

Case No. _____

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Electronically Filed
Sep 27 2023 05:02 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.

APPENDIX VOLUME 6

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APPENDIX - VOLUME 6

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
///		

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.

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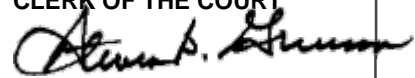
CERTIFICATE OF SERVICE

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
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**DISTRICT COURT
CLARK COUNTY, NEVADA**

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

Petitioners,

vs.

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

Respondents.

Case No. A-20-816761-C

Dept. No. 1

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

**SOUTHERN NEVADA WATER
AUTHORITY NOTICE OF APPEAL**

EXPEDITED PROCESS REQUESTED

Notice is hereby given that Petitioner SOUTHERN NEVADA WATER AUTHORITY ("SNWA"), by and through their counsel of record PAUL G. TAGGART, ESQ. and THOMAS P. DUENSING, ESQ., of the law firm TAGGART & TAGGART, LTD., and STEVEN C. ANDERSON, of SNWA, pursuant to NRS 533.450(9), hereby appeals to the Nevada Supreme Court from the Order

1 Granting Petitions for Judicial Review of State Engineer Order 1309 entered by this Court on April 19,
2 2022 (“Order”). The Notice of Entry of Order was served on April 19, 2022 (attached as Exhibit 1).¹

3 SNWA requests expedited processing of this Notice of Appeal because it plans to file an
4 emergency motion for stay of the district court’s Order, pursuant to NRAP 27(e), once the case is
5 docketed at the Supreme Court.

6
7 **AFFIRMATION**

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

10 DATED this 19th day of May 2022.

11 TAGGART & TAGGART, LTD.

12
13 By: /s/ Paul G. Taggart

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26 *Attorneys for Southern Nevada Water Authority*

27
28 ¹ On May 13, 2022, the Court issued an Addendum and Clarification to Court’s Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review Filed On April 19, 2022 (“Addendum”), (attached as Exhibit 2). Notice of Entry of Order was served on May 16, 2022. In the Addendum the Court clarified that it was granting Las Vegas Valley Water District and SNWA’s Petition for Judicial Review with respect to their due process claims and dismissed the remaining portion of the petition. The Court also dismissed Muddy Valley Irrigation Company’s petition and Center for Biological Diversity’s petition in their entirety.

CERTIFICATE OF SERVICE

I certify that I am an employee of Taggart & Taggart, LTD, and that on this 19th 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

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	44
2.	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

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25 WATER DISTRICT and VIDLER WATER
26 COMPANY, INC.

27 **DISTRICT COURT**
28 **CLARK COUNTY, NEVADA**

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

Case No. A-20-816761-C

Dept. No. 1

21 Petitioners,

22 vs.

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

25 Respondent.

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

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

28 ///

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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 19th day
3 of April, 2022 in the above captioned and consolidated cases, a copy of which is attached hereto.

4 DATED this 19th 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 participants in this case who are registered with the Eighth Judicial District Court's Odyssey eFileNV File & Service system to this matter.

DATED this 19th day of April, 2022.

/s/ Nancy Fontenot
NANCY FONTENOT

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<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”)¹.

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.² 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

25 ¹ 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.

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

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

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

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

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

25
26
27 ³ Stipulation for Consolidation, A-20-816761-C, May 26, 2021.

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

II.

FACTUAL HISTORY

A. The Carbonate Groundwater Aquifer and the Basins

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

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

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

⁶ SE ROA 659.

⁷ SE ROA 661.

⁸ SE ROA 661.

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

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

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

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

20 ⁹ SE ROA 11349-59.

21 ¹⁰ See SE ROA 11350.

22 ¹¹ SE ROA 41943.

23 ¹² SE ROA 660-61, 53056, 53062.

24 ¹³ SE ROA 663-664, 41959, 48680.

25 ¹⁴ SE ROA 73-75, 34545, 53062.

26 ¹⁵ SE ROA 60-61, 34545.

27 ¹⁶ SE ROA 46, 34545.

28 ¹⁷ 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,¹⁸ and administers and manages each
15 basin as a discrete hydrologic unit.¹⁹ The State Engineer keeps and maintains annual pumping
16 inventories and records on a basin-by-basin basis.²⁰

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

25
26 ¹⁸SE ROA 654, 659, 699, 726, 755.

27 ¹⁹ SE ROA 949-1069.

28 ²⁰ SE ROA 1070-1499.

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

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

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

19 Kane Springs Valley (“Kane Springs Valley”), Basin 206, which was also affected by
20 Order No. 1309, had not been designated previously for administration.²²
21
22

23 ²¹ See SE ROA 2-3, 71-72.

24 ²² 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.²³ The Muddy River Decree recognized specific water rights,²⁴ identified each water
5 right holder on the Muddy River, and quantified each water right.²⁵ 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. . .”²⁶. 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”).²⁷
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 1967.²⁸ Between 1933
18

19
20 ²³ See Judgment and Decree, *Muddy Valley Irrigation Co. v. Moapa and Salt Lake Produce Co.* (the “Muddy River
21 Decree” or “Decree”) (March 11, 1920) (SE ROA 33770-33816).

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

26 ²⁵ SE ROA 33798-806.

27 ²⁶ SE ROA 33775.

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

²⁸ SE ROA 5.

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

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

11 **D. Order 1169**

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

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

22
23
24 ²⁹ SE ROA 47169.

25 ³⁰ SE ROA 47160.

26 ³¹ SE ROA 42087.

27 ³² SE ROA 4, Ex. 1.

28 ³³ *Id.*

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

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

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

23 ³⁴ SE ROA 654-669.

24 ³⁵ See SE ROA 659, 665.

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

26 ³⁷ SE ROA 719.

27 ³⁸ SE ROA 713.

28 ³⁹ SE ROA 654-58, Ex. 7.

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

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

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

22
23
24 ⁴⁰ The Order uses the term acre-foot per year (afy), but for consistency with common usage, this Court uses the
equivalent term acre feet per annum.

25 ⁴¹ SE ROA 6, Ex. 1.

26 ⁴² SE ROA 36230 - 36231.

27 ⁴³ SE ROA 726 – 948.

28 ⁴⁴ See e.g., SE ROA 479.

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

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

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

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

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

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

33 ⁴⁵ SE ROA 635-53, Ex. 6.

34 ⁴⁶ 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.⁴⁷ Kane Springs continued to be excluded as
9 part of the LWRFS multi-basin area in Interim Order 1303.⁴⁸

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.⁴⁹ 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.⁵⁰

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 ⁴⁷ SE ROA 70-88.

26 ⁴⁸ *Id.*

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

28 ⁵⁰ SE ROA 522.

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

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

7 **F. Order 1309**

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

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

25 SE ROA 66, Ex. 1.

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

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

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

27 ⁵³ See SE ROA 285, Ex. 3.

28 ⁵⁴ SE ROA 2-69.

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.”⁵⁵ 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.

⁵⁵ SE ROA 48-49, Ex. 1.

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

11 **G. Petitioners and Their Respective Water Rights or Interests**

- 12 a. Southern Nevada Water Authority and Las Vegas Valley Water District are government
13 agencies serving Southern Nevada’s water needs, and own water rights in Coyote Springs
14 Valley, Hidden Valley, Garnet Valley, and a significant portion of the Muddy River decreed
15 rights.
16 b. Coyote Spring Investments, LLC is a developer who owns water rights in Coyote Spring
17 Valley, Kane Springs Valley, and California Wash;
18 c. Apex Holding Company, LLC and Dry Lake Water LLC own real estate and water rights to
19 the area of land commonly referred to as the Apex Industrial Park, in Garnet Valley and
20 Black Mountains Area;
21 d. The Center Biological Diversity is a national nonprofit conservation organization which does
22 not hold any water rights, but has educational, scientific, biological, aesthetic and spiritual
23 interests in the survival and recovery of the Moapa Dace;
24 e. Muddy Valley Irrigation Company is a private company that owns most of the decreed rights
25

26
27 ⁵⁶ The Court notes that the Nevada State Engineer determined that Kane Springs should be included in this joint
28 management area, even though the Kane Springs Basin had not been designated previously for management through the
statutory process delineated in under NRS 534.030.

1 in the Muddy River;

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

8 **III.**

9 **DISCUSSION**

10 **STANDARD OF REVIEW**

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

16 **A. Questions of Law**

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

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

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

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

9 **B. Questions of Fact**

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

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

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

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

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

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

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

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

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

22 ⁵⁷ The Nevada Water Words Dictionary, defines “Conjunctive (Water) Use” in part, as “the integrated use and
23 management of hydrologically connected groundwater and surface water.” *Water Words Dictionary, Nevada Division of
24 Water Planning* (2022) (available online at <http://water.nv.gov/WaterPlanDictionary.aspx>) The same dictionary
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.*

25 ⁵⁸ SE ROA 43.

26 ⁵⁹ *Id.*

27 ⁶⁰ *Id.*

28 ⁶¹ SE ROA 44.

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

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

8 1. *The Prior Appropriation Doctrine*

9 The doctrine of prior appropriation has been part of Nevada’s common law since the 1800’s,
10 and is a fundamental principle of water law in Nevada. *See Lobdell v. Simpson*, 2 Nev. 274, 277-78
11 (1866). “An appropriative right ‘may be described as a state administrative grant that allows the use
12 of a specific quantity of water for a specific beneficial purpose if water is available in the source free
13 from the claims of others with earlier appropriations.’” *Desert Irr., Ltd. v. State*, 113 Nev. 1049,
14 1051 n.1, 944 P.2d 835, 837 (1997) (quoting Frank J. Trelease & George A. Gould, *Water Law*
15 *Cases and Materials* 33 (4th ed. 1986)).

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

24 “A priority in a water right is property in itself”; therefore, “to deprive a person of his
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27 ⁶² *Id.*

28 ⁶³ *Id.*

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

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

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

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

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

5 2. **Joint Administration**

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

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

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

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

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

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

24 Indeed, if science was the sole governing principle to dictate the Nevada State Engineer’s
25 decisions, there would be a slippery slope in the changes that could be made in the boundaries of the
26 basins and how they are managed; each time scientific advancements and discoveries were made
27 regarding how sub-surface water structures are situated or interconnected, under this theory of
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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.

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21 **3. Conjunctive Management**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 ⁷¹ The Notice included the following summary:

21 On August 9, 2019, the State Engineer held a pre-hearing conference regarding the hearing on the
22 submission of reports and evidence as solicited in Order 1303.... The State Engineer established that
23 the purpose of the hearing on the Order 1303 reports was to provide the participants an opportunity to
24 explain the positions and conclusions expressed in the reports and/or rebuttal reports submitted in
25 response to the Order 1303 solicitation. The State Engineer directed the participants to limit the offer of
26 evidence and testimony to the salient conclusions, including directing the State Engineer and his staff
27 to the relevant data, evidence and other information supporting those conclusions. *The State Engineer*
28 *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).

⁷² SE ROA 647-48. Ex. 6.

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

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

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

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

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

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

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

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

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

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⁷³ SE ROA 648, Ex. 6.

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

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

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

19 SE ROA 54, Ex. 1.

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

26 ⁷⁴ These issues include, but are not limited to: whether Nevada law allows the State Engineer to conjunctively manage
27 multiple hydrographic basins in a manner that modifies the relative priority of water rights due to the administration
28 consolidation of basins; whether the State Engineer would establish a "critical management area" pursuant to NRS
534.110 and, if so, whether he would develop a groundwater management plan or defer to the stakeholders to develop
one; whether Nevada law gives the State Engineer authority to designate a management area that encompasses more than
one basin; whether "safe-yield" discrete management areas should be established within the proposed administrative
unit; whether water rights holders enjoy a "property right" in the relative priority of their water rights such that impairing
that right may constitute a "taking"; whether unused (or only sporadically used) senior water rights take precedence over
certificated or fully used junior rights, particularly where these junior rights are in continuous use to support
economically significant enterprises; whether States compel quantification of federal reserved rights by a date certain;
and whether the State Engineer should approach the legislature to seek different or additional management tools or
authority. See SE ROA 52801-8, Ex. 25 (Georgia Pacific and Republic Closing Argument, outlining policy questions
for consideration by the State Engineer at later proceedings, proceedings that never took place).

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

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

20 This Court is unpersuaded by the State Engineer's argument that it could develop the criteria
21 only after it heard all the evidence at the hearing. Even if it did, this does not justify a deprivation of
22 the right to due process. In order to provide the parties due process and a meaningful opportunity to
23 present evidence on these issues, the State Engineer should have included these factors in the Notice
24 of Pre-Hearing Conference. *See Eureka Cty.*, 131 Nev. at 855, 359 P.3d at 1120; *Revert*, 95 Nev. at
25 787, 603 P.2d at 265 (criticizing the state engineer for engaging in post hoc rationalization). This
26

27 ⁷⁵ See SE ROA 48.

28 ⁷⁶ SE ROA 726-948.

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

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

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

11 IV.

12 CONCLUSION

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

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

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

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

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

26 IT IS FURTHER ORDERED that the petition for review of the Nevada State Engineer's
27 Order No. 1309 filed by Petitioners Coyote Springs Investment, LLC is GRANTED.
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.

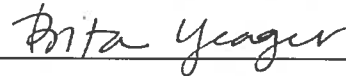
4 IT IS FURTHER ORDERED that the petition for review of the Nevada State Engineer's
5 Order No. 1309 filed by Petitioners Nevada Cogeneration Associates Nos. 1 and 2 is GRANTED.

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.

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12 IT IS SO ORDERED.

Dated this 19th day of April, 2022

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15 66B 24A E875 2549
16 Bita Yeager
17 District Court Judge
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1 CSERV

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA
4

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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Exhibit 2

Exhibit 2

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.

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26 IT IS SO ORDERED.

Dated this 13th day of May, 2022

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EE8 27A A594 AF7E
Bita Yeager
District Court Judge

1 CSERV

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA

4
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)

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14 Court. The foregoing Findings of Fact, Conclusions of Law and Judgment was served via the
15 court's electronic eFile system to all recipients registered for e-Service on the above entitled
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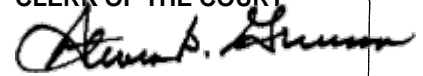
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16 **DISTRICT COURT**
17 **CLARK COUNTY, NEVADA**

18 LAS VEGAS VALLEY WATER DISTRICT
19 and SOUTHERN NEVADA WATER
20 AUTHORITY,

21 Petitioners,

22 vs.

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

28 Respondent.

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

MUDDY VALLEY IRRIGATION
COMPANY'S NOTICE OF APPEAL

Consolidated with:

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

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

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

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

IN THE MATTER OF THE PETITION OF
CENTER FOR BIOLOGICAL DIVERSITY

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

IN THE MATTER OF THE PETITION OF
MUDDY VALLEY IRRIGATION COMPANY

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

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

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

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

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

1 IN THE MATTER OF THE PETITION OF
2 LINCOLN COUNTY WATER DISTRICT
3 AND VIDLER WATER COMPANY, INC.

Case No.: A-21-833572-J (Sub Case)
Dept. No. 1

4 **MUDDY VALLEY IRRIGATION COMPANY'S NOTICE OF APPEAL**

5 MUDDY VALLEY IRRIGATION COMPANY ("MVIC"), by and through its counsel,
6 STEVEN D. KING and DOTSON LAW, pursuant to NRS 533.450(9), NRAP 4(a)(2), and NRAP
7 4(a)(1), hereby appeals to the Nevada Supreme Court from the Findings of Fact, Conclusions of
8 Law, and Order Granting Petitions for Judicial Review, filed by this Court on April 19, 2022, as well
9 as the Addendum and Clarification to Court's Findings of Fact, Conclusions of Law, and Order
10 Granting Petitions for Judicial Review Filed on April 19, 2022, filed on May 13, 2022. The first
11 Notice of Entry of Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial
12 Review was served on April 19, 2022, a copy of which is attached hereto as **Exhibit 1**. The State
13 Engineer filed a timely Notice of Appeal to the April 19, 2022, order on May 13, 2022, the Center for
14 Biological Diversity filed a timely Notice of appeal on May 16, 2022, and the Southern Nevada
15 Water Authority filed a timely Notice of Appeal on May 19, 2022. This appeal is therefore timely
16 pursuant to NRAP 4(a)(2) due to the previous appeals.

17 The Notice of Entry of Addendum and Clarification to Court's Findings of Fact, Conclusions
18 of Law, and Order Granting Petitions for Judicial Review was served on May 16, 2022, a copy of
19 which is attached hereto as **Exhibit 2**. Thus, the appeal of the addendum order is timely pursuant to
20 NRAP 4(1).

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Affirmation Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 26th day of May 2022.



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DATED this 26 day of May 2022.

L. Morgan Bogumil
L. MORGAN BOGUMIL

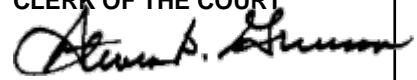
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INDEX OF EXHIBITS

EXHIBIT	DESCRIPTION	PAGES
1	Notice of Entry of Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review	45
2	Notice of Entry of Addendum and Clarification to Court's Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review	14

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 19th day
3 of April, 2022 in the above captioned and consolidated cases, a copy of which is attached hereto.

4 DATED this 19th 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 19th 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”)¹.

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.² 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

25 ¹ 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.

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

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

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

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

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

25
26 _____
27 ³ Stipulation for Consolidation, A-20-816761-C, May 26, 2021.

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

II.

FACTUAL HISTORY

A. The Carbonate Groundwater Aquifer and the Basins

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

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

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

⁶ SE ROA 659.

⁷ SE ROA 661.

⁸ SE ROA 661.

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

The Muddy River runs through a portion of the LWRFS before cutting southeast and discharging into Lake Mead.¹¹ Many warm-water springs, including the Muddy River Springs at issue in this litigation, discharge from the regional carbonate groundwater aquifer.¹² 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.¹³

The Muddy River Springs are directly connected to, and discharge from, the regional carbonate aquifer.¹⁴ 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.¹⁵ As carbonate groundwater levels decline, spring flows decrease, beginning with the highest-elevation springs.¹⁶

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.¹⁷

⁹ SE ROA 11349-59.

¹⁰ *See* SE ROA 11350.

¹¹ SE ROA 41943.

¹² SE ROA 660-61, 53056, 53062.

¹³ SE ROA 663-664, 41959, 48680.

¹⁴ SE ROA 73-75, 34545, 53062.

¹⁵ SE ROA 60-61, 34545.

¹⁶ SE ROA 46, 34545.

¹⁷ *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,¹⁸ and administers and manages each
15 basin as a discrete hydrologic unit.¹⁹ The State Engineer keeps and maintains annual pumping
16 inventories and records on a basin-by-basin basis.²⁰

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

25
26 ¹⁸SE ROA 654, 659, 699, 726, 755.

27 ¹⁹ SE ROA 949-1069.

28 ²⁰ SE ROA 1070-1499.

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

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

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

19 Kane Springs Valley (“Kane Springs Valley”), Basin 206, which was also affected by
20 Order No. 1309, had not been designated previously for administration.²²
21

22
23 ²¹ See SE ROA 2-3, 71-72.

24 ²² 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.²³ The Muddy River Decree recognized specific water rights,²⁴ identified each water
5 right holder on the Muddy River, and quantified each water right.²⁵ 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. . .”²⁶. 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”).²⁷
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 1967.²⁸ Between 1933
18

19
20 ²³ See Judgment and Decree, *Muddy Valley Irrigation Co. v. Moapa and Salt Lake Produce Co.* (the “Muddy River
Decree” or “Decree”) (March 11, 1920) (SE ROA 33770-33816).

21 ²⁴ 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 ²⁵ SE ROA 33798-806.

25 ²⁶ SE ROA 33775.

26 ²⁷ 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 ²⁸ SE ROA 5.

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

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

11 **D. Order 1169**

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

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

22
23
24

²⁹ SE ROA 47169.

25 ³⁰ SE ROA 47160.

26 ³¹ SE ROA 42087.

27 ³² SE ROA 4, Ex. 1.

28 ³³ *Id.*

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

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

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

23 ³⁴ SE ROA 654-669.

24 ³⁵ See SE ROA 659, 665.

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

26 ³⁷ SE ROA 719.

27 ³⁸ SE ROA 713.

28 ³⁹ SE ROA 654-58, Ex. 7.

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

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

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

22
23
24 ⁴⁰ The Order uses the term acre-foot per year (afy), but for consistency with common usage, this Court uses the
equivalent term acre feet per annum.

25 ⁴¹ SE ROA 6, Ex. 1.

26 ⁴² SE ROA 36230 - 36231.

27 ⁴³ SE ROA 726 – 948.

28 ⁴⁴ *See e.g.*, SE ROA 479.

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

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

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

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

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

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

27 ⁴⁵ SE ROA 635-53, Ex. 6.

28 ⁴⁶ 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.⁴⁷ Kane Springs continued to be excluded as
9 part of the LWRFS multi-basin area in Interim Order 1303.⁴⁸

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.⁴⁹ 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.⁵⁰

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 ⁴⁷ SE ROA 70-88.

26 ⁴⁸ *Id.*

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

28 ⁵⁰ SE ROA 522.

not a contested adversarial proceeding.⁵¹ 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.⁵²

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.”⁵³

F. Order 1309

On June 15, 2020, the State Engineer issued Order 1309.⁵⁴ 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.

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

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

⁵³ See SE ROA 285, Ex. 3.

⁵⁴ 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.”⁵⁵ 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.

⁵⁵ 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,⁵⁶ and modified the portion of the Black Mountains area that is in the LWRFS. Although Order 1309 did not specifically address priorities or conflict of rights, as a result of the consolidation of the basins, the relative priority of all water rights within the seven affected basins will be reordered and the priorities will be considered in relation to all water rights holders in the consolidated basins, rather than in relation only to the other users within the original separate basins.

G. Petitioners and Their Respective Water Rights or Interests

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

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

1 in the Muddy River;

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

8 **III.**

9 **DISCUSSION**

10 **STANDARD OF REVIEW**

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

16 **A. Questions of Law**

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

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

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 managing⁵⁷ 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.”⁵⁸
- 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.”⁵⁹
- NRS 534.020, which provides that all waters of the State belong to the public and are subject to all existing rights.⁶⁰
- 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.”⁶¹

⁵⁷ 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.*

⁵⁸ SE ROA 43.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ 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.⁶²
- NRS 534 and specifically NRS 534.120, which allows the State Engineer to make such rules, regulations and orders as are deemed essential for the welfare of an area where the groundwater basin is being depleted.”⁶³

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

1. **The Prior Appropriation Doctrine**

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

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

⁶² *Id.*

⁶³ *Id.*

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

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

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

24 Priority in time of a right is only as valuable as where the holder stands in relation to others
25 in the same situation, or more specifically in this case, in the same basin. As the statutes are written,
26

27
28 ⁶⁴ *United States v. State Engineer*, 117 Nev. 585, 592, 27 P.3d 51, 55 (2001)(Becker, J., concurring in part and
dissenting in part).

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

5 **2. Joint Administration**

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

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

20 While such statements of policy are accorded deference in terms of statutory interpretation,
21 the Nevada Supreme Court has specifically held that they are not binding. *See McLaughlin v. Hous.*
22 *Auth. of the City of Las Vegas*, 227 P.2d 206, 93 (1951) (“It has often been said that the declaration
23 of policy by the legislature, though not necessarily binding or conclusive upon the courts, is entitled
24 to great weight, and that it is neither the duty nor prerogative of the courts to interfere in such
25 legislative finding unless it clearly appears to be erroneous and without reasonable foundation.”); *see*
26

27
28 ⁶⁵ More accurately, the LWRFS is comprised of six hydrographic basins and a portion of a seventh.

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

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

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

24 Indeed, if science was the sole governing principle to dictate the Nevada State Engineer’s
25 decisions, there would be a slippery slope in the changes that could be made in the boundaries of the
26 basins and how they are managed; each time scientific advancements and discoveries were made
27 regarding how sub-surface water structures are situated or interconnected, under this theory of
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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.”⁶⁶
23 Historically, surface water and ground water have been managed separately. In fact, the term
24 “conjunctive management” was only introduced in the statutes in the 2017 session of the Nevada
25 Legislature when it added subsection 1(e) to NRS 533.024. However, as discussed previously, this
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28 ⁶⁶ SE ROA 43.

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

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

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

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

already reprioritized certain rights as they relate to one another, even if their priority dates remain the same.⁶⁸ 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,

⁶⁸ 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.⁶⁹

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

⁶⁹ “[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.^{70 71} But the
10 questions posed in Order 1303 did not relate to management of the LWRFS, such as issues of
11 conjunctive or joint administration, but rather related to factual inquiries. Instead, Order 1303
12 specifically authorized stakeholders to file reports addressing four specific areas, none of which
13 related to the management of the LWRFS.⁷²

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

20 ⁷¹ The Notice included the following summary:

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

28 ⁷² SE ROA 647-48. Ex. 6.

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

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

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

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

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

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

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

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

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

⁷³ SE ROA 648, Ex. 6.

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

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

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

19 SE ROA 54, Ex. 1.

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

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

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

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

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27 ⁷⁵ See SE ROA 48.

28 ⁷⁶ SE ROA 726-948.

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

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

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

11 **IV.**

12 **CONCLUSION**

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

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

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

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

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

26 IT IS FURTHER ORDERED that the petition for review of the Nevada State Engineer's
27 Order No. 1309 filed by Petitioners Coyote Springs Investment, LLC is GRANTED.
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.

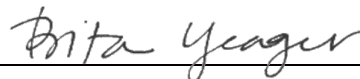
4 IT IS FURTHER ORDERED that the petition for review of the Nevada State Engineer's
5 Order No. 1309 filed by Petitioners Nevada Cogeneration Associates Nos. 1 and 2 is GRANTED.

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 
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15 **66B 24A E875 2549**
16 **Bita Yeager**
17 **District Court Judge**
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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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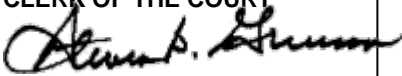
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EXHIBIT 2

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,

vs.

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

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

Respondents,

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

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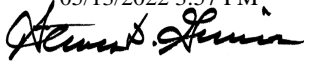
/s/ Thomas Duensing
Employee of Taggart & Taggart, LTD.

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.

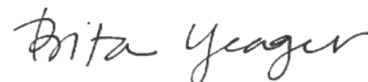
18 To the extent that the remaining petitions support the position that Nevada State Engineer did
19 not exceed his statutory authority and provided due process in issuing Order 1309;

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

AG0911

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 Judgment 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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IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

vs.

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

Respondents.

SOUTHERN NEVADA WATER
AUTHORITY,
Appellant,

vs.

COYOTE SPRINGS INVESTMENT,
LLC; APEX HOLDING COMPANY, LLC;

No. 84739

FILED

JUN 07 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

No. 84741

NEVADA COGENERATION
ASSOCIATES NOS. 1 AND 2;
GEORGIA-PACIFIC GYPSUM, LLC;
DRY LAKE WATER, LLC; REPUBLIC
TECHNOLOGIES, INC.; LINCOLN
COUNTY WATER DISTRICT; VIDLER
WATER COMPANY, INC.; MUDDY
VALLEY IRRIGATION COMPANY;
CENTER FOR BIOLOGICAL
DIVERSITY; SIERRA PACIFIC POWER
COMPANY, D/B/A NV ENERGY;
NEVADA POWER COMPANY, D/B/A
NV ENERGY; MOAPA VALLEY WATER
DISTRICT; THE CHURCH OF JESUS
CHRIST OF LATTER-DAY SAINTS;
CITY OF NORTH LAS VEGAS;
WESTERN ELITE ENVIRONMENTAL,
INC.; BEDROC LIMITED, LLC; AND
ADAM SULLIVAN, P.E., NEVADA
STATE ENGINEER, DIVISION OF
WATER RESOURCES, DEPARTMENT
OF CONSERVATION AND NATURAL
RESOURCES,

Respondents.

CENTER FOR BIOLOGICAL
DIVERSITY; SOUTHERN NEVADA
WATER AUTHORITY; LAS VEGAS
VALLEY WATER DISTRICT; MUDDY
VALLEY IRRIGATION COMPANY;
COYOTE SPRINGS INVESTMENT,
LLC; LINCOLN COUNTY WATER
DISTRICT; APEX HOLDING
COMPANY, LLC; DRY LAKE WATER,
LLC; NEVADA COGENERATION
ASSOCIATES NOS. 1 AND 2;
GEORGIA-PACIFIC GYPSUM, LLC;
REPUBLIC TECHNOLOGIES, INC.;
AND VIDLER WATER COMPANY,
INC.,

Appellants,

vs.

No. 84742

ADAM SULLIVAN, P.E., NEVADA
STATE ENGINEER, DIVISION OF
WATER RESOURCES, DEPARTMENT
OF CONSERVATION AND NATURAL
RESOURCES; THE CHURCH OF
JESUS CHRIST OF LATTER-DAY
SAINTS; SIERRA PACIFIC POWER
COMPANY, D/B/A NV ENERGY;
NEVADA POWER COMPANY, D/B/A
NV ENERGY; MOAPA VALLEY WATER
DISTRICT; CITY OF NORTH LAS
VEGAS; WESTERN ELITE
ENVIRONMENTAL, INC.; AND
BEDROC LIMITED, LLC,
Respondents.

MUDDY VALLEY IRRIGATION
COMPANY,
Appellant,

vs.

ADAM SULLIVAN, P.E., NEVADA
STATE ENGINEER, DIVISION OF
WATER RESOURCES, DEPARTMENT
OF CONSERVATION AND NATURAL
RESOURCES; LAS VEGAS VALLEY
WATER DISTRICT; SOUTHERN
NEVADA WATER AUTHORITY;
COYOTE SPRINGS INVESTMENT,
LLC; APEX HOLDING COMPANY, LLC;
DRY LAKE WATER, LLC; CENTER
FOR BIOLOGICAL DIVERSITY;
NEVADA COGENERATION
ASSOCIATES NOS. 1 AND 2;
GEORGIA-PACIFIC GYPSUM, LLC;
REPUBLIC ENVIRONMENTAL
TECHNOLOGIES, INC.; LINCOLN
COUNTY WATER DISTRICT; VIDLER
WATER COMPANY, INC.; SIERRA
PACIFIC POWER COMPANY, D/B/A NV
ENERGY; NEVADA POWER
COMPANY, D/B/A NV ENERGY;
MOAPA VALLEY WATER DISTRICT;

No. 84809

THE CHURCH OF JESUS CHRIST OF
LATTER-DAY SAINTS; CITY OF
NORTH LAS VEGAS; WESTERN ELITE
ENVIRONMENTAL, INC.; AND
BEDROC LIMITED, LLC,
Respondents.

ORDER GRANTING MOTIONS TO CONSOLIDATE

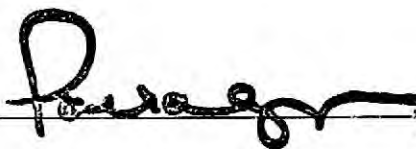
These four appeals each challenge April 19 and May 13, 2022, district court orders resolving petitions for judicial review of State Engineer Order 1309. Appellant State Engineer (Docket No. 84739) and appellant Center for Biological Diversity (Docket No. 84742) have filed joint motions to consolidate these appeals.

Having reviewed the joint motions, it appears that consolidation is appropriate, as these appeals arise from the same district court case, challenge the same orders, and involve the same parties. NRAP 3(b)(2) ("When the parties have filed separate timely notices of appeal, the appeals may be joined or consolidated by the court upon its own motion or upon motion of a party."). Accordingly, the joint motions are granted, and the clerk of this court is directed to consolidate the appeals in Docket Numbers 84739, 84741, 84742, and 84809. The appellants in these consolidated cases are Adam Sullivan, P.E., Nevada State Engineer, Division of Water Resources, Department of Conservation and Natural Resources (Docket No. 84739); Southern Nevada Water Authority (Docket No. 84741); Center for Biological Diversity (Docket No. 84742); and Muddy Valley Irrigation Co. (Docket No. 84809). The respondents for all appeals are Lincoln County Water District; Vidler Water Company, Inc.; Coyote Springs Investment, LLC; Nevada Cogeneration Associates Nos. 1 and 2; Apex Holding Company, LLC; Dry Lake Water, LLC; Georgia-Pacific

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

Appellants shall have until June 17, 2022, to file and serve their transcript request forms or certificates that no transcripts will be requested, as well as their docketing statements. Appellants shall have until September 30, 2022, to file and serve their opening briefs and appendices. Thereafter, briefing shall proceed in accordance with NRAP 31(a)(1), except that any appellant who disagrees with another appellant's opening brief may, to the extent the disagreeing appellant's interests are impacted thereby, file an answering brief addressing the issues related to those interests by the answering brief deadline. No extensions of time will be granted absent extreme and unforeseeable circumstances demonstrated by written motion.

It is so ORDERED.¹

 C.J.

¹The court defers ruling on the pending motions to exceed the page limit and for stay.

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellant,

vs.

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

Respondents.

SOUTHERN NEVADA WATER
AUTHORITY,

Appellant,

vs.

LINCOLN COUNTY WATER DISTRICT;
VIDLER WATER COMPANY, INC.;
COYOTE SPRINGS INVESTMENT,
LLC; NEVADA COGENERATION
ASSOCIATES NOS. 1 AND 2; APEX
HOLDING COMPANY, LLC; DRY LAKE

No. 84739

FILED

AUG 29 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

No. 84741

WATER, LLC; GEORGIA-PACIFIC
GYPSUM, LLC; REPUBLIC
ENVIRONMENTAL TECHNOLOGIES,
INC.; SIERRA PACIFIC POWER
COMPANY, D/B/A NV ENERGY;
NEVADA POWER COMPANY, D/B/A
NV ENERGY; THE CHURCH OF
JESUS CHRIST OF LATTER-DAY
SAINTS; MOAPA VALLEY WATER
DISTRICT; WESTERN ELITE
ENVIRONMENTAL, INC.; BEDROC
LIMITED, LLC; CITY OF NORTH LAS
VEGAS; AND LAS VEGAS VALLEY
WATER DISTRICT,

Respondents.

CENTER FOR BIOLOGICAL
DIVERSITY,

Appellant,

vs.

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

Respondents.

MUDDY VALLEY IRRIGATION

No. 84742

No. 84809

COMPANY,

Appellant,

vs.

LINCOLN COUNTY WATER DISTRICT;

VIDLER WATER COMPANY, INC.;

COYOTE SPRINGS INVESTMENT,

LLC; NEVADA COGENERATION

ASSOCIATES NOS. 1 AND 2; APEX

HOLDING COMPANY, LLC; DRY LAKE

WATER, LLC; GEORGIA-PACIFIC

GYPSUM, LLC; REPUBLIC

ENVIRONMENTAL TECHNOLOGIES,

INC.; SIERRA PACIFIC POWER

COMPANY, D/B/A NV ENERGY;

NEVADA POWER COMPANY, D/B/A

NV ENERGY; THE CHURCH OF

JESUS CHRIST OF LATTER-DAY

SAINTS; MOAPA VALLEY WATER

DISTRICT; WESTERN ELITE

ENVIRONMENTAL, INC.; BEDROC

LIMITED, LLC; CITY OF NORTH LAS

VEGAS; AND LAS VEGAS VALLEY

WATER DISTRICT,

Respondents.

*ORDER DENYING MOTIONS TO DISMISS,
GRANTING TEMPORARY STAY AND DIRECTING SUPPLEMENT,
AND SCHEDULING APPEAL CONFERENCE*

These are four consolidated appeals challenging April 19 and May 13, 2022, district court orders resolving petitions for judicial review of State Engineer Order 1309, which designated the Lower White River Flow System (LWRFS) and determined the amount of water that could be sustainably withdrawn therefrom. Currently before this court are two motions to dismiss and two motions for stay of the district court's order vacating Order 1309.

Motions to dismiss

Respondents Lincoln County Water District and Vidler Water Company, Inc. (collectively, Lincoln) have filed a motion to dismiss the appeals filed by appellants Southern Nevada Water Authority (SNWA) (Docket No. 84741), the Center for Biological Diversity (CBD) (Docket No. 84742), and Muddy Valley Irrigation Company (MVIC) (Docket No. 84809).¹ Respondent Coyote Springs Investments, LLC (CSI) also has filed a motion to dismiss those appeals, for substantially the same reasons. The moving respondents assert that SNWA, CBD, and MVIC lack standing to appeal because (1) they have no protectible interest in obtaining reinstatement of Order 1309 or that is otherwise affected by the district court's order and (2) they were granted the relief sought below, even if for reasons different from their arguments, and thus are not aggrieved by the district court's orders. They further assert that appellants cannot base any grievance on the Moapa dace because any interest in the fish is merely a general interest held in common with the public. Additionally, CSI asserts that no justiciable controversy exists between SNWA, CBD, and MVIC and any of the respondents or the State Engineer.

SNWA, CBD, and MVIC oppose the motions to dismiss, pointing out that the outcome of this matter affects their personal interests in senior decreed water rights or their (or their members') interests in protecting the endangered Moapa dace. They argue that they participated in the administrative proceedings preceding the State Engineer's order, as well as the district court proceedings, in which they were not granted the

¹Respondents Georgia-Pacific Gypsum, LLC, and Republic Environmental Technologies, Inc., filed a joinder to Lincoln's motion to dismiss on June 17, 2022.

relief they sought—the striking of certain findings and/or a lower cap on the amount of water that can be sustainably withdrawn from the LWRFS.

A party seeking to appeal from a district court order must be aggrieved by the order under NRAP 3A(a). “A party is ‘aggrieved’ within the meaning of NRAP 3A(a) when either a personal right or right of property is adversely and substantially affected by a district court’s ruling.” *Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440, 446, 874 P.2d 729, 734 (1994) (internal quotation marks omitted). “[A] substantial grievance also includes ‘[t]he imposition of some injustice, or illegal obligation or burden, by a court, upon a party, or the denial to him of some equitable or legal right.’” *Las Vegas Police Protective Ass’n Metro, Inc. v. Eighth Judicial Dist. Court*, 122 Nev. 230, 240, 130 P.3d 182, 189 (2006) (quoting *State v. State Bank & Tr. Co.*, 36 Nev. 526, 535, 137 P. 400, 402 (1913)).

We conclude that SNWA, CBD, and MVIC have adequate standing to appeal. Order 1309 relates to the administration of these appellants’ determined rights (or their interests in the Moapa dace), and under NRS 534.030(3), that order is subject to judicial review as provided in NRS 533.450. In relevant part, NRS 533.450(1) allows “any person feeling aggrieved by any order or decision of the State Engineer, . . . affecting the person’s interests, when the order or decision relates to the administration of determined rights” to petition for judicial review. This court has stated that the clause “any person” in NRS 533.450(1) “signifies inclusiveness, not limitation.” *In re Nevada State Eng’r Ruling No. 5823*, 128 Nev. 232, 239, 277 P.3d 449, 453-54 (2012); see also *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 807 F.3d 1031, 1044 (9th Cir. 2015) (recognizing CBD’s interest in preserving the Moapa dace and in asserting a procedural injury). Although appellants

petitioned the district court for judicial review to address the portions of Order 1309 that they felt aggrieved by, the district court did not grant them the relief they requested but vacated the order altogether, which decision they feel impacts their ability to protect their interests. Nor is it clear that this court cannot reach those issues in this appeal. See *Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. 521, 525, 245 P.3d 1145, 1148 (2010) (“In reviewing an order of the State Engineer, we are bound by the same standard of review as the lower court. Under this standard, we are to determine whether the evidence upon which the engineer based his decision supports the order.”). Thus, we conclude that these appellants are aggrieved by the district court’s order and having standing to challenge it, and we deny the motions to dismiss their appeals.

Motions for stay

In their stay motions, SNWA and CBD argue that, if the State Engineer is not able to enforce Order 1309 pending appeal, senior decreed rights and the Moapa dace’s survival will be at risk.² They note that an additional 22,000 afa groundwater could be pumped under existing permits, even though the State Engineer determined that no more than 8,000 afa could be pumped without impacting senior rights and fish habitat. They further assert that there is no other way to protect these interests because the district court, in determining that the State Engineer cannot jointly administer basins or conjunctively manage underground and surface waters, created uncertainty in how the State Engineer should use his statutory authority to effectively manage the subject basins. The State

²SNWA’s opposed motion for leave to file a stay motion with 14 pages in excess of the NRAP 27(d)(2) 10-page limit is granted; the motion was filed in Docket No. 84741 on June 1, 2022.

Engineer has joined in both stay motions, asserting that “in light of the findings in the Order Vacating Order 1309, the State Engineer is without means to address the next management and administrative steps to balance the interests of the water right holders within the LWRFS while being protective of the water resource.”

After reviewing the motions, the joinders, and the several oppositions and replies, we conclude that a temporary stay is warranted pending a response by the State Engineer further explaining his joinder. Therefore, within 10 days from the date of this order, we direct the State Engineer to file and serve a supplement to his joinder explaining, with specificity, his argument that the district court’s order limits his ability to proceed with balancing the various interests in the subject water resource. The supplement may be no longer than 10 pages. Respondents shall have 10 days from the date when the State Engineer’s supplement is served to file and serve a single, combined response to the supplement, no longer than 10 pages. No time- or page-limit extensions are permitted. The district court’s order vacating Order 1309 is hereby stayed pending our receipt and consideration of the State Engineer’s supplement and any response thereto and further order of this court.


NRAP 33 conference

Finally, based upon our review of the documents before us, and in light of the multiple parties involved in the four consolidated appeals and the overlapping arguments that appear to exist, we direct the attorneys for the parties to appear before the Southern Panel at 2:30 p.m. on Wednesday, September 14, 2022, at the Supreme Court building in Las Vegas for an appeal conference to address the issues raised in these proceedings and any other matters that may aid in the disposition of the pending appeals. NRAP

33. Attorneys may appear in person or by video conference. In addition to any other matters the attorneys wish to raise, the attorneys should be prepared to (1) specify the issues for resolution in these appeals; and (2) discuss briefing and appendices for all four cases, such that the same arguments/briefs and supporting documentation are not duplicated in these matters.

It is so ORDERED.


_____, J.
Hardesty


_____, J.
Stiglich


_____, J.
Herndon

cc: Hon. Bita Yeager, District Judge
Attorney General/Carson City
Brownstein Hyatt Farber Schreck, LLP/Las Vegas
Wingfield Nevada Group
Dotson Law
Robison, Sharp, Sullivan & Brust
Lisa T. Belenky
Taggart & Taggart, Ltd.
Scott Robert Lake
Steven C. Anderson
Steven D. King
Attorney General/Las Vegas
Coulthard Law PLLC

Schroeder Law Offices, P.C.
Marquis Aurbach Coffing
Lincoln County District Attorney
Dyer Lawrence, LLP
Parsons Behle & Latimer/Reno
McDonald Carano LLP/Reno
Justina Alyce Caviglia
Allison MacKenzie, Ltd.
Michael D. Knox
Kaempfer Crowell/Reno
Great Basin Law
Eighth District Court Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellant,

vs.

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

Respondents.

SOUTHERN NEVADA WATER
AUTHORITY,

Appellant,

vs.

LINCOLN COUNTY WATER DISTRICT;
VIDLER WATER COMPANY, INC.;
COYOTE SPRINGS INVESTMENT,
LLC; NEVADA COGENERATION
ASSOCIATES NOS. 1 AND 2; APEX
HOLDING COMPANY, LLC; DRY LAKE

No. 84739

FILED

OCT 03 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

No. 84741

WATER, LLC; GEORGIA-PACIFIC GYPSUM, LLC; REPUBLIC ENVIRONMENTAL TECHNOLOGIES, INC.; SIERRA PACIFIC POWER COMPANY, D/B/A NV ENERGY; NEVADA POWER COMPANY, D/B/A NV ENERGY; THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; MOAPA VALLEY WATER DISTRICT; WESTERN ELITE ENVIRONMENTAL, INC.; BEDROC LIMITED, LLC; CITY OF NORTH LAS VEGAS; AND LAS VEGAS VALLEY WATER DISTRICT,

Respondents.

CENTER FOR BIOLOGICAL DIVERSITY,

Appellants,

vs.

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

Respondents.

MUDDY VALLEY IRRIGATION

No. 84742

No. 84809

COMPANY,

Appellant,

vs.

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

Respondents.

ORDER GRANTING STAY

These are four consolidated appeals challenging April 19 and May 13, 2022, district court orders resolving petitions for judicial review of State Engineer Order 1309, which designated the Lower White River Flow System (LWRFS) and determined the amount of water that could be sustainably withdrawn therefrom.

Appellants Southern Nevada Water Authority (SNWA) and the Center for Biological Diversity (CBD) filed motions for stay, to which appellant the State Engineer filed a partial joinder, and on August 29, 2022, we temporarily stayed the district court's order vacating Order 1309,

pending our receipt and consideration of further briefing on the State Engineer's joinder to the stay motions. The State Engineer timely filed a supplement to his joinder, and respondents timely filed a response to the supplement.¹

When considering a motion for a stay, we consider the following factors: whether (1) the object of the appeal will be defeated absent a stay, (2) appellants will suffer irreparable or serious harm without a stay, (3) respondents will suffer irreparable or serious harm if a stay is granted, and (4) appellants are likely to prevail on the merits of the appeal. NRAP 8(c); *see also Fritz Hansen A/S v. Eighth Judicial Dist. Court*, 116 Nev. 650, 659, 6 P.3d 982, 987 (2000). Additionally, we may consider the public interest in granting or denying a stay. *Clark Cty. Office of Coroner/Med. Exam'r v. Las Vegas Review-Journal*, 134 Nev. 174, 179 n.1, 415 P.3d 16, 20 n.1 (2018) (Cherry, J., concurring and dissenting) (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (providing that courts will consider, as one factor, "where the public interest lies" when deciding a stay motion)). Ultimately, a stay may be issued to preserve the "status quo ante" while the matter is being considered on appeal. *See Nalder v. Eighth Judicial Dist. Court*, 136 Nev. 200, 208-09, 462 P.3d 677, 686 (2020) (quoting *209 Westside Charter Serv., Inc. v. Gray Line Tours of S. Nev.*, 99 Nev. 456, 460, 664 P.2d 351 (1983)).


Having considered the parties' arguments and competing interests under the above factors, as well as the public interest, we conclude that maintaining the stay would best preserve the status quo for the

¹SNWA's motion for leave to file a surreply to respondents' response is denied. The clerk of this court shall strike Exhibit 1 to SNWA's motion for leave to file a surreply, which Exhibit was separately filed in this court on September 27, 2022.

collective basins until this court can determine the issues before it. Therefore, we grant the motions for stay pending appeal and uphold the stay imposed by our August 29 order pending further order of this court.

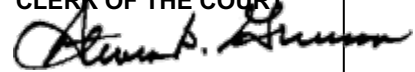
It is so ORDERED.

, J.
Hardesty

, J.
Stiglich

, J.
Herndon

cc: Hon. Bita Yeager, District Judge
Attorney General/Carson City
Brownstein Hyatt Farber Schreck, LLP/Las Vegas
Wingfield Nevada Group
Attorney General/Las Vegas
Robison, Sharp, Sullivan & Brust
Taggart & Taggart, Ltd.
Steven C. Anderson
Coulthard Law PLLC
Schroeder Law Offices, P.C.
Marquis Aurbach Coffing
Lincoln County District Attorney
Dyer Lawrence, LLP
Parsons Behle & Latimer/Reno
McDonald Carano LLP/Reno
Justina Alyce Caviglia
Allison MacKenzie, Ltd.
Michael D. Knox
Kaempfer Crowell/Reno
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Attorneys for Defendant State Engineer

DISTRICT COURT

CLARK COUNTY, NEVADA

COYOTE SPRINGS INVESTMENT, LLC, a Nevada Limited Liability Company;
COYOTE SPRINGS NEVADA, LLC, a Nevada Limited Liability Company; and
COYOTE SPRINGS NURSERY, LLD, a Nevada Limited Liability Company,

Plaintiffs,

vs.

STATE OF NEVADA, on relation to its Division of Water Resources;
DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, ADAM SULLIVAN, Nevada State Engineer;
CLARK COUNTY-COYOTE SPRINGS WATER RESOURCES GENERAL IMPROVEMENT DISTRICT, a political subdivision of the State of Nevada; and
DOES I through X

Defendants.

Case No. A-20-820384-B
Dept. No. XIII

**DEFENDANT'S MOTION TO STAY
PROCEEDINGS PENDING NEVADA
SUPREME COURT'S RESOLUTION OF
RELATED MATTER**

**HEARING REQUESTED ON
SHORTENED TIME**

Defendant State of Nevada ex rel. Department of Conservation and Natural Resources, Division of Water Resources, Adam Sullivan, P.E., the Nevada State Engineer (hereafter "State Engineer"), by and through counsel, moves for a stay of proceedings

1 pending the Nevada Supreme Court's resolution of *Sullivan, P.E. v. Lincoln Co. Water*
2 *Dist.*, Case No. 84379 (consolidated with Case Nos. 84741, 84742, 84809, and 85137)
3 (hereinafter referred to as "*Sullivan*"). The State Engineer has met and conferred with
4 counsel for Plaintiffs Coyote Springs Investment, LLC, Coyote Springs Nevada, LLC and
5 Coyote Springs Nursery, LLC (collectively, "CSI") and attempted to reach an agreement to
6 stay proceedings, but those attempts have been unsuccessful.

7 This Motion is requested to be heard on shortened time pursuant to the
8 accompanying declaration of Jessica E. Whelan, as expert discovery deadlines are
9 approaching and Plaintiffs have indicated their intention to file a motion for leave to amend
10 their Complaint for the third time. It is imperative that, before engaging in further
11 discovery and particularly before producing expert reports, the Parties and this Court are
12 aware of the scope of the issues in this case, as potentially narrowed by the Supreme Court's
13 decision in *Sullivan*.

14 DECLARATION OF JESSICA E. WHELAN

15 I, Jessica E. Whelan, declare and state as follows:

16 1. I am a Senior Deputy Attorney General in the Nevada Office of the Attorney
17 General, counsel of record for the State Engineer in this case. I have personal knowledge
18 of the facts stated in this declaration.

19 2. We have asked that this Motion be set for hearing on shortened time because
20 the current deadline for filing expert disclosures is November 1, 2023, roughly two-and-a-
21 half months from the date of this Motion. See 4/19/23 Order to Extend Discovery Deadlines
22 and Continue Trial. Were the Motion to be heard in the ordinary course, it is unlikely that
23 the Parties would have sufficient time, in the event of denial of this Motion, to retain
24 experts and produce expert reports. I have communicated via e-mail with Kent Robison,
25 counsel for Plaintiffs, who agrees that this Motion should be heard on order shortening
26 time concurrently with a forthcoming motion for leave to amend Plaintiffs' complaint,
27 discussed *infra*. Due to scheduling conflicts of counsel, the Parties request that the Court
28 set hearing on the two motions for **the week of September 11, 2023**.

1 3. Further, on August 17, 2023, Mr. Robison informed me and Mr. Casey Quinn
2 by e-mail that Plaintiffs intended to seek leave to file a Third Amended Complaint in this
3 matter. A true and correct copy of this e-mail (attachment omitted) is attached hereto as
4 **Exhibit A.**

5 4. I reviewed the proposed Third Amended Complaint, which seeks to add four
6 new claims. First, CSI adds a claim for “Per Se Appropriation Taking of CSI’s Water
7 Rights,” in which it claims that the State Engineer appropriated CSI’s senior priority status
8 in Basin 206 for over 100 groundwater holders in other areas without paying just
9 compensation. Second, CSI adds a claim for relief for a *Lucas* taking under the Nevada
10 Constitution as to 6,937.66 acres of land. Third, CSI adds a claim for a *Penn Central* taking
11 under the Nevada Constitution as to 6,937.66 acres of land. Finally, CSI adds an
12 alternative claim for “Temporary Taking.”

13 5. The State Engineer feels that further amendment of the Complaint is
14 unwarranted, particularly while the Nevada Supreme Court’s decision in *Sullivan* is
15 pending and could significantly narrow the issues in this case, potentially triggering
16 further amendment, as described in this Motion.

17 6. Good cause exists for granting this motion. Staying proceedings at this
18 juncture until the Nevada Supreme Court provides clarity in *Sullivan* as to the scope of the
19 State Engineer’s authority to issue Order 1309—a key issue in this case—will provide
20 certainty on the issues before this Court and may in fact significantly narrow the scope of
21 this case. Further, a stay would promote judicial economy in that this Court would not be
22 deciding issues that may be rendered moot by the Supreme Court’s *Sullivan* decision.
23 Finally, a stay would conserve resources of the Parties—both financial and otherwise—by
24 avoiding engaging in fact and expert discovery that may ultimately prove irrelevant to the
25 case.

26 7. My co-counsel Casey Quinn and I have met and conferred with Mr. Robison
27 about the basis of this Motion, but we have not been able to resolve the dispute without
28 Court intervention. Specifically, on August 15, 2023, Mr. Quinn and I had a telephone

1 conference with Mr. Robison regarding whether Plaintiffs would stipulate to a stay of
2 proceedings pending the Nevada Supreme Court's decision in Sullivan. While Mr. Robison
3 initially suggested there may be a desire to agree to a stay, on August 17, 2023, Mr. Robison
4 sent the e-mail attached as Exhibit A, in which he wrote that the proposed Third Amended
5 Complaint "goes a long way to alleviate the need to stay these proceedings." *See* Ex. A.
6 Later that same day, August 17, 2023, Mr. Quinn and I spoke with Mr. Robison further
7 about our requested stay of proceedings and Plaintiffs' proposed Third Amended
8 Complaint. Mr. Robison stated that he was no longer interested in staying the proceedings
9 because the proposed Third Amended Complaint alleviated the need for a stay in part due
10 to the addition of an alternative claim for Temporary Taking. That claim states if it is
11 found that CSI "may use its groundwater rights, have their subdivision maps approved,
12 and develop their long planned and fully entitled master planned community, then there
13 has still been a temporary appropriation and/or temporary taking of Plaintiffs' property for
14 which just compensation is due and must be paid." Mr. Robison further stated that this
15 case is not based on Order 1309, but rather is based on the May 16, 2018 letter issued by
16 the State Engineer and subsequent actions of the State Engineer.

17 8. Ultimately, the Parties were unable to reach agreement on either staying
18 proceedings or amending Plaintiffs' Complaint, and Court intervention is necessary on
19 order shortening time.

20 9. On May 25, 2022, Plaintiffs served their First Request for Production of
21 Documents to Defendants. A true and correct copy of this document is attached hereto as
22 **Exhibit F**.

23 10. On June 24, 2022, Defendants served their Responses to Plaintiffs' First
24 Requests for Production of Documents to Defendants. A true and correct copy of this
25 document is attached hereto as **Exhibit G**.

26 11. On March 17, 2023, Plaintiffs served their Second Set of Requests for
27 Production of Documents to Defendants. A true and correct copy of this document is
28 attached hereto as **Exhibit H**.

1 12. On March 29, 2023, Coyote Springs Nursery, LLC served its First Set of
2 Interrogatories to Defendants. A true and correct copy of this document is attached hereto
3 as **Exhibit I**.

4 13. On March 29, 2023, Coyote Springs Nevada, LLC served its First Set of
5 Interrogatories to Defendants. A true and correct copy of this document is attached hereto
6 as **Exhibit J**.

7 14. On May 2, 2023, Plaintiffs served their First Requests for Admission to
8 Defendants. A true and correct copy of this document is attached hereto as **Exhibit K**.

9 15. On February 13, 2023, Plaintiffs took the deposition of Micheline Fairbank.
10 A true and correct copy of excerpts from the deposition transcript is attached hereto as
11 **Exhibit L**.

12 16. A review of Ms. Fairbank's deposition transcript showed that the term "1309"
13 appeared eighty-seven times in the transcript.

14 17. On February 15, 2023, Plaintiffs took the deposition of Tim Wilson. A true
15 and correct copy of excerpts from the deposition transcript is attached hereto as **Exhibit**
16 **M**.

17 18. A review of Mr. Wilson's deposition transcript showed that the term "1309"
18 appeared fifty-three times in the transcript.

19 19. On February 14, 2023, Plaintiffs took the deposition of Adam Sullivan. A true
20 and correct copy of excerpts from the deposition transcript is attached hereto as **Exhibit**
21 **N**.

22 20. A review of Mr. Sullivan's deposition transcript showed that the term "1309"
23 appeared eighty-four times in the transcript.

24 21. On July 20, 2023, Plaintiffs took the 30(b)(6) deposition of the State Engineer,
25 through its representative Melissa Flatley. A true and correct copy of excerpts from the
26 deposition transcript is attached hereto as **Exhibit O**.

27 22. A review of the 30(b)(6) deposition transcript showed that the term "1309"
28 appeared ninety-three times in the transcript.

1 23. I declare under penalty of perjury that the foregoing is true and correct to the
2 best of my knowledge.

3 Executed this 21st day of August, 2023.

4 AARON D. FORD
5 Attorney General

6 By: /s/ Jessica E. Whelan
7 JESSICA E. WHELAN
8 Senior Deputy Attorney General
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DISTRICT JUDGE

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

CSI's claims and theories in this case have proved to be a moving target since its inception. Starting with six claims for relief in the initial Complaint filed August 28, 2020, a little over a year later Plaintiffs changed tactics in their First Amended Complaint to remove any federal claims and strip the federal courts of jurisdiction. A month after that, CSI filed its now-operative Second Amended Complaint, which added four new claims, including those for breach of contract and declaratory/injunctive relief, increasing the total causes of action to 10. Now, weeks after the Supreme Court heard oral argument on 1309 and just over two months before expert reports are due, CSI is altering its theories of the case yet again proposing a Third Amended Complaint with four additional claims for relief.

One thing that has remained constant, however, is CSI's reliance on State Engineer Order 1309 as the basis for many of its claims. Indeed, from the initial Complaint to the present day, Order 1309 has been central to CSI's allegations and discovery. Through this time period, one fact has become clear: the Nevada Supreme Court's resolution of the appeal concerning the validity of Order 1309 will have a significant impact, on not only these proceedings, but also Nevada water rights law as a whole. Proceeding without a clear understanding of how the landscape of water rights management in Nevada may change would be to walk blindly down a path of unknown scope of claims, alternative legal theories, and wildly varying damages amounts based on those alternative theories. This Court should issue a stay of proceedings to allow the Nevada Supreme Court to determine key issues that will clarify and narrow the issues pending before this Court.

II. RELEVANT BACKGROUND

A. CSI's Original Complaint Alleges Order 1309 "Effectuates A Take" of CSI's Rights.

On August 28, 2020, CSI commenced this case by filing its Complaint. The Complaint alleged that "the State, through its State Engineer's most recent decision, order, and actions described herein, *and most recently its State Engineer's Order 1309 dated*

1 **June 15, 2020**, has wrongfully taken at least 3640 afa, and possibly all 4140 afa of” CSI’s
2 water rights. Compl., ¶ 14 (emphasis added). The Complaint further alleged that, if CSI
3 is not permitted to develop its master planned community, “then the 460 afa relinquished
4 for the survival and protection of the Moapa dace is a further wrongful and unconstitutional
5 take of all of [CSI’s] economical beneficial use of its property and of the ability to develop
6 its” project.” *Id.*

7 CSI’s Complaint alleged six claims for relief: (1) Inverse Condemnation (*Lucas*
8 Regulatory Taking); (2) Inverse Condemnation (*Penn Central* Regulatory Taking); (3) Pre-
9 Condemnation Damages; (4) Equal Protection Violations; (5) Violation of 42 U.S.C. § 1983;
10 and (6) Claim of Attorney’s Fees. *See id.*, ¶¶ 47–79. The first through fifth claims for relief
11 relied on violations of both the United States Constitution (Fifth and Fourteenth
12 Amendments), and the Nevada Constitution. *Id.*

13 **B. Shortly Before Filing its Original Complaint, CSI Files a Petition for**
14 **Judicial Review of Order 1309.**

15 On July 9, 2020, CSI filed a Petition for Judicial Review of Nevada State Engineer
16 Order 1309, which was assigned case number A-20-817765-P, which was consolidated with
17 other cases into Case No. A-20-816761-C (the “Order 1309 PJR”). *See Exhibit B* (Order
18 1309 PJR, without attachments). The Order 1309 PJR was timely filed, pursuant to NRS
19 533.450(1), within thirty days of the State Engineer’s June 15, 2020, issuance of Order
20 1309. The factual allegations in the Order 1309 PJR overlap significantly with the
21 allegations in CSI’s original Complaint. Compare, for example:

- 22 • Complaint, ¶ 12 with Ex. B, ¶ 6 (detailing the history of CSI’s water rights);
- 23 • Complaint, ¶¶ 15–16 with Ex. B, ¶¶ 15–17 (summarizing Order 1169, the
24 ensuing pump tests, and issuance of Ruling 6255);
- 25 • Complaint, ¶¶ 25–26 with Ex. B, ¶¶ 21–22 (discussing the State Engineer’s
26 May 16, 2018 letter, since rescinded);
- 27 • Complaint, ¶ 34 with Ex. B, ¶ 29 (discussing the State Engineer’s
28 September 19, 2018 draft order);

- Complaint, ¶ 37 with Ex. B, ¶ 33 (regarding the January 11, 2019, issuance of State Engineer Order 1303);
- Complaint, ¶ 41 with Ex. B, ¶ 47 (listing findings of Order 1309).

On April 19, 2022, District Court Judge Bita Yeager issued an order granting the Order 1309 PJR and vacating Order 1309 in its entirety. Timely notices of appeal were filed by various parties involved. On October 3, 2022, the Nevada Supreme Court entered a stay of Judge Yeager's Order vacating Order 1309 pending appeal. Accordingly, Order 1309 remains in effect while the case is on appeal.

C. The Case Is Removed to Federal Court and CSI Moves for Leave to File a First Amended Complaint.

On October 2, 2020, the State Engineer filed a Notice of Removal to Federal Court on the grounds that Plaintiffs' first through fifth claims for relief allege violations of the Fifth and Fourteenth Amendments to the United States Constitution, as well as violations of 42 U.S.C. § 1983. 10/2/20 Notice of Removal to Federal Court, Ex. A, ¶ 5. On October 9, 2020, the State Engineer filed its Motion to Dismiss Plaintiffs' Complaint in the federal case. *See Exhibit C* (Plaintiffs' Motion for Leave to File First Amended Complaint, p. 2). On November 2, 2020, Plaintiffs filed their Opposition to the Motion to Dismiss. *Id.*

Thereafter, on November 19, 2020, Plaintiffs filed a Motion for Leave to File its [Proposed] First Amended Complaint in the federal court case ("Motion for Leave"). *See* Ex. C. Therein, Plaintiffs sought "to clarify that each of Plaintiffs' claims are state law-based claims, and Plaintiffs have withdrawn their federally based claims and thus not [sic] pursuing any federal claims or causes of actions therein." *Id.*, p. 2. Plaintiffs withdrew their 42 U.S.C. § 1983 claim and added facts to their "now Nevada based Equal Protection Claim," relating to "the State's unequal treatment of Plaintiffs from that of the Moapa Valley Water District . . . in regards to application of the underlying State Orders 1303 and 1309, use of their water rights, and the application of the subdivision map moratorium." *Id.*, p. 3.

1 **D. The Case is Remanded to State Court and the First Amended**
2 **Complaint is Filed.**

3 Contemporaneously with the filing of their Motion for Leave, on November 19, 2020,
4 Plaintiffs filed a Motion for Remand of Action to State Court (“Motion for Remand”).
5 **Exhibit D.** The Motion for Remand was based “on the grounds that all claims in the
6 Plaintiff’s proposed First Amended Complaint are based on state law, and the Court does
7 not have federal jurisdiction over these claims.” *Id.*, p. 1. On December 3, 2020, the State
8 Engineer filed an Opposition to the Motion for Remand, citing case law requiring the
9 district court to assess its subject matter jurisdiction at the time of removal, asserting that
10 CSI should not be permitted to plead itself out of removal, and analyzing the factors
11 relating to remand. On December 10, 2020, CSI filed its Reply in Support of its Motion for
12 Remand.

13 Notwithstanding the State’s Opposition, on September 28, 2021, the Court issued its
14 Order granting CSI’s Motion for Leave and Motion for Remand, finding that the state law
15 claims amended by CSI in its proposed First Amended Complaint “substantially
16 predominate over the claims which the Court had original jurisdiction over and the claims
17 raise novel and complex issues of state law.” **Exhibit E.** Thus, over a year after the case
18 was initiated, it returned to state court.

19 **E. CSI Files its Second Amended Complaint, and the Court Denies the**
20 **State Engineer’s Motion to Dismiss.**

21 On October 19, 2021, less than two weeks after the case was remanded, CSI filed a
22 Stipulation and Order that, *inter alia*, would authorize CSI to file a Second Amended
23 Complaint. *See* 10/19/21 SAO. The Court granted the Parties’ stipulation that same day.
24 *Id.*

25 On November 12, 2021, CSI filed its Second Amended Complaint. In addition to the
26 causes of action from the First Amended Complaint—Inverse Condemnation Under
27 Nevada Constitution - Lucas Regulatory Taking; Inverse Condemnation Under Nevada
28 Constitution - Penn Central Regulatory Taking; Pre-Condemnation Damages; Equal

1 Protection Violations Under Nevada Constitution; and Claim of Attorneys’ Fees Incurred
2 Herein—the Second Amended Complaint added four additional causes of action: Breach of
3 Contract; Breach of the Implied Covenant of Good Faith and Fair Dealing; Declaratory
4 Relief, and Injunctive Relief. *See* Second Amended Complaint, ¶¶ 55–104. The Second
5 Amended Complaint also substituted the current State Engineer, Adam Sullivan, in place
6 of the former, Tim Wilson. *See generally, id.* It also added the Clark County-Coyote
7 Springs Water Resources General Improvement District (“CSGID”) as a defendant.¹ *Id.*

8 The Second Amended Complaint also included a new fact section relating to Lincoln
9 County’s approval of CSI’s proposed plan of development of its Lincoln County property
10 and the approval and recording of a comprehensive development agreement with CSI. *See*
11 *id.*, ¶¶ 10–16. Additional facts were also alleged in support of CSI’s new breach of contract
12 argument, which claimed that the State Engineer breached his “obligations owed to CSI ‘to
13 process in good faith any and all maps or other issue submittals by CSI’ pursuant to the
14 Settlement Agreement.” *Id.*, ¶ 38. *See also, id.*, ¶ 41 (“CS-Entities further allege this Draft
15 Order moratorium on processing of all subdivision maps was a further violation of the
16 State’s obligation to process ‘in good faith’ CSI’s maps as required by the Settlement
17 Agreement.”); ¶ 44 (“[I]ssuance of the Interim Order [is] also a violation of the State’s good
18 faith” obligations to process CSI’s subdivision maps necessary to move their Master
19 Planned Community development forward.”); ¶ 47 (failure to issue final approval of
20 conditionally approved maps constitutes breach of “good faith” requirement); ¶ 49 (same
21 with respect to issuance of Order 1309); ¶ 52 (same).

22 On December 20, 2021, the State Engineer filed his Motion to Dismiss, arguing in
23 part that “Order 1309 is central to all of CSI’s claims,” and because “CSI filed a petition for
24 judicial review of the State Engineer’s Order 1309 that is pending decision in Department
25 1,” its claims were “premature and misguided.” The Motion argued that “CSI’s takings
26 claim should not be decided before the validity of Order 1309 is decided.” 12/20/21 Errata
27 to Motion to Dismiss Second Amended Complaint, p. 2.

28 ¹ The Court granted CSGID’s motion to dismiss without prejudice on January 5, 2023.

1 On January 18, 2022, CSI filed its Opposition to Defendants’ Motion to Dismiss
2 Second Amended Complaint. Therein, CSI did not dispute that Order 1309 was central to
3 its claims; indeed, “Order 1309” is found forty-one times in CSI’s twenty-seven-page
4 Opposition. *See generally* 1/18/22 Opposition. Rather, CSI argued that “[w]hile the
5 damages may change, the taking claims became ripe when Order 1309 became final in June
6 of 2020.” *Id.*, p. 2.

7 On January 24, 2022, the State Engineer filed his Reply in Support of the Motion to
8 Dismiss, and on February 9, 2022, the Court issued a minute order denying the Motion to
9 Dismiss. A full written order denying the Motion to Dismiss followed on February 23, 2022.

10 **F. The Parties Conduct Discovery with CSI Focusing Heavily on the**
11 **Effects of Order 1309.**

12 On March 10, 2022, roughly eighteen months after the filing of the original
13 Complaint, with the jurisdictional and venue issues having been finally determined, the
14 Complaint having been twice amended, and the State Engineer’s motion to dismiss having
15 been denied, the State Engineer filed an Answer to the Second Amended Complaint and
16 this case proceeded to discovery based on the allegations and claims in the Second Amended
17 Complaint. The procedure and substance of Order 1309 is a topic that has permeated both
18 written and oral fact discovery.

19 ***1. Requests for Production of Documents***

20 On May 25, 2022, Plaintiffs served their First Request for Production of Documents
21 to Defendants (“First RFPs”). **Exhibit F.** The First RFPs contained sixty-two separate
22 requests, one of which requested “[a]ll documents . . . regarding Defendants’ decision to join
23 multiple groundwater basins into the single Lower White River Flow System (“LWRFS”),
24 not including [sic] within the State’s Record on Appeal in [the Order 1309 PJR].” *Id.*, p. 7,
25 RFP No. 15. The State Engineer objected to this Request as not proportional to the needs
26 of the case, because the State Engineer had “already produced nearly 55,000 pages of
27 documents relevant to Order 1309.” **Exhibit G** (6/24/22 Responses to First RFPs), p. 7,
28 Response to RFP No. 15 (citing SE 1–54988).

1 On March 17, 2023, Plaintiffs served their Second Set of Requests for Production of
2 Documents to Defendants (“Second RFPs), which contained twenty-two separate requests.
3 **Exhibit H.** The Second RFPs requested documents and communications that mention,
4 refer to, discuss, relate, or refer to: (a) Order 1309; (b) the oral arguments in the Order 1309
5 PJR before Judge Yeager; (c) the Order 1309 PJR; and (d) other petitions for judicial review
6 filed against the State Engineer relating to Order 1309. *Id.*, pp. 7–9, RFP Nos. 63–75.

7 **2. Interrogatories**

8 On March 29, 2023, Coyote Springs Nursery, LLC and Coyote Springs Nevada, LLC
9 each served its First Set of Interrogatories to Defendants. *See Exhibit I* (“Coyote Springs
10 Nursery, LLC’s First Interrogatories”); **Exhibit J** (“Coyote Springs Nevada, LLC’s First
11 Interrogatories”). Coyote Springs Nursery, LLC’s First Interrogatories included forty
12 interrogatories, each with five subparts, that asked about various potential witnesses in
13 this case. *See generally* Ex. I. One subpart for each of the forty witnesses inquired about
14 requested the State Engineer to “[i]dentify with specificity the involvement [the witness]
15 had and/or has with each recital and finding in Order 1309. *Id.* Coyote Springs Nevada,
16 LLC’s First Interrogatories included four interrogatories relating to communications
17 during the Order 1309 PJR, Ex. J, p. 5, Irogs. 1–3; p. 7, Irog No. 13, one interrogatory
18 asking for the basis for the contention of Micheline Fairbank in her February 2023
19 deposition that Order 1309 does not have “any adverse impact on any individual water
20 right holder,” *id.*, p. 9, Irog. 22, and seven interrogatories asking about the perennial yield
21 for the seven hydrographic basins that comprise the Lower White River Flow System, as
22 delineated by Order 1309, *id.*, pp. 9–10, Irogs. 23–29.

23 **3. Requests for Admissions**

24 On May 2, 2023, Plaintiffs served their First Requests for Admission to Defendants
25 and Second Set of Interrogatories from Coyote Springs Nevada, LLC. To Defendants (“First
26 RFAs”). **Exhibit K.** At least four of the eighty-two RFAs directly concern Order 1309. *See*
27 *id.*, pp. 18–19, RFA Nos. 77–81. RFA No. 79 asks the State Engineer to “[a]dmit that the
28 State Engineer did not have express statutory authority to create the [Lower White River

Flow System],” *id.*, p. 19, a legal conclusion squarely before the Nevada Supreme Court in *Sullivan*.

4. *Depositions*

To date, CSI has taken depositions of the following five witnesses: (1) Micheline Fairbank, former Deputy Administrator for the Division of Water Resources; (2) Adam Sullivan, current State Engineer; (3) Tim Wilson, former State Engineer; (4) Jason King, former State Engineer; and (5) the State Engineer’s 30(b)(6) witness, Melissa Flatley. CSI inquired heavily into Order 1309 in these depositions.² By way of example, the term “1309” comes up eighty-seven times in Ms. Fairbank’s deposition, eighty-four times in Mr. Sullivan’s deposition, fifty-three times in Mr. Wilson’s deposition, and ninety-three times in Ms. Flatley’s deposition. Whelan Dec., ¶¶ 16, 18, 20, 22.

What is more, CSI did not merely reference 1309 in passing, but rather questioned the witnesses on issues already litigated in the Order 1309 PJR and pending before the Nevada Supreme Court. For example, counsel for CSI inquired of Ms. Fairbank, “Is it your position 1309 has -- did not have an impact on any stakeholders?” **Exhibit L** (Excerpts from 2/13/23 deposition transcript of M. Fairbank), 137:2–3. This line of questioning continued. *See id.*, 137:10–139:24. This same question was asked of Mr. Wilson. *See Exhibit M* (Excerpts from 2/15/23 deposition transcript of T. Wilson), 164:24–25 (“And is it your position as you sit here today that 1309 doesn’t impact any stakeholders’ rights?”).

Similarly, counsel for CSI asked Mr. Sullivan various questions regarding the effect of Order 1309’s creation of the Lower White River Flow System. **Exhibit N** (Excerpts from 2/14/23 deposition transcript of A. Sullivan), 162:15–18 (“But isn’t it true, sir, that by creating this larger seven-basin unit, the Lower White River Flow Basin, you put all the water right holders in one big unit?”); *id.*, 162:24–163:2 (“... But the Order 1309 re-prioritizes certain water rights as they relate to one another, even if the priority dates remain the same.”). Counsel for CSI also asked Mr. Sullivan additional questions that go

² The one exception is CSI’s deposition of Jason King, who retired from the Division of Water Resources in 2019 and therefore was not employed at the Division at the time Order 1309 was issued in 2020.

1 to the State Engineer’s statutory authority with respect to Order 1309. For example: “What
2 is the statutory basis for the state engineer to include the Kane Spring Valley standalone
3 basin into the super basin created by Order 1309?” *Id.*, 154:8–11. *See also* Ex. M, 162:17–
4 164:23 (questions regarding inclusion of Kane Springs Valley and 8,000 afa sustainable
5 pumping limit).

6 Counsel for CSI likewise asked a line of questioning during the 30(b)(6) deposition
7 of Ms. Flatley regarding Order 1309, its effects, Ms. Flatley’s role in drafting Order 1309,
8 and what the State Engineer may or may not do once the *Sullivan* matter before the
9 Nevada Supreme Court concludes. *See Exhibit O* (Excerpts from 7/20/23 deposition
10 transcript of 30(b)(6) deposition), 253:18–272:24.

11 **G. The Nevada Supreme Court Holds Oral Argument in *Sullivan*.**

12 On August 8, 2023, the Nevada Supreme Court held oral argument in the *Sullivan*.
13 Appellants and Respondents were respectively afforded fifteen minutes for argument. The
14 arguments focused on two primary issues: first, the authority of the State Engineer to
15 render Order 1309 and delineate the Lower White River Flow System hydrographic basin;
16 and second, whether Respondents suffered any due process violations in the Order 1309
17 fact-finding process. It is unknown when the Nevada Supreme Court will render a decision.
18 However, in recent water law cases, the Nevada Supreme Court has taken upwards of a
19 year or longer from the date of oral argument to render its decisions. *See, e.g., Diamond*
20 *Natural Resources Protection & Conservation Assoc. v. Diamond Valley Ranch, LLC*, 138
21 Nev. Ad. Op. 43, 511 P.3d 1003 (Nev. 2022) (oral argument held June 2, 2021; opinion filed
22 June 16, 2022); *Wilson v. Pahrump Fair Water, LLC*, 137 Nev. 10, 481 P.3d 853 (2021) (oral
23 argument held November 5, 2019; opinion filed February 25, 2021).

24 **H. Plaintiffs Indicate Their Intent to Move to Amend Their Complaint a**
25 **Third Time.**

26 On August 15, 2023, counsel for the State Engineer and counsel for CSI held a
27 telephone conference to discuss whether CSI would be amenable to stipulating to the stay
28 that this Motion now seeks. Although counsel initially stated some interest in a stay, on

1 August 17, 2023, counsel for CSI sent an e-mail in which he wrote that CSI was instead
2 planning to seek leave to amend its Complaint again. *See* Ex. A.

3 Counsel's review of the proposed Third Amended Complaint revealed that CSI
4 attempts to add four new claims for relief. First, CSI adds a novel claim for "Per Se
5 Appropriation Taking of CSI's Water Rights," in which CSI claims that the State Engineer
6 appropriated CSI's senior priority status in Basin 206 for over 100 groundwater holders in
7 other areas without paying just compensation. Whelan Dec., ¶ 4. Second, CSI adds a claim
8 for relief for a *Lucas* taking under the Nevada Constitution as to 6,937.66 acres of land. *Id.*
9 Third, CSI adds a claim for a *Penn Central* taking under the Nevada Constitution as to
10 6,937.66 acres of land. *Id.* Finally, CSI adds an alternative claim for "Temporary Taking."
11 *Id.*

12 Later on August 17, 2023, counsel spoke again about the requested stay of
13 proceedings and CSI's proposed Third Amended Complaint. Counsel for CSI stated that
14 he believed that the proposed Third Amended Complaint alleviated the need for a stay due
15 in part due to the addition of an alternative claim for Temporary Taking. That claim states
16 if it is found that CSI "may use its groundwater rights, have their subdivision maps
17 approved, and develop their long planned and fully entitled master planned community,
18 then there has still been a temporary appropriation and/or temporary taking of Plaintiffs'
19 property for which just compensation is due and must be paid." Counsel further stated
20 that this case is not based on Order 1309, but rather is based on the May 16, 2018, letter
21 issued by the State Engineer and subsequent actions of the State Engineer.³

22 The Parties could not reach agreement with respect to either the requested stay or
23 the requested leave to amend the Complaint. Counsel therefore agreed that each side
24 would file its respective motion on the same day.

25 ///

26 ///

27
28 ³ Review of the proposed Third Amended Complaint reveals, in fact, that Order 1309 is still
heavily referenced throughout.

1 **III. ARGUMENT**

2 This Motion presents a unique posture in which a stay is requested not because an
3 interlocutory order is currently on appeal, but rather because issues currently before the
4 Nevada Supreme Court in a related proceeding will have a direct and profound impact on
5 this case. It is beyond dispute that Nevada water law—both the scientific and legal
6 landscapes—is currently in a state of flux. This Court should allow the Nevada Supreme
7 Court to decide key issues that will undoubtedly impact these proceedings. To do so would
8 “simplify and streamline the proceedings and promote the efficient use of the parties’ and
9 the court’s resources.” *Nationstar Mortgage, LLC v. RAM LLC*, Case No. 2:15-CV-01776-
10 KJD-CWH, 2017 WL 1752933, at *2 (D. Nev. May 4, 2017) (granting stay pending U.S.
11 Supreme Court proceedings where jurisprudence in Nevada foreclosure law “continues to
12 evolve causing parties in the scores of foreclosure-challenging actions pending to file new
13 motions or supplement the ones that they already have pending, resulting in docket-
14 clogging entries and an impossible-to-follow chain of briefs in which arguments are
15 abandoned and replaced.” (cleaned up)).

16 Given the uniqueness of the procedural posture, the traditional factors considered
17 when deciding to issue a stay are not directly on point. Therefore, this Court should issue
18 a stay pursuant to its inherent authority to govern its own procedures, including
19 management of its docket. If the Court decides to consider the traditional stay factors, a
20 stay is likewise warranted.

21 **A. This Court Should Exercise Its Inherent Authority to Stay**
22 **Proceedings Pending the Nevada Supreme Court’s Resolution of**
23 ***Sullivan*.**

24 It is axiomatic that “[t]he judiciary has the inherent power to govern its own
25 procedures.” *Borger v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 120 Nev. 1021,
26 1029, 102 P.3d 600, 606 (2004) (quoting *State v. Connery*, 99 Nev. 342, 345, 661 P.2d 1298,
27 1300 (1983). Intrinsic in this authority is the “discretion of district courts in the procedural
28 management of litigation, which includes conservation of judicial resources.” *Borger*, 120

1 Nev. at 1029. Here, the Court should exercise its inherent authority to stay proceedings in
2 this case until the Nevada Supreme Court renders its decision in *Sullivan* for at least four
3 reasons.

4 First, the Nevada Supreme Court's decision will clarify the issues before this Court
5 significantly. For example, if the Supreme Court determines that the State Engineer had
6 the authority to issue Order 1309 and reverses the district court's order invalidating Order
7 1309, that legal determination would have *res judicata* effect in this action. The same
8 would occur if the Supreme Court determines the State Engineer did not have authority to
9 issue Order 1309, or that Order 1309 were invalid on the grounds that due process rights
10 were violated; that legal determination would provide clarity to the Court and the Parties
11 as they proceed through the case.

12 Second, and relatedly, allowing the Supreme Court to decide legal questions that
13 overlap with this case—such as the State Engineer's authority to issue Order 1309 or
14 whether Order 1309 constitutes mere fact-finding or a management decision—will serve
15 judicial economy. This Court will not have to decide those legal issues and will simply
16 apply the Supreme Court's determination to the facts. Further, there will be no risk of
17 conflicting conclusions of law between this Court and the Supreme Court—for example, if
18 this Court were to render its decision on dispositive motions before the Supreme Court
19 rendered its decision. Staying the proceedings would have the concomitant effect of
20 preventing appeals, extraordinary writ proceedings, or NRCP 60 motions to correct any
21 error stemming from conflicting decisions.

22 Third, allowing the appellate process to conclude before proceeding further in this
23 case could potentially narrow the issues before the Court significantly. Most concretely, if
24 the Supreme Court reverses the district court decision and upholds the validity of Order
25 1309, CSI's claims of inverse condemnation fall by the wayside. If the Supreme Court
26 determines that Order 1309 is purely fact-finding, as opposed to managerial, and does not
27 affect any party's rights, then any of CSI's claims dependent on Order 1309 being a final,
28

1 managerial government action would be subject to dismissal for lack of standing on
2 ripeness grounds.

3 Indeed, the United States Supreme Court has held that, in the regulatory taking
4 context, a plaintiff must show “*de facto* finality” of a government action to have standing to
5 sue. See *Pakdel v. City & Cty. of San Francisco*, __ U.S. __, 141 S.Ct. 2226, 2230, 210
6 L.Ed.2d 617 (2021).⁴ This requirement ensures that “a plaintiff has actually been injured
7 by the Government’s action and is not prematurely suing over a hypothetical harm.” *Id.*
8 (cleaned up). To establish such finality, “a plaintiff must show . . . that there is no question
9 about how the regulations at issue apply to the particular land in question.” *Id.* (cleaned
10 up).

11 Of course, the Supreme Court could make any number of other determinations that
12 could have an impact on this case. Allowing the case to proceed in light of such uncertainty
13 would encourage continuation of CSI’s “moving target” litigation strategy. Although the
14 State Engineer will address specific arguments in response to CSI’s anticipated motion for
15 leave to amend its complaint for a third time, it is reasonable to expect that, after the
16 Supreme Court hands down the *Sullivan* decision, CSI may want to amend its Complaint
17 yet another time to comport with any new precedent announced. This could mean the filing
18 of a Fourth Amended Complaint, begging the question of how many chances CSI should
19 have to solidify its ever-shifting theory of the case.

20 Fourth, the scope of remaining discovery in this case would be narrowed, conserving
21 the resources of the Parties and promoting judicial economy by, hopefully, requiring less
22 judicial intervention to resolve discovery disputes and/or reopen discovery following the
23 filing of the *Sullivan* decision. As shown above, CSI has propounded a significant amount
24 of discovery relating to the procedure and substance of Order 1309, including seeking
25 admissions and deposition testimony on legal questions squarely before the Nevada
26 Supreme Court in *Sullivan*. In effect, this shows an intent by CSI to relitigate matters that

27
28 ⁴ *Pakdel* is cited for its persuasive value but is not binding precedent due to the fact that
CSI’s takings claims arise only under the Nevada Constitution.

1 are currently pending before, and will be resolved by, the *Sullivan* appeal. Because the
2 scope of discovery in Nevada is broad, the State Engineer has cooperated in good faith in
3 this discovery thus far. However, as the parties move into expert discovery, the issues
4 become more complicated, and the costs increase greatly.

5 The current initial expert disclosure deadline is November 1, 2023, less than three
6 months away. With CSI's shifting legal theories and attempt to amend their Complaint
7 yet again to add four new claims for relief, including that of "Temporary Taking" and a
8 novel claim for "Per Se Appropriation Taking of CSI's Water Rights), the State Engineer
9 will have to prepare potentially unnecessary experts for any number of different
10 eventualities.⁵ For example, if the case proceeds to expert discovery before the issues in
11 *Sullivan* are decided, the State Engineer may need to be prepared with a water expert to
12 opine on the hydrological connection in the Lower White River Flow System under the
13 expectation that CSI will challenge the soundness of the science underlying Order 1309.
14 Of course, the State Engineer believes that such expert discovery is irrelevant and not
15 proportional to the needs of the case, as the NRS 533.450 judicial review process is the sole
16 avenue for such a challenge⁶, but he also needs to be able to contest expert testimony,
17 which, based on how fact discovery has proceeded, CSI is likely to disclose. However, if the
18 case is stayed until the Supreme Court reaches a decision in *Sullivan*, the soundness of the
19 State Engineer's decision will be resolved and not subject to collateral attack.

20 Likewise, damages discovery, which will be the subject of expert testimony, will be
21 significantly narrowed once the Supreme Court renders its decision in *Sullivan*. Rather
22

23 ⁵ There is undeniably nothing unique about a plaintiff pleading in the alternative. But what
24 is unique here is that a decision of the State's highest Court will, with certainty, issue an opinion
that will eliminate certain of the alternatives.

25 ⁶ Indeed, the State Engineer would argue that CSI should not be permitted to make a
26 collateral attack on the State Engineer's scientific and technical expertise to avoid the legislatively
approved relevant standard of review, which gives significant deference to the State Engineer. See
27 *Diamond Nat. Res. Prot. & Conservation Ass'n*, 138 Nev. Adv. Op. 43, 511 P.3d at 1011 (citing
28 *Pahrump Fair Water, LLC*, 137 Nev. at 16, 481 P.3d at 858 (explaining that the Court's deference
to the State Engineer's judgment "is especially warranted" when "technical and scientifically
complex" issues are involved)); *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979).

1 than have to prepare experts for the different damages scenarios of a total *Lucas* taking, a
2 partial *Penn Central* taking, or a temporary taking (if the Third Amended Complaint is
3 permitted to be filed), the Parties could wait and conduct damages discovery based on the
4 ***actual*** theory of the case that advances.

5 **B. The Court Should Stay the Proceedings Under the Traditional Stay**
6 **Factors.**

7 Rule 8(c) of the Nevada Rules of Appellate Procedure lists the factors that the
8 appellate court “will generally consider” in “deciding whether to issue a stay[.]” These
9 factors are:

- 10 (1) whether the object of the appeal or writ petition will be defeated if the stay
11 or injunction is denied; (2) whether appellant/petitioner will suffer
12 irreparable or serious injury if the stay or injunction is denied; (3) whether
13 respondent/real party in interest will suffer irreparable or serious injury if
14 the stay or injunction is granted; and (4) whether appellant/petitioner is
15 likely to prevail on the merits in the appeal or writ petition.

16 NRAP 8(c). Although not binding on district courts, these factors are a helpful guide when
17 a party first moves, as it must, in the district court for a stay. *See* NRAP 8(a)(1); *Hansen*
18 *v. Eighth Judicial Dist. Court, ex rel. Cty. of Clark*, 116 Nev. 650, 657, 6 P.3d 982, 986
19 (2000). Here, the factors, on balance, militate in favor of a stay.

20 **1. If the stay is denied, the object of the appeal would be defeated.**

21 As stated, this factor does not logically apply to the unique procedural posture of this
22 case. Specifically, this factor more directly applies to a case in which the appeal or writ at
23 issue is taken in the same case in which the stay is sought. Here, by contrast, the State
24 Engineer seeks a stay pending resolution of related appellate proceedings. Thus, the
25 inverse inquiry is really the critical one: whether, if the stay is denied, the resolution of the
26 appeal would defeat, or negatively affect, the proceedings in this case. The answer to this
27 question is a resounding yes.

28 As discussed in more detail above, the Supreme Court’s resolution of the *Sullivan*
appeal will clarify the issues in this case, potentially narrow CSI’s claims significantly,
conserve judicial economy, prevent conflicting results, and narrow the scope of discovery.

1 *See supra*, pp. 18–21. If the stay is denied, all these benefits would be lost. CSI’s claims
2 and legal theories will remain expanded, increasing the scope of discovery and likely the
3 involvement of this Court to resolve disputes. This Court may render decisions that
4 ultimately will conflict with the decision of the Nevada Supreme Court, leading to further
5 motion and/or appellate practice. In short, a stay will promote judicial economy and the
6 orderly administration of this case. This factor weighs in favor of issuing a stay.

7 ***2. The State Engineer would suffer serious injury if the stay is denied.***

8 As shown by the complex and protracted procedural history of this case, including
9 three amendments of the Complaint, a removal, and a remand, the Parties have already
10 expended significant resources in litigating this case. To continue down the path of broad
11 strokes litigation, preparing for all eventual outcomes of the Supreme Court’s *Sullivan*
12 decision, would seriously harm the State Engineer, who is defended by the taxpayer-funded
13 Office of the Attorney General. Admittedly, financial costs incurred to continue litigating
14 are generally not seen as “irreparable harm.” *See Mikohn Gaming Corp. v. McCrea*, 120
15 Nev. 248, 253, 89 P.3d 36, 39 (2004) (recognizing that “[n]ormally, the only cognizant harm
16 threatened to the party is increased litigation costs and delay.”). Therefore, courts tend to
17 give this factor little weight when deciding whether to issue a stay. *See id.*

18 ***3. CSI will suffer no irreparable harm or serious injury if the stay is***
19 ***granted.***

20 It is anticipated, based on conversations with counsel for CSI in the meet and confer
21 process, that CSI’s main objection and claim of harm will be that it will suffer further delay
22 in bringing its claims to resolution. Similar to the consideration of increased litigation
23 costs, “a mere delay in pursuing discovery and litigation normally does not constitute
24 irreparable harm.” *Mikohn Gaming*, 120 Nev. at 253. To offset the delay to CSI, it should
25 be noted that CSI will, like the State Engineer, benefit from a decrease in litigation costs
26 during the period of the stay and a decrease in litigation costs following the stay due to the
27 clarifying and narrowing of issues.

28 ***4. The State Engineer is likely to prevail on the merits in the appeal.***

1 The fourth factor requires not that the party moving for a stay show “a probability
2 of success on the merits,” but merely that it “present a substantial case on the merits when
3 a serious legal question is involved and show that the balance of equities weighs heavily in
4 favor of granting the stay.” *Hansen*, 116 Nev. at 659. Here, the State Engineer, in the
5 *Sullivan* appeal, has a substantial case on the merits that it had the authority to issue
6 Order 1309 and that it did not violate due process in how it proceeded. The most compelling
7 support for this is that the Supreme Court granted the State Engineer’s motion to stay
8 Judge Yeager’s order vacating Order 1309 during the pendency of the appeal, allowing
9 Order 1309 to remain in effect to present. If the State Engineer had not presented “a
10 substantial case on the merits,” it is unlikely the Supreme Court would have granted such
11 relief. This factor weighs in favor of a stay. The equities, on balance, favor granting a stay.

12 **IV. CONCLUSION**

13 For the reasons stated above, Defendant State of Nevada, ex rel. Division of Water
14 Resources, Department of Conservation and Natural Resources, Adam Sullivan, State
15 Engineer, respectfully requests that this Court enter a stay of proceedings pending the
16 Nevada Supreme Court’s resolution of related appellate proceedings in *Sullivan, P.E. v.*
17 *Lincoln Co. Water Dist.*

18 DATED this 21st day of August, 2023.

19 AARON D. FORD
20 Attorney General

21 By: /s/ Jessica E. Whelan

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/s/ Jeny M. Beesley
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DISTRICT COURT

CLARK COUNTY NEVADA

COYOTE SPRINGS INVESTMENT, LLC,
a Nevada Limited Liability Company;
COYOTE SPRINGS NEVADA, LLC, a
Nevada limited liability company; and
COYOTE SPRINGS NURSERY, LLC, a
Nevada limited liability company,

Plaintiffs,

vs.

STATE OF NEVADA, on relation to its
Division of Water Resources;
DEPARTMENT OF CONSERVATION
and NATURAL RESOURCES; ADAM
SULLIVAN, Nevada State Engineer; and
Does I through X.

Defendants.

Case No.: A-20-820384-B
Dept.: 13

**PLAINTIFFS' [PROPOSED] THIRD
AMENDED COMPLAINT FOR
DAMAGES AND DEMAND FOR JURY
TRIAL**

Plaintiffs COYOTE SPRINGS INVESTMENT LLC, a Nevada limited liability
company; COYOTE SPRINGS NEVADA LLC, a Nevada limited liability company; and
COYOTE SPRINGS NURSERY LLC, a Nevada limited liability company allege as

1 follows.

2
3 I.

4 **OVERVIEW**

5 Starting early 2018, the Department of Conservation and Natural Resources
6 (herein the “State Engineer”) initiated a plan to deprive the Plaintiffs of their right to use
7 valuable water rights which in turn has resulted in Plaintiffs losing their valuable
8 entitlements, valuable real property interests and seniority in their water rights.

9 Plaintiffs have justifiably relied on their water permits, former Orders and Rulings
10 issued by the State Engineer and the Doctrine of Prior Appropriation to invest over
11 \$300,000,000 in their ownership and development of their approved master planned
12 community in Clark County, Nevada.

13 On May 16, 2018, the State Engineer condemned the Plaintiffs’ rights to use their
14 permitted and certificated water rights, real property interests, entitlements, and senior
15 water rights.

16 The State Engineer condemned Plaintiffs’ property rights in a continuation of
17 orders since May 16, 2018, to further effectuate the taking of Plaintiffs’ property rights.

18 These acts of inverse condemnation by taking actions as further described below
19 were accomplished without paying Plaintiffs just compensation for the property rights
20 taken and appropriated to others.

21 The value of the property rights taken and appropriated to others exceed \$1.5
22 billion.

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24 II.

25 **INTRODUCTION**

26 1. Nevada’s water law statutes are rooted in the doctrine of prior appropriation,
27 or “first in time, first in right”. It is universally understood that the priority of a water right
28 is its most valuable component. See Gregory J. Hobbs, Jr., *Priority: The Most*

1 *Misunderstood Stick in the Bundle*, 32 Env'tl. L. 37, 43 (2002) ("Priority determines the
2 value of a water right").

3 2. In fact, courts have explained that "[a] priority in a water right is property in
4 itself"; therefore, "to deprive a person of his priority is to deprive him of a most valuable
5 property right." *Colorado Water Conservation Bd. v. City of Cent.*, 125 P.3d 424, 434
6 (Colo. 2005) (internal quotation marks omitted).

7 3. The Nevada Supreme Court agrees and has reiterated that "a loss of priority
8 that renders rights useless 'certainly affects the rights' value' and 'can amount to a de
9 facto loss of rights.'" *Wilson v. Happy Creek, Inc.*, 135 Nev. 301, 313, 448 P.3d 1106,
10 1115 (2019) (quoting *Andersen Family Assocs. v. State Eng'r.* 124 Nev. 182, 190, 191,
11 179 P.3d 1201 (2008)).

12 4. In the late 1960's, the Nevada State Engineer and the federal government
13 identified 232 hydrographic basins in the State of Nevada. Since that time, and consistent
14 with the mandates of Nevada's water law statutes, the State Engineer has managed water
15 rights by the individual basin in which the water rights are appropriated.

16 5. Because water rights are granted in specific basins, they have also been
17 managed based on the basin in which they are located. As a result, the priority rights of
18 a water rights holder in a specific basin are managed in relation to and based on the dates
19 of priority of the other water rights holders located in the same basin.

20 6. This concept is reflected in the Nevada water law statutes, which require,
21 for example, curtailment based on the date of priority of a water right in a specific basin.
22 See, e.g., NRS 534.110 (allowing under specific circumstances curtailment conforming
23 to priority rights in a basin); NRS 534.090(3)(g) (referring to "[t]he date of priority of the
24 water right as it relates to the potential curtailment of water use in the basin").

25 7. Finding adequate groundwater was available for appropriation in Coyote
26 Spring Hydrographic Basin (Basin 210), the State Engineer's office issued Permit 46777
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1 to Nevada Power Company, which was purchased by Coyote Springs Investment, LLC
2 (“CSI”) as a senior groundwater right in Basin 210.

3 8. Relying on these senior groundwater rights, the Plaintiffs have invested
4 millions of dollars into their master planned community located in Clark County, Nevada.

5 9. Additionally, the Plaintiffs entered contracts with Lincoln County Water
6 District and Vidler Water Company (collectively referred to as “Lincoln Vidler”) to purchase
7 an additional 1,000 afa of senior groundwater rights in Kane Spring Hydrographic Basin
8 (Basin 206) to be used for the master planned community.

9 10. The taking of CSI’s water rights and other property arose from the State
10 Engineer’s change in the basin-by-basin water management protocol through various
11 orders and decisions, beginning with the May 16, 2018, letter and through the June 15,
12 2020, Order 1309.

13 11. Rather than manage the Plaintiffs’ water rights in the individual basins in
14 which they are held, the State Engineer has combined seven previously separate basins
15 into a single consolidated basin.

16 12. In so doing, the State Engineer has taken Plaintiffs’ senior groundwater
17 rights in the Coyote Spring Hydrographic Basin and appropriated them for use by other
18 water right holders located in other groundwater basins.

19 13. Consequently, the State Engineer has rendered Plaintiffs’ land unusable
20 and valueless because it cannot be developed without groundwater.

21 III.

22 PARTIES AND JURISDICTION

23 14. Plaintiff COYOTE SPRINGS INVESTMENT LLC is a Nevada limited liability
24 company (“CSI”) doing business in Clark County, Nevada. It owns valuable water rights
25 and land intended to be developed with those water rights. Based on having water rights,
26 CSI received valuable property rights in the form of entitlements to develop.
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1 15. COYOTE SPRINGS NEVADA LLC is a Nevada limited liability company
2 ("CS-Nevada") doing business in Clark County, Nevada. It owns land in Clark County
3 approved for development with the right to use water rights permitted and certificated to
4 affiliate CSI. CS-Nevada is the entity intended to act as land developer for the master
5 planned community.

6 16. COYOTE SPRINGS NURSERY LLC is a Nevada limited liability company
7 ("CS-Nursery") doing business in Clark County, Nevada. CS-Nursery has the right to use
8 water permitted and held by affiliate CSI.

9 17. When referred to together, CSI, CS-Nevada, and CS-Nursery shall be
10 referred to as "Plaintiffs" or "CS-Entities".

11 18. The State Engineer's taking of CSI's water rights has caused CSI, CS-
12 Nevada, and CS-Nursery to lose valuable land, entitlements, and senior water rights
13 without compensation in violation of the Fifth Amendment of the United States
14 Constitution and Nevada Constitution.

15 19. The State Engineer is a division of the State of Nevada Department of
16 Conservation and Natural Resources. Adam Sullivan is the current Nevada STATE
17 ENGINEER.

18 20. The State Engineer has taken the Plaintiffs' vested, senior water rights
19 located in Coyote Spring Hydrographic Basin and Kane Springs Hydrographic Basin and
20 as a result has destroyed and taken Plaintiff's right to develop 6,937.66 acres of Plaintiffs'
21 land in Clark County, Nevada, for residential and commercial purposes.

22 21. This land has been planned, designed, mapped, approved, and partially
23 constructed as a Major Project in Clark County, Nevada (the "Approved Major Project" or
24 the "master planned community").

25 22. Venue and jurisdiction are appropriate in this Court as Plaintiffs allege that
26 the Defendant STATE OF NEVADA, on relation to its Division of Water Resources,
27 Department of Conservation and Natural Resources, and its State Engineers (hereinafter
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1 the "State" and/or the "State Engineer") have taken CSI's real property, including its water
2 rights, in Clark County, Nevada.

3 23. The true names and capacities, whether individual, corporate, associates
4 or otherwise, of Defendants herein designated as DOES I through X inclusive are
5 unknown to the Plaintiffs CS-Entities at this time, who therefore sue said Defendants by
6 such fictitious names. Plaintiffs are informed and believe and thereon allege that each of
7 said DOES Defendants may have conspired with the State and/or participated in the
8 wrongful events and happenings and proximately caused the injuries and damages herein
9 alleged. Plaintiffs may, as allowed under NRCP 15, seek leave to amend this Complaint
10 to allege their true names and capacities as they are ascertained.

11 24. This lawsuit was initially filed in the Eighth Judicial District Court, Clark
12 County, Nevada, where venue is proper, as the Coyote Springs development, and its
13 master planned community, processed and fully entitled under Clark County Code Title
14 30, is located in Clark County, Nevada.

15 25. Many of the claims and the underlying facts arose, and the causes of action
16 plead herein, relate to CS-Entities' real property rights, including but not limited to its
17 approved Clark County Major Project development and land use entitlement rights, and
18 the prohibited and wrongful delay and blocking of CS-Entities' use and enjoyment of its
19 Clark County real property, including but not limited to, its certificated and permitted water
20 rights in Clark and Lincoln Counties, Nevada.

21 26. Many of the witnesses in this case reside in Clark County, Nevada. On
22 October 1, 2020, Defendants removed this case to United States District Court for the
23 District of Nevada. On September 28, 2021, the United States District Court entered an
24 Order remanding this action back to State Court.

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IV.

STATEMENT OF FACTS

A. CS-Entities' Land and Senior Water Rights.

27. In 1998, the CS-Entities acquired approximately 6,937.66 acres in Clark County for the master-planned community.

28. Specifically, Coyote Springs Investment, LLC acquired 3,933.51 acres; Coyote Springs Nevada, LLC later acquired 2,986.66 acres; and Coyote Springs Nursery, LLC later acquired 17.49 acres.

29. The CS-Entities have been working to develop their master planned community on the 6,937.66 acres in Clark County.

30. To develop the master planned community, Coyote Springs Investment, LLC has also acquired for its beneficial use 5,090 acre feet annually ("afa") of vested, senior water rights, which are held as follows:

a. **Permit No. 70429:** 1,250 afa certificated water rights held in Basin 210 with a priority date of March 31, 1983. 1,250 afa were conveyed to the Coyote Springs General Improvement District ("CSGID") to be held in trust for the CS-Entities to put to beneficial use for the master planned community.

b. **Permit No. 74094:** 750 afa permitted water rights held in Basin 210 with a priority date of March 31, 1983. 750 afa were conveyed to the CSGID to be held in trust for the CS-Entities to put to beneficial use for the master planned community.

c. **Permit No. 70430:** 1,600 afa permitted water rights held in Basin 210 with a priority date of March 31, 1983. CSI relinquished 460 afa back to the State in care of the State Engineer in accord with the U.S. Fish and Wildlife Service as CS-Entities' mitigation for any potential Muddy River instream water level flow decreases potentially associated with the CS-Entities' Approved Major Project for the purpose of furthering the survival and recovery of the endangered Moapa dace fish and its habitat. Thus, CSI holds 1,140 under Permit 70430.

d. **Permit No. 74095:** 500 afa permitted water rights held in Basin 210 with a priority date of March 31, 1983.

1 e. **Permit No. 91200:** 250 afa permitted water rights held in Basin 210
2 with a priority date of March 31, 1983.

3 f. **Permit No. 91201:** 250 afa permitted water rights held in Basin 210
4 with a priority date of March 31, 1983.

5 g. **Permit Nos. 72220, 72221, 82727, and 82728:** collectively, these
6 permits, issued in Basin 206, allow for the use of 1,000 afa and have a priority date
7 of February 14, 2005. CSI holds a joint, undivided ownership interest in 172.96
8 afa, and the contractual right to acquire an additional 200.52 afa of permitted
9 groundwater rights under Permit 72220. CSI holds a joint, undivided ownership
10 interest in 74 afa, and the contractual right to acquire an additional 299.48 afa of
11 permitted groundwater rights under Permit 72221. CSI holds a joint, undivided
ownership interest in 500 afa, and the contractual right to acquire the entire
ownership interest therein under groundwater rights Permit 82727. CSI holds
contractual ownership interests and the contractual right to acquire 500 afa of
permitted groundwater rights under Permit 82728 (collectively the "Kane Springs
Water Rights").

12 h. Per the Memorandum of Agreement,¹ CSI must relinquish 5% of the
13 1,000 afa of Kane Springs Water Rights, resulting in 950 afa in Kane Springs Water
Rights.

14 31. In relation to the groundwater in Basin 210, NPC (CSI's predecessor in
15 interest) spent over a million dollars on groundwater monitoring and inventory studies to
16 better understand any hydrogeological connection between Coyote Springs Valley and
17 the groundwater, springs, and river flow in the Muddy River Springs Area.

18 32. NPC further contracted with an engineering firm to conduct exploratory
19 drilling at specific sites to establish realistic diversion points.

20 33. NPC additionally engaged the engineering firm to model the groundwater
21 system in Coyote Springs Valley.

22 34. At the time the State Engineer granted NPC's application to appropriate
23 groundwater in Basin 210 in Ruling 4542, the State Engineer found that the perennial
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27 ¹ In 2006, CSI entered a memorandum of agreement (the "MOA") with Moapa Valley Water District
28 ("MVWD"), United States Fish and Wildlife Service ("FWS"), Southern Nevada Water Authority ("SNWA"),
and the Moapa Band of Paiutes (the "Paiutes"), which adopted mitigation policies to support the Moapa
dace, a protected species, while CSI continued developing the Community.

1 yield of Basin 210 was at least 18,000 afa, which was more than adequate to grant the
2 application for NPC's water rights later purchased by CSI.

3 35. The State Engineer confirmed that NPC's groundwater rights in Basin 210
4 would not conflict with existing rights and would not be detrimental to the public interest.

5 36. CSI paid NPC approximately \$5,000,000 for the water rights held in Basin
6 210, which are the second most senior water rights in Basin 210.

7 37. Thus, at the time CSI acquired its groundwater rights in Basin 210 from
8 NPC, significant research, investigation, and study had been conducted, all of which
9 confirmed that adequate groundwater was available in Basin 210 to support the
10 groundwater permits CSI acquired from NPC.

11 38. CSI has paid more than \$8,500,00 for the water rights held in Basin 206
12 and will have paid at least \$13,500,000 in total when the contract with Lincoln Vidler is
13 fully performed. The 1,000 afa of groundwater rights in Basin 206 are the most senior
14 groundwater rights in the basin.

15 39. At the time the State Engineer granted the application to appropriate the
16 1,000 afa in Basin 206 in Ruling 5712, the State Engineer found that the 1,000 afa was
17 available for appropriation, that such appropriation would not cause a conflict with existing
18 rights, and that it would not be detrimental to the public interest to appropriate 1,000 afa
19 in Basin 210.

20 40. In Ruling 5712, the State Engineer expressly recognized that the 1,000 afa
21 of groundwater rights would be used for CSI's master planned community.

22 41. The Plaintiffs reasonably and justifiably relied on the State Engineer's
23 findings, conclusions, and approvals in both Ruling 4542 and Ruling 5712 related to the
24 adequate availability of groundwater to support CSI's groundwater rights in Basins 210
25 and 206 in purchasing those water rights and thereafter, in investing substantial sums
26 into developing those water rights and proceeding with the master planned community.

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1 **B. Relying on the State Engineer's Assurances of Available Groundwater,**
2 **the CS-Entities' Proceed with Developing the Master Planned**
3 **Community.**

4 42. The CS-Entities acquired the above-described land and senior water rights
5 for use in the master planned community.

6 43. Relying on the State Engineer's findings and conclusions that adequate
7 water was available to support CSI's groundwater rights in Basin 206 and Basin 210, for
8 the past 15+/- years, CS-Entities have completed, submitted, and processed land use
9 entitlements and zoning applications, permits and approvals for its Coyote Springs'
10 Approved Major Project in Clark County.

11 44. The CS-Entities have submitted and obtained multiple government and
12 regulatory approvals for infrastructure, maps and plans, including tentative maps,
13 submitted and recorded large parcel maps, parent final maps for the purpose of
14 subsequent residential subdivision maps and related property development and sales, all
15 in furtherance of its planned development of its master planned community.

16 45. These zoning, land use and construction applications and permits have
17 been submitted to numerous Federal, State and County agencies including the State, the
18 State Engineer, the CSGID, the Las Vegas Valley Water District ("LVVWD"), the Clark
19 County Water Reclamation District ("CCWRD") and Clark County, Nevada.

20 46. In further reliance on the State Engineer's findings, conclusions, and
21 representations that adequate groundwater was available to support CSI's groundwater
22 rights in Basin 210 and Basin 206, and as part of its ongoing efforts to develop the master
23 planned community, the CS-Entities submitted and obtained Clark County's approval of
24 Coyote Springs as a Major Project, pursuant to Clark County ("CC") Code 30.20.30, and
25 further submitted and obtained Clark County's approval of the following Major Project
26 development submittals:

- 27 a. Coyote Springs Concept Plan (MP-1424-01) approved on February
28 6, 2002.

1 b. Coyote Springs' Public Facilities Needs Assessment (PFNA) (MP-
2 0540-02) approved on May 22, 2002.

3 c. Coyote Springs Specific Plan (MP-0853-02), first approved on
4 August 7, 2002, and then later amended on August 2, 2006, and then again
5 amended and approved on September 17, 2008 (MP-0760-08).

6 d. CSGID created by Ordinance by the Clark County Board of County
7 Commissioners in October 2006, subject of Clark County Board of Commissioners
8 Ordinance # 3456, Bill # 10-17-06-2, along with the initiating Service Plan and
9 Operations Management Agreement among CSI, CSGID, LVVWD and CCWRD
10 all for purposes of operating and providing water and wastewater facilities and
11 services in the master planned community.

12 e. Coyote Springs' zone change request (ZC-1401-02) which included
13 master development agreement (DA-1400-02) for the master planned community
14 was approved on December 18, 2002 pursuant to Development Agreement
15 Ordinance #2844 that was effective January 1, 2003, and later amended by that
16 certain First Amendment and Restatement to Development Agreement dated
17 August 4, 2004 and recorded September 16, 2004 in Clark County Official Records
18 as Book 20040916-0004436.

19 f. In 2003, a use permit, UC-1493-03, was approved for a water
20 pumping station, power substation, and other related ancillary utility structures, and
21 another use permit, UC-0335-04 was approved for power transmission lines on
22 April 8, 2004.

23 g. Approved 125-acre Tourist Commercial zoning that includes a 40-
24 acre Gaming Enterprise District approved on December 17, 2008 (ZC-0947-08),
25 and the conditions therein extended until December 2024, pursuant to ET 0184-
26 16 which was approved on February 8, 2017.

27 47. CS-Entities' Approved Major Project status, memorialized by Clark County
28 Ordinances, establishes and confirms a vested property interest authorizing the CS-
29 Entities' development of its Approved Major Project, in Clark County, Nevada. CS-
30 Entities' Approved Major Project has been designed and pursued in furtherance of the
31 CS-Entities' investment backed development expectations when it acquired the Coyote
32 Springs property and its Coyote Springs' groundwater rights.

33 48. CS Entities' Approved Major Project in Clark County was memorialized
34 through County Ordinances, recorded with the respective County Recorders, which

1 worked to place the public, as well as the State, on notice of the Plaintiffs' master planned
2 community plans.

3 **C. The State Engineer Continued to Confirm and Protect CSI's Senior**
4 **Groundwater Rights From 2000 to 2017.**

5 49. In 2001, several parties filed applications for new and additional
6 groundwater rights in the Coyote Spring Valley Hydrographic Basin (Basin 210), Black
7 Mountains Area Hydrographic Basin (Basin 215), Garnet Valley Hydrographic Basin
8 (Basin 216), Hidden Valley (north) Hydrographic Basin (Basin 217), Muddy River Springs
9 Area a.k.a. Upper Moapa Valley Hydrographic Basin (Basin 219), and Lower Moapa
10 Valley Hydrographic Basin (Basin 220).

11 50. In response, the State Engineer issued Order 1169 on March 8, 2002,
12 explaining that the applications would be "held in abeyance" due to insufficient information
13 to determine if additional water was available for appropriation under these new
14 applications.

15 51. In Order 1169, the State Engineer recognized that certain parties, including
16 CSI, already had interests in water rights permitted from the carbonate aquifer system,
17 thereby acknowledging the existence and validity of CSI's senior water rights.

18 52. The State Engineer further acknowledged significant research had already
19 been done but explained that several complicated factors needed to be addressed to
20 determine whether additional water was available for new appropriations in these basins.

21 53. Thus, the State Engineer ordered the applicants to conduct a study covering
22 a five-year period of time during which at least 50% of the water rights then-permitted in
23 CSV be pumped for at least two consecutive years. The applicants, which included CS-
24 Entities, were to pay for the studies and were to file a report with the State Engineer within
25 180 days of the end of the fifth consecutive year.

26 54. The State Engineer, in Ruling 5712, which granted the application to
27 appropriate 1,000 afa in the Kane Springs Hydrographic Basin (Basin 206) expressly
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1 excluded water right holders in that basin from inclusion in the pump tests because there
2 was a lack of evidence of hydrological connectivity.

3 55. Following the issuance of Order 1169, CSI engaged in the pump tests of
4 the wells in the Coyote Spring Valley basin from 2010 to 2012. Other pump test
5 participants and CSI filed their reports in 2013.

6 56. In January 2014, the State Engineer issued Ruling 6255 and 6254, both of
7 which denied the pending applications for new and additional water rights in Coyote
8 Spring Valley Hydrographic Basin.

9 57. Relying on the 1169 Pump Test results, the State Engineer found that
10 granting **additional** water rights in Coyote Spring Valley basin could cause a decline in
11 down gradient water levels that would conflict with senior water rights.

12 58. Importantly, Ruling 6255 worked to protect **existing** water rights, including
13 CS-Entities' water rights, from any new appropriations by denying the pending new
14 groundwater applications on the basis that existing water rights, such as CS-Entities'
15 rights, must be protected.

16 59. Notably, Ruling 6255 acknowledged that the perennial yield for Basin 210
17 was 18,000 afa, in accordance with Ruling 4542 issued in 1997. Ruling 6255 did not
18 change the perennial yield of Basin 210 even after the pump tests were concluded.

19 60. Rulings 5712 and 6255 gave further reassurance to CSI that its senior
20 groundwater rights in Basin 210 and Basin 206 were valid and being protected by the
21 State Engineer.

22 61. The State Engineer has never conducted or ordered pump tests to be
23 conducted exclusively in Basin 210 to determine whether pumping **only** in Basin 210
24 would adversely affect the Muddy River Springs Area or the habitat of the Moapa dace.

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1 **D. Relying on the State Engineer's Continued Confirmation and Protection**
2 **of CSI's Senior Groundwater Rights in Basin 206 and Basin 210, CSI**
3 **Reasonably Invests Tens of Millions of Dollars into the Master Planned**
4 **Community.**

5 62. Based on their reasonable, investment backed expectations derived from
6 the State Engineer's repeated assurances that adequate groundwater was available to
7 support CSI's senior groundwater rights in Basin 210 and Basin 206, the CS-Entities
8 continued to develop, construct, and sell commercial and residential property within the
9 master planned community.

10 63. CS-Entities prepared, processed, and obtained permits, construction plans,
11 permits, and numerous approvals for community infrastructure.

12 64. CSI further obtained four recorded large parcel maps for development of
13 the master planned community with numerous agencies' approval, including the State
14 Engineer, LVVWD, and Clark County.

15 65. Multiple permits, applications, improvements, maps and plans have been
16 approved and the CS-Entities have designed, developed, and constructed significant
17 infrastructure improvements to support the master planned community.

18 66. Specifically, CS-Entities constructed and are operating a \$40,000,000 Jack
19 Nicklaus Signature designed golf course, which opened to the public since May 2008.²

20 67. CS-Entities designed and constructed as an amenity and to protect the
21 master planned community, a 325-acre flood control detention basin.

22 68. The flood control detention basin is the subject of a dam safety permit
23 issued by the State Engineer.

24 69. CS-Entities also designed, entitled, and constructed a groundwater
25 treatment plant, which includes two 1,000,000-gallon water storage tanks.

26 ² The Coyote Springs Golf Course operation was built as an amenity to serve the master planned
27 community. The Golf Course has operated at a significant annual loss since its inception and is expected
28 to continue to operate at a loss until the planned residential community is substantially built out with homes
 within the master planned community.

1 70. CS-Entities also designed, entitled, and constructed a wastewater
2 treatment plant and an initial package treatment plant.

3 71. CS-Entities, in conjunction with Lincoln County Power District, designed
4 and constructed electrical power facilities, including a three-megawatt electrical
5 substation and appurtenant equipment.

6 72. All of the above facilities and amenities have been considered and approved
7 by the State and its Nevada Division of Water Resources and Nevada Division of
8 Environmental Protection.

9 73. CS-Entities have also constructed four groundwater production wells (Well
10 1, Well 2, Well 3, and Well 4), two of which, Well 1 and Well 4, are in full operational use
11 at the present time and were constructed to culinary municipal well standards as required
12 by the LVVWD as manager of the CSGID, all approved by the State and its State Engineer
13 in 2013, with significant enhancements to make them compliant with municipal well
14 standards at a cost in excess of \$20,000,000.

15 74. CSI dedicated 2,000 afa to the CSGID pursuant to a contract titled the
16 Amended Multi-Party Agreement dated July 7, 2015, for CSI's beneficial use for the
17 master planned community. The water dedicated to CSGID is for the sole use and benefit
18 of the CS-Entities' right to develop the master planned community. By imposing a
19 moratorium on CSI's subdivision maps and development efforts, the State Engineer has
20 taken and condemned the water CSI dedicated to the CSGID for the benefit of the master
21 planned community.

22 75. Moreover, and with the approvals of the various government agencies,
23 including the State and subdivisions of the State, CS-Entities developed, permitted, and
24 constructed roads and streets and installed miles of associated underground utilities,
25 including water, treated water / wastewater, fiber-optic, electric lines and a 3-megawatt
26 substation, in the Coyote Springs Development within Clark County.

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1 76. This development, and its associated development costs, have all been
2 incurred based upon the CS-Entities' reasonable investment backed expectations and
3 assurances from the State Engineer that adequate groundwater existed to support CSI's
4 groundwater rights in Basin 210 and Basin 206, in compliance with all submitted and
5 approved plans, done in furtherance of its master planned community and Development
6 Agreement related thereto, done in furtherance of its real property rights, and with
7 assurance and reliance upon the State and the STATE ENGINEER's approval of the use
8 and enjoyment of its certificated and permitted water rights the CS-Entities acquired in
9 the Coyote Spring Valley as well as the Kane Springs Valley in support of the Coyote
10 Springs planned development of its master planned community.

11 77. When CS-Entities acquired the 6,937.66 acres and its certificated and
12 permitted water rights to be used in its master planned community, it had reasonable
13 investment backed expectations that it would be able to develop, construct, market, and
14 sell its master planned community.

15 78. The State Engineer's appropriation of 1,000 afa of groundwater rights in
16 Ruling 5712, was made with the explicit and expressed understanding that the water
17 rights would be used for the master planned community, which provided further
18 assurance to CS-Entities to proceed with the development.

19 79. Moreover, CS-Entities have relied upon and taken extensive action at the
20 Coyote Springs Development based upon the approvals of the agencies listed above, but
21 most particularly, those of the State and its State Engineer, to proceed with its master
22 planned community.

23 80. CSI, in particular has relied on the approvals of the State, and its State
24 Engineer, recognizing that CSI could use its certificated and permitted water rights,
25 including its reuse water rights, in the master planned community in order to support
26 operation of the golf course, all of its construction efforts, and ultimately to support the
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1 approved residential and commercial development planned for the master planned
2 community.

3 81. Consistent with its reasonable investment backed expectations to develop
4 its master planned community, and in further reliance on the State Engineer's Ruling 6255
5 and Ruling 5712 protecting its certificated and permitted water rights, CS-Entities have
6 pumped for beneficial use, and continued to pump between 1400- and 2000 afa annually
7 from its wells in the Coyote Spring Valley Basin.

8 82. Currently, approximately 1,100 afa are being pumped to support the existing
9 and operational golf course; however, CSI intends to put all of its water rights to beneficial
10 use to support the master planned community, and then reuse wastewater for the golf
11 course.

12 83. CS-Entities have adopted, and Clark County has approved via its Major
13 Plan Approval and Development Agreement, an aggressive water conservation plan for
14 the master planned community.

15 84. This plan includes significant reuse of water that is pumped from the
16 groundwater, including use of recycled water on its golf courses, common areas, and
17 public parks. CS-Entities' water conservation goals are aimed at a limitation on the use
18 of water for each developed lot in its development to 0.36 acre feet per year or less. The
19 water conservation goals continue to be lowered with advancement in water conservation
20 technology.

21 85. With the CS-Entities' water rights, Kane Springs' Water Rights, and all of
22 their Approved Major Project entitlements, CS-Entities intended to support thousands of
23 residential and commercial units within the master planned community.

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1 **E. After the CS-Entities Invest Substantial Sums into the Master Planned**
2 **Community, the State Engineer Takes CS-Entities Water Rights, and**
3 **Consequently, CSI's Land, and Master Planned Community.**

4 86. After decades of confirming that available water existed to support CSI's
5 senior groundwater rights in Basin 206 and Basin 210, and after substantial efforts were
6 taken by the State Engineer to protect CSI's senior groundwater rights, the State Engineer
7 took CSI's water rights.

8 **i. LVVWD'S November 16, 2017 Letter to the State Engineer**

9 87. In 2017, CSI began preparing to process a 575-unit tentative subdivision
10 map application and large lot parcel map to move forward with constructing the first phase
11 of the master planned community.

12 88. On November 16, 2017, Las Vegas Valley Water District purportedly acting
13 as the manager of the CSGID, sent an unsolicited letter dated November 16, 2017 to the
14 State Engineer, which sought "to solicit [the STATE ENGINEER's] opinion whether
15 Coyote Spring Valley groundwater can sustainably supply water for the Coyote Springs
16 Master Plan project."

17 89. Despite the fact that LVVWD's November 16, 2017, letter acknowledged
18 that State Engineer's Ruling 6255 "did not invalidate any existing water rights, including
19 those held by [Coyote Springs Water Resource General Improvement District] GID and
20 [CSI] Developers" at Coyote Springs, LVVWD sought an opinion from the State Engineer
21 as to whether the State Engineer's "office would be willing to execute subdivision maps
22 for the [Coyote Springs] Project if such maps were predicated on the use of groundwater
23 owned by the GID or [CSI] Developers in Coyote Spring Valley". *Id.*

24 **ii. The State Engineer's May 16, 2018 Letter**

25 90. In response, on May 16, 2018, the State Engineer, sent a letter to LVVWD
26 regarding Coyote Spring Valley Basin Water Supply, with a copy to CS-Entities'
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1 Representatives. A true and correct copy of the State Engineer's May 16, 2018, Letter
2 is attached hereto as **Exhibit "1"**.

3 91. The May 16, 2018, letter constitutes a public condemnation order
4 condemning CSI's water rights and asserting that the State Engineer would not approve
5 CSI's 575-unit subdivision map or any subdivision maps presented by CSI.

6 92. The State Engineer's May 16, 2018, letter publicly announced that the
7 amount of groundwater pumping that would be allowed in the five-basin area would be
8 limited to the amount that the State Engineer believed, based on no actual research,
9 would supposedly not conflict with the Muddy River Springs or the Muddy River, the most
10 senior rights in the five-basin area described in the May 16, 2018 letter.

11 93. Without technical and scientific investigation, inquiry, or justification, the
12 State Engineer further publicly announced that "carbonate pumping will have to be limited
13 to a fraction of the 40,300-acre feet already appropriated in the five-basin area". *Id.* The
14 State Engineer further stated:

15
16 Therefore, specific to the question raised in your November 16, 2017, letter,
17 considering current pumping quantities as the estimated sustainable carbonate
18 pumping limit, **pursuant to the provisions found in Nevada Revised Statutes**
19 **Chapter 278, 533 and 534, the State Engineer cannot justify approval of any**
20 **subdivision development maps based on the junior priority groundwater**
21 **rights currently owned by CWSRGID (sic) or CSI unless other water sources**
22 **are identified for development.** (emphasis in original.)

23 94. The May 16, 2018 letter took CSI's water rights. It also took CSI's priority
24 by characterizing CSI's water rights as a "junior priority". That false statement is required
25 by the fact that CSI's water rights were senior water rights in basin 210 and has never
26 been characterized as being junior water rights to any other water right owner in basin
27 210 that pumps from the carbon rock Aquifer.

28 95. The State Engineer has confirmed in discovery in this case that pursuant to
the May 16, 2018 letter, the amount of water CSI could use of its senior groundwater
rights to proceed with its subdivision map applications was zero (0) afa. Discovery has

1 revealed that the State Engineer inversely condemned and took CSI's senior groundwater
2 rights by and through its May 16, 2018 letter.

3 96. The State Engineer's May 16, 2018 letter took CSI's water rights and
4 appropriated them for senior water right holders in other hydrographic basins.

5 97. The State Engineer's May 16, 2018 letter abruptly halted CS-Entities'
6 development.

7 98. Following the State Engineer's May 16, 2018 public announcement of its
8 intent to appropriate and take the CS-Entities' water rights, the State Engineer, on May
9 17, 2018, further announced that it "would not sign off on CSI's subdivision maps to allow
10 their approval if they were based on the water rights CS-Entities owned or those
11 previously dedicated to the Coyote Springs General Improvement District CSGID."

12 99. On May 18, 2018, in conversations with CS-Entities Representatives, the
13 State Engineer advised CS-Entities "not to spend one dollar more on the Coyote Springs
14 Development Project and that processing of CSI's maps had stopped".

15 100. The State Engineer announced that it would prepare a new draft order.

16 101. The State Engineer admitted that this is "unchartered territory and his [State
17 Engineer] office has never granted rights and then just taken them away".

18 102. In an effort to best protect its water and development rights and its
19 investment backed expectations, on June 8, 2018, CSI filed a Petition for Judicial Review
20 of the State Engineer's May 16, 2018 letter in this Court, challenging the decision by the
21 State Engineer to place a moratorium on the processing of CSI's subdivision maps
22 preventing all construction in basin 210.

23 103. CSI's representative asked Jason King whether any water right holder had
24 asserted a conflict caused by CSI's groundwater pumping, and Jason King confirmed:
25 "No, no one has asserted a conflict or impairment by your current pumping or your water
26 rights."
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1 iii. **The August 29, 2018 Settlement Agreement**

2 104. During a court-ordered settlement conference, CSI and the State, through
3 then State Engineer Jason King, entered into a written Settlement Agreement dated
4 August 29, 2018 (the "Settlement Agreement"). A true and correct copy of the Settlement
5 Agreement is attached hereto as **Exhibit "7"**.

6 105. The Settlement Agreement established significant obligations upon both
7 CSI and the State designed to allow CSI to move forward with its master planned
8 community.

9 106. Further, the State Engineer accepted heightened "good faith" processing
10 obligations for critical mapping and development application approvals necessary for
11 Plaintiffs to move forward with the build-out and sales of lots within the master planned
12 community.

13 107. The State Engineer agreed to "process in good faith any and all maps or
14 other issue submittals as requested by CSI, and/or its agents or affiliates in accordance
15 with the State Engineers' ordinary course of business."

16 108. The State Engineer entered the Settlement Agreement under false
17 pretenses. It had already investigated a curtailment procedure in Basin 210. Knowing
18 that it was going to curtail CSI's water through a series of map moratoriums and orders
19 to defeat CSI's rights to its water, the State Engineer committed to process CSI's map
20 applications in good faith only as a ruse to find other ways to deny CSI's map applications.

21 109. Despite the State Engineer's fraudulent concealment of its motive to take
22 CSI's water, the contractual duty to accept and process CSI's map applications "in good
23 faith" remained in full force and effect but has since been inexcusably breached.

24 110. Unfortunately, and as discussed further herein, the State breached its
25 obligations owed to CSI "to process in good faith any and all maps or other issue
26 submittals by CSI" pursuant to the Settlement Agreement.

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1 **iv. The September 2018 Draft Order**

2 111. On September 7, 2018, the Office of the State Engineer issued two
3 conditional approvals of CSI's subdivision maps.

4 112. The first conditional approval was for the Large Lot Coyote Springs-Village
5 A, consisting of eight lots, a common area, and rights of way totaling approximately 643
6 acres in Clark County and requiring the statutory 2.0 afa per lot, for a total of 16 afa.

7 113. The second conditional approval was for the Coyote Springs-Village A
8 subdivision map, consisting of 575 lots, common areas and rights of way for
9 approximately 142.71 acres in Clark County and requiring an estimate demand of 408.25
10 afa of water annually based on .71 afa per residential unit.

11 114. The two subdivision maps were conditionally approved by the State
12 Engineer subject only to a will serve letter from CSGID and a final mylar map; the State
13 Engineer confirmed that sufficient water existed to supply to these subdivisions without
14 affecting senior water rights in the Muddy River and the Muddy River Springs.

15 115. These "conditions" were known by the State Engineer to be unachievable
16 and, as explained below, the State Engineer ultimately recommended disapproval of
17 CSI's subdivision maps.

18 116. On September 19, 2018, just 12 days after issuing a conditional approval
19 ostensibly paving the way for the development to proceed, the State Engineer held a
20 public workshop on the area he self-servingly refers to as the "LWRFS" and issued a Draft
21 Order at the workshop for comment (the "Draft Order"). A true and correct copy of the
22 September 19, 2018 Draft Order is attached as **Exhibit "2"**.

23 117. The Draft Order contained a completely new determination that there were
24 9,318 afa of water rights with a priority date of March 31, 1983, or earlier, that could be
25 safely pumped from the five basins without affecting the flows in the Muddy River and
26 without affecting the endangered Moapa dace fish.
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1 118. The Draft Order also placed a moratorium on processing any and all
2 subdivision maps unless there was a showing to the State Engineer's satisfaction that an
3 adequate supply of water was available "in perpetuity" for the subdivision.

4 119. The Draft Order further evidenced the State Engineer's intent to take CSI's
5 water rights.

6 120. On October 5, 2018, the CSI-Entities sent a series of comment letters
7 regarding the Draft Order. CS-Entities challenged the findings in the Draft Order as they
8 were not supported by scientific study or made in good faith, and therefore, were a breach
9 of the Settlement Agreement.

10 121. Notwithstanding its obligations under the Settlement Agreement, the State
11 Engineer continued to unreasonably delay³ the final approval as to CS-Entities' two
12 conditionally approval maps.

13 **v. January 11, 2019, Interim Order 1303**

14 122. On January 11, 2019, four months after issuing his Draft Order, the State
15 Engineer, Jason King, issued Interim Order 1303 (the "Interim Order").⁴ A true and correct
16 copy of the January 11, 2019 Interim Order 1303 is attached as **Exhibit "3"**.

17 123. In the Interim Order, the State Engineer again declared, consistent with the
18 May 18, 2018 letter, that CSI could not move forward with its subdivision map
19 applications.

20 124. In the Interim Order, the State Engineer explained that Coyote Spring
21 Valley, Muddy River Springs Area, Hidden Valley, Garnet Valley, California Wash, and
22 the northwestern part of the Black Mountains Area (now six basins rather than five) were
23

24 _____
25 ³ CS-Entities' representatives inquired as to the status of the maps submitted for processing several times,
26 via telephone and electronic-mail between August 15, 2019 and early January 2020, to no avail, and the
27 State Engineer would not meet or discuss any outstanding questions or concerns of their office regarding
28 the submittal.

⁴ Thereafter, also on January 11, 2019, the State Engineer resigned his State Engineer position effective
immediately.

1 designated as a “joint administrative unit” for purposes of administration of water rights,
2 known as the Lower White River Flow System or the Six-Basin Area.

3 125. Interim Order 1303 also declared a temporary moratorium on approvals
4 regarding any final subdivision or other submissions concerning development and
5 construction submitted to the State Engineer for review. Interim 1303 acknowledges that
6 the State Engineer has insufficient scientific and technical data to determine water
7 availability for CSI’s master planned community.

8 126. According to Interim Order 1303, any development submissions would be
9 held in abeyance pending the conclusion of a public process to determine the total
10 quantity of groundwater that may be developed within the “Lower White River Flow
11 System”.

12 127. Interim Order 1303 further stated that the State Engineer would review and
13 grant approval of a subdivision application if an applicant showed an adequate and
14 sustainable supply of water to meet the anticipated “life of the subdivision.”

15 128. Interim Order 1303 represented further confirmation that the State Engineer
16 had taken CSI’s water rights and completely halted the master planned community from
17 being any further developed.

18 129. On September 12, 2018, LVVWD sent the State Engineer correspondence
19 advising that LVVWD “*in its capacity as manager of the Coyote Springs Water Resources*
20 *General Improvement District (GID), has reviewed the subject [Coyote Springs Village A]*
21 *subdivision map*” and that based upon “*the facts described in the State Engineer’s letter*
22 *dated May 16, 2018, concerning the viability of groundwater rights previously dedicated*
23 *to the GID by the developer [CS-Entities], the uncertain resolution of the Lower White*
24 *River Flow System (“LWRFS”) workshop process initiated by the Division of Water*
25 *Resources . . . , and the [LVVWD]’s assessment of aquifer dynamics, potential conflicts*
26 *with senior rights, and potential adverse impacts to endangered species, the District is*
27

28

1 *unable to confirm the availability of water resources sufficient to support recordation of*
2 *this map at this time”.*

3 130. Thereafter, the State failed to recommend final approval of these
4 Conditionally Approved Village A Maps even though CSI presented a June 11, 2019,
5 Technical Report 053119.0 issued by Stetson Engineering, Inc., which provided the
6 necessary analysis to show that sufficient available water was present to support this
7 proposed Coyote Springs Village A development.

8 **vi. June 15, 2020, Order 1309**

9 131. On June 15, 2020, the State Engineer issued Order 1309.

10 132. Pursuant to its Order 1309, the State Engineer ordered, in relevant part:

11 a. The Lower White River Flow System consisting of the Kane Springs
12 Valley, Coyote Spring Valley, Muddy River Springs Area, California Wash, Hidden
13 Valley, Garnet Valley, and the Norwest potion of the Black Mountains Area as
described in this Order, is hereby delineated as a single hydrographic basin.

14 b. The maximum quantity of groundwater that may be pumped from the
15 Lower White River Flow System Hydrographic Basin on an average annual basis
16 without causing further declines in Warm Springs area spring flow and flow into
the Muddy River cannot exceed 8,000 afa and may be less.

17 c. The maximum quantity of water that may be pumped from the Lower
18 White River Flow System Hydrographic Basin may be reduced if it is determined
that pumping will adversely impact the endangered Moapa dace.

19 d. All applications for the movement of existing groundwater rights
20 among sub-basins of the Lower White River Flow System Hydrographic Basin will
be processed in accordance with NRS 533.370.

21 e. The temporary moratorium on the submission of final subdivision or
22 other submission concerning development and construction submitted to the
23 State Engineer for review established under Interim Order 1303 is hereby
terminated.

24 f. All other matters set forth in Interim Order 1303 that are not
25 specifically addressed herein are hereby rescinded.

26 See State Engineer's Order 1309, a true and correct copy of which is attached
27 hereto as **Exhibit “4”**.

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1 133. The State Engineer's Order 1309 combined seven previously distinct
2 hydrographic basins into a single, consolidated hydrographic basin.

3 134. Order 1309 is an extension of the May 16, 2018 letter, which appropriated
4 CSI's seniority rights and transferred this valuable seniority status to other water right
5 holders.

6 135. In issuing Order 1309, the State Engineer further relegated CSI's senior
7 water rights in Basin 210 and its senior Kane Springs Water Rights in Basin 206 to junior
8 priority rights in relation to the water right holders in the six other basins.

9 136. Thus, Order 1309 further appropriated CSI's senior water rights in Basin
10 210 and its senior Kane Springs Water Rights in Basin 206 for water right holders in the
11 six other basins.

12 137. Specifically, in Basin 210, through Order 1309, the State Engineer
13 appropriated CSI's senior water rights to over 55 other groundwater right holders in the
14 Muddy River Springs Area, Garnet Valley, and California Wash.

15 138. Moreover, in Basin 206, through Order 1309, the State Engineer
16 appropriated CSI's senior Kane Springs Water Rights to over 100 other groundwater right
17 holders in the Muddy River Springs Area, Garnet Valley, California Wash, Black
18 Mountains Area, Coyote Springs, and Hidden Valley.

19 139. The appropriation of CSI's water rights is illustrated by the fact that Order
20 1309 relegated CSI's water rights in Basin 210 from the second most senior water rights
21 to the 60th most senior in the seven-basin area.

22 140. Immediately after issuing Order 1309, the State Engineer sent
23 correspondence dated June 17, 2020 to CS-Entities regarding its "Final Subdivision
24 Review No. 13217-F" as to CS-Entities' conditionally approved Coyote Springs Village A
25 subdivision maps, which provided for "eight large parcels intended for further subdivision".
26 The State Engineer, relying upon Order 1309 and the newly created "LWRFS hydrologic
27 basin", stated in part:
28

1 General: Coyote Springs Investment, LLC groundwater permits have priority
2 dates which may exceed the threshold of allowable pumping within
3 the definition of this order [1309].

4 The State Engineer then took the following action:

5 Action: The Division of Water Resources recommends disapproval
6 concerning water quantity as required by statute for Coyote Springs
7 Village A subdivision based on water service by Coyote Springs
8 Water Resources General Improvement District.

9 A true and correct copy of the State Engineer's June 17, 2020 letter is attached
10 hereto **as Exhibit "5"**.

11 141. Accordingly, the State Engineer clearly appropriated CSI's senior
12 groundwater rights in Basin 206 and Basin 210 for use by the groundwater right holders
13 in the Muddy River Springs Area, Garnet Valley, and California Wash.

14 142. Moreover, through this appropriation, and other State actions described
15 herein, water right holders whose priority dates are junior to CS-Entities, including the
16 Moapa Valley Water District and potentially others, have unfettered use and enjoyment
17 of CS-Entities' appropriated water rights.

18 143. By appropriating CSI's senior groundwater rights (through the May 16, 2018
19 letter, Interim Order 1303, and Order 1309) in Basin 206 and Basin 210 for use by other
20 water right holders in other hydrographic basins, the State Engineer has denied the CS-
21 Entities all economically viable use of their land, which is zoned only for residential and
22 commercial purposes and cannot be developed as planned and zoned without water.

23 144. Moreover, the State Engineer has effectively destroyed CSI's master
24 planned community as confirmed by the above-referenced orders and decisions and in
25 discovery in this case, which demonstrate that the State Engineer has determined to block
26 CSI from using its senior groundwater rights to support its master planned community.

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V.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

(Per Se Appropriation Taking of CSI's Water Rights)

145. CS-Entities incorporate the preceding paragraphs as if fully set for the herein.

146. CSI owns or has the exclusive right to use 5,090 afa of senior groundwater rights in Basin 210 and Basin 206 for the development of its master planned community.

147. The State Engineer, through the May 16, 2018 letter, has taken and appropriated CSI's senior groundwater rights in Basin 210 for itself and/or for over 55 groundwater right holders in the Muddy River Springs Area, Garnet Valley, and the California Wash.

148. In so doing, the State Engineer further appropriated CSI's senior priority status in Basin 210 for over 55 groundwater right holders in the Muddy River Springs Area, Garnet Valley, and the California Wash.

149. Further, the State Engineer appropriated CSI's senior priority status in Basin 206 for over 100 groundwater right holders in the Muddy River Springs Area, Garnet Valley, and the California Wash, among others.

150. The State has not paid just compensation to the Plaintiffs for the appropriation and taking of their property.

151. The State's failure to pay just compensation to the Plaintiffs for the appropriation and taking of their property is a violation of the Nevada State Constitution, and Nevada Revised Statutes, which require the payment of just compensation when private property is appropriated or taken for a public use.

152. As a result of the State's conduct, Plaintiffs have been damaged in excess of \$15,000.

1 153. Plaintiffs' damages include the loss of value of their land due to the State
2 Engineer's appropriation of Plaintiffs' water rights.

3 154. As a further result, Plaintiffs have been required to retain legal counsel to
4 prosecute this action and are therefore entitled to recover their reasonable attorneys' fees
5 and costs of suit incurred herein.

6 **SECOND CLAIM FOR RELIEF**
7 **(Inverse Condemnation Under Nevada Constitution – Lucas Regulatory Taking –**
8 **As to CSI's Water Rights)**

9 155. CS-Entities incorporate the preceding paragraphs as if fully set for the
10 herein.

11 156. The State, through the regulatory actions described herein, beginning with
12 the May 16, 2018 letter, committed a *per se* regulatory taking of CSI's water rights.

13 157. The State Engineer's May 16, 2018 letter, was a condemnation order that
14 prevented CSI from using its water rights.

15 158. The State Engineer's May 16, 2018 letter and subsequent regulatory
16 actions described above constitute a categorical taking of CSI's water rights as the State
17 Engineer has taken all economic value associated with the water rights.

18 159. The State Engineer has deprived CSI of all economically beneficial use of
19 its property and prevented CSI from putting its water rights to beneficial use.

20 160. The State's taking of CS-Entities' property by the public constitutes a taking
21 by inverse condemnation which require compensation under Article I, Section 8 of the
22 Nevada Constitution, requiring the State to pay full and just compensation to Plaintiff CS-
23 Entities.

24 161. As a result of the State's wrongful conduct and actions as described herein,
25 the CS-Entities have been damaged far in excess of \$15,000.

26 162. As a further result of Defendants' wrongful conduct, Plaintiffs have been
27 required to retain legal counsel to prosecute this action and therefore Plaintiff CS-Entities
28

1 are entitled to recover their reasonable attorneys' fees and costs of suit incurred in this
2 action.

3 **THIRD CLAIM FOR RELIEF**
4 **(*Penn Central* Regulatory Taking – As to CSI's Water Rights)**

5 163. CS-Entities incorporate the preceding paragraphs as if fully set for the
6 herein.

7 164. The State, through the regulatory actions described herein, beginning with
8 the May 16, 2018 letter, committed a *Penn Central* regulatory taking of CSI's water rights.

9 165. The State Engineer did so through regulatory actions that appropriated and
10 took CSI's water rights and Kane Springs Water Rights, which deprives the CS-Entities
11 nearly all, if not all, the economic viability in their water rights.

12 166. The economic impact of the May 16, 2018 letter on CSI's water rights is
13 drastic and renders the water rights unusable for municipal purposes, which is the only
14 allowable use under the permits for the water rights.

15 167. In reliance on studies performed by CSI's predecessor in interest to the
16 groundwater rights in Basin 210, studies conducted by state and federal agencies
17 concerning groundwater availability, and the confirmation and reassurance by the State
18 Engineer that adequate groundwater existed to support CSI's senior groundwater rights
19 in Basin 210, CSI had reasonable investment-backed expectations to be able to use its
20 water rights to support residential and commercial development when it acquired the
21 water rights.

22 168. The State Engineer's regulatory actions, beginning with the May 16, 2018
23 letter, have substantially interfered with CSI's distinct, reasonable investment-backed
24 expectations and effectively destroyed any chance of putting CSI's water rights to
25 beneficial use.
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169. Given the State Engineer's continued assurance and confirmation that groundwater existed to support CSI's senior groundwater permits, the State Engineer's appropriation of CSI's senior groundwater rights was unforeseeable.

170. The State Engineer's regulatory actions are akin to a physical invasion of the Plaintiffs' water rights given that the State Engineer has appropriated CSI's Water Rights for the benefit of water right holders in other basins.

171. Defendants' taking of the Plaintiffs' water rights by the public constitutes a taking by inverse condemnation which requires full and just compensation under Article I, Section 8 of the Nevada Constitution.

172. As a result of Defendants' wrongful conduct and actions, the CS-Entities have been damaged far in excess of \$15,000.

173. As a further result of Defendants' wrongful conduct, the CS-Entities have been required to retain legal counsel to prosecute this action and therefore are entitled to recover their reasonable attorneys' fees and costs of suit incurred in this matter.

FOURTH CLAIM FOR RELIEF
**(Inverse Condemnation Under Nevada Constitution – Lucas Regulatory Taking –
As to the 6,937.66 Acres)**

174. CS-Entities incorporate the preceding paragraphs as if fully set for the herein.

175. The State, through the regulatory actions described herein, beginning with the May 16, 2018 letter, committed a *per se* regulatory taking of CSI's 6,937.66 acres of land in Clark County, Nevada.

176. Through the State Engineer's regulatory actions and by taking CSI's senior groundwater rights in Basin 210 and Basin 206, the State Engineer has deprived the CS-Entities all economically viable use of their 6,937.66 acres, which can only be developed for residential and commercial uses.

177. The CS-Entities' 6,937.66 is undevelopable and valueless without water.

1 178. The State Engineer has effectively destroyed the master planned
2 community and taken all of the entitlements to develop the master planned community.

3 179. The State's taking of CS-Entities' property by the public constitutes a taking
4 by inverse condemnation which require compensation under Article I, Section 8 of the
5 Nevada Constitution, requiring the State to pay full and just compensation to Plaintiff CS-
6 Entities.

7 180. As a result of the State's wrongful conduct and actions as described herein,
8 the CS-Entities have been damaged far in excess of \$15,000.

9 181. As a further result of Defendants' wrongful conduct, Plaintiffs have been
10 required to retain legal counsel to prosecute this action and therefore Plaintiff CS-Entities
11 are entitled to recover their reasonable attorneys' fees and costs of suit incurred in this
12 action.

13
14 **FIFTH CLAIM FOR RELIEF**
15 **(Inverse Condemnation Under Nevada Constitution – Penn Central Regulatory**
16 **Taking – As to the 6,937.66 Acres)**

17 182. CS-Entities incorporate the preceding paragraphs as if fully set forth the
18 herein.

19 183. The State, through the regulatory actions described herein, beginning with
20 the May 16, 2018 letter, committed a *Penn Central* regulatory taking of CSI's 6,937.66
21 acres of land in Clark County, Nevada.

22 184. The State Engineer did so through regulatory actions that appropriated and
23 took CSI's water rights and Kane Springs Water Rights, which in turn deprived the CS-
24 Entities nearly all, if not all, the economic viability in the 6,937.66 acres.

25 185. The economic impact of the May 16, 2018 letter on the 6,937.66 is drastic
26 and renders the land undevelopable for municipal, residential, and commercial purposes,
27 which are the only allowable uses for the land under zoning, applicable ordinances, and
28 the Development Agreement with Clark County.

1 186. In reliance on studies performed by CSI's predecessor in interest to the
2 groundwater rights in Basin 210, studies conducted by state and federal agencies
3 concerning groundwater availability, and the confirmation and reassurance by the State
4 Engineer that adequate groundwater existed to support CSI's senior groundwater rights
5 in Basin 210, CSI had reasonable investment-backed expectations to be able to use its
6 water rights to support residential and commercial development when it acquired the
7 water rights.

8 187. The State Engineer's regulatory actions, beginning with the May 16, 2018
9 letter, have substantially interfered with CSI's distinct, reasonable investment-backed
10 expectations and effectively destroyed the master planned community.

11 188. Given the State Engineer's continued assurance and confirmation that
12 groundwater existed to support CSI's senior groundwater permits, the State Engineer's
13 appropriation of CSI's senior groundwater rights was unforeseeable.

14 189. The State Engineer's regulatory actions are akin to a physical invasion of
15 the Plaintiffs' land given that the State Engineer has appropriated CSI's water rights for
16 the benefit of water right holders in other basins, thereby rendering the Plaintiffs' land
17 undevelopable.

18 190. Defendants' taking of the CS-Entities' property by the public constitutes a
19 taking by inverse condemnation which requires full and just compensation under Article
20 I, Section 8 of the Nevada Constitution.

21 191. As a result of Defendants' wrongful conduct and actions, the CS-Entities
22 have been damaged far in excess of \$15,000.

23 192. As a further result of Defendants' wrongful conduct, the CS-Entities have
24 been required to retain legal counsel to prosecute this action and therefore are entitled to
25 recover their reasonable attorneys' fees and costs of suit incurred in this matter.

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SIXTH CLAIM FOR RELIEF
(Pre-Condemnation Damages)

193. Plaintiff repeats and realleges all prior paragraphs as though fully set forth herein.

194. The May 16, 2018 letter was a public pronouncement of the State Engineer's decision to condemn the CS-Entities' water, land, priorities, and entitlements. The May 16, 2018 letter announces the State Engineer's taking of CSI's senior water rights by referring to them as having a "junior priority".

195. The State's acts and/or omissions have resulted in Plaintiff CS-Entities suffering pre-condemnation damages in an amount to be determined at trial, due to the massive delays in processing Plaintiffs' pending, and conditionally approved, subdivision maps, which has halted continuing development of the master planned community.

196. The pre-condemnation taking of Plaintiff's property by the public mandates compensation under Article I, Section 8 of the Nevada Constitution, requiring the State to pay full and just compensation to Plaintiffs CS-Entities in an amount to be determined.

197. As a result of the State's wrongful conduct and actions as described herein, the CS-Entities have damages far in excess of \$15,000.

198. As a further result of Defendants' wrongful conduct, the CS-Entities have been required to retain legal counsel to prosecute this action. Plaintiffs are therefore entitled to recover their reasonable attorney's fees and costs of suit incurred in this action.

SEVENTH CLAIM FOR RELIEF
(Equal Protection Violations Under Nevada Constitution)

199. Plaintiffs repeat and reallege all prior paragraphs as though fully set forth herein.

200. The State Engineer has violated CSI's rights to equal protection under the Nevada Constitution as the State Engineer has subjected CSI, but not others similarly

1 situated, to standards, requirements, and obligations through the May 16, 2018 letter, the
2 Draft Order, and Interim 1303 Order.

3 201. Each of these regulatory actions imposed a construction and subdivision
4 moratorium on CSI, alone. By failing to timely process and fairly adjudicate CS-Entities'
5 pending maps and applications, including its Conditionally Approved Maps, the State has
6 treated CS-Entities in a different, standardless and inconsistent manner than others
7 similarly situated.

8 202. Furthermore, through these regulatory actions, the State Engineer has
9 imposed requirements on CSI, including but not limited to requiring CSI to demonstrate a
10 source of water "in perpetuity" or for the "life of the subdivision" when the State has not
11 imposed such a standard on any other developer or subdivision map applicant.

12 203. The State, intentionally and without rational basis, treated CS-Entities
13 differently than other similarly situated developers, subdivision map applicants, and water
14 right holders, including the Moapa Valley Water District ("MVWD"), which holds water
15 rights junior to the CS-Entities water rights.

16 204. CS-Entities are informed and believe MVWD has been allowed to use its
17 water rights and conduct its business as a water utility using water rights junior to CS-
18 Entities', including, without limitation, for new hookups and processing tentative or
19 subdivision maps during the Orders 1303 and 1309 subdivision map moratoriums.

20 205. Moreover, the Defendants have not sought to curtail MVWD's use of any of
21 its water rights which are junior to CS-Entities water rights, while at the same time
22 precluding CS-Entities from use and enjoyment of its water rights and denying CS-Entities
23 subdivision maps.

24 206. CS-Entities were treated differently from MVWD and potentially others
25 subject to Orders 1303 and 1309, when Defendants refused to approve CS-Entities'
26 master planned community submitted subdivision maps and Conditionally Approved
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1 Maps as described herein. The State and its State Engineer, have unfairly and in bad
2 faith, targeted the CS-Entities.

3 207. The State and its State Engineer, without rational basis, treated the CS-
4 Entities differently from other similarly situated, and accordingly violated the equal
5 protection clause of the Nevada Constitution. *N. Pacifica LLC vs. City of Pacifica*, 526
6 F.3d 478,486 (9th Cir. 2008).

7 208. Plaintiff CS-Entities are entitled to damages for these Equal Protection
8 violations.

9 209. Defendant's conduct has required Plaintiffs to incur attorneys' fees and
10 costs of suit to bring this action, and Plaintiffs are entitled to an award of attorneys' fees
11 and costs incurred in this action.

12
13 **EIGHTH CLAIM FOR RELIEF**
14 **(Breach of Contract Claim)**

15 210. Plaintiffs repeat and reallege all prior paragraphs as though fully set forth
16 herein.

17 211. Plaintiffs challenged the May 16, 2018 letter as an arbitrary, capricious,
18 unlawful, and improper order reducing the priority to which the CS-Entities were entitled
19 regarding their groundwater rights.

20 212. The May 16, 2018 letter was determined to be an order with finality allowing
21 the Plaintiffs to challenge the propriety of it.

22 213. The May 16, 2018 letter was in effect a curtailment of the water rights
23 lawfully and properly held by CSI. The State Engineer provided no notice of the taking,
24 no opportunity to be heard regarding the findings in the letter or the propriety of those
25 findings.

26 214. Without notice or opportunity to be heard, and in the complete absence of
27 technical or scientific justification, the May 16, 2018 letter reduced CSI's priority from
28

1 being most senior carbonate rock aquifer groundwater right holder in Basin 210 to being
2 junior for unexplained reasons.

3 215. Because of the strength and legitimacy of CSI's challenge to the legality and
4 propriety of the May 16, 2018 letter, the State Engineer immediately attempted to initiate
5 settlement discussions.

6 216. CSI and the State Engineer participated in a settlement conference with the
7 Honorable David R. Gamble (Ret.) presiding.

8 217. The State Engineer participated in the settlement conference in bad faith.
9 He did so knowing that he had considered curtailment procedures against CSI in Basin
10 210 and that he had drafted proposed orders placing a moratorium on CSI's right to
11 develop, construct, and submit subdivision maps for the State Engineer's approval.

12 218. The Settlement Agreement entered on or around August 29, 2018, is a
13 valid, binding, and existing contract between Plaintiff CSI and the State. CSI entered into
14 the Settlement Agreement in good faith, believing and anticipating that the State Engineer
15 would honor the obligations and duties imposed upon it in the Settlement Agreement.
16 CSI bargained for the State Engineer's good faith and fair dealing.

17 219. Plaintiff CSI has fully performed its obligations under the Settlement
18 Agreement contract.

19 220. The State Engineer's conduct and actions following execution of the
20 Settlement Agreement demonstrate that the Settlement Agreement, although binding and
21 enforceable, was a ruse intended to induce CSI into dismissing its petition for judicial
22 review of the May 16, 2018 letter.

23 221. The State Engineer's conduct and actions following execution of the
24 Settlement Agreement demonstrate that the State Engineer never intended to comply
25 with its terms nor act in good faith when processing CSI's tentative subdivision maps and
26 development submissions.

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1 222. Rather, the State Engineer's conduct and actions have been targeted to
2 destroy the water rights and the master planned community.

3 223. Immediately after the State Engineer agreed to process CSI's maps in good
4 faith, the State Engineer circulated the Draft Order, without performing any investigations,
5 studies, or gathering hydrologic data to support the findings therein.

6 224. The Draft Order suggested availability of 9,318 afa to be pumped from the
7 six basins identified in the Draft Order but in clear violation of the State Engineer's duty
8 of good faith and fair dealing, the Draft Order imposed an unlawful moratorium on
9 subdivision map submissions to the State Engineer.

10 225. The Draft Order further stated that a subdivision map could be reviewed and
11 granted "if a showing of an adequate supply of water in **perpetuity** can be made to the
12 State Engineer's satisfaction." (emphasis added). The inclusion of the term "perpetuity"
13 was intended to prevent the CS-Entities from being able to develop their real property,
14 utilize its permitted water, and develop the master planned community. The State
15 Engineer later conceded that the term "perpetuity" was inappropriate and vague.

16 226. CSI pointed out the flaws and lack of technical information supporting the
17 Draft Order.

18 227. CSI demonstrated the flaws in the Draft Order and correctly presented
19 technical information showing at least 11,400 afa were available for groundwater pumping
20 in the illegally combined basins, and the State Engineer realized that CSI could proceed
21 with its master planned community under a pump cap of 11,400 afa, the State Engineer
22 then issued Interim Order 1303.

23 228. Order 1303 was the State Engineer's method to confirm and perpetuate the
24 terms of its May 16, 2018 letter despite the terms of the Settlement Agreement.

25 229. No additional study, investigation, or hydrological data was collected or
26 analyzed prior to the State Engineer issuing Interim Order 1303.
27
28

1 230. In Interim Order 1303, the State Engineer “designated as a joint
2 administrative unit” the six previously separate hydrographic basins, including Coyote
3 Spring Valley, Muddy River Springs Area, California Wash, Hidden Valley, Garnet Valley,
4 and [a] portion of the Black Mountains Area”.

5 231. There is no authority for the State Engineer to combine multiple
6 hydrographic basins into one.

7 232. Interim Order 1303 again imposed a moratorium regarding any final
8 subdivision or other submission concerning development and construction.

9 233. Interim Order 1303 again included an exception for any subdivision map
10 submissions “if a showing of an adequate and sustainable supply of water to meet the
11 anticipated life of the subdivision” were made.

12 234. Further contrary to Nevada law, the State Engineer ordered that the water
13 rights in the new combined basin would “be administered based upon their respective
14 date of priorities in relation to other rights within the regional groundwater unit.” See
15 **Exhibit “6”** (the State Engineer’s list of priorities in this new consolidated basin).

16 235. Thus, the State Engineer relegated CSI to a junior water right holder among
17 the water right holders in the six basins. Doing so is a breach of the Settlement
18 Agreement.

19 236. There is no statutory authority for the directives contained in Interim Order
20 1303.

21 237. Under Interim Order 1303, the State Engineer required the parties to
22 participate in an administrative hearing to address, among other things, the amount of
23 water that could sustainably be pumped from the six basins referenced in the Interim
24 Order.

25 238. Rather than meaningfully consider or analyze the new evidence presented
26 during the hearing, the State Engineer intentionally ignored the new evidence in favor of
27 the decades old pump tests that were not conducted to address the issues at the hearing.
28

1 239. When the State Engineer realized that CSI could use its Kane Springs
2 Water Rights to support the master planned community, the State Engineer decided to
3 include Kane Springs Valley Hydrographic Basin into the consolidated basin.

4 240. On June 15, 2020, the State Engineer issued Order 1309, which again
5 created a consolidated hydrographic basin, this time including Kane Springs Valley
6 Hydrographic Basin with the six other hydrographic basins, to further destroy Plaintiffs'
7 chance at proceeding with their master planned community.

8 241. The State Engineer ordered that 8,000 afa was the maximum amount of
9 groundwater that could be pumped from the seven-basin area.

10 242. Like the May 16, 2018 letter, Order 1309 relegated CSI to a junior water
11 right holder with no ability to use any of its senior groundwater rights to support the master
12 planned community.

13 243. Immediately after issuing Order 1309, the State Engineer sent CSI the June
14 17, 2020 letter, wherein the State Engineer informed CSI that he was recommending
15 disapproval of the conditionally approved Coyote Springs Village A subdivision map
16 because CSI was out of priority under Order 1309.

17 244. The State Engineer inexcusably breached the Settlement Agreement by
18 failing to act in good faith and by failing to timely and fairly process Plaintiffs' development
19 maps in "good faith" as required under the contract.

20 245. As a direct consequence of the conduct of the State as described above,
21 Plaintiffs have been damaged in an amount far in excess of \$15,000.00.

22 246. As a further result of the State's wrongful conduct, Plaintiffs have been
23 required to retain legal counsel to prosecute this action; Plaintiffs are therefore entitled to
24 recover their reasonable attorney's fees and costs of suit incurred herein.

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NINTH CLAIM FOR RELIEF
(Breach of the Implied Covenant of Good Faith and Fair Dealing)

247. Plaintiffs repeat and reallege all prior paragraphs as though fully set forth herein.

248. Plaintiff CSI and Defendant State are parties to a valid and existing contract; namely the Settlement Agreement entered on or around August 29, 2018.

249. The covenant of good faith and fair dealing is inherent and implied in every contract and is implied in the Settlement Agreement contract.

250. Defendant State owed Plaintiff CSI a duty of good faith and fair dealing.

251. Defendant State breached its duty of good faith and fair dealing by committing the acts and/or omissions described herein in a manner that was unfaithful to the purpose of the Settlement Agreement.

252. Plaintiff CSI's justified expectations under the Settlement Agreement were thus denied.

253. As a direct consequence of the conduct of the State, as described above, Plaintiffs have been damaged in an amount far in excess of \$15,000.00.

254. As a further result of the State Engineer's wrongful conduct, Plaintiffs have been required to retain legal counsel to prosecute this action and are therefore entitled to recover their reasonable attorneys' fees and costs of suit herein.

TENTH CLAIM FOR RELIEF
(Temporary Taking Against the State of Nevada) (Alternatively)

255. Plaintiffs repeat and reallege all prior paragraphs as though fully set for herein.

256. If there is a subsequent State action or a finding by a District Court or the Nevada Supreme Court, or otherwise, that the Plaintiffs may use their groundwater rights, have their subdivision maps approved, and develop their long planned and fully entitled

1 master planned community, then there still has been a temporary appropriation and/or
2 taking of Plaintiffs' property rights for which just compensation is due and must be paid.

3 257. The State has refused to pay just compensation for this temporary
4 appropriation and taking.

5 258. The State's failure to pay just compensation to the Plaintiffs for the
6 temporary appropriation and taking of the water rights, priority dates of water rights, Clark
7 County Approved Major Project development rights and Clark County land is a violation
8 of the Nevada State Constitution, and the Nevada Revised Statutes, which require the
9 payment of just compensation when private property is taken for a public use.

10 259. Plaintiff have been compelled to pursue this action for the temporary
11 appropriation and taking of their property, including water rights, priority dates of water
12 rights, Clark County Major Project development rights and Clark County land, to recover
13 just compensation for the property temporarily taken by the State without payment of just
14 compensation.

15 260. This claim for relief is in the alternative to the CS-Entities' claims set forth in
16 its First through Sixth Claims for Relief. The temporary take was initiated by the State
17 Engineer on May 16, 2018 and has lasted to and through the date hereof. Plaintiffs will
18 present evidence if necessary on this claim in the discovery process for the damages
19 caused by the temporary take.

20 261. As a further result, Plaintiffs have been required to retain legal counsel to
21 prosecute this action and are therefore entitled to recover their reasonable attorneys' fees
22 and costs of suit incurred herein.

23
24 **ELEVENTH CLAIM FOR RELIEF**
25 **(Declaratory Relief-Claimed Against the State of Nevada)**

26 262. Plaintiffs repeat and reallege all prior paragraphs as though fully set forth
27 herein.

28

1 263. A justiciable controversy exists between Plaintiffs and the State that
2 requires this Court's attention and intervention. Specifically, and pursuant to the
3 Amended Multi-Party Agreement dated July 7, 2015, Plaintiffs seek a declaration from
4 the Court that the State's wrongful actions as described herein has precluded Plaintiffs
5 from moving forward with its master planned community and caused Plaintiffs to
6 "permanently cease development of the Clark County Development" and that Plaintiffs
7 "have the right to receive back from the CSGID any and all water rights previously
8 dedicated by the Developers to CSGID that are not committed and are not otherwise
9 necessary to support existing development." Amended Multi-Party Agreement pg. 9 of
10 25. Plaintiffs seek a declaration that they have an ownership and beneficial interest in
11 the 2,000 afa presently held by the CSGID and that Plaintiffs have the right to seek just
12 compensation damages for the wrongful taking by the State of those 2000 afa water
13 rights.
14

15 264. Plaintiffs seek a declaration that Plaintiffs have the right to seek just
16 compensation and damages associated with the State's wrongful appropriation and take
17 of the 2,000 afa previously dedicated to CSGID, for use at the master planned community.

18 265. As the action of the State, and its State Engineer, necessitated that Plaintiffs
19 hire counsel and incur legal fees and costs to bring this action, Plaintiffs are also entitled
20 to an award of attorneys' fees and costs of suit.

21 **TWELFTH CLAIM FOR RELIEF**
22 **(Injunctive Relief Against State of Nevada)**

23 266. Plaintiffs repeat and reallege all prior paragraphs as though fully set forth
24 herein.

25 267. Plaintiffs are entitled to a preliminary and permanent injunction enjoining
26 further arbitrary and capricious actions and unfair and unconstitutional appropriations
27 and/or takings of Plaintiffs' water rights and development rights at its master planned
28 community. Further, that State should be enjoined from any further violations of its

1 obligations under the Settlement Agreement and from taking any further wrongful and
2 unlawful actions related to CS-Entities' water and development rights. The status quo as
3 to CS-Entities' water and development rights should be maintained during the pendency
4 of this action. Any Nevada Revised Statutory water forfeiture claims asserted by the State
5 should be tolled/stayed during the pendency of this action in order to protect Plaintiffs
6 from further wrongful actions by the State.

7
8 268. Plaintiffs are further entitled to a preliminary and permanent mandatory
9 injunction requiring processing and endorsement of subdivision maps as required by the
10 Settlement Agreement and Nevada Law to allow Plaintiffs' Clark County Approved Major
11 Project to proceed.

12 269. Plaintiffs have no plain, speedy or adequate remedy at law. Unless
13 Defendants are enjoined, Plaintiffs will continue to suffer irreparable harm, including
14 violations of its constitutional rights, lost business income, and injury to Plaintiffs' business
15 goodwill and other business relationships. Monetary damages are inadequate to fully
16 compensate Plaintiffs because of the difficulty in quantifying lost opportunity costs and
17 harm to business goodwill and other relationships.

18 270. Plaintiffs have a reasonable probability of success on the merits of its claims
19 and the public interest and relative hardships all weigh in favor of granting injunctive relief
20 to Plaintiffs.

21 271. A preliminary and permanent injunction should therefore issue enjoining the
22 State, and its State Engineer, from further arbitrary and capricious actions as alleged
23 herein, and further enjoining the State from continuing to unreasonably delay CS-Entities'
24 development efforts for its master planned community and requiring the State to properly,
25 fairly, timely and in good faith process Plaintiffs' submittals in support of its master
26 planned community. Further, any statutory forfeiture time frames applicable to the subject
27 water rights should be tolled during this litigation.

28

1 272. As the action of the State, and its State Engineer, necessitated that Plaintiffs
2 hire counsel and incur legal fees and costs to bring this action, Plaintiffs are also entitled
3 to an award of attorneys' fees and costs of suit.
4

5 **THIRTEENTH CLAIM FOR RELIEF**
6 **(Claim of Attorneys' Fees Incurred Herein)**

7 273. Plaintiffs repeat and reallege all prior paragraphs as though fully set forth
8 herein.
9

10 274. CS-Entities asserts that the State's conduct has required Plaintiffs to incur
11 attorneys' fees to bring this action and that Nevada Law provides for an award of
12 attorneys' fees to prevailing parties in inverse condemnation actions. CS-Entities hereby
13 provide notice to these Defendants that it intends to pursue its attorneys' fees incurred in
14 this action as allowed by Nevada law. Accordingly, the CS-Entities reserve all rights to
15 pursue an award of their attorney fees incurred in this matter as allowed.
16

17 **VI.**

18 **PRAYER FOR RELIEF**

19 WHEREFORE, Plaintiffs pray for the following relief:
20

- 21 1. For payment of full and just compensation as provided by law for the
22 appropriation and/or taking of property, water rights, and development rights of
23 the CS-Entities.
- 24 2. For payment of full and just compensation as provided by law for the temporary
25 taking of property, water rights, and development rights of the CS-Entities.
- 26 3. For pre-condemnation damages in an amount to be proven at trial;
- 27 4. For compensatory and special damages as set forth herein;
- 28 5. For pre-judgment and post-judgment interest, as allowed by law;
6. For declaratory relief as sought herein.
7. For injunctive relief as sought herein.

- 1 8. For all of the CS-Entities' incurred attorneys' fees and costs of suit as provided
2 by law;
3 9. For all other remedies and relief that the Court deems just and appropriate.
4

5 **DEMAND FOR JURY TRIAL**

6 Plaintiffs CS-Entities, hereby demand a jury trial for all issues so triable.

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

9 DATED this ____ day of _____, 2023.

11 ROBISON, SHARP, SULLIVAN &
12 BRUST

13 _____
14 Kent R. Robison, Esq., #1167
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19 71 Washington Street
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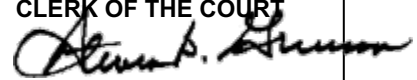
22 **IN ASSOCIATION WITH:**

23 COULTHARD LAW, PLLC

24 _____
25 William L. Coulthard, Esq.
26 840 South Rancho Drive #4-627
27 Las Vegas, Nevada 89106
28 *Attorney for Plaintiffs CS-Entities*

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<u>INDEX OF EXHIBITS</u>	
Exhibit No.	Description
1.	May 16, 2018 State Engineer letter to Las Vegas Valley Water District
2.	Draft Order dated September 19, 2018
3.	Interim Order 1303
4.	Order 1309, dated June 15, 2020
5.	June 17, 2020 Letter from State Department of Conservation and Natural Resources to Coyote Springs Investment LLC
6.	State Engineer's Lower White River Flow System Priority Chart
7.	Settlement Agreement dated August 29, 2018



OPPM

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Senior Deputy Attorney General

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Attorneys for Defendant State Engineer

DISTRICT COURT

CLARK COUNTY, NEVADA

COYOTE SPRINGS INVESTMENT, LLC,
a Nevada Limited Liability Company;
COYOTE SPRINGS NEVADA, LLC, a
Nevada Limited Liability Company; and
COYOTE SPRINGS NURSERY, LLC, a
Nevada Limited Liability Company,

Plaintiffs,

vs.

STATE OF NEVADA, on relation to its
Division of Water Resources;
DEPARTMENT OF CONSERVATION
AND NATURAL RESOURCES, ADAM
SULLIVAN, Nevada State Engineer;
CLARK COUNTY-COYOTE SPRINGS
WATER RESOURCES GENERAL
IMPROVEMENT DISTRICT, a political
subdivision of the State of Nevada; and
DOES I through X

Defendants.

Case No. A-20-820384-B
Dept. No. XIII

**DEFENDANT'S OPPOSITION TO
MOTION FOR LEAVE TO FILE
THIRD AMENDED COMPLAINT**

Defendant State of Nevada ex rel. Department of Conservation and Natural
Resources, Division of Water Resources, Adam Sullivan, P.E., the Nevada State Engineer
(hereafter "State Engineer"), by and through its counsel hereby files this Opposition to

1 Plaintiffs Coyote Springs Investment, LLC; Coyote Springs Nevada, LLC, and Coyote
2 Springs Nursery, LLC's (collectively "CSI") Motion for Leave to File Third-Amended
3 Complaint ("Motion"). This Opposition is based on the attached Declaration of Jessica E.
4 Whelan, the Memorandum of Points and Authorities, the pleadings and papers on file
5 herein, including but not limited to the State Engineer's Motion for Stay, which is hereby
6 incorporated by reference, and any oral argument that the Court may hear at the time of
7 hearing.

8 DATED this 5th day of September, 2023.

9 AARON D. FORD
10 Attorney General

11 By: /s/ Jessica E. Whelan
12 JESSICA E. WHELAN, (Bar No. 14781)
13 Senior Deputy Attorney General
14 CASEY J. QUINN, (Bar No. 11248)
15 Senior Deputy Attorney General
16 JAMES N. BOLOTIN, (Bar No. 13829)
17 Senior Deputy Attorney General
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DECLARATION OF JESSICA E. WHELAN

I, Jessica E. Whelan, declare and state as follows:

1. I am a Senior Deputy Attorney General in the Nevada Office of the Attorney General, counsel of record for the State Engineer in this case. I have personal knowledge of the facts stated in this declaration.

2. On June 15, 2023, my co-counsel Casey Quinn and I participated in a telephonic conference with counsel for Plaintiffs to meet and confer regarding Plaintiffs' topics for the 30(b)(6) deposition of the State Engineer. During that call, the parties agreed that the 30(b)(6) topics did not encompass the science supporting the State Engineer's rulings and orders and therefore the witness would not be prepared to speak to scientific questions.

3. On July 20, 2023, Plaintiffs took the 30(b)(6) deposition of the State Engineer, through its representative Melissa Flatley. A true and correct copy of excerpts from the deposition transcript is attached hereto as **Exhibit F**.

4. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 5th day of September, 2023.

By: /s/ Jessica E. Whelan
JESSICA E. WHELAN, (Bar No. 14781)
Senior Deputy Attorney General

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

As the State Engineer set forth in detail in its Motion to Stay Proceedings Pending Nevada Supreme Court's Resolution of Related Matter, *see* 8/21/23 Motion to Stay, CSI's claims and theories in this case have been a moving target since the case's inception. The instant Motion seeking leave to file a Third Amended Complaint continues this strategy. Notwithstanding the generous standard for granting motions for leave, the Court should deny the Motion for at least two reasons. First, the Motion's claim that new evidence learned in discovery supports amendment is belied by the fact that the "new" evidence cited was either already alleged in the Second Amended Complaint or was known to CSI at the time it filed the Second Amended Complaint. Second, the evidence cited does not support or relate to the new claims for relief and therefore cannot form the basis for amendment.

The Court should deny the Motion for the additional reason that CSI's theories of the case and claims for relief are likely to be significantly narrowed by the Nevada Supreme Court's decision in the appeal in *Sullivan, P.E. v. Lincoln Co. Water Dist.*, Case No. 84379 (consolidated with Case Nos. 84741, 84742, 84809, and 85137) (hereinafter referred to as "*Sullivan*"). Therefore, it is likely that CSI will want to amend again after the Supreme Court's decision is filed, rendering this amendment—particularly if the State Engineer's Motion to Stay is granted—futile.

II. RELEVANT BACKGROUND

A. CSI's Original Complaint, First Amended Complaint, and Second Amended Complaint Make Factual Allegations Related to The May 16, 2018 Letter.

On August 28, 2020, CSI commenced this case by filing its Complaint. The Complaint contained numerous allegations relating to the State Engineer's May 16, 2018 response to the Las Vegas Valley Water District's November 16, 2017 letter. *See*, Compl., ¶¶ 25–28. Specifically, the Complaint alleged:

The State Engineer's May 16, 2018 letter, publicly announced that the amount of groundwater pumping that will be allowed in the five basin area (also known as the "superbasin") will be limited to the amount that will not conflict with

1 the Muddy River Springs or the Muddy River as they are the most senior rights
2 in the five basin area.

3 Compl., ¶ 26. The Complaint further alleged that the May 16, 2018 letter informed CSI
4 that “the State Engineer cannot justify approval of any subdivision development maps
5 based on the junior priority groundwater rights currently owned by CWSRGID [sic] or CSI
6 unless other water sources are identified for development.” *Id.* (emphasis omitted). Both
7 the First Amended Complaint and the Second Amended Complaint contained identical
8 allegations. *See Exhibit A* (First Amended Complaint (“FAC”)), ¶ 26; 11/12/21 Second
9 Amended Complaint (“SAC”), ¶ 33.

10 The Complaint, First Amended Complaint, and Second Amended Complaint all
11 contained the allegation that the May 16, 2018 letter constituted a taking of property:

12 CS-Entities are informed and believe and thereupon asserts [sic] that the State
13 Engineer’s May 16, 2018 letter commenced a “take of CS-Entities’ property
14 rights, worked as a public announcement of the States’ [sic] intent to condemn
and/or wrongfully take CS-Entities’ Water Rights, and further worked to
unreasonably delay CS-Entities’ continued development of its Approved Major
Project development.

15 Compl., ¶ 27; FAC, Ex. A, ¶ 27; SAC, ¶ 34. *See also* Compl., ¶ 26, FAC, Ex. A, ¶ 26, SAC
16 ¶ 33 (The May 16, 2018 letter “effectively denied the CS-entities the use and access to their
17 Water Rights and commenced a taking by the State of these Water Rights and associated
18 Master Planned development rights.”).¹

19 CSI’s First Claim for Relief for Inverse Condemnation – Lucas Regulatory Taking,
20 has been based from the outset of the case, at least in part, on the State Engineer’s May
21 16, 2018 letter.² *See* Compl., ¶ 49; FAC, Ex. A, ¶ 49; SAC, ¶ 57 (“The State Engineer’s May
22 18, 2018 [sic] Letter, its purported ‘draft order’ issued only for delay, its 1303 Interim
23 Order, its Order 1309, and its most recent June 17, 2020 ‘disapproval concerning water
24

25 ¹ CSI’s allegations of a taking effectuated by the May 16, 2018 letter were made
26 notwithstanding the fact that each version of the Complaint recognized that “[a]fter a court-ordered
27 settlement conference the State Engineer rescinded his May 16, 2018 letter[.]” Compl., ¶ 31; FAC,
28 Ex. A, ¶ 31; SAC, ¶ 38.

² On information and belief, in all three iterations of the complaint, CSI mistakenly referred
to the May 16, 2018 letter as the “May 18, 2018 letter.” To the State Engineer’s knowledge, there
is no separate letter dated May 18, 2018, upon which CSI relies for its taking claims.

1 quantity . . . for Coyote Springs Village A subdivision’, all have effectuated a regulatory
2 taking of CS-Entities’ Water Rights, its property, and its development rights which
3 requires compensation to CS-Entities[.]”).

4 Likewise, all versions of CSI’s Second Claim for Relief for Inverse Condemnation –
5 Penn Central Regulatory Taking, have been based on the May 16, 2018 letter. *See* Compl.,
6 ¶ 56, FAC, Ex. A, ¶ 56; SAC, ¶ 64 (“The State Engineer’s May 18, 2018 [sic] Letter, its 1303
7 Interim Order, its Order 1309, along with the June 17, 2020 “disapproval” of Coyote
8 Springs Village A subdivision maps . . . all have effectuated a *Penn Central* regulatory
9 taking of the CS-Entities’ property and development rights which requires compensation
10 to the CS-Entities[.]”).

11 **B. CSI’s Position in Its Related Petition for Judicial Review is that the**
12 **State Engineer Lacked Authority to Combine Basins in Order 1309.**

13 On July 9, 2020, CSI filed a Petition for Judicial Review of Nevada State Engineer
14 Order 1309, case number A-20-817765-P, which was consolidated with other cases into
15 Case No. A-20-816761-C (the “Order 1309 PJR”). *See Exhibit B* (CSI’s Order 1309 PJR,
16 without attachments). The Order 1309 PJR specifically challenged the State Engineer’s
17 “delineation of six, and part of a seventh, previously separately delineated hydrographic
18 basins.” Ex. B, ¶ 2. The district court ultimately determined, *inter alia*, that the State
19 Engineer “acted outside the scope of his authority in entering Order 1309). *See Exhibit C*
20 (Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review),
21 p. 29.

22 Thereafter, the State Engineer, in *Sullivan*, appealed the district court’s order. The
23 Respondents’ Joint Answering Brief, in which CSI joined, continued the narrative that
24 “[w]ith Order 1309, the State Engineer, for the first time in history, combined seven
25 separate hydrographic basins into one.” **Exhibit D** (Respondents’ Joint Answering Brief
26 without Addendum), p. 1. CSI further argued that Order 1309 “reordered the priority of
27 water rights in the seven basins,” *id.*, p. 2, and recognized that the State Engineer’s position
28 that “the Order 1303 proceeding was ‘investigative’ with a limited fact-finding objective[.]”

1 *Id.*, p. 53. CSI also filed a separate brief before the Nevada Supreme Court alleging that
2 the State Engineer violated CSI's due process rights in its issuance of Order 1309. **Exhibit**
3 **E** (Respondent Coyote Springs Investment, LLC Answering Brief). Therein, CSI argued
4 that the State Engineer historically has managed water rights on a basin-by-basin basis,
5 and the deviation from this practice without notice violated due process. *Id.*, pp. 11–14.

6 **III. ARGUMENT**

7 **A. Legal Standard.**

8 Rule 15(a)(2) of the Nevada Rules of Civil Procedure provides, in relevant part, that
9 once the time to amend as a matter of course has expired, “a party may amend its pleading
10 only with the opposing party’s written consent or the court’s leave. The court should freely
11 give leave when justice so requires.” The Nevada Supreme Court has recognized that
12 although Rule 15(a)(2) provides that courts should freely give leave when justice so
13 requires, “[t]his does not, however, mean that a trial judge may not, in a proper case, deny
14 a motion to amend.” *Stephens v. S. Nev. Music Co., Inc.*, 89 Nev. 104, 106, 507 P.2d 138,
15 139 (1973). “If that were the intent, leave of court would not be required.” *Id.* The
16 determination of whether an amendment is proper is trusted to the sound discretion of the
17 district court. *See id.* Reasons for which a district court might properly deny a motion for
18 leave to amend include undue delay, bad faith, or dilatory motive. *Id.*, 89 Nev. at 105–06.

19 **B. CSI Has Unduly Delayed Amendment, as the “New” Information Has** 20 **Been Known to It from the Outset of this Case.**

21 CSI posits eight facts that it claims the State Engineer has “confirmed” in discovery
22 to support its request to amend the Complaint. With respect to the first “fact,” CSI paints
23 an incomplete picture by selectively cherry-picking testimony from the State Engineer’s
24 30(b)(6) witness. The remaining seven facts are not newly discovered at all but rather have
25 been known to CSI from the outset of this case. In fact, these facts have been alleged either
26 in the prior three iterations of the complaint or in the related *Sullivan* action. To allow
27 CSI to amend its complaint to add these “new” factual allegations would be to condone its
28 undue delay in amending its Complaint.

1 The first "fact" upon which CSI relies to support amendment of its complaint is,
2 The May 16, 2018, decision was made when the only information available to
3 the State Engineer showed that the perennial yield of Coyote Spring Valley
4 Hydrographic Basin was 18,000 afa and that the five basins referenced in the
May 16, 2018, letter had a combined perennial yield of 50,000 afa.

5 Motion, p. 3 (citing Exhibit 3, Excerpts of Deposition Transcript of the State's 30(b)(6)
6 representative, p. 144:11–21). The actual testimony, with the prior two lines, for context,
7 is excerpted below:

8 9 Before the break, we were talking about
9 10 the -- Exhibit 14, the May 16, 2018, letter.
10 11 So as of the date of this letter, when the
11 12 State Engineer cannot justify approving any
12 13 subdivision maps, what the State Engineer knew at
13 14 that time was that Basin 210 had an estimated
14 15 perennial yield of 18,000 acre-feet; right?
15 16 A. Yes.
16 17 Q. And what the State Engineer knew at that
17 18 time is that this five basin area had a perennial
18 19 yield of 50,000 acre-feet; right?
19 20 A. I think that was what the term was. I
20 21 think it said perennial yield of 50,000.

21 Ex. 3, 144:9–21. What CSI's Motion omits is counsel's follow up question and the witness'
22 disagreement with counsel's position:

23 22 Q. So whether it was 50 or five basins or
24 23 whether it's 18 for Coyote Springs, using water that
25 24 were permitted would not have jeopardized the 18 or
26 25 the 15; correct?

27 26 Page 145
28 1 A. I -- that doesn't make sense.
2 Q. Why?
3 A. Well, conflict is different than perennial
4 yield.
5 Q. What conflicts were there in May of '18
6 and with whom?
7 A. Based on the drawdown, there was the
8 potential that there was evidence that pumping would
9 cause a conflict with other rights.

Id., 144:22–145:9.

CSI's Motion also omits the *twelve* additional times that counsel for CSI asked the State's 30(b)(6) witness whether the Basin 210 perennial yield estimate of 18,000 afa ever changed and numerous objections of counsel for the State Engineer.³ See **Exhibit F** (Additional Excerpts from 30(b)(6) Deposition Transcript), 47:17–48:10; 49:18–50:9; 50:22–51:19; 52:18–53:1; 61:11–62:12; 72:24–73:7; 73:21–74:1; 108:25–109:4; 109:11–18; 112:1–5; 131:20–132:1; 213:12–22. Indeed, at one point, when the witness was asked whether the State Engineer changed the perennial yield estimate of 18,000 afa between 1997 and 2014, she clarified that “[t]he only change would have been acknowledging that the basins are connected and shared a perennial yield.” *Id.*, 52:18–53:1. This, of course, is the critical point that CSI does not want to acknowledge.

The remaining seven alleged “facts” that CSI claims were uncovered during discovery and warrant amendment of the complaint are instead “facts” that have been known to CSI and that were either included or should have been included in any one of the three prior versions of its complaint.

“Newly” Discovered Fact	Citation Showing Prior Knowledge
“2. Under the May 16, 2018, decision, CSI could not use any of its groundwater rights in Coyote Spring Valley Hydrographic Basin for subdivision maps or to build homes.”	Compl., ¶¶ 25–27; FAC, Ex. A, ¶¶ 25–27; SAC, ¶¶ 33–35 (alleging in May 16, 2018 letter, State Engineer represented that “the State Engineer cannot justify approval of any subdivision development maps based on the junior priority groundwater rights currently owned by CWSRGID [sic] or CSI unless other water sources are identified for development.”).
“3. Generally, the State Engineer has identified the priorities of water right holders in relation to other water right holders in the same basin.”	Ex. E, p. 11 (“The State Engineer changed his historical interpretation of Nevada’s water law statutes requiring a basin-by-basin management practice without giving proper notice to the Respondents.”)

³ Among other objections, counsel objected on the basis that the questioning went beyond the topics for the 30(b)(6) deposition, as narrowed through the meet and confer process. See Ex. F, 45:7–14. Specifically, the parties agreed that the 30(b)(6) topics did not encompass the science supporting the State Engineer’s rulings and orders and therefore the witness would not be prepared to speak to scientific questions such as this one. See Whelan Dec., ¶ 2.

1 2	“4. The ‘mega basin’ is the first time the State Engineer has reduced water users’ priorities by merging the basins into one.”	Ex. D, p. 1 (“With Order 1309, the State Engineer, for the first time in history, combined seven separate hydrographic basins into one.”).
3 4 5 6	“5. The May 16, 2018 letter negatively impacts the ability of Coyote Springs to process subdivision maps and build the master planned community and aggrieved CSI’s rights.”	Compl., ¶ 26, FAC, Ex. A, ¶ 26; SAC, ¶ 34 (Alleging May 16, 2018 letter “effectively denied the CS-Entities the use and access to their Water Rights and commenced a taking by the State of these Water Rights and associated Master Planned development rights.”).
7 8 9 10 11	“6. CSI’s water rights in Coyote Spring Valley Hydrographic Basin have been negatively impacted in that now, in the combined basin, 57 water right holders are now placed above CSI’s priority date.”	Ex. D, p. 2 (“[Order 1309] reordered the priority of water rights in the seven basins and subjected them to a generally applicable pump limit, all on the basis of previously undisclosed criteria. Thus, the State Engineer relegated senior groundwater holders in one basin to a more junior position to water right holders in formerly separate basins[.]”).
12 13 14 15	“7. The State Engineer maintains that he ‘has not determined the specific amounts that can be pumped pursuant to any particular permit under Order 1309 . . . , yet the State Engineer already denied CSI’s final Subdivision Map for Coyote Springs Village A.”	Ex. B, ¶ 71 (recognizing the State Engineer’s position that Order 1309 “identifies the need for ‘an effective management scheme,’ but “provides for neither a management scheme nor a plan for the development of such a management scheme,” and is therefore “incomplete.”).
16 17 18 19 20	“8. Since the State Engineer stopped CSI’s development and took its water rights in May 2018, nothing has changed. The State Engineer has only continued to place moratoriums on CSI even submitting subdivision map applications, . . . and when the State Engineer finally lifted the moratorium in Order 1309, the State Engineer denied CSI’s map.”	Ex. 6 (June 17, 2020 State Engineer letter denying CSI’s map; information has been known to CSI since June 17, 2020). ⁴

21 CSI’s failure to include allegations relating to information it already possessed at
22 the time of filing the original Complaint, FAC, and/or SAC, was done at its own peril. To
23 the extent CSI claims that it did not or could not include such allegations until the facts
24 were “confirmed” by the State Engineer, such claim is unavailing. CSI has sophisticated
25 counsel that have already demonstrated they know how to plead on information and belief

27 ⁴ CSI also cites Ex. 4, 137:4–7 in support of this fact. However, this appears to be a mis-cite,
28 as the testimony cited has nothing to do with CSI’s development or moratoriums on submitting
subdivision map applications.

1 and in the alternative. There is no excuse for CSI's undue delay in seeking to amend its
2 Complaint. Accordingly, the Court should deny CSI's Motion.

3 **C. The Information Cited by CSI Does Not Support the New Claims for**
4 **Relief.**

5 In addition to the delay in seeking to amend its Complaint, CSI's Motion should be
6 denied for the additional reason that the so-called newly discovered information does not
7 bear any relation to the actual Complaint amendments. Therefore, CSI has not adequately
8 supported its purported need for amendment and its likely explanation for the delay (only
9 recently learning the facts set forth in discovery) is further negated.

10 There are two primary amendments to the proposed Third Amended Complaint.
11 First, CSI attempts to bring two brand new claims for relief: the First Claim for Relief –
12 Per Se Appropriation Taking of CSI's Water Rights, and the Tenth Claim for Relief –
13 Temporary Taking Against the State of Nevada (Alternatively). Ex. 1, ¶¶ 145–54, 255–61.
14 Second, CSI attempts to split its two inverse condemnation claims—one for a *Lucas*
15 regulatory taking and one for a *Penn Central* regulatory taking—into four claims for relief.
16 *Compare* SAC, ¶¶ 55–67, with Ex. 1, ¶¶ 155–92. Specifically, CSI now alleges two *Lucas*
17 regulatory takings—one for taking of its water rights and one for taking of 6,937.66 acres
18 of land—and two *Penn Central* regulatory takings, for the same rights and land. *See* Ex.
19 1, ¶¶ 174–92. Factual allegations are amended, presumably to support these new claims.

20 However, CSI makes no attempt in its Motion to explain how the “new” evidence it
21 uncovered in discovery supports these new claims for relief. Nor can it. The eight facts
22 cited bear no relation to the four new claims for relief.⁵ Without a link between the “new”
23 facts learned in discovery and the new claims for relief, the only reasonable conclusion is

24 ⁵ The only attempt to link any of the cited evidence to the new claims comes in three
25 sentences at the end of CSI's Motion, where CSI cites to testimony of former State Engineer Jason
26 King, who testified that CSI's ability to use its water rights has been “negatively impacted in that
27 57 water right holders are now placed above their priority date” in the new single basin, “until such
28 time as that [8,000 afa] cap is once and for all finalized.” *See* Ex. 4, 155:25–156:8. Setting aside
the fact that this has been CSI's position since the inception of this case and the Order 1309 PJR,
the testimony does not support that CSI's water rights have been per se taken, only that its “ability
to use . . . its water rights” has been “negatively impacted.” Ex. 4, 155:18–156:3.

1 that CSI is simply attempting to add new claims for relief that it could have, and should
2 have, included in prior iterations of its Complaint. This further compounds the undue
3 delay and supports denial of CSI's Motion.

4 **D. CSI's Dilatory Amendment Would Prejudice the State Engineer.**

5 CSI cites no authority regarding the Court's consideration of the prejudice to the
6 non-moving party when considering whether to permit amendment of a pleading.
7 However, to the extent prejudice is relevant, CSI's belated amendment would prejudice the
8 State Engineer in several key ways. First, the parties are subject to an initial expert
9 disclosure deadline of November 1, 2023—fifty-seven days from the date of the filing of this
10 Opposition and only thirty-four days from the date of the September 28 hearing on the
11 Motion. Should the Motion be granted, the State Engineer will have to expand the scope
12 of work for its experts already engaged to opine on the issues in this case and may even
13 need to obtain additional experts, get them up to speed, and procure expert reports within
14 little more than a month.

15 The prejudice to the State Engineer increases if the instant Motion is granted and
16 the State Engineer's Motion to Stay is denied. In that case, the State Engineer would be
17 expending resources and obtaining experts on issues that will certainly be narrowed by the
18 Nevada Supreme Court's decision in *Sullivan*. See generally 8/21/23 Motion to Stay.
19 Moreover, judicial resources that would not otherwise have to be expended in ruling on
20 challenges to experts, dispositive motions, motions in limine, and perhaps even another
21 motion for leave to amend the Complaint, would be wasted. Therefore, the prejudice to the
22 State Engineer and the interests of judicial economy both weigh in favor of denying CSI's
23 Motion.

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26 ///

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28 ///

1 **IV. Conclusion**

2 For the reasons stated above, Defendant State of Nevada, ex rel. Division of Water
3 Resources, Department of Conservation and Natural Resources, Adam Sullivan, State
4 Engineer, respectfully requests that this Court deny CSI's Motion for Leave to Amend.

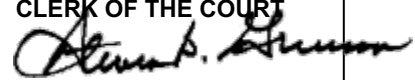
5 DATED this 5th day of September, 2023.

6 AARON D. FORD
7 Attorney General

8 By: /s/ Jessica E. Whelan
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/s/ Jeny M. Beesley
Jeny M. Beesley, an employee of the
State of Nevada Office of the Attorney General



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DISTRICT COURT

CLARK COUNTY, NEVADA

COYOTE SPRINGS INVESTMENT, LLC,
a Nevada Limited Liability Company;
COYOTE SPRINGS NEVADA, LLC, a
Nevada Limited Liability Company; and
COYOTE SPRINGS NURSERY, LLD, a
Nevada Limited Liability Company,

Plaintiffs,

vs.

STATE OF NEVADA, on relation to its
Division of Water Resources;
DEPARTMENT OF CONSERVATION
AND NATURAL RESOURCES, ADAM
SULLIVAN, Nevada State Engineer;
CLARK COUNTY-COYOTE SPRINGS
WATER RESOURCES GENERAL
IMPROVEMENT DISTRICT, a political
subdivision of the State of Nevada; and
DOES I through X

Defendants.

Case No. A-20-820384-B
Dept. No. XIII

**DEFENDANT'S REPLY IN SUPPORT
OF MOTION TO STAY
PROCEEDINGS PENDING NEVADA
SUPREME COURT'S RESOLUTION
OF RELATED MATTER**

Hearing date: September 14, 2023
Hearing time: 9:00 a.m.

Defendant State of Nevada ex rel. Department of Conservation and Natural
Resources, Division of Water Resources, Adam Sullivan, P.E., the Nevada State Engineer
(hereafter "State Engineer"), by and through counsel, hereby files his Reply in support of
the Motion for a stay of proceedings pending the Nevada Supreme Court's resolution of

1 *Sullivan, P.E. v. Lincoln Co. Water Dist.*, Case No. 84379 (consolidated with Case Nos.
2 84741, 84742, 84809, and 85137) (hereinafter referred to as “*Sullivan*.”). Plaintiffs Coyote
3 Springs Investment, LLC, Coyote Springs Nevada, LLC and Coyote Springs Nursery, LLC
4 (collectively, “CSI”) filed an Opposition on September 5, 2023. This Reply in support of the
5 Motion addresses the points raised in the Opposition and is based on the pleadings and
6 papers on file herein, the attached memorandum of points and authorities, and any
7 argument that may be heard at the time of the hearing.

8 **MEMORANDUM OF POINTS AND AUTHORITIES**

9 **I. INTRODUCTION**

10 The entirety of the Opposition, like the whole of Plaintiffs’ case, rests on a faulty
11 premise: that “Plaintiffs have not been able to continue to develop their land since the State
12 Engineer issued his May 16, 2018 letter.” Opp., p. 4. The State Engineer has **not** prevented
13 Plaintiffs from developing their land. And the State Engineer has **not** prevented Plaintiffs
14 from using their water rights. All the State Engineer has done is to recommend disapproval
15 of Plaintiffs’ subdivision maps to avoid a potential conflict with senior water rights
16 holders—specifically, the senior decreed rights of the Muddy River—before the State
17 Engineer is able to complete the management phase of addressing water availability in the
18 Lower White River Flow System. Plaintiffs are free to pursue building their subdivision
19 using an alternative water source or to use their water rights for another purpose that
20 would not conflict with senior rights. But Plaintiffs are unhappy that they unreasonably
21 invested hundreds of millions of dollars in a project dependent on water rights that could
22 be modified by the State Engineer at any time if found to conflict with senior rights.

23 In an attempt to recoup—at taxpayer expense—the alleged hundreds of millions of
24 dollars unreasonably expended, Plaintiffs have thrown every potential claim under every
25 potential theory at the proverbial wall to see what sticks. What the State Engineer is
26 asking this Court to do is to wait until the wall is on stable ground before allowing
27 Plaintiffs’ claims to proceed. Plaintiffs’ effort to shift the foundation of its case from Order
28 1309 to a since rescinded letter from May 16, 2018, is a thinly veiled attempt to avoid the

inevitable: the Nevada Supreme Court’s ruling in the *Sullivan* appeal will meaningfully impact these proceedings. Judicial economy and common sense both support staying proceedings until the Nevada Supreme Court determines the validity of Order 1309.

II. ARGUMENT

Plaintiffs’ Opposition is rife with speculation and hyperbole to paint a worst-case scenario for this Court. First, the Nevada Supreme Court’s decision in *Sullivan* will necessarily impact these proceedings, including fact and expert discovery with regard to both liability and damages. Second, judicial economy will be served and Plaintiffs minimally prejudiced by a stay. Third, contrary to Plaintiffs’ assertions, the stay could be narrowly tailored to avoid indefinite delay.

A. The Outcome of the *Sullivan* Appeal Will Necessarily Impact These Proceedings.

1. *The Court Should Grant the Stay, as The Sullivan Appeal Will Decide Issues Necessary to Resolution of this Case.*

Plaintiffs’ Opposition attempts to flip the script by arguing that the Supreme Court’s decision in *Sullivan* will not be dispositive of any issue in the case. Opp., p. 7. As a threshold matter, Plaintiffs cite no case law to support that a related proceeding must be dispositive of an issue in the case to warrant a stay; rather, they cite a non-binding Fifth Circuit case that a stay should not be granted unless the related case is deciding “issues that are ***necessary to the disposition*** of the stayed action.” Opp., p. 8 (quoting *Itel Corp. v. M/S Victoria U (Ex Pishtaz Iran)*, 710 F.2d 199, 203 (5th Cir. 1983) (emphasis added)). Importantly, “necessary to the disposition” of a case is not the equivalent of “dispositive” of a case. And further, the State Engineer never asserted that the resolution of Order 1309’s validity would be ***dispositive***, only that it would clarify and narrow the issues before this Court and prevent potentially conflicting rulings. See Mot., pp. 8, 19–20, 22–23.

2. *Plaintiffs’ Complaints, Including the Proposed Third Amended Complaint, Unquestionably Relies on Order 1309 as a Basis for their Claims.*

While Plaintiffs claim that they do not rely on the validity or invalidity of Order 1309, Opp., pp. 8–10, the allegations in each iteration of their Complaint, including the

1 Proposed Third Amended Complaint, reveal otherwise. In addition to claiming that the
2 rescinded May 16, 2018 letter commenced the taking, Plaintiffs also allege that the State
3 Engineer’s draft Order (never in effect), Order 1303 (rescinded), Order 1309 (in effect), and
4 June 17, 2020 letter recommending disapproval of final subdivision maps (based on Order
5 1309) are bases for their claims. *See, e.g.*, Proposed Third Amended Compl. (“Proposed
6 TAC”), ¶¶ 111–144. Although Plaintiffs’ Proposed Third Amended Complaint artfully
7 pleads the takings claims as being based on “[t]he State Engineer’s May 16, 2018 letter and
8 subsequent regulatory actions described above,” *id.*, ¶ 158, and “the regulatory actions
9 described herein, beginning with the May 16, 2018 letter,” *id.*, ¶¶ 164, 175, 183, it is clear
10 that the referenced “regulatory actions” include Order 1309.¹

11 If Plaintiffs genuinely are not relying on Order 1309 to form the basis of their takings
12 claims, then their claims rest solely on a rescinded letter, a draft Order that was never in
13 effect, rescinded Order 1303, and a letter that relies on findings the State Engineer made
14 in Order 1309. Order 1309 is ***integral*** to Plaintiffs’ claims, regardless of how they now try
15 to distance themselves from its impact in the aftermath of Supreme Court oral arguments
16 held on August 8, 2023.

17 Moreover, the Supreme Court’s potential findings and conclusions as to Order 1309
18 may have a significant impact on how liability and damages are determined in this case. If
19 the Supreme Court agrees with the State Engineer that Order 1309 was a fact-finding order
20 that took no action in contemplation of a second phase, it deflates Plaintiffs’ suggestion
21 that Order 1309 was a continuation of the alleged taking commenced by the rescinded May
22 16, 2018 letter. The Supreme Court’s decision can also impact damage calculations because
23 it could fundamentally affect whether there is a basis for no damages, a partial taking or a
24 full taking. Despite the best efforts of prognosticators on both sides of this Motion, there is
25 no way to know exactly how the Supreme Court’s decision will impact this case beyond the

26
27 ¹ Interestingly, Plaintiffs’ counsel’s August 17, 2023 email stated, “We believe the third
28 amended complaint goes a long way to alleviate the need to stay the proceedings.” Mot., Ex. A.
This statement implicitly recognizes that, under the operative Second Amended Complaint, a stay
was necessary.

fact that it will give us clarity on the validity of the State Engineer's authority to issue Order 1309.

B. The Supreme Court's Decision Will Have a Significant Impact on How Liability and Damages Are Determined.

As detailed in the Motion to Stay, Plaintiffs' prior Complaint allegations and their conduct throughout discovery confirms that Order 1309's validity lies at the center of this dispute. Staying this case until the Nevada Supreme Court decides the fate of Order 1309 will significantly serve judicial economy by clarifying and narrowing the issues before the Court, preventing conflicting rulings, and streamlining remaining fact and expert discovery. Plaintiffs will only be prejudiced to the extent they must wait marginally longer for a result²; however, even that assertion is specious. If the Motion to Stay were denied and this Court's decisions ultimately conflicted with the Supreme Court's ruling in *Sullivan*, the motions, appeals, and writs to correct this Court's rulings could potentially delay resolution of this case even longer than a stay would.

C. This Court Can Narrowly Tailor the Stay to Avoid Plaintiffs' Feared Indefinite Delay.

Plaintiffs would have this Court believe that the Supreme Court's decision in *Sullivan* will result in one of three outcomes, that two of the outcomes would lead to further proceedings; and that a stay by this Court would need to last until the conclusion of the further proceedings. *See Opp.*, pp. 5–7. This reasoning oversimplifies what is a complex appeal with other potential outcomes and reveals a lack of confidence in this Court's ability to narrowly tailor a stay.

First, Plaintiffs neglect to include additional options in the Supreme Court's resolution of the *Sullivan* appeal: that the Supreme Court (4) affirms in part and reverses in part; or (5) reverses in the entirety Judge Yeager's Order **and** independently determines

² Plaintiffs cite a Declaration of Albert D. Seeno, Jr., a principal of CSI, in support of their claim of harm. The State Engineer has been unable to locate said Declaration in Plaintiffs' contemporaneous filings with the Court. This fact notwithstanding, any harm to septuagenarian Mr. Seeno is irrelevant, as Mr. Seeno is not a named party in this litigation.

whether there was substantial evidence to support Order 1309. As noted by the Opposition, the parties briefed and argued the substantial evidence question in the district court before Judge Yeager, but because Judge Yeager invalidated Order 1309 on the first two grounds raised—that the State Engineer lacked statutory authority and violated Petitioners’ due process rights—she did not reach the question of substantial evidence. *See Opp.*, p. 6, n.1. Because the Supreme Court has a significant portion of the record before it on appeal and reviews *de novo* legal questions, *Diamond Nat. Res. Prot. & Conservation Ass’n v. Diamond Valley Ranch, LLC*, 138 Nev. Adv. Op. 43, 511 P.3d 1003, 1006 (2022), the Supreme Court could decide to bypass a remand all together and determine the substantial evidence question itself.

In that case, the Supreme Court could determine that: (6) there was substantial evidence and Order 1309 is valid; or (7) there was not substantial evidence and Order 1309 is invalid. Were the Supreme Court to make the substantial evidence determination without remand, Plaintiffs’ concern regarding delay caused by further district court and appellate proceedings would be alleviated.

Second, whatever the outcome of the *Sullivan* appeal, this Court is capable of narrowly tailoring its stay order to avoid a “years-long” or “indefinite” delay. For example, the Court could stay the proceedings until the Supreme Court’s decision in *Sullivan* is filed and require the parties to file a status report within thirty days. Upon evaluation of the Supreme Court’s decision and its impact on the instant case, the Court could either lift the stay or leave it place. Regardless of how the Supreme Court rules, the parties appear to agree that the *Sullivan* appeal will provide immediate clarity on the State Engineer’s authority to issue Order 1309, which will, as detailed above, necessarily impact the scope of this case.

III. CONCLUSION

For the reasons stated above, Defendant State of Nevada, ex rel. Division of Water Resources, Department of Conservation and Natural Resources, Adam Sullivan, State Engineer, respectfully requests that this Court enter a stay of proceedings pending the

1 Nevada Supreme Court's resolution of related appellate proceedings in *Sullivan, P.E. v.*
2 *Lincoln Co. Water Dist.*

3 DATED this 7th day of September, 2023.

4 AARON D. FORD
5 Attorney General

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13 *Attorneys for Defendant State Engineer*
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/s/ Jeny M. Beesley
Jeny M. Beesley, an employee of the
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ORDD

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**DISTRICT COURT
CLARK COUNTY NEVADA**

COYOTE SPRINGS INVESTMENT, LLC, a
Nevada Limited Liability Company; COYOTE
SPRINGS NEVADA, LLC, a Nevada limited
liability company; and COYOTE SPRINGS
NURSERY, LLC, a Nevada limited liability
company,

Plaintiffs,

vs.

STATE OF NEVADA, on relation to its
Division of Water Resources; DEPARTMENT
OF CONSERVATION and NATURAL
RESOURCES; ADAM SULLIVAN, Nevada
State Engineer; and Does I through X.

Defendants.

Case No.: A-20-820384-B
Dept.: 13

**ORDER DENYING DEFENDANT'S
MOTION TO STAY PROCEEDINGS
PENDING NEVADA SUPREME
COURT'S RESOLUTION OF RELATED
MATTER WITHOUT PREJUDICE**

This matter came before the Court on an Order Shortening Time on September 14, 2023, upon the Defendant's Motion to Stay Proceedings Pending Nevada Supreme Court's Resolution of Related Matter (the "Motion"). Plaintiffs filed an Opposition to the Motion, and the parties' respective counsel presented argument on September 14, 2023.

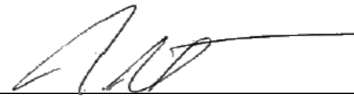
1 Having carefully considered the Motion, Plaintiffs' Opposition thereto, the parties' oral
2 argument, and finding good cause exists to deny the Motion, the Court orders as follows:

3 **ORDER**

4 IT IS HEREBY ORDERED THAT the Defendant's Motion to Stay Proceedings Pending
5 Nevada Supreme Court's Resolution of Related Matter is DENIED without prejudice as the Court
6 finds that the Motion is not ripe and that an indefinite stay is not warranted.

7 IT IS SO ORDERED.

8 Dated this 19th day of September, 2023

9
10 

11 DISTRICT COURT JUDGE

TMB

12 667 353 72BE A14A
13 Mark R. Denton
14 District Court Judge

15 Respectfully submitted by:

16 ROBISON, SHARP, SULLIVAN & BRUST

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Chrissy O'Brien

From: Casey J. Quinn <CQuinn@ag.nv.gov>
Sent: Tuesday, September 19, 2023 12:51 PM
To: Hannah Winston; Jessica E. Whelan
Cc: Kent Robison; Emilia Cargill; 'wlc@coulthardlaw.com'; Chrissy O'Brien
Subject: RE: CSI v. State - Proposed Order Denying Motion to Stay

Hannah,
Please put our same signature block from the other one on it and then you have my permission to put my electronic signature.

Thanks,
Casey

From: Hannah Winston <hwinston@rssblaw.com>
Sent: Tuesday, September 19, 2023 12:26 PM
To: Casey J. Quinn <CQuinn@ag.nv.gov>; Jessica E. Whelan <JWhelan@ag.nv.gov>
Cc: Kent Robison <krobison@rssblaw.com>; Emilia Cargill <emilia.cargill@wingfieldnevadagroup.com>; 'wlc@coulthardlaw.com' <wlc@coulthardlaw.com>; Chrissy O'Brien <cobrien@rssblaw.com>
Subject: CSI v. State - Proposed Order Denying Motion to Stay

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Hi Casey,

Attached is the proposed order denying the motion to stay. Please let us know if you have any edits or if we can affix your electronic signature.

Thanks,

Hannah

HANNAH E. WINSTON, ESQ.



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1 **CSERV**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 Coyote Springs Investment LLC, CASE NO: A-20-820384-B
7 Plaintiff(s)
8 vs.
9 State of Nevada, Defendant(s)

DEPT. NO. Department 13

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

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

Service Date: 9/19/2023

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