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 03:09 PM Elizabeth A. Brown Clerk of Supreme Court **Supreme Court No. 85137** District Court Case No. A816761

JOINT APPENDIX

VOLUME 4

APPENDIX – CHRONOLOGICAL TABLE OF CONTENTS

			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

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

AARON D. FORD
Attorney General
Steve Shevorski (Bar No. 8256)
Chief Litigation Counsel
James N. Bolotin (Bar No. 13829)
Senior Deputy Attorney General
Kiel B. Ireland (Bar No. 15368C)
Deputy Attorney General
Office of the Attorney General
100 N. Carson St.
Carson City, NV 89701-4717
T: (775) 684-1234
sshevorski@ag.nv.gov
jbolotin@ag.nv.gov
kireland@ag.nv.gov
Attorneys for Respondent
State Engineer

DISTRICT COURT

CLARK COUNTY, NEVADA

LAS VEGAS VALLEY WATER DISTRICT, and SOUTHERN NEVADA WATER AUTHORITY, Petitioners, vs. ADAM SULLIVAN, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, Respondent. And All Consolidated Cases.	Case No. A-20-816761-C Dept. No. I Consolidated with: A-20-817765-P A-20-818015-P A-20-817977-P A-20-818069-P A-20-817840-P A-20-817876-P A-21-833572-J

RESPONDENTS' ANSWERING BRIEF

TABLE OF CONTENTS

. . .

TABLE OF AUTHORITIES

CASES **Page(s)**

STATUTES

OTHER AUTHORITY

ISSUES PRESENTED FOR REVIEW

1. Is there substantial evidence supporting the State Engineer's Order 1309?
2. Did the State Engineer have legal authority to issue Order 1309?
3. Is Order 1309 constitutional?

INTRODUCTION

This Court should affirm the State Engineer's Order 1309. The State Engineer held a multiyear aquifer test to determine the effects of pumping a portion of the water rights granted for Coyote Spring Valley. The aquifer test showed an unprecedented decline in groundwater levels across a 1,100 square mile area. It also showed that the decline in groundwater resulted in a decline in the discharge of springs that feed the Muddy River.

The State Engineer received scientific reports on the aquifer test and post-test data from stakeholders in the area, including federal agencies, water districts, energy providers, private corporations and a conservation group. He then held a two-week hearing where stakeholders presented expert testimony, subject to cross-examination, before submitting closing briefs on their views.

Based on review of that extensive evidence and analysis – over 50,000 pages in the record on review – the State Engineer issued Order 1309. Order 1309 recognized that there are six sub-basins and a portion of a seventh within that 1,100 square mile area. Those sub-basins have a uniquely close hydrologic connection and share the same supply of water. That is why pumping in one part of the area causes groundwater declines in other areas, and pumping in nearly any part of the area eventually leads to declines in spring flow.

The State Engineer found that the uniquely close connection required joint administration of the area as a single hydrographic basin, identified as the Lower White River Flow System ("LWRFS"). He developed six hydrologic and geologic criteria to determine whether a basin or sub-basin should be included or excluded from the LWRFS.

The State Engineer also reviewed the data, analysis and argument presented to determine that 8,000 acre-feet annually ("afa") is the maximum amount of groundwater that can be pumped from the LWRFS without conflicting with senior rights. That

determination was based on extensive evidence that reduced pumping after the aquifer test ended had allowed groundwater levels and spring flow to *partially* recover (though not enough to support increased pumping).

Order 1309 should be affirmed for three reasons. First, Order 1309 consists of a series of highly scientific factual findings. The State Engineer's findings must be deferred to. There is substantial evidence in the record supporting his determination of the LWRFS boundaries and the maximum sustainable amount of pumping.

Second, the State Engineer had legal authority to issue Order 1309. The Nevada Legislature empowered the State Engineer to regulate all the water in Nevada. He is obligated to protect senior rights and step in when an area's water resources are insufficient to serve existing rights. Order 1309 is nothing more than a set of factual determinations that allow him to perform his duty of protecting senior rights.

Third, Order 1309 provided sufficient prior notice, consistent with constitutional due-process requirements. The State Engineer provided prior notice that he would be determining the LWRFS's boundaries and the maximum amount that can be pumped in the LWRFS without conflicting with senior rights. Order 1309 determined the LWRFS's boundaries and maximum amount that can be pumped without conflicting with senior rights.

STATEMENT OF THE CASE

The State Engineer issued Order 1309 on June 15, 2020. ROA 67. Seven sets of Petitioners timely filed petitions for judicial review in this Court pursuant to NRS 533.450. These parties stipulated to consolidating all the Order 1309 petitions for judicial review. Petitioners Lincoln County Water District and Vidler Water Co. timely petitioned for judicial review in the Seventh Judicial District Court, but that petition was transferred to this Court and consolidated with this proceeding. *See Lincoln Cty. Water Dist. v. Wilson*, No. 81792, 485 P.3d 210, 2021 WL 1440402, at *3 (Nev. 2021) (unpublished disposition). Several other interested parties moved to intervene in the various cases. This Court . . .

granted their motions to intervene. Petitioners filed their opening briefs, and the State Engineer now files his answering brief responding to all Petitioners.

STATEMENT OF FACTS

I. Background

A. The State Engineer is responsible for managing Nevada's water resources in accordance with Nevada's water law

The State Engineer has jurisdiction over all water in Nevada. *Mineral Cty. v. Lyon Cty.*, 136 Nev. 503, 513 & n.5, 473 P.3d 418, 426 & n.5 (2020). Nevada's water law is founded upon the "fundamental principle" of "prior appropriation" which essentially means first in time, first in right. *Id.* at 513, 473 P.3d at 426; *Lobdell v. Simpson*, 2 Nev. 274, 277 (1866).

Under prior appropriation, all water rights "are given 'subject to existing rights.'" *Mineral Cty.*, 136 Nev. at 513, 473 P.3d at 426 (quoting NRS 533.430(1)). Granted rights are given priority dates based either upon the date in which water was first placed to beneficial use (pre-statutory water rights) or the date that the application to appropriate was filed with the Office of the State Engineer (statutory appropriations). *See Application of Filippini*, 66 Nev. 17, 21-22, 202 P.2d 535, 537-38 (1949). Thus, seniority is assigned to the holder of the right based upon the date of the appropriation. *See Lobdell*, 2 Nev. at 277.

When allocating the right to the use of water, the State Engineer is bound to consider whether water is available in the source of supply, whether the appropriation would conflict with existing rights or a protectable interest in domestic wells, and whether the appropriation is in the public interest. NRS 533.380(2). Further, Nevada law imposes upon the State Engineer the continuing duty to protect senior rights from later appropriations. Further, the State Engineer must consider the public interest when allocating and administering water rights. *Mineral Cty.*, 136 Nev. at 506, 473 P.3d at 421.

. . .

. . .

. . .

B. The Lower White River LWRFS

The LWRFS consists of six hydrographic sub-basins, plus a portion of one more, in the desert northeast of Las Vegas. ROA 66.[1] As the State Engineer explains below, intensive study and analysis of the LWRFS shows that its constituent sub-basins are characterized by a "uniquely close hydrologic interconnection and shared source and supply of water." *Id.* at 47, 64.

The State has long recognized the uniqueness of the LWRFS. The State Engineer has actively managed most of the sub-basins within the LWRFS since 1971. ROA 2-3. Through a program for the study and testing of the carbonate-rock aquifers in southern Nevada funded by the Nevada Legislature, the U.S. Geological Survey and the Desert Research Institute concluded that "sustained withdrawals" of water from the area would "result in water-level declines and cause the depletion of large quantities of stored water." *Id.* at 3

The Muddy River runs through a portion of the LWRFS before cutting southeast and discharging into Lake Mead. ROA 41943 (map of the LWRFS and the Muddy River). A series of springs (collectively referred to as the Muddy River Springs) in the appropriately named Muddy River Springs Area serves as the headwaters and feeds the river. *Id.* at 41959, 48680. The springs, in turn, are fed by the carbonate-rock aquifer underlying the LWRFS. *Id.* at 641, 41959. There is also some seepage from groundwater, originating from the carbonate-rock aquifer, adjacent to the Muddy River that feeds the river. *Id.* at 48681, 48686.

A 1920 federal-court decree established water rights to the Muddy River. ROA 61; *see generally* ROA 33770-816 (Muddy River Decree). It is undisputed that these decreed rights are the oldest – and therefore most senior – rights in the LWRFS.

---

[1] Nevada's water resources are managed through administrative units called hydrographic basins. Nevada is divided into 256 hydrographic basins and sub-basins based upon the surface geography and subsurface flow. The LWRFS's sub-basins are: California Wash, Coyote Spring Valley, Garnet Valley, Hidden Valley, Kane Springs Valley, Muddy River Springs Area. ROA 66. The LWRFS also includes the northwest portion of the Black Mountains Area. *Id.*

The Muddy River springs are home to the Moapa dace, an endangered fish species. ROA 48725. Protecting the springs' flow is essential to support the continuing recovery of the dace. *Id.* at 64, 48726.

C. The Petitioners

Eight groups of Petitioners filed petitions for judicial review challenging Order 1309:

- Apex Holding Co. and Dry Lake Water, LLC (collectively, "Apex") own real estate and water rights in Southern Nevada. Apex Br. 1.
- The Center for Biological Diversity (the "Center") is a California nonprofit conservation organization. Center Br. 2.
- Coyote Spring Investment, LLC ("CSI") is a developer intending to build a master planned community about 45 minutes from Las Vegas. CSI Br. 6. It has water rights with a 2002 priority date. *Id.* at 7.
- Georgia-Pacific Gypsum LLC and Republic Environmental Technologies, Inc. (collectively, "Georgia-Pacific") are industrial companies that have water rights. Ga.-P. Br. 3-4.
- Lincoln County Water District and Vidler Water Co. (collectively, "Vidler") are a public water district and a private company, respectively. Vidler Br. viii. They own water rights in Kane Springs Valley that they intend to sell to CSI. *Id.* at 5; CSI Br. 7 n.3.
- Moapa Valley Irrigation Co. ("MVIC") is a private company that owns most of the decreed rights in the Muddy River, which are the most senior rights in the LWRFS. MVIC Br. 1.
- Nevada Cogeneration Associates Nos. 1 and 2 ("NV Cogeneration") operate gas-fired facilities at the south end of the LWRFS. NV Cogeneration Br. 5.
- Southern Nevada Water Authority and Las Vegas Valley Water District (collectively, "SNWA") are government agencies serving

Southern Nevada's water needs. SNWA Br. 14. They own a significant portion of the Muddy River decreed rights. *Id.*

II. The Order 1169 aquifer test

A. Order 1169 orders an aquifer test to evaluate the connectivity of the groundwater resources underlying the hydrographic basins of the southern portion of the White River regional flow system

In 2001 the State Engineer took up consideration of various parties' water right applications to appropriate some 135,000 afa in Coyote Spring Valley, in what is now the LWRFS. ROA 662. He acknowledged that – at that time – "little was known about the hydrologic connectivity" between the hydrographic basins around the study area. *Id.* at 664-65. Continuing to develop the region's groundwater could put existing rights at risk. *Id.*

For those reasons, the State Engineer ordered five organizations with interests in water rights within those groundwater basins to conduct an aquifer test. ROA 665. The study was initially intended to pump 50% of the then-existing water rights in Coyote Spring Valley to see the effects on the area's water resources. *Id.* Fifty percent of the then-existing water rights amounted to 8,050 afa. *Id.* at 4. All pending applications in the area were held in abeyance pending the results of the pump test. *Id.* at 665.

B. The aquifer-test participants enter into agreements to mitigate the test's effects on the flow of the Muddy River

After the State Engineer ordered the aquifer test, SNWA, the U.S. Fish and Wildlife Service, CSI, the Moapa Band of Paiute Indians and the Moapa Valley Water District entered into a memorandum of agreement. ROA 9921. The State Engineer was not a party to the agreement. *Id.*

The memorandum of agreement implicitly recognized that pumping groundwater could ultimately impact the Muddy River's surface water. *See* ROA 9930-32. All the parties to the agreement affirmed that maintaining the Muddy River's flow level was "essential for the protection and recovery of the Moapa dace." *Id.* at 9930. They therefore mandated that flow levels at one part of the Muddy River be monitored and reported. *Id.* They also

established certain "[t]rigger [r]anges" based on flow levels. *Id.* The trigger ranges were designed so that, if flow levels declined, the parties would decrease pumping and move pumping farther away from the Muddy River, in the hopes of stopping the decline. *See id.* at 9930-32.

Even with the memorandum of agreement in place, there were still fears that increased withdrawals from the carbonate-rock aquifer under the aquifer test could cause the Muddy River's flow to decrease to such an extent that it would impact senior water rights and potentially harm the Moapa dace. ROA 5-6. Accordingly, a broad group of interested parties agreed that the aquifer test would provide sufficient data even if less than 8,050 afa was ultimately pumped. *Id.*

C. The two-year aquifer test shows consistent declines in groundwater levels across the regional carbonate-rock aquifer

The aquifer test lasted about 26 months and ended December 31, 2012. ROA 6. The participants did not ever pump the contemplated 8,050 afa; on average they pumped 5,290 afa from carbonate-rock aquifer wells in Coyote Spring Valley. *Id.* When added together with the normal pumping unrelated to the pumping test, 14,535 afa was pumped across the test sub-basins. *Id.*

The pumping and its effects were measured across the regional carbonate-rock aquifer. ROA 6. Over 30 wells reported the groundwater levels during the pumping period. *Id.* Monitoring of groundwater levels was even more extensive: data were collected from 79 monitoring and pumping wells, including in Kane Springs Valley. *Id.* at 6, 39258. Participants also reported Muddy River data, like spring flow and the amount of water being discharged into Lake Mead. *Id.* at 6. All pump-test data were made publicly available. *Id.*

The test results delivered a stark warning to the participants and other stakeholders. Two aspects of the results stood out. First, the results showed "sharp declines" in the flows of springs that feed the Muddy River, as well as in the overall groundwater levels. ROA 7. One of the springs, Pederson Spring, declined 63% during the

aquifer test. *Id.* at 10928. The Pederson East Spring declined 45%. *Id.* at 10930. Groundwater declined 1.9 to 2.5 feet – "declines in groundwater levels [that were] unprecedented in the record" according to the federal government. *Id.* at 10889.

Second, the pumping's detrimental effects were remarkably consistent and widespread. ROA 7. The decline was "of nearly uniform magnitude" in the central regional carbonate-rock aquifer area. *Id.* at 10888. And the effects were spread across 700,000 acres – 1,100 square miles. *Id.* at 7, 10888; *see also id.* at 48740 (showing a near-identical change in water levels in northern Coyote Springs Valley and southern Kane Springs Valley).

D. Groundwater levels and spring flows stabilize after the aquifer test, but never fully recover

Total pumping in the LWRFS regional flow system slowed down once the test ended. ROA 56 & n.291. Reports showed a total of 8,300 afa of pumping in 2018 – about 6,000 afa less than during the aquifer test. *Id.* at 56 & n.293.

The decrease in pumping has coincided with a partial recovery in groundwater levels. ROA 56, 41993, 52887, 53733. But the groundwater has not returned to its pre-test levels. *Id.* at 56, 41992, 53733. Instead, the groundwater levels are approaching "steady state" – an equilibrium where they no longer are declining but they are not recovering further either. ROA 56-58, 41876, 41992-93, 53733.

Some Petitioners suggest that changes to groundwater levels during and after the aquifer test may be attributable to drought contributions, not pumping. *See, e.g.*, Ga.-P. Br. 14; CSI Br. 46. But substantial evidence shows that climate does not explain the declines observed on the LWRFS's groundwater levels. ROA 57, 41876, 42187-89, 53070. Contrasting the LWRFS regional flow system with other drought-affected basins shows that the declines in groundwater was a consequence of pumping, not drought. *Id.* at 53070.

. . .

. . .

. . .

III. The State Engineer immediately addresses the groundwater decline while soliciting additional data and analysis from interested parties

A. The State Engineer denies all pending groundwater applications in Order 1169 study basins based on the aquifer test results

The State Engineer gave aquifer-test participants the opportunity to submit reports analyzing the test. ROA 7, 655. The U.S. Department of Interior was one participant that filed a report (among others). *Id.* at 8-9. Its report noted that pumping during the test amounted to only 1/3 of the water rights that had already been granted in Coyote Spring Valley. *Id.* at 9. Yet pumping that small fraction of rights caused declines at springs at the head of the Muddy River that are "critical to the Moapa dace habitat." *Id.* at 8. Continuing pumping at that rate could have caused the springs to go completely dry in three years or less. *Id.* at 8.

After considering the aquifer-test results and the participants' reports, the State Engineer issued a series of rulings denying all the water-rights applications that had been stayed during the test. ROA 10 & n.37. The rulings found that the tested basins "share a unique and close hydrological connection and share virtually all of the same source and supply of water." *See, e.g.*, *id.* at 749. Granting additional water rights would impact Muddy River spring flow, interfering with existing rights. *Id.* at 750.

B. The State Engineer issues Order 1303, which establishes the initial scope of the LWRFS and sets up further analysis

Those rulings disposed of pending applications for *additional* water rights in the regional carbonate-rock aquifer. But they did not address the already granted rights. As noted above, if the holders of water rights pumped the full amount that they had been granted, that would result in greater declines in groundwater levels and spring flow than even during the test period. ROA 8-9.

The State Engineer therefore issued Order 1303 to begin a public process to address future management strategies for the regional carbonate-rock aquifer. Order 1303 reviewed the aquifer test results, post-test measurements of groundwater levels and spring flow and climate data. ROA 644. It found that those datapoints indicated that if pumping

returned to the level it had been during the aquifer test, that would conflict with senior rights on the Muddy River and adversely affect Moapa dace habitat. *Id.* But it also acknowledged that the "precise extent" of pumping that can continue without jeopardizing senior rights or the Moapa dace was not yet determined. *Id.* at 80.

Order 1303 established the initial identification of the LWRFS as a single delineated unit. ROA 82. The Order 1303 version of the LWRFS is identical to the currently delineated boundaries, except that it did not include Kane Springs Valley and its border within the Black Mountains Area was a little different. *See id.*

Order 1303 also called for reports from "[a]ny stakeholder with interests that may be affected by water right development within the [LWRFS]." ROA 647. The reports were to address five topics:

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

Id. at 82-83. It anticipated a hearing (the "hearing") to consider the parties' reports. *Id.*

Order 1303 also instituted a moratorium on the approval of plans for construction development in the LWRFS. ROA 83. It held in abeyance any application to permanently change existing water rights. *Id.* It also provided allowances for those applying for extensions of time to avoid cancellation or forfeiture of those water rights. *Id.* Lastly, it instituted a moratorium on the approval of plans for construction development in the LWRFS. *Id.*

. . .

C. The State Engineer holds a two-week hearing for the parties to present evidence and analysis on the five topics identified in Order 1303

1. The State Engineer explains the scope and procedure of the hearing at a prehearing conference

After an extension granted to all interested parties, ROA 88, most Petitioners filed the reports solicited by Order 1303.[2] The State Engineer then held a prehearing conference for the Order 1309 hearing. *Id.* at 521. The State Engineer explained that the purpose of the hearing would be to allow each party to present its analysis and conclusions and respond to arguments. *Id.*

The State Engineer characterized the proceedings as part of a "multi-tiered process" to "determin[e] the appropriate management strategy" for the LWRFS. ROA 522. The hearing was to assess the facts underlying the LWRFS – what are its boundaries and what water is available for pumping within it without interfering with senior rights? *See id.* What policy tools to bring to bear once those underlying facts were determined is a question for later proceedings. *Id.* In short, the State Engineer wanted to establish how much could be utilized without resulting in conflict with senior rights before addressing how to manage the resource if the ultimate determination was that less water could be developed than permitted. *Id.*

The State Engineer specifically noted that the "quantity of water that may be sustainably developed within the [LWRFS] without conflicting with senior rights" was a topic for the hearing. ROA 522. But the hearing was not intended to resolve the potential allegations of conflicts between particular water users. *Id.*

2. Petitioners and others present their analyses at the hearing

The State Engineer held the hearing for two weeks in fall 2019. ROA 12. The testimony and argument fills over 1800 pages of transcript. *Id.* at 53737. Every Petitioner except for Apex presented expert testimony, subject to cross-examination by the other participants. *Id.* at 12.

[2] Apex did not file a report.

Afterwards, participants were entitled to submit written closing arguments. ROA 12. Thirteen participants did so. *See generally id.* at 52757-959.

IV. The State Engineer issues Order 1309, which defines the boundaries of the LWRFS and determines the maximum amount of water that can be pumped without conflicting with senior rights

About six months after the submission of closing statements, the State Engineer issued Order 1309. ROA 67. Order 1309 found that the results of the Order 1169 aquifer test and the data collected in the years since showed that the hydrographic basins overlaying the carbonate-rock aquifer "exhibit[ ] a direct hydraulic connection" such that "joint administration of [them] is necessary and supported by the best available science." *Id.* at 43. It delineated the now-current boundaries of the LWRFS and established that 8,000 afa is the maximum amount that can be pumped from the LWRFS without conflicting with senior rights to the Muddy River. *Id.* at 66. All other aspects of Order 1303 were rescinded. *Id.* at 67.

A. Order 1309 is supported by statutory authority and general principles of prior appropriation

The State Engineer cited several bases for his legal authority to jointly administer the LWRFS. First, the Legislature has established that it is the State's policy that the State Engineer "consider the best available science" when determining the availability of water. ROA 43 (citing NRS 533.024(1)(c)). And that the State Engineer "manage conjunctively the appropriation, use and administration of all waters." *Id.* (NRS 533.024(1)(e)).[3]

Second, all water rights are granted subject to existing rights and cannot interfere with more-senior rights. ROA 43; *see Lobdell v. Simpson*, 2 Nev. 274, 277 (1866). Order 1309 gives force to that rule by determining the amount of water that can be pumped by holders of junior rights without interfering with senior rights. ROA 43.

. . .

[3] Conjunctive management means managing groundwater and surface water sources together, as opposed to as separate and distinct resources. *See* Nev. Div. of Water Res., *Water Words Dictionary by Letter*, C at 61, https://bit.ly/3kYvcjm.

Third, NRS 532.120 empowers the State Engineer to make "reasonable rules and regulations" to exercise his authority. ROA 44. And NRS Chapter 534 grants the State Engineer authority to protect groundwater basins that are being depleted. *Id.*

B. Order 1309 establishes the boundaries of the LWRFS based on the evidence presented

The lodestar in determining whether an area should be included for joint management as part of the LWRFS is whether it "demonstrat[es] a close hydrologic connection" with the other LWRFS sub-basins. ROA 48. The State Engineer developed six criteria to consider on that point:

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

Id. at 49.

. . .

Applying those criteria, the State Engineer added Kane Springs Valley to the LWRFS and he adjusted the boundary within the Black Mountains Area. *See* ROA 66. He found that the evidence compelled keeping the LWRFS's other boundaries the same. *Id.* at 55. He rejected NV Cogeneration's argument that its own wells should be excluded from the LWRFS. *Id.* at 51-52.

The State Engineer *rejected* calls to include other sub-basins in the LWRFS. For Lower Meadow Valley Wash and the northern portion of Las Vegas Valley, there were insufficient data to apply the six criteria. ROA 51, 55. So those basins were not included in the LWRFS. *Id.* at 55. Other basins demonstrated only a weak connection with the LWRFS sub-basins. *Id.* at 50. The State Engineer explained that "there must be reasonable and technically defensible limits to the geographic boundary." *Id.* Including only weakly connected basins would not comply with the six criteria and would make joint management "intractable." *Id.*

1. The State Engineer includes Kane Springs Valley because it responded to the aquifer test similarly to the rest of the LWRFS and it is geologically consistent with the other sub-basins

"[N]umerous" participants advocated including Kane Springs Valley in the LWRFS. ROA 52; *see, e.g.*, 52898-52902 (NV Cogeneration), 52913-14 (NV Energy). Evidence showed that groundwater levels in Kane Springs Valley moved consistently with groundwater levels in the other LWRFS sub-basins before, during and after the aquifer test. *Id.* at 52, 52310, 52312, 52899. For example, the National Park Service testified that groundwater levels increased in 2004 and 2005, like in other LWRFS sub-basins; that levels decreased during the aquifer test, like in other LWRFS sub-basins; and that they partially recovered after the aquifer test ended; like in other LWRFS sub-basins. *Id.* at 53170.

The State Engineer further found that the same carbonate-rock aquifer present in the other LWRFS sub-basins extended into Kane Springs Valley. ROA 53; *see id.* at 48695. There was no known geological structure causing a hydrologic barrier between Kane Springs Valley and the rest of the LWRFS. *Id.* at 53.

. . .

The State Engineer did acknowledge that "non-carbonate bedrock" underlay the northern part of Kane Springs Valley. ROA 53. But little is known about that non-carbonate rock at this time. *Id.*

In other words, criteria 2 and 3 supported including Kane Springs Valley. ROA 53. Criterion 5 did not counsel against inclusion. And criterion 6 supported including all of Kane Springs Valley – not just the southern portion. *Id.* at 53 & n.287. The State Engineer therefore found that "the available information require[d] that Kane Springs Valley be included within the geographic boundary of the LWRFS." *Id.* at 54.

2. The State Engineer includes the area with NV Cogeneration's wells because that area's groundwater data is "substantially similar" to the data in the rest of the LWRFS

NV Cogeneration's wells sit near the southern border of the LWRFS. NV Cogeneration Br. 5. NV Cogeneration argued that the border should move north so that its wells were excluded from the LWRFS. ROA 51-52. It based this argument principally on SNWA's analysis of that area. *Id.* at 51-52, 52890-91.

The State Engineer rejected NV Cogeneration's argument. ROA 52. He cited compelling testimony that undermined SNWA's analysis. *Id.* at 52. For instance, NV Energy's expert compared the estimates produced by SNWA's statistical model – which is what NV Cogeneration relies on – with the actual water measurements taken during and after the aquifer test. *Id.* at 53721. He found that the model's estimates did not match the measurements, undermining its conclusions about NV Cogeneration's wells. *Id.*

The State Engineer found that the best data available showed a "substantial similarity" between groundwater levels in the wells' area and in another part of the LWRFS. ROA 52 (citing NV Cogeneration's own chart at ROA 52906). And he found that including the wells in the LWRFS was more consistent with the area's geology. *Id.* at 52; *see id.* at 48690 & n.20. Doing so "honor[ed] the State Engineer's criteria by acknowledging the uncertainty in the data while reflecting a recognized physical boundary in the carbonate-rock aquifer." *Id.* at 52.

. . .

C. Order 1309 determines that 8,000 acre-feet annually is the maximum amount of groundwater that can be pumped in the LWRFS without interfering with senior rights

The aquifer test showed that uninhibited pumping in the LWRFS would harm senior rights by lowering groundwater levels and reducing the Muddy River's flow. However, there was no consensus among the participants as to what amount of pumping could safely continue. ROA 58. Recommendations ranged from 30,000 afa to zero. *Id.*

Most experts agreed that there "is an intermediate amount of pumping" that could be permitted without interfering with senior rights and further endangering the Moapa dace. ROA 62. That intermediate amount is close to the amount of pumping that has occurred since the aquifer test ended, which had decreased from 12,635 to 8,300 afa. *Id.* at 56 & n.291. The rate of decline in groundwater levels and spring flow has nearly stabilized at around that amount of pumping. *Id.* at 56-58, 62, 41992. But neither groundwater levels nor spring flow have returned to pre-test levels. *Id.* at 41992.

At the same time, the State Engineer identified substantial risks to allowing continued pumping at the current amount of more than 8,000 afa. He pointed to "rising trends in groundwater levels" in other parts of Southern Nevada outside of the LWRFS. ROA 63; *see id.* at 53070, 53184. That shows that recent precipitation has helped mitigate the effects of pumping. *Id.* at 63. If conditions became drier, the current amount of pumping could cause groundwater levels and spring flow to decline again. *Id.*

And data from some LWRFS wells cut against the conclusion that the LWRFS is at equilibrium. Groundwater at those wells "appear[s] to have reached peak recovery" from the aquifer test and has "exhibited downward trends for the past several years." ROA 63; *see id.* at 40644. That downward trend could be a leading indicator of declines that will be observed closer to the Muddy River – and eventually in the amount of spring flow into the river. *Id.* at 63.

Having considered the groundwater-level declines during the aquifer test, the partial recovery since then and the warning signs just discussed, the State Engineer found that 8,000 afa is "the maximum amount of groundwater that can continue to be developed

over the long term" in the LWRFS. ROA 64. Data from during and after the aquifer test "indicate[d] that continued groundwater pumping that consistently exceeds this amount" would conflict with senior rights to the Muddy River and harm the endangered Moapa dace. *Id.* Continued monitoring of the groundwater, the springs and the Muddy River's flow is necessary to determine whether further reductions to the maximum pumping amount are required. *Id.*

D. The State Engineer finds that changes to pumping locations must be assessed on a case-by-case basis

The State Engineer also determined how to treat applications to move pumping locations within the LWRFS. One of the topics raised in Order 1303 was whether it was preferable for pumping to take place in the alluvial aquifer or the carbonate-rock aquifer. ROA 83. The alluvial aquifer consists of soil directly adjacent to the Muddy River; it contributes to the river's flow as water seeps from the alluvial aquifer into the river. *Id.* at 48681, 48686. The carbonate-rock aquifer is generally not directly adjacent to the river, but it feeds the Muddy River's springs and is connected to the alluvial aquifer. *See id.*

The State Engineer found that, as a general matter, he could not approve transferring pumping from the carbonate-rock aquifer to the alluvial aquifer or vice versa. ROA 64-65. Because of the interconnectedness of the LWRFS, both types of pumping can potentially interfere with senior rights and/or harm the Moapa dace. *Id.*

That said, the State Engineer recognized that there may be discrete areas that are less connected to the rest of the LWRFS. ROA 64-66. Moving some pumping to those locations may not be harmful. *See id.* at 66. Applications to move pumping will be considered on a case-by-case basis by looking at individualized evidence. *Id.*

E. Order 1309 did not change parties' relative priority or establish a management policy governing the LWRFS

Many Petitioners accuse Order 1309 of having provisions that appear nowhere in its text. Order 1309 did not reprioritize any water rights. Nothing in Order 1309 changed the priority date of any water right. The priority date determines whether one right is senior

or junior relative to another right. *Desert Irr., Ltd. v. State*, 113 Nev. 1049, 1051, 944 P.2d 835, 837 n.1 (1997); *Lobdell*, 2 Nev. at 277. Order 1309 did not grant or revoke any water rights.

Order 1309 also did not impose a specific policy for regulating the amount of pumping in the LWRFS going forward. As the State Engineer explained before the hearing, Order 1309's purpose was to establish certain essential facts – the boundaries of the LWRFS and the amount of water that can be safely pumped – that can be foundation for future policies. ROA 522.

Order 1309 therefore did *not* order any appropriator in the LWRFS to decrease its pumping. *See* ROA 66-67. It does not designate any basin or basins as a critical management area. *See id.* All parties with an interest in the LWRFS – including all Petitioners – will have an opportunity to contribute when the State Engineer addresses the manner of managing the uniquely connected sub-basins within the LWRFS given the facts established by Order 1309.

SUMMARY OF ARGUMENT

Petitioners' arguments all fail to overcome their onerous burden on a petition for judicial review. Nearly all their arguments boil down to attempts to have this Court violate the standard of review by reweighing the evidence and substituting its judgment for that of the State Engineer. Because substantial evidence in the record supports each of the State Engineer's findings, the findings must be upheld. That is true even if Petitioners can point to other evidence in the record that arguably supports their position. On these highly technical hydrological and geological topics, the State Engineer's careful, evidence-based findings must receive deference.

The State Engineer had authority to issue Order 1309. Petitioners' arguments against his authority are dressed up as legal contentions but in substance attack the underlying factual determination that the LWRFS sub-basins have a unique hydrologic connection such that they are a single basin. Order 1309 is a basic exercise of the State . . .

Engineer's legislative prescribed duty to protect the senior decreed rights in the Muddy River, as well as other express powers and State policies.

The State Engineer provided prior notice of precisely what he ultimately determined in Order 1309. Most of Petitioners arguments attempt to manufacture a prior notice problem by inventing provisions in Order 1309 that do not exist. A cursory review of Order 1309 shows that it is cabined to the topics that were previously noticed to all parties. The other constitutional theories presented by Petitioners have no merit.

ARGUMENT

I. Substantial evidence supports Order 1309

A. The State Engineer's factual findings on the scientific questions presented here are entitled to peak deference

NRS 533.450 sharply limits the courts' review of State Engineer decisions. *See Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979); *Application of Filippini*, 66 Nev. 17, 27, 202 P.2d 535, 540 (1949). On a petition for judicial review, the State Engineer's decision is "prima facie correct" and the burden of proof is on the petitioner. NRS 533.450(10).

The State Engineer's factual findings cannot be disturbed if they are supported by substantial evidence. *Wilson v. Pahrump Fair Water, LLC*, 137 Nev. ____, 481 P.3d 853, 858 (Adv. Op. 2, Feb. 25, 2021). Substantial evidence is merely the amount of evidence that "a reasonable mind would accept as adequate." *Id.* The reviewing court may not reweigh the evidence or pass upon witnesses' credibility. *Revert*, 95 Nev. at 786, 603 P.2d at 264. And the Court's review must be "at its most deferential" where – like here – it is reviewing scientific determinations. *Wilson*, 481 P.3d at 858.

B. Substantial evidence supports the State Engineer's determination of the LWRFS's boundaries

1. Order 1309's criteria for determining inclusion in the LWRFS are appropriate

Order 1309 set out the criteria for determining if an area has a unique hydrological connection with the LWRFS such that it should be included in the LWRFS. ROA 48-49.

Determining those hydrological considerations is a highly technical project and the State Engineer's determination is entitled to peak deference. *Wilson*, 481 P.3d at 858.

Georgia-Pacific argues that the criteria themselves are not supported by substantial evidence. Ga.-P. Br. 13-16. It does not dispute that the LWRFS's monitor wells have shown consistent reactions to the start and end of the aquifer test. But it claims that the criteria fail to account for hypothetical other causes of the consistent movement, like climate. Ga.-P. Br. 14-15. Nothing requires the State Engineer to disprove every other hypothetical cause. Substantial evidence supports the findings that the State Engineer did make: the boundary was delineated by the unique connection between the sub-basins shown by the aquifer-test results and post-test measurements. ROA 65; *see, e.g.*, *id.* at 10888-89, 41941. And in any event substantial evidence *did* disprove the theory that climate alone caused the movements. *See id.* at 57, 41876, 42187-89.

Georgia-Pacific also takes issue with the State Engineer's finding certain testimony to be more credible than Georgia-Pacific's preferred testimony. Ga.-P. Br. 15. The State Engineer is entitled to credit certain witnesses more than others, and his determinations cannot be set aside unless they lack substantial evidence. *See Revert*, 95 Nev. at 786, 603 P.2d at 264.

CSI argues that the State Engineer's criteria are so subjective that "every basin [in Nevada] could be combined into one for management." CSI Br. 37-38. Yet it admits that the State Engineer found that some basins that geographically border the LWRFS do not exhibit the necessary hydrographic connection to be included. *Id.* at 40-41. The criteria were an evidence-based approach that distinguished between sub-basins that were hydrologically connected to the LWRFS and basins that were not. *See, e.g.*, ROA 50.

2. Substantial evidence supports including Kane Springs Valley

a. CSI concedes that the State Engineer pointed to substantial evidence

As the State Engineer explained above, Kane Springs Valley monitoring wells responded similarly to other LWRFS monitoring wells. ROA 52, 52310, 52312, 52899.

Indeed, Vidler concedes that there was "much testimony" about the "similar hydrographic pattern" between a Kane Springs Valley well and another well closer to the Muddy River. Vidler Br. 30.

Kane Springs Valley's geology is also consistent with the rest of the LWRFS's carbonate rock aquifer, with no known hydrological barriers. The Center's evidence showed a close connection between Kane Springs Valley and Coyote Springs Valley and the rest of the LWRFS, meaning that pumping in Kane Springs Valley would affect groundwater levels and spring flow elsewhere. ROA 34508, 34533-38. All the criteria weighed in favor of finding that Kane Springs Valley has a close hydrologic connection with the rest of the LWRFS and must be included. *See* ROA 52-54. All of that was substantial evidence supporting including Kane Springs Valley.

CSI concedes that the State Engineer points to at least two bases for finding that Kane Springs Valley should be included: the U.S. Fish and Wildlife Service's "analytical analysis" and the aquifer test results. CSI Br. 40. In other words, CSI concedes that there was substantial evidence supporting including Kane Springs Valley. CSI would have preferred the State Engineer rely on other purported evidence, but it was the State Engineer's prerogative to find the federal government's analysis and the aquifer test results to be more credible sources for determining whether to include Kane Springs Valley. *Revert*, 95 Nev. at 786, 603 P.2d at 264.

Nor does Order 1309's acknowledgment that more data will be helpful going forward undermine its findings. *See* CSI Br. 38. The Order 1309 record contained substantial evidence that Kane Springs Valley should be included to protect all of the LWRFS's water resources. The State Engineer is not obligated to sit on his hands and allow a scarce resource to be drained merely because of the possibility of future data.

. . .

. . .

. . .

b. Petitioners' attempts to undermine the State Engineer's evidence lack merit

Both CSI and Vidler put emphasis on geological studies they submitted. CSI Br. 42, 51-54, Vidler Br. 31-33. They speculate that faults that underlay Kane Springs Valley "may" restrict groundwater flow from the LWRFS. CSI Br. 42; *accord* Vidler Br. 32.

The State Engineer properly gave little weight to those studies. Many participants faulted the studies because they did *not* test permeability or present evidence showing that the faults act as a barrier to flow. *See* ROA 52923-25. Permeability is a crucial factor in determining whether groundwater travels between Kane Springs Valley and the rest of the LWRFS, whether or not there are faults there. *See id.* And the aquifer-test results provided the data to contradict the speculation offered by CSI and Vidler; the test results showed that there was indeed a connection with Kane Springs Valley. ROA 52, 52310, 52312, 52899.

Vidler cites favorably portions of the National Park Service's expert's testimony. Vidler Br. 31 (citing ROA 53170). But it ignores the most important part of the testimony: that Kane Springs Valley groundwater showed the same movements in groundwater as the rest of the LWRFS before, during and after the aquifer test. ROA 53170.

Vidler also attacks the aquifer-test results themselves. It points to an error in a transducer (part of the meter) that may have temporarily affected measurements. Vidler Br. 30. That is a red herring. The transducer was fixed and measurements were corroborated by separate manual measurements. ROA 53360, 53397 (testifying that the manual measurements were virtually identical to the transducer measurements). Vidler concedes that no other expert thought the potential temporary transducer error undermined the data. Vidler Br. 30-31.

Lastly, both CSI and Vidler cite the State Engineer's Ruling 5712 as purportedly supporting their case. CSI Br. 43, Vidler Br. 33. The State Engineer was not obligated to follow Ruling 5712. Ruling 5712 predated the aquifer test, so it was based on less-comprehensive data. *See* ROA 721. And even at that time the State Engineer recognized

the "strong hydrologic connection" between Kane Springs Valley and other basins with senior rights. *Id.* at 719-20.

3. Substantial evidence supports including NV Cogeneration's wells

Order 1309 found that NV Cogeneration's wells are within the LWRFS. No Petitioner takes issue with that finding except NV Cogeneration.

NV Cogeneration claims that there was no evidence anywhere in the record to support including its wells in the LWRFS. NV Cogeneration Br. 29-30. Order 1309 itself refuted that claim. It cites substantial similarity in monitoring-well measurements. ROA 52 (citing ROA 52906). It also points out that the geological and hydrological evidence shows that there is an LWRFS boundary on the other side of NV Cogeneration's wells (to their south). *Id.* (citing *id.* at 48703). That was an adequate basis to find that NV Cogeneration's wells should be included.

In disputing that, NV Cogeneration relies almost exclusively on SNWA's model. NV Cogeneration Br. 26-28. As NV Cogeneration concedes in its brief, multiple experts testified as to inaccuracies in and issues with SNWA's model. *Id.* at 27-28; *see* ROA 52 & n.277. While that testimony did not involve the model's results for NV Cogeneration's wells specifically, it called into question the model's accuracy overall. As such, the State Engineer did not have to follow the potentially discredited model's conclusion that there was "weak statistical correlation" between groundwater levels at NV Cogeneration's wells and other wells. *See id.* at 52. The State Engineer was entitled to base his decision on other credible data instead. *See Revert*, 95 Nev. at 786, 603 P.2d at 264.

C. Substantial evidence supports the State Engineer's finding that 8,000 afa is the maximum sustainable amount that can be pumped in the LWRFS

Georgia-Pacific, CSI and Vidler contend that substantial evidence does not support the State Engineer's finding that 8,000 afa is the maximum sustainable pumping amount – they argue that the limit is too low. The Center take the opposite tack and argue that it's too high. And SNWA attacks calculations that do not affect the 8,000 afa figure.

Substantial evidence supports the finding that 8,000 afa is a sustainable pumping amount. Deference to the State Engineer's scientific finding is appropriate and it would be improper to overturn it given the substantial evidence in the record. *See Wilson*, 481 P.3d at 858.

1. The 8,000 afa figure is grounded in evidence showing the harm caused by pumping greater amounts

a. Order 1309 explained that it balances evidence of recovering groundwater levels with evidence of threats to the LWRFS's water resources

Several parties attack the evidentiary foundation of the 8,000 afa number. Ga.-P. Br. 18-19; CSI Br. 48-50; Vidler Br. 35-36 Those arguments contradict each other. Georgia-Pacific argues (baselessly) that the State Engineer "simply took a poll of participants' positions," while CSI takes issue with 8,000 afa because no participant advocated for that precise figure. *Compare* Ga.-P. Br. 20, *with* CSI Br. 48. The truth is in between: the State Engineer used experts' analysis to independently come to his reasoned judgment.

Contrary to the arguments that the State Engineer found 8,000 afa to be the appropriate amount "randomly" or without "clear analysis," CSI Br. 48; Ga.-P. Br. 18, Order 1309 carefully explained how the State Engineer determined that amount. The State Engineer studied the aquifer test's effects on groundwater, ROA 8-9, the post-test data, *id.* at 58, and climate effects inside and outside the LWRFS, *id.* at 63. He compared groundwater levels at the LWRFS's borders with data closer to the Muddy River. *Id.* at 63. Based on all of that, he found that 8,000 afa appropriately balanced two contradictory factors: (1) data showing that current pumping levels had led to the slowing of groundwater decline and (2) certain warning signs for future groundwater movement. *Id.* at 64. The record supports that analysis. *Id.* at 10928, 10930, 34695-96, 53070.

CSI's argument that 8,000 afa is unsupported by the record because the State Engineer could have chosen 7,000 afa or 7,500 afa, *see* CSI Br. 48-4, misunderstands the standard of review. The State Engineer was not required to disprove every potential

number between zero and 30,000 afa. The inquiry is whether there is adequate support for his ultimate finding, not all other potential findings. *See Wilson*, 481 P.3d at 858. For the reasons discussed above, substantial evidence supports the 8,000 afa figure.

b. The 8,000 afa limit reflects the hydrological connection between the LWRFS sub-basins

Georgia-Pacific and CSI also argue that substantial evidence does not support applying the 8,000 afa across the whole of the LWRFS. Ga.-P. Br. 19-20; CSI Br. 49-54. Vidler makes a similar argument, asserting that it can pump in Kane Springs Valley without affecting the rest of the LWRFS. Vidler Br. 36-37. But the LWRFS's defining features are the uniquely close connection between its sub-basins – including Kane Springs Valley – and the shared single source of water. ROA 63.[4] Substantial evidence supports the finding that pumping in one location in the LWRFS affects the groundwater supply and spring flow throughout it. *Id.* at 64-65, 10888, 48740, 52899. All the evidence showing consistent hydrology across 1,100 square miles supports the finding that it is appropriate to establish one sustainable pumping limit uniformly applied across the region.

Vidler asserts that one piece of evidence it adduced, a biological opinion, should have carried the day. Vidler Br. 37. But the State Engineer was entitled to weigh other evidence of hydrological connection more heavily, and this Court may not reweigh the evidence. *Revert*, 95 Nev. at 786, 603 P.2d at 264

Georgia-Pacific argues that the State Engineer failed to account for the additional "water resources" added to the LWRFS by Order 1309's including Kane Springs Valley. Ga.-P. Br. 18-19. That misunderstands the hydrology. Kane Springs Valley was always hydrologically connected to the rest of the LWRFS. ROA 53, 52899, 53170. The decline in groundwater and spring flows during the aquifer test therefore *already* accounts for whatever water flows from Kane Springs Valley into the other LWRFS sub-basins. Because Order 1309 was based on the aquifer test and post-test data, which inherently . . .

[4] *See, e.g.*, ROA 749, 10888, 42174, 48740.

reflect Kane Springs Valley's connection to the LWRFS, there is no need to speculatively add to the pumping limit on account of Kane Springs Valley.

c. The 8,000 afa limit accounts for the impact of drought conditions observed in and near the LWRFS

CSI claims that the 8,000 afa figure is erroneous because it doesn't account for the drought conditions present during and after the aquifer test. CSI Br. 32, 46-48. On the contrary, Order 1309 specifically considered climate effects in determining the 8,000 afa limit. ROA 63. The record shows that despite an overall drought, nearby basins with little pumping have shown *increasing* groundwater levels. *Id.* at 53070. Given that, Order 1309 properly accounted for the fact that conditions could become drier going forward. *Id.* at 63.

d. The State Engineer was entitled to act based on substantial evidence, even if additional evidence will eventually be developed

Order 1309 acknowledged areas where further study will be beneficial. ROA 58. Georgia-Pacific and Vidler latch onto that to essentially argue that the State Engineer was obligated to do nothing until he has more data. Ga.-P. Br. 18; Vidler Br. 36.

There was substantial evidence that if a larger proportion of the junior water rights already granted in the LWRFS were pumped, that would significantly interfere with senior decreed rights to the Muddy River. ROA 8-9; *see, e.g.*, *id.* at 10890, 10928-30. It would lower groundwater levels and reduce spring flow into the river, threatening senior rights and the endangered Moapa dace. *Id.* at 6-9. There is no obligation for the State Engineer to allow conditions to deteriorate just because hypothetically there may be better evidence later. If and when the parties develop more data, that data will be considered in future decisions related to the LWRFS.

. . .

. . .

. . .

2. Substantial evidence supports the State Engineer's finding that 8,000 afa can be pumped without interfering with senior decreed rights

a. The plain text of Order 1309 undermines the Center's arguments

The Center contends that the maximum limit should be lower than 8,000 afa. It claims that the State Engineer "acknowledged that" his determination that 8,000 afa is a sustainable limit "was not supported by evidence." Center Br. 24 (citing ROA 58). That is simply wrong. The State Engineer acknowledged the obvious truth that further study will help decide whether future adjustments to the limit are called for. ROA 58, 63. But he also set out the substantial evidence supporting an 8,000 afa limit at this time. *Id.* at 58-63, 41876, 41992-93, 53733.

The Center's argument that the State Engineer "failed to consider environmental factors," Center Br. 28 (title case omitted), is equally wrong. Order 1309 was chockablock with analysis of how pumping affects the Moapa dace. *See, e.g.*, ROA 7-8, 46, 66. The State Engineer chose an "intermediate amount of pumping" to allow because, in part, a majority of experts agreed, and substantial evidence showed, that that amount of pumping would "still protect the Moapa dace." *Id.* at 61.

The Center misleadingly cites statutes and caselaw pertaining to water-rights applications to assert that the State Engineer was obligated to do more. Center Br. 29 (citing NRS 533.370; *Pyramid Lake Paiute Tribe of Indians v. Washoe Cty.*, 112 Nev. 743, 748, 918 P.2d 697, 700 (1996)). Those authorities have no relevance to Order 1309, which did not consider any water-rights applications.

The balance of the Center's brief argues that the State Engineer should have privileged the Center's evidence over other participants'. Center Br. 25-28. That is an impermissible request to have this Court reweigh the evidence. *See Revert*, 95 Nev. at 786, 603 P.2d at 264. Order 1309 noted that different experts proposed different amounts. ROA 58. But the only factor relevant on review is whether there was substantial evidence supporting his finding that 8,000 afa is a sustainable limit. As the State Engineer has

already explained, there was. *See, e.g.*, *id.* at 41876, 41992-93, 53733 (evidence indicating that the LWRFS's groundwater and spring flow are approaching equilibrium).

b. SNWA implicitly concedes that limiting pumping to 8,000 afa is sufficient to protect its water rights

SNWA argues that the State Engineer "failed to recognize the full impact of ongoing groundwater pumping on senior decreed rights." SNWA Br. 16. But the central basis of Order 1309 was protecting decreed rights in the Muddy River, including SNWA's. The State Engineer cited substantial evidence that post-test pumping amounts have allowed groundwater levels to recover and, consequently, spring flow to stabilize. ROA 56-58, 41876, 53733. SNWA implicitly concedes as much – it does not challenge the finding that 8,000 afa will protect its senior rights.

SNWA attacks calculations related to the Muddy River Decree. SNWA Br. 27-32. But those calculations are not necessary to the ultimate finding that 8,000 afa protects SNWA's rights – again, a finding that SNWA does not dispute. *See id.*

D. Petitioners' other challenges to the State Engineer's factual findings fail

1. The State Engineer was entitled to weigh aquifer-test results and post-test data more heavily than water budget estimates

CSI accuses the State Engineer of "overemphasi[zing] and unreasonabl[y] rel[ying]" on the aquifer-test results in making his findings. CSI Br. 29. But weighing the aquifer-test results more than other potential forms of evidence was within the State Engineer's discretion and expertise. *See Wilson*, 481 P.3d at 858; *Revert*, 95 Nev. at 786.

CSI would have preferred that the State Engineer rely on a water budget, instead of the aquifer-test results. CSI Br. 31-35, 51. That is, it would like this Court to reweigh the evidence. Even if that were permissible, it would not make sense to privilege a water budget over the aquifer-test results. A water budget is merely an estimate of how much water flows into and out of an area. *See* ROA 58. The aquifer-test results are actual measurements of the real-world effects of pumping. The aquifer test showed that pumping caused declines that threaten to conflict with existing water rights, irrespective of the

water budget. *Id.* at 58 *see also id.* at 42196 (explaining that CSI's water budget failed to account for the aquifer-test results).[5]

2. Substantial evidence supports Order 1309's findings on the connection between the alluvial aquifer and the carbonate-rock aquifer

Order 1309 found that pumping the alluvial and the carbonate-rock aquifer both present risks to the senior rights in the Muddy River. ROA 64. It also found that there may be discrete pockets of the LWRFS that don't present such a close connection with the aquifers. *Id.* at 66. Applications to move existing water rights will be determined on individualized evidence about the proposed new pumping location. *Id.*

Contrary to CSI, CSI Br. 50, it is not inconsistent to recognize that the data showed striking consistency over an 1,100 square mile area but that limited pockets of that area may not respond in exactly the same way. A party that can prove that his proposed location is in fact hydrologically isolated should be able to move pumping there. The problem for CSI is that it could not make that showing. Groundwater in Kane Springs Valley responded similarly to groundwater in the rest of the LWRFS, undermining any claim that it was an isolated pocket. ROA 52310, 52312, 52899.

CSI also cites evidence that it submitted to the State Engineer. CSI Br. 51-54. To the extent it is challenging the finding that both alluvial and carbonate-rock pumping affect senior rights to the Muddy River, its evidence does not carry its burden. The State Engineer's finding is supported by substantial evidence in the record – evidence CSI does not seriously dispute. ROA 65 & nn.334-34; *see, e.g.*, *id.* at 53575. This Court may not reweigh the evidence and credit CSI's evidence over the evidence in the record the State Engineer based his finding on. *Revert*, 95 Nev. at 786, 603 P.2d at 264.

. . .

. . .

[5] CSI also attacks the aquifer test because it arose from applications for additional water rights. It does not explain how that would have had any effect on the results of the aquifer test, which showed that pumping a fraction of the already-granted rights caused groundwater-level and spring-flow declines.

II. The State Engineer plainly has legal authority to issue Order 1309

A. Order 1309 is firmly rooted in the text of Chapters 533 and 534 and prior appropriation doctrine

Challenges to the State Engineer's authority start with the text. *Wilson v. Pahrump Fair Water, LLC*, 137 Nev. ____, 481 P.3d 853, 856 (Adv. Op. 2, Feb. 25, 2021). Here, they can end there too. The State Engineer was well within his legal authority to issue Order 1309.

Several sections of Nevada statutory water law support the State Engineer's power to issue Order 1309. "The State Engineer shall not carry out his or her duties pursuant to this chapter in a manner that conflicts with any applicable provision of a decree or order issued by a state or federal court, an interstate compact or an agreement to which this State is a party for the interstate allocation of water pursuant to an act of Congress." NRS 533.0245. That language does not constrain the State Engineer's fealty to decrees and vested rights depending on a basin-by-basin approach. Especially given the State Engineer's duty "to consider the best available science in rendering decisions concerning the availability of surface and underground sources of water in Nevada." NRS 533.0241(1)(c). That is just what the State Engineer did in Order 1309 by recognizing the close hydrological connection between the sub-basins across the LWRFS to protect senior rights established by the Muddy River Decree and to protect the Moapa dace that live within the waters to which those senior rights attach. ROA 43-44, 65-66.

In finding a close hydrological connection across the LWRFS, the State Engineer is keeping faith with this statutory duty. Nevada law requires the State Engineer to "conduct investigations in any basin or portion thereof where it appears that the average annual replenishment to the groundwater supply may not be adequate for the needs of all permittees and all vested-right claimants, and if the findings of the State Engineer so indicate, except as otherwise provided in subsection 9, the State Engineer may order that withdrawals, including, without limitation, withdrawals from domestic wells, be restricted to conform to priority rights." NRS 534.110(6). An investigation authorized by NRS

534.110(6) is what the State Engineer did. In no way did he alter the priority rights of anyone by issuing Order 1309. By conducting an investigation and showing as a matter of fact the LWRFS is one basin, the State Engineer is acting pursuant to an express power from the Legislature and conducting fact finding that he is uniquely qualified to do under Nevada law. *Wilson*, 481 P.3d at 858.[6]

Order 1309's recognition of the uniquely close hydrological connections between the LWRFS sub-basins and the Muddy River's surface water also gives force to the State's policy of managing water conjunctively. NRS 533.024(1)(e). Manufacturing a new "basin-by-basin" management rule would have no basis in Nevada water law and be contrary to the policy of conjunctive management. *Id.*

Petitioners mistakenly argue that "any assertion by the State Engineer that his interpretation of his own authority should be given deference is misplaced." NV Cogeneration Br. 19-23. That is wrong as to the State Engineer and wrong as to any administrative body charged with implementing their statutory duties. The State Engineer's interpretation of his statutory authority is persuasive, but not controlling. *Wilson*, 481 P.3d at 856 (citing *Town of Eureka v. Office of State Eng'r*, 108 Nev. 163, 165-66, 826 P.2d 948, 949-50 (1992)). A reviewing court "may" undertake an independent review. *Id.*

To mistakenly try to strip the State Engineer of his persuasive interpretation of the statutes he is charged with interpreting and implementing, most Petitioners cite snippets of previous cases that say that the question of the State Engineer's authority is subject to de novo review. *See, e.g.*, CSI Br., 17 (citing *Bacher v. Office of State Eng'r*, 122 Nev. 1110, 1117, 146 P.3d 793, 798 (2006)). But all questions of statutory interpretation, because they are legal questions, are subject to de novo review. *In re Estate of Murray*, 131 Nev. 64, 67, 344 P.3d 419, 421 (2015). Merely because the Court is considering a legal question does

[6] To be sure, the State Engineer has not ordered that withdrawals "be restricted to conform to priority rights" (known as curtailment). *See* NRS 534.110(6). But that doesn't change the State Engineer's right to investigate in the first place. *See id.* NRS 534.110(6) grants the State Engineer discretion as to whether to move onto the next step of curtailment. *See id.*

not mean that it jettisons (i) the express will of the Legislature regarding the correctness of the State Engineer's decisions and (ii) administrative law principles that govern review of administrative action.

When discussing the persuasive character of the State Engineer's interpretation of Chapters 533 and 534, the Nevada Supreme Court has been mindful of NRS 533.450(9). *See State v. Morros*, 104 Nev. 709, 712-13, 766 P.2d 263, 265-66 (1988). This section provides that "[t]he decision of the state engineer shall be prima facie correct, and the burden of proof shall be upon the party attacking the same." *Id.* at 713, 766 P.2d at 266 (quoting NRS 533.450(9)). The State Engineer's interpretation of his authority, like any other agency, is entitled to great deference when it is within the language of the statute. *United States v. State Eng'r*, 117 Nev. 585, 589, 27 P.3d 51, 53 (2001).

History confirms that the State Engineer was well within his authority in recognizing the LWRFS and protecting the senior rights within it. Nevada uses prior appropriation to determine water rights. *Ormsby Cty. v. Kearney*, 37 Nev. 314, 142 P. 803, 805-06 (1914). That means those who obtain their rights earlier have priority over those who obtain their rights later – first in time, first in right. *Id.*; *Lobdell v. Simpson*, 2 Nev. 274, 277 (1866). All rights are obtained "subject to existing rights." NRS 533.430(1), 534.020(1); *Mineral Cty. v. Lyon Cty.*, 136 Nev. 503, 513, 473 P.3d 418, 426 (2020). There is no language in any prior appropriation case that limits existing rights by Petitioners' concept of a basin. Petitioners certainly cite to none. Further, there is no language in NRS 533.430(1) that cabins the State Engineer's duty to protect senior rights to the exclusion of taking appropriate administrative actions authorized by law in the way Petitioners suggest either. That no case or statute even hints at such a limitation should tell the Court all it needs to know.

B. Petitioners' contrary view seeks to rewrite statutory text to misclassify a factual dispute as a legal one

A Court's review must be "at its most deferential" when it is reviewing scientific determinations. *Wilson*, 481 P.3d at 858. That is because technical and scientific

determinations are not defined by the Legislature (and are not even simple questions of fact) but left to the special expertise of the State Engineer whom the legislature has empowered to make those findings based on investigations "at the frontiers of science." *Id.* In contrast, a State Engineer's purely legal determination is subject to de novo review. *Eureka,* 108 Nev. at 165-66, 826 P.2d at 949-50. It is easy to see why Petitioners would seek to classify their dispute with Order 1309 as a purely legal one, but none of their arguments are persuasive.

Most Petitioners contend, as CSI does, that the State Engineer does not have statutory authority to "create a mega basin." *See, e.g.*, CSI Br. 17. With comic book style flair, Vidler refers to LWRFS as a "super basin." Vidler Br. 15. In its view, "[t]he comprehensive statutory scheme enacted by the Nevada Legislature allows the State Engineer to manage and take action in a groundwater basin or any portion thereof, as deemed essential for the welfare of the area involved." *Id.* at 16-19. That view hinges on the Legislature's use of the term "basin," singular, versus basins, plural, in various Chapter 534 sections. *See, e.g.*, *id.*; *see also* CSI Br. 19-21.

That approach represents a fundamental misunderstanding of what is a legal question versus a factual one. Petitioners simply elide over the fact that no statute in Chapter 533 or Chapter 534 of the Nevada Revised Statutes defines the term, "basin." Unwittingly, Vidler forfeits their statutory argument by citing the following definition from the Water Words Dictionary by Letter:

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

Vidler Br. 18 (quoting *Water Words Dictionary by Letter*, B at 25-26). The number 232 is not a magic legal number. It is found nowhere in the Nevada Revised Statutes to constrain the State Engineer's view of what constitutes a basin. Accordingly, Petitioners' cited definition shows (i) nothing in Nevada law defines what a basin is (ii) as far as Nevada law

is concerned it is up to Nevada Division of Water Resources to make that determination and (iii) most importantly, basins are determined for "water planning and management purposes" and not because of any statutory reason. Nothing in Nevada law, and indeed Petitioners' own definition of the term "basin," prevented the State Engineer from classifying the LWRFS as a basin.

Courts are equipped to interpret laws. That is lawyers' work. To ask this Court to overrule the State Engineer's view that the LWRFS is a basin is to not only stray into the unfamiliar but also to delve into a scientific question where courts lack special scientific expertise. Petitioners cite no statute requiring the State Engineer to manage Nevada's waters basin-by-basin. Worse, there is no language in any statute explaining how each basin came to be identified and determined. The Legislature left it to the State Engineer to identify basins as a management and planning tool. Nothing in Chapter 533 and 534 of the Nevada Revised Statute is to the contrary.

Several Petitioners contend that NRS 533.024 cannot serve as statutory authority for Order 1309. The State Engineer does not argue that NRS 533.024 serves as an independent source of statutory authority. But Petitioners attempt to junk the Legislature's statement of policy is not persuasive. The Legislature's declaration of policy "is entitled to great weight . . . it is neither the duty or the prerogative of the courts to interfere with such legislative finding unless it clearly appears to be erroneous and without reasonable foundation." *McLaughlin v. Housing Auth.*, 68 Nev. 84, 93, 227 P.2d 206, 209 (1951). Petitioners never explain how using the "best available science" could be contrary to any statute. NRS 533.024(1)(c). Petitioners never explain how managing waters conjunctively could conceivably violate any statute. *See* NRS 533.024(1)(e). To the contrary, using the best available science and managing waters conjunctively better ensures that the prior decrees are complied with (NRS 533.0245) and the doctrine of prior appropriation (NRS 533.430(1)) is observed.

That AB 51 did not pass does not undermine Order 1309. Generally, courts are reluctant to draw inferences from a legislature's failure to act. *Brecht v. Abrahamson*, 507

U.S. 619, 632-33 (1993). In most cases, there are a number of possible reasons why the legislature might have failed to have enacted a proposed provision. *Arnett v. Dal Cielo*, 923 P.2d 1, 16 (Cal. 1996). Thus, unpassed bills have little value as evidence of intent. *Id.* at 17. Indeed, a cursory review of AB 51 reveals that its proposed provisions were broader than simply encouraging conjunctive management policies, but included new policies to resolve disputes between junior and senior rights holders that would be implemented through new regulations. AB 51, §§3-4. For this, and any number of reasons, AB 51 may not have passed. What is clear is that NRS 533.024(1)(e)'s policy of conjunctive administration of all waters in the state remained in effect.

Nothing in Order 1309 jeopardizes priority or finality of vested water rights. There is not a sentence in Order 1309 that adjusts the priority of water rights or lessens their finality. Vidler writes that prior appropriation means "first in time, first in right." Vidler Br. 19. The State Engineer agrees. Does it matter under the prior appropriation doctrine in which hydrographic area the junior right holder stakes its claim versus the senior right holder? The answer is, of course, no. Water rights are granted subject to existing rights and always determined based on who has the prior right. *Lobdell*, 2 Nev. at 277; *accord Mineral Cty.*, 136 Nev. at 513, 473 P.3d at 427. There is nothing in these statutes that limits the State Engineer's duty to protect senior rights. Due to the close hydrological connection that the State Engineer has scientifically determined as a matter of fact, Vidler's rights, as an example, were *always* subject to older (more senior) existing rights, including those protected by the Muddy River Decree.

None of the Petitioners can use the State Engineer's reference in Order 1309 to the Endangered Species Act to undermine it. First, the State Engineer is required to consider the public interest in managing Nevada's waters. Second, the Moapa dace is located in an area where senior water rights exist. Protecting senior rights, which the State Engineer is required to do, necessarily protects the dace.[7]

[7] NV Cogeneration complains that its proposed expert Hugh Ricci was not deemed to be a qualified expert on hydrology. NV Cogeneration Br. 31. The State Engineer had discretion to determine Order 1309 procedural matters like expert qualification. *See*

C. SNWA does not challenge the State Engineer's authority to determine that 8,000 afa is the maximum sustainable amount of water that can be pumped

Order 1309 found that allowing a maximum of 8,000 afa of pumping in the LWRFS will protect senior rights in the Muddy River. ROA 64. That was based on evidence showing that pumping even more than 8,000 afa still allowed aquifer recovery and stabilization of spring flow decline. *Id.* at 56-58, 62. SNWA does not dispute this. SNWA Br. 19-27. It does not challenge the 8,000 afa finding.

SNWA argues that Order 1309 impairs its senior rights. SNWA Br. 25. But it does not explain how 8,000 afa could impair its rights if 8,000 afy is sufficient to maintain the current spring flow – or indeed allow additional aquifer recovery and greater spring flow.

SNWA's argument that Order 1309 violates prior appropriation, SNWA Br. 25-27, fails for the same reason. While SNWA complains that LWRFS pumping "captures" Muddy River flow, it does not grapple with the finding that 8,000 afa of pumping is allowing aquifer recovery (or at least stabilization). Because the 8,000 afa limit does not diminish the Muddy River's flow (again, a finding unchallenged by SNWA), it does not violate SNWA's rights.

Substantial evidence supports the State Engineer's ultimate conclusion in Order 1309 that 8,000 afa is the volume of groundwater that can be sustainably pumped without conflicting with existing senior rights, like those claimed by SNWA and MVIC. This ultimate conclusion of 8,000 afa is not legitimately challenged by SNWA and MVIC. However, these parties attack an incidental finding by the State Engineer that "the current flow in the Muddy River is sufficient to serve all decreed rights in conformance with the Muddy River Decree, and that reductions in flow that have occurred because of groundwater pumping in the headwaters basins is not conflicting with Decreed rights." ROA 62; *see also* SNWA Br. 19-22; MVIC Br. 16-20. In reaching this finding, SNWA and

. . .

Dutchess Bus. Servs., Inc. v. State Bd. of Pharmacy, 124 Nev. 701, 710 & n.12, 191 P.3d 1159, 1165 n.12 (2008). Ricci was not qualified as an expert in hydrology because he was not a hydrologist. ROA 603-04, 606.

MVIC allege that the State Engineer made "an impermissible reduction" or "re-quantification" of the Muddy River's decreed rights. SNWA Br. 19; MVIC Br. 16.

In Order 1309, the State Engineer did not "re-quantify" the vested rights in the Muddy River Decree. The quantities in the Decree are the diversion rate in cubic feet per second (cfs) and the number of acres that are irrigated under each vested right. *See, e.g.*, ROA 33798, 33813. In Order 1309, the State Engineer uses a standard accepted method to estimate a value that is not provided in the Decree: the actual volume of water consumed,[8] in acre-feet, under fully decreed irrigation use. *Id.* at ROA 61-62. To do this, the State Engineer looked to the consumptive use rate for a high-water use crop, alfalfa, based on a full cover, well-watered field. *Id.* This amount may be less than the accumulation of the full decreed diversion rate. This is because an irrigation system managed on rotation is delivered as needed to meet the crop water demands, and is not delivered at the constant decreed flow rate. The State Engineer applied a common method of calculating net irrigation water requirement to make a practical estimate of the actual water needed to satisfy the vested rights in the decree. *Id.* The State Engineer's estimate of consumptive water volume in Order 1309 does not recalculate or "re-quantify" the values determined in the decree for acreage or diversion rates in cfs.

If this Court nevertheless finds that this portion of Order 1309 (the paragraph starting at the bottom of ROA 61 and going to the top of ROA 62) exceeded the charge of Order 1303 or the State Engineer's legal authority, the State Engineer requests that the Court merely strike that paragraph and affirm the remaining portions of Order 1309. The incidental finding by the State Engineer at ROA 61-62 is not necessary for the State Engineer's ultimate determination that 8,000 afa is the maximum sustainable amount of pumping that may occur in the LWRFS without conflicting with senior existing rights. As shown above, the State Engineer's conclusion that the maximum quantity of groundwater

[8] Consumptive water use in the context of irrigation is that quantity of water that is absorbed by the crop and transpired or used directly in the building of plant tissue, together with that evaporated from the cropped area. It does not include runoff or deep percolation. *See* Nev. Div. of Water Res., *Water Words Dictionary by Letter*, C at 63, https://bit.ly/3kYvcjm.

that may be pumped from the LWRFS "cannot exceed 8,000 afa and may be less" is supported by substantial evidence, is due the highest deference and should be affirmed. As stated previously, this finding protects SNWA's (and MVIC's) senior rights in the river and these parties do not challenge this ultimate conclusion.

D. Petitioners' "ad hoc rulemaking" arguments are baseless because the State Engineer is exempt from the Administrative Procedure Act

Several Petitioners accuse the State Engineer of having undertaken "ad hoc rulemaking" by issuing Order 1309. *E.g.*, Ga.-P. Br. 27. As those Petitioners admit, ad hoc rulemaking is a concept that applies to rulemaking under the Nevada Administrative Procedure Act (the "APA"), NRS Chapter 233B. *E.g.*, *id.* But State Engineer adjudicatory proceedings like the Order 1309 proceedings are exempt from the APA's requirements. NRS 233B.039(1)(i); *Wilson*, 481 P.3d at 858-89 (brackets omitted). No ad hoc rulemaking complaint can be pressed against the State Engineer. *See id.*

III. Order 1309 is constitutional

A. Order 1309 satisfied all due process requirements

Several Petitioners challenge Order 1309 on procedural due process grounds. Procedural due process is satisfied by "notice and an opportunity to be heard." *Wilson v. Pahrump Fair Water, LLC*, 137 Nev. ____, 481 P.3d 853, 859 (Adv. Op. 2, Feb. 25, 2021).

None of Petitioners asserts that the State Engineer violated any procedural statute. Petitioners can therefore succeed on their challenges only if they prove a constitutional violation while overcoming the respect due to the Legislature's choice of procedure in the unique context of water-rights proceedings. *Humboldt Land & Cattle Co. v. Dist. Court*, 47 Nev. 396, 224 P. 612, 613 (1924); *see also Vineyard Land & Stock Co. v. Dist. Court*, 42 Nev. 1, 171 P. 166, 174 (1918) (considering the "character of the proceeding" in upholding the constitutionality of statutes governing water-rights procedures).

. . .

. . .

. . .

1. All parties had prior notice consistent with due process

a. Order 1309 did not address policy issues outside the scope of the notice

Apex, Georgia-Pacific and CSI contend that the State Engineer did not provide prior notice that he would make policy determinations in Order 1309. Apex does not identify any purported "policy determinations" that were made. Apex Br. 12-13. (quoting ROA 522). Georgia-Pacific claims that Order 1309 "modifies the relative priority of water rights" in the LWRFS. Ga.-P. Br. 23-27. CSI claims that Order 1309 "curtail[s] senior water rights." CSI Br. 27-28 (emphasis omitted).

None of them accurately characterizes Order 1309. Before the hearing, the State Engineer gave notice that he would be considering, among other things, (1) the "geographic boundary of the hydrologically connected groundwater and surface water systems comprising the [LWRFS]" and (2) "[t]he long-term annual quantity of groundwater that may be pumped from the [LWRFS]." ROA 82; *accord id.* at 522. Order 1309 decides the geographic boundary of the LWRFS and the long-term annual quantity of groundwater that can be pumped from it. *Id.* at 66. Petitioners had prior notice of everything accomplished by Order 1309.

There is no basis for Petitioners' accusations about what Order 1309 did. Nothing in Order 1309 reprioritizes rights. *See* ROA 66. It makes no attempt to distinguish between senior rights and junior rights. *Id.*

Nor does it curtail any rights, let alone senior rights. ROA 66. Curtailment is where junior appropriators are ordered to stop using water in order to protect senior rights. *See Kobobel v. State*, 249 P.3d 1127, 1129-30 (Colo. 2011) (en banc). Order 1309 does not identify any party as having junior rights that need to be curtailed.

As the State Engineer explained, policy decisions on what tools to use to manage the LWRFS and maintain pumping at a sustainable quantity are for the next phase of proceedings. ROA 522. Georgia-Pacific alludes to many potential policies that may be . . .

considered in future proceedings. Ga.-P. Br. 25. Those future proceedings will occur after proper notice and a hearing for Petitioners and any other interest parties.[9]

b. Order 1309's discussion of the Muddy River's flow was within the scope of the notice

SNWA and MVIC contend that the State Engineer's finding that the Muddy River's current flow satisfies their water rights violated due process. SNWA Br. 36-38; MVIC Br. 20. SNWA's due process argument must be rejected out of hand. Both of SNWA's components (the Southern Nevada Water Authority and the Las Vegas Valley Water District) are political subdivisions of the State. SNWA Br. 14-15; *Bella Layne Holdings, LLC v. S. Nev. Water Auth.*, No. 2:21-cv-235, 2021 WL 4268451, at *1 (D. Nev. Sept. 20, 2021). Political subdivisions cannot assert due process claims against the State. *City of Boulder v. State*, 106 Nev. 390, 392, 793 P.2d 845, 846 (1990).

MVIC is a corporation, so it is not prohibited from pressing a procedural due process claim. To succeed on that claim, MVIC needs to show more than just a deprivation of a property right; it must also show that the procedure provided was constitutionally inadequate. *Malfitano v. Cty. of Storey ex rel. Storey Cty. Bd. of Cty. Comm'rs*, 133 Nev. 276, 282, 396 P.3d 815, 819 (2017). Even assuming that MVIC's property right was deprived here (which the State Engineer does not concede), the State Engineer's procedure was adequate.

The State Engineer finding challenged by MVIC is narrow. The State Engineer found that 8,000 afa would not conflict with senior rights because it would not cause further decline in Muddy River flow. ROA 62, 64. MVIC does not dispute the factual basis of that finding.

MVIC instead argues that it lacked prior notice because the State Engineer had stated at the prehearing conference that the "purpose of the hearing is not to resolve or

[9] To the extent that Georgia-Pacific argues that it did not have notice that the LWRFS would be designated a joint administrative unit, *see* Ga.-P. Br. 24, Order 1303 had already done that, ROA 82. Order 1303 was the principal notice for the Order 1309 proceedings. *See id.* at 82-83.

address allegations of conflict between groundwater pumping within the LWRFS and Muddy River decreed rights." MVIC Br. 26 (quoting ROA 522). MVIC ignores that the State Engineer also said (on the same page of the transcript) that one hearing topic was the "quantity of water that may be sustainably developed within the [LWRFS] *without conflicting with senior rights*." ROA 522 (emphasis added). The State Engineer's finding that 8,000 afa can be pumped without conflicting with senior Muddy River rights is consistent with that prior notice. Indeed, we know MVIC had prior notice of the topic because it argued in the Order 1309 proceedings that LWRFS pumping "conflicts with [its] senior decreed" rights. ROA 52874.

The State Engineer's two statements are not contradictory. The State Engineer needed to determine how much total water was available in the LWRFS to assess potential policies to manage it. But he did not need to know whether any particular user's pumping conflicted with any other particular user's rights. Allegations of conflict are usually adjudicated on a case-by-case basis based on the specific rights at issue.[10]

d. Order 1309's determination that Kane Springs Valley is within the LWRFS was within the scope of the notice

Vidler argues that including Kane Springs Valley in the LWRFS violated its due process rights because it exceeded the scope of the hearing. Vidler Br. 21-24. But the LWRFS's "geographic boundary" was expressly part of the notice provided by Order 1303. ROA 82.

Contrary to Vidler's arguments, Vidler Br. 21-24, the State Engineer did not violate due process by developing the six criteria for inclusion as part of the Order 1309 proceedings. Much as a court surveys existing caselaw before determining what is the best test to apply to a current set of facts, the State Engineer surveyed the extensive evidence presented to him to determine the best criteria for making the scientific finding that an area has a uniquely close hydrologic connection to the rest of the LWRFS. That was an

[10] MVIC argues that the State Engineer violated NRS 533.3703. No. NRS 533.3703 applies only to applications for a "change in the place of diversion, manner of use or place of use." NRS 533.3703(1). Order 1309 does not determine any such application.

integral part of – not departure from – the announced topic of determining the LWRFS's "geographic boundary." *See* ROA 82, 522.

2. There is no constitutional issue with Order 1309's scope

Georgia-Pacific's prior notice section contains a different argument: that the State Engineer should have broadened the scope of the Order 1309 proceedings. Ga.-P. Br. 26-27. According to Georgia-Pacific, the State Engineer was constitutionally mandated to make certain policy decisions in Order 1309. *Id.*

Georgia-Pacific points to no authority for the principle that the Constitution mandates the scope of administrative proceedings. Georgia-Pacific may have thought it was better policy to tackle more issues at once, but the State Engineer has discretion to decide the scope of the issues.

3. The hearing satisfied due process

Vidler takes issue with two aspects of the hearing itself. First, it argues that it was unconstitutional for the State Engineer to allow experts to express new opinions "based upon testimony they heard at the hearing." Vidler Br. 40. Second, it argues that the hearing violated the Constitution because it was too short. *Id.* Neither argument has merit.

Administrative hearings are subject to more relaxed procedural and evidentiary rules. *Dutchess Bus. Servs., Inc. v. State Bd. of Pharmacy*, 124 Nev. 701, 711, 191 P.3d 1159, 1166 (2008). An agency has discretion to determine the procedure for its own hearings. *Id.* at 710 & n.12, 191 P.3d at 1165 & n.12. Vidler may have preferred a different procedure, but there is nothing in the Constitution that prohibited the State Engineer from considering experts' final, most reasoned opinion. And Vidler admits that it responded to any purportedly different opinions by filing a motion to strike. Vidler Br. 40.

Similarly, there is no constitutional requirement that the State Engineer hold a hearing of interminable length. Due process requires notice and an opportunity to be heard. *Wilson*, 481 P.3d at 859. Vidler had notice. It had an opportunity to be heard through its Order 1303 report, its testimony (it presented a panel of five separate experts)

at the two-week hearing and its closing brief. *E.g.*, ROA 36184-187, 36201-03, 52815, 53497; *see also* ROA 20-23 (detailing Vidler's analysis as part of Order 1309).

B. Petitioners' other constitutional theories are baseless

1. The water statutes do not violate separation of powers

Vidler argues that the State Engineer's powers violate the separation of powers because they constitute a delegation of legislative authority. Vidler Br. 24-25. Strictly speaking, that is not a challenge to Order 1309, but instead to "legislative enactment[s]" – i.e. statutes. Vidler Br. 25; *see, e.g.*, *Sheriff v. Luqman*, 101 Nev. 149, 153, 697 P.2d 107, 109-10 (1985) (determining whether the Uniform Controlled Substances Act violated separation of powers). A statute is unconstitutional only if it lacks sufficient standards "to guide the agency with respect to the purpose of the law and the power authorized." *Luqman*, 101 Nev. at 153-54, 697 P.2d at 110. Statutes are presumed constitutional and those challenging them bear a heavy burden. *Byars v. State*, 130 Nev. 848, 856, 336 P.3d 939, 945 (2014).

Vidler does not carry its heavy burden. It does not point to any statute that delegates truly legislative power to the State Engineer without suitable standards. Vidler Br. 24-25. The opposite is true. NRS Chapters 533 and 534 establish a comprehensive scheme for the regulation of water in this State. They require "strict" compliance with their elaborate provisions. *Application of Filippini*, 66 Nev. 17, 27, 202 P.2d 535, 540 (1949). The extensive statutory provisions of Nevada's water law, subject to judicial review by the Nevada courts, give sufficient standards for the State Engineer's exercise of his duties.

What's more, Vidler concedes that the Legislature can permissibly grant the State Engineer fact-finding authority to carry out his duties. Vidler Br. 25 (citing *Luqman*, 101 Nev. at 153, 697 P.2d at 110). Order 1309 is an exercise in fact finding. The State Engineer determined as a factual matter the LWRFS boundaries and the maximum sustainable amount of pumping.

. . .

. . .

2. Order 1309 does not effect a taking

CSI contends that Order 1309 violated the Takings Clauses of the U.S. and Nevada Constitutions by "redistribut[ing]" its water rights to other water rights holders. CSI Br. 27. As an initial matter, CSI points to no authority that it can raise a takings claim as part of a petition for judicial review. *See id.* There is none. The proper vehicle for asserting a takings claim is an inverse condemnation claim, which CSI has already done. *See Coyote Springs Invest., LLC v. State*, No. A-20-820384-B (8th Judicial Dist. Ct. filed Aug. 28, 2020).[11]

Even if CSI could somehow maintain a takings claim as part of its petition for judicial review, there is no taking here. Order 1309 did not reprioritize CSI's or any other Petitioner's rights. *See* ROA 66-67. CSI's water rights had the same priority date the day after Order 1309 issued as they did the day before it issued.

CONCLUSION

For the reasons stated above, this Court should affirm Order 1309.

DATED this 23rd day of November, 2021.

AARON D. FORD
Attorney General

By: /s/ *Kiel B. Ireland*
Steve Shevorski (Bar No. 8256)
Chief Litigation Counsel
James N. Bolotin (Bar No. 13829)
Senior Deputy Attorney General
Kiel B. Ireland (Bar No. 15368C)
Deputy Attorney General
Attorneys for Respondents

[11] The State Engineer does not concede that a takings claim would be ripe at this time or that it would be viable no matter the disposition of these consolidated petitions for judicial review. But if CSI ever has a viable takings claim, an inverse condemnation action is the proper way to bring it.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court by using the electronic filing system on the 23rd day of November, 2021, and e-served the same on all parties listed on the Court's Master Service List.

/s/ *Traci Plotnick*
Traci Plotnick, an employee of the
Office of the Attorney General

Exhibits Excluded from Appendix

Exhibits Excluded from Appendix

A-20-816761-C

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Civil Matters **COURT MINUTES** **December 03, 2021**

A-20-816761-C Southern Nevada Water Authority, Plaintiff(s)
vs.
Nevada State Engineer, Division of Water Resources, Defendant(s)

December 03, 2021 **Minute Order**

HEARD BY: Yeager, Bita **COURTROOM:** RJC Courtroom 16A

COURT CLERK: Michele Tucker

JOURNAL ENTRIES

The Court having reviewed Georgia-Pacific Gypsum LLC and Republic Environmental Tech, Inc.'s Request for Judicial Notice and the related briefing and being fully informed, DENIES the request.

The Court having also reviewed Coyote Springs Investment, LLC's ("CSI") Request for Judicial Notice and the related briefing and being fully informed, DENIES the request.

"On appeal, a court can only consider those matters that are contained in the record made by the court below and the necessary inferences that can be drawn therefrom. Toigo v. Toigo, 109 Nev. 350, 350, 849 P.2d 259, 259 (1993) (citing Lindauer v. Allen, 85 Nev. 430, 433, 456 P.2d 851, 853 (1969))." Mack v. Est. of Mack, 125 Nev. 80, 91, 206 P.3d 98, 106 (2009).

Under NRS 47.150, a court must take judicial notice "if requested by a party and supplied with the necessary information." NRS 47.150(2). Under NRS 47. 130(1), "The facts subject to judicial notice are facts in issue or facts from which they may be inferred." If a fact is judicially noticed, it must be "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." NRS 47.130(2)(b).

Upon review of a final judgment, a court generally " . . .will not take judicial notice of records in another and different case, even though the cases are connected." Occhiuto v. Occhiuto, 97 Nev. 143, 145, 625 P.2d 568, 569 (1981) (citing Giannopulos v. Chachas, 50 Nev. 269, 270, 257 P.618, 618 (1927)). Mack v. Est. of Mack, 125 Nev. 80, 91–92, 206 P.3d 98, 106 (2009).

Georgia-Pacific Gypsum LLC and Republic Environmental Tech, Inc Request for Judicial Notice

Georgia-Pacific Gypsum LLC and Republic Environmental Tech, Inc. seek judicial notice for items that post-date Order #1309, which is the subject of review in this case. As these exhibits postdate the issuance of Order 1309, they are not " . . . facts in issue" under NRS 17.130(1). In addition, the Court GRANTS Respondent State Engineer's request to strike the

portion of Georgia-Pacific Gypsum LLC and Republic Environmental Tech, Inc Opening Brief as set forth in their pleadings.

Coyote Springs Investment, LLC's Request for Judicial Notice

The Court finds the request from CSI to be distinguished from Wilson v. Pahrump Fair Water, LLC, 137 Nev. Adv. Op.2 ___, 481 P.3d 853 (2021) in that CSI participated in the administrative hearing and had the opportunity to introduce evidence and testimony into the record before Order 1309 was issued. The petitioner in Wilson v. Pahrump Fair Water, LLC was allowed to file a supplemental record, but the court notes the significant distinction that the petitioner in that case had no opportunity to introduce evidence and testimony into the record before the order was issued, since an administrative hearing was not held prior to the issuance of the order. CSI had the opportunity to introduce the subject matter of the instant request at the administrative hearing, but failed do so.

The Court also finds that there is no authority that allows this Court to take judicial notice of the expert-created "Glossary" of terms in Exhibit 1, nor does the exhibit meet the requirements of NRS 47.130(1) or (2).

Respondent State Engineer is to directed to submit a proposed order approved by moving counsel consistent with the foregoing within fourteen (14) days and distribute a filed copy to all parties involved in this matter. Such order should set forth a synopsis of the supporting reasons proffered to the Court in their briefing. This Decision sets forth the Court's intended disposition on the subject but anticipates further order of the Court to make such disposition effective as an order.

CLERK'S NOTE: A copy of this minute order was distributed via the E-Service list. / mlt

PRB
BRADLEY J. HERREMA #10368
BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, Nevada 89106
TELEPHONE: (702) 382-2101
FACSIMILE: (702) 382-8135
BHERREMA@BHFS.COM

KENT R. ROBISON #1167
KROBISON@RSSBLAW.COM
HANNAH E. WINSTON #14520
HWINSTON@RSSBLAW.COM
ROBISON, SHARP, SULLIVAN & BRUST
71 Washington Street
Reno, Nevada 89503
TELEPHONE: (775) 329-3151
FACSIMILE: (775) 329-7941

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

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

DISTRICT COURT

CLARK COUNTY, NEVADA

LAS VEGAS VALLEY WATER DISTRICT, and SOUTHERN NEVADA WATER AUTHORITY

Petitioners,

v.

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

Respondent.

_____/

Case No.: A-20-816761-C (Lead Case)
Dept. No.: 1

COYOTE SPRINGS INVESTMENT, LLC'S REPLY IN SUPPORT OF OPENING BRIEF

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

IN THE MATTER OF THE PETITION OF COYOTE SPRINGS INVESTMENT, LLC /	**CONSOLIDATED WITH:** Case No.: A-20-817765-P (Sub Case) Dept. No.: 1
IN THE MATTER OF THE PETITION OF APEX HOLDING COMPANY, LLC /	Case No.: A-20-817840-P (Sub Case) Dept. No.: 1
IN THE MATTER OF THE PETITION OF CENTER FOR BIOLOGICAL DIVERSITY /	Case No.: A-20-817876-P (Sub Case) Dept. No.: 1
IN THE MATTER OF THE PETITION OF MUDDY VALLEY IRRIGATION COMPANY /	Case No.: A-20-817977-P (Sub Case) Dept. No.: 1
IN THE MATTER OF THE PETITION OF NEVADA COGENERATION ASSOCIATES NOS. 1 AND 2 /	Case No.: A-20-818015-P (Sub Case) Dept. No.: 1
IN THE MATTER OF THE PETITION OF GEORGIA-PACIFIC GYPSUM, LLC AND REPUBLIC ENVIRONMENTAL TECHNOLOGIES, INC. /	Case No.: A-20-818069-P (Sub Case) Dept. No. 1
IN THE MATTER OF THE PETITION OF LINCOLN COUNTY WATER DISTRICT AND VIDLER WATER COMPANY, INC.	Case No.: A-21-833572-J Dept. No. 1

COYOTE SPRINGS INVESTMENT, LLC'S REPLY IN SUPPORT OF OPENING BRIEF

Coyote Springs Investment, LLC ("CSI"), by and through its counsel of record, replies in support of its Opening Brief as follows.

I. Introduction

"First, it is undisputed that Nevada's ground water resources have long been managed on a perennial yield basis for the entire Hydrographic **basin**. Such a system is specifically

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

contemplated by the Nevada Groundwater Code, which provides the State Engineer to take various acts on a **basin-wide basis**. *See* NRS 534.030 (method for designation of groundwater **basins**), 534.035 (establishment of groundwater boards for **individual basins**), 534.050 (permit required before well may be drilled in **a designated groundwater basin**), 534.120 (State Engineer may make regulations for the welfare of **a designated basin**). It is, in fact, under this authority that the State Engineer has identified the 232 Administrative Ground Water Basins in Nevada. It is patently reasonable for the State Engineer to manage these basins in a manner consistent with his statutory authority. This approach is also reasonable for the reason that managing a basin on the basis of its perennial yield ensures that **the basin** will remain in balance." *See* **EXHIBIT 34** (Respondent Nevada State Engineer's Answering Brief, filed in *Pyramid Lake Paiute Tribe of Indians v. Ricci*, Case No. CV01-05764), p. 9 (emphasis added).[1]

These are not the words of CSI or any other Petitioner. These are the exact words authored by the NSE in *Pyramid Lake Paiute Tribe of Indians v. Ricci*. Obviously, and as explained more fully herein, judicial estoppel rears its persuasive and binding presence. The NSE is not free to argue that groundwater management is done in a basin-by-basin manner in one judicial proceeding and then reverse its position in another judicial proceeding. Such selectivity is improper, and the hypocrisy is self-evident.

The thrust of the NSE's Answering Brief is based on self-serving semantics concerning the word "basin" and the NSE's declaration of his unlimited authority. No one disputes that the United States Geological Survey ("USGS") together with the NSE originally indexed the 232 hydrographic basins in the State of Nevada in 1968. For over three decades of litigation, regulatory challenges and management of these hydrographic basins, water users, the NSE, and courts have referred to these hydrographic basins.[2] Now, for the first time, the NSE professes

[1] CSI numbers its exhibits consecutively with the exhibits attached to its Opening Brief and Brief in Intervention.

[2] Indeed, and as discussed herein, the NSE has previously taken the position in litigation that water management in

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

confusion over CSI's use of the term "basin".

Aside from trying to distract the Court from its previous practices, statements, and terminology, the NSE now contends that it has the omnipotent power to do whatever he chooses to do regarding water management that is not expressly prohibited by statute– and that this Court cannot question it. The strategy is to convince the Court that if the Legislature has not said that the NSE cannot do something, then the NSE can do it.

This case represents an example of tortured statutory construction. The NSE does not identify any statutes that allow him to re-define the established Nevada basins. Rather, the NSE argues that because there is no specific statute that prevents the NSE from creating a "Mega Basin", he is permitted to do so even though all statutes involved in this action use the singular term basin. Nowhere in the statutory framework is the NSE empowered to combine multiple basins into a "Mega Basin". And no statute or combination of statutes, permit the NSE to deviate from basin-by-basin water management.

The NSE issued CSI the right to use 4,140 afa of groundwater per year in the Coyote Spring Valley basin (CSV), a specific basin. When CSI obtained its water rights, they were given a definitive priority within the basin in which the NSE granted those permits– CSV. The NSE would now have the Court believe that the priority established can be extinguished, modified, or eliminated because the NSE can –at any time– combine multiple basins. Under the NSE's position, CSI's priority is diluted because of priorities that may have been established in other basins with different permitted users and different hydrological circumstances, including different perennial yields. To subject water users to such an arbitrary process is a fundamental violation of due process.

The Court is the gatekeeper of legal rights and entitlements and the ultimate enforcer of the fundamental right to due process. The State is required to honor the prior appropriation

---

the State of Nevada is to be performed on a basin-by-basin basis.

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

doctrine and if it is unwilling to do so, this Court must implement the appropriate remedy. The prior appropriation doctrine establishes CSI's priority, and the NSE has violated that mandate by utilizing hydrological issues in other basins to curtail and jeopardize CSI's established priority rights.

The NSE is just another state agency with limited and restricted authority who can only act where the Legislature expressly authorizes him to do so. If the NSE is permitted to ignore or abandon the basin-by-basin water management policy, the future for all Nevada users becomes dangerously unpredictable. Neither the Legislature nor the Nevada Supreme Court accepts or condones this application of the NSE's omnipotence. Order 1309 is clearly void. Accordingly, CSI respectfully requests that this Court grant its Petition for Judicial Review.

II. The Appropriate Standard of Review Does Not Require Deference to the NSE's Interpretation of the Law or Findings of Fact

The NSE's recitation of the appropriate standard of review in this matter reads as though the NSE is the sole arbiter and that this Court does not play any role in reviewing Order 1309 and *must* defer to the NSE on all issues of fact and law; this is untrue. *See* NSE Answering Brief, p. 19, 31-32. Contrary to the NSE's self-serving contention that the interpretation of Nevada law and the unsupported factual determinations in Order 1309 cannot be meaningfully reviewed by this Court, this Court is not required to simply rubber stamp the NSE's orders. Indeed, doing so would be contrary to all fundamental rules of applicable law. The process of judicial review of the NSE's decisions is fundamental to due process and to ensure that agencies, like the NSE, do not act in excess of their limited, statutory authority.

The Nevada Supreme Court has clarified the important role of the judiciary in water law cases noting that "despite that Nevada often follows its arid Western sister states in codifying and modifying the law of prior appropriation, 'consideration of equity or fairness in access and

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

distribution is one of the cardinal principles underlying every enduring water management system.'" *Wilson v. Happy Creek, Inc.*, 135 Nev. 301, 304, 448 P.3d 1106, 1109 (2019) (quoting Stephen P. Mumme, *From Equitable Utilization to Sustainable Development: Advancing Equity in U.S.-Mexico Border Water Management,* Water, Place, and Equity, at 117 (John M. Whiteley et al. eds., 2008). Thus, the Court recognized the courts' role in ensuring the proper implementation of the State's water rights regime: "although states have modified water rights by statute, 'in all jurisdictions, judge-made law remains crucial to the understanding of water allocation legislation'". *Id.* at 304, 448 P.3d at 1110 (quoting Anthony Dan Tarlock & Jason Anthony Robison, *Law of Water Rights and Resources* § 1:1 (2018)).

Accordingly, this Court's consideration of the legal and factual issues presented in the Petitioners' Opening Briefs is neither as limited nor perfunctory as characterized by the NSE. Moreover, the issues raised by the Petitioners require applying different standards of review, each affording a different level of deference.

First, several opening briefs raise significant and important issues about the scope of the NSE's statutory authority. The NSE argues that whether the NSE has authority to combine multiple basins for "conjunctive management" is truly a factual issue and that the Court must therefore defer to his findings. *See* NSE Answering Brief, p. 32-33 (arguing that Petitioners "misclassify a factual dispute as a legal one"). The NSE's attempt to conflate legal and factual issues to persuade this Court to completely defer to his interpretation of the scope of his legal authority must be rejected.[3]

Indeed, the NSE argues that "When discussing the persuasive character of the State Engineer's interpretation of Chapters 533 and 534, the Nevada Supreme Court has been mindful

[3] Notably, even if this issue involved questions of fact and law, de novo review would still apply because the legal issue concerning the scope of the NSE's statutory authority predominate. *See Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 480, 215 P.3d 709, 717 (2009) (explaining that the Nevada Supreme Court reviews mixed questions of law and fact de novo when legal issues predominate).

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

of NRS 533.450(9)".[4] NSE Answering Brief, p. 32. But, to the contrary, the Nevada Supreme Court has explained that the interpretation and construction of a statute is a "purely legal question" not subject to the presumption in NRS 533.450(1). *In re Nevada State Eng'r Ruling No. 5823*, 128 Nev. 232, 239, 277 P.3d 449, 453 (2012) ("A decision of the State Engineer enjoys a presumption of correctness. NRS 533.450(10). The presumption does not extend to purely legal questions, such as the construction of a statute, as to which the reviewing court may undertake independent review.") (internal quotation marks omitted).

Purely legal questions, such as whether the NSE has statutory authority to enter Order 1309, are subject to this Court's *de novo* review. *Id.* at 238, 277 P.3d at 453. Because the NSE has familiarity with water law, "'the State Engineer's interpretation of a statute [may be] persuasive, [but] it is not controlling.'" *Id.* at 239, 277 P.3d at 453 (first alteration in original) (quoting *Town of Eureka v. State Engineer*, 108 Nev. 163, 165-66, 826 P.2d 948, 950 (1992)). Therefore, this Court "is free to decide purely legal questions... without deference to the agency's decision." *Town of Eureka*, 108 Nev. at 165, 826 P.2d at 949. This Court is certainly empowered to (and should) completely disregard the NSE's interpretation of statutes where, as here, the NSE's interpretation of the scope of his statutory authority is not found within the language of any relevant statutes. *See State v. Morros*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988) (explaining that an agency's interpretation can be persuasive "when it is within the language of the statute"); *Wilson v. Pahrump Fair Water, LLC*, 137 Nev. Adv. Op. 2, 481 P.3d 853, 856 ("[T]he scope of the State Engineer's authority... is a question of statutory interpretation, subject to de novo review.").

Second, while the NSE's factual findings are afforded more deference than the NSE's legal conclusions, this Court must still review the NSE's factual findings to ensure they are

[4] It appears that the NSE incorrectly cites NRS 533.450(9), which is an outdated version of the statute. The current version of the statute is NRS 533.450(10).

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

supported by substantial evidence in order to determine whether the NSE abused his discretion. *See King v. St. Clair*, 134 Nev. 137, 139, 414 P.3d 314, 316 (2018); *Bacher v. Off. of State Eng'r of State of Nevada*, 122 Nev. 1110, 1122, 146 P.3d 793, 801 (2006). Moreover, even where issues involve technical or complex scientific issues, the NSE's orders "must be sufficiently explained and supported to allow for judicial review." *Eureka Cnty v. State Eng'r*, 131 Nev. 846, 856, 359 P.3d 1114, 1120-21 (2015). Accordingly, "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". *Id.* at 856, 359 P.3d at 1121 (quoting *Port of Jacksonville Mar. Ad Hoc Comm., Inc. v. U.S. Coast Guard,* 788 F.2d 705, 708 (11th Cir.1986)).

It is these principles– not the NSE's mischaracterization of the applicable standards of review– that must guide this Court's analysis of the legal and factual issues presented by the Petitioners regarding Order 1309.

III. Nevada Requires and has Historically Implemented a Basin-By-Basin Approach to Managing Water

Several Petitioners Opening Briefs discussed that Order 1309 is contrary to Nevada law because the NSE, for the first time in Nevada history, combined seven established hydrographic basins into one for "joint administration," even though the Nevada statutes and historical practice require managing basins individually and separately.[5] The NSE responds as though this is a novel concept that has not been understood by all water rights holders and the Nevada Supreme Court for the past several decades. *See* NSE Answering Brief, pp. 31 ("Manufacturing a new 'basin-by-basin' management rule would have no basis in Nevada water law and be contrary to

[5] Indeed, the NSE has recognized as much in other cases. *See* **EXHIBIT 34** (Respondent Nevada State Engineer's Answering Brief, filed in *Pyramid Lake Paiute Tribe of Indians v. Ricci*, Case No. CV01-05764), p. 9. In that case, the NSE specifically represented to the Court that "it is undisputed that Nevada's groundwater resources have long been managed on perennial yield basis for the entire hydrographic basin. Such a system is specifically contemplated by the Nevada groundwater Code, which provides for the State Engineer to take various acts on a basin-wide basis."

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

the policy of conjunctive management.").[6] In fact, the NSE feigns confusion at what the Petitioners even mean when they refer to the term "basin". *See id.* at pp. 33-34.

In order to demonstrate the inordinate nature of Order 1309, CSI sets forth the following detailed explanation of (1) what a basin is; (2) how the Nevada basins were originally indexed and defined; (3) and how groundwater rights are allocated and managed.

A. The NSE's Interpretation of the Word "Basin" in NRS Chapters 533 and 534 is Absurd.

The NSE does not conduct a statutory interpretation analysis of the word "basin" as used throughout NRS Chapter 533 and 534, nor does the NSE argue that the word "basin" is ambiguous. Notwithstanding, the NSE feigns confusion as to what the word "basin" means by arguing that the Petitioners have their own "concept" of what a basin is. *See* NSE Answering Brief, p. 32. But Petitioners' understanding of what a basin is is rooted in Nevada law and the NSE's long-standing precedent.

The NSE argues that "[i]t is found nowhere in the Nevada Revised Statutes to constrain the State Engineer's view of what constitutes a basin." *Id.* at p. 33. But the NSE's "view of what constitutes a basin" is irrelevant. It is the *Legislature's* view of what constitutes a basin

---

Id.

[6] The NSE should be judicially estopped from taking inconsistent positions on this issue. *Kaur v. Singh*, 136 Nev. Adv. Op. 77, 477 P.3d 358, 362 (2020) ("Judicial estoppel prevents a party from stating a position in one proceeding that is contrary to his or her position in a previous proceeding."). Well-established caselaw sets forth a five-factor test for courts to consider when determining whether judicial estoppel applies: whether (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.

Id. at 362-63 (internal quotation marks omitted).

Each of these factors is clearly met here because (1) the NSE is the same party in both cases and has taken two positions (2) in judicial proceedings. Moreover, (3) the District Court and Nevada Supreme Court accepted the NSE's representation as true by denying the Petition for Judicial Review. *See Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. 521, 527, 245 P.3d 1145, 1149 (2010) (affirming NSE's ruling). Finally, (4) the positions are totally inconsistent given that the NSE represents to this Court that CSI has "manufactured" a new basin-by-basin management rule, and (5) the NSE did not set forth that argument as a result of fraud, ignorance, or mistake. The NSE's problematic and inconsistent positions should be rejected by this Court.

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

that matters because the *Legislature* specifically used the term throughout NRS Chapters 533 and 534 to describe how the NSE can allocate, prioritize, and manage water in Nevada.

The NSE fails to conduct a statutory analysis of what the term "basin" means in Nevada's water law statutes because doing so demonstrates that the NSE does not have statutory authority to redefine established Nevada basins. Rather, the NSE reasons that because "there is no language in any statute explaining how each basin came to be identified and determined" then the Legislature *must have* intended the NSE to define what a basin is.[7] *Id.* at p. 34. This is not how statutory interpretation works.

Statutory analysis begins with the plain language of the statute. *Pahrump Fair Water, LLC*, 137 Nev. Adv. Op. 2, 481 P.3d at 856 (2021). "If a statute's language is clear and unambiguous, this court will apply its plain language." *Gold Ridge Partners v. Sierra Pac. Power Co.*, 128 Nev. 495, 500-01, 285 P.3d 1059, 1062-63 (2012). As noted above, the NSE does not contend that the word "basin" is ambiguous– because it is not.

Because the Legislature did not define the term "basin", this Court should "give the word its ordinary meaning, which can be ascertained through contemporaneous dictionary definitions." *Advanced Pre-Settlement Funding LLC v. Gazda & Tadayon*, Docket No. 74802 (Unpublished Disposition) WL 1422713 (Order of Affirmance, March 28, 2019). A basin is "[a] geographic area drained by a single major stream". *Water Words Dictionary by Letter*, B at 25.[8] Basins are simply geologic features akin to valleys; there are not competing "concepts" of what is a "basin". *See id.* In Nevada, there are 232 distinct hydrographic basins. *Id.* at 25-26. Therefore, when the Nevada Legislature refers to a "basin" in Nevada's water law statutes, the only reasonable

[7] If the term "basin" as used throughout NRS Chapters 533 and 534 means whatever the NSE decides a basin is, then Nevada's entire water law statutory scheme is vague, arbitrary, and meaningless and entirely subject to the NSE's ultimate determination.

[8] This *Water Words Dictionary* is most obviously known to the NSE as it is found on the NSE's own website. *See* http://water.nv.gov/WaterPlanDictionary.aspx (last visited January 9, 2022). For the NSE to even argue that the

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

interpretation is that the Legislature is referring to the 232 hydrographic basins established in 1968 and relied on for over 5-decades.

The NSE's argument that because the statutes do not define "basin", then a "basin" is whatever the NSE decides it should be, is absurd and underhanded. *See Great Basin Water Network*, 126 Nev. at 196, 234 P.3d at 918 (explaining that "[a]n ambiguous statute is one that is capable of more than one ***reasonable*** interpretation") (emphasis added). The NSE's interpretation is categorically the antithesis to all principles of statutory construction.

The NSE seizes on the fact that in the definition of "basin" in the Water Words Dictionary, it is explained that "[t]he U.S. Geological Survey (USGS) and the Nevada Division of Water Resources, Department of Conservation and Natural Resources, ***have divided*** the state into discrete hydrological units for water planning and management purposes" to argue that "it is up to Nevada Division of Water Resources to make that determination [of what constitutes a basin]". *Id.* at p. 33 (emphasis added). But just because the NSE was involved in the original indexing of the hydrographic basins in Nevada (which process is more fully described below) does not mean that the NSE has *statutory authority* to, on an ongoing, indefinite, and unlimited basis, change and alter those established Nevada basins. The NSE's attempt to obfuscate the clear meaning of what a "basin" is, as used by the Legislature throughout Nevada's water law statutes, must be rejected by this Court.

B. How the 252 Nevada Basins Were Originally Indexed and Defined.

The NSE argues that "there is no language in any statute explaining how each basin came to be identified and determined." NSE Answering Brief, p. 34. However, there is no reason such information would be included in a Nevada *statute*. And, as discussed above, the absence of such information does not mean that "[t]he Legislature left it to the State Engineer to identify basins as a management and planning tool" as the NSE contends. *See id.* To the contrary,

word "basin" is anything other than clearly known to the NSE is disingenuous at best.

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

Nevada statutes neither authorize the NSE to "identify basins" nor to change the boundaries of the Nevada basins *because the basins have already been identified and established.*

As referenced in the Water Words Dictionary, the United States Geological Survey ("USGS") office, with cooperation from the NSE's office, originally indexed and identified Nevada's 232 hydrographic basins in 1968. *See* Rush, F.E., 1968, Index of hydrographic areas in Nevada: Nevada Division of Water Resources Information Report 6, 38 p, *available at* http://images.water.nv.gov/images/publications/Information%20series/6.pdf (the "Rush Report").

i. Scope and Purpose of the Report

Rush's explanation of the purpose and scope of the Rush Report demonstrates why the NSE's decisions in Order 1309 and arguments in the NSE's Answering Brief are incorrect.

Rush explains that "Nevada is composed of more than 200 valleys bounded by mostly northtrending mountain ranges." *Id.* at p. 2. "Each valley is partly filled with alluvium, mostly derived by weathering and erosion from surrounding mountains." *Id.* Rush confirms that "[t]he alluvium is the principal storage reservoir for ground water." *Id.* Important to understanding the reason water rights are allocated and managed in a basin-by-basin manner, Rush acknowledges that "[t]he valley floors are the principal ground-water and surface-water use areas." *Id.* "Thus, the valley commonly has become the basic unit of social, economic, and water-development activity in Nevada." *Id.*

"For the study, research, development, management, and administration of water resources, a need for a systematic identification of "valleys," or preferably "hydrographic areas," of Nevada was recognized by both the U.S. Geological Survey and the State Engineer's office." *Id.* Therefore, the USGS and NSE's office compiled a map showing the hydrographic areas in Nevada. *Id.* Rush explains that the Rush Report includes a revised map and that, "[t]he *primary*

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

purpose for the report and map is to *define and describe specifically the hydrographic regions, basins, and areas so that these descriptions and map can be available as an official guide to all water-resources and other natural-resources agencies*." *Id.* (emphasis added).

Demonstrably then, the Rush Report established what the State and Federal governments consider to be Nevada's hydrographic basins. *See id.*[9] The NSE's professed confusion about how the Nevada basins were first established is indicative of the overall lack of merit in the NSE's Answering Brief.

ii. How the Rush Report Identified the Nevada Basins.

In the Rush Report, Rush notes that "[t]he general term "hydrographic area" is used mostly in place of "valley" but it also applies to areas that are called flat, desert, basin, meadow, area, segment, plains, wash, canyon, and mesa." *Id.* at p. 4.[10] Rush named the hydrographic areas, in most cases, using the names used by those who lived in the area. *Id.*

To determine where the boundaries for each basin should be, the hydrologists used topographic maps and drew the lines "along topographic ridges". *Id.* Rush further explains that "[i]n some localities, the lines are drawn across nearly flat alluvial terrain. Low divides were located with the aid of aerial photographs (scale about 1:60,000)." *Id.* However, "[i]n other areas, hydrographic-area boundaries were drawn on the basis of boundary decisions in published hydrologic reports or on the basis of the collective judgment of the authors of the map and others identified in the acknowledgments section of this report." *Id.* Before capitalizing on self-imposed confusion, the NSE comfortably relied on and used the term basin throughout the

---

[9] Indeed, the Water Words Dictionary relies on the Report without identifying it. *See Water Words Dictionary by Letter - B*, at 25-26.

[10] Rush's interchangeable use of the terms "hydrographic area" and "basin" demonstrates that SNWA's argument that the term "basin" in NRS Chapters 533 and 534 does not refer to the 232 "Hydrographic areas" but instead to the 14 hydrographic regions is deceptive. *See* SNWA Answering Brief, p. 18. SNWA admits that the term "basin" in Nevada's water statutes refers to the index of basins, but SNWA neglected to continue the analysis of which it (SNWA) is certainly aware (meaning, SNWA should have included the Rush Report in its history and a description of how those basins were identified). SNWA's failure to do so renders SNWA's argument incomplete and incorrect.

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

1303/1309 process (and other NSE rulings and Orders), referring to the basins established in the Rush Report. Hypocrisy permeates the NSE's newly formulated confusion.

C. How Groundwater Rights are Allocated, Prioritized, and Managed.

Neither the USGS nor the NSE's office has altered or modified the index of basins in the Rush Report since it was published in 1968.[11] Rather, both State and Federal agencies have used the identification of Nevada's basins in the Rush Report for the study, management, and administration of Nevada water since 1968, 54 years ago.

The Rush Report's index of basins is how water rights holders, the NSE, other Nevada agencies and political subdivisions, Nevada State and Federal courts, and all persons in Nevada who have anything to do with water law, refer to basins in Nevada. The NSE provides no explanation for his theory that Nevada's water law statutes do not refer to the same basins. For example, Chapters 533 and 534 reference water rights as being located in a basin. *See, e.g.*, NRS 533.371 ("*In any basin in which an application to appropriate water is approved* pursuant to subsection 1, the State Engineer may act upon any other pending application to appropriate water *in that basin* that the State Engineer concludes constitutes the use of a minimal amount of water.") (emphasis added); NRS 534.090(3)-(4) (requiring water rights holders seeking extensions of time to work a forfeiture to provide specific information about the basin in which "the water right is located"). When water rights holders obtain permits to appropriate groundwater, those water rights are permitted in a specific hydrographic basin, such as CSI's water rights being located in CSV.

Because water rights are granted in specific basins, they are also managed based on the basin in which they are located. *See* **EXHIBIT 34**, p. 9. As a result, the priority rights for water rights holders are ordered based on the dates of priority within a specific basin. This concept is reflected in the Nevada water law statutes, which require, for example, curtailment based on the

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

date of priority of a water right in a specific basin. *See, e.g.*, NRS 534.110 (allowing under specific circumstances curtailment conforming to priority rights in a basin); NRS 534.090(3)(g) (referring to "[t]he date of priority of the water right as it relates to the potential curtailment of water use in the basin"). Therefore, no water rights holder in Nevada would expect, or even consider it a possibility, that its priority right would be determined in consideration of the priority dates of water right holders *in different basins* because under Nevada's statutes, priority rights are determined in relation to other water rights in the specific basin in which the rights are located. No provision of Nevada water law allows for a curtailment across multiple basins that would result in causing senior rights holders in certain basins to become junior rights holders to a water right holder in a different basin, based on moving, modifying, combing, or removing any particular basin's boundaries.

D. The Nevada Supreme Court's Discussion of Nevada Basins and Priority Rights is Consistent with CSI's Analysis Herein.

The NSE argues that "[t]here is no language in any prior appropriation case that limits existing rights by Petitioners' concept of a basin." NSE Answering Brief, p. 32. While the Nevada Supreme Court has not directly addressed this issue because the NSE has never attempted to re-define Nevada's established basins, the Court's analysis and discussion in other water rights cases demonstrates that the order of priority is established by the basin, basin by basin.

For example, in *Eureka Cty. v. Seventh Jud. Dist. Ct. in & for Cty. of Eureka*, 134 Nev. 275, 276, 417 P.3d 1121, 1122-23 (2018), the Nevada Supreme Court discussed the fact that water in Diamond Valley Hydrographic Basin (Basin No. 153) is over-appropriated and has been pumped "at a rate exceeding its perennial yield for over four decades." The issue in *Eureka* involved "[a] vested, senior water rights holder... ask[ing] the district court to order the State

[11] Except, of course, for the NSE's unilateral, unauthorized, and unsupported attempt to do so in Order 1309.

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

Engineer to curtail junior water rights in the Diamond Valley Hydrographic Basin No. 153 (Diamond Valley)." *Id.*

The Court's discussion is important to this case for several reasons. First, it demonstrates that the Court refers to basins by their identification in the Rush Report. *See id.* (referring specifically to the Diamond Valley Hydrographic Basin and its corresponding Basin Number, 153). Second, the Court's analysis shows that junior and senior water rights holders are determined in a basin-by-basin manner. To be sure, the Court references only those water rights holders in the Diamond Valley Hydrographic Basin– not the entire State of Nevada as the NSE now contends would have to be the case. *Id.* at 282, 417 P.3d at 1126 ("[W]e conclude that all Diamond Valley water rights holders should be given notice of the upcoming show cause hearing regardless of whether the district court is deciding only a 'pure question of law.'").

The Court's discussion is completely contrary to the NSE's unprecedented understanding of a basin, which the NSE contends is whatever he decides a basin is at any given point in time. Moreover, the NSE's interpretation would render Nevada's water right statutes vague and arbitrary. Indeed, if a basin is simply whatever the NSE determines it should be, there can be no certainty in Nevada's water law. Such result would be directly contrary to the prior appropriation doctrine, which requires certainty in the holding and use of water rights. *See Min. Cty. v. Lyon Cty.*, 136 Nev. 503, 518, 473 P.3d 418, 429 (2020) ("In *Arizona v. California*, the United States Supreme Court recognized that '[c]ertainty of rights is particularly important with respect to water rights in the Western United States,' and '[t]he doctrine of prior appropriation ... is itself largely a product of the compelling need for certainty in the holding and use of water rights.') (citing *Arizona v. California*, 460 U.S. 605, 620, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983)).

///

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

IV. The NSE Does Not Identify Any Authority Authorizing the NSE to Combine Multiple Basins into One Basin for Conjunctive Management.

Despite admitting that the NSE's authority is statutory, the NSE neither refers to nor cites any statute that allows the NSE to combine multiple basins into one for joint administration. *See* NSE Answering Brief, p. 30-35. Rather, the NSE makes vague, generalized commentary that "Order 1309 is firmly rooted in the text of Chapters 533 and 534 and prior appropriation doctrine", *id.* at 30, even though the NSE cannot pinpoint any actual statutory text that gives the NSE the authority to enter Order 1309.

Because the NSE cannot identify a statute that supports Order 1309's unprecedented terms[12], the NSE attempts to justify Order 1309 by arguing that there is no statute that *prohibits* the NSE from combining multiple basins into one for joint administration. NSE Answering Brief, p. 30. But the NSE cannot establish his authority in the negative because the NSE only has the authority to act where the Legislature has so determined. *See Wilson v. Pahrump Fair Water, LLC*, 137 Nev. Adv. Op. 2, 481 P.3d 853, 856 (2021). The NSE's analysis of his authority is contrary to basic notions of statutory interpretation, which principles must guide the Court in determining the scope of the NSE's *statutory* authority. *See id.* (explaining that in determining the scope of the NSE's statutory authority, "the plain meaning of the relevant text guides the answer").

The NSE does not even conduct a statutory interpretation analysis.[13] Rather, the NSE attempts to blur all of the statutes in NRS Chapters 533 and 534 together to argue that these chapters provide him the authority to combine and "jointly administer" multiple basins.[14] The

---

[12] Because no such statute exists.

[13] Again, the NSE can't conduct a statutory analysis because there are no statutes to analyze; the NSE is simply waving a wand and saying "it is so" which it is not allowed to do.

[14] SNWA takes the same approach in its Answering Brief by conceding that each statute upon which the NSE relies pertains to a specific function (none of which are at issue in Order 1309), but contending that taking the statutes as a

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

NSE's failure to identify any statute that gives him the authority to issue Order 1309 demonstrates that it is an unlawful order.

A. There is No Statutory Authority for the NSE to Redefine Hydrographic Basins.

The NSE avers that "[s]everal sections of Nevada statutory water law support the State Engineer's power to issue Order 1309." NSE Answering Brief, p. 30. The NSE cites NRS 533.0245, NRS 533.024(1)(c)[15], NRS 534.110(6), NRS 533.024(1)(e), NRS 533.430(1), and NRS 534.020(1) to argue that the NSE has authority to redefine established basins and combine them into one, new basin for joint administration. *Id.* at 30-35. However, none of these statutes support the NSE's argument that it could redefine hydrographic basins in Nevada as it did in Order 1309.

i. NRS 533.0245 Does Not Provide the NSE Authority to Issue 1309.

In the NSE Answering Brief, the NSE contends that he is not constrained to act based on individual basins. NSE Answering Brief, p. 30. In fact, the NSE argues that the Petitioners have "[m]anufactur[ed] a new 'basin-by-basin' management rule" that has "no basis in Nevada water law and [is] contrary to the policy of conjunctive management". NSE Answering Brief, p. 31. But Nevada basins have been managed in a basin-by-basin manner for decades. *See* **EXHIBIT 34**, p. 9. This is supported by the plain language of the statutes, by Nevada caselaw, and by the NSE's own website.

The NSE relies on NRS 533.0245 in support of this argument; however, this statute simply provides that the NSE is prohibited from carrying out duties in a manner that conflicts with decrees, orders, compacts or agreements. *See Min. Cty.*, 136 Nev. at 517-18, 473 P.3d at

---

whole, the statutes "form a mosaic of powers" that empowers the NSE to enter Order 1309. Under these vague analyses, the NSE's power would be unlimited.

[15] The NSE incorrectly cites "NRS 533.0241(c)". NSE Answering Brief, p. 30. However, the language the NSE quotes is from NRS 533.024(1)(c).

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

429 (2020) (citing NRS 533.0245 and explaining that the NSE is expressly prohibited from reallocating adjudicated water rights). NRS 533.0245 does not empower the NSE to redefine established hydrographic basins.

The NSE contends that NRS 533.0245 "does not constrain the State Engineer's fealty to decrees and vested rights depending on a basin-by-basin approach." NSE Answering Brief, p. 30. The NSE's argument ignores the fact that water rights can be held for surface flows and groundwater flows, and the process to acquire and manage each type of water right is different in certain ways. Consequently, decrees, orders, compacts, and agreements can govern water rights for both surface flows *and* groundwater flows.

Water rights for surface flows include rights to divert water from stream systems, such as the Muddy River, which systems can cross several basins as the water flows downstream. Water rights for surface flows are therefore not allocated by the basin but instead, based on a right to divert water at the place of diversion in a stream. Thus, the statutes governing surface flow water rights discuss those rights in relation to the stream system. *See, e.g.*, NRS 533.090(3) ("A water user upon or from any stream or body of water shall be held and deemed to be a water user upon the stream system of which such stream or body of water is a part or tributary."); NRS 533.100(1) ("The State Engineer shall begin an investigation of the flow of the stream and of the ditches diverting water, and of the lands irrigated therefrom, and shall gather such other data and information as may be essential to the proper determination of the water rights in the stream.").

In contrast, groundwater rights *are* allocated in a basin-by-basin manner and as a result, the statutes governing groundwater rights authorize the NSE to take action based on the basin in which the rights are held. *See, e.g.*, NRS 533.0241 ("For *each basin* in which there is groundwater that has not been committed for use, including, without limitation, pursuant to a permit, certificate or by any other water user in the basin, as of June 5, 2019, the State Engineer

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

shall reserve 10 percent of the total remaining groundwater that has not been committed for use in the basin.") (emphasis added); NRS 534.030(1) (describing a petition under NRS Chapter 534 as one that requests the NSE "to administer the provisions of this chapter as relating to designated areas, ... in any particular basin or portion therein").

The different types of water rights require different management tools. Therefore, as shown above by the description of the different statutes that apply to surface water and groundwater, where the Legislature meant to address one of those types of water rights, the Legislature did so. But where the statute could equally apply to both groundwater rights and surface water rights, such as NRS 533.0245, the Legislature did not identify the location of the permitted water right, i.e. steam or basin. Accordingly, the NSE's argument that NRS 533.0245 means that groundwater rights are not managed and allocated in a basin-by-basin manner is incorrect because adjudicated water rights can include both surface and groundwater rights. The Legislature's intent is clear from the plain language of the statutes. The NSE's reliance on NRS 533.0245 is misplaced and only confirms that the NSE is required to manage water in a basin-by-basin manner.

ii. The NSE Concedes that NRS 533.024 Provides Statements of Policy, Not Statutory Authority.

NRS 533.024 sets forth the Legislative declaration of policy, and, as conceded by the NSE, it does not authorize any particular action. *See* NSE Answering Brief, p. 34 ("The State Engineer does not argue that NRS 533.024 serves as an independent source of statutory authority."). Notwithstanding, the NSE contends that the Petitioners "attempt to junk" the statement of policy and further argues, "Petitioners never explain how using the 'best available science' could be contrary to any statute" and that "Petitioners never explain how managing waters conjunctively could conceivably violate any statute". *Id.* The NSE intentionally mischaracterizes the Petitioners' arguments.

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

CSI specifically argued that these statements of policy do not provide statutory authority for the NSE to combine multiple basins together as one for joint administration. CSI Opening Brief, pp. 17-22. CSI expressly contended that the NSE could not rely on these statutes for authorization to issue Order 1309 and that even if he could, he did not rely on the best available science. *See id.* at 17-22, 28-30. CSI agrees that the Legislature's statements of policy are important. The NSE's total disregard of Nevada legislative policy in Order 1309 is egregious, egregious to CSI, and an affront to the Nevada legislature. The NSE can and should implement these Legislative policies but only where he actually has authority to do so.

iii. Order 1309 is not Based on NRS 534.110(6) as the NSE Now Argues.

The NSE argues that he conducted an investigation pursuant to NRS 534.110(6) and "show[ed] as a matter of fact the LWRFS is one basin". NSE Answering Brief, p. 31. The NSE contends that this "investigation" was done "pursuant to an express power from the Legislature". *Id.* However, NRS 534.110(6) does not authorize the actions the NSE attempts to take by way of Order 1309.

Primarily, neither NRS 534.110(6) nor any other Nevada statute allows the NSE to conduct investigations into multiple basins to determine if their boundaries should be removed so that they are instead one basin. Whether the NSE has *authority* to change the boundaries of basins that have been established for decades is a legal question, not factual. The NSE's attempt to reconstruct a legal issue into a factual one is obvious and telling of the NSE's understanding that Order 1309 far exceeds the scope of his authority.

Second, there is no language in NRS 534.110(6) that authorizes the NSE to conduct an investigation into multiple basins. In fact, the statute only permits the NSE to conduct investigations in "any basin or portion thereof", not across multiple basins. *See* NRS 534.110(6). Therefore, the NSE's attempt to justify Order 1309 as merely constituting an investigation into

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

the LWRFS under NRS 534.110(6) fails.

Third, the NSE ignores the purpose of the investigation contemplated by NRS 534.110. The investigation authorized by NRS 534.110 is not a broad investigation for *any reason*, nor does it include an investigation to alter the boundaries of established basins. Rather, the plain language of NRS 534.110(6) authorizes investigations into "any basin or portion thereof where it appears that the average annual replenishment to the groundwater supply may not be adequate for the needs of all permittees and all vested-right claimants".

The statute further provides that if such investigation confirms that the annual replenishment to the groundwater supply is not adequate for the permittees and vested-right claimants, the NSE has authority to take two specific actions: (1) order that withdrawals from domestic wells be restricted to conform to priority rights, or (2) designate as a critical management area the basin in which withdrawals of groundwater consistently exceed the perennial yield. *See* NRS 534.110(6)-(7). The Legislature did not include in those options the ability for the NSE to alter the boundaries of established basins. *See id.* The proper conduct for the NSE would have been to analyze each individual basin, determine the perennial yield of each and, assess if their yields interact with other adjacent basins, and then, if appropriate, engage in basin-by-basin management. If the Legislature intended for the NSE to have the authority to alter basin boundaries or combine them as a result of the investigation contemplated by NRS 534.110(6), the Legislature would have so indicated. *See Slade v. Caesars Entm't Corp.*, 132 Nev. 374, 380-81, 373 P.3d 74, 78 (2016) (citing Antonin Scalia & Bryan A. Garner, Reading Law: *The Interpretation of Legal Texts* 107 (2012) ("The expression of one thing implies the exclusion of others.")).

Fourth, the NSE's argument ignores that NRS 534.030 provides the preliminary process that must occur *prior* to the NSE conducting an investigation under NRS 534.110. NRS 534.030

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

provides that an investigation can only occur if either the appropriators "*in any particular basin or portion therein*" file a petition requesting administration or after a public hearing held by the NSE "*within the basin*" or "*within the county where the basin lies*". *See* NRS 534.030(1)-(2) (emphasis added). There was never a petition filed under NRS 534.030, and the 1303 Hearing was not conducted pursuant to NRS 534.030. Thus, 534.030 is inapplicable.

SNWA also attempts to justify Order 1309 by referring to NRS 534.030(2) and arguing that the NSE employed NRS 534.030(2) to "designate" the entire LWRFS as an area in need of administration. *See* SNWA Answering Brief, pp. 15-16. SNWA's argument is belied by Order 1309 itself, which does not include any analysis under NRS 534.030. *See generally* Exh. 2.[16] Interim (and rescinded) Order 1303 also contradicts SNWA's characterization of Order 1309 because Interim Order 1303 explains that several of the basins now included in the LWRFS (including Coyote Spring Valley Hydrographic Basin, Black Mountains Area Hydrographic Basin, Garnet Valley Hydrographic Basin, California Wash Hydrographic Basin, Hidden Valley Hydrographic Basin, and part of the Muddy River Springs Area)[17] have already been designated pursuant to NRS 534.030. *See* Exh. 16, pp. 2-3. This fact alone demonstrates that the NSE has previously construed and implemented these statutes by the specific hydrographic basin. Regardless, Order 1303 identifies the orders that previously designated the individual basins under NRS 534.030. It is illogical that Order 1309 was intended to repeat that process.

Finally, SNWA's contention that the NSE's "due investigation" under NRS 534.110 began with Order 1169 and the 1169 Pump Tests is contradicted by the NSE's own description of Order 1169 and the related pump tests.[18] For example, in Ruling 5712, the NSE explains that "Order

---

[16] When referring to exhibits that were attached to CSI's Opening Brief, CSI refers to them herein as "Exh."

[17] Notably, Kane Spring Valley has *not* been designated under NRS 534.030.

[18] Moreover, to the extent Order 1309 could at all be interpreted as originating in NRS 534.030 or NRS 534.110, combining seven established basins into one is not merely a reasonable rule or regulation because it impacts CSI's

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

No. 1169 was issued to address the requests for the additional appropriation of water filed in Coyote Spring Valley, but the focus of the additional study ordered is the Muddy River Springs Area." Exh.7, p.40589.[19] Indeed, in Order 1169, the NSE expressly ordered the parties to conduct the 1169 Pump Tests pursuant to NRS 533.370 and NRS 533.368. *See* Exh. 4, p. 664.[20]

The NSE's and SNWA's disingenuous attempts to characterize Order 1309 as being authorized by NRS 534.110 must be rejected by this Court. NRS 534.110 does not authorize the NSE to conduct investigations in order to combine basins or modify basin boundaries. NRS 534.110 plainly applies to investigations concerning administration and designation of critical management areas within a basin. Order 1309 neither stems from such investigation, nor does NRS 534.110 authorize the NSE to issue Order 1309. Accordingly, Order 1309 is void.

V. Order 1309 is Unconstitutional Because It Re-Prioritizes Water Rights.[21]

The NSE avers that Order 1309 is constitutional because he has not yet initiated curtailment proceedings nor actually implemented a plan to do so. NSE Answering Brief, p. 39. Indeed, the NSE argues that "Order 1309 does not identify any party as having junior rights that need to be curtailed" and that because the NSE has not curtailed any rights, CSI (and other Petitioners) mischaracterize Order 1309.[22] *Id.* The NSE's argument again ignores that priority

---

property rights.

[19] This expansion to the Muddy River Springs Area was still conducted to determine whether additional water was available for appropriation. *See* Exh. 8, p. 654.

[20] Now, in the NSE's Answering Brief, the NSE dismisses the caselaw discussing NRS 533.070 because according to the NSE, "Those authorities have no relevance to Order 1309, which did not consider any water-rights applications." NSE Answering Brief, p. 27. The NSE and SNWA cannot have it both ways. The 1169 Pump Tests (which concluded in 2012) were clearly not meant to decide the issues in Order 1309 (issued in 2020). Therefore, the NSE's almost exclusive reliance upon the 1169 Pump Tests in Order 1309 is irrelevant, arbitrary and capricious.

[21] Both the NSE and SNWA contend that the NSE did not re-prioritize water rights. SNWA contends that water rights will still be administered "based upon their respective date priorities in relation to other rights within the regional groundwater unit." SNWA Answering Brief, p. 21 n.65. Given the numerous Petitioners who do contend the NSE's Order 1309 re-prioritizes water rights, it cannot be disputed that Order 1309 is vague and lacks due process.

[22] However, the NSE states on page 12 of the Answering Brief that "Order 1309 gives force to that rule [of prior appropriation] by determining the amount of water that can be pumped by holders of junior rights without interfering with senior rights."

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

rights are identified by ordering the dates of water rights in a basin. Therefore, even though the NSE has neither implemented a management plan nor initiated the curtailment process, CSI's arguments are not premature because the effect and consequence of Order 1309 is that CSI's water rights are now called into question because other water right holders with older priority in different hydrographic basins have displaced CSI's seniority in the Coyote Spring Valley basin when considered along with the completely arbitrary and capricious limitation of 8000 afa imposed by the NSE.

The consequence of Order 1309, which indisputably reprioritizes water rights, is exemplified by the impact of Order 1309 to CSI's water rights. Prior to Order 1309, CSI's priority in Coyote Spring Valley was second only to Bedroc's priority right, and CSI's priority in Kane Spring Valley, along with Vidler and LCWD, was the most senior. After Order 1309, however, CSI's priorities in Coyote Spring Valley and Kane Spring Valley are now challenged against the 8000 afa limitation wrongfully established in Order 1309. CSI's senior rights are now being denied by the State of Nevada and CSI is not allowed to use its senior rights to finalize subdivision maps. Yet, other users such as Moapa Valley Water District, whose water rights are junior in date to CSI, and fall below the 8000 afa limitation, are allowed to continue to pump thousands of acre feet a year. Furthermore, other water right holders elsewhere in the LWRFS, and outside of the Coyote Spring Valley basin with priority dates older than CSI's, and who previously, never before had any effect on whether CSI could use or rely on its water rights, now "step in front of" CSI's senior water rights and push CSI down to the artificial 8000 afa limitation. Thus, the impact of Order 1309 results in a monumental loss to CSI's property rights, CSI's priority rights, and CSI's water rights, which is a taking and which violates CSI's due process rights.[23]

[23] The NSE summarily dismisses CSI's argument that Order 1309 violates the Takings Clause of the Nevada and United States Constitutions. *See* NSE Answering Brief, p. 44. The NSE misses the point. CSI is not suing the NSE

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

The NSE's position that he can combine multiple basins and later develop a management plan is akin to the NSE's approach in *Eureka Cnty v. State Eng'r*, 131 Nev. 846, 359 P.3d 1114 (2015), which was rejected by the Nevada Supreme Court. In that case, an applicant filed numerous applications to appropriate water and change the use of its existing water rights. *Id.* at 848, 359 P.3d at 1116. Senior right holders in the basin protested, arguing that the sought after groundwater appropriations would conflict with existing rights under NRS 533.370(2). *Id.* at 848-49, 359 P.3d at 1116. Despite concluding that granting the applications would deplete the water source, the NSE ruled that any conflict with existing water rights could be mitigated through a monitoring, management, and mitigation plan (3M Plan). *Id.* at 852, 359 P.3d at 1118.

Similar to the NSE's lack of a management plan in this case, the NSE failed to create a monitoring, management, and mitigation plan in *Eureka Cnty*. *Id.* at 853, 359 P.3d at 1119 ("Nowhere in the ruling, however, does the State Engineer articulate what mitigation will encompass, even in the most general sense."). The Nevada Supreme Court expressly rejected the NSE's theory that he "may leave for a later day, namely the day the 3M Plan is before him, the determination of exactly what [the applicant]'s mitigation would entail." *Id.* at 855, 359 P.3d at 1120.

The Court explained that the NSE's determination under NRS 533.370(2) "must be made upon presently known substantial evidence, rather than information to be determined in the future, for important reasons." *Id.* The first of those important reasons is to afford water rights holders due process. *See id.* The Court noted that "those who protest an application to appropriate or change existing water rights must have a full opportunity to be heard, a right that includes the ability to challenge the evidence upon which the State Engineer's decision may be based." *Id.* Therefore, due process requires that water rights holders have the opportunity to

---

for a taking and seeking damages by way of its Petition for Judicial Review. Rather, CSI argues that Order 1309 must be declared void because it violates the Takings Clause.

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

challenge the evidence relied upon by the NSE prior to the NSE's determination. *Id.*

Although *Eureka Cnty.* involved the grant of water right applications, the Court's analysis applies here. Under Order 1309, the NSE attempts to combine seven established Nevada basins into one for "joint administration". But the NSE seeks to delay to another day what that administration, management, and curtailment will be. CSI cannot be forced to wait and challenge a future management plan because at that point, the only remedy available would be vacating the management plan. *See id.* at 855-56, 359 P.3d at 1120. Allowing the NSE to alter established basin boundaries for "joint administration" without an actual management plan violates CSI's due process rights. *See id.* ("In other words, challenging the sufficiency of a later developed mitigation plan cannot undo a decision to grant applications for a proposed use or change that may have been erroneous. And allowing the State Engineer to grant applications conditioned upon development of a future 3M Plan when the resulting appropriations would otherwise conflict with existing rights, could potentially violate protestants' rights to a full and fair hearing on the matter, a rule rooted in due process.").

The NSE's argument that the NSE cannot be challenged for engaging in ad hoc rulemaking is false. As noted by the Court in *Eureka Cnty.*, the NSE must afford water rights holders notice and a full and fair hearing on the matter at issue. *See id.* The NSE's reliance on factors that are not found in Nevada statutes, Nevada caselaw, nor the Notice of the 1303 Hearing means that the Petitioners did not have notice of such criteria nor opportunity to fully challenge the same. The NSE's characterization of these criteria as the "lodestar in determining whether an area should be included for joint management as part of the LWRFS" is entirely unsupported by fact or law.[24] Therefore, the NSE did not provide CSI with due process in including Kane Spring Valley in the "Mega Basin".

///

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

VI. The NSE Has Failed to Identify Substantial Evidence Supporting Order 1309.

Given the utter lack of authority for the NSE to enter Order 1309, this Court need not even reach the issue of whether substantial evidence supports the NSE's conclusions in Order 1309. Notwithstanding, in the event this Court determines that the NSE had statutory authority to combine the seven basins into one, the NSE's conclusions are arbitrary and capricious as they are not supported by substantial evidence.

A. The NSE Does Not Demonstrate that the Inclusion of KSV in the LWRFS is Supported by Substantial Evidence.

NSE argues that National Parks testified that groundwater levels in KSV increased and decreased in a similar manner as the other basins in the LWRFS before, during, and after the 1169 Pump Tests. NSE Answering Brief, p. 14. However, the NSE ignores the National Parks full testimony, which clarified that while there were "similar responses... they are greatly attenuated compared to the others." **EXHIBIT 35** (SE ROA 53170). Moreover, the witness testified that while there was "an initial trend of declining water levels... during the period of the Order 1169 testing", he was not going to "claim" that the water levels were increasing when the pumping of MX-5 well ceased. *Id.* at 53173.

The witness further confirmed that National Parks was "in agreement with CSI that there's faulting in this area and that those faults may impede flow through Kane Spring Valley in to Coyote Spring Valley" and that there is a barrier that causes "the different hydrographic response we see in CSVM-5 than we see in these two wells at the mouth of the Kane Spring Valley." *Id.* at 53174-175. This directly refutes the NSE's statement in the Answering Brief that "[t]here was no known geological structure causing a hydrologic barrier between Kane Springs Valley and the rest of the LWRFS." NSE Answering Brief, p. 14.

Therefore, the testimony the NSE cites as constituting "substantial evidence" of Kane

[24] Indeed, this "lodestar" criteria was not used in the Rush Report to establish the Nevada basins.

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

Spring Valley's inclusion in the LWRFS poignantly illustrates the extreme arbitrary and capriciousness of the NSE's finding.

Additionally, the NSE argues that CSI has "conceded" that the NSE relied on substantial evidence because CSI noted the NSE's citation to the FWS' SerieSEE analysis. *Id.* at p. 21. The NSE misconstrues CSI's argument. The 1169 Pump Tests and the FWS' SerieSEE, which interprets those pump test results, cannot constitute substantial evidence because no reasonable mind can accept that two isolated years of pump tests that were not even conducted in KSV nor implemented in a manner that provides an understanding of how specific wells impact particular water levels could support the determination that KSV should be included in the LWRFS. The NSE's results driven approach is not based on substantial evidence because neither the 1169 Pump Test results nor the SerieSEE support including KSV in the LWRFS.

Finally, the NSE is dismissive of the fact that in Ruling 5712, he excluded KSV from the LWRFS based on the differences in hydraulic head. NSE Answering Brief, p. 22. The NSE argues that Ruling 5712 is outdated and not based on comprehensive data. *Id.* The NSE reiterates that the 1169 Pump Tests confirmed that flows in KSV were affected in a similar manner to those in the LWRFS and emphasizes that in Order 5712, he recognized the "strong hydrologic connection" between Kane Springs Valley. *Id.* Of course, the NSE again omits from his analysis that the testimony upon which he relies includes the conclusion that impact to KSV was "greatly attenuated" from the other basins in the LWRFS. The NSE's argument demonstrates that he, again, relies solely on the 1169 Pump Tests to include KSV in the LWRFS even though KSV was not even part of the study. Accordingly, the NSE's inclusion of KSV is arbitrary and capricious.

///

///

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

B. The NSE Does Not Identify Any Evidence to Support the Conclusion that 8,000 afa is the Maximum Allowable Pumping that Can Occur in the LWRFS.

Absent from the NSE's brief is any evidence that supports the NSE's conclusion that 8,000 afa is the maximum that can be pumped from the entire LWRFS. *See* NSE Answering Brief, pp. 16-17, 24-26. Rather, the NSE admits that the Petitioners recommended various amounts of pumping, ranging from 30,000 afa to zero. *Id.* at 16. The NSE's remaining analysis demonstrates that the NSE simply picked the number 8,000 at random from that broad range.

To be sure, the NSE argues that the amount of pumping that has occurred since the 1169 Pump Tests concluded decreased from 12,635 to 8,300 and that "at or around that amount of pumping", the rate of decline of groundwater has stabilized although neither groundwater nor surface flow have returned to pre-test levels. *Id.* This information is not contained in the cited portion of SNWA's report, as represented by the NSE. *See id.*; *see also* ROA 41992. But regardless, this information does not provide substantial evidence to support the NSE's random selection that 8,000 afa is the maximum amount that can be pumped.

The NSE additionally admits that his determination of 8,000 afa is based on speculative and incomplete information. *See* NSE Answering Brief, pp. 16-17 (stating that downward trends in groundwater "*could* be a leading indicator of declines that will be observed closer to the Muddy River- and eventually in the amount of spring flow into the river" and explaining that "*If* conditions became drier, the current amount of pumping *could* cause groundwater levels and spring flow to decline again"). The NSE argues that the "record shows that despite an overall drought, nearby basins with little pumping have shown *increasing* groundwater levels." *Id.* at p. 26. Therefore, the NSE concludes that Order 1309 "properly accounted for the fact that conditions could become drier going forward". *Id.* But CSI presented evidence that conditions could become wetter going forward. The NSE's random reference to drought conditions in other

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

basins is not substantial evidence to support 8,000 afa.

The NSE argues that CSI's analysis would impose an incorrect burden on the NSE to disprove that every other number in the broad range is wrong. *See* NSE Answering Brief, pp. 24-25. But CSI's point is the opposite. If the NSE's pronouncement that 8000 afa is the magic number, then there must be substantial evidence in the record that 8,000 afa is in fact the maximum that can be pumped in the LWRFS. That evidence simply does not exist in this case. In fact, the only citation the NSE provides to any source that identifies 8,000 afa as the correct number is Order 1309, which itself cannot form the basis for substantial evidence. Accordingly, it is clear that the NSE's determination of 8,000 afa is arbitrary and capricious.

VII. Conclusion and Remedy Sought

Based on the foregoing, and as described in CSI's Opening Brief, it is clear that the NSE lacked authority to issue Order 1309 and that the NSE violated CSI's constitutional and due process rights in the development and issuance of Order 1309. Order 1309 additionally is contrary to Nevada law. Accordingly, CSI respectfully requests that this Court grant CSI's Petition for Judicial Review and enter an Order declaring Order 1309 void.

CSI additionally requests that this Court grant CSI's Petition for Judicial Review and enter an Order determining that Order 1309 is neither supported by substantial evidence nor the best available science, and as such, is arbitrary, capricious, and must be reversed. Accordingly, CSI requests that if this Court determines the NSE had authority to issue Order 1309, that this Court enter an Order declaring Order 1309 arbitrary and capricious.

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

///

///

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

DATED this 11th day of January, 2022.

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

KENT R. ROBISON #1167
HANNAH E. WINSTON #14520

IN ASSOCIATION WITH:

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

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

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

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 REPLY IN SUPPORT OF OPENING BRIEF** to be served on all parties to this action by:

__X__ placing an original or true copy thereof in a sealed, prepaid delivery package via United States Mail at Reno, Nevada, addressed to:

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

__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.
KIEL B. IRELAND, ESQ.
Office of the Attorney General
100 North Carson
Carson City, NV 89701
Email: jbolotin@ag.nv.gov; lstjules@ag.nv.gov; kireland@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

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

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

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

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

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

LISA BELENKY, ESQ.
Center for Biological Diversity
1212 Broadway, #800
Oakland, CA 94612
Email: lbelenky@biologicaldiversity.org
Attorneys for Center for Biological Diversity

SCOTT LAKE. ESQ.
Center for Biological Diversity
P.O. Box 6205
Reno, NV 89513
Email: slake@biologicaldiversity.org
Attorney for Center for Biological Diversity

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

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

ROBERT A. DOTSON, ESQ.
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

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

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

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

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

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

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

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

WAYNE O. KLOMP, ESQ.
Great Basin Law
1783 Trek Trail
Reno, NV 89521
Email: wayne@greatbasinlawyer.com
Attorneys for Lincoln County Water District and Vidler Water Company, Inc.

DATED: This 11th day of January, 2022.

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

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

EXHIBIT LIST

Exhibit No.	Description	Pages
34	Respondent Nevada State Engineer's Answering Brief Case No. CV-01-05764 -2nd Judicial District (5/3/2002)	32
35	Excerpts of Transcript of 9/25/2019 Public Hearing Order 1303	7

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

Exhibits 34-35 Excluded from Appendix

Exhibits 34-35 Excluded from Appendix

PRB

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

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

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

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

DISTRICT COURT

CLARK COUNTY, NEVADA

LAS VEGAS VALLEY WATER DISTRICT, and SOUTHERN NEVADA WATER AUTHORITY, et al.,	Case No. A-20-816761-C
	Dept. No. 1
Petitioners,	Consolidated with Cases: A-20-817765-P A-20-818015-P A-20-817977-P A-20-818069-P A-20-817840-P A-20-817876-P A-21-833572-J
vs.	
ADAM SULLIVAN, P.E., Acting Nevada State Engineer, et al.,	
Respondent.	

_____/

LINCOLN COUNTY WATER DISTRICT AND VIDLER WATER COMPANY, INC.'S REPLY BRIEF

///

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

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

TABLE OF CONTENTS

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

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

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

TABLE OF AUTHORITIES

Cases:

Rules:

Statutes:

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

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

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 11th day of January, 2022.

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
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

Petitioners, LINCOLN COUNTY WATER DISTRICT ("Lincoln") and VIDLER WATER COMPANY, INC. ("Vidler"), hereby file this Reply Brief in response to the Answering Briefs or Briefs in Intervention of the Nevada State Engineer ("NSE" or "State Engineer"), Southern Nevada Water Authority ("SNWA") and Las Vegas Valley Water District ("LVVWD"), Muddy Valley Irrigation Company ("MVIC"), Moapa Valley Water District ("MVWD"), The Church of Jesus Christ of Latter-day Saints (the "Church"), Sierra Pacific Power Company dba NV Energy and Nevada Power Company dba NV Energy (jointly "NV Energy"), and the Center for Biological Diversity ("CBD").

ARGUMENT

I. Introduction

When the Nevada State Engineer issued Order 1309, he grossly exceeded his statutory authority granted and defined by the Nevada Legislature. He created new rules based on evidence presented rather than any rule of law and without notice, reprioritized already-adjudicated water rights in individual basins, and combined separately-administered basins into a single super-basin. Moreover, the State Engineer left all water users in limbo by indicating there would be a "next phase of proceedings" to determine how to manage the Lower White River Flow System ("LWRFS") and define the new-but-not-released criteria for moving water rights within the new super-basin. In Order 1309 and now in this proceeding, the State Engineer has hinted at (but not released) new rules, regulations, and laws which will govern permitted rights in the LWRFS. The State Engineer has ignored the Supreme Court's guidance that "[c]ertainty of rights is particularly important with respect to water rights in the Western United States," and "[t]he doctrine of prior appropriation . . . is itself largely a product of the compelling need for certainty in the holding and use of water rights." *Mineral Cnty. v. Lyon Cnty.*, 473 P.3d 418 (Nev. 2020), *quoting Arizona v. California*, 460 U.S. 605, 620 (1983).

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

The State Engineer has created new regulations not subject to the process and procedures of a democratic government; he has created uncertainty by failing to define his newly minted "multi-tiered process" for conjunctive management of super-basins; and he has ignored the process and procedures for designating basins and curtailing pumping as provided by the Nevada Legislature, instead formulating an incomplete process not subject to stakeholder input or public scrutiny. The issues raised in this Consolidated Action are exemplified by the State Engineer's Answering Brief where he asserts that the "State Engineer was not obligated to follow Ruling 5712." NSE Answering Brief at 22:26-27. The State Engineer blatantly disregarded the rule of law by ignoring prior state engineer's Rulings and Orders, Legislative processes, and rule-making procedures. From this unlawful conduct Petitioners seek relief. The State Engineer is bound by the rule of law, and he cannot simply make new law without legislative mandate, public notice, and appropriate hearings. This violates fundamental principles of due process.

Thus, as a matter of law, the State Engineer lacked authority to: (1) create new regulations; (2) ignore prior Rulings and Orders granting property rights; (3) reprioritize water rights in a newly-minted super-basin; and (4) create an incomplete regulatory scheme. For those reasons, Order 1309 should be vacated as a matter of law. The State Engineer created a problem by over-appropriating other basins within the LWRFS contrasted with Kane Springs Valley ("Kane Springs") which has only one appropriation granted to Petitioners. Now he seeks to mitigate the problem he created in the over-appropriated basins by lumping those basins into a super-basin and taking water rights granted to Lincoln and Vidler in Kane Springs and transferring the right to pump that water to others. These actions are inconsistent with and ignore the statutory scheme created by the Legislature for designating and curtailing pumping in over-appropriated basins.

Moreover, the State Engineer failed to base his decisions in Order 1309 on substantial evidence or failed entirely to identify in the Order the evidence upon which

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

he included Kane Springs in the LWRFS. Contrary to the State Engineer's present assertions, substantial evidence does not warrant including Kane Springs in the LWRFS. First, the State Engineer ignored the substantial evidence that Kane Springs should be treated separately from the LWRFS because: (1) a geologic structure, i.e., a fault,[1] separates Kane Springs from the rest of the LWRFS; (2) climate data and other evidence explains the inconsistent water table drop in Kane Springs; (3) an "attenuated" connection between Kane Springs and the LWRFS is inconsistent with an "uniquely close connection" cited by the State Engineer; and (4) there has been no pumping in Kane Springs, and therefore no possible impacts to the springs or the Moapa dace from Kane Springs. Second, Order 1309 is based on a scientific impossibility—that pumping anywhere in an 1,100 square mile area affects spring flows the same as if the pumping occurred proximate to Muddy River flows. The State Engineer ignores the fact that the main production well for municipal use in Moapa Valley is located adjacent to the Muddy River Springs and harms flows more than a well that would be pumping over 20 miles from the Muddy River.

For those reasons, Order 1309 should be vacated.

II. The State Engineer Lacked Statutory Authority to Create a Super-Basin and Issue Order 1309.[2]

In response to comprehensive discussion that he lacks statutory authority to issue Order 1309, the State Engineer claims "plain" statutory authority to do so. NSE Answering Brief at 30-32. But the State Engineer's tortured reading of the statutory scheme is hardly clear. He fails to identify with any particularity the authority for issuing Order 1309. Instead, he relies on inapplicable statutes, ignores the comprehensive statutory scheme for this situation, and dismisses his own prior rulings

[1] The geophysical data Lincoln/Vidler presented showed a series of faulting occurring in southern Kane Springs Valley and northern Coyote Spring Valley. ROA 36202.

[2] The arguments in this Section apply equally to the following sections in answering briefs: CBD Answering Brief at § VI.A; LDS Church Answering Brief at § VII.A.1-2; MVWD Answering Brief at § VI.A; MVIC Answering Brief at § II; NSE Answering Brief at § II.A-B; NV Energy Answering Brief at § IV.a; and SNWA Answering Brief at § I.A-B.

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

and statutory interpretation. Not only does Order 1309 exceed statutory authority, but it also creates significant uncertainty in how the State Engineer will manage super-basins, especially if he is permitted to ignore legislative directive, prior orders, rulings, and adjudications.

A. The Statutes Cited by the State Engineer Do Not Provide Authority to Combine and Manage a Super-Basin.

The State Engineer's authority must be viewed under the lens that "no administrative body may arbitrarily select a statutory basis for its decision." *Desert Irrigation, Ltd. v. State*, 113 Nev. 1049, 1055, 944 P.2d 835, 839 (1997). But that is exactly what occurred here. The State Engineer first cites NRS 533.0245 as authority for Order 1309. Answering Brief at 30. But that section is a limit on authority, not an affirmative delegation by the Legislature. That section prohibits him from carrying out his duties in a manner inconsistent with court orders or interstate compacts. He then cites to a statute requiring him to consider the "best available science," but provides no basis for joining previously-separately administered hydrographic basins or any other element of Order 1309, including creation of new regulations after the evidentiary hearing has concluded. *Id.* citing NRS 533.0241(1)(c). Rather, that section is, again, a limit on the State Engineer's authority, requiring him to consider the best science in carrying out his statutory duties—it does not on its face reveal any authority for Order 1309.

The State Engineer next cites NRS 534.110(6) as authority. But on its face that statute authorizes investigations "in any basin or portion thereof where it appears that the average annual replenishment of the groundwater supply may not be adequate for the needs of all permittees . . . ." Nowhere in that section does it authorize the combining of basins into a super-basin and redesignation of previously separate basins into sub-basins.

///

///

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

B. The Nevada Legislature Provided a Comprehensive Statutory Scheme for Over-Appropriated Basins, a Statutory Scheme Ignored by the State Engineer.

Interestingly, the State Engineer fails to cite as authority any statutes which actually provide his authority to manage over-appropriated or insufficient water supply despite the fact that the requirement to utilize those statutes is mandatory—"The State Engineer **shall administer** this chapter and **shall prescribe** all necessary regulations within the terms of this chapter for its administration." NRS 534.110(1). In fact, the State Engineer never addresses his actual authority to designate and administer an over-appropriated basin as adopted by the Legislature in the current statutory scheme. Instead, he alleges that he has not violated any statute. NSE Answering Brief at 34:22-23. This statement illustrates the problem—the State Engineer is not looking for legislative authority to act but a prohibition against acting. In other portions of his brief, the State Engineer affirmatively states that "NRS Chapters 533 and 534 establish a comprehensive scheme for the regulation of water in this State. They require "strict" compliance with their elaborate provisions. *Application of Filippini*, 66 Nev. 176, 27, 202 P.2d 535, 540 (1949)." Yet, other than a broad policy statement, the State Engineer cannot point to any portion of the "elaborate" statutory scheme that discusses the authority to do what he has done in Order 1309.

In order for an executive agency to act, there must be an affirmative grant of authority, not a prohibition against every other possibility. *See Nev. Dep't of Pub. Safety v. Coley*, 368 P.3d 758, 761 (Nev. 2016) ("The legislative act is the charter of the administrative agency and administrative action beyond the authority conferred by the statute is ultra vires.") (internal citation omitted). Moreover, when interpreting statutes "the expression of one thing is the exclusion of another." *Desert Irrigation, Ltd. v. State*, 113 Nev. 1049, 1060, 944 P.2d 835 (1997).

Here, the Legislature provided methods in the statutory scheme for the State Engineer to curtail, forfeit, designate, and manage an over-appropriated basin—and those provisions do not look like Order 1309. For example, statutes provide for the

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

State Engineer to designate "as a critical management area any basin in which withdrawals of groundwater consistently exceed the perennial yield of the basin." NRS 534.110(7)(a). The designation of a basin is appealable. NRS 534.110(7). Moreover, once an area has been designated by the State Engineer,[3] only then does statute authorize the State Engineer to "make such rules, regulations and orders as are deemed essential" for the designated basin or portion of a basin. NRS 534.120(1).

Under the critical management area statute, once a basin has been designated for at least 10 years, the State Engineer is then required to order withdrawals be restricted unless a groundwater management plan has been approved for that basin. *Id.* A groundwater management plan is developed by "a majority of the holders of permits or certificates to appropriate water in the basin" rather than by fiat decree of the State Engineer. NRS 534.037(1).

The State Engineer does not argue that he followed the statutory scheme for designating basins or allowing stakeholders to develop a management plan as he should have done. The Legislature has given the State Engineer the tools to protect water supply in over-appropriated basins. And the expression of that authority is the exclusion of alternative methods not expressly adopted by the Legislature. But rather than follow those statutes, he has re-framed and deviated from existing water law in Nevada without Legislative mandate.

Instead, the State Engineer posits that the definition of what constitutes a "hydrographic basin" is a fluid definition that can be changed at his discretion because it is not specifically defined by statute. *See* NSE Answering Brief at 33-35. The State Engineer ignores the statutes, rules, and regulations which have for decades governed water rights in Nevada and which have provided certainty to public entities managing and purveying water such as Lincoln, and private interests in developing water resources such as Vidler. By ignoring the statutory tools for designating basins and curtailing water use within basins cited above, the State Engineer has turned decades of

[3] *See also* NRS 534.030.

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

water law upside down, leaving water-users in limbo and uncertainty as to the development of their permitted rights, procedures, and rules for joint management of basins, and priority of rights in formerly independent basins.

The State Engineer simply states that "[t]here is no language in any prior appropriation case that limits existing rights by Petitioners' concept of a basin." NSE Answering Brief at 32:80-20. In making this statement, the State Engineer ignores the comprehensive statutory scheme and all prior case law which base the adjudication of water rights on their location within a hydrographic basin. *See, e.g.*, *supra* II.A and *infra* II.C (discussing statutory scheme).

C. The State Engineer Historically Manages and Administers Water Pursuant to Legislative Directive Basin-by-Basin.

The State Engineer has traditionally administered and managed groundwater in Nevada basin by basin. The State Engineer's orders going back to 1971 ***designating*** the Muddy River Springs, Lower Meadow Valley Wash, Coyote Springs Valley, Black Mountains, Hidden Valley (North), Garnet Valley and California Wash all indicate he is issuing an order designating and describing the ground water basin and finding that conditions warrant he designate the basin under NRS Chapter 534: "The State Engineer finds that conditions warrant the designation of the Muddy River Springs Area Ground Water Basin, Clark County, Nevada and by this Order designates the following described area of land as a ground water basin coming under the provisions of Chapter 534 NRS (Conservation and Distribution of Under Ground Waters . . . ."

The State Engineer's Orders designating the other basins named above contain the same language. *See* ROA at 670-698 (containing the State Engineer's Orders 392, 803, 905, 2028, 1023, 1024 1025 and 1026 designating Muddy River Springs (Basin No. 219), Lower Meadow Valley Wash (Basin No. 205), Coyote Springs Valley (Basin No. 13-210), Black Mountains (Basin No. 215), Hidden Valley (North) (Basin No. 217), Garnet Valley (Basin No. 216) and California Wash (Basin No 218)); *see also* ROA at 71-72. All the Orders (except Order 392 from July 1971) state the basin is also

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

delineated as a Hydrographic Area on a map titled "State of Nevada Water Resources and Inter-Basin Flows" prepared cooperatively by the Nevada Division of Water Resources and the Geological Survey, United States Department of the Interior and published in September 1971 or state the basin is depicted and defined on Nevada Division of Water Resources, State Engineer's office maps. The September 1971 basin map is in the record. ROA at 9295. The Orders indicate the State Engineer held a hearing as required by NRS 534.030. Thus, for the last 50 years the State Engineer has recognized and separately administered these basins as depicted and defined on the September 1971 map found at ROA 9295. When the State Engineer has determined to designate a basin, he has issued an order such as contained in the record for each individual basin within the LWRFS with the exception of Kane Springs. SNWA's argument that "basin" means a regional area is without merit because the State Engineer's Orders regarding these basins and the maps on file in the State Engineer's office specifically depict, delineate, and define groundwater basins as depicted on the September 1971 map or the State Engineer's orders.

As further evidence of the Legislative mandate to manage each basin as a distinct unit, in 2017, the Legislature enacted NRS 532.167 which requires the State Engineer to prepare a water budget and inventory for each basin in the State. NRS 532.167 provides:

> **Duties: Water budget and inventory.** For each basin located in whole or in part in the State, the State Engineer shall prepare a water budget and calculate and maintain an inventory of water which includes, without limitation:
> 1. The total amount of groundwater appropriated in the basin in accordance with decreed, certified and permitted rights regardless of whether the water appropriations are temporary in nature;
> 2. An estimate of the amount of groundwater used by domestic wells in the basin; and
> 3. An estimate of the amount of all groundwater that is available for appropriation in the basin.

If the Legislature had wanted the State Engineer to administer and manage basins jointly, it certainly would have included language in NRS 532.167 indicating the State

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

Engineer could prepare the water budget and inventory for combined basins. Instead, the Legislature used the words "each basin" in providing the State Engineer's duties for basin water budgets and inventories as recently as 2017.

D. The State Engineer Impermissibly Ignored Prior Rulings, Legislative Direction, and His Own Previous Statutory Interpretations When Issuing Order 1309.

The State Engineer argues that he is entitled to deference regarding his own interpretation of his statutory authority. But this affirmation begs the question, to which of the several, conflicting interpretations of statutory authority should the court give deference? Or should this Court give ANY deference to the State Engineer when his prior orders, rulings, and administrative practice is contrary to the current interpretation including arguments that he is not obligated to follow prior orders and rulings? *See* NSE Answering Brief at 22:26-27.

The Supreme Court has recognized that, with respect to rules and regulations, courts need not "defer to a new interpretation, whether or not introduced in litigation, that creates 'unfair surprise' to regulated parties. . . . That disruption of expectations may occur when an agency substitutes one view of a rule for another." *Kisor v. Wilkie*, 588 U.S. __, 139 S.Ct. 2400, 2418 (2019) (internal citation omitted). Moreover, the "general rule, then, is not to give deference to agency interpretations advanced for the first time in legal briefs." *Id.* at n.6. The Supreme Court applies these deference principles to agency interpretations of statutes as well. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (refusing to grant deference to agency's litigating position on interpretation of statute unsupported by prior "regulations, rulings, or administrative practice.").

In 2019, the State Engineer proposed an amendment to the statutory scheme which would have given him authority to enact regulations regarding, and ultimately combining separate hydrographic basins into a jointly-administered basin.[4] *See*

[4] The State Engineer argues that this Court should not draw any inferences from the Legislature's refusal to pass the AB 51. Answering Brief at 34:27-28. Although courts are reluctant to draw inferences from a legislature's failure to act, the legislative history

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

Assembly Bill 51 (2019). The basis for the introduction of this bill, as stated by the State Engineer, was because "[p]reviously, under Nevada water law, we have treated surface water and groundwater separately . . . ." Minutes of the Meeting of the Ass. Comm. on Natural Resources, Ag., and Mining, Feb. 27, 2019, Tim Wilson at p. 6. "We have been managing groundwater and surface water separately for over 100 years. . . . Assembly Bill 51 is designed to . . . get some direction from the Legislature as to how best to manage [conflict among existing right holders]." *Id.*, Bradley Crowell at p. 31. Notably, the State Engineer testified that "**existing statute does not provide the framework necessary to effectively implement the Legislature's policy direction.**" *Id.* at p. 32 (emphasis added).

Critically, the State Engineer's interpretation of his statutory authority did not include the authority to adopt rules or regulations governing conjunctive management of groundwater and surface water resources:

> As a continuation of the 2017 policy directive, Assembly Bill 51 proposes two basic first steps: First, it directs the Division of Water Resources to adopt regulations for the conjunctive management of groundwater and surface water resources. Regulations need to be specific to the affected region to account for different hydrologic settings and different manners of use. **The process of developing regulations will include full public and stakeholder participation with full transparency. It is critical that any new regulations for conjunctive management have the benefit of careful consideration and a clear, understandable outcome.** Second, A.B. 51 authorizes the Division of Water Resources to create the programs necessary to develop regulations and effectively implement conjunctive management of groundwater and surface water.

Id. at 32 (emphasis added). The State Engineer goes on to testify about what regulations would be necessary to provide for the conjunctive management. *Id.* In response, at

---

of this Bill reflects the State Engineer's prior interpretation of his statutory authority, and this Court can and should consider the legislative history at least for that purpose. That the State Engineer specifically asked for the statutory authority to do what he did in Order 1309 is extremely telling—he did not believe in 2019 that he had the authority to do what he did only months later.

Moreover, the Nevada Supreme Court has expressly determined legislative intent where the Legislature "demonstrated through its silence that Nevada's water law statutes should remain as they have been . . . ." *Pyramid Lake Paiute Tribe v. Washoe Cnty.*, 112 Nev. 743, 749 918 P.2d 697, 700-01 (1996).

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

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

least one legislator expressed discomfort that "this is essentially giving all the authority to the State Engineer, someone who is not an elected official. This does not have a lot of input from the elected body . . . ." *Id.* at 39, comments of Assemblywoman Hansen. Assembly Bill 51 never became law. Nevertheless, in Order 1309, the State Engineer proved the Legislative fears correct, when without the benefit of statutory authority, he in fact usurped the power that the Legislature refused to give. *See infra* § VII.

In 2019, the State Engineer recognized several critical points: First that he lacked the statutory authority to enact regulations governing conjunctive management. Second, that any rules or regulations must be subject to public and stakeholder participation "with full transparency." And third, that any regulations must provide for a "clear, understandable outcome." Those three points regarding his statutory authority and expressly raised by the State Engineer, conflict with the subsequent interpretation and actions of the State Engineer in this case.

The State Engineer's conflicting interpretations of his own statutory authority undermine any argument that he is entitled to deference. The water statutes were designed to give certainty to water rights. *Mineral Cnty.*, 473 P.3d at 429. By ignoring the legislative grant of authority, the State Engineer has created uncertainty in an already complex statutory scheme.

III. Even If He Had Authority to Create the LWRFS, the State Engineer Treated Kane Springs Differently than the Other Basins in the LWRFS and Failed to Follow Statutory Mandates in Creating the Super Basin and Including Kane Springs.

The State Engineer and other parties argue the State Engineer has the authority to include Kane Springs in the super basin based upon the authority granted to him by NRS 534.030, NRS 534.110 and/or NRS 534.120.[5] They gloss over or ignore the

[5] Lincoln/Vidler do not believe the State Engineer complied with or performed the analysis required by those statutes to create the super basin in Order 1303, but that occurred prior to Kane Springs being included in the super basin and Lincoln/Vidler's involvement in the LWRFS. Likewise, some parties argue—and the State Engineer indicated in Order 1303—that groundwater rights in the original LWRFS basins, excluding Kane Springs, have been managed jointly since Rulings 6254-6261 were issued in 2014. ROA at 77. Kane Springs was not included in those determinations

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

statutory requirements for the State Engineer to manage and administer a basin. The State Engineer failed to comply with or perform any of the analysis required by those statutes to include Kane Springs in the super basin—even assuming those statutes provide authority for the State Engineer to create a super basin which Lincoln/Vidler dispute.

The State Engineer previously determined that the Order 1169 pumping caused impacts and therefore he needed to manage basin pumping. This action was in accord with the powers granted under NRS 534.030, NRS 534.110 and NRS 534.120 for management of a basin after the State Engineer first made a determination that pumping is decreasing ground water levels in the basin. The State Engineer did not do any of this analysis for Kane Springs as he is required to do under NRS 534.030, NRS 534.110 and NRS 534.120. There is no evidence that groundwater levels in Kane Springs are being depleted. There is no evidence of over appropriation of water in Kane Springs. The State Engineer ignored the process required by NRS 534.030, NRS 534.110 and NRS 534.120 and included Kane Springs in the super basin because of the impacts to the springs caused by pumping in the over-appropriated Coyote Springs Basin and the Muddy River Springs Area Basin and without any evidence that pumping in Kane Springs would impact the springs or the Muddy River. This is why Lincoln/Vidler complain about the State Engineer's actions and how they have been (mis)treated during this process. The State Engineer performed no analysis allowed by statute for Kane Springs before determining to include it in the super basin even if he had the power to create a super basin, which Lincoln and Vidler dispute.

A. The State Engineer Did Not Follow Statute to Designate Kane Springs as a Basin in Need of Administration.

NRS 534.030 provides two scenarios to initiate basin administration—one in which 40% of the water right holders petition the State Engineer to administer the basin

---

and Lincoln and Vidler were not impacted by any such "joint management." Lincoln and Vidler focus their arguments on Kane Springs being included in the super basin by Order 1309.

and a second in which the State Engineer initiates that process. NRS 534.030(2) is the relevant section in this scenario and provides:

> In the absence of such a petition from the owners of wells in a groundwater basin which the State Engineer considers to be in need of administration, the State Engineer shall hold a public hearing:
> (a) If adequate facilities to hold a hearing are available within the basin; or
> (b) If such facilities are unavailable, hold the hearing within the county where the basin lies or within the county, where the major portion of the basin lies,
> ➥to take testimony from those owners to determine whether administration of that basin is justified. If the basin is found, after due investigation, to be in need of administration the State Engineer may enter an order in the same manner as if a petition, as described in subsection 1, had been received.

There was no process initiated by the State Engineer pursuant to NRS 534.030 to designate Kane Springs as a basin in need of administration. There was no public hearing in Lincoln County prior to Order 1309 to take testimony from the water right holders in Kane Springs to determine whether administration of that basin was justified as explicitly required by NRS 534.030. To date, the State Engineer has not designated the Kane Springs basin pursuant to NRS 534.030. Nor can he under the statutory scheme.

Additionally, numerous parties cite NRS 534.110 and in particular NRS 534.110(6) as authority for the State Engineer to create the LWRFS. NRS 534.110(6) provides:

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

(Emphasis added).

The State Engineer did not make any average annual replenishment finding with regard to the groundwater supply in Kane Springs or for any other basin he included in

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

the LWRFS, and he did not make this finding with regard to the LWRFS as a whole in Order 1309. The State Engineer has already determined the average annual replenishment in Kane Springs is adequate to support the needs of all permittees and all vested-right claimants in the basin. In Ruling 5712, the State Engineer determined the perennial yield for Kane Springs is 1,000 afa. ROA at 712, *see also* ROA at 1063. The perennial yield for Kane Springs was determined taking into account the annual average replenishment for the basin.[6] ROA at 709-713. As the State Engineer noted in Ruling 5712, the perennial yield of a groundwater reservoir is "defined as the maximum amount of ground water that can be salvaged each year over the long term without depleting the ground-water reservoir. The perennial yield cannot be more than the natural recharge to a ground water basin and in some cases is less." ROA at 712. Thus, the evidence supports the State Engineer could not make the determination required by NRS 534.110(6) for Kane Springs to curtail water rights even if the State Engineer had authority to create a super basin, which authority Lincoln and Vidler dispute.

The State Engineer made no attempt to comply with NRS 534.110(6) if he purportedly relied upon that statute as authority for Order 1309. The water supply numbers the State Engineer used to exclude Kane Springs from Order 1169 and Order 1303 were the very same water supply numbers the State Engineer used when he included Kane Springs in the LWRFS. ROA at 43, 76-77, 663. Further, the State Engineer specifically determined in Order 1309 the annual water budget was not to be used to determine water available for development in the LWRFS. ROA at 59. NRS 534.110(6) does not authorize the State Engineer to create super basins based upon purported hydrologic connection and then to order withdrawals to conform to priority rights. He must have made a determination that the average annual replenishment to the groundwater supply of that basin may not be adequate for the needs of all permittees and all vested-right claimants which is not found in Order 1309.

[6] This also complied with the State Engineer's obligation under statute to identify the inventory for "each basin." *See* discussion at *supra* § II.C.

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

No other provisions in NRS 435.110 provide authority for the actions taken by the State Engineer. NRS 534.110(1) provides "[t]he State Engineer shall administer this chapter and shall prescribe all necessary regulations ***within the terms of this chapter*** for its administration." (Emphasis added). NRS 534.110(7) does not provide any support for Order 1309 as the State Engineer has not declared the LWRFS as a "critical management area."

B. NRS 534.120 Does Not Provide the State Engineer Authority to Manage Kane Springs as a Designated Basin.

Numerous parties cite NRS 534.120(1) as authority for the State Engineer to create the super basin. NRS 534.120(1) provides:

> ***Within an area that has been designated by the State Engineer, as provided for in this chapter***, where, in the judgment of the State Engineer, ***the groundwater basin is being depleted***, the State Engineer in his or her administrative capacity may make such rules, regulations and orders as are deemed essential for the welfare of the area involved.

(Emphasis added).

As set forth above, the State Engineer has never designated Kane Springs pursuant to NRS 534.030. Nor has the State Engineer ever issued an order, similar to the orders issued by the State Engineer for the other basins in the LWRFS, designating the basin in need of administration.[7] Further, the State Engineer made no determination the Kane Springs groundwater basin is being depleted nor did he make a finding in Order 1309 that the "LWRFS groundwater basin," if he had authority to create such a super basin, is being depleted. To the contrary, the State Engineer found stabilization of spring discharge, steady state conditions in the Warm Springs area spring flow and slight declining water levels in Garnet Valley which were not evident in wells close to the Warm Springs area. ROA at 60, 62-63. There was no finding of decreasing water levels in Kane Springs or the LWRFS to trigger the State Engineer's administrative

[7] *See supra* § II.C (identifying orders designating other basins in the LWRFS).

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

capacity to make rules, regulations, and orders for the welfare of the area involved as provided in NRS 534.120(1).

Instead of performing the investigation and analysis required by NRS 534.030, NRS 534.110 and/or NRS 534.120 to administer and manage water rights and curtail pumping of water rights in a singular basin, which powers the State Engineer clearly possesses, the State Engineer determined to lump basins together centered on *potential* hydrologic connectivity—not any of the prerequisites or requirements of NRS 534.030, NRS 534.110 or NRS 534.120 which trigger the State Engineer's authority. To include Kane Springs, the State Engineer developed six factors as the standard for determining potential hydrologic connectivity after the hearing. He included Kane Springs in the super basin even though the groundwater is not being depleted in Kane Springs and while acknowledging in Order 1309 that water levels in the LWRFS are stabilizing, not decreasing or being depleted.

IV. The State Engineer Unlawfully Reprioritized Water Right Appropriations When He Issued Order 1309.[8]

A. Priority Is Historically Based on Individual Basins.

The State Engineer argues that he did not reprioritize water rights in the LWRFS because the "Legislature left it to the State Engineer to identify basins as a management and planning tool." NSE at 34:11-12. He further states—without legal citation—that it does not matter "in which hydrographic area the junior right holder stakes its claim versus the senior right holder." *Id.* at 35:13-15. Again, this argument ignores the statutes, decades of appropriations, and the State Engineer's own practice.

In granting a water right, the law states that the State Engineer "shall determine whether there is unappropriated water in the area affected and may issue permits only if the determination is affirmative." NRS 534.110(3). The State Engineer grants

[8] The arguments in this section apply equally to the following sections answering briefs: LDS Church Answering Brief at § VII.A.1-2; MVWD Answering Brief at § VI.C; NSE Answering Brief at § II.B; NV Energy Answering Brief at § IV.b; and SNWA Answering Brief at § I.C.

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

appropriations based on the available water in a basin. *See, e.g.*, Ruling 5712; ROA 699-721, 713 (application filed to appropriate water in specific hydrographic basin granted "for appropriation from Kane Springs Valley"). And those water rights are administered based on priority within the independent basin. SNWA said it best when it characterized the individual basins comprising the LWRFS as "formerly independent sub-basins." SNWA Answering Brief at 20:18-19. Even SNWA recognizes that the basins were independent—and now they are not. This represents the significant and critical deviation from the priority of water rights in individual basins.

Further, designation of areas and development of critical management plans is done on a basin-by-basin basis as mandated by the Legislature. *See supra*, § II.C. And only water users in a particular basin may petition the State Engineer for administration of that basin. NRS 534.030. Special assessments are based on a particular basin. NRS 534.040(6). Money is allocated by the State Controller based on an individual basin. NRS 534.040(7). Curtailment and forfeiture of rights is based on the water rights in that basin. NRS 534.110; 534.090. And most critically, the forfeiture of rights is specifically based, in part, on the "date of priority of the water right as it relates to the potential curtailment of water use in the basin;" and the "availability of water in the basin . . . ." NRS 534.090(3)(g), (h).

The State Engineer admits in his Answering Brief that water planning and management is based on the definition of a basin or "discrete hydrologic unit." NSE Answering Brief at 33-34. Changing the definition of a basin in which a water right is located, as the State Engineer has done here, necessarily alters the fundamental nature of the right previously granted. One constraint on the State Engineer's view of a basin is how water rights in each hydrographic unit have historically been administered.

Thus, to state that the basin in which a water right is granted has no bearing on priority ignores both statutes and practice. And based upon the State Engineer's actions here, what is to stop him from enlarging the LWRFS super-basin to include the Upper White River Flow System which extends to Elko and beyond, hundreds of miles away?

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

By combining previously individual basins, which had their own priorities, into one large basin the State Engineer has changed the priority of water rights—plain and simple—even if the State Engineer contends there is not a sentence in Order 1309 that adjusts the priority of water rights. *See* NSE Answering Brief at 35:10-12.

B. The Effect of Order 1309 Reprioritized Rights within All Affected Basins.

Numerous parties argue since Order 1309 does not specifically state water rights in the LWRFS will be managed by priority in the future, there has been no reprioritization of rights.[9] This argument contradicts the very arguments these parties make that senior rights are entitled to protection under the prior appropriation doctrine and ignores the significance of Order 1309's 8,000 afa pumping cap. The State Engineer combined seven previously independent basins into one basin for administration and management. ROA at 66. The seven basins have a total of 40,731.83 acre feet of water rights issued including the 1,000 afa issued in Kane Springs. *See* ROA at 8215-8218, State Engineer's exhibit of LWRFS water rights by priority with cumulative duty of 39,731.83 and adding 1,000 acre feet for Kane Springs. The State Engineer has limited pumping in the LWRFS to 8,000 afa. ROA at 66. Simple math indicates there are 32,731.83 acre feet of existing water rights in the LWRFS that will not be able to be pumped under Order 1309. If the State Engineer does not intend to manage water rights in the LWRFS by priority in the future, why will he not sign CSI's subdivision map supported by Coyote Spring and Kane Springs water rights approved for that development?

No party disputes Lincoln/Vidler had the most senior rights in Kane Springs Valley with a priority date of February 14, 2005. ROA at 716 (Ruling 5712 stating at the time of the Ruling there were no other permitted or certificated groundwater rights in Kane Springs Valley). Lincoln/Vidler would be able to pump their rights as the most

[9] State Engineer Answering Brief at 44; SNWA Answering Brief at 20-24; MVWD Answering Brief at 9-10; Church Answering Brief at 24-28; NV Energy Answering Brief at 7-8; MVIC Answering Brief at 23-24; CBD Answering Brief at 25-29.

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

senior in the basin. Based upon the State Engineer's LWRFS water rights by priority exhibit, if water rights are regulated by seniority in the LWRFS, the last rights allowed to be pumped under the 8,000 afa cap have a priority date of March 31, 1983. ROA at 8216. Lincoln/Vidler's rights with a priority date of February 14, 2005 are way below (junior to) the 8,000 afa cap and would only be allowed to be pumped after a cumulative duty of 38,804.73 of existing rights with a priority date of August 25, 2000 ahead of its rights would be allowed to be pumped in the LWRFS. ROA at 8217.

The argument that there has been no reprioritization of rights because Order 1309 did not specifically say water rights in the LWRFS will be managed by priority in the future is disingenuous. All these parties strenuously argue the Court must recognize the prior appropriation doctrine and that junior rights, such as Lincoln/Vidler's rights in the LWRFS, were issued "subject to existing rights." If the State Engineer did **not** regulate by priority in the LWRFS, these parties would contend the State Engineer was violating the prior appropriation doctrine and the requirement that junior water rights are issued "subject to existing rights." The State Engineer reprioritized the seniority of Lincoln/Vidler's water rights by creating the super basin, not allowing Kane Springs to be administered and managed as it has historically been managed as a separate basin per existing law and putting Kane Springs into the LWRFS to be administered and managed as one super basin. The Nevada Supreme Court has specifically indicated that "the public trust doctrine cannot be used as a tool to uproot an entire water system, particularly where finality is firmly rooted in our statutes. We cannot read into the statutes any authority to permit reallocation when the Legislature has already declared that adjudicated water rights are final, nor can we substitute our own policy judgments for the Legislature's." *Min. Cty. v. Lyon Cty.*, 136 Nev. 503, 519, 473 P.3d 418, 430 (2020). That is exactly what the State Engineer did here. He decided that in order to protect the Moapa dace, he needed to manage and administer seven historically managed individual basins, as one basin. He had no statutory authority to do so nor has the Nevada Supreme Court allowed such reprioritization under existing law. *Id.* at 518,

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

473 P.3d at 429 (the statutory water scheme in Nevada expressly prohibits reallocating adjudicated water rights that have not been abandoned, forfeited, or otherwise lost pursuant to an express statutory provision.) As the Supreme Court noted:

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

Id. Thus, any arguments the State Engineer did not reprioritize Lincoln/Vidler's water rights by including Kane Springs in the LWRFS ignores the basin-by-basin approach to management and administration of water enacted by the Nevada Legislature and historically used and recognized by the State Engineer, the law of prior appropriation and effect of Order 1309.

Nothing in statute speaks to a multi-tiered process that leaves thousands of acre feet of water rights in limbo until the State Engineer decides to continue with Phase 2 (which has not been scheduled and which has no criteria for ascertaining relative water rights). *See infra* § VI.B. On this basis alone, Order 1309 should be vacated in its entirety.

V. The State Engineer Did Not Base His Decision to Include Kane Springs in the LWRFS on Substantial Evidence.[10]

The State Engineer's own statements regarding inclusion of Kane Springs in the LWRFS are contradictory and ignore the substantial evidence presented in this case. Although this Court need not "reweigh the evidence," the case law dictates that the Court must consider whether the State Engineer's decision is not just based on evidence, but that the evidence supporting the State Engineer's findings amount to "substantial evidence." *Revert v. Ray*, 95 Nev. 782, 603 P.2d 262, 265 (1979). Critically, the State

[10] The arguments in this Section apply equally to the following sections answering briefs: CBD Answering Brief at § III; LDS Church Answering Brief at § VII.A.1-2; MVWD Answering Brief at § VI.C; NSE Answering Brief at § I.B.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

Engineer must both "resolve all crucial issues presented" and "must prepare findings in sufficient detail to permit judicial review . . . ." *Id.* (internal citation omitted).

A. The State Engineer's "Factual Conclusions" Contradict Each Other and Fail His Own Criteria.

The State Engineer stated the rationale for creating the geographic boundary of the LWRFS as: (1) the presence of a carbonate-rock aquifer underlying the areas; (2) the flat potentiometric surface in the area; (3) the diagnostic groundwater pattern from monitoring wells; and (4) the area-wide diagnostic water level response to pumping. ROA at 47. These criteria indicated a "close hydrologic connection" warranting joint management. ROA at 48. However, a boundary to the "joint management area" would be indicated by a steep hydraulic gradient or where a geologic structure existed. ROA at 49.

The State Engineer found that the water elevations in Kane Springs were "60 feet higher than those observed in the majority of carbonate-rock aquifer wells within the LWRFS to the south" comprising all of the other basins. ROA at 53.[11] Additionally, the State Engineer ignores the evidence of a geologic structure between Kane Springs and the LWRFS. ROA at 53. This is extremely surprising because Order 1309 recognizes significant differences between Kane Springs and the remaining LWRFS. Specifically, the responses in monitoring wells and response to pumping in Kane Springs "is different compared to that exhibited in wells located in the LWRFS, being muted, lagged, obscured by climate response, or compromised by low-resolution data." ROA at 53. The State Engineer ignores the evidence presented that would explain this difference—a geologic structure separating Kane Springs from the LWRFS. *See, e.g.*, ROA 36460.[12] Even the National Parks Service expert (Waddell)—upon whom the

[11] MVWD's expert indicated this gradient was "flat." MVWD Answering Brief at 12. However, this is based on extrapolating the 60 foot elevation difference over 20 miles rather than proximate to the well readings. ROA 39269 (calculating the gradient between KMW-1 and EH-5). This is likely why the State Engineer disregarded his testimony.

[12] Had the Petitioners known of the State Engineer's criteria before the hearing, they could have provided evidence of the geologic structure to the State Engineer.

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

State Engineer relies heavily—agrees that the geologic structure explains the muted connection. *See* ROA 53224. Even the State Engineer initially recognized the existence of the geologic boundary when he issued Ruling 5712 granting Petitioners' water applications. ROA 699-721. But the State Engineer ignores prior rulings and cherry picks the information he wants to meet the criteria released only after the evidentiary hearing. Finally, the State Engineer recognizes that "there is insufficient information available to determine whether the non-carbonate bedrock" indicates a boundary in northern Kane Springs. ROA at 53.

Despite these inconsistencies and the admitted and significant differences between Kane Springs and the remainder of the LWRFS, the State Engineer simply lumped the entirety of Kane Springs into the LWRFS. This was improper because the decision was not based on "substantial evidence."

B. The State Engineer Relied on Faulty Information to Determine the Correlation between Kane Springs and the LWRFS.

Next, the State Engineer relies on faulty evidence to determine the diagnostic relationship across the area in response to pumping. First, he misstates Petitioner's Opening Brief, stating that they "concede[] that no other expert thought the potential temporary transducer error undermined the data." NSE Answering Brief at 22:23-24. To the contrary, the Opening Brief points out that no other expert "accounted for this transducer error failure of a foot or so." Opening Brief at 30:16-19. The "concession" the State Engineer manufactured is false.

The hydrographs upon which all experts relied "had a high failure rate due to high water temperature in the well, so fluctuations of a foot or less should not be used to infer absolute response." ROA 10141. In contrast, the well in Kane Springs decreased by approximately half a foot. Further, although measurements were taken from 30 wells within the LWRFS during the pump test, the only well relied upon to include Kane Springs was CSVM-4 —the well with faulty readings. Moreover, the opinion relied on in Order 1309 was based on a visual comparison of the hydrographs

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

"because at the time I could not locate the data to actually do the analysis." ROA 53668. But a visual comparison is unreliable and not based on the "best available science."

Further, it is uncontested that the response in Kane Springs to the pumping test was different from any other area. Specifically, experts testified that "you don't see any response when [pumping] turned off during the 1169 aquifer test . . . . And the water levels continue to decline after pumping ends." ROA 53509. This coupled with a lack of increase of water level rise in Kane Springs "indicates that drought has a strong influence on the groundwater elevations . . . ." ROA 36481.

Critically, none of the experts for any other stakeholder performed the critical drawdown analysis for Kane Springs. *See* discussion at *infra* § V.C.2. The State Engineer again ignored this evidence despite its significance.

C. Substantial Evidence Exists that Groundwater Pumping from SNWA, MVWD, the Church, and NV Energy Impacted the Springs—Not Petitioners or Kane Springs.

The substantial evidence indicates that pumping in other basins proximate to the springs caused the impacts identified in Order 1309. And certainly, the State Engineer cannot conclude that pumping by Petitioners in Kane Springs caused any negative impacts—no pumping was conducted.

1. Pumping proximate to the Springs caused the impacts alleged in Order 1309.

The parties to this proceeding who argue the most about groundwater pumping impacting the springs and senior Muddy River rights are the parties who pumped the most water during the Order 1169 pump test impacting the springs. It was SNWA, MVWD, the Church and NV Energy in the Coyote Spring Valley and Muddy River Springs Area basins who pumped the most groundwater during the Order 1169 pump test, and it was their pumping which caused the impacts to the springs. ROA at 8058-8104. Other than LVVWD, the pumping by others in basins such as Garnet Valley or California Wash did not amount to much of the total amount pumped during the Order 1169 pump test and did not compare in volume to the total pumped from Coyote Spring

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

Valley and Muddy River Springs Area basins. ROA at 8058-8104. Thus, if there is any pumping that needs to be stopped based upon quantified impacts to the springs and Muddy River senior rights, it is the pumping from wells in the Coyote Spring Valley and Muddy River Springs Area basins in close proximity to the springs and which caused the sharp decline in discharge at the springs. SNWA, the Church, NV Energy, MVIC and MVWD did not appeal the above findings of the State Engineer in Order 1309.

The State Engineer took some action in response to the Order 1169 pump test results and denied pending applications in Coyote Spring Valley and the Muddy River Springs Area. *See* ROA at 726-948 (Rulings 6254-6261 not copied in Master Appendix). The water rights granted to SNWA, MVWD, the Church and NV Energy contain the same permit terms they argue Lincoln/Vidler are subject to, i.e., their permits were issued subject to existing rights. NRS 533.030(1), 534.020(1). Based upon his pump test, the State Engineer could have and should have taken action to shut down groundwater pumping by SNWA, MVWD, the Church and NV Energy in close proximity to the springs and the Muddy River—the very parties who acknowledge Order 1169 test pumping caused impacts to the springs and the Muddy River.

The State Engineer could have taken that action under his basin-by-basin management powers provided in NRS 534.110(6) and NRS 534.120 and to protect the Muddy River Decree right holders pursuant to NRS 533.085 and NRS 533.0245. Instead of recognizing the pumping evidence which they all acknowledge caused the impacts, the State Engineer and SNWA, MVWD, the Church and NV Energy seek to include basins further away, including Kane Springs, with no evidence that pumping from these distal basins causes any impacts to the springs or the Muddy River, and which distal pumping the State Engineer now acknowledges has correlated with stabilization of the springs. There was no pumping from Kane Springs Valley during the Order 1169 pump test, therefore there were no impacts from Kane Springs Valley on the headwaters of the springs or on the Muddy River. The majority of the pumping

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

from Garnet Valley during the Order 1169 pump test was by LVVWD. There is no evidence pumping of the smaller quantities of water by the other parties pumping water from that basin impacted the springs or the Muddy River.

2. No evidence from other parties' experts indicates that pumping in Kane Springs will impact the Springs or the Muddy River.

There is no evidence of record that any pumping from Kane Springs will impact the springs or the Muddy River. Lincoln/Vidler asked each expert at the hearing, including those that advocated for the inclusion of Kane Springs in the LWRFS, if the expert had performed any analysis that pumping from Kane Springs would impact the springs or the Muddy River. No expert had performed any such analysis:

a. Center for Biological Diversity did not analyze impact of pumping in Kane Springs on the Muddy River Springs Area. ROA at 53627.

b. City of North Las Vegas did not advocate Kane Springs be included in the LWRFS. ROA at 53581.

c. Moapa Band of Paiute Indians did not calculate the propagation of drawdown from assumed pumping in Kane Springs Valley. ROA at 53277.

d. National Park Service did not investigate if the Kane pumping would impact the Muddy River Springs Area. ROA at 53223.

e. Nevada Cogeneration Associates No. 1 and 2 had three experts and did not calculate drawdowns of the Muddy River Springs Area from Kane Springs pumping nor did they calculate drawdown to the wells owned or controlled by Nevada Cogeneration Associates from pumping the Kane Springs Valley wells. ROA at 53674.

f. NV Energy did not calculate drawdown to the Muddy River Springs Area from pumping Kane Springs Valley wells. ROA at 53732.

g. US Fish and Wildlife Service's two experts, Dr. Halford or Ms. Braumiller, did not do any analysis of Kane Springs pumping impacts on the Muddy River. ROA at 53087.

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

h. SNWA was asked by MVWD if SNWA conducted or contracted for any geohydrological studies specific to boundary flows between Kane Springs Valley and Coyote Springs Valley and SNWA answered "no". MVWD clarified the no answer by asking "SNWA didn't conduct or contract to have on its behalf any geohydrological studies in Northern Coyote Springs Valley?" SNWA replied "no." ROA at 53359. Lincoln/Vidler's water rights located in Kane Springs are now being included in the LWRFS with no evidence pumping of their water rights will impact the springs or the Muddy River. The State Engineer acknowledged as much in Order 1309 by his finding that it is not known if pumping in Kane Springs will impact water resources in the LWRFS. ROA at 55 (Additional hydrologic study is necessary in Kane Springs to determine the degree to which water use in Kane Springs would impact the LWRFS.). This is contrary to the standard used by the State Engineer to determine impacts to the springs and/or the Muddy River for other water right holders in the LWRFS. It is also contrary to law which requires pumping restrictions if pumping causes a conflict with existing rights—not restrictions based upon potential, hypothetical, and speculative impacts as admitted by the State Engineer. ROA at 55.

D. The State Engineer Found No Evidence that Senior Rights Failed to Receive Their Water Allotment and no "Take" Ever Occurred as a Result of Groundwater Pumping.

Finally, the State Engineer has taken severe and unprecedented action in issuing Order 1309 without citing any adverse consequences precipitating the Order. The stated purpose of Order 1309 was to protect senior rights and to protect the Moapa dace, but none of the preliminary orders or rulings cite to even one instance where senior rights did not receive their allotment or where a take of the Moapa dace occurred.

And even if he had made such findings, he then failed to follow the law to curtail pumping in the designated basins. The State Engineer previously designated all the basins in the LWRFS pursuant to NRS 534.030—with the exception of Kane Springs. Nothing in Order 1309 or any other ruling restricts groundwater withdrawals be restricted "to conform to priority of rights" as required by NRS 534.110(6). Instead of

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

curtailing pumping based on the priority of rights in individual basins (as required by the statutory scheme), the State Engineer re-defined the term "basin," created the LWRFS, and injured permitted water rights holders in undesignated and unpumped basins such as Kane Springs.

For the foregoing reasons, the decision to include Kane Springs was not based either on the "best available science" or "substantial evidence" and that portion of Order 1309 should be vacated.

VI. The State Engineer Violated Petitioner's Due Process Rights.

The State Engineer gives little concern for (and misstates) the due process violations raised by Lincoln and Vidler in their Opening Brief. *Compare, e.g.*, Petitioners' Opening Brief at 21-25, 40, *with* NSE Answering Brief at 42. The State Engineer incorrectly states that Petitioners' argument is that the hearing was "too short" and that experts were allowed to express new opinions "based upon testimony heard at the hearing." NSE Answering Brief at 42:13-16. Not only does this ignore Lincoln's and Vidler's arguments, but it also demonstrates the failings in the process about which Petitioners complain.

It is axiomatic that a "fair trial in a fair tribunal is a basic requirement of due process. . . . This applies to administrative agencies which adjudicate as well as to courts." *Withrow v. Larkin*, 421 U.S. 35, 46-47 (internal citation omitted).

Petitioners' due process concerns are, in fact, that the State Engineer: (1) failed to follow his own rules for the hearing, changed the rules during the hearing, and created a new legal standard for developing the LWRFS boundary from the evidence presented to which he then applied the evidence; (2) did not give Lincoln and Vidler a full and fair opportunity to be heard; and (3) failed to notify parties that the Order 1303 proceedings may result in a deprivation or fundamental alteration of property rights.

///

///

///

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

A. The State Engineer Violated Due-Process in Order 1309 Proceedings by Creating Legal Standards Based on Evidence and Engaging in *Ex Post*, Non-Public Rulemaking.

The State Engineer first asserts that his actions passed constitutional muster because "[n]one of the Petitioners asserts that the State Engineer violated any procedural statute." NSE Answering Brief at 38:19. In the next sentence, he argues that Petitioners "must prove a constitutional violation while overcoming the respect due to **the Legislature's choice of procedure in the unique context of water-rights proceedings.**" *Id.* at 38:20-22 (emphasis added). But as pointed out above, the Legislature approved a completely different procedure for administering over-appropriated basins. Lincoln and Vidler's complaint in these proceedings is that no statute granted the State Engineer authority to do what he did in Order 1309. And there certainly is no statutory "procedure" for what has occurred in Order 1309. The State certainly does not identify any.[13]

During the process that led to the issuance of Order 1309, none of the stakeholders had access to the criteria the State Engineer ultimately used to determine whether a close-hydrologic connection existed to create the LWRFS—the State Engineer identified the legal criteria for redrawing hydrographic basins based on the evidence presented and for the first time when he issued Order 1309. Moreover, the process left all parties in a state of limbo as to their relative priorities in the new super-basin because of the incomplete "multi-tiered" process not contemplated by legislative authority. It is the very lack of procedure about which Lincoln and Vidler complain.

1. The State Engineer impermissibly created rules based on a survey of the evidence rather than statute.

In a terrifying display of partiality, the State Engineer crafted six legal criteria in Order 1309 based on the evidence presented in order to determine the extent of the LWRFS. ROA 48-49. In his Answering Brief, the State Engineer admits he "surveyed

[13] This is additional evidence, if any were needed, that the State Engineer exceeded his statutory authority.

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

the extensive evidence presented to him to determine the best criteria for making the scientific finding that an area has a uniquely close connection to the rest of the LWRFS." NSE Answering Brief at 41:24-26. He compares this to a court surveying caselaw to determine what is the best test to apply to a set of facts. *Id.* at 41:23-24. The State Engineer's argument reflects a fundamental misunderstanding regarding the adjudication process and suggests that he created criteria for redrawing basin boundaries in an outcome-based strategy rather than by applying facts to a pre-determined legal standard.

"The Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation." *Eureka Cnty. v. State*, 359 P.3d 1114, 1120 (Nev. 2015). When a legal standard is based on the evidence presented, rather than disclosed prior to presentation of evidence, the participants are prevented from offering a meaningful, contrary presentation. Moreover, the standard developed based on a survey of evidence is prone to bias and improper influence. To state that a legal standard is based on the evidence presented, and then to apply the evidence to the legal standard created is circular at best. Any evidence can amount to "substantial evidence" if the law for applying the evidence is created from the evidence itself. Unsurprisingly, case law does not reflect any legal standard developed from a "survey of the evidence."

2. The State Engineer's incomplete rulemaking including the "multi-tiered process" for super-basin administration violates fundamental principles of due process and democratic principles of governance.

The State Engineer admits that Order 1309 did not "establish a management policy governing the LWRFS" and argues that the yet-to-be-determined "manner of managing the uniquely connected sub-basins within the LWRFS" will be based upon input of all parties with an interest. NSE Answering Brief at 17-18. SNWA also argues that priority will be determined according to a yet-to-be-released standard developed during Phase 2. SNWA Answering Brief at 21:9. In other words, although the State

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

Engineer created the LWRFS as a super-basin, no stakeholder has any idea what management of that basin will look like because the State has made no subsequent efforts to create any policies, rules, or regulations governing its management—nor has it released a timeframe for doing so. The "interested parties" are left with unanswered questions that the State Engineer failed to address including, according to the parties who argue no priorities have been set yet in the super basin, who has priority in the LWRFS? Do priorities change if places of diversion are changed to different sub-basins within the LWRFS? What are the criteria for changing places of diversion to different sub-basins?

The State Engineer's answer to all of this is that he is not bound to follow the Administrative Procedures Act. NSE Answering Brief at 38. While true that the exemption from NRS 233B applies in most instances,[14] the State Engineer is not exempt from the due process violations of incomplete or deferred decision-making.

The Nevada Supreme Court has stated that "the status of water rights should be readily determinable from the public record." *Town of Eureka v. State Engineer*, 108 Nev. 163, 169, 826 P.2d 948 (1992). That Court further invalidated a decision of the State Engineer regarding permit changes where he left for future determination a management and mitigation plan. *Eureka Cnty.*, 359 P.3d at 1120. The State Engineer ignores this case entirely, and SNWA argues that it does not apply here. SNWA Answering Brief at 24-25. Both parties ignore the fact that Order 1309 is a stand-apart order not governed by any statutory guidelines or elucidated management principles. There is no framework from which Petitioners can work, no timeframe for issuance of further guidance, and no rules governing priority. Order 1309, in violation of principles of due process recognized by the Nevada Supreme Court, impermissibly defers decision-making on critical issues and should be declared void for that reason.

///

///

[14] Some rulemaking is expressly included within the APA. NRS 533.365(7).

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

B. The State Engineer Violated Principles of Due Process by Refusing to Grant Parties a Full and Fair Opportunity to be Heard During the Hearing Process.

The State Engineer gives short-shrift to Petitioners' complaint that the hearing process employed by the hearing officer did not give them a full and fair opportunity to be heard, simply stating that Petitioners' claim the hearing was "too short." NSE Answering Brief at 42. But the complaint has nothing to do with the brevity of the hearing process, but the refusal by the hearing officer to give parties a full and fair opportunity to be heard.[15] Due process requires a "full opportunity to be heard, . . . and the State Engineer must clearly resolve all the crucial issues presented . . . ." *Revert v. Ray*, 95 Nev. 782, 787, 603 P.2d 262 (1979).

Not only were Petitioners unaware of the standard the State Engineer would employ, but the rules of the hearing also changed throughout the process. Despite being told that experts would be held and limited to the opinions in written reports, their opinions changed through the hearing, and the hearing officer refused to hold experts to the scope of their reports. *See* Petitioners' Opening Brief at 40. Moreover, the participants were given a limited opportunity to present evidence. *Id.* Finally, the State Engineer refused to resolve a motion to strike evidence that violated the hearing officer's stated rules. *Id.* All these actions violated principles of due process as stated in *Revert v. Ray*.

C. Lincoln and Vidler Had No Notice that the State Engineer Was Going to Refuse to Follow Ruling 5712—the Only Water Appropriated in Kane Springs.

The State Engineer avers in his Answering Brief that he does not have to follow Ruling 5712. NSE Answering Brief at 22. This is the only position the State Engineer could take since he contradicted nearly every factual finding and conclusion in Ruling 5712 which granted the only appropriation in Kane Springs Valley.

[15] Notably, the Petitioners could not have had a full and fair opportunity to be heard because, as pointed out in the previous section, Petitioners were unaware of upon what criteria the State Engineer would base his decision. The State Engineer only developed the legal standard for super-basin boundaries based on the evidence presented.

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

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonable calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 314 (1950).

Nothing in Order 1303 put Lincoln and Vidler on notice that its appropriated water rights under Ruling 5712 in Kane Springs Valley were in jeopardy of losing their priority. Nothing in Order 1303 put Lincoln and Vidler on notice that the State Engineer would take the position that he did have to follow a previous State Engineer's Ruling and determinations in a contested proceeding which adjudicated Lincoln/Vidler's water right applications and granted them property rights. Order 1303 said nothing about Kane Springs, and all previous rulings from the State Engineer (including Ruling 5712) specifically excluded Kane Springs from the LWRFS. For those reasons, Petitioners' due process rights were violated and Order 1309 should be vacated.

VII. The State Engineer Violated the Separation of Powers by Usurping Legislative Functions and Exceeding His Authority.

Petitioners argue that the State Engineer usurped the Legislative power by exceeding the scope of the comprehensive water statutes. Petitioners' Opening Brief at 24-25. The State Engineer's position is that Petitioners do "not point to any statute that delegates truly legislative power to the State Engineer without suitable standards." NSE Answering Brief at 43:16-17. But the State Engineer exceeded his legislative mandate by ignoring the comprehensive statutory scheme and by the creation of the six criteria to determine the boundaries of the LWRFS under Order 1309.

The State Engineer ignores the caselaw which provides that a complete legislative enactment must establish the standards the agency is to employ and must "guide the agency with respect to the . . . power authorized." *Sheriff v. Luqman*, 101 Nev. 149, 153-54, 697 P.2d 107 (1985).

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

In this case, the State Engineer has no standards for defining the boundaries of a super-basin, having created them from "a survey of the evidence." The Legislature certainly provided no standards for "conjunctive management" of water rights. NRS 533.024(1)(e). And the Legislature refused to provide guidance to the State Engineer by failing to adopt Assembly Bill 51 in 2019, demonstrating "through its silence that Nevada's water law statutes should remain as they have been . . . ." *Pyramid Lake Paiute Tribe*, 112 Nev. at 749.

Therefore, the State Engineer usurped the Legislative power by issuing Order 1309, and the Order should be vacated for that reason.

VIII. The 8,000 afa Cap on Pumping Is Arbitrary.

The State Engineer, NV Energy, the Church, MVWD and SNWA contend the 8,000 afa pumping cap imposed by the State Engineer in the LWRFS by Order 1309 was based upon substantial evidence.[16] NV Energy, the Church and MVWD generally argue the State Engineer relied upon the testimony of experts to support his 8,000 afa cap and merely repeat statements made by the State Engineer in Order 1309 to support their arguments. These parties do not point to or cite any evidence of record relied upon by the State Engineer in Order 1309 to support his 8,000 afa pumping cap.

Furthermore, these statements recited from Order 1309 do not support the State Engineer's 8,000 afa pumping cap conclusion and the only numbers close to 8,000 afa in Order 1309 mischaracterized the expert's report or were developed outside the record and after the hearing. The State Engineer noted the acceptable pumping caps of the experts on page 61 of Order 1309 who recommended pumping at 9,318 afa, 11,400 afa, 10,000 afa or 4,000-6,000 afa. ROA at 62-63. Except for SNWA's recommendation, all the experts' acceptable pumping caps were substantially above 8,000 afa. As set forth in Lincoln/Vidler's Opening Brief, the only evidence cited in this section of Order 1309 which mentions 7,000-8,000 afa pumping and stabilization of spring discharge

[16] State Engineer Answering Brief at 23-26; NV Energy Answering Brief at 8-9; the Church Answering Brief at 19-24; MVWD Answering Brief at 18-19; and SNWA Answering Brief at 45-54.

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

misstates the expert's statements in the report. The NV Energy report cited in footnote 326 of Order 1309 (ROA at 63, n. 326) does not conclude that only 7,000-8,000 afa can continue to be pumped. ROA at 41882. The report uses the 7,000-8,000 afa pumping amount to determine there is no 1:1 depletion ratio from groundwater pumping to impacts to the Muddy River. ROA at 41882. That paragraph of the NV Energy report concludes that groundwater pumping in certain areas of the LWRFS will have less impacts on the Muddy River than other areas of pumping. ROA at 41882. No party addressed the State Engineer's misuse of the 7,000 – 8,000 afa figure cited in NV Energy's report in their Answering Briefs.

In Order 1309, the State Engineer also stated on page 55 that pumping from the carbonate rock aquifer since the completion of the aquifer test has consistently ranged between 7,000 and 8,000 but does not cite to any evidence supporting that statement. ROA at 56. The evidence the State Engineer cites in the sentences right before this unsupported statement provides average pumping figures for the LWRFS which are 12,635 afa in 2013-2014 and 9,318 afa in 2015-2017. ROA at 56. The State Engineer then indicates that pumping inventories for 2018 ***which were published after the completion of the hearing***, report a total of 8,300 afa. ROA at 56. The pumping inventories published after the completion of the hearing appear to be the only evidence which could possibly correlate to the State Engineer's arbitrary 8,000 afa cap, but that evidence was outside the hearing and the record in this case. Thus, there is no evidence of record, let alone substantial evidence of record, to support the 8,000 afa pumping cap arbitrarily picked by the State Engineer in Order 1309. Finally, the State Engineer's 8,000 afa cap is inconsistent with his other finding in Order 1309 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. We don't know if that distributed pumping is 12,635 afa, 9,318 afa or the evidence outside the record of 8,300 afa. That is why Order 1309 must be vacated because we have no idea what evidence the State Engineer purportedly relied upon to support his conclusions.

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

The State Engineer cites to evidence in his Answering Brief that is not cited by the State Engineer in Order 1309 to support the argument the State Engineer's 8,000 afa pumping cap is supported by substantial evidence. *See* State Engineer's Answering Brief at 24-26. The Nevada Supreme Court has specifically held a district court errs in relying upon the State Engineer's post review brief to supply missing findings. *Revert v. Ray*, 95 Nev. 782, 787, 603 P.2d 262, 265 (1979) (district court erred in looking to post-review brief filed by the State Engineer to supply missing findings on adverse possession issue). For this Court to perform a proper judicial review and not merely rubber stamp the State Engineer's determination, it must review the evidence relied upon by the State Engineer to make sure his findings are supported by substantial evidence and support the conclusion reached. The State Engineer's findings must be provided in sufficient detail to permit judicial review. *Id.* The State Engineer providing the citations to evidence in the record in his Answering Brief he may have relied upon to make his findings is not appropriate because it supplies the evidence the State Engineer purportedly relied upon after the fact. Because the purported evidence to support his determination was not provided in the Order, this procedure does not allow the Court to determine whether the evidence is "that which a reasonable mind might accept as adequate to support a conclusion." *Bacher v. State Engineer*, 122 Nev. 1110, 1121, 146 P.3d 793, 800 (2006). On appeal, a reviewing court must "determine whether the evidence upon which the engineer based his decision supports the order." *State Engineer v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991) (citing *State Engineer v. Curtis Park*, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985)). We don't know what that evidence is because the State Engineer did not cite to the evidence he purportedly relied upon to support his order. For these reasons, Order 1309 should be vacated.

Even if the Court could rely upon the evidence of record citations contained in the State Engineer's Answering Brief to support the 8,000 afa cap contained in Order 1309, the record citations provided by the State Engineer in his Answering Brief do not support his arguments and statements in his Answering Brief:

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

a. State Engineer Answering Brief states: "Based on all that, he found that 8,000 afa appropriately balanced two contradictory factors: (1) data showing that current pumping levels had led to the slowing of groundwater decline and (2) certain warning signs for future groundwater movement", citing ROA at 64, 10928, 10930, 34695-34696 and 53070 as the record that supports that analysis. State Engineer Answering Brief at 24:22-25. ROA at 64 is the State Engineer's conclusion in Order 1309 that water pumping has declined since completion of the pump test, is approaching 8,000 afa and this coincides with the period of time when spring discharge may be approaching steady state. There are no citations to any portion of the record in this paragraph. Pages 10928 and 10930 of the record are from the federal agencies' 2013 report after the Order 1169 pump test and relate to observed results to Pederson springs levels from the aquifer test pumping; pages 34695-34696 are from the City of North Las Vegas expert's report discussing the conceptual yield of groundwater in Garnet Valley, recommends additional pumping in Garnet Valley and merely recites certain conclusions from earlier 1169 reports which do not include Kane Springs as part of the LWRFS (*see* ROA at 34651); and page 53070 is testimony from the USFWS expert regarding climate conditions and water levels in basins not in the LWRFS, i.e., Dry Lake, Delamar and Tule Desert. None of this evidence cited supports the State Engineer's analysis as framed in the State Engineer's Answering Brief.

b. State Engineer Answering Brief states: "But the LWRFS's defining features are the uniquely close connections between its sub-basins—including Kane Springs Valley—and the shared single source of water." State Engineer Answering Brief at 25:9-11, citing ROA at 63 and footnote 4. ROA at 63 contains paragraphs discussing whether there will be continued spring flow decline and concludes further data collection is needed to further refine the amount of groundwater that can be pumped over the long term. Footnote 4 cites ROA 749 (Ruling 6254 denying water right applications in Coyote Spring Valley and discussing the hydrologic connection between 5 basins—Coyote Spring Valley, Muddy River Springs Area, Hidden Valley,

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

Garnet Valley and California Wash—which does not include Kane Springs); page 10888 (federal agencies' 2013 test pump report conclusions which do not include Kane Spring Valley in the study area of the report); page 42174 (SNWA response to Lincoln/Vidler report discussing the Northern Kane Springs fault and has no discussion regarding uniquely close connections of the sub-basins); and page 48740 (USFWS hydrographs of CSVM-4 and KMW-1). Again, the record cited by the State Engineer does not support his statement in his Answering Brief.

c. State Engineer Answering Brief states: "Substantial evidence supports the finding that pumping in one location in the LWRFS affects the groundwater supply and spring flow throughout it," citing ROA at 64-65, 10888, 48740 and 52899. State Engineer Answering Brief at 25:11-13. Order 1309 at ROA 64-65 discusses movement of water rights and that pumping from different locations in the LWRFS is not homogeneous; page 10888 is the federal agencies' 2013 Order 1169 test pump report conclusions which do not include Kane Spring Valley in the study area of the report; page 48740 is the USFWS' hydrographs of CSVM-4 and KMW-1; and page 52899 is Nevada Cogeneration's post hearing brief citing Kane Springs Ruling 5712 out of context. A post hearing brief is not evidence.

d. State Engineer Answering Brief states: "Kane Springs was always hydrologically connected to the rest of the LWRFS." citing ROA at 53, 52899 and 53170. State Engineer Answering Brief at 25:22-23. Order 1309 at 53 is the State Engineer's discussion of the evidence he relies upon to include Kane Springs in the LWRFS. Lincoln/Vidler discussed this evidence at length in their Opening Brief at 29-33. Page 52899 is Nevada Cogeneration's post hearing brief citing Kane Springs Ruling 5712 out of context. As indicated above, a post hearing brief is not evidence. Page 53170 is Dr. Waddell's testimony discussing MX-5 and seasonal Muddy River Springs Area pumping and Dr. Waddell's testimony refusing to opine that CSVM-4 and KMW-1 are "well connected" as the rest of the LWRFS and are only "connected."

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

e. State Engineer Answering Brief states: "There was substantial evidence that if a larger proportion of the junior water rights already granted in the LWRFS were pumped, that would significantly interfere with senior decreed rights to the Muddy River." citing ROA at 8-9, 10890 and 10928-10930. State Engineer's Answering Brief at 26:16-18. ROA at 8-9 in Order 1309 summarizes various parties' reports discussing their 2013 opinions from the Order 1169 pump test that ***pending*** applications at that time should not be granted and other reports concluded additional water could be developed in certain areas of the study area; Page 10890 was the federal agencies' 2013 Order 1169 test pump report conclusions that no water was available for appropriation for the ***pending*** applications held in abeyance which did not include Kane Spring Valley in the study area of the report; and pages 10928-10930 of the record are from the federal agencies' report in 2013 after the Order 1169 pump test and relate to observed results to Pederson springs levels from the aquifer test pumping in Coyote Springs Basin from MX-5. Thus, even if the State Engineer's Answering Brief could be used to supply citations to the record that are missing from Order 1309, the citations to the record made by the State Engineer in his Answering Brief do not support his arguments and statements.

SNWA's Answering Brief also for the most part recites the State Engineer's findings in Order 1309 to support its argument the 8,000 afa pumping cap is supported by substantial evidence. *See* SNWA's Answering Brief at 45-52. At footnote 165, SNWA cites to transcript testimony in which it contends experts debated whether impacts from the pump test had stabilized. None of this testimony is cited by the State Engineer in Order 1309 at ROA 58-64 and none of this testimony is cited by the State Engineer in his Answering Brief to support the 8,000 afa pumping cap. SNWA then summarily concludes "Thus, substantial evidence supports that 8,000 afa is the upper limit on the amount of water that can be safely pumped in the LWRFS based on existing data. SNWA Answering Brief at 46-47. There is no correlation to experts debating whether impacts from the pump test had stabilized and that 8,000 afa is the upper limit

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

on the amount of water that can be safely pumped in the LWRFS based on existing data. SNWA contends "the State Engineer relied upon decades of pumping data, observed flows in the Muddy River and extensive scientific study to support his conclusion." SNWA Answering Brief at 47:16-18. However, nowhere in that section of its brief does SNWA state where that evidence is cited by the State Engineer in Order 1309 to support the 8,000 afa pumping cap or provide any cites to evidence in the record to support that statement.

Finally, SNWA argues Lincoln/Vidler confuse three separate limitations to groundwater pumping (unappropriated water, conflicts and public interest citing to NRS 533.370(2)) in making their arguments that the pumping cap is discriminatory and contrary because it ignores their wells are 22 miles from the Muddy River and the springs. SNWA Answering Brief at 49:3-17. SNWA thus concludes the 8,000 afa regional cap is proper and movement of individual water rights will be considered case-by-case under Order 1309, the two concepts work together and are not in conflict with each other. SNWA Answering Brief at 49:13-17.

SNWA's argument is fatally flawed and highlights the reasons why the State Engineer's Order 1309 must be vacated because it is unlawful. NRS 533.370(2) governs the analysis the State Engineer must make in granting groundwater right applications. Lincoln/Vidler's water applications have already been granted. The State Engineer already made the determinations required by NRS 533.370(2) when he granted Lincoln/Vidler's applications in 2007 finding: (1) there was unappropriated water available notwithstanding the arguments there was no water available in the regional water supply, (2) there were no conflicts with existing rights even though NPS argued Kane Springs should be included in Order 1169 and granting the applications would impact existing rights downgradient, and (3) granting the applications would not impact the Moapa dace or the Muddy River. ROA at 712-713, 716, 718-719. SNWA's argument requires the State Engineer reevaluate the NRS 533.370(2) criteria as to Lincoln/Vidler's vested water rights already granted based upon the State Engineer's

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

creation of the super basin. There is no statutory authority allowing the State Engineer to reallocate and reconsider vested water rights already granted under the provisions of NRS 533.370(2) which govern the grant of initial water right applications. The Nevada Supreme Court agreed in *Min. Cty. v. Lyon Cty.*, 136 Nev. 503, 518-519, 473 P.3d 418, 429-430 (2020) (the statutory water scheme in Nevada expressly prohibits reallocating adjudicated water rights that have not been abandoned, forfeited, or otherwise lost pursuant to an express statutory provision.)

SNWA's arguments further highlight why Order 1309 is discriminatory and unworkable. Lincoln/Vidler have no need to move their water rights or for their rights to be addressed further under the State Engineer's determination to review future applications for the movement of water rights in the LWRFS on a case-by-case basis. ROA at 64-66. Lincoln/Vidler's points of diversion in the newly created LWRFS are some of the most distal from the springs and the Muddy River. There is no evidence in the record that Lincoln/Vidler's pumping of their water rights in Kane Springs will impact the springs or the Muddy River. The evidence of hydrologic connection between Kane Springs and the rest of the LWRFS south of northern Coyote Spring Valley is "very attenuated" and based upon faulty data. The State Engineer admitted as much in Order 1309 when he stated inclusion of Kane Springs in the LWRFS "provides the opportunity for conducting additional hydrologic studies in sub-basins such as these [Kane Springs], ***to determine the degree to which water use would impact water resources in the LWRFS***". ROA at 55. There has been no pumping from Kane Springs which has impacted the springs or contributed to declining water levels in the original super basin or current stabilizing water levels. Thus, arguments the 8,000 afa pumping cap is appropriate because it is a proper regional limit and movement of individual water rights will be considered on a case-by-case basis, show Order 1309 is discriminatory and unworkable for Kane Springs because there is no correlation that pumping from Kane Springs impacted the springs or Muddy River during the pump test and Lincoln/Vidler have no need to move their water rights

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

For the foregoing reasons, the State Engineer's Order 1309 must be vacated

IX. Order 1309 Is Based on Non-Existent Liability for an ESA Take That Has Never Occurred—The ESA Provides No Authority to Uproot Established Water Law Procedures.

The CBD, NV Energy and SNWA[17] accept the State Engineer's analysis of his potential liability under the Endangered Species Act ("ESA"). Notably, the State Engineer's Answering Brief failed to address the legal arguments questioning his authority to consider and make an order on the ESA. In Order 1309, the State Engineer appears to conclude he and groundwater users in the LWRFS would be subject to strict liability for a "take" resulting from the State Engineer's permitted water use. However, Courts have rejected theories of "per se" liability under the ESA for government officials issuing water permits as the State Engineer appears to impose upon himself in Order 1309. *Aransas Project v. Shaw*, 775 F.3d 641, 659 (5th Cir. 2014) (the court's rule establishing proximate cause from "authorizing" any activity that "caused" a take creates liability far beyond the contours of current ESA case law.) Proximate cause and foreseeability are required to affix liability for ESA violations, and the United States Supreme Court has rejected the application of strict liability for ESA violations that are unlimited by causal connection. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 700 (1995) (ESA statute "should be read to incorporate ordinary requirements of proximate causation and foreseeability"), cited in *Aransas Project v. Shaw*, 775 F.3d 641, 656–57 (5th Cir. 2014).

In *Aransas*, the Fifth Circuit Court of Appeals overturned the district court's erroneous analysis of causation based upon the issuance of water permits. *Aransas Project*, 775 F.3d at. The Court stated: "The district court either misunderstood the relevant liability test or misapplied proximate cause when it held the state defendants responsible for remote, attenuated, and fortuitous events following their issuance of water permits." *Id.* The Fifth Circuit observed:

[17] CBD Answering Brief at 4-14; NV Energy Answering Brief at 9-10; and SNWA Answering Brief at 27-30.

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

> The court concluded in the very next paragraph to one of these citations that "[p]roximate causation exists where a defendant government agency authorized the activity that caused the take." *Id.* at 786. This is an erroneous view of proximate cause standards. Taken at face value, the court's statement eliminates "proximate" from "proximate cause" whenever a governmental entity's licensing activity is involved in a "take."

Aransas at 658. The Fifth Circuit noted the district court failed to consider direct relationship and foreseeability in its proximate causation analysis:

> The district court's formulation and its ensuing opinion ignore both of those concepts, as it nowhere mentions remoteness, attenuation, or the natural and probable consequences of actions. Nowhere does the court explain why the remote connection between water licensing, decisions to draw river water by hundreds of users, whooping crane habitat, and crane deaths that occurred during a year of extraordinary drought compels ESA liability.

Aransas at 658-659. The Fifth Circuit stated the district court either misunderstood the relevant liability test or misapplied proximate cause when it held the state defendants responsible for remote, attenuated, and fortuitous events following their issuance of water permits. *Id.* at 656.

The Court noted the state's control over water usage is at a macro, not a micro level. Surface water is the property of the state, subject to the vested property rights of landowners. *Texas Water Rights Comm'n v. Wright,* 464 S.W.2d 642, 647 (Tex.1971). *Aransas* at 662. The State had no control over who used their water rights and who did not and the reasons why permit holders used or did not use their water. Other users, such as domestic users, did not need permits. The Court observed that even more unpredictable and uncontrollable were the forces of nature. In that case, the weather, tides, and temperature conditions dramatically affect salinity within and throughout the bay. *Id.* The Court rejected liability based upon modeling and estimation in expert reports, such as presented in this case, which provided no basis of foreseeability based upon non-specific, conditional, predictive statements. *Id.* at 660-661. The Court observed: "The lack of foreseeability or direct connection between TCEQ permitting and crane deaths is also highlighted by the number of contingencies affecting the chain

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

of causation from licensing to crane deaths. The contingencies are all outside the state's control and often outside human control." *Id.* at 661-662. The Fifth Circuit Court of Appeals concluded:

> Contingencies concerning permittees' and others' water use, the forces of nature, and the availability of particular foods to whooping cranes demonstrate that only a fortuitous confluence of adverse factors caused the unexpected 2008–2009 die-off found by the district court. This is the essence of unforeseeability.

Id. Accordingly, the Court determined finding proximate cause and imposing liability on the State defendants in the face of multiple, natural, independent, unpredictable, and interrelated forces affecting the cranes' estuary environment goes too far under the ESA. *Id.* at 663.

As Georgia-Pacific and Republic's Opening Brief at 30 and Georgia-Pacific and Republic's Answering Brief at 4-5 set forth, there are factors other than spring flows that are more meaningful regarding the survival of the Moapa dace, including the documented impact of invasive species found in the record in this proceeding. Further, the CBD's Answering Brief at 11:22-28 and 12:9-14 appears to acknowledge that Lincoln/Vidler's Biological Opinion provides protection from Section 9 "take" liability. Lincoln/Vidler do not agree to or with the State Engineer's assumption of liability under the ESA based solely on the issuance of groundwater permits in the LWRFS.

CBD and SNWA argue the State Engineer is required to consider the Moapa dace under his public interest responsibilities pursuant to NRS 533.370, and that is exactly what he did when he issued Ruling 5712 granting Petitioners' water rights in Kane Springs. ROA 701-02. That statute governs applications to appropriate water. The Nevada Supreme Court addressed this issue in *Min. Cty. v. Lyon Cty.*, 136 Nev. 503, 519, 473 P.3d 418, 430 (2020) and specifically rejected the argument made by CBD and SNWA here. In *Min. Cty. v. Lyon Cty.*, the Supreme Court held Nevada's comprehensive water statutes are consistent with the public trust doctrine. *Id.* at 517, 473 P.3d at 429. First, Nevada's statutes regulating water use require the State Engineer

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

to consider the public interest in allocating water rights. *Id.* at 513-514, 473 P.3d at 426-427. Next, the statutory scheme ensures that the State is fulfilling its continuous public trust duties because water usage is constrained to uses that are necessary and the statutory scheme terminates water rights when water is not used beneficially. *Id.* at 514, 473 P.3d at 427. Water rights may be abandoned, and the State Engineer is permitted to declare preferred uses and regulate groundwater in the interest of the public welfare. *Id.* at 515. However, the Supreme Court refused to allow a reallocation of water rights based upon the public trust doctrine as SNWA and CBD urge here. The Court stated the State's water statutes recognize the importance of finality in water rights and therefore do not permit reallocation of adjudicated water rights. *Id.* at 517, 473 P.3d at 429. The Supreme Court concluded:

> Nonetheless, this does not necessarily mean that water rights can be reallocated under the public trust doctrine. Rather, it means that rights holders must continually use water beneficially or lose those rights. We therefore hold that the public trust doctrine does not permit reallocating water rights already adjudicated and settled under the doctrine of prior appropriation.

Id. at 518–19, 473 P.3d at 430. Finally, the Supreme Court indicated "the public trust doctrine cannot be used as a tool to uproot an entire water system, particularly where finality is firmly rooted in our statutes. We cannot read into the statutes any authority to permit reallocation when the Legislature has already declared that adjudicated water rights are final, nor can we substitute our own policy judgments for the Legislature's." *Id.* at 519, 473 P.3d at 430. Thus, the Supreme Court has specifically rejected reallocation of water rights based upon public trust motives. The State Engineer's creation of the super basin which results in the reallocation of water rights in the LWRFS for public trust reasons cannot stand.

NV Energy cites to *Cappaert v. United States*, 426 U.S. 128 (1976) to support the State Engineer's actions in this case. *Cappaert* is inapposite because it involved enforcement of a senior reserved water right held by the United States when it established Devil's Hole as a national monument which senior reserved right the State

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

Engineer refused to recognize. The State Engineer allowed local junior groundwater right holders to pump their rights which lowered water in an underground pool in the national monument below a certain level necessary to preserve the pool's scientific value and implement the Presidential Proclamation. The Supreme Court upheld the injunction enjoining junior groundwater pumping that would lower the water level below a certain level necessary to preserve the fish based on the United States' reservation of water necessary to the purpose of the national monument reservation. *Id.* at 147. This case does not involve a senior reserved water right held by the United States for the Moapa dace which the State Engineer refused to recognize and therefore, the *Cappaert* case is not relevant

There are practical consequences resulting from the State Engineer's assumption of liability under the ESA which will impede private mitigation measures for protection of the Moapa dace. By operating outside his jurisdiction and overlooking any mitigation agreed to by the USFWS with water right holders, the State Engineer has effectively halted any monetary and water right mitigation measures any party might be willing to provide to mitigate impacts to the Moapa dace. No one will agree to mitigation measures with the USFWS in the future if the State Engineer can ignore the mitigation measures agreed to by the USFWS or Biological Opinions issued by the USFWS so the water right holder can pump its ground water rights. The State Engineer's actions in this case to assume liability for himself under the ESA and ignore the monetary and water right mitigation measures parties have made in this case for protection of the Moapa dace underscores why the State Engineer needs to stay within the scope of his jurisdiction under the Nevada water law statutes and not inject himself and permitted water right holders into areas outside his jurisdiction by his orders purportedly made to manage and administer water rights. Lincoln/Vidler agree with Georgia Pacific and Republic "the State Engineer has no authority to determine when and whether a 'take' could occur under the ESA, failed to provide due process regarding this issue and regarding factual findings affecting the dace, and arbitrarily applied those

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

findings to all groundwater use and users within the consolidated basin regardless of location" and regardless of mitigation measures agreed to by the USFWS and a water right holder. *See* Georgia Pacific and Republic Opening Brief at 31.

X. Broad, Sweeping Statements Made by Certain Petitioners Should Be Disregarded by the Court.

Various petitioners make broad sweeping statements in their answering briefs about the scope of the State Engineer's powers, pumping impacts in the LWRFS and the State Engineer's findings in Order 1309. For example, SNWA contends the State Engineer has authority over all water in the State. SNWA Answering Brief at 14:7-8.[18] Some Petitioners contend any groundwater pumping in the LWRFS impacts Muddy River senior rights and/or the Moapa dace. SNWA Answering Brief at 33; CBD Answering Brief at 3:1-3, 26:12-13. SNWA contends the State Engineer found no discrete aquifers had been proven to exist in the LWRFS. SNWA Answering Brief at 34. The Church contends "pumping in one basin affects the available water in another basin." Church Answering Brief at 26:12-13. As explained in more detail below, the Court should be very cautious in accepting such broad generalizations which are not supported by the evidence of record in this case or the law cited in support of such generalizations.

A. The State Engineer's Authority over All Waters Is Limited by the Legislative Enactment.

SNWA cites to NRS 533.030(1) to support its statement the State Engineer has authority over all water in the State. However, NRS 533.030(1) provides that subject to existing rights, all water in the State may be appropriated for beneficial use as provided in Chapter NRS 533. This statute says nothing about the State Engineer's authority over all water in the State and in fact directs the State Engineer to grant

[18] *See also* NSE Answering Brief at 3:7-8.

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

appropriations for all water in the State for beneficial use subject to existing rights. The citation does not support SNWA's statement.[19]

B. The State Engineer Found Evidence that Discrete Aquifers Exist.

As another example, SNWA states: "While the State Engineer recognized discrete aquifers may conceptually exist within the LWRFS, he found none had been proven to exist." SNWA Answering Brief at 34:3-4, citing to ROA at 54. However, a review of ROA 54 reveals the State Engineer stated: "The State Engineer finds that while information such as that provided by Bedroc is convincing and supports a finding that local, potentially discrete aquifers may exist in parts of the northern Coyote Springs Valley, his criteria for defining the LWRFS calls for the inclusion of the entirety of the basin in the LWRFS." ROA at 54. Nowhere in that sentence did the State Engineer state discrete aquifers may conceptually exist within the LWRFS but he finds none have been proven to exist as SNWA contends. The State Engineer found just the opposite, that is, that Bedroc's evidence was convincing and supported a finding that local, potentially discrete aquifers may exist in northern Coyote Springs Valley. ROA at 54.

C. Nothing In the Answering Briefs Support Contentions that the State Engineer Previously Amended Basin Boundaries or Jointly Managed Discrete Basins.

Statements made by NV Energy in its Answering Brief to support its argument the State Engineer has changed basin boundaries or managed basins together are not supported by NV Energy's citations in its Answering Brief. For instance, NV Energy argues the State Engineer has previously changed basin boundaries. *See* page 7 of NV Energy's Answering Brief and footnotes 27, 28 and 29. Ruling 995 referenced in footnote 27 to support the statement the State Engineer has amended basin boundaries numerous times and has broken out numerous subareas as the need for separate regulation has arisen does not mention basin boundaries, regulation of basin boundaries and that subareas are broken out as the need for separate regulation has arisen. Ruling

[19] For further discussion of the State Engineer's statutory authority, *see supra* § II.

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

995 involved applications to appropriate water in an over appropriated area that the State Engineer denied because the applications would adversely impact existing rights in the nearby area. The Ruling mentions the Oreana subarea but did not discuss anything about a subarea being created for separate regulation or that the State Engineer was amending basin boundaries. The citation does not support NV Energy's statement.

NV Energy stated on page 7 of its Answering Brief the State Engineer has managed several basins together based on hydrologic connection citing the entire Reconnaissance Series Report 27 in footnote 28 as support for that statement. Reconnaissance Series Report 27 involves the Meadow Valley Area, refers to it as a drainage area, and takes notice that water flowing through a basin from above that is utilized, would not be available for appropriation in a basin below. Reconnaissance Series Report 27 does not manage basins together based on hydrologic connection, does not reprioritize rights, and in fact confirms that basins are managed separately in Nevada.

On page 7 of its Answering Brief, NV Energy refers to the entire report entitled "Water for Nevada, Nevada Division of Water Resources Water Planning Report 3, 1971" in footnote 29, claiming "The State Engineer is not bound to use the same basin boundaries that in existed in 1971 . . . ," Lincoln/Vidler did not find any statement or reference to that idea anywhere in this report.

D. The State Engineer Made No Finding that Any Pumping within the LWRFS Impacts Muddy River or the Moapa dace.

As the final example, SNWA and CBD broadly state that any pumping in the LWRFS impacts Muddy River senior water right holders and/or the Moapa dace. However, that is not what the evidence from the Order 1169 pump test showed. As the State Engineer recites in Order 1309: "For instance, the Order 1169 aquifer test demonstrated that pumping 5,290 afa from the carbonate rock aquifer wells in ***Coyote Spring Valley***, caused a sharp decline in discharge at the springs but distributed pumping since the completion of the aquifer test in excess of 8,000 afa has correlated

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

with a stabilization of spring discharge." (Emphasis added) ROA at 60, *see also* ROA at 7, 10 ("that the impacts of aquifer tests pumping in ***Coyote Spring Valley*** was widespread throughout the Order 1169 test area and that the additional pumping in ***Coyote Spring Valley*** was a significant contributor to the decline in the springs that serve as the headwaters of the Muddy River and habitat for the Moapa dace;" (emphasis added)). Similar findings were made by the State Engineer with regard to alluvial and carbonate pumping from the Muddy River Springs Area affecting Muddy River flows. ROA at 65. The State Engineer concluded "pumping from locations within the LWRFS that are distal from the Warm Springs area can have a lesser impact on spring flow than pumping from locations more proximal to the springs." ROA at 60. The State Engineer recognized that drawdown from Garnet Valley may not yet have propagated to the Muddy River Springs Area. ROA at 63. The State Engineer found "there remains some uncertainty as to the extent that distance and location relative to other capturable sources of discharge either delay, attenuate, or reduce capture from the springs." ROA at 60. Thus, there has been no finding made by the State Engineer that pumping from any location within the LWRFS impacts the springs or the Moapa dace and it is certainly not true that pumping from Kane Springs impacts the springs or Moapa dace. Similarly, there is no evidence of record that "pumping in one basin affects available water in another basin" as the Church broadly proclaims.

The Court should disregard such broad, sweeping statements not supported by the record or by law in making its determinations in this case.

XI. Conclusion

The State Engineer's actions in Order 1309 are a significant departure from and refusal to follow legislative mandates and the comprehensive statutory scheme—the actions of the State Engineer exceed his statutory authority and should be vacated. In violation of Nevada Supreme Court precedent, Order 1309 impermissibly reprioritized water rights within the seven, previously-independent basins.

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

Order 1309 also violated Lincoln's and Vidler's due process rights by creating legal standards only after the hearing and based on "a survey of the evidence" rather than any law or legislative approval. The State Engineer violated due process standards by changing the hearing rules midstream and by failing to give Petitioners a full and fair opportunity to be heard. And the hearing notice was constitutionally inaccurate because it failed to give Petitioners notice that their senior property rights were in jeopardy.

The State Engineer's decision to include Kane Springs in the LWRFS is not based on "substantial evidence" required by law, and his 8,000 afa cap on pumping is arbitrary. The State Engineer's factual conclusions were contradictory and relied on faulty information. No pumping in Kane Springs caused any impact on the springs or Moapa dace. And no evidence demonstrated any impact to senior water rights or the Moapa dace implicating the Endangered Species Act.

For those reasons and as shown in Lincoln/Vidler's Opening Brief, this Court should vacate Order 1309. Order 1309's findings as to Kane Springs must be vacated. Kane Springs should continue to be administered in accordance with the basin specific statutory scheme set out by the Legislature.

DATED this 11th day of January, 2022.

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 #9020
Email: dfrehner@lincolncountynv.gov

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

/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

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

CERTIFICATE OF COMPLIANCE

We hereby certify that we have read the foregoing Reply 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 14 points or more, and contains 17, 449 words. The Court determined the parties do not have to comply with the type-volume limitations stated in NRAP 32(a)(7). 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 11th day of January, 2022.

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

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

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. Bita Yeager – District. Ct. Dept. 1
Court Administration – 2nd Floor
200 Lewis Avenue
Las Vegas, NV 89101

DATED this 11th day of January, 2022.

/s/ Nancy Fontenot
NANCY FONTENOT

4868-0268-1609, 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

Exhibits Excluded from Appendix

Exhibits Excluded from Appendix