

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

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

Appellants,

vs.

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

Respondents.

Electronically Filed  
Jun 02 2022 11:39 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court  
Case No. 84742

**THE STATE ENGINEER’S AND  
THE CENTER FOR BIOLOGICAL DIVERSITY’S  
JOINT MOTION TO CONSOLIDATE APPEALS AND MODIFY CAPTION**

Appellant, Adam Sullivan, P.E., in his capacity as the Nevada State Engineer, Department of Conservation and Natural Resources, Division of Water Resources (hereafter “State Engineer”), by and through counsel, Nevada Attorney General Aaron D. Ford, Chief Litigation Counsel Steve Shevorski, Senior Deputy Attorney General James N. Bolotin, and Deputy Solicitor General Kiel B. Ireland, and Appellant, the Center for Biological Diversity, by and through counsel Scott Lake, hereby file this Joint Motion to Consolidate Appeals and Modify Caption. This Motion<sup>1</sup> is based upon the following memorandum of points and authorities, and papers on file in this case.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

The underlying appeal in this case filed by the Center for Biological Diversity (“the Center”), and those appeals filed by the State Engineer in Case No. 84739, the Southern Nevada Water Authority (“SNWA”) in Case No. 84741, and the Muddy Valley Irrigation Company (“MVIC”) (which does not yet have a Nevada Supreme Court Case Number but was timely filed on May 26, 2022, in the district court

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<sup>1</sup> This Motion was originally filed on June 1, 2022, solely in Case No. 84741. Counsel was unaware that it needed to be filed in all cases for which consolidation is requested but does so now to comply with this requirement.



pursuant to NRAP 4(a)(2)) should be consolidated under Case No. 84739 (as the first-filed appeal). *See* Exhibit 1, MVIC’s Notice of Appeal. While the four Appellants stand in different shoes, with different individual interests and missions, all four appeals challenge and seek reversal of (in whole or in part) the same district court order and seek reinstatement of (in whole or in part) the State Engineer’s Order 1309. In accordance with the requested consolidation, the State Engineer and the Center likewise request that the caption be modified to reflect the State Engineer, SNWA, the Center, and MVIC be designated as the Appellants in the consolidated action.

## **II. LEGAL AUTHORITY**

Pursuant to NRAP 3(b)(2), “[w]hen the parties have filed separate timely notices of appeal, the appeals may be joined or consolidated by the court upon its own motion or upon motion of a party.” Likewise, although this case does not involve cross-appeals, NRAP 28.1 provides that the designation of the appellant in the caption may be modified by the parties’ agreement or by court order.

## **III. PROCEDURAL AND FACTUAL BACKGROUND**

Following a lengthy administrative process, the State Engineer issued Order 1309 on June 15, 2020, delineating the interconnected Lower White River Flow System (“LWRFS”) as a single administrative unit sharing a common supply of water and finding that 8,000 acre-feet annually was the maximum quantity of

groundwater that could be pumped from the area without causing declines to spring flows or flows in the fully decreed Muddy River and adversely impacting the endangered Moapa dace. *See* Exhibit 2, Order 1309.

Subsequently, eight petitions for judicial review were timely filed pursuant to NRS 533.450, including by SNWA, the Center, and MVIC. *See* Exhibits 3–10, Petitions for Judicial Review Challenging Order 1309 without Exhibits. While most of the petitions for judicial review sought the complete reversal and vacation of Order 1309, those filed by SNWA, the Center, and MVIC challenged more limited aspects of Order 1309 while supporting the State Engineer’s authority to make factual findings like those in Order 1309. *See* Exhibits 3, 5, and 7. Specifically, SNWA requested “that the Court order the State Engineer to amend Order 1309 to remove or strike findings made therein regarding conflicts with senior water rights” while explicitly not “seek[ing] relief from any other portion of Order 1309.” *See* Exhibit 3, p. 8. Likewise, the Center agreed that the State Engineer had the authority to issue Order 1309, but filed a petition for judicial review seeking “an Order amending Order 1309” to remove or strike certain factual findings therein, directing the State Engineer to consider environmental consequences, and “directing the State Engineer to prohibit all carbonate groundwater pumping within the geographic boundary of the Lower White River Flow System, including Kane Springs Valley, until a new sustainable limit is determined by the State Engineer.” *See* Exhibit 7,

p. 18. Similarly, MVIC’s petition requested that the district court “order the State Engineer to amend Order 1309 to strike the findings regarding conflicts with senior water rights” found at page 61 of Order 1309 but argued that the State Engineer has authority (if not a duty) under both statutory law and the Muddy River Decree to conjunctively manage the resource, *i.e.*, limiting groundwater pumping to protect its decreed surface water rights. *See* Exhibit 5, p. 5.

Once the deadline had run, and all timely petitions challenging Order 1309 had been filed, the district court ordered consolidation of all the petitions then-pending in Clark County on August 17, 2020. *See* Exhibit 11, Order Granting Consolidation. On September 15, 2020, the district court granted the Joint Stipulation for Joint Intervention, allowing each petitioner to intervene in each other’s petitions. *See* Exhibit 12, Joint Stipulation for Joint Intervention. On February 26, 2021, the Court also ultimately ordered that all other pending motions to intervene (including those filed by non-petitioner intervenors) were granted. *See* Exhibit 13, Order Granting Motion to Intervene.

On May 26, 2021, the parties stipulated to consolidation of the petition filed by Lincoln County Water District and Vidler Water Company once its venue was transferred from Lincoln County to Clark County. *See* Exhibit 14, Stipulation for Consolidation. Lincoln County Water District and Vidler Water Company then stipulated to mutual intervention with each petitioner and intervenor, except for

SNWA and MVIC. *See* Exhibit 15, all Notices of Entry of Orders on Stipulations to Intervene between Lincoln County Water District and Vidler Water Company and other parties. The Court ultimately likewise ordered mutual intervention between Lincoln County Water District and Vidler Water Company, SNWA, and MVIC. *See* Exhibit 16, Order Granting SNWA and MVIC Intervention dated July 9, 2021; Exhibit 17, Order Granting Lincoln County Water District and Vidler Water Company Intervention in Petitions of SNWA and MVIC dated September 13, 2021.

Following a full briefing and oral argument, the district court issued its Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review (“Order Vacating Order 1309”) on April 19, 2022. Therein, the district court found that State Engineer lacked authority to jointly administer the area delineated as the LWRFS, lacked authority to engage in conjunctive management of water resources (*i.e.*, managing surface water and groundwater together under prior appropriation), and violated certain Petitioners’ due process rights during the administrative process preceding Order 1309. *See generally* Exhibit 18, Order Vacating Order 1309. Based on these conclusions, the district court found that Order 1309 was arbitrary and capricious, void, and vacated Order 1309 in its entirety, and did not reach the question of whether substantial evidence supports Order 1309. *See id.*, p. 35. Further, the district court expressly granted the petitions for judicial review filed by Lincoln County Water District and Vidler Water

Company, Inc., Coyote Springs Investment, LLC, Apex Holding Company, LLC and Dry Lake Water, LLC, Nevada Cogeneration Associates Nos. 1 and 2, and Georgia-Pacific Gypsum LLC and Republic Environmental Technologies, Inc. *See id.*, pp. 35–36.

Notably in the Order Vacating Order 1309, the district court did not expressly address the petitions filed by SNWA, the Las Vegas Valley Water District (“LVVWD”), the Center, or MVIC. However, on May 13, 2022, the district court issued its Addendum and Clarification to Court’s Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review Filed on April 19, 2022 (“Addendum and Clarification of Order Vacating Order 1309”). *See* Exhibit 19, Addendum and Clarification of Order Vacating Order 1309. Therein, the district court noted that SNWA, LVVWD, the Center, and MVIC “supported the Nevada State Engineer’s Position that Order 1309 did not exceed the State Engineer’s statutory authority nor violated participant’s due process rights” but did challenge some “factual findings as not being supported by substantial evidence.” *Id.*, p. 2. The district court then specifically DISMISSED the petitions for judicial review to the extent they “support the position that Nevada State Engineer did not exceed his statutory authority and provided due process in issuing Order 1309.” *Id.* The State Engineer, SNWA, the Center, and MVIC all subsequently appealed, seeking reversal

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of the Order Vacating Order 1309 and reinstatement of Order 1309, in whole or in part.

#### **IV. ARGUMENT**

While undersigned counsel are unaware of any precedent from this Court regarding the standard for consolidating appeals, apart from consolidation being permitted under NRAP 3(b), the appeals at issue here should be consolidated. Judicial economy, the economy of the parties, and common-sense dictate that these four appeals should be consolidated, and should be briefed simultaneously and heard during one oral argument (if oral argument is requested).

All four appeals stem from the same administrative process, same administrative record, and the same consolidated district court action regarding the same decision of the State Engineer, Order 1309, wherein briefing and oral argument occurred simultaneously. Furthermore, all four appeals challenge the same, single district court Order Vacating Order 1309 and the subsequent Addendum and Clarification of that Order. While there may be differences in the extent to which each of the Appellants seek to reverse the Order Vacating Order 1309 and reinstate Order 1309, all appeals seek to reverse (1) the district court's finding that the State Engineer lacks the authority to delineate and jointly administer the LWRFS as a single administrative unit, based on substantial scientific evidence showing that this is one interconnected aquifer, sharing the same, single supply of water; (2) the

district court's finding that the State Engineer lacks the authority to conjunctively manage groundwater and surface water (*i.e.*, limit groundwater pumping to protect more senior, decreed surface water rights); and (3) the district court's finding that the State Engineer did not provide adequate due process to those Petitioners whose petitions were granted through notice and the ability to be heard during the administrative process, including an evidentiary hearing, preceding the State Engineer's rendition of Order 1309. Lastly, based on the district court proceedings, all Appellants also likely seek to argue that Order 1309, or portions thereof, was based on substantial evidence in the State Engineer's record (despite the district court declining to reach that issue).

In summation, the questions involved in all four appeals from the Order Vacating Order 1309, and the subsequent Addendum and Clarification, are sufficiently related so as to make consolidation of the appeals prudent. Such consolidation will expedite the consideration of the appeals, and the issues therein, and makes the best use of the resources of the Court and the parties.

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## V. CONCLUSION

The State Engineer and the Center respectfully request that the Court consolidate this appeal with those taken by the State Engineer, SNWA, and MVIC, and modify the caption such that these four parties are designated as Appellants.

RESPECTFULLY SUBMITTED this 2nd day of June, 2022.

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## CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 2nd day of June, 2022, I served a copy of the foregoing THE STATE ENGINEER'S AND THE CENTER FOR BIOLOGICAL DIVERSITY'S JOINT MOTION TO CONSOLIDATE APPEALS AND MODIFY CAPTION, by electronic service to the participants in this case who are registered with the Nevada Supreme Court's EFlex Electronic Filing System:

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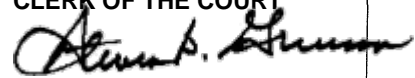
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EXHIBIT 1

EXHIBIT 1



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**DISTRICT COURT  
CLARK COUNTY, NEVADA**

LAS VEGAS VALLEY WATER DISTRICT  
and SOUTHERN NEVADA WATER  
AUTHORITY,

Petitioners,

vs.

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

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

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

Consolidated with:

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

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

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

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

IN THE MATTER OF THE PETITION OF  
CENTER FOR BIOLOGICAL DIVERSITY

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

IN THE MATTER OF THE PETITION OF  
MUDDY VALLEY IRRIGATION COMPANY

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

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

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

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

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

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

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

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

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

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

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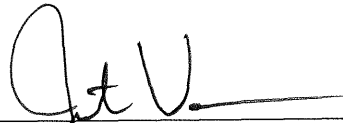
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**Affirmation Pursuant to NRS 239B.030**

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

DATED this 26<sup>th</sup> day of May 2022.



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DATED this 26 day of May 2022.

L. Morgan Bogumil  
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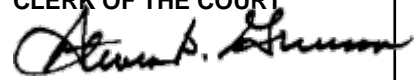
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# **EXHIBIT 1**

# **EXHIBIT 1**



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15 WATER DISTRICT and VIDLER WATER  
16 COMPANY, INC.

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

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

Case No. A-20-816761-C

Dept. No. 1

21 Petitioners,

Consolidated with Cases:

22 vs.

A-20-817765-P

A-20-818015-P

A-20-817977-P

A-20-818069-P

A-20-817840-P

A-20-817876-P

A-21-833572-J

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

24 Respondent.

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

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

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

5           LINCOLN COUNTY DISTRICT ATTORNEY  
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**CERTIFICATE OF SERVICE**

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

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

/s/ Nancy Fontenot  
NANCY FONTENOT

**INDEX OF EXHIBITS**

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

4857-5859-8684, v. 1

# **EXHIBIT “1”**



FFCO

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

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

Petitioners,

vs.

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

Respondent.

And All Consolidated Cases.

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

Consolidated with Cases:

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

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

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

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

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

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

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

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

14 **I.**

15 **PROCEDURAL HISTORY**

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

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

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

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

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

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

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

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

25  
26 \_\_\_\_\_  
27 <sup>3</sup> Stipulation for Consolidation, A-20-816761-C, May 26, 2021.

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

II.

**FACTUAL HISTORY**

**A. The Carbonate Groundwater Aquifer and the Basins**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

28 <sup>20</sup> SE ROA 1070-1499.

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

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

- 8 a. Coyote Spring Valley Hydrographic Basin (“Coyote Spring Valley”), Basin No. 210, since  
9 1985;
- 10 b. Black Mountains Area Hydrographic Basin (“Black Mountains Area”), Basin No. 215, since  
11 November 22, 1989;
- 12 c. Garnet Valley Hydrographic Basin (“Garnet Valley”), Basin No. 216, since April 24, 1990;
- 13 d. Hidden Valley Hydrographic Basin (“Hidden Valley”), Basin No. 217, since October 24,  
14 1990;
- 15 e. California Wash Hydrographic Basin (“California Wash”), Basin No. 218, since August 24,  
16 1990; and
- 17 f. Muddy River Springs Area Hydrographic Basin (“Muddy River Springs Area”), Basin No.  
18 219, since July 14, 1971.<sup>21</sup>

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

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

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

1     **B.     The Muddy River Decree**

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

15     **C.     The Moapa Dace**

16             The Moapa dace (*Moapa coriacea*) is a thermophilic minnow endemic to the upper spring-  
17 fed reaches Muddy River, and has been federally listed as endangered since 1967.<sup>28</sup> Between 1933  
18

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

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

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

25     <sup>26</sup> SE ROA 33775.

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

28     <sup>28</sup> SE ROA 5.



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

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

11 **D. Order 1169**

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

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

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23  
24 

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

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

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

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

28 <sup>33</sup> *Id.*

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

10 Notably, Kane Springs was not included in the Order 1169 study area. In Ruling 5712, the  
11 State Engineer specifically determined Kane Springs would not be included in the Order 1169  
12 study area because there was no substantial evidence that the appropriation of a limited quantity of  
13 water in Kane Springs would have any measurable impact on the Muddy River Springs that  
14 warranted the inclusion of Kane Springs in Order 1169.<sup>37</sup> The State Engineer specifically rejected  
15 the argument that the Kane Springs rights could not be appropriated based upon senior  
16 appropriated rights in the down gradient basins.<sup>38</sup>

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

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

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

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

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

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

28 <sup>39</sup> SE ROA 654-58, Ex. 7.

1 Power Company. Pumping included 5,300 afa in Coyote Spring Valley, 14,535 afa total carbonate  
2 pumping, and 3,840 afa alluvial pumping.<sup>40</sup> Pumping tests effects were examined at 79 monitoring  
3 wells and 11 springs and streamflow monitoring sites.<sup>41</sup> The Kane Springs basin was not included in  
4 the Order 1169 aquifer testing, and Kane Springs basin water right holders were not involved, not  
5 provided notice, and did not participate in the aquifer testing, monitoring or measurements,  
6 submission of reports, proceedings and actions taken by the State Engineer pursuant to Order 1169.<sup>42</sup>

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

15 In 2014, and based on the results of the Aquifer Test, the State Engineer issued Rulings  
16 6254–6261 on January 29, 2014 denying all the pending groundwater applications in Coyote  
17 Springs Valley, Muddy River Springs Area, California Wash, Hidden Valley, Garnet Valley, and  
18 certain portions of the Black Mountains Area.<sup>43</sup> His rationale in each ruling was the same:  
19 "because these basins share a unique and close hydrologic connection and share virtually all of the  
20 same source and supply of water, unlike other basins in Nevada, these five basins will be jointly  
21 managed."<sup>44</sup>  
22

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

25 <sup>41</sup> SE ROA 6, Ex. 1.

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

27 <sup>43</sup> SE ROA 726 – 948.

28 <sup>44</sup> *See e.g.*, SE ROA 479.

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

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

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

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

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

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

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33            <sup>45</sup> SE ROA 635-53, Ex. 6.

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

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

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

5 SE ROA 647-48, Ex. 6.

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

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

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

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

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

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

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

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

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

**F. Order 1309**

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

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

SE ROA 66, Ex. 1.

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

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

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

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

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

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

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

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

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

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

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

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



1 in the Muddy River;

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

8 **III.**

9 **DISCUSSION**

10 **STANDARD OF REVIEW**

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

16 **A. Questions of Law**

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

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

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

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

**B. Questions of Fact**

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

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

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

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

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

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

### 16 CONCLUSIONS OF LAW

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

20 The powers of the State Engineer are limited to those set forth in the law. *See, e.g., City of*  
21 *Henderson v. Kilgore*, 122 Nev. 331, 334, 131 P.3d 11, 13 (2006); *Clark Cty. School Dist. v. Clark*  
22 *Cty. Classroom Teachers Ass’n*, 115 Nev. 98, 102, 977 P.2d 1008, 1011 (1999) (*en banc*) (An  
23 administrative agency’s powers “are limited to those powers specifically set forth by statute.”);  
24 *Clark Cty. v. State, Equal Rights Comm’n*, 107 Nev. 489, 492, 813 P.2d 1006, 1007 (1991)); *Wilson*  
25 *v. Pahrump Fair Water, LLC*, 137 Nev. Adv. Op. 2, 481 P.3d 853, 856(2021) (The State Engineer’s  
26 powers thereunder are limited to “only those . . . which the legislature expressly or implicitly  
27 delegates.”); *Andrews v. Nevada State Bd. of Cosmetology*, 86 Nev. 207, 208, 467 P.2d 96, 97  
28 (1970) (“Official powers of an administrative agency cannot be assumed by the agency, nor can they  
be created by the courts in the exercise of their judicial function. The grant of authority to an agency  
must be clear.”) (*internal citation omitted*).

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

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

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

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

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

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

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

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

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

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

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

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

1. **The Prior Appropriation Doctrine**

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

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

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

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

<sup>63</sup> *Id.*

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

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

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

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

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

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

5 **2. Joint Administration**

6 The State Engineer’s position is that the “best available science” demonstrates that the  
7 seven<sup>65</sup> named hydrographic basins are so hydrologically interconnected that science dictates they  
8 must be managed together in one superbasin. However, NRS 533.024(1)(c) is a policy declaration  
9 of the Legislature’s intent that simply “encourages” the State Engineer “to consider the best  
10 available science in rendering decisions” that concern water he has authority to manage. NRS  
11 533.024(1)(c).

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

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

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

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

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

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

24 Indeed, if science was the sole governing principle to dictate the Nevada State Engineer’s  
25 decisions, there would be a slippery slope in the changes that could be made in the boundaries of the  
26 basins and how they are managed; each time scientific advancements and discoveries were made  
27 regarding how sub-surface water structures are situated or interconnected, under this theory of  
28



1 authority, the Nevada State Engineer could change the boundaries of the existing basins. Each  
2 boundary change would upend the priority of water right holders as they relate to the other water  
3 right holders in the new, scientifically-dictated “basin.” This would lead to an absurd result as it  
4 relates to the prior appropriation doctrine. Every water right holder would be insecure in their  
5 priority, as their relative priority could change at any moment that science advances in determining  
6 further interconnectivity of water below the surface. In the administration of water rights, the  
7 certainty of those rights is particularly important and prior appropriation is “largely a product of the  
8 compelling need for certainty in the holding and use of water rights.” *Mineral Cty. v. Lyon Cty.*, 136  
9 Nev. at 518, 473 P.3d at 429 (quoting *Arizona v. California*, 460 U.S. 605, 620 (1983)). Science in  
10 and of itself cannot alter common law and statutes. Thus, the State Engineer’s reliance on NRS  
11 533.024(1)(c) for giving him authority to create a superbasin out of seven existing basins is  
12 misplaced.

13 While NRS 532.120 allows the State Engineer to make reasonable rules and regulations as  
14 may be necessary for proper and orderly execution, this authority is not without its limits, and is  
15 only authorized for those “powers conferred by law.” Nothing in Chapters 532, 533 or 534 gives the  
16 State Engineer direct authority to eliminate, modify, or redraw the boundaries of existing  
17 hydrographic basins, or to consolidate multiple, already established, hydrographic basins into a  
18 single hydrographic superbasin. For at least 50 years, holders of groundwater rights in Nevada have  
19 understood a “hydrographic basin” to be an immutable administrative unit. This has been the case  
20 regardless of whether the boundaries of the unit accurately reflected the boundaries of a particular  
21 water resource. The Nevada Legislature has adopted a comprehensive scheme that provides the  
22 framework for the State Engineer to administer surface water and groundwater. Moreover, the State  
23 Engineer has, for decades, administered water on the basis of hydrographic basins identified,  
24 described, and released to the public and relied upon by the Legislature, former State Engineers, and  
25 the public. Applications to appropriate water are and have been on the basis of each hydrographic  
26 basin. Protests, agreements, and resolutions of water applications have been on the basis of each  
27 basin. Furthermore, statutes require that the State Engineer consider available water and  
28

1 appropriations based on the basins already defined.

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

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

22 NRS 534.110(6) sets forth the State Engineer’s ability to make basin-specific determinations  
23 and provides the authority to curtail water rights where investigations into specific basins  
24 demonstrate that there is insufficient groundwater to meet the needs of all permittees and all vested-  
25 right claimants. NRS 534.110 plainly applies to investigations concerning administration and  
26 designation of critical management areas within a basin. If the State Engineer conducts an  
27 investigation as set forth in NRS 534.110(6) and determines that the annual replenishment to the  
28

1 groundwater supply is not adequate for the permittees and vested-right claimants, he has the  
2 authority to either (1) order that withdrawals from domestic wells be restricted to conform to priority  
3 rights, or (2) designate as a critical management area the basin in which withdrawals of groundwater  
4 consistently exceed the perennial yield. NRS 534.110(6)-(7). It is important to note, however, that  
5 the statute does not provide authority to change the boundaries of established basins, combine  
6 multiple basins into one unit or superbasin, and then modify or curtail groundwater rights based  
7 upon restructured priority dates in this newly created superbasin.

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

20 **3. Conjunctive Management**

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

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

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

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

21 The State Engineer’s position is that the determination of conflicts and priorities has not yet  
22 occurred since that is to occur in the second step of the proceeding. However, by the very nature of  
23 erasing the existing basins and putting all of the water rights holders in one superbasin, he has  
24

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25  
26 <sup>67</sup> This Court rejects the State Engineer’s argument that Order 1309 did not change priorities merely because it did not  
27 change priority dates. His argument conflates the meaning of *priority* as defined by the date of a water right application,  
28 and the common meaning of *priority*, as defined by one’s “place in line.” While it is true that the Order does not change  
priority dates, this Court finds that it *does* change the relative priorities, as petitioners who previously held the most  
senior rights within their singular basin may now be relegated to more junior status within the “superbasin.”

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

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

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

18 The Nevada Constitution protects against the deprivation of property without due process of  
19 law. Nev. Const. art. 1, § 8(5). “Procedural due process requires that parties receive notice and an  
20 opportunity to be heard.” *Eureka Cty. V. Seventh Jud. Dist. Ct.*, 134 Nev. 275, 279, 417 P.3d 1121,  
21 1124 (2018)(internal quotation marks omitted). “In Nevada, water rights are ‘regarded and  
22 protected as real property.’” *Id.*(quoting *Application of Filippini*, 66 Nev. 17, 21-22, 202 P.2d 535,  
23

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24 <sup>68</sup> Although this Court refrains from analyzing whether or not 1309 is supported by substantial evidence, the Court notes  
25 that part of the State Engineer’s 1309 decision of limiting use to 8,000afa or less is based on the concern of adversely  
26 impacting the endangered Moapa Dace, located in the Muddy River Springs. This decision does not appear to take into  
27 account more nuanced effects of how pumping in each separate basin affects the Muddy River flows, no matter how far  
28 away the basin is from the river. In other words, reprioritization of each water rights holder in relation to the other (by  
prioritization date in the newly created superbasin) means that their standing (and more importantly, their potential for  
curtailment) is only by date. Water use in one basin may not have the same effect as another in reducing Muddy River  
flows; however, these distinguishing factors are all erased by combining all of the basins together for joint  
administration.

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

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

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

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

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<sup>69</sup> “[B]ecause the language in the show cause order indicates that the district court may enter an order forcing curtailment to begin, junior water rights holders must be given an opportunity to make their case for or against the option of curtailment. Notice must be given at an appropriate stage in the proceedings to give parties meaningful input in the adjudication of their rights...Thus, junior water rights holders must be notified before the curtailment decision is made, even if the specific “how” and “who” of curtailment is decided in a future proceeding.” *Seventh Jud. Dist. Ct.*, 134 Nev. 275, 280-81, 417 P.3d 1121, 1125 (2018).

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

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

14 In noticing the hearing to consider the reports submitted pursuant to Order 1303, there was  
15 no mention of consideration of the prospective management of the LWRFS, *i.e.*, whether it would be  
16 appropriately managed conjunctively and as a joint administrative unit. Indeed, this was consistent  
17 with the Hearing Officer's opening remarks at the August 8, 2019, prehearing conference in which  
18

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19 <sup>70</sup> See SE ROA 262-82, Ex. 2; SE ROA 284-301, Ex. 3

20 <sup>71</sup> The Notice included the following summary:

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

28 <sup>72</sup> SE ROA 647-48. Ex. 6.

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

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

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

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

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

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

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

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

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

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



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

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

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

19 SE ROA 54, Ex. 1.

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

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

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

8 Finally, as noted above, the State Engineer did not give notice or disclose before or during  
9 the Order 1303 proceedings, the six specific criteria that he would use in evaluating the connectivity  
10 of the basins and determining the new consolidated basin boundary. Although the State Engineer  
11 asserted that he considered the evidence and testimony presented in the public hearing "on the basis  
12 of a common set of criteria that are consistent with the original characteristics conserved critical in  
13 demonstrating a close hydrologic connection requiring joint management in Rulings 6254-6261,"<sup>75</sup>  
14 a review of these rulings reveals that none of the six criteria or characteristics were previously  
15 identified, examined in the hydrological studies and subsequent hearing that followed the  
16 completion of the Order 1169 aquifer test, or expressly disclosed in Rulings 6254-6261.<sup>76</sup> These  
17 criteria were instead explicitly disclosed for the first time in Order 1309, which means the  
18 participants had no opportunity to directly address these criteria in their presentations, or critically,  
19 to address the appropriateness of these criteria.

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

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

28 <sup>76</sup> SE ROA 726-948.

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

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

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

11 **IV.**

12 **CONCLUSION**

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

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

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

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

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

26 IT IS FURTHER ORDERED that the petition for review of the Nevada State Engineer's  
27 Order No. 1309 filed by Petitioners Coyote Springs Investment, LLC is GRANTED.  
28

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

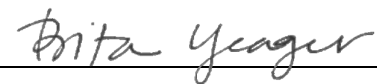
4 IT IS FURTHER ORDERED that the petition for review of the Nevada State Engineer's  
5 Order No. 1309 filed by Petitioners Nevada Cogeneration Associates Nos. 1 and 2 is GRANTED.

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

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

11  
12 IT IS SO ORDERED.

Dated this 19th day of April, 2022



66B 24A E875 2549  
Bita Yeager  
District Court Judge

1 **CSERV**

2  
3 **DISTRICT COURT**  
4 **CLARK COUNTY, NEVADA**

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

CASE NO: A-20-816761-C

8 vs.

DEPT. NO. Department 1

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

12 **AUTOMATED CERTIFICATE OF SERVICE**

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

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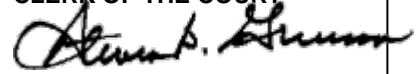
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## **EXHIBIT 2**

## **EXHIBIT 2**





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**DISTRICT COURT  
CLARK COUNTY, NEVADA**

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

Petitioners,

vs.

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

Respondents,

Case No. A-20-816761-C

Dept. No. 1

Consolidated with Cases:

A-20-817765-P

A-20-818015-P

A-20-817977-P

A-20-818069-P

A-20-817840-P

A-20-817876-P

A-21-833572-J

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

//

//

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

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

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

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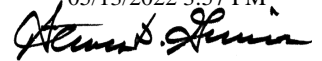
/s/ Thomas Duensing  
Employee of Taggart & Taggart, LTD.

**EXHIBIT INDEX**

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

# EXHIBIT 1

# EXHIBIT 1



CLERK OF THE COURT

FFCO

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

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

Petitioners,

vs.

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

Respondent.

And All Consolidated Cases.

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

Consolidated with Cases:

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

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

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

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



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

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

11 **IV.**

12 **CONCLUSION**

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


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

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

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

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

Dated this 13th day of May, 2022

  
\_\_\_\_\_

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

1 **CSERV**

2  
3 DISTRICT COURT  
4 CLARK COUNTY, NEVADA

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

CASE NO: A-20-816761-C

8 vs.

DEPT. NO. Department 1

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

12 **AUTOMATED CERTIFICATE OF SERVICE**

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

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# EXHIBIT 2

# EXHIBIT 2

**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**

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**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.<sup>1</sup>

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.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

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<sup>1</sup> 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.

<sup>2</sup> Memorandum dated August 3, 1984, from Terry Katzer, Nevada Office Chief, Water Resources Division, United States Department of Interior Geological Survey, Carson City, Nevada to Members of the Carbonate Terrane Study.

<sup>3</sup> 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.

<sup>4</sup> *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.<sup>5</sup> 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.<sup>6</sup> The State Engineer conducted a hearing on Coyote Springs Investments LLC (CSI) Applications 63272–63276 on August 20-24, 27-28, 2001.<sup>7</sup>

**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.<sup>8</sup>

**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.<sup>9</sup>

**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.<sup>10</sup> On April 18, 2002, the State Engineer added the California Wash to the Order 1169 aquifer test basins.<sup>11</sup>

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<sup>5</sup> See NSE Exs. 14–20, *Ruling 6254–Ruling 6260*, Hearing on Interim Order 1303, official records of the Division of Water Resources.

<sup>6</sup> See NSE Ex. 14.

<sup>7</sup> *Id.*

<sup>8</sup> See NSE Ex. 3.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> 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.<sup>12</sup> 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).<sup>13</sup>

**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.<sup>14</sup>

**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.<sup>15</sup> As a result, the Order 1169 study participants, which included the LVVWD, SNWA, CSI, Nevada Power Company,<sup>16</sup> MVWD, Dry Lake Water Company, LLC, Republic Environmental Technologies, Inc. (Republic),

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

<sup>13</sup> *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.

<sup>14</sup> *Id.*

<sup>15</sup> *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.

<sup>16</sup> 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.<sup>17</sup>

**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.<sup>18</sup>

**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.<sup>19</sup>

**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.<sup>20</sup>

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<sup>17</sup> See July 1, 2010, letter from Jason King, Nevada State Engineer, to Order 1169 Study Participants, official records of the Division of Water Resources.

<sup>18</sup> See NSE Ex. 2, *Order 1169A*, Hearing on Interim Order 1303, official records of the Division of Water Resources.

<sup>19</sup> See, e.g., NSE Ex. 1, Appendix B.

<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup>

**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.<sup>23</sup> 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.<sup>24</sup> 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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<sup>21</sup> 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.

<sup>22</sup> *See, e.g.*, NSE Ex. 14. *See also* NSE Ex. 256.

<sup>23</sup> *See* NSE Ex. No. 236.

<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup>

**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.<sup>27</sup>

**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.<sup>28</sup>

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<sup>25</sup> 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.

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

<sup>27</sup> NSE Ex. 247, *Coyote Springs Investments, LLC Order 1169 Report*, Hearing on Interim Order 1303, official records of the Division of Water Resources.

<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup>

**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.<sup>31</sup> 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.<sup>32</sup>

**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.<sup>33</sup> 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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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> 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.

<sup>32</sup> *Id.*

<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup>

**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.<sup>36</sup>

**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.<sup>37</sup>

**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.<sup>38</sup> 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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<sup>34</sup> NSE Ex. 246, *Great Basin Water Network Order 1169 Report*, Hearing on Interim Order 1303, official records of the Division of Water Resources.

<sup>35</sup> *Id.*

<sup>36</sup> NSE Ex. 248, *Center for Biological Diversity Order 1169 Report*, Hearing on Interim Order 1303, official records of the Division of Water Resources.

<sup>37</sup> 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.

<sup>38</sup> 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.<sup>39</sup>

## 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.<sup>40</sup> 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.<sup>41</sup> 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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<sup>39</sup> *Id.*

<sup>40</sup> 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.

<sup>41</sup> *Id.*, p. 7.



submitted by interested stakeholders were intended to aid in the fact-finding goals of the Division.<sup>42</sup>

**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<sup>43</sup>, 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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<sup>42</sup> *Id.*, pp. 16–17.

<sup>43</sup> 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.”<sup>44</sup>

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.<sup>45</sup>

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

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<sup>44</sup> 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.

<sup>45</sup> 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.<sup>46</sup>

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.<sup>47</sup>

#### *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.<sup>48</sup> 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.<sup>49</sup>

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<sup>46</sup> 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.

<sup>47</sup> See CBD Ex. 3, pp. 20–26; See CBD Ex. 4, p. 28–29; Tr. 1525–1528.

<sup>48</sup> See Letter from the Church, received August 15, 2019, Hearing on Interim Order 1303, official records of the Division of Water Resources.

<sup>49</sup> 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.<sup>50</sup> 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).<sup>51</sup> 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.<sup>52</sup>

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.<sup>53</sup> 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.<sup>54</sup> 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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<sup>50</sup> 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.

<sup>51</sup> 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.

<sup>52</sup> *Id.*, p. 3, Technical Memo, pp. 14–16.

<sup>53</sup> *Id.*, pp. 3–4.

<sup>54</sup> *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.<sup>55</sup> 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.<sup>56</sup>

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.<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup> 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.<sup>60</sup>

#### *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.

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<sup>55</sup> *Id.*, Technical Memo, p. 48–49.

<sup>56</sup> *Id.*

<sup>57</sup> *See* CNLV Ex. 6, pp. 1–2.

<sup>58</sup> *Id.*, p. 2.

<sup>59</sup> *Id.*, pp. 2–3.

<sup>60</sup> *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.<sup>61</sup> 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.<sup>62</sup> Additionally, annual cyclical patterns of groundwater pumping should not be confused with long-term climate variability.<sup>63</sup>

CSI challenged the basic assumption that the LWRFS, as proposed in Interim Order 1303, is a homogenous unit.<sup>64</sup> 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.<sup>65</sup> CSI also acknowledged that due to the fragmented nature of the LWRFS, the Theis solution is of limited utility.<sup>66</sup>

CSI presented geologic and geophysical information in support of the idea that the LWRFS administrative unit is a geophysically and hydrogeologically heterogeneous 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.<sup>67</sup> CSI stated that the LWRFS does not include Kane Springs Valley.<sup>68</sup>

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<sup>61</sup> 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.

<sup>62</sup> CSI Ex. 1, p. 5.

<sup>63</sup> 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.

<sup>64</sup> CSI Ex. 1, p. 7.

<sup>65</sup> CSI Ex. 1, p. 7; Tr. 131–132.

<sup>66</sup> Tr. 154.

<sup>67</sup> 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.

<sup>68</sup> 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.<sup>69</sup> CSI's CSAMT study showed evidence of a prominent carbonate block bounded on either side by normal faults.<sup>70</sup> 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.<sup>71</sup> Faulting has created a preferred path for groundwater flow "from the east side Coyote Spring Valley to the Muddy River Springs Area".<sup>72</sup>

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.<sup>73</sup> Comparing several models of recharge, CSI estimated recharge at 5,280 afy from the Sheep Range to the western side of Coyote Spring Valley.<sup>74</sup> 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.<sup>75</sup>

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.<sup>76</sup> CSI argues that effects are dependent on well location, geologic formations, hydraulic gradients, and elevation.<sup>77</sup> 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.<sup>78</sup> 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.<sup>79</sup>

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<sup>69</sup> CSI Ex. 1, p. 25

<sup>70</sup> CSI Ex. 1, p. 25.

<sup>71</sup> CSI Ex. 1, p. 29; evidence of impermeability, Tr. 181.

<sup>72</sup> CSI Ex. 1, p. 29.

<sup>73</sup> CSI Closing.

<sup>74</sup> CSI Ex. 1, pp. 31–40.

<sup>75</sup> Tr. 221–223; CSI Closing, pp. 8–9.

<sup>76</sup> CSI Closing.

<sup>77</sup> CSI Closing, p. 19.

<sup>78</sup> CSI Closing.

<sup>79</sup> 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.<sup>80</sup> 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.<sup>81</sup> 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.<sup>82</sup> 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.<sup>83</sup> 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

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<sup>80</sup> CSI Closing.

<sup>81</sup> CSI Ex. 2, p. 17.

<sup>82</sup> 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.

<sup>83</sup> 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.<sup>84</sup>

#### *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.<sup>85</sup> 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.<sup>86</sup> 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.<sup>87</sup>

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<sup>84</sup> See Closing GP-REP.

<sup>85</sup> *GBWN Report on Order 1303*, (GBWN Report), Hearing on Interim Order 1303, official records of the Division of Water Resources.

<sup>86</sup> 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.

<sup>87</sup> 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.<sup>88</sup> LC-V states that these findings have not been challenged by any of the Order 1169 participants.<sup>89</sup> 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.<sup>90</sup>

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.<sup>91</sup> 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.<sup>92</sup>

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.<sup>93</sup> 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.<sup>94</sup> 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.<sup>95</sup> 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.<sup>96</sup> LC-V argues that the water from these wells is chemically

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<sup>88</sup> LC-V Ex. 1, pp. 2-2 through 2-3, citing State Engineer’s Rulings 5712, 6254, 5712.

<sup>89</sup> LC-V Ex. 1, p. 2-3.

<sup>90</sup> 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.

<sup>91</sup> LC-V Ex. 1, p. 3-1.

<sup>92</sup> 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.

<sup>93</sup> LC-V Ex. 1, Appendix C, pp. 111–153.

<sup>94</sup> *Id.*, pp. 124–125.

<sup>95</sup> “Gradient alone does not mean flow.” Thomas Butler, witness on behalf of LC-V, Tr. 1281.

<sup>96</sup> 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.<sup>97</sup> LC-V concludes carbon isotope data also confirmed that the water from Kane Springs Valley does not appear in the Muddy River Springs area.<sup>98</sup>

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.<sup>99</sup> 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.<sup>100</sup> Additional transects were run in Coyote Spring Valley.<sup>101</sup> The results of the geophysical data validated concealed faulting indicated on existing maps, and was ground-truthed with observations in the field.<sup>102</sup> 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.<sup>103</sup> 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.<sup>104</sup>

LC-V gave no opinion on the long-term annual quantity of groundwater that could be pumped from the LWRFS.<sup>105</sup> 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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<sup>97</sup> Tr. 1284.

<sup>98</sup> Tr. 1286.

<sup>99</sup> LC-V Ex. 1, pp. 1-1, 4-1 through 4-10.

<sup>100</sup> LC-V Ex. 1, p. 4-3.

<sup>101</sup> LC-V Ex. 1, p. 4-3.

<sup>102</sup> LC-V Ex. 1, p. 4-8, Tr. 1322.

<sup>103</sup> Tr. 1271-1272; LC-V Ex. 1, p. 4-9.

<sup>104</sup> 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.

<sup>105</sup> LC-V Ex. 1, p. 5-2.

Valley.<sup>106</sup> 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.<sup>107</sup>

*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.<sup>108</sup> MBOP opposed management of the LWRFS as one basin and argues the scientific consensus is lacking amongst participants.<sup>109</sup> 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.<sup>110</sup>

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.<sup>111</sup> 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

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<sup>106</sup> LC-V Ex. 1, p. 5-3.

<sup>107</sup> LC-V Ex. 1, p. 5-3.

<sup>108</sup> Tr. 772–773; 839.

<sup>109</sup> 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.

<sup>110</sup> *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.

<sup>111</sup> 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.<sup>112</sup> This hydrodynamic divide theory was not shared by SNWA, CBD, CSI, and NPS.<sup>113</sup>

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.<sup>114</sup> Thus, MBOP concluded that no reduction in pumping will restore high-elevation spring flows.<sup>115</sup> 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.<sup>116</sup>

A quantity available for sustainable pumping was not proposed, but MBOP presumed more water is available in California Wash than previously thought.<sup>117</sup> 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.<sup>118</sup>

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.<sup>119</sup> 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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<sup>112</sup> See MBOP Ex. 2, pp. 2, 4, 12, 14, 20, 35, 55; Tr. 812; 845.

<sup>113</sup> 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.

<sup>114</sup> See MBOP Ex. 2, pp. 3, 26–32, 35; Tr. 764–771; 805.

<sup>115</sup> See MBOP Ex. 2, pp. 3, 35; Tr. 821–826.

<sup>116</sup> See MBOP Ex. 2, p. 29; Tr. 775, 838–840; 848.

<sup>117</sup> See MBOP Ex. 2, pp. 2, 20, 35.

<sup>118</sup> See MBOP Ex. 2, pp. 6, 19, 35; Tr. 850–851.

<sup>119</sup> See MBOP Ex. 2, pp. 23–24, 35; Tr. 836.

proportional to pumping may be expected.<sup>120</sup> 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.<sup>121</sup>

*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.”<sup>122</sup> MVWD provides municipal water service to approximately 8,500 people with 3,250 metered service connections, including service to the MBOP.<sup>123</sup>

MVWD supported the inclusion of Kane Springs Valley within the LWRFS boundary.<sup>124</sup> 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.<sup>125</sup> 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 LRVWD’s 2001 calculation of that quantity of water at approximately 6,000 afy.<sup>126</sup> 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.<sup>127</sup> MVWD also

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<sup>120</sup> See MBOP Ex. 2, pp. 23, 35.

<sup>121</sup> See MBOP Closing.

<sup>122</sup> Tr. 1172.

<sup>123</sup> 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.

<sup>124</sup> MVWD Ex. 3, p. 1; Tr. 1175.

<sup>125</sup> MVWD Ex. 3, p. 1; MVWD Ex. 4, p. 2.

<sup>126</sup> 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.

<sup>127</sup> 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.<sup>128</sup>

MVWD disagreed that a hydrologic barrier exists between Coyote Springs Valley and Kane Springs Valley.<sup>129</sup> 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.<sup>130</sup> Additionally, the “highly transmissive fault zone” is continuous across the basin boundary between Kane Springs Valley and Coyote Spring Valley.<sup>131</sup> 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.<sup>132</sup> 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.<sup>133</sup> 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.<sup>134</sup>

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

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<sup>128</sup> Tr. 1195–1197.

<sup>129</sup> Tr. 1176–1177.

<sup>130</sup> 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.

<sup>131</sup> Tr. 1185.

<sup>132</sup> Tr. 1250.

<sup>133</sup> Tr. 1219.

<sup>134</sup> *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.<sup>135</sup> MVWD viewed this as being consistent with the State Engineer's statements in Interim Order 1303.<sup>136</sup>

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.<sup>137</sup> 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.<sup>138</sup> 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.<sup>139</sup>

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.<sup>140</sup> 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.<sup>141</sup> 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.<sup>142</sup>

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<sup>135</sup> Tr. 1198, MVWD Ex. 3, p. 4.

<sup>136</sup> Tr. 1199.

<sup>137</sup> Tr. 1199–1200; MVWD Closing, pp. 9–10.

<sup>138</sup> MVWD Ex. 3, p. 5.

<sup>139</sup> *Id.*

<sup>140</sup> MVWD Ex. 3, p. 5.

<sup>141</sup> MVWD Ex. 3, p. 6; Tr. 1203–1204; 6,791 afa constitutes an increase in the carbonate-rock aquifer pumping for MVWD. Tr. 1228.

<sup>142</sup> 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.<sup>143</sup> 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.<sup>144</sup> 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.<sup>145</sup> MVIC did not dispute the geographic boundaries as identified in Interim Order 1303.<sup>146</sup> 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.<sup>147</sup>

*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.<sup>148</sup> 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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<sup>143</sup> Tr. 1693–1696, 1705.

<sup>144</sup> 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.

<sup>145</sup> MVIC Ex. 1, p. 5; Tr. 1698.

<sup>146</sup> *See* MVIC Ex. 1, p. 3; Tr. 1697–1698.

<sup>147</sup> *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.

<sup>148</sup> *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.<sup>149</sup> 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.<sup>150</sup> 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.<sup>151</sup>

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.<sup>152</sup> 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.<sup>153</sup> 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.<sup>154</sup>

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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<sup>149</sup> 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.

<sup>150</sup> NPS Ex. 2, p. 22; NPS Closing, pp. 2–4.

<sup>151</sup> *Id.*

<sup>152</sup> NPS Ex. 2, p. 22; NPS Ex. 3, pp. 5–11; Tr. 550–551; NPS Closing, pp. 4–5.

<sup>153</sup> NPS Ex. 2, p. 22; NPS Ex. 3, pp. 5–11; Tr. 550–551; NPS Closing, pp. 5–6.

<sup>154</sup> NPS Ex. 2, p. 22; Tr. 552–554.

factor.<sup>155</sup> 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.<sup>156</sup> 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.<sup>157</sup> 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.<sup>158</sup>

#### *Nevada Cogeneration Associates*

NCA submitted a Rebuttal Report Pertaining to Interim Order 1303 and provided testimony at the Interim Order 1303 hearing.<sup>159</sup> 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.<sup>160</sup>

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.<sup>161</sup> 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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<sup>155</sup> NPS Ex. 2, pp. 7, 22–23. *See also* NPS Closing, pp. 5–6.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> NPS Ex. 2, p. 23. *See also* NPS Closing, p. 6, and Tr. 593–594.

<sup>159</sup> 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.

<sup>160</sup> NCA Ex. 1, pp. 1, 23.

<sup>161</sup> *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.<sup>162</sup>

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.<sup>163</sup> 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.<sup>164</sup> 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.<sup>165</sup>

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.<sup>166</sup> 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.<sup>167</sup> Specifically, NCA concluded that the Pahrangat 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.<sup>168</sup> NCA concluded, advocating that proper management of the LWRFS is appropriate and sufficient for the

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<sup>162</sup> *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.

<sup>163</sup> NCA Ex. 1 pp. 3–7, 23. *See also* NCA Closing, pp. 15–16.

<sup>164</sup> NCA Ex. 1, pp. 8–17, 23. *See also* NCA Closing, pp. 10–14, and Tr. 1629–44.

<sup>165</sup> NCA Ex. 1, pp. 11–16.

<sup>166</sup> *Id.*, pp. 17–18, 23.

<sup>167</sup> *Id.*, pp. 19, 24.

<sup>168</sup> *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.<sup>169</sup>

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,<sup>170</sup> as it did not believe there to be sufficient data to support either an increase or decrease from this amount.<sup>171</sup> 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.<sup>172</sup>

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.<sup>173</sup> Rather, NCA concluded that movement of those rights would compound the impact of pumping from the carbonate-rock aquifer.<sup>174</sup> 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.<sup>175</sup>

#### *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.<sup>176</sup> In its rebuttal report, NV Energy opined that the geographic boundary of the LWRFS should be as established in Interim Order 1303.<sup>177</sup> NV Energy further

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<sup>169</sup> *Id.*

<sup>170</sup> 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.

<sup>171</sup> *Id.*, pp. 18, 24.

<sup>172</sup> NCA Closing, pp. 14–15.

<sup>173</sup> NCA Ex. 1, pp. 19–23, 24.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> 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.

<sup>177</sup> *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.<sup>178</sup>

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.<sup>179</sup>

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.<sup>180</sup> 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.<sup>181</sup> NV Energy further concluded that, contrary to the conclusions of MBOP, drought was not a significant cause for the groundwater level declines observed.<sup>182</sup> 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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<sup>178</sup> *Id.*

<sup>179</sup> *Id.*, pp. 2–7.

<sup>180</sup> NVE Ex. 1, p. 8.

<sup>181</sup> *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.

<sup>182</sup> *Id.*, pp. 9–12.

534.120, require the water right holders within the LWRFS to develop a conjunctive management plan.<sup>183</sup>

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.<sup>184</sup> 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.<sup>185</sup> 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.<sup>186</sup>

*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.<sup>187</sup> 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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<sup>183</sup> *Id.*, p. 12.

<sup>184</sup> Tr. 1761–1762.

<sup>185</sup> NV Energy Closing, pp. 2–3.

<sup>186</sup> *Id.*, pp. 3–6.

<sup>187</sup> 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.<sup>188</sup> 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.<sup>189</sup>

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.<sup>190</sup> 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.<sup>191</sup> Further, SNWA and LVVWD rejected the premise that climate was a significant factor over groundwater withdrawals for the observed groundwater level decline.<sup>192</sup>

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.<sup>193</sup> 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.<sup>194</sup> Ultimately, SNWA and LVVWD concluded that while any amount of pumping results

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<sup>188</sup> SNWA Ex. 7, pp. 5-1 through 5-18, 8-1. *See also*, Tr. 953.

<sup>189</sup> *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.

<sup>190</sup> SNWA Closing, pp. 9-12. *See also* SNWA Ex. 7, pp. 5-1 through 5-18, and SNWA Ex. 9, pp. 15-20.

<sup>191</sup> SNWA Closing, pp. 11-12. *See also* Tr. 932.

<sup>192</sup> SNWA Closing, pp. 12-14. *See also* SNWA Ex. 9, pp. 15-17.

<sup>193</sup> SNWA Ex. 7, pp. 6-3 through 6-4, 8-2 through 8-4.

<sup>194</sup> *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.<sup>195</sup> 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.<sup>196</sup> 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.<sup>197</sup>

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.<sup>198</sup> 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.<sup>199</sup>

#### *Technichrome*

Technichrome submitted a response and additional response to the Interim Order in July 2019 but did not participate in the hearing.<sup>200</sup> 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.<sup>201</sup> However,

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<sup>195</sup> Tr. 921–22. *See also* SNWA Ex. 7, pp. 8-1 through 8-5; SNWA Ex. 9, p. 27.

<sup>196</sup> *See* SNWA Ex. 8.

<sup>197</sup> *Id.*, pp. 8-1 through 8-2. *See also* SNWA Closing, pp. 17–19.

<sup>198</sup> *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.

<sup>199</sup> SNWA Closing, p. 20. *See also* Tr. 904–05.

<sup>200</sup> *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.

<sup>201</sup> 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.<sup>202</sup> 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.<sup>203</sup>

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.<sup>204</sup> 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.<sup>205</sup>

#### *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.<sup>206</sup> USFWS opted to participate in the proceeding by submitting initial and rebuttal reports and providing testimony during the administrative hearing.<sup>207</sup> The approach of

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<sup>202</sup> *Id.*

<sup>203</sup> *Id.*, and Technichrome Addendum.

<sup>204</sup> Technichrome Addendum.

<sup>205</sup> *Id.*

<sup>206</sup> 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).

<sup>207</sup> 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.<sup>208</sup>

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.<sup>209</sup>

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.<sup>210</sup> 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

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<sup>208</sup> See USFWS Ex. 5, pp. 2, 28–36.

<sup>209</sup> USFWS Ex. 5, pp. 3, 32–33, 35, 37–45; Tr. 266–270, 273–281, 299–301, 433–435.

<sup>210</sup> USFWS Ex. 5, p. 3.

periods.<sup>211</sup> Using the pumpage inventories for this time period, USFWS estimated the sustainable groundwater withdrawals to be 9,318 afa.<sup>212</sup>

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.<sup>213</sup>

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.<sup>214</sup>

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.<sup>215</sup>

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<sup>211</sup> USFWS Ex. 5, pp. 3, 37; Tr. 269–270, 433–435.

<sup>212</sup> USFWS Ex. 5, pp. 3, 36–38; Tr. 268–270.

<sup>213</sup> See USFWS Ex. 5, pp. 3–4, 38–39; Tr. 272–273.

<sup>214</sup> 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.

<sup>215</sup> 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.<sup>216</sup> Bedroc submitted an undated rebuttal report signed by Derek Muaina, General Counsel, and a closing statement.<sup>217</sup> Bedroc presented Jay Dixon as its expert to give a presentation and to discuss the rebuttal report.<sup>218</sup> 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).<sup>219</sup> 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.<sup>220</sup>

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.<sup>221</sup>

To show the hydraulic disconnect, Bedroc presented geologic information demonstrating its unique location.<sup>222</sup> 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.<sup>223</sup> 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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<sup>216</sup> 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.

<sup>217</sup> 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.

<sup>218</sup> See Tr. 1718–1719.

<sup>219</sup> Tr. 1719, 1741.

<sup>220</sup> Tr. 1718–1757, 1749–1750.

<sup>221</sup> 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.

<sup>222</sup> Bedroc Closing, p. 2.

<sup>223</sup> *Id.*; Tr. 1726–1733.

available.<sup>224</sup> SNWA challenged this calculation, pointing out that the estimated recharge could be as low as 130 acre-feet.<sup>225</sup>

Bedroc believes that it is capturing the recharge that would otherwise be lost to evapotranspiration.<sup>226</sup> Groundwater conditions at Bedroc's site show a rise in water levels between 2003 and 2006.<sup>227</sup> 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.<sup>228</sup> Between 2006 and 2011, Bedroc showed that groundwater levels had been relatively stable even though pumping by Bedroc was fairly constant.<sup>229</sup> 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.<sup>230</sup> 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.<sup>231</sup> This results in an estimate of 400 to 600 afa of groundwater that potentially could be captured every year without pulling groundwater from storage.<sup>232</sup> If pumping in this area exceeded ET, water levels to the east of Bedroc would be dropping.<sup>233</sup>

Bedroc considered the alluvial system at its location to be a separate aquifer from the carbonate-rock aquifer in the LWRFS.<sup>234</sup> 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.<sup>235</sup> SNWA testified similarly during the hearing.<sup>236</sup>

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<sup>224</sup> Tr. 1724–1725, 1755.

<sup>225</sup> Tr. 1755.

<sup>226</sup> Bedroc Closing, pp. 5–9.

<sup>227</sup> Tr. 1735.

<sup>228</sup> *Id.*

<sup>229</sup> Tr. 1735–1736.

<sup>230</sup> Tr. 1734, 1738.

<sup>231</sup> Tr. 1739.

<sup>232</sup> Tr. 1739.

<sup>233</sup> Tr. 1739. *See also* Bedroc Closing, p. 8.

<sup>234</sup> Tr. 1746.

<sup>235</sup> Bedroc Ex. 2, p. 5.

<sup>236</sup> 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.<sup>237</sup> Bedroc compared groundwater elevations over time in two alluvial wells, CSV-3009M and CSV-7, and showed an upward trend in groundwater elevations.<sup>238</sup> But, when comparing groundwater elevations of two monitoring wells in different sources, CSV-7 in the alluvium and CSV-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.<sup>239</sup> 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.<sup>240</sup> 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.<sup>241</sup> 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.<sup>242</sup>

### 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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<sup>237</sup> 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.

<sup>238</sup> Bedroc Closing, p. 12. *See also* Tr. 1736–1737, 1752.

<sup>239</sup> Tr. 1737–1738.

<sup>240</sup> Bedroc Ex. 2, pp. 2–4.

<sup>241</sup> *Id.*, p. 6.

<sup>242</sup> Tr. 1740.

County Commissioners submitted written public comment in addition to the closing argument submitted by LC-V.<sup>243</sup>

#### 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.<sup>244</sup>

**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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<sup>243</sup> 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.

<sup>244</sup> 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.<sup>245</sup>

**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.<sup>246</sup> Specifically, while the ESA is primarily a conservation program, a critical element of the conservation component seeks to encourage cooperation and coordination

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<sup>245</sup> See also NRS 534.030, NRS 534.110.

<sup>246</sup> 16 U.S.C. § 1531(a)–(b).

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

**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.<sup>249</sup> The term “person” is broadly defined to include the State and its instrumentalities.<sup>250</sup> “Take” encompasses actions that “harass, harm” or otherwise disturb listed species, including indirect actions that result in a take.<sup>251</sup> 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.<sup>252</sup> In *Strahan v. Cox*, 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.”<sup>253</sup> 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.”<sup>254</sup> At least three other circuits have held similarly.<sup>255</sup> In each case, “the regulatory entity purports to make lawful an activity that allegedly violates the ESA.”<sup>256</sup> 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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<sup>247</sup> 16 U.S.C. § 1531(c); 16 U.S.C. § 1536.

<sup>248</sup> 16 U.S.C.A. § 1536.

<sup>249</sup> 16 U.S.C.A. § 1538(g).

<sup>250</sup> 16 U.S.C.A. § 1532(13).

<sup>251</sup> 16 U.S.C.A. § 1532(19). The term “harm” is defined by regulation, 50 C.F.R. § 17.3 (1999).

<sup>252</sup> *Strahan v. Cox*, 127 F.3d 155 (1st Cir.1997), *cert denied* 525 U.S. 830 (1998).

<sup>253</sup> *Id.*, p. 163.

<sup>254</sup> *Id.*

<sup>255</sup> 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).

<sup>256</sup> *Loggerhead Turtle*, 148 F.3d at 1251.

**WHEREAS**, the use of water in Nevada is a regulated activity.<sup>257</sup> It is the responsibility of the State to manage the appropriation, use and administration of all waters of the state.<sup>258</sup> 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.<sup>259</sup> 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.<sup>260</sup>

**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.<sup>261</sup> 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.<sup>262</sup>

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<sup>257</sup> NRS 533.030; 533.325; 534.020.

<sup>258</sup> NRS 533.325; 533.024(1)(e); 534.020.

<sup>259</sup> USFWS Ex. 5, pp. 50–52.

<sup>260</sup> SNWA Ex. 8, pp. 6-2 through 6-3; SNWA Ex. 40, *Hatten, J.R., Batt, T.R., Scopettone, 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.

<sup>261</sup> Tr. 1127–1128.

<sup>262</sup> 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.<sup>263</sup> 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.<sup>264</sup> 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

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<sup>263</sup> NSE Ex. 236; SNWA Ex. 8, pp. 5-1 through 5-8.

<sup>264</sup> See NSE Ex. 1, p. 6.

close hydrologic connection<sup>265</sup> and shared source and supply of water in the LWRFS required joint management.<sup>266</sup>

**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.<sup>267</sup> 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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<sup>265</sup> 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”.

<sup>266</sup> See NSE Ex. 14, p. 12, 24.

<sup>267</sup> 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 LWRFS 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.<sup>268</sup> 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.<sup>269</sup> 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

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<sup>268</sup> 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.

<sup>269</sup> 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.<sup>270</sup> 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.<sup>271</sup> 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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<sup>270</sup> NPS Closing, pp. 3–5.

<sup>271</sup> 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,<sup>272</sup> the difference in observed water level elevations compared to those in adjacent carbonate-rock aquifer wells to the north and west,<sup>273</sup> and the absence of observed diagnostic hydrographic patterns and responses that define the uniquely close hydraulic connection that characterizes the LWRFS.<sup>274</sup>

**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.<sup>275</sup> 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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<sup>272</sup> 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.

<sup>273</sup> See, e.g., USFWS Ex. 5, p. 30.

<sup>274</sup> *Id.*, p. 17.

<sup>275</sup> *Id.*, pp. 19-24.



on discharge to the Warm Springs area.<sup>276</sup> 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.<sup>277</sup> The substantial similarity in observed water level elevation and water level response at EBM-3 compared to EH-4<sup>278</sup> and limitations in relying on poor resolution water level measurements for statistical or comparative analysis<sup>279</sup> 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.<sup>280</sup> 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.<sup>281</sup>

**WHEREAS**, numerous participants advocated to include Kane Springs Valley in the LWRFS basins.<sup>282</sup> Other participants advocated to exclude Kane Springs Valley.<sup>283</sup> 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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<sup>276</sup> See, Tr. 1622, 1624; NCA Closing.

<sup>277</sup> See, e.g., Tr. 1467–1469 CNLV presentation, slides 21–23; Tr. 1784–1786; NV Energy presentation, slides 32–33.

<sup>278</sup> NCA Closing, p. 18, Figure 3.

<sup>279</sup> NCA Closing, p. 8.

<sup>280</sup> See e.g., USFWS Ex. 5.

<sup>281</sup> See map of the LWRFS Hydrographic Basin as defined by this Order, Attachment A.

<sup>282</sup> See, e.g., NV Energy Closing, p. 2; NCA Closing, p. 10–14; MVWD Closing, p. 2–8.

<sup>283</sup> 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.<sup>284</sup> 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.<sup>285</sup> 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.<sup>286</sup> 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.<sup>287</sup> He also finds that while geologic mapping<sup>288</sup> 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.<sup>289</sup> After weighing all of the testimony and evidence relative to his criteria

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<sup>284</sup> LC-V Closing, p. 7.

<sup>285</sup> See, e.g., LC-V Closing, pp. 5–6; LC-V Ex. 1, pp. 3-3–3-4; CSI Closing, pp. 5–6.

<sup>286</sup> See Tr. 524–55. See, e.g., NPS presentation, slides 23–27.

<sup>287</sup> 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.

<sup>288</sup> 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.

<sup>289</sup> 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.<sup>290</sup> In the years since completion of the Order 1169 aquifer test, pumping from wells in the LWRFS has gradually declined.<sup>291</sup> Pumping in 2013-2014 averaged 12,635 afa; pumping in 2015-2017 averaged 9,318 afa.<sup>292</sup> Pumpage inventories for 2018 that were published after the completion of the hearing report a total of 8,300 afa.<sup>293</sup> 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.<sup>294</sup> 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.<sup>295</sup>

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<sup>290</sup> NSE Ex. 1, p. 4.

<sup>291</sup> *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.

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> *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.

<sup>295</sup> 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.<sup>296</sup> 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.<sup>297</sup> 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.<sup>298</sup> These rises have been attributed to efficient winter recharge that has occurred despite low cumulative precipitation.<sup>299</sup> 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.<sup>300</sup> 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,<sup>301</sup> or is still in a state of decline.<sup>302</sup> 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.<sup>303</sup> However, other

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<sup>296</sup> See USGS, 1993, *Drought*, US Geological Survey Open File Report 93-642, accessible at <https://bit.ly/93-642>, (last accessed June 6, 2020).

<sup>297</sup> SNWA Ex. 7, pp. 4-1-4-4.

<sup>298</sup> Tr. 577, 304-307.

<sup>299</sup> NPS Ex. 3, Appendix A.

<sup>300</sup> See, e.g., SNWA Closing, p. 11. NPS Closing, p. 4. See also Tr. 642, 644-45, 1545.

<sup>301</sup> MVWD Closing, pp. 8-9. See also NV Energy Closing, p. 3; CNLV Closing, pp. 5-7.

<sup>302</sup> SNWA Closing, pp. 11-12. NPS Closing, pp. 4-5.

<sup>303</sup> SNWA Ex. 7, pp. 5-7.

carbonate-rock aquifer wells located further away from the Warm Springs area such as CSVN-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.<sup>304</sup> 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,<sup>305</sup> 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,<sup>306</sup> 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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<sup>304</sup> *Id.*

<sup>305</sup> CSI Closing, p. 2.

<sup>306</sup> *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.<sup>307</sup> 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.<sup>308</sup> Others drew the same conclusion based on their review of the data and characterization of a heterogeneous system<sup>309</sup> or on weak connectivity between peripheral locations and the Warm Springs area.<sup>310</sup>

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.<sup>311</sup> They rebut the contention by others that spring flow is affected homogeneously by pumping within the LWRFS.<sup>312</sup> CSI used geophysical data to map a north-south trending subsurface feature that bisects Coyote Spring

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<sup>307</sup> See CNLV Ex. 3, pp. 45–47; GP-REP Ex. 1, pp. 2–3.

<sup>308</sup> NVE Ex. 1, pp. 8–9.

<sup>309</sup> See e.g. MBOP Ex. 2, p. 23; GP-REP Ex. 2, pp. 4–5. See also Technichrome Response.

<sup>310</sup> See e.g. NCA Closing, pp. 2–10; LC-V Closing, pp. 4–6; Bedroc Closing, pp. 9–11.

<sup>311</sup> CSI Closing, pp. 2–5.

<sup>312</sup> 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.<sup>313</sup> 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.<sup>314</sup> 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.<sup>315</sup>

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.<sup>316</sup> 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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<sup>313</sup> *Id.* See also CSI Ex. 1, pp. 31–40.

<sup>314</sup> MBOP Closing, p. 7.

<sup>315</sup> See e.g., SNWA Ex. 9, pp. 23–24.

<sup>316</sup> 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.<sup>317</sup> 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.<sup>318</sup> 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.<sup>319</sup>

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<sup>317</sup> See, e.g., CBD Ex. 3, p. 23; SNWA Ex. 7, p. 8-4; MVIC Ex. 1, p. 3.

<sup>318</sup> NSE Ex. 333.

<sup>319</sup> *Id.*

Flow in the Muddy River at the Moapa Gage has averaged approximately 30,600 afa since 2015,<sup>320</sup> which is less than the predevelopment baseflow of about 33,900.<sup>321</sup> 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.<sup>322</sup> 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.<sup>323</sup> 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.<sup>324</sup> 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.<sup>325</sup> 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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<sup>320</sup> NSE Ex. 211, *USGS 09416000 Muddy River Moapa 1914-2013*, Hearing on Interim Order 1303, official records of the Division of Water Resources.

<sup>321</sup> SNWA Ex. 7, p. 5-4.

<sup>322</sup> 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.

<sup>323</sup> USFWS Ex. 5, p. 3; NCA Ex. 1, p. 19.

<sup>324</sup> CSI Closing, p. 2.

<sup>325</sup> CNLV Ex. 3, p. 2.

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

**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<sup>328</sup> even though total precipitation has been below average and since 2006 has been described as a drought.<sup>329</sup> 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.<sup>330</sup> 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 development 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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<sup>326</sup> NVE Ex. 1, p. 8.

<sup>327</sup> SNWA Ex. 7, p. 8-4.

<sup>328</sup> NPS Ex. 3, Appendix A. *See also* Tr. 304–307, 577.

<sup>329</sup> 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.

<sup>330</sup> 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.<sup>331</sup> However, the effects of pumping from different locations within the LWRFS on discharge at the Warm Springs area is not homogeneous.<sup>332</sup> 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.<sup>333</sup> 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.<sup>334</sup> 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.<sup>335</sup> 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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<sup>331</sup> See SNWA Closing, pp. 10, 16; MVIC Closing, p. 6.

<sup>332</sup> See, e.g., SNWA Closing, p. 10.

<sup>333</sup> CNLV Closing, p. 8; Tr. 1456–1457, 1458. See also SNWA Closing, p. 16; MVWD Closing, p. 11; MVIC Closing, p. 6.

<sup>334</sup> CNLV Closing, pp. 8–10; Tr. 1457, 1458; NV Energy Closing, p. 4; MVIC Closing, p. 6.

<sup>335</sup> 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.

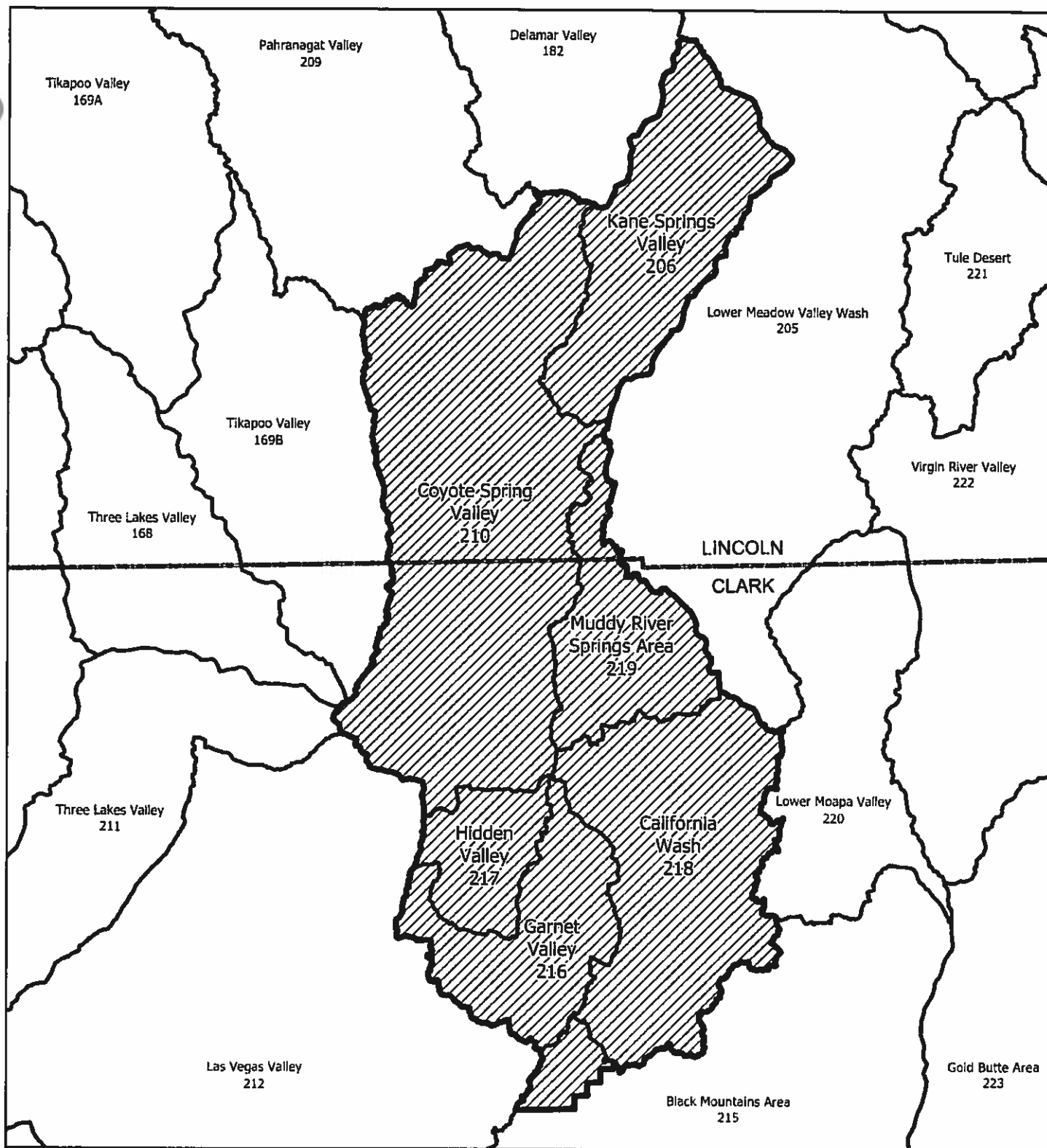
State Engineer

Dated at Carson City, Nevada this

15th day of June, 2020.



## **ATTACHMENT A**

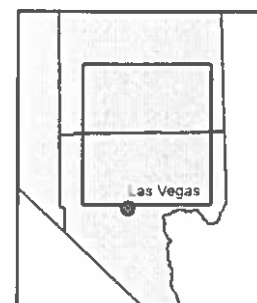


Location and Extent of LWRFS Hydrographic Basin,  
Clark and Lincoln Counties, Nevada

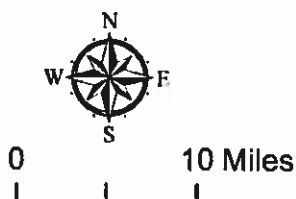
State of Nevada  
Department of Conservation and  
Natural Resources  
Office of the State Engineer  
Division of Water Resources

Tim Wilson, P.E.  
State Engineer

June 2020

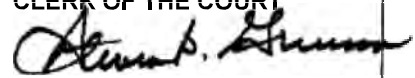


- LWRFS Boundary
- Hydrographic Basin Boundary
- County Boundary



# EXHIBIT 3

# EXHIBIT 3



CASE NO: A-20-816761-C  
Department 19

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20 **DISTRICT COURT**  
21 **CLARK COUNTY, NEVADA**

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

24 Petitioners,

25 vs.

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

Respondent.

Case No.

Dept. No.

**PETITION FOR JUDICIAL REVIEW OF  
ORDER 1309**

Petitioners SOUTHERN NEVADA WATER AUTHORITY ("SNWA") and LAS VEGAS VALLEY WATER DISTRICT ("LVVWD"), by and through its counsel, PAUL G. TAGGART, ESQ. and TIMOTHY D. O'CONNOR, ESQ., of the law firm of TAGGART & TAGGART, LTD., hereby files this Petition for Judicial Review of Order 1309 issued by Respondent TIM WILSON, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND

1 NATURAL RESOURCES on June 15, 2020, attached hereto as Exhibit 1. This Petition for Judicial  
2 Review is filed pursuant to NRS 533.450(1).

3 **JURISDICTIONAL STATEMENT**

4 Under NRS 533.450(1), any order or decision of the State Engineer is subject to judicial review  
5 “in the proper court of the county in which the matters affected or a portion thereof are situated.” The  
6 real property to which the water at issue in this appeal is appurtenant lies within Clark County, Nevada;  
7 therefore, the Eighth Judicial District Court of the State of Nevada in and for Clark County is the proper  
8 venue for judicial review.

9 Further, the subject matter of the appeal involves decreed waters of the Muddy River Decree.  
10 Under NRS 533.450(1), “on stream systems where a decree of court has been entered, the action must  
11 be initiated in the court that entered the decree.” This court has proper jurisdiction of the Muddy River  
12 Decree, *Muddy Valley Irrigation Company, et al, vs. Moapa Salt Lake Produce Company, et al*, Case  
13 No. 377, which was entered in the Tenth Judicial District of the State of Nevada, in and for the County  
14 of Clark in 1920.<sup>1</sup>

15 **FACTUAL BACKGROUND**

16 **I. SNWA and LVVWD have substantial interests in the Lower White River Flow System.**

17 SNWA is a not-for-profit political subdivision of the State of Nevada consisting of seven  
18 member agencies (local municipalities and political subdivisions in Clark County) and is a wholesale  
19 water provider serving approximately 74 percent of Nevada’s population. SNWA’s water resource  
20 portfolio includes approximately 20,000 afa of senior Muddy River decreed water rights, 9,000 afa of  
21 groundwater in Coyote Spring Valley, and 2,200 afa of groundwater in Garnet and Hidden valleys.  
22 SNWA conducted the Order 1169 pumping test and is one of the primary participants in the 2006  
23 Memorandum of Agreement concerning the Moapa dace. Clark County designated SNWA’s largest  
24 member purveyor, LVVWD, to be the operating entity for the Coyote Springs Water Resources General  
25 Improvement District.

26 //

27 //

28 <sup>1</sup> In 1920, the Tenth Judicial District consisted of Clark County and Lincoln County. In 1945, Clark County was designated  
as the Eighth Judicial District.

## 1     **II.     Order 1169 Pumping Tests**

2           On March 8, 2002, the State Engineer issued Order 1169 to hold in abeyance all pending  
3 groundwater applications filed in Coyote Spring Valley, Black Mountains Area, Garnet Valley, Hidden  
4 Valley, Muddy River Springs Area, and Lower Moapa Valley. The California Wash was later added to  
5 the study area, making Order 1169 apply to the entire Lower White River Flow System ("LWRFS").  
6 The purpose of Order 1169 was to require a large pumping study to determine whether pumping in the  
7 LWRFS would have detrimental impacts on existing water rights or the environment.

8           In 2006, a Memorandum of Agreement ("MOA") was signed among the Southern Nevada Water  
9 Authority ("SNWA"), Coyote Springs Investments ("CSI"), the United States Fish and Wildlife Service  
10 ("USFWS"), the Moapa Valley Water District ("MVWD"), and the Moapa Valley Band of Paiute  
11 Indians ("MBOP"). The MOA was created to ensure water usage in the LWRFS did not interfere with  
12 measurable progress toward protection and recovery of the endangered Moapa Dace and its habitat. The  
13 MOA contained triggers and actions for the various parties to take if flow levels in the Muddy River  
14 declined. Through the MOA, all parties recognized that pumping in Coyote Spring Valley could have  
15 a detrimental impact on existing water rights and the environment.

16           The State Engineer issued Order 1169A on December 21, 2012, in which he declared that the  
17 Order 1169 pump test was complete. Ultimately, the State Engineer concluded that the pumping had a  
18 direct connection to the fully appropriated Muddy River which is part of the source of water for the  
19 endangered Moapa Dace, and the decreed senior rights of the Muddy River. The State Engineer issued  
20 Rulings 6254-6258 on January 29, 2014, in which he denied all pending water right applications in the  
21 LWRFS basins. The State Engineer ruled in Rulings 6254-6258 that pumping of existing rights in the  
22 1169 pump tests measurably reduced flows in headwater springs of the Muddy River. While the State  
23 Engineer denied the pending applications, he took no action to limit or reduce the existing water rights.

## 24     **III.     Public Workshops**

25           Starting in 2018, the State Engineer held several public workshops review the status of  
26 groundwater use and recovery following the conclusion of the State Engineer Order 1169 pumping tests.  
27 The purpose of the workshops was to update the public on development in the LWRFS, address concerns  
28 relating to the effect of groundwater pumping, and to provide an opportunity to comment on how to

1 proceed in developing the water resources in the LWRFS.<sup>2</sup> In the 2018 Notice of Public Workshop, the  
2 State Engineer noted that pumping only 10,200 afa of the over 50,000 afa of permitted rights during the  
3 Order 1169 pumping test “yielded an unacceptable loss in spring flow and aquifer storage within the  
4 LWRFS.” The State Engineer found that “only a small portion of the permitted water rights in the  
5 LWRFS may be fully developed without negatively affecting the endangered Moapa Dace and its habitat  
6 or the senior decreed rights on the Muddy River.”<sup>3</sup>

7 As a result of the workshops, on August 30, 2018, the State Engineer drafted a proposed order.  
8 On December 14, 2018, the State Engineer held a hearing on the proposed order. The State Engineer  
9 received comments on the proposed order. On January 11, 2019, the State Engineer issued Interim  
10 Order 1303 as a result of the workshop and proposed order process. The State Engineer continued to  
11 hold several more workshops and meetings relating to the potential development of a conjunctive  
12 management plan on the LWRFS.<sup>4</sup>

#### 13 **IV. Order 1303**

14 On January 11, 2019, the State Engineer issued Interim Order 1303 to obtain stakeholder input  
15 on four specific factual matters: 1) the geographic boundary of the LWRFS, 2) aquifer recovery since  
16 the 1169 pump test, 3) long-term annual quantity that may be pumped from the LWRFS, and 4) effects  
17 of moving water rights between the carbonate and alluvial system to senior water rights on the Muddy  
18 River.<sup>5</sup> After factual findings were made on those questions, the State Engineer was to evaluate  
19 groundwater management options for the Lower White River Flow System (“LWRFS”).<sup>6</sup>

20 In Order 1303, the State Engineer made sound factual findings based on the Order 1169 pumping  
21 test. He found that groundwater rights within the LWRFS should be jointly managed because of a  
22 “unique” and “direct hydraulic connection” among basins that encompass over 1,100 square miles. He  
23

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24 <sup>2</sup> June 14, 2018, Notice of Public Workshop at 2. Available at <http://water.nv.gov/news.aspx?news=LWRFS>  
(Public Meetings, July 24, 2018). Last visited 6/17/2020.

25 <sup>3</sup> *Id.*

26 <sup>4</sup> See LWRFS Working Group Meeting Agenda for February 6, 2019, and Notice of Public Workshop on July 17, 2019, dated  
June 10, 2019. Available at <http://water.nv.gov/news.aspx?news=LWRFS> (Public Meetings). Last visited 6/17/2020.

27 <sup>5</sup> Exhibit 2.

28 <sup>6</sup> Exhibit 3 at 2 (“The State Engineer directed the participants to limit the offer of evidence and testimony to the salient  
conclusions, including directing the State Engineer and his staff to the relevant data, evidence and other information  
supporting those conclusions. The State Engineer further noted that the hearing on the Order 1303 reports was the first step  
in determining to what extent, if any, and in what manner the State Engineer would address future management decisions,  
including policy decisions relating to the [LWRFS] basins.”)

1 also determined water was not available for additional applications and denied all the pending  
2 applications in the LWRFS through Rulings 6254-6260. The State Engineer also found that:

- 3 1. pumping has a direct interrelationship with the flow of the decreed and  
4 fully appropriated Muddy River, which are the most senior rights;
- 5 2. the Muddy River had a pre-development flow of approximately 34,000  
6 acre-feet annually;
- 7 3. pumping from the test caused “sharp declines in groundwater levels and  
8 flows in the Pederson and Pederson East springs,” and throughout the  
LWRFS; and
4. pumping in the LWRFS must be less than occurred during the test,  
otherwise pumping will conflict with senior Muddy River rights or  
adversely impact the Moapa dace.<sup>7</sup>

9 Order 1303 was issued to solicit input from experts on discrete issues to build on these foundational  
10 findings from Rulings 6254-6260 – not to “start over.”

11 On May 13, 2019, the State Engineer amended Order 1303 and modified certain deadlines for  
12 filing reports. On July 25, 2019, the State Engineer issued a Notice of Pre-Hearing Conference. On  
13 August 23, 2019, the State Engineer held a prehearing conference. At the prehearing conference,  
14 Hearing Officer Fairbank unequivocally stated that “the purpose of the hearing is not to resolve or  
15 address allegations of conflict between groundwater pumping within the LWRFS and Muddy River  
16 decreed rights.”<sup>8</sup> On August 23, 2019, the State Engineer issued a Notice of Hearing, and again clarified  
17 the limited scope of the hearing.

18 In July and August 2019, reports and rebuttal reports were submitted discussing the four matters  
19 set forth in Order 1303. Several parties filed objections to witnesses and evidence. Most of the  
20 objections were related to the scope of the topics in the submitted evidence. On August 23, 2019, the  
21 State Engineer issued an Order on Objections to Witnesses and Evidence. The State Engineer agreed  
22 that “the evidence presented in the hearing is to be limited to the four issues identified in the Notice of  
23 Hearing.” The State Engineer allowed all evidence to be presented, but again warned that the “scope  
24 of the testimony shall be limited to the four issues identified in Order 1303” and cautioned that while  
25 some evidence could be submitted outside the specific scope but that the State Engineer “may order a  
26 line of questioning to cease or to remain limited to the relevant issues that are the subject of the hearing.”<sup>9</sup>

27  
28 <sup>7</sup> Exhibit 2 at 7-11.

<sup>8</sup> Exhibit 4 at 12:6-15.

<sup>9</sup> August 23, 2019, Order on Objections.



1 Between September 23, 2019, and October 4, 2019, the State Engineer held a hearing on the  
2 reports submitted under Order 1303. As part of that hearing, SNWA offered very limited evidence of  
3 conflicts with its senior water rights.<sup>10</sup> SNWA repeatedly indicated that this evidence was limited  
4 because of the prior directions of the State Engineer, and because the question of conflicts was to be  
5 addressed at a latter administrative stage of the proceedings.<sup>11</sup>

6 **V. Order 1309**

7 On June 15, 2020, the State Engineer issued Order 1309. In Order 1309, the State Engineer  
8 determined that “reductions in flow that have occurred because of groundwater pumping in the  
9 headwaters basins is not conflicting with Decreed rights.”<sup>12</sup>

10 **GROUNDNS FOR THE PETITION**

11 The third factual inquiry the State Engineer sought input on was: “The long-term annual quantity  
12 of groundwater that may be pumped from the Lower White River Flow System, including the relationships  
13 between the location of pumping on discharge to the Muddy River Springs, and the capture of Muddy River  
14 flow.”<sup>13</sup> The State Engineer specifically limited the evidence he would consider on this matter, stating  
15 that this hearing was not to address allegations of conflict.<sup>14</sup> During a prehearing conference, the State  
16 Engineer’s staff stated that

17 the purpose of the hearing is not to resolve or address allegations of  
18 conflict between groundwater pumping within the LWRFS and Muddy  
19 River decreed rights. That is not the purpose of this hearing and that’s not  
20 what we are going to be deciding at this point in time. The purpose of the  
21 hearing is to determine what the sustainability is, what the impact is on  
decreed rights, and then addressing and resolving allegations of conflict  
should that be a determination that will be addressed in, at a future point  
in time.<sup>15</sup>

22 Thus, the majority of the evidence submitted related to the capture of Muddy River water by junior  
23 groundwater pumpers. The State Engineer agreed in Order 1309 that current pumping is capturing  
24 Muddy River flows.<sup>16</sup>

25 <sup>10</sup> See e.g., Hr’g on Order 1303 Tr. vol. 5, 942 (Burns), SNWA Ex.7 at 7-5 to 7-6. (SNWA has suffered a loss of approximately  
26 12,040 afa over the last 10 years, equating to over \$2 million in costs for replacement supplies.)

<sup>11</sup> Hr’g on Order 1303 Tr. 2019-09-07 at 1049:20-1050:3(Taggart); Tr. 2019-09-27 at 1072:9-23(Pellegrino).

27 <sup>12</sup> Exhibit 1 at 61.

<sup>13</sup> Exhibit 2 at 13.

28 <sup>14</sup> Exhibit 4 at 12:6-15.

<sup>15</sup> Exhibit 4 at 12:6-15.

<sup>16</sup> Exhibit 1 at 61.

1           However, the State Engineer incorrectly went beyond the scope of the hearing to determine that  
2   “capture or potential capture of flows of the waters of a decreed system does not constitute a conflict.”<sup>17</sup>  
3   The State Engineer stated that “there is no conflict as long as the senior water rights are served.”<sup>18</sup> The  
4   State Engineer then performed a coarse calculation to determine the consumptive use needs of the senior  
5   decreed rights holders and concluded that the capture of 8,000 acre-feet of Muddy River flows by junior  
6   groundwater users would not deprive the seniors of any portion of their water rights.<sup>19</sup> The calculation  
7   did not include consideration of water losses through the river system, such as losses in conveying the  
8   water or losses on water reservoirs.

9           By making these findings in Order 1309, the State Engineer violated the due process rights of  
10   SNWA and other senior water right owners because he indicated before the hearing that he would not  
11   be making a finding on this point, and evidence on this point would not be accepted. He also acted  
12   arbitrarily and capriciously because he ignored the only evidence that existed related to conflicts  
13   (SNWA’s), and then applied an erroneous analysis that no party had an opportunity to review or  
14   comment on. Further, the State Engineer’s method is contrary to law – particularly the Muddy River  
15   Decree.

16           SNWA owns and leases substantial water rights on the Muddy River and the capture of flow by  
17   junior groundwater pumping has deprived SNWA of use of its senior decreed water rights. Prior to  
18   groundwater development in the LWRFS, Muddy River flows were approximately 34,000 afa, and every  
19   acre-foot is apportioned in the Decree.<sup>20</sup> Since groundwater development began, Muddy River flows  
20   have declined by over 3,000 afa. This is an impermissible conflict with existing rights that can only  
21   continue if effective mitigation occurs for the impacts to senior water rights holders.

22           The difference between predevelopment flows and annual post-development flows represents  
23   the impacts from pumping, and the conflict with SNWA’s rights, because SNWA is being deprived of  
24   the full beneficial use of its senior water rights at a significant cost to the organization.<sup>21</sup> The State  
25   Engineer failed to consider the impacts to non-irrigation uses and failed to consider direct evidence of

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26   <sup>17</sup> Exhibit 1 at 61

27   <sup>18</sup> Exhibit 1 at 60.

28   <sup>19</sup> Exhibit 1 at 60-61.

29   <sup>20</sup> Exhibit 2 at 7.

30   <sup>21</sup> Hr’g on Order 1303 Tr. vol. 5, 942 (Burns), SNWA Ex.7 at 7-5 to 7-6. (SNWA has suffered a loss of approximately 12,040  
afa over the last 10 years, equating to over \$2 million in costs for replacement supplies.)

1 conflict outside his hypothetical analysis. Current pumping has already conflicted with existing rights.  
2 Continued pumping at the current levels will only continue to conflict with existing rights and harm  
3 SNWA.

4 **CONCLUSION**

5 For the foregoing reasons, and for others that may be discovered and raised during the pendency  
6 of this Petition for Judicial Review, LVVWD and SNWA request that the Court order the State Engineer  
7 to amend Order 1309 to remove or strike findings made therein regarding conflicts with senior water  
8 rights. LVVWD and SNWA do not seek relief from any other portion of Order 1309.

9 DATED this 17 day of June, 2020.

10 TAGGART & TAGGART, LTD.

11  
12 By: 

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**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I hereby certify that I am an employee of TAGGART & TAGGART, LTD., and that on the 18<sup>th</sup> day of June, 2020, I served, or caused to be served, a true and correct copy of the foregoing as follows:

[X] By **HAND-DELIVERY**:

Tim Wilson P.E., State Engineer  
Nevada Division of Water Resources  
Department of Conservation and Natural Resources  
901 South Stewart Street, Suite 2002  
Carson City, Nevada 89701

[ X ] By **U.S. POSTAL SERVICE, CERTIFIED, RETURN RECEIPT REQUESTED**, by placing a true and correct copy of the foregoing document in an envelope, with postage prepaid, in Carson City, Nevada, addressed as follows:

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15 DATED this 18th day of June, 2020.

16  
17 

18 Employee of TAGGART & TAGGART, LTD.  
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EXHIBIT INDEX

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4.	Transcript of Proceedings, Public Hearing, Pre-Hearing Conference, Thursday, August 8, 2019, pp. 11-13.	8

EXHIBIT 4

EXHIBIT 4





CASE NO: A-20-817765-P  
Department 1

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ATTORNEYS FOR: PETITIONER COYOTE SPRINGS INVESTMENT, LLC

DISTRICT COURT  
CLARK COUNTY, NEVADA

PETITION FOR JUDICIAL REVIEW OF NEVADA STATE ENGINEER ORDER 1309	)	CASE NO.
	)	DEPT. NO.
COYOTE SPRINGS INVESTMENT, LLC	)	PETITION FOR JUDICIAL REVIEW OF NEVADA STATE ENGINEER ORDER 1309
	)	
Petitioner,	)	
v.	)	

1 TIM WILSON, State Engineer, State )  
2 of Nevada, Department of )  
3 Conservation and Natural )  
4 Resources, Division of Water )  
Resources, )  
Respondent. )

---

5  
6 1. Petitioner Coyote Springs Investment, LLC ("CSI"), by and through the  
7 undersigned counsel, hereby petitions this Court for judicial review of a June 15, 2020  
8 decision entitled "Order # 1309 DELINEATING THE LOWER WHITE RIVER FLOW  
9 SYSTEM HYDROGRAPHIC BASIN WITH THE KANE SPRINGS VALLEY BASIN (206),  
10 COYOTE SPRING VALLEY BASIN (210). A PORTION OF BLACK MOUNTAINS AREA  
11 BASIN (215), GARNET VALLEY BASIN (216), HIDDEN VALLEY BASIN (217),  
12 CALIFORNIA WASH BASIN (218), AND MUDDY RIVER SPRINGS AREA (AKA  
13 UPPER MOAPA VALLEY) BASIN (219) ESTABLISHED AS SUB-BASINS,  
14 ESTABLISHING A MAXIMUM ALLOWABLE PUMPING IN THE LOWER WHITE RIVER  
15 FLOW SYSTEM WITHIN CLARK AND LINCOLN COUNTIES, NEVADA, AND  
16 RESCINDING INTERIM ORDER 1303" by Tim Wilson, Nevada State Engineer ("Order  
17 1309"). A true and correct copy of Order 1309 is attached as Exhibit "A".

18 2. In Order 1309, Nevada State Engineer ("State Engineer"), Tim Wilson, ordered  
19 the delineation of six, and part of a seventh, previously separately delineated  
20 hydrographic basins, into a single hydrographic basin called the "Lower White River  
21 Flow System", *and ordered* designated a maximum quantity of 8000 acre-feet-annually  
22 of groundwater that may be pumped from the Lower White River Flow System  
23 Hydrographic Basin, *and ordered* that the 8000 acre-foot maximum may be reduced if it  
24 is determined that pumping adversely affects the Moapa dace, *and ordered* that the  
25 previously issued moratorium regarding any final subdivision submitted to the State  
26 Engineer for review set forth in State Engineer Interim Order 1303 dated January 11,

1 2019 ("Rescinded Order 1303") be terminated, *and ordered* that all other matters set  
2 forth in Rescinded Order 1303 that are not specifically addressed in Order 1309 were  
3 rescinded.

#### 4 JURISDICTION AND PARTIES

5 3. This Court has jurisdiction to address this petition pursuant to N.R.S. 533.450(1),  
6 which provides that "any person feeling aggrieved by any order or decision of the State  
7 Engineer, . . . may have the same reviewed by a proceeding for that purpose, insofar as  
8 may be in the nature of an appeal, which must be initiated in the proper court of the  
9 county in which the matters affected or a portion thereof are situated. . . ." Coyote  
10 Springs Investment LLC, master developer of the Coyote Springs Development, which  
11 is subject to the State Engineer's June 15, 2020 decision, has over 21,000 acres of fee-  
12 owned land for development in Lincoln County, Nevada, and holds a leasehold interest  
13 to over 7,500 acres of conservation land in Lincoln County, Nevada; and over 6,800  
14 acres of fee-owned land for development in Clark County, Nevada, and holds a  
15 leasehold interest to over 6,200 acres of conservation land in Clark County, Nevada.

16 4. CSI is a limited liability company, formed under the laws of the State of Nevada,  
17 and is the original developer of Coyote Springs Development in both Lincoln and Clark  
18 Counties, Nevada.

19 5. Tim Wilson is, as of the date of this Petition, the State Engineer, Nevada Division  
20 of Water Resources, is an agent of the State of Nevada, and is appointed by and  
21 responsible to the Director of the State Department of Conservation and Natural  
22 Resources ("Department"). NRS 532.020. The State Engineer issued the June 15,  
23 2020 decision, Order 1309, which is the subject of this Petition.

## FACTS

6. From water rights purchased in 1998, CSI owns 4600 acre feet annually ("afa") of certificated and permitted Nevada water rights in the Coyote Spring Valley Hydrographic Basin. CSI's groundwater rights in the Coyote Spring Valley are evidenced as follows: CSI owned 1500 afa under Permit 70429 (Certificate 17035) of which 1250 afa was conveyed to the Clark County Coyote Springs Water Resources General Improvement District ("CS-GID") to be used for the Coyote Springs Development, with the remaining 250 afa still owned by CSI. CSI also owned 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 owned 1600 afa under Permit 70430 of which 460 afa was relinquished as approved and permitted by the State Engineer and accepted by the United States Fish and Wildlife Service ("USFWS") as required mitigation arising from the Coyote Springs Development and for the protection of the Moapa dace fish, thus leaving 1140 afa that continues to be owned by CSI. Further, CSI continues to own 500 afa under Permit 74095. Thus, the total amount of water permits held by CSI as of the date of this Petition is 2140 afa, and the total amount of water rights held by the CS-GID is 2000 afa all of which is to be used for the Coyote Springs Development<sup>1</sup>, with 460 afa relinquished by CSI for protection of the endangered Moapa dace. CSI also owns a few additional rights in the LWRFS Hydrographic Basin outside of the Coyote Springs Valley. Furthermore, through a purchase and option agreement dated October 17, 2005, and as amended from time to time ("KS-Agreement"), CSI purchased from Lincoln County Water District ("LCWD")

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<sup>1</sup> And pursuant to that certain Amended and Restated Coyote Springs Water and Wastewater Multi-Party Agreement, dated July 7, 2015, regarding operation and management of the CS-GID, if the Coyote Springs Development ceases to develop, then the water rights revert to CSI. Meaning, the CS-GID executes deeds and other related instruments necessary to effectuate that reversion.

1 and Vidler Water Company ("Vidler") 246.96 acre feet of permitted water rights in Kane  
2 Springs Valley and a contractual commitment from Lincoln County Water District to  
3 provide CSI with 253.04 afa that CSI purchased and dedicated to Lincoln County Water  
4 District (for an available total quantity of water equal to 500 afa) as evidenced by  
5 Permits 72220 and 72221. Further subject to the KS-Agreement, CSI holds an option to  
6 purchase from Vidler, an additional 500 afa of permitted Kane Springs Valley water  
7 rights.

8 7. Directly relevant to CSI's interests, the total amount of water rights affected by  
9 the State Engineer's decision is 4140 afa in Coyote Spring Valley and 1000 afa in the  
10 Kane Spring Valley, in Clark and Lincoln Counties, Nevada, respectively.

11 8. The Southern Nevada Water Authority ("SNWA"), USFWS, CSI, Moapa Band of  
12 Paiutes, and the Moapa Valley Water District ("MVWD") entered into a Memorandum of  
13 Agreement dated April 20, 2006 and as amended from time to time (as amended, the  
14 "2006 MOA") as a result of the State Engineer's Order 1169 and their respective  
15 proposed development needs. The purpose of the 2006 MOA was to protect Muddy  
16 River's flow rates for protection of the Moapa dace initially during the Order 1169 pump  
17 test and then beyond. The 2006 MOA set forth certain rights and obligations of the  
18 parties to the agreement. Among other things, CSI agreed to dedicate ten percent of its  
19 initial water rights (4600 afa), which was a quantity of 460 afa, to the survival and  
20 recovery of the Moapa dace pursuant to Section 3(a) of the MOA. The Biological  
21 Opinion issued by USFWS described in File Nos. 84320-2008-F-0113 and 84320-2008-  
22 I-0499, dated October 22, 2008] confirm CSI's obligation to dedicate this water as  
23 appropriate mitigation for any take of the Moapa dace related to the development of  
24 Coyote Springs community. USFWS determined that the best use of this 460 afa of  
25 dedicated water would be for it to remain in the groundwater system in reliance on the  
26 premise that the water makes its way in the underground system to the Muddy River

1 and the Muddy River Springs area, and thus also eventually to Lake Mead. In  
2 accordance with Nevada water law, CSI recorded an Affidavit to Relinquish Water  
3 Rights in Clark County and Lincoln County. The Affidavits were filed with the State  
4 Engineer on May 24, 2016. These documents ensure the 460 afa will not be pumped  
5 and remain in the State Engineer's count of appropriated water rights to prevent re-  
6 appropriation in the future.

7 9. Since just before the year 2000, over 20 years ago, CSI commenced  
8 development efforts of its property in the Coyote Spring Valley. CSI's first development  
9 agreement in Clark County was dated September 2004, and since that time CSI has  
10 prepared and processed permits and approvals for community infrastructure, maps and  
11 plans, and recorded maps. CSI's development efforts include zoning entitlements for  
12 golf course, resort, residential, multi-family, commercial, industrial, gaming enterprise,  
13 among others. These efforts include recorded large parcel, parent final maps for  
14 purpose of subsequent residential subdivision maps, all of which were for the  
15 development of the community and master plan known as the Coyote Springs  
16 Development. These efforts were engaged with many agencies, including, without  
17 limitation, Clark County, Lincoln County, the Las Vegas Valley Water District  
18 ("LVVWD"), Lincoln County Water District, Clark County Water Reclamation District,  
19 Nellis Air Force Base, Nevada Department of Wildlife, USFWS, US Army Corp. of  
20 Engineers, Bureau of Land Management, Clark County Regional Flood Control District,  
21 Nevada Department of Transportation, Nevada Division of Environmental Protection,  
22 Department of Air Quality, Southern Nevada Water Authority, Southern Nevada Health  
23 District, and the State Engineer. CSI holds and has been issued, a variety of permits,  
24 entitlements, bonds, improvements, maps and plans.

25 10. Based on those permits, entitlements, bonds, and approved plans, CSI  
26 constructed significant infrastructure improvements to support the Coyote Springs

1 Development. CSI constructed a Jack Nicklaus Signature Golf Course ("Golf Course") at  
2 a cost of \$40,000,000. The Golf Course was constructed to support future residential  
3 development and the overall Coyote Springs Development; but for the full development  
4 of Coyote Springs Development pursuant to its entitlements, the Golf Course would not  
5 have been built as a stand-alone business; golf courses are built to sell homes. The  
6 Golf Course was designed to also serve as natural storm water drainage for the Coyote  
7 Springs Development.

8 11. The Golf Course opened in May 2008, and has operated since opening at a  
9 monetary loss, and operations at a loss continue to the present. The Golf Course has  
10 just over 25,000 rounds of golf played per year. Prior to COVID-19 over 60 full time  
11 employees were employed; post-COVID-19, there remain just 25 personnel employed  
12 in connection with the Coyote Springs Golf Club and the Coyote Springs Development.  
13 Many more employees would be activated and employed if CSI were allowed to  
14 proceed with its entitled and permitted development efforts.

15 12. CSI's many improvements for the Coyote Springs Development include the  
16 \$40,000,000 Jack Nicklaus Signature Golf Course; a 325 acre flood control detention  
17 basin (subject of a dam permit issued and renewed by the State Engineer); a  
18 groundwater treatment plant permitted by Nevada Department of Environmental  
19 Projection and to specifications required by the LVVWD and the CS-GID which includes  
20 two 1,000,000 gallon water storage tanks designed and constructed to culinary water  
21 standards; a wastewater treatment plant permitted by the Nevada Department of  
22 Environmental Protection and to specifications required by the LVVWD and the CS-GID  
23 and initial package treatment plant; and a 3-megawatt electrical substation and  
24 appurtenant equipment operated by Lincoln County Power District.

25 13. The Coyote Springs Development drilled and operated four groundwater  
26 production wells, two of which are fully equipped to LVVWD and CS-GID standards,

1 municipal water wells, all of which have been overseen, approved, and permitted by the  
2 State Engineer. The two wells equipped to municipal standards were done so at a cost  
3 greater than Twenty Million Dollars (\$20,000,000). Based on, and in reliance on these  
4 approvals, and other approvals by the relevant government agencies, including the  
5 State Engineer, CSI constructed miles of roadways, curbs, and installed associated  
6 underground utilities, including water, sewer, gas and electricity in the Coyote Springs  
7 Development. The total cost of construction and acquisitions for these improvements  
8 and associated processing is well over Two Hundred Million Dollars (\$200,000,000).

9 14. CSI relied upon the approvals granted by the relevant agencies, some of which  
10 are listed above, but most particularly the State Engineer, to proceed with these  
11 construction projects. CSI, in particular has relied on the approvals of the State  
12 Engineer recognizing that CSI must use its certificated and permitted water rights in the  
13 Coyote Springs Development in order to support operation of the existing and operating  
14 golf course and related facilities, and all of its residential subdivision development and  
15 construction efforts in order to open a homebuilding center to the public and sell  
16 residential homes, among other customary southern Nevada master planned  
17 community commercial and public facility support amenities.

18 15. Eighteen years ago, prior State Engineer Hugh Ricci issued an order which held  
19 in abeyance certain applications pending or to be filed for additional water rights in the  
20 Coyote Spring Valley Basin 210 (and other basins), known as Order 1169 ("Order  
21 1169"). At the time of Order 1169, various parties, including CSI, MVWD, SNWA,  
22 among others, had water right applications pending for determination. The State  
23 Engineer determined there was insufficient information and data concerning the deep  
24 carbonate aquifer underlying the hydrographic basins in question. Based on the need  
25 for additional information and data, the State Engineer exercised his authority under  
26 NRS 533.368 to order a hydrological study of the basins in question. In taking this step,



1 the State Engineer studied available water to issue a permit for pending applications,  
2 and in so doing the State Engineer determined that certain applicants, including CSI,  
3 already had a vested interest in water rights permitted from the carbonate aquifer  
4 system, thereby acknowledging the existence and validity of CSI's 4600 afa referenced  
5 in paragraph 6 above. The study requested was to occur over a five-year period and  
6 fifty-percent (50%) of the water rights then permitted in the Coyote Springs Valley Basin  
7 were to be pumped for at least two consecutive years. The applicants, which included  
8 CSI, were to pay for the studies and were to file a report with the State Engineer within  
9 180 days of the end of the fifth (5<sup>th</sup>) consecutive year following commencement of the  
10 test.

11 16. CSI, SNWA, MVWD, among others, thereafter performed the required pump  
12 tests on the wells in the Coyote Springs Valley Basin from 2010 to 2012 and filed their  
13 reports in 2013.

14 17. On January 29, 2014, State Engineer Jason King issued Ruling 6255 ("Ruling  
15 6255") out of the Order 1169 pump tests. In Ruling 6255, the State Engineer ruled that  
16 pumping groundwater in Coyote Spring Valley Basin for new applications would  
17 decrease flows at existing springs and could impact existing water rights held by parties  
18 such as CSI's then existing 4600 afa of permitted water rights. The State Engineer also  
19 found that the Muddy River and Muddy River Springs were fully appropriated and  
20 pumping of groundwater could, in the future, potentially reduce flows in the Muddy River  
21 that might cause a conflict with existing water rights. The State Engineer decided this  
22 conflict with existing rights was not in the public interest and allowing appropriation of  
23 additional groundwater resources could impair protection of springs and the habitat of  
24 the Moapa dace that lives in the headwaters of the Muddy River. Based on those  
25 findings, the State Engineer denied the then-pending new water right applications.  
26 Ruling 6255 protects existing water rights (such as CSI's then owned 4600 afa) from

1 any new appropriations by denying the pending applications on the basis that existing  
2 water rights must be protected.

3 18. CSI's existing water rights in what is now designated "Lower White River Flow  
4 System Hydrographic Basin" are part of the rights the State Engineer ruled must be  
5 protected in Ruling 6255. CSI has historically pumped, and continues to pump,  
6 between 1400 afa and 2000 afa from its wells in the Coyote Spring Valley Basin. Golf  
7 Course operations use, on average, 1100 afa, and beyond that water is used to support  
8 construction activity in the Coyote Springs Development. Irrigation of Golf Course  
9 Operations and other landscaping areas will be replaced by grey-reclaimed water in the  
10 future after residential development is underway.

11 19. Through the specific plan, development agreement, entitlement and zoning  
12 process, and creation of the CS-GID, CSI adopted aggressive water conservation plans  
13 that it stands ready to implement. These plans include reuse of groundwater once it  
14 makes its ways through the residential infrastructure, including grey-water use on golf  
15 courses, common areas, and public parks. Coyote Springs Development's water  
16 conservation target is for each equivalent-residential-unit to achieve 0.36 afa. Treated  
17 effluent from CSI's wastewater treatment plant will be recycled within the development  
18 and any portion not reused is designed to recharge the aquifer and flow to the Muddy  
19 River and ultimately to Lake Mead.

20 20. Of the 4140 afa CSI has available for immediate development of the Coyote  
21 Springs Development, CSI intends to support its existing entitled residential units within  
22 its subdivisions, plus related resort, commercial and industrial development. Return  
23 flows from the subdivision and effluent from its treatment plants will be returned to the  
24 aquifer or recycled.

25 21. As CSI processed the final governmental approvals of what would be its first  
26 residential subdivision map for 575 units in "Village A" of the Coyote Spring

1 Development, on May 16, 2018, State Engineer Jason King sent a letter to LVVWD  
2 regarding Coyote Spring Valley Basin Water Supply, with a copy to CSI's  
3 representative, Mr. Albert Seeno III.<sup>2</sup> The State Engineer stated that the pump tests  
4 from Order 1169 through the present clearly indicate that pumping at the level during  
5 the two year pump test caused unprecedented declines in groundwater levels.

6 22. In the State Engineer's May 16, 2018 letter, he stated (for the first time), that any  
7 groundwater to be pumped across a *five-basin area* [emphasis in original] would be  
8 limited to ensure no conflict with Muddy River Springs or the Muddy River as they are  
9 the most senior rights in the then-identified five-basin area. The State Engineer further  
10 said that carbonate pumping will be limited to a fraction of the 40,300 acre feet already  
11 appropriated in the identified five-basin area. Following that sweeping statement, the  
12 State Engineer specifically addressed the purpose of the then instant letter by stating:

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

22 This May 16, 2018 letter went on to close with a desire that the water rights holders in  
23 the area plus the Nevada Division of Water Resources work together to reach a  
24 resolution for the entirety of the five basin area.

25 23. Subsequently, in communications by email between Albert Seeno III with the  
26 State Engineer, on May 17, 2018, the State Engineer advised that he would neither  
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<sup>2</sup> The May 16, 2018 letter was rescinded pursuant to a settlement agreement between CSI and the State Engineer. See paragraph 26 below.

1 sign-off nor approve any subdivision map submitted by CSI if they were based on  
2 water rights CSI owned or had dedicated to the CS-GID.

3 24. On May 18, 2018, in a conversation with Albert Seeno III, the State Engineer  
4 advised CSI not to spend one dollar more on the Coyote Springs Development Project  
5 and that processing of CSI's maps had stopped. The State Engineer stated that he  
6 was going to prepare a new draft order that would supersede or dramatically modify  
7 Order 1169 and Ruling 6255, in approximately 30 days. The State Engineer admitted  
8 to Albert Seeno III that this was uncharted territory and further, that his office has  
9 never granted rights and then just taken them away.

10 25. Following his conversation with State Engineer Jason King, on May 18, 2018,  
11 Albert Seeno III emailed Jason King and asked if anyone had filed an impairment claim  
12 or any type of grievance with regard to CSI's and/or CS-GID's water rights and/or the  
13 pumping CSI had performed over the prior 12 years. On May 21, 2018, the State  
14 Engineer responded that no one had asserted a conflict or impairment regarding CSI's  
15 pumping of the CS-GID and CSI's water rights.

16 26. On June 8, 2018, CSI filed a Petition for Review of the State Engineer's May 16,  
17 2018, letter challenging the State Engineer's decision to place a moratorium on  
18 processing CSI's subdivision maps. After a court-ordered settlement meeting on  
19 August 29, 2018,, the parties agreed to settle and dismiss the case. In that settlement  
20 agreement dated August 29, 2018, the State Engineer agreed to rescind his May 16,  
21 2018, letter and to process CSI's subdivision maps without prejudice.

22 27. Thereafter, the State Engineer began a public workshop process to review the  
23 water available for pumping in an area that the State Engineer began calling the Lower  
24 White River Flow System ("LWRFS") which includes the Coyote Spring Valley  
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1 hydrographic basin<sup>3</sup>. This public process included public workshops, a working group  
2 of stakeholders, and included facilitation of a meeting of the Hydrologic Review Team  
3 ("HRT") established pursuant to that certain 2006 Memorandum of Agreement among  
4 some of the parties involved in the new LWRFS process.<sup>4</sup>

5 28. On September 7, 2018, the Office of the State Engineer issued two conditional  
6 approvals of subdivision maps submitted for review by CSI. The first conditional  
7 approval was for the Large Lot Coyote Springs—Village A, consisting of eight lots,  
8 common area, and rights of way totaling approximately 643 acres in Clark County and  
9 requiring the statutory 2.0 afa per lot, for a total of 16 afa. The second conditional  
10 approval was for the Coyote Springs—Village A subdivision map, consisting of 575  
11 lots, common areas and rights of way for approximately 142.71 acres in Clark County  
12 and requiring an estimate demand of 408.25 afa of water annually based on .71 afa per  
13 residential unit. The two subdivision maps were conditionally approved subject to a  
14 showing by CSI (or its agent) that sufficient water was available without affecting senior  
15 water rights in the Muddy River and the Muddy River Springs.

16 29. Following this brief public input process, the State Engineer issued a draft order  
17 at a public workshop held on September 19, 2018. The September 19, 2018, draft  
18 order contained a preliminary determination that there were 9,318 afa of water rights  
19 with a priority date of March 31, 1983, or earlier, that could be safely pumped from five-  
20 basins composing the initial-LWRFS basins without affecting the flows in the Muddy  
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22 <sup>3</sup> The Lower White River Flow System as so named, was identified colloquially prior to January 2019, and in  
23 Rescinded Order 1303 dated January 11, 2019 these same hydrographic basins were identified as a single  
24 administrative unit, and then even further, in his June 15, 2020 Order#1309 the State Engineer specifically  
25 named and identified the Lower White River Flow System Hydrographic Basin which is fully described in this  
Petition.

26 <sup>4</sup> On July 24, 2018, the State Engineer held a Public Workshop and on August, 23, 2018 facilitated the  
27 meeting of the HRT.

1 River and without affecting the endangered Moapa dace fish. The draft order included  
2 a moratorium on processing of subdivision maps unless demonstrated to the State  
3 Engineer's satisfaction that an adequate supply of water was available "in perpetuity"  
4 for the subdivision proposed to be mapped.

5 30. On October 5, 2018, CSI submitted a series of comment letters to the State  
6 Engineer regarding the September 19, 2018, draft order. CSI commented on the total  
7 lack of technical information necessary to perform a comprehensive review of the State  
8 Engineer's conclusions in the draft order. CSI requested that the State Engineer  
9 provide public access to the cited 30,000 pages of documentation used to support his  
10 conclusions in the draft order.

11 31. In the October 5, 2018 CSI comment letters from CSI and its qualified expert,  
12 CSI also pointed out to the State Engineer that his use of the 9318 afa limit for pumping  
13 in the basin was not supported by substantial evidence and that the State Engineer's  
14 own data supported a figure of at least 11,400 afa that could be pumped without any  
15 effect on the flows in the Muddy River or any effects on the Moapa dace. CSI also  
16 criticized reliance on only three-years of pump data to establish the limitation of 9318  
17 afa when data from more than three years was available.

18 32. On October 23, 2018, CSI provided additional comments on the September 19,  
19 2018 draft order. CSI noted again that the State Engineer's own data supported a  
20 determination that the correct amount of pumping that could be sustained in the  
21 LWRFS was at least 11,400 afa and not 9,318 afa. However, even assuming that  
22 9,318 afa was the correct number, CSI was still entitled to at least 1,880 afa of water  
23 for its subdivisions.

24 33. On January 11, 2019, State Engineer Jason King issued Rescinded Order 1303.

25 34. On May 13, 2019 the State Engineer amended Rescinded Order 1303. In  
26 Rescinded Order 1303, the State Engineer declared that Coyote Spring Valley, Muddy

1 River Springs Area, Hidden Valley, Garnet Valley, California Wash, and the  
2 northwestern part of the Black Mountains Area were designated as a joint  
3 administrative unit for purposes of administration of water rights, known as the Lower  
4 White River Flow System or the Six-Basin Area. Rescinded Order 1303 also declared  
5 a temporary moratorium on approvals regarding any final subdivision or other  
6 submissions concerning development and construction submitted to the State Engineer  
7 for review. According to Rescinded Order 1303, any such submittal shall be held in  
8 abeyance pending the conclusion of the public process to determine the total quantity  
9 of groundwater that may be developed within the Lower White River Flow System.  
10 Rescinded Order 1303 did provide an exception to the moratorium, that the State  
11 Engineer could review and grant approval if a showing of an adequate and sustainable  
12 supply of water to meet the anticipated "life of the subdivision" was made to his  
13 satisfaction.

14 35. Rescinded Order 1303 raised five questions for stakeholders to review and to  
15 which they could respond with technical, scientific data: (a) the geographic boundary  
16 of the LWRFS, (b) aquifer recovery subsequent to the Order 1169 aquifer test, (c) the  
17 long-term annual quantity and location of groundwater that may be pumped from the  
18 LWRFS, (d) the effect of movement of water rights between alluvial and carbonate  
19 wells within the LWRFS and (e) any other matter believed to be relevant to the State  
20 Engineer's analysis (the "Five Topics Noticed for Determination").

21 36. In issuing Order 1309, the State Engineer went well beyond the scope of issues  
22 within the Rescinded Order 1303's Five Topics Noticed for Determination.

23 37. Former State Engineer Jason King retired the same day that Rescinded Order  
24 1303 was issued, January 11, 2019. Thereafter, Tim Wilson was appointed as Acting  
25 State Engineer; and on December 12, 2019, Tim Wilson was appointed as the full  
26 State Engineer.

1 38. On June 13, 2019, CSI submitted two-maps for signature and approval subject to  
2 the exception written into Rescinded Order 1303: (i) its previously described Large Lot  
3 Coyote Springs—Village A, consisting of eight lots, common area, and rights of way  
4 totaling approximately 643 acres in Clark County and on the face of the map requiring  
5 the statutory 2.0 afa per lot, for a total of 16 afa, and (ii) its Coyote Springs—Village A  
6 subdivision map, consisting of 575 lots, common areas and rights of way for  
7 approximately 142.71 acres in Clark County and requiring an estimate demand of  
8 408.25 afa of water annually based on .71 afa per residential unit. These maps were  
9 accompanied by a cover letter describing a request approval based on an attached  
10 technical report which evidenced support for approval and identifying the technical and  
11 hydrogeologic analysis supporting CSI's request for 2000 afa to be approved and  
12 assigned to these maps for development within the Coyote Springs master planned  
13 community.

14 39. The State Engineer held several workshops and meetings regarding Rescinded  
15 Order 1303, on February 6, March 22, April 23, and July 24, 2019. These meetings  
16 were workshops and held in anticipation and preparation for the scheduled hearing on  
17 Rescinded Order 1303 scheduled for the end of September, early October, 2019.

18 40. The State Engineer identified dates for a hearing to be held on Rescinded Order  
19 1303, to allow all interested parties to submit technical reports and studies in response  
20 to the five questions raised by the State Engineer in Rescinded Order 1303, and cross  
21 examine the others' experts, following which the State Engineer would take under  
22 advisement all of the reports and testimony and render a decision in a new order.

23 41. Expert reports by interested parties were due July 3, 2019, and rebuttal reports  
24 were due on August 16, 2019. CSI filed expert scientific, geophysical, hydrologic, and  
25 hydrogeologic reports, and related rebuttal reports; all of which are reflected on the  
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1 State Engineer's administrative record supporting Rescinded Order 1303 on their  
2 website.

3 42. The hearing on Rescinded Order 1303 took place in Carson City, Nevada  
4 between September 23, 2019, and October 4, 2019.

5 43. Following the hearing on Rescinded Order 1303, the State Engineer allowed for  
6 closing reports, which were due on or before December 3, 2019.

7 44. Initial reports and expert opinions and rebuttal reports, submitted by interested  
8 parties, including those that demanded that the Kane Spring Valley be included within  
9 the Lower White River Flow System (thus, turning a Six-Basin area into a Seven-Basin  
10 area).

11 45. In addition to CSI's hydrogeologist and other experts at Stetson Engineering,  
12 CSI, LCWD, and Vidler retained an expert in the area of geophysics, Zonge  
13 International, to review underground faulting in the Coyote Spring and Kane Springs  
14 hydrographic basins and identify faults that could act as barriers to flow from the Kane  
15 Springs and Coyote Spring valleys east to the Muddy River and the Muddy River  
16 Springs area.

17 46. Other than CSI and its team of experts in the fields of geology and hydrogeology,  
18 water rights, climate, biology, and geophysics, from Stetson Engineering and Zonge  
19 International, more than 15 additional other stakeholders were present and participated  
20 at Rescinded Order 1303 Hearing, and each stakeholder presented expert witnesses<sup>5</sup>  
21 to their previously submitted reports. All of this testimony, and all reports and rebuttal  
22 reports submitted is a part of the State Engineer's files for Rescinded Order 1303  
23 Hearing, and testimony preserved by a stenographer's transcript and video taken. CSI  
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25 <sup>5</sup> More than 25 experts presented testimony. See Nevada State Engineer website for LWRFS at  
26 <http://water.nv.gov/news.aspx?news=LWRFS> and the tab "hearing documents."

disagrees with the summarization by the State Engineer of hearing testimony in Order 1309.

47. Order 1309 specifically delineated the following decisions<sup>6</sup>:

*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 the Warm Springs area spring 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 subdivision 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.*

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<sup>6</sup> Exhibit "A" at 65-66.

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

3 48. Order 1309 neither delivers evidence in support of, nor analysis to support, any  
4 of the order and rulings the State Engineer made in Order 1309, Section X, Orders,  
5 items 1, 2, 3, and 4, including, without limitation, the addition of Kane Springs Valley into  
6 the newly designated Lower White River Flow System Hydrographic Basin.

7 49. In Order 1309, Section X, Orders, items 5 and 6, the State Engineer correctly  
8 terminates the improper, arbitrary, and capricious Rescinded Order 1303 in its entirety,  
9 including, without limitation, specifically terminating the improper moratorium instituted  
10 in Rescinded Order 1303.

11 50. On June 17, 2020, 371 days following written submittal of a request for review  
12 and approval for an exception pursuant to Rescinded Order 1303, and two days  
13 following issuance of Order 1309, Steve Shell, Water Resource Specialist II, signed a  
14 letter addressed to Coyote Springs Nevada at an address that the entity has not used  
15 for over ten (10) years, and recommended disapproval for water service to be provided  
16 by the CS-GID to the Coyote Springs Development ("Subdivision Map Denial Letter"). A  
17 true and correct copy of the Subdivision Map Denial Letter is attached as Exhibit "B".  
18 The request at issue was for review and approval of a final subdivision map for eight  
19 large parcels intended to be further subdivided. This denial was premised on Order  
20 1309 and a statement that "[CSI] groundwater permits have priority dates which may  
21 exceed the threshold of allowable pumping within the definition of [Order 1309]".

22 51. The June 17, 2020 Subdivision Map Denial Letter received by CSI did not include  
23 analysis or review of any facts or circumstances or analysis as to why the State  
24 Engineer's office refused to process the request for map approval pursuant to the  
25 exception provided in Rescinded Order 1303. The State Engineer's office did not  
26

1 explain why other request made under the exception to the moratorium under  
2 Rescinded Order 1303 were processed and CSI's was not.

### 3 PETITION FOR JUDICIAL REVIEW

4 52. This Petition is filed on the grounds that CSI is an aggrieved party by the decision  
5 of the State Engineer on June 15, 2020 and the water rights owned or optioned by CSI,  
6 in which CSI has a contractual interest, and the water rights CSI dedicated to the CS-  
7 GID will be injured as a result of these decisions.

8 53. The purpose of the State Engineer's hearing leading to its Order 1309 was to  
9 address the Five Topics Noticed for Determination:

- 10 a. The geographic boundary of the hydrologically connected  
11 groundwater and surface water systems comprising the  
12 Lower White River Flow System;
- 13 b. The information obtained from the Order 1169 aquifer test  
14 and subsequent to the aquifer test and Muddy River  
15 headwater spring flow as it relates to aquifer recovery since  
16 the completion of the aquifer test;
- 17 c. The long-term annual quantity of groundwater that may be  
18 pumped from the Lower White River Flow System, including  
19 the relationships between the location of pumping on  
20 discharge to the Muddy River Springs, and the capture of  
21 Muddy River flow;
- 22 d. The effects of movement of water rights between alluvial  
23 wells and carbonate wells on deliveries of senior decreed  
24 rights to the Muddy River; and,
- 25 e. Any other matter believed to be relevant to the State  
26 Engineer's analysis.

27 54. The State Engineer's determinations in his June 15, 2020 order regarding the  
28 geographic boundary of the LWRFS, the aquifer recovery since completion of the Order  
1169 aquifer test, the long-term annual quantity of groundwater that may be pumped  
from the LWRFS, and the effects of movement of water rights between alluvial wells  
and carbonate wells on deliveries of senior decreed rights to the Muddy River are

1 arbitrary, capricious, an abuse of discretion and devoid of supporting facts and  
2 substantial evidence.

3 55. The State Engineer's Order 1309 is arbitrary<sup>7</sup> and capricious<sup>8</sup> due to the lack of  
4 substantial evidence supporting its determination that the seven hydrographic basins  
5 have a "close" hydraulic connection and must therefore be administered as a single  
6 hydrographic basin. The State Engineer concluded in Order 1309 that there may be  
7 discrete, local aquifers within the LWRFS with an uncertain hydrologic connection to the  
8 Warm Springs Area.<sup>9</sup> The State Engineer based this opinion on his recognition that  
9 "The LWRFS has structural complexity and heterogeneity, and some areas have more  
10 immediate and more complete connection than others"<sup>10</sup>. One basis for his findings was  
11 from Bedroc who presented evidence that their groundwater wells in Coyote Spring  
12 Valley are hydraulically disconnected from the regional carbonate aquifer of the  
13 LWRFS.<sup>11</sup> The evidence and findings contained in Order 1309 are not sufficient to  
14 support its designation of the basins as a single hydrographic basin.

15 56. In his June 15, 2020 Order 1309, the State Engineer inconsistently applies his  
16 own criteria for determining those basins that should be included in the LWRFS based  
17 on a "close hydraulic connection"<sup>12</sup>. Order 1309 outlines six criteria that the State  
18 Engineer relies on to support the finding of a close hydraulic connection, including  
19 geologic structure and water level observations. The State Engineer's application of  
20

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21 <sup>7</sup> A finding is arbitrary if "it is made without consideration of or regard for facts, circumstances fixed by  
22 rules or procedure." (Black's Law Dictionary, Arbitrary (10th ed. 2014).)

23 <sup>8</sup> A decision is capricious if it is "contrary to the evidence or established rules of law," (Black's Law  
24 Dictionary, Capricious (10th ed 2014).)

25 <sup>9</sup> Exhibit "A" at. 65.

26 <sup>10</sup> Exhibit "A" at 59.

27 <sup>11</sup> Exhibit "A" at 39,

28 <sup>12</sup> Exhibit "A" at 47.

1 these criteria to his decision regarding the Black Mountains Area, Kane Springs Valley,  
2 and Lower Meadow Wash appears subjective, and is thus arbitrary and capricious.

3 57. For example, Order 1309 excludes from the LWRFS Hydrographic Basin the  
4 entire Black Mountain Area due to, among other things, the lack of contiguity of  
5 carbonate-rock aquifer and difference in groundwater levels. However, the substantial  
6 evidence in the State Engineer's record shows contiguous carbonate rock extends  
7 across the Muddy Mountain Thrust Fault between California Wash into the Black  
8 Mountains Area<sup>13</sup>, similar to the occurrence of contiguous carbonate rock from Kane  
9 Springs Valley into Coyote Spring Valley that is offset by a boundary fault<sup>14</sup>. Additional  
10 evidence indicated a 150 foot difference in groundwater level between California Wash  
11 and the Black Mountains Area, similar in magnitude to the 60 foot difference in  
12 groundwater level between Kane Springs Valley and Coyote Spring Valley<sup>15</sup>.

13 58. While both the Black Mountains Area-California Wash and Kane Springs Valley-  
14 Coyote Spring Wash boundaries exhibit the same physical expression reflective of a low  
15 permeability boundary, the State Engineer's Order 1309 includes one, but not the other,  
16 in the LWRFS Hydrographic Basin based on perceived "general hydrographic pattern".<sup>16</sup>  
17 The State Engineer's reliance on these subjective criteria instead of objectively applied  
18 criteria is arbitrary and capricious.

19 59. Order 1309 states "the LWRFS exhibits a direct hydraulic connection that  
20 demonstrates that conjunctive management and joint administration of these  
21 groundwater basins is necessary and supported by the best available science"<sup>17</sup> and at  
22

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23 <sup>13</sup> Exhibit "A" at 15-18.

24 <sup>14</sup> Exhibit "A" at 19-22.

25 <sup>15</sup> Exhibit "A" at 52.

26 <sup>16</sup> Exhibit "A" at 51, 52.

27 <sup>17</sup> Exhibit "A" at 42.

1 the same time cites numerous documents that do not support this statement. For  
2 example, the Order 1169 Aquifer Test Reports cited variously describe potential barriers  
3 and flow paths within the LWRFS, while others postulate that the LWRFS is  
4 hydraulically connected, and some address the entire LWRFS, while other reports only  
5 address portions of the LWRFS.<sup>18</sup> The underlying technical analyses in these cited  
6 documents are admittedly unreliable and therefore Order 1309's findings regarding the  
7 hydraulic connection within the LWRFS are arbitrary and capricious.

8 60. The State Engineer's determination in his June 15, 2020 order to include the  
9 Kane Springs Valley Hydrographic Basin as part of the LWRFS Hydrographic Basin  
10 relies on standards regarding hydrologic connections, hydraulic connections, and  
11 "close" connections that were not previously known to those submitting evidence in  
12 response to Rescinded Order 1303. Inclusion of the Kane Springs Valley Hydrographic  
13 Basin into the LWRFS in Order 1309 was a violation of CSI's due process rights. CSI's  
14 due process rights were violated because the State Engineer neither provided the  
15 standards nor procedures nor analysis describing the method of making such a  
16 determination. Therefore, pursuant to Nevada law, as a result, Order 1309 should be  
17 voided.

18 61. Further the State Engineer's determination on June 15, 2020 in Order 1309 to  
19 include the Kane Springs Valley Hydrographic Basin in the LWRFS Hydrographic Basin  
20 is not supported by substantial evidence. See *Bacher v. Office of State Eng'r of State of*  
21 *Nevada*, 122 Nev. 1110, 1121 (2006) ("This court has defined substantial evidence as  
22 that which a reasonable mind might accept as adequate to support a conclusion.")  
23 (internal quotation marks omitted). Furthermore, the State Engineer has not provided  
24 "findings in sufficient detail to permit judicial review" as required. *Revert v. Ray*, 95 Nev.

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25  
26 <sup>18</sup> Exhibit "A" at 42, FN 244

1 782, 787 (1979) ("When these procedures, grounded in basic notions of fairness and  
2 due process, are not followed, and the resulting administrative decision is arbitrary,  
3 oppressive, or accompanied by a manifest abuse of discretion, this court will not  
4 hesitate to intervene."). In his February 2, 2007 Ruling 5712, the State Engineer stated  
5 that the then-available evidence supported the probability of a low-permeability structure  
6 or change in lithology between Kane Springs Valley and the southern part of Coyote  
7 Spring Valley and there was not substantial evidence that the appropriation of a limited  
8 quantity of water in Kane Springs Valley Hydrographic Basin will have any measurable  
9 impact on the Muddy River Springs. (5712, p. 21.) The State Engineer's determination  
10 in his June 15, 2020 Order 1309 to include the Kane Springs Valley Hydrographic Basin  
11 in the LWRFS Hydrographic Basin is not based on substantial evidence contrary to the  
12 evidence supporting his determinations in Ruling 5712.

13 62. Finally, the State Engineer's determination in his June 15, 2020 order to include  
14 the Kane Springs Valley Hydrographic Basin in the LWRFS Hydrographic Basin is  
15 arbitrary and capricious as the substantial evidence, as viewed through the State  
16 Engineer's own proposed standards regarding hydrologic connections, hydraulic  
17 connections, and "close" connections that it uses in Order 1309, does not satisfy his  
18 own standards for the purposes of creating a LWRFS Hydrographic Basin.

19 63. The State Engineer's June 15, 2020 Order 1309 subjectively applies criteria for  
20 determining whether the Lower Meadow Valley Wash should be included in the  
21 LWRFS. In Order 1309, the State Engineer finds that "while carbonate rocks may  
22 underlie the Lower Meadow Valley Wash and be contiguous with carbonate rocks to the  
23 south and west, data are lacking to characterize the potential hydraulic connection that  
24 may exist."<sup>19</sup> The State Engineer further acknowledges that a connection exists, but  
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26 <sup>19</sup> Exhibit "A" at 50.



1 determines that the Lower Meadow Valley Wash may be managed outside the LWRFS.  
2 Accordingly, Order 1309's exclusion of the Lower Meadow Valley Wash from the  
3 LWRFS is inconsistent with his decision to include the Kane Springs Valley, as both  
4 basins are upgradient of the Muddy River Springs Area, and based on the State  
5 Engineer's findings in Order 1309, both basins have a hydraulic connection to the  
6 LWRFS. Additional record evidence demonstrates that groundwater from the Lower  
7 Meadow Wash directly support streamflow in the Muddy River and groundwater  
8 resources in the carbonate aquifer. Further, both Kane Springs Valley and Meadow  
9 Valley Wash have relatively little or no groundwater development. Given the similarities  
10 between the Lower Meadow Valley Wash and Kane Springs Valley, the inconsistent  
11 treatment of the two in regard to their incorporation into the LWRFS is inconsistent and  
12 accordingly arbitrary and capricious.

13 64. The State Engineer's determination that pumping groundwater in the Coyote  
14 Springs Basin will have an adverse impact on flows in the Muddy River or on the Moapa  
15 dace lacks substantial supporting record evidence and is thus arbitrary and capricious.  
16 As described above, the State Engineer relied on outdated and inadequate data in  
17 making these determinations. The record evidence before the State Engineer  
18 demonstrates that he failed to account for factors such as the effect of faults,  
19 groundwater barriers, and hydrogeologic parameters between Coyote Spring Valley  
20 pumping and the Muddy River Spring Area.

21 65. The State Engineer's determination in his June 15, 2020 order that the maximum  
22 quantity of groundwater that may be pumped from the LWRFS Hydrographic Basin on  
23 an average annual basis without causing further declines in Warm Springs area spring  
24 flow and flow in the Muddy River cannot exceed 8,000 afa is not supported by  
25 substantial evidence. This is the case as the State Engineer also misinterprets the  
26 evidence from the hearing following Rescinded Order 1303 regarding the effect of

1 groundwater pumping within the LWRFS on the Moapa dace. Furthermore, CSI has  
2 already performed and completed its required mitigation for development of Coyote  
3 Springs as required by USFWS. CSI was required to set aside 460 afa to protect the  
4 endangered Moapa dace and USFWS deemed this dedication as appropriate mitigation  
5 for any take of the Moapa dace related to development of the Coyote Springs  
6 Development. Ignoring these significant considerations was arbitrary and capricious,  
7 rendering Order 1309 unlawful.

8 66. Order 1309's use of the term "maximum quantity" of groundwater that may be  
9 pumped is further confused by the Order's qualifier "on an average annual basis".<sup>20</sup> The  
10 use of the "average annual basis" suggests that pumping may be less than 8,000 afa in  
11 some years and more than 8,000 afa in others. Accordingly, Order 1309's pumping  
12 limitations is vague and lacks direction for how the average annual basis will be used to  
13 enforce the maximum quantify of groundwater that may be pumped. Order 1309 further  
14 does not distinguish the quantity of pumping that can occur from each of the two  
15 aquifers that compose the LWRFS, the Basin Fill and Carbonate aquifers. Accordingly,  
16 Order 1309 is arbitrary and capricious as it "lacks specific standards, thereby  
17 encouraging, authorizing, or even failing to prevent arbitrary and discriminatory  
18 enforcement." *Silvar v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 122 Nev. 289,  
19 293 (2006).

20 67. Further, the State Engineer's determination in his June 15, 2020 Order 1309 that  
21 the maximum quantity of groundwater that may be pumped from the LWRFS on an  
22 average annual basis without causing further declines in Warm Springs area spring flow  
23 and flow in the Muddy River cannot exceed 8,000 afa is not supported by substantial  
24 evidence as there is no evidence in the record regarding the effects of this quantity of  
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26 <sup>20</sup> Exhibit "A" at 65.

1 water being pumped within the newly defined LWRFS.<sup>21</sup> Absent such evidence, the  
2 State Engineer refers to "Pumpage inventories for 2018 that were published after the  
3 completion of the hearing report a total of 8,300 afa."<sup>22</sup> Further, the State Engineer  
4 identifies that additional inquiry and evidence is still necessary to support this  
5 conclusion. Accordingly, the State Engineer's determination regarding the maximum  
6 quantity of groundwater that may be pumped from the LWRFS on an average annual  
7 basis is not supported by substantial record evidence.

8 68. The State Engineer's determination in his June 15, 2020 Order 1309 that the  
9 maximum quantity of groundwater that may be pumped from the LWRFS on an average  
10 annual basis without causing further declines in Warm Springs area spring flow and flow  
11 in the Muddy River cannot exceed 8,000 afa is not supported by substantial evidence as  
12 the State Engineer recognizes that there may be discrete, local aquifers within the  
13 LWRFS with an uncertain hydrologic connection to the Warm Springs area and that  
14 determination of the effect of moving water rights into these areas may require  
15 additional scientific data and analysis.<sup>23</sup> However, Order 1309 does not include any  
16 plan to gather such data or conduct such analysis.

17 69. The State Engineer's determination in his June 15, 2020 Order 1309 that the  
18 maximum quantity of groundwater that may be pumped from the LWRFS on an average  
19 annual basis without causing further declines in Warm Springs area spring flow and flow  
20 in the Muddy River cannot exceed 8,000 afa is further arbitrary and capricious and  
21

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22 <sup>21</sup> Order 1309 states "Groundwater level recovery reached completion approximately two to three years after  
23 the Order 1169 aquifer test pumping ended" and pumping at that time averaged 9,318 afa. (Exhibit "A" at  
24 55.) Order 1309's determination to then to base maximum pumping on 2018 when it finds that groundwater  
25 levels had recovered by 2015-2016 is arbitrary and capricious and unsupported by substantial evidence.

26 <sup>22</sup> Exhibit "A" at 55.

27 <sup>23</sup> Exhibit "A" at 64-65.

1 violates Nevada law as Order 1309 contains no mechanism for the implementation of  
2 this limitation to ensure that the Nevada doctrines of prior appropriation<sup>24</sup> and that the  
3 limit and definition of a water right is its reasonable use.<sup>25</sup>

4 70. The State Engineer's determination in Order 1309 regarding the movement of  
5 water rights within the LWRFS is inconsistent, arbitrary, and capricious. The statement  
6 in Order 1309 stating "The State Engineer also finds that any movement of water rights  
7 into carbonate-rock aquifer and alluvial aquifer wells in the Muddy River Springs Area  
8 that may increase the impact to Muddy River decreed rights is disfavored"<sup>26</sup> implies that  
9 the some water rights in LWRFS have less impact than others. If there are water rights  
10 within the LWRFS that have less impact than others, then the system cannot be  
11 homogeneous and be considered as one administrative unit. Accordingly, Order 1309's  
12 determination regarding the boundaries of the LWRFS are arbitrary and capricious and  
13 not supported by substantial evidence.

14 71. Throughout Order 1309, the State Engineer "*recognizes*" that Order 1309 will  
15 serve as an initial step toward management of the newly defined LWRFS Hydrographic  
16 Basin [emphasis added]. The word "recognize" is neither a finding nor a ruling, it is  
17 simply the observation of something by the State Engineer. The State Engineer also  
18 identifies the need for "an effective management scheme" to "provide for the flexibility to  
19 adjust boundaries based on additional information, retain the ability to address unique  
20 management issues on a sub-basin scale, and maintain partnership with water users  
21 who may be affected by management actions throughout the LWRFS."<sup>27</sup> However, the  
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23 <sup>24</sup> *Steptoe Livestock Co. v. Gulley*, 53 Nev 163, 171-173, 205 P.772 (1931); *Jones v. Adams* 19 Nev. 78,  
24 87, (1885).

25 <sup>25</sup> NRS 533.035.

26 <sup>26</sup> Exhibit "A" at 64.

27 <sup>27</sup> Exhibit "A" at 53.

1 State Engineer's Order 1309 provides for neither a management scheme nor a plan for  
2 the development of such a management scheme. Accordingly, the State Engineer's  
3 Order 1309 is incomplete and as a result, his issuance of Order 1309 is both arbitrary  
4 and capricious.

5 72. In his Order 1309, the State Engineer repeatedly identifies that additional  
6 information is necessary to administer the newly created LWRFS Hydrographic Basin  
7 the manner that he proposes – as a single hydrographic basin from which only 8,000  
8 afa may be pumped. As such additional information is not part of the record underlying  
9 Order 1309, the State Engineer's Order 1309 is incomplete, is not supported by  
10 substantial evidence, and his issuance of Order 1309 is both arbitrary and capricious.

11 73. THEREFORE, for the foregoing reasons, and for others that may be discovered  
12 and raised during the pendency of this Petition for Judicial Review, Petitioner Coyote  
13 Springs Investment, LLC hereby requests that this Court reverse the decision of the  
14 State Engineer made on June 15, 2020 regarding the geographic boundary of the  
15 LWRFS, the aquifer recovery since completion of the Order 1169 aquifer test, the long-  
16 term annual quantity of groundwater that may be pumped from the LWRFS, and the  
17 effects of movement of water rights between alluvial wells and carbonate wells on  
18 deliveries of senior decreed rights to the Muddy River for the reasons discussed in this  
19 Petition.

20  
21 Dated: July 9, 2020

Brownstein Hyatt Farber Schreck, LLP

22 BY: /s/ Bradley J. Herrema  
23 BRADLEY J. HERREMA  
24 Bar No. 10368  
25 100 North City Parkway, Suite 1600  
26 Las Vegas, NV 89106  
27 Email: bherrema@bhfs.com  
28 *Attorneys for Coyote Springs*  
*Investment, LLC* 21256970

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Brownstein Hyatt Farber Schreck, LLP, and that on the 9th day of July, 2020, I served, or caused to be served, a true and correct copy of the foregoing PETITION FOR JUDICIAL REVIEW OF NEVADA STATE ENGINEER ORDER 1309, to the following:

[X]: Via HAND DELIVERY:

Tim Wilson, P.E., State Engineer  
Nevada Division of Water Resources  
Department of Conservation and Natural Resources  
901 South Stewart Street, Suite 2002  
Carson City, NV 89701

[X]: Via U.S. Postal Service Certified Mail, Return Receipt Requested, by placing a true and correct copy of the foregoing document in an envelope, postage prepaid, and properly addressed, to the following:

Robert O. Kurth, Jr. 3420 North Buffalo Drive Las Vegas, NV 89129	Laura A. Schroeder Theresa A. Ure 10615 Double R Blvd., Suite 100 Reno, NV 89521
Kent R. Robison Therese M. Shanks Robison, Sharp, Sullivan & Brust 71 Washington Street Reno, NV 89503	Paulina Williams Baker Botts, L.L.P. 98 San Jacinto Blvd., Suite 1500 Austin, TX 78701
Sylvia Harrison Sarah Ferguson McDONALD CARANO LLP 100 W. Liberty Street, 10th Floor Reno, NV 89501	Severin A. Carlson Kaempfer Crowell, Ltd. 50 West Liberty Street, Suite 700 Reno, NV 89511
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2		
3	Justina Caviglia 6100 Neil Road Reno, NV 89511	Luke Miller Office of Regional Solicitor U.S. Dept. of the Interior 2800 Cottage Way, Suite E1712 Sacramento, CA 95825
4		
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6	Karen Glasgow Office of the Regional Solicitor U.S. Dept. of the Interior 333 Bush Street, Suite 775 San Francisco, CA 94104	Larry Brundy P.O. Box 136 Moapa, NV 89025
7		
8		
9	Casa De Warm Springs, LLC 1000 N. Green Valley Pkwy., #440-350 Henderson, NV 89074	Clark County 500 S. Grand Central Pkwy. Sixth Floor Las Vegas, NV 89155-1111
10		
11	Clark County Coyote Springs Water Resources GID 1001 S. Valley View Blvd. Las Vegas, NV 89153	Mary K. Cloud P.O. Box 31 Moapa, NV 89025
12		
13	Don J. and Marsha L. Davis P.O. Box 400 Moapa, NV 89025	Dry Lake Water, LLC 2470 St. Rose Pkwy., Suite 107 Henderson, NV 89074
14		
15	Kelly Kolhoss P.O. Box 232 Moapa, NV 89025	Lake and Las Vegas Joint Venture 1600 Lake Las Vegas Parkway Henderson, NV 89011
16		
17	Laker Plaza, Inc. 7181 Noon Rd. Everson, WA 98247-9650	State of Nevada Dept. of Transportation 1263 S. Stewart Street Carson City, NV 89712
18		
19	State of Nevada Dept. of Conservation and Natural Res. 901 S. Stewart Street, Suite 5005 Carson City, NV 89701	Pacific Coast Building Products, Inc. P.O. Box 364329 Las Vegas, NV 89036
20		
21	S & R, Inc. 808 Shetland Road Las Vegas, NV 89107	Technichrome 4709 Compass Bow Lane Las Vegas, NV 89130
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William O'Donnell 2780 S. Jones Blvd., Suite 210 Las Vegas, NV 89146	Global Hydrologic Services, Inc. Mark D. Stock 561 Keystone Avenue, #200 Reno, NV 89503-4331
Patrick Donnelly Center for Biological Diversity 7345 S. Durango Dr. B-107, Box 217 Las Vegas, NV 89113	Lisa Belenky Center for Biological Diversity 1212 Broadway, #800 Oakland, CA 94612

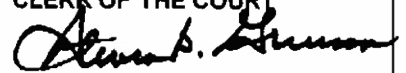
DATED this 9th day of July, 2020.

/s/ Paula Kay  
an employee of Brownstein Hyatt Farber  
Schreck, LLP



# EXHIBIT 5

# EXHIBIT 5



1 **PTJR**

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CASE NO: A-20-817977-P

Department 2

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19 Attorneys for Petitioner MVIC

13 **DISTRICT COURT**

14 **CLARK COUNTY, NEVADA**

15 **MUDDY VALLEY IRRIGATION COMPANY,**

Case No.:

16 Petitioner,

Dept. No.:

17 vs.

18 **TIM WILSON, P.E., Nevada State Engineer,**  
19 **DIVISION OF WATER RESOURCES,**  
20 **DEPARTMENT OF CONSERVATION AND**  
21 **NATURAL RESOURCES,**

**PETITION FOR JUDICIAL REVIEW**  
**OF ORDER 1309**

Respondent.

22 **MUDDY VALLEY IRRIGATION COMPANY ("MVIC"), by and through its counsel,**  
23 **STEVEN D. KING and DOTSON LAW, hereby files this Petition for Judicial Review of Order 1309**  
24 **issued by Respondent TIM WILSON, P.E., Nevada State Engineer, DIVISION OF WATER**  
25 **RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES on June**  
26 **15, 2020. This Petition for Judicial Review is filed pursuant to NRS 533.450(1).**

27 **I. JURISDICTIONAL STATEMENT**

28 NRS 533.450(1) provides that any order or decision of the State Engineer is subject to judicial review "in the proper court of the county in which the matters affected or a portion thereof are

1 situated.” The real property to which the water at issue is appurtenant lies in Clark County, Nevada;  
2 thus, the Eighth Judicial Court is the proper venue for this judicial review.

3 Additionally, the subject of this appeal involves decreed waters of the Muddy River Decree.  
4 Under NRS 533.450(1), “on stream systems where a decree of court has been entered, the action must  
5 be initiated in the court that entered the decree.” The Muddy River Decree, *Muddy Valley Irrigation*  
6 *Company, et al. v. Moapa & Salt Lake Produce Company, et al.*, Case No. 377, was entered in the  
7 Tenth Judicial District Court of the State of Nevada in and for Clark County in 1920.<sup>1</sup> This Decree is  
8 attached hereto as **Exhibit 1**. Thus, this Court, without question, has jurisdiction over the instant  
9 matter.

## 10 **II. FACTUAL BACKGROUND**

11 MVIC has been in existence as a Nevada corporation since 1895 for purposes which include  
12 the acquisition of water rights and the construction, operation, and maintenance of their associated  
13 irrigation works of diversion and distribution for MVIC’s and its shareholder’s “beneficial use” of  
14 Muddy River water within the Moapa Valley.

15 Through the Muddy River Decree of 1920, it was determined that MVIC owns the majority of  
16 the Muddy River decreed surface water rights and that those rights were appropriated and placed to  
17 beneficial use prior to 1905 and are senior in priority to all Nevada groundwater rights within the  
18 Lower White River Flow System (“LWRFS”). The Muddy River Decree states, in part:

19 [T]he Muddy Valley Irrigation Company is declared and decreed to  
20 have acquired by valid appropriate and beneficial use and to be  
21 entitled to divert and use upon the lands...all waters of said Muddy  
22 River, its head waters, sources of supply and tributaries save and  
except the several amounts and rights hereinbefore specified...

23 (See **Exhibit 1**, Muddy River Decree at 20:1-8, emphasis added.) The Muddy River Decree also  
24 held that “the total aggregate volume of the several amounts and quantities of water awarded and  
25 allotted...is the total available flow of said Muddy River and consumes and exhausts all of the  
26 available flow of the said Muddy Valley River...” *Id.* at 22:28-23:1, emphasis added. MVIC’s  
27 decreed rights were therefore entitled to protection from capture and depletion by other parties.

28  
<sup>1</sup> In 1920, the Tenth Judicial District included both Clark and Lincoln County. In 1945, Clark County was designated as the Eighth Judicial District.

1 In 2018, the State Engineer held several public workshops to review the status of groundwater  
2 use and recovery following the conclusion of State Engineer Order 1169 from 2002, requiring a large  
3 study to determine whether pumping in the LWRFS would have detrimental impacts on existing  
4 water rights or the environment. Following the workshops, and as a result thereof, the State Engineer  
5 drafted a proposed order and held a hearing on the proposed order on December 14, 2018.

6 On January 11, 2019, the State Engineer issued Interim Order 1303 to seek input on the  
7 following specific matters: (1) the geographic boundary of the LWRFS, (2) aquifer recovery since  
8 the pump test, (3) long-term annual quantity that may be pumped from the LWRFS, and (4) effects of  
9 moving water rights between the carbonate and alluvial system to senior water rights on the Muddy  
10 River. (See **Exhibit 2**, Interim Order 1303.) After factual findings were made on those questions, the  
11 State Engineer was to evaluate groundwater management options for the LWRFS. The State  
12 Engineer held a number of hearings, allowed the presentation of evidence and exchange of reports,  
13 and eventually issued Order 1309 on June 15, 2020. (See **Exhibit 3**, Order 1309.)

14 MVIC took the position, and continues to take the position, that the Muddy River Decree  
15 prevents the depletion of groundwater if that would reduce the flow of the Muddy River, as that  
16 would conflict with MVIC's senior decreed rights. However, the State Engineer appears to have  
17 taken a contrary position, stating that "reductions in flow that have occurred because of groundwater  
18 pumping in the headwaters basins is not conflicting with Decreed rights." (**Exhibit 3**, Order 1309 at  
19 p. 61.) Importantly, in making this determination, the State Engineer tacitly acknowledged that  
20 groundwater pumping is in fact reducing flow and therefore conflicting with MVIC's senior decreed  
21 rights.

### 22 **III. GROUNDS FOR THE PETITION**

23 The third inquiry the State Engineer sought input on was "[t]he long-term annual quantity of  
24 groundwater that may be pumped from the Lower White River Flow System, including the relationships  
25 between the location of pumping on discharge to the Muddy River Springs, and the capture of Muddy  
26 River flow." (**Exhibit 2**, Order 1303 at p. 13.) The scope of the hearing was purportedly "not to  
27 resolve or address allegations of conflict between groundwater pumping within the LWRFS and  
28 Muddy River decreed rights;" rather, it was to determine what the impact is on decreed rights and

1 then address that at a future point in time. (**Exhibit 4**, Transcript of Proceedings, Public Hearing,  
2 Pre-Hearing Conference, Thursday, August 8, 2019 at 12:6-15.) However, despite acknowledging  
3 that current pumping is capturing Muddy River flows, the State Engineer went beyond the scope of  
4 the hearing to determine that “capture or potential capture of flows of the waters of a decreed system  
5 does not constitute a conflict.” (**Exhibit 3**, Order 1309 at p. 61.) The State Engineer stated that  
6 “there is no conflict as long as the senior water rights are served.” (*Id.* at p. 60.) The State Engineer  
7 then performed a coarse calculation to determine the consumptive use needs of the senior decreed  
8 rights holders and concluded that the capture of 8,000 acre-feet of Muddy River flows by junior  
9 groundwater users would not deprive the senior holders of any portion of their water rights.<sup>2</sup> (*Id.* at  
10 pp. 60-61.)

11 One problem with the State Engineer’s analysis is that it contradicts the stated narrow purpose  
12 of the hearing. As a result of this stated purpose, much of the evidence submitted was related to the  
13 capture of the Muddy River water by junior groundwater pumpers. By making the findings it did  
14 without MVIC having the opportunity to present evidence on that point, the State Engineer violated  
15 MVIC’s due process rights. He also acted arbitrarily and capriciously because he ignored and/or  
16 precluded the only evidence that existed related to conflicts and then applied an erroneous analysis  
17 that no party had an opportunity to review or comment on. This is the classic definition of a violation  
18 of due process rights.

19 Additionally, Order 1309 is contrary to law – particularly the Muddy River Decree. This is  
20 because determining the consumptive needs of the senior decreed rights holders is irrelevant; as  
21 MVIC’s senior decreed rights are not based on their alleged calculated needs. Rather, other than the  
22 limited exceptions noted in the Muddy Valley Decree, MVIC is entitled to “all waters of said Muddy  
23 River, its head waters, sources of supply and tributaries.” (*See Exhibit 1*, Decree at 20:1-8.) As the  
24 Decree held that “the total aggregate volume of the several amounts and quantities of water awarded  
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26 <sup>2</sup> The State Engineer’s analysis is contrary to the Muddy River Decree, and even if not it is  
27 improperly premised upon inaccurate information as it did not correctly consider transmission losses,  
28 or the gross amount of water necessary to apply to reach the fields in question, or operate those and  
adequately flush salts. The analysis appears faulty in the applied acreage calculations and the net  
irrigation water requirement.

1 and allotted...is the total available flow of said Muddy River and consumes and exhausts all of the  
2 available flow of the said Muddy Valley River..." (*id.* at 22:28-23:1, emphasis added), a holding  
3 which requires that MVIC's decreed rights were therefore entitled to protection from capture and  
4 depletion by other parties. Order 1309 arrives at the conclusion that if all decreed acres were planted  
5 with a high-water-use crop like alfalfa, the net irrigation requirement would be 28,300 afa based upon  
6 a consumptive rate of 4.7 afa. (**Exhibit 3**, Order 1309 at p. 61.) However, MVIC's alleged  
7 "requirement" is irrelevant to determining whether pumping interferes with MVIC's decreed rights  
8 because MVIC has rights to the "total aggregate volume" independent of its alleged requirements.<sup>3</sup>  
9 (**Exhibit 1**, Decree at 22:28-23:1.) Thus, the State Engineer's conclusion that reductions in flow  
10 from groundwater pumping does not conflict with MVIC's rights is erroneous, as anything that  
11 depletes the aggregate volume, which the State Engineer recognized groundwater pumping does,  
12 conflicts with MVIC's rights as a matter of law.

13 **IV. CONCLUSION**

14 For the reasons described herein, MVIC respectfully requests that the Court order the State  
15 Engineer to amend Order 1309 and strike the findings regarding conflicts with senior water rights.

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28 <sup>3</sup> Though the State Engineer apparently believes MVIC's requirements are limited, they in fact are not and all water is actually used. The analysis disregards the application of Nevada law, including, but not limited to, NRS 533.0245 or the actual operation diversion, delivery, and use of the water by MVIC for its shareholders and other laws and circumstances applicable to these Muddy River water rights.

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**Affirmation Pursuant to NRS 239B.030**

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

DATED this 14<sup>th</sup> day of July, 2020.

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1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I hereby certify that I am an employee of DOTSON LAW and that on  
3 this date I caused to be served a true and correct copy of the foregoing by:

- 4 ☒ (BY MAIL) on all parties in said action, by placing a true copy thereof enclosed in a  
5 sealed envelope in a designated area for outgoing mail, addressed as set forth below.  
6 At Dotson Law, mail placed in that designated area is given the correct amount of  
7 postage and is deposited that same date in the ordinary course of business, in a United  
8 States mailbox in the City of Reno, County of Washoe, Nevada.
- 9 ☐ By electronic service by filing the foregoing with the Clerk of Court using the Tyler  
10 Technologies E-filing system, which will electronically mail the filing to the below  
11 listed individuals registered on the Court's E-Service Master List.
- 12 ☐ (BY PERSONAL DELIVERY) by causing a true copy thereof to be hand delivered  
13 this date to the address(es) at the address(es) set forth below.
- 14 ☐ (BY FACSIMILE) on the parties in said action by causing a true copy thereof to be  
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