No. 87356

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,

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.

COYOTE SPRINGS INVESTMENT, LLC, COYOTE SPRINGS NEVADA, LLC, and COYOTE SPRINGS NURSERY, LLC APPENDIX VOL. 1

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Attorneys for Real Parties in Interest

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DOCUMENT	DATE FILED or ADMITTED	VOLUME NO.	PAGE NO.
Order Granting Plaintiffs' Motion for Leave to File Third Amended Complaint	2023-10-03	Vol. 3	CSI0511-CSI0519

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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, TIM WILSON, NEVADA STATE ENGINEER; and DOES I through X, Defendants.	Case No. A-20-820384-B Dept. No. XIII **NOTICE OF REMOVAL TO FEDERAL COURT**

TO: CLERK OF THE COURT FOR THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF NEVADA

TO: WILLIAM L. COULTHARD, COULTHARD LAW, PLLC, counsel for Plaintiffs

PLEASE TAKE NOTICE THAT Defendants STATE OF NEVADA, on relation to its DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, TIM WILSON, NEVADA STATE ENGINEER, by and through

their counsel of record, have removed this action to the United States District Court for the District of Nevada pursuant to 28 U.S.C. § 1441(a). A true copy of the Notice of Removal filed in the United States District Court for the District of Nevada is attached hereto as **Exhibit A**.

DATED this 2nd day of October, 2020.

AARON D. FORD
Attorney General

By: /s/ *Akke Levin*
Steve Shevorski (Bar No. 8256)
Chief Litigation Counsel
Akke Levin (Bar No. 9102)
Senior Deputy Attorney General
Kiel B. Ireland (Bar No. 15368C)
Deputy Attorney General
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court by using the electronic filing system on the 2nd day of October, 2020, and e-served the same on all parties listed on the Court's Master Service List.

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

EXHIBIT A

EXHIBIT A

AARON D. FORD
Attorney General
Steve Shevorski (Bar No. 8256)
Chief Litigation Counsel
Akke Levin (Bar No. 9102)
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Attorneys for Defendants

UNITED STATES DISTRICT COURT

DISTRICT OF 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, TIM WILSON, NEVADA STATE ENGINEER; and DOES I through X, Defendants.	Case No. **DEFENDANTS' NOTICE OF REMOVAL TO FEDERAL COURT**

Under 28 U.S.C. §§1331, 1441, 1446, Defendants State of Nevada ex rel. Division of Water Resources, Department of Conservation and Natural Resources, and State Engineer Tim Wilson ("Defendants") remove Case No. A-20-820384-B, from Nevada's Eighth Judicial District Court to the United States District Court, District of Nevada.

1. Plaintiffs Coyote Springs Investment LLC, Coyote Springs Nevada LLC, and Coyote Springs Nursery LLC ("Plaintiffs") filed their complaint against Defendants on August 28, 2020. **Ex. A**.

2. Plaintiffs served a copy of the summons and complaint on Defendants and the Nevada Attorney General's Office on September 3, 2020. **Ex. B**.

3. Plaintiffs assert Defendants' alleged actions took Plaintiffs' water rights and deprived them of all economical beneficial use of their property in Coyote Springs, Nevada. **Ex. A**, ¶ 3.

4. This Court has subject matter jurisdiction under 28 USC § 1331 because Plaintiffs' first through fifth claims for relief arise under the United States Constitution.

5. Plaintiffs in their first through fifth claims for relief allege violations of the Fifth and Fourteenth Amendment to the United States Constitution and seek damages under 42 U.S.C. § 1983.[1] **Ex. A** at 25-30.

6. Plaintiffs allege various inverse condemnation theories and seek just compensation and pre-condemnation damages. They allege that Defendants' actions took Plaintiffs' property, "which requires compensation under the Fourteenth Amendment to the United States Constitution[.]" *Id.* ¶¶ 51, 57, and 62.

7. Plaintiffs also allege that Defendants took various actions that violated the Equal Protection and Privileges and Immunities Clauses of the Fourteenth Amendment to the United States Constitution. *Id.* ¶¶ 65-68 and 71-73.

8. This Court has supplemental jurisdiction under 28 USC § 1367(a) because Plaintiffs' State Constitutional inverse condemnation theories embedded in its first through fifth claims for relief and its sixth claim for relief arise from the same common nucleus of operative facts as their federal inverse condemnation theories.

9. No consent from other defendants is required under 28 U.S.C. § 1446(b)(2)A). Removal is unanimous. Defendants are the only defendants to this action. Accordingly, they may remove Plaintiffs' action to federal court.

. . .

[1] The Fifth Amendment's Just Compensation Clause is applicable to the States via the Fourteenth Amendment to the United States Constitution. *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 160 (1980).

10. Removal to this Court is proper under 28 USC § 1446(a). Nevada's Eighth Judicial District Court, where the action lies, is in this Court's district and division.

11. Defendants' removal is timely under 28 U.S.C. § 1446(b). Defendants filed their Notice within 30 days of the service date, September 3, 2020. **Ex. B**, supra.

12. Defendants will promptly serve written notice of this Notice of Removal on Plaintiff's counsel and file the same with the Clerk of the Eighth Judicial District Court for the State of Nevada under 28 U.S.C. § 1446(d).

13. Defendants have not yet responded to Plaintiffs' complaint.

14. By removing this action from the Eighth Judicial District Court for the State of Nevada to this Court, the Defendants do not waive any defenses available to them.

15. By removing this action from the Eighth Judicial District Court for the State of Nevada to this Court, the Defendants do not admit any of the allegations in Plaintiffs' complaint.

DATED this 2nd day of October, 2020.

AARON D. FORD
Attorney General

By: /s/ *Akke Levin*
Steve Shevorski (Bar No. 8256)
Chief Litigation Counsel
Akke Levin (Bar No. 9102)
Senior Deputy Attorney General
Kiel B. Ireland (Bar No. 15368C)
Deputy Attorney General
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court by using the electronic filing system on the 2nd day of October, 2020.

I certify that some of the participants in this case may be registered electronic filing systems users and will be served electronically. For those participants in the case that are not registered electronic filing system users, service was made by depositing a copy of the above-referenced document for mailing in the United States Mail, first-class postage prepaid, at Las Vegas, Nevada to the following unregistered participants:

William L. Coulthard, Esq.
Coulthard Law PLLC
840 South Rancho Drive, #4-627
Las Vegas, Nevada 89106
Attorneys for Plaintiffs

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

JS 44 (Rev. 06/17)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) 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

(b) County of Residence of First Listed Plaintiff _____
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
William L. Coulthard, Esq., Coulthard Law PLLC, 840 S. Rancho Dr., #4-627, Las Vegas, NV 89106, 702-898-9944

DEFENDANTS

State of Nevada, on relation to its Division of Water Resources, Department of Conservation and Natural Resources, Tim Wilson, Nevada State Engineer

County of Residence of First Listed Defendant _____
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*
Steve Shevorski, Akke Levin and Kiel B. Ireland, Office of the Attorney General, 555 E. Washington Ave., Ste. 3900, Las Vegas, NV 89101, 702-486-3420

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ❒ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question *(U.S. Government Not a Party)*
- ❒ 2 U.S. Government Defendant
- ❒ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	❒ 1	❒ 1	Incorporated *or* Principal Place of Business In This State	❒ 4	❒ 4
Citizen of Another State	❒ 2	❒ 2	Incorporated *and* Principal Place of Business In Another State	❒ 5	❒ 5
Citizen or Subject of a Foreign Country	❒ 3	❒ 3	Foreign Nation	❒ 6	❒ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

Click here for: Nature of Suit Code Descriptions.

CONTRACT
- ❒ 110 Insurance
- ❒ 120 Marine
- ❒ 130 Miller Act
- ❒ 140 Negotiable Instrument
- ❒ 150 Recovery of Overpayment & Enforcement of Judgment
- ❒ 151 Medicare Act
- ❒ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ❒ 153 Recovery of Overpayment of Veteran's Benefits
- ❒ 160 Stockholders' Suits
- ❒ 190 Other Contract
- ❒ 195 Contract Product Liability
- ❒ 196 Franchise

REAL PROPERTY
- ❒ 210 Land Condemnation
- ❒ 220 Foreclosure
- ❒ 230 Rent Lease & Ejectment
- ❒ 240 Torts to Land
- ❒ 245 Tort Product Liability
- ☒ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ❒ 310 Airplane
- ❒ 315 Airplane Product Liability
- ❒ 320 Assault, Libel & Slander
- ❒ 330 Federal Employers' Liability
- ❒ 340 Marine
- ❒ 345 Marine Product Liability
- ❒ 350 Motor Vehicle
- ❒ 355 Motor Vehicle Product Liability
- ❒ 360 Other Personal Injury
- ❒ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ❒ 365 Personal Injury - Product Liability
- ❒ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ❒ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ❒ 370 Other Fraud
- ❒ 371 Truth in Lending
- ❒ 380 Other Personal Property Damage
- ❒ 385 Property Damage Product Liability

CIVIL RIGHTS
- ❒ 440 Other Civil Rights
- ❒ 441 Voting
- ❒ 442 Employment
- ❒ 443 Housing/ Accommodations
- ❒ 445 Amer. w/Disabilities - Employment
- ❒ 446 Amer. w/Disabilities - Other
- ❒ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ❒ 463 Alien Detainee
- ❒ 510 Motions to Vacate Sentence
- ❒ 530 General
- ❒ 535 Death Penalty

Other:
- ❒ 540 Mandamus & Other
- ❒ 550 Civil Rights
- ❒ 555 Prison Condition
- ❒ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
- ❒ 625 Drug Related Seizure of Property 21 USC 881
- ❒ 690 Other

LABOR
- ❒ 710 Fair Labor Standards Act
- ❒ 720 Labor/Management Relations
- ❒ 740 Railway Labor Act
- ❒ 751 Family and Medical Leave Act
- ❒ 790 Other Labor Litigation
- ❒ 791 Employee Retirement Income Security Act

IMMIGRATION
- ❒ 462 Naturalization Application
- ❒ 465 Other Immigration Actions

BANKRUPTCY
- ❒ 422 Appeal 28 USC 158
- ❒ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ❒ 820 Copyrights
- ❒ 830 Patent
- ❒ 835 Patent - Abbreviated New Drug Application
- ❒ 840 Trademark

SOCIAL SECURITY
- ❒ 861 HIA (1395ff)
- ❒ 862 Black Lung (923)
- ❒ 863 DIWC/DIWW (405(g))
- ❒ 864 SSID Title XVI
- ❒ 865 RSI (405(g))

FEDERAL TAX SUITS
- ❒ 870 Taxes (U.S. Plaintiff or Defendant)
- ❒ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ❒ 375 False Claims Act
- ❒ 376 Qui Tam (31 USC 3729(a))
- ❒ 400 State Reapportionment
- ❒ 410 Antitrust
- ❒ 430 Banks and Banking
- ❒ 450 Commerce
- ❒ 460 Deportation
- ❒ 470 Racketeer Influenced and Corrupt Organizations
- ❒ 480 Consumer Credit
- ❒ 490 Cable/Sat TV
- ❒ 850 Securities/Commodities/ Exchange
- ❒ 890 Other Statutory Actions
- ❒ 891 Agricultural Acts
- ❒ 893 Environmental Matters
- ❒ 895 Freedom of Information Act
- ❒ 896 Arbitration
- ❒ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ❒ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

❒ 1 Original Proceeding ☒ 2 Removed from State Court ❒ 3 Remanded from Appellate Court ❒ 4 Reinstated or Reopened ❒ 5 Transferred from Another District *(specify)* ❒ 6 Multidistrict Litigation - Transfer ❒ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing ***(Do not cite jurisdictional statutes unless diversity)***:
42 U.S.C. 1983, Fifth and Fourteenth Amendments of the U.S. Constitution

Brief description of cause:
Plaintiffs allege unconstitutional taking of water rights and real property

VII. REQUESTED IN COMPLAINT:

❒ CHECK IF THIS IS A **CLASS ACTION** UNDER RULE 23, F.R.Cv.P.

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☒ Yes ❒ No

VIII. RELATED CASE(S) IF ANY *(See instructions)*:

JUDGE _____ DOCKET NUMBER _____

DATE
10/02/2020

SIGNATURE OF ATTORNEY OF RECORD
/s/ Akke Levin

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

EXHIBIT A

Complaint and Appendix to Complaint filed in the Eighth Judicial District Court, Case No. A-20-820384-B

EXHIBIT A

BUSINESS COURT CIVIL COVER SHEET

Clark County, Nevada

Case No. _____
(Assigned by Clerk's Office)

CASE NO: A-20-820384-B
Department 13

I. Party Information *(provide both home and mailing addresses if different)*

Plaintiff(s) (name/address/phone):	Defendant(s) (name/address/phone):
Coyote Springs Investment LLC, a Nevada Limited Liability Company; Coyote	STATE OF NEVADA, on relation to its Division of Water Resources,
Springs Nevada LLC, a Nevada Limited Liability Company; and Coyote Springs	Department of Conservation and Natural Resources; Tim Wilson,
Nursery LLC, a Nevada limited liability company.	State Engineer; and Does I through X.
Attorney (name/address/phone):	Attorney (name/address/phone):
William L. Coulthard, Esq (#3927), Coulthard Law PLLC	
840 South Rancho Drive #4-627, Las Vegas, Nevada 89106	
(t) 898-9944	

II. Nature of Controversy *(Please check the applicable boxes for both the civil case type and business court case type)*

☐ Arbitration Requested

Civil Case Filing Types

Real Property

Landlord/Tenant
- ☐ Unlawful Detainer
- ☐ Other Landlord/Tenant

Title to Property
- ☐ Judicial Foreclosure
- ☐ Foreclosure Mediation Assistance
- ☐ Other Title to Property

Other Real Property
- ☐ Condemnation/Eminent Domain
- ■ Other Real Property

Construction Defect & Contract

Construction Defect
- ☐ Chapter 40
- ☐ Other Construction Defect

Contract Case
- ☐ Uniform Commercial Code
- ☐ Building and Construction
- ☐ Insurance Carrier
- ☐ Commercial Instrument
- ☐ Collection of Accounts
- ☐ Employment Contract
- ☐ Other Contract

Torts

Negligence
- ☐ Auto
- ☐ Premises Liability
- ☐ Other Negligence

Malpractice
- ☐ Medical/Dental
- ☐ Legal
- ☐ Accounting
- ☐ Other Malpractice

Other Torts
- ☐ Product Liability
- ☐ Intentional Misconduct
- ☐ Employment Tort
- ☐ Insurance Tort
- ☐ Other Tort

Civil Writs
- ☐ Writ of Habeas Corpus
- ☐ Writ of Mandamus
- ☐ Writ of Quo Warrant
- ☐ Writ of Prohibition
- ☐ Other Civil Writ

Judicial Review/Appeal/Other Civil Filing

Appeal Other
- ☐ Appeal from Lower Court

Other Civil Filing
- ☐ Foreign Judgment
- ☐ Other Civil Matters

Business Court Filing Types

CLARK COUNTY BUSINESS COURT
- ☐ NRS Chapters 78-89
- ☐ Commodities (NRS 91)
- ☐ Securities (NRS 90)
- ☐ Mergers (NRS 92A)
- ☐ Uniform Commercial Code (NRS 104)
- ☐ Purchase/Sale of Stock, Assets, or Real Estate
- ☐ Trademark or Trade Name (NRS 600)
- ☐ Enhanced Case Management
- ■ Other Business Court Matters

WASHOE COUNTY BUSINESS COURT
- ☐ NRS Chapters 78-88
- ☐ Commodities (NRS 91)
- ☐ Securities (NRS 90)
- ☐ Investments (NRS 104 Art.8)
- ☐ Deceptive Trade Practices (NRS 598)
- ☐ Trademark/Trade Name (NRS 600)
- ☐ Trade Secrets (NRS 600A)
- ☐ Enhanced Case Management
- ☐ Other Business Court Matters

8/28/2020
Date

William L Coulthard #3927
Signature of Initiating Party or Representative

COMP (CIV)

William L. Coulthard, Esq.
Nevada Bar No. #3927
Coulthard Law PLLC
840 South Rancho Drive #4-627
Las Vegas, Nevada 89106
(702) 898-9944
wlc@coulthardlaw.com

Attorneys for Plaintiffs CS-Entities

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, v. STATE OF NEVADA, on relation to its Division of Water Resources, Department of Conservation and Natural Resources, Tim Wilson, Nevada State Engineer; and Does I through X. Defendants.	Case No. Dept. No. **COMPLAINT FOR DAMAGES;** **AND,** **DEMAND FOR JURY TRIAL** **Exempt From Arbitration:** **Action for Inverse Condemnation with Damages Far in Excess of $50,000**

COULTHARD LAW, PLLC
840 South Rancho Drive #4-627
Las Vegas, Nevada 89106
(702) 989-9944

COME NOW 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 (collectively the "CS-Entities" and or "Plaintiffs"), by and through their counsel, William L. Coulthard Esq., of Coulthard Law PLLC, and hereby complain and allege against Defendants STATE OF NEVADA, on relation to its Division of Water Resources, Department of Conservation and Natural Resources, Tim Wilson, Nevada State Engineer; and DOES I through X, as follows:

COULTHARD LAW, PLLC
840 South Rancho Drive #4-627
Las Vegas, Nevada 89106
(702) 989-9944

I.

PARTIES AND JURISDICTION

1. Plaintiffs COYOTE SPRINGS INVESTMENT LLC, a Nevada limited liability company ("CSI"), and COYOTE SPRINGS NEVADA LLC, a Nevada limited liability company ("CS-Nevada"), and COYOTE SPRINGS NURSERY LLC, a Nevada limited liability company ("CS-Nursery") and when referred to together, CSI, CS-Nevada and CS-Nursery shall be referred to as the "CS-Entities"; each of which such entities were formed under the laws of the State of Nevada and collectively are the owners of all of Coyote Springs, a Master Planned development measuring roughly 42,100 acres located in both Clark and Lincoln County, Nevada. A portion of Coyote Springs land measuring approximately 6,881 acres has been planned, designed, mapped, approved and partially constructed as a Major Project in Clark County, Nevada, along with an additional 6,219 acres managed by CSI, of designated conservation land subject to a lease from Bureau of Land Management. Coyote Springs is located approximately 50 miles north of Las Vegas, Nevada. As a critical and necessary part of its Master Planned development and approved Major Project, the CS-Entities also own certain acre feet annually ("afa") of certificated and permitted Nevada ground water rights in the Coyote Spring Valley.

2. Plaintiffs are informed and believe and thereupon allege that Defendant STATE OF NEVADA, on relation to its Division of Water Resources, Department of Conservation and Natural Resources, and Tim Wilson its State Engineer (hereinafter the "State" and/or the "State Engineer") has taken actions, as will be more particularly described herein, in contravention of CS-Entities' Master Planned Major Project development rights and its existing permitted and certificated Nevada water rights at Coyote Springs, Nevada

3. Plaintiffs are informed and believe and thereupon allege that the State's actions, as will be more particularly described herein, rise to the level of an unconstitutional taking of CS-Entities' permitted and certificated water rights as detailed herein, and that the taking of such water rights by the State has left the CS-Entities with no economical beneficial use of its real estate and its master planned development property in Coyote Springs, Nevada.

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Las Vegas, Nevada 89106
(702) 989-9944

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

5. Venue is proper in this Eighth Judicial District Court, Clark County, Nevada, as the Coyote Springs Development, and its approved Clark County Major Project under Clark County Code Title 30, is located in Clark County, Nevada. Moreover, many of the claims and the underlying facts arose, and the causes of action plead herein, relate to certain of the CS-Entities' real property rights, including but not limited to its approved Clark County Major Project Development rights, and the prohibited and wrongful delay and blocking of CS-Entities' use and enjoyment of its Clark County real property, including but not limited to, its certificated and permitted water rights in Clark County, Nevada. Finally, many of the witnesses in this case reside in Clark County, Nevada.

II.

STATEMENT OF FACTS

A. CS-Entities' Coyote Springs Master Plan Development.

6. Coyote Springs, Nevada is a master-planned community being developed by Plaintiff CS-Entities in Clark County and Lincoln County, Nevada. The Coyote Springs property, in its entirety, consists of roughly 42,100 acres, or 65 square miles, located approximately 50 miles north of Las Vegas. It is bordered by the Delamar Mountains to the north, the Meadow Valley Mountains to the east, State Route 168 to the south and U.S. 93 to the west. Approximately one-third of the CS-Entities lands (13,100 acres) lie within Clark County, Nevada and the remaining two-thirds of the lands (29,000 acres) are located in Lincoln County, Nevada.

COULTHARD LAW, PLLC
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7. For the past 15 years, CS-Entities have completed, submitted, and processed land use entitlements and zoning applications, permits and approvals for its Coyote Springs' master planned community. CS-Entities have submitted and obtained multiple government and regulatory approvals for infrastructure, maps and plans, including tentative maps, submitted and recorded large parcel maps, parent final maps for purpose of subsequent residential subdivision maps and related property development and sales, all in furtherance of its planned development of the Coyote Springs master planned community (the "Coyote Springs Master Planned Community"). These zoning, land use and construction applications and permits have been submitted to numerous Federal, State and County agencies including the State, the State Engineer, the Clark County – Coyote Springs Water Resources General Improvement District ("CS-GID"), the Las Vegas Valley Water District ("LVVWC"), Clark County Water Reclamation District ("CCWRD"), and Clark County, Nevada. These CS-Entities' submittals, approvals, subsequent design, construction and construction approvals consistent with such land use entitlements and approvals were all done in reliance on and in furtherance of, and in support of the CS-Entities' Coyote Springs Master Planned Community development and investment backed expectations and their efforts to design, develop, construct, sell and operate the Coyote Springs Master Planned Community.

B. Clark County Approves Coyote Springs as a Clark County Title 30 Major Project and Enters Into A Comprehensive Development Agreement with the CS-Entities.

8. As part of its ongoing efforts to develop the Coyote Springs Master Planned Community, the CS-Entities submitted and obtained Clark County's approval of Coyote Springs as a Major Project, pursuant to Clark County ("CC") Code 30.20.30, and further submitted and obtained Clark County's approval of the following Major Project development submittals:

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

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

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

d. CS-GID created by Ordinance by the Clark County Board of County Commissioners in October 2006, subject of Clark County Board of Commissioners Ordinance # 3456, Bill # 10-17-06-2, along with the initiating Service Plan and operating agreement among developers and LVVWD and the Clark County Water Reclamation District, all for purposes of operating and providing water and wastewater services in the Coyote Springs Project.

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

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

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

h. Many other zoning and land use plan approvals have been similarly pursued and approved for the Coyote Springs Master Planned Community by Clark County.

All of the above, when taken together with all other CS-Entities' approvals and entitlements, will be referred to herein as the "CS-Entities' Approved Major Project".

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9. CS-Entities' Approved Major Project status, confirmed by County Ordinances, authorizes the CS-Entities' development and completion of its Approved Major Project. CS-Entities' Approved Major Project has likewise been designed and pursued in furtherance of the CS-Entities' investment backed development expectations when it acquired the Coyote Springs property and its Coyote Springs' ground water rights in the late 1990's. CS-Entities assert and allege that their Approved Major Project status further vests certain additional Major Project development rights for the Coyote Springs Development.

C. CS-Entities Spend Years and Hundreds of Millions of Dollars Developing Coyote Spring Master Planned Community In Furtherance of Their Reasonable Investment Backed Expectations and In Reliance Upon Government Approvals.

10. In furtherance of its investment backed expectations and its Approved Major Project, CS-Entities have further been preparing and processing permits and construction plans and have obtained numerous approvals for community infrastructure, construction maps and plans, including recorded large parcel, parent final maps for purpose of subsequent residential subdivision maps, for development of the Coyote Springs Development with numerous agencies, including the State, and its State Engineer, LVVWD, CCWRD, Clark County Water Reclamation District ("CCWRD"), CS-GID, and Clark County. Multiple permits, applications, improvements, maps and plans have been approved and the CS-Entities have designed, developed, and constructed significant infrastructure improvements to support the Coyote Springs Master Planned Community and its investment backed expectations. Specifically, CS-Entities constructed and are operating a $40,000,000 Jack Nicklaus Signature designed golf course open to the public since May 2008, a 325 acre flood control detention basin, which is the subject of a dam permit issued by the Defendant State and its State Engineer, a groundwater treatment plant, including two 1,000,000 gallon water storage tanks designed and constructed to culinary water standards, a wastewater treatment plant and initial package treatment plant, all of which have been considered and approved by the Defendant State and its Nevada Department of Water Resources, and associated electrical power facilities, including a three megawatt electrical substation and appurtenant equipment. CS-Entities have also constructed four groundwater production wells

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(Well 1, Well 2, Well 3, and Well 4), two of which, Well 1 and Well 4, are in full operational use at the present time and were constructed to culinary municipal well standards as required by the LVVWD on behalf of the CS-GID, all approved by the State and its State Engineer in 2013, with significant enhancements to make them compliant with municipal well standards at a cost in excess of $20,000,000. Moreover, and with the approvals of the various government agencies, including the State and subdivisions of the State, CS-Entities developed, permitted, and constructed miles of roads and streets and installed miles of associated underground utilities, including water, treated water / wastewater, fiber-optic, electric lines and a 3 megawatt substation, in the Coyote Springs Development. The total cost of construction and acquisitions for these improvements and associated processing is well over $200,000,000. This development, and its associated development costs, have all been incurred based upon the CS-Entities' reasonable investment backed expectations, in compliance with all submitted and approved plans, done in furtherance of its Approved Major Project and Development Agreement related thereto, done in furtherance of its real property rights, and with assurance and reliance upon the State and the State Engineer's approval of the use and enjoyment of its certificated and permitted water rights the CS-Entities acquired in the Coyote Spring Valley in support of the Coyote Springs planned development and Approved Major Project.

11. When CS-Entities acquired the Coyote Springs real property, and its certificated and permitted water rights to be used in its Master Planned Development, it had reasonable investment backed expectations that it would be able to develop, construct, market and sell its Master Planned Community and their Approved Major Project. Moreover, CS-Entities have relied upon and taken extensive action at the Coyote Springs Development based in large part upon the approvals of the agencies listed above, but most particularly those of the State and its State Engineer, to proceed with its Master Planned Development and construction projects. CSI, in particular has relied on the approvals of the State, and its State Engineer, recognizing that CSI could use its certificated and permitted water rights in the Coyote Springs Development in order to support operation of the golf course, all of its construction efforts, and ultimately to support

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the approved residential and commercial development planned for the Coyote Springs Master Planned Development and Approved Major Project.

D. CSI's Permitted and Certificated Water Rights.

12. In furtherance of its investment backed expectations, and as a necessary component of the Coyote Springs Master Planned Development, CSI acquired rights to 4600 acre feet annually ("afa") of permitted Nevada water rights in the Coyote Spring Valley. Specifically, CSI holds and perfected 1500 afa under Permit 70429 (Certificate 17035) of which 1250 afa were conveyed to the CS-GID to be used for the Coyote Springs Development, with the remaining 250 afa still owned by CSI. CSI also holds 1000 afa under Permit 74094 of which 750 afa were conveyed to the CS-GID to be used for the Coyote Springs Development, with the remaining 250 afa still owned by CSI. CSI also holds 1140 afa under Permit 70430. CSI, in reliance upon moving forward with the Coyote Springs Development, relinquished 460 afa of Permit 70430, under Permit 70430 RO1, back to the STATE in care of the State Engineer in accord with the US Fish and Wildlife Service as 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. CSI also holds 500 afa under Permit 74095. In the event that CS-GID is unable or unwilling to supply any of these Water Rights to CS-Entities' Approved Major Project and approve and sign-off on large lot and subdivision maps, and proceed with permits, approvals, inspections, and certificates of occupancy, which is the case following the State actions described herein, all 2000 afa of the Water Rights previously transferred by CSI, to CS-GID, revert back to CSI pursuant to that certain Amended and Restated Coyote Springs Water and Wastewater Multi-Party Agreement dated July 7, 2015.

13. CS-Entities are informed and believe and thereupon assert that as of the date hereof the total amount of certificated and permitted Nevada groundwater rights owned by CSI is 2140 afa; the total amount owned by CS-GID is 2000 afa; and, 460 afa has been relinquished for the purpose of furthering the survival and recovery of the Moapa dace (collectively all 4600 afa are referred to herein as, "CS-Entities' Water Rights"). Importantly, the 460 afa of CS-Entities'

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permitted and certificated water rights previously relinquished by CSI to the State in care of the State Engineer, and in accord with the US Fish and Wildlife Service, was done in furtherance of the survival and recovery of the Moapa dace, an endangered fish that lives within the headwater springs of the Muddy River, pursuant to agreement among the State, the State Engineer, LVVWD and SNWA and others, in order to mitigate potential harms to the Moapa dace that may arise in connection with the CS-Entities' use of ground water at its planned Coyote Springs Master Planned Development. CS-Entities assert that the State, though its State Engineer's actions of unlawful regulation and restriction of CS-Entities use of its Water Rights allegedly to help protect Muddy River water flow levels for the benefit of the Moapa dace fish are an unlawful and unconstitutional exaction by the State. The CS-Entities have previously relinquished 460 afa of its Water Rights, as mitigation for its development of Coyote Springs. The State's recent actions as described herein place an unreasonable and unfair burden on the CS-Entities for protection of the Moapa dace that should more appropriately be borne by the public as a whole and not the CS-Entities individually.

14. CS-Entities are informed and believe and thereupon allege that the State, through its State Engineer's most recent decisions, orders, and actions described herein, and most recently memorialized in the State Engineer's Order 1309 dated June 15, 2020, has wrongfully taken at least 3640 afa, and possibly all 4140 afa of, the CS-Entities' Water Rights; and if the CS-Entities are not allowed to develop the Coyote Springs Master Planned Community, then the 460 afa relinquished for the survival and protection of the Moapa dace is a further wrongful and unconstitutional take from the CS-Entities. This wrongful "take" of CSI's Water Rights has, as the State Engineer is well aware, further effectuated a wrongful and illicit "take" of all of the CS-Entities' economical beneficial use of its property and of the ability to develop its Approved Major Project and the Coyote Springs Master Planned Development.

E. History of Wrongful State Actions Related to CS-Entities' Water Rights.

15. After CSI acquired the Water Rights described above, CSI and others applied for additional water rights in the Coyote Springs Valley. In response to CSI's new applications and the applications of others, in 2002, the State, through then State Engineer, Hugh Ricci, issued

Order 1169 which held in abeyance these pending applications. Order 1169 determined that there was insufficient information and data concerning the deep carbonate aquifer from which the water would be extracted for the State Engineer to make a decision on new water rights applications, including CS-Entities' then pending applications. The State Engineer further ordered a hydrological study of the basins. In doing so, the State Engineer recognized that certain parties, including CS-Entities, already had an interest in water rights permitted from the carbonate aquifer system, thereby acknowledging the existence and validity of CS-Entities' Water Rights. The State Engineer ordered a study of the carbonate aquifer over a five-year period during which 50% of the water rights currently permitted in the Coyote Spring Valley Basin were to be pumped for at least two consecutive years. The applicants, which included CS-Entities, were to pay for the studies and were to file a report with the State Engineer within 180 days of the end of the fifth consecutive year.

16. Following the issuance of Order 1169, and in furtherance of its ongoing Coyote Springs development plans, CS-Entities along with other applicants engaged in pump tests of the wells in the Coyote Spring Valley basin from 2010 to 2012 and filed their reports in 2013. In January 2014, the State Engineer issued Ruling 6255 which found that the new applications to appropriate groundwater in the Coyote Spring Valley basin could cause a decrease in flows at existing springs and could impact prior appropriated existing water rights. The State Engineer further determined that this potential conflict with existing rights was not in the public interest and that allowing appropriation of additional groundwater resources could impair protection of springs and the habitat of the Moapa dace, an endangered species that lives in the headwaters of the Muddy River. In Ruling 6255, the State Engineer then denied the pending applications for new water rights based on the lack of unappropriated groundwater at the source of supply, that the proposed use would conflict with existing water rights in the Order 1169 basins, and the proposed use would threaten and prove detrimental to the public interest. Importantly, Ruling 6255 worked to protect existing water rights, including CS-Entities' Water Rights, from any new appropriations by denying the pending applications on the basis that existing water rights, such as CS-Entities' rights, must be protected.

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17. Consistent with its reasonable investment backed expectations to develop its Master Planned Community, and in further reliance on the State and its State Engineer's aforementioned Ruling 6255 protecting its certificated and permitted water rights, CS-Entities have pumped for beneficial use, and continued to pump between 1400 and 2000 acre feet annually from its wells in the Coyote Spring Valley Basin. Currently, approximately 1100 afa are pumped to support the existing and operational golf course, and the rest of the water is pumped to support its planned Master Plan construction activities.

18. CS-Entities have adopted, and Clark County has approved via its Major Plan Approval and Development Agreement, an aggressive water conservation plan for Coyote Springs. This plan includes significant reuse of water that is pumped from the groundwater, including use of recycled water on its golf courses, common areas, and public parks. CS-Entities' water conservation goals are aimed at a limitation on the use of water for each developed lot in its development to 0.36 acre feet per year. It is the intent that the effluent from the Coyote Springs Development's wastewater treatment plant will be recycled within the development and any portion not reused for irrigation will be allowed to be re-injected and recharge the aquifer. To effectuate these plans, an affiliate to CS-Entities was formed to hold the rights to the re-use water from the wastewater treatment facility and that entity, Coyote Springs Reuse Water Company LLC holds permits 77340, 77340-S01 and 77340-S02, which are specifically reuse water permits, for treated wastewater to be used within the Coyote Springs community.

19. With the CS-Entities' Water Rights and all of their Approved Major Project entitlements contemplated and as were approved, CS-Entities intended to support thousands of residential units within its Master Planned Community subdivisions, plus related resort, commercial and industrial development. Return flows from the proposed subdivision and effluent from its treatment plants owned by Coyote Springs Reuse Water Company LLC were to be returned to the aquifer or recycled for use at Coyote Springs. Unfortunately, and as alleged herein, in violation of CS-Entities' historic reasonable investment backed development expectations, the State, has taken oppressive and wrongful actions to wrongfully delay and preclude CS-Entities

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from moving forward with their design, development and construction of the Coyote Springs Master Planned Development.

F. **The State, Commences Efforts to Wrongfully Interfere With CS-Entities' Water Rights and Development Efforts at Coyote Springs.**

20. The CS-Entities are informed and believe, and thereupon alleges that LVVWD purportedly acting as the manager of the CS-GID, sent an unsolicited letter dated November 16, 2017 to the State, and its State Engineer, which sought "to solicit [the State Engineer's] opinion whether Coyote Spring Valley groundwater can sustainably supply water for the Coyote Springs Master Plan project." Through its response to this letter, the State commenced its efforts to wrongfully interfere with CS-Entities' use and enjoyment of its certificated and permitted water rights and CS-Entities' continuing efforts to develop and construct its Coyote Springs Master Planned and Approved Major Project.

21. Despite the fact that LVVWD's November 16, 2017, letter acknowledged that State Engineer's Ruling 6255 "did not invalidate any existing water rights, including those held by [Coyote Springs Water Resource General Improvement District] GID and [CSI] Developers" at Coyote Springs, LVVWD asserted that "we [LVVWD] are not convinced that Coyote Spring Valley groundwater can sustainably support the CSI Approved Major Project given endangered species issues in the Muddy River and impacts to senior water rights." *Id.* Finally, the LVVWD November 16, 2017 letter sought an opinion from the State Engineer as to whether the State Engineer's "office would be willing to execute subdivision maps for the [Coyote Springs] Project if such maps were predicated on the use of groundwater owned by the GID or [CSI] Developers in Coyote Spring Valley". *Id.*

22. The State received and took action to respond to LVVWD's November 16, 2017 letter despite the fact that no person or entity had asserted an alleged conflict or impairment regarding pumping and use of the CS-GID or CS-Entities' water rights in Coyote Springs.

23. CS-Entities are informed and believe, and thereupon allege that the State accepting and acting upon LVVWD's November 16, 2017 letter:

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(1) wrongfully interfered with CS-Entities' use and enjoyment of their Water Rights and continuing Master Planned and Approved Major Project development rights at Coyote Springs;

(2) was wrongfully aimed at delaying and/or stopping CS-Entities' ongoing development of its Coyote Springs Project and use of their certificated, permitted and previously unchallenged Water Rights; and,

(3) was wrongfully aimed at precluding CS-Entities' use of its Water Rights in the Coyote Spring Valley thus preventing development of the Coyote Springs Project, and according to the State's newly formulated theory of homogeneity of the hydrographic basins (which is contested by the CS-Entities) comprising the Lower White River Flow System identifying these basins incorrectly as a "single bathtub" arguably resulting in increased water flows in the Muddy River and flowing to Lake Mead thereby increasing SNWA's claim for return flow credits and/or intentionally created surplus, which is then available for use by LVVWD and SNWA in the Las Vegas Valley.

24. CS-Entities are informed and believe and thereupon allege that the aforementioned actions done by the State, were aimed at delaying and/or halting CS-Entities planned use of its certificated and permitted Water Rights to develop the Coyote Springs Project with an end game of asserting that unused CS-Entities' Water Rights flow underground into the Muddy River watershed and eventually into Lake Mead. While contested by CS-Entities, the State and others will likely assert that these unused CS-Entities' Water Rights will flow through the LWRFS into the Muddy River Springs Area and the Muddy River, and will eventually flow downstream into Lake Mead, thereby providing LVVWD and its affiliate SNWA, with additional water that can be used and/or banked for use by these political entities in Southern Nevada as described in SNWA's reports and certifications to the U.S. Bureau of Reclamation, in the LVVWD / SNWA Integrated Resource Plan(s) and annual Water Resource Plan(s), among others. The CS-Entities assert that these recent State's actions are driven in part by SNWA's recent 2020 abandonment of its long-planned pipeline for the pumping of groundwater from central Nevada into southern Nevada.

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H. The State's Response to LVVWD November 16, 2017 Letter.

25. On May 16, 2018, and in response to LVVWD's November 16, 2017 letter, the State, through its State Engineer, sent a letter to LVVWD regarding Coyote Spring Valley Basin Water Supply, with a copy to CS-Entities' Representatives. A true and correct copy of the State Engineer's May 16, 2018 Letter is attached hereto as Exhibit "1". In this correspondence, the State asserted that the Order 1169 pump tests indicate that pumping at the level during the two year pump test caused declines in groundwater levels and noted that monitoring of pumpage and water levels has continued since completion of the pumping tests on December 31, 2012 and that the additional data shows that groundwater levels and spring flows have remained relatively flat while precipitation has been nearly average and the five basin carbonate pumping has ranged between 9090 and 14766 acre feet annually during the years 2007 to 2017. *See* Interim Order 1303, Section IV final "whereas" clause, page 9.

26. The State Engineer's May 16, 2018 letter, the State Engineer 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 the Muddy River Springs or the Muddy River as they are the most senior rights in the five basin area. The State, through its State Engineer, then further publicly announced that "carbonate pumping will have to be limited to a fraction of the 40,300-acre feet already appropriated in the five basin area". *Id.* The State Engineer further stated:

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

These State actions 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.

27. CS-Entities are informed and believe and thereupon asserts that the State Engineer's May 16, 2018 letter commenced a "take of CS-Entities' property rights, worked as a public announcement of the States' 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. CS-Entities further contend that it was inappropriate, unreasonable, and oppressive for the State, and it's State Engineer, in response to an unsolicited inquiry by LVVWD, with no claim of conflict or impairment of its water rights against the CS-Entities, to publicly announce its decision and intent to manage groundwater resources "across the five-basin area" and that "pumping will have to be limited to a fraction of the 40,300 acre-feet already appropriated in the five-basin area". *Id.*

28. Following the State and its State Engineer's May 16, 2018 public announcement of its intent to condemn and/or take the CS-Entities' Water Rights and effectively freeze CS-Entities' development rights, in communications by email between CS-Entities Representatives and the State Engineer, on May 17, 2018, the State further announced that it "would not sign off on CSI's subdivision maps to allow their approval if they were based on the water rights CS-Entities owned or those previously dedicated to the Coyote Springs General Improvement District CS-GID." CSI asserts that such State action was unreasonable, oppressive and unlawful.

29. On May 18, 2018, in conversation with CS-Entities Representatives, the State Engineer advised CS-Entities "not to spend one dollar more on the Coyote Springs Development Project and that processing of CSI's maps had stopped". This further evidences the State's intent and decision to wrongfully take CSI's existing and certificated water rights and to further unreasonably delay and eventually wrongfully take CS-Entities' development rights at its Master Planned Community. The State announced that it would prepare a new draft order that would supersede or dramatically modify Order 1169 and Ruling 6255. The State, again through its State Engineer, admitted that this is "unchartered territory and his [State Engineer] office has never granted rights and then just taken them away". These statements of the State Engineer further confirm the State's taking of CS-Entities' Water Rights.

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30. On May 18, 2018, CS-Entities Representatives further inquired of the State Engineer if anyone had filed an impairment claim or any type of grievance with regards to CSI's and CS-GID's water rights and/or the pumping CS-Entities had performed over the last 12 years at its Coyote Springs Master Planned Development. On May 21, 2018, the State Engineer responded that no one has asserted a conflict or impairment regarding CSI's pumping of the CS-GID and CS-Entities' Water Rights.

31. In an effort to best protect its water and development rights and its investment backed expectations, on June 8, 2018, CSI filed a Petition for Judicial Review of the State Engineer's May 16, 2018 letter in this Court, challenging the decision by the State Engineer to place a moratorium on the processing of CSI's subdivision maps. After a court-ordered settlement conference the State Engineer rescinded his May 16, 2018 letter and agreed to "process in good faith any and all maps or other issue submittals as requested by CSI, and/or its agents or affiliates in accordance with the State Engineers' ordinary course of business."

32. Recognizing its May 16, 2018 letter decision was unlawful and now rescinded, the State Engineer began a public workshop process to review the water available for pumping in the Lower White River Flow System ("LWRFS") which includes the Coyote Spring Valley basin. On July 24, 2018, the State Engineer held a Public Workshop on the LWRFS and on August, 23, 2018, the State Engineer facilitated a meeting of the Hydrologic Review Team ("HRT"), a team established under a 2006 Memorandum of Agreement ("MOA") among some of the same parties.

33. On September 7, 2018, the Office of the State Engineer issued two conditional approvals of subdivision maps submitted for review by CSI. The first conditional approval was for the Large Lot Coyote Springs—Village A, consisting of eight lots, common area, and rights of way totaling approximately 643 acres in Clark County and requiring the statutory 2.0 afa per lot, for a total of 16 afa. The second conditional approval was for the Coyote Springs—Village A subdivision map, consisting of 575 lots, common areas and rights of way for approximately 142.71 acres in Clark County and requiring an estimate demand of 408.25 afa of water annually based on .71 afa per residential unit. The two subdivision maps were conditionally approved by the State Engineer subject only to a will serve letter from CS-GID and a final mylar map; the

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State Engineer confirmed that sufficient water existed to supply to these subdivisions without affecting senior water rights in the Muddy River and the Muddy River Springs.[1]

34. On September 19, 2018, the State Engineer held an additional Public Workshop on the LWRFS and issued a Draft Order at the workshop for comment (the "Draft Order"). A true and correct copy of the September 19, 2018 Draft Order is attached as Exhibit "2". The Draft Order contained a preliminary determination that there were 9,318 afa of water rights with a priority date of March 31, 1983, or earlier, that could be safely pumped from the LWRFS basins without affecting the flows in the Muddy River and without affecting the endangered Moapa dace fish. The Draft Order also contained provisions that would place a moratorium on processing of all subdivision maps unless there was a demonstration that there was a showing to the State Engineer's satisfaction that an adequate supply of water was available "in perpetuity" for the subdivision. CS-Entities are informed and believe and thereupon allege that the "in perpetuity" restriction was arbitrary, capricious, and unreasonable and not supported by law or State precedent.

35. On October 5, 2018, CSI-Entities sent a series of comment letters regarding the Draft Order. CS-Entities commented upon the total lack of technical information that was necessary to perform a comprehensive review of the State Engineer's conclusions in the Draft Order. CS-Entities also pointed out to the State Engineer that his use of the 9,318 afa limit for pumping in the basin was not supported by substantial evidence and that the State Engineer's own data supported a figure of at least 11,400 afa that could be pumped without any effect on the flows

[1] Conditional approval letter for Tentative Subdivision Review No. 13217-T Permit None for Coyote Springs – Village A; dated September 7, 2018, and signed by Mark Sivazlian, PE, Section Chief, Water Rights for the Division of Water Resources, and specifically stating on page 4 thereof: "*Because there exist numerous mechanisms that may supply water to support **Coyote Springs – Village A**…there exists justification to conditionally approved **Coyote Springs Village – A**, as submitted*." And also see Conditional approval letter for Tentative Subdivision Review No. 13216-T Permit None for Large Lot Coyote Springs – Village A; dated September 7, 2018, and signed by Mark Sivazlian, PE, Section Chief, Water Rights for the Division of Water Resources, and specifically stating on page 4 thereof: "*Because there exist numerous mechanisms that may supply water to support **Large Lot Coyote Springs – Village A**…there exists justification to conditionally approved **Large Lot Coyote Springs – Village A**, as submitted*."

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in the Muddy River or any effects on the Moapa dace. CS-Entities' technical expert, Mr. Steve Reich, a qualified hydrogeologist from Stetson Engineering, after criticizing the State Engineer's use of only three years of data, provided the following technical comments on the State Engineer's Draft Order:

> a. The observed data does not substantiate a direct relationship between the recent three years of pumping and "relatively flat" groundwater levels and spring discharge that support groundwater pumping of 9,318 acre-feet per year for the 6-Basin area.
>
> b. An extended 14-year dry period, including two wetter than normal years, occurred from 2000 through 2012.
>
> c. Climate and climatic cycles play a significant role in assessing available water supply.
>
> d. Discharge at the Pederson Spring Complex is affected by local and regional recharge as shown by response to 1-year and multi-year climatic conditions.
>
> e. The relationship between local carbonate pumping and groundwater levels in the [Muddy River Springs Area] MSRA [sic] is affected by recharge and long-term climate. The impact to water levels from pumping in other basins is not defined.
>
> f. The effect of pumping in CSV [Coyote Spring Valley] on carbonate groundwater levels in MSRA [sic] may be affected by groundwater barriers and geologic structure.
>
> g. Groundwater levels were declining in the MSRA at the early part of this century when there was no pumping in the CSV.
>
> h. Rainfall intensity and temporal distribution affect recharge and subsequent groundwater levels in the 6-Basin area.

36. On October 23, 2018, CS-Entities provided additional comments on the Draft Order noting again that the State Engineer's own data supported a determination that the correct amount of pumping that could be sustained in the LWRFS was at least 11,400 afa and not 9,318 afa. However, even assuming that 9,318 afa was the correct number, this would mean, based on CS-Entities' Water Right priority date of March 31, 1983, that CS-Entities should be permitted to pump at least 1,880 afa of water for its Approved Major Project subdivisions. Importantly, and as further evidence of its unreasonable and

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oppressive conduct, the State, and its State Engineer have refused to acknowledge that the 1,880 afa was more than sufficient to support CSI's current proposed subdivision developments that were conditionally approved by the Office of the State Engineer on September 7, 2018. The State Engineer continued to unreasonably delay[2] the final approval as to CS-Entities' two conditionally approval maps despite the fact the State Engineer's own analysis in the September 19, 2018 Draft Order determined that CSI could pump at least 1,880 afa of water from the Coyote Spring Valley Basin in priority and would be within the 9,318 afa of water that the State Engineer believed could be safely pumped. After CS-Entities incurred extensive time, energy, and expenses related to responding to and addressing the State's proposed Draft Order, the State Engineer abandoned the Draft Order outright and failed to process same as a final order. CS-Entities assert that such actions were unfair, unreasonable, and designed to further delay and frustrate CS-Entities' efforts to continue its Master Planned Development.

37. On January 11, 2019, the State Engineer issued Interim Order 1303 (the "Interim Order"). A true and correct copy of the January 11, 2019 Interim Order 1303 is attached as Exhibit "3". In the Interim Order, the State Engineer again declared, consistent with its prior, now withdrawn May 18, 2018 letter, that Coyote Spring Valley, Muddy River Springs Area, Hidden Valley, Garnet Valley, California Wash, and the northwestern part of the Black Mountains Area are designated as a joint administrative unit for purposes of administration of water rights, known as the Lower White River Flow System or the Six-Basin Area. Interim Order 1303 also declared a temporary moratorium on approvals regarding any final subdivision or other submissions concerning development and construction submitted to the State Engineer for review. According to Interim Order 1303, any such submissions shall be held in abeyance pending the conclusion of the public

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

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process to determine the total quantity of groundwater that may be developed within the Lower White River Flow System. Interim Order 1303 does provide, however, that the State Engineer may review and grant approval of a subdivision or other submission if a showing can be made of an adequate and sustainable supply of water to meet the anticipated "life of the subdivision." Unfortunately, the State Engineer continued its unreasonable and oppressive delay practice as to CS-Entities pending subdivision map submittals, the State Engineer again failed to address any of the technical and legal issues raised by CS-Entities in its comments and failed to recognize that even under the State Engineer's own analysis, there was more than sufficient water in the Six-Basin Area to support CS-Entities current pending subdivision plans. These continuing delays were unreasonable and oppressive actions that have and continue to effectuate an unlawful taking of CS-Entities use and enjoyment of its Water Rights and Master Planned Development rights.

I. The State Failed to Finally Approve CSI's Conditionally Approved Subdivision Maps Despite Available Water for Such Development Under the State Engineer's Own Water Availability Analysis.

38. CS-Entities have submitted, and attempted to fully process, certain Coyote Springs Village A Development Maps required to move their Approved Major Project and Master Planned Development forward. Specifically, CS-Entities have submitted and obtained Conditional Approval to the following Village A development maps:

A. Village A – Large Lot Tentative Map (TM-18-500081) (8 Lots)

a. Submitted : May 14, 2018
b. CC Planning Commission Final Approval: July 3, 2018
c. Expires July 3, 2022
d. LVVWD Response Letter dated August 20, 2018
e. State of Nevada- Division of Water Resources on Sept. 7, 2018 – Conditionally Approved subject to a will serve letter, and then as set forth in Order 1303 a verifiable water source condition.
f. CSI satisfies verifiable water source condition on June 13, 2019, upon submittal of Technical Report 053119.0 dated May 31, 2019 issued by Stetson Engineering, Inc., to the State Engineer.

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B. Village A – Large Lot Final Map (8 Lots)

a. Final Mylar Submitted to Division of Water Resources: June 13, 2019 -- No Response
b. Paper Map Reviews through Clark County with County Approval "OK to Submit Final Mylar Map"
c. Paper Final Map submitted to LVVWD – Response Letter dated September 12, 2018.

C. Village A – Parcels A-D Tentative Map (575 Residential Lots)

a. Submitted: June 11, 2018
b. Board of County Commissioners Approval: Aug. 8, 2018
c. Expires: July 3, 2020
d. LVVWD Response Letter date August 20, 2018
e. State of Nevada- Division of Water Resources on Sept. 7, 2018 – Conditionally Approved subject to a will serve letter, and then as set forth in Order 1303 a verifiable water source condition.
f. CSI satisfies verifiable water source condition on June 13, 2019, upon submittal of Technical Report 053119.0 dated May 31, 2019 issued by Stetson Engineering, Inc., to the State Engineer.

D. Village A – Parcel A-B Unit 1 Final Map (30 Lots) - Only Department of Water Resources submittal

a. Paper Final Map only to DWRS: Dec. 4, 2018 - No Response from Department of Water Resources.

(Collectively the "Conditionally Approved Maps").

39. On September 12, 2018, LVVWD sent the State Engineer correspondence advising that LLVWD "in its capacity as manager of the Coyote Springs Water Resources General Improvement District (GID), has reviewed the subject [Coyote Springs Village A] subdivision map" and that based upon "the facts described in the Sate Engineer's letter dated May 16, 2018, concerning the viability of groundwater rights previously dedicated to the GID by the developer [CS-Entities], the uncertain resolution of the Lower White River Flow System ("LWRFS") workshop process initiated by the Division of Water Resources . . , and the [LVVWD] District's assessment of aquifer dynamics, potential conflicts with senior rights, and potential adverse impacts to endangered species, the District is unable to confirm the availability of water resources sufficient to support recordation of this map at this time".

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40. The State failed to issue final approval of these Conditionally Approved Village A Maps, despite the fact that the State Engineer's own Draft Order and Interim Order 1303 allow development to proceed if conditions were met by the CS-Entities. Those conditions were met on June 11, 2019, upon submittal of Technical Report 053119.0 issued by Stetson Engineering, Inc. to the State Engineer, providing the necessary analysis that sufficient available water is present to support this proposed Coyote Springs Village A development. CS-Entities asserts that the State's failure to finally approved the Conditionally Approved Maps was wrongful, unreasonable and oppressive and have effectuated precondemnation damages, inverse condemnation damages, and a wrongful taking of CSI's property rights, including CSI's Water Rights and its development rights as to the Coyote Springs Master Planned Development and Approved Major Project, in the Coyote Springs Valley.

J. The State Engineer Issues Order 1309 Which Effectuates A Take of CS-Entities' Water Rights and Its Master Planned Development Rights, and Has Destroyed All Viable Economic Use of CS-Entities' Property.

41. On June 15, 2020, the State, through its State Engineer, issued Order 1309. Pursuant to its Order 1309, the State Engineer ordered, in relevant part:

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 Norwest potion of the Black Mountains Area as described in this Order, is herby delineated as a single 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 into 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 Rive Flow System Hydrographic Basin may be reduced if it is determined that pumping will adversely impact the endangered Moapa dace.

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

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

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

See State Engineer's Order 1309 a true and correct copy of which is attached hereto as Exhibit "4".

42. The State Engineer's Order 1309, in creating a new single super basin now known as the Lower White River System Hydrological Basin ("LWRFS") for these seven previously stand-alone hydrological basins, with its limitation of the maximum quantity of groundwater that may be pumped from the LWRFS on an average annual basis that "cannot exceed 8,000 afa and may be less" effectuates a "take" of the CS-Entities Water Rights and its Master Planned Approved Major Project development rights. Multiple legal challenges have been filed by impacted parties, including CSI, to the State Engineer's Order 1309. If Order 1309 is allowed to stand, the State, will have effectuated an unlawful and unconstitutional take of CS-Entities' property for which just compensation is due. Moreover, even with a judicial set aside of State Engineer's Order 1309, the State has occasioned a wrongful precondemnation delay and other violations as claimed below, on CS-Entities for which compensation is now due and owing CSI.

43. Immediately following its issuance of Order 1309, the State, through its State Engineer, sent correspondence dated June 17, 2020 to CS-Entities regarding its "Final Subdivision Review No. 13217-F" as to CS-Entities' conditionally approved Coyote Springs Village A subdivision maps, which provided for "eight large parcels intended for further subdivision". The State Engineer, relying upon the LWRFS as a single hydrological basin, stated in part:

> General: Coyote Springs Investment, LLC groundwater permits have priority dates which may exceed the threshold of allowable pumping within the definition of this order.

The State Engineer then took the following action:

> Action: The Division of Water Resources recommends disapproval concerning water quantity as required by statute for Coyote Springs Village A

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> subdivision based on water service by Coyote Springs Water Resources General Improvement District.

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

44. CS-Entities assert and thereupon allege that the State's actions, and its application of Order 1309 as to CS-Entities' water rights and pending Coyote Springs Village A Maps, effectively deprives the CS-Entities of all economically viable beneficial use of its property and precludes and prevents the continued development of the Coyote Springs Master Planned Community and Approved Major Project. The State's action of joining multiple groundwater basins into the single Lower White River Flow System ("LWRFS") hydrographic basin and reducing the "maximum quantity of groundwater that may be pumped from the LWRFS" is a wrongful and unconstitutional "take" of CS-Entities' Water Rights and Master Planned Community and Major Project development rights for which just compensation for such take is due the CS-Entities. The United State Supreme Court stated in *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 120 L.Ed.2d 796, 505 U.S. 1003 (1992) that "when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." CS-Entities asserts that they have suffered such a taking and that just compensation for such taking of its property rights is now due.

45. CSI has previously relinquished 460 afa of its certificated and permitted water rights for protection of the Moapa dace endangered fish species and has committed to dedicate 5% of all additional water CSI acquires above 4600 afa and used to support its development. Such water right mitigation contribution was aimed at mitigating the potential decrease in in-stream water flows along the Muddy River to best protect the Moapa dace potentially caused by the ground water pumping needed for the continued development of the Coyote Springs Master Planned Development and Approved Major Project. To take the balance of CSI's Water Rights to further protect the Moapa dace, is an unfair and unreasonable burden placed upon CS-Entities which should be more appropriately born by the public as a whole rather than on the CS-Entities

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individually. "[W]hen the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is to leave his property economically idle, he has suffered a taking". *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1982). In this matter, CS-Entities have been called upon, though State Order 1309, to sacrifice all economically beneficial uses of its Water Rights and real property development rights allegedly in the name of the common good, the protection of the Moapa dace, which is a taking for which just compensation is required.

46. CS-Entities asserts that the aforementioned acts of the State, and its issuance and application of Order 1309 by the State Engineer, effectuated a total regulatory taking of all of CS-Entities' economically viable use of the entirety of its Coyote Springs property for which it is entitled to an award of just compensation.

III.

FIRST CLAIM FOR RELIEF

(Inverse Condemnation – Lucas Regulatory Taking)

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

48. The Nevada Supreme Court has previously recognized that the first right established in the Nevada Constitution's declaration of rights is the protection of a landowner's inalienable rights to acquire, possess and protect private property. The Nevada Supreme Court further recognized "the Nevada Constitution contemplates expansive property rights in the context of takings claims through eminent domain" and that "our State enjoys a rich history of protecting private property owners against government taking." *McCarren Intern. Airport v. Sisolak*, 122 Nev. 645, 669, (2006). The United States Supreme Court has "recognized that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster – and that such "regulatory takings" may be compensable under the Fifth Amendment" of the United States Constitution. *Sisolak,* 122 Nev. at 662. Further, "the Supreme Court has defined "two categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment Purposes." *Id*. One such *per se* regulatory taking occurs when a government regulation "completely deprives an owner of all

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economical beneficial use of her property." *Id.* CSI-Entities asserts and alleges that the State's Orders, concluding in Order 1309, effectuates a *per se* regulatory taking and deprives CS-Entities of all economical beneficial use of its property in Coyote Springs.

49. The State Engineer's May 18, 2018 Letter, its purported "draft order" issued only for delay, its 1303 Interim Order, its Order 1309, and its most recent June 17, 2020 "disapproval concerning water quantity . . . for Coyote Springs Village A subdivision", all have effectuated a regulatory taking of CS-Entities' Water Rights, its property, and its development rights which requires compensation to CS-Entities (the "State Engineer's Orders"). The State Engineer's Orders have had a massive, devasting and continuing economic impact on the CS-Entities and their Coyote Springs Master Planned Development, blocked and interfered with CS-Entities' reasonable and approved investment-backed expectations to design, develop, construct and sell Coyote Springs Master Planned Development, and unfairly signaled out CSI to bear the burden of protecting the Moapa dace that should more appropriately be borne by the public as a whole. The Defendants' actions have left CS-Entities' property economically idle and the CS-Entities have suffered an unconstitutional taking for which just compensation is now due.

50. CS-Entities are informed and believe and thereupon alleges that the State, and its State Engineer's actions as described herein, were wrongful, oppressive and unreasonable and have resulted in a taking of CS-Entities' Water Rights, its property, and its Master Planned and Approved Major Project development rights, and any viable economic use of its property. The State's actions rise to the level of an unconstitutional *per se* regulatory taking for which just compensation is due to the CS-Entities.

51. The State's taking of CS-Entities' property by the public constitutes a taking by inverse condemnation which require compensation under the Fourteenth Amendment to the United Sates Constitution and Article I, Section 8 of the Nevada Constitution, requiring the State to pay full and just compensation to Plaintiff CS-Entities.

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

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

SECOND CLAIM FOR RELIEF

(Inverse Condemnation –Penn Central Regulatory Taking)

54. CS-Entities incorporate the preceding paragraphs as if fully set forth the herein.

55. Regulatory taking challenges are governed by the standard set forth in *Penn Central Transportation Co. vs New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631(1978). In determining whether a Penn Central-type regulatory taking has occurred a Court should consider (1) the regulation's economic impact on the property owner, (2) the regulations interference with investment-backed expectations, and, (3) the character of the government action. *Sisolak,* 122 Nev. at 663.

56. The State Engineer's May 18, 2018 Letter, its 1303 Interim Order, its Order 1309, along with the June 17, 2020 "disapproval" of Coyote Springs Village A subdivision maps based on water service" all have effectuated a *Penn Central* regulatory taking of the CS-Entities' property and development rights which requires compensation to the CS-Entities (the "State Engineer's Orders"). The State Engineer's Orders have had a massive and devastating economic impact on the CS-Entities and their Coyote Springs Master Planned Development, blocked, interfered with, and ultimately destroyed the CS-Entities' investment-backed expectations to design, develop, construct and sell Coyote Springs Master Planned Development, and unfairly signaled out the CS-Entities to bear a public burden, protecting the Moapa dace, that should be borne by the public as a whole rather than by the CS-Entities. This is particularly true when the CS-Entities, as the Master Planned Community and Approved Major Project owner and developer, has previously transferred and conveyed 460 afa of their water rights in Coyote Springs Valley, to mitigate for any potential damage the Coyote Springs development and its water use may cause to water flows and the Moapa dace. CS-Entities' investment backed expectations have been destroyed and wrongfully taken by the State for which just compensation is now due.

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57. Defendants taking of the CS-Entities' property by the public constitutes a taking by inverse condemnation which require compensation under the Fourteenth Amendment to the United Sates Constitution and Article I, Section 8 of the Nevada Constitution, requiring Defendants to pay full and just compensation to Plaintiff.

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

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

THIRD CLAIM FOR RELIEF

(Pre-Condemnation Damages)

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

61. 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 thereby freezing continuing development of the Coyote Springs Master Planned Development.

62. The pre-condemnation taking of Plaintiff's property by the public mandates compensation under the Fourteenth Amendment to the United States Constitution and 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.

63. 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.

FOURTH CLAIM FOR RELIEF

(Equal Protection Violations)

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

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65. Under the Fourteenth Amendment of the United States Constitution, the State, cannot deprive the CS-Entities of the equal protection of the law. Under the Equal Protection Clause, CS-Entities must not be subjected to discrimination by the State and its State Engineer's decisions that result in standardless and inconsistent administration. The State Engineer has violated Plaintiff CSI's rights to equal protection under the Nevada and United States Constitutions as its May 16, 2018 letter, its Draft Order, and its Interim 1303 Order, all singled out the CS-Entities as to the map moratorium contained therein. By failing to timely process and fairly adjudicate CS-Entities' pending maps and applications, including its Conditionally Approved Maps, the State has treated CS-Entities in a different, standardless and inconsistent position than others similarly situated.

66. The State, intentionally and without rational basis, treated CS-Entities differently than others subject to its State Engineer Orders, by placing a moratorium on the processing and final approval of CS-Entities' Master Planned Development submitted subdivision maps and Conditionally Approved Maps as described herein. The State and its State Engineer, have unfairly and in bad faith, targeted the CS-Entities.

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

68. Plaintiff CS-Entities are entitled to damages for these Equal Protection violations.

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

FIFTH CLAIM FOR RELIEF

(Violation of 42 U.S.C. Sec. 1983)

70. Plaintiffs repeats and realleges all prior paragraphs as though fully set forth herein.

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71. The above described actions also subject the State to liability under 42 U.S.C Sec. 1983.

72. The above referenced Equal Protection violations were committed by the State, and its State Engineer, purportedly acting under color of state laws including NRS 533 et seq.

73. The State conduct deprived the CS-Entities of the rights, privileges, and immunities secured by the Constitution and /or laws of the United States to which the CS-Entities are legitimately entitled.

74. The CS-Entities have been damaged by such deprivations in an amount to be determined at trial.

75. The State's conduct has required Plaintiff CS-Entities to incur attorneys' fees and costs of suit to bring this action, and Plaintiffs are entitled to an award of their attorneys' fees and costs incurred in this matter.

SIXTH CLAIM FOR RELIEF

(Claim of Attorneys' Fees Incurred Herein)

76. Plaintiffs repeats and realleges all prior paragraphs as though fully set forth herein.

79. CS-Entities asserts that the State's conduct has required Plaintiffs to incur attorneys' fees to bring this action and that Nevada Revised Statutes and State Common Law provide for an award of attorneys' fees to prevailing parties in inverse condemnation actions. CS-Entities hereby provide notice to these Defendants that it intends to pursue its attorneys' fees incurred in this action as allowed by Nevada law. Accordingly, the CS-Entities reserve all rights to pursue an award of their Attorney Fees incurred in this matter as allowed by law.

IV.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief:

1. For payment of full and just compensation as provided by law for the taking of property, water rights, and development rights of the CS-Entities.
2. For Pre-Condemnation damages in an amount to be proven at trial;

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3. For compensatory and special damages as set forth herein;
4. For pre-judgment and post-judgment interest, as allowed by law;
5. For all of the CS-Entities' incurred attorneys' fees and costs of suit as provided by law;
6. For all other remedies and relief that the Court deems just and appropriate.

V.

DEMAND FOR JURY TRIAL

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

DATED this 28TH day of August, 2020.

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APEN (CIV)

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CASE NO: A-20-820384-B
Department 13

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,

v.

STATE OF NEVADA, on relation to its Division of Water Resources, Department of Conservation and Natural Resources, Tim Wilson, Nevada State Engineer; and Does I through X.

Defendants.

Case No.
Dept. No.

APPENDIX TO PLAINTIFFS' COMPLAINT FOR DAMAGES

Plaintiffs Coyote Springs Investment LLC, Coyote Springs Nevada LLC, and Coyote Springs Nursery LLC (collectively, the "CS-Entities) by and through their attorneys of record, Coulthard Law PLLC, hereby submits its Appendix of Exhibits to their Complaint for Damages.

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/ / /

Exhibit. No.	Description	Number of Pages (excluding exhibit marker)	Location of exhibit within Complaint
1	May 16, 2018 State Engineer letter to Las Vegas Valley Water District	3	14
2	Draft Order dated September 19, 2018	13	17
3	Interim Order 1303	17	19
4	Order 1309, dated June 15, 2020	68	23
5	June 17, 2020 Letter from State Department of Conservation and Natural Resources to Coyote Springs Investment LLC	3	24

DATED this 28TH day of August, 2020.

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EXHIBIT 1

EXHIBIT 1

EXHIBIT 1

BRIAN SANDOVAL
Governor

STATE OF NEVADA

BRADLEY CROWELL
Director

JASON KING, P.E.
State Engineer

DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES
DIVISION OF WATER RESOURCES
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May 16, 2018

Gregory Walch, Esq.
General Counsel
Las Vegas Valley Water District
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Las Vegas, NV 89153

Re: Coyote Spring Valley Water Supply

Dear Mr. Walch:

The Nevada Division of Water Resources (NDWR) is in receipt of your letter dated November 16, 2017, on behalf of the Las Vegas Valley Water District (LVVWD). In that letter, you provided background on groundwater supply in the Coyote Spring Valley based on existing water rights and related hydrologic data from the NDWR, including Order 1169 pumping test results and the subsequent issuance of Ruling 6255. Your letter concluded by asking the State Engineer, as Administrator of the NDWR, for an opinion regarding the extent to which subdivision maps for the Coyote Springs Development Project (Project) "predicated on the use of groundwater owned by the Coyote Springs Water Resources General Improvement District (CSWRGID) or developers in Coyote Spring Valley" would be executed by the NDWR.[1]

As you are aware, the development of groundwater resources in Coyote Spring Valley, Muddy River Springs Area, California Wash, Hidden Valley and Garnet Valley (*five-basin area*), are inextricably connected and can influence the flows in the Muddy River Springs and the Muddy River. Although your question is specific to the use of existing water rights

[1] Your letter identified the developers as Coyote Springs Land Development Corporation (CSLD), Coyote Springs Investment LLC (CSI), and Coyote Springs Nevada LLC (CSN), whom are developing the Coyote Springs development project.

held by the CSWRGID or the Project developers, it is necessary to address your inquiry within the broader context of appropriately managing and developing groundwater resources within the larger *five-basin area*.

1169 Pumping Test Background

During the Order 1169 pumping test conducted from November 2010 through December 2012, approximately 8,500 acre-feet per year of water was pumped from the carbonate aquifer, and 3,700 acre-feet per year was pumped from the alluvial aquifer within the larger *five-basin area*. Almost all of the alluvial pumping came from the Muddy River Springs Area. Results of the 2-year test clearly indicate that pumping at that level from the carbonate aquifer caused unprecedented declines in groundwater levels and flows in the high-altitude springs. These springs have a direct connection to the fully appropriated Muddy River and are part of the source of water for the endangered Moapa Dace, a fish federally listed as an endangered species since 1967, and the decreed senior rights of the Muddy River.

Post 1169 Pumping Test Considerations

Monitoring of pumpage and water levels has continued since the completion of the pumping test on December 31, 2012. This additional data provides NDWR a better understanding of the amount of groundwater pumping that may be sustainable in the *five-basin area* carbonate aquifer. Since completion of the pumping test, groundwater levels and spring flows have remained relatively flat while precipitation has been nearly average and the five-basin carbonate pumping has been about 6,000 afa.

Adding to the consideration as to how much groundwater can be sustainably pumped from the *five-basin area* is the Memorandum of Agreement (MOA) that was entered into on April 20, 2006, between the Southern Nevada Water Authority, the United States Fish and Wildlife Service, Coyote Springs Investment, the Moapa Band of Paiute Indians, and the Moapa Valley Water District. The purpose of the MOA was "to make measurable progress toward protection and recovery of the Moapa dace and its habitat concurrent with the operation and development of water projects for human use." Analysis of the Order 1169 pumping test and the observed correlation between pumping and spring flow indicates that MOA-required curtailment thresholds could be rapidly triggered should carbonate pumping exceed its current rate.

Future Groundwater Development

Ultimately, the amount of groundwater pumping that will be allowed in the *five-basin area* will be limited to the amount that will not conflict with the Muddy River Springs or the Muddy River as they are the most senior rights in the *five-basin area* and, by law must be protected. Moving forward, in order to <u>not</u> conflict witb the senior decreed rights and

negatively impact the Moapa Dace, carbonate pumping will have to be limited to a fraction of the 40,300 acre-feet already appropriated in the *five-basin area* as demonstrated by the hydrologic data and analysis from Order 1169 and Ruling 6255.

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

In closing, as outlined in this letter, the matter you're inquiring about is part of a much broader need to appropriately manage groundwater resources across the *five-basin area*. As such, it is incumbent upon the NDWR to work with all the water right holders on a conjunctive management plan for the *five-basin area*.

Sincerely,

P.E.

Jason King, P.E.
State Engineer

cc: Albert Seeno III, Coyote Springs Investments, LLC

EXHIBIT 2

EXHIBIT 2

EXHIBIT 2

IN THE OFFICE OF THE STATE ENGINEER
OF THE STATE OF NEVADA

DRAFT ORDER #DRAFT

DESIGNATING THE ADMINISTRATION OF ALL WATER RIGHTS WITHIN COYOTE SPRING VALLEY HYDROGRAPHIC BASIN (210), BLACK MOUNTAINS AREA (BASIN 215), GARNET VALLEY (BASIN 216), HIDDEN VALLEY (BASIN 217), CALIFORNIA WASH (BASIN 218), AND MUDDY RIVER SPRINGS AREA (A.K.A. UPPER MOAPA VALLEY) (BASIN 219) AS A SINGLE HYDROGRAPHIC BASIN, LIMITING GROUNDWATER PUMPING, AND HOLDING IN ABEYANCE REVIEW OF FINAL SUBDIVISION MAPS

I. BASIN DESIGNATIONS PURSUANT TO NRS § 534.030

WHEREAS, the Coyote Spring Valley Hydrographic Basin was designated pursuant to Nevada Revised Statute (NRS) § 534.030 by Order 905 dated August 21, 1985, which also declared municipal, power, industrial and domestic uses as preferred uses of the groundwater resource pursuant to NRS § 534.120.

WHEREAS, the Black Mountains Area Hydrographic Basin was designated pursuant to NRS § 534.030 by Order 1018 dated November 22, 1989, which also declared municipal, industrial, commercial and power generation purposes is to be considered preferred uses of the groundwater resource pursuant to NRS § 534.120, declared irrigation of land using groundwater to be a non-preferred use, and ordered that applications to appropriate groundwater for irrigation will be denied.

WHEREAS, the Garnet Valley Hydrographic Basin was designated pursuant to NRS § 534.030 by Order 1025 dated April 24, 1990, which also declared municipal, quasi-municipal, industrial, commercial, mining, stockwater and wildlife purposes as preferred uses pursuant to NRS § 534.120, and declared irrigation of land using groundwater to be a non-preferred use, and ordered that applications to appropriate groundwater for irrigation will be denied.

WHEREAS, the California Wash Hydrographic Basin was designated pursuant to NRS § 534.030 by Order 1026 dated April 24, 1990, which also declared

municipal, quasi-municipal, industrial, commercial, mining, stockwater and wildlife purposes as preferred uses pursuant to NRS § 534.120, and declared irrigation of land using groundwater to be a non-preferred use, and ordered that applications to appropriate groundwater for irrigation will be denied.

WHEREAS, the Hidden Valley Hydrographic Basin was designated pursuant to NRS § 534.030 by Order 1024 dated April 24, 1990, which also declared municipal, quasi-municipal, industrial, commercial, mining, stockwater and wildlife purposes as preferred uses pursuant to NRS § 534.120, and declared irrigation of land using groundwater to be a non-preferred use, and ordered that applications to appropriate groundwater for irrigation will be denied.

WHEREAS, the Muddy River Springs Area (a.k.a., the Upper Moapa Valley) was partially designated pursuant to NRS § 534.030 by Order 392 dated July 14, 1971 and was fully designated by Order 1023 dated April 24, 1990, which also declared municipal, quasi-municipal, industrial, commercial, mining, stockwater and wildlife purposes as preferred uses pursuant to NRS § 534.120, declared irrigation of land using groundwater to be a non-preferred use, and ordered that applications to appropriate groundwater for irrigation will be denied.

II. ORDERS 1169 AND 1169A

WHEREAS, on March 8, 2002, the State Engineer issued Order 1169 holding in abeyance carbonate-rock aquifer system groundwater applications pending or to be filed in Coyote Spring Valley (Basin 210), Black Mountains Area (Basin 215), Garnet Valley (Basin 216), Hidden Valley (Basin 217), Muddy River Springs Area (a.k.a. Upper Moapa Valley) (Basin 219), Lower Moapa Valley (Basin 220), and ordered an aquifer test of the carbonate-rock aquifer system, which was not well understood, to determine whether additional appropriations could be developed from the carbonate-rock aquifer system.

WHEREAS, on April 18, 2002, the State Engineer in Ruling 5115, added the California Wash (Basin 218) to the Order 1169 aquifer pumping test basins.

WHEREAS, on November 15, 2010, the Order 1169 aquifer test began whereby the study participants began reporting to the State Engineer on a quarterly basis, the amounts of water being pumped from wells in the carbonate and alluvial aquifer during the aquifer test.

WHEREAS, on December 21, 2012, the State Engineer issued Order 1169A declaring the completion of the aquifer test directed in Order 1169 on December 31, 2012, after a period of 25½ months, and providing the study participants until June 28, 2013, the opportunity to file reports with the State Engineer addressing the information gained from the aquifer test and the water available to applications in the aquifer test basins.

WHEREAS, during the Order 1169 aquifer test, an average of 5,290 acre-feet per year was pumped from carbonate wells in Coyote Spring Valley, and a cumulative total of approximately 10,180 acre-feet per year of water was pumped from the carbonate aquifer throughout the study basins. An additional 3,700 acre-feet per year was pumped from the Muddy River Springs Area alluvial aquifer.

WHEREAS, results of the 2-year test demonstrate that pumping 5,290 acre-feet annually from the carbonate aquifer in Coyote Spring Valley, in addition to the non-study carbonate pumping, caused unprecedented declines in groundwater levels and flows in the Petersen and Peterson East springs, two high-altitude springs, which are considered to be the "canary in the coal mine" springs for the overall condition of the Muddy River. These springs are at the headwaters of the decreed and fully appropriated Muddy River and are the predominate source of water that supplies the habitat of the endangered Moapa Dace, a fish federally listed as an endangered species since 1967.

WHEREAS, based upon the findings of the aquifer test, the carbonate aquifer underlying Coyote Spring Valley, Garnet Valley, Hidden Valley, Upper Moapa

Valley, California Wash and the northwest part of the Black Mountains Area[1] ("Lower White River Flow System" or "LWRFS") was acknowledged to have a unique hydrologic connection and share virtually the same supply of water (see attached map).[2]

III. RULINGS 6254, 6255, 6256, 6257, 6258, 6259, 6260, AND 6261

WHEREAS, on January 29, 2014, the State Engineer issued Rulings 6254 and 6255 on pending applications in the Coyote Spring Valley, Ruling 6256 on pending applications in the Garnet Valley, Ruling 6257 on pending applications in the Hidden Valley, Ruling 6259 on pending applications in the Muddy River Springs Area, Ruling 6260 on pending applications in the Black Mountains Area, and Ruling 6258 on pending applications in the California Wash, upholding in part the protests to said applications and denying them on the grounds that there is no unappropriated groundwater at the source of supply, the proposed use would conflict with existing rights, and the proposed use of the water would threaten to prove detrimental to the public interest because it would threaten the water resources upon which the endangered Moapa dace are dependent.

IV. LOWER WHITE RIVER FLOW SYSTEM

WHEREAS, the total water supply to the LWRFS, from subsurface groundwater inflow and local precipitation recharge, is not more than 50,000 acre-feet annually.[3]

WHEREAS, the Muddy River, a fully appropriated surface water source, has its headwaters in the Muddy River Springs Area, or Upper Moapa Valley and has the most senior rights in the LWRFS. Spring discharge in the Muddy River Springs Area

[1] The area of the Black Mountain Area lying within the Lower White River Flow System is defined as those portions of Sections 29, 30, 31, 32, 33, T.18S., R.64E.: portions of Sections 1, 11, 12, 14, and all of Section 13, T.19S., R.63E.: and portions of Sections 4, 6, 9, 10, 15 and all of Sections 5, 7, 8, 16, 17, 18, T.19S., R.64E., M.D.B.&M.
[2] *See, e.g.* State Engineer Ruling 6254, p. 24, official records in the Office of the State Engineer.
[3] *Id*.

is produced from the regional carbonate aquifer. Prior to groundwater development, the Muddy River flows at the Moapa gage were approximately 34,000 acre-feet annually.[4]

WHEREAS, the alluvial aquifer surrounding the Muddy River ultimately derives virtually all of its water supply from the carbonates, either through spring discharge that infiltrates into the alluvium or through subsurface hydraulic connectivity between the carbonate rocks and the alluvium.[5]

WHEREAS, the State Engineer has determined that pumping of groundwater within the LWRFS has a direct interrelationship with the flow of the decreed and fully appropriated Muddy River, which has the most senior rights.[6]

WHEREAS, since the conclusion of the Order 1169 aquifer test, the State Engineer has jointly managed the water rights within LWRFS.

WHEREAS, the State Engineer, under the joint management of the LWRFS, has not distinguished pumping from wells in the Muddy River Springs Area alluvium from pumping carbonate wells within the LWRFS, although the Muddy River Springs Area basin has consistently been considered among the jointly managed basins.

V. PUMPAGE INVENTORIES AND GROUNDWATER LEVELS

WHEREAS, the State Engineer performs annual groundwater pumpage inventories in the Coyote Spring Valley, and in calendar years 2007 through 2010, prior to the aquifer test, and 2013 through 2017, after completion of said test, the

[4] *See, e.g.*, United States Geological Survey Surface-Water Annual Statistics for the Nation, USGS 09416000 MUDDY RV NR MOAPA, NV, accessed at https://waterdata.usgs.gov/nwis/annual/?search_site_no=09416000&agency_cd=USGS&referred_module=sw&format=sites_selection_links.
[5] *See, e.g.* State Engineer Ruling 6254, pp. 24, official records in the Office of the State Engineer.
[6] *Id.*

annual pumping ranged from approximately 1,800 acre-feet to approximately 3,000 acre-feet, with an average of approximately 2,300 acre-feet annually.[7]

WHEREAS, the State Engineer performs annual groundwater pumpage inventories in the Black Mountains Area, and in calendar years 2007 through 2010, prior to the aquifer test, and 2013 through 2017, after completion of said test, the annual pumping for the entire basin ranged from approximately 1,000 acre-feet to approximately 2,000 acre-feet, with an average of approximately 1,600 acre-feet annually.[8]

WHEREAS, the State Engineer performs annual groundwater pumpage inventories in the Garnet Valley, and in calendar years 2007 through 2010, prior to the aquifer test, and 2013 through 2017, after completion of said test, the annual pumping ranged from approximately 1,000 acre-feet to approximately 2,000 acre-feet, with an average of 1,600 acre-feet annually.[9]

WHEREAS, the State Engineer performs annual groundwater pumpage inventories in the California Wash, and in calendar years 2007 through 2010, prior to the aquifer test, and 2013 through 2017, after completion of said test, the annual pumping ranged from approximately 100 acre-feet to approximately 300 acre-feet, with an average of approximately 200 acre-feet annually.[10]

WHEREAS, the State Engineer performs annual groundwater pumpage inventories in the Muddy River Springs Area (a.k.a. Upper Moapa Valley), and received reported pumpage data from water right holders, Muddy Valley Water District and Nevada Energy, and in calendar years 2007 through 2010, prior to the aquifer test, and 2013 through 2017, after completion of said test, the annual

[7] *See, e.g. Nevada Division of Water Resources, Coyote Spring Valley Hydrographic Basin 13-210 Groundwater Pumpage Inventory*, 2017.
[8] *See*, e.g., *Nevada Division of Water Resources, Black Mountains Area Hydrographic Basin 13-215 Groundwater Pumpage Inventory*, 2017.
[9] *See*, e.g., *Nevada Division of Water Resources, Garnet Valley Hydrographic Basin 13-216 Groundwater Pumpage Inventory*, 2017.
[10] *See*, e.g., *Nevada Division of Water Resources, California Wash Hydrographic Basin 13-218 Groundwater Pumpage Inventory*, 2017.

pumping ranged from approximately 3,000 acre-feet to about 7,000 acre-feet, with an average of approximately 5,700 acre-feet annually.[11]

WHEREAS, total groundwater pumpage in Coyote Spring Valley, Muddy River Springs Area, California Wash, Hidden Valley, Garnet Valley, and the Black Mountains Area in calendar years 2007 through 2010, prior to the aquifer test, and 2013 through 2017, after completion of said test, ranged from approximately 9,000 to 14,000, and averaged approximately 11,400 acre-feet annually.

WHEREAS, during the Order 1169 aquifer test, total pumpage increased to approximately 14,000 acre-feet annually and the resulting water-level decline encompassed 1,100 square miles and extended from northern Coyote Spring Valley through the Muddy River Springs Area, Hidden Valley, Garnet Valley, California Wash, and the northwestern part of the Black Mountains Area.[12] The water-level decline was estimated to be 1 to 1.6 feet in this area with minor drawdowns of 0.5 feet or less in the northern part of Coyote Spring Valley north of the Kane Springs Wash fault zone.

WHEREAS, during the Order 1169 pump test, the high-altitude (Petersen and Petersen East) springs showed an unprecedented decrease in flow, with the Pedersen spring flow decreasing from 0.22 cubic feet per second (cfs) to 0.08 cfs, and Petersen East spring flow decreasing from 0.12 cfs to 0.08 cfs. Additional springs, the Baldwin and Jones Springs, declined approximately 4% during the test.[13]

[11] *See*, e.g., *Nevada Division of Water Resources, Muddy River Springs Area (A.K.A. Upper Moapa Valley) Hydrographic Basin 13-219 Groundwater Pumpage Inventory*, 2017.

[12] *See, e.g.*, Ruling 6254. *See also* U.S. Fish and Wildlife Service, U.S. Bureau of Land Management and U.S. National Park Service Order 1169A Report, *Test Impacts and Availability of Water Pursuant to Applications Pending Under Order 1169*, June 28, 2013, official records in the Office of the State Engineer.

[13] U.S. Fish and Wildlife Service, U.S. Bureau of Land Management and U.S. National Park Service Order 1169A Report, *Test Impacts and Availability of Water Pursuant to Applications Pending Under Order 1169*, pp. 43-46, 50-51, June 28, 2013, official records in the Office of the State Engineer. *See also* http://waterdata.usgs.gov/nv/nwis/.

WHEREAS, based upon the analysis of the carbonate aquifer test, it was asserted that pumping at the Order 1169 rate at well MX-5 in Coyote Spring Valley could result in both of the high-altitude springs going dry in 3 years or less.[14]

WHEREAS, in the five years since completion of the aquifer test, ongoing data monitoring shows that groundwater levels and spring flows have remained relatively flat and precipitation has been about average.[15] Groundwater pumping in the LWRFS over the last 3 years has averaged 9,318 acre-feet annually.[16]

WHEREAS, within the LWRFS, there exists more than 40,000 acre-feet of groundwater appropriations.

WHEREAS, NRS 533.024(c) directs the State Engineer "to consider the best available science in rendering decisions concerning the availability of surface and underground sources of water in Nevada."

WHEREAS, NRS 533.024(e) was amended in 2017 to declare the policy of the State to "manage conjunctively the appropriation, use and administration of all waters of this State regardless of the source of the water."

WHEREAS, given that the State Engineer must use the best available science and manage conjunctively the water resources in the LWRFS, consideration of any development of long-term uses that could ultimately be curtailed due to water availability will be examined with great caution.

WHEREAS, assurances regarding the extent of any additional development of the existing appropriations of groundwater within the LWRFS that can occur

[14] *See, e.g.*, Ruling 6254. *See also* U.S. Fish and Wildlife Service, U.S. Bureau of Land Management and U.S. National Park Service Order 1169A Report, *Test Impacts and Availability of Water Pursuant to Applications Pending Under Order 1169*, p. 85, June 28, 2013, official records in the Office of the State Engineer.

[15] *See Standardized Precipitation Index*, Nevada Climate Division 4, http://wrcc.dri.edu.

[16] *See, e.g. Nevada Division of Water Resources, Groundwater Pumpage Inventories* for the LWRFS subject basins for the years 2012 through 2017, official records of the Office of the State Engineer.

without adversely affecting the senior rights on the fully decreed Muddy River cannot be made based solely upon the results of the Order 1169 aquifer test.

WHEREAS, based upon the review of the data available to the State Engineer in the years since the conclusion of the aquifer test, it is believed that only a very small portion of the existing rights within the LWRFS may be pumped without adversely impacting the senior rights on the Muddy River or the habitat of the Moapa Dace.

VI. AUTHORITY AND NECESSITY

WHEREAS, as demonstrated by the results of the aquifer test, Coyote Spring Valley, Muddy River Springs Area, Hidden Valley, Garnet Valley, California Wash, and the northwestern part of the Black Mountains Area have a direct hydraulic connection and interact as a single groundwater basin, and as a result must be administered as a single hydrographic basin, including the administration of all water rights based upon the date of priority of such rights in relation to the priority of rights in the other basins.

WHEREAS, pumping approximately 14,000 acre-feet per year, including 5,290 acre-feet per year from Coyote Spring Valley and a total of 10,120 acre-feet from the carbonate aquifer during the pumping test yielded groundwater declines of a foot or more, resulting in an unacceptable loss in spring flow and aquifer storage. In order to not conflict with the senior decreed rights of the Muddy River and negatively affect the Moapa Dace and its habitat, the State Engineer finds that it is necessary to limit pumping to a small percentage of the more than 40,000 acre-feet of appropriated groundwater rights in the LWRFS.

WHEREAS, on the basis that only a small percentage of the total quantity of the appropriated groundwater rights within the LWRFS may be developed, the State Engineer, with the following exception, finds that it is necessary to hold in abeyance the review and any decisions relating to any final subdivision or other submission concerning development and construction to the Division of Water Resources seeking a finding that adequate water is available to support the proposed development. The

State Engineer may review and grant approval of a subdivision or other submission if a showing of an adequate supply of water in perpetuity can be made to the State Engineer's satisfaction.

WHEREAS, through the public workshop process, which the State Engineer is engaged in at the time of the issuance of this Order, coupled with the continued monitoring of the LWRFS, is intended to develop a more precise understanding of the amount of sustainable groundwater pumpage that may occur within the LWRFS over the long-term without adverse impacts to the Muddy River and the springs that serve as the headwaters of the Muddy River. Moreover, if groundwater cannot be developed in the LWRFS without conflicts to the senior, decreed Muddy River rights and springs, the State Engineer, through the public workshop process, desires to establish a conjunctive management plan for the LWRFS.

WHEREAS, through continued monitoring of the LWRFS during the pendency of the public workshop process, while maintaining groundwater pumping in an amount not to exceed the current pumping rate of 9,318 acre-feet annually, a more precise understanding of the amount of sustainable groundwater pumpage will be determined.

WHEREAS, the State Engineer is empowered to make such reasonable rules and regulations as may be necessary for the proper and orderly execution of the powers conferred by law.[17]

WHEREAS, within an area that has been designated by the State Engineer, as provided for in NRS Chapter 534, where, in the judgment of the State Engineer, the groundwater basin is being depleted, the State Engineer in his or her administrative capacity may make such rules, regulations and orders as are deemed essential for the welfare of the area involved.[18]

WHEREAS, the State Engineer finds that additional data relating to the impacts of groundwater pumping from the LWRFS coupled with the public workshop

[17] NRS § 532.120.
[18] NRS § 534.120.

process will allow his office to make a determination as to the appropriate long-term management of groundwater pumping that may occur in the LWRFS by existing holders of water rights without adversely affecting existing senior decreed rights and the endangered Moapa Dace.

VII. ORDER

NOW THEREFORE, the State Engineer orders:

1. The Coyote Spring Valley, Muddy River Springs Area, California Wash, Hidden Valley, Garnet Valley, and the portion of the Black Mountains Area as described in this Order, is herewith designated as a single groundwater basin for purposes of administration of water rights. All water rights within the Lower White River Flow System will be administered based upon their respective date of priorities in relation to other rights within the regional groundwater basin.
2. The total allowable groundwater pumping in the Lower White River Flow System shall not exceed 9,318 acre-feet annually.
3. The date of priority at the limit of 9,318 acre-feet of water rights appropriated within the five-basin carbonate aquifer is within a portion of the water rights bearing a priority date of March 31, 1983.
4. Pumping by water right holders junior to the portion from March 31, 1983, within the 9,318 acre-foot limit, which is in effect as of September 1, 2018, will not be curtailed unless and until unused senior water right pumping exceeds 9,318 acre-feet annually in the Lower White River Flow System.
5. That any final subdivision or other submission concerning development and construction submitted to the State Engineer for review shall be held in abeyance pending the conclusion of the public process to determine the total quantity of groundwater that may be developed within the Lower White River Flow System. The State Engineer may review and grant approval of a subdivision or other submission if a showing of an adequate supply of water in perpetuity can be made to the State Engineer's satisfaction.

6. The State Engineer may consider: (1) a Groundwater Management Plan developed by the water right holders within the Lower White River Flow System as an alternative to any prohibition of out of priority junior groundwater pumping; or (2) allowing additional groundwater pumping over the 9,318 acre-foot limit if it can be demonstrated to the satisfaction of the State Engineer that an alternative source of water will be substituted in a timely manner to replace the additional groundwater pumping unless such additional pumping causes a conflict with existing rights.
7. This Order will be considered when examining applications to change the point of diversion from alluvial wells to carbonate wells in the Lower White River Flow System and will be subject to heightened scrutiny for determination of conflict with existing rights.
8. This Order will be considered when examining applications to change the point of diversion, place of use, or manner of use of an existing water right and in examining requests for extension of time for filing Proofs of Completion of Work or Proofs of Application of Water to Beneficial Use and Extensions of Time to Prevent the Working of a Forfeiture filed within the Lower White River Flow System.

DRAFT

JASON KING, P.E.
State Engineer

Dated at Carson City, Nevada this

_____ day of _____, _____.

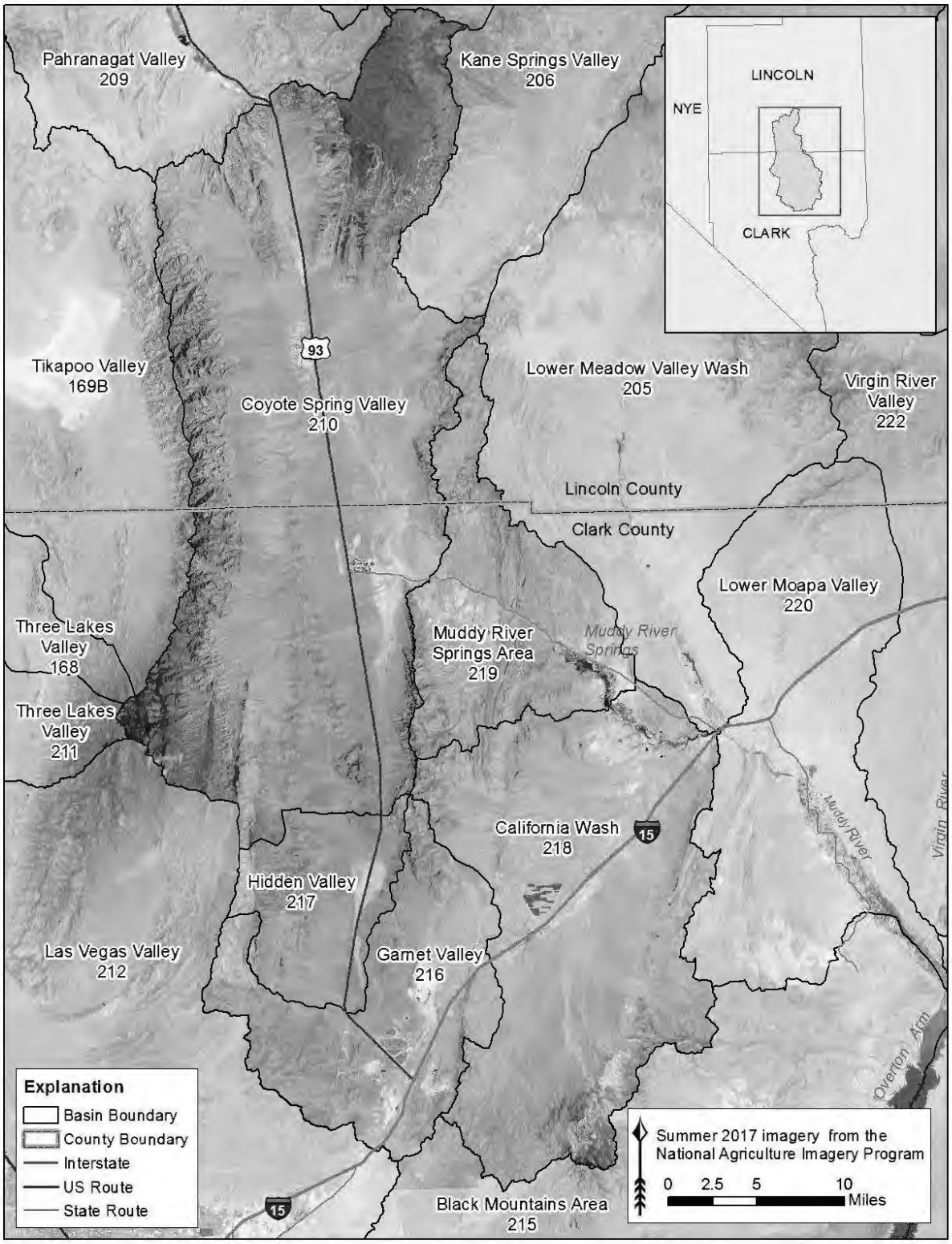
Pahranagat Valley
209
Kane Springs Valley
206
LINCOLN
NYE
CLARK
93
Tikapoo Valley
169B
Coyote Spring Valley
210
Lower Meadow Valley Wash
205
Virgin River
Valley
222
Lincoln County
Clark County
Lower Moapa Valley
220
Three Lakes
Valley
168
Muddy River
Springs Area
219
Muddy River
Springs
Three Lakes
Valley
211
California Wash
218
15
Muddy River
Virgin River
Hidden Valley
217
Las Vegas Valley
212
Garnet Valley
216
Overton Arm
Explanation
Basin Boundary
County Boundary
Interstate
US Route
State Route
Summer 2017 imagery from the
National Agriculture Imagery Program
0 2.5 5 10
Miles
15
Black Mountains Area
215

EXHIBIT 3

EXHIBIT 3

EXHIBIT 3

IN THE OFFICE OF THE STATE ENGINEER
OF THE STATE OF NEVADA

INTERIM ORDER **#1303**

DESIGNATING THE ADMINISTRATION OF ALL WATER RIGHTS WITHIN COYOTE SPRING VALLEY HYDROGRAPHIC BASIN (210), A PORTION OF BLACK MOUNTAINS AREA BASIN (215), GARNET VALLEY BASIN (216), HIDDEN VALLEY BASIN (217), CALIFORNIA WASH BASIN (218), AND MUDDY RIVER SPRINGS AREA (AKA UPPER MOAPA VALLEY) BASIN (219) AS A JOINT ADMINISTRATIVE UNIT, HOLDING IN ABEYANCE APPLICATIONS TO CHANGE EXISTING GROUNDWATER RIGHTS, AND ESTABLISHING A TEMPORARY MORATORIUM ON THE REVIEW OF FINAL SUBDIVISION MAPS

I. PURPOSE

WHEREAS, the purpose of this Interim Order is to designate a multi-basin area known to share a close hydrologic connection as a joint administrative unit, which shall be known as the Lower White River Flow System (LWRFS).

WHEREAS, an adequate and predictable supply of groundwater within the LWRFS supports the health, safety and welfare of the area, and this Interim Order aims to protect existing senior rights and the public interest in an endangered species, recognize existing beneficial use, and limit development actions that are dependent on a supply of water that may not be available in the future.

WHEREAS, during the interim period that this Order is in effect, holders of existing rights and other interested parties are encouraged to submit reports to the Nevada Division of Water Resources (NDWR) analyzing the data available regarding sustainable groundwater development in the LWRFS, the geographic extent of the LWRFS, and considerations relating to groundwater pumping within the LWRFS and its effects on the fully decreed Muddy River. This collected and analyzed data is an essential step to optimize the beneficial use of the available water supply in the LWRFS.

WHEREAS, concurrent with this interim order, holders of existing rights and other interested parties are encouraged to participate in the public process to develop a conjunctive management plan.

I. BASIN DESIGNATIONS PURSUANT TO NRS § 534.030

WHEREAS, the Coyote Spring Valley Hydrographic Basin was designated pursuant to Nevada Revised Statute (NRS) § 534.030 by Order 905 dated August 21, 1985, which also declared municipal, power, industrial and domestic uses as preferred uses of the groundwater resource pursuant to NRS § 534.120.

WHEREAS, the Black Mountains Area Hydrographic Basin was designated pursuant to NRS § 534.030 by Order 1018 dated November 22, 1989, which also declared municipal, industrial, commercial and power generation purposes as preferred uses of the groundwater resource pursuant to NRS § 534.120, declared irrigation of land using groundwater to be a non-preferred use, and ordered that applications to appropriate groundwater for irrigation purposes would be denied.

WHEREAS, the Garnet Valley Hydrographic Basin was designated pursuant to NRS § 534.030 by Order 1025 dated April 24, 1990, which also declared municipal, quasi-municipal, industrial, commercial, mining, stockwater and wildlife purposes as preferred uses pursuant to NRS § 534.120, and declared irrigation of land using groundwater to be a non-preferred use, and ordered that applications to appropriate groundwater for irrigation purposes would be denied.

WHEREAS, the California Wash Hydrographic Basin was designated pursuant to NRS § 534.030 by Order 1026 dated April 24, 1990, which also declared municipal, quasi-municipal, industrial, commercial, mining, stockwater and wildlife purposes as preferred uses pursuant to NRS § 534.120, and declared irrigation of land using groundwater to be a non-preferred use, and ordered that applications to appropriate groundwater for irrigation purposes would be denied.

WHEREAS, the Hidden Valley Hydrographic Basin was designated pursuant to NRS § 534.030 by Order 1024 dated April 24, 1990, which also declared municipal, quasi-municipal, industrial, commercial, mining, stockwater and wildlife purposes as preferred uses pursuant to NRS § 534.120, and declared irrigation of land using groundwater to be a non-preferred use, and ordered that applications to appropriate groundwater for irrigation purposes would be denied.

WHEREAS, the Muddy River Springs Area was partially designated pursuant to NRS § 534.030 by Order 392 dated July 14, 1971, and was fully designated by Order 1023 dated April 24, 1990, which also declared municipal, quasi-municipal, industrial, commercial, mining, stockwater and wildlife purposes as preferred uses pursuant to NRS § 534.120, and declared irrigation of land using groundwater to be a non-preferred use, and ordered that applications to appropriate groundwater for irrigation purposes would be denied.

II. ORDERS 1169 AND 1169A

WHEREAS, on March 8, 2002, the State Engineer issued Order 1169 holding in abeyance carbonate-rock aquifer system groundwater applications either pending or to be filed in Coyote Spring Valley (Basin 210), Black Mountains Area (Basin 215), Garnet Valley (Basin 216), Hidden Valley (Basin 217), Muddy River Springs Area (Basin 219), and Lower Moapa Valley (Basin 220) and ordering an aquifer test of the carbonate-rock aquifer system, which was not well understood, to determine whether additional appropriations could be developed from the carbonate-rock aquifer system. The Order required that at least 50%, or 8,050 acre-feet annually (afa), of the water rights then currently permitted in Coyote Spring Valley be pumped for at least two consecutive years.

WHEREAS, on April 18, 2002, in Ruling 5115, the State Engineer added the California Wash (Basin 218) to the Order 1169 aquifer test basins.

WHEREAS, prior to the Order 1169 aquifer test beginning, there were significant concerns that pumping 8,050 afa from the Coyote Spring Valley as part of the aquifer test would adversely impact the water resources at the Muddy River Springs, and consequently the Muddy River. Ultimately, the Order 1169 study participants agreed that even if the minimum 8,050 afa was not pumped, sufficient information would be obtained to inform future decisions relating to the study basins.

WHEREAS, on November 15, 2010, the Order 1169 aquifer test began, whereby the study participants began reporting to NDWR on a quarterly basis the amounts of water being pumped from wells in the carbonate and alluvial aquifer during the pendency of the aquifer test.

WHEREAS, on December 21, 2012, the State Engineer issued Order 1169A declaring the completion of the aquifer test to be December 31, 2012, after a period of 25½ months. The

State Engineer provided the study participants the opportunity to file reports with NDWR until June 28, 2013, addressing the information gained from the aquifer test and the water available to support applications in the aquifer test basins.

WHEREAS, during the Order 1169 aquifer test, an average of 5,290 acre-feet per year was pumped from carbonate wells in Coyote Spring Valley, and a cumulative total of approximately 14,535 acre-feet per year of water was pumped throughout the LWRFS. Of this total, approximately 3,840 acre-feet per year was pumped from the Muddy River Springs Area alluvial aquifer.[1]

WHEREAS, during the aquifer test, pumpage was measured and reported from 30 other wells in the Muddy River Springs Area, Garnet Valley, California Wash, Black Mountains Area, and Lower Meadow Valley Wash. Stream diversions from the Muddy River were reported, and measurements of the natural discharge of the Muddy River and several of the Muddy River's headwater springs were collected daily. Water-level data were collected from a total of 79 monitoring and pumping wells within the LWRFS. All of the data collected during the aquifer test was made available to each of the study participants and the public.

WHEREAS, during the Order 1169 aquifer test, the resulting water-level decline encompassed 1,100 square miles and extended from northern Coyote Spring Valley through the Muddy River Springs Area, Hidden Valley, Garnet Valley, California Wash, and the northwestern part of the Black Mountains Area.[2,3] The water-level decline was estimated to be 1 to 1.6 feet in this area with minor drawdowns of 0.5 feet or less in the northern part of Coyote Spring Valley north of the Kane Springs Wash fault zone.

WHEREAS, results of the two-year test demonstrated that pumping 5,290 acre-feet annually from the carbonate aquifer in Coyote Spring Valley, in addition to the other carbonate pumping in Garnet Valley, Muddy River Springs Area, California Wash and the northwest part

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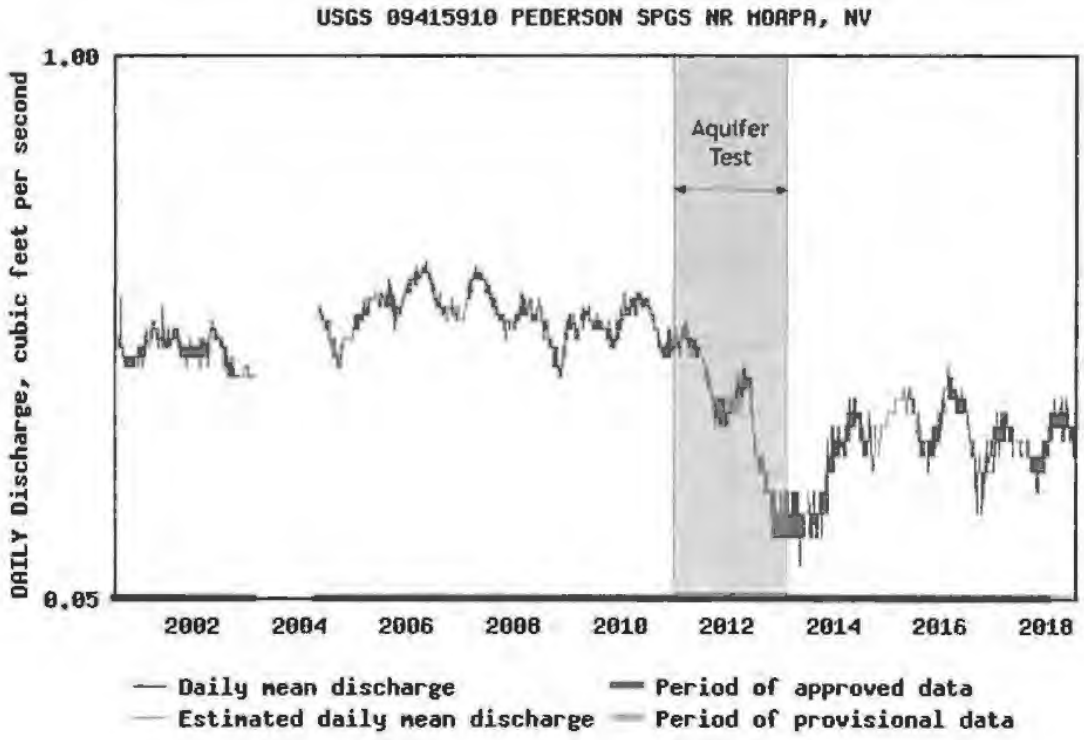
[1] *See, e.g.*, Ruling 6254, p. 17; Appendix B.
[2] *See, e.g.*, Ruling 6254. *See also* U.S. Fish and Wildlife Service, U.S. Bureau of Land Management and U.S. National Park Service Order 1169A Report, *Test Impacts and Availability of Water Pursuant to Applications Pending Under Order 1169*, June 28, 2013, official records in the Office of the State Engineer.
[3] There was no groundwater pumping in Hidden Valley but effects were still observed in the Hidden Valley monitor well.

of the Black Mountains Area, caused sharp declines in groundwater levels and flows in the Pederson and Pederson East springs. These two springs are considered to be sentinel springs for the overall condition of the Muddy River because they are at a higher altitude than other Muddy River source springs, and therefore are proportionally more affected by a decline in groundwater level in the carbonate aquifer.[4] The Pederson spring flow decreased from 0.22 cubic feet per second (cfs) to 0.08 cfs and the Pederson East spring flow decreased from 0.12 cfs to 0.08 cfs. The following hydrograph at Pederson spring illustrates the decline in discharge during the aquifer test and also demonstrates that in the five years since the end of the aquifer test, spring flow has not recovered to pre-test flow rates.



[4] *See* the 2006 Memorandum of Agreement among the Southern Nevada Water Authority, United States Fish and Wildlife Service, Coyote Springs Investments, Moapa Band of Paiutes, and the Moapa Valley Water District.

Additional headwater springs at lower altitude, the Baldwin and Jones springs, declined approximately 4% during the test.[5] All of the headwater springs contribute to the decreed and fully appropriated Muddy River and are the predominant source of water that supplies the habitat of the endangered Moapa dace, a fish federally listed as an endangered species since 1967.

WHEREAS, based upon the analysis of the carbonate aquifer test, it was asserted that pumping at the Order 1169 rate at well MX-5 in Coyote Spring Valley could result in both of the high-altitude Pederson and Pederson East springs going dry in 3 years or less.[6]

WHEREAS, based upon the findings of the aquifer test, the carbonate aquifer underlying Coyote Spring Valley, Garnet Valley, Hidden Valley, Muddy River Springs Area, California Wash and the northwest part of the Black Mountains Area[7] (the LWRFS as depicted in Appendix A) was acknowledged to have a unique hydrologic connection and share the same supply of water.[8]

III. RULINGS 6254, 6255, 6256, 6257, 6258, 6259, 6260, AND 6261

WHEREAS, on January 29, 2014, the State Engineer issued Ruling 6254 on pending applications of the Las Vegas Valley Water District (LVVWD) and Coyote Springs Investment, LLC (CSI) in the Coyote Spring Valley; Ruling 6255 on pending applications of Dry Lake Water, LLC (Dry Lake), and CSI in Coyote Spring Valley; Ruling 6256 on pending applications of Bonneville Nevada Corporation, Nevada Power Company (Nevada Power), Dry Lake, and the Southern Nevada Water Authority (SNWA) in the Garnet Valley; Ruling 6257 on pending applications of Nevada Power, Dry Lake, and SNWA in the Hidden Valley; Ruling 6258 on

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[5] U.S. Fish and Wildlife Service, U.S. Bureau of Land Management and U.S. National Park Service Order 1169A Report, *Test Impacts and Availability of Water Pursuant to Applications Pending Under Order 1169*, pp. 43-46, 50-51, June 28, 2013, official records in the Office of the State Engineer. *See also,* http://waterdata.usgs.gov/nv/nwis/.

[6] *See, e.g.*, Ruling 6254. *See also* U.S. Fish and Wildlife Service, U.S. Bureau of Land Management and U.S. National Park Service Order 1169A Report, *Test Impacts and Availability of Water Pursuant to Applications Pending Under Order 1169*, p. 85, June 28, 2013, official records in the Office of the State Engineer.

[7] That portion of the Black Mountains Area lying within the Lower White River Flow System is defined as those portions of Sections 29, 30, 31, 32, and 33, T.18S., R.64E., M.D.B.&M.; Section 13 and those portions of Sections 1, 11, 12, and 14, T.19S., R.63E., M.D.B.&M.; Sections 5, 7, 8, 16, 17, and 18 and those portions of Sections 4, 6, 9, 10, and 15, T.19S., R.64E., M.D.B.&M.

[8] *See, e.g.,* State Engineer Ruling 6254, p. 24, official records in the Office of the State Engineer.

pending applications by LVVWD, Nevada Power, Dry Lake, and the Moapa Band of Paiute Indians in the California Wash; Ruling 6259 on pending applications by the Moapa Valley Water District in the Muddy River Springs Area; and Ruling 6260 on pending applications by Nevada Cogeneration Associates #1, Nevada Cogeneration Associates #2, and Dry Lake, in the Black Mountains Area, upholding in part the protests to said applications and denying the applications on the grounds that there was no unappropriated groundwater at the source of supply, the proposed use would conflict with existing rights, and the proposed use of the water would threaten to prove detrimental to the public interest because it would threaten the water resources upon which the endangered Moapa dace are dependent.

IV. LOWER WHITE RIVER FLOW SYSTEM

WHEREAS, the total long-term average water supply to the LWRFS, from subsurface groundwater inflow and local precipitation recharge, is not more than 50,000 acre-feet annually.[9]

WHEREAS, the Muddy River, a fully appropriated surface water source, has its headwaters in the Muddy River Springs Area and has the most senior rights in the LWRFS. Spring discharge in the Muddy River Springs Area is produced from the regional carbonate aquifer. Prior to groundwater development, the Muddy River flows at the Moapa gage were approximately 34,000 acre-feet annually.[10]

WHEREAS, the alluvial aquifer surrounding the Muddy River ultimately derives virtually all of its water supply from the carbonates, either through spring discharge that infiltrates into the alluvium or through subsurface hydraulic connectivity between the carbonate rocks and the alluvium.[11]

WHEREAS, the State Engineer has determined that pumping of groundwater within the LWRFS has a direct interrelationship with the flow of the decreed and fully appropriated Muddy River, which has the most-senior rights.[12]

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[9] *Id.*
[10] United States Geological Survey Surface-Water Annual Statistics for the Nation, USGS 09416000 MUDDY RV NR MOAPA, NV, accessed at https://waterdata.usgs.gov/nwis/annual/?search_site_no=09416000&agency_cd=USGS&referred_module=sw&format=sites_selection_links.
[11] *See, e.g.*, State Engineer Ruling 6254, p. 24, official records in the Office of the State Engineer.
[12] *Id.*

WHEREAS, since the conclusion of the Order 1169 aquifer test, the State Engineer has jointly managed the groundwater rights within LWRFS.

WHEREAS, the State Engineer, under the joint management of the LWRFS, has not distinguished pumping from wells in the Muddy River Springs Area alluvium from pumping carbonate wells within the LWRFS.

WHEREAS, within the LWRFS, there exist more than 38,000 acre-feet of groundwater appropriations. Groundwater pumping from 2007 forward is included in Appendix B and is significantly less than the total appropriations.

WHEREAS, groundwater levels within the LWRFS have been relatively flat in the five years since the end of the Order 1169 aquifer test, but groundwater levels have not recovered to pre-test levels.[13]

IV. PUMPAGE INVENTORIES

WHEREAS, annual groundwater pumpage inventories in the Coyote Spring Valley have been published by the State Engineer since 2005. In the years 2005 through 2017 pumping has ranged from 665 acre-feet to 5,606 acre-feet, averaging 2,605 acre-feet. The average pumping in Coyote Spring Valley, excluding the years 2011 and 2012 when the aquifer test was being conducted, is 2,068 acre-feet.[14]

WHEREAS, annual groundwater pumpage inventories in the Black Mountains Area have been published by the State Engineer since 2001. In the years 2001 through 2017 pumping in the northwest portion of the basin has ranged from 1,137 acre-feet to 1,591 acre-feet, with an average of 1,476 acre-feet.[15]

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[13] *See, e.g., USGS water level data for Site 364650114432001 219 S13 E65 28BDBA1 USGS CSV-2.* waterdata.usgs.gov/nwis.
[14] *See, e.g., Nevada Division of Water Resources, Coyote Spring Valley Hydrographic Basin 13-210 Groundwater Pumpage Inventory*, 2017.
[15] *See, e.g., Nevada Division of Water Resources, Black Mountains Area Hydrographic Basin 13-215 Groundwater Pumpage Inventory*, 2017.

WHEREAS, annual groundwater pumpage inventories in the Garnet Valley have been published by the State Engineer since 2001. In the years 2001 through 2017 pumping has ranged from 797 acre-feet to 2,181 acre-feet, averaging 1,358 acre-feet.[16]

WHEREAS, the State Engineer does not conduct annual groundwater pumpage inventories in the Hidden Valley basin because there is no groundwater pumping in the basin.

WHEREAS, annual groundwater pumpage inventories in the California Wash have been published by the State Engineer since 2016. In the years 2016 and 2017 pumping has ranged from 88 acre-feet to 252 acre-feet, averaging 170 acre-feet.[17] Groundwater pumpage data have been reported by water right holders since 2009.

WHEREAS, annual groundwater pumpage inventories in the Muddy River Springs Area have been published by the State Engineer since 2016. In the years 2016 and 2017 pumping has ranged from 3,553 acre-feet to 4,048 acre-feet, with an average of 3,801 acre-feet.[18] Groundwater pumpage data have been reported by water right holders since 1976.

WHEREAS, total groundwater pumpage in Coyote Spring Valley, Muddy River Springs Area (MRSA), California Wash, Hidden Valley, Garnet Valley, and the northwest portion of the Black Mountains Area in calendar years 2007 through 2017, ranged from 9,090 acre-feet to 14,766 acre-feet. Pumpage in years 2011-2012 during the aquifer test averaged 14,535 afa. Pumpage in years 2015 through 2017, when alluvial pumping in the MRSA was greatly reduced because of the Reid Gardner Generating Station closure, ranged from 9,090 afa to 9,637 afa.

V. AUTHORITY AND NECESSITY

WHEREAS, NRS § 533.024(1)(c) directs the State Engineer "to consider the best available science in rendering decisions concerning the availability of surface and underground sources of water in Nevada."

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[16] *See, e.g., Nevada Division of Water Resources, Garnet Valley Hydrographic Basin 13-216 Groundwater Pumpage Inventory*, 2017.
[17] *See, e.g., Nevada Division of Water Resources, California Wash Hydrographic Basin 13-218 Groundwater Pumpage Inventory*, 2017.
[18] *See, e.g., Nevada Division of Water Resources, Muddy River Springs Area (AKA Upper Moapa Valley) Hydrographic Basin 13-219 Groundwater Pumpage Inventory*, 2017.

WHEREAS, NRS § 533.024(1)(e) was added in 2017 to declare the policy of the State to "manage conjunctively the appropriation, use and administration of all waters of this State regardless of the source of the water."

WHEREAS, given that the State Engineer must use the best available science and manage conjunctively the water resources in the LWRFS, consideration of any development of long-term, permanent, uses that could ultimately be curtailed due to water availability will be examined with great caution.

WHEREAS, as demonstrated by the results of the aquifer test, Coyote Spring Valley, Muddy River Springs Area, Hidden Valley, Garnet Valley, California Wash, and the northwestern part of the Black Mountains Area have a direct hydraulic connection, and as a result must be administered as a joint administrative unit, including the administration of all water rights based upon the date of priority of such rights in relation to the priority of rights in the other basins.[19]

WHEREAS, the pre-development discharge of 34,000 acre-feet of the Muddy River system, which is fully appropriated, plus the more than 38,000 acre-feet of groundwater appropriations within the LWRFS greatly exceed the total water budget within the flow system.

WHEREAS, the results from the aquifer test, the data from groundwater level recovery and spring flow, and climate data indicate to the State Engineer that the quantity of water that may be pumped within the LWRFS without conflicting with senior rights on the Muddy River or adversely affecting the habitat of the Moapa dace is less than the quantity pumped during the aquifer test.

WHEREAS, the current amount of pumping corresponds to a period of time in which spring flows have remained relatively stable and have not demonstrated a continuing decline.

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[19] *See, e.g.,* Southern Nevada Water Authority, *Nevada State Engineer Order 1169 and 1169A Study Report*, June 2013; Tom Meyers, Ph.D., *Technical Memorandum Comments on Carbonate Order 1169 Pump Test Data and Groundwater Flow System in Coyote Springs and Muddy River Springs Valley, Nevada*, June 25, 2013; U.S. Fish and Wildlife Service, U.S. Bureau of Land Management and U.S. National Park Service Order 1169A Report, *Test Impacts and Availability of Water Pursuant to Applications Pending Under Order 1169*, June 28, 2013; Johnson and Mifflin, *Summary of Order 1169 Testing Impacts, per Order 1169A*, June 28, 2013; Tetra Tech, *Comparison of Simulated and Observed Effects of Pumping from MX-5 Using Data Collected to the End of the Order 1169 Test, and Prediction of Recovery from the Test*, June 10, 2013, official records in the Office of the State Engineer.

WHEREAS, the precise extent of the development of existing appropriations of groundwater within the LWRFS that may occur without conflicting with the senior rights of the fully decreed Muddy River has not been determined.

WHEREAS, recognizing that there exists a need for further analysis of the historic and ongoing groundwater pumping data, the relationship of groundwater pumping within the LWRFS to spring discharge and flow of the fully decreed Muddy River, the extent of impact of climate conditions on groundwater levels and spring discharge, and the ultimate determination of the sustainable yield of the LWRFS, the State Engineer finds that input by means of reports by the stakeholders in the interpretation of the data from the aquifer test and from the years since the conclusion of the aquifer test is important to fully inform the State Engineer prior to setting a limit on the quantity of groundwater that may be developed in the LWRFS or to developing a long-term Conjunctive Management Plan for the LWRFS and Muddy River.

WHEREAS, the State Engineer finds that it is necessary to carefully monitor the effects of groundwater development within the LWRFS under current conditions, toward the goal of collaboratively (with stakeholders) evaluating the amount of groundwater that may ultimately be developed within the LWRFS without conflicting with senior decreed rights on the Muddy River or adversely affecting the public interest in maintaining the habitat of the endangered Moapa dace. The evaluation process will include public meetings, meetings of a stakeholder representative working group, and coordination with the Hydrologic Review Team (HRT) developed under the 2006 Memorandum of Agreement among the Southern Nevada Water Authority, United States Fish and Wildlife Service, Coyote Springs Investments, Moapa Band of Paiutes, and the Moapa Valley Water District. The process will provide the opportunity for the stakeholders to engage in the development of a conjunctive management plan that will be informed by the determination of the total quantity of groundwater that may be developed within the LWRFS and that will facilitate the continued use of groundwater by junior priority groundwater rights holders whom have perfected their water rights while protecting the senior decreed rights on the Muddy River.

WHEREAS, recognizing that an amount less than the full quantity of the appropriated groundwater rights within the LWRFS may be developed in a manner that will provide for a reasonably certain supply of water for future permanent uses without jeopardizing the economies of the communities reliant on the water supply within the LWRFS, the health and safety of those

whom are either presently reliant the water, existing public interests, or those who may in the future become reliant on a reliable and sustainable source of supply, the State Engineer, with the following exception, finds that it is necessary to issue a temporary moratorium on the review and decision by the Division of Water Resources regarding any final subdivision map or other construction or development submission requiring a finding that adequate water is available to support the proposed development. During the pendency of this Interim Order, the State Engineer may review and grant approval of a subdivision or other submission if a showing of an adequate and sustainable supply of water to meet the anticipated life of the subdivision, other construction or development can be made to the State Engineer's satisfaction.

WHEREAS, through continued monitoring of the LWRFS during the effective period of this Interim Order, the State Engineer seeks to maintain recent groundwater pumping amounts, while providing time for the submission of additional scientific data and analysis regarding the total quantity of water that may be sustainably withdrawn from the LWRFS over the long-term without conflicting with senior Muddy River decreed rights or jeopardizing the communities, water users, or public interests identified above.

WHEREAS, the State Engineer is empowered to make such reasonable rules and regulations as may be necessary for the proper and orderly execution of the powers conferred by law.[20]

WHEREAS, within an area that has been designated by the State Engineer, as provided for in NRS Chapter 534, where, in the judgment of the State Engineer, the groundwater basin is being depleted, the State Engineer in his or her administrative capacity may make such rules, regulations and orders as are deemed essential for the welfare of the area involved.[21]

WHEREAS, the State Engineer finds that additional data relating to the impacts of groundwater pumping from the LWRFS coupled with the public process will allow his office to make a determination as to the appropriate long-term management of groundwater pumping that may occur in the LWRFS by existing holders of water rights without conflicting with existing senior decreed rights or adversely affecting the endangered Moapa dace.

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[20] NRS § 532.120.
[21] *Id.*

VI. ORDER

NOW THEREFORE, the State Engineer orders:

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

2. Any stakeholder with interests that may be affected by water right development within the Lower White River Flow System may file a report in the Office of the State Engineer in Carson City, Nevada, no later than the close of business on Monday, June 3, 2019.[22] Reports filed with the Office of the State Engineer should address the following matters:

    a. The geographic boundary of the hydrologically connected groundwater and surface water systems comprising the Lower White River Flow System;
    b. The information obtained from the Order 1169 aquifer test and subsequent to the aquifer test and Muddy River headwater spring flow as it relates to aquifer recovery since the completion of the aquifer test;
    c. The long-term annual quantity of groundwater that may be pumped from the 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;

[22] For any stakeholder affected by the shut-down of the United States government beginning in December 2018, upon a request and showing of good cause to the satisfaction of the State Engineer, an extension of time may be granted to those affected parties.

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

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

3. Any stakeholder with interests that may be affected by water right development within the Lower White River Flow System may file with the Office of the State Engineer no later than the close of business on Thursday July 18, 2019, a rebuttal to the Reports filed on June 3, 2019.

4. The State Engineer will schedule an administrative hearing within the month of September 2019 to take comment on the submitted reports.

5. During the pendency of this Interim Order:

   a. Permanent applications to change existing groundwater rights shall be held in abeyance pending the submission of the reports as required by Paragraph 2 of this Order and as authorized by NRS §§ 532.165(1), 533.368 and 533.370(4)(d). Temporary applications to change existing groundwater rights will be processed pursuant to NRS § 533.345.

   b. A temporary moratorium is issued regarding any final subdivision or other submission concerning development and construction submitted to the State Engineer for review, and such submissions shall be held in abeyance pending the conclusion of the public process to determine the total quantity of groundwater that may be developed within the Lower White River Flow System. The State Engineer may review and grant approval of a subdivision or other submission if a showing of an adequate and sustainable supply of water to meet the anticipated life of the subdivision, other construction or development can be made to the State Engineer's satisfaction.

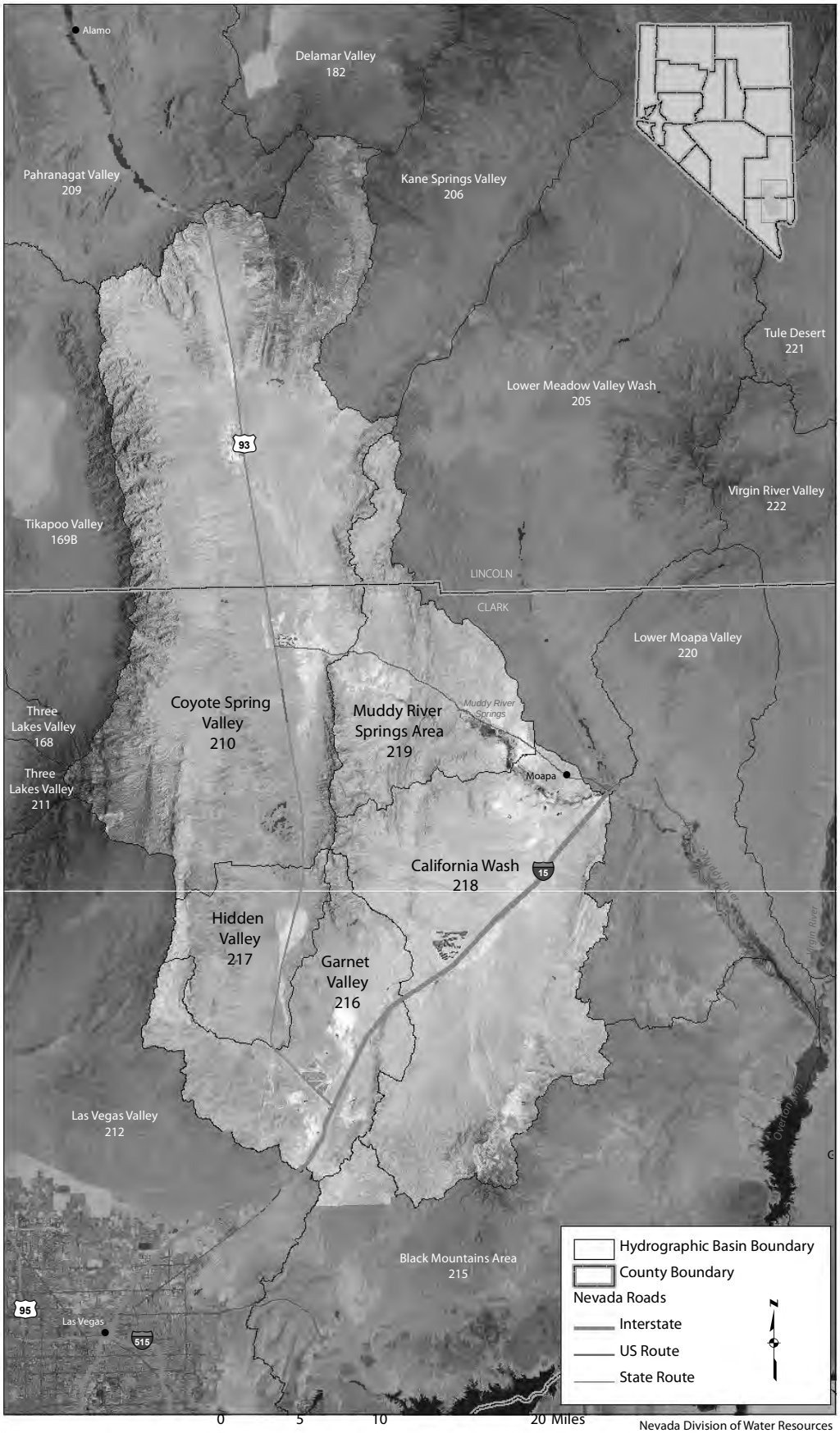
c. Holders of water rights who maintain their water rights in good standing by filing all required applications for extension of time in conformity with the requirements of NRS §§ 533.390, 533.395 and 533.410 may cite this order in support of their applications for extension of time.

d. Holders of water rights who file all required applications for extension of time in conformity with the requirements of NRS § 534.090 may cite this order in support of their applications for extension of time to prevent the working of a forfeiture.

JASON KING, P.E.
State Engineer

Dated at Carson City, Nevada this
11TH day of JANUARY, 2019.

Coyote Spring Valley, Muddy River Springs Area, Hidden Valley, Garnet Valley, California Wash, and a portion of Black Mountains Area



Summer 2017 imagery from the National Agriculture Imagery Program

Nevada Division of Water Resources
Office of the State Engineer
Jason King, P.E.
State Engineer

Order 1303, APPENDIX B: Groundwater Pumping in the Lower White River Flow System, 2007–2017

Basin No.	219				215		210	216	218	217	Total pumping in the LWRFS
Basin Name	Muddy River Springs Area				Black Mountains Area		Coyote Spring Valley	Garnet Valley	California Wash	Hidden Valley	
Year	Carbonate pumping (reported by MVWD)	Alluvial pumping (reported by NV Energy)	All other Alluvial Pumping[1]	Total Pumping in Basin 219[1]	Carbonate pumping in the Northwest Portion of Basin 215	Total Pumping in Basin 215					
2007	2,079	4,744	253	7,076	1,585	1,732	3,147	1,412	27[2]	0	**13,247**
2008	2,272	4,286	253	6,811	1,591	1,759	2,000	1,552	27[2]	0	**11,981**
2009	2,034	4,092	253	6,379	1,137	1,159	1,792	1,427	21[3]	0	**10,756**
2010	1,826	4,088	253	6,167	1,561	1,572	2,923	1,373	26[3]	0	**12,050**
2011	1,837	4,212	253	6,302	1,398	1,409	5,606	1,427	33[3]	0	**14,766**
2012	2,638	2,961	253	5,852	1,556	1,564	5,516	1,351	28[3]	0	**14,303**
2013	2,496	3,963	253	6,712	1,585	1,776	3,407	1,484	66[3]	0	**13,254**
2014	1,442	4,825	253	6,520	1,429	1,624	2,258	1,568	241[3]	0	**12,016**
2015	2,396	1,249	253	3,898	1,448	1,708	2,064	1,520	460	0	**9,390**
2016	2,795	941	312	4,048	1,434	1,641	1,722	2,181	252	0	**9,637**
2017	2,824	535	194	3,553	1,507	1,634	1,961	1,981	88	0	**9,090**

The LWRFS includes basins 210, 216, 217, 218, 219 and the northwest portion of 215.

All values in this table are from State Engineer basin pumpage inventory reports except as noted in the footnotes below:

1. Alluvial Pumping not reported by NV Energy for years 2007–2015 estimated as the average of inventoried years 2016–2017.
2. Estimated as the average of groundwater pumping in years 2009–2012.
3. Reported to the State Engineer but not published in a basin inventory report.

EXHIBIT 4

EXHIBIT 4

EXHIBIT 4

IN THE OFFICE OF THE STATE ENGINEER
OF THE STATE OF NEVADA

#1309

ORDER

DELINEATING THE LOWER WHITE RIVER FLOW SYSTEM HYDROGRAPHIC BASIN WITH THE KANE SPRINGS VALLEY BASIN (206), COYOTE SPRING VALLEY BASIN (210), A PORTION OF BLACK MOUNTAINS AREA BASIN (215), GARNET VALLEY BASIN (216), HIDDEN VALLEY BASIN (217), CALIFORNIA WASH BASIN (218), AND MUDDY RIVER SPRINGS AREA (AKA UPPER MOAPA VALLEY) BASIN (219) ESTABLISHED AS SUB-BASINS, ESTABLISHING A MAXIMUM ALLOWABLE PUMPING IN THE LOWER WHITE RIVER FLOW SYSTEM WITHIN CLARK AND LINCOLN COUNTIES, NEVADA, AND RESCINDING INTERIM ORDER 1303

Table of Contents

I. BACKGROUND OF THE ADMINISTRATION OF THE LOWER WHITE RIVER FLOW SYSTEM BASINS

WHEREAS, the State Engineer has actively managed and regulated the Coyote Spring Valley Hydrographic Basin (Coyote Spring Valley), Basin 210, since August 21, 1985; the Black Mountains Area Hydrographic Basin (Black Mountains Area), Basin 215, since November 22, 1989; the Garnet Valley Hydrographic Basin (Garnet Valley), Basin 216, since April 24, 1990; the Hidden Valley Hydrographic Basin (Hidden Valley), Basin 217, since April 24, 1990; the California Wash Hydrographic Basin (California Wash), Basin 218, since April 24, 1990; and the

Muddy River Springs Area Hydrographic Basin (Muddy River Springs Area), Basin 219, since July 14, 1971.[1]

WHEREAS, in 1984, the United States Department of Interior, Geological Survey (USGS), Water Services Division, proposed a ten-year investigation into carbonate-rock aquifers that underlay approximately 50,000 square miles of eastern and southern Nevada.[2] In 1985, a program for the study and testing of the carbonate-rock aquifer system of eastern and southern Nevada was authorized by the Nevada Legislature. In 1989, a report was published by the USGS summarizing the first phase of the study.[3] Included in the summary was a determination that:

> Large-scale development (sustained withdrawals) of water from the carbonate-rock aquifers would result in water-level declines and cause the depletion of large quantities of stored water. Ultimately, these declines would cause reductions in the flow of warm-water springs that discharge from the regional aquifers. Storage in other nearby aquifers also might be depleted, and water levels in those other aquifers could decline. In contrast, isolated smaller ground-water developments, or developments that withdraw ground water for only a short time, may result in water-level declines and springflow reductions of manageable or acceptable magnitude.
>
> Confidence in predictions of the effects of development, however, is low; and it will remain low until observations of the initial hydrologic results of development are analyzed. A strategy of staging developments gradually and adequately monitoring the resulting hydrologic conditions would provide information that eventually could be used to improve confidence in the predictions.[4]

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[1] *See* NSE Ex. 9, *Order 905*, Hearing on Interim Order 1303, official records of the Division of Water Resources. *See* NSE Ex. 8, *Order 1018*, Hearing on Interim Order 1303, official records of the Division of Water Resources. *See* NSE Ex. 5, *Order 1025*, Hearing on Interim Order 1303, official records of the Division of Water Resources. *See* NSE Ex. 6, *Order 1024*, Hearing on Interim Order 1303, official records of the Division of Water Resources. *See* NSE Ex. 4, *Order 1026*, Hearing on Interim Order 1303, official records of the Division of Water Resources. *See* NSE Ex. 7, *Order 1023,* Hearing on Interim Order 1303, official records of the Division of Water Resources; NSE Ex. 11, *Order 392,* Hearing on Interim Order 1303, official records of the Division of Water Resources.

[2] Memorandum dated August 3, 1984, from Terry Katzer, Nevada Office Chief, Water Resources Division, United States Department of Interior Geologic Survey, Carson City, Nevada to Members of the Carbonate Terrane Study.

[3] Michael D. Dettinger, *Distribution of Carbonate-Rock Aquifers in Southern Nevada and the Potential for their Development, Summary of Findings, 1985-1988*, Summary Report No. 1, U.S. Geological Survey, Department of Interior and Desert Research Institute, University of Nevada System, 1989, p. Forward. *See also* NSE Ex. 3, *Order 1169*, Hearing on Interim Order 1303, official records of the Division of Water Resources.

[4] *Id.*, p. 2.

WHEREAS, beginning in 1989 and through the early 2000s, numerous groundwater applications were filed in Coyote Spring Valley, Black Mountains Area, Garnet Valley, Hidden Valley, California Wash, and Muddy River Springs Area Hydrographic Basins seeking to appropriate more than 300,000 acre-feet annually (afa) of groundwater from the carbonate-rock aquifer underlying these basins.[5] The State Engineer held a hearing on July 12-20, 23-24, and August 31, 2001, for pending Applications 54055–54059, filed by Las Vegas Valley Water District (LVVWD) to appropriate 27,510 afa of water in Coyote Spring Valley.[6] The State Engineer conducted a hearing on Coyote Springs Investments LLC (CSI) Applications 63272–63276 on August 20-24, 27-28, 2001.[7]

WHEREAS, following the conclusions of these hearings, the State Engineer issued Order 1169 on March 8, 2002, requiring all pending applications in Coyote Spring Valley, Black Mountains Area, Garnet Valley, Hidden Valley, Muddy River Springs Area, and Lower Moapa Valley Hydrographic Basin (Basin 220), be held in abeyance pending an aquifer test of the carbonate-rock aquifer system to better determine whether the pending applications and future appropriations could be developed from the carbonate-rock aquifer.[8]

WHEREAS, in Order 1169, the State Engineer found that he did not believe that it was prudent to issue additional water rights to be pumped from the carbonate-rock aquifer until a significant portion of the then existing water rights were pumped for a substantial period of time to determine whether the pumping of those water rights would have a detrimental impact on existing water rights or the environment.[9]

WHEREAS, Order 1169 required that at least 50%, or 8,050 afa, of the water rights then currently permitted in Coyote Spring Valley be pumped for at least two consecutive years.[10] On April 18, 2002, the State Engineer added the California Wash to the Order 1169 aquifer test basins.[11]

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[5] *See* NSE Exs. 14–20, *Ruling 6254–Ruling 6260*, Hearing on Interim Order 1303, official records of the Division of Water Resources.
[6] *See* NSE Ex. 14.
[7] *Id.*
[8] *See* NSE Ex. 3.
[9] *Id.*
[10] *Id.*
[11] *See* State Engineer's Ruling 5115, dated April 18, 2002, official records of the Division of Water Resources.

WHEREAS, subsequent to the issuance of Order 1169, the United States Fish and Wildlife Service (USFWS) expressed concern that current groundwater pumping coupled with additional groundwater withdrawals in Coyote Spring Valley and California Wash may cause reduction of spring flow to the Warm Springs area, tributary thermal springs in the upper Muddy River, which serves as critical habitat to the Moapa dace (*Moapa corciacea*), an endemic fish species federally listed as endangered in 1967.[12] Due to these concerns, on April 20, 2006, the Southern Nevada Water Authority (SNWA), USFWS, CSI, the Moapa Band of Paiute Indians (MBOP) and the Moapa Valley Water District (MVWD) entered into a Memorandum of Agreement (MOA).[13]

WHEREAS, the MOA stated that all the parties shared "a common interest in the conservation and recovery of the Moapa dace and its habitat." The MOA established certain protections to the Moapa dace, including protocols relating to pumping from the regional carbonate-rock aquifer that may adversely impact spring flow to the dace habitat in the Warm Springs area. Specifically, the MOA identified conservation measures, which included protections for minimum instream flows in the Warm Springs area with trigger levels set at 3.2 cubic feet per second (cfs) at the Warm Springs West gage requiring initial action by the MOA parties, and the most stringent action required at a flow rate of 2.7 cfs.[14]

WHEREAS, the MBOP raised concerns that pumping 8,050 afa from the Coyote Spring Valley as part of the aquifer test would adversely impact the water resources at the Warm Springs area, and consequently the Moapa dace, and that the impacts would persist such that protective measures established in the MOA would be inadequate to protect the dace.[15] As a result, the Order 1169 study participants, which included the LVVWD, SNWA, CSI, Nevada Power Company,[16] MVWD, Dry Lake Water Company, LLC, Republic Environmental Technologies, Inc. (Republic),

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[12] USFWS, *Fish and Aquatic Conservation - Moapa dace*, https://bit.ly/moapadace (last accessed June 3, 2020). *See also* SNWA Ex. 8, p. 1-1.

[13] *See* NSE Ex. 236, *2006 Memorandum of Agreement between the Southern Nevada Water Authority, United States Fish and Wildlife Service, Coyote Springs Investment LLC, Moapa Band of Paiute Indians and Moapa Valley Water District*, Hearing on Interim Order 1303, official records of the Division of Water Resources.

[14] *Id.*

[15] *See* May 26, 2010, letter from Darren Daboda, Chairperson, Moapa Band of Paiutes, to Jason King, Nevada State Engineer, official records of the Division of Water Resources.

[16] Nevada Power Company, following the merger with Sierra Pacific Power Company and Sierra Pacific Resources subsequently began doing business as NV Energy. *See, e.g.*, NV Energy, *Company History*, https://bit.ly/NVEhistory (last accessed April 20, 2020).

Chemical Lime Company, Nevada Cogeneration Associates, and the MBOP, or their successors, agreed that even if the minimum 8,050 afa was not pumped, sufficient information would be obtained to inform future decisions relating to the study basins.[17]

WHEREAS, on November 15, 2010, the Order 1169 aquifer test began, whereby the study participants began reporting to the Nevada Division of Water Resources (Division) on a quarterly basis the amounts of water pumped from wells in the carbonate-rock and alluvial aquifers during the pendency of the aquifer test.

WHEREAS, on December 21, 2012, the State Engineer issued Order 1169A declaring the completion of the Order 1169 aquifer test to be December 31, 2012, after a period of 25½ months. The State Engineer provided the study participants the opportunity to file reports with the Division until June 28, 2013, to present information gained from the aquifer test in order to estimate water to support applications in the Order 1169 study basins.[18]

WHEREAS, during the Order 1169 aquifer test, an average of 5,290 acre-feet per year (afy) was pumped from carbonate-rock aquifer wells in Coyote Spring Valley, and a cumulative reported total of 14,535 afy of water was pumped throughout the Order 1169 study basins. Of this total, approximately 3,840 afy was pumped from the Muddy River Springs Area alluvial aquifer with the balance pumped from the carbonate-rock aquifer.[19]

WHEREAS, during the aquifer test, pumpage was measured and reported from 30 other wells in the Coyote Spring Valley, Muddy River Springs Area, Garnet Valley, California Wash, Black Mountains Area, and Lower Meadow Valley Wash Hydrographic Basin (Lower Meadow Valley Wash). Stream diversions from the Muddy River were reported, and measurements of the natural discharge of the Muddy River and from the Warm Springs area springs were collected daily. Water-level data were collected from a total of 79 monitoring and pumping wells within the Order 1169 study basins. All of the data collected during the aquifer test were made available to each of the study participants and the public.[20]

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[17] *See* July 1, 2010, letter from Jason King, Nevada State Engineer, to Order 1169 Study Participants, official records of the Division of Water Resources.
[18] *See* NSE Ex. 2, *Order 1169A*, Hearing on Interim Order 1303, official records of the Division of Water Resources.
[19] *See, e.g.*, NSE Ex. 1, Appendix B.
[20] *See* Division, *Water Use and Availability – Order 1169*, https://bit.ly/Order1169

WHEREAS, during the Order 1169 aquifer test, the resulting water-level decline encompassed 1,100 square miles and extended from southern Kane Springs Valley, northern Coyote Spring Valley through the Muddy River Springs Area, Hidden Valley, Garnet Valley, California Wash, and the northwestern portion of the Black Mountains Area.[21] The water-level decline was estimated to be 1 to 1.6 feet throughout this area with minor drawdowns of 0.5 foot or less in the northern portion of Coyote Spring Valley north of the Kane Springs Wash fault zone.[22]

WHEREAS, results of the two-year aquifer test demonstrated that pumping 5,290 afa from the carbonate-rock aquifer in Coyote Spring Valley, in addition to the other carbonate-rock aquifer pumping in Garnet Valley, Muddy River Springs Area, California Wash and the northwest portion of the Black Mountains Area, caused sharp declines in groundwater levels and flows in the Pederson and Pederson East springs, two springs considered to be sentinel springs for the overall condition of the Muddy River due to being higher in altitude than other Muddy River source springs, and therefore are proportionally more affected by a decline in groundwater level in the carbonate-rock aquifer.[23] The Pederson spring flow decreased from 0.22 cfs to 0.08 cfs and the Pederson East spring flow decreased from 0.12 cfs to 0.08 cfs. Additional headwater springs at lower altitude, the Baldwin and Jones springs, declined approximately 4% in spring flow during the test.[24] All of the headwater springs contribute to the decreed and fully-appropriated Muddy River and are the predominant source of water that supplies the habitat of the endangered Moapa dace.

WHEREAS, Order 1169A provided the study participants an opportunity to submit reports addressing three specific questions presented by the State Engineer: (1) what information was obtained from the study/pumping test; (2) what were the impacts of pumping under the pumping test; and, (3) what is the availability of additional water resources to support the pending applications. SNWA, USFWS, National Park Service (NPS) and Bureau of Land Management

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[21] USFWS Ex. 5, *Report in Response to Order 1303*, Hearing on Interim Order 1303, official records of the Division of Water Resources, pp. 21, 67. *See, e.g.*, NSE Ex. 14. *See also* NSE Ex. 256, *Federal Bureaus Order 1169A Report*, Hearing on Interim Order 1303, official records of the Division of Water Resources. There was no groundwater pumping in Hidden Valley, but effects were still observed in the Hidden Valley monitor well.

[22] *See, e.g.*, NSE Ex. 14. *See also* NSE Ex. 256.

[23] *See* NSE Ex. No. 236.

[24] NSE Ex. 256, pp. 43–46, 50–51. *See also,* USGS, *Water Data for Nevada,* https://bit.ly/nvwater.

(BLM), MBOP, MVWD, CSI, Great Basin Water Network (GBWN) and Center for Biological Diversity (CBD) submitted either reports or letters.

WHEREAS, in its report, SNWA addressed water levels throughout the Order 1169 basins. SNWA acknowledged that hydrologic connectivity supported the potential need for redistribution of existing pumping, and indirectly acknowledged the limitation on availability of water to satisfy the pending applications.[25] SNWA further acknowledged declines to spring flow in the Pederson and Pederson East springs as a result of the aquifer test, but characterized the decline in spring flow at the Warm Springs West location as minimal. SNWA further correlated the declining trends as associated with climate but opined that Muddy River flow did not decline as a result of the aquifer test and carbonate-rock aquifer pumping; rather, impact to Muddy River flows were due to alluvial aquifer pumping.[26]

WHEREAS, CSI, through a letter, agreed with SNWA's report and asserted that additional water resources could be developed within the Coyote Spring Valley north of the Kane Springs Fault, which supported granting new appropriations of water.[27]

WHEREAS, the United States Department of Interior Bureaus (USFWS, NPS and BLM) concluded that the aquifer test provided sufficient data to determine the effects of the aquifer drawdown as well as identify drawdown throughout the region and was sufficient to project future pumping effects on spring flow. Based upon their analysis, the Department of Interior Bureaus concluded that water-level declines due to the aquifer test encompassed 1,100 square miles throughout the Order 1169 study basins. Additionally, the Department of Interior Bureaus' analysis found a direct correlation between the aquifer test pumping and flow declines at Pederson, Plummer and Apcar units and Baldwin Spring, all springs critical to the Moapa dace habitat, and asserted that pumping at the Order 1169 rate at well MX-5 in Coyote Spring Valley could result in both of the high-altitude Pederson and Pederson East springs going dry in 3 years or less.[28]

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[25] *See* NSE Ex. 245, *Southern Nevada Water Authority Order 1169 Report*, Hearing on Interim Order 1303, official records of the Division of Water Resources, pp. 23–25.
[26] *Id.*
[27] NSE Ex. 247, *Coyote Springs Investments, LLC Order 1169 Report*, Hearing on Interim Order 1303, official records of the Division of Water Resources.
[28] *See, e.g.*, NSE Ex. 14, pp.15–18. *See also* NSE Ex. 256.

WHEREAS, the Department of Interior Bureaus further found that the groundwater withdrawals that occurred in Coyote Spring Valley during the Order 1169 aquifer test represented approximately one-third of the then existing water rights within Coyote Spring Valley, concluding that even one-third of the existing water rights could not be developed without adversely impacting spring flow to the headwaters of the Muddy River and habitat for the Moapa dace.[29] Ultimately, the Department of Interior Bureaus concluded that there was insufficient water available for the pending applications, and that the area that was subject to the Order 1169 aquifer test behaved as one connected aquifer and pumping in one basin would have similar effects on the whole aquifer.[30]

WHEREAS, MBOP's report disagreed with the magnitude of drawdown resulting from the Order 1169 aquifer test, but ultimately concluded carbonate-rock aquifer pumping in Coyote Spring Valley and the Muddy River Springs Area would have a one-to-one impact on Muddy River flows.[31] MBOP opined to the existence of a southern flow field, which included California Wash, Hidden Valley, Garnet Valley, and the northwest portion of the Black Mountains Area, that could be developed without depleting spring flows. MBOP also argued that changes in the groundwater levels were directly tied to water level declines in Lake Mead.[32]

WHEREAS, MVWD's report was limited to water levels and flows within the Muddy River Springs Area. In its report, MVWD acknowledged the groundwater level declines resulting from the aquifer test, including decreased spring flow at the Pederson springs, Warm Springs West gage and Baldwin Spring, but not at Jones Spring or Muddy Spring.[33] Ultimately, MVWD concluded that additional water was available in the Lower Moapa Valley, as that aquifer did not appear hydrologically connected to the regional carbonate-rock aquifer.

WHEREAS, GBWN presented a report that recognized the decline in the groundwater levels in Coyote Spring Valley and discharge to the Muddy River Springs Area resulting from the

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[29] *Id.*
[30] *Id.*
[31] *See* NSE Ex. 252, *Moapa Band of Paiute Indians Order 1169 Report*, Hearing on Interim Order 1303, official records of the Division of Water Resources, p. 25.
[32] *Id.*
[33] NSE Ex. 250, *Moapa Valley Water District Basin 220 Well Site Analysis*, Hearing on Interim Order 1303, official records of the Division of Water Resources; NSE Ex. 251, *Moapa Valley Water District Evaluation of MX-5 Pumping Test on Springs and Wells in the Muddy Springs Area,* dated June 24, 2013, Hearing on Interim Order 1303, official records of the Division of Water Resources.

aquifer test.[34] However, GBWN believed that the aquifer test failed to provide sufficient data to determine water availability throughout the other study basins. GBWN did assert that pumping of existing rights within all of the study basins would unacceptably decrease spring discharge.[35]

WHEREAS, CBD, relying on GBWN's technical report, opined that pumping existing water rights within the Order 1169 study basins would result in unacceptable decline in spring flow, ultimately threatening the Moapa dace and the habitat necessary for the species survival.[36]

WHEREAS, based upon the findings of the Order 1169 aquifer test, in denying the pending applications the State Engineer found: (1) that the information obtained from the Order 1169 aquifer test was sufficient to document the effects of pumping from the carbonate-rock aquifer on groundwater levels and spring flow and that the information could assist in forming opinions regarding future impacts of groundwater pumping and availability of groundwater in the study basins; (2) that the impacts of aquifer test pumping in Coyote Spring Valley was widespread throughout the Order 1169 aquifer test study basins and that the additional pumping in Coyote Spring Valley was a significant contributor to the decline in the springs that serve as the headwaters of the Muddy River and habitat for the Moapa dace; and, (3) that additional pumping from the then pending applications would result in significant regional water-level decline, and decreases in spring and Muddy River flows.[37]

WHEREAS, the basins that were included in the Order 1169 aquifer test were acknowledged to have a unique hydrologic connection and share the same supply of water.[38] The State Engineer further went on to find that the total annual supply to the basins could not be more than 50,000 acre-feet, that the perennial yield is much less than that because the Muddy River and the springs in the Warm Springs area utilize the same supply, and that the quantity and location of

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[34] NSE Ex. 246, *Great Basin Water Network Order 1169 Report*, Hearing on Interim Order 1303, official records of the Division of Water Resources.
[35] *Id.*
[36] NSE Ex. 248, *Center for Biological Diversity Order 1169 Report*, Hearing on Interim Order 1303, official records of the Division of Water Resources.
[37] NSE Exs. 14–21. The study basins include Coyote Spring Valley, Garnet Valley, Hidden Valley, Muddy River Springs Area, California Wash, and that portion of the Black Mountains Area lying within the LWRFS was defined as those portions of Sections 29, 30, 31, 32, and 33, T.18S., R.64E., M.D.B.&M.; Section 13 and those portions of Sections 1, 11, 12, and 14, T.19S., R.63E., M.D.B.&M.; Sections 5, 7, 8, 16, 17, and 18 and those portions of Sections 4, 6, 9, 10, and 15, T.19S., R.64E., M.D.B.&M.
[38] *See, e.g.*, NSE Ex. 14, p. 24.

any groundwater that could be developed without conflicting with senior rights on the Muddy River and the springs was uncertain.[39]

II. INTERIM ORDER 1303

WHEREAS, on January 11, 2019, the State Engineer issued Interim Order 1303 designating the Lower White River Flow System (LWRFS), a multi-basin area known to share a close hydrologic connection, as a joint administrative unit for purposes of administration of water rights. The Interim Order defined the LWRFS to consist of the Coyote Spring Valley, Muddy River Springs Area, California Wash, Hidden Valley, Garnet Valley, and the portion of the Black Mountains Area Hydrographic Basins as described in the Interim Order.[40] Pursuant to Interim Order 1303, all water rights within the LWRFS were to be administered based upon their respective dates of priority in relation to other rights within the regional groundwater unit.

WHEREAS Interim Order 1303 recognized the need for further analysis of the LWRFS because the pre-development discharge of 34,000 acre-feet of the Muddy River system plus the more than 38,000 acre-feet of existing groundwater appropriations within the LWRFS greatly exceed the total water budget, which was determined to be less than 50,000 acre-feet.[41] Stakeholders with interests in water right development within the LWRFS were invited to file a report with the Office of the State Engineer addressing four specific matters, generally summarized as: 1) The geographic boundary of the LWRFS, 2) aquifer recovery subsequent to the Order 1169 aquifer test, 3) the long-term annual quantity and location of groundwater that may be pumped from the LWRFS, and 4) the effect of movement of water rights between alluvial and carbonate wells within the LWRFS. Stakeholders were also invited to address any other matter believed to be relevant to the State Engineer's analysis.

WHEREAS, on May 13, 2019, the State Engineer amended Interim Order 1303 modifying the deadlines for the submission of reports and rebuttal reports by interested stakeholders. Reports

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[39] *Id.*
[40] *See* NSE Ex. 1, *Order 1303 and Addendum to Interim Order 1303*, Hearing on Interim Order 1303, official records of the Division of Water Resources.
[41] *Id.*, p. 7.

submitted by interested stakeholders were intended to aid in the fact-finding goals of the Division.[42]

WHEREAS, a public hearing was held in Carson City, Nevada between, September 23, 2019, and October 4, 2019. The purposes of this hearing were to afford stakeholder participants who submitted reports pursuant to the solicitation in Interim Order 1303 an opportunity to provide testimony on the scientific data analysis regarding the five topics within the Interim Order and to test the conclusions offered by other stakeholder participants.

WHEREAS, during the Interim Order 1303 hearing, testimony was provided by expert witnesses for the participants CSI, USFWS, NPS, MBOP, SNWA and LVVWD[43], MVWD, Lincoln County Water District and Vidler Water Company (LC-V), City of North Las Vegas (CNLV), CBD, Georgia Pacific Corporation (Georgia Pacific) and Republic, Nevada Cogeneration Associates Nos. 1 and 2 (collectively "NCA"), Muddy Valley Irrigation Company (MVIC), Western Elite Environmental, Inc. and Bedroc Limited, LLC (collectively "Bedroc"), and NV Energy.

WHEREAS, following the conclusion of the Interim Order 1303 hearing, stakeholder participants were permitted to submit written closing statements no later than December 3, 2019. The specific area evaluated, data analyzed, and methodology used varied by participant. Generally, participants relied on spring and streamflow discharge, groundwater level measurements, geologic and geophysical information, pumping data, climate data, and interpretations of aquifer hydraulics. Methodologies applied ranged from conceptual observations to statistical analysis to numerical and analytical models; the level of complexity and uncertainty differing for each.

WHEREAS, each of the participants' conclusions with respect to the topics set forth in Interim Order 1303 are summarized as follows:

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[42] *Id.*, pp. 16–17.

[43] SNWA is a regional water authority with seven water and wastewater agencies, one of which is LVVWD. References to SNWA include its member agency, LVVWD, which too retains water rights and interests within the LWRFS.

Center for Biological Diversity

The primary concern of the CBD was to ensure adequate habitat for the survival and recovery of the Moapa dace. CBD felt "that the Endangered Species Act is the primary limiting factor on the overall quantity of allowable pumping within the [LWRFS] and thus [...] geared [the] analysis toward that goal of protecting the dace." The Moapa dace primarily resides in the springs and pools of the Muddy River; protecting those areas of habitat are of the utmost importance to CBD's goal and have the collateral benefit of protecting the Muddy River decreed rights. Furthermore, CBD "believe[d] that withdrawals from the carbonate aquifer that cause a reduction in habitat quantity for the dace are a take under the Endangered Species Act and thus prohibited."[44]

CBD urges that Kane Springs Valley Hydrographic Basin (Kane Springs Valley) be included and managed as part of the LWRFS; otherwise CBD did not dispute the boundary as presented in Interim Order 1303. The inclusion of Kane Springs Valley was based on a shallow hydraulic gradient between Coyote Spring Valley and Kane Springs Valley; propagation of water level decline into Kane Springs Valley during the Order 1169 aquifer test; and a finding that the carbonate-rock aquifer extends into Kane Springs Valley. In CBD's opinion, adequate management of the LWRFS does not require that the administrative boundary include the White River Flow System north of Coyote Spring Valley.[45]

CBD identified a long-term, declining trend commencing in the 1990s in carbonate-rock aquifer water levels within the Muddy River Springs Area, which was accelerated by the Order 1169 aquifer test. Although CBD observed a partial, immediate recovery in the carbonate-rock aquifer water levels and spring flows, CBD finds that full recovery to pre-Order 1169 aquifer test conditions were never realized. Concurring with multiple other participants, CBD identified higher water levels in response to wet years despite the continued decline in the overall trend in the hydrographs. However, with regards to long-term drought, in their review of the Climate Division Data for southern Nevada, CBD saw no indication of a 20-year drought and disagreed with the conclusions and analysis presented by MBOP. Decreased spring flows in conjunction with

[44] *See* CBD Ex. 3, *CBD Order 1303 Report by Dr. Tom Myers; 27 pp.*, Hearing on Interim Order 1303, official records of the Division of Water Resources, p. 1; Transcript 1504–1505.
[45] *See* CBD Ex. 3, pp. 1, 2, 12, 17, 19; *See* CBD Ex. 4, *CBD Order 1303 Rebuttal in Response to Stakeholder Reports by Dr. Tom Myers; 30 pp.*, Hearing on Interim Order 1303, official records of the Division of Water Resources, pp. 17–21; Tr. 1516; 1520–1521; 1526–1527; 1538–1539; CSI Ex. 2, p. 38; LC-V Ex. 2, pp. 11–14.

increased carbonate-rock aquifer pumping, led the CBD to infer the dependency of spring flows on carbonate-rock aquifer water supply.[46]

Again, with emphasis on protecting spring flows, and thus the Moapa dace habitat, CBD did not support any pumping of the carbonate-rock aquifer. CBD's desired outcome would be to avoid decreases in spring flow in the Warm Springs area attributed to continued carbonate-rock aquifer pumping. CBD postulated that surface water rights on the Muddy River will be protected by limiting carbonate-rock aquifer pumping.

Alternatively, CBD speculated that some alluvial aquifer pumping, within the Muddy River Springs Area and Coyote Spring Valley, could be sustained without significantly impacting the Warm Springs area. A preliminary estimate of 4,000 afa of sustainable alluvial aquifer pumping was proposed, based on the existing pumping within the Muddy River Springs Area and considering pumping in the 1990s near 5,000 afa when alluvial aquifer water levels were stable.[47]

Church of Jesus Christ of Latter-day Saints

The Church of Jesus Christ of Latter-day Saints (the Church) chose not to directly participate in the hearing but joined the evidentiary submissions of CNLV.[48] In response to the directives set forth in Interim Order 1303 and considering the testimony provided, the Church requests the continued administration and management of the LWRFS as identified in Interim Order 1303, and to allow for change applications throughout the LWRFS basins that move pumping of groundwater further away from the Muddy River Springs Area and from the alluvial aquifer to the carbonate-rock aquifer. The Church further requests that the testimony and recommendation of Dwight Smith, PE, PG on behalf of CNLV be considered and adopted.[49]

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[46] *See* CBD Ex. 3, pp. 1, 24; *See* CBD Ex. 4, p. 8–10, 21–25; Tr. 1508–1525; LC-V Ex. 2, p. 12, GP-REP Ex. 2, p. 3; CBD's expert suggest that the Palmer Drought Severity Index is more robust to evaluate for drought rather than using precipitation.
[47] *See* CBD Ex. 3, pp. 20–26; *See* CBD Ex. 4, p. 28–29; Tr. 1525-1528.
[48] *See* Letter from the Church, received August 15, 2019, Hearing on Interim Order 1303, official records of the Division of Water Resources.
[49] *See Closing Brief of the Church of Jesus Christ of Latter-Day Saints* (Church closing), Hearing on Interim Order 1303, official records of the Division of Water Resources.

City of North Las Vegas

In CNLV's report submissions and closing statement it addressed four questions set forth in Interim Order 1303.[50] CNLV generally urges for more analysis and study of the LWRFS before administrative decisions are made due to lack of agreement on fundamental interpretations of the water availability and basin connectivity. It was agreed to by CNLV that most of Garnet Valley and a small portion of the Black Mountains area were within the larger carbonate-rock aquifer underlying the LWRFS basins, but that there is uncertainty in the boundaries of Garnet Valley with California Wash and Las Vegas Valley Hydrographic Basin (Las Vegas Valley).[51] With respect to the recovery of the groundwater aquifer following the Order 1169 aquifer test, CNLV concluded that the record and evidence demonstrates a long-term declining trend in the groundwater level since the late 1990s and that pumping responses can propagate relatively quickly through the carbonate-rock aquifer and drawdown is directly related to the pumping.[52]

While CNLV did consider the long-term quantity of groundwater that may be developed without adversely impacting discharge to the Warm Springs area, its opinions were limited to the sustainability of pumping within Garnet Valley.[53] CNLV concluded that the safe yield concept should be applied to the management of pumping within the LWRFS and that pumping between 1,500 afa to 2,000 afa does not appear to be causing regional drawdown within the LWRFS carbonate-rock aquifer and that pumping this quantity of water may be sustainable within the APEX Industrial Park area of Garnet Valley.[54] Finally, CNLV asserted that movement of alluvial water rights from the Muddy River Springs Area along the Muddy River would reduce the capture

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[50] *See* CNLV Ex. 5, *City of North Las Vegas Utilities Department: Interim Order 1303 Report Submittal from the City of North Las Vegas – July 2, 2019*, Hearing on Interim Order 1303, official records of the Division of Water Resources. *See* CNLV Ex. 6, *Rebuttal Document submitted on behalf of the City of North Las Vegas, to Interim Order 1303 Report Submittals of July 3, 2019 – Prepared by Interflow Hydrology – August 2019*, Hearing on Interim Order 1303, official records of the Division of Water Resources. *See* Tr. 1416–66, and *City of North Las Vegas' Closing Statement* (CNLV Closing), Hearing on Interim Order 1303, official records of the Division of Water Resources.

[51] *See* CNLV Ex. 5, pp. 2–3. *See also* CNLV Ex. 3, *Garnet Valley Groundwater Pumping Review for APEX Industrial Complex, City of North Las Vegas, Clark County, Nevada- Prepared by Interflow Hydrology, Inc.- July 2019*, pp. 7–8, 38.

[52] *Id.*, p. 3, Technical Memo, pp. 14–16.

[53] *Id.*, pp. 3–4.

[54] *Id.*, p. 4., Technical Memo, p. 45.

of Muddy River flow, move more senior water rights into Garnet Valley to support a secure water supply for the municipal uses within the APEX area, and would support overall objectives relating to the management of the LWRFS.[55] CNLV advocated that transferring water rights between alluvial aquifer and carbonate-rock aquifer should be considered on a case-by-case basis with consideration given as to location, duration, and magnitude of pumping.[56]

CNLV disagreed with certain conclusions of the NPS relating to the inclusion of the entirety of the Black Mountains Area within the LWRFS boundaries and had concerns relating to the reliability of the Tetra Tech model for future water resource management within the LWRFS.[57] CNLV further disagreed with stakeholder conclusions that movement of groundwater withdrawals from the alluvial aquifer along the Muddy River to the carbonate-rock aquifer in Garnet Valley will not alleviate the conflicts to Muddy River flow, rather concluding that there may be benefits for overall management of the LWRFS.[58] Further, CNLV disagreed with certain findings regarding water flow through the carbonate-rock aquifer, finding that it is likely that some groundwater can be pumped within Garnet Valley without capturing groundwater that would otherwise discharge to the Warm Springs area and the Muddy River.[59] Finally, in its rebuttal the CNLV joined other stakeholders in supporting the conclusion that there is a quantity of water that may be sustainably developed within the LWRFS and that use of carbonate-rock aquifer groundwater in Garnet Valley is critical to the short-term and long-term management and development of the APEX Industrial Complex.[60]

Coyote Springs Investments

In presenting its opinions and conclusions CSI's focus was primarily on climate as the foundation for groundwater elevation declines after the Order 1169 aquifer test, and additional geophysical research that provided evidence of a structural block isolating the west side of Coyote Spring Valley.

[55] *Id.*, Technical Memo, p. 48–49.
[56] *Id.*
[57] *See* CNLV Ex. 6, pp. 1–2.
[58] *Id.*, p. 2.
[59] *Id.*, pp. 2–3.
[60] *Id.*, p. 3.

CSI did a statistical analysis of climate data, and determined from the results that 1998, 2004, 2005, and 2010 were wetter than normal, with a drying trend from 2006 to 2017.[61] The Order 1169 aquifer test took place toward the end of an extended dry period when all water resources throughout the LWRFS were negatively affected.[62] Additionally, annual cyclical patterns of groundwater pumping should not be confused with long-term climate variability.[63]

CSI challenged the basic assumption that the LWRFS, as proposed in Interim Order 1303, is a homogenous unit.[64] CSI could not duplicate the results of the SeriesSEE, and its own Theis solution modeling concluded that a greater impact occurred from pumping at a well closer in proximity to Pederson Spring than pumping from a well further away, or the combined effect of both wells.[65] CSI also acknowledged that due to the fragmented nature of the LWRFS, the Theis solution is of limited utility.[66]

CSI presented geologic and geophysical information in support of the idea that the LWRFS administrative unit is a geophysically and hydrogeologically heterogenous area, characterized by multiple flow paths defined by faults and structural elements that control the occurrence and movement of regional and local groundwater along the western side of Coyote Spring Valley, the eastern side of Coyote Spring Valley, and from Lower Meadow Valley Wash into the LWRFS.[67] CSI stated that the LWRFS does not include Kane Springs Valley.[68]

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[61] CSI Ex. 1, *CSI July 3, 2019 Order 1303 Report*, Hearing on Interim Order 1303, official records of the Division of Water Resources, pp. 4–5; Tr. 53.
[62] CSI Ex. 1, p. 5.
[63] CSI Ex. 2, *CSI August 16, 2019 Rebuttal Report*, Hearing on Interim Order 1303, official records of the Division of Water Resources, pp. 2, 7.
[64] CSI Ex. 1, p. 7.
[65] CSI Ex. 1, p. 7; Tr. 131–132.
[66] Tr. 154.
[67] CSI Ex. 2, p. 2; *CSI Closing Statement* (CSI Closing), Hearing on Interim Order 1303, official records of the Division of Water Resources; CSI recommended including Lower Meadow Valley Wash in its Rebuttal report. See CSI Ex. 2, p. 12; Mr. Herrema said Lower Moapa Valley, but the report said Lower Meadow Valley 10:10.
[68] CSI Ex. 1, p. 15; the outflow from Kane Springs Valley is included in the water budget, but due to isolating geologic features, groundwater elevations in Kane Springs Valley are not impacted by pumping in the LWRFS, Tr. 135:7–137:3, 160:2–12.

CSI engaged a geophysicist to conduct a CSAMT survey at multiple points in the valley.[69] CSI's CSAMT study showed evidence of a prominent carbonate block bounded on either side by normal faults.[70] CIS asserts that the carbonate block isolates recharge from the zone west of the block, such that it eliminates or limits contribution of local recharge to the Warm Springs area.[71] Faulting has created a preferred path for groundwater flow "from the east side Coyote Spring Valley to the Muddy River Springs Area".[72]

CSI relied on a water budget as the best method to determine available water in the LWRFS, accounting for recharge and subsurface flow as well as climatic variations.[73] Comparing several models of recharge, CSI estimated recharge at 5,280 afy from the Sheep Range to the western side of Coyote Spring Valley.[74] CSI stated that 30,630 afa can be pumped from the LWRFS, but there would be impacts from pumping the water, and that the Coyote Spring Valley can sustain 5,280 afa of pumping from the western side without impact to the Warm Springs area or the Muddy River.[75]

As asserted by CSI, groundwater pumping from the carbonate-rock aquifer in the Muddy River Springs Area affects flow in the carbonate-rock aquifer to the alluvial aquifer, which then affects flow from the alluvial aquifer to the Muddy River.[76] CSI argues that effects are dependent on well location, geologic formations, hydraulic gradients, and elevation.[77] Transfers between carbonate and alluvial pumping should be made on a case-by-case basis, analyzing place of use, points of diversion, and quantity of groundwater.[78] Movement of water rights between alluvial wells and carbonate-rock aquifer wells will only serve to shift the timing and location of impacts and not the amount of the impact.[79]

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[69] CSI Ex. 1, p. 25
[70] CSI Ex. 1, p. 25.
[71] CSI Ex. 1, p. 29; evidence of impermeability, Tr. 181.
[72] CSI Ex. 1, p. 29.
[73] CSI Closing.
[74] CSI Ex. 1, pp. 31–40.
[75] Tr. 221–223; CSI Closing, pp. 8–9.
[76] CSI Closing.
[77] CSI Closing, p. 19.
[78] CSI Closing.
[79] CSI Ex. 1, p. 58.

As a consequence of the heterogenous nature of the LWRFS, CSI recommended sustainable management of the LWRFS through the creation of "Management Areas" that recognize flow paths and their relative contributions to spring flow, surface flow, evapotranspiration, and sub-surface outflow.[80] For example, though pumping in the Muddy River Springs Area near the Warm Springs area would have a direct impact on available surface water resources, structural blocks and faults isolate the effect of groundwater pumping in other areas of the LWRFS.[81] Thus CSI does not recommend a blanket ban on carbonate-rock aquifer pumping, or a decrease in carbonate-rock aquifer pumping in exchange for alluvial aquifer pumping.

Georgia Pacific and Republic

Dry Lake Water, LLC, Georgia Pacific and Republic submitted initial and rebuttal responses to Interim Order 1303 and offered testimony during the hearing.[82] In their response, Georgia Pacific and Republic acknowledged impacts to groundwater elevations throughout the LWRFS, including wells in the Black Mountains Area and Garnet Valley, which does demonstrate a degree of hydraulic connectivity throughout the carbonate-rock aquifer. However, Georgia Pacific and Republic called for collection of more scientific evidence to further understand the LWRFS and its boundaries. Further, it was their opinion that climate, seasonal fluxes and pumping within Garnet Valley and the Black Mountains Area resulted in the groundwater declines observed during the Order 1169 aquifer test.[83] Ultimately, Georgia Pacific and Republic do not believe sufficient information exists to draw distinct conclusions as to the cause of the groundwater declines during the Order 1169 aquifer test and whether carbonate-rock aquifer pumping within

[80] CSI Closing.
[81] CSI Ex. 2, p. 17.
[82] The initial response was submitted on behalf of Dry Lake Water, LLC, Georgia Pacific, and Republic. *See* GP-REP Ex. 1, *Broadbent July 2, 2019 Initial Report*, Hearing on Interim Order 1303, official records of the Division of Water Resources. The rebuttal response was submitted on behalf of Dry Lake Water, LLC, Georgia Pacific Gypsum LLC, and Republic. *See* GP-REP Ex. 2, *Broadbent August 16, 2019 Rebuttal Report*, Hearing on Interim Order 1303, official records of the Division of Water Resources. However, the expert only appeared at the Hearing on Interim Order 1303 on behalf of Georgia Pacific and Republic. *See* Tr. 1588-91.
[83] *See* GP-REP Ex. 01, GP-REP Ex. 02, and *Closing Argument of Georgia Pacific Corporation and Republic Environmental Technologies, Inc.* (Closing GP-REP), Hearing on Interim Order 1303, official records of the Division of Water Resources.

the Garnet Valley and the Black Mountains Area has a measurable impact to spring flow in the Warm Springs area.[84]

Great Basin Water Network

GBWN elected to pose procedural suggestions relating to public involvement, availability of documents and data, transparency, and decision making, and did not submit a report with an independent analysis addressing the questions in Interim Order 1303.[85] GBWN advocates for sustainable management of the entirety of the White River Flow System as one unit based on the interconnected nature of all of the hydrologically connected basins, although no analysis to support which areas this would include was provided. GBWN relies on conclusory statements to establish the interconnected nature of the system as support for its position. Later, GBWN chose not to participate in the hearing nor submit a rebuttal report, closing arguments, or public comment.

Lincoln County Water District and Vidler Water Company

LC-V's participation in the LWRFS hearing was driven by their existing and pending groundwater rights in Kane Springs Valley, and an interest in excluding Kane Springs Valley from the LWRFS management area.[86] They disputed that Kane Springs Valley should be included within the LWRFS boundary based on their assertion of: prior decisions of the State Engineer that acknowledged the separate nature of the basin from the rest of the LWRFS, groundwater elevation comparisons, precipitation and recharge data, groundwater chemistry, and geophysical study results. In general, Kane Springs Valley should be managed based on its perennial yield, recognizing that there is groundwater flow to the LWRFS as there are from other basins into the LWRFS, but where they are excluded from the proposed management area.[87]

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[84] *See* Closing GP-REP.

[85] *GBWN Report on Order 1303*, (GBWN Report), Hearing on Interim Order 1303, official records of the Division of Water Resources.

[86] LC-V Ex. 1, *Lower White River Flow System Interim Order #1303 Report Focused on the Northern Boundary of the Proposed Administrative Unit, prepared by Lincoln County Water District and Vidler Water Company in Association with Zonge International Inc., dated July 3, 2019*, Hearing on Interim Order 1303, official records of the Division of Water Resources, p. 2-1.

[87] LC-V Ex. 2, *Rebuttal Submittal to Reports Submitted in Response to Interim Order #1303, dated August 16, 2019 and Attachments A, B, C, D and E containing the reports or technical memorandums of Greg Bushner, Peter Mock, Thomas Butler, Todd Umstot and Norman Carlson.*, Hearing on Interim Order 1303, official records of the Division of Water Resources, pp. 7, 14–15.

Various rulings of the State Engineer have previously addressed whether appropriation of groundwater from Kane Springs Valley would affect the Muddy River Springs Area.[88] LC-V states that these findings have not been challenged by any of the Order 1169 participants.[89] However, to the extent that SNWA relied on multiple linear regression models to establish groundwater flow from Kane Springs Valley to the LWRFS, LC-V do not agree.[90]

LC-V identified a distinct "break," or local increase, in water levels in the regional hydraulic gradient between wells drilled in the LWRFS versus wells drilled in Kane Springs Valley and northern Coyote Spring Valley.[91] It attributed the break to geologic structures located throughout the carbonate-rock aquifer. Although wells within the LWRFS exhibit very consistent groundwater levels, indicative of high transmissivity values across the area, the gradient between well KPW-1 and down-basin wells is much steeper, implying an impediment to groundwater flow near the mouth of Kane Springs Valley.[92]

In a 2006 hearing for protested water rights applications, LC-V presented an analysis of the regional geochemistry data including stable isotopes, temperature, and carbon-14 data.[93] That analysis found that the groundwater pumped from Kane Springs Valley could not be identified in the source water for the Big Muddy Spring, nor other springs farther south and outside the boundaries of the LWRFS.[94] LC-V concluded that groundwater pumped from production well KPW-1 is on a different groundwater flow path from the springs, consistent with the differences in hydraulic gradients, groundwater levels, and geophysical data.[95] CSVM-4, a well located in Coyote Spring Valley, and KPW-1, in Kane Springs Valley, have similar temperatures compared to the other wells in the basin, and a lower percentage difference on other markers tracked throughout groundwater in the basin.[96] LC-V argues that the water from these wells is chemically

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[88] LC-V Ex. 1, pp. 2-2 through 2-3, citing State Engineer's Rulings 5712, 6254, 5712.
[89] LC-V Ex. 1, p. 2-3.
[90] Testimony generally at Tr. 1311–1318. "... simply having correlation is not proof of causation. Causation is neither proved nor evaluated in a regression analysis." Tr. 1303.
[91] LC-V Ex. 1, p. 3-1.
[92] LC-V Ex. 1, pp. 1-1, 3-1 through 3-4. LC-V went on to conclude that local groundwater recharge occurs in Kane Springs Valley that does not flow to the LWRFS, and therefore there is available unappropriated water in the basin. LC-V Ex. 1, p. 3-5.
[93] LC-V Ex. 1, Appendix C, pp. 111–153.
[94] *Id.*, pp. 124–125.
[95] "Gradient alone does not mean flow." Thomas Butler, witness on behalf of LC-V, Tr. 1281.
[96] Tr. 1281–1282, LC-V Ex. 1, pp. 3-7 through 3-11.

unique and does not appear in any other wells in the LWRFS.[97] LC-V concludes carbon isotope data also confirmed that the water from Kane Springs Valley does not appear in the Muddy River Springs area.[98]

LC-V engaged a geophysical company to perform a CSAMT survey across the boundary line between Kane Springs Valley and Coyote Spring Valley, and identified significant geologic structures in southern Kane Springs Valley and northern Coyote Spring Valley.[99] Several transect lines were conducted perpendicular to the axis of the Kane Springs Valley, and one was also conducted along the axis of the southern part of the basin.[100] Additional transects were run in Coyote Spring Valley.[101] The results of the geophysical data validated concealed faulting indicated on existing maps, and was ground-truthed with observations in the field.[102] Results indicated a previously unmapped fault at the mouth of Kane Springs Valley, which LC-V named the Northern Boundary LWRFS fault, with a potentially 2,500-foot offset of materials with different resistivities.[103] LC-V argues that the extensive faulting that occurs in southern Kane Springs Valley and northern Coyote Spring Valley form the basis for the exclusion of Kane Springs Valley from the LWRFS.[104]

LC-V gave no opinion on the long-term annual quantity of groundwater that could be pumped from the LWRFS.[105] LC-V attributes all reduction in flows of the Muddy River and its associated springs to carbonate-rock aquifer pumping within the Muddy River Springs Area, and finds no discernable effect from carbonate-rock aquifer pumping occurring in Coyote Springs

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[97] Tr. 1284.
[98] Tr. 1286.
[99] LC-V Ex. 1, pp. 1-1, 4-1 through 4-10.
[100] LC-V Ex. 1, p. 4-3.
[101] LC-V Ex. 1, p. 4-3.
[102] LC-V Ex. 1, p. 4-8, Tr. 1322.
[103] Tr. 1271–1272; LC-V Ex. 1, p. 4-9.
[104] LC-V Ex. 1, p. 7-1 through 7-2; Tr. 1408. Questions from the National Park Service and the State Engineer inquired whether the areas of high resistivity in the CSAMT necessarily implied low transmissivity, low permeability of the rock. LC-V conceded that the resistivity information alone does not provide data about the hydraulic properties of either side of the resistive area, but when considered with all available information, LC-V concluded that the fault is likely an impediment to groundwater flow. Tr. 1327–1328, 1363–1364.
[105] LC-V Ex. 1, p. 5-2.

Valley.[106] As a result, LC-V finds that the efforts to protect the Warm Springs area must focus on groundwater pumping within the Muddy River Springs Area itself.[107]

Moapa Band of Paiutes

The MBOP participated in the administrative hearing due to their interest in the outcome of the proceedings and how it may affect their pending water right applications within California Wash. A regional approach, spanning a large aerial expanse, was taken by MBOP; the analysis and modeling efforts extended into central Nevada and Utah. MBOP stands apart from other participants with their interpretation of the data.[108] MBOP opposed management of the LWRFS as one basin and argues the scientific consensus is lacking amongst participants.[109] Regarding the interpretation of other participants, MBOP disagreed with the methodology and application of the 2013 USFWS SeriesSEE analysis and SNWA's multiple linear regression and requests repudiation of both.[110]

While not agreeing with the proposed boundaries of the LWRFS, MBOP did not provide a clear suggestion for which basins or portions therein should be included or excluded. MBOP suggested that pumping in California Wash has little to no impact on the Warm Springs area.[111] MBOP further suggested there are two capture zones, separated by a hydrodynamic and hydrochemical divide, which transects the Moapa River Indian Reservation area and results in south-flowing groundwater into the Las Vegas Valley through the LWRFS, bypassing the Muddy

[106] LC-V Ex. 1, p. 5-3.
[107] LC-V Ex. 1, p. 5-3.
[108] Tr. 772– 773; 839.
[109] *See Closing Statement by the Moapa Band of Paiute Indians for Order 1303 Hearing* (MBOP Closing), Hearing on Interim Order 1303, official records of the Division of Water Resources, pp. 1–2, 6.
[110] *Id.*, pp. 7–12, 15–16; *See* MBOP Ex. 3, *Johnson, C., and Mifflin, M. Rebuttal Report of the Moapa Band of Paiutes in Response to Stakeholder Technical Reports Filed under Order #1303: unpublished report and appendices, August 16, 2019. 27 p.*, Hearing on Interim Order 1303, official records of the Division of Water Resources.
[111] *See* MBOP Ex. 2, *Johnson, C., and Mifflin, M. Water Level Decline in the LWRFS: Managing for Sustainable Groundwater Development. Initial Report of the Moapa Band of Paiutes in Response to Order #1303: unpublished report and appendices, July 3, 2019. 84 p.*, Hearing on Interim Order 1303, official records of the Division of Water Resources, pp. 2, 4, 14, 35; Tr. 819.

River Springs Area.[112] This hydrodynamic divide theory was not shared by SNWA, CBD, CSI, and NPS.[113]

Several participants agree that climate impacts were observed in the hydrographs, e.g., periods of wet and dry; however, MBOP interpreted the existing data to show that climate-driven decline, specifically drought, as the primary response observed in the long-term declining groundwater levels.[114] Thus, MBOP concluded that no reduction in pumping will restore high-elevation spring flows.[115] MBOP did not agree with other participants that decreasing groundwater levels and spring flows were attributed to increased carbonate-rock aquifer pumping beginning in the early 1990s.[116]

A quantity available for sustainable pumping was not proposed, but MBOP presumed more water is available in California Wash than previously thought.[117] A flux of approximately 40,000 afy of south-flowing groundwater into the Las Vegas Valley, bypassing the Muddy River Springs Area, was postulated in the initial report as possible with the hydrodynamic divide; however, during the hearing this quantity was given a range of plus or minus an order of magnitude based on assumptions for calculations.[118]

MBOP acknowledged that the Muddy River is connected to the alluvial aquifer and thus pumping from the alluvial and carbonate-rock aquifers in the Muddy River Springs Area impact the Muddy River flows.[119] Therefore, to mitigate impacts to the Muddy River, MBOP proposed that alluvial aquifer pumping, specifically between Arrow Canyon and White Narrows, can be moved to the carbonate-rock aquifer in basins to the south, such as California Wash, with minimal anticipated impacts to the Muddy River flows, rather than moving alluvial aquifer pumping from the Muddy River Springs Area to the carbonate-rock aquifer in connected areas, where impacts

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[112] *See* MBOP Ex. 2, pp. 2, 4, 12, 14, 20, 35, 55; Tr. 812; 845.
[113] SNWA Ex. 9, pp. 12–13; CBD Ex. 4, p. 15; CSI Ex. 2, p. 23; NPS Ex. 3, *National Park Service's Response to July 2019 Interim Order 1303 Reports, Waddell, August 16, 2019*, Hearing on Interim Order 1303, official records of the Division of Water Resources, p. 4.
[114] *See* MBOP Ex. 2, pp. 3, 26–32, 35; Tr. 764–771; 805.
[115] *See* MBOP Ex. 2, pp. 3, 35; Tr. 821–826.
[116] *See* MBOP Ex. 2, p. 29; Tr. 775, 838–840; 848.
[117] *See* MBOP Ex. 2, pp. 2, 20, 35.
[118] *See* MBOP Ex. 2, pp. 6, 19, 35; Tr. 850–851.
[119] *See* MBOP Ex. 2, pp. 23–24, 35; Tr. 836.

proportional to pumping may be expected.[120] Thus, MBOP proposed favoring temporary over permanent uses and transferring of rights between the carbonate-rock and alluvial aquifers on a case-by-case basis.[121]

Moapa Valley Water District

MVWD was created by the Nevada legislature in 1983, pursuant to NRS Chapter 477, to provide water service "vital to the economy and well-being of Moapa Valley."[122] MVWD provides municipal water service to approximately 8,500 people with 3,250 metered service connections, including service to the MBOP.[123]

MVWD supported the inclusion of Kane Springs Valley within the LWRFS boundary.[124] Data indicated a direct connection between Kane Springs Valley and Coyote Spring Valley. This data included observations that the water level in KMW-1/KSM-1 decreased 0.5 foot over the duration of the Order 1169 aquifer test.[125] State Engineer's rulings have concluded that geochemical evidence and groundwater gradient data indicate that groundwater flows from the Kane Springs Valley into Coyote Spring Valley, and MVWD supports LVVWD's 2001 calculation of that quantity of water at approximately 6,000 afy.[126] MVWD performed its own calculations of the groundwater gradients from Kane Springs Valley at KMW-1 to EH-4, and concluded that the gradient was "an uninterrupted, continuous, exceptionally flat gradient," unlike gradients commonly seen in the western U.S., especially in highly fractured areas.[127] MVWD also

[120] *See* MBOP Ex. 2, pp. 23, 35.
[121] *See* MBOP Closing.
[122] Tr. 1172.
[123] MVWD Ex. 3, *District July 1, 2019 Report in response to Interim Order 1303*, p.5, Hearing on Interim Order 1303, official records of the Division of Water Resources; MVWD Ex. 4, *District August 16, 2019 Rebuttal Report*, p, 1, Hearing on Interim Order 1303, official records of the Division of Water Resources. MVWD has 3,147 afa of water rights in Arrow Canyon. Tr. 1169–1170.
[124] MVWD Ex. 3, p. 1; Tr. 1175.
[125] MVWD Ex. 3, p. 1; MVWD Ex. 4, p. 2.
[126] MVWD Ex. 3, pp. 1–2, referring to State Engineer's Ruling 5712 (*see*, NSE Ex. 12, *Ruling 5712*, Hearing on Interim Order 1303, official records of the Division of Water Resources) and MVWD Ex. 8, *Las Vegas Valley Water District, Water Resources and Ground-Water Modeling in the White River and Meadow Valley Flow Systems, Clark, Lincoln, Nye, and White Pine Counties, Nevada (2001)*, Hearing on Interim Order 1303, official records of the Division of Water Resources, p. 6-3.
[127] Tr. 1177–1178.

introduced evidence of a stipulation between LC-V and the USFWS that bases a reduction in pumping in Kane Springs Valley on a lowering of spring discharges in the Warm Springs area, and introduced a letter from SNWA to the State Engineer, as additional support that the participants to the Interim Order 1303 hearing have previously recognized Kane Springs Valley is part of the LWRFS.[128]

MVWD disagreed that a hydrologic barrier exists between Coyote Springs Valley and Kane Springs Valley.[129] Relying on a 2006 report prepared by another consultant, MVWD said the evidence indicated that the fault at the mouth of Kane Springs Valley was not an impediment to flow, and that there was no evidence of having encountered hydraulic barriers to groundwater flow during a seven-day aquifer test.[130] Additionally, the "highly transmissive fault zone" is continuous across the basin boundary between Kane Springs Valley and Coyote Spring Valley.[131] MVWD found further support for its position from evidence that KMW-1 showed drawdown during both the seven-day aquifer test on KPW-1, as well as from the Order 1169 aquifer test pumping that occurred from MX-5.[132] MVWD considered the water level data collected before, during and after the Order 1169 aquifer test, and Warm Springs area spring discharge to support its finding that the fault is not interrupting groundwater flow.[133] MVWD found it "questionable" that the first suggestion of a fault that impedes southward groundwater flow would be prepared by LC-V for this hearing.[134]

Although water levels and spring discharge did not recover to the levels rneasured before the Order 1169 aquifer test, MVWD believed that the LWRFS is at or near steady-state conditions

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[128] Tr. 1195–1197.
[129] Tr. 1176–1177.
[130] Tr. 1181–1182. MVWD also quoted from the report that "the fracturing was so extensive that the fractured aquifer system really behaved as an equivalent porous media." *Id.* MVWD later agreed that this would behave like a sandy aquifer. Tr. 1224.
[131] Tr. 1185.
[132] Tr. 1250.
[133] Tr. 1219.
[134] *Post-Hearing Brief of Moapa Valley Water District* (MVWD Closing), Hearing on Interim Order 1303, official records of the Division of Water Resources, p. 5.

regarding aquifer recovery.[135] MVWD viewed this as being consistent with the State Engineer's statements in Interim Order 1303.[136]

Finally, MVWD did not provide a specific quantity of available water but did acknowledge that the "actual safe pumpage" is less than current pumping rates, and recognized a direct relationship between pumping from the carbonate-rock aquifer, spring and Muddy River flows, and alluvial aquifer pumping.[137] The timing and magnitude of carbonate-rock aquifer pumping effects on spring discharge is dependent on the volume of water pumped and the proximity of a pumping center to the springs; however, all cumulative carbonate-rock aquifer pumping in the seven interconnected basins will eventually cause depletions on the Warm Springs area springs.[138] Further, if carbonate rights are transferred to the alluvial aquifer there will be depletions to Muddy River flows and impacts to senior Muddy River water right owners.[139]

MVWD raised additional matters that they believed relevant to the analysis under Interim Order 1303. First, they stressed the importance of municipal water rights, and the necessity for a reasonably certain supply of water for future permanent uses without jeopardizing the economies of the communities that depend on the water supply, and to protect the health and safety of those who rely on the water supply.[140] To that end, MVWD requested that the State Engineer consider designating municipal use as the most protected and highest use of water, and to give MVWD the perpetual right to divert 6,791 afa of permitted and certificated rights from its carbonate-rock aquifer wells.[141] Second, MVWD stated that it had already satisfied its obligation to protect Moapa dace habitat and senior water rights when it dedicated 1cfs/724 afa, or approximately 25% of the MVWD current diversions, from its most senior water right, to the enhancement of the Moapa dace habitat.[142]

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[135] Tr. 1198, MVWD Ex. 3, p. 4.
[136] Tr. 1199.
[137] Tr. 1199–1200; MVWD Closing, pp. 9–10.
[138] MVWD Ex. 3, p. 5.
[139] *Id.*
[140] MVWD Ex. 3, p. 5.
[141] MVWD Ex. 3, p. 6; Tr. 1203–1204; 6,791 afa constitutes an increase in the carbonate-rock aquifer pumping for MVWD. Tr. 1228.
[142] MVWD Ex. 3, pp. 6–7; Tr. 1202–1203.

Muddy Valley Irrigation Company

The MVIC is a non-profit Nevada corporation with the senior decreed water rights to the Muddy River, who provided testimony that SNWA is a majority shareholder while other participants such as CSI, LC-V, and MVWD are minority shareholders of the decreed rights.[143] MVIC concurred with SNWA's conclusions regarding aquifer recovery, long-term quantity of groundwater, and movement of water between the alluvial and the carbonate-rock aquifers.[144] Specifically, that any groundwater pumping, from both alluvial or carbonate-rock aquifers, within the Muddy River Springs Area impacts Muddy River flows, thus violating the Muddy River Decree.[145] MVIC did not dispute the geographic boundaries as identified in Interim Order 1303.[146] MVIC argued that the Muddy River and all of its sources are fully appropriated and emphasized the decreed seniority to groundwater rights, and further asserts that these surface water rights are protected by the Muddy River Decree and the prior appropriation doctrine.[147]

United States Department of the Interior, National Park Service

NPS submitted both an initial and rebuttal report in response to the Interim Order 1303 solicitation and presented testimony during the hearing.[148] Based upon NPS's evaluation of the evidence relating to the Order 1169 aquifer test, the use of an updated numerical groundwater flow model previously developed to predict conditions within the LWRFS, data compiled since the conclusion of the Order 1169 aquifer test, and review of other available data, NPS came to multiple conclusions relating to the delineation and management of the LWRFS. NPS advocates for the

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[143] Tr. 1693–1696, 1705.
[144] MVIC Ex. 1, *MVIC Rebuttal Report dated August 15, 2019*, Hearing on Interim Order 1303, official records of the Division of Water Resources. MVIC identified sections from the SNWA report, but the references do not correspond with sections in SNWA's report. The State Engineer assumes that these section numbers correspond to page numbers of the SNWA report; *See also*, SNWA Ex. 7, *Burns, A., Drici, W., Collins, C., and Watrus, J., 2019, Assessment of Lower White River Flow System water resource conditions and aquifer response, Presentation to the Office of the Nevada State Engineer: Southern Nevada Water Authority, Las Vegas, Nevada*, Hearing on Interim Order 1303, official records of the Division of Water Resources.
[145] MVIC Ex. 1, p. 5; Tr. 1698.
[146] *See* MVIC Ex. 1, p. 3; Tr. 1697–1968.
[147] *Muddy Valley Irrigation Company Post Hearing Closing Statement* (MVIC Closing), Hearing on Interim Order 1303, official records of the Division of Water Resources; Tr. 1967, 1700–1708. *See also*, NSE Ex. 333, *Muddy River Decree*, Hearing on Interim Order 1303, official records of the Division of Water Resources.
[148] *See* NPS Ex. 2, *Prediction of the Effects of Changing the Spatial Distribution of Pumping in the Lower White River Flow System, Waddell, July 3, 2019*; Tr. 494–597.

inclusion of the entirety of the Black Mountains Area within the geographic boundary of the LWRFS based upon its review of geologic conditions that facilitate flow from the southern portion of the LWRFS through the Muddy Mountains thrust sheet and discharging in Rogers Spring and Blue Point Spring.[149] Further supporting this opinion, NPS cites to spring chemistry and isotopic composition of the water discharging from Rogers Spring and Blue Point Spring and the hydraulic head conditions that NPS believes supports the flow of groundwater beneath the Muddy Mountains from the carbonate-rock aquifer to those springs.[150] NPS acknowledge that there is a weak hydraulic connection between Rogers Spring and Blue Point Spring to the LWRFS based upon the geologic conditions within the Muddy Mountains, but argues that the entirety of the Black Mountains Area should be included to allow for management of the regional carbonate-aquifer to protect against diminished discharge to those springs.[151]

In addition to advocating for the inclusion of the entirety of the Black Mountains Area, the NPS provided evidence and analysis to support its conclusion that Kane Springs Valley too should be included within the geographic boundary of the LWRFS.[152] Based upon a review of the hydrologic data, geology of the Kane Springs Valley and basin boundaries, Coyote Spring Valley, and data from the Order 1169 aquifer test, NPS concludes that there is a clearly established hydrological connection between Kane Springs Valley and the other LWRFS basins, including discharge to the Warm Springs area.[153] While NPS advocates for the inclusion of the entire Black Mountains Area and Kane Springs Valley, it did not find any evidence to support the inclusion of the Las Vegas Valley within the LWRFS based upon a similar review of the geology and hydrological data.[154]

In interpreting data since the conclusion of the Order 1169 aquifer test, NPS reviewed the available data, concluding that the decades long decline of groundwater levels is not attributable to climate, but rather that the groundwater pumping within the LWRFS is the contributing

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[149] *See* NPS Ex. 2, p. 22. *See also*, Tr. 569–70; NPS, *Closing Statements Interim Order 1303 Hearing Testimony* (NPS Closing), Hearing on Interim Order 1303, official records of the Division of Water Resources, p. 2.
[150] NPS Ex. 2, p. 22; NPS Closing, pp. 2–4.
[151] *Id.*
[152] NPS Ex. 2, p. 22; NPS Ex. 3, pp. 5–11; Tr. 550–551; NPS Closing, pp. 4–5.
[153] NPS Ex. 2, p. 22; NPS Ex. 3, pp. 5–11; Tr. 550–551; NPS Closing, pp. 5–6.
[154] NPS Ex. 2, p. 22; Tr. 552–554.

factor.[155] NPS opined that if recent pumping withdrawals continued, the current declining trend would be accelerated, adversely impacting spring discharge in the Warm Springs area and Muddy River flow.[156] Further, NPS's review of the data lead to its conclusion that it will take many years, if not decades for the LWRFS carbonate-rock aquifer to reach equilibrium, particularly at the current groundwater pumping withdrawals and even longer if pumping withdrawals occurred at Order 1169 aquifer test levels.[157] However, NPS did not provide an opinion as what rate of groundwater withdrawals would be sustainable within the LWRFS.

Finally, NPS concluded that the movement of groundwater withdrawals from the alluvial aquifer within the Muddy River Springs Area to the carbonate-rock aquifer within the LWRFS would ultimately have little impact on capture of Muddy River flow. Specifically, NPS found that while there may be near-term benefits to the Warm Springs area and Muddy River flow, those benefits would eventually disappear, as the impact would only be delayed and not eliminated.[158]

Nevada Cogeneration Associates

NCA submitted a Rebuttal Report Pertaining to Interim Order 1303 and provided testimony at the Interim Order 1303 hearing.[159] NCA objected to the inclusion of certain non-profit organizations on the basis that those organizations were not stakeholders and did not have an interest to protect as the non-governmental organizations did not have water rights within the LWRFS basins effected by the proceedings.[160]

With respect to the geographic boundary of the LWRFS, in its Rebuttal Report, NCA is of the opinion that the northwestern portion of the Black Mountains Area, as identified by the State Engineer, should be within the LWRFS basins, but expressed its disagreement with other opinions advocating for the inclusion of the entire Black Mountains Area based upon NCA's analysis of the geology and groundwater elevations.[161] During the Interim Order 1303 hearing and in its Post-Hearing Brief, NCA's opinion shifted to advocate for the boundary of the LWRFS to be adjusted

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[155] NPS Ex. 2, pp. 7, 22–23. *See also* NPS Closing, pp. 5–6.
[156] *Id.*
[157] *Id.*
[158] NPS Ex. 2, p. 23. *See also* NPS Closing, p. 6, and Tr. 593–594.
[159] NCA Ex. 1, *NCA Rebuttal Report Pertaining to Interim Order 1303 August 16, 2019,* Hearing on Interim Order 1303, official records of the Division of Water Resources; Tr. 1602–50.
[160] NCA Ex. 1, pp. 1, 23.
[161] *Id.*, pp. 2, 23.

to exclude its production wells in the Black Mountains Area; however, NCA did not alter its opinion regarding the remaining portion of the Black Mountains Area staying within the LWRFS.[162]

NCA further expressed that the Lower Meadow Valley Wash should not be included in the LWRFS boundaries based upon the fact that observed groundwater levels do not indicate a hydrologic response to carbonate-rock aquifer pumping and that insufficient data supports a finding of continuity between water level trends to support its inclusion in the LWRFS.[163] However, NCA advocated for the inclusion of the Kane Springs Valley within the LWRFS based upon its opinion that the groundwater data demonstrated hydrologic connectivity between Coyote Spring Valley and Kane Springs Valley, acknowledging that the data is slightly attenuated resulting from the Kane Springs fault.[164] Ultimately, NCA concluded that Kane Springs Valley is tributary to the Coyote Spring Valley and the other LWRFS basins, which justify its inclusion within the boundary of the LWRFS.[165]

Similarly, based upon the groundwater data from the northern portion of Coyote Spring Valley demonstrating similar water level responses as other wells throughout the LWRFS and pumping data demonstrating high hydrologic connectivity across all the LWRFS basins, NCA concluded that there was no basis to exclude the northern portion of Coyote Spring Valley.[166] Finally, NCA rejected a suggestion that the entirety of the White River Flow system, which extends into northeastern Nevada, be included within the management area.[167] Specifically, NCA concluded that the Pahranagat Shear Zone creates a significant barrier to the northwestern portion of the LWRFS and that review of groundwater levels does not support a finding that groundwater level declines propagate into the northern reaches of the White River Flow System.[168] NCA concluded, advocating that proper management of the LWRFS is appropriate and sufficient for the

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[162] *Post-hearing brief of Nevada Cogeneration Associates Nos. 1 and 2 pertaining to Amended Notice of Hearing Interim Order #1303 following the hearing conducted September 23, 2019, through October 4, 2019, before the Nevada State Engineer* (NCA Closing), Hearing on Interim Order 1303, official records of the Division of Water Resources, pp. 2–10. *See also* Tr. 1619–22.
[163] NCA Ex. 1 pp. 3–7, 23. *See also* NCA Closing, pp. 15–16.
[164] NCA Ex. 1, pp. 8–17, 23. *See also* NCA Closing, pp. 10–14, and Tr. 1629–44.
[165] NCA Ex. 1, pp. 11–16.
[166] *Id.*, pp. 17–18, 23.
[167] *Id.*, pp. 19, 24.
[168] *Id.*

purpose of managing discharge of groundwater to the Warm Springs area to support habitat for the Moapa dace and serve senior Muddy River decreed rights.[169]

In addressing the annual amount of groundwater that could be developed within the LWRFS without adversely impacting senior decreed rights on the Muddy River or Warm Springs area discharge supporting the habitat for the Moapa dace, NCA supported a target of 9,318 afa, a recent three-year average of annual pumping within the LWRFS,[170] as it did not believe there to be sufficient data to support either an increase or decrease from this amount.[171] However, in its post-hearing brief, NCA opined that if their production wells located within the northwestern portion of the Black Mountains Area were excluded from the LWRFS boundary, then the annual amount of water that could be sustainably developed was less than the 9,318 afa.[172]

Finally, NCA did not support movement of water rights from the Muddy River Springs Area alluvial aquifer to the carbonate-rock aquifer, as it was of the opinion that the movement of those rights would not mitigate impact to the Warm Springs area.[173] Rather, NCA concluded that movement of those rights would compound the impact of pumping from the carbonate-rock aquifer.[174] However, NCA did express some support for movement of senior alluvial water rights as a management tool to offset existing junior carbonate-rock aquifer pumping within the LWRFS.[175]

NV Energy

NV Energy submitted a rebuttal report outlining its responses to the five matters the State Engineer solicited in Interim Order 1303 and presented its opinions and conclusions during the Interim Order 1303 hearing.[176] In its rebuttal report, NV Energy opined that the geographic boundary of the LWRFS should be as established in Interim Order 1303.[177] NV Energy further

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[169] *Id.*
[170] NCA Ex. 1, p. 19. *See, e.g.* Draft order of the State Engineer distributed to LWRFS stakeholders at the LWRFS Working Group meeting, September 19, 2018, official records of the Division of Water Resources.
[171] *Id.*, pp. 18, 24.
[172] NCA Closing, pp. 14–15.
[173] NCA Ex. 1, pp. 19–23, 24.
[174] *Id.*
[175] *Id.*
[176] NVE Ex. 1, *NV Energy Rebuttal Report to State Engineer's Order 1303 Initial Reports by Respondents*, Hearing on Interim Order 1303, official records of the Division of Water Resources.
[177] *Id.*, pp. 1–2.

opined that the existence of subsurface outflow from Kane Springs Valley into the LWRFS basins was insufficient to support its inclusion.[178]

NV Energy, in its rebuttal report, disagreed with MBOP's conclusion that the groundwater level declines observed during and after the Order 1169 aquifer test were primarily caused by drought. Rather, NV Energy agreed with SNWA's and MVWD's conclusions that the groundwater recovery occurred between 2–3 years following the conclusion of the aquifer test, but that continued pumping within the carbonate-rock aquifer has inhibited recovery to pre-Order 1169 aquifer test groundwater levels, and that at the current rate of carbonate-rock aquifer pumping the aquifer has nearly reached steady-state conditions and discharge to the Warm Springs area has reached equilibrium.[179]

NV Energy further agreed in its rebuttal report with MBOP's and CNLV's conclusions that some groundwater flowing within the carbonate-rock aquifer bypassed the Muddy River Springs Area, and ultimately the Muddy River. NV Energy also agreed that groundwater development within the southern boundary of the LWRFS would likely have less of an effect on discharge to the Warm Springs area and the river. NV Energy did not opine as to the quantity of water that bypassed the springs, but inferred that the current 7,000–8,000 afy of carbonate-rock aquifer pumping appeared to support the conclusion that steady-state conditions had been reached.[180] NV Energy also opined that movement of senior certificated alluvial water rights in the Muddy River Springs Area to carbonate-rock aquifer wells located in the southern portion of the LWRFS may be considered acceptable as Nevada law allows for the reasonable lowering of the groundwater table, and such movement would not necessarily result in a conflict to existing rights.[181] NV Energy further concluded that, contrary to the conclusions of MBOP, drought was not a significant cause for the groundwater level declines observed.[182] Finally, NV Energy concluded with suggestions that the State Engineer either: (1) combine the LWRFS basins into a single hydrographic basin and declare the new basin to be a Critical Management Area pursuant to NRS 534.037 and 534.110; or, (2) for the State Engineer to, under his authority in NRS 534.020 and

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[178] *Id.*
[179] *Id.*, pp. 2–7.
[180] NVE Ex. 1, p. 8.
[181] *Id.*, pp. 8–9; *Nevada Energy's Closing Statements* (NV Energy Closing), Hearing on Interim Order 1303, official records of the Division of Water Resources, pp. 4–5.
[182] *Id.*, pp. 9–12.

534.120, require the water right holders within the LWRFS to develop a conjunctive management plan.[183]

After considering all of the evidence and testimony presented at the Interim Order 1303 hearing, NV Energy ultimately altered its opinion and found compelling arguments to both support the inclusion of Kane Springs Valley in the LWRFS as well as its exclusion.[184] Ultimately, NV Energy changed its opinion with respect to the geographic boundary of the LWRFS and in its closing statement expressed support for the inclusion of Kane Springs Valley within the LWRFS boundary due to the connection with Coyote Spring Valley and thus the potential for impacts to LWRFS from pumping within Kane Springs Valley.[185] NV Energy proposes that the current pumping regime of 7,000 to 8,000 afy be maintained to evaluate the potential for steady-state conditions and the continued monitoring of the Warm Springs West gage and agrees that moving pumping further south may reduce impact to the Muddy River and springs. With regards to moving water between the alluvial and carbonate-rock aquifers, similar to others, NV Energy agrees with the evaluation of change applications on a case-by-case basis with demonstration that impacts are reduced or unchanged by the proposed point of diversion compared to the existing point of diversion. NV Energy supports an agreement that would include all water users within the LWRFS for the purposes of not exceeding stresses within system and protecting the Moapa dace.[186]

Southern Nevada Water Authority and Las Vegas Valley Water District

The SNWA and LVVWD submitted multiple reports in response to the Interim Order 1303 solicitation.[187] SNWA and LVVWD supported the boundary of the LWRFS as identified in Interim Order 1303, and argued that there was a general consensus of the participants regarding the

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[183] *Id.*, p. 12.
[184] Tr. 1761–1762.
[185] NV Energy Closing, pp. 2–3.
[186] *Id.*, pp. 3–6.
[187] SNWA Ex. 7; SNWA Ex. 8, *Marshall, Z.L., and Williams, R.D., 2019, Assessment of Moapa dace and other groundwater- dependent special status species in the Lower White River Flow System, Presentation to the Office of the Nevada State Engineer: Southern Nevada Water Authority, Las Vegas, Nevada*, Hearing on Interim Order 1303, official records of the Division of Water Resources; SNWA Ex. 9, *Burns, A., Drici, W., and Marshall Z.L., 2019, Response to stakeholder reports submitted to the Nevada State Engineer with regards to Interim Order 1303, Presentation to the Office of the Nevada State Engineer: Southern Nevada Water Authority, Las Vegas, Nevada*, Hearing on Interim Order 1303, official records of the Division of Water Resources.

boundaries based upon the hydraulic connectivity within the identified basins.[188] Further, SNWA and LVVWD argued against the exclusion of the northern and western portions of Coyote Spring Valley, that management of adjoining basins should be done in a manner recognizing an impact on pumping from those basins on water availability in the LWRFS basins, and that the Las Vegas Valley should be excluded from the LWRFS.[189]

With respect to the evaluation of the carbonate-rock aquifer recovery since the conclusion of the Order 1169 aquifer test, SNWA and LVVWD concluded that the aquifer has not returned to pre-Order 1169 levels, and that the evidence demonstrates a continued declining trend within the carbonate-rock aquifer as a result of continued groundwater pumping.[190] SNWA and LVVWD concluded that the current pumping continues to capture groundwater storage and that based upon the current rate of groundwater withdrawals, water levels within the carbonate-rock aquifer will continue to decline for the foreseeable future.[191] Further, SNWA and LVVWD rejected the premise that climate was a significant factor over groundwater withdrawals for the observed groundwater level decline.[192]

Based upon a review of the evidence, SNWA and LVVWD concluded that current rate of groundwater withdrawals were not sustainable without adversely impacting senior Muddy River water rights and Moapa dace habitat.[193] Based upon the analysis performed by SNWA and LVVWD, examining the discharge from the Muddy River Springs Area and groundwater production within the carbonate-rock aquifer within the LWRFS, SNWA and LVVWD concluded that any groundwater development within the carbonate-rock aquifer resulted in a one-to-one (1:1) ratio of capture of Muddy River flow, and that regardless of where that pumping occurred, it still resulted in a 1:1 ratio of capture, only that the period of time that the capture was realized was longer.[194] Ultimately, SNWA and LVVWD concluded that while any amount of pumping results

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[188] SNWA Ex. 7, pp. 5-1 through 5-18, 8-1. *See also*, Tr. 953.
[189] *Closing Brief of Southern Nevada Water Authority and Las Vegas Valley Water District* (SNWA Closing), pp. 4–9, Hearing on Interim Order 1303, official records of the Division of Water Resources. *See also* SNWA Ex. 9 at sections 6, 7 and 12.
[190] SNWA Closing, pp. 9–12. *See also* SNWA Ex. 7, pp. 5-1 through 5-18, and SNWA Ex. 9, pp. 15–20.
[191] SNWA Closing, pp. 11–12. *See also* Tr. 932.
[192] SNWA Closing, pp. 12–14. *See also* SNWA Ex. 9, pp. 15–17.
[193] SNWA Ex. 7, pp. 6-3 through 6-4, 8-2 through 8-4.
[194] *Id.*, pp. 6-4 through 6-11, 8-2 through 8-4; SNWA Ex. 9, pp. 22–27.

in a conflict with senior decreed Muddy River rights, approximately 4,000 to 6,000 afa could be sustainably pumped from the aquifer.[195] In conjunction with SNWA and LVVWD's evaluation of the quantity of water that may be sustainably developed within the LWRFS, SNWA and LVVWD reviewed the interrelationship between discharge from the carbonate-rock aquifer underlying the LWRFS, groundwater pumping and the impact on the habitat and recovery of the Moapa dace.[196] SNWA and LVVWD ultimately concluded that the flow required to sustain the Moapa dace from adverse effects, including habitat loss and fish population declines was a minimum 3.2 cfs at the Warm Springs West gage.[197]

Finally, it was SNWA and LVVWD's opinion that movement of water rights from the Muddy River Springs Area alluvial aquifer to the carbonate-rock aquifer within the LWRFS may delay the capture of water serving senior decreed rights on the Muddy River, but that movement of water from the alluvial aquifer to the carbonate-rock aquifer would adversely impact the habitat of the Moapa dace.[198] Thus, SNWA and LVVWD concluded transfer of water rights from the Muddy River Springs Area alluvial aquifer to the LWRFS carbonate-rock aquifer would result in further depletion of flow to the Warm Springs area.[199]

Technichrome

Technichrome submitted a response and additional response to the Interim Order in July 2019 but did not participate in the hearing.[200] Technichrome stated that it had no objection to a "joint administrative basin" consisting of Coyote Spring Valley, Black Mountain Area, Garnet Valley, Hidden Valley, Muddy River Springs Area, and Lower Moapa Valley, expressed no comment regarding the inclusion of Kane Springs Valley, but questioned whether the entirety of the White River Flow System should be included in the State Engineer's analysis.[201] However,

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[195] Tr. 921–22. *See also* SNWA Ex. 7, pp. 8-1 through 8-5; SNWA Ex. 9, p. 27.
[196] *See* SNWA Ex. 8.
[197] *Id.*, pp. 8-1 through 8-2. *See also* SNWA Closing, pp. 17–19.
[198] *See* SNWA Closing, pp. 19–20. *See also* SNWA Ex. 7, pp. 6-3 through 6-11, 8-4; SNWA Ex. 9, pp. 21–22.
[199] SNWA Closing, p. 20. *See also* Tr. 904–05.
[200] *Response to Interim Order #1303 Submitted [sic] by Technichrome* (Technichrome Response), Hearing on Interim Order 1303, official records of the Division of Water Resources, and *Additional Comments from Technichrome* (Technichrome Addendum), Hearing on Interim Order 1303, official records of the Division of Water Resources.
[201] Technichrome Response, pp. 1–3.

Technichrome did note that it believed that combining all water rights into a single management structure reduced the State Engineer's ability to control groundwater withdrawals. Technichrome stated that it believed that the State Engineer should have the ability to control withdrawals in small areas to best manage the discharge to the Warm Springs area, and that more targeted control over the groundwater withdrawals would be more effective in managing the discharge.[202] Technichrome supported this opinion with some analysis of the results of the Order 1169 aquifer test and its opinion that pumping farther from the Warm Springs area had little to no impact on discharge to Pederson Spring.[203]

In Technichrome's additional comments, Technichrome addressed concerns regarding the injury that would result from a system-wide reduction of groundwater rights throughout the LWRFS.[204] Finally, Technichrome addressed concerns regarding reliance on the priority system, as utilization of the prior appropriation system would benefit senior irrigation uses over the junior industrial uses, and that removal of basin boundaries would remove limitations on movement of water rights between the existing hydrographic basins, which would disrupt junior uses in areas where senior rights may be moved.[205]

U.S. Fish and Wildlife Service

USFWS holds several water rights within the LWRFS and its mission is consistent with the scientific and management aspects of the LWRFS and the management area as established in Interim Order 1303.[206] USFWS opted to participate in the proceeding by submitting initial and rebuttal reports and providing testimony during the administrative hearing.[207] The approach of

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[202] *Id.*
[203] *Id.*, and Technichrome Addendum.
[204] Technichrome Addendum.
[205] *Id.*
[206] The USFWS' mission is to work with others to conserve, protect and enhance fish, wildlife and plants and their habitats for the continuing benefit of the American people. *See also,* USFWS, *About the U.S. Fish and Wildlife Service*, https://bit.ly/aboutusfws (last accessed June 4, 2020).
[207] USFWS Ex. 5, *Report in Response to Order 1303*, Hearing on Interim Order 1303, official records of the Division of Water Resources; USFWS Ex. 7, *Rebuttal to: Water Level Decline in the LWRFS: Managing for Sustainable Groundwater Development by Cady Johnson and Martin Mifflin* [sic], *Mifflin & Associates, Inc., submitted by the Moapa Band of Paiutes in accordance with Order 1303*, Hearing on Interim Order 1303, official records of the Division of Water Resources.

USFWS was to review available data, develop a hydrogeologic conceptual model, and answer the specific questions posed in Interim Order 1303.

USFWS proposed that the boundary be based on geologic breaks rather than the surface drainage areas. The boundary would then encompass all Muddy River Springs Area, Hidden Valley, Garnet Valley, most of Coyote Spring Valley, most of California Wash, the northwest portion of the Black Mountains area, Kane Springs Valley, and most of Lower Meadow Valley Wash. The extent to which Kane Springs Valley and Lower Meadow Valley Wash are included would depend on the data from an aquifer test that has not yet been performed.[208]

Although, USFWS did not directly opine their view on recovery, their report discusses a conceptual model with insight into lag times and hydraulic connections, and how current conditions relate to sustainable pumping. An "undiminished state of decline" in water levels and spring flows indicated that the system was not in equilibrium at the end of the Order 1169 aquifer test. USFWS postulated there was generally good connectivity within the aquifer system with areas of higher and lower transmittivity. Trends in water levels and spring flows allude to the connection between high elevation springs and carbonate-rock aquifer pumping, with a time lag observed in the recovery of carbonate-rock aquifer water levels and spring flows following the cessation of the Order 1169 aquifer test. The exception is Big Muddy Spring where surface water level trends appeared to be unrelated to the carbonate-rock aquifer water levels.[209]

USFWS determined that the optimum method currently available to estimate the maximum allowable rate of pumping in the LWRFS is the average annual rate of pumping from 2015–2017.[210] USFWS considered the period from 2015 to 2017 because it found that the groundwater withdrawals, the discharge of the Muddy River Springs, and the flow of the Muddy River were all relatively constant; flow rates from Plummer, Pederson, Jones and Baldwin springs, though generally lower than before the Order 1169 aquifer test, were reasonably stable compared to earlier

[208] *See* USFWS Ex. 5, pp. 2, 28–36.
[209] USFWS Ex. 5, pp. 3, 32–33, 35, 37–45; Tr. 266–270, 273–281, 299-301, 433-435.
[210] USFWS Ex. 5, p. 3.

periods.[211] Using the pumpage inventories for this time period, USFWS estimated the sustainable groundwater withdrawals to be 9,318 afa.[212]

Even if total carbonate-rock and alluvial aquifer pumping is maintained at a "sustainable" overall level, USFWS did not support increased carbonated-rock aquifer pumping in exchange for reductions in alluvial aquifer pumping, nor did USFWS support increased alluvial aquifer pumping in exchange for reductions in carbonate-rock aquifer pumping. USFWS suggested that carbonate-rock aquifer pumping should not be moved closer to the springs or the river. Similarly, USFWS suggests that alluvial aquifer pumping in the vicinity of the river should not be moved closer to the river. USFWS opines that any movement of water nearer to the springs or the river is anticipated to decrease the lag time for observing responses from pumping and shorten the time to respond to unfavorable impacts.[213]

Moving forward with management of the LWRFS, USFWS supported the use of the triggers at the Warm Springs West gage, as established under the 2006 MOA. Continuing to use these Warm Springs West flows as a trigger for management will protect and provide habitat for the Moapa dace; a reduction in the flow translates to a reduction in habitat.[214]

USFWS did not deny that water levels were independent of a climate response signal. Using observed data for Nevada Climate Divisions, USFWS visually inspected hydrographs for climate signals. USFWS opined that response to wet periods are observed for wells in both the carbonate-rock and alluvial aquifers and springs that discharge from the carbonate-rock aquifer but stated that response to dry periods cannot be separated from the impacts of pumping. USFWS did not observe these same climate signals in the hydrographs for Jones and Baldwin Springs or the Big Muddy Spring. USFWS disagreed with the conclusion of the MBOP regarding long-term, regional drought, as well as the analytical methods.[215]

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[211] USFWS Ex. 5, pp. 3, 37; Tr. 269–270, 433–435.
[212] USFWS Ex. 5, pp. 3, 36–38; Tr. 268–270.
[213] *See* USFWS Ex. 5, pp. 3–4, 38–39; Tr. 272–273.
[214] *See* USFWS Ex. 5, pp. 4, 39–45; Tr. 273–282; *See also*, NSE Ex. 256; NSE Ex. 244, *2006 Memorandum of Agreement Trigger Levels agreed to by the Southern Nevada Water Authority, Moapa Valley Water District, Coyotes Springs Investments LLC and Moapa Band of Paiute Indians*, Hearing on Interim Order 1303, official records of the Division of Water Resources.
[215] *See* USFWS Ex. 5, pp. 24–28, 34–35; *See* USFWS Ex. 7, pp. 2–16; Tr. 258–260, 299–322, 429–432.

Western Elite Environmental/Bedroc

Bedroc is the land holding and water-right holding entity for Western Elite Environmental, Inc., a provider of construction and recyclable waste collection and disposal in Southern Nevada.[216] Bedroc submitted an undated rebuttal report signed by Derek Muaina, General Counsel, and a closing statement.[217] Bedroc presented Jay Dixon as its expert to give a presentation and to discuss the rebuttal report.[218] Mr. Dixon stated that he contributed to the report, and that he agreed with it, but he did not sign the report because he was working for another participant in the hearing (NCA).[219] Mr. Dixon did provide testimony consistent with the report, and adopted the findings of that report, and both the testimony and the report will be considered in this Order.[220]

Bedroc presented testimony and evidence that its source of groundwater is hydraulically disconnected from the regional carbonate aquifer of the LWRFS and that additional groundwater may be available for pumping in their part of Coyote Spring Valley. Bedroc also argued that its basin fill alluvial groundwater pumping should be managed outside of the proposed LWRFS joint administrative unit.[221]

To show the hydraulic disconnect, Bedroc presented geologic information demonstrating its unique location.[222] Bedroc showed that a confining shelf of sedimentary rock was noticeably absent in the vicinity of the Bedroc site where recharge from the Sheep Range rises toward the surface between two faults, which results in shallow groundwater that is subject to ET and capture from shallow groundwater wells at the Bedroc site.[223] Recharge from the Sheep Range was estimated to be 750 afy, an average of the high and low estimates of the maximum recharge

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[216] Bedroc Ex. 2, *Interim Order 1303- Rebuttal Report- Prepared by Bedroc and Dixon Hydrologic, PLLC- August 2019*, Hearing on Interim Order 1303, official records of the Division of Water Resources.
[217] Bedroc Ex. 2; *Western Elite Environmental Inc.'s and Bedroc Limited, LLC's Closing Statement* (Bedroc Closing), Hearing on Interim Order 1303, official records of the Division of Water Resources.
[218] *See* Tr. 1718–1719.
[219] Tr. 1719, 1741.
[220] Tr. 1718–1757, 1749–1750.
[221] Bedroc Closing, pp. 13–14. Bedroc offered summary responses to the first four questions posed by Order 1303 but did no independent analysis. *See* Bedroc Closing, p. 12.
[222] Bedroc Closing, p. 2.
[223] *Id*; Tr. 1726–1733.

available.[224] SNWA challenged this calculation, pointing out that the estimated recharge could be as low as 130 acre-feet.[225]

Bedroc believes that it is capturing the recharge that would otherwise be lost to evapotranspiration.[226] Groundwater conditions at Bedroc's site show a rise in water levels between 2003 and 2006.[227] Bedroc attributed this rise in part to the installation of an unlined storage pond upgradient from the well, but also to the 2005 recharge event that was discussed by many participants to the proceeding.[228] Between 2006 and 2011, Bedroc showed that groundwater levels had been relatively stable even though pumping by Bedroc was fairly constant.[229] Bedroc showed photo evidence of evapotranspiration occurring around the Bedroc site, pointing to areas of white surface soils and green occurring in the photo as evidence of salt residue and phreatophytes, both occurring as a result of shallow groundwater evaporation.[230] The area is estimated to be about 2,200 acres, and the ET range is estimated to be 0.2 to 0.3 feet per year.[231] This results in an estimate of 400 to 600 afa of groundwater that potentially could be captured every year without pulling groundwater from storage.[232] If pumping in this area exceeded ET, water levels to the east of Bedroc would be dropping.[233]

Bedroc considered the alluvial system at its location to be a separate aquifer from the carbonate-rock aquifer in the LWRFS.[234] CBD in its report also supports this conclusion, suggesting that some groundwater can be withdrawn from the Coyote Spring Valley alluvial aquifer system because that system is disconnected from and not responsible for substantial recharge to the carbonate-rock aquifer.[235] SNWA testified similarly during the hearing.[236]

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[224] Tr. 1724–1725, 1755.
[225] Tr. 1755.
[226] Bedroc Closing, pp. 5–9.
[227] Tr. 1735.
[228] *Id.*
[229] Tr. 1735–1736.
[230] Tr. 1734, 1738.
[231] Tr. 1739.
[232] Tr. 1739.
[233] Tr. 1739. *See also* Bedroc Closing, p. 8.
[234] Tr. 1746.
[235] Bedroc Ex. 2, p. 5.
[236] Tr. 1024.

Relying on a lack of connection between pumping at Bedroc and the carbonate-rock aquifer, Bedroc asserted that there is no likely impact to the Warm Springs area caused by Bedroc.[237] Bedroc compared groundwater elevations over time in two alluvial wells, CSV-3009M and CSVM-7, and showed an upward trend in groundwater elevations.[238] But, when comparing groundwater elevations of two monitoring wells in different sources, CSVM-7 in the alluvium and CSVM-4 in the carbonate-rock aquifers, the carbonate-rock aquifer well elevations showed a decline during the Order 1169 aquifer test, but the alluvial well elevation rose during the same period and leveled off after the conclusion of the test.[239] Bedroc concluded that these data illustrate 1) the hydraulic disconnect between the local alluvial aquifer and carbonate-rock aquifer and 2) if historical alluvial pumping at Bedroc has not impacted water levels in nearby alluvial wells, then there is likely no impact to spring or streamflow in the Muddy River Springs Area.

Finally, Bedroc stated that managing all users in the region under the same system would arbitrarily impact users whose water neither comes from the regional carbonate-rock aquifer system nor impacts the springs of concern downstream.[240] It urged caution in allowing transfer of water rights between alluvial and carbonate-rock aquifers due to potential impacts on senior users that are using local recharge that may not sustain pumping from additional users.[241] Transfers of senior alluvial rights from the Muddy River Springs Area to the area near Bedroc should be considered on a case-by-case basis to protect Bedroc's senior water rights.[242]

III. PUBLIC COMMENT

WHEREAS, following the conclusion of the Interim Order 1303 hearing, opportunity for public comment was offered, including the opportunity to submit written public comment, which was due to be submitted to the Division no later than December 3, 2019. Lincoln County Board of

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[237] Bedroc Closing, p.11. *See also* SNWA testimony of Andrew Burns that pumping at Bedroc wells is not likely to impact the carbonate system or the Muddy River. Tr. 1024–1025.
[238] Bedroc Closing, p. 12. *See also* Tr. 1736–1737, 1752.
[239] Tr. 1737–1738.
[240] Bedroc Ex. 2, pp. 2–4.
[241] *Id.*, p. 6.
[242] Tr. 1740.

County Commissioners submitted written public comment in addition to the closing argument submitted by LC-V.[243]

IV. AUTHORITY AND NECESSITY

WHEREAS, NRS 533.024(1)(c) directs the State Engineer "to consider the best available science in rendering decisions concerning the availability of surface and underground sources of water in Nevada."

WHEREAS, in 2017 the Nevada Legislature added NRS 533.024(1)(e), declaring the policy of the State to "manage conjunctively the appropriation, use and administration of all waters of this State regardless of the source of the water."

WHEREAS, NRS 534.020 provides that all waters of the State belong to the public and are subject to all existing rights.

WHEREAS, as demonstrated by the results of the Order 1169 aquifer test and in the data collected in the years since the conclusion of the aquifer test, the LWRFS exhibits a direct hydraulic connection that demonstrates that conjunctive management and joint administration of these groundwater basins is necessary and supported by the best available science.[244]

WHEREAS, the pre-development discharge of 34,000 acre-feet of the fully appropriated Muddy River system plus the more than 38,000 acre-feet of groundwater appropriations within the LWRFS greatly exceed the total water budget that may be developed without impairment of senior existing rights or proving detrimental to the public interest.

WHEREAS, the available groundwater supply within the LWRFS that can be continually pumped over the long-term is limited to the amount that may be developed without impairing existing senior rights, rights on the Muddy River or adversely affecting the public interest in

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[243] *See* Board of County Commissioners, Lincoln County, Nevada, *Public Comment to Interim Order #1303 Hearing, Reports, and Evidence on the Lower White River Flow System,* Hearing on Interim Order 1303, official records of the Division of Water Resources.

[244] *See, e.g.,* NSE Ex. 245; NSE Ex. 248; NSE Ex. 256; NSE Ex. 252; NSE Ex. 282, *Federal Bureaus Order 1169 Report Selected References: Comparison of Simulated and Observed Effects of Pumping from MX-5 Using Data Collected to the Endo of the Order 1169 Test, and Prediction of the Rates of Recovery from the Test, TetraTech, 2013,* Hearing on Interim Order 1303, official records of the Division of Water Resources. *See also, e.g.,* CBD Ex. 3; MVWD Exs. 3–4; MVIC Ex. 1; NCA Ex. 1, SNWA Exs. 7–9; USFWS Exs. 5–6; NPS Exs. 2–3.

protection of the endangered Moapa dace and the habitat necessary to support the management and recovery of the Moapa dace.

WHEREAS, pursuant to NRS 532.120, the State Engineer is empowered to make such reasonable rules and regulations as may be necessary for the proper and orderly execution of the powers conferred by law.

WHEREAS, pursuant to NRS 534.110(6) the State Engineer is directed to conduct investigations in groundwater basins where it appears that the average annual replenishment of the groundwater is insufficient to meet the needs of all water right holders, and if there is such a finding, the State Engineer may restrict withdrawals to conform to priority rights.

WHEREAS, within an area that has been designated by the State Engineer, as provided for in NRS Chapter 534, and specifically, NRS 534.120, where, in the judgment of the State Engineer, the groundwater basin is being depleted, the State Engineer in his or her administrative capacity may make such rules, regulations and orders as are deemed essential for the welfare of the area involved.[245]

WHEREAS, the State Engineer has the authority to hold a hearing to take evidence and the interpretation of the evidence with respect to its responsibility to manage Nevada's water resources and to allow willing participants to present evidence and testimony regarding the conclusions relating to the questions presented in Interim Order 1303. The State Engineer recognizes that the MBOP is a federally recognized tribe, and that its participation in the hearing was to facilitate the understanding of the interpretation of data with respect to the Interim Order 1303 solicitation.

V. ENDANGERED SPECIES ACT

WHEREAS, the Endangered Species Act (ESA), 16 U.S.C. §1531 et seq. is a federal law designed to serve the purpose of identifying, conserving and ultimately recovering species declining toward extinction.[246] Specifically, while the ESA is primarily a conservation program, a critical element of the conservation component seeks to encourage cooperation and coordination

[245] *See also* NRS 534.030, NRS 534.110.
[246] 16 U.S.C. § 1531(a)–(b).

with state and local agencies.[247] The responsibility of enforcement and management under the ESA rests predominately with the federal government; however, the ultimate responsibility is shared.[248]

WHEREAS, the ESA makes it unlawful for any person to "take" an endangered species – or to attempt to commit, solicit another to commit, or cause to be committed, a taking.[249] The term "person" is broadly defined to include the State and its instrumentalities.[250] "Take" encompasses actions that "harass, harm" or otherwise disturb listed species, including indirect actions that result in a take.[251] For example, a state regulator is not exempted from the ESA for takings that occur as a result of a licensee's regulated activity. States have been faced with the impediment of their administrative management actions being subservient to the ESA. For example, the Massachusetts Division of Marine Fisheries was subject to an injunction prohibiting it from issuing commercial fishing licenses because doing so would likely lead to the taking of an endangered species.[252] In *Strahan v. Coxe*, the court's decision relied on reading two provisions of the ESA— the definition of the prohibited activity of a "taking" and the causation by a third party of a taking— "to apply to acts by third parties that allow or authorize acts that exact a taking and that, but for the permitting process, could not take place."[253] Although Massachusetts was not the one directly causing the harm to the endangered species, the court upheld the injunction because "a governmental third party pursuant to whose authority an actor directly exacts a taking of an endangered species may be deemed to have violated the provisions of the ESA."[254] At least three other circuits have held similarly.[255] In each case, "the regulatory entity purports to make lawful an activity that allegedly violates the ESA."[256] Thus the action of granting the permit for the regulated activity has been considered an indirect cause of a prohibited taking under the ESA.

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[247] 16 U.S.C. § 1531(c); 16 U.S.C. § 1536.
[248] 16 U.S.C.A. § 1536.
[249] 16 U.S.C.A. § 1538(g).
[250] 16 U.S.C.A. § 1532(13).
[251] 16 U.S.C.A. § 1532(19). The term "harm" is defined by regulation, 50 C.F.R. § 17.3 (1999).
[252] *Strahan v. Coxe*, 127 F.3d 155 (1st.Cir.1997), *cert denied* 525 U.S. 830 (1998).
[253] *Id.*, p. 163.
[254] *Id.*
[255] *See Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir.1991); *Defenders of Wildlife v. EPA*, 882 F.2d 1294 (8th Cir. 1989); *Loggerhead Turtle v. County Council*, 148 F.3d 1231 (11th Cir.1998); *Palila v. Hawaii Dept. of Land & Natural Resources*, 852 F.2d 1106 (9th Cir.1988).
[256] *Loggerhead Turtle*, 148 F.3d at 1251.

WHEREAS, the use of water in Nevada is a regulated activity.[257] It is the responsibility of the State to manage the appropriation, use and administration of all waters of the state.[258] Based on *Strahan* and similar decisions, the act of issuing a permit to withdraw groundwater that reduces the flow of the springs that form the habitat of the Moapa dace and were to result in harm to the Moapa dace exposes the Division, the State Engineer and the State of Nevada to liability under the ESA.

WHEREAS, a USFWS biological opinion for the MOA found that the reduction in spring flow from the warm springs could impact the dace population in multiple ways. First, the USFWS found that declines in groundwater levels will reduce the flow to the Warm Springs area and allow for cooler groundwater seepage into streams. With reduced spring flow, Moapa dace habitat is reduced.[259] Additionally, USFWS determined that the reduced flows of warm water from the springs will also result in cooler water available throughout the dace habitat, reducing spawning habitat and resulting in a population decline.[260]

WHEREAS, based upon the testimony and evidence offered in response to Interim Order 1303, it is clear that it is necessary for spring flow measured at the Warm Springs West gage to flow at a minimum rate of 3.2 cfs in order to maintain habitat for the Moapa dace.[261] A reduction of flow below this rate may result in a decline in the dace population. This minimum flow rate is not necessarily sufficient to support the rehabilitation of the Moapa dace.[262]

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[257] NRS 533.030; 533.325; 534.020.
[258] NRS 533.325; 533.024(1)(e); 534.020.
[259] USFWS Ex. 5, pp. 50–52.
[260] SNWA Ex. 8, pp. 6-2 through 6-3; SNWA Ex. 40, *Hatten, J.R., Batt, T.R., Scoppettone, G.G., and Dixon, C.J., 2013, An ecohydraulic model to identify and monitor Moapa dace habitat. PLoS ONE 8(2):e55551, doi:10.1371/journal.pone.0055551.*, Hearing on Interim Order 1303, official records of the Division of Water Resources; SNWA Ex. 41, *U.S. Fish and Wildlife Service, 2006a, Intra-service programmatic biological opinion for the proposed Muddy River Memorandum of Agreement regarding the groundwater withdrawal of 16,100 acre-feet per year from the regional carbonate aquifer in Coyote Spring Valley and California Wash basins, and establish conservation measures for the Moapa Dace, Clark County, Nevada. File No. 1-5-05 FW-536, January 30, 2006.*, Hearing on Interim Order 1303, official records of the Division of Water Resources.
[261] Tr. 1127–1128.
[262] Tr. 401–402, 1147, 1157–1158.

WHEREAS, the ESA prohibits any loss of Moapa dace resulting from actions that would impair habitat necessary for its survival. Some groundwater users are signatories to an MOA that authorizes incidental take of the Moapa dace; however, the State Engineer and many other groundwater users are not covered by the terms of the MOA.[263] Not only would liability under the ESA for a "take" extend to groundwater users within the LWRFS, but would so extend to the State of Nevada through the Division as the government agency responsible for permitting water use.

WHEREAS, the State Engineer concludes that it is against the public interest to allow groundwater pumping from the LWRFS that will reduce spring flow in the Warm Springs area to a level that would impair habitat necessary for the survival of the Moapa dace and could result in take of the endangered species.

VI. GEOGRAPHIC BOUNDARY OF THE LWRFS

WHEREAS, the geographic boundary of the hydrologically connected groundwater and surface water systems comprising the LWRFS, as presented in Interim Order 1303, encompasses the area that includes Coyote Spring Valley, Muddy River Springs Area, California Wash, Hidden Valley, Garnet Valley and the northwest portion of the Black Mountains Area.[264] The rationale for incorporating these areas into a single administrative unit included the presence of a distinct regional carbonate-rock aquifer that underlies and uniquely connects these areas; the remarkably flat potentiometric surface observed within the area; the diagnostic groundwater level hydrographic pattern exhibited by monitoring wells distributed across the area; and the area-wide diagnostic water level response to pumping during the Order 1169 aquifer test. Each of these characteristics were previously identified and examined in the hydrological studies and subsequent hearing that followed the completion of the Order 1169 aquifer test. Indeed, these characteristics were the foundational basis for the State Engineer's determination in Rulings 6254–6261 that the

[263] NSE Ex. 236; SNWA Ex. 8, pp. 5-1 through 5-8.
[264] *See* NSE Ex. 1, p. 6.

close hydrologic connection[265] and shared source and supply of water in the LWRFS required joint management.[266]

WHEREAS, evidence and testimony presented during the Interim Order 1303 hearing indicated a majority consensus among stakeholder participants that this originally defined area is appropriately combined into a single unit.[267] Evidence and testimony was also presented on whether to add adjacent basins, or parts of basins to the administrative unit; to modify boundaries within the existing administrative unit; or to eliminate the common administrative unit boundaries. The State Engineer has considered this evidence and testimony on the basis of a common set of criteria that are consistent with the original characteristics considered critical in demonstrating a close hydrologic connection requiring joint management in Rulings 6254–6261 and more specifically, include the following:

1) Water level observations whose spatial distribution indicates a relatively uniform or flat potentiometric surface are consistent with a close hydrologic connection.

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[265] The State Engineer notes that the terminology "***hydrologic*** connection" and "***hydraulic*** connection" have been used by different parties sometimes interchangeably, and commonly with nearly the same meaning. The State Engineer considers a hydraulic connection to be intrinsically tied to the behavior and movement of water. With regard to aquifers, it may be thought of as the natural or induced movement of water through permeable geologic material. The degree of hydraulic connection can be considered a measure of the interconnection between locations as defined by a cause and effect change in potentiometric surface or a change in groundwater inflow or outflow that reflects characteristics of both the aquifer material and geometry, and groundwater behavior. It is commonly characterized by a response that is transmitted through the aquifer via changes in hydraulic head, ie., groundwater levels. Hydrologic connections may include hydraulic connections but can also represent more complex system interactions that can encompass all parts of the water cycle, and in some cases may focus on flow paths, water budgets, geochemical interactions, etc. The State Engineer's use of the term "***close*** hydrological connection" is intended to encompass and include a direct hydraulic connection that is reflected in changes in groundwater levels in response to pumping or other fluxes into or out of the aquifer system within a matter of days, months, or years. The closeness, strength, or directness of the response is indicated by timing, with more distinct and more immediate responses being more "close".

[266] *See* NSE Ex. 14, p. 12, 24.

[267] *See* Participant testimony from SNWA (Tr. 875–876), CNLV (Tr. 1418), and CSI (Tr. 95–96). Several other participants agreed, too, that the State Engineer's delineation of the LWRS as defined in Interim Order 1303 was acceptable. *See also* Bedroc Closing, p. 12, Church Closing, p. 1; Technichrome Response, p. 1. Other participants recommended larger areas be included within the LWRFS boundary. *See* Tr. 261–266 (USFWS), 1571–1572 (CBD), 1697–1698 (MVIC). *See also* NV Energy Closing, pp. 2–3; NPS Closing pp. 2–5.

2) Water level hydrographs that, in well-to-well comparisons, demonstrate a similar temporal pattern, irrespective of whether the pattern is caused by climate, pumping, or other dynamic is consistent with a close hydrologic connection.

3) Water level hydrographs that demonstrate an observable increase in drawdown that corresponds to an increase in pumping and an observable decrease in drawdown, or a recovery, that corresponds to a decrease in pumping, are consistent with a direct hydraulic connection and close hydrologic connection to the pumping location(s).

4) Water level observations that demonstrate a relatively steep hydraulic gradient are consistent with a poor hydraulic connection and a potential boundary.

5) Geological structures that have caused a juxtaposition of the carbonate-rock aquifer with low permeability bedrock are consistent with a boundary.

6) When hydrogeologic information indicate a close hydraulic connection (based on criteria 1-5), but limited, poor quality, or low resolution water level data obfuscate a determination of the extent of that connection, a boundary should be established such that it extends out to the nearest mapped feature that juxtaposes the carbonate-rock aquifer with low-permeability bedrock, or in the absence of that, to the basin boundary.

WHEREAS, some testimony was presented advocating to include additional areas to the LWRFS based principally on water budget considerations and/or common groundwater flow pathways.[268] Indeed, some participants advocate to include the entire White River Flow System, or other basins whose water may ultimately flow into or flow out of the system.[269] Other participants used, but did not rely on, water budget and groundwater flow path considerations to support their analysis. Like those participants, the State Engineer agrees that while water budget and groundwater flow path analysis are useful to demonstrate a hydrologic connection, additional information is required to demonstrate the relative strength of that connection. Thus, the State

[268] *See e.g.*, CNLV Ex. 3, p. 33, Tr. 1430; NPS Closing, p. 2. *See also* Tr. 253–257; Sue Braumiller, *Interpretations of available Geologic and Hydrologic Data Leading to Responses to Questions Posed by the State Engineer in Order 1303 regarding Conjunctive Management of the Lower White River Flow System* (USFWS Braumiller presentation), slide 11, Item 6., bullet 1, official records of the Division of Water Resources; MBOP Ex. 2, p. 11.
[269] *See e.g.*, GBWN Report, pp. 1–2.

Engineer recognizes that while any hydrologic connection, weak or strong, needs to be considered in any management approach, many of the connections advocated based principally on a water budget or flow path analysis, including those between nearby basins like Las Vegas Valley and Lower Meadow Valley Wash, are not demonstrated to provide for the uniquely close hydraulic connection that require joint management.

WHEREAS, in their closing statement, NPS proposes that all adjacent hydrographic areas to the original Interim Order 1303 administrative unit where a hydraulic interconnection exists, whether weak or strong, be included in the LWRFS.[270] It does so to alleviate the need for developing new management schemes for the excluded remnants and to provide for appropriate management approaches based on new information and improved understanding of differing degrees of hydraulic interconnection in various sub-basins. The State Engineer agrees with this logic, up to a point, and has applied these concepts to the extent practical as demonstrated in his criteria for determining the extent of the LWRFS. However, the State Engineer also finds that there must be reasonable and technically defensible limits to the geographic boundary. Otherwise, if management were to be based on the entire spectrum of weak to strong hydraulic interconnection, then exclusion of an area from the LWRFS would require absolute isolation from the LWRFS; every sub-basin would have its own management scheme based on some measure of its degree of connectedness; and proper joint management would be intractable.

WHEREAS, evidence and testimony was also presented by the NPS regarding the specific inclusion of the entirety of the Black Mountains Area in the LWRFS.[271] The State Engineer recognizes that there may be a hydrologic connection between the Black Mountains Area and upgradient basins that are sources of inflow, and that outflow from the LWRFS carbonate-rock aquifer may contribute to discharge from Rogers and Blue Point Springs. However, the State Engineer does not find that this supports inclusion of the entirety of the Black Mountains Area. This determination is made based on the lack of contiguity of the carbonate-rock aquifer into this

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[270] NPS Closing, pp. 3–5.
[271] NPS Closing pp. 3–4. *See also* Tr.534, 555–569; Richard K. Waddell, Jr., *Testimony of Richard K. Waddell on behalf of the National Park Service*, presentation during hearing for Interim Order 1303 (NPS Presentation), slides 32–46, official records of the Division of Water Resources.

area,[272] the difference in observed water level elevations compared to those in adjacent carbonate-rock aquifer wells to the north and west,[273] and the absence of observed diagnostic hydrographic patterns and responses that define the uniquely close hydraulic connection that characterizes the LWRFS.[274]

WHEREAS, evidence and testimony presented by USFWS relied principally on SeriesSEE analysis of water level responses submitted by the Department of Interior Bureaus following the Order 1169 aquifer test to establish the general extent of the LWRFS. This was supported by the application of hydrogeology and principles of groundwater flow to define specific boundary limits to the LWRFS. It proposed that most of the Lower Meadow Valley Wash be considered for inclusion in the LWRFS based on the potential geologic continuity between carbonate rocks underlying the Lower Meadow Valley Wash and the carbonate-rock aquifer underlying Coyote Spring Valley, the Muddy River Springs Area, and California Wash.[275] Additionally, it asserted that the alluvial aquifer system in Lower Meadow Valley Wash contributes to and is connected to both the Muddy River and the alluvial aquifer system in California Wash. The State Engineer finds that while carbonate rocks may underlie the Lower Meadow Valley Wash and be contiguous with carbonate rocks to the south and west, data are lacking to characterize the potential hydraulic connection that may exist. Regarding the hydraulic connection between the Lower Meadow Valley Wash alluvial aquifer and the LWRFS, the State Engineer agrees with USFWS that a connection exists, but finds that any impacts related to water development in the Lower Meadow Valley Wash alluvial aquifer are localized, and unrelated to the carbonate-rock aquifer, and can be appropriately managed outside the LWRFS joint management process.

WHEREAS, NCA advocated for the exclusion of the portion of the Black Mountains Area from the LWRFS that contains their individual production wells. NCA premise this primarily on testimony and analysis performed by SNWA with respect to the impact of pumping from this area

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[272] *See* CSI Ex. 14, Plate 2, Map and Plate 4, Cross section K–K', in Peter D. Rowley et. al., *Geology and Geophysics of White Pine and Lincoln Counties, Nevada and Adjacent Parts of Nevada and Utah: The Geologic Framework of Regional Groundwater Flow Systems*, Nevada Bureau of Mines and Geology Report 56.
[273] *See, e.g.*, USFWS Ex. 5, p. 30.
[274] *Id.*, p. 17.
[275] *Id.*, pp. 19–24.

on discharge to the Warm Springs area.[276] It also used hydrogeologic and water level response information to conclude that strike-slip faulting and a weak statistical correlation between water levels at NCA well EBM-3 and EH-4 in the Warm Springs area support a boundary to the north of the NCA production wells. While the State Engineer finds logic in NCA's position, other testimony describing flaws in the SNWA analysis make for a compelling argument against relying on SNWA's statistically-based results.[277] The substantial similarity in observed water level elevation and water level response at EBM-3 compared to EH-4[278] and limitations in relying on poor resolution water level measurements for statistical or comparative analysis[279] requires a more inclusive approach that places the boundary to the south of the NCA production wells to a geological location that coincides with the projection of the Muddy Mountain Thrust. This more closely coincides with the measurable drop in water levels recognized to occur south of the NCA wells, between EBM-3 and BM-ONCO-1 and 2, that is indicative of a hydraulic barrier or zone of lower permeability.[280] It also better honors the State Engineer's criteria by acknowledging the uncertainty in the data while reflecting a recognized physical boundary in the carbonate-rock aquifer. Specifically, this shall be defined to include that portion of the Black Mountains Area lying within portions of Sections 29, 30, 31, 32, and 33, T.18S., R.64E., M.D.B.&M.; portions of Sections 1, 11, 12, 14, 22, 23, 27, 28, 33, and 34 and all of Sections 13, 24, 25, 26, 35, and 36, T.19S., R.63E., M.D.B.&M.; portions of Sections 4, 6, 9, 10, and 15 and all of Sections 5, 7, 8, 16, 17, 18, 19, 20, 21, 29, 30, and 31, T.19S., R.64E., M.D.B.&M.[281]

WHEREAS, numerous participants advocated to include Kane Springs Valley in the LWRFS basins.[282] Other participants advocated to exclude Kane Springs Valley.[283] Several expert witnesses recommended the exclusion of Kane Springs Valley based on their characterization of water level elevation data, temporal hydrographic response patterns, geochemistry, and/or the

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[276] *See,* Tr. 1622, 1624; NCA Closing.
[277] *See, e.g.*, Tr. 1467–1469 CNLV presentation, slides 21–23; Tr. 1784–1786; NV Energy presentation, slides 32–33.
[278] NCA Closing, p. 18, Figure 3.
[279] NCA Closing, p. 8.
[280] *See e.g.*, USFWS Ex. 5.
[281] See map of the LWRFS Hydrographic Basin as defined by this Order, Attachment A.
[282] *See, e.g.*, NV Energy Closing, p. 2; NCA Closing, p. 10–14; MVWD Closing, p. 2–8.
[283] *See e.g., Written Closing Statement of Lincoln County Water District and Vidler Water Company, Inc.* (LC-V Closing), Hearing on Interim Order 1303, official records of the Division of Water Resources, p. 3–6; CSI Closing, p. 2.

geophysically-inferred presence of structures that may act as flow barriers. Others recommended inclusion based on the same or similar set of information. Water level elevations observed near the southern edge of Kane Springs Valley are approximately 60 feet higher than those observed in the majority of carbonate-rock aquifer wells within the LWRFS to the south; consistent with a zone of lower permeability.[284] Some experts suggested that the hydrographic response pattern exhibited in wells located in the southern edge of Kane Springs Valley is different compared to that exhibited in wells in the LWRFS, being muted, lagged, obscured by climate response, or compromised by low-resolution data.[285] In this regard, the State Engineer recognizes these differences. However, he finds that the evidence and testimony supporting a similarity in hydrographic patterns and response as provided by expert witnesses, like that of the NPS, to be persuasive.[286] Namely, that while attenuated, the general hydrographic pattern observed in southern Kane Springs Valley reflects a response to Order 1169 pumping, consistent with a close hydraulic connection with the LWRFS. The State Engineer also finds that occurrence of the carbonate-rock aquifer in the southern Kane Springs Valley indicates that there is no known geologic feature at or near the southern Kane Springs Valley border that serves to juxtapose the carbonate-rock aquifer within the LWRFS with low permeability rocks in Kane Springs Valley.[287] He also finds that while geologic mapping[288] indicates that the carbonate-rock aquifer does not extend across the northern portion of the Kane Springs Valley, there is insufficient information available to determine whether the non-carbonate bedrock interpreted to underlie the northern part of the Kane Springs Valley represents low-permeability bedrock that would define a hydraulic boundary to the carbonate-rock aquifer.[289] After weighing all of the testimony and evidence relative to his criteria

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[284] LC-V Closing, p. 7.
[285] *See, e.g.*, LC-V Closing, pp. 5–6; LC-V Ex. 1, pp. 3-3–3-4; CSI Closing, pp. 5–6.
[286] *See* Tr. 524–55. *See, e.g.*, NPS presentation, slides 23–27.
[287] Pursuant to the criteria requiring joint management of hydrographic basins and the sixth criteria establishing that the boundary should extend to the nearest mapped feature that juxtaposes the carbonate-rock aquifer with low-permeability bedrock, or where a mapped feature cannot be adequately identified, to the basin boundary, the State Engineer includes the entirety of Kane Springs Valley.
[288] *See, e.g.*, NSE Ex. 12; Page, W.R., Dixon, G.L., Rowley, P.D., and Brickey, D.W., 2005, *Geologic Map of Parts of the Colorado, White River, and Death Valley Groundwater Flow Systems, Nevada, Utah, and Arizona*: Nevada Bureau of Mines and Geology Map 150, Plate plus text.
[289] *See, e.g.*, SNWA Ex. 7, pp. 2-4, 2-5, 2-10, 2-11, and 4-1, that describe volcanic rocks as important aquifers, and calderas as both flow paths and barriers depending on structural controls

for inclusion into the LWRFS, the State Engineer finds that the available information requires that Kane Springs Valley be included within the geographic boundary of the LWRFS.

WHEREAS, limited evidence and testimony were provided by participants advocating to either include or exclude the northern portion of Coyote Spring Valley. The State Engineer finds that while information such as that provided by Bedroc is convincing and supports a finding that local, potentially discrete aquifers may exist in parts of the northern Coyote Springs Valley, his criteria for defining the LWRFS calls for the inclusion of the entirety of the basin in the LWRFS. However, the State Engineer also acknowledges that there may be circumstances, like in the northern Coyote Spring Valley, where case-by-case considerations for proper management are warranted.

WHEREAS, evidence and testimony from Georgia-Pacific and Republic, and MBOP advocated against creating a single LWRFS administrative unit. Their arguments were principally based on concerns that there was insufficient consensus on defining the LWRFS geographic boundaries and that there were inherent policy implications to establishing an LWRFS administrative unit. MBOP recommended continuing to collect data and focusing on areas of scientific consensus. Georgia-Pacific and Republic asserted that boundaries are premature without additional data and without a legally defensible policy and management tools in place. They expressed concern that creating an administrative unit at this time inherently directs policy without providing for due process. The State Engineer has considered these concerns and agrees that additional data and improved understanding of the hydrologic system is critical to the process. He also believes that the data currently available provide enough information to delineate LWRFS boundaries, and that an effective management scheme will provide for the flexibility to adjust boundaries based on additional information, retain the ability to address unique management issues on a sub-basin scale, and maintain partnership with water users who may be affected by management actions throughout the LWRFS.

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to flow, citing Peter D. Rowley, and Dixon, G.L., 2011, *Geology and Geophysics of Spring, Cave, Dry Lake, and Delamar Valleys, White Pine and Lincoln Counties, and Adjacent Areas, Nevada and Utah: The Geologic Framework of Regional Flow Systems*,.

WHEREAS, evidence and testimony support the delineation of a single hydrographic basin as originally defined by the State Engineer in Interim Order 1303, with the adjustment of the Black Mountain Area boundary and the addition of Kane Springs Valley. The State Engineer acknowledges that special circumstances will exist with regard to both internal and external management. Water development both inside and outside of the perimeter of the LWRFS will continue to be evaluated on the best available data and may become subject to or excluded from the constraints or regulations of the LWRFS.

WHEREAS, the geographic extent of the LWRFS is intended to represent the area that shares both a unique and close hydrologic connection and virtually all of the same source and supply of water, and therefore will benefit from joint and conjunctive management. In that light, the State Engineer recognizes that different areas, jointly considered for inclusion into the LWRFS, have been advocated both to be included and to be excluded by the different hearing participants based on different perspectives, different data subsets, and different criteria. For the Muddy River Springs Area, California Wash, Garnet Valley, Hidden Valley, Coyote Spring Valley, and a portion of the Black Mountain Area, there is a persuasive case previously laid out in Rulings 6254–6261, and the consensus amongst the participants support their inclusion in the LWRFS. For other sub-basins such as Kane Springs Valley and the area around the NCA production wells in the Black Mountain Area, there is persuasive evidence to support their inclusion or exclusion; however, the State Engineer's criteria and available data mandate their inclusion. Their inclusion in the LWRFS provides the opportunity for conducting additional hydrologic studies in sub-basins such as these, to determine the degree to which water use would impact water resources in the LWRFS and to allow continued participation by holders of water rights in future management decisions. Thus, these sub-basins, and any other portions of the LWRFS that may benefit from additional hydrological study, can be managed more effectively and fairly within the LWRFS. For other basins whose inclusion was advocated, such as the northern portion of Las Vegas Valley and the Lower Meadow Valley Wash, the State Engineer finds that data do not exist to apply his criteria, and therefore they cannot be considered for inclusion into the LWRFS. These types of areas may require additional study and special consideration regarding the potential effects of water use in these areas on water resources within the LWRFS.

VII. AQUIFER RECOVERY SINCE COMPLETION OF THE ORDER 1169 AQUIFER TEST

WHEREAS, during the Order 1169 aquifer test an average of 5,290 afa were pumped from the carbonate-rock aquifer wells in Coyote Spring Valley and a cumulative total of 14,535 afa were pumped throughout the Order 1169 study basins. A portion of this total, approximately 3,840 acre-feet per year, was pumped from the alluvial aquifer in the Muddy River Springs Area.[290] In the years since completion of the Order 1169 aquifer test, pumping from wells in the LWRFS has gradually declined.[291] Pumping in 2013-2014 averaged 12,635 afa; pumping in 2015-2017 averaged 9,318 afa.[292] Pumpage inventories for 2018 that were published after the completion of the hearing report a total of 8,300 afa.[293] Pumping from alluvial aquifer wells in the Muddy River Spring Area has consistently declined since closure of the Reid Gardner power plant beginning in 2014, while pumping from the carbonate-rock aquifer since the completion of the aquifer test has consistently ranged between approximately 7,000 and 8,000 afa.

WHEREAS, the information obtained from the Order 1169 aquifer test and in the years since the conclusion of the test demonstrates that while, following conclusion of the aquifer test, there was a recovery of groundwater levels, the carbonate-rock aquifer has not recovered to pre-Order 1169 test levels.[294] Evidence and testimony submitted during the 2019 hearing does not refute the conclusions made by the State Engineer in Rulings 6254–6261 regarding interpretations of the Order 1169 aquifer test results, which were based on observations and analysis by multiple technical experts. Groundwater level recovery reached completion approximately two to three years after the Order 1169 aquifer test pumping ended.[295]

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[290] NSE Ex. 1, p. 4.
[291] *See, e.g.* NSE Ex. 50, *Pumpage Report Coyote Spring Valley 2017*; NSE Ex. 67, *Pumpage Report Black Mountains Area 2017*; NSE Ex. 84, *Pumpage Report Garnet Valley Area 2017*; NSE Ex. 86, *Pumpage Report California Wash Area 2017*; Ex. 88, *Pumpage Report Muddy River Springs Area 2017*, Hearing on Interim Order 1303, official records of the Division of Water Resources.
[292] *Id.*
[293] *Id.*
[294] *See, e.g.*, SNWA Ex. 7, pp. 5-17–5-18, 8-2; NPS Closing, p. 4; MVWD Closing, p. 8. *See also* Tr. 1807; NV Energy presentation, p. 11.
[295] SNWA Ex, 7, pp. 5-17–5-18; NVE Ex. 1, p. 2

WHEREAS, several participants testified about the effects of drought and climate on the recovery of groundwater levels and spring discharge after the Order 1169 aquifer test. Droughts, or periods of drier than normal conditions that last weeks, months, or years can lead to declines in groundwater levels.[296] The LWRFS is within National Oceanic and Atmospheric Administration's Nevada Climate Division 4 (Division 4). Precipitation records for Division 4 from 2006 to the 2019 season records indicate that 10 of those 14 seasons received lower than average precipitation.[297] Despite low precipitation, several participants submitted evidence that water levels continue to rise under current climate conditions in other areas with a relative lack of pumping that are tributary to the LWRFS, such as Dry Lake Valley, Delamar Valley, Garden Valley, Tule Desert, Dry Lake Valley, and other areas.[298] These rises have been attributed to efficient winter recharge that has occurred despite low cumulative precipitation.[299] Based on these observations, it was argued that the continued stress of pumping in the LWRFS carbonate-rock aquifer is limiting the recovery of water levels.[300] The State Engineer acknowledges that spring discharge is affected by both pumping and climate, and finds that groundwater levels remain a useful tool for monitoring the state of the aquifer system in the LWRFS regardless of the relative contribution of climate and drought to the measured groundwater levels. The State Engineer only has the authority to regulate pumping, not climate, in consideration of its potential to cause conflict or to be detrimental to the public interest and must do so regardless of the relative contributing effects of climate.

WHEREAS, evidence and testimony during the 2019 hearing was divided on whether water levels in the Warm Springs area and carbonate-rock aquifer indicate the system has reached or is approaching equilibrium,[301] or is still in a state of decline.[302] Hydrographs and evidence presented show that water levels at well EH-4 near the Warm Springs area have been relatively stable for several years following recovery from the Order 1169 aquifer test.[303] However, other

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[296] *See* USGS, 1993, *Drought,* US Geological Survey Open File Report 93-642, accessible at https://bit.ly/93-642, (last accessed June 6, 2020).
[297] SNWA Ex. 7, pp. 4-1–4-4.
[298] Tr. 577, 304–307.
[299] NPS Ex. 3, Appendix A.
[300] *See, e.g.*, SNWA Closing, p. 11. NPS Closing, p. 4. *See also* Tr. 642, 644–45, 1545.
[301] MVWD Closing, pp. 8–9. *See also* NV Energy Closing, p. 3; CNLV Closing, pp. 5–7.
[302] SNWA Closing, pp. 11–12. NPS Closing, pp. 4–5.
[303] SNWA Ex. 7, pp. 5–7.

carbonate-rock aquifer wells located further away from the Warm Springs area such as CSVM-1, TH-2, GV-1, and BM-DL-2 appear to have reached peak recovery from the Order 1169 aquifer test in 2015-2016 and have exhibited downward trends for the past several years.[304] The State Engineer agrees that water levels in the Warm Springs area may be approaching steady state with current pumping conditions. However, the trend is of insufficient duration to make this determination with absolute assurance and continued monitoring is necessary to determine if this trend continues or if water levels are continuing to decline slowly.

VIII. LONG-TERM ANNUAL QUANTITY OF WATER THAT CAN BE PUMPED

WHEREAS, the evidence and testimony presented at the 2019 hearing did not result in a consensus among experts of the long-term annual quantity of groundwater that can be pumped. Recommendations range from zero to over 30,000 afa, though most experts agreed that the amount must be equal to or less than the current rate of pumping. There is a near consensus that the exact amount that can be continually pumped for the long-term cannot be absolutely determined with the data available and that to make that determination will require more monitoring of spring flows, water levels, and pumping amounts over time.

WHEREAS, evidence and testimony were presented arguing that the regional water budget demonstrates that far more groundwater is available for development within the LWRFS than is currently being pumped. CSI argues that the total amount of groundwater available for extraction from the LWRFS may be up to 30,630,[305] which is an estimate of the entirety of natural discharge from the system that occurs through groundwater evapotranspiration and subsurface groundwater outflow. Nearly all other experts disagreed that pumping to that extent could occur without causing harm to the Moapa dace or conflict with senior Muddy River decreed rights. The disagreement is not about the amount of the water budget, but rather the importance of the water budget in determining the amount of groundwater in the LWRFS that can continually be pumped,[306] not the amount of inflow and outflow to the system. In addition, availability of groundwater for pumping based on water budget should consider whether the same water is appropriated for use in upgradient and downgradient basins, and CSI did not account for this.

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[304] *Id.*
[305] CSI Closing, p. 2.
[306] *See e.g.*, SNWA Ex. 9, p. 24.; MVWD Ex. 3, p. 4; NPS Ex. 3, p. 23.

The State Engineer recognizes that the water budget is important to fully understand the hydrology of the regional flow system but also agrees with nearly all participants that the regional water budget is not the limiting measure to determine water available for development in the LWRFS. The potential for conflict with senior rights and impacts that are detrimental to the public interest in the LWRFS is controlled by aquifer hydraulics and the effect of pumping on discharge at the Warm Springs area rather than the regional water budget.

WHEREAS, evidence and testimony were presented arguing that the location of pumping within the LWRFS is an important variable in the determination of the amount that can be pumped. Participants representing groundwater users in Garnet Valley and the APEX area at the south end of the LWRFS testified that pumping within Garnet Valley does not have a discernable signal at wells near the Warm Springs area and that the hydraulic gradient from north-to-south within the LWRFS indicates that there is a component of groundwater flow in Garnet Valley that does not discharge to the Warm Springs area.[307] Several participants agreed that moving pumping to more distal locations within the LWRFS will lessen the effect of that pumping on spring flows. NV Energy testified that there would be a lesser effect because pumping areas around the periphery of the main carbonate-rock aquifer are less well-connected to the springs, and because of the likelihood that some amount of subsurface outflow occurs along and southern and southeastern boundary of the LWRFS and it is possible to capture some of that subsurface outflow without a drop-for-drop effect on discharge at the Warm Springs area[308] Others drew the same conclusion based on their review of the data and characterization of a heterogeneous system[309] or on weak connectivity between peripheral locations and the Warm Springs area.[310]

CSI argues that more groundwater development can occur in the LWRFS because subsurface fault structures create compartmentalization and barriers to groundwater flow that reduce the effects of pumping on discharge at the Warm Springs area.[311] They rebut the contention by others that spring flow is affected homogeneously by pumping within the LWRFS.[312] CSI used geophysical data to map a north-south trending subsurface feature that bisects Coyote Spring

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[307] *See* CNLV Ex. 3, pp. 45–47; GP-REP Ex. 1, pp. 2–3.
[308] NVE Ex. 1, pp. 8–9.
[309] *See e.g.* MBOP Ex. 2, p. 23; GP-REP Ex. 2, pp. 4–5. *See also* Technichrome Response.
[310] *See e.g.* NCA Closing, pp. 2–10; LC-V Closing, pp. 4–6; Bedroc Closing, pp. 9–11.
[311] CSI Closing, pp. 2–5.
[312] CSI Ex. 2, pp. 40–41.

Valley. They hypothesize that this structure is an impermeable flow barrier that creates an isolated groundwater flow path on the west side of Coyote Spring Valley from which pumping would capture recharge from the Sheep Range without spring flow depletion at the Warm Springs area.[313] MBOP also contends that the system is far too complex to characterize it as a homogeneous "bathtub" and that preferential flow paths within the region mean that pumping stress will greatly differ within the LWRFS depending on where the pumping occurs.[314] Rebuttals to MBOP and CSI contend that an emphasis on complexities in geologic structure is a distraction from the question at hand, and that the hydraulic data collected during and after the Order 1169 aquifer test clearly demonstrate close connectivity and disproves CSI's hypothesis.[315]

The State Engineer finds that the data support the conclusion that pumping from locations within the LWRFS that are distal from the Warm Springs area can have a lesser impact on spring flow than pumping from locations more proximal to the springs. The LWRFS system has structural complexity and heterogeneity, and some areas have more immediate and more complete connection than others. For instance, the Order 1169 aquifer test demonstrated that pumping 5,290 afa from carbonate-rock aquifer wells in Coyote Spring Valley caused a sharp decline in discharge at the springs, but distributed pumping since the completion of the aquifer test in excess of 8,000 afa has correlated with a stabilization of spring discharge. The data collected during and after the Order 1169 aquifer test provide substantial evidence that groundwater levels throughout the LWRFS rise and fall in common response to the combined effects of climate and pumping stress, which controls discharge at the Warm Springs area.[316] The State Engineer finds that the best available data do not support the hypotheses that variable groundwater flow paths and heterogeneous subsurface geology are demonstrated to exist that create hydraulically isolated compartments or subareas within the LWRFS carbonate-rock aquifer from which pumping can occur without effect on the Warm Springs area. However, there remains some uncertainty as to the extent that distance and location relative to other capturable sources of discharge either delay, attenuate, or reduce capture from the springs.

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[313] *Id. See also* CSI Ex. 1, pp. 31–40.
[314] MBOP Closing, p. 7.
[315] *See e.g.*, SNWA Ex. 9, pp. 23–24.
[316] NSE Exs. 15–21.

WHEREAS, evidence and testimony were presented to argue that no amount of groundwater can be pumped from the carbonate-rock aquifer or from the LWRFS without conflicting with the Muddy River decree or causing harm to the Moapa dace habitat. This argument is predicated on the interpretation that lowering of groundwater level anywhere within the LWRFS, whether caused by climate or pumping, eventually has an effect on spring discharge, and that any reduction in spring discharge caused by pumping conflicts with senior decreed rights or harms the Moapa dace or both.[317] MVIC and SNWA agree that capturing discharge from the Warm Springs area springs and the Muddy River are a conflict with the Muddy River decree, which appropriates "all of the flow of the said stream, its sources of supply, headwaters and tributaries."

The Muddy River Decree was finalized in 1920, decades before any significant amount of groundwater development within the Muddy River springs area or the LWRFS. The statement quoted above, or something similar to it, is a common conclusion in decrees to establish finality to the determination of relative priority of rights. By including this statement, the decreed right holders are afforded the assurance that no future claimants will interject a new priority right. However, it is also common on decreed systems for junior rights to be appropriated for floodwater or other excess flows, provided that no conflict occurs with the senior priorities. Similarly, groundwater development almost always exists in the tributary watersheds of decreed river systems, even though groundwater in a headwater or tributary basin is part of the same hydrologic system. There is no conflict as long as the senior water rights are served.

The State Engineer disagrees with SNWA and MVIC that the above quoted statement in the decree means that any amount of groundwater pumped within the headwaters that would reduce flow in the Muddy River conflicts with decreed rights. The State Engineer finds that capture or potential capture of the waters of a decreed system does not constitute a conflict with decreed right holders if the flow of the source is sufficient to serve decreed rights. Muddy River decreed rights were defined by acres irrigated and diversion rates for each user.[318] The sum of diversion rates greatly exceeds the full flow of the River, but all users are still served through a rotation schedule managed by the water master. The total amount of irrigated land in the decree is 5,614 acres.[319]

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[317] *See, e.g.*, CBD Ex. 3, p. 23; SNWA Ex. 7, p. 8-4; MVIC Ex. 1, p. 3.
[318] NSE Ex. 333.
[319] *Id.*

Flow in the Muddy River at the Moapa Gage has averaged approximately 30,600 afa since 2015,[320] which is less than the predevelopment baseflow of about 33,900.[321] If all decreed acres were planted with a high-water use crop like alfalfa, the net irrigation water requirement would be 28,300 afa, based on a consumptive use rate of 4.7 afa.[322] Conveyance loss due to infiltration is an additional consideration to serve all decreed users; however, this is limited in the Muddy River because the alluvial corridor is narrow and well defined so water stays within the shallow groundwater or discharges back to the river. The State Engineer finds that the current flow in the Muddy River is sufficient to serve all decreed rights in conformance with the Muddy River Decree, and that reductions in flow that have occurred because of groundwater pumping in the headwaters basins is not conflicting with Decreed rights.

WHEREAS, the majority of experts agree that there is an intermediate amount of pumping approximated by recent pumping rates that can continue to occur in the LWRFS and still protect the Moapa dace and not conflict with decreed rights. USFWS and NCA endorsed the use of average pumping over the years 2015-2017 (9,318 afa as reported by State Engineer pumpage inventories) as a supportable amount that can continue to be pumped, because the system appears to have somewhat stabilized.[323] CSI also endorsed this approach as an initial phase, though they suggested 11,400 afa, which was the average pumping reported by State Engineer inventories over the years 2010-2015 that included the period of the Order 1169 aquifer test.[324] CNLV makes a rough estimate that no more than 10,000 afa can be supported throughout the entire region, based on their professional judgment and review of the data.[325] NV Energy concludes that 7,000–8,000 afa can continue to be pumped, based on the amount of pumping in recent years from carbonate-rock aquifer wells and the observation that steady-state conditions in Warm Springs area spring

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[320] NSE Ex. 211, *USGS 09416000 Muddy River Moapa 1914-2013*, Hearing on Interim Order 1303, official records of the Division of Water Resources.
[321] SNWA Ex. 7, p. 5-4.
[322] *See, e.g.*, Huntington, J.L. and R. Allen, (2010), *Evapotranspiration and Net Irrigation Water Requirements for Nevada*, Nevada State Engineer's Office Publication, accessible at https://bit.ly/etniwr, (last accessed June 7, 2020), official records of the Division of Water Resources.
[323] USFWS Ex. 5, p. 3; NCA Ex. 1, p. 19.
[324] CSI Closing, p. 2.
[325] CNLV Ex. 3, p. 2.

flow are being reached.[326] SNWA estimates that only 4,000–6,000 afa of carbonate-rock aquifer pumping can continually occur within the LWRFS.[327]

WHEREAS, the State Engineer finds that the evidence and testimony projecting continual future decline in spring flow at the current rate of pumping is compelling but not certain. Several participants pointed out rising trends in groundwater levels at many locations in Southern Nevada, outside of the LWRFS, that are distant from pumping[328] even though total precipitation has been below average and since 2006 has been described as a drought.[329] This suggests that climate and recharge efficiency may have actually buffered the full effect of pumping on discharge at the Warm Springs area, and that the system could not support the current amount of groundwater pumping during an extended dry period with lesser recharge. In addition, slight declining trends that are observed in Garnet Valley monitoring wells are not evident in wells close to the Warm Springs area.[330] If drawdown in Garnet Valley has not yet propagated to the Muddy Springs area, then the resilience of the apparent steady state of spring flow is in doubt. Projections of continued future decline in spring discharge suggests that the current amount of pumping in the LWRFS is a maximum amount that may need to be reduced in the future if the stabilizing trend in spring discharge does not continue.

WHEREAS, there is an almost unanimous agreement among experts that data collection is needed to further refine with certainty the extent of groundwater developrnent that can be continually pumped over the long term. The State Engineer finds that the current data are adequate to establish an approximate limit on the amount of pumping that can occur within the system, but that continued monitoring of pumping, water levels, and spring flow is essential to refine and validate this limit.

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[326] NVE Ex. 1, p. 8.
[327] SNWA Ex. 7, p. 8-4.
[328] NPS Ex. 3, Appendix A. *See also* Tr. 304–307, 577.
[329] Tr. 1292–1300. *See, also* LC-V Ex. 11, *PowerPoint Presentation of Todd G. Umstot, entitled Drought and Groundwater*, Hearing on Interim Order 1303, official records of the Division of Water Resources, slides 3–10.
[330] CNLV Ex. 3, pp. 45–46.

WHEREAS, pumping from wells in the LWRFS has gradually declined since completion of the Order 1169 aquifer test and is approaching 8,000 afa. This coincides with the period of time when spring discharge may be approaching steady state. The State Engineer finds that the maximum amount of groundwater that can continue to be developed over the long term in the LWRFS is 8,000 afa. The best available data at this time indicate that continued groundwater pumping that consistently exceeds this amount will cause conditions that harm the Moapa dace and threaten to conflict with Muddy River decreed rights.

IX. MOVEMENT OF WATER RIGHTS

WHEREAS, the data and evidence are clear that location of pumping within the LWRFS relative to the Warm Springs area and the Muddy River can influence the relative impact to discharge to the Warm Springs area and/or senior decreed rights on the Muddy River. The transfer of groundwater pumping from the Muddy River Springs Area alluvial wells to carbonate-rock aquifer wells may change the timing of any impact to Muddy River flows and amplify the effect on discharge to the Warm Springs area, thus potentially adversely impacting habitat for the Moapa dace. And the transfer of groundwater withdrawals from the carbonate-rock aquifer into the Muddy River alluvial aquifer may reduce the impact to the Moapa dace habitat but increase the severity of impact to the senior decreed rights on the Muddy River. The State Engineer recognizes that the LWRFS is fundamentally defined by its uniquely close hydrologic interconnection and shared source and supply of water. However, the State Engineer also recognizes that there can be areas within the LWRFS that have a greater or lesser degree of hydraulic connection due to distance, local changes in aquifer properties, or proximity to other potential sources of capturable water.

WHEREAS, Rulings 6254–6261 acknowledge that one of the main goals of Order 1169 and the associated pumping test at well MX-5 was to observe the effects of increased pumping on groundwater levels and spring flows. Coyote Spring Valley carbonate-rock aquifer pumping during the Order 1169 aquifer test was the largest localized carbonate-rock aquifer pumping in the LWRFS. In addition, concurrent carbonate-rock aquifer and alluvial aquifer pumping in Garnet Valley, Muddy River Springs Area, California Wash, and the northwest portion of the Black Mountains Area occurred during the test period. Rulings 6254–6261 described the data and analysis used to determine that additional pumping at the MX-5 well contributed significantly to decreases in high elevation springs (Pederson Springs) and other springs that are the sources to the

Muddy River. Evidence and reports provided under Interim Order 1303 do not challenge the findings in Rulings 6254–6261 that pumping impacts were witnessed. There is a strong consensus among participants that pumping during the Order 1169 aquifer test along with concurrent pumping caused drawdowns of water levels throughout the LWRFS.[331] However, the effects of pumping from different locations within the LWRFS on discharge at the Warm Springs area is not homogeneous.[332] The State Engineer finds that movement of water rights that are relatively distal from the Warm Springs area into carbonate-rock aquifer wells that have a closer hydraulic connection to the Warm Springs area is not favorable.

WHEREAS, evidence and testimony provided by participants during the Interim Order 1303 hearing provides a strong consensus that alluvial aquifer pumping in the Muddy River Springs Area affects Muddy River discharge.[333] There is also strong evidence that carbonate-rock aquifer pumping throughout the LWRFS affects spring flow but can also be dependent on proximity of pumping to springs.[334] No participant is a proponent of moving additional water rights closer to the headwaters of the Muddy River within the Muddy River Springs Area, and most participants agree that carbonate-rock aquifer and alluvial aquifer pumping in the Muddy River Springs Area captures Muddy River flow. The State Engineer finds that any pumping within close proximity to the Muddy River could result in capture of the Muddy River. The State Engineer also finds that any movement of water rights into carbonate-rock aquifer and alluvial aquifer wells in the Muddy River Springs Area that may increase the impact to Muddy River decreed rights is disfavored.

WHEREAS, the Order 1169 aquifer test demonstrated that impacts from the test along with concurrent pumping was widespread within the LWRFS encompassing 1,100 square miles and supported the conclusion of a close hydrologic connection among the basins.[335] While the effects of movement of water rights between alluvial aquifer wells and carbonate-rock aquifer wells on deliveries of senior decreed rights to the Muddy River or impacts to the Moapa dace may not be uniform across the entirety of the LWRFS, the relative degree of hydrologic connectedness

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[331] *See* SNWA Closing, pp. 10, 16; MVIC Closing, p. 6.
[332] *See, e.g.*, SNWA Closing, p. 10.
[333] CNLV Closing, p. 8; Tr. 1456–1457, 1458. *See also* SNWA Closing, p. 16; MVWD Closing, p. 11; MVIC Closing, p. 6.
[334] CNLV Closing, pp. 8–10; Tr. 1457, 1458; NV Energy Closing, p. 4; MVIC Closing, p. 6.
[335] NSE Ex. 256. *See also* NSE Ex. 14, pp. 20–21; NSE Ex. 17, p. 19; SNWA Closing pp. 2, 3.

in the LWRFS will be the principle factor in determining the impact of movement of water rights. The State Engineer recognizes that there may be discrete, local aquifers within the LWRFS with an uncertain hydrologic connection to the Warm Springs area. Determining the effect of moving water rights into these areas may require additional scientific data and analysis. Applications to move water rights under scenarios not addressed in this Order will be evaluated on their individual merits to determine potential impact to existing senior rights, potential impact to the Warm Springs area and Moapa dace habitat, and impacts to the Muddy River.

X. ORDER

NOW THEREFORE, the State Engineer orders:

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.

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

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

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

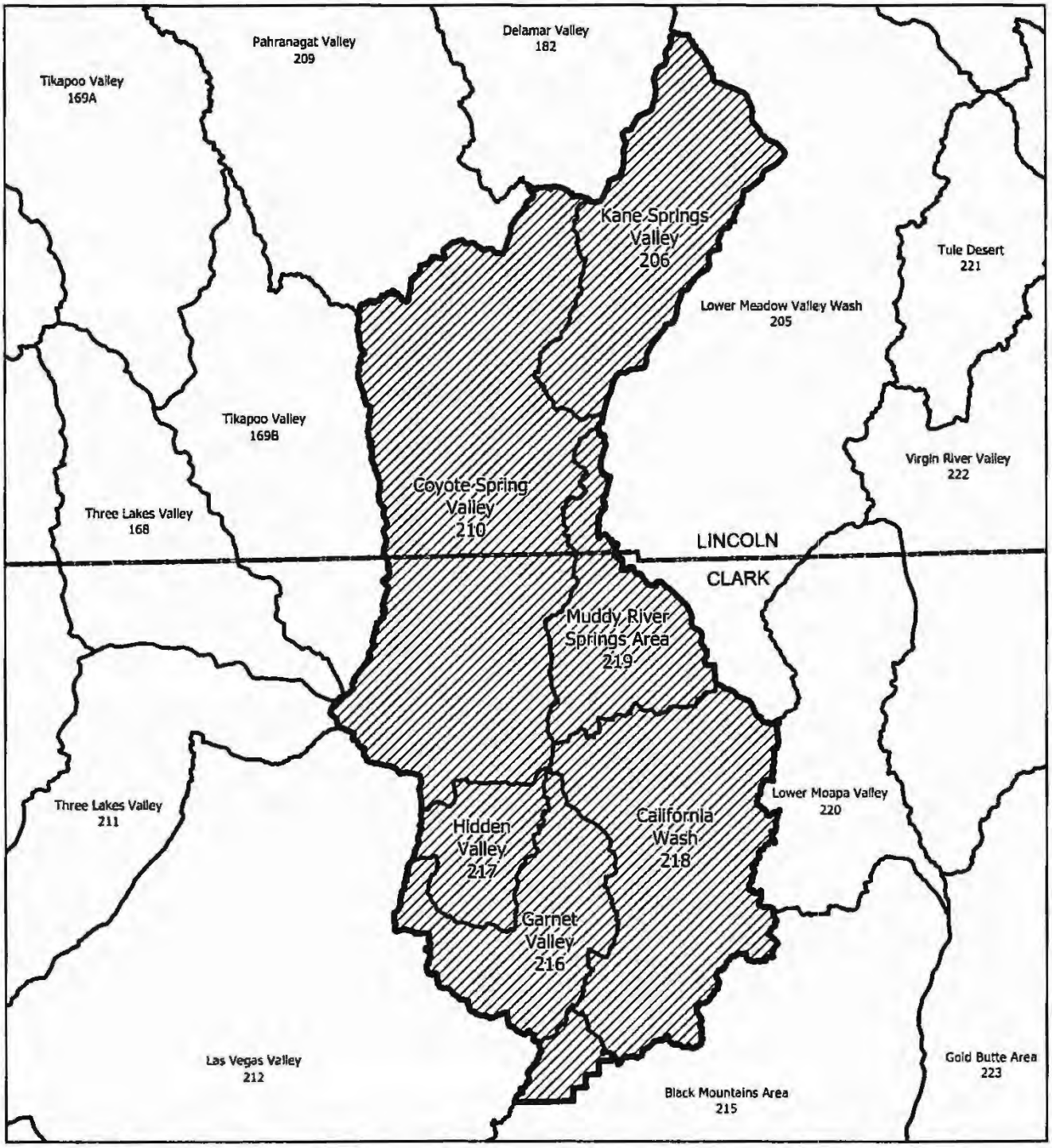
Tim Wilson, P.E.

TIM WILSON, P.E.
State Engineer

Dated at Carson City, Nevada this

15th day of June, 2020.

ATTACHMENT A



Location and Extent of LWRFS Hydrographic Basin, Clark and Lincoln Counties, Nevada

LWRFS Boundary
Hydrographic Basin Boundary
County Boundary

N
W E
S

0 10 Miles

State of Nevada
Department of Conservation and
Natural Resources
Office of the State Engineer
Division of Water Resources

Tim Wilson, P.E.
State Engineer

June 2020

Ex. 4 p. 68

EXHIBIT 5

EXHIBIT 5

EXHIBIT 5

From: Leann Ramirez
To: Emilia Cargill
Subject: Coyote Springs Village A
Date: Wednesday, June 17, 2020 10:02:17 AM
Attachments: image001.png
Coyote Srpings Village A.pdf

Good Morning,

Please see attached.

Thanks,

Leann Ramirez
Department of Conservation and Natural Resources
Division of Water Resources
Administrative Assistant III
901 S. Stewart St. Ste 2002
Carson City, NV 89701
775-684-2800

STEVE SISOLAK
Governor

STATE OF NEVADA

BRADLEY CROWELL
Director

TIM WILSON, P.E.
State Engineer

DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES
DIVISION OF WATER RESOURCES
901 South Stewart Street, Suite 2002
Carson City, Nevada 89701-5250
(775) 684-2800 • Fax (775) 684-2811
http://water.nv.gov

June 17, 2020

To: Emillia K. Cargill
Chief Operating Officer
Senior Vice President and General Counsil
Coyote Springs Investment, LLC
300 S 4th St Ste 1700
Las Vegas, NV 89101

Re: Final Subdivision Review No. 13217-F

Name: *Coyote Springs Village A*

County: Clark County – Highway 93 and Highway 168

Location: A portions of Sections 15, 16, 21, 22 and 23, Township 13 South, Range 63, East, MDB&M.

Plat: Final: Eight large parcels intended for further subdivision.

Water Service Commitment Allocation: An estimated 2,000 acre-feet annually from Coyote Springs Investments, LLC permits.

Owner-Developer: Coyote Springs Nevada, LLC
1050 Indigo Drive, Suite 200
Las Vegas, NV 89415

Engineer: Stetson Engineers, Inc.
785 Grand Avenue, Suite 262
Carlsbad, CA 92008

Water Supply: Coyote Springs Water Resources General Improvement District

General: A final subdivision map was presented and reviewed by this office on June 13, 2019, as described on the ***Coyote Springs Village A*** map.

As described in the State Engineer's letter of September 7, 2018, tentative approval was granted.

On June 15, 2020, the State Engineer issued Order #1309 which defined the maximum groundwater which can be pumped from the Lower White River Flow System as being 8,000 acre-feet annually, or less.

Coyote Springs Investment, LLC groundwater permits have priority dates which may exceed the threshold of allowable pumping within the definition of this order.

As provided in Nevada Revised Statutes (NRS) 278.377, a copy of this certificate must be furnished to the subdivider who in turn shall provide a copy of the certificate to each purchaser of land before the time the sale is completed. Any statement of approval is not a warranty or representation in favor of any person as to the safety or quantity of such water.

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

Best regards,

Steve Shell

Steve Shell
Water Resource Specialist II

SS/lr
cc: Division of Real Estate
Public Utilities Commission of Nevada
Southern Nevada Health District (Clark County)
Clark County Zoning Commision
Coyote Springs Water Resources General Improvement District
Coyote Springs Investments

EXHIBIT B

Summons and Affidavits of Service, Case No. A-20-820384-B

EXHIBIT B

AARON D. FORD
Attorney General

KYLE GEORGE
First Assistant Attorney General

CHRISTINE JONES BRADY
Second Assistant Attorney General

JESSICA L. ADAIR
Chief of Staff

RACHEL J. ANDERSON
General Counsel

HEIDI PARRY STERN
Solicitor General

STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL
100 North Carson Street
Carson City, Nevada 89701

DATE/TIME RECEIVED: 9-3-2020, ~~2020~~ RECEIVED BY (OAG): K Rutledge

NAME OF SERVING PERSON/ENTITY: LPS (Cindy Arnold)

CASE NAME: Coyote Springs Investment LLC; Coyote Springs Nevada LLC; Coyote Springs Nursery, LLC v State of Nevada Division of Water Resources, Dept of Conservation & Natural Resources, etal

CASE NUMBER: A-20-820384-B COURT: 8th JD

DOCUMENT(S) RECEIVED: Summons; Complaint for Damages (Summons: (1) DWR (2) CNR)

NOTICE

NRS 41.031(2) provides in part that, in any action against the State of Nevada, the action must be brought in the name of the State of Nevada on relation of the particular department, commission, board or other agency of the state whose actions are the basis for the suit. In an action against the State of Nevada, the summons and a copy of the complaint must be served upon the Attorney General, at the Office of the Attorney General in Carson City and upon the person serving in the office of administrative head of the named agency. **Service on the Attorney General or designee does not constitute service on any individual or administrative head.**

This Receipt acknowledges that the documents described herein have been received by the Nevada Attorney General or the designee authorized by NRS 41.031(2)(a). This Receipt does not ensure that any party, person or agency has been properly served, nor does it waive any legal requirement for service.

Receipt of a subpoena by the Office of the Attorney General does not constitute valid service of the subpoena upon any individual or upon any state agency, except the Office of the Attorney General. **Receipt of summons and complaint or any other process by the Attorney General or designee does not constitute service upon any individual, nor does it constitute service upon the administrative head of an agency pursuant to NRS 41.**

SEI

William L. Coulthard, Esq.
Nevada Bar No. #3927
Coulthard Law PLLC
840 South Rancho Drive #4-627
Las Vegas, Nevada 89106
(702) 898-9944
wlc@coulthardlaw.com

Attorneys for Plaintiffs CS-Entities

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, v. STATE OF NEVADA, on relation to its Division of Water Resources, Department of Conservation and Natural Resources, Tim Wilson, Nevada State Engineer; and Does I through X. Defendants.	Case No.A-20-820384-B Dept. No.Department 13 **SUMMONS**

COULTHARD LAW, PLLC
840 South Rancho Drive #4-627
Las Vegas, Nevada 89106
(702) 989-9944

TO: STATE OF NEVADA, on relation to its Division of Water Resources, Department of Conservation and Natural Resources, Tim Wilson, Nevada State Engineer.

NOTICE: YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU WITHOUT YOU BEING HEARD UNLESS YOU RESPOND WITHIN 45 DAYS. READ THE INFORMATION BELOW.

TO THE DEFENDANT: A civil Complaint For Damages and Demand for Jury Trial ("Complaint") has been filed by the Plaintiffs against you for the relief set forth in the Complaint.

1. If you intend to defend this lawsuit, as the State and within 45 days after this Summons is served on you exclusive of the day of service, you must do the following:
   a. File with the Clerk of this Court, whose address is shown below, a formal written response to the Complaint in accordance with the rules of the Court.
   b. Serve a copy of your response upon the attorney whose name and address are shown below.
2. Unless you respond, your default will be entered upon application of the Plaintiffs and this Court may enter a judgment against you for the relief demanded in the Complaint, which could result in the taking of money or property or other relief requested in the Complaint.
3. If you intend to seek the advice of an attorney in this matter, you should do so promptly so that your response may be filed on time.
4. The State of Nevada, its political subdivisions, agencies, officers, employees, board members, commission members and legislators, each have 45 days after service of this Summons within which to file an Answer or other responsive pleading to the complaint.

Issued at direction of:
COULTHARD LAW, PLLC

William L. Coulthard, Esq.
840 South Rancho Drive #4-627
Las Vegas, Nevada 89106
(702) 989-9944
wlc@coulthardlaw.com
Attorney for Plaintiffs CS-Entities

STEVEN D. GRIERSON
CLERK OF THE COURT

By: Robyn Rodriguez 9/1/2020
Deputy Clerk Date
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155
Robyn Rodriguez

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Attorneys for Plaintiffs CS-Entities

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, v. STATE OF NEVADA, on relation to its Division of Water Resources, Department of Conservation and Natural Resources, Tim Wilson, Nevada State Engineer; and Does I through X. Defendants.	Case No.A-20-820384-B Dept. No.Department 13 **SUMMONS**

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Las Vegas, Nevada 89106
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TO: STATE OF NEVADA, on relation to its Division of Water Resources, Department of Conservation and Natural Resources, Tim Wilson, Nevada State Engineer.

NOTICE: YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU WITHOUT YOU BEING HEARD UNLESS YOU RESPOND WITHIN 45 DAYS. READ THE INFORMATION BELOW.

TO THE DEFENDANT: A civil Complaint For Damages and Demand for Jury Trial ("Complaint") has been filed by the Plaintiffs against you for the relief set forth in the Complaint.

1. If you intend to defend this lawsuit, as the State and within 45 days after this Summons is served on you exclusive of the day of service, you must do the following:
   a. File with the Clerk of this Court, whose address is shown below, a formal written response to the Complaint in accordance with the rules of the Court.
   b. Serve a copy of your response upon the attorney whose name and address are shown below.
2. Unless you respond, your default will be entered upon application of the Plaintiff's and this Court may enter a judgment against you for the relief demanded in the Complaint, which could result in the taking of money or property or other relief requested in the Complaint.
3. If you intend to seek the advice of an attorney in this matter, you should do so promptly so that your response may be filed on time.
4. The State of Nevada, its political subdivisions, agencies, officers, employees, board members, commission members and legislators, each have 45 days after service of this Summons within which to file an Answer or other responsive pleading to the complaint.

Issued at direction of:
COULTHARD LAW, PLLC

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Attorney for Plaintiffs CS-Entities

STEVEN D. GRIERSON
CLERK OF THE COURT

By: Robin Rodriguez 9/1/2020
Deputy Clerk Date
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155
Robyn Rodriguez

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Attorney(s) for: Plaintiff(s)

DISTRICT COURT
CLARK COUNTY, NEVADA

Coyote Springs Investment LLC, a Nevada Limited Liability Company; et al.
Plaintiff(s)

vs

State of Nevada, in relation to its Division of Water Resources; et al.
Defendant(s)

Case No.: A-20-820384-B
Dept. No.:
Date:
Time:

AFFIDAVIT OF SERVICE

I, **Cindy Lee Arnold**, being duly sworn deposes and says: That at all times herein affiant was and is a citizen of the United States, over 18 years of age, licensed to serve civil process in the State of Nevada under license #604, and not a party to or interested in the proceeding in which this affidavit is made. The affiant received 2 copy(ies) of the: **Summons; Complaint for Damages; Demand for Jury Trial; Business Court Civil Cover Sheet** on the **2nd** day of **September, 2020** and served the same on the **3rd** day of **September, 2020** at **3:10PM** by serving the **Defendant (s), Office of the Attorney General, Aaron D. Ford** by personally delivering and leaving a copy at **100 N. Carson St., Carson City, NV 89701** with **Karen Rutledge** as **Administrative Assistant** an agent lawfully designated by statute to accept service of process.

Pursuant to NRS 239B.030 this document does not contain the social security number of any person.

I declare under penalty of perjury under the law of the state of Nevada that the foregoing is true and correct. Executed this 4th day of September 2020

Cindy Lee Arnold # R-2020-12596
Legal Process Service License # 604
WorkOrderNo 2006824

Legal Process Service, 724 S. 8th Street, Las Vegas, NV 89101 (702) 471-7255

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DISTRICT COURT
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Pursuant to NRS 239B.030 this document does not contain the social security number of any person.

I declare under penalty of perjury under the law of the state of Nevada that the foregoing is true and correct. Executed this 4th day of September 2020

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DISTRICT COURT
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Coyote Springs Investment LLC, a Nevada Limited Liability Company; et al.
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vs

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Pursuant to NRS 239B.030 this document does not contain the social security number of any person.

I declare under penalty of perjury under the law of the state of Nevada that the foregoing is true and correct. Executed this 4th day of September 2020

Cindy Lee Arnold #R-2020-12596
Legal Process Service License # 604
WorkOrderNo 2006826

Legal Process Service, 724 S. 8th Street, Las Vegas, NV 89101 (702) 471-7255

134

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

COYOTE SPRINGS INVESTMENT, LLC, a Nevada limited liability company, *et al.*, Plaintiffs, v. STATE OF NEVADA, on relation to its Division of Water Resources, Department of Conservation and Natural Resources, TIM WILSON, Nevada State Engineer, Defendants.	Case No. 2: 20-cv-1842-KJD-DJA ORDER

Presently before the Court is Plaintiffs' Motion for Leave to File First Amended Complaint (#18). Defendants filed a response in opposition (#29) to which Plaintiffs replied (#32). Also before the Court is Plaintiffs' Motion to Remand (#19). Defendants filed a response in opposition (#30) to which Plaintiffs replied (#33).

I. Background

On August 28, 2020, the Coyote Springs Plaintiffs filed this action in the Eighth Judicial District Court, Clark County, Nevada as Case No. A-20-820384-B. Plaintiffs' Complaint alleged causes of action for inverse condemnation (Lucas and Penn Central regulatory takings), pre-condemnation damages, equal protection violations, a 42 U.S.C. §1983 claim, and a demand for attorneys' fees. Plaintiffs assert their Complaint was filed in Nevada's State District Court as each of Plaintiffs' claims are heavily intertwined with questions of Nevada state law.

On October 2, 2020, the Defendants removed the Complaint to the United States District Court for the District of Nevada due to the federal questions arising out of the inverse condemnation claims' references to the Fifth Amendment to the U.S. Constitution, the Equal Protection claim's references to the Fourteenth Amendment to the U.S. Constitution, and the

federal 42 U.S.C. §1983 claim. See Defendant's Notice of Removal, Doc. No. 1. Defendants' removal was based upon 28 U.S.C. §§ 1331; 1367(a).

Following removal to this Court, on October 9, 2020, Defendants filed their Motion to Dismiss Plaintiffs' Complaint (#4) in its entirety. On November 2, 2020, Plaintiffs filed their Opposition (#9) to Motion to Dismiss. The Opposition to the Motion to Dismiss included a request for leave to amend, should the Court determine that any of Plaintiffs' claims were insufficiently pled and subject to dismissal under Federal Rule of Civil Procedure ("Rule") 12(b)(6).

Plaintiffs then filed the present motion to amend and motion to remand. Plaintiffs clarify that each of Plaintiffs' claims are entirely based in state law and that Plaintiffs have withdrawn their federally based claims and are not pursuing any federal claims or causes of action. Plaintiffs argue their original intent in this action was to allege primarily state law claims and to litigate the claim in Nevada state courts. According to Plaintiffs, the original Complaint referenced the U.S. Constitution as state courts often and regularly apply the federal law and standards to inverse condemnation claims and civil rights violations of the Nevada Constitution.

To clarify this intent to litigate in Nevada state court, Plaintiffs' [Proposed] First Amended Complaint[1] makes clear that the inverse condemnation claims and civil rights claims are all brought only under the Nevada Constitution's protections of property rights and equal protection of the law. Plaintiffs' equal protection claim is now clearly based on the Nevada Constitution and the 42 U.S.C. §1983 claim has been withdrawn from the [Proposed] First Amended Complaint. The only other changes from the initial complaint to the First Amended Complaint are found within Paragraph 66 of the [Proposed] First Amended Complaint wherein Plaintiffs, in the Nevada based Equal Protection Claim, allege facts related to the State's unequal treatment of Plaintiffs compared to its treatment of Moapa Valley Water District ("MVWD") 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. Having withdrawn any reliance upon

[1] Plaintiffs have attached the proposed amended complaint as required by Local Rule 15-1(a) which they did not do when they alternatively requested leave to amend in opposition to the motion to dismiss.

federal law in pursuit of their claims, Plaintiffs seek remand since the court would no longer have original jurisdiction.

II. Analysis

A. Motion to Amend

Pursuant to Rule 15, a party may amend its pleadings only by leave of the court after responsive pleadings have been filed and in the absence of the adverse party's written consent. Thornton v. McClatchy Newspapers, Inc., 261 F.3d 789, 799 (9th Cir. 2001). The court has discretion to grant leave and should freely do so "when justice so requires." Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990) (quoting Fed. R. Civ. P. 15(a). However, courts may deny leave to amend if (1) it will cause undue delay; (2) it will cause undue prejudice to the opposing party; (3) the request is made in bad faith; (4) the party has repeatedly failed to cure deficiencies; or (5) the amendment would be futile. Leadsinger, Inc., v. BMG Music Publ'g, 512 F.3d 522, 532 (9th Cir. 2008).

Plaintiffs are forthright in acknowledging that they seek to amend the complaint for the sole purpose of removing all federal claims with the intention of having the action remanded to state court. The question is whether the factors fall on the side of the liberal rule in favor of amendment. Here, in the early stages of litigation, the motion to amend having been filed long before the deadline in the discovery plan and scheduling order, amendment will cause no undue delay. However, it cannot be said that Defendants will not suffer some prejudice from the amendment. But there is no indication that prejudice would be "undue." Plaintiffs cannot be forced to assert and litigate particular claims. The paramount policy of pleading is that "the plaintiff is the master of the complaint[.]" See Caterpillar, Inc. v. Williams, 482 U.S. 386, 398-99 (1987). Rather than being made in bad faith, Plaintiffs admit that they seek amendment for the purpose of avoiding federal jurisdiction. Id. at 399 ("the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court").

Finally, Defendants rely on futility to oppose Plaintiffs' proposed amendments. However, the questions raised by Defendants go to the heart of Plaintiffs' claims. They involve questions of Nevada law, interpretation of Nevada statute, and public policy of substantial import that

should be resolved by the courts of Nevada. Accordingly, the Court grants Plaintiffs' motion to amend.

B. Motion to Remand

Federal courts have removal jurisdiction only if there is original jurisdiction over a suit. See 28 U.S.C. §1441(a); Caterpillar, 482 U.S. at 392 ("Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant"). In effect, a party seeking to retain a case in federal court must show that plaintiff has either alleged a federal claim, a state claim that requires a resolution of a substantial issue of federal law, or a state claim completely pre-empted by federal statute. See American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916); Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 9 (1983); Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 65 (1987).

Here, Plaintiffs have amended the complaint to remove all federal claims. Defendants are correct in asserting that a plaintiff may not **compel** remand by amending a complaint to eliminate the federal claims that provided the basis for removal. See Sparta Surgical Corp. v. Nat'l Ass'n of Sec. Dealers, Inc., 159 F.3d 1209, 1213 (9th Cir. 1998). Retaining jurisdiction to adjudicate pendent state law claim is within the discretion of the Court. See 28 U.S.C. § 1367(c). Here, the Court finds that the claims raised by Plaintiffs substantially predominate over the claims which the Court had original jurisdiction over and the claims raise novel and complex issues of state law. See 28 U.S.C. § 1367(c)(1,2). Therefore, the Court declines to exercise its supplemental jurisdiction over the amended claims and remands them to state court.

III. Conclusion

Accordingly, IT IS HEREBY ORDERED that Plaintiffs' Motion for Leave to File First Amended Complaint (#18) is **GRANTED**;

IT IS FURTHER ORDERED that Plaintiffs' Motion to Remand (#19) is **GRANTED**;

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IT IS FINALLY ORDERED that all other outstanding motions are **DENIED as moot**.

DATED this 28th day of September 2021.

The Honorable Kent J. Dawson
United States District Judge

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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; 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 **MOTION TO DISMISS SECOND AMENDED COMPLAINT**

Defendant State of Nevada, on relation to its Division of Water Resources, Department of Conservation and Natural Resources, Adam Sullivan ("State Engineer") moves to dismiss the second amended complaint ("SAC") filed by Plaintiffs Coyote Springs Investment LLC, Coyote Springs Nevada LLC, and Coyote Springs Nursery LLC (collectively "CSI") under Nevada Rule of Civil Procedure 12(b)(5).

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

The Court should dismiss CSI's second amended complaint, because all its claims are premature and misguided. CSI filed a petition for judicial review of the State Engineer's Order 1309 that is pending decision in Department 1. Order 1309 is central to all of CSI's claims. CSI's takings claims should not be decided before the validity of Order 1309 is determined.

Even assuming CSI's claims were ripe, CSI has no inverse condemnation claims for an alleged taking of its real property, water rights, or development rights.

First, CSI's allegation that the State Engineer's Order 1309's creation of a "super basin now known as the Lower White River Flow System . . . effectuates a taking," SAC 49, directly contradicts CSI's agreement to "the State Engineer's conjunctive management of the Lower White River Flow System," which is an "ongoing administrative process" in which CSI agreed to "participate in good faith . . . " *Id*. Ex. 7 ¶ 3.

Second, the State Engineer's Orders did not take CSI's water rights, change its priority, or deprive CSI of all beneficial use of its property to support a "total" regulatory taking under *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

Third, not one of the three factors of *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) supports CSI's second inverse condemnation claim: (1) CSI's alleged investment-backed expectations that it could obtain enough water to develop an ambitious master-planned community 50 miles north of Las Vegas are belied by (a) the conditions it accepted upon purchasing the property; (b) Nevada law that declares water belongs to the public and limits water rights to those put to beneficial use; (c) CSI's admission that its water rights are subject to senior rights; and (d) its knowledge since 2002 that pumping large quantities of groundwater may affect those rights; (2) the State Engineer's Orders serve a crucial public purpose—to prevent depletion of Nevada's groundwater basins and protect senior existing water rights; and (3) the public purpose overcomes any loss of property value, which CSI has not alleged.

CSI's remaining claims fare no better. CSI pleads no facts that show an official announcement to condemn CSI's property or unreasonable delay, which is fatal to CSI's precondemnation damages claim. CSI fails to state a claim for equal protection because all applicants were denied additional groundwater in 2014 and Order 1309 serves the legitimate public purpose to protect Nevada's scarce groundwater sources, senior decreed water rights, and the protected Moapa dace fish. CSI has no contract claims because the settlement agreement on which it relies contains no obligation to approve CSI's maps.

For these reasons, the remedies CSI seeks in its last three claims—declaratory relief, injunctive relief, and attorneys' fees—are misplaced and should be rejected. The second amended complaint should be dismissed.

II. Background

A. CSI buys the Property subject to existing rights and conditions that may limit its access to groundwater

CSI owns 42,100 acres of land located about 50 miles north of Las Vegas, Nevada ("Property"). Second Amended Complaint ("SAC"), on file, ¶ 1.[1] Approximately a third of the Property is in Clark County; the rest is in Lincoln County. *Id*.

The Property originally belonged to the United States. *See* Nevada-Florida Land Exchange Authorization Act of 1988, Pub. L. No. 100-275; 102 Stat. 52 (the "Act").[2] In 1988, the United States conveyed 28,800 acres and leased 14,000 acres of the Property to CSI's predecessor in interest, Aerojet-General Corporation ("Aerojet"). *See* §§ 3(b)(1) and 4(b)(1) of the Act. The Act provided, in relevant part:

> In the event that the State Engineer of Nevada determines that the withdrawal of ground water from beneath lands conveyed or leased pursuant to this Act or from beneath other lands underlain by the same aquifer is causing depletion of water to a surface water habitat of any endangered or threatened species,

[1] Defendants do not admit any of CSI's allegations but accept them as true for purposes of this motion to dismiss.

[2] Available at https://www.govinfo.gov/content/pkg/STATUTE-102/pdf/STATUTE-102-Pg52.pdf, *last visited* December 7, 2021. The Court may take judicial notice of United States statutes, NRS 47.140(1), and the United States' prior ownership of the Property. *See Cowlitz Tribe of Indians v. City of Tacoma*, 253 F.2d 625, 626 (9th Cir. 1957) ("District Court could take judicial notice, the United States did occupy all this territory . . .").

> Aerojet (*or its successors or assigns*) and the Secretary shall jointly petition the State Engineer *to reduce the total water allocation in the affected area, or to take any other actions authorized by State law, in order to eliminate such depletion of water to such habitat.*

Id. § 6(a)(3) (emphasis added).

CSI acquired the Property subject to "[v]alid existing rights" and the "reservations, conditions, and limitations" of the Act and the land exchange agreement between Aerojet and the United States. *See* **Ex. A,** §§ 1, 9, **App. 003, 008** (Corrective Land Patent to CSI, filed in Clark County Assessor Pages as document 20050218-0002675).[3]

B. CSI learns of obstacles to its development plans at the outset

1. Order 1169 stays CSI's water applications in 2002

In or before 2002, CSI conceived of a concept plan for the development of the Coyote Springs Master Planned Community, which was approved on February 6, 2002. SAC ¶¶ 8, 9(a).

But less than a month later, the State Engineer issued Order 1169, which held all pending water right applications in abeyance—including those of CSI—and ordered a hydrological study of the carbonate aquifer over a period of 5 years during which all water right applicants were to engage in pumping tests in the Property. SAC ¶¶ 9(a), 22. A 1985 study quoted in Order 1169 had already found that "[l]arge-scale development (sustained withdrawals) of water from the carbonate-rock aquifers would result in water-level declines and cause the depletion of large quantities of stored water." **Ex. B, App. 053** (Order 1169). Pumping tests were necessary to determine, among other things: (1) the quantities of groundwater, (2) the potential adverse effects of development on the underground aquifers; and (3) the impact of development on the 37,000 afa of groundwater discharged annually at the "fully appropriated" Muddy River Springs area and Muddy River, where "listed endangered and/or potential threatened species exist." **Ex. B, App. 055**.

. . .

[3] The Court may take judicial notice of matters of public record. *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993) (citations omitted).

The Order 1169 pumping tests began in 2010 and were deemed complete in 2012. SAC ¶ 23. Water right applicants and other interested parties filed their reports in 2013. *Id.*

2. All CSI's applications for additional groundwater are denied in 2014

CSI holds 2,140 acre-feet annually ("afa") of permitted water rights in the Coyote Spring Valley basin, SAC ¶ 19, and had applied for many thousands afa more. **Ex. B, App. 054**.

On January 29, 2014, the State Engineer issued Ruling 6255, denying all applications for additional groundwater appropriations, including CSI's, on the grounds that: (1) the pump tests under Order 1169 "measurably reduced flows in headwater springs of the Muddy River"; (2) the proposed use of the groundwater would conflict with existing, senior rights, including those in the Muddy River and springs; (3) the proposed use would prove detrimental to the public interest; and (4) there was no unappropriated groundwater left at the source of supply. SAC ¶ 23; Ruling 6255, **Ex. C, App. 090-091**

CSI did not appeal from, or otherwise seek review of, Ruling 6255 in 2014.

3. The State Engineer expresses concern about the Property's groundwater in 2017

On November 16, 2017, LVVWD wrote the State Engineer to express concern about Coyote Spring Valley's ability to supply the groundwater for CSI's Master Plan Project given the issues identified in Ruling 6255. SAC ¶ 27-28. The State Engineer responded on May 16, 2018, that groundwater pumping in Coyote Springs would be limited to a degree that does not interfere with the most senior rights of the Muddy River and Muddy River Springs, *i.e.*, "a fraction of the 40,300-acre feet already appropriated in the five-basin area," and that he could not justify approving any development maps unless other water sources were identified. *Id.* ¶ 33; Ex. 1 thereto.

After CSI filed a petition for judicial review, the State Engineer rescinded his May 16 letter to LVVWD and agreed to in good faith process CSI's maps. *Id.* ¶ 38 and Ex. 7

thereto (Settlement Agreement), §§ 2, 4. On its part, CSI agreed to "participate in good faith in the ongoing administrative process of the State Engineer concerning the conjunctive management of the Lower White River Flow System." *Id*. § 3.

C. The State Engineer's conjunctive management of the LWRFS

In the summer of 2018, the State Engineer began a public workshop process to review the groundwater available in the Lower White River Flow System, which includes the Coyote Spring Valley basin. SAC ¶¶ 39, 41-42.

On September 19, 2018, the State Engineer circulated a draft order, which designated Coyote Spring Valley, Muddy River Springs Area, California Wash, Hidden Valley, Garnet Valley, and a portion of the Black Mountains Area (the "LWRFS") as a single hydrographic unit for purposes of administration of water rights. The draft order held in abeyance "any final subdivision or other submission concerning development and construction . . . pending the conclusion of the public process to determine the total quantity of groundwater that may be developed in [LWRFS]." SAC ¶ 41 and Ex. 2 thereto at 11.

Following comments on the draft order, including from CSI, the State Engineer on January 11, 2019, issued Interim Order 1303, which designated LWRFS as a joint administrative unit for purposes of administration of water rights. SAC ¶¶ 42-44 and Ex. 3 at 13. Interim Order 1303 imposed a temporary moratorium on approvals of final subdivisions pending conclusion of this public process, except upon a showing of an adequate water supply that can meet the needs of the life of the project. *Id*. Ex. 3 at 14-15. The State Engineer invited each interested party to submit reports for his consideration that should address, among other things: (1) the results of the pumping tests performed between 2010 and 2012; and (2) the "long-term annual quantity of groundwater" that may be pumped in LWRFS and the pumping location's effect on the Muddy River. *Id*. Ex. 3 at 13.

1. The State Engineer receives reports and holds a public hearing

Between September 23 and October 4, 2019, the State Engineer held a public hearing and allowed experts for multiple interested parties that had submitted reports to

testify and submit evidence. SAC Ex. 4 (Order 1309) at 11. CSI participated in the hearing, as did many other interested parties such as USFWS, National Park Service ("NPS"), the City of North Las Vegas, LVVWD, Southern Nevada Water Authority ("SNWA"), NV Energy, and others. *Id*. Ex. 4 at 11. Opinions and recommendations as to how much allowable groundwater could safely be pumped in the LWRFS without impacting senior rights and, by extension, the Moapa dace ranged between "zero to over 30,000 afa . . . ". *Id*. at 57.

2. The State Engineer issues Order 1309

On June 15, 2020, the State Engineer issued a 68-page order—Order 1309—in which he detailed all interested parties' opinions and conclusions as to the various items he sought comment on in his Interim Order 1303, followed by his own findings. SAC Ex. 4 at 11-66. The State Engineer found and ordered that: (1) the LWRFS, consisting of the six basins plus Kane Springs Valley, were delineated as a single hydrographic basin ("Basin"); (2) the maximum amount of groundwater that may be pumped from the Basin without harm to the Warm Springs area flows and Muddy River cannot exceed 8,000; (3) the 8,000 afa may be reduced if pumping adversely impacts the Moapa dace; and (4) the temporary moratorium on final subdivision and development submissions was terminated. *Id*. Ex. 4 at 65-66.

3. CSI's final subdivision map for the 8-parcel lot is denied

On June 17, 2020, two days after Order 1309, the State Division of Water Resources wrote CSI that CSI's low water right priority meant that it was at risk of exceeding the threshold of allowable pumping under Order 1309. SAC ¶ 43 and Ex. 5. The Division therefore recommended disapproval of the subdivision maps for 8 large lots in Coyote Springs Village A. *Id*. CSI did not timely file a petition for judicial review of this disapproval.

. . .

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4. CSI seeks judicial review of Order 1309

On July 9, 2020, CSI filed a petition for judicial review of Order 1309 against the State Engineer in Case No. A-20-817765-P, which was consolidated with lead Case No. A-20-816761-C. **Ex. D, App. 094-123**.[4]

5. CSI files this lawsuit for inverse condemnation

Six weeks after filing its petition for judicial review, CSI filed a complaint against the State Engineer in this Court, alleging that the May 16, 2018, Letter, Draft Order, Interim Order 1303, Order 1309, and June 17, 2020, letter (collectively "Orders") have effectuated a regulatory taking of CSI's property and require compensation under the Nevada and United States Constitutions. *See* Compl., on file. The State Engineer removed the case to federal court, but it was remanded to this Court after CSI moved for leave to amend its complaint to omit the references to federal law. *See* October 5, 2021, Order, on file. After CSI filed a First Amended Complaint, the parties stipulated to CSI filing a second amended complaint ("SAC"), which CSI filed on November 12, 2021.

CSI's SAC makes two inverse condemnation claims. The first claim alleges a regulatory taking under *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) ("*Lucas*"). *See* SAC at 25 (First Claim for relief), ¶¶ 53-56. The second claim alleges a regulatory taking under *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) ("*Penn Central*"). *See* SAC (Second Claim for Relief) at 27, ¶¶ 63-64. CSI also makes claims for pre-condemnation damages, equal protection, breach of contract, breach of the implied covenant of good faith and fair dealing, declaratory and injunctive relief, and attorneys' fees. *See* SAC ¶¶ 68-104 (Claims Three through Nine).

III. Motion to Dismiss Standard

A court may dismiss a complaint for "failure to state a claim upon which relief can be granted." NEV. R. CIV. P. 12(b)(5). While all factual allegations of the complaint are presumed true and inferences are drawn in favor of the plaintiff on a motion to dismiss,

[4] The Court may take judicial notice of this case because CSI admits the pendency of the case and it is closely related to this case. NRS 47.130(2)(b); SAC ¶ 49 at 23:24-25; *Mack v. Estate of Mack*, 125 Nev. 80, 91-92, 206 P.3d 98, 106 (2009).

Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008), a plaintiff must allege sufficient facts to support each element of its claim, *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984), and cannot make a case out of bare legal conclusions. *Conway v. Circus Circus Casinos, Inc.*, 116 Nev. 870, 875, 8 P.3d 837, 840 (2000).

The Court may consider materials attached to the complaint without converting the motion to dismiss into one for summary judgment. *Breliant*, 109 Nev. at 847, 858 P.2d at 1261.

IV. Legal Argument

A. CSI's two inverse condemnation claims are premature because Order 1309 on which the claims are based is under judicial review

If the decision on which the alleged taking is based is not final, then neither is the alleged taking. *Knick v. Twp. of Scott, Pa.*, 139 S. Ct. 2162, 2169, 204 L. Ed. 558 (2019) (upholding the finality requirement of *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108 (1985)); *Pakdel v. City & Cty. of San Francisco*, 952 F.3d 1157, 1163 (9th Cir. 2020) ("*Knick* left this finality requirement untouched. . .").

Orders issued by the State Engineer remain "in full force and effect ***unless*** proceedings to review the same are commenced in the proper court within 30 days . . . " NRS 533.450(1) (emphasis added). Until a final decision is reached "'regarding the *application* of the regulations to the property at issue,'" the claim is not ripe. *State v. Eighth Jud. Dist. Ct.*, 131 Nev. 411, 419, 351 P.3d 736, 742 (2015) (quoting *Williamson Cty. Reg'l Planning Comm'n*, 473 U.S. at 186).

Here, the State Engineer's Order 1309, which CSI alleges effects a taking, SAC ¶¶ 57, 64, is subject to judicial review in Case A-20-816761-C. In that case, CSI also argues that Order 1309 violates the takings clause of the Nevada Constitution. *See* **Ex. E, App. 157** (CSI Opening Brief). The hearing on the parties' petitions for judicial review is set for February 14, 2022. *Id.* at 125.

Consideration of CSI's takings claims is not in order until the validity of Order 1309 is confirmed: The court in Case A-20-816761-C could deny CSI's petition, but it could also grant CSI's petition for judicial review and invalidate Order 1309, as in *Wilson v. Pahrump Fair Water, LLC*, 137 Nev. ___, ___, 481 P.3d 853, 856 (2021) (district court granted petition for judicial review and invalidated Order No. 1293A). Until Order 1309 is declared valid, CSI's takings claims are not ripe.

Even assuming CSI's inverse condemnation claims were ripe, the Court should dismiss them. Whether a taking has occurred presents a question of law. *City of Las Vegas v. Cliff Shadows Prof'l Plaza*, LLC, 129 Nev. 1, 11, 293 P.3d 860, 866 (2013). CSI alleges that the State Engineer's Orders "have effectuated a regulatory taking" of its (1) "Water Rights"; (2) its Property; and (3) "and its development rights." SAC ¶ 49. CSI is mistaken on all three counts, as discussed in order below.

B. The State Engineer did not unconstitutionally take CSI's water rights

1. Relevant principles of Nevada water law

Nevada water law principles defeat CSI's inverse condemnation claims. First, under the public trust doctrine, all water in Nevada, including groundwater, "belongs to the public," NRS 533.025, and is held in trust for the public by the State. *Mineral Cty. v. Lyon Cty.*, 136 Nev. 503, 511, 473 P.3d 418, 425 (2020). The tenets of this doctrine were first recognized in 1970—decades before CSI purchased the Property. *See State Eng'r v. Cowles 610 Bros., Inc.*, 86 Nev. 872, 874, 478 P.2d 159, 160 (1970) (holding that the state owns the waters and beds beneath them). The doctrine allows the State to grant water rights only if it is in the public's interest. *Lawrence v. Clark Cty.*, 127 Nev. 390, 400, 254 P.3d 606, 613 (2011). CSI always knew when it bought the Property that the State may not grant all necessary water to develop a master plan community 50 miles north from Las Vegas if it would not be in the best interest of "the current and future needs of Nevada citizens and the stability of Nevada's environment." *Bacher v. Office of State Eng'r of State of Nev.*, 122 Nev. 1110, 1116, 146 P.3d 793, 797 (2006); *see also* **Ex. A, App. 001-049.**

. . .

Second, water right holders do not own or acquire title to water but a right to the beneficial use of the water. *Desert Irrigation, Ltd. v. State of Nev.*, 113 Nev. 1049, 1059, 944 P.2d 835, 842 (1997). While water rights are "regarded and protected as real property," *Application of Filippini*, 66 Nev. 17, 21–22, 202 P.2d 535, 537 (1949), beneficial use of the water is "the *basis*, the measure *and the limit* of the *right* to the use of water." NRS 533.035 (emphasis added).

Third, "Nevada is a prior appropriation state." *Mineral Cty.*, 136 Nev. at 508, 473 P.3d at 423. This means that holders of permitted and certified water rights, such as CSI, hold and accept their rights "subject to existing rights," NRS 533.430(1), such as senior rights (those that predate CSI's permits), vested rights that existed under common law before NRS Chapter 533 was enacted in 1913, and rights adjudicated by decree. *See* NRS 533.085(1) ("Nothing contained in this Chapter shall impair the vested right of any person to the use of water. . ."); NRS 533.210 (providing that court decrees are "final . . . and conclusive upon all persons. . ."); *see also Mineral Cty.*, 136 Nev. at 513, 473 P.3d at 426 ("Water rights are given 'subject to existing rights'. . . ."). CSI's alleged 2,140 afa of permitted and certificated groundwater rights are "subject to" the senior and fully appropriated rights of the Muddy River. SAC ¶ 20, and Ex. 3 at 5 (Interim Order 1303) (recognizing the "decreed and fully appropriated Muddy River, which has the most senior-rights").

Finally, water "is a precious and increasingly scarce resource." *Bacher*, 122 Nev. at 1116, 146 P.3d at 797. "Nevada's resulting system of prior appropriation neither envisions nor guarantees that there will be enough water to meet every demand for it . . . ." *Wilson*, 137 Nev. at ___, 481 P.3d at 845.

2. The Orders do not take CSI's water rights

The Nevada Constitution provides that "[p]rivate property shall not be taken for public use without just compensation having been first made . . ." NEV. CONST. art. 1, § 8(6). Where a governmental agency "has neither physically diverted or appropriated any . . .

water nor physically reduced the quantity of water that is available," there is no takings claim. *Washoe Cty., Nev. v. U.S.*, 319 F.3d 1320, 1327 (Fed. Cir. 2003).

Here, Order 1309 does not say that CSI can no longer use any groundwater; nor does it foreclose future use of groundwater by any individual water right holder, including CSI. Instead, CSI complains about not being able to use its permitted water rights in the *future* as it had "planned to," SAC ¶ 21, and about the State Engineer's denial of CSI's final map for 8 lots that require use of CSI's junior water rights to the detriment of senior rights. *Id.* ¶ 50 and Ex. 5 (June 17, 2020 letter). But CSI has no "constitutionally protected property right" to future groundwater. *Kobobel v. State, Dep't of Nat. Res.*, 249 P.3d 1127, 1137 (Colo. 2011); *Wilson*, 137 Nev. at ___, 481 P.3d at 854 (prior appropriation system does not envision or guarantee "enough water to meet every demand").

3. The State Engineer's obligations to the holders of senior rights in the Muddy River do not effect a taking of CSI's junior water rights

The prior appropriation doctrine "prohibits the use of water to the injury of senior water rights." *Kobobel*, 249 P.3d at 1134. Thus, there is no taking where the government seeks to satisfy its obligations to senior water rights holders—even if it works to the detriment of junior rights holders. *See, e.g., Baley v. United States*, 942 F.3d 1312, 1331, 1341 (Fed. Cir. 2019), *cert. denied*, 2020 WL 3405869 (U.S. June 22, 2020) (holding that the government did not take the farmers' water without just compensation when it temporarily halted water delivery to satisfy its obligation to the more senior rights of the Tribes to protect endangered species of fish); *Sierra Nev. SW Enters., Ltd. v. Douglas Cty.*, 2011 WL 1304472, at *4 (D. Nev. Mar. 30, 2011), *aff'd*, 506 F. App'x 663 (9th Cir. 2013) (dismissing takings claim "because there is no taking for the denial of a permit . . . where such approval would be in derogation of other prior appropriated rights.").

Similarly, here, CSI never had an "unfettered right to use water in derogation of senior water rights holders." *Kobobel*, 249 P.3d at 1139. Its rights were always "subject to" the Muddy River's senior rights. NRS 533.030; NRS 533.340(1). "The Muddy River Decree was finalized in 1920"—many decades before CSI obtained its statutory water

rights. *See* SAC Ex. 4 (Order 1309) at 60. The Muddy River Decree is final. NRS 533.210. State Engineers may not carry out their duties in ways that conflict with a court decree. NRS 533.0245; *Mineral Cty*, 136 Nev. at 517, 473 P.3d at 429 (citing NRS 533.0245).

As a result, the State Engineer would not unconstitutionally take CSI's water rights if necessary to satisfy obligations to the most senior Muddy River and Muddy River Spring water rights (as well as to those holders of groundwater rights that predate CSI's). As the findings of Order 1309 indicate, "the additional pumping in Coyote Spring Valley was a significant contributor to the decline in the springs that serve as the headwaters of the Muddy River and habitat for the Moapa dace." SAC, Ex. 4 (Order 1309) at 9 (Second "whereas"). The State Engineer could adopt such orders to protect those senior rights. *See* NRS 534.120. CSI's takings claim therefore fails on this basis as well.

4. CSI states no claim for a *per se* regulatory taking of its Water Rights

Courts analyze inverse condemnation claims under the Nevada Constitution using federal takings cases by analogy. *See McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 662, 137 P.3d 1110, 1121 (2006) (applying federal takings case law to inverse condemnation claim). To support a regulatory, "total," takings claim, plaintiffs face a high hurdle: They must show that the regulatory acts deprive them of "*all* economically beneficial uses" of their property and leave it "economically idle." *Lucas*, 505 U.S. at 1015. But even if the alleged deprivation is total, compensation is not due if the restrictions imposed by the regulation "inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id*. at 1029.

Here, CSI does not allege that the Orders deprived it of all its Water Rights. But even if it did, its claim would fail because Nevada's "background principles" of water law discussed above preclude a *Lucas* takings claim. Any restrictions imposed by the Orders are inherent to the legal limitations that came with CSI's permitted water rights to begin with.

. . .

C. CSI has no vested development rights that the State Engineer took

CSI's claim for an alleged taking of its development rights also fails as a matter of law. Where, as here, a developer has a mere hope to obtain a final approval of a master planned community, it has no vested property interest that the Fifth Amendment protects. *See, e.g., Boulder City v. Cinnamon Hills Assocs.*, 110 Nev. 238, 245, 871 P.2d 320, 324 (1994) ("a denial of a building permit is not an unconstitutional taking without just compensation in violation of the Fifth Amendment"); *Oceanic Cal., Inc. v. City of San Jose*, 497 F. Supp. 962, 974–75 (N.D. Cal. 1980) ("Oceanic has no 'vested right' in the particular development it proposed, under California law").

CSI only had conditional approvals of subdivision maps and then only for certain parcels. SAC ¶ 45. The conditional approvals were specifically conditioned upon a "will serve" letter from CS-GID and a final mylar map. *Id.* When the Division has "*any* discretion in granting or denying the [approval], there [is] no entitlement and no constitutionally protected interest." *Cinnamon Hills Assocs.*, 110 Nev. at 245, 871 P.2d at 324 (citing *Gardner v. Baltimore Mayor & City Council*, 969 F.2d 63, 69 (4th Cir.1992)).

D. The State Engineer did not take CSI's Property

1. CSI states no *Lucas* takings claim

To determine whether a regulation deprives an owner of all economically beneficial use of its real property, courts must look at the "property as a whole." *Murr v. Wisconsin*, 137 S. Ct. 1933, 1949, 198 L. Ed. 2d 497 (2017). Even if a landowner loses 90% or 95% of the value of its property, the landowner cannot be said to have lost "all economically beneficial use" to support a *per se* takings claim. *Lucas*, 505 U.S. at 1019 n.8; *Murr*, 137 S.Ct. at 1949.

Here, CSI admits it is not denied all economically beneficial use of its 42,100-acre property: CSI developed and is operating a Signature golf course on the Property. SAC ¶ 17. CSI also does not allege it lost all value in the Property. CSI merely complains that it cannot build its intended master-planned community. *Id.* ¶¶ 45, 51, 57. Nothing in the Orders prohibits CSI from using its property for residential use and therefore does not

leave its property "economically idle." *Palazzolo v. Rhode Island*, 533 U.S. 606, 631, 121 S. Ct. 2448 (2001) ("A regulation permitting a landowner to build a substantial residence . . . does not leave the property 'economically idle'"). As a result, CSI's first inverse condemnation claim for the denial of "all" economically beneficial use of its Property fails.

2. CSI does not meet the *Penn Central* factors either

"Anything less than a 'complete elimination of value,' or a 'total loss'" requires an analysis under the multi-factor test of *Penn Central*. *Tahoe–Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322–23 (2002) (quoting *Lucas*, 505 U.S. at 1019–1020, n. 8); *see also Sisolak*, 122 Nev. at 663, 137 P.3d at 1122 (holding to same effect). The *Penn Central* factors include: (1) the economic impact of the regulation on the plaintiff; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. *Penn Central*, 438 U.S. at 124; *Sisolak*, 122 Nev. at 663, 137 P.3d at 1122. CSI's allegations demonstrate that none of the factors weighs in favor of finding a taking.

a. CSI alleges no loss in economic value of the Property

A mere "allegation that a regulation has diminished the property's value, or destroyed the potential for its highest and best use, does not, without more, constitute a taking." *Sisolak*, 122 Nev. at 663, 137 P.3d at 1122. "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). The loss in property value must be substantial: An "81% diminution in value" was held an insufficient economic loss in *MHC Fin. Ltd. P'ship v. City of San Rafael*, 714 F.3d 1118, 1127 (9th Cir. 2013).

But even if a regulation has a significant economic impact on the plaintiff, there is no taking if the regulation serves an important public purpose. *See Penn Cent.*, 438 U.S. at 127 (discussing case examples); *Kuban v. McGimsey*, 605 P.2d 623, 627, 96 Nev. 105, 112 (1980) (ordinance effected no taking despite significant adverse economic impact on a . . .

claimant, because it served important public purpose and did not deprive the owner of other "reasonable uses of their property").

Here, CSI does not allege that the Property lost any value since CSI purchased it. Although CSI complains it lost millions of dollars in pre-construction costs, such costs do not inform the economic impact factor of *Penn Cent.* Further, the State has a significant public interest in preserving its scarce water resources, in not adversely impacting the delivery of Muddy River to senior decreed rights, in not over-pumping groundwater in the Basin, and in preserving endangered species like the Moapa dace. Thus, the first *Penn Cent.* factor weighs against finding a taking.

b. Order 1309 does not physically take CSI's property

A government regulation that adjusts "the benefits and burdens of economic life to promote the common good" is less likely to yield a taking than a "physical invasion" by the government. *Penn Central*, 438 U.S. at 123–24. Because the State Engineer has not taken CSI's Property, the second *Penn Central* factor also weighs against finding a taking.

c. Order 1309 does not interfere with CSI's investment-backed expectations

The property owner's distinct investment-backed expectations are informed by, *inter alia*: (1) "the law in force in the State in which the property is located," *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 38-39 (2012); (2) the foreseeability of restrictions that the government may impose on the property, *id.* at 39; (3) the "existing use" of the property, *Esposito v. S.C. Coastal Council*, 939 F.2d 165, 170 (4th Cir.1991), *cert. denied*, 505 U.S. 1219 (1992); and (4) the owner's "notice that his development plans might be frustrated." *Kelly v. Tahoe Reg'l Planning Agency*, 109 Nev. 638, 651, 855 P.2d 1027, 1035 (1993). In *Kelly*, the owner knew at the time of purchase that the Lake Tahoe Regional Planning Commission had expressed concerns over "rapid growth in the Lake Tahoe Basin and the need for land-use planning regulations." *Kelly*, 109 Nev. at 651, 855 P.2d at 1035.

Here, CSI had no investment-backed expectations that it could ever develop a master planned community on the Property.

First, CSI bought the Property knowing that if the withdrawal of groundwater from beneath its Property or *other* property caused "depletion of water to a surface water habitat of any endangered or threatened species," the State Engineer was empowered "to reduce the total water allocation in the affected area . . ." Act § 6(a)(3).

Second, CSI knew that under Nevada law, its water rights were subject to existing rights, vested rights, and senior rights, and that there was no guarantee there would be enough water to meet its project's demands. *Wilson*, 137 Nev. at ___, 481 P.3d at 845.

Third, the Property was not, and had not historically been, used for master planned communities. SAC ¶ 9(c).

Fourth, CSI knew by March 8, 2002—at which time it only had a Concept Plan, SAC ¶ 9(a)—that its applications for additional water rights necessary for CSI to develop its master plan were held in abeyance pending a multi-year hydraulic study. Order 1169, **Ex. B, App. 050-061**. Order 1169 already advised CSI in 2002 that: (1) until studies are done, development was risky; (2) "[l]arge-scale development (sustained withdrawals) of water from the carbonate-rock aquifers would result in water-level declines and cause the depletion of large quantities of stored water," which would cause reductions in the flow of warm-water springs; (3) "listed endangered and/or potential threatened species exist in the Muddy Springs/Muddy River area"; and (6) "the State Engineer had previously granted groundwater permits" in Coyote Spring Valley to entities *other* than CSI. Order 1169 at 1-3, 5-6. For all these reasons, the State Engineer:

> [Did] not believe it is prudent to issue *any* additional water rights . . . until a significant portion of the water rights which have already been issued are pumped for a substantial period of time in order ***to determine if the pumping of those water rights will have any detrimental impacts on existing water rights or the environment***.

Order 1169, **Ex. B, App. 057** (emphasis added).

Fifth, all CSI's applications for additional groundwater were denied in 2014 and CSI never appealed from that ruling. SAC ¶ 23.

. . .

Sixth, CSI recognized the State Engineer's powers to conjunctively manage the LWRFS and agreed in 2018 to cooperate "in good faith in the ongoing administrative process of the State Engineer concerning conjunctive management of the [LWRFS]." SAC Ex. 7 ¶ 3. Order 1309 was issued as part of that conjunctive management.

Thus, based on its own allegations, CSI had no reasonable investment-backed expectations that it could *ever* put to beneficial use all its permitted water rights or receive additional water rights than those obtained before 2002. Here as in *Esplanade Properties v. City of Seattle*, CSI took a risk when buying the Property and moving forward with planning that it could "overcome those numerous hurdles to complete its project and realize a substantial return on its limited initial investment." 307 F.3d 978, 987 (9th Cir. 2002). "Now, having failed . . . [CSI] seeks indemnity from the [State]." *Id.* But the "takings doctrine does not supply plaintiff with such a right to indemnification." *Id.*

For all these reasons, CSI did not suffer a taking that could give rise to inverse condemnation claims; these claims fail as a matter of law.

D. CSI's claim for pre-condemnation damages fails as a necessary result

"To support a claim for precondemnation damages, the landowner must first allege facts showing an official action by the [would be] condemnor amounting to an announcement of intent to condemn." *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 229, 181 P.3d 670, 673 (2008) (internal quotation marks and citation omitted).

CSI does not allege any facts to support this first element. CSI merely refers to the "State's [unidentified] acts and/or omissions" alleged in prior paragraphs. SAC ¶ 69. None of the Orders alleged in the SAC amounts to an announcement of intent to take CSI's property. The State Engineer's May 16, 2018, letter *to LVVWD* in which it advised that he "cannot justify approval of any subdivision maps" based on CSI's "junior priority groundwater rights . . . unless other water sources are identified" was not an official announcement, let alone one announcing an intent to take CSI's Property or its Water Rights. *Cf. Buzz Stew*, 124 Nev. at 229, 181 P.3d at 673 (City adopted a resolution in which it expressed the need for Buzz Stew's property). This alone dooms the claim.

"Second, the landowner must show that the public agency acted improperly following the agency's announcement of its intent to condemn certain land," such as by unreasonably delaying an eminent domain action." *Id*.

CSI complains of "massive delays" in paragraph 69 of its SAC without quantifying them or relate them to any Order that could qualify as an intent to condemn. Moreover, the allegations that precede ¶ 69 of the SAC refute this conclusory allegation: Between May 2018 and January 2019, the State Engineer began a public workshop process, conditionally approved two of CSI's subdivision maps, gave CSI and all other interested parties an opportunity to weigh in on the availability of the groundwater in the LWRFS, held an additional public workshop on the LWRFS, and issued Interim Order 1303. *Id*. ¶¶ 39-44 and Ex. 3; *compare City of N. Las Vegas v. 5th & Centennial, LLC*, No. 58530, 2014 WL 1226443, at *3 (Nev. Mar. 21, 2014) (unpublished) (involving oppressive conduct and a near eight-year delay). As CSI admits, the State Engineer conducted extensive hearings to allow all interested parties to comment on the allowable amount of groundwater in the Basin. SAC ¶¶ 39-44. CSI participated fully in those hearings. *Id*. Ex. 4. Here, as in *N. Pacifica LLC v. City of Pacifica*, "[t]here is a reasonable explanation on the face of the complaint for every delay in the [State Engineer's] eventual [denial] of the application." 526 F.3d 478, 485 (9th Cir. 2008). CSI cannot now, after demanding careful consideration by the State Engineer in 2018, somehow claim it is entitled to damages because the State Engineer did precisely what CSI asked of him.

E. CSI's equal protection claim fails because the State Engineer's Orders have a rational basis

An equal protection claim "may be brought by a 'class of one' if the [plaintiff] can demonstrate that he or 'she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.'" *Malfitano v. Cty. of Storey*, 133 Nev. 276, 284, 396 P.3d 815, 821 (2017) (quoting *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S.Ct. 1073 (2000)). A statute "meets rational basis review so . . .

long as it is reasonably related to a legitimate government interest." *Rico v. Rodriguez*, 121 Nev. 695, 703, 120 P.3d 812, 817 (2005).

Here, the Orders and CSI's allegations belie that it was "singled out" by the State Engineer. SAC ¶ 74. *All* applicants for additional groundwater were denied permits for additional groundwater in 2014—not just CSI. *Id.* ¶ 22. Order 1309 does not single out any water rights holder that must give up its water rights; in fact no single water right holder has been denied the use of their existing water right as a result of Order 1309. CSI's allegation that Moapa Valley Water District (MVVD") is "allowed to use its water rights" and continue its business despite having more junior rights than those of CSI, SAC ¶ 75, overlooks that CSI, too, is allowed to use the 1400 to 2000 afa it puts to beneficial use and operate its golf course.

Even assuming CSI was treated differently from MVVD, CSI alleges no facts to show that the Orders lack a rational basis, as is its burden. *Malfitano*, 133 Nev. at 284, 296 P.3d at 821. All Orders—including the June 17, 2020, recommendation to deny CSI's Village A map approval that required 2,000 afa—are based on expert testimony and reports and rationally related to the regulation of Nevada's scarce groundwater, which belongs to the public. The State Engineer had a statutory right to deny applications that "exceed the threshold of allowable pumping" of Order 1309. SAC ¶ 50. For these reasons, the Court should dismiss the equal protection claim.

F. CSI's five new claims are not ripe and are non-starters

1. CSI alleges no breach of contract or implied duty

A claim for breach of contract requires the plaintiff to plead and prove a contract, a breach by the defendant, and damages resulting from such breach. *Richardson v. Jones*, 1 Nev. 405, 408 (1865). It is for the Court to interpret the terms of the contract. *Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 486, 117 P.3d 219, 223 (2005).

The August 29, 2018, settlement agreement between CSI and the State Engineer on which CSI bases its contract claims includes mutual, ongoing obligations: The State Engineer agreed to "process in good faith any and all maps or any other issues as requested

by CSI . . ." SAC Ex. 7, ¶¶ 2, 4. CSI, on its part, agreed to "participate in good faith in the ongoing administrative process of the State Engineer concerning conjunctive management of the Lower White River Flow System." *Id*. ¶ 3.

As CSI's allegations and petition for judicial review confirm, the administrative process concerning the conjunctive management of the LWRFS is "ongoing." SAC ¶ 49; **Ex. E, App. 124-192**. CSI cannot complain about an untimely or unfair process, SAC ¶ 82, because it has not been completed and CSI agreed to participate in it in good faith. *Id.* Ex. 7 ¶ 3. Moreover, the terms of the settlement agreement do not guarantee approval of CSI's maps, just a fair "process." In other words, CSI has not alleged a breach.

CSI's claim for breach of the implied covenant of good faith and fair dealing fails for the same reasons, because the settlement agreement imposes no duty on the State Engineer to approve CSI's maps. *See Nelson v. Heer*, 123 Nev. 217, 227, 163 P.3d 420, 427 (2007) (dismissing implied covenant claim because defendant had no contractual duty to do what Plaintiff complained of). Moreover, the duty of good faith and fair dealing imposed by every contract applies to both "contracting parties"—not just the State Engineer. *Hilton Hotels Corp. v. Butch Lewis Prods., Inc.*, 109 Nev. 1043, 1046, 862 P.2d 1207, 1209 (1993). CSI's implied covenant claim is incompatible with its own agreement to participate "in good faith" in the ongoing administrative process. For these reasons, the contract claims are misplaced.

2. The Declaratory Relief claim is not ripe and would fail

One of the key elements and requirements for declaratory relief is that the issue involved in the justiciable controversy is "'ripe for judicial determination.'" *MB Am., Inc. v. Alaska Pac. Leasing*, 132 Nev. 78, 86, 367 P.3d 1286, 1291 (2016) (quoting *Kress v. Corey*, 65 Nev. 1, 26, 189 P.2d 352, 364 (1948)).

CSI seeks a declaration that the State Engineer's actions "precluded" CSI "from moving forward with its Master Planned Development" and caused [CSI] to "permanently cease development of the Clark County Development." SAC ¶ 94 (quoting Ex. 6 p. 9). CSI further seeks a declaration that it is entitled to compensation for its takings claims. *Id*. ¶

95. But as discussed above, those claims are not ripe and lack merit. CSI's petition for judicial review of Order 1309 remains pending. There is no legal basis for a declaration that the State Engineer wrongfully took any of CSI's property.

3. CSI does not meet the requirements for preliminary injunctive relief

"For a preliminary injunction to issue, the moving party must show that there is a likelihood of success on the merits and that the nonmoving party's conduct, should it continue, would cause irreparable harm for which there is no adequate remedy at law." *Dep't of Conservation & Nat. Res., Div. of Water Res. v. Foley*, 121 Nev. 77, 80, 109 P.3d 760, 762 (2005).

For all the reasons discussed above, CSI is unlikely to succeed on the merits of its (inverse condemnation) claims, and it has an adequate remedy at law to preserve the "status quo" during these proceedings under NRS 533.450. *Cf. Foley*, 121 Nev. at 84, 109 P.3d at 764 (NRS Chapter 533 afforded the Foleys an "administrative remedy to reinstate at least some water usage to their land"). Should it nevertheless prevail on its inverse condemnation claims, monetary damages would adequately compensate CSI.

4. CSI is not entitled to attorneys' fees

CSI's last claim for attorneys' fees is also premature and misplaced. A party who prevails on an inverse condemnation claim may make a request for attorneys' fees, NRS 37.185, but if there is no taking, there is no right for attorneys' fees. *See City of Las Vegas v. Cliff Shadows Prof'l Plaza*, 129 Nev. 1, 14, 293 P.3d 860, 868 (2013) ("Since no taking occurred . . ., Cliff Shadows is not the prevailing party on any of its claims and thus is not entitled to attorney fees"). Because CSI cannot prevail on its inverse condemnation claims, its "claim" for attorneys' fees should be likewise dismissed.

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V. CONCLUSION

For these reasons, this Court should dismiss CSI's Second Amended Complaint with prejudice.

DATED this 20th day of December, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court by using the electronic filing system on the 20th day of December, 2021, and e-served the same on all parties listed on the Court's Master Service List.

/s/ *Traci Plotnick*
Traci Plotnick, an employee of the
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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; 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.: 13 **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT** **Hearing Date: January 31, 2022** **Hearing Time: 9:00 AM**

Plaintiffs Coyote Springs Investment LLC, Coyote Springs Nevada, LLC and Coyote Springs Nursery, LLC (collectively "Plaintiffs" or "CS-Entities"), by and through their counsel William L. Coulthard of Coulthard Law PLCC, file this Opposition to Defendant's Motion to Dismiss based upon NRCP 12(b)(5). This Opposition is made and based upon the following points and authorities as well as the arguments of counsel at the hearing of this matter.

I. Introduction.

Defendant State of Nevada, and its Department of Conservation and Natural Resources (the "State") brings its Motion to Dismiss based on arguments that ignore the mandate of NRCP 12(b)(6) and Nevada law applicable thereto, that all facts plead in the Plaintiffs' Second Amended Complaint are assumed true, and further that all reasonable inferences must be drawn in favor of Plaintiffs. The State conveniently disregards this applicable legal standard and present its own set of facts, many of which are contested. The State's actions are not appropriate on a NRCP 12(b)(6) motion.

The State premises its Motion on the argument that this action is "premature and misguided" and that Plaintiffs' taking claims are not ripe for adjudication. The State is mistaken. This action is ripe for adjudication. The State's Order 1309 is final and enforceable. The Judicial Review appeal of Order 1309 does not change the finality of Order 1309. The inverse condemnation claims are ripe because a taking of Plaintiffs' water rights, its development rights, and its property has occurred. A property owner has ripe and actionable takings claim as soon as the government has taken property without paying for it in violation of the Takings clause contained within Article 1, Section 8(3) of the Nevada Constitution. If Order 1309 is reversed on appeal, Plaintiffs' taking claims may be treated as a temporary taking rather than a permanent taking. While the damages may change, the taking claims became ripe when Order 1309 became final in June of 2020.

In Nevada, water rights are "regarded and protected as real property." As such, water rights as an interest in real property, cannot be taken without the payment of just compensation under the United States and Nevada Constitutions. Yet that is exactly what the State has done through the issuance of Order 1309. The State reallocated and reprioritized Coyote Springs' previously permitted and valid water rights, making them unusable, without paying just compensation for the taking of such rights. Such action likewise took Plaintiffs' development rights and destroyed their fully entitled master planned community. This rises to a regulatory taking of Plaintiffs' property rights for which just compensation is due.

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Moreover, Plaintiffs have properly plead that the State breached its Settlement Agreement with Plaintiffs. As alleged, the State failed to "process in good faith . . . maps or other issue submittals by [Plaintiff] CSI" as required by the Settlement Agreement. Within days of its issuance of Order 1309, the State denied Plaintiffs' conditionally approved subdivision maps needed to move the Coyote Springs Master Planned Community forward. As a result, the long planned, fully entitled, and partially constructed Coyote Springs Master Planned Community cannot move forward with further construction and sales of homes within the planned community. As a result of the State's actions, Coyote Springs is dead in its tracks, and there is no viable economic use for the property.

Plaintiffs' fact intensive, well plead and comprehensive 34-page Second Amended Complaint for Damages and Demand for Jury Trial necessarily withstands the State's ill-conceived Motion to Dismiss. The State's Motion to Dismiss should be denied in its entirety.

II. Procedural Background.

On August 28, 2020, Plaintiffs filed this action in Clark County District Court, State of Nevada, Case No. A-20-820384-B. Plaintiffs' claims surrounded the wrongful and unconstitutional regulatory taking of Plaintiffs' permitted and certificated groundwater rights in the Coyote Springs Valley and its corresponding approved Major Project Master Planned Development projects.

On October 2, 2020, the State removed this case to Federal Court. ECF No. 1.[1] On October 9, 2020 the State filed its Motion to Dismiss Plaintiffs' Complaint. ECF No. 4. Shortly after the briefing on the Motion to Dismiss was complete, Plaintiffs filed their Motion for Leave to File First Amended Complaint. ECF 21. The proposed First Amended Complaint did not raise any federal questions justifying the Federal District Court to continue exercising jurisdiction over the case. ECF 21. Contemporaneously with the filing of the Motion for Leave to Amend, Plaintiffs filed a Motion to Remand the case back to Nevada State District Court on

[1] Electronic Court Filing ("ECF") from the now remanded Federal Case No. 2:20-cv-01842-KJD-DJA.

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the basis that no federal claims, and corresponding federal jurisdiction, remained in this case. ECF 22.

After languishing for nearly a year in Federal Court, on September 28, 2021, United States District Court Judge Kent Dawson entered an Order that granted Plaintiffs' Motion to Amend and "decline[d] to exercise supplemental jurisdiction over the amended claims and remands them to state court." ECF 40 at pg. 4, lns. 19-20. Finally, the Court "denied as moot" all other outstanding motions. *Id.* pg. 5, ln. 1. Shortly thereafter, Plaintiffs filed their Second Amended Complaint in this Court on November 12, 2021.

III. Factual History.

a. Coyote Springs' Master Planned Development.

Coyote Springs is a master-planned community long planned to be developed by the Plaintiff CS-Entities located in Clark and Lincoln County, Nevada. *See* Second Amended Complaint ("SAC") SAC ¶¶ 1. The Coyote Springs property consists of approximately 42,100 acres, measures nearly 65 square miles, and is located 50 miles north of Las Vegas in the Coyote Spring Valley adjacent to and north of State Route 168 and east of U.S. Highway 93. Approximately 1/3 of the Coyote Springs property (13,000 +/- acres) lies in Clark County, with the remaining property (29,000 +/- acres) located in Lincoln County, Nevada. SAC ¶ 7.

Over the past 15 + years, Plaintiffs have pursued and obtained multiple land use and zoning entitlements for its planned development of the Coyote Springs Master Planned community (the "Master Planned Community"). SAC ¶ 8. Plaintiffs have further pursued and entered into comprehensive Development Agreements with both Lincoln and Clark Counties in furtherance of the development of its Master Planned Community. *Id*. In furtherance of their investment backed expectations, Plaintiffs have spent years and hundreds of millions of dollars in planning, design, engineering, and constructing significant infrastructure improvements to support their Master Planned Community. SAC ¶ 17. With the approval of the Defendant State, Clark County, Lincoln County, and various other State and Federal Agencies, Plaintiffs have constructed significant infrastructure at Coyote Springs, including, but not limited to a 3 Megawatt Electrical substation and associated electrical facilities, a 325 acre stormwater

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detention basin, 4 groundwater production wells for the Master Planned Community, 2 of which are fully operational and presently in use. CS Entities have constructed miles of roads and streets and installed miles of associated underground utilities including treated and wastewater lines, electrical lines, and fiber-optics within the Master Planned Community. Plaintiffs have incurred over $200 Million in construction costs associated with the Coyote Springs Master Planned Community. SAC ¶ 17.

b. Coyote Springs Water Rights.

In furtherance of development of its Master Planned Community, and as a critical and necessary component of its planned development, CS-Entities purchased, among other things, 5000 acre feet annually ("afa") of permitted ground water rights of which 400 afa were sold to the Southern Nevada Water Authority ("SNWA") with the CS-Entities retaining 4600 afa of permitted Nevada ground water rights in the Coyote Springs Valley. SAC ¶ 19. Pursuant to NRS 533.370, the State Engineer could not have approved the right to appropriate this water if:

A. There was no unappropriated water at the proposed sources;

B. The proposed use or change conflicted with existing rights;

C. The proposed use or change conflicted with protectable interests in domestic wells as set forth in NRS 533.024; or,

D. The proposed use or change threatened to prove detrimental to the public interest. NRS 533.370(2).

When granting and issuing the permits for these water rights, the State Engineer conclusively found that the appropriation of 5000 afa from the Coyote Springs Valley did not (1) conflict with prior rights of any person; and (2) did not threaten to prove detrimental to the public interest including the Moapa dace endangered fish.

In furtherance of its Master Planned Development, CSI has created and conveyed to the Coyote Springs General Improvement District ("CS-GID") for use within the Master Planned Community a portion of these permitted water rights (2000 afa), and further relinquished 460 afa back to the aquifer, in accord with the US Fish and Wildlife Service as mitigation for any potential Muddy River instream water level flow decreases potentially associated with CS-

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Entities' proposed ground water pumping at its Master Planned Community for the purpose of furthering the survival and recovery of the endangered Moapa dace fish. SAC ¶ 19.

c. History of Wrongful State Actions Related to CS-Entities Water Rights.

In response to an unsolicited letter from the Las Vegas Valley Water District ("LVVWD") to the State, and its State Engineer, which sought "to solicit [the State Engineer's] opinion whether Coyote Spring Valley groundwater can sustainably supply water for the Coyote Springs Master Plan project", the State issued a May 16, 2018 letter to the CS-Entities that announced that the amount of groundwater pumping that will be allowed in the proposed reconfigured five basin area (also known as the "Superbasin"), which was to include the Coyote Spring Valley Basin, will be limited so as to not conflict with the Muddy River Springs or the Muddy River as the most senior rights in the five basis area. SAC ¶ 32-33. The State then further unilaterally announced in part that "the State Engineer cannot justify approval of any subdivision development maps based on the junior priority groundwater rights currently owned by Coyote Springs Water Resources General Improvement District or CSI unless other water sources are identified for development." SAC ¶ 33. This State action effectively denied the CS-Entities the use and enjoyment of their water rights and commenced a taking by the State of the CS-Entities' water rights and associated Master Planned Development Rights. *Id*. The State followed this announcement with e-mail correspondence to the CS-Entities that confirmed that the State "would not sign off on CSI's subdivision maps to allow their approval if they were based on the water rights CS-Entities owned or those dedicated to the Coyote Springs General Improvement District CS GID." ("Water Rights"). SAC ¶29-35. This State Action effectively froze the CS-Entities' continuing efforts to use their Water Rights for residential development and continue to develop their Master Planned Community, and was an unreasonable and unconstitutional take of Plaintiffs' Water Rights and Master Planned Community development rights. *Id.*

As a result, Coyote Springs filed a Petition for Judicial Review challenging the State's actions as publicly announced in its May 16, 2018, letter in Judicial Review Case No. A-18-

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775817-J. SAC ¶ 38. Early in the action, the parties participated in a Court Ordered mediation and resolved the matter pursuant to a Settlement Agreement which provided in part:

1. The Petition for Judicial Review would be withdrawn or dismissed;
2. The State Engineer rescinded its May 16, 2018 letter decision;
3. CSI agreed to participate in good faith in the ongoing administrative process with the State Engineer concerning conjunctive management of the Lower White River Flow System; and
4. The State Engineer agreed to process in good faith any and all maps or any other issues as requested by CSI, or its affiliates, in accordance with the State Engineer's ordinary course of business. *Id*.

The Settlement Agreement was entered into without prejudice to any parties' rights regarding future proceedings. *Id*. The Settlement Agreement established significant obligations for the State which were designed to allow Coyote Springs to move forward with its Master Planned Development mapping, development, construction and sales of homes within its fully approved and entitled Master Planned Community. Specifically, the State agreed to "process in good faith any and all maps and other issue submittals" by Coyote Springs necessary for continued progress on its Master Planned Community. Unfortunately, and as alleged by Plaintiffs in the Complaint, the State breached its obligations under the Settlement Agreement. SAC ¶. 38

d. Conditional Map Approvals.

On January 11, 2019, thought its State Engineer's issued Interim Order 1303, the State again declared that multiple previously stand-alone hydrographic basins would be designated as a "joint administrative unit for purposes of administration of water rights, known as to Lower White River Flow System, or the now "Six-Basin Area." SAC ¶ 44. Interim Order 1303 also declared and continued the temporary moratorium on approvals regarding any final subdivision or other submissions concerning development and construction submitted to the State Engineer for review. *Id*. Despite Interim Order 1303 provision that allowed exceptions to the announced moratorium on processing of land development maps, and the CS-Entities' compliance with

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such moratorium exceptions, the State failed and continued to fail to process CS-Entities subdivision maps needed to move forward with their construction and sale of residences within their long planned and now frozen Master Planned Community. SAC ¶¶ 44-47.

On June 15, 2020 the State, through its State Engineer, issued Order 1309 which ignored Nevada Statutes, ignored the law of prior appropriation, and ignored the priority of the permitted ground water and development property rights of the CS-Entities. Order 1309 created the Lower White River Flow System ("LWRFS") super basin and purports to limit all pumping across all 6+ basins in this newly created super basin to only 8,000 afa. Order 1309 held that the existing water rights, and their priority dates, within this newly created super basin would be reallocated and reprioritized as if the LWRFS super-basin had always existed. As a result, the CS-Entities were stripped of their senior water rights in Coyote Spring Valley, with their water rights being reallocated and reprioritized, to become one of many junior water rights holders in the newly created LWRFS super basin. This action effectuated an unconstitutional take of CS-Entities' water rights and corresponding Master Planned Community development rights. Without the use of its permitted water rights, the CS-Entities cannot develop their Coyote Springs Master Planned Community. SAC ¶¶ 48-49. Without these water rights, Coyote Springs has no viable economic use of its Mater Planned Development. SAC ¶ 51.

Days after the issuance of Order 1309, and as the final nail in CS-Entities' efforts to develop their Master Planned Community, on June 17, 2020, the State fully and finally denied CS-Entities' long pending and previously "conditionally approved" Final Village A subdivision maps necessary for CS-Entities Master Planned Community. CS-Entities assert that this action was done in violation of the parties Settlement Agreement, and specifically the State's obligations to "process in good faith any and all maps or any other issues as requested by CSI [] in accordance with the State Engineer's ordinary course of business." SAC ¶¶ 50-54; Settlement Agreement pg. 1, ¶ 4.

CS-Entities further assert and allege in this action that the aforementioned acts of the State, culminating in the issuance and application of Order 1309 and denial of CS-Entities' subdivisions maps needed for continued development of its long planned and fully entitled

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Master Planned Community, effectuated a regulatory taking of all of CS-Entities economically viable use of its Coyote Spring Valley water rights and master planned land for which it is entitled to an award of just compensation. SAC ¶ 54.

IV. Motion to Dismiss Standard of Review.

a. Failure to State a Claim Upon Which Relief Can Be Granted

A motion to dismiss for failure to state a claim tests the legal sufficiency of the claims set out against the moving party, but it should not be granted unless it appears beyond a doubt that plaintiff is entitled to no relief under any set of facts that could be proved in support of the claim(s). *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008); *Stockmeier v. Nevada Dep't of Corr.*, 124 Nev. 313, 316, 183 P.3d 133, 135 (2008). In *Buzz Stew*, the Nevada Supreme Court stated that the appropriate standard for a motion to dismiss based upon a failure to state a claim is "beyond a doubt." 124 Nev. at 228 n.6, 181 P.3d at 672 n.6. For purposes of a Rule 12(b)(5) motion, a court must accept all of the allegations in the complaint as true and draw all inferences in favor of the non-moving party. *Id*. at 228, 181 P.3d at 672. The test to determine whether the allegations in the complaint are sufficient to assert a claim is "whether the allegations give fair notice of the nature and basis of a legally sufficient claim and the relief requested." *Ravera v. City of Reno*, 100 Nev. 68, 70 (1984).

Importantly, however, a Rule 12(b) motion to dismiss challenges only the legal sufficiency of the complaint, not the strength of the plaintiff's proof of evidence. *Buss v. Consolidated Casino Corp.*, 82 Nev 355, 357, 418 P.2d 815, 816 (1966). That is, the "purpose of a motion to dismiss is to test the sufficiency of the complaint, not to decide the merits." *Gibson v. City of Chi.*, 910 F.2d 1510, 1520 (7th Cir. 1990). A plaintiff "need not prove its case at the pleading stage." *Nalco Co. v. Chem-Mod, LLC*, 883 F.3d 1337, 1350 (Fed. Cir. 2018).

V. The Takings Claims are Ripe.

This action is ripe for adjudication. Defendant's arguments that the CS-Entities' takings claims are premature and not ripe are erroneous and based on outdated case law. In 2019 and again in 2021, the U.S. Supreme Court clarified that takings claims are ripe at the time of the government's action, and there is no requirement that plaintiffs must first exhaust administrative

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remedies or seek judicial review in state court prior to bringing their actions. *See Pakdel v. City & Cty. of San Francisco, California*, 141 S. Ct. 2226, 2230-31 (2021); *Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162, 2170, (2019).

Takings claims are ripe when the government entity charged with implementing the regulations has reached a final decision regarding the application of regulations to the property at issue. *Williamson Cty. Regional Planning Comm. v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186, (1981). While a landowner must give a land-use authority an opportunity to exercise its discretion, once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened. *Palazzolo v. Rhode Island*, 533 U.S. 606, 620, (2001). Essentially, once the government is committed to a position regarding a landowner's development rights, the dispute is ripe for judicial resolution. *Pakdel*, 141 S.Ct. at 2230

The State reached a final decision when issuing Order 1309 and denying Plaintiffs' ability to use their permitted and valid water rights and development entitlements. The State has reallocated Plaintiffs' Coyote Spring Valley water rights into the LWRFS super-basin and reprioritized their senior usable water rights into junior non-usable water rights. Within days of issuing Order 1309, the State applied Order 1309 to Plaintiffs' property directly by denying CS-Entities' long pending and conditionally approved subdivision maps for Village A of its fully entitled and partially constructed Master Planned Community.

Nevada Constitution's right to full compensation arose at the time the State formally denied Plaintiff's use of its water rights at its Master Planned Community, regardless of post-taking remedies that may be available. *Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162, 2170, (2019). If a governmental entity "takes private property without paying for it, that government has violated the Fifth Amendment - just as the Takings Clause says - without regard to subsequent state court proceedings." *Id*. Likewise, the Nevada Constitution provides that "[p]rivate property shall not be taken for public use without just compensation having been

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first made…". Nev. Const. art. 1, §8(6). Order 1309, and its application to Plaintiffs' water rights and subdivision maps, effectuated a taking. These taking claims are ripe.

The State's decision is final due to the Plaintiffs receiving a negative determination on future development, and Plaintiffs need not exhaust all state or county-based review of the decision. *O'Neil v. California Coastal Comm'n*, 2020 WL 2522026, at *4 (C.D. Cal. May 18, 2020); *see Williamson Cty. Regional Planning Comm. v. Hamilton Bank of Johnson City*, 473 U.S. 172, 190 (1981); *see also Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, 657 (9th Cir. 2003) ("In Williamson the Supreme Court made it clear that resort beyond the 'initial decision-maker' is not necessary to fulfill the final decision prong of the ripeness analysis."). In June of 2021, the U.S. Supreme court stated that this "finality requirement is relatively modest. All a plaintiff must show is that 'there [is] no question … about how the regulations at issue apply to the particular land in question.'" *Pakdel*, 141 S.Ct. at 2230 (internal citations omitted).

The State, without citing authority, erroneously assert that the takings claims are not ripe until their actions are first upheld as valid by a state court. However, the question underlying the takings claims is whether the state's actions in precluding Plaintiffs' development and use of their water rights constitutes a taking – not whether a state court on judicial review decides whether the Order 1309 was valid. The validity of the state's action does not make the taking any more or less likely to have occurred, as takings claims already presume the validity of the state's actions. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005).

If the Plaintiffs win their state court appeal of the State's regulation, it will not affect the inquiry into whether a taking occurred due to Defendants' actions. The United States Supreme Court has recognized that temporary takings are compensable. *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cty., Cal.*, 482 U.S. 304 (1987). And invalidation of a regulation without payment of fair value for use of property during period landowner is denied use of property under regulation is a constitutionally insufficient remedy for a taking. *Id.* at 318-19. Moreover, if Order 1309 were invalidated, it would not remedy the taking of Plaintiff's property as Interim Order 1303, and its moratorium against issuance of subdivision

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maps, would still be in place and continue its take of CS-Entities water rights and development rights.

The ripeness of CS-Entities' claims is likewise supported by the factual allegations in the Complaint. Despite having CS-Entities' Approved Major Project entitlements and approval from Clark County for its 6500-acre Major Project Master Planned Community (SAC ¶¶ 8-9), CS-Entities have been precluded from subdividing their lands and building their long-planned and approved residential homes within their Master Plan Community due to:

- The State's May 16, 2018 Letter to LVVWD which provided, in part, "the State Engineer cannot justify approval of any subdivision maps based on junior priority groundwater rights currently owned by Coyote Springs Water Resources General Improvement District or CSI" (SAC ¶¶ 32-33);
- The State Engineer's May 18, 2018 statement to Plaintiffs' representatives that it should "not to spend one dollar more on the Coyote Springs Development Project and that processing of CSI's maps had stopped" (SAC ¶ 36);
- The State Engineer's admission to Plaintiffs that this was "unchartered territory and the State Engineer's office has never granted rights and then just taken them away" *Id.*;
- After the State "conditionally approved" the CS-Entities' subdivision maps, in compliance with the state's express process, the CS-Entities submitted a series of Technical Submittal letters based upon the State's own data, demonstrating there was sufficient available water for final approval of the Coyote Springs subdivision maps. The State failed to further process and approve the Village A subdivision maps (SAC ¶ 47);
- Interim Order 1303 was entered on January 11, 2019, which likewise continued the moratorium on final approval of Coyote Springs' subdivision maps. The State continued to fail to finally approve Coyote Springs' subdivision maps despite the Technical Submittals demonstrating available groundwater to sustain the Approved Major Project (SAC ¶¶ 43, 47);
- Order 1309 was entered which created a super-basin, reallocated the priority of water rights within that newly created super-basin, and capped the groundwater pumping at 8000 afa (SAC ¶¶ 48-49); and
- Days after the entry of Order 1309, the State fully and finally denied CS-Entities' previously conditionally approved Village A subdivision maps necessary for construction and sale of residential homes within the Coyote Springs Master Planned Development (SAC ¶¶ 49-51).

Accepting these allegations as true, which this Court must do under the NRCP 12(b)(5) standard, demonstrates that Plaintiffs' regulatory takings claims are ripe for adjudication, as the Plaintiffs' received a final, definitive decision from the State on how the regulations apply to Plaintiffs' water rights and further development of its Master Planned Community.

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VI. Plaintiffs' Complaint States a Claim for a Per Se Taking under Lucas.

Plaintiffs' Complaint alleges a cognizable *Lucas* taking. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992). *Lucas* takings are referred to as per se or categorical takings, as the government's total taking of a property's value, in-and-of itself, proves the taking claim. *Id*. at 1019.

a. The Complaint Sufficiently Alleges that Defendants' Actions Took All Economically Beneficial Use of Plaintiffs' Property.

The Complaint provides sufficient factual allegations supporting Plaintiffs' claim that the Defendants' actions took all economically beneficial use of its property. This is especially so when considering all reasonable inferences that may be drawn from the Complaints' allegations in a light most favorable to the Plaintiffs. Specifically, the Complaint alleges that:

- The Defendants' actions took Plaintiffs' certificated, permitted, and valid groundwater water rights in Order 1309. That Defendants have taken at least 3640 and possibly all 4140 afa of CS-Entities' water rights, thereby making the property undevelopable, leaving it without any economically beneficial uses, and obliterating the Plaintiffs' ability to sell the property. SAC ¶¶ 2, 3, 48-54.

- The Plaintiffs' investment in its Master Planned Community infrastructure and community amenities were constructed specifically with the understanding, based upon longstanding Nevada Law, that the CS-Entities would be able to use its State-approved and valid groundwater rights in support of its Clark County Approved Major Project. Without these rights, these improvements have no purpose, and the underlying land and improvements have now lost all economically viable use. As the Defendants' Motion to Dismiss muses, it's true that the golf course is open, however it was constructed as an amenity for the planned Master Planned Community, it has operated at a financial loss, and it cannot be sustained without the development of the Master Planned Community. SAC ¶¶ 8; 17; 18.

- The Plaintiffs' numerous, valuable land use entitlements, which culminated in comprehensive Development Agreements in both Clark and Lincoln counties to construct its Master Planned Community was "taken" and rendered valueless due to the Defendants' Order 1309. Order 1309 has left the property with no economically beneficial use. SAC ¶¶ 48-54.

b. The Complaint Sufficiently States that Plaintiffs' Actionable and Vested Property Rights were Taken by the Defendants' Interim Order 1303, Order 1309, and Final Decisions Based on these Policies.

The Complaint alleges that Plaintiffs' permitted ground water rights and prior development approvals are actionable property rights for purposes of takings claims. *See Application of Filippini*, 202 P.2d 535, 537 (Nev. 1949) (holding that, in Nevada, a water right

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is "a right which is regarded and protected as property"). As such, water rights are protected property that cannot be taken without the payment of just compensation under the United States and Nevada Constitutions. *Carson City vs. Estate of Lompa*, 501 P.2d 662 (Nev. 1972).

In its Motion, the State initially asserts that Plaintiffs' water rights are "inherently limited" and that Plaintiffs "thus knew when purchasing the Property that the State may not grant it all the water necessary to develop a new master plan community." While these unsupported allegations are far outside the allowable challenge for a NRCP 12(b)(5) motion, the State is factually incorrect. Specifically, when CS-Entities acquired the land, they also acquired 5000 afa of ground water rights that were certificated and permitted by the State.[2] These water rights were purchased by Plaintiffs prior to, and are unrelated to, the additional water rights applied for by CS-Entities which occasioned Order 1169 and Ruling 6255. The State misleadingly attempts to mix apples and oranges when simultaneously discussing Plaintiffs' previously permitted 5000 afa of groundwater rights, versus Plaintiffs' supplementary application for additional water rights that was denied under State Order 1169. SAC ¶¶ 19-20.

Moreover, it is uncontested that a significant portion (1600 afa +/-) of Plaintiffs' 4600 afa of ground water was placed into beneficial use by CS-Entities. SAC ¶ 20. The balance of CS Entities water rights are presently held under an extension of time to place into beneficial use and have not expired or been forfeited for non-use.[3] Pursuant to the permit terms the water must be pumped from the carbonate aquifer underlying the Coyote Springs Development. It is further alleged in the Complaint, and it is uncontested that CSI has placed a portion of its water into beneficial use to support construction activity, dust control, golf course and landscape irrigation, and a plant nursery. SAC ¶ 24. A Certificate was issued for CSI Water Permit 70429

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[2] Also as alleged in the SAC, 460 afa were previously "relinquished" by Plaintiffs to the State and into the aquifer in accordance with the US Fish and Wildlife Service, in furtherance of the survival and recovery of the Moapa dace. SAC ¶ 19. Order 1309 seeks to further burden Plaintiffs with more protection of the Moapa dace, a burden that should be borne by the public as a whole rather than just by the CS-Entities. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1982).

[3] The water rights subject to extensions of time are permitted for residential use within the proposed Master Planned Community. Given the State's issuance of Order 1309 and subsequent denial of Coyote Springs Subdivision Maps, Plaintiffs are unable to construct homes and put the water to beneficial residential use.

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on August 28, 2008. SAC ¶ 19. CSI Water Permits 70430, 74094, and 74095 remain in Permit Status with the State and are currently subject to an Extension of Time to file the Proof of Beneficial Use with the State. Until State Order 1309 was issued, the water Permits were valid and effective. Specifically, Plaintiffs' water rights have not been relinquished, withdrawn, cancelled, forfeited, or abandoned. Order 1309 reallocated and reprioritized a single basin into a super basin comprised of 6+ previously stand-alone basins. The Nevada Supreme Court has previously held that this "states comprehensive water statutes" prohibit the reallocation of water rights already granted under the doctrine of prior appropriation. *Mineral City vs. Lyon City*, 473 P.3d 418 (Nev. 2020). Plaintiffs have properly alleged their takings claims.

The State next argues that "Nevada's 'background principles of water law' … preclude a *Lucas* takings claim." MTD page 13. It is true that CS-Entities' water rights are subject to background principles of state water law including the fundamental principles of prior appropriation, seniority of water rights, and the government's ability to ensure water is being pumped for beneficial use and is not wasted. *See Mineral Cty. v. Lyon Cty.*, 136 Nev. 503, 513-14 (2020). However, the "background principles" defense to *Lucas* takings claims is not so expansive to allow the government to regulate water and impact existing rights in any way that it wants.

In fact, courts have explained that "[a] priority in a water right is property in itself"; therefore, "to deprive a person of his priority is to deprive him of a most valuable property right." *Colorado Water Conservation Bd. v. City of Cent.*, 125 P.3d 424, 434 (Colo. 2005) (internal quotation marks omitted). The Nevada Supreme Court has likewise confirmed that "a loss of priority that renders rights useless 'certainly affects the rights' value' and 'can amount to a de facto loss of rights.'" *Wilson v. Happy Creek, Inc.*, 135 Nev. 301, 313, 448 P.3d 1106, 1115 (2019) (quoting Andersen Family Assocs. v. State Eng'r. 124 Nev. 182, 190, 191, 179 P.3d 1201 (2008); see also Gregory J. Hobbs, Jr., Priority: The Most Misunderstood Stick in the Bundle, 32 Envtl. L. 37, 43 (2002) ("The priority of a water right is ... its most important ... feature.").

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The Plaintiffs have alleged that the State's Order 1309 wrongfully reallocates CS-Entities' existing rights by combining 6+ previously separate basins, into a single Lower White River Flow System ("LWRFS") super-basin, and then limiting the "maximum quantity of groundwater that may be pumped from the LWRFS on an average annual basis . . . cannot exceed 8,000 afa and may be less." Order 1309 pg. 65. As alleged in the Complaint, "[t]the State Engineer's Order 1309, in creating a new single super basin, for these 6+ previously stand-alone hydrological basins, with its limitation on the maximum quantity of groundwater that may be pumped from the LWRFS on an average annual basis that 'cannot exceed 8000 afa and may be less' **effectuates a 'take' of the CS-Entities Water Rights and its Master Planned Approved Major Project development rights."** SAC ¶ 49. Accepting these allegations as true, which the Court must do in the NRCP 12(b)(5) context, demonstrates a properly pled and sustainable regulatory taking claim against the State.

c. The State Has Acknowledged that Plaintiffs' Water Rights Were Valid and Enforceable.

As alleged in the Complaint and following the State Engineer's issuance of the May 16, 2018 letter, the State Engineer made the following representations to Coyote Springs:

- The State Engineer admitted to CS-Entities Representatives that this "is unchartered territory and his [State Engineer] Office has never granted rights and then just taken them away" (SAC ¶ 36); and
- In response to CS-Entities' inquiry, the State sent CS-Entities a written acknowledgement that no one had asserted a conflict or impairment claim regarding CS-Entities' pumping of its water rights (SAC ¶ 37).

As Plaintiffs' water rights have not been abandoned, forfeited, or otherwise lost pursuant to an express statutory provision, they are valid and existing water rights that cannot be "taken" by the State in violation of the Nevada Constitution without just compensation. The Nevada Supreme Court recognized the importance of finality of water rights when it recently stated:

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

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The State's Order 1309 and its reallocation of water rights has undermined the public's interest in finality of these water rights and occasioned a regulatory "take" for which compensation is now due CS-Entities.

d. The Nevada-Florida Land Exchange Authorization Act of 1988 is Irrelevant.

Early in its Motion, the State cites to the Nevada-Florida Land Exchange Authorization Act of 1988 (the "Act"), Section 6(a)(1), to suggest that State Order 1309 is somehow authorized or appropriate under the Act. The State, however, fails to mention that the triggering event for Section 6(a)(1) of the Act requires the Secretary of the Interior and the CS-Entities, as the successor in interest to Aerojet-General Corporation, to "**jointly petition the State Engineer to reduce the total water allocation in the affected area**,". *Id.* (emphasis added). Such a joint petition never occurred, and any State assertion is far outside an appropriately NRCP 12(b)(5) challenge. Moreover, the State cites to and suggests that the Corrective Land Patent, (MTD Ex. A) somehow likewise justifies the issuance of Order 1309 by the State. The Corrective Land Patent is between the United States and Coyote Springs Investment LLC, and the State in not a party to that Patent. The Patent expressly provides:

> It is the express intent of both AEROJET and the United States of America and it is hereby agreed by THE PARTIES that **nothing in this Agreement or Exhibits hereto shall be construed as creating any rights of enforcement by any person or entity this is not a party to this Agreement**. *See* Ex. A to State's MTD Section 20. (emphasis added).

Neither the Act nor the Corrective Land Patent authorize or supports the issuance of Order 1309 and the State's wrongful take of the CS-Entities water rights, land development rights, and all economically beneficial use of land. To suggest otherwise is both erroneous and disingenuous.

VII. Plaintiffs' Complaint States a Claim for a Regulatory Taking Under the *Penn Central* Balancing Test.

Plaintiffs have properly plead a *Penn Central* taking by the State. *Penn Central* is a balancing test and not every element of the test must weigh in favor of Plaintiffs to state a claim. The elements of *Penn Central* are viewed in their aggregate to determine whether the

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regulation goes "too far" and takes the Plaintiffs' property. The U.S. Supreme Court has eschewed "any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104,124, 98 S.Ct. 2646 (1978). The outcome instead "depends largely 'upon the particular circumstances [in that] case.'" *Id.* at 124. Regulatory takings cases necessarily entail complex factual assessments of the purposes and economic effects of government actions. *Penn Central* does not supply mathematically precise variables, but instead provides important guideposts that lead to the ultimate determination whether just compensation is required. *Yee v. Escondido*, 503 U.S. 519, 523, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992)

Penn Central identified several factors—including the regulation's economic impact on the claimant, the extent to which it interferes with distinct investment-backed expectations, and the character of the government action—that are particularly significant in determining whether a regulation effects a taking. *Lingle* at 528–29.

a. Plaintiffs' Complaint Alleges Sufficient Economic Loss.

The Complaint provides numerous factual allegations regarding the severity of economic loss suffered by Plaintiffs due to the State's actions. These were previously discussed in Section (VI)(a) of this Opposition. When considering the allegations in the Complaint as true, the extent and severity of Plaintiffs' economic loss weighs in favor of recognizing a taking under *Penn Central*. Prior Nevada Federal District Court rulings have held that allegations that plaintiff lost $100 million and 50% of the property's value met the *Penn Central* standard. *See e.g., Comm. for Reasonable Regulation of Lake Tahoe v. Tahoe Reg'l Planning Agency*, 311 F. Supp. 2d 972, 994 (D. Nev. 2004) (holding that the plaintiff's "entire takings claim rests upon the allegations in the complaint that TRPA's actions 'deprived plaintiff of the economic viable use of property' and represents a 'confiscation ... of over $100 million' and 'a loss of value of over 50%.' Taking this allegation as true, plaintiff has stated an economic impact under the first factor.") *Penn Central* takings claims are not typically dismissed under the economic loss prong unless a complaint's allegations are vague and conclusory or lack any facts demonstrating the

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regulation's economic impact. *See, e.g., Taverna v. Palmer Twp.*, 2020 WL 5554387, at *10 (E.D. Pa. Sept. 16, 2020) (holding that the plaintiff "has failed to plead any facts that demonstrate the Ordinance's economic impact on him").

b. Plaintiffs' Complaint Alleges Sufficient Investment-Backed Expectations Losses.

The investment-backed expectations prong requires an objective, fact-specific inquiry into what, under all the circumstances, the landowner should have reasonably anticipated when investing in the property. As painstakingly detailed in the Complaint, Plaintiffs acquired the Coyote Springs land **and** 5000 afa of permitted ground water rights in the Coyote Spring Valley. Coyote Springs then sought and obtained multiple land use and development approvals that culminated in comprehensive written Development Agreements between Plaintiffs and Clark and Lincoln Counties for its Master Planned Development. SAC ¶¶ 1; 7-20. The Development Agreements authorized Plaintiffs to construct up to 49,600 residential units and 800+ acres of commercial development over the next 40 years in Clark County and up to 110,000 units in Lincoln County. The entirety of these development rights have been taken by the State through its issuance of Order 1309. These Development Agreements were each memorialized in recorded Ordinances in both Clark and Lincoln County, and are part of the Public Record in the State of Nevada. SAC ¶9-16.

As alleged in the Complaint, CS Entities' significant investments in the Coyote Springs development were objectively reasonable and completed incrementally over time in reliance on the numerous governmental approvals, representations, and the government's requests for exactions to mitigate environmental impacts of the development. SAC ¶¶ 17-18. This case is not about a one-time wild expenditure made by a land speculator buying an expensive piece of land in the hopes of being able to convince the local government to rezone the property. CS-Entities' massive investment in the development and construction of infrastructure improvements added to the property's value and were completed in conjunction with multiple federal, state, and local government entities review, processing and approvals of permits, plans, and inspections of completed infrastructure SAC ¶¶ 7-18. At the time the Plaintiffs were

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investing in and constructing its Master Plan infrastructure in reliance on the permits and representations from the State and local agencies, they could not have foreseen that the State would later wrongfully reconfigure the Coyote Spring Valley basin, create a super-basin with 6+ other basins, and reallocate and restrict water rights in a way that fundamentally changed the playing field and diminished all viable economic development potential of the property.

Allegations in the Complaint that support Plaintiffs' reasonable-investment backed expectations include its incremental investment of hundreds of millions of dollars in infrastructure and community amenities like the development's golf course, 325-acre flood control detention basin (which was built after the State issued a permit for the dam), groundwater treatment plant, deep carbonate culinary standard water wells, and two 1,000,000 gallon water storage tanks (with $20,000,000 of enhancements to meet municipal well standards), wastewater treatment plant, multiple package plant for wastewater treatment (all permitted by the Defendant State and Nevada Department of Conservation and Natural Resources), and miles of associated roads, underground utilities, and electrical power facilities. SAC ¶¶ 17-18.

The Plaintiffs invested in these large-scale infrastructure improvements in reliance on their State permitted, and valid groundwater and developments rights and pursuant to validly issued permits. As plead in the Complaint, Plaintiffs had a reasonable expectation when investing in the property for decades based on these entitlements, permits and water rights that the Coyote Springs development would move forward and that it would have the opportunity to construct and market for sale its Master Planned Community. SAC ¶¶ 7-18 (discussing Plaintiffs' good-faith efforts to work with federal, state, and local governments by obtaining land use entitlements and mitigating the project under the then-existing regulations which Plaintiffs relied upon; including working with the State, State Engineer, the Clark County CS-GID, the LVVWD, Clark County Reclamation District ("CCWRD"), and Clark County, Nevada.

The State's recent change in position, and issuance of Order 1309, to the massive detriment of the Plaintiffs is similar to *Pennsylvania Coal Co. v. Mahon*, where the claimant had

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sold the surface rights to particular parcels of property, but expressly reserved the right to remove the coal thereunder. 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922). A Pennsylvania statute, enacted after the sale transaction, forbade any mining of coal that caused the subsidence of any house, unless the house was the property of the owner of the underlying coal and was more than 150 feet from the improved property of another.

Because the statute made it commercially impracticable to mine the coal, and thus had nearly the same effect as the complete destruction of rights claimant had reserved from the owners of the surface land, the court held that the statute effected a taking without just compensation. *See Id*. at 414–415, 43 S.Ct., at 159–160; *see also Armstrong v. United States*, 364 U.S. 40, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960) (Government's complete destruction of a materialman's lien in certain property held a taking); *Hudson Water Co. v. McCarter*, 209 U.S. 349, 355, 28 S.Ct. 529, 531, 52 L.Ed. 828 (1908) (if height restriction makes property wholly useless "the rights of property . . . prevail over the other public interest" and compensation is required). Plaintiffs have sufficiently plead the loss of their investment backed expectations to withstand the State's NRCP 12(b)(6) challenge.

c. The Character of the Government's Action Prong Weighs in Plaintiffs' Favor

Defendants misstate the character of the government action prong of *Penn Central*. This requirement does not mean that the government literally caused a physical taking of Plaintiffs' property. Indeed, all *Penn Central* taking claims would otherwise also be required to include claims for per se physical invasion takings. Instead, this prong, and the entire point of the *Penn Central* analysis, is to determine whether the regulation causes a taking that is functionally equivalent to a physical invasion takings. *Lingle*, 544 U.S. at 539. That is to say, the government can appropriate property rights by physically rerouting water just as much as it can by precluding the use of valid water and development rights through overly burdensome state regulations. That is the effect of State Order 1309.

This *Penn Central* factor likewise weighs in Plaintiffs favor as the Complaint alleges that Defendants' regulations are oppressive and unfairly single out Plaintiffs to bear a substantial

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burden and implicate fundamental principles of fairness underlying the Takings Clause. *See Maritrans Inc. v. United States*, 342 F.3d 1344, 1356 (Fed. Cir. 2003); *Eastern Enters. v. Apfel*, 524 U.S. 498, 537 (1998).

VIII. The CS-Entities Have Properly Plead a Pre-Condemnation Claim for Relief.

The State further moves to dismiss Plaintiffs' claim for pre-condemnation damages on the basis that the State's May 16, 2018 letter to LVVWD was not an official announcement of intent to condemn, and that there was not unreasonable delay by the State after issuance of its May 16, 2018 letter. Both of these arguments fail. In *Buzz Stew, LLC vs. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008) the Nevada Supreme Court held:

> To support a claim for precondemnation damages, the landowner must allege facts showing an official action by the would-be condemnor amounting to an announcement of intent to condemn. Second, the landowner must show that the public agency acted improperly following the announcement of its intent to condemn. Unreasonable or extraordinary delay in moving forward with the condemnation proceeding can constitute improper action which causes damage to the landowner such as reduced market value of the property. Id. 124 Nev. at 229.

The CS-Entities properly alleged multiple facts supporting each of the above requisite elements in its Complaint. First, the CS-Entities outline the State's efforts to wrongfully interfere with its water rights and development efforts in response to LVVWD November 16, 2017 letter. SAC ¶¶ 27-31. Next, the CS-Entities outline the uncontested facts surrounding the State's issuance of its May 16, 2018 letter, asserting that through this correspondence "the State Engineer publicly announced that the amount of groundwater pumping that will be allowed in the five basin (also known as the "super-basin") will be limited," and further that "carbonate pumping will be limited to a fraction of the 40,300-acre feet already appropriated in the five basin area". SAC ¶¶ 33-34. CS-Entities alleged that the May 16, 2018 State letter, between 2 public entities (the State and LVVWD) "commenced a take of CS-Entities property rights, worked as a public announcement of the States' intent to condemn and/or wrongfully take CS-Entities Water Rights, and further worked to unreasonably delay CS-Entities continued development of the Approved Major Project development." *Id*. The Complaint further details the unreasonable delay and oppressive actions by the State of refusing to approve the

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conditionally approved Village A subdivision maps from the May 2018 to the issuance of State Order 1309 in June of 2020. SAC ¶¶ 45-47. This two year delay is despite the fact that the State, through the Settlement Agreement, promised to "process in good faith any and all maps or other issue submittals as requested by CSI". CSI's conditional subdivision maps were conditionally approved on September 7, 2018 and sat for nearly two years on the State Engineer's desk, until after issuance of Order 1309. Two days after issuance of Order 1309, the conditionally approved subdivision maps were denied by the State. SAC ¶40, 50. Plaintiffs have alleged sufficient facts, when accepted as true for purposes of this Motion to Dismiss, to establish that Plaintiffs have properly plead that the State acted improperly following its May 18, 2018 public announcement and unreasonably delayed the processing of these subdivision maps.

The State next argues that there was no extraordinary delay. MTD at 19. The *Buzz Stew* Court, however, opined that because the Nevada Legislature has not passed legislation "defining what qualifies as an extraordinary delay or oppressive conduct, we must reserve this question for the fact finder."124 Nev. at 229. The factual determination as to whether this was unreasonable or extraordinary delay is not appropriate in a NRCP 12(b)(5) proceeding. Finally, as Plaintiffs alleged, following the State's public announcement, both unreasonable delay and oppressive conduct occurred, all of which "resulted in Plaintiffs CS-Entities suffering pre-condemnation damages . . . due to the massive delays in processing Plaintiffs' pending, and conditionally approved, subdivision maps, thereby freezing continuing development of the Coyote Springs Master Planned Development." SAC ¶ 69. Plaintiffs' pre-condemnation damage claim properly withstands the State's NRCP 12(b)(5) challenge.

IX. Plaintiffs' Complaint Properly Alleges an Equal Protection Claim.

After incorporating all of the lengthy factual history into its Equal Protection Claim, the CS-Entities allege that "the State, intentionally and without rational basis, treated CS-Entities differently than others, including the Moapa Valley Water District ("MVWD"), which holds water rights junior to the CS-Entities water rights. SAC ¶¶ 74-76. The equal protection claim has been properly plead and should likewise withstand the present challenge. Following

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discovery however, it may be determined that the CS-Entities are a "class of one" as to this claim. *See Village of Willowbrook v. Olech*, 528 U.S. 562 (2000). Moreover, the question of whether there was a rational basis underlying the State's actions involves disputed facts and is not proper to resolve on a NRCP 12(b)(5) motion. Plaintiffs' equal protection claim likewise withstands the State's NRCP 12(b)(6z) challenge.

X. Plaintiff's Complaint Sufficiently Alleges Claims for Breach of Contract and Implied Covenant of Good Faith and Fair Dealing

a. Plaintiffs' Complaint Alleges All Elements of a Breach of Contract Claim

To state a claim for breach of contract, a plaintiff must allege that a contractual relationship existed between the plaintiff and the defendant, that the defendant materially breached a duty owed to the plaintiff under the contract, and damages resulting from such breach. *Richardson v. Jones*, 1 Nev. 405, 408 (1865); *see Bernard v. Rockhill Dev. Co.*, 103 Nev. 132, 135, 734 P.2d 1238, 1240 (1987).

Plaintiff's Complaint sufficiently asserts each of these allegations required to state a claim for breach of contract. Specifically, the Complaint alleges:

- The existence of the Settlement Agreement between Plaintiffs and Defendant and also includes a copy of the contract attached as an exhibit to the SAC. *See* SAC ¶¶ 3; 38; 80.
- That the Defendant breached its obligations under the contract, including by failing to process in good faith any and all maps or any other issues as requested by Plaintiffs in accordance with the State Engineer's ordinary course of business. *See* SAC ¶¶ 3; 38-47; 82.
- That Plaintiffs suffered damages due to Defendant's breach. *See* SAC ¶¶ 47-54; 83-84.

Defendant's Motion ignores these allegations and the standard of review under NRCP 12(b)(5). The Defendant instead makes contrary factual arguments regarding whether a breach occurred and whether its process of reviewing and denying the CS-Entities' subdivision map was fair. Essentially, Defendants are asserting, without citing legal authority, that any and all of its arbitrary and unfair actions it took in denying Plaintiff's subdivisions maps cannot be considered a breach of the Settlement Agreement because Plaintiff's are appealing the State's

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decision. These arguments are not proper under the limited motion to dismiss standard and should be denied.

b. Plaintiffs' Complaint Alleges all Elements of a Breach of the Implied Covenant of the Duty of Good Faith and Fair Dealing.

Where the terms of a contract are literally complied with but one party to the contract deliberately countervenes the intention and spirit of the contract, that party can incur liability for breach of the implied covenant of good faith and fair dealing. *Hilton Hotels Corp. v. Butch Lewis Prods., Inc.*, 107 Nev. 226, 232–33, 808 P.2d 919, 922–23 (1991); *A.C. Shaw Constr. v. Washoe County*, 105 Nev. 913, 784 P.2d 9 (1989).

Defendant asserts that there was no breach of these duties because the Settlement Agreement imposes no specific duty on the State Engineer to actually approve Plaintiffs' maps. However, as laid out in numerous allegations in the Complaint, Plaintiffs' argument is that the State took actions in bad faith while processing the applications, and that these bad faith actions themselves were used as a basis for denying Plaintiff's maps. *See* SAC ¶¶ 38-54; 85-92. As the Complaint sufficiently alleges that the Defendant breached their implied duty of good faith and fair dealing, the Motion to Dismiss should be denied.

XI. Plaintiffs' Declaratory Relief Claim is Ripe

Declaratory relief is available when "(1) a justiciable controversy exists between persons with adverse interests, (2) the party seeking declaratory relief has a legally protectable interest in the controversy, and (3) the issue is ripe for judicial determination." *Cty. of Clark, ex rel. Univ. Med. Ctr. v. Upchurch*, 114 Nev, 749, 752 (1998).

The Plaintiff's declaratory relief claim is primarily focused on confirming that the CS-Entities hold a beneficial interest in the 2000 afa of ground water rights conveyed to the CS-GID for use in its Master Planned Development. It is undisputed that the CS-GID holds these 2000 afa in trust, for the benefit and use by these CS-Entities. While Plaintiffs do not believe this issue will be contested by the State, the claim is aimed at obtaining a declaration, if necessary, from the Court that the CS-Entities have standing and the right to seek damages for

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the wrongful actions of the State as to these 2000 afa water rights presently held by the CS-GID for the benefit of Plaintiffs. *See* SAC ¶¶ 94-95.

The Defendant's Motion simply argues that if the takings claims are not ripe, the declaratory relief claim is also not ripe. However, as already discussed in Section V of this Opposition, *supra*, the Plaintiff's takings claims are ripe under the prevailing U.S. Supreme Court case law, and therefore the Defendant's argument should be rejected. *See Pakdel v. City & Cty. of San Francisco, California*, 141 S. Ct. 2226 (2021); *Knick*, 139 S. Ct. at 2170.

Alternatively, Plaintiffs hereby request leave to amend after time for discovery on the issue of Ernie V and Sallie's misrepresentations. The Nevada Supreme Court has explained that district courts should apply a relaxed pleading standard where the facts necessary for pleading fraud with particularity, as required by NRCP 9(b) "are peculiarly within the defendant's knowledge or are readily obtainable by him." *Rocker v. KPMG, LLP*, 122 Nev. 1185, 1196, 148 P.2d 702 (2006). "If the district court finds that the relaxed standard is appropriate, it should allow the plaintiff time to conduct the necessary discovery. Thereafter, the plaintiff can move to amend his complaint to plead allegations of fraud with particularity in compliance with NRCP 9(b). Correspondingly, the defendant may renew its motion to dismiss under NRCP 9(b) if the plaintiff's amended complaint still does not meet NRCP 9(b)'s particularity requirements." Id.

XII. Alternatively, Leave to Amend Should be Freely Given.

Plaintiffs believe they have properly plead each of their claims. If, however, the Court determines additional particular information should be plead, Plaintiffs request the opportunity to amend. "If the court grants a Rule 12(b)([5]) motion to dismiss, it should grant leave to amend unless the deficiencies cannot be cured by amendment." *K & K Prods. v. Walt Disney Studios Motion Pictures*, No. 2:20-CV-1753 JCM (NJK), 2021 U.S. Dist. LEXIS 182012, at *5-7 (D. Nev. Sep. 23, 2021). *See also, Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995) (holding, the district court should grant leave to amend if the counterclaims can possibly be cured by additional factual allegations). "The court should grant leave to amend 'even if no request to amend the pleading was made.'" *K & K Prods.*, 2021 U.S. Dist. LEXIS 182012, at *6 (quoting *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc)).

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XIII. Conclusion

The Plaintiffs' claims contained within the Second Amended Complaint are ripe for adjudication. The State's Order 1309 is final, and has been used by the State to render the CS-Entities' permitted water rights useless and further to deny the CS-Entities' final subdivision maps needed to move the Coyote Springs Master Planned Development forward. The State's actions, as comprehensively detailed in the Second Amended Complaint, have effectuated a regulatory taking of permitted and valid water rights, and the corresponding development rights, for which just compensation is now due pursuant to the takings clause of the Nevada Constitution. Plaintiffs have further properly plead their breach of contract claims, based upon the State's breach of its obligations to "process in good faith" Plaintiffs' subdivisions maps needed to move the Master Planned Development forward.

Accepting all of the allegations within this detailed Second Amended Complaint as true, and drawing all reasonable inferences therefrom, this Court must deny the State's Motion to Dismiss in its entirety. Alternatively, should the Court determine that Plaintiffs have failed to properly plead any of its claims, Plaintiffs respectfully request an opportunity to amended their claims to cure any deficiencies that the Court believes exists.

DATED this 18th day of January, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of January, 2022 the foregoing **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT** was served via electronic service and/or US Mail pursuant to NRCP 5, NEFCR 9 and EDCR 8.05 as follows:

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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; 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 **REPLY TO OPPOSITION TO MOTION TO DISMISS SECOND AMENDED COMPLAINT**

Defendant State of Nevada, on relation to its Division of Water Resources, Department of Conservation and Natural Resources, Adam Sullivan ("State Engineer") files its reply to Plaintiffs' Opposition to the State Engineer's Motion to Dismiss second amended complaint ("SAC").

. . .

I. INTRODUCTION

CSI seeks compensation where the law affords none: Nevada's "system of prior appropriation neither envisions nor guarantees that there will be enough water to meet every demand for it. . . ." *Wilson v. Pahrump Fair Water, LLC*, 137 Nev. ___, ___, 481 P.3d 853, 845 (Adv. Op. 2, Feb. 25, 2021). If we are in unchartered territory, it is not because the State Engineer "stripped" CSI of its water rights, but because water in Nevada is an "increasingly scarce resource." *Bacher v. Office of State Eng'r of State of Nev.*, 122 Nev. 1110, 1117, 146 P.3d 793, 797 (2006). As CSI's own allegations and the exhibits to its complaint show, years of studies and test pumping have demonstrated that the six groundwater basins and a portion of a seventh are inter-connected, and that excessive pumping depletes the basins and thereby conflicts with senior water rights as well as threatens endangered species. SAC ¶¶ 22, 41-44, 48-49, and Exs. 2-4 thereto.

In an effort to distract the Court and create the illusion of merit, CSI's Second Amended Complaint spends multiple pages with allegations detailing a lengthy property history. But the Court should not be fooled: (1) only a few allegations are relevant; (2) those few allegations confirm that CSI's inverse condemnation claims are not ripe; and (3) none of the other allegations is legally sufficient to state claims for inverse condemnation, precondemnation damages, or breach of contract.

To see that CSI's claims are not ripe, all the Court needs to do is look at paragraph 49 of the SAC, which alleges that CSI is challenging Order 1309 on which its inverse condemnation claims are based in Court, SAC ¶ 49, and Order 1309, which takes no final position on the amount of groundwater CSI may use. *Id.* Ex. 4.

To understand that CSI's *Lucas* regulatory claim fails, consider just paragraph 17 of the SAC, in which CSI admits that it is "operating . . . a golf course open to the public since May 2008." SAC ¶ 17. CSI thus admits that it is not deprived of "all economically beneficial" uses of its property, and CSI has not alleged that it is foreclosed from building *any* residences on the property.

. . .

To realize that CSI's *Penn Central* claim fails, the SAC is telling for what it does *not* allege: Nowhere does CSI allege that its property lost any value, let alone substantial value, or that the State Engineer physically took any or all of CSI's water rights or property. Fatal to CSI's claim is paragraph 22 of the SAC, where CSI admits that it knew by 2002—twenty years ago—that it may not be able to obtain enough ground water for its ambitious development project. SAC ¶ 22. CSI also knew and admits that its permitted rights were always subject to senior, decreed, vested rights. Opp'n at 15, 17. Despite these hurdles, CSI took a calculated risk to proceed with ambitious planning. SAC ¶¶ 9-18, 45. "Now, having failed . . . [CSI] seeks indemnity from the [State]." *Esplanade Properties v. City of Seattle*, 307 F.3d 978, 987 (9th Cir. 2002). But the "takings doctrine does not supply plaintiff with such a right to indemnification." *Id*.

The five claims that CSI added in the most recent iteration of its pleading do not make up for the lacking inverse condemnation claims. Rather they are a distraction aimed at masking the lack of merit of CSI's main claims. For these reasons and those stated below, the Court should dismiss the Second Amended Complaint.

II. ARGUMENT

The State Engineer met his burden on his Motion to Dismiss because it appears beyond a doubt—based on Plaintiffs' own allegations and the law applicable to them—that Plaintiffs "could prove no set of facts, which, if true, would entitle [them] to relief." *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008).

A. The inverse condemnation claims are not ripe

CSI's reliance on *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2168, 204 L. Ed. 2d 558 (2019) and *Pakdel v. City & Cty. of San Francisco*, 141 S. Ct. 2226, 2230, 210 L. Ed. 2d 617 (2021) to argue that the State Engineer has issued a final decision ripe for inverse condemnation claims is misplaced.

In *Knick*, the Township had notified the plaintiff—who had graves on her private property—that she was in violation of an ordinance that required all cemeteries to be kept open to the public during the day and allowed the Township to enter on "any property" to

determine if and where a cemetery existed. *Knick*, 139 S. Ct. at 2168. Her takings claim was ripe at the time of the alleged taking—there, the passing and enforcement of the ordinance. *See id*. at 1272.

In *Pakdel*, there was also no question as to whether the city had taken a final position: the plaintiffs either had to "execute the lifetime lease" or face an "enforcement action," which meant that the plaintiffs had "to choose between surrendering possession of their property or facing the wrath of the government." *Pakdel*, 141 S. Ct. at 2230.

Here, by contrast, Order 1309 and the State Engineer's disapproval of CSI's Village A development plan for 8 large lots and 575 residential lots are not final decisions ripe for an inverse condemnation claim.

1. Order 1309 does not finally determine CSI's groundwater use

Unlike the ordinance in *Knick* or the city's program in *Pakdel*, the State Engineer's Order 1309 takes no final position on the amount of groundwater CSI may use—whether temporarily or permanently—but sets a maximum limit of 8000 afa on all available groundwater pumping in the Lower White River Flow System ("LWRFS"). SAC Ex. 4. Moreover, CSI and others with permitted water rights filed a petition for judicial review of Order 1309, asking the Court to "reverse the decision" that establishes a maximum limit to annual groundwater pumping in the Basin to 8000 afa. *See* Ex. D to Motion to Dismiss ("MTD"), App. 094-123. While CSI's petition for judicial review is pending and undecided, there is no final order, let alone a final position establishing a final limit on the amount of water CSI may use, that could form the basis of a takings claim. *See* NRS 533.450(1) (providing that the State Engineer's orders remain "in full force and effect unless proceedings to review the same are commenced . . .").

CSI erroneously conflates the finality requirement with an exhaustion requirement. Opp'n at 11:3-13. The State Engineer has never argued that CSI was obligated to exhaust by seeking judicial review before asserting a takings claim. But CSI has voluntarily invoked a process that could reverse or significantly modify Order 1309, which renders Order 1309 nonfinal until the process concludes. Under the same case law that CSI relies

on, a nonfinal decision cannot be the basis for a takings claim. *See Knick*, 139 S. Ct. at 2169.

2. The State Engineer's disapproval of CSI's 575 residential lot proposal is not a final denial of "any development"

The State Engineer's disapproval of CSI's Village A development plans is also not a final position giving rise to a takings claim. Contrary to CSI's contention, the State Engineer's disapproval of a proposal for a 575 residential lot development does not make "clear" that the State Engineer "lacks the discretion to permit any development" or delineate the "permissible uses of the property . . . ." Opp'n at 10:8-13 (citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001)). Rather, his disapproval of such a large residential development plan leaves "doubt whether a more modest submission . . . would be accepted." *Palazzolo*, 533 U.S. at 620 (citing, *e.g., MacDonald, Sommer & Frates v. Yolo Cty.*, 477 U.S. 340, 342, 106 S. Ct. 2561, 2563 (1986) ("*MacDonald*")).

In *MacDonald*, as here, the property owner's proposal to subdivide the property into 159 single-family and multifamily residential lots was denied. *MacDonald*, 477 U.S. at 342, 106 S. Ct. at 2563. Like CSI, the plaintiff filed a petition to set aside the decision and a lawsuit for an alleged taking. *Id.* at 343-44, 106 S. Ct. at 2563. The district court dismissed the takings claim based on the pleadings and the appellate court affirmed, because the denial of plaintiff's application for "a *particular* and relatively *intensive* residential development . . . cannot be equated with a refusal to permit *any* development . . . ." *Id.* at 347, 106 S. Ct. at 2565 (emphasis added). The Supreme Court affirmed the dismissal for lack of finality and held the taking claim was not ripe, because the County's refusal "to permit the intensive development desired by the landowner [did] not preclude *less intensive*, but still valuable development." *Id.* (emphasis added). Without the Board's "final, definitive position" as to how it would apply the regulations to plaintiff's land, the court could not "determine whether a regulation has gone 'too far' . . ." *Id.* at 348, 351, 106 S. Ct. at 2566-67.

. . .

Similarly, here, the State Engineer's disapproval of CSI's "intensive" 575 residential lot development plan—which disapproval CSI did not challenge—does not preclude "less intensive" new development, which CSI has not proposed. Thus, not only is Order 1309 not final, but there is no final decision of how Order 1309 would apply to CSI's Property. The Court should likewise dismiss CSI's takings claim.

3. CSI also has no temporary taking claim that is ripe

CSI's attempt to evade the finality requirement by asserting it may seek compensation for a temporary taking of its water or property rights—*i.e.*, a taking of rights between the issuance of Interim Order 1303 or Order 1309 and the time its petition for judicial review is determined—is also misplaced. Opp'n at 11:21-12:2 (relying on *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) ("*First English*").

First English did not present the same finality issue as in *MacDonald*, because the ordinance in *First English* allegedly denied the plaintiff "all use" of its property. *First English*, 482 U.S. at 311, 107 S. Ct. at 2383. Although the Supreme Court held that temporary takings that deny a landowner "all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation," its holding is narrow. *Id*. at 318, 107 S. Ct. at 2388 (citation omitted). First, the *First English* Court accepted as true the allegation that "the ordinance in question denied appellant *all* use of its property." *Id*. at 321, 107 S. Ct. at 2389 (emphasis added). Second, the holding was limited "to the facts presented" and did "not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits . . . ." *Id*. Moreover, *First English* did not decide whether a temporary taking had in fact occurred. *Tahoe–Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 328, 122 S. Ct. 1465, 1482 (2002) (discussing scope of holding in *First English*).

Here, as CSI's own allegations confirm, Interim Order 1303 did not temporarily deprive CSI of all use of its property or groundwater, nor did it preclude all future development: it "allow[ed] development to proceed if conditions were met by the CS-

Entities." SAC ¶ 47. CSI also continues to operate its golf course. *Id.* ¶ 17. By its terms, Order 1309 does not take all or any of CSI's water or deprive CSI of any or all use of its property either. "Mere fluctuations in value during the process of governmental decisionmaking" cannot be the basis for a temporary takings claim (absent extraordinary delay, which is not the case here). *Tahoe-Sierra*, 535 U.S. at 332, 122 S. Ct. at 1484. Thus, even if Order 1309 is invalidated, CSI has no temporary takings claim, let alone one that is ripe for review now.

B. CSI's allegations do not support a categorical *Lucas* taking

In summary fashion and without analysis, CSI argues that "*Lucas* takings are referred to . . . as the government's total taking of a property's value, in-and-of itself, proves the taking claim." Opp'n at 13:3-5 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019, 112 S. Ct. 2886, 2895 (1992)). But *Lucas'* holding is more nuanced than that.

A categorical taking occurs if a regulation denies a property owner "*all* economically beneficial or productive use of land," *unless* the regulation's limitations "inhere ... in the restrictions that background principles of the State's law of property and nuisance already placed upon land ownership." *Lucas*, 505 U.S. at 1015, 1029, 112 S. Ct. at 2895, 2900; *see also Murr v. Wisconsin*, 137 S. Ct. 1933, 1937, 198 L. Ed. 2d 497 (2017) (holding same). Moreover, the regulation must take away *any* residential use, and "all" means that a 90% or even 95% loss of value is not enough. *Murr*, 137 S. Ct. at 1949; *Lucas*, 505 U.S. at 1019 n.8, 112 S. Ct. at 2895.

The allegations to which CSI refers the Court, Opp'n at 13:12-22, do not support that the State Engineer's Order 1309 deprived CSI of "all economically beneficial use" of its property. First, CSI does not allege that the State Engineer took 3640 afa of 4140 afa of CS-Entities' alleged water rights in the SAC. If it did, it would not be a categorical taking, as it would account for less than 90% of CSI's alleged water rights. *Murr*, 137 S. Ct. at 1949.

Second, the inquiry is not whether CSI's "investment in its Master Planned Community infrastructure and community amenities" no longer has a purpose for CSI,

Opp'n at 13:17, but whether the regulatory action forecloses *all* economically beneficial uses for the property. Order 1309 does not foreclose all uses. As CSI admits, CSI's signature golf course on the property has been "open to the public since May 2008. . . ." SAC ¶ 17. That it may operate at a loss, *id*., SAC at 8 fn. 1, is of no consequence, because a "loss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim." *Andrus v. Allard*, 444 U.S. 51, 66, 100 S. Ct. 318, 327 (1979). CSI does not allege that it is foreclosed from building *any* residences on the property. Moreover, despite obtaining leave to amend its complaint twice, CSI still does not allege that it is unable to sell the property—contrary to what page 13 of the Opposition (first bullet point) may suggest.

Third, CSI also does not allege in SAC ¶¶ 48-54 that the State Engineer took CSI's "land use entitlements. . ." Opp'n at 13:21-22. CSI instead alleges a taking of its "property development rights," SAC ¶ 48, which claims are foreclosed as a matter of law. *See* MTD at 14:1-9 (citing cases).

C. Nevada water law precludes a categorical *Lucas* taking

Even assuming CSI had properly alleged a total deprivation of "all economically beneficial or productive use" of its property, whatever restrictions Order 1309 imposes inhere in the restrictions that Nevada water law already placed on CSI's water and property rights.

1. CSI admits that its permitted rights are subject to decreed, vested, senior rights

The State Engineer is not confused about the law on takings when water rights are concerned, nor does he misunderstand the amount of afa CSI allegedly owns or puts to beneficial use, as CSI contends. Opp'n at 14. Rather, the State Engineer's argument is that regardless of the amount of permitted water rights held by CSI, permitted rights are subject to existing, decreed, and senior rights. *See* NRS 533.430. When CSI allegedly acquired the 5000 afa more than twenty years ago, its permitted water rights were always, and by law "declared to be [] subject to **existing rights** and **to the decree and**

modifications thereof entered in such adjudication proceedings . . . ." NRS 533.430(1)(emphasis added).

Thus, even if the State Engineer determined twenty years ago that the conditions of NRS 533.370(2) for awarding CSI 5000 afa were met, CSI still took its permitted rights "subject to existing rights," NRS 533.430(1), such as: (1) senior rights (those that predate CSI's permits); (2) vested claims that existed under common law before NRS Chapter 533 was enacted in 1913; and (3) rights adjudicated by decree. *See* NRS 533.085(1) ("Nothing contained in this Chapter shall impair the vested right of any person to the use of water. . ."); NRS 533.210 (providing that court decrees are "final . . . and conclusive upon all persons. . ."); *see also Min. Cty. v. Lyon Cty.*, 136 Nev. 503, 513, 473 P.3d 418, 426 (2020) ("Water rights are given 'subject to existing rights'. . . ."). These are the "background principles" of Nevada's water law that preclude a categorical *Lucas* taking, because they inherently limit CSI's water rights at the outset.

CSI agrees with all of this. *See* Opp'n at 15:10-17. Still, CSI argues that "the background principles' defense to *Lucas* takings claims is not so expansive to allow the government to regulate water and impact existing rights in any way that it wants." *Id.* at 15:15-17. But CSI agreed upon accepting its permitted rights, that they "shall be subject to regulation and control by the State Engineer . . . to the same extent as rights which have been adjudicated and decreed under the provisions of this chapter." NRS 533.430(1). And CSI's own allegations refute that the State Engineer regulated water rights willy-nilly when issuing the Orders. The Orders are the result of years of testing, studies, analysis, and hearings with significant input from CSI's experts and many others. SAC ¶¶ 22-23, 32-44, 48-50 and Ex. 2-4 thereto.

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2. Order 1309 does not reallocate any rights

CSI also cannot avoid dismissal of its *Lucas* claim by alleging that Order 1309 reallocated its rights, Opp'n at 15,[1] because the Court need not accept as true factual allegations that contradict exhibits to a complaint on which the plaintiff relies. *Gonzalez v. Planned Parenthood of Los Angeles*, 759 F.3d 1112, 1115 (9th Cir. 2014) (citing cases). Order 1309, attached as Exhibit 4 to the SAC, does not reallocate any water rights. All it says is that groundwater pumping in the Basin must be limited to not more than 8,000 afa if water levels are to be maintained and Moapa dace fish are to survive. SAC, Ex. 4. Moreover, CSI's contention that Order 1309 reallocates its permitted water rights is a legal contradiction in terms. While water rights adjudicated by *decree* cannot be reallocated because they are "final . . . and conclusive," NRS 533.210(1), CSI only has *permitted* water rights, SAC ¶¶ 19-20, which are inferior to the senior decreed rights of the Muddy River. Permitted rights cannot impair vested senior decreed rights. NRS 533.085.

Further, nowhere in Order 1309 does the State Engineer even discuss any permitted water rights or discuss how the state intends to administer the 8000 afa maximum limit. The Order makes certain specific baseline findings necessary to inform future proceedings that would address the mechanisms in which withdrawals will be limited.

3. CSI's permitted rights are not final and conclusive

The fact that CSI's rights are "valid and enforceable" does not mean they are "final" and cannot be restricted without just compensation, as CSI argues. Opp'n at 16:21-23. Although CSI does not cite the case, CSI appears to rely on and quote from *Min. Cty.* for its argument. Opp'n at 16:25-28. But in *Min. Cty.,* at issue was the finality of decreed water rights—*not* permitted water rights. *See Min. C*ty., 136 Nev. at 517, 473 P.3d at 429. The Nevada Supreme Court held that "NRS 533.210 expressly provides that decreed water rights 'shall' be final and conclusive." *Min. C*ty., 136 Nev. at 517, 473 P.3d at 429. It said nothing about the finality of permitted rights such as those held by CSI.

[1] CSI discusses the importance of priority in water rights, Opp'n at 15:18-27, but does not allege or argue that Order 1309 changed its priority. Thus, this legal argument requires no response and is refuted by Order 1309 itself.

4. CSI purchased the property subject to a promise to protect endangered species

Another limitation inherent to CSI's water rights that came with its purchase of the property is contained in the Nevada-Florida Land Exchange Authorization Act of 1988 ("1988 Act"). It is irrelevant if the "triggering event" did not occur, as CSI contends. Opp'n at 17. The point is that CSI when purchasing the property committed itself to protect endangered species, such as the Moapa dace fish, if the State Engineer of Nevada determined that "the withdrawal of ground water from beneath" CSI's property or "other lands underlain by the same aquifer is causing depletion of water to a surface water habitat of any endangered or threatened species." 1988 Act, § 6(a)(3). This is just one more restriction inherent in CSI's water rights that explains why CSI's categorical takings claim under *Lucas* fails.

D. CSI admits it has no claim for a taking of its development rights

CSI did not challenge any of the authorities cited by the State Engineer holding that a party has no constitutionally protected right to develop its property. *See* MTD at 14. CSI thus concedes it lacks a legal basis for an alleged taking of development rights.

E. CSI's complaint does not meet any of the *Penn Central* factors

Regulatory takings claims are not only dismissed when the complaint is vague or conclusory, as CSI contends. Opp'n at 18:27-28. Such claims are also properly dismissed where, as here, "the complaint fail[s] to allege facts sufficient to constitute a taking under *Penn Central*, especially given the judicially noticed documents that counsel against such a finding." *Comm. for Reasonable Regulation of Lake Tahoe v. Tahoe Reg'l Planning Agency*, 311 F.Supp.2d 972, 997 (D. Nev. 2004).

1. CSI does not allege a loss in value, let alone a substantial loss

A plaintiff cannot meet the economic impact factor of *Penn Cent.* by alleging a mere loss in property value, because the "mere diminution in the value of property, however serious, is insufficient to demonstrate a taking." *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 645, 113 S. Ct. 2264, 2291 (1993)

(citing cases). Even an 81% loss in property value is insufficient to interfere with investment-backed expectations. *MHC Fin. Ltd. P'ship v. City of San Rafael*, 714 F.3d 1118, 1127–28 (9th Cir. 2013).

In *Comm. for Reasonable Regulation of Lake Tahoe*—a case on which CSI relies—the district court held that the plaintiff's complaint "stated an economic impact under the first [*Penn Cent.*] factor, because it alleged a 'confiscation . . . . of over $100 million' and 'a loss of value of over 50% . . .'" *Comm. for Reasonable Regulation of Lake Tahoe*, 311 F.Supp.2d at 994 (quoting complaint allegations). Contrary to CSI's contention, Opp'n at 18:21, that alleged loss, alone, was *not* enough to state a *Penn Central* takings claim, because the plaintiff did not meet the other *Penn Central* factors. *Comm. for Reasonable Regulation of Lake Tahoe*, 311 F.Supp.2d at 997 ("Plaintiff fails under *Penn Central*") (bold emphasis omitted).

Here, CSI does not allege any loss in property value since CSI purchased it more than 20 years ago, let alone the extent of it. In fact, CSI argues that its "massive investment in the development and construction of infrastructure improvements *added to the property's value* . . . ." Opp'n at 19:25-26 (emphasis added). This alone is dispositive on the economic impact factor.

What CSI complains about instead are the losses of millions of dollars in development costs it allegedly invested in the Property. SAC ¶¶ 17-18. But investment losses do not inform the economic impact factor of *Penn Central*. Rather, courts must "'compare the value that has been taken from the property with the value that remains in the property.'" *Bridge Aina Le'a, LLC v. Land Use Comm'n*, 950 F.3d 610, 630–31 (9th Cir. 2020) ("*Bridge Aina*"), *cert. denied sub nom. Bridge Aina Le'a, LLC v. Hawaii Land Use Comm'n*, 141 S. Ct. 731, 209 L. Ed. 2d 163 (2021) (quoting *Colony Cove Props., LLC v. City of Carson*, 888 F.3d 445, 450 (9th Cir. 2018) (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497, 107 S.Ct. 1232 (1987)), *cert. denied.*__ U.S. ___, 139 S. Ct. 917, 202 L.Ed.2d 645 (2019)). The reason why economic impact is measured by a loss of property value is because the goal is "to identify regulatory actions that are functionally

equivalent to the classic taking in which government directly appropriates private property or ousts the owners from his domain." *Bridge Aina*, 950 F.3d at 631 (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539, 125 S. Ct. 2074, 2082 (2005)).

Without any allegations supporting a loss—let alone a substantial loss—in property value, CSI's complaint fails to meet the first *Penn Central* factor.

2. CSI's allegations refute its alleged investment-backed expectations

Existing and foreseeable government restrictions are key factors in determining whether property owners' investment-backed expectations were reasonable. *See, e.g., Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 39, 13 S. Ct. 511, 522 (2012); *Comm. for Reasonable Regulation of Lake Tahoe*, 311 F. Supp. 2d at 995-97.

In *Comm. for Reasonable Regulation of Lake Tahoe*, the plaintiff's allegation that the regulation interfered with its investment-backed expectations ran "counter to the extensive collection of documents that [the court] judicially noticed regarding the regulatory history of the Lake Tahoe Basin." 311 F. Supp. 2d at 995. The land purchasers in the Tahoe Basin had "known of the tremendous power conferred on TRPA . . . since at least 1980," and its "ability to regulate scenic concerns . . . since 1982." *Id.* at 995-96. The Scenic Review Ordinance therefore did "not significantly impair the reasonable investment-backed expectations of the average homeowner in the Lake Tahoe shoreland." *Id.* at 997.

Similarly, here, CSI has known since purchasing the Property more than twenty years ago that the State Engineer could: (1) limit drilling of wells to protect other wells, vested rights holders, and groundwater levels, NRS 534.110; (2) "reduce the total water allocation" if withdrawal of groundwater underneath CSI's property or elsewhere caused "depletion of water to a surface water habitat of any endangered or threatened species," 1988 Act, § 6(a)(3); and (3) adopt such "orders" deemed "essential for the welfare of the area" if "in the judgment of the State Engineer, the groundwater basin is being depleted . . ." NRS 534.120(1). These statutes make it objectively *unreasonable* for CSI to expect that

the State Engineer would not years later adopt regulations to "reduce the total water allocation" or designate inter-connected groundwater basins as one, as in Order 1309.

CSI's allegations further prove that it knew since 2002 that it may not be able to succeed in its ambitious development plan, because "in 2002" the State Engineer "issued Order 1169 which held in abeyance [CSI's] pending new ground water applications" and ordered "a study of the carbonate aquifer over a five-year period" to determine the amount of available groundwater and how pumping would affect "prior appropriated existing water rights," such as those of the Muddy River Springs and Muddy River. SAC ¶¶ 22-23; MTD, Ex B (Order 1169) at 5.

CSI's Opposition ignores this history and focuses instead on what CSI did *after* Order 1169, such as its efforts to obtain land use and development approvals that "culminated" in the December 2002 Development Agreement. Opp'n at 19. But except for CSI's Concept Plan, CSI alleges it undertook all other development activities *after* Order 1169 was issued. *Id.* ¶¶ 9(a)-(g), 17, 22. CSI's Development Agreement with Clark County did not assure CSI that the State Engineer would approve CSI's proposals.

Thus, CSI's unsupported and erroneous argument that it "could not have foreseen that the State would later wrongfully reconfigure the Coyote Spring Valley basin. . . and restrict water rights in a way that fundamentally changed the playing field and diminished all viable economic development," Opp'n at 20, is without merit given the State Engineer's broad powers under NRS 534.110 and the 1988 Act, the obvious scarcity of water in Nevada, Order 1169, and the known impact of CSI's groundwater use on the flow to the Warm Springs that supports the Moapa dace habitat and headwaters to the Muddy River. These facts distinguish this case from those in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160 (1922), a case on which CSI relies.

Equally irrelevant is CSI's argument that it made investments incrementally, over time, rather than speculating on land by making a one-time "wild" expenditure. Opp'n at 19. The point is that CSI proceeded with its plans despite knowing of significant legal and . . .

logistical obstacles by March 2002. CSI had no objectively reasonable investment-backed expectations that it could ever develop its ambitious Project.

Order 1309 was also not a "recent change in position" by the State Engineer, as CSI argues. Opp'n at 20. Order 1309 was at least eighteen years in the making. It found its origins in Order 1169. *See* SAC ¶¶ 22-23, 32-33, 41-44, 48-49. Order 1169, the pumping tests, and subsequent orders issued by the State Engineer over the years were constant warnings to CSI that its Project may not come to fruition. CSI therefore fails to meet the second *Penn Central* factor as well.

3. Order 1309 adjusts the benefits and burdens of economic life to promote the common good

CSI misunderstands the third *Penn Central* factor and the State Engineer's analysis of it. The third *Penn Central* factor looks at the character of the regulation. *Penn Cent.*, 438 U.S. at 124, 98 S. Ct. at 2659. "A taking may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* (internal citation and quotation marks omitted); *accord Lingle*, 544 U.S. at 539, 125 S. Ct. at 2082 (quoting *Penn Cent.*, 438 U.S. at 124, 98 S. Ct. 2646).

The State Engineer does not argue that only physical invasions support a taking, as CSI contends. Opp'n at 21:18-21. Rather, his argument is—and the law supports—that the third *Penn Central* factor weighs against CSI because CSI does not allege that the State Engineer's Order 1309 amounts to a physical invasion of CSI's property.

Again, the Court need not accept as true CSI's allegations that it was singled out by Order 1309 because Order 1309, Ex. 4 to its SAC, provides the opposite. By its terms, Order 1309 affects the rights of all holders and applicants of permitted groundwater rights in the six basins and portion of a seventh that make up the LWRFS delineated by Order 1309, such as Las Vegas Valley Water District ("LVVWD") and NV Energy. SAC, Ex. 4. at 11. Order 1309 sets a maximum amount of groundwater that can safely be pumped in the

LWRFS without affecting the Muddy River Springs area flows and the Muddy River. *Id*. at 65-66. Order 1309 is a prime example of a "public program adjusting the benefits and burdens of economic life to promote the common good"—*i.e*., Nevada's groundwater conservation and the protection of endangered species. *Id*. at 65-66.

Because CSI meets none of the three Penn Central factors, the Court should dismiss CSI's second claim for relief—its *Penn Central* takings claim—now.

F. The State Engineer made no official announcement that could provide the basis for a pre-condemnation claim

The May 16, 2018, letter from the State Engineer to LVVWD is not an "official action amounting to an announcement of intent to condemn [CSI's property]," as required by *Buzz Stew, LLC*, 124 Nev. at 229, 181 P.3d at 673 (internal quotation marks and citation omitted).

The letter was not published. It does not talk about taking away any of CSI's water rights. It talks about the need to substantially limit pumping in what at that time was a five-basin area—not just Coyote Springs—given the effects of the pumping tests on the senior rights of the Muddy River Springs and Muddy River. SAC, Ex. 1.

CSI seeks to avoid dismissal of this claim by selectively quoting the allegations of its complaint and the letter on which it relies. Opp'n at 22:21-23. But CSI already conceded that the May 16, 2018 letter did not stop by saying pumping in the five-basin area had to be "limited," *id*.; it said "limited to the amount that will not conflict with the Muddy River Springs or the Muddy River as they are the most senior rights in the five basin area." SAC ¶ 33. The May 16, 2018 letter also did not stop after saying that "carbonate pumping will be limited to a fraction of the 40,300-acre feet already appropriated in the five basin area." Opp'n at 22:21-23. It went on to say, in relevant part, that the State Engineer could not "justify approval of any subdivision development maps based on the junior priority groundwater rights currently owned by [CSWR-GID] *unless other water sources are identified for development*." SAC ¶ 33, Ex. 1 (emphasis added).

. . .

In other words, the May 16, 2018, letter on which CSI hangs its hat does not publicly announce any intent to condemn CSI's property but reflects the reality of CSI's rights vis-à-vis senior rights. Because the State Engineer always had the right to limit junior permitted rights to protect senior decreed rights, the State Engineer could not be liable for "condemnation," let alone pre-condemnation damages. This moots CSI's argument that the State Engineer unreasonably delayed for two years because the May 16, 2018, letter never started the clock. This claim fails as a matter of law.

G. CSI was not singled out, nor were the Orders irrational

An equal protection claim that does not involve a suspect class or fundamental right requires plaintiffs to show that the government action was irrational. *Zamora v. Price*, 125 Nev. 388, 392, 213 P.3d 490, 493 (2009). "A party may bring a class-of-one equal protection claim showing that (1) the party was '*intentionally* treated differently from others similarly situated and [2] that there is no rational basis for the difference in treatment.'" *Riley v. Dep't of Pub. Safety*, 479 P.3d 224, 2021 WL 150763, at *1 (Nev. 2021) (unpublished) (quoting *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)).

Contrary to CSI's contention, courts routinely dismiss equal protection claims without discovery if, as here, plaintiffs "fail[] to demonstrate that the State lacked a rational basis for [the challenged action]." *Riley*, 2021 WL 150763, at *1-2 (affirming dismissal of equal protection claim). None of CSI's allegations suggest, let alone support, that the Orders of the State Engineer are irrational. Thus, CSI admits that the Orders are a rational response to prevent depletion of Nevada's groundwater basins and thereby protect existing senior rights and the Moapa dace, an endangered fish species.

Without a showing that the Orders are irrational, CSI cannot succeed on its "class of one" claim because the absence of a rational basis is one of two elements required for such claim. *Olech*, 528 U.S. at 564, 120 S. Ct. at 1074. Without the first, the claim fails. It is thus irrelevant—even if true—that Moapa Valley Water District ("MVWD") is allegedly treated differently and is allowed to use its water rights (so is CSI). What CSI is essentially asking the Court to do is to treat CSI the same as MVWD to the disadvantage

of all other entities equally affected by the Orders. SAC ¶ 75; *compare Riley*, 2021 WL 150763, at *1 ("Essentially, [appellant] argues that because [others before him] benefitted from a mistaken interpretation of the law, the State should deliberately make the same mistake again for appellant's benefit"). This is not what equal protection claims were designed to do.

CSI also has no response to the State Engineer's argument that the Orders do not single CSI out. MTD at 20:3-11. Indeed, CSI's conclusory allegation that it was "singled out" is belied by the State Engineer's Orders. The May 16, 2018, letter states that all carbonate pumping in the five-basin area must be limited "to a fraction of the 40,300 acre-feet already appropriated in the five-basin area," SAC, Ex. 1—not just CSI's pumping in Coyote Spring Valley. *Id.* ¶ 12. Interim Order 1303 created a five-basin area and placed a moratorium on "*any* final subdivision or other submission concerning development and construction submitted to the State Engineer for review." SAC, Ex. 3 at 13-14 (emphasis added). Order 1309 affects several other entities, many of which also filed petitions for judicial review of Order 1309. *Id.*, Ex. 4 at 11, 65. The Court should therefore dismiss CSI's Equal Protection claim.

H. CSI's contract claim allegations are legally insufficient

Even if CSI alleges a contract, a breach, and damages, as CSI contends, "the allegations must be legally sufficient to constitute the elements of the claim asserted" to survive dismissal. *Sanchez ex rel. Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 823, 221 P.3d 1276, 1280 (2009). If, as here, the contract does not obligate the State Engineer to grant CSI's maps, there can be no breach as a matter of law. And if the contract requires CSI to "participate in good faith in the ongoing administrative process of the State Engineer concerning conjunctive management of the [LWRFS]," SAC Ex. 7, ¶ 3, CSI cannot come to court and make a contract claim because the claim is not ripe. These are not factual arguments but arguments that test the sufficiency of the allegations based on the contract attached as Ex. 7 to the SAC.

. . .

CSI's claim for breach of the implied covenant of good faith and fair dealing fails for the same reasons, because the settlement agreement imposes no duty on the State Engineer to approve CSI's maps. *See Nelson v. Heer*, 123 Nev. 217, 227, 163 P.3d 420, 427 (2007) (dismissing implied covenant claim because defendant had no contractual duty to do what Plaintiff complained of). For these reasons, the contract claims are misplaced.

I. The Declaratory Relief claim is not ripe and would fail

CSI's Opposition clarifies that its declaratory relief claim is "primarily focused on confirming that the CS-Entities hold a beneficial interest in the 2000 afa of ground water rights conveyed to the CS-GID for use in its Master Planned Development." Opp'n at 25. If so, then it appears CSI's declaratory relief claim is mainly aimed at defendant CS-GID based on an alleged justiciable controversy between CSI and CS-GID. *See* SAC ¶ 95. To the extent CSI seeks a declaration that the State Engineer has "permanently" caused CSI to "cease development," the claim is not ripe for all the reasons discussed above under section A.

CSI did not address, and thus admits, the State Engineer's argument that there is no basis for preliminary injunctive relief, and that it claim for attorneys' fees is premature and fails if CSI does not state a takings claim. MTD at 22.

J. CSI's alternative request for leave to amend should be denied

"[A] party may amend its pleading only with the opposing party's written consent or the court's leave." Nev. R. Civ. P. 15(2). While leave should be freely given "when justice so requires," *id.*, the Court has discretion whether to do so, *Allum v. Valley Bank of Nev.*, 109 Nev. 280, 287, 849 P.2d 297, 302 (1993), because "there are instances where leave should not be granted." *State, Univ. & Cmty. Coll. Sys. v. Sutton*, 120 Nev. 972, 988, 103 P.3d 8, 18-19 (2004) (internal quotation marks omitted). If, for example, the Court gives leave to amend the complaint once, it may deny a second request if the moving party fails to show how the amendment would save its claims from dismissal. *See McMahon on Behalf of Uranium Energy Corp. v. Adnani*, 457 P.3d 968, 2019 WL 959267, at *3 (Nev. 2019) (unpublished).

Here, CSI relies only on federal case law and fails to mention that it already once obtained leave of court to file an amended complaint and that the State Engineer stipulated to CSI filing a second amended complaint. Opp'n at 26:19-28. If the Court grants the State Engineer's Motion to Dismiss, CSI should file a Motion to Amend showing that its new allegations support its claims and attach a proposed pleading as required by EDCR 2.30(a). Until then, its request for leave to amend should be denied.[2]

III. CONCLUSION

For these reasons, this Court should dismiss CSI's Second Amended Complaint with prejudice.

DATED this 24th day of January, 2022.

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[2] On page 26 of its Opposition, CSI also argues that "[a]lternatively, Plaintiffs hereby request leave to amend after time for discovery on the issue of Ernie V and Sallie's misrepresentations . . . ." Opp'n at 26:8-17. This paragraph appears to pertain to a different matter because CSI makes no fraud claims to which the *Rocker* standard could apply.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court by using the electronic filing system on the 24th day of January 2022, and e-served the same on all parties listed on the Court's Master Service List.

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