

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.

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A816761

JOINT APPENDIX

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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:

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DATED this 27th day of December, 2022.

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

1 basin-by-basin basis, you know, in history.

2 You look at the basin and you figure out what the
3 issues are with regard to that basin and you take action based
4 on that. And that's why we think it's appropriate because,
5 again, it doesn't create all the chaos, as Mr. Foletta was
6 talking about here. It doesn't create all the chaos across
7 seven basins when it doesn't need to.

8 THE COURT: So let me ask you, because I know that,
9 you know, you've been making a point that first the Nevada
10 State Engineer showed that there wasn't enough connectivity.
11 Now he's saying that there is connectivity. Would you agree,
12 though, that if the science dictates that there is more impact
13 or more connectivity that he could reverse himself if he
14 followed the proper statutory framework?

15 MS. PETERSON: With regard to like the Kane rights?

16 THE COURT: Yes.

17 MS. PETERSON: So if we are pumping our Kane rights
18 and they impact somebody else that has a higher seniority, that
19 issue has to be addressed. We can't -- by our pumping we
20 cannot impact somebody else's water rights that's senior.

21 THE COURT: Right. But your beef, I guess, is more
22 that everyone was lumped into the same mega-basin as opposed to
23 handling it basin by basin under the statutory framework?

24 MS. PETERSON: Right.

25 THE COURT: Okay.

1 MS. PETERSON: And knowing what he knows from the
2 pump test where the areas, the problem areas are.

3 THE COURT: Proportional impact.

4 MS. PETERSON: His findings are -- I'm not sure I
5 understand what you mean by --

6 THE COURT: So what I'm saying is that some areas may
7 impact, you know, the Moapa dace. Let's just say the Moapa
8 dace at greater rates than other places.

9 MS. PETERSON: Yes.

10 THE COURT: Okay.

11 MS. PETERSON: Yes. Yes. And then I did want to
12 address conjunctive management. And I think it was Mr. Dotson
13 who put up the slide, the Davenport slide yesterday or whatever
14 day, that conjunctive management is -- oh, gosh, separate -- is
15 not separate administration for surface and groundwater,
16 they're treated as one source. And our legislation is not
17 there yet. That's our position: It's not there yet. And you
18 know the reasons.

19 The 2019 legislation and one position there, what
20 happened here in 1309, and then I'm just going to raise it just
21 for the legal conflict, issue of 1329. So we don't think there
22 has been a reboot of Nevada water law by the policy declaration
23 that there can be conjunctive management.

24 And I think the questions that you were asking some
25 of the other -- like CSI, I know you asked them specifically

1 and they were saying -- what I heard what they were saying was
2 that if there is a conflict between their right and a surface
3 water -- a senior surface water right, or if there was a
4 conflict even with a senior groundwater right, that they would
5 understand that they would have to address that and that could
6 affect. But, see, to me that's that impacts analysis or the
7 conflicts analysis and the subject to existing rights analysis.
8 It's not conjunctive use management.

9 THE COURT: So tell me then, what, in your opinion,
10 does conjunctive use management mean.

11 MS. PETERSON: Okay. And I wouldn't even say my
12 opinion because I don't feel like I'm an expert, but my
13 understanding of it.

14 THE COURT: Yes.

15 MS. PETERSON: My understanding of conjunctive use
16 management is that you have a limited resource and you would
17 try to maximize the use of that surface and groundwater
18 resource. And if one of the objectives is to protect senior
19 rights, that could be one of the objectives of the
20 conjunctive-use management, a conjunctive use management plan
21 or whatever.

22 So, and I -- the one example I can use because I
23 think the information is in the record but it's only with
24 regard to one water right holder, but to try to explain how
25 this might happen, and I'm not as familiar with the hydrology

1 and everything down here in the Muddy River area. I'm more
2 familiar with everything up north. But Vidler owns, you know,
3 groundwater rights in Kane Springs, and Vidler owns surface
4 water rights in the Muddy Valley Irrigation Company.

5 And so they're one owner that owns groundwater and
6 surface water, but they could use their water rights more
7 efficiently to maximize the use of the surface and the
8 groundwater rights by maybe, for example, if they needed to
9 pump their groundwater they wouldn't pump -- they wouldn't take
10 their surface water maybe one year because they wanted to pump
11 more of their groundwater based on hydraulic conditions or
12 something. Maybe another year they would want to use more of
13 their surface water and not pump as much of their groundwater.
14 And that's how they would conjunctively manage the water
15 resources.

16 Utilities do it that have, like, surface water rights
17 and groundwater rights. They conjunctively manage their
18 resources so that -- up north, this is how it happens up north.
19 And I'm not trying to get any objections, but, for example --

20 MR. TAGGART: Well, I will if you --

21 MS. PETERSON: Okay. I'll move on. I'll move on.
22 I'll move on.

23 MR. TAGGART: No, I don't disagree. I didn't mean to
24 stop you. I'm sorry.

25 MS. PETERSON: Yeah, I'll move on. But I don't

1 equate --

2 THE COURT: So it's really a much more nuanced,
3 closely connected -- what's the word that I'm looking for --
4 calculation that you're making when you're conjunctively
5 managing the surface water and the groundwater together. It's
6 not just looking at the conflict of the rights between the
7 surface water and the groundwater, it's really like a
8 management plan between the two and how to maximize whatever
9 your objective is?

10 MS. PETERSON: It does use the word management right
11 in there.

12 THE COURT: Yes.

13 MS. PETERSON: So, yeah. And again, I think the
14 examples that you were giving, the way I understood them with
15 the others was that that was more of a conflicts analysis.

16 THE COURT: I see.

17 MS. PETERSON: And I'll tell you, and I've got it in
18 here because I was going to comment on it, but all the
19 slides -- there was a slide, and I can't remember the number of
20 it. I'll get to it in my notes here, that the SNWA attorney
21 had. And those cases weren't about conjunctive management.
22 They were about surface water and groundwater rights that
23 were --

24 THE COURT: At conflict with each other. I see.

25 MS. PETERSON: -- in conflict with each other.

1 THE COURT: Okay.

2 MS. PETERSON: The cases don't mention conjunctive
3 use management at all.

4 THE COURT: Okay.

5 MS. PETERSON: So I will -- oh, and I guess could you
6 bring up the slide. I guess just another thing just to point
7 out some of the evidence in the record.

8 THE COURT: And what number slide is this?

9 MS. PETERSON: It's Slide 8.

10 So this is the slide we put up the other day, and
11 it's the -- on the left is a narrative from the SNWA report and
12 it was after the 1169 pump test that says there's a lack of
13 pumping responses from the 1169 pumping north of the Kane
14 Springs fault and west of the MX-5 and CSI wells. And this
15 again is information that could be used for purposes of
16 management of a basin to maybe allow pumping in a certain
17 portion of a basin where there wasn't as much connectivity.
18 And so maybe you can put water --

19 THE COURT: Oh, I see.

20 MS. PETERSON: -- because it's saying there's a lack
21 of pumping responses. So, again, maybe this is an area where
22 there could be pumping in the Lower White River Flow System or
23 in this basin in particular and it's not going to have --

24 THE COURT: So the point is that just because a
25 basin -- part of the basin has connectivity with other basins

1 doesn't mean that the entire basin is connected.

2 MS. PETERSON: Right. Okay. I'm going to get on to
3 Mr. Dotson, and he had an example yesterday about wasn't it a
4 lot of water, 6 inches over 1,100 square miles. And we did the
5 math on that. And the quantity of water that he's talking
6 about, 6 inches over 1,100 square miles, there's 640 acres in
7 1 square mile. And then 640 acres times 1,100 equals
8 704 acres. And then an acre foot of water -- oh, 704,000.

9 Thank you.

10 An acre foot of water is 1 foot of water in an acre.
11 We're only talking about 6 inches here. So we're going to cut
12 the 704,000 acres in half to 352-. And the evidence and the
13 testimony -- or the evidence or the argument that you heard was
14 that there was an average over the two years of 14,500 acre
15 feet pumped per year, so during the two year pump test we're
16 talking about 29,000 acre feet being pumped.

17 But under Mr. Dotson's scenario, even though there
18 were only 29,000 acre feet pumped during the pump test, there
19 was 352,000 acre feet of water in that 6 inches over the
20 1,100 square miles. And so, you know, that's over 10 times
21 more water that was pumped, he's contending in his scenario,
22 was in that 6 inches over the 1,100 square miles.

23 THE COURT: Okay. You totally lost me on the math.

24 MS. PETERSON: Okay. Trying to show --

25 THE COURT: So, you know what, if you give me -- have

1 you figured out what the 6 inches over 1,100 square miles is in
2 acre feet?

3 MS. PETERSON: Yes.

4 THE COURT: And is that number 352 --

5 MS. PETERSON: 352.

6 MR. TAGGART: I'm just going to object.

7 THE COURT: 352 or 352,000?

8 MS. PETERSON: Thousand.

9 MR. DOTSON: I'm going to object that it's an
10 improper hypothetical because it assumes a vacuous space during
11 that entire area because you're not counting the mass of the
12 earth.

13 THE COURT: Oh, boy. Okay.

14 MR. DOTSON: It calls for math.

15 THE COURT: No, no, no, no, I'm just saying -- I'm
16 just saying my brain is hurting from the math, and I'm not a
17 mathematician. So I'm just --

18 MR. DOTSON: In other words, there's not a hole.
19 It's not a hole of water. And it also misstates my argument.
20 So those are my two objections.

21 MR. TAGGART: Your Honor, I'm just going to object
22 that I just think -- getting another math question into the
23 record. I think the point is getting made. Clearly she
24 disagrees with what Mr. Dotson said, but putting another value
25 into the record that the State Engineer didn't calculate is not

1 a good idea.

2 MS. PETERSON: It's argument. This is argument, and
3 I'm responding to the argument of Mr. Dotson that 6 inches over
4 1,100 square miles is a lot of water. And, yeah, if you're
5 saying that after the result of that pump test there were
6 drawdowns in the Lower White River Flow System, 1,100 square
7 miles that totaled 6 inches, at least, you're talking about
8 352,000 acre feet of water when only 29,000 was pumped. That's
9 the point of that.

10 You also heard during the argument with regard to
11 Phase 2 of Order 1309, if a Phase 2 occurs that, you know, we
12 don't -- number one, we don't know when that might be. We
13 don't know what might happen during that phase. And it's clear
14 we don't know what to expect in Phase 2.

15 And I think we heard Mr. Bolotin say that we don't
16 know what the State Engineer is going to -- he may not want to
17 curtail by priority. He said there's nothing explicit in the
18 statute how to manage or how to reprioritize. He also
19 indicated that -- priorities in sub-basins. He's not sure what
20 to do with those, whether that stays. It's all unknown.

21 Mr. Taggart indicated we don't know how to divide the
22 8,000. We don't know how it will be done. This is the first
23 part of a curtailment. A curtailment is the next step.

24 And again, just throwing into the whole -- and
25 building on, I guess, the whole -- the argument that

1 Mr. Foletta made about all the chaos that has been thrown into
2 this proceeding, and I will tell you, I know they didn't like
3 the fact that I talked about the decree and how you have to
4 give notice to everybody.

5 But if there is a curtailment in seven basins they
6 will have to give notice to every water right holder in those
7 basins because there is a Nevada case right on point, *Eureka*
8 *County v. District Court*, where the Nevada Supreme Court
9 specifically held that prior to curtailment proceedings you
10 have to notify every single water right holder, groundwater
11 right holder in the basin. So they will have to notify
12 everybody in the seven basins that hold water rights.

13 And then just kind of briefly addressing some of the
14 other arguments that were made, I heard Mr. Morrison for Moapa
15 Valley Water District say that the State Engineer found Kane
16 Springs water ends up in Muddy Springs, and that is nowhere
17 found in Order 1309, not at all.

18 I also -- with regard to some of Mr. Taggart's
19 argument, he indicated that NRS 532.120 was the authority to
20 include Kane, and that statute states that the State Engineer
21 may make such rules and regulations as may be necessary for the
22 proper and orderly execution of the powers conferred by law,
23 and obviously that has nothing to do with designating a basin
24 and Order 1309 was certainly not rules and regulations.

25 In the afternoon Mr. Taggart presented -- it was

1 page 41 of the slides and he cited to ROA 41982. He had five
2 hydrographs that he said were all very familiar. Recovery did
3 not occur with those hydrographs. And again, that's -- a
4 hydrograph is just one -- it's the well location. It doesn't
5 necessarily mean that that's what's happening, you know, in the
6 ground all around the well. We don't know. We just know
7 what's happening in that well and that the water levels had not
8 come back to pretest levels.

9 And it's not the same hydrographs that you saw that
10 the State Engineer put up. These hydrographs that he was
11 describing, the five hydrographs, they only had to do -- they
12 didn't have anything to do with Kane, the Kane wells or the
13 CSVN-4 well, which is in northern Coyote Springs. Those
14 hydrographs were in lower Coyote Spring Valley, the Muddy River
15 Springs Area, California Wash, Garnet Valley and Black
16 Mountains. They didn't have anything to do with, again,
17 northern Coyote Springs or Kane.

18 There was also argument that the application
19 procedures in NRS 533 and 534 indicated -- were indicative of
20 conjunctive management because they both used the NRS 533
21 statute. And the Legislature said that you can use that same
22 procedure to apply, whether it was surface water or
23 groundwater; therefore, that was indicative of conjunctive
24 management. And I guess my response to that would be why would
25 you need the -- if that was true, why would you need the

1 conjunctive management legislative policy enacted in 2017 if
2 the application statute was indicative of conjunctive
3 management?

4 And then Slide 58 was the slide that had all the
5 cases with the authority for conjunctive management. And
6 again, none of those cases described or discussed conjunctive
7 management. Those words were not used in those cases. But
8 those cases had to do with impacts between surface water right
9 holders and groundwater right holders.

10 And the *Cappaert* decision in particular involved the
11 State Engineer not recognizing a reserved right of the Federal
12 Government claim that the national monument that had the
13 pupfish, and the State Engineer allowed a nearby groundwater
14 right holder that was junior to the federal reserved right to
15 pump and lowered the Devil's Hole, which was the habitat for
16 the pupfish. And the U.S. Supreme Court said that the federal
17 reserve right had to be recognized. So that was -- again, it
18 was an impacts case.

19 THE COURT: Impact on conflict of rights.

20 MS. PETERSON: Yes.

21 THE COURT: Okay.

22 MS. PETERSON: And then the Center for Bio Diversity
23 indicated that proving liability or argued that proving
24 liability for a take, that that was in federal court and that
25 was a standard there for federal cases. But it was different

1 from proving potential for a take. And I just did want to
2 indicate that the State Engineer indicated that he was
3 worried -- in his ROA at 47 that he definitely indicted that he
4 was worried about the liability for the State and that's what
5 he was talking about, not that there is some kind of different
6 standard for proving potential for a take.

7 The attorney then for Center for Bio Diversity also
8 indicated that the 60-foot higher water level elevations -- he
9 was kind of attacking those and that the water levels really
10 weren't 60 that the State Engineer was describing. And I guess
11 I would just indicate that the State Engineer made that
12 determination. He made that determination in Ruling 5712 and
13 he made it also in Order 1309.

14 And, you know, it is improper to ask the Court to
15 reweigh the factual determination that was made by the State
16 Engineer on that issue. And I don't even believe the Center
17 even appealed that issue, so I'm not asking you to substitute
18 or reweigh the evidence on that issue.

19 I would also, Your Honor, when you're -- if you're
20 using the demonstrative evidence or the slides here when you're
21 reviewing everything and making your decision, I would ask that
22 you look at some of them very carefully because in some
23 instances there were words that were, you know, taken out and
24 put the dot, dot, dot that are pretty important for the
25 statutes.

1 And I know you noticed them before when you were
2 reading the statute, but there was one on the slides yesterday
3 and it was a Southern Nevada Water Authority slide, NRS
4 534.120, subsection 1. The words that were taken out were "as
5 provided for in this chapter." So what you saw on the slide or
6 what somebody saw on the slide was, "Within an area that has
7 been designated by the State Engineer." The words "as provided
8 for in this chapter" were taken out and then it goes on as if
9 to read, "where, in the judgment of the State Engineer the
10 groundwater basin is being depleted." So we would ask you to
11 just look at those carefully.

12 And then moving on to Mr. Dotson today, the argument
13 that he made today --

14 MR. DOTSON: Your Honor, objection. She can't
15 respond to something I said today unless it's just framing a
16 question. This was the point that counsel made, which is why
17 we did it in the order that we did.

18 THE COURT: Right. No, no, I understand your point.

19 I guess it just really depends on what it is that you
20 are addressing.

21 MS. PETERSON: There was a dialogue today with the
22 Court regarding the scope of judicial review versus the decree
23 court. And I understood the Court to ask Mr. Dotson the
24 question that his petition for judicial review was with the
25 issue of procedural due process in Order 1309, as opposed to a

1 determination from the decree court on anything in the decree
2 under -- in this proceeding.

3 THE COURT: So, no, I think what I was -- so what I
4 was asking is when he was talking about, you know, invoking the
5 powers of the decree that he was asking the Court to do, that
6 was as it related specifically to the conflicts analysis that
7 was done in 1309 regarding the Muddy River Decree.

8 MS. PETERSON: Okay.

9 THE COURT: So I guess -- I know that there was --
10 let me think about this -- that in your intervening brief that
11 you had addressed issues regarding how they had calculated the
12 Muddy River Degree water. Is that what you were going to or
13 was that something different?

14 MS. PETERSON: I definitely was going to address
15 that, but I was going to go to the remand instruction that you
16 saw on the slide today.

17 THE COURT: As it relates to Vidler?

18 MS. PETERSON: As it relates to the relief that
19 Mr. Dotson asked for.

20 THE COURT: Regarding enforcing the decree?

21 MS. PETERSON: Yes. Well, and also the one about
22 even though they're appealing the part of the order that deals
23 with the State Engineer's statement about what the
24 predevelopment flows of the Muddy River were, the 33,900 --

25 THE COURT: Uh-huh.

1 MS. PETERSON: -- he wants you to affirm that.

2 THE COURT: So I think you covered that pretty well
3 in your intervening answering brief.

4 MS. PETERSON: Okay.

5 THE COURT: So I think -- I don't think I need
6 further argument on that --

7 MS. PETERSON: Okay.

8 THE COURT: -- if that gives you some assurance.

9 MS. PETERSON: Okay.

10 THE COURT: I think that's what caused me to ask
11 those questions about the calculations as it relates to, you
12 know, translating historical volume and then, you know, because
13 it looks like there are different opinions, I guess I should
14 say, from the different entities as to how much that volume
15 actually is.

16 MS. PETERSON: And I guess my last argument with
17 regard to the Muddy River would be that there was no notice to
18 the parties. And I guess I'm kind of following up on
19 Mr. Foletta's argument about the Endangered Species Act. There
20 was no notice to the parties in this case that we were to
21 address what the predevelopment flows of the Muddy River were
22 and provide evidence on that, so I'll leave it at that.

23 THE COURT: Okay.

24 MS. PETERSON: And then with regard to the six
25 criteria, I know there were questions from the Court a few days

1 ago about whether -- if we had known the six criteria if our
2 presentations would have been any different, and of course we
3 did raise the due process argument in our petition for judicial
4 review.

5 And I can assure you, absolutely, that if we had
6 known what the six criteria were before we went into the
7 hearing, that we would have performed work that would have
8 provided information with regard to geologic structures and/or
9 mapping. I mean, we would have drilled bore holes near our
10 wells to show what the geology was there so that we could have
11 complied with Criteria 5 and/or Criteria 6. And it would have
12 made a difference in the case that we would have presented and
13 what we would have presented and how we would have presented
14 it, so our due process rights were violated.

15 And I also wanted to touch upon the best -- you know,
16 the best available science and all that's been raised. And I'm
17 not asking you to reweigh any evidence here, but I am going to
18 let you know, Your Honor, that in response to Order 1303,
19 Lincoln and Vidler did provide what they considered, their
20 experts considered to be the best available science to the
21 State Engineer. They provided some geophysics. I'm not asking
22 you to reweigh it. I'm just telling you it's in the record.
23 They provided geophysics. They provided geochemistry data that
24 they believe showed that the Kane Springs water, what didn't
25 end up in the Muddy River springs --

1 THE COURT: Oh, this is like the duadanem (sic) or
2 whatever it's called.

3 MS. PETERSON: Yeah, the deuterium --

4 THE COURT: Yeah, the deuterium.

5 MS. PETERSON: -- and the chemical signature. And
6 they also provided --

7 MR. BOLOTIN: Your Honor.

8 THE COURT: Yes?

9 MR. BOLOTIN: I just got a message from my colleague
10 that's on BlueJeans. He said he wasn't able to get back into
11 the BlueJeans just now and I just wanted to make sure that --

12 THE COURT: Oh, okay. Hang on. Stop the clock.
13 Let's check on that.

14 MR. BOLOTIN: It might be a personal issue, but I
15 just wanted -- I didn't want all those people to miss
16 anything --

17 THE COURT: Oh, sure.

18 MR. BOLOTIN: -- if it was that, but I'll tell him it
19 might be his problem.

20 THE COURT: Yeah. See if he can try it again. Okay.
21 All right, start the clock.

22 MS. PETERSON: So we did try to present what we
23 thought was the best available science. And with due respect,
24 I want to state on the record our frustration with trying to
25 provide that, not having any guidance in advance as to what the

1 State Engineer wanted to see. Obviously if we would have known
2 what he wanted to see, we would have tried to provide that to
3 him.

4 But there's been this suggestion, for example, that
5 maybe there should be -- the State Engineer would welcome a
6 pump test from the Kane Springs well at this point. And
7 obviously, you know, we don't even know if we have any water
8 rights. So why would we go out and spend all the money, which
9 would be a lot, because there's no power at that site? There's
10 no -- again, that's one of the things we complained about in
11 our petition.

12 The State Engineer is telling us that there can be
13 additional hydrologic study or there has to be additional
14 hydrologic study in Kane Springs to know what the hydrologic
15 connection is. And why we would do a pump test when we don't
16 even know what the State Engineer would want to see? What we
17 would have to try to show by that pump test again just reveals
18 that we're in this mega mess where we don't even know if we can
19 get out or how we can out.

20 And it's very frustrating because we have to litigate
21 the issue instead of trying to be involved in finding the
22 solution or working with other parties. It's very frustrating.
23 And our clients, you know, they're frustrated that they're
24 losing their property rights, and it just has created a lot of
25 problems. I'll just leave it at that.

1 There were some other slides that I just wanted to
2 highlight.

3 Slide 7. So, Your Honor, there was a question the
4 other day that you had about what the headwaters were.

5 THE COURT: As related to the tributaries?

6 MS. PETERSON: Headwaters related to the springs.

7 THE COURT: Oh, the springs.

8 MS. PETERSON: And so on Record on Appeal 7, the
9 State Engineer indicates Pederson Springs. It's in the middle
10 there. And actually the sharp declines with the pumping from
11 Coyote Springs. This is one of the sites. The other site on
12 page 60 just references the pumping from Coyote Spring Valley
13 of 5,290 acre feet that caused -- he used the same language --
14 sharp decline, I think, was -- yeah, in groundwater levels and
15 flows. But the Pederson Springs there are noted as headwater
16 springs and then also the Baldwin and the Jones Springs.

17 And so we also provided a map, and there's a cite to
18 the record on that, 41959, that shows the springs in that area.
19 So you had asked just about the headwaters. And so those are
20 the headwater springs --

21 THE COURT: Okay.

22 MS. PETERSON: -- referenced in the decree.

23 THE COURT: Okay.

24 MS. PETERSON: And then the next slide.

25 Okay. Slide 9, there were some comments about this

1 slide. And the access on the left is the KMW monitor well and
2 water levels and then the access on the right is the CSVM-4
3 scale with regard to water levels. And you'll see on the slide
4 that the KMW data is in blue and the CSVM-4 data is in red.
5 And so the scales are different.

6 The reason that they're different is that the monitor
7 well, the KMW monitor well showed 26 feet of drawdown. And
8 because we wanted to show the responses for both wells on this
9 one graph, we plotted again the CSVM-4 data on the right-hand
10 side. And the scale needs to be larger because the CSVM-4 data
11 shows that there was approximately a 1 and a half foot change.
12 And so on the one hand we have a 26-foot change and a one and a
13 half foot change, and so that's why the data is plotted like
14 that. Because if we had plotted the CSVM-4 data on the same
15 scale as the KMW-1, basically the red would be a flat line and
16 you wouldn't be able to see the data points. And so the red
17 blocks are the data points.

18 And I know there was some criticism of that and the
19 data points there, but it is data from -- it's a Southern
20 Nevada Water Authority well. And if you don't like the lines,
21 you can just look at the red squares. You can just ignore the
22 lines and you can look at the red squares and you can see what
23 the data points were.

24 And then the other thing I wanted to mention about
25 this is that this well recovered on April 26, 2007, the water

1 level. And this is in the record. It's in the record at page
2 1585. The water levels in the KMW monitor well had recovered
3 to 1,879.9 feet, which is where they were -- actually a little
4 bit above where they started.

5 And I guess I'm just bringing this to your attention
6 because in those hydrographs that were talked about they were
7 indicating how other wells in the Lower White River Flow
8 System, in the lower part of the Lower White River Flow System
9 had not recovered yet to date. And our well recovered, you
10 know, one year after the well had been pumped, the production
11 well had been pumped.

12 And then moving on to the next slide, which is
13 Slide 10, and there was some discussion about this slide, that
14 the data -- and we're talking about the text that's on the
15 left-hand side and it talks about the problem with the
16 transducer and the failure. And there was some information
17 that there had been hand measurements.

18 And I guess what I want to say about that is that we
19 were not around in this mega-mess when these reports were
20 prepared because we weren't involved in 1169 at all. And so
21 we're reading the report and we're taking this at face value
22 put out by SNWA that you can't rely on this data because of
23 this failure. So it doesn't say in here that there were hand
24 measurements and so it's okay to rely on this data. It doesn't
25 say anything like that. It just says you can't rely on the

1 data. So that's what everybody was put on notice with regard
2 to their report.

3 And then the next slide would be 11. And this was --
4 I put in the full redirect examination on this question with
5 regard to the U.S. Fish and Wildlife witness that answered the
6 question about take. And he's being asked questions by his
7 attorney, which is Mr. Miller. And he wants to ask
8 questions -- my interpretation of it is is to clarify the
9 record. And he does, he specifically asked the three
10 witnesses, they had three on their panel, None of you are
11 proffered to give testimony and discuss ESA compliance issues?
12 And they say they're not.

13 Mr. Mayer, he's a hydrologist, he said he wasn't.

14 Ms. Braumiller, she was a hydrologist, she said she
15 wasn't.

16 Then Dr. Schwemm says he's going to answer it, and he
17 does answer it. His counsel asks him, and he answers it. And
18 he's trying to clarify this thought or inference that had been
19 placed in the record by the Center for Biological Diversity.

20 And nobody objected to that. There's no objection to
21 that testimony by that witness and that opinion by that
22 witness. So I would give full weight to that testimony from
23 that witness.

24 Okay. And, Your Honor, these next three slides,
25 which are Numbers 12, 13 and 14, and the reference on the

1 record is there, but this is the same chart but it's the full
2 chart that Mr Robison presented to you yesterday. And again,
3 it starts out at the top on the first page. This is the State
4 Engineer's exhibit. The first page indicates all the water
5 rights in priority. And we get to -- if we go to the next
6 page.

7 THE COURT: You know, I didn't even look. Does it
8 actually indicate which are surface and which are groundwater
9 rights?

10 MS. PETERSON: They're all groundwater.

11 THE COURT: Oh, they're all groundwater.

12 MS. PETERSON: Yes.

13 THE COURT: Oh, you know, I saw that. Okay.

14 MS. PETERSON: Okay. And then when we get to the
15 second page there's the -- I don't know if we put that there or
16 if that was there in the original one, but there is a
17 cumulative total running there of the duty.

18 THE COURT: Yes.

19 MS. PETERSON: So you can see where the 8,000 cutoff
20 line is. And you can also see the priority dates of all the
21 water rights. So I think Coyote Springs might have been on
22 this page so they showed these two pages. But then if we go to
23 the next page, we go to where Lincoln and Vidler's water rights
24 would be in the basin. And they're not on here. I'm not sure
25 why they're not on here, but maybe this was before we were

1 thrown into the basin.

2 THE COURT: Oh.

3 MS. PETERSON: But our priority rights are February
4 14th, 2005, so they would be right above the Muddy River, that
5 permit. Is it 775161?

6 THE COURT: So right above the Muddy River Springs
7 Area.

8 MS. PETERSON: Springs Area. Yes, that area --

9 THE COURT: Nevada Power Company?

10 MS. PETERSON: Yes. That area that's highlighted.
11 So you can see in the cumulative total, you know, we're like at
12 the 38,000, 39,000 of an 8,000 cap.

13 MR. TAGGART: Your Honor, if I can just object to
14 clarify the record. This is -- earlier stated, this is where
15 we stand. This particular document was --

16 THE COURT: Was one that was stricken or rescinded
17 from 1303. Is that the one?

18 MR. TAGGART: Well, first it was attached to a Draft
19 1303 --

20 THE COURT: Right.

21 MR. TAGGART: -- and it was not part of 1303. So I
22 hope counsel agrees so we can clarify the record that this
23 table that we're looking at was part of a Draft 1303. It was
24 not part of Order 1303 and it was not part of Order 1309. I
25 think it's really important that the Court be aware --

1 THE COURT: Sure.

2 MR. TAGGART: -- of that record.

3 MS. PETERSON: But it was an exhibit in the 1309
4 proceedings. It was a State Engineer exhibit in the 1309
5 proceedings.

6 MR. TAGGART: No. The State Engineer put Draft 1303
7 into his exhibits. And because he put his Draft 1303 in his
8 exhibits, the attachment to Draft 1303 was also in his
9 exhibits.

10 THE COURT: So it's in the record on appeal?

11 MR. TAGGART: Yes, it is.

12 THE COURT: And you're just clarifying for the record
13 what it is, which is that it was part of the draft. It didn't
14 make it to 1303 itself. And then 1309 basically rescinded
15 anything else that wasn't included in 1309 from 1303.

16 MR. TAGGART: That's right.

17 THE COURT: Okay.

18 MR. TAGGART: I mean, does it depict what the State
19 Engineer said in the draft of 1303? Absolutely.

20 THE COURT: Sure.

21 MR. TAGGART: I don't disagree. I think it's --

22 THE COURT: Well, and I think it may be -- it's being
23 used more illustratively to make a point regarding where
24 everyone's respective rights would be now that they're thrown
25 into a seven basin mega-basin.

1 MR. TAGGART: Well, if they are thrown in --

2 THE COURT: If that's true.

3 MR. TAGGART: -- and if it were done with one
4 priority schedule --

5 THE COURT: Sure.

6 MR. TAGGART: -- this is what it would look like.

7 THE COURT: Sure.

8 MS. PETERSON: Any knowledge that the information is
9 not correct in that exhibit?

10 MR. TAGGART: I didn't say it was. I think -- I'm
11 just trying to clarify for the Court so the Court is not
12 confused about what this document is.

13 THE COURT: No, no, no. I understand what the
14 document means.

15 MR. TAGGART: Okay.

16 MS. PETERSON: And if we could go back to the first
17 page.

18 MR. HERREMA: Your Honor, Brad Herrema on behalf of
19 CSI. We showed this. I think we were the first ones to bring
20 it into the proceeding. I don't think there's any dispute from
21 Mr. Taggart it was prepared by the State Engineer. It's
22 accurate as to what it says at the top of the first page,
23 regardless of what it was associated with previously. It was
24 prepared by the State Engineer. It's accurate to show
25 groundwater rights by priority in the Lower White River Flow

1 System at the time it was prepared.

2 THE COURT: Thank you. And I think Mr. Taggart's
3 point is at this point you don't know exactly how these
4 priorities are going to be looked at, considered or anything
5 like that because that's not part of the conflicts portion. Is
6 that right?

7 MR. TAGGART: Well, yes. And I think -- yes. I
8 mean, this is part of what we said is Phase 2.

9 THE COURT: I understand your position.

10 MR. TAGGART: Right.

11 THE COURT: So I understand everyone's respective
12 positions as to that, but you can continue. I think that
13 you're illustrating your point as far as the uncertainty that
14 you are put in with the possibility, I guess, that this could
15 happen.

16 MS. PETERSON: Correct. And on that note, we hope it
17 doesn't happen. We hope the Court vacates Order 1309, finding
18 that the State Engineer had no statutory authority to issue
19 Order 1309 with regard to, you know, putting all these basins
20 into one mega-basin and I guess in the future somehow requiring
21 conjunctive management. Again, we don't think the State
22 Engineer has statutory authority for that. We hope the case
23 ends there and that's the only determination that the Court has
24 to make. But obviously we also would want the Court, if for
25 some reason that doesn't happen, to rule on all our other

1 requests for relief with regard to vacating the ruling because
2 of a violation of our due process rights with regard to the six
3 criteria and all the other due process violations that we've
4 made and the substantial evidence arguments that we've made.

5 THE COURT: Okay.

6 MS. PETERSON: And thank you very much. Appreciate
7 your time.

8 THE COURT: Thank you. Thank you. So I think that
9 concludes our hearing. I'm sure we have housekeeping matters.

10 MR. BOLOTIN: Your Honor, this is James Bolotin for
11 the State Engineer.

12 THE COURT: Yes.

13 MR. BOLOTIN: And since my argument was two days ago
14 and it's been another --

15 THE MARSHAL: You're not close to a microphone.

16 THE COURT: Oh, yeah, come close to the mic.

17 MR. BOLOTIN: Since our argument was two days ago and
18 it's been a long two days, I also wanted to say that on behalf
19 of the State Engineer and the Attorney General's Office we
20 really appreciate your time and focus and devotion to getting
21 through all of this and sticking through it with us those four
22 days. Thank you, Your Honor.

23 THE COURT: All right. Okay, so I feel like I have
24 enough, but I know that there was a mention of --

25 UNIDENTIFIED SPEAKER: My fault.

1 THE COURT: So whose hearing were you seeing it at?
2 Which I have never seen. I don't even know it's a thing. But
3 I'll certainly let the parties let me know their positions on
4 that.

5 MR. HERREMA: Your Honor, just a housekeeping issue.

6 THE COURT: Sure.

7 MR. HERREMA: Brad Herrema again on behalf of CSI.
8 All of the demonstratives, those are considered admitted? Do
9 we do anything further on those? Admitted as demonstratives,
10 obviously.

11 THE COURT: Yeah. They're the Court's exhibits that
12 will be made part of the record.

13 MR. HERREMA: Okay, great.

14 THE CLERK: But not the big boards, though.

15 THE COURT: Not the big boards, but I think that we
16 have the smaller copies of those. Right? Yeah, but we have
17 the smaller copies of those. Okay. So I see a lot of people
18 standing up. Why don't I just go from Mr. Bolotin this way and
19 then we can go through everyone. Okay.

20 MR. BOLOTIN: Your Honor, just based on what you just
21 said, sometimes in these water cases there's specific issues
22 that the judge does want post-hearing briefing on, but if there
23 isn't, the State Engineer has no desire or request for
24 post-hearing briefing specifically on anything.

25 MR. TAGGART: And I guess I'm next in line.

1 THE COURT: You're next.

2 MR. TAGGART: Okay. I tend to agree. If the Court
3 has -- I mean, we've gone through things pretty exhaustively
4 and the briefs are pretty good. I mean, if something new came
5 up during the hearing or you go back in chambers and you
6 realize there is an issue that you think you'd like the parties
7 to brief more, we've seen that happen. But I think because
8 we -- and we also did the findings of fact and conclusions of
9 law.

10 THE COURT: Right.

11 MR. TAGGART: So I think nothing is jumping out at me
12 as a need to do that, but -- because usually we'll then wait
13 for the transcripts and then we'll summarize the evidence.

14 THE COURT: Oh, yeah.

15 MR. TAGGART: I just -- we've done enough of all of
16 that.

17 THE COURT: I mean, you all have done so much work
18 already. I will ask this. Are there any specific case that
19 speak to conjunctive management as conjunctive management and
20 not as a conflict of laws issue?

21 MR. TAGGART: Well, I think that presumes --

22 THE COURT: Or one that's closest to that.

23 MR. TAGGART: Yeah. I think that presumes what
24 conjunctive management means. And I think there's valid,
25 multiple --

1 THE COURT: Interpretations of what that actually
2 means?

3 MR. TAGGART: Yeah, obviously from here today.

4 THE COURT: Okay.

5 MR. TAGGART: So, I mean, I gave you the list I have.
6 I think Ms. Peterson made her points about that. They're fair
7 points, so I'm not sure I could add to that much.

8 THE COURT: Okay. All right. I also still -- okay.
9 Yes?

10 MR. BOLOTIN: The only thing I'd add on that, Your
11 Honor, not to get into a conflicts of law -- and this is James
12 Bolotin, for the record. There are persuasive authorities from
13 other states that probably use the term conjunctive management,
14 but --

15 THE COURT: Yeah.

16 MR. BOLOTIN: Yeah.

17 THE COURT: I'll just stick to Nevada. It's probably
18 a lot safer that way. Okay. Mr. Dotson, was there something
19 you wanted?

20 MR. DOTSON: No, I was just going to put -- I thought
21 you were going to ask everybody to put on the record. I have
22 no need for any post-trial briefing, unless you -- but I would
23 say if in the Court's exercise of your review of the record it
24 comes to light that you would care to see any issue, please do
25 not hesitate to ask. And I'm sure I speak with everyone in the

1 room when it comes to that. But I am not asking for any
2 post-trial opportunity.

3 THE COURT: Yeah. Okay, Mr. Lake.

4 MR. LAKE: I take the same position on briefing as
5 Mr. Dotson. I don't see a need for it from our perspective.
6 I'd also like to ask, I know we've all been here for a long
7 time and I understand that, I would like to ask for one more
8 brief recess before we adjourn today. I need to confer with my
9 client one more time.

10 THE COURT: Okay. So I guess we'll just rest at
11 ease. How brief do you need?

12 MR. LAKE: Five minutes or less would be fine.

13 THE COURT: Okay. I mean, why don't everyone just
14 stick around here until 3:30. Let me just ask Mr. Flaherty, is
15 there anything else that you wanted to add?

16 MR. FLAHERTY: Regarding briefing, Your Honor?

17 THE COURT: Yeah.

18 MR. FLAHERTY: On behalf of Nevada Cogen I was going
19 to say no mas, por favor.

20 THE COURT: Yeah. Okay.

21 MR. FLAHERTY: Thank you.

22 THE COURT: All right. Mr. Balducci, I assume that
23 same thing.

24 MR. BALDUCCI: Please, no more.

25 THE COURT: Okay. Well, you know, I will tell you

1 there is a lot for me to think about, re-review, make sure.
2 And I have to thank everyone for their excellent arguments. It
3 has been extremely helpful to me as someone who has never
4 practiced water law or done anything even remotely close to
5 water law to be really able to understand how everything fits
6 together and what something I think it means isn't really
7 actually what it means until, you know, when you really kind of
8 solidified it for me in your arguments. That really helped me
9 follow the briefings a little bit better.

10 So I think that's why now that I have all this
11 information I'm going to reread the briefings again just to
12 make sure in preparing the order. You know what, let me just
13 make sure I have everyone's proposed findings of fact and
14 conclusions of law. So hang on. I'm just going to go get my
15 binder, and I'm going to read off the ones that I have.

16 (Pause in the proceedings.)

17 THE COURT: So let me just read off the ones that I
18 have and make sure I'm not missing anyone. I've got Las Vegas
19 Valley Water District, Center for Biological Diversity, Lincoln
20 County, Vidler, Coyote Springs, NVEnergy, Apex Holding, Nevada
21 Cogen, Church of Jesus Christ of Latter-Day Saints, Nevada
22 State Engineer, Muddy Valley Irrigation Company. And I think
23 there was Georgia-Pacific that I received just like recently.
24 Is that right, Mr Foletta?

25 MR. FOLETTA: Yeah, you should have it.

1 THE COURT: Okay.

2 MR. FOLETTA: At the -- I think it was the first day
3 of the hearing.

4 THE COURT: Yeah. Is there anyone who thought they
5 had put forward proposed findings of fact and didn't hear their
6 entity called? No. Okay.

7 MR. BOLOTIN: Your Honor, just to double -- just to
8 triple check, you said State. You said you got the State
9 Engineer's?

10 THE COURT: Yep, I did get the State Engineer. Yep.
11 And then, Mr. Lake, was there anything else? Were you able to
12 confer with your client?

13 MR. LAKE: One second, Your Honor.

14 THE COURT: Okay, sure.

15 MR. LAKE: Your Honor.

16 THE COURT: Yes?

17 MR. LAKE: I'll wait for everybody to get settled. I
18 have one more thing just to add. So the Center for Biological
19 Diversity and the State Engineer have reached -- I'm going to
20 stop short of calling it an agreement in principle, but an
21 agreement in concept in which we would dismiss our PJR, subject
22 to certain terms. The specifics of the terms are still under
23 negotiation.

24 THE COURT: You're still in the negotiating stage?

25 MR. LAKE: Uh-huh. But just to make the Court aware.

1 And we would be maintaining our intervenor status in the
2 remaining appeals as well.

3 MR. BOLOTIN: And, Your Honor, I would just echo that
4 it would be subject to the same motion -- by the time we get
5 across the finish line it would be subject to the same motion
6 practice, objection, everybody would -- the same thing that
7 people would get to say to the proposed settlement with SNWA
8 and MVIC as well.

9 THE COURT: Okay. Thank you. Thank you for letting
10 us know.

11 So with that said, this -- although I hate taking
12 matters under advisement, this absolutely necessitates that I
13 take this under advisement. You know, I will try to get it out
14 as expediently as I can.

15 They give us like the drop-dead date of 60 days. I'm
16 hoping to do it well before then. No promises, but, you know,
17 it will certainly not take months and months and years and
18 years because I know that that really puts a stop on
19 everything, and I know that you want to get this case moving
20 along.

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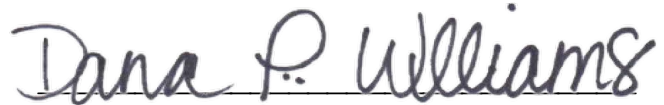
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THE COURT: So thank you all. I hope you -- for those of you who are traveling back, that you do so safely. And have a great weekend.

(Proceedings concluded at 3:29 p.m.)

-oOo-

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



Dana L. Williams
Transcriber

ADDITIONAL TRANSCRIBER: LIZ GARCIA

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FFCO

**DISTRICT COURT
CLARK COUNTY, NEVADA**

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

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

Petitioners,

Consolidated with Cases:

vs.

A-20-817765-P
A-20-818015-P
A-20-817977-P
A-20-818069-P
A-20-817840-P
A-20-817876-P
A-21-833572-J

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

Respondent.

And All Consolidated Cases.

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

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

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

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

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

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

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

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

I.

PROCEDURAL HISTORY

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

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

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

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

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

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

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

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

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

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

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II.

FACTUAL HISTORY

A. The Carbonate Groundwater Aquifer and the Basins

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

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

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

⁶ SE ROA 659.

⁷ SE ROA 661.

⁸ SE ROA 661.

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

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

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

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

19
20 _____
21 ⁹ SE ROA 11349-59.

22 ¹⁰ *See* SE ROA 11350.

23 ¹¹ SE ROA 41943.

24 ¹² SE ROA 660-61, 53056, 53062.

25 ¹³ SE ROA 663-664, 41959, 48680.

26 ¹⁴ SE ROA 73-75, 34545, 53062.

27 ¹⁵ SE ROA 60-61, 34545.

28 ¹⁶ SE ROA 46, 34545.

¹⁷ *See* SE ROA 661.

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

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

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

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

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

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

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

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

19 Kane Springs Valley (“Kane Springs Valley”), Basin 206, which was also affected by
20 Order No. 1309, had not been designated previously for administration.²²

21 ²¹ See SE ROA 2-3, 71-72.

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

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B. The Muddy River Decree

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

C. The Moapa Dace

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

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

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

²⁵ SE ROA 33798-806.

²⁶ SE ROA 33775.

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

²⁸ SE ROA 5.

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

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

11 **D. Order 1169**

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

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

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24 _____
25 ²⁹ SE ROA 47169.

26 ³⁰ SE ROA 47160.

27 ³¹ SE ROA 42087.

28 ³² SE ROA 4, Ex. 1.

³³ *Id.*

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

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

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

23 ³⁴ SE ROA 654-669.

24 ³⁵ See SE ROA 659, 665.

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

26 ³⁷ SE ROA 719.

27 ³⁸ SE ROA 713.

28 ³⁹ SE ROA 654-58, Ex. 7.

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

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

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

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

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

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

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

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

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

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

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34 ⁴⁵ SE ROA 635-53, Ex. 6.

35 ⁴⁶ SE ROA 82-83.

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

SE ROA 647-48, Ex. 6.

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

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

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

⁴⁷ SE ROA 70-88.

⁴⁸ *Id.*

⁴⁹ SE ROA 263, Ex. 2 (Notice); SE ROA 285, Ex. 3 (Amended Notice).

⁵⁰ SE ROA 522.

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

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

7 **F. Order 1309**

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

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

25 SE ROA 66, Ex. 1.

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

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

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

27 ⁵³ See SE ROA 285, Ex. 3.

28 ⁵⁴ SE ROA 2-69.

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

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

⁵⁵ SE ROA 48-49, Ex. 1.

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

G. Petitioners and Their Respective Water Rights or Interests

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

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

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

8 **III.**

9 **DISCUSSION**

10 **STANDARD OF REVIEW**

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

16 **A. Questions of Law**

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

23 Any “presumption of correctness” of a decision of the State Engineer as provided by NRS
24 533.450(10), “does not extend to ‘purely legal questions,’ such as ‘the construction of a statute,’
25 as to which ‘the reviewing court may undertake independent review.’” *In re State Engineer*
26 *Ruling No. 5823*, 128 Nev. 232, 238-239, 277 P.3d 449, 453 (2012) (quoting *Town of Eureka v.*
27 *State Engineer*, 108 Nev. 163, 165, 826 P.2d 948, 949 (1992)). At no time will the State
28

1 Engineer’s interpretation of a statute control if an alternative reading is compelled by the plain
2 language of the statute. *See Andersen Family Assoc.*, 124 Nev. at 186, 179 P.3d at 1203.

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

9 **B. Questions of Fact**

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

27 ⁵⁸ SE ROA 43.

28 ⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ SE ROA 44.

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

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

1. The Prior Appropriation Doctrine

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

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

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

⁶² *Id.*

⁶³ *Id.*

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

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

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

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

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

5 **2. Joint Administration**

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

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

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

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

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

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

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

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

1 appropriations based on the basins already defined.

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

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

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

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

20 **3. Conjunctive Management**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 ⁷¹ The Notice included the following summary:

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

28 ⁷² SE ROA 647-48. Ex. 6.

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

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

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

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

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

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

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

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

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

⁷³ SE ROA 648, Ex. 6.

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

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

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

19 SE ROA 54, Ex. 1.

20 This language reflects a serious misunderstanding of the effect of Order 1309. Insofar as
21 Order 1309 subjects the LWRFS to conjunctive management and joint administration, resulting in
22 effectively reordering of priority of water rights in the LWRFS superbasin, the order effectuates a
23 management scheme with far reaching consequences. Thus, agreeing on the one hand that an
24 “effective management scheme” will be necessary to address challenges in the LWRFS, but
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26 ⁷⁴ These issues include, but are not limited to: whether Nevada law allows the State Engineer to conjunctively manage
27 multiple hydrographic basins in a manner that modifies the relative priority of water rights due to the administration
28 consolidation of basins; whether the State Engineer would establish a “critical management area” pursuant to NRS
534.110 and, if so, whether he would develop a groundwater management plan or defer to the stakeholders to develop
one; whether Nevada law gives the State Engineer authority to designate a management area that encompasses more than
one basin; whether “safe-yield” discrete management areas should be established within the proposed administrative
unit; whether water rights holders enjoy a “property right” in the relative priority of their water rights such that impairing
that right may constitute a “taking”; whether unused (or only sporadically used) senior water rights take precedence over
certificated or fully used junior rights, particularly where these junior rights are in continuous use to support
economically significant enterprises; whether States compel quantification of federal reserved rights by a date certain;
and whether the State Engineer should approach the legislature to seek different or additional management tools or
authority. See SE ROA 52801-8, Ex. 25 (Georgia Pacific and Republic Closing Argument, outlining policy questions
for consideration by the State Engineer at later proceedings, proceedings that never took place).

1 contending it will be developed in the future, reveals a lack of appreciation of the implications of the
2 order to the detriment of not only the participants but all water rights holders in the LWRFS basins.
3 Without consideration of the implications of the management decision contained in the order, it
4 cannot be based on a full consideration of the issues presented. In affirmatively limiting the scope of
5 the proceeding to include a full consideration of the issues, the State Engineer violated the
6 stakeholders' due process rights. Both the notice and the hearing procedures employed failed to
7 comport with due process.

8 Finally, as noted above, the State Engineer did not give notice or disclose before or during
9 the Order 1303 proceedings, the six specific criteria that he would use in evaluating the connectivity
10 of the basins and determining the new consolidated basin boundary. Although the State Engineer
11 asserted that he considered the evidence and testimony presented in the public hearing "on the basis
12 of a common set of criteria that are consistent with the original characteristics conserved critical in
13 demonstrating a close hydrologic connection requiring joint management in Rulings 6254-6261,"⁷⁵
14 a review of these rulings reveals that none of the six criteria or characteristics were previously
15 identified, examined in the hydrological studies and subsequent hearing that followed the
16 completion of the Order 1169 aquifer test, or expressly disclosed in Rulings 6254-6261.⁷⁶ These
17 criteria were instead explicitly disclosed for the first time in Order 1309, which means the
18 participants had no opportunity to directly address these criteria in their presentations, or critically,
19 to address the appropriateness of these criteria.

20 This Court is unpersuaded by the State Engineer's argument that it could develop the criteria
21 only after it heard all the evidence at the hearing. Even if it did, this does not justify a deprivation of
22 the right to due process. In order to provide the parties due process and a meaningful opportunity to
23 present evidence on these issues, the State Engineer should have included these factors in the Notice
24 of Pre-Hearing Conference. *See Eureka Cty.*, 131 Nev. at 855, 359 P.3d at 1120; *Revert*, 95 Nev. at
25 787, 603 P.2d at 265 (criticizing the state engineer for engaging in post hoc rationalization). This
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27 ⁷⁵ See SE ROA 48.

28 ⁷⁶ SE ROA 726-948.

1 due process violation is particularly harmful to water rights holders in Kane Springs, the sole basin
2 that had not been previously designated for management under NRS 534.030, had not been included
3 in the Order 1169 aquifer test, and had not been identified as a basin to be included in the LWRFS
4 superbasin in Order 1303.

5 Accordingly, this Court concludes that revealing the criteria only after stakeholders had
6 engaged in the extensive investigations, expert reporting, and the intense factual hearing requested
7 by Order 1303 further violates the participants' due process rights.

8 As this Court has determined that the Nevada State Engineer exceeded his statutory authority
9 and violated the participants' due process rights in issuing Order 1309, it declines to reach further
10 analysis on whether his factual findings in Order 1309 were supported by substantial evidence.

11 **IV.**
12 **CONCLUSION**

13 The Court FINDS that the Nevada State Engineer exceeded his statutory authority and had
14 no authority based in statute to create the LWRFS superbasin out of multiple distinct, already
15 established hydrographic basins. The Nevada State Engineer also lacked the statutory authority to
16 conjunctively manage this LWRFS superbasin.

17 The Court ALSO FINDS that the Nevada State Engineer violated the Petitioners'
18 Constitutional right to due process by failing to provide adequate notice and a meaningful
19 opportunity to be heard.

20 As a result, Order 1309 is arbitrary, capricious, and therefore void.

21 Good cause appearing, based upon the above Findings of Fact and Conclusions of Law, the
22 Court ORDERS, ADJUDGES AND DECREES as follows:

23 IT IS HEREBY ORDERED that the petition for review of the Nevada State Engineer's
24 Order No. 1309 filed by Petitioners Lincoln County Water District and Vidler Water Company, Inc.
25 is GRANTED.

26 IT IS FURTHER ORDERED that the petition for review of the Nevada State Engineer's
27 Order No. 1309 filed by Petitioners Coyote Springs Investment, LLC is GRANTED.
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IT IS FURTHER ORDERED that the petition for review of the Nevada State Engineer’s Order No. 1309 filed by Petitioners Apex Holding Company, LLC and Dry Lake Water, LLC is GRANTED.

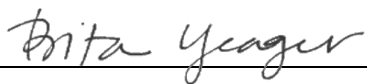
IT IS FURTHER ORDERED that the petition for review of the Nevada State Engineer’s Order No. 1309 filed by Petitioners Nevada Cogeneration Associates Nos. 1 and 2 is GRANTED.

IT IS FURTHER ORDERED that the petition for review of the Nevada State Engineer’s Order No. 1309 filed by Petitioners Georgia-Pacific Gypsum LLC, and Republic Environmental Technologies, Inc. is GRANTED.

IT IS FURTHER ORDERED that the State Engineer’s Order 1309 is VACATED in its entirety.

IT IS SO ORDERED.

Dated this 19th day of April, 2022



**66B 24A E875 2549
Bitia Yeager
District Court Judge**

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Southern Nevada Water
Authority, Plaintiff(s)

CASE NO: A-20-816761-C

7 vs.

DEPT. NO. Department 1

8
9 Nevada State Engineer, Division
of Water Resources,
10 Defendant(s)

11
12 **AUTOMATED CERTIFICATE OF SERVICE**

13 This automated certificate of service was generated by the Eighth Judicial District
14 Court. The foregoing Findings of Fact, Conclusions of Law and Order was served via the
15 court's electronic eFile system to all recipients registered for e-Service on the above entitled
case as listed below:

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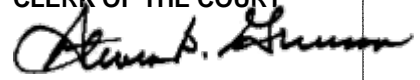
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Attorneys for Petitioner Coyote Springs Investment, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

21 LAS VEGAS VALLEY WATER DISTRICT,
22 and SOUTHERN NEVADA WATER
23 AUTHORITY

24 Petitioners,
25 v.

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

Respondent.

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

Dept. No.: 1

**COYOTE SPRINGS INVESTMENT, LLC'S
MOTION FOR ATTORNEY FEES**

HEARING REQUESTED

1 IN THE MATTER OF THE PETITION OF
2 COYOTE SPRINGS INVESTMENT, LLC

CONSOLIDATED WITH:
Case No.: A-20-817765-P (Sub Case)
Dept. No.: 1

3 IN THE MATTER OF THE PETITION OF
4 APEX HOLDING COMPANY, LLC

Case No.: A-20-817840-P (Sub Case)
Dept. No.: 1

5 IN THE MATTER OF THE PETITION OF
6 CENTER FOR BIOLOGICAL DIVERSITY

Case No.: A-20-817876-P (Sub Case)
Dept. No.: 1

7 IN THE MATTER OF THE PETITION OF
8 MUDDY VALLEY IRRIGATION COM
9 PANY

Case No.: A-20-817977-P (Sub Case)
Dept. No.: 1

10 IN THE MATTER OF THE PETITION OF
11 NEVADA COGENERATION ASSOCIATES
12 NOS. 1 AND 2

Case No.: A-20-818015-P (Sub Case)
Dept. No.: 1

13 IN THE MATTER OF THE PETITION OF
14 GEORGIA-PACIFIC GYPSUM, LLC AND
15 REPUBLIC ENVIRONMENTAL
16 TECHNOLOGIES, INC.

Case No.: A-20-818069-P (Sub Case)
Dept. No. 1

17 IN THE MATTER OF THE PETITION OF
18 LINCOLN COUNTY WATER DISTRICT
19 AND VIDLER WATER COMPANY, INC.

Case No.: A-21-833572-J
Dept. No. 1

20
21 **COYOTE SPRINGS INVESTMENT, LLC'S MOTION FOR ATTORNEY FEES**

22 Coyote Springs Investment, LLC, Petitioner in Case No. A-20-817765-P, moves
23 this Honorable Court for its Order awarding it attorneys' fees. This motion is based
24 upon the pleadings on file herein, Rule 54(d) of the Nevada Rules of Civil Procedure,
25 NRS 18.010(2)(b), and NRS 18.010(1). This motion is being filed less than 21 days
26 from the entry of judgment filed herein on April 19, 2022. This motion is also supported
27 and based upon the attached points and authorities.

28 ///

1 Dated this 5th day of May, 2022.

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21 *Attorneys for Petitioner*
22 *Coyote Springs Investment, LLC*

23 **MEMORANDUM OF POINTS AND AUTHORITIES**

24 **I. INTRODUCTION**

25 For nearly six years, Coyote Springs Investment, LLC (“CSI”) has been relentlessly
26 trying to convince the Nevada State Engineer that it does not have statutory or legal
27 authority to create a “mega basin.” In November of 2017, the Las Vegas Valley Water
28 District (“LVVWD”) refused to honor its contract with CSI and shifted its concern to the
State Engineer. See **Exhibit 1** (November 2017 letter). LVVWD initiated the conflict
which was recently resolved by this Honorable Court’s Findings of Fact, Conclusions of
Law, and Order entered in this matter on April 19, 2022.

The State Engineer responded to LVVWD’s expression of concern on or about

1 May 16, 2018. See **Exhibit 2** (May 16, 2018, letter). The State Engineer, with no
2 scientific data to support its decision, informed CSI that it had no water to develop its
3 approved projects. The May 16, 2018, letter (Exh. 2) arbitrarily, capriciously, without due
4 process, and without any evidence to support its letter, put a moratorium on CSI's
5 development efforts.

6 CSI promptly filed a Petition for Judicial Review challenging the State Engineer's
7 May 16, 2018, letter. CSI alleged that the State Engineer had no authority to curtail,
8 eliminate, restrict, or limit CSI's utilization of its 4,140 acre-feet of permitted groundwater.
9 The State Engineer essentially conceded that the May 16, 2018, letter was inappropriate
10 and as a result the initial Petition for Judiciary Review was settled pursuant to the July 29,
11 2018, Settlement Agreement attached hereto as **Exhibit 3**.

12 The mega basin concept concocted by the State Engineer was challenged from
13 the beginning. Those arguments were met with the State Engineer's disdain for anyone
14 arguing that the State Engineer abused his power. Then, like in the 1309 arguments, the
15 State Engineer was dismissive, if not demeaning, of any suggestion that the State
16 Engineer was anything but omnipotent.

17 The State Engineer settled the initial Petition for Judicial Review while harboring
18 an intent to utilize other measures to curtail, restrict, and limit CSI's right to use its
19 permitted water. On September 18, 2018, the State Engineer distributed a Draft Order.
20 The scientific basis for the Draft Order (attached as **Exhibit 4**) was not known. The Draft
21 Order was further evidence that the State Engineer had, at best, a paucity of technical
22 and scientific data to support any restrictions or limitations on CSI's right to utilize the
23 groundwater it had been permitted to use. The State Engineer was considering
24 curtailment of CSI's groundwater pumping on the basis that CSI's rights were part of the
25 six-basin mega basin, which at that time consisted of six separate and distinct
26 hydrological basins. The State Engineer had never before combined distinct basins into
27 one "mega basin".

28 Despite CSI's repeated assertions that the State Engineer had no statutory or

1 constitutional authority to create a six-basin mega basin, the State Engineer proceeded
2 without scientific data or information to support its conduct. The Draft Order was a non-
3 starter. It was replaced by Interim Order 1303 in January 2019. The inconsistencies and
4 contradictions between and among the May 16, 2018, letter, the Draft Order, and Interim
5 Order 1303 are self evident. Order 1303 arbitrarily and capriciously shut down all
6 development at Coyote Springs. Nonetheless, the creation of the improper and illegal
7 mega basin was a predicate to all three improper rulings.

8 CSI challenged Interim Order 1303 with yet another Petition for Judiciary Review.
9 CSI made its position abundantly clear. Interim Order 1303 imposed an illegal
10 moratorium on all construction activities in the “mega basin”. Order 1303 was based on
11 the mega basin concept, one never before utilized by the State Engineer. Interim Order
12 1303 acknowledged that the State Engineer was without adequate and sufficient technical
13 and scientific data to restrict, curtail, or limit any permitted users’ water rights. Despite
14 not having adequate and sufficient technical and scientific data, the State Engineer “shut
15 down” all of CSI’s development opportunities, impermissibly, in violation of clearly worded
16 statutes. He did so with conscientious indifference to CSI’s constitutional rights to due
17 process.

18 The legal proceedings in CSI’s second Petition for Judicial Review, in which CSI
19 challenged Interim Order 1303, bogged down, certainly not by accident. Various motions
20 were filed in that proceeding that delayed the determination of whether CSI had correctly
21 argued the State Engineer improperly and illegally created the six-basin mega basin. The
22 proceeding challenging Interim Order 1303 was stayed in August 2019 because the 1303
23 Administrative Hearing which led to Order 1309 was imminent.

24 The 1303 Administrative Hearing was punctuated with repeated claims and
25 arguments that the State Engineer had no authority to regulate, limit, impair, and curtail
26 water rights based upon its illegal creation of the six-basin mega basin. Those arguments
27 were improperly and unreasonably ignored. As a result, CSI incurred substantial fees in
28 its attempt to convince the State Engineer that its efforts to curtail CSI’s water rights

1 through the mega basin concept was illegal, not supported by statute, and was
2 unconstitutional.

3 In June 2020, the State Engineer issued Order 1309 (“1309”). Eight different water
4 users challenged the legality of 1309. In several of eight petitions for judiciary review
5 (consolidated for administration in this case), the State Engineer was inundated with
6 arguments and briefs reminding and informing the State Engineer that his creation of the
7 mega basin was disastrous and volitive of the statutes that govern the State Engineer’s
8 conduct.

9 The way in which the State Engineer defended 1309 requires careful attention.
10 The State Engineer claimed that CSI was manufacturing a **new** “basin-by-basin”
11 management rule when in fact the State Engineer has always managed the basins in a
12 basin-by-basin manner. The argument was in bad faith. CSI submitted, as part of the
13 record, a brief filed by the State Engineer in an unrelated matter in which the State
14 Engineer expressly acknowledged that Nevada groundwater is regulated in a basin-by-
15 basin manner. The hypocrisy is obvious, as is the bad faith.

16 The State Engineer approached the 1309 proceedings with indifference and
17 arrogance. The State Engineer suggested that the Court was incapable of interpreting
18 the law that pertains to use of groundwater and suggested that all Courts should defer to
19 its omnipotence. Incredibly, the State Engineer engaged in the fake and untrue argument
20 that it did not know what a “basin” was. The procedural contortions and machinations in
21 which that State Engineer contrived more than justify an award of attorney’s fees under
22 NRS 18.010(2)(b).

23 **II. STANDARD OF REVIEW FOR ATTORNEYS’ FEES**

24 This Court has broad discretion to award attorney fees pursuant to NRS 18.010.
25 *Valley Elec. Ass’n v. Overfield*, 121 Nev. 7, 9, 106 P.3d 1198, 1199 (2005). Under NRS
26 533.450, parties aggrieved by a decision of the State Engineer are allowed to seek judicial
27 review of the decision before a district court. Importantly, petitions for judicial review filed
28 pursuant to NRS 533.450 are governed by the “practice in civil cases...” NRS 533.450(8).

1 NRS 18.010 is part of Nevada’s “civil practice.” In Nevada’s civil practice, attorneys’ fees
2 can be awarded “upon a finding that a party maintained a claim without reasonable
3 ground.” NRS 18.010(2)(b). “To support such an award, . . . there must be evidence in
4 the record supporting the proposition that the complaint was brought without reasonable
5 grounds or to harass the other party.” *Khan v. Morse & Mowbray*, 121 Nev. 464, 479, 117
6 P.3d 227, 238 (2005) (internal quotations omitted).

7 Further, NRS 18.010(2)(b) permits a granting of a motion for attorney’s fees can
8 be granted “[w]ithout regard to the recovery sought...” and therefore, a monetary
9 recovery is not a prerequisite.

10 To be awarded fees under NRCP 54 (d), CSI must show:

11 1. The motion for fees was filed within 21 days from Notice of Entry of
12 the Court’s Findings, Conclusions and Order. CSI has complied.

13 2. The statute entitling CSI to fees. CSI has complied. NRS 18.010
14 (2) (a) applies. It allows fees to be awarded to the prevailing party when the prevailing
15 party does not recover more than \$20,000. CSI prevailed and has not been awarded
16 more than \$20,000. NRS 18.010 (2) (b) is also applicable authority. Both should be
17 construed “liberally” in favor of awarding fees.

18 3. The amount sought. See attached **Exhibit 5**, Declaration of Kent
19 Robison. The amount being sought is \$804,963.

20 4. Agreements for payment for legal services. See Exh. 5. CSI has
21 complied.

22 5. Compliance with the *Brunzell* factors. See *supra*; and

23 6. Points and authorities in support of the *Brunzell factors*. Please see
24 below. CSI has complied.

25 **III. ARGUMENT**

26 **A. The State Engineer’s Defense of Order 1309 was without Reasonable 27 Grounds Because There Were No Reasonable Grounds for the State 28 Engineer to Contend He could Create the Illegal Mega Basin.**

The following positions taken by the State Engineer in this proceeding highlight the

1 unreasonable of the State Engineer's defense of Order 1309:

2 1. The State Engineer contended that the Petitioners were
3 “[m]anufacturing a new ‘basin-by-basin’ management rule [that] would have no basis in
4 Nevada water law and be contrary to the policy of conjunctive management.” State
5 Engineer’s Answering Brief, p. 31. The State Engineer made this argument despite the
6 fact that Nevada’s water has *always* been managed in a basin-by-basin approach, which
7 the State Engineer knows and has confirmed in other cases and legislative sessions. See
8 **Exhibit 6** (State Engineer’s Answering Brief, filed in *Pyramid Lake Paiute Tribe of Indians*
9 *v. Ricci*, Case No. CV01-05764). The State Engineer’s awareness of the hypocrisy of
10 this argument is also shown in the legislative history of AB 51. This legislative effort was
11 pursued by the State Engineer as an acknowledgment that no statutory authority existed
12 for conjunctive management of multiple hydrological basins. The State Engineer’s
13 legislative efforts to essentially create the mega basin concept failed and AB 51 did not
14 pass.

15 2. The State Engineer represented that he “cited several bases for his
16 legal authority to jointly administer the LWRFS” in Order 1309. Answering Brief, p. 12.
17 That is false. The State Engineer has never identified any statute that supports Order
18 1309.

19 3. The State Engineer argued that the 1303 hearing was not intended
20 to determine policy, conflicts, or curtailment, while simultaneously contending that “Order
21 1309 gives force to that rule [of prior appropriation] by determining the amount of water
22 that can be pumped by holders of junior rights without interfering with senior rights.”
23 Answering brief, p. 12.

24 4. The State Engineer characterized the six factors applied in Order
25 1309 to determine hydraulic connection as the “lodestar” for such analysis when those
26 factors had never been used nor identified by the State Engineer (or anyone) prior to
27 Order 1309. Answering Brief, p. 13.

28 5. The State Engineer randomly added Kane Springs Valley to the

1 LWRFS when the 1169 Pump Tests were not even conducted in Kane Springs Valley.

2 6. The State Engineer tried to frame his attempt to combine distinct
3 basins into one mega basin as a “factual determination” in order to argue that this Court
4 could not question it because the State Engineer knew that there was no statutory
5 authority to do so. Answering Brief, p. 18.

6 7. The State Engineer’s argument regarding his statutory authority was
7 completely without legal basis or reasonable ground. The State Engineer argued that
8 “[c]hallenges to the State Engineer’s authority start with the text” and “[h]ere, they can
9 end there too”. Answering Brief, p. 30. But the State Engineer did not identify any “text”
10 to support the actions taken in Order 1309. Instead, the State Engineer took the position
11 that if the statutes do not say he *cannot* do something, then he must be able to do it. *Id.*
12 (“That language does not constrain the State Engineer’s fealty to decrees and vested
13 rights depending on a basin-by-basin approach.”).

14 8. The State Engineer falsely claimed that Order 1309 was the result of
15 an investigation under NRS 534.110(6) when it clearly was not as the State Engineer did
16 not follow the proper procedure to conduct such an investigation and Order 1169 did not
17 order an investigation under NRS 534.110(6). *Id.* at p. 30-31.

18 9. The State Engineer argued that he was “acting pursuant to an
19 express power from the Legislature and conducting fact finding that he is uniquely
20 qualified to do under Nevada law.” *Id.* at p. 31. Again, this was a blatantly false and
21 unsupported argument.

22 10. The State Engineer feigned confusion at the “Petitioners’ *concept* of
23 a basin” when the State Engineer, all water rights holders, and the Nevada Supreme
24 Court have all shared the same understanding of what a basin is for decades.

25 11. While citing his own Water Words Dictionary that defines what the
26 basins are in Nevada, the State Engineer argued that “The number 232 is not a magic
27 legal number. It is found nowhere in the Nevada Revised Statutes to constrain the State
28 Engineer’s view of what constitutes a basin.” Answering Brief, p. 33. The State

1 Engineer's arguments about what a basin is (or is not) are frivolous.

2 12. The State Engineer did not even attempt to conduct a statutory
3 interpretation analysis and dismissed—without any legal basis or reasonable ground—
4 CSI's actual statutory interpretation analysis. *Id.*

5 13. The State Engineer argued that the basins were "determined for
6 'water planning and management purposes' and not because of any statutory reason",
7 Answering Brief, p. 34, but the statutes define how water within basins are managed. The
8 State Engineer's representation that the Petitioners "cite no statute requiring the State
9 Engineer to manage Nevada's water basin-by-basin" is false.

10 14. The State Engineer's argument that the "Legislature left it to the State
11 Engineer to identify basins as a management and planning tool" is blatantly false and
12 unsupported.

13 15. The State Engineer's attempt to admonish this Court not to question
14 his authority to create a mega basin was completely unreasonable and unprofessional.
15 *Id.* at p. 34 ("To ask this Court to overrule the State Engineer's view that the LWRFS is a
16 basin is to not only stray into the unfamiliar but also to delve into a scientific question
17 where courts lack special scientific expertise.").

18 16. The State Engineer argued that "Nothing in Order 1309 jeopardizes
19 priority or finality of vested water rights. There is not a sentence in Order 1309 that adjusts
20 the priority of water rights or lessens their finality." Answering Brief, p. 35. Yet Order
21 1309 completely impacted the Petitioners' priority rights because, as this Court
22 acknowledged, it is the relative priority rights in a basin that determines how valuable the
23 right is. The State Engineer, again, acted like this was a novel concept when he (and all
24 water rights holders) knows that it is true.

25 17. The State Engineer attempted to mislead this Court regarding the
26 standard of review by arguing that "When discussing the persuasive character of the State
27 Engineer's interpretation of Chapters 533 and 534, the Nevada Supreme Court has been
28

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

9 **B. The State Engineer Made False and Unsupported Arguments.**

10 As demonstrated by the foregoing, the State Engineer's defense of Order 1309
11 was clearly without reasonable ground as several of the State Engineer's arguments were
12 based on false representations of Nevada law and the historical management of Nevada's
13 groundwater and surface water. The State Engineer is a state entity that holds great
14 power to impact people's lives. Water rights holders in Nevada should be able to trust
15 that the State Engineer will follow the law and act within the scope of his authority.
16 Receiving the State Engineer's Answering Brief in this case was quite alarming. Not only
17 was the State Engineer's tone surprisingly condescending and flippant, but it was also
18 shocking to realize that the State Engineer could so confidently take the position that the
19 Petitioners were "manufacturing" a new basin-by-basin management rule. The State
20 Engineer's reckless disregard for applicable law is disappointing and cannot be condoned
21 by this Court. Fees are more than appropriate under NRS 18.010(2)(b) and will hopefully
22 deter this type of litigation practice by the State Engineer in the future.

23 **C. The Brunzell Factors.**

24 This Court must consider the following factors when granting a motion for attorney
25 fees: (1) the qualities of the advocate; (2) the character of the work to be done; (3) the
26 work performed; and (4) the result. The *Brunzell* factors are analyzed in *Schouweiler v.*

27 _____
28 ¹ The State Engineer incorrectly cited NRS 533.450(9), which is an outdated version of the statute. The
current version of the statute is NRS 533.450(10).

1 Yancy Co., 101 Nev. 827, 712 P.2d 786, 790 (1985).

2 **1. Qualities of the Advocates**

3 **a. Brownstein Firm**

4 CSI was represented by Brownstein Hyatt Farber Schreck, LLP in this matter. See
5 **Exhibit 7** (Declaration of Bradley J. Herrema). Bradley J. Herrema, Matthew J.
6 McKissick, and Brook Wangsgard were the Brownstein lawyers who provided services to
7 CSI. The Brownstein firm is a nationally recognized, AV rated firm. Brownstein employs
8 well qualified attorneys, three of whom provided legal services for CSI in this matter.
9 Attached to Exhibit 7 is Mr. Herrema's statement of qualifications Exhibit 7(b). His skill,
10 expertise, competence, and reputation as an extraordinary attorney who focuses on water
11 law are unmatched.

12 Similarly, Matthew J. McKissick is a skillful, qualified, and competent lawyer as
13 reflected by his experience and statement of qualifications, which is attached as Exhibit
14 7(c). Mr. McKissick has been recognized as one of the top lawyers in Las Vegas
15 according to Vegas Inc's 2021 publication.

16 **b. Robison, Sharp, Sullivan & Brust**

17 Kent Robison is an extremely experienced and well qualified litigator, as shown in
18 his statement of qualifications, which is attached to Mr. Robison's declaration (attached
19 hereto as Exhibit 5(a)). Mr. Robison has practiced law for nearly 50 years and has
20 represented CSI in complicated water matters since 2016. A simple and cursory review
21 of Mr. Robison's statement of qualifications results in the inescapable conclusion that his
22 skill, talent, experience, experience, and standing in the legal community cannot be
23 seriously questioned.

24 Hannah Winston is a shareholder in the Robison firm and was assigned the difficult
25 task of briefing the complicated legal issues presented in these consolidated cases. Ms.
26 Winston presented arguments concerning the unauthorized conduct of the State Engineer
27 that presented constitutional issues that resulted in a decision that was extremely
28 favorable to her client. Ms. Winston, a former Nevada Supreme Court law clerk for the

1 Honorable James Hardesty, has excelled in her area of focus, which is appellate
2 advocacy See Exhibit 5.

3 **c. Emilia Cargill**

4 Ms. Cargill is counsel of record in this case and has appeared as co-counsel for
5 CSI since it filed its petition for judicial review in July of 2021. Ms. Cargill's experience
6 and qualifications are reflected in her declaration, which is attached hereto as **Exhibit 8**.
7 Ms. Cargill is an extremely experienced real estate development and land planning lawyer
8 familiar with all of the complicated factors that pertain to the Coyote Springs development,
9 including water rights and all agreements and matters arising from and related to CSI's
10 water rights. Ms. Cargill's knowledge, experience, and expertise with matters presented
11 in this proceeding were crucial to the result achieved.

12 **2. Character of Work**

13 The work performed by CSI's attorneys involved water law issues that were
14 created with the initial Order 1169 pump tests. From Order 1169 to and through closing
15 arguments, CSI's counsel was confronted with the analysis, evaluation, and scrutiny of
16 tens of thousands of pages of reports, documents, and surveys. The character of the
17 work performed by CSI's lawyers is highlighted by the fact that the State Engineer has
18 steadfastly refused to acknowledge its ongoing violations of the Nevada Revised
19 Statutes, which governs its conduct and authority. The record on appeal in this case was
20 massive and required CSI's lawyers to be familiar with all facets of the administrative
21 proceedings, including complicated hydrological reports, geological surveys, expert
22 analyses, case interpretation, and scrutiny of statutory authority. The complicated
23 character of the work performed more than justifies the amount of fees charged to CSI
24 for the complex work performed by CSI's lawyers.

25 **3. Work Performed**

26 Mr. Herrema's declaration includes an analysis of the work performed by the
27 Brownstein lawyers for and on behalf of CSI See Exhibit 7(a). Those services were
28 reasonable and completely necessary. The work performed by the Robison firm and its

1 lawyers is summarized in the attached Exhibit 5(b). Ms. Winston and Mr. Robison served
2 as lead counsel and orchestrated what can be characterized as one of the most significant
3 accomplishments in Nevada's water law history. Ms. Cargill's familiarity with all issues
4 concerning the development of Coyote Springs was and is an extraordinary contribution
5 to the work performed. As shown in the attached Exhibits 5, 7, and 8, the rates charged
6 by CSI's lawyers are more than reasonable because lawyers in the Las Vegas
7 professional community are charging well in excess of \$600 per hour.

8 Given the qualities of CSI's lawyers, the nature of the work they performed, and
9 the challenges with which they were confronted, the fees charged by the Brownstein firm
10 in the amount of \$197,384, the Robison firm in the amount of \$381,529, and the
11 reasonable fees for Ms. Cargill's dedication and effort in the amount of \$226,050, (see
12 Exhibit 8(a)), should be awarded for a total award of \$804,963.

13 **4. The Result**

14 The result in this case that CSI's lawyers secured for CSI was an outstanding and
15 overwhelming victory. After years of challenging the State Engineer's unlawful
16 characterization of six separate hydrological basins as one mega basin, justice was finally
17 reached in April 2022. This Court's findings of fact and conclusions of law closely parallels
18 CSI's arguments in its Opening Brief, which is a result that more than justifies the award
19 of attorney fees since CSI was unquestionably victorious in its efforts to have a judicial
20 declaration that Order 1309 violated due process and Nevada law.

21 **IV. CONCLUSION AND REMEDY SOUGHT**

22 CSI's legal team has worked for years to correct the injustice imposed upon CSI
23 by the Nevada State Engineer. The State Engineer's defense of Order 1309 was
24 shockingly improper and unreasonable. The State Engineer did not even conduct a
25 statutory interpretation analysis in this case, despite contending that his authority to issue
26 Order 1309 was somehow rooted in Nevada's water law statutes. This Motion should be
27 granted to deter future unreasonable litigation practices that greatly impact water rights
28 holders in Nevada.

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

DATED this 5th day of May, 2022.

ROBISON, SHARP, SULLIVAN & BRUST
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EXHIBIT LIST

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<u>Exhibit No.</u>	<u>Description</u>	<u>Pages</u>
1	11/16/2017 Letter from LVVWD	1-2
2	5/16/18 Letter from the State Engineer	3-5
3	8/29/18 Settlement Agreement	6-7
4	9/18/18 Draft Order	8-20
5	Declaration of Kent R. Robison, Esq.	21
5(a)	CV of Kent R. Robison, Esq.	22-26
5(b)	Bills from Robison, Sharp, Sullivan & Brust	27-62
6	State Engineer's Answering Brief, filed in <i>Pyramid Lake Paiute Tribe of Indians v. Ricci</i> , Case No. CV01-05764	63-94
7	Declaration of Bradley J. Herrema, Esq.	95-97
7(a)	Bills from Brownstein Firm	98-189
7(b)	Bradley J. Herrema, Esq. Biography	190-193
7(c)	Mathew J. McKissick, Esq. Biography	194-196
8	Emilia K. Cargill, Esq. CV	197-200
8(a)	Emilia K. Cargill, Esq. Fees	201

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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 INVESTMENTS, LLC'S MOTION FOR ATTORNEY FEES** to be served on all parties to this action by:

_____ placing an original or true copy thereof in a sealed, postage prepaid, envelope in the

United States mail at Reno, Nevada, addressed to:

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

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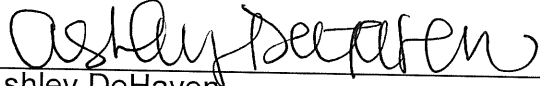
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DATED: This 5th day of May, 2022.



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