1121, 1125 (2018), the Nevada Supreme Court recognized that notice must be given at an appropriate
16 stage in the proceedings to give parties meaningful input in the adjudication of their rights citing
17 *Hamdi v. Rumsfeld*, 542 U.S. 507, 533, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) (“It is equally
18 fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful
19 time and in a meaningful manner.” (quoting *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (other quotation
20 marks and citations omitted))).

21 The State Engineer only articulated his LWRFS criteria in Order 1309 after the presentation of
22 evidence and the hearing. This violated LINCOLN/VIDLER’s due process rights because they were
23 given no notice of or any opportunity to address the State Engineer’s criteria.

24 Further, the State Engineer’s adoption of the six factor criteria constitutes improper *ad hoc*
25 rulemaking. Because the State Engineer articulated a rule of general applicability in Order 1309, and
26 there was no notice and an opportunity to comment on the proposed rule, the State Engineer’s Order
27 1309 adopting the criteria is void.
28

1 For example, in one case the Labor Commissioner determined a job classification existed. *S.*
2 *Nev. Operating Eng'rs Contract Compliance Tr. v. Johnson*, 121 Nev. 523, 530, 119 P.3d 720, 726
3 (2005). This determination was made after evidence had already been presented and prior to the
4 existence of that job classification. *Id.* The court determined this was *ad hoc* rule making and refused
5 to uphold this conduct. *Id.* at 531, 119 P.3d at 726.

6 Similarly, the Nevada Supreme Court has also held that, because an administrative agency
7 order was prospective and general in nature, the intent to adopt a new rate design should properly be
8 done by the rule making process rather than by a purely judicial method of evolving rules on a case-
9 by-case basis. *Pub. Serv. Comm'n of Nevada v. Sw. Gas Corp.*, 99 Nev. 268, 273, 662 P.2d 624, 627
10 (1983). Therefore, the administrative agency order was declared void by the court and of no effect.
11 *Id.*

12 LINCOLN/VIDLER's due process rights were violated by the State Engineer by his
13 announcement of the new six criteria used to judge whether a basin would be included in the LWRFS
14 after the evidence was submitted and the hearing held in the Order 1309 proceedings. Order 1309
15 should be declared void and of no effect by the Court.

16 Finally, there was no determination made by the State Engineer that the six factor criteria he
17 adopted for joint administration and management protects the flows of the Muddy River, protects the
18 Moapa dace or keeps the flows of the Muddy River at 3.2 cfs, the trigger the State Engineer determined
19 was appropriate to protect the Moapa dace. In fact, the State Engineer specifically determined that
20 more hydrologic study would be necessary to determine the degree to which water use in Kane Springs
21 would impact water resources in the LWRFS. ROA at 55.

22 **2. Creation of the six criteria amounts to unlawful usurpation of legislative power**
23 **and violates the Nevada Constitution's separation of powers.**

24 The Nevada Legislature may not delegate its powers to legislate. Nev. Const. art. 3 § 1.
25 Although the legislature may not delegate this authority, it may delegate the power to determine the
26 facts or state of things upon which the law makes its own operations depend." *Sheriff v. Luqman*, 101
27 Nev. 149, 153, 697 P.2d 107, 110 (1985). It has long been the law that the Legislature must "clearly
28 indicate the legal principles which are to control" the executive agency, thereby leaving nothing but

1 “to carry out the purposes of the act in the manner prescribed” *Ex rel. Ginocchio v. Shaughnessy*,
2 47 Nev. 129, 135 (1923).

3 “Thus, the legislature can make the application or operation of a statute complete within itself
4 dependent upon the existence of certain facts or conditions, the ascertainment of which is left to the
5 administrative agency. . . . In doing so, the legislature vests the agency with mere fact finding authority
6 and not the authority to legislate.” *Sheriff*, 101 Nev. at 153, 697 P.2d at 110. To be complete, a
7 legislative enactment must specify what standards the agency is to employ and “be sufficient to guide
8 the agency with respect to the purpose of the law and power authorized. Sufficient legislative
9 standards are required in order to assure that the agency will neither act capriciously nor arbitrarily.”
10 *Id.* at 154, 697 P.2d at 110.

11 Here, the State Engineer relies upon a legislative policy statement to authorize the creation of
12 a super-basin, reallocate permitted water resources, and jointly manage seven, previously independent
13 basins. ROA at 43 (relying on NRS 533.024(1)(e)). But the comprehensive statutory scheme dictates
14 regulation based on prior appropriation in individual basins. For example, the Legislature has not
15 adopted any legislation for the following: (1) Standards or guides governing reprioritizing water
16 resources in combined basins; (2) Criteria for combining basins for joint administration; (3) Guidance
17 on existing procedures for allocating water rights in individual basins; and (4) Authorizations or
18 statutory changes for movement of the point of diversion within a newly-formed super basin. Indeed,
19 even the illegitimate criteria used by the State Engineer fails to address any of the significant issues
20 above. And no standards have been created (or at least no guidelines have been disclosed) for the
21 management of any super basin including the LWRFS.

22 The obligation to create standards for creating and managing super basins is a legislative
23 function that the Legislature must undertake in order to guide the State Engineer with the application
24 of facts in the manner prescribed to give effect to the legislation. There is no question that this did not
25 occur here. In addition to constituting impermissible *ad hoc* rule-making, the State Engineer’s creation
26 of the six criteria amounts to usurpation of the legislative function.

27 ///

28 ///

1 **3. The State Engineer failed to analyze the six criteria he developed post hearing in**
2 **determining Kane Springs should be included in the “super basin.”**

3 Despite articulating the six criteria after the fact, the State Engineer failed to apply the six
4 criteria to determine the Kane Springs basin had a close hydrologic connection to the LWRFS
5 requiring joint management. Order 1309 addresses Kane Springs in one paragraph. ROA at 52-54.
6 Nowhere in that paragraph does the State Engineer address all six criteria or determine whether all six
7 criteria demonstrate a close hydrologic connection requiring joint management. In fact, the Kane
8 Springs data for criteria 1 and 4¹⁰ regarding water level observations support no close hydrologic
9 connection between Kane Springs and the other basins in the LWRFS. The State Engineer
10 acknowledges this with regard to criteria 4 by noting that water level observations in Kane Springs are
11 60 feet higher (6 stories higher) than the other basins consistent with a zone of lower permeability,
12 i.e., a potential boundary. ROA at 53. The State Engineer did not analyze criteria 1 in his Kane
13 Springs analysis. Indeed, this water level evidence acknowledged by the State Engineer shows, not a
14 relatively uniform and flat potentiometric surface, but a marked difference in water level elevations
15 that is consistent with a low permeable structure that impedes water flow between Kane Springs and
16 Coyote Springs; hardly the close hydrologic connection required by criteria 1.

17 The State Engineer did give recognition to criteria 2¹¹, but noted that analysis of the
18 hydrographic response pattern for Kane Springs was “muted, lagged, obscured by climate response,
19 or compromised by low-resolution data” compared to the other LWRFS basins. ROA at 53. The State
20 Engineer stated he recognized these differences but found the testimony supporting a similarity in
21 hydrographic patterns and response “persuasive.” ROA at 53. Despite this finding, the State Engineer
22 did not explain why he found the testimony persuasive and cited to 30 pages of testimony and 5
23 presentation slides but does not say what was in that testimony or slides that was persuasive. ROA at
24 53, n. 286 found at ROA at 53170-53178 (Tr. 524-55) and 52310-52314 (NPS presentation slides 23-
25

26 ¹⁰ Criteria 1 and 4 are: 1) Water level observations whose spatial distribution indicates a relatively uniform or flat
27 potentiometric surface and consistent with a close hydrologic connection; and 4) Water level observations that demonstrate
28 a relatively steep hydraulic gradient are consistent with a poor hydraulic connection and a potential boundary.

¹¹ Criteria 2 is: 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.

1 27). Most of the 30 pages of testimony and 5 presentation slides do not relate to hydrographic patterns
2 and response and fail to support the State Engineer’s position. The decisionmaker must prepare
3 findings in sufficient detail to permit judicial review. *Revert v. Ray*, 95 Nev. 782, 787, 603 P.2d 262,
4 264–65 (1979). The State Engineer’s findings contain no details of the evidence he found persuasive
5 to permit judicial review. Instead, Petitioners and this Court are left to guess what the State Engineer
6 found “persuasive” or even upon which evidence he actually relied, if any.

7 The State Engineer failed to analyze criteria 3¹² other than to say a response to Order 1169
8 pumping was “attenuated.” “Attenuated” means “having been reduced in force, effect, or value.” The
9 State Engineer failed to cite any evidence of record or any quantification of a Kane Springs response
10 (observable increase or decrease) as required by criteria 3 to Order 1169 pumping to support his
11 statement or his determination of the general hydrographic pattern observed in southern Kane Springs
12 reflects a response to Order 1169 pumping consistent with a close hydraulic connection.
13 LINCOLN/VIDLER maintain that the State Engineer cited no evidence or quantity to support his
14 determination because there is no such reliable evidence in the record in the Order 1309 proceedings.
15 Without this evidence or quantification, there is not substantial evidence supporting the State
16 Engineer’s determination. See *Bacher v. State Engineer*, 122 Nev. 1110, 1121, 146 P.3d 793, 800
17 (2006) (reasonable person would expect quantification of water rights needed and no evidence of such
18 quantification or calculations by the State Engineer in the record).

19 The State Engineer also failed to analyze criteria 5.¹³ ROA at 52-54. LINCOLN/VIDLER’s
20 new geophysical data submitted as evidence in the hearing before the State Engineer shows a fault
21 consistent with a barrier under criteria 5. ROA at 36220-36229, 36255-36263. This evidence was
22 ignored by the State Engineer in the Kane Springs section of Order 1309. Further, the Kane Springs
23 Wash Fault zone is the nearest mapped feature to Petitioners’ wells that juxtaposes the carbonate-rock
24
25
26

27 ¹² Criteria 3 is 3) Water level hydrographs that demonstrate an observable increase in drawdown that corresponds to an
28 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).

¹³ Criteria 5 is 5) Geological structures that have caused a juxtaposition of the carbonate-rock aquifer with low permeability
bedrock are consistent with a boundary.

1 aquifer with low-permeability bedrock consistent with a boundary and was not discussed by the State
2 Engineer. ROA at 73, 36258.¹⁴

3 Newly created criteria 6 requires a mapped feature or to the basin boundary to establish the
4 boundary for inclusion in the LWRFS when limited, poor quality or low resolution water level data
5 obfuscate a determination of the extent of the “close hydraulic connection.” ROA at 49. The State
6 Engineer admits the hydrographic pattern data he had in the record for Kane Springs was “muted,
7 lagged, obscured by climate response, or compromised by low-resolution data” and “attenuated” and
8 thus cannot be used to determine the extent of the “close hydraulic connection.” ROA at 49, 53.
9 Accordingly, the State Engineer created an additional new rule—criteria 6—requiring a mapped
10 feature. LINCOLN/VIDLER presented geophysical data as the best available science showing the
11 “geological structures that have caused a juxtaposition of the carbonate-rock aquifer with low
12 permeability bedrock” consistent with a boundary. But because the State Engineer did not want to
13 accept LINCOLN/VIDLER’S geophysical data confirming the State Engineer’s determination in
14 Ruling 5712 that the water level data in Kane Springs showed the probability of a low-permeability
15 structure or change in lithology between Kane Springs and the southern part of Coyote Spring Valley,
16 the State Engineer ignored LINCOLN/VIDLER’s geophysical data, did not analyze his new criteria 5
17 in the Kane Springs portion of Order 1309 and created new criteria 6. This concrete evidence (ignored
18 in Order 1309) demonstrates a poor hydraulic connection and a boundary between Kane Springs and
19 the remainder of the LWRFS as stated in factors 4 and 5.

20 Because he did not articulate his new criteria prior to the submission and evidence and before
21 the hearing, the State Engineer knew there was no mapping in the record that complied with his newly
22 created criteria 6 and thus, based upon his new criteria 6, Kane Springs would have to be included in
23 the LWRFS. LINCOLN/VIDLER should have been given the opportunity to provide mapping to the
24 State Engineer at the hearing to comply with a standard that had been articulated before the hearing.
25 Because the State Engineer violated Petitioners’ due process rights and then failed to address the
26 evidence presented by LINCOLN/VIDLER which supported excluding Kane Springs from the
27 LWRFS under his unlawful criteria, Order 1309 should be vacated, and Kane Springs should continue
28

¹⁴ The State Engineer recognized this mapped feature in Interim Order 1303. ROA at 73.

ALLISON MacKENZIE, LTD.
402 North Division Street, P.O. Box 646, Carson City, NV 89702
Telephone: (775) 687-0202 Fax: (775) 882-7918
E-Mail Address: law@allisonmackenzie.com

1 to be administered and managed as a separate basin under the statutory scheme adopted by the
2 Legislature.

3 4. **The evidence relied upon—for the few factors the State Engineer did analyze—**
4 **does not support the inclusion of Kane Springs in the super basin, nor is the State**
5 **Engineer’s determination supported by substantial evidence.**

6 The evidence relied upon by the State Engineer does not support his determination. In Order
7 1309, the State Engineer cites to the expert testimony of the NPS supporting a similarity in
8 hydrographic response pattern exhibited in wells located in the southern edge of Kane Springs Valley.
9 ROA at 53, n. 286 citing to NPS testimony and presentation slides which are found at ROA at 53170-
10 53178 (Tr. 524-55) and 52310-52314 (NPS presentation slides 23-27). First, as set forth above, the
11 State Engineer cited to 30 pages of testimony and 5 slides in support of his determination. However,
12 he failed to cite to the specific information in the 30 pages of testimony and 5 slides that was
13 “persuasive” to support a similarity in hydrographic patterns. Most of the witness’ testimony is not
14 discussing hydrographs or hydrographic patterns but rather is unintelligible. It is not clear if the
15 witness is discussing the slides, what he may be pointing to on the slides or frankly, what he is
16 discussing. Thus, the State Engineer’s Order 1309 does not provide findings in sufficient detail to
17 permit judicial review, that is, if it is supported by substantial evidence and the State Engineer’s
18 reasoning for his conclusion as required by *Revert v. Ray*, 95 Nev. 782, 787, 603 P.2d 262, 264–65
19 (1979) and *Eureka Cnty v. State Eng’r*, 131 Nev. 846, 856, 359 P.3d 1114, 1120–21 (2015). The
20 Nevada Supreme Court stated:

21 Furthermore, the State Engineer’s decision to grant an application must be sufficiently
22 explained and supported to allow for judicial review. *Id.*, at 787, 603 P.2d at 265; *see also*
23 *Port of Jacksonville Mar. Ad Hoc Comm., Inc. v. U.S. Coast Guard*, 788 F.2d 705, 708
(11th Cir.1986) (even under deferential substantial evidence review, courts must not
merely “rubber stamp” agency action: they must determine that the “agency articulated a
rational connection between the facts presented” and the decision) (internal quotation
omitted).

24 *Eureka Cnty.*, 131 Nev. at 856, 359 P.3d at 1120-21.

25 Significantly, the NPS witness failed to consider there was a one (1) foot measurement error
26 in the SNWA data (as explained below) that he (and the State Engineer) relied upon to support even
27 the muted, lagged, and attenuated response in well data. ROA at 53360 [9-27-19 Tr. 978:2-10 (Burns
28 Testimony)]. This error was pointed out by LINCOLN/VIDLER after the NPS witness testified. This

1 is extremely significant because the NPS witness (and the State Engineer) relied on a purported six
2 inch to one foot decline in water levels in Kane Springs basin during the Order 1169 pump test. ROA
3 at 53170 [09-25-19 Tr. 524:8-17 (Waddell Testimony)] ROA at 53359-53360 [09-27-19 Tr. 974:18-
4 978:10 (Burns Testimony)]. But where the measurement was off by one foot, a six-inch or one foot
5 difference in decline is within the error and thus erased and cannot be relied upon to demonstrate a
6 “close hydraulic connection.” ROA at 53173 [9-25-19 R. 535:20-24 – 536:1-6 (Waddell Testimony)].

7 There was much testimony and reliance on water levels from monitor well CSVM-4¹⁵ to show
8 a similar hydrographic pattern between that well (and Kane Springs Valley) and wells in the LWRFS.
9 ROA at 53170 [09-25-19 Tr. 524:8-24 (Waddell Testimony)]. However, SNWA had previously
10 identified issues with measurements collected from this well as documented in its Order 1169 Report:
11 “CSVM-4 may be showing a slight response with December 2012 water levels approximately 1 ft
12 lower than September 2010 water levels, but the transducer in CSVM-4 had a high failure rate due to
13 the high water temperature in the well, so fluctuations of a foot or less should not be used to infer an
14 absolute response.” ROA at 10141 (first paragraph). SNWA witness Andrew Burns responded to
15 questioning about this:

16 Q. “And has anybody that you’ve heard testify earlier this week indicated in any of
17 their hydrographs that they’ve accounted for this transducer error failure of a foot or
18 so?”

19 A. “Not that I heard.”

20 Q. “All right. And the drawdowns that were – or the impacts, I guess, or the effects that
21 everybody’s been talking about this week with regard to CSVM-4 are in that one-foot
22 range; aren’t they?”

23 A. “Yes.”

24 ROA at 53360 [9-27-19 Tr. 978:2-10 (Burns Testimony)]. Thus, the experts contending there was a
25 6 inch or one foot decline in water levels in CSVM-4 in response to Order 1169 test pumping are
26 incorrect because the data used by these witnesses from CSVM-4 was unreliable. No expert except
27

28 ¹⁵ CSVM-4 is located north of the Kane Springs Fault, approximately 2.5 miles from the southern Kane Springs basin boundary. ROA at 36243. CSVM-4 is approximately 13.4 miles away or more than 70,700 feet (13.4 miles x 5,280 feet/mile) from the Order 1169 test pumping well MX-5. ROA at 36243.

1 LINCOLN/VIDLER’s experts took this error into consideration in commenting on the hydrographic
2 patterns. Thus, a reasonable mind would not accept as adequate this citation to the record to support
3 the State Engineer’s conclusion that there is a close hydraulic connection between northern Coyote
4 Springs and the LWRFS. *See Bacher v. State Engineer*, 122 Nev. 1110, 1121, 146 P.3d 793, 800
5 (2006).

6 The inclusion of Kane Springs in the LWRFS is based upon its purported connectedness with
7 northern Coyote Spring Valley. ROA at 53170 [09-25-19 Tr. at 524:8-9 (Waddell Testimony)]. A
8 careful review of the NPS testimony and slides shows the NPS witness testified the hydrographic
9 pattern between CSVM-4 in northern Coyote Spring Valley was “greatly attenuated” compared to the
10 others in the LWRFS. ROA at 53170 [09-25-19 Tr. at 524:9-11 (Waddell Testimony)]. The NPS
11 witness refused to opine that northern Coyote Spring Valley was “well connected” with the rest of the
12 LWRFS, and testified this area was merely “connected.” ROA at 53170 [09-25-19 Tr. at 524:18-19
13 (Waddell Testimony)]; ROA 53171 [09-25-19 Tr. at 528:2-4 (Waddell Testimony)] (“CSVM-4, the
14 one just southwest of Kane Springs Valley, I say is connected. It is on the eastern side of the structural
15 block.”). The State Engineer’s reliance on this testimony for his conclusion “that while attenuated,
16 the general hydrographic pattern observed in southern Kane Springs reflects a response to Order 1169
17 pumping, consistent with a close hydraulic connection with the LWRFS” misstates the witness’
18 testimony. First, the NPS witness testified as to northern Coyote Spring Valley, not Kane Springs.
19 Second, the NPS witness testified the hydrographic pattern in northern Coyote Spring Valley was
20 “greatly attenuated” not just attenuated, compared to others in the LWRFS. Finally, the NPS
21 specifically declined to opine that northern Coyote Spring Valley was closely or well-connected with
22 the rest of the LWRFS by stating northern Coyote Spring Valley was merely “connected.” Thus, the
23 NPS witness’ testimony cited by the State Engineer to support his conclusion, does not in fact support
24 the State Engineer’s determination to include Kane Springs in the LWRFS and certainly fails to
25 amount to the “substantial evidence” required by law.

26 The State Engineer’s criteria 6 specifically acknowledges that a determination of the extent of
27 the hydraulic connection is not known when there is limited, poor quality or low-resolution water level
28 data because it obfuscates such a determination. ROA at 49. The State Engineer acknowledged and

1 recognized the hydrographic response pattern for wells located in southern Kane Springs is different
2 compared to the wells in the LWRFS, “being muted, lagged, obscured by climate response or
3 compromised by low-resolution data.” ROA at 53. The State Engineer recognized that additional
4 hydrologic study was necessary in Kane Springs “to determine the degree to which water use would
5 impact water resources in the LWRFS.” ROA at 55. Based upon the State Engineer’s own findings
6 and criteria, the extent of any hydraulic connection between Kane Springs and the rest of the LWRFS
7 is not known, nor the degree to which water use in Kane Springs would impact water resources, if any,
8 in the LWRFS. Substantial evidence does not support the State Engineer’s determination to include
9 Kane Springs in the LWRFS because a reasonable mind would not accept these findings as adequate
10 to support that determination.

11 The NPS witness did testify that he liked the CSAMT, the geophysics, that
12 LINCOLN/VIDLER submitted, and the geophysics provided useful information. ROA at 53172-
13 53173 [09-25-19 Tr. at 532: 19-24, 533: 1-8, 536:7-11 (Waddell Testimony)]. The NPS witness
14 agreed with LINCOLN/VIDLER’s interpretation of the geology provided by the geophysics ROA
15 53174 [09-25-19 Tr. at 537:5-8 (Waddell Testimony)] and did not necessarily disagree that there is a
16 fault in the southern Kane Springs area. ROA 53174 [09-25-19 Tr. at 537:24, 538:1 (Waddell
17 Testimony)] (“And I don’t necessarily disagree that there’s a fault in this area.”), ROA 53174 [09-25-
18 19 Tr. at 539:20-21 (Waddell Testimony)] (“So, you know, there’s likely to be faulting in that area.
19 We don’t know specifically where it is.”). The NPS witness testified “these faults are likely to be
20 impediments to flow. So, we’re basically in agreement with CSI that there’s faulting in this area and
21 that those faults may impede flow through Kane Spring Valley into Coyote Spring Valley.” ROA at
22 53174 [09-25-19 Tr. at 540:5-10 (Waddell Testimony)]. The NPS witness agreed the gradients (water
23 level elevations) show the area to the north between CSVN-4 and KMW-1 was less permeable and
24 was less transmissive referencing the State Engineer’s Ruling 5712 as to whether Kane Springs should
25 be included. ROA at 53174-53175 [09-25-19 Tr. at 540:13-15, 17, 19-22, 541:2-20, 542:5-12
26 (Waddell Testimony)]. The NPS witness testified: “So Vidler’s argument is that the lower hydraulic
27 gradients in the northern part of Coyote Spring Valley are indicative of lower transmissivities in the
28 northern part of the valley. And I agree with that one on that. Something has resulted in lower

1 permeability and lower transmissivity in the northern part of the Coyote Spring Valley than what we
2 find in the central and southern part.” ROA at 53175 [09-25-19 Tr. at 544:18-24 (Waddell
3 Testimony)].

4 The State Engineer also concluded there was insufficient information available to define a
5 hydraulic boundary to the carbonate rock aquifer in southern Kane Springs citing to a SNWA general
6 exhibit describing structural controls to flows based upon geology such as volcanic rocks and calderas.
7 ROA at 53, n. 289. This statement by the State Engineer ignores the determination made by his
8 predecessor in Ruling 5712 that the marked difference in head (water levels between Kane Springs
9 and southern Coyote Springs Valley and throughout most of the other basins covered under Order
10 1169) supports the probability of a low-permeability structure or change in lithology between Kane
11 Springs and the southern part of Coyote Spring Valley. ROA at 719. The geophysics data submitted
12 by LINCOLN/VIDLER in the Order 1303 hearing confirmed this previous finding by the State
13 Engineer. ROA at 36202, 36227-36228. The NPS witness stated he agreed there was a fault shown
14 in the southern Kane Springs area based upon the geophysics. ROA at 53174 [09-25-19 Tr. at 537:5-
15 15, 538:1, 22-24, 539:8-21, 540:5-10 (Waddell Testimony)]. The State Engineer ignored the
16 geophysics and failed to address this crucial evidence which supported his predecessor’s Ruling 5712
17 contrary to the holding of *Revert v. Ray*, 95 Nev. 782, 787, 603 P.2d 262, 264–65 (1979) (the State
18 Engineer must clearly resolve all crucial issues presented) and the direction provided by NRS
19 533.024(1)(c) for the State Engineer “to consider the best available science in rendering decisions
20 concerning the availability of surface and underground sources of water in Nevada.”) ROA at 53. For
21 all these reasons, the State Engineer’s determination to include Kane Springs in the LWRFS should
22 be vacated.

23 **5. Order 1309 improperly reweighed the Order 1169 pump test results to include**
24 **Kane Springs in the super-basin.**

25 In Interim Order 1303, the State Engineer noted the resulting water level decline during the
26 Order 1169 pump test encompassed 1,100 square miles and extended from northern Coyote Spring
27 Valley through the Muddy River Springs Area, Hidden Valley, Garnet Valley, California Wash, and
28 the northwestern part of the Black Mountains Area. ROA at 73. The State Engineer cited to Ruling

1 6254 and the federal agencies' Order 1169 report in support of these findings and noted there was no
2 groundwater pumping in Hidden Valley, but effects were still observed in the Hidden Valley monitor
3 well. ROA at 73, n. 2, 3. The water level decline was estimated to be 1 to 1.6 feet in this area with
4 minor drawdowns of 0.5 feet or less in the northern part of Coyote Spring Valley north of the Kane
5 Springs Wash fault zone. ROA at 73. Notably absent from these findings is any indication or
6 quantification of any resulting water level decline during the Order 1169 pump test in Kane Springs
7 or KMW-1. Order 1303 stated: "The State Engineer finds that input by means of reports by the
8 stakeholders in the interpretation of the data from the aquifer test and from the years since the
9 conclusion of the aquifer test is important to fully inform the State Engineer prior to setting a limit on
10 the quantity of groundwater that may be developed in the LWRFS or to developing a long-term
11 Conjunctive Management Plan for the LWRFS and Muddy River. ROA at 80. The State Engineer
12 noted since the conclusion of the Order 1169 aquifer test, he had jointly managed the groundwater
13 rights within the LWRFS. ROA at 77.

14 In Order 1309, the State Engineer changed his finding above regarding the resulting water level
15 decline during the 1169 aquifer test in the 1,100 square miles and included southern Kane Springs.
16 ROA at 7. The only new citation to authority by the State Engineer in Order 1309 to support this
17 change was USFWS Exhibit 5. ROA at 7, n. 21 citing to USFWS Ex. 5, pp. 21, 67 found at ROA at
18 48694, 48740. USFWS is the entity that stipulated before the State Engineer in 2007 to allow Kane
19 Springs pumping notwithstanding the Order 1169 aquifer test. ROA at 36689-36700. The USFWS
20 stated the reason for now including Kane Springs with a resulting water level decline during the Order
21 1169 aquifer test was a purported similar hydrograph response in KMW-1 to CSVM-4 in Coyote
22 Springs Valley. ROA at 48694. Nowhere is that data interpretation contained in the 2013 Order 1169
23 report of the federal agencies stating the results of the Order 1169 aquifer test. ROA at 10888-10889,
24 10969. The 2013 Order 1169 report of the federal agencies limits the response of the Order 1169
25 aquifer test to responses in Coyote Spring Valley, Muddy River Springs Area, Hidden Valley, Garden
26 Valley and California Wash, and does not include any analysis of Kane Springs. ROA at 10888-
27 10889, 10969. There was no water level hydrograph analysis for CSVM-4 even though Coyote
28 Springs Valley was part of the aquifer test. ROA at 10896. The USFWS did provide distance

1 drawdown graphs that show the changes over time (each line represents a different time) of water
2 levels at distances from the pumping well that used data from well CSVM-4, however as stated
3 previously that data is all but unreliable. There are documented issues with the transducer, data
4 measurement device, where it was either off or failed altogether and had to be replaced over 10 times
5 during the 1169 aquifer test. ROA at 1700-1714, 10141. This doesn't include the many times the
6 transducers failed and had to be replaced before the testing. The State Engineer improperly relied
7 upon a new interpretation of the same 2013 data he had previously accepted to exclude Kane Springs
8 from the LWRFS.

9 In addition, CSVM-4 is the well with the 1-foot data error. ROA at 10141, 53360 [9-27-19 Tr.
10 978:2-10 (Burns Testimony)]. This data error was not taken into account by the USFWS hydrologist
11 in making her opinion. ROA at 53360 [9-27-19 Tr. 978:2-10 (Burns Testimony)]. In fact, this witness
12 testified in response to questioning by LINCOLN/VIDLER that she was not recommending that Kane
13 Springs be included in the LWRFS at this time. ROA at 53136 [9-24-19 Tr. 464:8-10, 16-19
14 (Braumiller Testimony)]. The State Engineer's reliance on USFWS Exhibit 5 to include Kane Springs
15 was directly contrary to his previous acceptance of the Order 1169 aquifer test results to exclude Kane
16 Springs and not based upon substantial evidence to the extent it relied upon the admitted unreliable
17 CSVM-4 water level measurements.

18 C. **THE STATE ENGINEER'S DETERMINATION THAT 8,000 AFA IS THE**
19 **MAXIMUM AMOUNT OF GROUNDWATER THAT CAN BE DEVELOPED**
20 **FROM THE SUPER BASIN WAS NOT SUPPORTED BY SUBSTANTIAL**
21 **EVIDENCE AND WAS ARBITRARY AND CAPRICIOUS.**

22 The State Engineer determined that 8,000 afa is the maximum amount of groundwater that can
23 continue to be developed over the long term in the LWRFS. ROA at 64. This determination was
24 based upon the State Engineer's statement that pumping from wells in the LWRFS has gradually
25 declined since completion of the Order 1169 aquifer test, pumping was approaching 8,000 afa and this
26 coincided with the period of time when spring discharge may be approaching steady state. ROA at
27 64. The State Engineer cited no evidence of record to support these statements. His determination is
28 inconsistent with his previous statement that distributed pumping since the completion of the aquifer
test in excess of 8,000 afa has correlated with a stabilization of spring discharge. ROA at 60, with no

1 citation to the record. The evidence he did cite in this section of the Order describes parties'
2 recommendations of what pumping level may be acceptable which ranged from 0 afa to 30,000 afa as
3 noted by the State Engineer. ROA at 58. The only evidence cited in the section which mentions
4 7,000-8,000 afa pumping and stabilization of spring discharge misstates the party's opinion in the
5 report. The NV Energy report cited in footnote 326 of Order 1309 (ROA at 63, n. 326) does not
6 conclude that only 7,000-8,000 afa can continue to be pumped. ROA at 41882. The report uses the
7 7,000-8,000 afa pumping amount to determine there is no 1:1 depletion ratio from groundwater
8 pumping to impacts to the Muddy River. ROA at 41882. That paragraph of the NV Energy report
9 concludes that groundwater pumping in certain areas of the LWRFS will have less impacts on the
10 Muddy River than other areas of pumping. ROA at 41882.

11 There is no substantial evidence in the record cited by the State Engineer in this section of the
12 Order to support the State Engineer's conclusion that 8,000 afa is the maximum amount of water that
13 can continue to be developed over the long term in the LWRFS. Without citation to the substantial
14 evidence that supports his conclusion, the State Engineer's Order does not comply with the
15 requirements of *Revert v. Ray*, 95 Nev. 782, 787, 603 P.2d 262, 264-65 (1979) (the State Engineer
16 must prepare findings in sufficient detail to permit judicial review) and *Eureka Cnty v. State Eng'r*,
17 131 Nev. 846, 856, 359 P.3d 1114, 1120-21 (2015) (even under deferential substantial evidence
18 review, courts must not merely "rubber stamp" agency action: they must determine that the "agency
19 articulated a rational connection between the facts presented" and the decision). Accordingly, Order
20 1309 must be vacated.

21 The State Engineer admitted it is not known if pumping in Kane Springs will impact water
22 resources in the LWRFS. ROA at 55 (Additional hydrologic study is necessary in Kane Springs to
23 determine the degree to which water use in Kane Springs would impact the LWRFS.) In Order 1309,
24 the State Engineer made no determination that pumping 1,000 afa in Kane Springs will impact the
25 Muddy River or the Moapa dace and he ignored and overruled his predecessor's determination in
26 Ruling 5712 that Kane Springs would not be included in the Order 1169 proceedings and pumping
27 this amount of water from Kane Springs will not impact the Muddy River Springs. ROA at 719.
28 Without knowing if there would be impacts from Kane Springs pumping, the State Engineer decreased

1 the pumping cap in the LWRFS to 8,000 afa, yet he increased the area of the LWRFS by including
2 Kane Springs. ROA at 54, 55, 64. The State Engineer did this notwithstanding the Amended
3 Stipulation for Withdrawal of Protests which governs LINCOLN/VIDLER's water rights and sets
4 triggers to protect the Moapa dace, the same triggers acknowledged by the State Engineer in Order
5 1309 to protect the Moapa dace. Cf. ROA at 46, 36698-36699; see also ROA at 53085 [09-24-19 Tr.
6 364:1-18 (Mayer Testimony)]. The State Engineer ignored that LINCOLN/VIDLER obtained a
7 Biological Opinion from the USFWS that Petitioners' groundwater pumping project in Kane Springs
8 was not likely to jeopardize the continued existence of the endangered Moapa dace and the level of
9 anticipated take is not likely to result in jeopardy to the Moapa dace based in part on the implantation
10 of the conservation measures for Petitioners' project. ROA at 49942, 49944-49945. In issuing Order
11 1309, the State Engineer failed to consider the unrefuted expert opinion testimony in the record of the
12 former USFWS Field Supervisor who signed the Biological Opinion and helped negotiate the
13 Amended Stipulation for Withdrawal of Protests that Petitioners, as parties holding a Biological
14 Opinion and the Amended Stipulation for Withdrawal of Protests, are compliant with the Endangered
15 Species Act. ROA at 53442 [09-30-19 Tr. 1138:10-23, 1139:7-16 (Williams Testimony)] ROA at
16 53443 [09-30-19 Tr. 1141:9-11 (Williams Testimony)].¹⁶ The Nevada Supreme Court has repeatedly
17 held the State Engineer has no jurisdiction over issues not within his statutory authority, for example,
18 protection of the Moapa dace in excess of that required by the USFWS, the agency responsible for
19 protection of the Moapa dace. *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 112 Nev.
20 743, 749-750, 918 P.2d 697, 701 (1996) (County directed by Legislature to select among competing
21 methods of water augmentation and develop master plan; State Engineer had no express authority to
22 engage in a comparative economic analysis of water delivery alternatives); *Helms v. State*
23 *Environmental Protection Division*, 109 Nev. 310, 314, 849 P.2d 279, 282 (1993) (Nevada Department
24 of Environmental Protection (NDEP) did not have a duty to independently review a function that was
25

26
27 ¹⁶ The hydrologist testifying for the USFWS in the Order 1309 proceedings did not know the USFWS entered into the
28 Amended Stipulation for Withdrawal of Protests with LINCOLN/VIDLER. ROA at 53088 [09-24-19 Tr. 376:17-24 –
377:1-5 (Braumiller Testimony)]. The biologist testifying for the USFWS did not know there was a Biological Opinion
issued to LINCOLN/VIDLER for the Kane Springs applications. ROA at 53085-53086 [09-24-19 Tr. 366:22-24 – 368:1-
14 (Schwemm Testimony)].

1 statutorily reserved to county government, thereby allowing the NDEP to *presume* the county’s
2 approval was valid).

3 The State Engineer’s determination to include Kane Springs into the LWRFS and to limit the
4 collective pumping in the LWRFS to 8,000 to purportedly protect the Muddy River and the Moapa
5 dace is not supported by substantial evidence or any evidence. The State Engineer’s determination as
6 to Kane Springs is not even logical based upon the Amended Stipulation to Withdraw Protests
7 executed by the USFWS and the Biological Opinion issued to LINCOLN/VIDLER by the USFWS
8 which protect the Muddy River and the Moapa dace to the satisfaction of the USFWS.

9 **D. THE STATE ENGINEER’S DETERMINATIONS REGARDING THE**
10 **MANAGEMENT OF THE SUPER BASIN ARE INCONSISTENT WITH HIS**
11 **OTHER FINDINGS, ARE NOT BASED UPON SUBSTANTIAL EVIDENCE**
12 **AND ARE ARBITRARY AND CAPRICIOUS.**

13 The State Engineer’s Order 1309 improperly leaves to future determinations how the LWRFS
14 will be administered and managed in violation of *Eureka County v. State Engineer*, 131 Nev. 846, 856,
15 359 P.3d 1114, 1120-21(2015) (State Engineer may not defer the determination of what mitigation
16 would encompass to a later date). Here, the State Engineer determined that Kane Springs “can be
17 managed more effectively and fairly within the LWRFS.” ROA at 55. Not only does the failure to
18 address management violate the law, but there is also no citation to the record which supports this
19 conclusion. The State Engineer stated that “an effective management scheme will provide for the
20 flexibility to adjust boundaries based on additional information, retain the ability to address unique
21 management issues on a sub-basin scale, and maintain partnership with water users who may be
22 affected by management actions through the LWRFS.” ROA at 54. There is no citation to the record
23 which supports this conclusion. The State Engineer further stated: “Water development both inside
24 and outside of the perimeter of the LWRFS will continue to be evaluated on the best available data
25 and may become subject to or excluded from the constraints or regulations of the LWRFS.” ROA at
26 55. However, there are no management standards or criteria provided in Order 1309.¹⁷ There is no
27 determination of what administration and management would encompass nor any determination of
28

¹⁷ As noted above, one of the purposes of the Order 1309 proceedings per State Engineer Order 1303 was to develop a long-term Conjunctive Management Plan for the LWRFS and Muddy River. ROA at 80.

1 what will be required in future hydrologic studies to be excluded from the constraints or regulations
2 of the LWRFS. There is no determination of what may be required for future water development
3 inside and outside the LWRFS boundaries. The State Engineer states: “the relative degree of
4 hydrologic connectedness in the LWRFS will be the principle factor in determining the impact of
5 movement of water rights.” ROA at 65- 66. He also recognized there may be discrete, local aquifers
6 within the LWRFS with an uncertain hydrologic connection to the Warm Springs area and that the
7 effect of moving water rights into these areas may require additional scientific data and analysis. ROA
8 at 66. However, nowhere in the Order does the State Engineer determine what the additional scientific
9 data and analysis should comprise or what data or analysis is necessary for approval to move water
10 rights. There is no evidence in the record that pumping from Kane Springs will impact anything in
11 the LWRFS, yet Kane Springs was arbitrarily included in the LWRFS. The State Engineer has
12 unlawfully deferred what his management standards or criteria are to a future determination, all in
13 violation of LINCOLN/VIDLER’s due process rights. *Eureka Cnty v. State Eng’r*, 131 Nev. at 856,
14 359 P.3d at 1120–21.

15 Finally, the State Engineer’s pumping cap is discriminatory and contrary to his determinations
16 made in Order 1309 stating the impacts from the Order 1169 pumping. The water rights with the most
17 seniority in the 8,000 afa pumping cap are located closest to the Muddy River and the Muddy River
18 Springs Area and Moapa dace habitat. For example, the USFWS witness testified that pumping from
19 the Arrow Canyon well, one of the wells closest to the Muddy River, impacts Pederson Springs
20 because it lowers the groundwater level. ROA at 53136 [09-24-19 Tr. 465:4-11 (Mayer Testimony)].
21 The Arrow Canyon well is allowed to be pumped under the State Engineer’s 8,000 afa pumping cap
22 causing impacts to the Pederson Springs, yet Kane Springs rights, located 22 miles away and the most
23 senior in the Kane Springs basin are not allowed to be pumped under Order 1309. This is contrary to
24 the State Engineer’s own finding in Order 1309 that pumping within close proximity to the Muddy
25 River could result in capture of the Muddy River and any movement of water rights in carbonate-rock
26 aquifer and alluvial aquifer wells in the Muddy River Springs Area that may increase the impact to
27 Muddy River decreed rights is disfavored. ROA at 65. Further, under Order 1309, senior water right
28 holders in the LWRFS can try to move their points of diversion to Kane Springs which is the basin

1 furthest away from the Muddy River and Muddy River Springs area and pump, but
2 LINCOLN/VIDLER cannot pump their senior Kane Springs rights. ROA at 64-66.

3 **E. OTHER DUE PROCESS VIOLATIONS.**

4 There were numerous other due process violations that occurred during the Order 1309
5 administrative hearing process. For example, the Hearing Officer indicated during the prehearing
6 conference that the experts would be held to the opinions they expressed in their reports. ROA at 528
7 [Prehearing Conference Transcript 08-8-19 35:6-24 – 36:1-8]. However throughout the hearing,
8 experts were allowed to express new opinions that were contrary to their reports or based upon
9 testimony they heard at the hearing. See ROA at 53463 [09-30-19 Tr. 1223:3-18 (Lazarus
10 Testimony)]; ROA at 53722, 53727, 53729 [10-4-19 Tr. 1761:20-24, 1782:6-20, 1787:7-9, 20-24,
11 1789:11-19 (Felling Testimony)]. Certain participants included new opinions and evidence in their
12 closing statements which did not allow for review and cross-examination by other parties. ROA at
13 52883-52888, 52889-52911. LINCOLN/VIDLER filed a motion to strike that information.
14 LINCOLN/VIDLER’s motion and associated pleadings in response were not included in the record
15 on appeal and not decided by the State Engineer.¹⁸ Finally, parties were given limited opportunity to
16 present their information and cross-examination was limited based on the time allotted for the
17 presentation because of the limited hearing time allowed by the State Engineer. ROA at 521
18 [Prehearing Conference Tr. pp. 7-9], ROA at 526 [Prehearing Conference Tr. p. 27:11-19] see also
19 footnote 5 *supra*.¹⁹ These procedures certainly violated LINCOLN/Vidler’s due process rights
20 because the hearing procedures were not fair as required by *Revert v. Ray, supra*.

21 **VII.**

22 **CONCLUSION**

23 For over one hundred years, groundwater has been appropriated on a basin-by-basin system as
24 established by the Legislature – each groundwater basin is considered a separate “source of water”
25

26 ¹⁸ LINCOLN/VIDLER provide these documents as part of the Addendum.

27 ¹⁹ In the last week or so, LINCOLN/VIDLER have discovered that Jason King, former State Engineer who issued many
28 of the orders and rulings that led up to and signed Interim Order 1303 (ROA at 84) and who presided over the Order 1169
aquifer test, entered into a contract with LVVWD (one of the SNWA members which has prepared evidence in this matter.
See ROA at 41930) to provide consulting services regarding the LWRFs. Mr. King is providing professional consulting
services on matters he made decisions on which are pending on appeal before this Court. This is in addition to SNWA’s
professional services contract with MVIC to pay MVIC’s attorney’s fees for representing SNWA’s interests in this case.

1 from which water can be appropriated, and water within that basin is administered in accordance with
2 the priorities established in that basin. In Order 1309, the State Engineer has disregarded this
3 legislative directive and the Supreme Court’s directive that appropriated water cannot be reallocated
4 and reprioritized. *Mineral Cty.* The State Engineer has combined seven separate groundwater basins
5 into one “super-basin” and reallocated and reprioritized all water rights within this super-basin as
6 though the vested water rights of each appropriation within the individual basins had been granted in
7 a hypothetical single basin. The result is that LINCOLN/VIDLER’s most senior water rights in Kane
8 Springs were reallocated and reprioritized to make them the most junior water rights in the newly
9 created super-basin. On June 14, 2020, LINCOLN/VIDLER had the most senior and most valuable
10 water rights in Kane Springs. On June 15, 2020, LINCOLN/VIDLER had the most junior water rights
11 in the new LWRFS super-basin. These most senior water rights were rendered unusable because the
12 State Engineer restricted pumping in this super-basin to 8,000 acre feet annually. Because at least
13 36,000 afa of water rights had earlier priority dates in other basins, these rights automatically became
14 senior to LINCOLN/VIDLER’s rights.

15 This disregard of legislative and Supreme Court directives was made worse because the State
16 Engineer disregarded almost two decades of prior State Engineer’s Rulings and Orders that had
17 expressly and specifically excluded Kane Springs from the LWRFS study area. From 2002, when the
18 LWRFS study area was created, until Order 1309 on June 15, 2020, the State Engineer intentionally
19 excluded Kane Springs from the LWRFS. Indeed, when the State Engineer granted
20 LINCOLN/VIDLER’s appropriation in Kane Springs, the State Engineer specifically rejected
21 arguments that Kane Springs should be included in the LWRFS, that the appropriation would harm
22 the Moapa dace habitat, and that the appropriation would harm prior appropriators in the Muddy River.
23 This decision was largely based on the fact that the State Engineer found that a low permeability
24 structure separated Kane Springs from the Coyote Springs Valley to the south.

25 In an attempt to prop up the decision, the State Engineer belatedly created a six-factor test to
26 determine whether a basin should be included in the LWRFS, but even so the State Engineer badly
27 mis-applied his own factors to justify including Kane Springs. In Order 1309, the State Engineer
28 disregarded the Legislature, the Supreme Court, and prior State Engineers by creating a six-factor test

1 to determine whether Kane Springs should be included in the LWRFS super-basin: a test he created
2 without notice and articulated for the first time in Order 1309; a test he failed to apply; a test that had
3 he applied properly would lead to the exclusion of Kane Springs from the LWRFS super-basin.

4 Instead, the State Engineer relied on evidence that was, in his own words, “muted,” “lagged,”
5 “obscured,” “compromised,” and “attenuated” to include Kane Springs in the LWRFS super-basin.
6 Indeed, the entirety of his decision to include Kane Springs was based on an alleged drawdown of six
7 inches in a well that was 22 miles from the alleged area of impact. And this drawdown was based on
8 data from a well that had faulty readings, so that “fluctuation of a foot or less should not be used to
9 infer an absolute response.” In other words, drawdowns in the well below 12 inches were unreliable
10 and should not be used as evidence to compare the drawdowns in other wells – which is exactly what
11 the State Engineer did. This is hardly substantial evidence.

12 For all these reasons, Order 1309’s findings as to Kane Springs should be vacated. Kane
13 Springs should continue to be administered in accordance with the specific statutory scheme set out
14 by the Legislature.

15 DATED this 27th day of August, 2021.

16 LINCOLN COUNTY DISTRICT ATTORNEY
17 181 North Main Street, Suite 205
18 P.O. Box 60
19 Pioche, Nevada 89043
20 Telephone: (775) 962-8073

21 /s/ Dylan V. Frehner
22 DYLAN V. FREHNER #9020
23 Email: dfrehner@lincolncountynv.gov

24 GREAT BASIN LAW
25 1783 Trek Trail
26 Reno, Nevada 89521
27 Telephone: (775) 770-0386

28 /s/ Wayne O. Klomp
WAYNE O. KLOMP #10109
Email: wayne@greatbasinlawyer.com

Attorneys for Lincoln County Water District

///

ALLISON MacKENZIE, LTD.
402 North Division Street, P.O. Box 646, Carson City, NV 89702
Telephone: (775) 687-0202 Fax: (775) 882-7918
E-Mail Address: law@allisonmackenzie.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ALLISON MacKENZIE, LTD.
402 North Division Street
Carson City, Nevada 89703
Telephone: (775) 687-0202

/s/ Karen A. Peterson
KAREN A. PETERSON #366
Email: kpeterson@allisonmackenzie.com

Attorneys for Vidler Water Company, Inc.

ALLISON MacKENZIE, LTD.
402 North Division Street, P.O. Box 646, Carson City, NV 89702
Telephone: (775) 687-0202 Fax: (775) 882-7918
E-Mail Address: law@allisonmackenzie.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF COMPLIANCE

We hereby certify that we have read the foregoing Opening Brief and to the best of our knowledge, information and belief, it is not frivolous or interposed for any improper purpose. We further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. We further certify that this brief is proportionately spaced, has a typeface of 12 points or more, and contains 16,927 words. We understand that we may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of Nevada Rules of Appellate Procedure.

DATED this 27th day of August, 2021.

LINCOLN COUNTY DISTRICT ATTORNEY
181 North Main Street, Suite 205
P.O. Box 60
Pioche, Nevada 89043
Telephone: (775) 962-8073

/s/ Dylan V. Frehner
DYLAN V. FREHNER, ESQ.
Nevada State Bar No. 9020
Email: dfrehner@lincolncountynv.gov

~ and ~

GREAT BASIN LAW
1783 Trek Trail
Reno, Nevada 89521
Telephone: (775) 770-0386

/s/ Wayne O. Klomp
WAYNE O. KLOMP, ESQ.
Nevada State Bar No. 10109
Email: wayne@greatbasinlawyer.com

Attorneys for Petitioner, **LINCOLN COUNTY WATER DISTRICT**

///
///
///
///

ALLISON MacKENZIE, LTD.
402 North Division Street, P.O. Box 646, Carson City, NV 89702
Telephone: (775) 687-0202 Fax: (775) 882-7918
E-Mail Address: law@allisonmackenzie.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ALLISON MacKENZIE, LTD.
402 North Division Street
Carson City, NV 89703
Telephone: (775) 687-0202

/s/ Karen A. Peterson
KAREN A. PETERSON, ESQ.
Nevada State Bar No. 366
Email: kpeterson@allisonmackenzie.com

Attorneys for Petitioner **VIDLER WATER
COMPANY, INC.**

ALLISON MacKENZIE, LTD.
402 North Division Street, P.O. Box 646, Carson City, NV 89702
Telephone: (775) 687-0202 Fax: (775) 882-7918
E-Mail Address: law@allisonmackenzie.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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.

I hereby certify that I caused a true and correct copy of the foregoing document to be served via FedEx as follow:

Clark County District Court
Attn: Hon. Bitá Yeager – District. Ct. Dept. 1
Court Administration – 2nd Floor
200 Lewis Avenue
Las Vegas, NV 89101

DATED this 27th day of August, 2021.

/s/ Nancy Fontenot
NANCY FONTENOT

4824-9822-7960, v. 1

ADDENDUM

Due service of this foregoing

accepted by court thereof this

24

1916

Clawson
Wally
Geo. S. Brown
W. L. Anderson

Attorney for Plaintiffs

ORIGINAL

No.

IN THE
TENTH
Tenth Judicial District Court
OF THE
State of Nevada
IN AND FOR **CLARK** COUNTY
CLARK

Muddy Valley Irrigation Company
et al.,
Plaintiff

vs

MOAPA AND EAST LAKE PRODUCE COMPANY
a Corporation, et al.,
Defendants

ANSWER OF DEFENDANTS **G. S. HOLL**
AND JULIA MAY KNOX,

Filed *24* of *May* 1916

Wally
Clerk

By _____
Deputy Clerk

J. E. McNamur & Leo A. McNamee,
Attorneys for Defendants.

1 IN THE TENTH JUDICIAL DISTRICT COURT OF THE STATE
2 OF NEVADA, IN AND FOR THE COUNTY OF CLARK.

3 ---c0o---

4
5 MUDDY VALLEY IRRIGATION COMPANY, a cor-)
6 poration, NEVADA LAND & LIVESTOCK COM-)
7 PANY, a corporation, and SAMUEL H. WELLS,)

8 Plaintiffs,)

9 -vs-)

10 ANSWER OF DEFENDANTS

11 MOAPA AND SALT LAKE PRODUCE COMPANY, a)
12 corporation, GEORGE BALDWIN and)
13 BALDWIN, his wife, JOHN H. MITCHELL,)
14 ISSIAH COX and Cox, his wife,)
15 JOSEPH PERKINS and PERKINS,)
16 his wife, D. H. LIVINGSTON and RICHARD)
17 SMITH, G. S. HOLMES, FRED L. FOSTER and)
18 JOHN DOE KNOX, RICHARD ROE and MARY DOE,)
19 the three last named persons being and)
20 representing the heirs at law, next of)
21 kin and successors in interest of Frank)
22 Knox, deceased,)
23 Defendants.)

24 G. S. HOLMES AND

25 JULIA MAY KNOX.

26
27 Come now the defendants G. S. Holmes and Julia May
28 Knox, sued as John Doe Knox, Richard Roe and Mary Doe, two of
29 the above named defendants, and answering for themselves and not
30 for the other defendants, admit, deny, and aver as follows:

31 -I-

32 Aver that they have not sufficient knowledge or in-
33 formation upon which to base a belief as to the allegations con-
34 tained in paragraph I of said complaint, and they therefore deny
35 said paragraph I and each and every allegation thereof.

36 -II-

37 Aver that they have not sufficient knowledge or inform-
38 ation upon which to base a belief as to the allegations contain-
39 ed in paragraph II. of said complaint, and they therefore deny
40 said paragraph II. and each and every allegation thereof.

-III-

1 Aver that they have not sufficient knowledge or inform-
2 ation to enable them to answer the allegations contained in Para-
3 graph III. of said complaint, and they therefore deny said Para-
4 graph III, and each and every allegation thereof.
5

-IV-

6 Aver that they have not sufficient knowledge or inform-
7 ation upon which to base a belief as to the allegations of Para-
8 graph IV. of said complaint, and they therefore deny said Para-
9 graph IV. and each and every allegation thereof.
10

-V-

11 Admit Paragraph V. of said complaint.
12

-VI-

13 Answering Paragraph VI. of said complaint, these defend-
14 ants deny that Fred L. Foster has any interest whatsoever in the
15 land and premises described in said Paragraph VI. or any interest
16 whatever in said suit or controversy, and allege the fact to be
17 that the said Frank Knox died during the year 1915, and that prior
18 to his death he conveyed to the defendant Julia May Knox, all of
19 his right, title and interest in and to the land described in Para-
20 graph VI. known as the Wiser Ranch, and that said defendant is now
21 the owner and in the possession of the same.
22

-VII-

23 Aver that these defendants have not sufficient knowledge
24 or information upon which to base a belief as to the allegations
25 of Paragraph VII. of said complaint, and they therefore deny the
26 same and each and every allegation thereof, save and except, they
27 admit that the ranches and lands owned and claimed by the defend-
28 ants, other than these defendants, are situate above and westerly
29 of said Wiser Ranch.
30
31
32

-2-

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

-XI-

These defendants deny Paragraph XI. of said complaint, and each and every allegation therein contained, save and except they admit that there has been diverted, appropriated and applied to a beneficial use, on said Muddy River below the Wiser Ranch, not to exceed thirty-two cubic feet per second of the waters thereof; but as to whether said waters were so diverted, appropriated and used by said plaintiffs or not, these defendants have not sufficient knowledge or information upon which to base a belief, and they therefore, on information and belief, deny that said or any appropriation or application to a beneficial use of any of the waters of said Muddy River below the Wiser Ranch, was made by said plaintiffs or either of them.

-XII-

Answering Paragraph XII. of said complaint, these defendants deny said Paragraph XII. and each and every allegation therein contained; and they deny that at the time of the alleged applications to appropriate water, as set forth in said Paragraph XII., there was flowing in said Muddy River any unappropriated waters, except during the Winter season, or any water whatsoever than waters the right to which had become vested in prior appropriators on said stream.

-XIII-

Answering Paragraph XIII. of said complaint, these defendants deny each and every allegation in said Paragraph contained.

-XIV-

1 Answering Paragraph XIV. of said complaint these de-
2 fendants aver that they have not sufficient ^{knowledge} information or be-
3 lief to enable them to answer the same, and basing their an-
4 swer on that ground, deny each and every allegation therein
5 contained.
6

7
8 -XV-

9 Answering Paragraph XV. of said complaint, these de-
10 fendants deny each and every allegation thereof, except that
11 they admit that they diverted water and applied the same to a
12 beneficial use on their lands situate on the Muddy River, dur-
13 ing the years 1913, 1914 and 1915; but they allege the fact to
14 be that the amount of water so diverted by these defendants
15 during the said years and applied to a beneficial use on their
16 lands situate on the Muddy River, was water that had been approp-
17 riated for many years prior thereto by their grantors and prede-
18 cessors in interest, and applied to a beneficial use thereon,
19 and was appurtenant to said land, and that these defendants and
20 their predecessors had and now have a vested right thereto.
21

22 -XVI-

23 Aver that they have not sufficient ^{knowledge} information or be-
24 lief to enable them to answer the allegations contained in Para-
25 graph XVI. of said complaint, and they therefore deny the same,
26 and each and all of the allegations thereof, except that they ad-
27 mit that there is no source of water supply from which water may
28 be obtained for lands situate on the Muddy River below the Wiser
29 Ranch, other than the Muddy River.
30

31 -XVII-

32 Answering Paragraph XVII. of said complaint, these de-

1 defendants admit that since June 1913, and during the years 1914
2 and 1915, they have increased the area of land cultivated and
3 irrigated by them, but deny that said acts were wrongful, or an
4 excessive diversion and use of the waters of the Muddy River, and
5 upon their information and belief aver the facts to be, that they
6 did not, during the years 1913, 1914 and 1915, increase the area
7 of land cultivated and irrigated by their predecessors in inter-
8 est on the lands claimed by them and set forth in said complaint
9 and in this answer, but only cultivated and applied to a benefi-
10 cial use the amount of water theretofore appropriated and applied
11 to a beneficial use on said lands by their grantors and predecess-
12 ors in interest, which said waters and the amounts so diverted,
13 were and are appurtenant to said land, and the use of said waters
14 is a right vested in these defendants; and they deny that such
15 use of said waters by the defendants is an irreparable injury and
16 damage, or any injury or damage to said plaintiffs, as alleged in
17 said Paragraph XVII., or at all.

18
19 -XVIII-

20 Answering Paragraph XVIII. of said complaint, these de-
21 fendants admit that they assert and claim a right to divert and
22 use the waters of said Muddy River to the extent used during the
23 years 1913, 1914 and 1915, but they deny each and every other
24 allegation in said Paragraph contained.

25
26 FOR A FURTHER AND SEPARATE ANSWER TO PLAINTIFFS' COM-
27 PLAINT AND AS A DEFENSE THERETO, THESE DEFENDANTS ALLEGE:

28 -I-

29 That the said defendants G. S. Holmes and Julia May
30 Knox, are the owners of, in the possession of, and entitled to
31 the possession of the following described parcels of land situ-
32

1 ate in the Muddy River Valley, in the County of Clark, State
2 of Nevada, and particularly described as follows:

3 The South half ($S\frac{1}{2}$) of the North-west quarter ($NW\frac{1}{4}$)
4 of the South-west quarter ($SW\frac{1}{4}$); the South half ($S\frac{1}{2}$) of the
5 South-west quarter ($SW\frac{1}{4}$) and the South half ($S\frac{1}{2}$) of the South-
6 east quarter ($SE\frac{1}{4}$), all in Section One (1); also the North-east
7 quarter ($NE\frac{1}{4}$), and the North-east quarter ($NE\frac{1}{4}$) of the South-
8 east quarter ($SE\frac{1}{4}$), and the North-east quarter ($NE\frac{1}{4}$) of the
9 North-west quarter ($NW\frac{1}{4}$) of Section Twelve (12), Township Fif-
10 teen (15) South, Range Sixty-six (66) East, Mount Diablo Base &
11 Meridian; also the South-west quarter ($SW\frac{1}{4}$) of the North-west
12 quarter ($NW\frac{1}{4}$) and the North-east quarter ($NE\frac{1}{4}$) of the South-west
13 quarter ($SW\frac{1}{4}$), and the fractional one-half of the South-west
14 quarter ($SW\frac{1}{4}$) of Section Seven (7), Township Fifteen (15) South,
15 Range sixty-seven (67) East, Mount Diablo Base & Meridian.

16 And that the said defendants and their several grantors
17 and predecessors in interest, have so been the owners of and in
18 the quiet, actual, peaceable and continuous possession of said
19 described lands, for a long time last past, to-wit, since the
20 year 1887, or thereabouts.

21
22 -II-

23 That the climate where said lands are situate is dry
24 and arid, and that it is necessary to irrigate said lands in
25 order to produce or raise crops thereon, and without irrigation
26 said lands would not produce crops and are entirely worthless;
27 that said land is only valuable as meadow land and for cultiva-
28 tion and agriculture, and that in order to cultivate the same
29 it is necessary that the defendants have sufficient water for
30 the irrigation thereof, and that without sufficient water, no
31 crop of any character will grow thereon.

32

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

-III-

That more than two hundred acres of said land has been, continuously since the year 1890, by said defendants and their grantors and predecessors in interest as aforesaid, irrigated and rendered of great value, by the diversion, appropriation and application to a beneficial use thereon of five cubic feet per second of the waters of the stream known as the Muddy River, flowing in a southeasterly direction through said Muddy River in its natural channel, and that said five cubic feet per second of the waters thereof is necessary for the use of said defendants in the irrigation of their said lands as aforesaid, and for their domestic uses and the watering of their livestock.

-IV-

That the grantors and predecessors in interest of the said defendants did, to-wit, prior to the year 1890, construct dams and flumes in, on and upon the Muddy River, above the lands herein described, with a water ditch of sufficient capacity to carry five cubic feet per second, connecting said dam with the lands of defendants herein described, with sufficient laterals to irrigate the same; and thereafter from year to year during the irrigating season, the said defendants and their grantors and predecessors in interest, at all times kept said dams and flumes in good repair and said ditch cleaned out, and by means thereof diverted from the said Muddy River through said flumes and irrigating ditch, and appropriated and applied to a beneficial use in the irrigation of said lands and the growing thereon of grass, pasture, alfalfa, wheat, melons, fruit, corn and garden truck above described, and for domestic purposes and the watering of their live stock, five cubic feet per second of the waters of said stream, which amount of water is now and at all times heretofore has been, necessary in the irrigation of the

1 crops of these defendants, in, on and upon the said lands above
2 described, and domestic uses and the watering of their livestock,
3 and that at the time of the said diversion, appropriation and ap-
4 plication to a beneficial use, no other person or persons had ac-
5 quired any rights to said five cubic feet per second of said wat-
6 er, and the said water was flowing in said Muddy River unapprop-
7 riated and unused, and was appropriated by the grantors of the
8 defendants.

9
10 -v-

11 That during the summer of 1896, a cloudburst and rain-
12 fall in the Pahrnagat Wash caused an enormous flood to pass down
13 through the Muddy River Valley and over and across the lands of
14 these defendants; that the Muddy River Valley where the lands of
15 these defendants is situated, is narrow, and the soil porous, and
16 by reason of the character of said soil, the floods of 1896 caus-
17 ed a ditch or channel of considerable size to be cut through the
18 entire length of defendants' said lands; that thereafter on the
19 1st day of January, 1910, excessive rains and snowfalls in the
20 Clover Valley Mountains and in the Meadow Valley Wash, a tribu-
21 tary to said Muddy River, produced and caused a great volume of
22 water to rush suddenly down said Meadow Valley Wash and in and
23 upon the Muddy River, at a point along the North boundary of said
24 defendants' land, and cut and washed out a gorge or channel extend-
25 ing from the Northerly end of said lands to the Southeastern ex-
26 tremity thereof, of an average width of forty feet more or less,
27 and of an average depth of about twenty feet, more or less, ex-
28 tending through the whole length of said defendants' land. That
29 subsequent to the year 1910 there has been divers and sundry other
30 floods, increasing the width and depth of said channel through the
31 defendants' land. That the fields of said defendants now and for
32 many years long prior thereto, were and are situated on either

1 side of said channel, and extend up to the very brink or edge
2 thereof. That on the Westerly side of said channel, for a dis-
3 tance of more than half a mile, and at distances varying from
4 three hundred feet to eight hundred feet, along the defendants'
5 lands situate South and West of said channel, there are divers
6 and sundry springs and swamps and marshy lands, from which there
7 arise and flow both surface and subterranean ~~or~~ underground
8 seepage water, and that the same subirrigates and finds its way
9 into the main channel of said River by reason of the depth of
10 the channel or gorge caused by said washouts; that of the said
11 five cubic feet per second of water diverted and applied by the
12 defendants and their predecessors, on their lands on either side
13 of said channel as herein before set forth, subsequent to the time
14 of the cutting of said channel by said floods, as these defendants
15 are informed and believe and therefore allege the fact to be,
16 two cubic feet per second thereof. during the course of its ap-
17 plication in the irrigation of said lands, subirrigates and perco-
18 lates through the soil and into the main channel, and into the
19 River, and flows on to the users below.

20
21 VI.

22 That the said plaintiffs and each of them, and the
23 stockholders thereof, claim and assert an interest in the waters
24 of said Muddy River, and assert rights to divert and apply to a
25 beneficial use the waters of said Muddy River on certain lands
26 claimed by them situate below the lands of these defendants, which
27 are adverse to the rights of these defendants. That the rights
28 of said plaintiffs, if any they have, to divert and use the wat-
29 ers of said River in excess of thirty-two cubic feet per second
30 upon the lands claimed by said plaintiffs, or upon any lands, are
31 inferior to and subsequent in time to, and subordinate to, the
32 rights of these defendants; and as these defendants are advised
and believe and therefore allege the fact to be, are inferior to,

1 subsequent in time to, and subordinate to, the rights of all
2 of the other defendants sued in this complaint.

3
4 FOR A FURTHER AND SEPARATE ANSWER TO SAID COMPLAINT
5 AND AS A DEFENSE THERETO, these defendants allege that at all
6 times since the year 1890 until the service of the injunction
7 herein, the said defendants and their grantors and predecessors
8 in interest, diverted, appropriated and applied to a beneficial
9 use, in and upon their lands herein described, during the irri-
10 gating season of each year, five cubic feet per second of the
11 waters of said Muddy River, and that such diversion, appropria-
12 tion and application to a beneficial use of said waters as afore-
13 said, was at all times under a claim of right, was open, notori-
14 ous, peaceable, uninterrupted, continuous, and with the acquies-
15 cence of said plaintiffs and their grantors and predecessors in
16 interest, and was adverse to said plaintiffs and to each of them,
17 and to their respective stockholders, and to any of their rights
18 or alleged rights, and to all the world, and that the cause of ac-
19 tion alleged in said complaint did not accrue against these de-
20 fendants or either of them, or against their rights as herein
21 set forth to the use of waters from the Muddy River, within
22 twelve years next before the commencement of this action.

23 WHEREFORE, the said defendants having fully answered,
24 pray--

25 (1) That the temporary injunction or restraining order
26 heretofore issued by said Court against these defendants be dis-
27 solved.

28 (2) That upon a final hearing of this cause, a judg-
29 ment and decree of this Court be entered herein adjudging and
30 decreeing that the said defendants are entitled to divert, con-
31 vey and distribute through their ditch and laterals, upon the
32 lands of the said defendants herein described, five cubic feet

1 per second of the waters of said Muddy River for the irrigation
2 of the lands of said defendants, and for domestic purposes, and
3 the watering of their livestock, during all seasons of the year;
4 and that the plaintiffs and each of them, their agents, servants
5 and employees, be perpetually enjoined from interfering with the
6 defendants in the use and enjoyment of said quantity of water in
7 and upon their lands hereinabove described, and that said defend-
8 ants have such further and different relief as to the Court may
9 seem just, proper and equitable, and that all of the rights of
10 the water users of said Muddy River, whether plaintiffs or de-
11 fendants herein, be adjudicated and determined; and that the
12 defendants have judgment against the plaintiffs for their costs
13 and disbursements herein expended.

14 J. R. McManis
15
16 and L. G. McManis
17 Attorneys for said defendants.
18
19
20

21 STATE OF Utah
22 COUNTY OF Dalton
23 Julia May Knox being first duly
24 sworn, deposes and says that she is one of the defendants in
25 the above entitled action; that she has read over the foregoing
26 answer and knows the contents thereof and that the same is
27 true of her own knowledge, except as to the matters therein
28 stated upon her information and belief, and as to those matters
29 she believes it to be true.

30
31
32
33
34
35
36 Subscribed and sworn to before me
37 this eight day of May 1916.
38 My Commission Expires March 16, 1919
39 L. G. McManis
40 Notary Public in and for said
41 County and State.

1 Nevada Cogeneration Associates (NCA) wells.” (NCA’s post hearing brief, p. 7). The NCA post
2 hearing brief acknowledges Mr. Dixon performed his analysis following the conclusion of the hearing
3 and the post hearing analysis is provided in NCA’s post hearing brief. *Id.* at 6-7. Similarly, in NPS’
4 December 2, 2019 closing statement, it provided further analysis of groundwater temperature data.
5 (NPS closing statement at 2²). NPS states this analysis was a “subsequent examination of the
6 temperature data.” *Id.* NPS and NCA proffer the new analysis and expert opinions, purportedly as
7 evidence for the State Engineer’s consideration, in closing statements after the close of the evidentiary
8 hearing. NPS and NCA already had ample opportunity to present such evidence and opinions. This
9 attempt to supplement the record with evidence is improper and deprives LINCOLN
10 COUNTY/VIDLER of the opportunity to respond to or cross examine the new analysis and opinions
11 provided after the close of the evidentiary hearing.

12 Specifically, LINCOLN COUNTY/VIDLER request the following be stricken from NCA’s
13 post-hearing brief: 1) Sections entitled “Background” and “Order 1303—BMA Pumping and Effects
14 Conclusions” on p. 7 of NCA’s post-hearing brief; 2) Section entitled “Follow-Up Review of NCA
15 Pumping and Groundwater Levels” on pgs. 7-9 of NCA’s post-hearing brief; 3) Section entitled
16 “Results of Follow-Up Review” on pgs. 9-10 of NCA’s post-hearing brief; 4) Section entitled
17 “Conclusions” on p. 10 of NCA’s post-hearing brief; 5) The first 3 sentences in the Section entitled
18 “Conclusion as to the boundary in the Black Mountains Area” on p. 10; and 6) the following exhibits:
19 Figure 2; Figure 3; Figure 4; Figure 5; Map 1; and Map 2 and any references contained therein.
20 LINCOLN COUNTY/VIDLER also request that the first two full paragraphs on p. 2 after the bullet
21 point of NPS’ closing statement be stricken from the record.

22 In Interim Order (IO) #1303, the State Engineer requested reports and rebuttal reports be
23 submitted to address: (a) the geographic boundary of the hydrologically connected groundwater and
24 surface water systems comprising the Lower White River Flow System (LWRFS), (b) an analysis
25 regarding aquifer recovery since the completion of the Order 1169 aquifer test, (c) the long-term
26 annual quantity of groundwater that may be pumped from the LWRFS and how that would affect the
27

28 ² There are no page numbers in the NPS Closing Statement document. This motion excludes the NPS cover letter for purposes of identifying the pages of the NPS’ closing statement.

1 hydrology of the Muddy River Springs Area (MRSA), (d) the effects of movement of water rights
2 between alluvial wells and carbonate wells on deliveries of senior decreed rights to the Muddy River
3 and, (e) any other matter believed to be relevant to the State Engineer's analysis. (NSE Ex. 1 Order
4 1303, at 13-14).

5 On August 8, 2019, the State Engineer held a pre-hearing conference. At the pre-hearing
6 conference, the Hearing Officer specifically stated that opinions not expressed in the participants'
7 reports or rebuttal reports would not be allowed. Transcript of Proceedings, Pre-Hearing Conference,
8 Thursday August 8, 2019 at 35. The Amended Notice of Hearing stated that "the purpose of the
9 hearing on the Order 1303 reports was to provide the participants an opportunity to explain the
10 positions and conclusions expressed in the reports and/or rebuttal reports submitted in response to the
11 Order 1303 solicitation." See Amended Notice of Hearing at 2.

12 In the body of its closing statement, NPS provided new analysis by Dr. Richard Waddell
13 regarding certain groundwater temperature data from Garnet Valley to bolster its position and to
14 attempt to answer questions that Dr. Waddell failed to answer during the hearing. (NPS closing
15 statement at 2). NPS did not provide this information or analysis during the evidentiary hearing.

16 In its post-hearing brief, NCA provided what NCA described as "additional analysis" by
17 NCA's lead hydrologist, Jay Dixon. Mr. Dixon performed a "more thorough review of information"
18 assessing exactly what was discussed at the hearing involving the Black Mountain Area. (NCA post
19 hearing brief at 6-7). Mr. Dixon signed his report as a professional engineer to comply with NAC
20 625.612 - another acknowledgement the objected to information is additional, new analysis and
21 opinion. At no time during the report or rebuttal report exchange period or during the hearing
22 proceedings did NCA provide this analysis or opinions to the State Engineer or other participants in
23 this proceeding.

24 **B. ARGUMENT**

25 **1. NCA and NPS improperly provided new analysis and opinions purportedly as**
26 **evidence in their closing statements which should be stricken.**

27 In the context of protest hearings, the Nevada Supreme Court has held that those participating
28 in protest hearings "must have a full opportunity to be heard, a right that includes the ability to

1 challenge the evidence upon which the State Engineer's decision may be based." *Eureka County v.*
2 *State Engineer*, 131 Nev. 846, 855, 359 P.3d 1114, 1120 (2015) citing *Revert v. Ray*, 95 Nev. 782,
3 787, 603 P.2d 262, 264 (1979).³ The Court cited to *Bowman Transp., Inc. v. Arkansas-Best Freight*
4 *Sys., Inc.*, 419 U.S. 281, 288 n.4, 95 S. Ct. 438 (1974) as follows: "The Due Process Clause forbids an
5 agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation." *Id.*

6 The new analysis and opinions of Mr. Dixon, NCA's lead hydrologist and by Dr. Waddell in
7 their closing statements deny all participants the opportunity to challenge the evidence prior to the
8 State Engineer considering it. If NCA or NPS are permitted to supply this additional analysis and
9 opinion as evidence in a post-hearing brief or statement for consideration by the State Engineer in his
10 decision-making, the State Engineer will effectively deny other participants their due process rights to
11 challenge the proffered evidence.

12 **2. The additional information provided by NCA and NPS is argument and therefore**
13 **should be disregarded by the State Engineer.**

14 NAC 533.180 which governs protest hearings conducted by the State Engineer states that the
15 objective of hearings is to "develop a record upon which the State Engineer may rely to make a sound
16 decision." The purpose of the post-hearing briefs or statements is not to add to the record nor is it to
17 provide additional information or expert opinions. Rather, it is to provide a summary of the evidence
18 that was presented at the hearing. NCA and NPS provided additional information that should be
19 stricken from the record as consideration of such information would violate the other participants' due
20 process rights to rebut and cross-examine such information presented for the State Engineer's
21 consideration.

22 However, if the State Engineer chooses not to strike the information provided by NCA and
23 NPS in their post-hearing brief and closing statement, the State Engineer should disregard such
24 information because it is not evidence that has been properly introduced and admitted at the hearing.

25 ///

26 ///

27
28

³ While this proceeding was not a protest hearing, the same due process protections are required in the Order 1303 proceedings.

ALLISON MacKENZIE, LTD.
402 North Division Street, P.O. Box 646, Carson City, NV 89702
Telephone: (775) 687-0202 Fax: (775) 882-7918
E-Mail Address: law@allisonmackenzie.com

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee of ALLISON MacKENZIE, LTD., Attorneys at Law,
3 and on this date, I caused the foregoing document to be served on the following via Hand Delivery
4 and/or Electronic Transmission as follows:

5 **Via Hand Delivery:**

6 Micheline N. Fairbank
7 Deputy Administrator
8 Nevada State Engineer's Office
9 901 S. Stewart Street, Suite 2002
10 Carson City, NV 89701

11 **Via Electronic Transmission:**

12 8milelister@gmail.com; ablack@mcdonaldcarano.com; admin.mbop@moapabandofpaiutes.org;
13 aflangas@kcnvlaw.com; alaskajulie12@gmail.com; andrew.burns@snwa.com;
14 asaintil@kcnvlaw.com; barbnwalt325@gmail.com; bbaldwin@ziontzchestnut.com;
15 bherrema@bhfs.com; bostajohn@gmail.com; bvann@ndow.org;
16 chair.mbop@moapabandofpaiutes.org; Chris.Benkman@nsgen.com; Colby.pellegrino@snwa.com;
17 Coop@opd5.com; coopergs@ldschurch.org; counsel@water-law.com;
18 craig.primas@snvgrowers.com; craig.wilkinson@pabcogypsum.com;
19 dan.peressini@lasvegas paving.com; david.stone@fws.gov; Dbrown@ldalv.com;
20 dennis.barrett10@gmail.com; derekm@westernelite.com; devaulr@cityofnorthlasvegas.com;
21 dfrehner@lincolncountynv.gov; dixonjim@gmail.com; dorothy@vidlerwater.com; doug@nvfb.org;
22 dvossmmer@republicservices.com; dwight.smith@interflowhydro.com; edna@comcast.net;
23 emilia.cargill@coyotesprings.com; fan4philly@gmail.com; gary.karst@nps.gov;
24 gbushner@vidlerwater.com; glen.knowles@fws.gov; gmorrison@parsonsbehle.com;
25 golden@apexindustrialpark.com; golds@nevcogen.com; greatsam@usfds.com;
26 greg.walch@lvvwd.com; hartthethird@gmail.com; Howard.Forepaugh@nsgen.com;
27 ircady@yahoo.com; JCaviglia@nvenergy.com; jeff.phillips@lasvegas paving.com;
28 jim.watrus@snwa.com; joe@moapawater.com; Karen.glasgow@sol.doi.gov; kbrown@vvh2o.com;
Kevin.Desroberts@fws.gov; kimberley.jenkins@clarkcountynv.gov; kingmont@charter.net;
kpeterson@allisonmackenzie.com; krobison@rssblaw.com; kurthlawoffice@gmail.com;
lazarus@glorietageo.com; lbelenky@biologicaldiversity.org; lbenezet@yahoo.com;
liamleavitt@hotmail.com; Lindseyd@mvdsl.com; Lisa@ldalv.com; lle@mvdsl.com;
lon@moapawater.com; lroy@broadbentinc.com; LuckyDirt@icloud.com; luke.miller@sol.doi.gov;
luke.stewart@pabcogypsum.com; martinmiffilin@yahoo.com; MBHoffice@earthlink.net;
michael.schwemm@fws.gov; mjohns@nvenergy.com; mmmiller@cox.net;
moapalewis@gmail.com; moorea@cityofnorthlasvegas.com; muddyvalley@mvdsl.com;
onesharp1@gmail.com; paul@legaltnt.com; pdonnelly@biologicaldiversity.org;
progress@mvdsl.com; rafelling@charter.net; raymond.roessel@bia.gov;
rberley@ziontzchestnut.com; rhoerth@vidlerwater.com; robert.dreyfus@gmail.com;
Rott@nvenergy.com; rozaki@opd5.com; rteague@republicservices.com; Sarahpeterson@blm.gov;
SCarlson@kcnvlaw.com; sc.anderson@lvvwd.com; sc.anderson@snwa.com;
sferguson@mcdonaldcarano.com; sharrison@mcdonaldcarano.com; stever@stetsonengineers.com;
sue.braumiller@fws.gov; technichrome@jps.net; tim@legaltnt.com; tommyers1872@gmail.com;
trobison@mvdsl.com; tshanks@rssblaw.com; twtem1@hotmail.com; veronica.rowan@sol.doi.gov;
vsandu@republicservices.com; whitfam@mvdsl.com; william.paff@rocklandcapital.com;
wpoulsen@lincoln.vv.gov; mfairbank@water.nv.gov; mflatley@water.nv.gov;
jmordhorst@water.nv.gov

DATED this 20th day of December, 2019.


NANCY FONTENOT

4850-5086-0271, v. 1

ALLISON MacKENZIE, LTD.
402 North Division Street, P.O. Box 646, Carson City, NV 89702
Telephone: (775) 687-0202 Fax: (775) 882-7918
E-Mail Address: law@allisonmackenzie.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10

**IN THE OFFICE OF THE STATE ENGINEER
OF THE STATE OF NEVADA**

11
12
13
14
15
16
17
18
19
20
21
22
23
24

IN THE MATTER OF THE ADMINISTRATION AND MANAGEMENT OF THE LOWER WHITE RIVER FLOWSYSTEM WITHIN COYOTE SPRING VALLEY HYDROGRAPHIC BASIN (210), A PORTION OF THE BLACK MOUNTAINS AREA HYDROGRAPHIC BASIN (215), GARNET VALLEY HYDROGRAPHIC BASIN (216), HIDDEN VALLEY HYDROGRAPHIC BASIN (217), CALIFORNIA WASH HYDROGRAPHIC BASIN (218), AND MUDDY RIVER SPRINGS AREA (AKA UPPER MOAPA VALLEY) HYDROGRAPHIC BASIN (219).

**RESPONSE OF NEVADA COGENERATION ASSOCIATES Nos. 1 & 2 ("NCA")
TO THE MOTION TO STRIKE FILED BY
LINCOLN COUNTY WATER DISTRICT AND VIDLER WATER COMPANY**

NCA provides this Response to that portion of the Motion to Strike filed by Lincoln County Water District and Vidler Water Company (collectively, "Lincoln/Vidler") directed to the Post-hearing brief submitted by NCA in regard to the hearings involving the Lower White River Flow System ("LWRFS"). Hereinafter, the "Post-hearing brief of NCA" will be designated as the "NCA Brief" for clarity.

Discussion

Introduction: With one, minor, exception, *all* of Lincoln/Vidler's objections are directed to the *entirety* of Jay Dixon's contribution to the NCA Brief, which NCA provided in a form that was highlighted so that the State Engineer would easily distinguish between the discussion points of legal counsel and those of NCA's consultant.¹ Lincoln/Vidler apparently

¹ As is known to the State Engineer and his staff, Jay Dixon of Dixon Hydrologic participated in the hearings involving Interim Order #1303 regarding the LWRFS as an expert for both NCA and for Bedroc, two of the stakeholders who made presentations during the hearing.

1 does not have a problem with the undersigned stating the same things, perhaps simply because
2 the undersigned is a lawyer rather than a hydrologist who is doing the speaking. NCA's counsel
3 also raised the point at the pretrial conference that this proceeding might benefit from allowing
4 the experts to directly question the other experts, but faced opposition to that proposal from the
5 other lawyers -- despite the fact that it has repeatedly been emphasized that these hearings were
6 *not* an adversarial/protest hearing, but rather this process was intended to advise the State
7 Engineer on the positions of the Stakeholders and on the underlying hydrology of the Lower
8 White River Flow System ("LWRFS").

9 What lawyers do in "briefs" is summarize, *analyze* and *apply their understanding of the*
10 *principals involved* (whether those principals are scientific, legal, or factual/observations) to the
11 facts presented during a trial or hearing. There is clearly "analysis" applied in the discussion
12 section of any brief, and lawyers utilize what we all learned long ago in law school, a process
13 that has been enshrined by the acronym "IRAC," which stands for "Issue, Rule, Application or
14 Analysis, and Conclusion." We are taught to identify the Issue, state the Rule, Apply the rule or
15 *Analyze the rule's application to the facts*, and draw the Conclusion following that analysis.
16 This is what the State Engineer is likely to find in all of the post-hearing briefs presented by the
17 lawyers for the various parties if they are well-trained and follow their training. They should all
18 identify their specific issues, identify the rules that apply to their issue, "analyze" the facts
19 presented and how the rules supposedly work for them in this particular circumstance, and draw
20 conclusions for the State Engineer from those facts.

21 In NCA's brief, the undersigned did exactly that, and interestingly received no objection
22 to his words. But nothing in the procedures for these post-hearing briefs prevents NCA's
23 consultants from participating and performing *the exact, same function* as legal counsel. Mr.
24 Dixon did in his section of the brief exactly what the lawyers do -- he highlighted for the State

1 Engineer some of the facts that were already in the record but which may not have been
2 examined by the State Engineer as closely as other facts, reiterated the “rules” – which were the
3 hydrologic principles he discussed at the hearing to help identify conditions that would explain
4 why the wells acted as they did, which would support whether the boundary should be moved –
5 and then applied the facts to the rules, explaining the same thing that he had already discussed
6 in his testimony at the hearing. The fact that Mr. Dixon is a “hydrologist” rather than a lawyer
7 has no bearing whatsoever; he employed the same process, using facts already in the record and
8 simply analyzed those facts to explain how those facts further support NCA’s position that the
9 boundary should be adjusted to exclude the NCA production wells.

10 No “rule” of procedure before the State Engineer prevents NCA from having *both* the
11 undersigned and his consultant participate in presenting that “IRAC-styled” analysis for the
12 State Engineer’s consideration. Indeed, the undersigned and NCA simply felt that a discussion
13 of the facts presented at the hearing by a hydrology expert in a “non-adversarial process”
14 designed to advise the State Engineer as to what the facts and circumstances are surrounding the
15 LWRFS might actually be more beneficial to the State Engineer than just arguments of legal
16 counsel; Mr. Dixon speaks the same language and uses similar verbiage as other engineers. The
17 process is the same whether spoken by Mr. Dixon or by the undersigned.

18 **1. Mr. Dixon’s Contribution to the NCA Brief Did Not Provide New Evidence**
19 **Outside of What Was Already In the Record**

20 Lincoln/Vidler’s first objection to the NCA Brief is their contention that the review and
21 discussion portion of the Brief in which Jay Dixon participated, beginning at the top of page 7
22 of the Brief, allegedly contains “evidence” that is new and was not presented during the hearing.
23 This contention is without merit. It was made clear in NCA’s Brief that Mr. Dixon simply
24 provided his analysis and explanation of evidence already in the record.

At the hearing, Mr. Dixon participated in NCA’s PowerPoint presentation. He testified

1 as a witness on behalf of NCA and discussed – in large part – evidence and information in the
2 record which supports the contention that NCA’s production wells located near the currently-
3 drawn southern boundary of the LWRFS “geographic boundary” area should be considered as
4 *outside that boundary*, thus requiring the boundary to be re-drawn to exclude those production
5 wells. At pages 5 and 6 of NCA’s Brief – *sections to which Lincoln/Vidler did not pose any*
6 *objection* – NCA highlighted some of the testimony provided by Mr. Dixon that went
7 specifically to the boundary issue. That testimony identified that the NCA wells had been
8 intentionally located *in the fault* that was identified by Marty Mifflin. *See* NCA Brief at p. 6,
9 cited in the first full paragraph, and at footnote 13. That discussion in NCA’s Brief explained
10 that Mr. Dixon and his colleagues went beyond what SNWA looked at, and it reiterated that Mr.
11 Dixon provided more information at the hearing than what SNWA had considered as being a
12 *basis* for why those NCA production wells had a minimal effect, if any, on the water levels and
13 spring flow in the Muddy River Springs Area and demonstrated a different effect than did the
14 other monitoring wells in that vicinity, such as BM-DL-2.

15 As was explained in detail in the NCA Brief itself at the bottom of p. 6 and top of p. 7,
16 the discussion portion contributed by Mr. Dixon was culled from information taken expressly
17 from the pumping files of NCA – files that were part of the record of the State Engineer in this
18 matter:

19 Indeed, SNWA’s Figure A-3 showed no influence from BMA pumping of
20 production wells, which Mr. Dixon explained would be consistent with the vastly
21 different P-values. However, Mr. Dixon did note that there was “noise”
associated with the well data for EBM-3 (the NCA well), and noted that it would
be helpful to have additional work done to analyze the data more thoroughly.

22 Following the conclusion of the hearing, Mr. Dixon did precisely that –
23 he analyzed *the existing monitoring record back to 1992, and performed a more*
thorough review of information already in the State’s record. Notably, nothing
24 *herein is added to the record that was not made available to the Nevada State*
Engineer during the hearing, but is rather a more thorough review of the
materials from the NCA Permit files that are part of the record, using the data

1 provided therein and assessing exactly what was discussed at the hearing
2 involving the Black Mountains Area and the differing effects noted from the
3 production wells in that area as compared to nearly all the other wells reported
4 upon and analyzed by SNWA and others....

5 NCA Brief, at p. 6 and 7 (emphasis added).

6 Lincoln/Vidler claims that Mr. Dixon supplied additional “evidence” because, following
7 the hearing, Mr. Dixon performed an additional review and analysis of NCA’s permit files.
8 But, during the hearing, Mr. Dixon discussed the long record of information in his responses to
9 questions posed by Jon Benedict of the State Engineer’s office. Mr. Dixon referred to that
10 information as, “a 25-year test at NCA. Particularly those two northern most wells they’ve been
11 pumping. They use all of their water rights every year.”² At its core, Mr. Dixon’s contribution to
12 the NCA Brief was simply that he went back to the State Engineer’s NCA permit files – *which*
13 *are a part of the record before the State Engineer in this proceeding* (as are all of the permit
14 files of the various stakeholders and water right holders in the various basins affected) – and he
15 reviewed and assembled the pumping data into a more usable form for the State Engineer’s
16 consideration. At the hearing, Mr. Dixon discussed the fact that it would be helpful to eliminate
17 some of the “noise” associated with the pumping data associated with EBM-3, one of the NCA
18 wells Mr. Dixon discussed at length during his testimony, but again reiterated that there was as
19 “long period of record....”³

20 **2. The Figures Are Simply a Compilation of Fact in the Record Presented As An**
21 **Engineer Would Describe Them, Rather Than As a Lawyer Would**

22 Lincoln/Vidler further objects to various “Figures” or exhibits utilized by Mr. Dixon to
23 explain his section of the brief, but that is merely an objection to form over substance. Lawyers
24 use words primarily in their arguments; they are our stock in trade, as we are known for being
wordsmiths. Recently, however, with the advent of digital processing and electronic filing,

²See Transcript Vol. IX., Oct. 3, 2019, p. 1674, lines 12-15.

³Id. at p. 1675, line 2.

1 some lawyers are actually embedding their briefs with photos, links, graphs, and even video
2 (when allowed) to enhance their presentations to courts.⁴ Engineers are often less wordy than
3 lawyers, but instead resort to using graphs or diagrams to make their points and to summarize
4 their conclusions. Here, Mr. Dixon simply communicated his version of the same IRAC
5 principal utilized by lawyers through the use of figures then explained his analysis rather than
6 using words, but he did not go beyond the traditional IRAC concept to get there. Had the
7 undersigned presented the graphs, maps and such as demonstrative exhibits (no differently than
8 did Mr. Dixon), there likely would have been no objection; saving words (precious, when given
9 a page limit), was key to the decision to have Mr. Dixon say it as an engineer would.

10 **3. Lincoln/Vidler's Citations to Protest Hearing Cases is Inapplicable in This**
11 **Context.**

12 The lone citations provided by Lincoln/Vidler as support for their objection and motion
13 to strike are cases discussing due process in the context of adversarial protest hearings. *See,*
14 Lincoln/Vidler Motion at p. 4, citing *e.g., Eureka County v. State Engineer*, 131 Nev. 846, 359
15 P.3d 1114 (2015); *Revert v. Ray*, 95 Nev. 782, 603 P.2d 262 (1979), or general trial cases. *See,*
16 *e.g., Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281 (1974).

17 The present matter is neither an adversarial court proceeding between contesting parties
18 nor a protested water rights application/permit proceeding. Instead, as was made abundantly
19 clear on numerous occasions by Deputy Administrator Micheline Fairbank both before and
20 during the hearing, this is a non-adversarial process designed to provide the State Engineer and
21 his staff with information about the hydrology of the LWRFS and directed to assist with the

22 ⁴ *See* http://www.counselpress.com/page_blog_single.cfm?bid=38 "E-filing a short video clip
23 directly to the PACER CM/ECF system with CP eBrief technology," published Feb. 14, 2014,
24 John C. Kruesi, Esq. ; *see also, Experiential Legal Writing: Analysis, Process, and Documents*,
Diana R. Donahoe, Wolters Kluwer Law & Business (2015), p. 106 (ideas for embedding
multimedia within briefs including pictures, animations, simulations, video, diagrams and maps,
and links).

1 specific areas limited to the context of Interim Order #1303 – but not as to the policy aspects at
2 this stage. This entire process was intended to give the State Engineer and his staff some
3 additional understanding from the Stakeholders’ points of view as to the hydrology of the
4 LWRFS so that the State Engineer could determine if the boundary needed adjustment, how the
5 system is adapting since the Order 1169 aquifer test and whether it has recovered wells,, the
6 long-term quantity of groundwater that may be pumped from the LWRFS and the relationships
7 between location of pumping on discharge to the Muddy River Springs and capture of Muddy
8 River flow, and the hydrologic effects of movement of water rights between alluvial wells and
9 carbonate wells on deliveries of senior decreed rights to the Muddy River. Information
10 presented and discussed – whether by a lawyer or by a consultant – is what is key here.

11 Notably, Mr. Dixon did not drill any new wells. Mr. Dixon did not take any new
12 measurements of existing wells, nor did Mr. Dixon commission any new studies of the LWRFS
13 to be performed by any outside entity that, itself, drilled new wells or pumped water from areas
14 that had not yet been tested. No new data *beyond what is already in the record* was obtained
15 from outside sources and supplied in NCA’s Brief. Mr. Dixon transparently described both the
16 process and sources of data for his analysis, the results of which can be duplicated by the State
17 Engineer or any other stakeholder. The objection of Lincoln/Vidler does not identify evidence
18 that was outside the record; rather, Lincoln/Vidler objects to the fact that the *existing record*
19 *data* was better explained by Mr. Dixon in the NCA Brief than had been previously explained.
20 Well, that is the purpose – in every case in which the undersigned has been involved – of using
21 post-hearing briefs, to allow the advocate to *present the information in a clear, concise manner*
22 *that is summarized and explained*, hopefully in a manner that clarifies and crystalizes the
23 testimony of many witnesses and many documents previously presented over many days.

24

1 **4. The Stamp of Mr. Dixon Is Consistent With The Requirements of NAC 625.611.**

2 Lastly, Lincoln/Vidler objects to Mr. Dixon's portion of the NCA Brief suggesting that
3 because Mr. Dixon applied his professional engineer's stamp to the document, it must mean he
4 supplied "new" evidence or a "new" report. Again, Lincoln/Vidler has misconstrued the
5 purpose and intent of the stamp, the purpose and intent of the NAC requirement, and the
6 rationale for its application in this instance.

7 During the hearing, Mr. Dixon utilized a laser pointer while discussing Slides Nos. 7, 8,
8 9, 15, and 17, and he expressly testified about the geology of the area demonstrated in those
9 slides in discussing the "boundary" issue.⁵ Essentially, Mr. Dixon outlined where the boundary
10 should likely be using that pointer and describing the conditions, but he did not put a map on
11 paper showing – in demonstrative form – what he was saying as to where that boundary would
12 be located if the State Engineer followed his testimony about the strike-slip fault and the
13 intentional location of the NCA production wells in that fault by Marty Mifflin. One thing that
14 is likely, however, is that a hydrologic boundary is not typically a perfectly straight line as is
15 currently the boundary in the southern portion of the LWRFS where these wells are located.
16 Consequently, Mr. Dixon -- as part of NCA's Brief, added a demonstrative exhibit to show what
17 his testimony demonstrated, and that was a map following the geologic features to which he had
18 testified at pages 1618-1627.

19 NAC 625.611 requires an engineer to apply his or her professional stamp whenever a
20 map is submitted to a "public authority." Though the attachments to NCA's Brief were
21 demonstrative only (much in the way they could have been *embedded* as media in a legal brief),
22 the inclusion of such a map suggested to Mr. Dixon that it would require him to apply his stamp
23 in order to comply with NAC 625.611. Notably, nothing in that NAC provision exempts a map
24

⁵ Trans. IX, Oct. 3, 2019, at pp. 1618-1627.

1 used for “demonstrative” purposes versus a map supplied for permitting or other purposes; in an
2 abundance of caution, it simply seemed prudent to have Mr. Dixon “stamp” the NCA document
3 to avoid any suggestion that he had improperly supplied a “map” without a stamp.

4 CONCLUSION

5 The NCA Brief does not contain new evidence, and Mr. Dixon did not conduct
6 additional expert analysis beyond the type of “analysis” in which lawyers engage each and
7 every time they prepare arguments for their post-hearing briefs. The objection made here by
8 Lincoln/Vidler is to the person, not to the substance – and there is no basis under which to
9 uphold that objection. Nothing prohibits Mr. Dixon from participating as a contributor to the
10 post-hearing brief of NCA, and his input was simply a summarization of the information from
11 NCA’s permit files that *anyone* could have gleaned had they taken the time to do the deep dive
12 that Mr. Dixon performed and worked their way through that record.

13 The entire Order 1303 administrative process was intended to give the State Engineer
14 and his staff an additional understanding from the Stakeholders’ points of view as to the
15 hydrology of the LWRFS so that the State Engineer could determine if the boundary needed
16 adjustment, how the system is adapting since the Order 1169 aquifer test and whether it has
17 recovered, the long-term quantity of groundwater that may be pumped from the LWRFS and the
18 relationships between location of pumping on discharge to the Muddy River Springs and
19 capture of Muddy River flow, and the hydrologic effects of movement of water rights between
20 alluvial wells and carbonate wells on deliveries of senior decreed rights to the Muddy River.
21 Mr. Dixon transparently described both the process and source of data for his analysis, the
22 results of which can be duplicated by the State Engineer or any other stakeholder. When this
23 entire Order 1303 administrative process has been completed, the State Engineer will be the
24 sole person responsible for making the ultimate decision regarding management of the LWRFS,

1 protection of the LWRFS resources and the protection of water rights for the stakeholders
2 within the LWRFS. The State Engineer has broad discretion as to what data, standards and
3 methodologies are used to make these decisions. Mr. Dixon's analysis is one of many tools the
4 State Engineer has at his discretion in the decision making process.

5 Finally, it should be remembered that the "record" before the State Engineer is not
6 simply what was discussed at the hearing, but rather is all that information the State Engineer
7 identified as being part of the record, and the permit files of NCA are certainly fair game for
8 NCA to point out to the State Engineer for consideration when making a determination
9 regarding the establishment of the boundaries of the LWRFS. The simple fact that an engineer
10 pointed out those files and what was contained therein rather than a lawyer, however, is not a
11 violation of anyone's "due process."

12 The motion of Lincoln/Vidler should be denied.

13 DATED January 7, 2020.

14 KAEMPFER CROWELL

15 BY:



16 Alex J. Flangas
17 Nevada Bar No.
18 50 West Liberty Street, Suite 900
19 Reno, NV 89501
20 *Attorneys for*
21 *Nevada Cogeneration Associates Nos. 1 and 2*

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of KEMPFFER CROWELL, and on January 7, 2020, I caused the foregoing **RESPONSE OF NEVADA COGENERATION ASSOCIATES Nos. 1 & 2 ("NCA") TO THE MOTION TO STRIKE FILED BY LINCOLN COUNTY WATER DISTRICT AND VIDLER WATER COMPANY** to be served via electronic transmission as follows:

8milelister@gmail.com;
ablack@mcdonaldcarano.com;
admin.mbop@moapabandofpaiutes.org;
aflangas@kcnvlaw.com
alaskajulie12@gmail.com;
andrew.burns@snwa.com;
barbnwalt325@gmail.com;
bbaldwin@ziontzchestnut.com;
bostajohn@gmail.com;
bvann@ndow.org;
chair.mbop@moapabandofpaiutes.org;
chris.benkman@nsgen.com;
Colby.pellegrino@snwa.com;
Coop@opd5.com;
coopergs@ldschurch.org;
craig.primas@snvgrowers.com;
craig.wilkinson@pabcogypsum.com;
dan.peressini@lasvegaspaving.com;
david_stone@fws.gov;
Dbrown@ldalv.com;
dennis.barrett10@gmail.com;
derekm@westernelite.com;
devaulr@cityofnorthlasvegas.com;
dfrehner@lincolncountynv.gov;
dixonjm@gmail.com;
dorothy@vidlerwater.com;
doug@nvfb.org;
dvossmer@republicservices.com;
dwight.smith@interflowhydro.com;
edna@comcast.net;
emilia.cargill@coyotesprings.com;
EveryoneWaterResources@water.nv.gov;
fan4philly@gmail.com;
gary_karst@nps.gov;
gbushner@vidlerwater.com;
glen_knowles@fws.gov;
gmorrison@parsonsbehle.com;
golden@apexindustrialpark.com;
golds@nevcogen.com;
greatsam@usfds.com;

jmordhorst@water.nv.gov;
joe@moapawater.com;
Karen.glasgow@sol.doi.gov;
kbrown@vvh2o.com;
Kevin_Desroberts@fws.gov;
kimberley.jenkins@clarkcountynv.gov;
kingmont@charter.net;
kpeterson@allisonmackenzie.com;
krobison@rsslblaw.com;
kurthlawoffice@gmail.com;
lazarus@glorietageo.com;
lbelenky@biologicaldiversity.org;
lbenezet@yahoo.com;
liamleavitt@hotmail.com;
Lindseyd@mvdsl.com;
Lisa@ldalv.com;
lle@mvdsl.com;
lon@moapawater.com;
lroy@broadbentinc.com;
LuckyDirt@icloud.com;
luke.miller@sol.doi.gov;
martinmifflin@yahoo.com
mfairbank@water.nv.gov
mflatley@water.nv.gov
MBHoffice@earthlink.net;
Michael_schwemm@fws.gov;
mjohns@nvenergy.com;
mmmiller@cox.net;
moapalewis@gmail.com;
moorea@cityofnorthlasvegas.com;
muddyvalley@mvdsl.com;
oldnevadanwater@gmail.com;
onesharp1@gmail.com;
paul@legaltnt.com;
pdonnelly@biologicaldiversity.org;
progress@mvdsl.com;
rafelling@charter.net;
raymond.roessel@bia.gov;
rberley@ziontzchestnut.com;
rhoerth@vidlerwater.com;

KEMPFFER CROWELL
50 West Liberty Street, Suite 700
Reno, Nevada 89501

1 greg.walch@lvvwd.com;
2 hartthethird@gmail.com;
3 howard.forepaugh@nsgen.com;
4 ircady@yahoo.com;
5 info4gbwn@gmail.com;
6 JCaviglia@nvenergy.com;
7 Jeff.phillips@lasvegaspaving.com;
8 jim.watrus@snwa.com;
9 mordhorst@water.nv.gov
10 sue_braumiller@fws.gov;
11 technichrome@jps.net;
12 tim@legaltnt.com;
13 tomg@nevadawatersolutions.com;
14 tommyers1872@gmail.com;
15 trobinson@mvdsl.com;
16 twtemt@hotmail.com;
17 veronica.rowan@sol.doi.gov;
18 vsandu@republicservices.com;
19 whitfam@mvdsl.com;

robert.dreyfus@gmail.com;
Rott@nvenergy.com;
rozaki@opd5.com;
rteague@republicservices.com;
Sarahpeterson@blm.gov;
SCarlson@kcnvlaw.com;
sc.anderson@lvvwd.com;
sc.anderson@snwa.com;
sharrison@mcdonaldcarano.com;
stever@stetsonengineers.com;
william.paff@rocklandcapital.com;
wpoulsen@lincolnnv.com;
therese@water-law.com;
schroeder@water-law.com;
c.skulan@water-law.com;
l.gage@water-law.com;
jeanette_pizarro@fws.gov;
RShaffer@parsonsbehle.com

11 Additionally, a copy of this document was delivered via facsimile to the Division of
12 Water Resources this same day.

13 DATED January 7, 2020.

14
15 
16 Employee of Kaempfer Crowell

RECEIVED

**IN THE OFFICE OF THE STATE ENGINEER
OF THE STATE OF NEVADA**

2020 JAN 17 PM 3: 57

STATE ENGINEER, NEVADA

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE MATTER OF THE ADMINISTRATION AND MANAGEMENT OF THE LOWER WHITE RIVER FLOW SYSTEM WITHIN COYOTE SPRING VALLEY HYDROGRAPHIC BASIN (210), A PORTION OF BLACK MOUNTAINS AREA HYDROGRAPHIC BASIN (215), GARNET VALLEY HYDROGRAPHIC BASIN (216), HIDDEN VALLEY HYDROGRAPHIC BASIN (217), CALIFORNIA WASH HYDROGRAPHIC BASIN (218), AND MUDDY RIVER SPRINGS AREA (AKA UPPER MOAPA VALLEY) HYDROGRAPHIC BASIN (219).

REPLY IN SUPPORT OF LINCOLN COUNTY WATER DISTRICT AND VIDLER

WATER COMPANY, INC. MOTION TO STRIKE

LINCOLN COUNTY WATER DISTRICT ("LINCOLN COUNTY") and VIDLER WATER COMPANY, INC. ("VIDLER") and collectively "LINCOLN COUNTY/VIDLER", by and through their attorneys, DYLAN V. FREHNER, ESQ. the LINCOLN COUNTY DISTRICT ATTORNEY and KAREN A. PETERSON, ESQ. of the law firm of ALLISON MacKENZIE, LTD., hereby submit their Reply in Support of their Motion to Strike certain portions of the post hearing brief¹ of Nevada Cogeneration Associates Nos. 1 and 2 ("NCA").²

NCA argues in its Response to the Motion to Strike ("Response"), that Mr. Dixon's portion of NCA's post hearing brief is no different than argument by NCA counsel's in a brief and Mr. Dixon's contribution to the NCA post hearing brief did not provide new evidence. Both contentions are incorrect, and the State Engineer should grant LINCOLN COUNTY/VIDLER's Motion to Strike.

¹ Nevada Cogeneration Associates Nos. 1 and 2 titled its brief submitted on December 3, 2019 to the State Engineer in this proceeding as "Post-hearing brief of Nevada Cogeneration Associates Nos. 1 and 2" so it is not clear why NCA now wants to refer to its post hearing brief as "'NCA Brief' for clarity". See NCA Response at 1.

² The National Park Service ("NPS") did not submit an Opposition to the Motion to Strike filed by LINCOLN/VIDLER requesting that the first two full paragraphs on page 2 after the bullet of NPS' Closing Statement be stricken from the record.

ALLISON MacKENZIE, LTD.
402 North Division Street, P.O. Box 646, Carson City, NV 89702
Telephone: (775) 687-0202 Fax: (775) 882-7918
E-Mail Address: law@allisonmackenzie.com

1 It is undisputed NCA provided new analysis and explanation of evidence described and
2 presented by Mr. Dixon, as an engineer³, outside of the hearing in NCA's post hearing brief. See NCA
3 Response at 3, 5-6; NCA Post Hearing Brief at 6-7. That new analysis and explanation of evidence
4 constitute new opinions and thus, new evidence that NCA is improperly attempting to include in this
5 proceeding long after the hearing has concluded. To argue that what Mr. Dixon did is the same as
6 what lawyers do in a post hearing brief is disingenuous. Mr. Dixon was supposed to perform his
7 analysis and explanation prior to the hearing and include his analysis, explanation, opinions, figures
8 and maps in his rebuttal report. He could have then testified at the hearing as to his new and further
9 analysis, explanation, opinions, figures and maps and been subject to cross-examination concerning
10 his further analysis, explanation, opinions, figures and maps during the hearing. If he or NCA's
11 counsel then cited in NCA's post hearing brief to Mr. Dixon's hearing testimony or exhibits introduced
12 into evidence concerning Mr. Dixon's analysis, explanation, opinions, figures and maps,
13 LINCOLN/VIDLER would not be objecting. NCA tried to include slides at the hearing with opinions
14 outside the scope of its rebuttal report and the Hearing Officer excluded that information. Transcript
15 of Proceedings, Public Hearing, Hearing on Order 1303, Volume IX, P.M. Session, Thursday October
16 3, 2019 at pp. 1610-1611. NCA is trying the same thing again in its post hearing brief. In addition,
17 the fact Mr. Dixon felt compelled as a professional engineer to sign NCA's post hearing brief to
18 comply with the professional requirements contained in NAC 625.612 for a "report, study, test result,
19 certification or calculation" submitted to a public authority only underscores that NCA's post hearing
20 brief contains improper outside the record analysis and opinions and is not argument. Obviously, Mr.
21 Dixon did not believe he adequately addressed his client's interests prior to the close of the hearing
22 and now seeks to supplement the hearing record with additional analysis, explanation, opinions,
23 figures and maps post hearing. NCA's attempt to introduce new analysis, explanation, opinions,
24 figures and maps that should have been presenting during the hearing and which prejudices the due
25 process rights of all the participants in the Lower White River Flow System proceeding should not be
26 allowed by the State Engineer. Accordingly, LINCOLN/VIDLER request their Motion to Strike be
27 granted.

28

³ Mr. Dixon was qualified for this proceeding as an expert in hydrology and water rights. NCA Witness List, p. 2.

ALLISON MacKENZIE, LTD.
402 North Division Street, P.O. Box 646, Carson City, NV 89702
Telephone: (775) 687-0202 Fax: (775) 882-7918
E-Mail Address: law@allisonmackenzie.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DATED this 17th day of January, 2020.

LINCOLN COUNTY DISTRICT ATTORNEY
181 North Main Street, Suite 205
P.O. Box 60
Pioche, NV 89043
Telephone: (775) 962-8073
Email: dfrehner@lincolncountynv.gov

~ and ~

ALLISON MacKENZIE, LTD.
402 North Division Street
Carson City, Nevada 89703
Telephone: (775) 687-0202
Email: kpeterson@allisonmackenzie.com

BY: 
KAREN A. PETERSON, ESQ.
Nevada State Bar No. 0366

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

ALLISON MacKENZIE, LTD.
402 North Division Street, P.O. Box 646, Carson City, NV 89702
Telephone: (775) 687-0202 Fax: (775) 882-7918
E-Mail Address: law@allisonmackenzie.com

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee of ALLISON MacKENZIE, LTD., Attorneys at Law,
3 and on this date, I caused the foregoing document to be served on the following via Hand Delivery
4 and/or Electronic Transmission as follows:

5 **Via Hand Delivery:**

6
7 Micheline N. Fairbank
8 Deputy Administrator
9 Nevada State Engineer's Office
10 901 S. Stewart Street, Suite 2002
11 Carson City, NV 89701

12 **Via Electronic Transmission:**

13 8milelister@gmail.com; ablack@mcdonaldcarano.com; admin.mbop@moapabandofpaiutes.org;
14 aflangas@kcnvlaw.com; alaskajuliel2@gmail.com; andrew.burns@snwa.com;
15 asaintil@kcnvlaw.com; barbnwal325@gmail.com; bbaldwin@ziontzchestnut.com;
16 bherrema@bhfs.com; bostajohn@gmail.com; bvann@ndow.org;
17 chair.mbop@moapabandofpaiutes.org; Chris.Benkman@nsgen.com; Colby.pellegrino@snwa.com;
18 Coop@opd5.com; cooper@ldschurch.org; counsel@water-law.com;
19 craig.primas@snvgrowers.com; craig.wilkinson@pabcogypsum.com;
20 dan.peressini@lasvegaspaving.com; david_stone@fvs.gov; Dbrown@ldalv.com;
21 dennis.barrett10@gmail.com; derekm@westernelite.com; devaulr@cityofnorthlasvegas.com;
22 dfrchner@lincolncountynv.gov; dixonjm@gmail.com; dorothy@vidlerwater.com; doug@nvfb.org;
23 dvoosiner@republicservices.com; dwight.smith@interflowhydro.com; edna@comcast.net;
24 emilia.cargill@coyotesprings.com; fan4philly@gmail.com; gary_karst@nps.gov;
25 gbushner@vidlerwater.com; glen_knowles@fvs.gov; gmorrison@parsonsbehle.com;
26 golden@apexindustrialpark.com; golds@nvcogen.com; greatsam@usfds.com;
27 greg.walch@lvvwd.com; hartthethird@gmail.com; Howard.Forepaugh@nsgen.com;
28 ircady@yahoo.com; JCaviglia@nvenergy.com; jeff.phillips@lasvegaspaving.com;
jim.watrus@snwa.com; joe@moapawater.com; Karen.glasgow@sol.doi.gov; kbrown@vvh2o.com;
Kevin_Desroberts@fvs.gov; kimberley.icnkins@clarkcountynv.gov; kingmont@charter.net;
kpeterson@allisonmackenzie.com; krobison@rsslblaw.com; kurthlawoffice@gmail.com;
lazarus@glorietageo.com; lbelenky@biologicaldiversity.org; lbenezet@yahoo.com;
liamleavitt@hotmail.com; Lindseyd@mvdsl.com; Lisa@ldalv.com; lle@mvdsl.com;
lon@moapawater.com; lroy@broadbentinc.com; LuckyDirt@icloud.com; luke.miller@sol.doi.gov;
luke.stewart@pabcogypsum.com; martinmifflin@yahoo.com; MBHoffice@earthlink.net;
michael_schwemm@fvs.gov; mjohns@nvenergy.com; mmmiller@cox.net;
moapalewis@gmail.com; moorea@citvofnorthlasvegas.com; muddyvalley@mvdsl.com;
onesharp1@gmail.com; paul@legaltnt.com; pdonnely@biologicaldiversity.org;
progress@mvdsl.com; rafelling@charter.net; raymond.roessel@bia.gov;
rberley@ziontzchestnut.com; rhoerth@vidlerwater.com; robert.dreyfus@gmail.com;
Rott@nvenergy.com; rozaki@ond5.com; rteague@republicservices.com; Sarahpeterson@blm.gov;
SCarlson@kcnvlaw.com; sc.anderson@lvvwd.com; sc.anderson@snwa.com;
sferguson@mcdonaldcarano.com; sharrison@mcdonaldcarano.com; stever@stetsonengineers.com;
sue_braumiller@fvs.gov; technichrome@jps.net; tim@legaltnt.com; tommyvers1872@gmail.com;
trobison@mvdsl.com; tshanks@rsslblaw.com; twtemt@hotmail.com; veronica.rowan@sol.doi.gov;
vsandu@republicservices.com; whitfam@mvdsl.com; william.paff@rocklandcapital.com;
wpoulsen@lincolnnv.com; mfairbank@water.nv.gov; mlflatley@water.nv.gov;
jmordhorst@water.nv.gov

ALLISON MacKENZIE, LTD.
402 North Division Street, P.O. Box 646, Carson City, NV 89702
Telephone: (775) 687-0202 Fax: (775) 882-7918
E-Mail Address: law@allisonmackenzie.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DATED this 17th day of January, 2020.

Susan Price
SUSAN PRICE

Exhibits Excluded from Appendix

Exhibits Excluded from Appendix