**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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ADAM SULLIVAN, P.E., NEVADA STATE ENGINEER, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES; SOUTHERN NEVADA WATER AUTHORITY; CENTER FOR BIOLOGICAL DIVERSITY; AND MUDDY VALLEY IRRIGATION CO.,

Appellants,

vs.

LINCOLN COUNTY WATER DISTRICT; VIDLER WATER COMPANY, INC.; COYOTE SPRINGS INVESTMENT, LLC; NEVADA COGENERATION ASSOCIATES NOS. 1 AND 2; APEX HOLDING COMPANY, LLC; DRY LAKE WATER, LLC; GEORGIA-PACIFIC GYPSUM, LLC; REPUBLIC ENVIRONMENTAL TECHNOLOGIES, INC.; SIERRA PACIFIC POWER COMPANY, D/B/A NV ENERGY; NEVADA POWER COMPANY, D/B/A/ NV ENERGY; THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; MOAPA VALLEY WATER DISTRICT; WESTERN ELITE ENVIRONMENTAL, INC.; AND BEDROC LIMITED, LLC; CITY OF NORTH LAS VEGAS,

Respondents.

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**Case No. 84739**
Case No. 84741
Case No. 84742
Case No. 84809
Case No. 85137

District Court
Case No.
A816761

**RESPONDENTS LINCOLN COUNTY WATER DISTRICT'S AND VIDLER WATER COMPANY, INC.'S PETITION FOR REHEARING**

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

~ and ~

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

*Attorneys for Respondent, LINCOLN COUNTY WATER DISTRICT*

KAREN A. PETERSON, ESQ.
Nevada State Bar No. 366
ALIDA C. MOONEY, ESQ.
Nevada State Bar No. 16282
**ALLISON MacKENZIE, LTD.**
402 North Division Street
Carson City, NV 89703-4168
Telephone: (775) 687-0202
Facsimile: (775) 882-7918
Email: kpeterson@allisonmackenzie.com
Email: amooney@allisonmackenzie.com

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

## NRAP 26.1 DISCLOSURE STATEMENT

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

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

2. Respondent, VIDLER WATER COMPANY, INC. ("Vidler"), is a Nevada corporation authorized to conduct business in the state of Nevada.

3. All parent corporations and publicly held companies owning 10 percent or more of any of Respondent, Vidler's stock:

Vidler's parent company is D.R. Horton, Inc., a Delaware corporation and a publicly held company that owns 10% or more of Vidler's stock.

4. Names of all law firms whose attorneys have appeared for Respondents Lincoln and Vidler in this case:

Lincoln County District Attorney, Snell & Wilmer, L.L.P., and Great Basin Law have appeared for Lincoln. Allison MacKenzie, Ltd. has appeared for Vidler. Snell & Wilmer, L.L.P. has been substituted out of this case and no longer represents Lincoln.

5. If any litigant is using a pseudonym, the litigant's true name:

Not applicable.

DATED this 12th day of February, 2024.

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

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

~ and ~

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

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

*Attorneys for Respondent, LINCOLN COUNTY WATER DISTRICT*

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///

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

By: *<u>/s/ Karen A. Peterson</u>*
KAREN A. PETERSON, ESQ.
Nevada State Bar No. 366
ALIDA C. MOONEY, ESQ.
Nevada State Bar No. 16282
Email: kpeterson@allisonmackenzie.com
Email: amooney@allisonmackenzie.com

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

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Respondents Lincoln and Vidler, pursuant to Nevada Rules of Appellate Procedure ("NRAP") 40, file this Petition for Rehearing.

**A. Standard for Rehearing.**

Pursuant to NRAP 40(c)(2), rehearing will be considered by the Court when a material fact in the record or a material question of law in the case has been overlooked or misapprehended or controlling authority on a dispositive issue has been overlooked, misapplied, or not considered.

**B. No notice was provided to all water right holders in the seven basins of the State Engineer's investigation.**

In making its due process determination, the Court overlooked that the State Engineer did not provide notice to all water right holders in the seven basins that the State Engineer was conducting an investigation pursuant to the curtailment statute – NRS 534.110(6) – prior to determining the boundaries of the Lower White River Flow System ("LWRFS") and establishing a pumping cap for the basin.[1] The Court has previously held junior water rights holders should be given notice in curtailment proceedings at an appropriate stage in the proceedings to give parties meaningful input in the adjudication of their rights. *Eureka County v. Seventh Jud. Dist. Ct.*, 134 Nev. 275, 280, 417 P.3d 1121, 1125 (2018), citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) ("It is equally fundamental that the right to notice and an opportunity

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[1] This issue was raised in Lincoln and Vidler's Answering Brief Re Due Process Issue B at 17-18 and Respondents' Joint Answering Brief at 11, 20.

to be heard must be granted at a meaningful time and in a meaningful manner."); *cf.*, *Wilson v. Pahrump Fair Water, LLC*, 137 Nev. 10, 17-18, 481 P.3d 853, 859 (2021) (noting that failure of the State Engineer to provide notice prior to a decision that could impact "established water rights[] would unquestionably be fatal"). "[J]unior 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" so they are able to make their case for or against the option of curtailment. *Eureka County*, 134 Nev. at 280-81, 417 P.3d at 1125. Notice provided after certain decisions in the adjudication of their rights are made violates due process. *Id.*[2]

The Court's Opinion states the findings of the State Engineer were purely factual in Order 1309, no policy or management issues were resolved, no deprivation of priority property rights occurred because Order 1309 rescinded the portion of Interim Order 1303 that reordered priority rights[3], and no loss of flow resulted to any respondent, much less the "possible outcome" of curtailment. *See* Opinion at 27-28. However, the State Engineer failed to give notice to all water right holders (permitted and vested) in the seven basins of his intent to conduct an investigation under NRS 534.110(6) as to the boundaries of the LWRFS and the maximum amount of water

[2] Notice to all holders of water rights in the seven basins of the State Engineer's factual determinations binding on their water rights would be required under any of the statutory provisions referenced in the Court's Opinion.

[3] As set forth in Section C below, this holding is incorrect as a matter of law.

that can be pumped from the LWRFS. The factual determinations the State Engineer intended to make would be binding on all existing water right holders in the basins. No one, including Respondents, had notice the Order 1303 proceedings were being conducted as an investigation under NRS 534.110(6) because neither Order 1303 nor the applicable Notice of the Hearing put anyone on notice of such an investigation. 2 JA 394-412; 464-503.[4]

Permitted and vested water rights holders in the seven basins notified after these factual decisions were made by the State Engineer have now been deprived of the opportunity to argue for or against the inclusion of a basin or any portion of a basin in the LWRFS and to argue for or against the maximum amount of water that can be pumped from the LWRFS. Because these factual determinations are binding on all water right holders in the seven basins and have already been made by the State Engineer, water right holders not participating in the Order 1309 proceedings will only be able to argue their water rights are above or below the maximum amount of water that can be pumped from the LWRFS. As in *Eureka County*, notice provided to water right holders after these factual determinations have already been made by the State Engineer is too late for a water right holder bound by the State Engineer's basin boundary and pumping cap determinations to argue otherwise or for another solution.

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[4] This issue was raised in Respondents' Joint Answering Brief at 11, 20.

In addition, the Opinion rests on the errant conclusion that because the State Engineer only made factual determinations, no property rights were impacted. This conclusion misapprehends and overlooks the material fact that the determinations made by the State Engineer, even if they are only factual, are binding on all water right holders in the newly created basin. Therefore, without notice to all water right holders subject to the State Engineer's factual determinations, those water right holders were deprived of the opportunity to participate in the proceedings which resulted in factual determinations binding on their rights. That failure to provide notice violated due process requirements.

While Order 1309 did not curtail any individual user, the Court's Opinion misapprehends and overlooks the legal and actual ramifications of the State Engineer's factual determinations in Order 1309 on all water right holders in the combined basin, namely, adjusting the boundaries of the LWRFS and limiting the maximum amount of water that could be pumped within the boundaries of the LWRFS. The State Engineer's failure to provide notice to all water right holders in the affected basins violated due process because all water right holders in the seven basins are bound by his factual determinations and were not given an opportunity to participate in the proceedings binding on their property rights. *Eureka County*, 134 Nev. at 280-81, 417 P.3d at 1125.

Prior to Order 1309, the State Engineer's records admitted as exhibits at the Order 1309 hearing show the following perennial yields[5] for each of the seven basins:

Kane Springs Valley 1,000 acre feet annually ("afa");

Coyote Spring Valley 1,900-18,000 afa;

Black Mountains Area 1,300 afa;

Garnet Valley 400 afa;

Hidden Valley (North) 200 afa;

California Wash 2,200 afa; and

Muddy River Springs Area (Upper Moapa) 100-36,000 afa.

3 JA 1228-1234. The historical total combined perennial yield of all the basins prior to Order 1309 was, therefore, 7,100-54,000 afa. As these State Engineer records show, the State Engineer's factual determinations as to the basin boundaries and maximum amount that can be pumped from the LWRFS changes previous determinations as to the perennial yields of the seven basins affecting all water right holders in the seven basins—perennial yields that were relied on by those making business decisions and appropriating water in those individual basins, not the combined superbasin.

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[5] The perennial yield of a ground-water reservoir may be defined as the maximum amount of ground water that can be salvaged each year over the long term without depleting the ground-water reservoir. 3 JA 877.

Additional State Engineer records admitted as exhibits at the hearing showed all the water right holders in each of the basins. *See* 3 JA 1157-1226; 1665-1677; 1678-1680. Water right holders were not given notice of the Order 1309 proceedings. For example, and without limitation, Ascar Egtedar, Billy & Linda Parson, Dan Whitmore, Ute Leavitt, Western Mining & Minerals, Inc., Richard and Meredith Rankin, Rachael Schlarman, Hiko Land and Cattle Company, Rachael Ballow, Gardner Ranch Company, and H.E. Love were not provided notice and did not participate in the Order 1309 proceedings. For other water right holders that may have been provided notice of Order 1303, there was no notice provided the State Engineer was conducting an investigation pursuant to NRS 534.110(6). These water rights holders were: 3335 Hillside LLC, Mary K Cloud, Willam O'Donnell, Larry Brundy, Kelly Kolhoss, Casa De Warm Springs LLC, Don J & Marsha L Davis, NDOT and S & R, Inc. *See* 3 JA 1157-59, 1678-80, listing the names of all water right holders in Coyote Spring Valley, Black Mountains Area, Garnet Valley, Hidden Valley (North), California Wash, and Muddy River Springs Area (Upper Moapa). Further, since water rights are unique forms of property, those with an ownership interest cannot be adequately represented by others. *Eureka County*, 134 Nev. at 280-81, 417 P.3d at 1125-26, citing *Dixon v. Thatcher,* 103 Nev. 414, 416, 742 P.2d 1029, 1030 (1987).

Thus, the State Engineer deprived water right holders of due process when he failed to provide notice of his investigation and topics of the Order 1309 proceedings to all water right holders in the seven basins. The Court's Opinion not only overlooked the material fact that the findings made by the State Engineer were binding on all existing water right holders in the newly created basin, not just on Respondents, but also overlooked this Court's controlling authority set forth in *Eureka County* requiring the State Engineer to provide all water right holders due notice and an opportunity to be heard and participate in the State Engineer's proceeding. The Opinion further overlooked controlling authority in determining there were no due process violations in the State Engineer's proceeding because he only made factual determinations as to the basin boundaries and maximum amount that can be pumped from the LWRFS. The State Engineer should be directed to provide notice to all water right holders in the seven basins prior to any factual determinations made by the State Engineer becoming binding on all water right holders in the seven basins.

### C. <u>The Opinion ignores application of the doctrine of prior appropriation to the State Engineer's factual determinations.</u>

Once the Court determined the State Engineer had authority to delineate seven basins into a single hydrographic basin in Order 1309, the priorities of water rights were necessarily reordered relative to other water rights within the new basin boundaries as a matter of law under the prior appropriation doctrine; otherwise, that

determination is left to future proceedings leaving the superbasin in limbo and the application of the doctrine of prior appropriation as Nevada law in doubt. As this Court recognized, prior appropriation is 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." *See* Court's Opinion at 13 and 17, citing *Mineral County v. Lyon County*, 136 Nev. 503, 509, 473 P.3d 418, 423 (2020), and *Proctor v Jennings*, 6 Nev. 83, 86 (1870) ("Priority of appropriation, where no other title exists, undoubtedly gives the better right.").

Yet, when the Court held the State Engineer has implied authority to combine existing basins into one new basin and establish a pump cap for the combined basin, the Court failed to recognize that all existing water right holders in the new basin will be bound by application of the doctrine of prior appropriation, as described by the Court in its Opinion, regarding the new pump cap. The Opinion's footnote 8, which states: "[t]he factual findings in Order 1309 do not by themselves re-prioritize the rights of individual permittees, and Order 1309 revoked the portions of Interim Order 1303 that re-prioritized rights," misapprehends the doctrine of prior appropriation and fails to consider the doctrine's application to the newly created basin and the new pump cap.

If one basin has one existing water right and another basin has ten existing water rights, when a new basin is created encompassing the two basins based on the State Engineer's determination that the new basin is one source of water, the priorities of the eleven water rights are de facto re-ordered in the new basin under the doctrine of prior appropriation based upon the factual determination to create the new basin. This is especially critical because curtailment proceedings cut off the most junior rights within a basin first. *See* NRS 534.110(6) ("the State Engineer may order that withdrawals, including, without limitation, withdrawals from domestic wells, be restricted to conform to priority rights"). If the basin boundary is redrawn, so are the priorities.

Order 1309's creation of a new single basin from seven basins, therefore, did in fact re-prioritize the rights of individual permittees relative to the priorities of the larger number of existing water right holders, based upon the factual findings made by the State Engineer. The day before Order 1309 was issued, Respondents Lincoln and Vidler had the most senior water rights in Kane Springs Valley Hydrographic Basin. The day after Order 1309, the seniority of those rights in Kane Springs had been stripped away because the doctrine of prior appropriation mandates that as a matter of law. Respondents' rights are now junior to all rights in the combined basin with a more-senior priority date. The 8,000 acre foot pump cap in Order 1309 effectively makes Lincoln and Vidler's first-priority rights in Kane Springs unusable

in the new LWRFS basin because those rights are now among the most junior, far below the 8,000 acre foot pumping cap.

In determining there had been no reprioritization of existing rights and no priorities had been changed by Order 1309, the Court overlooked paragraph 4 of Order 1309 which provides: "All applications for the movement of existing groundwater rights among sub-basins of the Lower White River Flow System Hydrographic Basin will be processed in accordance with NRS 533.370." 2 JA 390.

Paragraph 4 of Order 1309 allows points of diversion of existing groundwater rights to be moved among sub-basins. Prior to Order 1309, the water rights in the seven basins (both surface and ground) were granted a point of diversion within an individual basin. The point of diversion could never be moved to a different basin, even if the rights in the new basin were junior. Rather, to move a point of diversion to a different hydrographic basin, the appropriator was required to file a new application and would receive a new priority date based on the date of application. *See* NRS 534.080(3). Because Order 1309 allows the movement of existing groundwater rights among sub-basins, a water right holder with a priority senior to any other water right holder in another basin can apply by change application to move its point of diversion to another basin without having to file a new application to appropriate water in the new basin with a new priority date. Again, because all groundwater water rights are now in one basin based upon the State Engineer's

factual determinations in Order 1309, water right priorities are de facto re-ordered in the new basin under the doctrine of prior appropriation. Because the factual determination was made by the State Engineer as to the LWRFS basin boundaries and a pump cap, water rights are automatically reordered based on the doctrine of prior appropriation.

Failure to acknowledge this re-prioritization misapprehends how the doctrine of prior appropriation works, misapplies the doctrine, and/or ignores the application of the doctrine altogether with regard to all water rights in the new basin. The Court's holding casts into question the continued applicability of prior appropriation as Nevada law, exacerbating the due process violations discussed above for existing water right holders in the seven basins.

### D. The Court overlooked Ruling 5712 in its due process analysis.

The Opinion concluded there was no due process violation because Kane Springs Valley Respondents received notice and had an adequate opportunity to be heard on the factual issues determined by the State Engineer's Order 1309. Opinion at 27. The Court determined the State Engineer's factual determinations in Order 1309 were authorized by various statutes, but the Court's Opinion overlooked and did not discuss the impact of Ruling 5712.[6]

[6] This issue was raised in Lincoln and Vidler's Answering Brief Re Due Process Issue B at 21, 24-27.

Ruling 5712 granted Lincoln and Vidler vested property rights and adjudicated numerous protest issues and expressly rejected that Kane Springs should be included within the LWRFS, an issue rendered final after all appeals were exhausted. Order 1309 overturned Ruling 5712 after Lincoln and Vidler's right became a vested property right. *Application of Filippini*, 66 Nev. 17, 22, 202 P.2d 535, 537 (1949) (recognizing that a water right as a property right becomes vested when it "has become fixed and established either by diversion and beneficial use or by permit procured pursuant to the statutory water law relative to appropriation"). As the Court recognized, the determination on whether unappropriated water exists at the source in question and whether the applied-for appropriation is detrimental to the public interest must be made at the time the application is acted upon in the first instance. Opinion at 25-26. Indeed, this Court has previously recognized that the statutory water scheme in Nevada "expressly prohibits" reprioritizing water rights after they have been appropriated unless they have been "abandoned, forfeited, or otherwise lost pursuant to an express statutory provision." *Mineral County v. Lyon County* 136 Nev. 503, 518, 473 P.3d 418, 429 (2020).

The Court held that the "State Engineer has implied authority to make a factual determination as to the boundaries of the source of water in order to make determinations on new applications for appropriations." Opinion at 26. Yet in fact, the effect of this Court's Opinion is to allow the change in boundaries to apply not

only to new applications for appropriations, but to existing, permitted rights that have already become vested property rights. The Court's decision upends the finality of water rights embodied in the doctrine of prior appropriation. It allows a later State Engineer, based upon implied authority, to overrule prior rulings granting applications that had already expressly determined that unappropriated water was available and that the appropriation was not determinantal to the public interest, based upon the express and comprehensive statutory scheme enacted by the Legislature. This is especially true here when in Ruling 5712 the prior State Engineer expressly rejected a protest that Kane Springs be included in the LWRFS.

The Court's Opinion did not address or overlooked the important question of law as to whether the State Engineer is free to throw aside a previous State Engineer's determinations in a contested proceeding which adjudicated Lincoln and Vidler's water rights applications and granted them property rights. The State Engineer already knew of the hydrologic connection between Kane Springs and the carbonate aquifer—he acknowledged this in Ruling 5712. 3 JA 713. Water right holders are entitled to know if factual determinations made in granting their vested property rights in State Engineer rulings and orders are subject to being overturned and reversed later based upon implied statutory powers.

### E. **Conclusion.**

For the reasons stated herein, Respondents Lincoln and Vidler respectfully request that rehearing be granted.

DATED this 12th day of February, 2024.

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

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

~ and ~

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

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

*Attorneys for Respondent, LINCOLN COUNTY WATER DISTRICT*

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

By: *_/s/ Karen A. Peterson_*
KAREN A. PETERSON, ESQ.
Nevada State Bar No. 366
ALIDA C. MOONEY, ESQ.
Nevada State Bar No. 16282
Email: kpeterson@allisonmackenzie.com
Email: amooney@allisonmackenzie.com

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

## CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this petition has been prepared in a proportionally spaced font using Microsoft 365 in 14-point Times New Roman font;

2. I further certify that this petition complies with the page/volume limitations of NRAP 40(b)(3) because the petition contains no more than 4,667 words excluding the title page, affirmation, this certificate of compliance, and the certificate of service.

3. Finally, I hereby certify that I have read this petition, and, to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 40(b).

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

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DATED this 12th day of February, 2024.

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

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

~ and ~

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

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

*Attorneys for Respondent, LINCOLN COUNTY WATER DISTRICT*

///

///

///

///

///

///

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

By: *__/s/ Karen A. Peterson__*
KAREN A. PETERSON, ESQ.
Nevada State Bar No. 366
ALIDA C. MOONEY, ESQ.
Nevada State Bar No. 16282
Email: kpeterson@allisonmackenzie.com
Email: amooney@allisonmackenzie.com

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

## CERTIFICATE OF SERVICE

Pursuant to NRAP 25(1)(c), I hereby certify that I am an employee of ALLISON MacKENZIE, LTD., Attorneys at Law, and that on this date, I caused the foregoing document to be served on all parties to this action by:

_✓_ Court's electronic notification system

~ and ~

_✓_ Via E-Mail as follows:

Jordan W. Montet
jmontet@maclaw.com

DATED this 12th day of February, 2024.

*/s/ John R. Brooks*
JOHN R. BROOKS