

Case No. \_\_\_\_\_

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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STATE OF NEVADA, on relation to its Division of Water Resources;  
DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES  
SULLIVAN, Nevada State Engineer,  
*Petitioner,*

Electronically Filed  
Sep 27 2023 05:01 PM  
Elizabeth A. Brown  
Clerk of Supreme Court

v.

The Eighth Judicial District Court of the State of Nevada, in and for the County of  
Clark and the Honorable Mark R. Denton,  
*Respondent,*

and

COYOTE SPRINGS INVESTMENT, LLC, COYOTE SPRINGS NEVADA,  
LLC, and COYOTE SPRINGS NURSERY, LLC,  
*Real Parties in Interest.*

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**APPENDIX VOLUME 4**

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## APPENDIX - VOLUME 4

VOLUME NO.	DOCUMENT DESCRIPTION	PAGES
I.	Complaint for Damages and Demand for Jury Trial, filed August 28, 2020	AG0107 – AG0136
VI.	Defendants Motion to Stay Proceedings Pending Nevada Supreme Court's Resolution of Related Matter, filed August 21, 2023	AG0936 – AG0960
VI.	Defendant's Opposition to Motion for Leave to File Third Amended Complaint, filed September 5, 2023	AG1008 – AG1021
VI.	Defendant's Reply in Support of Motion to Stay Proceedings Pending Nevada Supreme Court's Resolution, filed September 7, 2023	AG1022 – AG1029
III.	Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review, filed April 19, 2022	AG0454 – AG0493
VI.	Muddy Valley Irrigation Company's Notice of Appeal, filed May 26, 2022	AG0852 – AG0915
IV.	Nevada State Engineer's Amended Notice of Appeal, filed May 15, 2022	AG0494 – AG0556
VI.	Order Denying Defendant's Motion to Stay Proceedings Pending Nevada Supreme Court's Resolution, filed September 19, 2023	AG1030 – AG1036
VI.	Order Denying Motions to Dismiss, Granting Temporary Stay and Directing Supplement, and Scheduling, filed August 29, 2022	AG0922 – AG0930
I.	Order Granting Consolidation, filed August 17, 2020	AG0105 – AG0106
VI.	Order Granting Motions to Consolidate, filed June 7, 2022	AG0916 – AG0921
VI.	Order Granting Stay, filed October 3, 2022	AG0931 – AG0934
I.	Petition for Judicial Review of Nevada State Engineer Order 13096, filed July 9, 2020	AG0001 – AG0104
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II.	Plaintiffs' First Amended Complaint for Damages and Demand for Jury Trial, filed October 7, 2021	AG0137 – AG0277
III.	Plaintiffs' Second Amended Complaint for Damages and Demand for Jury Trial, filed November 12, 2021	AG0278 – AG0453
VI.	Plaintiffs' [Proposed] Third Amended Complaint for Damages and Demand for Jury Trial, filed August 21, 2023	AG0961 – AG1007
VI.	Southern Nevada Water Authority's Notice of Appeal, filed May 19, 2022	AG0795 – AG0851
VII.	Stipulation and Order to Extend Discovery Deadlines [Third Request], filed September 20, 2023	AG1037 – AG1048
V.	The Center for Biological Diversity's Notice of Appeal, filed May 16, 2022	AG0557 – AG0794

DATED this 27th day of September, 2023.

AARON FORD Attorney  
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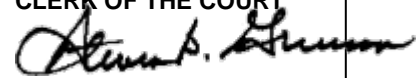
## **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing in accordance with this Court's electronic filing system and consistent with NEFCR 9 on September 27, 2023.

Participants in the case who are registered with this Court's electronic filing system will receive notice that the document has been filed and is available on the court's electronic filing system.

I further certify that any of the participants in the case that are not registered as electronic users will be mailed the foregoing document by First-Class Mail, postage prepaid.

/s/ Jeny M. Beesley  
Jeny M. Beesley, an employee of  
the Office of the Nevada Attorney General



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12 **DISTRICT COURT**  
13 **CLARK COUNTY, NEVADA**

14 LAS VEGAS VALLEY WATER  
15 DISTRICT, and SOUTHERN NEVADA  
16 WATER AUTHORITY,

16 Petitioners,

17 vs.

18 ADAM SULLIVAN, P.E., Nevada  
19 State Engineer, DIVISION OF  
20 WATER RESOURCES, DEPARTMENT  
21 OF CONSERVATION AND NATURAL  
22 RESOURCES,

21 Respondent.

22 And All Consolidated Cases.

Case No. A-20-816761-C

Dept. No. 1

Consolidated with:

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

24 **AMENDED NOTICE OF APPEAL**

25 Adam Sullivan, P.E., in his capacity as the Nevada State Engineer, Department of  
26 Conservation and Natural Resources, Division of Water Resources (hereafter "State  
27 Engineer"), by and through counsel, Nevada Attorney General Aaron D. Ford, Chief  
28 Litigation Counsel Steve Shevorski, Senior Deputy Attorney General James N. Bolotin,

Deputy Solicitor General Kiel B. Ireland, and Deputy Attorney General Laena St-Jules, pursuant to NRS 533.450(9), hereby appeals to the Nevada Supreme Court from the Court's Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review, filed by this Court on April 19, 2022. The first Notice of Entry of Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review was served on April 19, 2022, a copy of which is attached hereto as Exhibit 1.

The State Engineer files this Amended Notice of Appeal out of an abundance of caution to ensure that this is a timely appeal of a final, appealable order in light of the Court's May 13, 2022, Addendum and Clarification to Court's Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review Filed on April 19, 2022. Notice of Entry of Addendum and Clarification to Court's Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review was served on May 16, 2022, a copy of which is attached hereto as Exhibit 2.

#### **AFFIRMATION**

The undersigned does hereby affirm that the foregoing Amended Notice of Appeal does not contain the social security number of any person.

DATED this 19th day of May, 2022.

AARON D. FORD  
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By: /s/ James N. Bolotin  
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*Attorneys for Respondent, State Engineer*

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/s/ Dorene A. Wright

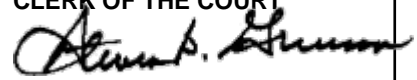
## INDEX OF EXHIBITS

EXHIBIT No.	EXHIBIT DESCRIPTION	NUMBER OF PAGES
1.	Notice of Entry of Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review filed April 19, 2022	44
2.	Notice of Entry of Addendum and Clarification to Court's Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review filed May 16, 2022	13



# EXHIBIT 1

# EXHIBIT 1



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15 WATER DISTRICT and VIDLER WATER  
16 COMPANY, INC.

17 **DISTRICT COURT**  
18 **CLARK COUNTY, NEVADA**

19 LAS VEGAS VALLEY WATER DISTRICT,  
20 and SOUTHERN NEVADA WATER  
AUTHORITY, et al.,

Case No. A-20-816761-C

Dept. No. 1

21 Petitioners,

Consolidated with Cases:

22 vs.

A-20-817765-P

A-20-818015-P

A-20-817977-P

A-20-818069-P

A-20-817840-P

A-20-817876-P

A-21-833572-J

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

24 Respondent.

25 \_\_\_\_\_/  
26 **NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW,**  
27 **AND ORDER GRANTING PETITIONS FOR JUDICIAL REVIEW**

28 ///

1           **YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE** that the *Findings of Fact,*  
2 *Conclusions of Law, and Order Granting Petitions for Judicial Review* was entered on the 19<sup>th</sup> day  
3 of April, 2022 in the above captioned and consolidated cases, a copy of which is attached hereto.

4           DATED this 19<sup>th</sup> day of April, 2022.

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**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I hereby certify that I am an employee of ALLISON MacKENZIE, LTD., Attorneys at Law, and that on this date, I caused a true and correct copy of the foregoing document to be served on all parties to this action by electronic service to the participates in this case who are registered with the Eighth Judicial District Court's Odyssey eFileNV File & Service system to this matter.

DATED this 19<sup>th</sup> day of April, 2022.

/s/ Nancy Fontenot  
NANCY FONTENOT

**INDEX OF EXHIBITS**

<u>Exhibit No.</u>	<u>Description</u>	<u>Number of Pages</u>
"1"	Findings of Fact, Conclusions of Law, And Order Granting Petitions for Judicial Review	40

4857-5859-8684, v. 1

# **EXHIBIT “1”**

FFCO

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

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

Petitioners,

vs.

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

Respondent.

And All Consolidated Cases.

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

Consolidated with Cases:

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

**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.

1 The parties stipulated to permit the following Intervenor into this matter:

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

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

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

14 **I.**

15 **PROCEDURAL HISTORY**

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

18 On June 17, 2020, the Las Vegas Valley Water District and the Southern Nevada Water  
19 Authority (collectively, “SNWA”) filed a petition for judicial review of Order 1309 in the Eighth  
20 Judicial District Court in Clark County, Nevada.<sup>2</sup> Subsequently, the following petitioners filed  
21 petitions for judicial review in the Eighth Judicial District Court: Coyote Spring Investments, LLC  
22 (“CSI”); Apex Holding Company, LLC and Dry Lake Water LLC (collectively, “Apex”); the  
23 Center Biological Diversity (“CBD”); Muddy Valley Irrigation Company (“MVIC”); Nevada  
24

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

<sup>2</sup> LVVWD and SNWA Petition for Judicial Review, filed June 17, 2020.



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

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

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

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

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<sup>3</sup> Stipulation for Consolidation, A-20-816761-C, May 26, 2021.

<sup>4</sup> Bedroc and CNLV did not file briefs and did not participate in oral argument.

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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> These flow systems connect the groundwater beneath dozens of topographic valleys across distances exceeding 200 miles.<sup>8</sup> The White River-Muddy River Springs flow system, stretching approximately

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

<sup>6</sup> SE ROA 659.

<sup>7</sup> SE ROA 661.

<sup>8</sup> SE ROA 661.

240 miles from southern Elko County in the north to the Muddy River Springs Area in the south, was identified as early as 1966.<sup>9</sup> The area designated by Order 1309 as the LWRFS consists generally of the southern portion of the White River-Muddy River Springs flow system.<sup>10</sup>

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

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

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

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<sup>9</sup> SE ROA 11349-59.

<sup>10</sup> *See* SE ROA 11350.

<sup>11</sup> SE ROA 41943.

<sup>12</sup> SE ROA 660-61, 53056, 53062.

<sup>13</sup> SE ROA 663-664, 41959, 48680.

<sup>14</sup> SE ROA 73-75, 34545, 53062.

<sup>15</sup> SE ROA 60-61, 34545.

<sup>16</sup> SE ROA 46, 34545.

<sup>17</sup> *See* SE ROA 661.

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

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

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

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

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25  
26 <sup>18</sup>SE ROA 654, 659, 699, 726, 755.

27 <sup>19</sup> SE ROA 949-1069.

28 <sup>20</sup> 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.<sup>21</sup>

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.<sup>22</sup>  
21

22  
23 <sup>21</sup> See SE ROA 2-3, 71-72.

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

1     **B.     The Muddy River Decree**

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

15     **C.     The Moapa Dace**

16             The Moapa dace (*Moapa coriacea*) is a thermophilic minnow endemic to the upper spring-  
17 fed reaches Muddy River, and has been federally listed as endangered since 1967.<sup>28</sup> Between 1933  
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19  
20     <sup>23</sup> 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).

21     <sup>24</sup> SE ROA 33770-816. Specifically, the Muddy River Decree finds “[t]hat the aggregate volume of the several  
22 amounts and quantities of water awarded and allotted to the parties . . . is the total available flow of the said Muddy  
23 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.

24     <sup>25</sup> SE ROA 33798-806.

25     <sup>26</sup> SE ROA 33775.

26     <sup>27</sup> See SNWA Report (June 2019) (SE ROA 41930 – 42072) at § 3.4.1 (SE ROA 41962) describing the predevelopment  
27 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     <sup>28</sup> 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.<sup>29</sup>

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.<sup>30</sup> 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.<sup>31</sup>

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.<sup>32</sup>

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.<sup>33</sup>

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<sup>29</sup> SE ROA 47169.

25 <sup>30</sup> SE ROA 47160.

26 <sup>31</sup> SE ROA 42087.

27 <sup>32</sup> SE ROA 4, Ex. 1.

28 <sup>33</sup> *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”).<sup>34</sup> 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).<sup>35</sup> California Wash (Basin 218) was  
9 subsequently added to this Order.<sup>36</sup>

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.<sup>37</sup> 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.<sup>38</sup>

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.<sup>39</sup> 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

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23 <sup>34</sup> SE ROA 654-669.

24 <sup>35</sup> See SE ROA 659, 665.

25 <sup>36</sup> SE ROA 659-69, Ex. 8; *see also* SE ROA 654, Ex. 7.

26 <sup>37</sup> SE ROA 719.

27 <sup>38</sup> SE ROA 713.

28 <sup>39</sup> 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.<sup>40</sup> Pumping tests effects were examined at 79 monitoring  
3 wells and 11 springs and streamflow monitoring sites.<sup>41</sup> 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.<sup>42</sup>

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.<sup>43</sup> 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."<sup>44</sup>

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23  
24 <sup>40</sup> 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 <sup>41</sup> SE ROA 6, Ex. 1.

26 <sup>42</sup> SE ROA 36230 - 36231.

27 <sup>43</sup> SE ROA 726 – 948.

28 <sup>44</sup> *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.<sup>45</sup> 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.<sup>46</sup> 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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33            <sup>45</sup> SE ROA 635-53, Ex. 6.

34            <sup>46</sup> SE ROA 82-83.

1 d. The effects of movement of water rights between alluvial wells and  
2 carbonate wells on deliveries of senior decreed rights to the Muddy River;  
and,

3 e. Any other matter believed to be relevant to the State Engineer's  
4 analysis.

5 SE ROA 647-48, Ex. 6.

6 The State Engineer identified the LWRFS as including the following hydrographic basins:  
7 Coyote Spring Valley, a portion of Black Mountains Area, Garnet Valley, Hidden Valley,  
8 California Wash, and the Muddy River Springs Area.<sup>47</sup> Kane Springs continued to be excluded as  
9 part of the LWRFS multi-basin area in Interim Order 1303.<sup>48</sup>

10 In July and August 2019, reports and rebuttal reports were submitted discussing the four  
11 matters set forth in Interim Order 1303. On July 25, 2019, the State Engineer issued a Notice of  
12 Pre-Hearing Conference, and on August 9, 2019, the State Engineer held a prehearing conference.  
13 On August 23, 2019, the State Engineer issued a Notice of Hearing (which it amended on August  
14 26, 2019), noting that the hearing would be “the first step” in determining how to address future  
15 management decisions, including policy decisions, relating to the LWRFS.<sup>49</sup> He also indicated that  
16 the legal question of whether groundwater pumping in the LWRFS conflicts with senior water  
17 rights would be addressed in Phase 2 of the LWRFS administrative process.<sup>50</sup>

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

24 \_\_\_\_\_  
25 <sup>47</sup> SE ROA 70-88.

26 <sup>48</sup> *Id.*

27 <sup>49</sup> SE ROA 263, Ex. 2 (Notice); SE ROA 285, Ex. 3 (Amended Notice).

28 <sup>50</sup> SE ROA 522.

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

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

**F. Order 1309**

On June 15, 2020, the State Engineer issued Order 1309.<sup>54</sup> The first three ordering paragraphs state as follows:

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

SE ROA 66, Ex. 1.

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

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

<sup>52</sup> SE ROA 52962, Transcript 7:5-7 (Sept. 23, 2019) (Hearing Officer Fairbank).

<sup>53</sup> See SE ROA 285, Ex. 3.

<sup>54</sup> SE ROA 2-69.

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

- 9 1. Water level observations whose spatial distribution indicates a relatively  
10 uniform or flat potentiometric surface are consistent with a close hydrologic  
11 connection.
- 12 2. Water level hydrographs that, in well-to-well comparisons, demonstrate a  
13 similar temporal pattern, irrespective of whether the pattern is caused by  
14 climate, pumping, or other dynamic is consistent with a close hydrologic  
15 connection.
- 16 3. Water level hydrographs that demonstrate an observable increase in drawdown  
17 that corresponds to an increase in pumping and an observable decrease in  
18 drawdown, or a recovery, that corresponds to a decrease in pumping, are  
19 consistent with a direct hydraulic connection and close hydrologic connection  
20 to the pumping location(s).
- 21 4. Water level observations that demonstrate a relatively steep hydraulic gradient  
22 are consistent with a poor hydraulic connection and a potential boundary.
- 23 5. Geological structures that have caused a juxtaposition of the carbonate-rock  
24 aquifer with low permeability bedrock are consistent with a boundary.
- 25 6. When hydrogeologic information indicate a close hydraulic connection (based  
26 on criteria 1-5), but limited, poor quality, or low resolution water level data  
27 obfuscate a determination of the extent of that connection, a boundary should  
28 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.

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<sup>55</sup> SE ROA 48-49, Ex. 1.

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,<sup>56</sup> 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

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<sup>56</sup> 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

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

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

**B. Questions of Fact**

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

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

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

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



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

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

### 16 CONCLUSIONS OF LAW

#### 17 **A. The State Engineer Did Not Have the Authority to Jointly Administrate Multiple** 18 **Basins by Creating the LWRFS “Superbasin,” Nor Did He Have the Authority to** 19 **Conjunctively Manage This Superbasin.**

20 The powers of the State Engineer are limited to those set forth in the law. *See, e.g., City of*  
21 *Henderson v. Kilgore*, 122 Nev. 331, 334, 131 P.3d 11, 13 (2006); *Clark Cty. School Dist. v. Clark*  
22 *Cty. Classroom Teachers Ass’n*, 115 Nev. 98, 102, 977 P.2d 1008, 1011 (1999) (*en banc*) (An  
23 administrative agency’s powers “are limited to those powers specifically set forth by statute.”);  
24 *Clark Cty. v. State, Equal Rights Comm’n*, 107 Nev. 489, 492, 813 P.2d 1006, 1007 (1991)); *Wilson*  
25 *v. Pahrump Fair Water, LLC*, 137 Nev. Adv. Op. 2, 481 P.3d 853, 856(2021) (The State Engineer’s  
26 powers thereunder are limited to “only those . . . which the legislature expressly or implicitly  
27 delegates.”); *Andrews v. Nevada State Bd. of Cosmetology*, 86 Nev. 207, 208, 467 P.2d 96, 97  
28 (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

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

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

In the instant case, the State Engineer relied on the following specific statutes as authority for combining prior independently designated basins as a superbasin newly named the LWRFS, and then conjunctively managing<sup>57</sup> this superbasin:

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

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

<sup>58</sup> SE ROA 43.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> SE ROA 44.

- 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.<sup>62</sup>
- 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.”<sup>63</sup>

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 *Env’tl. 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

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<sup>62</sup> *Id.*

<sup>63</sup> *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”<sup>64</sup> 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 <sup>64</sup> *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 seven<sup>65</sup> 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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28 <sup>65</sup> More accurately, the LWRFS is comprised of six hydrographic basins and a portion of a seventh.

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

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

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

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

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

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

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

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

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

20 **3. Conjunctive Management**

21 The Nevada State Engineer relies on NRS 534.024(1)(e), as the source of authority that  
22 allows him to manage both surface and groundwater together through “conjunctive management.”<sup>66</sup>  
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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28 <sup>66</sup> 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.<sup>67</sup> 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 <sup>67</sup> 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.”

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

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

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

The Nevada Constitution protects against the deprivation of property without due process of law. Nev. Const. art. 1, § 8(5). “Procedural due process requires that parties receive notice and an opportunity to be heard.” *Eureka Cty. V. Seventh Jud. Dist. Ct.*, 134 Nev. 275, 279, 417 P.3d 1121, 1124 (2018)(internal quotation marks omitted). “In Nevada, water rights are ‘regarded and protected as real property.’” *Id.*(quoting *Application of Filippini*, 66 Nev. 17, 21-22, 202 P.2d 535,

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<sup>68</sup> Although this Court refrains from analyzing whether or not 1309 is supported by substantial evidence, the Court notes that part of the State Engineer’s 1309 decision of limiting use to 8,000afa or less is based on the concern of adversely impacting the endangered Moapa Dace, located in the Muddy River Springs. This decision does not appear to take into account more nuanced effects of how pumping in each separate basin affects the Muddy River flows, no matter how far 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.

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

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

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

For the reasons that follow, this Court concludes that (a) the notice and hearing procedure employed by the State Engineer failed to satisfy the requirements of due process because the notice failed to put the parties on notice that the State Engineer would decide on a management protocol for

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<sup>69</sup> “[B]ecause the language in the show cause order indicates that the district court may enter an order forcing curtailment to begin, junior water rights holders must be given an opportunity to make their case for or against the option of curtailment. Notice must be given at an appropriate stage in the proceedings to give parties meaningful input in the 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.<sup>70</sup> <sup>71</sup> 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.<sup>72</sup>

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

20 <sup>71</sup> 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 <sup>72</sup> 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."<sup>73</sup> 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

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<sup>73</sup> SE ROA 648, Ex. 6.

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

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

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

19 SE ROA 54, Ex. 1.

20 This language reflects a serious misunderstanding of the effect of Order 1309. Insofar as  
21 Order 1309 subjects the LWRFS to conjunctive management and joint administration, resulting in  
22 effectively reordering of priority of water rights in the LWRFS superbasin, the order effectuates a  
23 management scheme with far reaching consequences. Thus, agreeing on the one hand that an  
24 “effective management scheme” will be necessary to address challenges in the LWRFS, but  
25

---

26 <sup>74</sup> 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,"<sup>75</sup>  
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.<sup>76</sup> These  
17 criteria were instead explicitly disclosed for the first time in Order 1309, which means the  
18 participants had no opportunity to directly address these criteria in their presentations, or critically,  
19 to address the appropriateness of these criteria.

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

26  
27 <sup>75</sup> See SE ROA 48.

28 <sup>76</sup> 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.  
28

1 IT IS FURTHER ORDERED that the petition for review of the Nevada State Engineer's  
2 Order No. 1309 filed by Petitioners Apex Holding Company, LLC and Dry Lake Water, LLC is  
3 GRANTED.

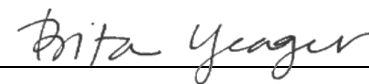
4 IT IS FURTHER ORDERED that the petition for review of the Nevada State Engineer's  
5 Order No. 1309 filed by Petitioners Nevada Cogeneration Associates Nos. 1 and 2 is GRANTED.

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

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

11  
12 IT IS SO ORDERED.

Dated this 19th day of April, 2022

13   
14

15 66B 24A E875 2549  
16 Bita Yeager  
17 District Court Judge  
18  
19  
20  
21  
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26  
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28

1 **CSERV**

2  
3 DISTRICT COURT  
4 CLARK COUNTY, NEVADA

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

CASE NO: A-20-816761-C

8 vs.

DEPT. NO. Department 1

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

12 **AUTOMATED CERTIFICATE OF SERVICE**

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

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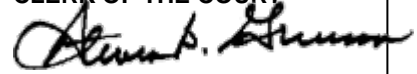
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# EXHIBIT 2

# EXHIBIT 2



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**DISTRICT COURT  
CLARK COUNTY, NEVADA**

LAS VEGAS VALLEY WATER DISTRICT,  
and SOUTHERN NEVADA WATER  
AUTHORITY, et al.

Case No. A-20-816761-C  
Dept. No. 1

Petitioners,

Consolidated with Cases:

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

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

Respondents,

**NOTICE OF ENTRY OF ADDENDUM  
AND CLARIFICATION TO COURT'S  
FINDINGS OF FACT, CONCLUSIONS OF  
LAW, AND ORDER GRANTING  
PETITIONS FOR JUDICIAL REVIEW**

//

//

1           **YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE** that the *Addendum and*  
2 *Clarification to Court's Findings of Fact, Conclusions of Law, and Order Granting Petitions for*  
3 *Judicial Review* was entered on the 13<sup>th</sup> day of May 2022 in the above captioned and consolidated  
4 cases, a copy of which is attached hereto as **Exhibit 1**, which specifically granted the Petition for  
5 Judicial Review filed by Las Vegas Valley Water District (LVVWD) and Southern Nevada Water  
6 Authority (SNWA) in part and dismissed in part.

7           DATED this 16<sup>th</sup> day of May 2022

8  
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10                               /s/ Paul G. Taggart

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27  
28





## CERTIFICATE OF SERVICE

I certify that I am an employee of Taggart & Taggart, LTD, and that on this 13th day of May 2022, I served a true and correct copy of the foregoing document by electronic service to the participants in this case who are registered with the Eighth Judicial District Court's Odyssey eFile NV File & Serve system to this matter:

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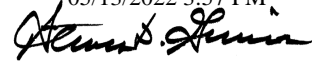
/s/ Thomas Duensing  
Employee of Taggart & Taggart, LTD.

**EXHIBIT INDEX**

<u>Exhibit</u>	<u>Description</u>	<u>Pages</u>
1.	Addendum and Clarification to Court's Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review Filed on April 19, 2022	6

# EXHIBIT 1

# EXHIBIT 1

  
CLERK OF THE COURT

FFCO

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

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

Petitioners,

vs.

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

Respondent.

And All Consolidated Cases.

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

Consolidated with Cases:

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

**ADDENDUM AND CLARIFICATION TO COURT'S FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND ORDER GRANTING PETITIONS FOR JUDICIAL  
REVIEW FILED ON APRIL 19, 2022**

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

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

1 In the Order filed April 19, 2022, the Court determined that the Nevada State Engineer  
2 exceeded his statutory authority and violated the participants' due process rights in issuing Order  
3 1309, and declined to reach further analysis on whether his factual findings in Order 1309 were  
4 supported by substantial evidence.

5 The Petitions filed by petitioners Southern Nevada Water Authority and Las Vegas Valley  
6 Water District, Muddy Valley Irrigation Company, and The Center for Biological Diversity  
7 supported the Nevada State Engineer's position that Order 1309 did not exceed the State Engineer's  
8 statutory authority nor violated participant's due process rights in issuing Order 1309. However,  
9 each of these three petitioners challenged the factual findings as not being supported by substantial  
10 evidence.

11 **IV.**

12 **CONCLUSION**

13 To the extent that the petition for review of the Nevada State Engineer's Order No. 1309  
14 filed by Southern Nevada Water Authority and Las Vegas Valley Water District seeks relief for  
15 violating their due process rights, IT IS HEREBY ORDERED that the petition is GRANTED IN  
16 PART. The remaining portion of the petition that support the position that the Nevada State  
17 Engineer did not exceed his statutory authority in issuing Order 1309 is DISMISSED.

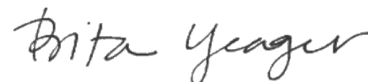
18 To the extent that the remaining petitions support the position that Nevada State Engineer did  
19 not exceed his statutory authority and provided due process in issuing Order 1309;

20 IT IS FURTHER ORDERED that the petition for review of the Nevada State Engineer's  
21 Order No. 1309 filed by Petitioner Muddy Valley Irrigation Company is DISMISSED.

22 IT IS FURTHER ORDERED that the petition for review of the Nevada State Engineer's  
23 Order No. 1309 filed by Petitioner The Center for Biological Diversity is DISMISSED.

24  
25  
26 **IT IS SO ORDERED.**

Dated this 13th day of May, 2022

27   
28

**EE8 27A A594 AF7E**  
**Bita Yeager**  
**District Court Judge**

1 **CSERV**

2  
3 DISTRICT COURT  
4 CLARK COUNTY, NEVADA

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

CASE NO: A-20-816761-C

8 vs.

DEPT. NO. Department 1

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

12 **AUTOMATED CERTIFICATE OF SERVICE**

13 This automated certificate of service was generated by the Eighth Judicial District  
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