

IN THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA GOLD MINES LLC,

Petitioner,

vs.

NEVADA DEPARTMENT OF  
CONSERVATION AND NATURAL  
RESOURCES, OFFICE OF THE  
STATE ENGINEER OF THE STATE  
OF NEVADA, AND ADAM  
SULLIVAN, IN HIS CAPACITY AS  
STATE ENGINEER,

Respondents.

Case No.

Electronically Filed  
May 26 2022 10:22 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

**APPENDIX IN SUPPORT OF  
PETITIONER NEVADA GOLD  
MINES LLC'S PETITION FOR  
WRIT OF PROHIBITION**

**VOLUME II OF II**

DATED this 25th day of May, 2022.

PISANELLI BICE PLLC

By: /s/ Todd L. Bice

Todd L. Bice, Esq., #4534  
Dustun H. Holmes, Esq., #12776  
Emily A. Buchwald, Esq., #13442  
400 South 7th Street, Suite 300  
Las Vegas, Nevada 89101

*Attorneys for Petitioner Nevada Gold Mines, LLC*

## CHRONOLOGICAL INDEX

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Pershing County Water Conservation District Petition for Writ of Mandamus, or in the Alternative, Writ of Prohibition, Eleventh Judicial District Case No. CV 15-12019	08/12/2015	I	0023-0044
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Petition for Judicial Review of Order #1329 by Pershing County Water Conservation District	01/05/2022	I	0161-0213
Ruling of the Office of the State Engineer	09/27/2001	I	0001-0022
Scheduling Order and Order on Intervention and Service	12/02/2019	I	0103-0107

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am an employee of Pisanelli Bice PLLC, and that on this 25th day of May, 2022, I electronically filed and served via United States Mail, postage prepaid, a true and correct copy of the above and foregoing **APPENDIX IN SUPPORT OF NEVADA GOLD MINES, LLC'S PETITION FOR WRIT OF PROHIBITION OR MANDAMUS UNDER NRAP 21** properly addressed to the following:

Adam Sullivan, P.E.  
State Engineer  
Division of Water Resources  
901 South Stewart Street, Suite 2002  
Carson City, Nevada 89701

*State Engineer, Division of Water Resources,  
Department of Conservation and Natural Resources*

Aaron D. Ford, Esq.  
Attorney General  
Ian Carr, Esq.  
Deputy Attorney General  
STATE OF NEVADA  
Office of the Attorney General  
100 North Carson Street  
Carson City, Nevada 89701-4717

*Attorneys for the State Engineer, Division of Water  
Resources, Department of Conservation and  
Natural Resources*

/s/ Kimberly Peets  
An employee of Pisanelli Bice PLLC

1 SCHROEDER LAW OFFICES P.C.  
2 Laura A. Schroeder, NSB #3595  
3 Therese A. Stix, NSB #10255  
4 Caitlin R. Skulan, NSB #15327  
5 10615 Double R Blvd., #100  
6 Reno, Nevada 89521  
7 PHONE (775) 786-8800  
8 counsel@water-law.com  
9 Attorneys for PCWCD

OFFICE OF THE ATTORNEY GENERAL  
CARSON CITY, NEVADA

JAN 06 2022

BUREAU OF GOVERNMENT AFFAIRS  
GNR/BL/APPELLATE

FILED 01/06/22

10 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
11  
12 IN AND FOR CARSON CITY

10 PERSHING COUNTY WATER  
11 CONSERVATION DISTRICT,

12 Plaintiff,

13 v.

14 ADAM SULLIVAN, P.E., State Engineer of  
15 the State of Nevada, DIVISION OF  
16 WATER RESOURCES, DEPARTMENT  
17 OF CONSERVATION AND NATURAL  
18 RESOURCES,

19 Defendant.

CASE NO.: 22 OC 00001 IB

DEPT. NO.: I

COMPLAINT: BREACH OF CONTRACT  
REQUESTING SPECIFIC  
PERFORMANCE

19 COMES NOW plaintiff, Pershing County Water Conservation District ("PCWCD" or  
20 "District"), by and through Schroeder Law Offices, P.C. and its attorneys Laura A. Schroeder,  
21 Therese A. Ure Stix, and Caitlin R. Skulan, and files this complaint for breach of contract under  
22 the Settlement Agreement.

23 Plaintiff PCWCD alleges as follows:

24 **JURISDICTION AND PARTIES**

25 1. PCWCD is an irrigation district in Lovelock Nevada, formed under Chapter 539  
26 of the Nevada Revised Statutes. PCWCD is a quasi-municipal agency that is led by a Board of



1 Directors and its manager Ryan Collins. PCWCD owns, controls, and operates a water  
2 conveyance system that provides water to approximately 100 constituents with approximately  
3 37,506 acres of irrigated agricultural lands within the District boundaries. PCWCD operates  
4 diversion structures and dams along the Humboldt River, as well as delivery infrastructure within  
5 the District's boundaries.

6 2. Defendant, Nevada State Engineer ("State Engineer") is an agent of the State of  
7 Nevada who together with the Office of the State Engineer, Division of Water Resources,  
8 Department of Conservation and Natural Resources, regulates the use of waters of the State.  
9 PCWCD and the State Engineer entered into a Settlement Agreement dated October 19, 2020.  
10 *See Exhibit 1.*

11 3. This Court has jurisdiction which is proper under NRS 13.010 and NRS 13.020,  
12 as the contract includes a governing law clause setting the proceedings before the First Judicial  
13 District Court in and for Carson City, however the case and controversy is the result of the State  
14 Engineer's breach of a Settlement Agreement that was in response to litigation in the Eleventh  
15 Judicial District Court in and for Pershing County in Case No. CV15-12019.

#### 16 JURISDICTION AND VENUE

17 4. Venue is proper under NRS 13.010 and NRS 13.020 as the contract was entered  
18 containing a clause a governing law clause setting the proceedings before the First Judicial  
19 District Court in and for Carson City.

20 5. This case involves parties and subject matter before the Eleventh Judicial District  
21 as part of a Petition for Judicial Review filed on January 5, 2022 as Case No. 27CV-JA6-2022-  
22 0002. Exhibit 2.

#### 23 BREACH OF CONTRACT

24 6. On or around October 19, 2020, the State Engineer and PCWCD entered into a  
25 Settlement Agreement and Mutual Release ("Settlement Agreement"). *See Exhibit 1.*  
26



1           7.     PCWCD upheld its contractual obligation under the Settlement Agreement when  
2 it dismissed case CV15-12019 with prejudice on November 20, 2020.

3           8.     On December 7, 2021, the State Engineer issued Order 1329, establishing  
4 regulations to prevent the increase in capture by the exercise of State Engineer issued  
5 groundwater rights of use that conflict with the surface water rights decreed in the Humboldt  
6 River Adjudication. *See* Exhibit 3.

7           9.     Order 1329 fails to include terms relating to Settlement Agreement paragraph  
8 2(c), which states:

9                     Addressing Future Conflicts. The Order will set out a mechanism  
10 to address future conflicts between valid existing groundwater uses  
11 and decreed Humboldt River rights within the Humboldt River  
12 Region. This will include articulating a basis upon which to make  
13 determination, based upon the best available science, as to issuing  
future orders that would restrict withdrawals to conform to priority  
of rights, and the establishment of specific considerations that  
would be reviewed by the State Engineer in determining whether  
to invoke a curtailment order.

14          10.    In failing to address future conflicts as required by paragraph 2(c) in Order 1329,  
15 PCWCD will continue to have a portion of its surface water supply diverted for use by  
16 unregulated junior groundwater appropriators.

17          11.    Without the water supply to which it is entitled, PCWCD will continue to be  
18 unable to supply its patrons with the water delivery to which the patron's lands are entitled  
19 requiring PCWCD to take some or all of the following actions over multiple years:

- 20                   a.   Curtail the volume of irrigation water deliveries to its patrons at amount  
21                       less than the legal entitlement;  
22                   b.   Require fallowing of patrons water righted lands;  
23                   c.   Employing staff to secure water deliveries, prevent waste, water stealing,  
24                       and promote efficiency; and/or  
25                   d.   Limit access to water delivery by rotating water delivery to discrete areas  
26                       of the district over the irrigation season.





1           12.     In taking such actions, PCWCD patrons will suffer continuing hardship and  
2 economic loss over multiple years in one or more of the following ways:  
3                 a. Have insufficient irrigation water delivery to have a full harvest season  
4                 (e.g. more than one cutting of alfalfa hay);  
5                 b. Have insufficient irrigation water delivery to grow feed crops (e.g. corn);  
6                 c. Lose feed crops already planted and fertilized including perennial feed  
7                 crops (e.g. alfalfa hay);  
8                 d. Require additional treatments to control dust and weeds; and/or  
9                 e. Employing personnel to monitor and manage water deliveries received at  
10                irregular intervals.

11           13.     The cost of implementation of the actions by PCWCD and its patrons as stated  
12 above cannot be remedied by money damages, requiring the State Engineer to specifically  
13 perform.

14           14.     PCWCD is especially damaged by having to incur attorney fees and costs in  
15 pursuing this action and the petition for judicial review action in the Eleventh Judicial Court as a  
16 result of the State Engineer's breach of the Settlement Agreement as stated herein.

#### 17                                 REQUEST FOR RELIEF

18           WHEREFORE, PCWCD requests the Court to:

- 19           1. Directing the State Engineer to address future conflicts as provided in paragraph 2(c)  
20           of the Settlement Agreement;  
21           2. Special damages in the form of attorney fees and costs related to enforcing the  
22           contract;  
23           3. Attorney fees and costs; and  
24           4. For such other and further relief that this Court deems proper and just.

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**AFFIRMATION**

This document does not contain the social security number of any person.

DATED this 6<sup>th</sup> day of January, 2022.



SCHROEDER LAW OFFICES P.C.  
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*Attorneys for PCWCD*



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**APPENDIX OF EXHIBITS  
TABLE OF CONTENTS**

<b><u>Exhibit No.</u></b>	<b><u>Description</u></b>
1	Settlement Agreement and Mutual Release
2	Petition for Judicial Review
3	State Engineer Order 1329



PERSHING COUNTY WATER CONSERVATION DISTRICT

v.

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

**Complaint: Breach of Contract Requesting Specific Performance**

**APPENDIX OF EXHIBITS**

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1	Settlement Agreement and Mutual Release
2	Petition for Judicial Review
3	State Engineer Order 1329

## **SETTLEMENT AGREEMENT AND MUTUAL RELEASE**

This Settlement Agreement and Release ("Agreement") is hereby entered into and effective upon the date of the full execution of this Agreement ("Effective Date"), by and between Pershing County Water Conservation District ("PCWCD"), and Tim Wilson, P.E., as State Engineer, Department of Conservation and Natural Resources, State of Nevada ("State Engineer").

### **RECITALS**

A. On August 12, 2015, PCWCD filed its original Petition for Writ of Mandamus, or in the Alternative, Writ of Prohibition in the Eleventh Judicial District Court of the State of Nevada in and for the County of Pershing ("the Court") in Case No. CV15-12019 ("the Dispute").

B. On January 2, 2018, after being granted leave to do so by the Court, PCWCD filed its First Amended Petition for Writ of Mandamus, or in the Alternative, Writ of Prohibition ("Amended Writ Petition").

C. On June 14, 2018, the Court held an evidentiary hearing on PCWCD's Amended Writ Petition, wherein the Court provided PCWCD with an opportunity to provide evidence to prove up the basis for its Amended Writ Petition.

D. On October 23, 2018, the Court issued its Order to Answer Writ of Mandamus, finding that PCWCD presented sufficient evidence to meet its initial burden that its Amended Writ Petition was proper and should go forward, and therefore requiring the State Engineer to Answer PCWCD's Amended Writ Petition to show why a writ should not issue, with an evidentiary hearing to follow.

E. On February 4, 2019, the State Engineer filed his Answer to PCWCD's Amended Writ Petition.

F. During a hearing before the Court on July 28, 2020, the Court ordered PCWCD to provide notice of the Dispute to holders of water rights in the Humboldt River Basin by mail as well as publish notice in newspapers of general circulation in the Humboldt River Basin by October 14, 2020. The Court also set an evidentiary hearing for March 22 through March 26, 2021, for the State Engineer to present evidence in opposition to PCWCD's Amended Writ Petition, as well as providing an opportunity for intervening parties to present supplemental evidence in opposition to PCWCD's Amended Writ Petition.

G. On October 12, 2020, pursuant to a stipulation submitted by the State Engineer and PCWCD, the Court entered its Order Staying Judicial Proceedings and All Currently Pending Matters, staying all proceedings in the Dispute for a period of 90 days so that the State Engineer and PCWCD could engage in settlement discussions.

H. While the Dispute has been proceeding in the Court, the State Engineer has undertaken the following endeavors in an effort to proactively manage the Humboldt River Region in an effort to balance the interests of the senior decreed rights of the Humboldt River with those groundwater uses in the region. These efforts include, but are not limited to:

- a. In 2016, in an effort to utilize the best available science to inform decisions relating to the appropriate management of the Humboldt River Basin, the State Engineer initiated work with the United States Geological Survey ("USGS") and the Desert Research Institute ("DRI") on a groundwater capture model ("the Model") for the Humboldt River Region to more accurately understand the relationships between groundwater and surface water, and to determine the effects of groundwater pumping on Humboldt River flows. The State Engineer retained USGS and DRI to develop a scientifically-sound calibrated numerical model and to develop improved groundwater budgets at the basin scale using modern methods to update estimates from early USGS Reconnaissance Series Reports and Water Resource Bulletins. The Model will be a science-based tool to determine to what extent groundwater withdrawals within the Humboldt River Region capture river flow, and to assist in determining effective measures to avoid conflict with deliveries of Humboldt River water.
- b. Recognition of the hydrologic connections between the Humboldt River and the tributary groundwater basins, in accordance with the Nevada Legislature's adoption of NRS 533.024(1)(e) declaring it the policy of the state to "manage conjunctively the appropriation, use and administration of all waters of [Nevada], regardless of the source of the water."
- c. Establishment of a policy relating to evaporative losses from pit lakes, including requirements that evaporative losses be accounted for through permanent relinquishment of groundwater rights and included within the basin groundwater budget.
- d. Continued communication and stakeholder outreach relating to the State Engineer's efforts within the Humboldt River Region to work toward data sharing and uniform management within the Humboldt River Region.
- e. Issuance of an order requiring the installation of totalizing meters and required reporting of water use, subsequent field verification of meter installation and data accuracy, and development of a database to manage and report groundwater pumping data.

1. Through negotiations, the State Engineer and PCWCD (together as "Parties" or separately as a "Party") have reached a compromise that will settle and resolve the Dispute.

NOW, THEREFORE, in consideration of the mutual promises and agreements herein and other good and valuable consideration, the receipt and sufficiency of which the Parties acknowledge, the Parties hereby agree to the following terms, conditions, and covenants:

#### **TERMS OF SETTLEMENT**

1. Recitals. The Recitals stated above are true and incorporated herein as though set forth in full.

2. Forthcoming Administrative Order. The State Engineer is in the process of developing an administrative draft order ("Order") that is intended to provide clear procedures and standards for review of groundwater applications within the Humboldt River Region as informed by the Model. These procedures will provide the following:

- a. New Groundwater Appropriations. The Order will set out specific thresholds for capture for new groundwater appropriations, including requirements to provide replacement water in a manner sufficient to avoid conflict resulting from the application. The mitigation requirements will be specific as to quantity, priority, and other considerations of the State Engineer to assure that the replacement water is sufficient to avoid conflict with existing rights.
- b. Groundwater Change Applications. The Order will set out specific thresholds for capture for applications to change existing groundwater appropriations that consider the changes in capture, and resulting potential for conflict, caused by a change in the point of diversion. Where such a change results in an increase in capture the Order will set out specific requirements to offset any increase in capture with surface water replacement or relinquishment of groundwater rights. Such requirements are intended to be specific and intended to assure any change is sufficiently mitigated so as to not increase any resulting capture and potential conflict.
- c. Addressing Future Conflicts. The Order will set out a mechanism to address future conflicts between valid existing groundwater uses and decreed Humboldt River rights within the Humboldt River Region. This will include articulating a basis upon which to make determination, based upon the best available science, as to issuing future orders that would restrict withdrawals to conform to priority of rights, and the establishment of specific considerations that would be reviewed by the State Engineer in determining whether to invoke a curtailment order.
- d. Notice. The Order will seek to notify all applicants of new rights, as well as those applying for changes to existing rights, that approval of the application does not constitute an exception to any long-term conjunctive management plan determined to be necessary by the State Engineer to prevent or avoid conflict so as to meet the needs of the water users.

The Order will first be issued as a Draft Order and will be subject to a public administrative process that will include taking comments from interested parties and the general public on the Draft Order as well as a public administrative hearing. A Final Order will be issued following the public administrative hearing.

3. Issuance of the Administrative Order. The State Engineer hereby agrees to issue the aforementioned Draft Order within ninety (90) days of the Effective Date of this Agreement.



4. Dismissal of PCWCD's Amended Writ Petition. In exchange for the State Engineer's agreement to issue the aforementioned Draft Order within the aforementioned time period, PCWCD agrees to dismiss its Amended Writ Petition with prejudice.

5. Full and Final Release. The Parties agree that this Agreement is intended to be a full and final compromise, release and settlement of all claims, demands, lawsuits, expenses, injuries, attorney fees, actions, suits, causes of action, known or unknown, suspected or unsuspected, against the other relating in any manner to the Dispute. Nothing herein shall be construed as a release of or otherwise affect the right of any party to enforce any right under this Agreement.

6. Dismissal of the Dispute. The Parties, through counsel, agree to fully execute the Stipulation and Order for Dismissal with Prejudice shown in Exhibit 1 hereto simultaneous with the execution of this Agreement.

7. Complete Agreement. The Parties understand and agree that this Agreement sets forth the full and complete agreement of the Parties, and that no statement or representation, other than those contained herein, have been made or relied upon by the Parties as an inducement for executing this Agreement. No part of this Agreement may be changed except in a writing executed by a duly authorized representative of each Party.

8. Representation by Counsel. All Parties to this agreement hereby represent and acknowledge that they have been represented by counsel regarding the terms of this Agreement and that their counsel have fully advised them with respect to the consequences associated with agreeing to its terms.

9. Litigation Attorneys' Fees. The Parties hereby acknowledge and agree to bear their own attorneys' fees and costs in connection with the Litigation and the preparation of this Agreement.

10. Miscellaneous:

a) Execution of Additional Documents: Each of the Parties hereto agrees to perform any and all acts and to execute and deliver any and all documents reasonably necessary to carry out the intent and the provisions of this Agreement.

b) Governing Law and Choice of Venue: This Agreement is executed and intended to be performed in the State of Nevada, and the laws of Nevada shall govern its interpretation and effect, and any dispute arising from this agreement shall be commenced before the First Judicial District Court, in and for Carson City, Nevada.

c) Severance: Should any term, part, portion or provision of this Agreement be decided or declared by the Courts to be, or otherwise found to be, illegal or in conflict with any law of the State of Nevada or the United States, or otherwise be rendered unenforceable or ineffectual, the validity of the remaining parts, terms, portions and provisions shall be deemed severable and shall not be affected thereby, providing such remaining parts, terms, portions or

provisions can be construed in substance to constitute the agreement that the parties intended to enter into in the first instance.

d) Successors and Assigns: This Agreement shall be binding and inure to the benefit of the Parties hereto, their predecessors, parents, subsidiary and affiliated business entities, all officers, directors, shareholders, members, agents, employees, attorneys, assigns, successors, heirs, executors, administrators and legal representatives of whatsoever kind or character in privity therewith.

e) Third-Party Beneficiary: This Agreement is for the benefit of the Parties, their successors and assigns only. No other third-party beneficiary rights are intended by this Agreement.

f) No Precedential Effect: Each of the parties hereto acknowledges and agrees that certain negotiated provisions of this Agreement were agreed as an accommodation to the Parties and may be unique to the facts and circumstances surrounding this particular relationship. By entering into this Agreement, it is not the intention of the State Engineer to establish any policy, procedure, course of dealing or plan of general application irrespective of any similarity in facts or circumstances involving such other person or party. This Agreement shall not be binding or controlling in any proceeding before the State Engineer or any court reviewing the State Engineer's decisions, other than to enforce the terms of this Agreement.

g) No Liability: This Agreement is a compromise and is not to be construed as an admission of liability on the part of any Party. Nothing in this agreement shall be construed as an admission against the interest of any Party.

h) Counterparts: This Agreement may be executed in counterparts, one or more of which may be facsimiles or color scanned copies but all of which shall constitute one and the same Agreement. Facsimile or scanned signatures of this Agreement shall be accepted by the Parties to this Agreement as valid and binding in lieu of original signatures.

IN WITNESS WHEREOF, this Agreement is executed as of:

SIGNATORIES

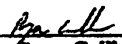
On Behalf of Nevada Division of Water Resources:

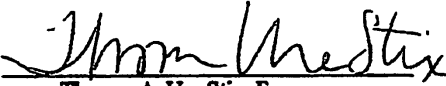
By: Tim Wilson, P.E. Date: 10/19, 2020  
Tim Wilson, P.E.  
State Engineer

By: James Bolotin Date: 10/19, 2020  
James Bolotin, Esq.  
Senior Deputy Attorney General

**On Behalf of Pershing County Water Conservation District:**

By:  Date: 10/15, 2020  
Ronnie Burrows  
PCWCD President

By:  Date: 10-15-, 2020  
Ryan Collins  
PCWCD Secretary/Manager

By:  Date: 10/15, 2020  
Therese A. Ure Stix, Esq  
Attorney for PCWCD

1 CASE NO. \_\_\_\_\_  
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6 IN THE ELEVENTH JUDICIAL DISTRICT COURT  
7 OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF PERSHING  
8

9 PERSHING COUNTY WATER  
10 CONSERVATION DISTRICT,

11 Petitioner,

12 v.

13 ADAM SULLIVAN, P.E., State Engineer of  
14 the State of Nevada, DIVISION OF  
15 WATER RESOURCES, DEPARTMENT  
16 OF CONSERVATION AND NATURAL  
17 RESOURCES,

18 Respondent.

**PETITION FOR JUDICIAL REVIEW  
OF ORDER #1329**

18 COMES NOW Petitioner, Pershing County Water Conservation District ("PCWCD" or  
19 "District"), by and through Schroeder Law Offices, P.C. and its attorneys Laura A. Schroeder,  
20 Therese A. Ure Stix, and Caitlin R. Skulan, and files this petition for judicial review of  
21 Respondent Nevada State Engineer's Order #1329 ("Order 1329") dated December 7, 2021.

22 Petitioner PCWCD alleges as follows:

23 **JURISDICTION AND PARTIES**

24 1. PCWCD is an irrigation district in Lovelock Nevada, formed under Chapter 539  
25 of the Nevada Revised Statutes. PCWCD is a quasi-municipal agency that is led by a Board of  
26 Directors and its manager Ryan Collins. PCWCD owns, controls, and operates a water

Page 1 - PETITION FOR JUDICIAL REVIEW OF ORDER #1329



10615 Double R Blvd., Suite 100  
Reno, NV 89521  
PHONE (775) 786-8800 FAX (775) 600-4971

JP0158783, 0243, 19 TAU

Exhibit 2 Page 01

NGM0255

1 conveyance system that provides water to approximately 100 constituents with approximately  
2 37,506 acres of irrigated agricultural lands within the District boundaries. PCWCD operates  
3 diversion structures and dams along the Humboldt River, as well as delivery infrastructure within  
4 the District's boundaries.

5 2. Respondent, Nevada State Engineer ("State Engineer") is an agent of the State of  
6 Nevada who together with the Office of the State Engineer, Division of Water Resources,  
7 Department of Conservation and Natural Resources, regulates the use of waters of the State. The  
8 State Engineer issued Order 1329 on December 7, 2021. *See* Exhibit 1.

9 3. This Court has jurisdiction to address the Petition for Judicial Review under NRS  
10 533.450.

11 4. Jurisdiction is proper NRS 13.010 and NRS 13.020 because PCWCD's  
12 boundaries are within Pershing County, and Order 1329 was entered, in part, as a response to a  
13 proceeding before the Eleventh Judicial District Court.

14 5. Pursuant to NRS 533.450(3), a Notice of this Petition was served on the State  
15 Engineer, and parties to the Eleventh Judicial District Court Proceeding, Case No. CV 15-12019  
16 filed August 12, 2015.

#### 17 VENUE

18 6. Venue is proper under NRS 533.450 (Petition for Judicial Review) as Order 1329  
19 was issued "Establishing Interim Procedures for Managing Groundwater Appropriations to  
20 Prevent the Increase of Capture and Conflict with Rights Decreed Pursuant to the Humboldt  
21 River Adjudication," and PCWCD holds Humboldt River Decreed rights appurtenant to lands  
22 within its boundaries lying within Pershing County. NRS 533.450.

23 7. Venue is proper under NRS 13.010 and NRS 13.020 as the contract was entered  
24 in response to a proceeding before the Eleventh Judicial District Court in and for Pershing  
25 County.

26 ///



1 **DECISION**

2 8. On August 12, 2015, PCWCD filed an action in this court against the State  
3 Engineer under Case No. CV15-12019, under a Petition for Writ of Mandamus, or in the  
4 Alternative, Writ of Prohibition ("Original Writ Petition").

5 9. Case CV15-12019 proceeded on PCWCD's Amended Petition for Writ of  
6 Mandamus, or in the Alternative, Writ of Prohibition (Jan. 2, 2018) ("Amended Writ Petition"),  
7 that concluded on or around October 19, 2020, when the State Engineer and PCWCD entered  
8 into a Settlement Agreement and Mutual Release ("Settlement Agreement"). *See* Exhibit 2.

9 10. On October 20, 2020, and pursuant to the Settlement Agreement, PCWCD and  
10 the State Engineer stipulated to the dismissal of Case CV15-12019, which Order of Dismissal  
11 was entered and filed on November 20, 2020.

12 11. On December 7, 2021, the State Engineer issued Order 1329, establishing  
13 regulations to prevent the increase in capture and conflict with the surface water rights decreed in  
14 the Humboldt River Adjudication.

15 12. Order 1329 fails to include terms relating to the Settlement Agreement paragraph  
16 2(c), which states:

17 Addressing Future Conflicts. The Order will set out a mechanism  
18 to address future conflicts between valid existing groundwater uses  
19 and decreed Humboldt River rights within the Humboldt River  
20 Region. This will include articulating a basis upon which to make  
21 determination, based upon the best available science, as to issuing  
22 future orders that would restrict withdrawals to conform to priority  
23 of rights, and the establishment of specific considerations that  
24 would be reviewed by the State Engineer in determining whether  
25 to invoke a curtailment order.

26 13. This petition for judicial review is filed with this Court under the authority of  
NRS 533.450 on the grounds that PCWCD is aggrieved by Order 1329.

24 **GENERAL ALLEGATIONS**

25 14. On August 12, 2015, PCWCD filed Case CV15-12019, after years of drought  
26 wherein the constituents received little to no water delivery pursuant to their decreed rights of



1 record while during the same irrigation season upstream groundwater appropriators continued to  
2 pump their full delivery pursuant to their groundwater rights of record with the State Engineer  
3 from the Humboldt River Basin.

4 15. On January 2, 2018, upon leave of the Court, PCWCD filed is Amended Writ  
5 Petition to:

6 [R]equire the State Engineer to use all statutory available tools in  
7 order to: 1) bring all over-appropriated groundwater basins  
8 surrounding the Humboldt River back to their perennial annual  
9 yield; 2) eliminate the cone of depression caused by over-  
allocation of groundwater pumping causing interference with  
surface water flows in the Humboldt River; and 3) regulate water  
used for mining and milling pursuant to Nevada statutory code.

10 16. On June 14, 2018, upon bifurcation of the evidentiary hearing, PCWCD first  
11 presented testimony and evidence on its Amended Writ Petition.

12 17. On October 23, 2018, the Court issued an Order to Answer Writ of Mandamus  
13 (Exhibit 3) making the following findings:

14 A) PCWCD met its burden under a writ proceeding by showing that the State Engineer  
15 has a legal duty to administer and regulate the waters of the Humboldt River Basin.  
16 Order at 3.

17 B) PCWCD satisfied their initial burden in the writ proceedings of showing they had a  
18 senior water right which the State Engineer failed to protect. Order at 4.

19 C) PCWCD has met its burden of showing that it has no other plain, speedy, or adequate  
20 remedy at law. Order at 4.

21 18. The October 23, 2018, Order also required the State Engineer to Answer the  
22 Amended Writ Petition and ordered that the matter proceed to a second evidentiary hearing for  
23 the State Engineer to present evidence to support his Answer. Order at 6.

24 19. On February 4, 2019, the State Engineer filed his Answer to the Amended Writ  
25 Petition.  
26



1           20.    Before the matter could proceed to the evidentiary hearing on the State Engineer's  
2 Answer, the State Engineer and PCWCD requested additional time to engage in settlement  
3 discussions.

4           21.    Based on these settlement discussions, PCWCD and the State Engineer entered  
5 into the Settlement Agreement and Mutual Release. Exhibit 2.

6           22.    The relevant terms of the Settlement Agreement for purposes of the petition are  
7 found at paragraphs two and three:

8           2.    Forthcoming Administrative Order. The State Engineer is in the  
9 process of developing an administrative draft order ("Order") that is  
10 intended to provide clear procedures and standards for review of  
groundwater applications within the Humboldt River Region as informed  
by the Model. These procedures will provide the following:

- 11           a. New Groundwater Appropriations. The Order will set out specific  
12 thresholds for capture for new groundwater appropriations, including  
13 requirements to provide replacement water in a manner sufficient to  
14 avoid conflict resulting from the application. The mitigation  
requirements will be specific as to quantity, priority, and other  
15 considerations of the State Engineer to assure that the replacement  
16 water is sufficient to avoid conflict with existing rights.
- 17           b. Groundwater Change Applications. The Order will set out specific  
18 thresholds for capture for applications to change existing groundwater  
19 appropriations that consider the changes in capture, and resulting  
20 potential for conflict, caused by a change in the point of diversion.  
Where such a change results in an increase in capture the Order will  
21 set out specific requirements to offset any increase in capture with  
22 surface water replacement or relinquishment of groundwater rights.  
Such requirements are intended to be specific and intended to assure  
23 any change is sufficiently mitigated so as to not increase any resulting  
24 capture and potential conflict.
- 25           c. Addressing Future Conflicts. The Order will set out a mechanism to  
26 address future conflicts between valid existing groundwater uses and  
decreed Humboldt River rights within the Humboldt River Region.  
This will include articulating a basis upon which to make  
determination, based upon the best available science, as to issuing  
future orders that would restrict withdrawals to conform to priority of  
rights, and the establishment of specific considerations that would be  
reviewed by the State Engineer in determining whether to invoke a  
curtailment order.
- d. Notice. The Order will seek to notify all applicants of new rights, as  
well as those applying for changes to existing rights, that approval of  
the application does not constitute an exception to any long-term

Page 5 - PETITION FOR JUDICIAL REVIEW OF ORDER #1329



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:0558781-0247 19 TAL:

Exhibit 2 Page 05

NGM0259



1 conjunctive management plan determined to be necessary by the State  
2 Engineer to prevent or avoid conflict so as to meet the needs of the  
3 water users.  
4 The Order will first be issued as a Draft Order and will be subject to a  
5 public administrative process that will include taking comments from  
6 interested parties and the general public on the Draft Order as well as a  
7 public administrative hearing. A Final Order will be issued following the  
8 public administrative hearing.  
9 3. Issuance of the Administrative Order. The State Engineer hereby  
10 agrees to issue the aforementioned Draft Order within ninety (90) days of  
11 the Effective Date of this Agreement.  
12 23. On November 20, 2020, based on the Settlement Agreement, litigation under  
13 CV15-12019 was dismissed with prejudice.  
14 24. On January 19, 2021, the State Engineer issued a "Notice of Hearing and  
15 Proposed Interim Order" with a "Draft Interim Order" "Establishing procedures for review of  
16 applications to appropriate groundwater in the Humboldt River Region with regard to the  
17 potential for capture of and conflict with decreed rights to the waters of the Humboldt River and  
18 tributaries." See Exhibit 4.  
19 25. On February 8, 2021, PCWCD sent correspondence to the State Engineer  
20 advising that the terms of the Settlement Agreement, and specifically Paragraph 2(c) were not  
21 consistent with the Draft Interim Order. See Exhibit 5.  
22 26. On February 22, 2021, after PCWCD expressed to the State Engineer its concern  
23 that the Draft Interim Order failed to address current conflicts, PCWCD and the State Engineer  
24 engaged in a virtual discussion to consider the issue in light of the Settlement Agreement.  
25 PCWCD made it clear to the State Engineer that it was not waiving enforcement of the terms of  
26 the settlement agreement by not immediately contesting this failure.  
27 On April 2, 2021, a virtual public hearing was held to receive comments on the  
Draft Interim Order, to which PCWCD attended and provided comments.



1 28. On April 14, 2021, PCWCD submitted comments to the Draft Interim Order  
2 consistent with the Settlement Agreement specifically addressing the State Engineer's failure to  
3 address regulation of existing and future conflicts. See Exhibit 6.

4 29. On August 30, 2021 and September 15, 2021, PCWCD contacted the State  
5 Engineer requesting updates on the Draft Interim Order. See Exhibit 6.

6 30. On September 21, 2021, the State Engineer responded to PCWCD noting in part:

7 [A] complete immediate resolution will not be forthcoming  
8 without the finalized model. Once again, the State Engineer  
9 reiterates this fact. The published groundwater models, and  
10 additional public input on long-term management strategies  
11 supported by those models, are necessary for such strategies to be  
12 effective and defensible into the future. That being said, the  
13 forthcoming interim order will indeed be just that: an actual  
14 interim order and not another "proposed" order. This forthcoming  
15 interim order is intended to have tangible effects and will guide the  
16 State Engineer's decision-making by providing more clarity and  
17 certainty to all affected parties in the interim until the groundwater  
18 models are published and the State Engineer can move to the next  
19 phase of the administrative process. *Internal quotes omitted.*

20 31. On December 7, 2021, the State Engineer issued Order 1329 that once again  
21 failed to address the terms of the Settlement Agreement paragraphs 2(c).

#### 22 PETITION FOR JUDICIAL REVIEW

23 32. Petitioner re-alleges paragraphs 1-31 and incorporate the same herein by  
24 reference.

25 33. PCWCD is aggrieved by the December 7, 2021, Order 1329 in one or more of the  
26 following ways:

- 27 a. Failing to include terms to address the Settlement Agreement, Paragraph  
28 2(c);
- 29 b. Failing to address and provide a procedure to address current and future  
30 conflicts between Humboldt River Decreed Rights and State Engineer  
31 issued groundwater rights;



1 c. Failing to provide a timeline for implementation of procedures to address  
2 current and future conflicts between Humboldt River Decreed Rights and  
3 State Engineer issued groundwater rights including issuance of future  
4 orders; and

5 d. Failing to provide a timeline as to when a final order will be issued.

6 34. Order 1329 should be remanded in part to require the State Engineer to provide a  
7 procedure to address current and future conflicts between Humboldt River Decreed Rights and  
8 groundwater rights issued by the State Engineer including a timeline for implementation of the  
9 procedure

10 **REQUEST FOR RELIEF**

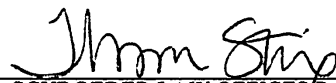
11 WHEREFORE, PCWCD requests the Court to:

- 12 1. Remand in part Order 1329 to the State Engineer with specific instruction to require  
13 the State Engineer to provide a procedure to address current and future conflicts  
14 between Humboldt River Decreed Rights and groundwater rights issued by the State  
15 Engineer including a timeline for implementation of the procedure; and  
16 2. For such other and further relief that this Court deems proper and just.

17 **AFFIRMATION**

18 This document does not contain the social security number of any person.

19  
20 DATED this 5<sup>th</sup> day of January, 2022.

21   
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IN THE OFFICE OF THE STATE ENGINEER  
OF THE STATE OF NEVADA

ORDER

#1329

ESTABLISHING INTERIM PROCEDURES FOR MANAGING GROUNDWATER  
APPROPRIATIONS TO PREVENT THE INCREASE OF CAPTURE AND CONFLICT  
WITH RIGHTS DECREED PURSUANT TO THE HUMBOLDT RIVER  
ADJUDICATION

I.

OVERVIEW

WHEREAS, it is well established that the source of water to a pumping well originates from three primary sources; first from groundwater storage, then increasing over time from capture of streamflow (where present in a hydrographic system) and evapotranspiration.<sup>1,2</sup> The terms "stream capture" or simply "capture," as used in this Order, refer to a reduction in streamflow caused by groundwater pumping. Decades of groundwater pumping in the Humboldt River Region (Region) has led to increasing capture of the Humboldt River and its tributaries, resulting in growing conflict with rights of the Humboldt Decree.

WHEREAS, there are a range of actions or strategies that may be implemented by water users, whether in cooperation with the State Engineer or through other means, to mitigate or avoid conflict. Regional groundwater models currently in development by the United States Geological Survey (USGS) and Desert Research Institute (DRI) are an important tool that will be used to demonstrate the effectiveness of different management strategies and possible administrative actions. Public participation throughout the process of developing a long-term management strategy is an essential component for communication, transparency, and successful implementation. Through the State Engineer's engagement with the community of water users within the Humboldt Region, several viable strategies have come under consideration, and include:

- Prohibition on pumping within a determined capture zone under certain thresholds of predicted seasonal water supply;
- Credit systems that account for non-use or for return flow from artificial recharge;

<sup>1</sup> Charles V. Theis, 1940, *The Source of Water Derived from Wells - Essential factors controlling the response of an aquifer to development*, Civil Engineering, v. 10, no. 5, p. 277-280.

<sup>2</sup> Barlow, P.M., and Leake, S.A., 2012, *Streamflow Depletion by Wells - Understanding and Managing the Effects of Groundwater Pumping on Streamflow*, U.S. Geological Survey Circular (Dec. 1, 2021, 1:06 p.m.) 1376, 84 p., <https://doi.org/10.3133/cir1376>

Exhibit 1 Page 01

Exhibit 2 Page 09

NGM0263

- Enhanced storage capacity, including aquifer storage and recovery that benefits the Humboldt River system;
- Use of conservation funds to enact measures that benefit the Humboldt River such as purchase of groundwater rights that are in immediate/frequent conflict with the Humboldt decree;
- Other private party agreements to resolve conflict; and/or
- Withdrawal or abandonment of existing committed rights.<sup>3</sup>

**WHEREAS**, the primary mechanism available to the State Engineer to unilaterally address conflict among water right holders is to order that withdrawals of groundwater be restricted to conform to priority rights per NRS 534.110(6). However, it is also well established that groundwater use in the Humboldt River Region is fundamental to the Region's culture, communities and economic vitality. Strict curtailment would be a draconian measure resulting in significant and lasting economic harm. It is further recognized that permitted groundwater use is a beneficial use. Additionally, a varying amount of the source of water to pumping wells originates from sources other than stream capture and this use is not in conflict with the Humboldt Decree. For these reasons, among others, strict curtailment is not a preferred option. Rather, implementation of a management framework based on the quantifiable impact of each groundwater well's capture of streamflow will more precisely address harm from any conflict with Humboldt decreed rights.

**WHEREAS**, the State Engineer recognizes that any comprehensive solution will require extensive outreach to those impacted by any future decisions and management strategies, including water right holders, tribal communities, water users, representatives of conservation and environmental interests, and other interests (collectively referred to as "stakeholders"). The State Engineer seeks to collaborate with stakeholders on the development of long-term management strategies, supported by groundwater models that are currently in development, to address conflict caused by stream capture without arbitrary curtailment or other administrative restrictions on groundwater use. The State Engineer anticipates that any future management framework shall consider active water replacement plans carried out by groundwater right holders, local water resource plans developed in accordance with NRS 278.0228, implementation of Water Conservation Plans pursuant to NRS 540.131, preferred uses of water in the interest of public

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<sup>3</sup> See generally, comments received from the draft interim order; notes from Working Group meetings, notes from Humboldt River Basin Water Authority meetings, official records of the Nevada Division of Water Resources.

Exhibit 1 Page 02

Exhibit 2 Page 10

welfare pursuant to NRS 534.120(2), and domestic well protections under NRS 533.024(b). It is also anticipated that any such framework will be supported by the use of the USGS and DRI models to demonstrate effectiveness in preventing conflict resulting from groundwater use within the Humboldt River Region.

WHEREAS, the State Engineer recognizes that under the current conditions there are substantial implications for the water users in the Humboldt River Region. The State Engineer also acknowledges and appreciates that the water users understand the issue and share in the desire to see an effective management strategy that addresses the issues relating to groundwater use that conflicts with senior decreed rights and the need for a defensible outcome. While the science that will be used to inform those long-term management strategies is being finalized, an interim protocol is necessary to avoid exacerbating existing problems. This Order establishes the management framework that the State Engineer is adopting for this period to avoid additional harm to water rights above what is already occurring.

## II.

### BACKGROUND OF THE HUMBOLDT RIVER REGION

WHEREAS, the Humboldt River Region is delineated by the topographic boundary of the Humboldt River watershed, extending over 11,000 square miles, including 34 hydrographic basins in eight Nevada counties. Hydrographic basins within the Humboldt River Region include Marys River Area (042), Starr Valley Area (043), North Fork Area (044), Lamoille Valley (045), South Fork Area (046), Huntington Valley (047), Dixie Creek-Tenmile Creek Area (048), Elko Segment (049), Susie Creek Area (050), Maggie Creek Area (051), Marys Creek Area (052), Pine Valley (053), Crescent Valley (054), Carico Lake Valley (055), Upper Reese River Valley (056), Antelope Valley (057), Middle Reese River Valley (058), Lower Reese River Valley (059), Whirlwind Valley (060), Boulder Flat (061), Rock Creek Valley (062), Willow Creek Valley (063), Clovers Area (064), Pumpernickel Valley (065), Kelly Creek Area (066), Little Humboldt Valley (067), Hardscrabble Area (068), Paradise Valley (069), Winnemucca Segment (070), Grass Valley (071), Imlay Area (072), Lovelock Valley (073), Lovelock Valley-Oreana Subarea (073A), and White Plains (074).

Exhibit 1 Page 03

Exhibit 2 Page 11

**WHEREAS**, the Bartlett Decree<sup>4</sup> dated October 20, 1931, in the Sixth Judicial Court of the State of Nevada, establishes relative rights to the use of the waters of the Humboldt River and setting forth the dates of priority and duties of water for the decreed claims. The Bartlett Decree determined the waters of the stream system to be fully appropriated, and that in an average year there existed no surplus water for irrigation. Subsequent decrees, orders and writs made corrections to the Bartlett Decree, collectively forming the Humboldt River Adjudication, hereafter referred to as the "Humboldt Decree." This process was complete by 1938. The most senior decreed surface water right in the Humboldt River system has a priority date of 1861 and the most junior right has a priority date of 1921.<sup>5</sup> The Humboldt Decree does not include the Little Humboldt River adjudication or Reese River vested claims.

**WHEREAS**, Humboldt River flow measured at the Palisade gage is the primary tool utilized for determining and scheduling delivery amounts of Humboldt River decreed rights.<sup>6</sup> Deliveries are scheduled during the irrigation season based on the daily flow measurement at the gage.<sup>7</sup> When daily flows at the Palisade gage are sufficient to deliver all decreed rights on the Humboldt River and its tributaries, all water rights irrespective of location above or below the gage are scheduled to receive their full duty of water. When flows are not sufficient to deliver all decreed rights, those rights with senior priority dates are served first. In practice, actual deliveries over the expanse of the Humboldt River Region may be different than exact scheduled deliveries due to a wide range of variables including water distribution and management practices and climatic variations that affect riparian evapotranspiration rates, streambank storage, and baseflow.

**WHEREAS**, during the 2012–2015 period the Humboldt River Region experienced one of the worst droughts since 1902.<sup>8</sup> Annual flow at the Palisade gage for that 4-year period averaged 82,872 acre-feet, which is 30% of the historical average annual flow of 287,846 acre-feet for the

<sup>4</sup> Bartlett Decree, incorporated as Section 1 into the Decree entered *In the Matter of the Determination of the Relative Rights of Claimants and Appropriators of the Waters of the Humboldt River Stream System and its Tributaries*, Case No. 2804, Sixth Judicial District Court of the State of Nevada, In and For the County of Humboldt (October 20, 1931).

<sup>5</sup> *In the Matter of the Determination of the Relative Rights of Claimants and Appropriators of the Waters of the Humboldt River Stream System and Tributaries*, Case No. 2804, Sixth Judicial District Court of the State of Nevada, In and For the County of Humboldt (October 20, 1931).

<sup>6</sup> Bartlett Decree, the decreed irrigation season begins March 15th downstream of Palisade and April 15th upstream of Palisade and ends on varying dates depending on location and culture.

<sup>7</sup> United States Geological Survey (USGS) Gage 10322500, Humboldt River at Palisade.

<sup>8</sup> Period of record for the Palisade gage begins in 1902.

period of record spanning 112 years.<sup>9</sup> At the headwaters of the Humboldt River system during 2012–2015, upstream of any significant groundwater pumping, Lamoille Creek also experienced its lowest 4-year flow since at least 1944 when continuous flow measurements on Lamoille Creek started.<sup>10</sup> By the end of the irrigation seasons in 2014 and 2015 the Humboldt River at Imlay was dry and water was unavailable to allocate to downstream surface water users in the Lovelock area. In the midst of the unprecedented drought, senior decreed water right holders alleged that junior groundwater appropriators were capturing surface flows of the Humboldt River and that groundwater use conflicted with the delivery of their surface water rights. In a writ petition filed in the 11th Judicial District Court for Pershing County in 2015, senior water right holders requested that the Court require the State Engineer to take action within his statutory authority to address the alleged conflict.<sup>11</sup>

**WHEREAS**, nearly all groundwater uses within the Humboldt River Region are junior to decreed surface water rights in the Humboldt River and its tributaries. There are only four active groundwater permits having a priority date earlier than 1921, the date of the most junior Humboldt Decree right.<sup>12</sup> Groundwater development began to increase more substantially in the 1960s and has gradually increased in the decades since. Groundwater is now extensively relied upon for all manners of use, supporting communities and industry throughout the Region. Groundwater rights were approved in accordance with existing Nevada law over the years by the State Engineer based upon findings that unappropriated water was available and its use would not conflict with existing rights or the public interest.

**WHEREAS**, it is scientifically understood that groundwater pumping has the potential to capture streamflow when surface water and groundwater are hydraulically connected, either by inducing greater infiltration losses from the stream channel or by reducing the amount of

<sup>9</sup> For water years between 1902–1906 and 1912–2019.

<sup>10</sup> USGS Gage 10316500, Lamoille Creek Near Lamoille. Note that flow measurements also exist for a period between 1915 and 1923.

<sup>11</sup> *Petition for Writ of Mandamus, or in the Alternative, Writ of Prohibition*. In the Eleventh Judicial District Court of the State of Nevada In and For the County of Pershing, (Case No. CV 15-12019), *Pershing County Conservation District v. Jason King, P.E., State Engineer of the State of Nevada, Division of Water Resources, Department of Conservation and Natural Resources*.

<sup>12</sup> See Permit 1843, Certificate 139; Permit 2397, Certificate 399; Permit 3520, Certificate 995; and Permit 4589, Certificate 749, Nevada Division of Water Resources' Water Rights Database, official records of the Nevada Division of Water Resources, <http://water.nv.gov/hydrographicabstract.aspx>



groundwater that would otherwise discharge as baseflow to the stream.<sup>13</sup> The potential for hydraulic connectivity and capture by itself does not necessarily demonstrate that conflict is occurring or will occur in the future, or that surface water deliveries cannot be met. However, because stream capture due to pumping necessarily reduces streamflow, any amount of capture in a fully appropriated river system when not in full priority will reduce surface water that would otherwise have been delivered to surface water right holders. In addition, with climate models forecasting a continuing pattern of increasing frequency and intensity of droughts and flood events,<sup>14</sup> drought-accentuated natural losses from the river, combined with the likelihood for greater drawdown due to increased reliance on groundwater during drought, may increase the future potential for insufficient surface flow to fully serve decreed rights. The hydrologic connection between surface water and groundwater was not a consideration in the Humboldt Decree, but these long-term dynamics underscore the difficulty in developing and implementing conjunctive management strategies for future administration of groundwater and surface water in the Humboldt River Region.

### III.

#### ACTIONS TAKEN SINCE THE 2012–2015 DROUGHT

WHEREAS, a basic tenet of prior appropriation is that if there is not enough water to serve all users then senior water right holders are entitled to water before junior right holders.<sup>15</sup> During the drought period of 2012–2015 available data were insufficient to identify to what extent groundwater pumping was causing the inadequacy of water supply for Humboldt River senior decreed right holders and to what extent it was the result of natural low flow because of drought.

<sup>13</sup> *Charles v. Theis*, 1940, *The Source of Water Derived from Wells—Essential factors controlling the response of an aquifer to development*, Civil Engineering, v. 10, no. 5, p. 277-280.

<sup>14</sup> USGCRP, 2017, Climate Science Special Report: Fourth National Climate Assessment, Volume I [Wuebbles, D.J., D.W. Fahey, K.A. Hibbard, D.J. Dokken, B.C. Stewart, and T.K. Maycock (eds.)]. U.S. Global Change Research Program, Washington, DC, USA, 470 pp., See Chapter 8, page 237.

<sup>15</sup> See NRS 534.110, providing for curtailment by priority. See also *Wilson v. Pahrump Fair Water, LLC*, 481 P. 3d 853, 860 (2021) (“That some water rights must necessarily acquiesce to senior water rights is a natural consequence of the prior appropriation doctrine” quoting *Fox v. Skagit Cty.*, 372 P.3d 784, 796 (Wash. App. 2016)); *U.S. v. Orr Water Ditch Co.*, 600 F.3d 1152, 1158-59 (9th Cir. 2010) (“Surface water contributes to groundwater, and groundwater contributes to surface water...[Surface rights granted by decree] cannot be defeated by allocation of water to others—whether by allocation of surface water or groundwater.”).

Analysis of the data at the time indicated that curtailing junior groundwater pumping to protect senior decreed rights would result in a negligible addition to flow in the River and that such action would not likely be legally defensible without additional data and scientific analysis. However, such action would have had devastating and severe impacts to the communities and economies throughout the Region that rely on groundwater.<sup>16</sup> Consequently, no curtailment was imposed.

**WHEREAS**, in the years since the end of the 2012–2015 drought, the State Engineer initiated several measures to improve the available data in the Region and thus provide an informed and sound basis to render decisions with regard to avoiding potential conflict. Among these measures:

1. All non-designated basins within the Region were designated pursuant to NRS 534.030;
2. Totalizing meter installation and reporting were required by State Engineer's Order 1251;
3. Field investigations were completed to verify installation and meter data;
4. The Nevada Division of Water Resources enhanced its database capacity to maintain and manage the pumping data in a publicly accessible manner;
5. The State Engineer established a policy requiring water rights for pit lake evaporation; and,
6. Applications to appropriate groundwater or to change the point of diversion (POD) of existing groundwater rights were denied if granting the application would conflict with existing senior rights due to stream capture.

**WHEREAS**, in 2016, the State Engineer assembled the Humboldt River Working Group<sup>17</sup> to assist in developing draft regulations to resolve future conflict between surface and groundwater rights. The Working Group members included both surface water and groundwater users representing municipalities, agriculture, mining, and other community interests across the Humboldt River Region. Over the course of the next three years, the Working Group developed a conjunctive management approach whose objective was to protect senior water interests while at the same time maximizing beneficial use of surface water and groundwater. This effort culminated in a set of draft regulations that relied on a combination of mitigation plans and financial compensation to avoid future conflict. However, in the 2019 Legislative session, the statutory

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<sup>16</sup> Nevada Division of Water Resources, public presentations on the Humboldt River in Lovelock, Winnemucca, and Elko, February 12–13, 2015. Analysis available in the files of the Nevada Division of Water Resources.

<sup>17</sup> The Humboldt River Working Group consists of representatives from key stakeholder and water user groups from within the Humboldt River Region with the common purpose to propose, negotiate, and provide feedback on conjunctive use management regulations.

revisions required to give the State Engineer the authority to implement the draft regulations were unsuccessful.<sup>18</sup> Surface water users expressed no interest in financial mitigation in lieu of water. Groundwater users likewise expressed no interest in being assessed fees for capture that had yet to be quantified by best available science.<sup>19</sup>

**WHEREAS**, since 2016, the State Engineer has worked with the USGS and DRI to develop improved groundwater budgets at the basin scale and to develop numerical groundwater capture models for the Humboldt River Region. These peer-reviewed products are intended to serve as a basis for determining the effect of groundwater pumping on flows in the Humboldt River and its tributaries.<sup>20</sup> When published, and made publicly available, this model study will provide a consistent basis and a scientifically sound measure to evaluate different management strategies. These products will allow for the development of capture maps, which identify the relative potential for the capture of surface water flow at any given well location and the potential for the capture of surface water flow over different durations of time. This study will also serve as a foundation for review of the perennial yield<sup>21</sup> values for the Region, first estimated from the early USGS Reconnaissance Series Reports and Water Resource Bulletins, which are the primary guidelines used by the State Engineer to determine the water budget for any particular basin.<sup>22</sup>

**WHEREAS**, while the completion of the Humboldt River Region groundwater model study is expected in 2022, preliminary findings from that effort provide insight into the dynamics of stream capture by groundwater pumping. These findings indicate that there may be important non-linear, climate-driven behaviors that influence interactions between the surface water and

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<sup>18</sup> AB 51 (2019).

<sup>19</sup> See *Minutes of the Meeting of the Assembly Committee on Natural Resources, Agriculture and Mining*, February 27, 2019, (Dec. 2, 2021, 1:08 p.m.) <https://www.leg.state.nv.us/Session/80th2019/Minutes/Assembly/NRAM/Final/309.pdf>

<sup>20</sup> See *Nevada Water Science Center: Evaluation of Streamflow Depletion Related to Groundwater Withdrawal, Humboldt River Basin*, (December 2, 2021, 1:10 p.m.) <https://nevada.usgs.gov/humboltddepletion/index.html>

<sup>21</sup> Perennial yield is defined as the maximum amount of groundwater that can be withdrawn each year over the long term without depleting the groundwater reservoir. Perennial yield is ultimately limited to the maximum amount of natural discharge that can be utilized for beneficial use. The perennial yield cannot be more than the natural recharge to a groundwater basin and in some cases is less. See Office of the State Engineer, *Water for Nevada, State of Nevada Water Planning Report No. 3*, p. 13, Oct. 1971.

<sup>22</sup> See, e.g. Hydrographic Area Summary for Marys River Area, (042), (December 2, 2021, 1:10 p.m.) [https://nevada.usgs.gov/humboltddepletion/HumboldtDepletionProposal\\_Public.pdf](https://nevada.usgs.gov/humboltddepletion/HumboldtDepletionProposal_Public.pdf) official records in the Nevada Division of Water Resources.

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groundwater systems. These behaviors suggest that pumping-related capture of surface water tends to increase during wet years when excess water is available and decrease during dry years when the potential for conflict is greater.<sup>23</sup> Understanding these phenomena is necessary to accurately define both the timing and distribution of capture so that conflict attributable to groundwater pumping can be characterized and quantified. Long-term management strategy will rely on completion of the modeling effort and a process of public review and deliberation to determine best practices that satisfy legislative directives of prior appropriation, beneficial use and the public interest. Until then, the interim management practices described herein focus on statutorily available mechanisms for avoiding conflict due to increased capture caused by new appropriations or changes to existing groundwater permits.

**WHEREAS**, as of the date of this Order (Fall 2021) the Region is two years into a Severe to Extreme Drought.<sup>24</sup> Humboldt River flows for the summer of 2021 were running at or below 10th percentile flow levels,<sup>25</sup> very little decreed water was served during the 2021 irrigation season, and current Rye Patch Reservoir storage is approximately 7,000 acre-feet, which is 4% of the reservoir's capacity. This current condition highlights the difficult issues that face the water users in the Region, which are especially apparent during droughts like these.

#### 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**, NRS 533.024(1) was amended in 2017 adding a new subsection declaring that it is the policy of Nevada "[t]o manage conjunctively the appropriation, use and administration of all waters of this State, regardless of the source of the water."<sup>26</sup>

**WHEREAS**, NRS 532.120 authorizes the State Engineer to make such reasonable rules as

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<sup>23</sup> Steven Jepsen, Kip Allander, and Kyle Davis, "Behavior and prediction of stream capture under varying streamflow conditions," presentation at Nevada Water Resources Association Annual Conference, Jan. 26, 2021, (Dec. 2, 2021 1:11 a.m.)

[https://www.youtube.com/watch?v=2vLalhesE\\_E](https://www.youtube.com/watch?v=2vLalhesE_E)

<sup>24</sup> U.S. Drought Monitor, Nevada Map, October 5, 2021, (Dec. 2, 2021, 1:12 p.m.)

[https://droughtmonitor.unl.edu/data/pdf/20211005/20211005\\_nv\\_1rd.pdf](https://droughtmonitor.unl.edu/data/pdf/20211005/20211005_nv_1rd.pdf)

<sup>25</sup> USGS gaging stations (10318500, 10321000, 10325000, 10327500, 10333000).

<sup>26</sup> NRS 533.024(1)(e).

may be necessary for the proper and orderly execution of the powers conferred by law.

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

**WHEREAS**, NRS 533.370(2) requires that, in review of an application to appropriate water or to change water already appropriated, the State Engineer must consider whether there is unappropriated water in the source of supply, whether the uncommitted groundwater has been reserved pursuant to NRS 533.0241, whether the proposed use or change conflicts with existing rights or protectable interests in existing domestic wells, and whether it threatens to prove detrimental to the public interest.

**WHEREAS**, the State Engineer's procedures to evaluate applications to appropriate water or to change existing appropriations must be applied in a manner that is consistent and understandable to water right holders and their representatives.

**WHEREAS**, the State Engineer is responsible for establishing procedures to evaluate applications that provide clarity to water users about how to meet the needs of communities and local economies while avoiding conflict with senior decreed water rights.

**WHEREAS**, procedures established by this Order are intended to allow for efficient administration of groundwater rights, with provisions for in-stream replacement water and withdrawal or duty limitation of groundwater permits, when necessary. The intent is to provide needed flexibility for water right holders without increasing conflict by adding to any capture impacts above what is already occurring. In the short term, these procedures will make progress toward avoiding conflicts and preserving the availability of surface water in the Humboldt River Region to serve senior priority rights.

**WHEREAS**, during this interim period before the USGS and DRI models are published and while long-term strategies are being developed with involvement from the stakeholder community, the State Engineer may adopt further conjunctive management measures necessary to address capture impacts.

#### **ORDER**

**NOW THEREFORE, IT IS HEREBY ORDERED**, that in addition to those considerations required by NRS 533.370 and established by previous State Engineer's Orders discussed herein, the following procedures are being implemented by the State Engineer for the review of applications for groundwater rights in the Humboldt River Region:

1. Applications for groundwater rights will be reviewed for increases to stream capture.

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and cannot increase conflict along the Humboldt River or its tributaries. Capture shall be determined by the State Engineer using established analytical or numerical methods along with any available knowledge of aquifer properties associated with the points of diversion. These rules apply to:

A. New appropriations of groundwater where annual capture is predicted to exceed 10% of duty for any year during 50 years of continual pumping.<sup>27</sup> Continual pumping is defined as the annualized duty amount requested under the application. Where there is a non-consumptive return flow component of the application, the annualized duty amount only applies to the consumptive portion.

B. Applications to change the point of diversion of existing rights that are predicted to result in an increase of net capture on the system or a tributary, defined as the difference between capture at the proposed POD and capture at the existing POD, and where annual capture at the proposed POD is predicted to exceed 10% of the permitted duty in any year during 50 years of continual pumping.

C. Temporary applications filed under NRS 533.345 to change the point of diversion of an existing groundwater right and applications for new groundwater appropriations filed under the provisions of NRS 533.371.

2. Capture shall be offset by not diverting an existing decreed right (in-stream replacement water), or by the withdrawal of an existing groundwater permit (meaning that the groundwater permit is no longer active, in part or in its entirety) so the resulting availability of streamflow is not less than it was prior to the appropriation or the change in the point of diversion.

A. In-stream replacement water or withdrawn groundwater rights shall be sufficient to equal or exceed the predicted annual capture amount if there is a reasonable probability that the replacement water will be available, in both time and quantity, as determined by the State Engineer. The State Engineer finds that "reasonable probability" would be an 80% probability threshold, which is established to ensure a replacement surface water right or a groundwater withdrawal right is of sufficient quantity and priority to reliably offset annual capture in 40 out of 50-years after an application is approved. In the case of replacement water, probabilities can be determined based on historical

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<sup>27</sup> This threshold is considered to represent the range of certainty of the methods currently being used to calculate capture.

Humboldt River flow and diversion records. In the case of withdrawal of a groundwater right, probabilities can be determined based on analytical or numerical model predictions of recovered capture amounts.

- B. If in-stream replacement water is used to offset capture, then the following applies:
    - i. If a decreed water right is the source of replacement water, it shall be for a crop-type, duty amount, and priority date that is sufficient to equal or exceed the predicted total capture amount of the new appropriation over a 50-year period of use, as determined by the State Engineer.
    - ii. Replacement water shall have an existing place of use that can and will be stripped of use. Water use on areas of natural flooding and other areas where water cannot be physically removed from the land will not be considered for replacement water.
  - C. If withdrawal of an existing groundwater right is used to offset capture, whether withdrawn in its entirety or an adequate portion of the existing right, the predicted total capture amount of the withdrawn right shall be sufficient to equal or exceed the predicted total capture amount of the new appropriation over a 50-year period of use, as determined by the State Engineer.
  - D. Where a change application moves an existing POD capture source from the Humboldt River or a tributary to either an upstream reach or to a different tributary, offset will be required for capture impacts on the new reach or tributary as well as for net capture on the Humboldt River. If capture impacts occur on a new reach or tributary, the applicant will have to offset the entire amount of capture on the new reach or tributary.
  - E. If either temporary in-stream replacement water or temporary withdrawal of a groundwater permit is used to offset capture, the predicted capture offset amount of the replacement water or withdrawn right must equal or exceed the predicted 50-year total capture amount of the temporary application within 10 years of the application's approval, as determined by the State Engineer.
3. These procedures do not apply:
- A. to any application where pumping at the proposed POD results in capture less than 10% of the permitted duty every year during 50 years of continual pumping.
  - B. to change applications where capture at the proposed POD is less than or equal to capture at the existing POD.
  - C. to any application for groundwater where annual capture associated with pumping at

Exhibit 1 Page 12

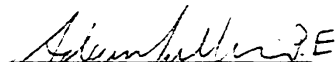
Exhibit 2 Page 20

the proposed place of use does not exceed 5 acre-feet during a 50-year period of use.<sup>28</sup>

D. to temporary applications to change PODs within an area designated by State Engineer order allowing for multiple PODs from a single representative POD for mining, milling, and dewatering operations.

4. Uncommon or unforeseeable circumstances will be treated on a case-by-case basis, as determined by the State Engineer, with the same overall objective of preventing additional stream capture.

5. This order is in effect until it is replaced by a subsequent order establishing long term management practices addressing conflict caused by capture to the satisfaction of the State Engineer, or it is superseded by another order or decision.

  
ADAM SULLIVAN, P.E.  
State Engineer

Dated at Carson City, Nevada this

7<sup>th</sup> day of December, 2021.

<sup>28</sup> This exemption is equivalent to a capture rate of less than 0.01 cfs and would effectively exempt all domestic use, much stockwater use, and other pumping resulting in nominal capture.



### SETTLEMENT AGREEMENT AND MUTUAL RELEASE

This Settlement Agreement and Release ("Agreement") is hereby entered into and effective upon the date of the full execution of this Agreement ("Effective Date"), by and between Pershing County Water Conservation District ("PCWCD"), and Tim Wilson, P.E., as State Engineer, Department of Conservation and Natural Resources, State of Nevada ("State Engineer").

### RECITALS

A. On August 12, 2015, PCWCD filed its original Petition for Writ of Mandamus, or in the Alternative, Writ of Prohibition in the Eleventh Judicial District Court of the State of Nevada in and for the County of Pershing ("the Court") in Case No. CV15-12019 ("the Dispute").

B. On January 2, 2018, after being granted leave to do so by the Court, PCWCD filed its First Amended Petition for Writ of Mandamus, or in the Alternative, Writ of Prohibition ("Amended Writ Petition").

C. On June 14, 2018, the Court held an evidentiary hearing on PCWCD's Amended Writ Petition, wherein the Court provided PCWCD with an opportunity to provide evidence to prove up the basis for its Amended Writ Petition.

D. On October 23, 2018, the Court issued its Order to Answer Writ of Mandamus, finding that PCWCD presented sufficient evidence to meet its initial burden that its Amended Writ Petition was proper and should go forward, and therefore requiring the State Engineer to Answer PCWCD's Amended Writ Petition to show why a writ should not issue, with an evidentiary hearing to follow.

E. On February 4, 2019, the State Engineer filed his Answer to PCWCD's Amended Writ Petition.

F. During a hearing before the Court on July 28, 2020, the Court ordered PCWCD to provide notice of the Dispute to holders of water rights in the Humboldt River Basin by mail as well as publish notice in newspapers of general circulation in the Humboldt River Basin by October 14, 2020. The Court also set an evidentiary hearing for March 22 through March 26, 2021, for the State Engineer to present evidence in opposition to PCWCD's Amended Writ Petition, as well as providing an opportunity for intervening parties to present supplemental evidence in opposition to PCWCD's Amended Writ Petition.

G. On October 12, 2020, pursuant to a stipulation submitted by the State Engineer and PCWCD, the Court entered its Order Staying Judicial Proceedings and All Currently Pending Matters, staying all proceedings in the Dispute for a period of 90 days so that the State Engineer and PCWCD could engage in settlement discussions.

H. While the Dispute has been proceeding in the Court, the State Engineer has undertaken the following endeavors in an effort to proactively manage the Humboldt River Region in an effort to balance the interests of the senior decreed rights of the Humboldt River with those groundwater uses in the region. These efforts include, but are not limited to:

- a. In 2016, in an effort to utilize the best available science to inform decisions relating to the appropriate management of the Humboldt River Basin, the State Engineer initiated work with the United States Geological Survey ("USGS") and the Desert Research Institute ("DRI") on a groundwater capture model ("the Model") for the Humboldt River Region to more accurately understand the relationships between groundwater and surface water, and to determine the effects of groundwater pumping on Humboldt River flows. The State Engineer retained USGS and DRI to develop a scientifically-sound calibrated numerical model and to develop improved groundwater budgets at the basin scale using modern methods to update estimates from early USGS Reconnaissance Series Reports and Water Resource Bulletins. The Model will be a science-based tool to determine to what extent groundwater withdrawals within the Humboldt River Region capture river flow, and to assist in determining effective measures to avoid conflict with deliveries of Humboldt River water.
- b. Recognition of the hydrologic connections between the Humboldt River and the tributary groundwater basins, in accordance with the Nevada Legislature's adoption of NRS 533.024(1)(e) declaring it the policy of the state to "manage conjunctively the appropriation, use and administration of all waters of [Nevada], regardless of the source of the water."
- c. Establishment of a policy relating to evaporative losses from pit lakes, including requirements that evaporative losses be accounted for through permanent relinquishment of groundwater rights and included within the basin groundwater budget.
- d. Continued communication and stakeholder outreach relating to the State Engineer's efforts within the Humboldt River Region to work toward data sharing and uniform management within the Humboldt River Region.
- e. Issuance of an order requiring the installation of totalizing meters and required reporting of water use, subsequent field verification of meter installation and data accuracy, and development of a database to manage and report groundwater pumping data.

1. Through negotiations, the State Engineer and PCWCD (together as "Parties" or separately as a "Party") have reached a compromise that will settle and resolve the Dispute.

NOW, THEREFORE, in consideration of the mutual promises and agreements herein and other good and valuable consideration, the receipt and sufficiency of which the Parties acknowledge, the Parties hereby agree to the following terms, conditions, and covenants:

#### TERMS OF SETTLEMENT

1. Recitals. The Recitals stated above are true and incorporated herein as though set forth in full.

2. Forthcoming Administrative Order. The State Engineer is in the process of developing an administrative draft order ("Order") that is intended to provide clear procedures and standards for review of groundwater applications within the Humboldt River Region as informed by the Model. These procedures will provide the following:

- a. New Groundwater Appropriations. The Order will set out specific thresholds for capture for new groundwater appropriations, including requirements to provide replacement water in a manner sufficient to avoid conflict resulting from the application. The mitigation requirements will be specific as to quantity, priority, and other considerations of the State Engineer to assure that the replacement water is sufficient to avoid conflict with existing rights.
- b. Groundwater Change Applications. The Order will set out specific thresholds for capture for applications to change existing groundwater appropriations that consider the changes in capture, and resulting potential for conflict, caused by a change in the point of diversion. Where such a change results in an increase in capture the Order will set out specific requirements to offset any increase in capture with surface water replacement or relinquishment of groundwater rights. Such requirements are intended to be specific and intended to assure any change is sufficiently mitigated so as to not increase any resulting capture and potential conflict.
- c. Addressing Future Conflicts. The Order will set out a mechanism to address future conflicts between valid existing groundwater uses and decreed Humboldt River rights within the Humboldt River Region. This will include articulating a basis upon which to make determination, based upon the best available science, as to issuing future orders that would restrict withdrawals to conform to priority of rights, and the establishment of specific considerations that would be reviewed by the State Engineer in determining whether to invoke a curtailment order.
- d. Notice. The Order will seek to notify all applicants of new rights, as well as those applying for changes to existing rights, that approval of the application does not constitute an exception to any long-term conjunctive management plan determined to be necessary by the State Engineer to prevent or avoid conflict so as to meet the needs of the water users.

The Order will first be issued as a Draft Order and will be subject to a public administrative process that will include taking comments from interested parties and the general public on the Draft Order as well as a public administrative hearing. A Final Order will be issued following the public administrative hearing.

3. Issuance of the Administrative Order. The State Engineer hereby agrees to issue the aforementioned Draft Order within ninety (90) days of the Effective Date of this Agreement.

4. Dismissal of PCWCD's Amended Writ Petition. In exchange for the State Engineer's agreement to issue the aforementioned Draft Order within the aforementioned time period, PCWCD agrees to dismiss its Amended Writ Petition with prejudice.

5. Full and Final Release. The Parties agree that this Agreement is intended to be a full and final compromise, release and settlement of all claims, demands, lawsuits, expenses, injuries, attorney fees, actions, suits, causes of action, known or unknown, suspected or unsuspected, against the other relating in any manner to the Dispute. Nothing herein shall be construed as a release of or otherwise affect the right of any party to enforce any right under this Agreement.

6. Dismissal of the Dispute. The Parties, through counsel, agree to fully execute the Stipulation and Order for Dismissal with Prejudice shown in Exhibit 1 hereto simultaneous with the execution of this Agreement.

7. Complete Agreement. The Parties understand and agree that this Agreement sets forth the full and complete agreement of the Parties, and that no statement or representation, other than those contained herein, have been made or relied upon by the Parties as an inducement for executing this Agreement. No part of this Agreement may be changed except in a writing executed by a duly authorized representative of each Party.

8. Representation by Counsel. All Parties to this agreement hereby represent and acknowledge that they have been represented by counsel regarding the terms of this Agreement and that their counsel have fully advised them with respect to the consequences associated with agreeing to its terms.

9. Litigation Attorneys' Fees. The Parties hereby acknowledge and agree to bear their own attorneys' fees and costs in connection with the Litigation and the preparation of this Agreement.

10. Miscellaneous:

a) Execution of Additional Documents: Each of the Parties hereto agrees to perform any and all acts and to execute and deliver any and all documents reasonably necessary to carry out the intent and the provisions of this Agreement.

b) Governing Law and Choice of Venue: This Agreement is executed and intended to be performed in the State of Nevada, and the laws of Nevada shall govern its interpretation and effect, and any dispute arising from this agreement shall be commenced before the First Judicial District Court, in and for Carson City, Nevada.

c) Severance: Should any term, part, portion or provision of this Agreement be decided or declared by the Courts to be, or otherwise found to be, illegal or in conflict with any law of the State of Nevada or the United States, or otherwise be rendered unenforceable or ineffectual, the validity of the remaining parts, terms, portions and provisions shall be deemed severable and shall not be affected thereby, providing such remaining parts, terms, portions or

provisions can be construed in substance to constitute the agreement that the parties intended to enter into in the first instance.

d) Successors and Assigns: This Agreement shall be binding and inure to the benefit of the Parties hereto, their predecessors, parents, subsidiary and affiliated business entities, all officers, directors, shareholders, members, agents, employees, attorneys, assigns, successors, heirs, executors, administrators and legal representatives of whatsoever kind or character in privity therewith.

e) Third-Party Beneficiary: This Agreement is for the benefit of the Parties, their successors and assigns only. No other third-party beneficiary rights are intended by this Agreement.

f) No Precedential Effect: Each of the parties hereto acknowledges and agrees that certain negotiated provisions of this Agreement were agreed as an accommodation to the Parties and may be unique to the facts and circumstances surrounding this particular relationship. By entering into this Agreement, it is not the intention of the State Engineer to establish any policy, procedure, course of dealing or plan of general application irrespective of any similarity in facts or circumstances involving such other person or party. This Agreement shall not be binding or controlling in any proceeding before the State Engineer or any court reviewing the State Engineer's decisions, other than to enforce the terms of this Agreement.

g) No Liability: This Agreement is a compromise and is not to be construed as an admission of liability on the part of any Party. Nothing in this agreement shall be construed as an admission against the interest of any Party.

h) Counterparts: This Agreement may be executed in counterparts, one or more of which may be facsimiles or color scanned copies but all of which shall constitute one and the same Agreement. Facsimile or scanned signatures of this Agreement shall be accepted by the Parties to this Agreement as valid and binding in lieu of original signatures.

IN WITNESS WHEREOF, this Agreement is executed as of:

SIGNATORIES

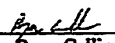
On Behalf of Nevada Division of Water Resources:


By: Tim Wilson, P.E. Date: 10/19, 2020  
Tim Wilson, P.E.  
State Engineer

By: James Bolotin, Esq. Date: 10/19, 2020  
James Bolotin, Esq.  
Senior Deputy Attorney General

**On Behalf of Pershing County Water Conservation District:**

By:  Date: 10/15, 2020  
Ronnie Burrows  
PCWCD President

By:  Date: 10-15, 2020  
Ryan Collins  
PCWCD Secretary/Manager

By:  Date: 10/15, 2020  
Therese A. Ure Stix, Esq  
Attorney for PCWCD

1 CASE NO. CV 15-12019

2 Pursuant to NRS 239B.030, the  
3 undersigned hereby affirms this document  
4 does not contain the social security number  
5 of any person.

6 **IN THE ELEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,**  
7 **IN AND FOR THE COUNTY OF PERSHING**

8  
9 **PERSHING COUNTY WATER  
CONSERVATION DISTRICT,**

10 **Plaintiff,**

11 **vs.**

12 **JASON KING, P.E., STATE ENGINEER OF  
THE NEVADA DIVISION OF WATER  
13 RESOURCES, DEPARTMENT OF  
14 CONSERVATION AND NATURAL  
RESOURCES.**

15 **Defendant.**

**ORDER TO ANSWER WRIT OF  
MANDAMUS**

16 THE ABOVE-ENTITLED MATTER came before the Court on June 14, 2018, for a  
17 hearing on Plaintiff's *First Amended Petition for Writ of Mandamus, or in the Alternate, Writ of*  
18 *Prohibition*. Laura A. Schroeder and Therese A. Ure, attorneys at law, were present on behalf of  
19 Plaintiff, the Pershing County Water District ("PCWCD"). James N. Bolotin, Deputy Attorney  
20 General, and Tori N. Sundheim, Deputy Attorney General, were present on behalf of Defendant,  
21 Jason King, the State Engineer ("State Engineer"), who was not present. The Court previously  
22 bifurcated the briefing and argument on Plaintiff's Petition such that Plaintiff was required to  
23 present its case, and if PCWCD was able to satisfy its initial burden then the Court would order  
24 the State Engineer to respond and present his case.

25 **I. BACKGROUND**

26 "PCWCD is an irrigation district in Lovelock, Nevada that owns, controls, and operates a  
27 water conveyance system that provides water to approximately 100 constituents holding  
28 approximately 37,506 acres of irrigated agricultural lands within the District boundaries." Legal

1 Issues Brief at 1. PCWCD holds in trust senior water rights for its constituents for use of the  
2 Humboldt River water. Id. at 2. In 2014 and 2015, PCWCD delivered 0% of its allocated water  
3 to constituents. Id. PCWCD believed that the absence of water was due to the actions of the State  
4 Engineer.

5 On January 4, 2018, Plaintiff filed a *First Amended Petition for Writ of Mandamus, or in*  
6 *the Alternate, Writ of Prohibition*. The Writ was supported by the Affidavit of Bennie B.  
7 Hodges. The central issue identified in the Petition is whether the Court should intervene to  
8 require the State Engineer to "sustainably manage groundwater in the Humboldt River Basin  
9 according to Nevada law." Writ at 4. The Writ seeks a Writ of Mandamus, or Prohibition in  
10 order to (1) Bring all over-appropriated ground water basins surrounding the Humboldt River  
11 back to their perennial annual yield; (2) Eliminate the cone of depression caused by over-  
12 allocation of ground water pumping, causing interference with surface water flows in the  
13 Humboldt River; and (3) Regulate water used for mining and milling pursuant to Nevada  
14 Statutory Code." Writ at 1-2, 3, 21. In justification for the second portion of the request, the  
15 Petition alleges that the State Engineer has failed to comply with numerous statutory duties, to  
16 wit: State Engineer has violated his statutory duties (1) By allowing ground water allocation in  
17 basins in which there is no unappropriated water; (2) By allowing ground water pumping that  
18 conflicts with existing rights; (3) By allowing ground water pumping that is detrimental to the  
19 public interest; (4) By finding that groundwater use for mining and milling is not appropriative,  
20 and issuing permanent water rights; and (5) By allowing groundwater pumping in conflict with a  
21 State issued court decree.

## 22 II. LEGAL STANDARD

23 A writ of mandamus is available to compel the performance of an act that the law  
24 requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious  
25 exercise of discretion. *See* NRS 34.160; Int'l Game Tech., Inc. v. Second Judicial Dist. Court,  
26 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). "Mandamus will not lie to control discretionary  
27 action, unless discretion is manifestly abused or is exercised arbitrarily or capriciously." Round  
28 Hill Gen. Improvement Dist. v. Newman, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981)



1 (citation omitted). An exercise of discretion is considered arbitrary if it is "founded on prejudice  
2 or preference rather than on reason" and capricious if it is "contrary to the evidence or  
3 established rules of law." State v. Eighth Judicial Dist. Court (Armstrong), 127 Nev. 927, 931-  
4 32, 267 P.3d 777, 780 (2011) (quoting *Arbitrary and Capricious*, Black's Law Dictionary (9th  
5 ed. 2009)). Further, mandamus is an extraordinary remedy, and it is within the discretion of this  
6 Court to determine if a petition will be considered. See Smith v. Eighth Judicial Dist. Court, 107  
7 Nev. 674, 677, 818 P.2d 849, 851 (1991). A writ of mandamus will not issue if the petitioner has  
8 a plain, speedy, and adequate remedy at law. See NRS 34.170; Int'l. Game Tech., 124 Nev. at  
9 197, 179 P.3d at 558. Petitioner bears the burden of demonstrating that extraordinary relief is  
10 warranted. See Pan v. Eighth Judicial Dist. Court, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

### 11 III. ANALYSIS

#### 12 A. State Engineer has a Legal Duty to Administer Water Rights

13 The State Legislature has conferred upon the State Engineer the authority and duty to  
14 regulate groundwater and surface water rights in the State of Nevada. See NRS 532, NRS 533,  
15 and NRS 534. The State Engineer must consider several factors when determining whether to  
16 approve or deny applications for new appropriations of water. See e.g. NRS 533.370(2) and NRS  
17 533.371. Specifically, NRS 534 which governs underground water and wells provides that the  
18 State Engineer may grant permits "so long as any protectable interests in existing domestic wells  
19 as set forth in NRS 533.024 and *the rights of holders of existing appropriations can be satisfied*  
20 *under such express conditions*." NRS 534.110(5) (emphasis added). Moreover, the Legislature  
21 has declared as the policy of the State "[t]o encourage the State Engineer to consider the best  
22 available science in rendering decisions concerning the available surface and underground  
23 sources of water in Nevada." NRS 533.024(1)(c).

24 As such, the Court finds that Plaintiff has met its burden under a writ proceeding by  
25 showing that the State Engineer has a legal duty to administer and regulate the waters of the  
26 Humboldt River Basin.

27 ///

28 ///

1           **B. PCWCD has a Senior Water Right Which the State Engineer Failed to Protect**

2           Based upon the evidence presented at the hearing, the Court finds that PCWCD satisfied  
3 their initial burden in the writ proceeding of showing they had a senior water right which the  
4 State Engineer failed to protect.

5           First, PCWCD demonstrated that they had an adjudicated right to a certain amount of  
6 water based upon the Bartlett and Edward Decrees. Based upon those decrees, the Humboldt  
7 River has an established system of delivery. Bennie Hodges testified to the following:

8           the Palisade gauge is the most critical stream flow gauge in the entire Humboldt River  
9 system, because the stream flow gauge in the entire Humboldt River system, because the  
10 stream flow gauge in Palisade is what sets the priority of flow each and every day during  
11 the irrigation season on the Humboldt system. It determines how much water all  
12 constituents and landowners of the Humboldt River system are entitled for that day. ...  
13 And then also the final gauge at Imlay, which is the gauge that our water is measure at  
14 and we get our water distributed to.

15           The testimony of Dwight Smith, an expert in hydrogeology, added to and clarified the  
16 testimony of Bennie Hodges. He testified that below the Palisade gauge there are 277,027 acre  
17 feed of decreed rights, of which PCWCD is responsible for managing approximately 144,833  
18 acre feet. As such, if the water rights arrive at Palisade, PCWCD is entitled, under their decree,  
19 to receive approximately 144,833 acre feet.

20           Second, PCWCD made a call on their senior water rights. Mr. Hodges testified that in  
21 PCWCD noticed that the flows of water they were entitled to, based upon the system described  
22 above, began to taper off in 2012 and 2013. Consequently, Mr. Hodges stated that in 2014 and  
23 2015, PCWCD received no water because there was not enough water to release from Rye Patch.  
24 Due to the lack of water, PCWCD met with the State Engineer to express their concerns about  
25 the lack of water and requested that something be done. Additionally, PCWCD began opposing  
26 new applications to appropriate water in the Humboldt River Basin.

27           Third, PCWCD showed that the State Engineer continued to grant applications, which  
28 affected the senior water rights, after PCWCD made the call on the water. Mr. Smith's report and  
testimony illustrate that several reports, which were in the possession of the State Engineer and  
at times funded by the State Engineer, showed a connection between pumping groundwater and

1 the potential impacts to PCWCD's senior water rights. Specifically, one of the reports which Mr.  
2 Smith analyzed stated:

3 The possibility of increased groundwater development is of major interest to almost  
4 everyone in the basin. Water users in the Lovelock area have long been aware of the fact  
5 that groundwater from Grass and Paradise Valleys discharges into the Humboldt River.  
6 They have been concerned that groundwater development in these basins would decrease  
7 the amount of seepage gain in the river, and thereby decrease the downstream supply of  
8 surface water. Their concern, of course, has been justified. ... development of  
9 groundwater from the aquifer may partly deplete the flow of the Humboldt River and thus  
10 infringe on established downstream surface water rights.

11 PCWCD presented evidence that despite the State Engineer's knowledge of the  
12 connection between groundwater pumping and the potential to deplete the Humboldt River, the  
13 State Engineer continued to grant applications after PCWCD made a call on the water and failed  
14 to take actions to inhibit or stop the interference with the senior water rights in the basin. See Ex.  
15 3A.

16 The Court finds that the State Engineer cannot grant an application to appropriate water  
17 that conflicts with existing rights. NRS 533.370(2). Indeed, "[a]ll appropriation of water in the  
18 State of Nevada ... is subject to existing rights." NRS 533.030. Furthermore, where an  
19 application "threatens to prove detrimental to the public interest, the State Engineer shall reject  
20 the application and refuse to issue the requested permit." NRS 533.370. Black's Law Dictionary  
21 defines "public interest" as is "[t]he general welfare of a populace considered as warranting  
22 recognition and protection" or "[s]omething in which the public as a whole has a stake." *Public*  
23 *Interest*, Black's Law Dictionary (10th ed. 2014). PCWCD presented evidence that the lack of  
24 water in 2014 and 2015 had a detrimental effect on the agricultural production of Plaintiff's  
25 constituents and argues that this fact shows the actions taken by the State Engineer to approve  
26 new appropriations and to regulate existing wells was detrimental to the public interest.

27 Consequently, the Court finds PCWCD presented enough evidence to satisfy their initial  
28 burden in this writ proceeding.

**C. Plaintiff Has no Other Plain, Speedy, or Adequate Remedy at Law**

The Court finds that PCWC has met its burden of showing that it has no other plain,  
speedy, or adequate remedy at law. Plaintiff has met and conferred with the State Engineer and

1 filed individual protests against applications within the Humboldt River Basin, thereby making a  
2 call on the water that the State Engineer had a duty to act upon. There is no adequate, speedy, or  
3 plain remedy at law because a lawsuit against the State Engineer is not tenable.

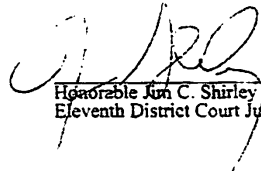
4 Based upon the findings of fact outlined above, the Court makes the following  
5 conclusions of law and orders:

6 THE COURT CONCLUDES that Plaintiff presented enough evidence to meet its initial  
7 burden of showing that their Petition for Writ of Mandamus, or in the Alternative, Writ of  
8 Prohibition is proper and should go forward.

9 THE COURT HEREBY ORDERS the State Engineer to Answer Plaintiff's Writ of  
10 Mandamus, showing cause why a writ should not issue, within 45 days of the date of this order.

11 THE COURT FURTHER ORDERS that an evidentiary hearing will be held at the  
12 request of the State Engineer to present evidence to support his Answer.

13  
14 DATED, this 25<sup>th</sup> day of October 2018.

15  
16   
17 Honorable Jim C. Shirley  
18 Eleventh District Court Judge  
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STEVE SISOLAK  
Governor

STATE OF NEVADA



BRADLEY CROWELL  
Director

ADAM SULLIVAN, P.E.  
Acting State Engineer

DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES  
DIVISION OF WATER RESOURCES

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<http://water.nv.gov>

NOTICE OF HEARING ON PROPOSED INTERIM ORDER  
WITHIN THE HUMBOLDT RIVER REGION

The Nevada Division of Water Resources will hold a public hearing on a proposed interim order within the Humboldt River Region. The hearing is open to the public and will convene at 9:30 a.m., Friday, April 2, 2021. Due to restrictions on the operation of the State of Nevada office buildings and limitations on public gatherings established under the state of emergency declared by Governor Sisolak on March 12, 2020, the Nevada Division of Water Resources will conduct the hearing through a video conference link.

WHO: Nevada Division of Water Resources

WHAT: Hearing on Proposed Interim Order

WHERE: Videoconference link, <https://call.lifesizecloud.com/7315362> and via telephone at (877) 422-8614, meeting code 7315362.  
*Pursuant to Governor Steve Sisolak's Emergency Directive 006 and as extended by Emergency Directive 21, section 37, there will be no physical location for this hearing. The hearing can be viewed or listened to live over the Internet or through the telephone. Any person planning to participate in the hearing must participate either by using the videoconference link or teleconference number.*

WHEN: 9:30 a.m., Friday, April 2, 2021

WHY: The public hearing will be held to provide notice and to take public comment on the proposed interim order to establish procedures for the review of applications to appropriate groundwater in the Humboldt River Region with regard to the potential for capture of and conflict with decreed rights to the waters of the Humboldt River and tributaries, in Marys River Area (042), Starr Valley Area (043), North Fork Area (044), Lamoille Valley (045), South Fork Area (046), Huntington Valley (047), Dixie Creek-Tenmile Creek Area (048), Elko Segment (049), Susie Creek Area (050), Maggie Creek Area (051), Marys Creek Area (052), Pine Valley (053), Crescent Valley (054), Carico Lake Valley (055), Upper Reese River Valley (056), Antelope Valley (057), Middle Reese River Valley (058), Lower Reese River Valley (059), Whirlwind Valley (060), Boulder Flat (061), Rock Creek Valley

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NGM0288

Notice of Hearing on Proposed Interim Order Within the Humboldt River Region  
Page 2

(062), Willow Creek Valley (063), Clovers Area (064), Pumpnickel Valley (065), Kelly Creek Area (066), Little Humboldt Valley (067), Hardscrabble Area (068), Paradise Valley (069), Winnemucca Segment (070), Grass Valley (071), Imlay Area (072), Lovelock Valley (073), Lovelock Valley-Oreana Subarea (073A), and White Plains (074), located in Elko, White Pine, Eureka, Lander, Nye, Humboldt, Pershing, and Churchill counties.

COMMENT: Oral public comment will be accepted during the hearing; a sign-in sheet will be posted the week before the hearing and you can indicate whether you would like to make public comment. Written public comments will be accepted until Friday, April 9, 2021, and may be mailed to the Nevada Division of Water Resources at the above address.

*The Nevada Division of Water Resources is pleased to make reasonable accommodations for members of the public who are disabled and wish to participate in the hearing. If special arrangements for the hearing are necessary, please call (775) 684-2800.*

Notice of this hearing was provided via electronic means as follows:  
To all persons on the NDWR e-mail list for the Humboldt River  
Division of Water Resources website: <http://water.nv.gov>

And via publication in Lahontan Valley News (Churchill County), Battle Mountain Bugle (Lander County), Humboldt Sun (Humboldt County), Lovelock Review Miner (Pershing County), Elko Daily Free Press (Elko County), Ely Times/Eureka Sentinel (Eureka and White Pine Counties), and Tonopah Times- Bonanza & Goldfield News (Nye County).

And via e-mail to participants in *Pershing County Water District v. State Engineer*, Eleventh Judicial District, CV15-12019.

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NGM0289

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

**DRAFT INTERIM ORDER**

**ESTABLISHING PROCEDURES FOR REVIEW OF APPLICATIONS TO  
APPROPRIATE GROUNDWATER IN THE HUMBOLDT RIVER  
REGION WITH REGARD TO THE POTENTIAL FOR CAPTURE OF  
AND CONFLICT WITH DECREED RIGHTS TO THE WATERS OF THE  
HUMBOLDT RIVER AND TRIBUTARIES**

**I. BACKGROUND OF THE HUMBOLDT RIVER REGION**

**WHEREAS**, the Humboldt River Region is delineated by the topographic boundary of the Humboldt River watershed, extending over 11,000 square miles, including 34 hydrographic basins in eight Counties. Hydrographic basins within the Humboldt River Region are Marys River Area (042), Starr Valley Area (043), North Fork Area (044), Lamoille Valley (045), South Fork Area (046), Huntington Valley (047), Dixie Creek-Tenmile Creek Area (048), Elko Segment (049), Susie Creek Area (050), Maggie Creek Area (051), Marys Creek Area (052), Pine Valley (053), Crescent Valley (054), Carico Lake Valley (055), Upper Reese River Valley (056), Antelope Valley (057), Middle Reese River Valley (058), Lower Reese River Valley (059), Whirlwind Valley (060), Boulder Flat (061), Rock Creek Valley (062), Willow Creek Valley (063), Clovers Area (064), Pumpernickel Valley (065), Kelly Creek Area (066), Little Humboldt Valley (067), Hardscrabble Area (068), Paradise Valley (069), Winnemucca Segment (070), Grass Valley (071), Imlay Area (072), Lovelock Valley (073), Lovelock Valley-Oreana Subarea (073A), and White Plains (074).

**WHEREAS**, the Bartlett Decree was filed on October 20, 1931, in the Sixth Judicial Court of the State of Nevada, establishing relative rights to the use of the waters of the Humboldt River and setting forth the dates of priority and duty of water for existing claims. The Bartlett Decree determined the waters of the stream system to be fully appropriated, and that in an average year there existed no surplus water for irrigation. Subsequent decrees, orders and writs made corrections to the Bartlett Decree, and collectively form the Humboldt River Adjudication. This process was complete by 1938. The most senior decreed surface water right in the Humboldt River system has a priority date of 1861 and the most junior right has a priority date of 1921.<sup>1</sup>

**WHEREAS**, Humboldt River flow measured at the Palisade gage is the primary tool utilized for determining and scheduling delivery amounts of Humboldt River decreed rights.<sup>2</sup>

<sup>1</sup> *In the Matter of the Determination of the Relative Rights of Claimants and Appropriators of the Waters of the Humboldt River Stream System and Tributaries*, Case No. 2804, Sixth Judicial District Court of the State of Nevada, In and For the County of Humboldt (October 20, 1931).

<sup>2</sup> United States Geological Survey (USGS) Gage 10322500, Humboldt River at Palisade.

**Exhibit 4 Page 03**

**Exhibit 2 Page 36**

Deliveries are scheduled during the irrigation season based on the daily flow measurement at the gage.<sup>3</sup> When daily flows at the Palisade gage are sufficient to deliver all decreed rights on the Humboldt River and its tributaries, all water rights irrespective of location above or below the gage are scheduled to receive their full duty of water. When flows are not sufficient to deliver all decreed rights, those rights with senior priority dates are served first. In practice, actual deliveries over the expanse of the Humboldt River Region may be different than exact scheduled deliveries due to a wide range of variables including water distribution and management practices, and climatic variations that affect riparian evapotranspiration rates, streambank storage, and baseflow. Figure 1 shows the ratio of actual deliveries to scheduled deliveries at the Imlay gage, which is the furthest downstream point of diversion.<sup>4</sup> The ratio is generally higher in wet years and lower in dry years. Scheduled deliveries for the irrigation seasons were exceeded in all but six years since 1936.

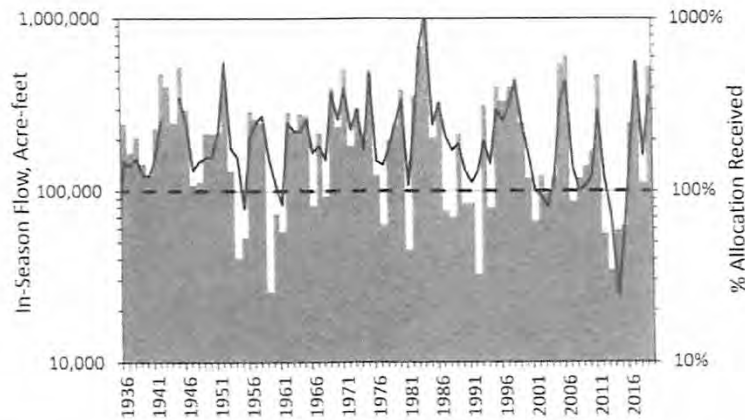


Figure 1. Humboldt River in-season flow volume (bars corresponding to left axis) at the Palisade gage and water delivery ratio of actual to scheduled (solid line corresponding to right axis) at Imlay from 1936 to 2019. Scheduled deliveries for the irrigation seasons that exceeded allocations occur when black line is above the 100% allocation line (dashed line corresponding to right axis). Conversely, years that did not meet allocations occur below the 100% allocation line (dashed line).<sup>5</sup>

<sup>3</sup> Barlett Decree, the decreed irrigation season begins March 15th downstream of Palisade and April 15th upstream of Palisade, and ends on varying dates depending on location and culture.

<sup>4</sup> USGS Gage 10333000, Humboldt River Near Imlay.

<sup>5</sup> USGS Gage 10322500, Humboldt River at Palisade; Annual Tabulation of Delivery Records for the Humboldt River Decree, official records in the Office of the State Engineer.



**WHEREAS**, during the 2012-2015 period the Humboldt River Region experienced one of the worst droughts since 1902.<sup>6</sup> Annual flow at the Palisade gage for that 4-year period averaged 82,871 acre-feet, which is 30% of the historical average annual flow of 287,846 acre-feet for the period of record spanning the 112 years.<sup>7</sup> At the headwaters of the Humboldt River system during 2012-2015, upstream of any significant groundwater pumping, Lamoille Creek also experienced its lowest 4-year flow since at least 1944 when continuous flow measurements on Lamoille Creek started.<sup>8</sup> By the end of the irrigation seasons in 2014 and 2015 the Humboldt River at Imlay was dry and water was unavailable to allocate to downstream surface water users in the Lovelock area. While this occurred during the unprecedented drought, decreed water right holders alleged that junior groundwater appropriators were capturing surface flows of the Humboldt River and that groundwater use conflicts with the senior surface water rights. In a writ filed in Pershing County District Court in 2015, Pershing County Water Conservation District requested that the Court require the State Engineer to take action within his statutory authority to address the alleged conflict.<sup>9</sup>

**WHEREAS**, nearly all groundwater vested claims and appropriations within the Humboldt River Region are junior to decreed surface water rights in the Humboldt River and its tributaries. The most senior groundwater permit has a priority date of 1912.<sup>10</sup> Groundwater development began to increase more substantially in the 1960s and has gradually increased in the decades since. Groundwater is now extensively relied upon for all manners of use supporting communities and industry throughout the Region. Groundwater rights were approved over the years by the State Engineer upon findings that unappropriated water was available and its use would not conflict with existing rights or the public interest, given the best data available to the State Engineer at the time.

**WHEREAS**, it is scientifically understood that groundwater pumping has the potential to capture stream flow in a hydraulically connected system, either by inducing greater infiltration losses from the stream channel or by reducing the amount of groundwater that would otherwise discharge as baseflow to the stream.<sup>11</sup> Although this principle has factored into numerous State Engineer decisions, site-specific capture data is generally not available to accurately quantify potential conflict pursuant to Nevada Revised Statute (NRS) § 533.370.<sup>12</sup> The potential for hydraulic connectivity and capture by itself does not demonstrate that conflict is occurring or will

<sup>6</sup> Period of record for the Palisade gage begins in 1902.

<sup>7</sup> For water years between 1902-1906 and 1912-2019.

<sup>8</sup> USGS Gage 10316500, Lamoille Creek Near Lamoille.

<sup>9</sup> *Petition for Writ of Mandamus, or in the Alternative, Writ of Prohibition*, In the Eleventh Judicial District Court of the State of Nevada In and For the County of Pershing, (Case No. CV 15-12019), Pershing County Conservation District V. Jason King, P.E., State Engineer of the State of Nevada, Division of Water Resources, Department of Conservation and Natural Resources.

<sup>10</sup> Nevada Division of Water Resources' Water Rights Database, official records in the Office of the State Engineer, available at <http://water.nv.gov/hydrographicabstract.aspx>.

<sup>11</sup> Charles V. Theis, 1940, *The Source of Water Derived from Wells -Essential factors controlling the response of an aquifer to development*, Civil Engineering, v. 10, no. 5, p. 277-280.

<sup>12</sup> See e.g., State Engineer's Ruling 55, Ruling 790, Ruling 2197, Ruling 2593, Ruling 4036.

occur in the future, unless it is shown that scheduled surface water deliveries cannot be met, and those unmet deliveries are caused by groundwater pumping.

**WHEREAS**, since the end of the 2012-2015 drought, all scheduled deliveries at Imlay were fully served through the 2020 irrigation season. However, with climate models forecasting a continuing pattern of increasing frequency and intensity of droughts and flood events,<sup>13</sup> drought-accentuated natural losses from the river, combined with greater drawdown due to increased reliance on groundwater during drought, may increase the future potential for insufficient surface flow to fully serve decreed rights. Conversely, larger or more frequent flood events may episodically replenish the groundwater system, helping to offset any natural or pumping-induced depletion during drought periods. These long-term hydrologic uncertainties were not explicitly foreseen in the Barlett Decree and underscore the difficulty in developing and implementing management strategies for future administration of groundwater and surface water in the Humboldt River Region.

## II. ACTIONS TAKEN SINCE THE DROUGHT

**WHEREAS**, a basic tenet of prior appropriation is that if there is not enough water to serve all users then senior right holders are entitled to water before junior right holders. This principle originated at a time when surface water was the only significant source of supply, but it has been preserved in water law to also apply to groundwater. NRS 534.110 provides that where groundwater supply is not adequate for the needs of all permittees and vested-right holders, the State Engineer may order that withdrawals be restricted to conform to priority rights. This is the regulatory mechanism established in statute for the State Engineer to address conflict due to inadequate supply of groundwater or unreasonable lowering of the water table. During the drought period of 2012-2015 there were insufficient data to identify to what extent groundwater pumping was causing the inadequacy of water supply for Humboldt River senior decreed right holders, and to what extent it was the result of natural low flow because of drought. Analysis of the data at the time indicated that curtailing junior groundwater pumping to protect senior decreed rights would result in a nominal addition to flow in the River, but would have had devastating and severe impacts to the communities and economies throughout the Region that rely on groundwater.<sup>14</sup> Consequently, no curtailment was imposed.

**WHEREAS**, in the years since the end of the 2012-2015 drought, the State Engineer initiated several measures to improve the available data in the Region and thus provide a sound basis to render defensible decisions with regard to avoiding potential conflict. Among these measures: all non-designated basins within the Region were designated pursuant to NRS 534.030; totalizing meter installation and reporting were required by State Engineer's Order 1251; field

<sup>13</sup> USGCRP. 2017. Climate Science Special Report: Fourth National Climate Assessment, Volume I [Wuebbles, D.J., D.W. Fahey, K.A. Hibbard, D.J. Dokken, B.C. Stewart, and T.K. Maycock (eds.)]. U.S. Global Change Research Program, Washington, DC. USA. 470 pp., See Chapter 8, page 237.

<sup>14</sup> Nevada Division of Water Resources, public presentations on the Humboldt River in Lovelock, Winnemucca, and Elko, February 12-13, 2015.

investigations were completed to verify the meter data; the State Engineer enhanced its database capacity to maintain and manage the pumping data in a publicly accessible manner; the State Engineer established a policy requiring water rights for pit lake evaporation; and applications to appropriate groundwater or to change the point of diversion were denied if granting the application would result in an increase in capture that conflicts with existing rights.

**WHEREAS**, in 2016, the Humboldt Working Group was assembled to assist in developing draft regulations to resolve future conflict. The working group members included both surface water and groundwater users representing municipalities, agriculture, mining, and other community interests across the Humboldt River Region. Over the course of the next three years, the group developed a conjunctive management approach whose objective was to protect senior water rights while at the same time maximizing beneficial use of surface water and groundwater. This effort culminated in a set of draft regulations that relied on a combination of augmentation and mitigation through financial compensation to avoid future conflict. However, in the 2019 Legislative session, the supporting statutory revisions lacked unanimous support and failed. Surface water users expressed no interest in financial mitigation in lieu of water. Groundwater users express no interest in being assessed fees for capture that had yet to be quantified by best available science.

**WHEREAS**, in 2016, the State Engineer initiated work with the United States Geological Survey (USGS) and the Desert Research Institute (DRI) to develop improved groundwater budgets at the basin scale and to develop numerical groundwater capture models for the Humboldt River Region. These efforts are intended to serve as a basis for determining the effect of groundwater pumping on flows in the Humboldt River and its tributaries. This work will also serve to review the perennial yield values for the Region, first estimated from the early USGS Reconnaissance Series Reports and Water Resource Bulletins, which are the primary guideline used by the State Engineer to determine the availability of groundwater in any particular basin.

**WHEREAS**, while the completion of the Humboldt River Region groundwater model study is expected in 2021, preliminary findings from that effort provide insight into the dynamics of surface water capture by groundwater pumping. These findings indicate that there may be important non-linear, climate-driven behaviors that influence interactions between the surface water and groundwater systems. These behaviors suggest that pumping-related capture of surface water tends to increase during wet years when excess water is available and decrease during dry years when the potential for conflict is greater. Understanding these phenomena is necessary to accurately define both the timing and distribution of capture so that conflict attributable to groundwater pumping can be characterized and quantified. Long-term management will rely on completion of the modeling effort and a process of public review and deliberation to determine best practices that satisfy legislative directives of prior appropriation, beneficial use and the public interest. Until then, interim management described herein must focus on avoiding increased capture caused by new appropriations or changes to existing groundwater permits.

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### III. AUTHORITY AND NECESSITY

**WHEREAS**, NRS 533.024 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.”<sup>15</sup>

**WHEREAS**, NRS 533.024 was amended in 2017 adding a new subsection declaring that it is the policy of Nevada “[t]o manage conjunctively the appropriation, use and administration of all waters of this State, regardless of the source of the water.”<sup>16</sup>

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

**WHEREAS**, NRS 533.370 requires that, in review of an application to appropriate water or to change water already appropriated, the State Engineer must consider whether there is unappropriated water in the source of supply, whether the uncommitted groundwater has been reserved pursuant to NRS 533.0241, whether the proposed use or change conflicts with existing rights or protectable interests in existing domestic wells, and whether it threatens to prove detrimental to the public interest.

**WHEREAS**, the State Engineer’s procedures to evaluate applications to appropriate groundwater or to change existing appropriations must be applied in a manner that is consistent and understandable to water right holders and their representatives, and that provide clarity to water users about how to meet the needs of communities and local economies while avoiding conflict with senior decreed water rights.

**WHEREAS**, procedures established herein allow for efficient administration of groundwater rights, with provisions for in-stream replacement water and withdrawal of groundwater permits, when necessary. The intent is to provide the needed flexibility for water right holders without adding to any capture impacts above what is predicted for the existing base right. Over time these procedures will result in a reduction in total groundwater commitments, an increase in availability of surface water in the Humboldt River Region to serve senior priority rights, and a reduced potential for conflict between groundwater use and Humboldt River decreed rights.

**WHEREAS**, these procedures do not restrict the State Engineer from adopting further conjunctive management measures necessary to address capture impacts.

### IV. ORDER

**NOW THEREFORE, IT IS HEREBY ORDERED**, that the following considerations will be implemented by the State Engineer for the review of applications for groundwater rights in the Humboldt River Region, in addition to those considerations required by NRS 533.370 and

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<sup>15</sup> NRS 533.024(1)(c).

<sup>16</sup> NRS 533.024(1)(c).

established by previous State Engineer's Orders.<sup>17</sup> As used herein, "capture" refers to modeled capture of surface water of the Humboldt River and its tributaries by groundwater pumping, as simulated by USGS and DRI groundwater models.

1. Applications for New Groundwater Appropriations

Applications for new appropriations of groundwater where capture, as a percentage of pumping rate, exceeds 10% after 50 years of continual pumping, may be considered if capture is offset by providing in-stream replacement water or withdrawing a portion of an existing groundwater right. Applications for new appropriations of groundwater where capture is less than 10% after 50-years of continual pumping may be evaluated without the requirement to offset capture.

A. If in-stream replacement is used to offset capture:

- i. Replacement water using a senior decreed water right shall be for a crop-type, duty amount, and priority date that is sufficient to equal or exceed the predicted cumulative capture amount of the new appropriation over a 50-year period of use, as determined by the State Engineer;<sup>18</sup>
- ii. Replacement water shall be sufficient to equal or exceed the predicted annual capture amount of the new appropriation during 80% of the years over a 50-year period, as determined by the State Engineer; and,
- iii. Replacement water shall be demonstrated to have an existing place of use that can and will be stripped of use. Water used in areas of flooding or other areas that cannot be isolated from the natural or man-caused application of that water will not be considered for replacement water.

B. If withdrawal of an existing groundwater right is used to offset capture:

- i. The amount of the withdrawn right shall be sufficient to equal or exceed the predicted cumulative capture amount of the new appropriation over a 50-year period of use, as determined by the State Engineer; and
- ii. The amount shall be sufficient to equal or exceed the predicted annual capture amount of the new appropriation during 90% of the years over a 50-year period, as determined by the State Engineer.

2. Applications to Change Existing Groundwater Appropriations

Applications to change the point of diversion (POD) of an existing groundwater right will be considered based on net capture, defined as the difference between capture at the

<sup>17</sup> Nevada Division of Water Resources' Orders Database, official records in the Office of the State Engineer, available at <http://water.nv.gov/StateEngineersOrdersList.aspx>.

<sup>18</sup> For the purposes of this draft interim order, the mechanism to be used by the State Engineer to make this determination will be demonstrated in public workshops and available for public review.

proposed POD and capture at the existing POD. Net capture is commonly described either in terms of a percentage of the pumping rate, or as a volume of captured water, after a specified period of continuous pumping.

Change applications where capture at the proposed POD is greater than capture at the existing POD may be considered if the net capture is offset by providing replacement water or withdrawing a portion of an existing groundwater right. Change applications where capture at the proposed POD is less than or equal to capture at the existing POD may be considered on their merits without the requirement to offset capture.

If either replacement water or withdrawn groundwater rights are used they shall be subject to the same conditions as for new appropriations (as described in Section 1) but the amount shall correspond to the net capture.

In instances where a change application moves an existing POD either to a new location that is upstream of its existing location or nearer to a different tributary, the reach-specific capture impacts to senior decreed water rights who divert their water from those reaches will be determinative irrespective of the net capture.

3. Addressing Future Conflict Between Existing Valid Groundwater Rights and Decreed Humboldt River Surface Water Rights

The principle statutory mechanism available to the State Engineer to address conflict among water users is curtailment of junior-priority water use pursuant to NRS 534.110. The State Engineer finds that the data currently available do not demonstrate that curtailment of junior rights could be implemented in a manner that would eliminate potential future conflict without unduly restricting valid existing groundwater rights.

This Order provides mechanisms to prevent the increased potential for conflict over time in an effort to avoid the severe and devastating potential effects of curtailment of groundwater rights that support communities and economies throughout the Region. However, the State Engineer is not precluded from ordering that withdrawals be restricted to conform to priority rights when necessary: if conflict due to inadequate water supply is determined to be imminent, and prevention or avoidance cannot be accomplished.

The State Engineer may consider the following factors before making any decision regarding curtailment pursuant to NRS 534.110:

- A. Statutory protections:
  - i. Domestic well protections under NRS 533.024(b).
  - ii. Preferred uses of water in the interest of public welfare per NRS 534.120(2).
- B. Hydrologic conditions:
  - i. Effectiveness of any curtailment to increase actual flow in the decreed source and thereby avoid conflict caused by non-delivery of senior rights.
  - ii. Drought conditions as measured by available snowpack data, runoff forecast for the season, prior years' condition and cumulative water deficit.
  - iii. Well location and potential for capture as demonstrated by USGS and DRI models

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- a. Capture as a percent of pumping rate within the time frame of potential conflict
  - b. Hydraulic connectivity between a decreed surface water source and a specific well location and screen depth.
  - iv. Storage in surface water reservoirs or aquifer storage and recovery projects and the capacity for this storage to meet scheduled deliveries.
- C. Active management measures:
- i. Implementation of Water Conservation Plans developed in accordance with NRS 540.131.
  - ii. Active water replacement plans carried out by groundwater right holders.

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ADAM SULLIVAN, P.E.  
Acting State Engineer

Dated at Carson City, Nevada this

\_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

Exhibit 4 Page 11

Exhibit 2 Page 44

NGM0298

Laura A. Schroeder  
Oregon, Idaho,  
Nevada, Washington & Utah  
Therese A. Ure Stix  
Oregon & Nevada  
Sarah R. Liljefelt  
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**SCHROEDER**  
LAW OFFICES, P.C.

William F. Schroeder  
(1928 - 2015)  
Wyatt E. Rolfe  
Of Counsel  
Oregon & Washington  
James Browitt  
Of Counsel  
Idaho & Washington

February 8, 2021

**VIA U.S. MAIL & EMAIL**

Deputy Attorney General James Bolotin  
c/o Office of the Attorney General  
100 North Carson Street  
Carson City, NV 89701  
jbolotin@ag.nv.gov

**RE: Amended Settlement Agreement & Proposed Order  
Pershing County Water Conservation District v. State Engineer  
Pershing County District Court, Case No. CV 15-12019**

Dear Mr. Bolotin:

We have reviewed the Draft Interim Order (Order) issued in response to our Settlement Agreement and Mutual Release ("Settlement") with our client, Pershing County Water Conservation District ("PCWCD").

PCWCD advises that the Settlement terms as set out at page 3, paragraph 2(c), are not consistent with the Order at page 8, paragraph 3. In good faith, rather than litigate what could be construed as a breach of the Settlement, PCWCD is willing to enter into an Amended Settlement Agreement as follows:

The State Engineer would withdraw the terms of the Order at page 8, paragraph 3, moving forward with the public process as agreed with the remainder of the Order. (PCWCD would continue to engage in final good faith with comments and approval of the same); and

Extend the timeline for the State Engineer to issue a Draft Order addressing the Settlement terms as set out at page 3, paragraph 2(c) to June 1, 2021.

If such an amendment to the Settlement Agreement would be acceptable as an alternative, PCWCD would, at the State Engineer's request, work with the State Engineer or its attorney in the interim on the language for a second draft Order that complies with the Settlement terms at page 3, paragraph 2(c).

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PCWCD 02.08.21 09:45 AM

**Exhibit 5 Page 01**

**Exhibit 2 Page 45**

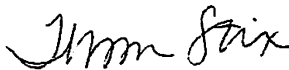
**NGM0299**



Deputy Attorney General James Bolotin  
February 8, 2021  
Page 2 of 2

All other terms of the Settlement Agreement would remain unchanged. We look forward to your response.

Very truly yours,  
SCHROEDER LAW OFFICES, P.C.



Therese A. Ure Stix

TAU:tau

cc: Client

RECEIVED

Exhibit 5 Page 02

Exhibit 2 Page 46

NGM0300

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Oregon, Idaho,  
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April 14, 2021

**VIA U.S. MAIL**

Division of Water Resources  
c/o Micheline N. Fairbank, Esq.  
Deputy Administrator  
901 S. Steward St. 2002  
Carson City, NV 89701

**RE: Pershing County Water Conservation District  
Comments to Proposed Interim Order within the Humboldt River Region**

Dear Ms. Fairbank:

On behalf of the Pershing County Water Conservation District ("PCWCD" or "District"), Schroeder Law Offices submits the following comments regarding the Nevada Division of Water Resources' ("NDWR's") *Proposed Interim Order within the Humboldt River Region* ("Proposed Order").<sup>1</sup> PCWCD's comments and participation in the public hearing for the Proposed Order do not constitute a waiver of any claim to which PCWCD may be entitled under the settlement agreement entered into in *Pershing County Water Conservation District v. Tim Wilson*, Case No. CV5-12019 in the Eleventh Judicial District Court of the State of Nevada in and for the County of Pershing.

**Comment 1:** The Proposed Order provides incomplete and at times misleading facts. The last paragraph of Section I (Background of the Humboldt River) refers to scheduled deliveries and states that they have been fully served except at the end of the 2012-2015 drought. *Proposed Order*, p. 4. However, the scheduled deliveries are impacted in all years, due to capture that occurs up-stream of the Palisades gage, which impacts the flow rates upon which delivery scheduling is determined. Additionally, the portion of the river flows that are captured downstream of the Palisades gage are not serving decreed water rights on the river system, they are serving junior groundwater users. To the extent stream flow capture occurs on the system, the Decreed rights are not being fully served the amount that these rights are entitled. The only exception would be a year when the river flows are sufficient for deliveries to not be "on priority" and all Decree rights are being fully served for the entire irrigation season.

<sup>1</sup> PCWCD's comments to the Proposed Order were developed in conjunction with Consultant Dwight Smith of McGinley and Associates; and Consultant Bennie Hodges, formerly of PCWCD.

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NGM0301

Comment 2: The last paragraph of Section I also states that certain “long-term hydrologic uncertainties were not explicitly foreseen in the Bartlett Decree” citing this as the reason for difficulty developing and implementing management strategies for water use. *Id.* This statement is entirely irrelevant and incorrect. The 1931 Bartlett Decree understood that there would be “climatic variations” resulting in wet years and periods of drought. *See* Bartlett Decree, p. 28; *see also* Bartlett Decree, p. 242. Later additions to the Humboldt Decree also recognized hydrographic uncertainties that would require management by priority. *See* Humboldt River Water Distribution, Parts I & II. PCWCD agrees that no amount of forecasting can accurately predict future variability, however, this is the exact purpose for which the prior appropriation system was developed and implemented.

Comment 3: The explanatory clauses of the Proposed Order should be more fully developed to include a complete and accurate factual background for the Proposed Orders. The explanatory clauses should better set the stage for the management mechanisms provided in the Proposed Order and therefore aid in any challenges to the adopted Order and provide future interpretations of those mechanisms and their purposes. These clauses should include:

WHEREAS, in 1964, the Division of Water Resources Published “Humboldt River Water Distribution.” Part I (Problems) and Part II (Priority Tables) to address already existing distribution issues with Humboldt River Decree water rights.<sup>2</sup>

WHEREAS, while the completion of the Humboldt River Region groundwater model study is expected in 2021, preliminary findings from the effort, and thus the best available science to date, supports a determination that groundwater pumping captures Humboldt River surface water.<sup>3</sup>

WHEREAS, the preliminary findings from the effort also provide insight into the dynamics of surface water capture by groundwater pumping. These findings indicate that there may be additional non-linear, climate driven behaviors that influence interactions between the surface water and groundwater systems. Understanding these behaviors are necessary to accurately define both the timing and distribution of capture so that conflict attributable to groundwater pumping can be characterized and quantified. Long-term management will rely on completion of the modeling effort, a process of public review and deliberation to determine best practices that satisfy legislative directives of prior appropriation, beneficial use and public interest, and proposed legislation to develop better management directives and tools not contemplated prior to conjunctive management. Until then, interim management described herein will focus on avoiding

<sup>2</sup> Proposed to be inserted in Section I, after paragraph 2.

<sup>3</sup> Proposed to be inserted in Section II in place of paragraph 5 and followed by graphics showing the same from Slides 111 and 112 of February 4, 2021 Humboldt River Region Modeling Update.

capture under the best available science and legislative directives and tools already in place.<sup>4</sup>

Comment 4: The last paragraph of Section II (Actions Taken Since the Drought) states that long-term management will rely on completion of the modeling effort, public review, and determination of best practices, but until then “interim management described herein must focus on avoiding increased capture caused by new appropriations and changes to existing groundwater permits.” *Proposed Order*, p. 5. This suggests that Section 3 of the Proposed Order should not be included and that NDWR does not intend to manage existing and future conflicts between existing junior groundwater withdrawals and senior decreed surface water rights until some unknown future time.

Comment 5: Further, the Proposed Order is not consistent with the presentation and summary NDWR provided on February 4, 2021 as part of the Humboldt River modeling update. The presentation discussed legacy effects of pre-existing permits (slides 112 and 114); goals to prevent, avoid, reduce, and mitigate conflicts due to capture (slide 113), and focused curtailment (slides 118 and 123). Yet, none of these mechanisms are contemplated in the Proposed Order.

Comment 6: NDWR's threshold for new groundwater appropriations that require capture offsets is not sufficiently specific. The proposed threshold of 10% after 50 years of continual pumping fails to recognize large groundwater appropriations that would result in significant and impactful captures after 50 years, but that may still fall below the 10% threshold. As such, NDWR should provide an additional volumetric threshold and require that capture not exceed that volume or 10% after 50 years of continual pumping, whichever is less.

Comment 7: Alternatively, NDWR should consider other thresholds that are more equitable to different water users, especially small appropriators who may trigger mitigation of a couple acre-feet when large appropriators with significantly more impact avoid mitigation due to the blanket 10% threshold. For example, NDWR may consider a tiered volumetric or percentage approach that recognizes more tolerance for small appropriations and less for large appropriations. However, large appropriations should include multiple small appropriations that have a combined total duty to avoid users breaking up appropriations as a loophole to trigger mitigation.

Comment 8: “New appropriations” should be defined. Specifically, NDWR should clarify if “new appropriations” include “temporary” (traditional 1-year applications) and limited duration appropriations, such as those granted for mining and milling, and mine dewatering. PCWCD would encourage NDWR to include “temporary” and limited duration mining applications among “new appropriations” that could require replacement water pursuant to the order.

Comment 9: In addition to including limited duration mining applications as “new appropriations,” the analysis for new appropriations to require capture offset should be expanded. Limited duration mining appropriation may not include 50 years of continual

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<sup>4</sup> Revision of existing Section II, paragraph 5, proposed to follow the preceding proposed paragraph.

pumping. However, the analysis for these appropriations should adequately consider the post-pumping implications as capture effects may not be experienced until pumping ceases.

Comment 10: The Proposed Order should clarify if the mitigation requirements stated will affect the current process for mitigating pit lake evaporation loss.

Comment 11: The term "priority date" should be clarified in paragraph 1.A.i of the Order. The inclusion of "priority date" in the features of in-stream replacement water as it relates to a new appropriation<sup>5</sup> is unclear.

Comment 12: NDWR should require additional proof from applicants regarding the water provided for offset. For example, NDWR should require applicants to show that the existing groundwater rights proposed to offset new appropriations is "wet water." This will prevent the use of "paper" water rights as offset water, creating additional pressure on the Humboldt River Region water availability and resulting in greater impacts to senior surface water rights. PCWCD encourages NDWR to consider the factors outlined in Idaho for acquisitions of water to the Water Supply Bank and to utilize similar criteria for offset water.<sup>6</sup>

Comment 13: PCWCD urges NDWR to remove Section 3 of the Proposed Order in its entirety and develop the mechanisms for mitigating conflicts between existing groundwater rights and decreed surface water rights into a more robust and independent Interim Order. As drafted, Section 3 of the Proposed Order fails to adequately create any concrete mitigation strategies for conflicts between existing water rights.

Comment 14: The Proposed Order fails to address the mechanism NDWR will employ to regulate existing and future conflicts between Decreed Humboldt River surface water rights and "valid" groundwater rights. The Proposed Order claims that "data currently available do not demonstrate that curtailment of junior rights could be implemented in a manner that would eliminate potential future conflict without unduly restricting valid existing groundwater rights." While PCWCD understands that strict priority-based curtailment of Humboldt River Region groundwater rights will not have a linear effect on impacts to senior surface water rights, it does not agree with NDWR's assertion that curtailment will "unduly [restrict] *valid* existing groundwater rights."

Any determination that groundwater rights are *valid* under Nevada statutory law would require them to have been issued without injury or effect on senior water rights, including surface water rights. Further, the permits and certificates for ground water rights are issued with the condition that such rights of use are subject to existing rights. Additionally, NDWR is legislatively

<sup>5</sup> This section is incorporated by reference into paragraph 2, *Application to Change Existing Groundwater Appropriations*. Presumably, an application to change an existing groundwater appropriation is where the inclusion of a superior priority date truly applies as any existing senior decreed water right forfeited as capture off-set water would always predate an application for a new appropriation absent an application for a vested water right.

<sup>6</sup> The requirements for Acquisitions of Water for the Idaho Water Supply Bank (Rule 25) can be found at the following link at page 4: <https://adminrules.idaho.gov/rules/current/37/370203.pdf>.

mandated to manage groundwater and surface water rights conjunctively. As is clearly evident from the Proposed Order, previously issued groundwater rights continue to affect senior decreed surface water rights which is especially evident in certain years. Thus, the assertion that these groundwater rights are "valid" is in question. As such, it may be necessary for NDWR to review existing rights and validity in light of statutory requirements for issuance of water rights, the permit/certificate terms, and conjunctive management. In addition, a mechanism must be employed now to address these existing conflicts whether it be those tools already available to NDWR such as strict curtailment or a more technical solution.

Comment 15: NDWR's assertion that it "is not precluded from ordering that withdrawals be restricted to conform to priority rights when necessary: if conflict due to inadequate water supply is determined to be *imminent*" does not sufficiently protect senior decreed surface water rights. Nevada law prohibits the appropriation of groundwater that *conflicts with existing rights*. See NRS 533.370(2). Such conflicts are not limited to those that are "imminent." As NDWR stated in its order "a basic tenant of prior appropriation is that if there is not enough water to serve all users then senior right holders are entitled to water before junior right holders." *Proposed Order*, p. 4. As such, NDWR's qualification requiring junior conflicts with senior right holders be "imminent" prior to restricting withdrawals is not a condition precedent for NDWR's regulation as required by Nevada law.

Comment 16: The Proposed Order fails to provide a concrete mechanism by which NDWR will order withdrawal restrictions. PCWCD recognizes NDWR's hesitation for outright curtailment of groundwater that only influences decreed surface water rights in drought years or under certain hydrographic conditions that may change from year to year. However, it is already a customary practice in Nevada to "turn off" junior water users to facilitate delivery of water to senior water right holders. As such, the order should describe the concrete mechanisms NDWR will use to facilitate turning off water users that conflict with senior decreed surface water rights in low water years. The current language that NDWR "is not precluded from ordering that withdrawal be restricted" and those factors it "may consider" does not provide a specific enough process and system by which NDWR will ensure that such withdrawals that affect senior decreed surface water rights will be restricted. Given that NDWR has many years of measurements along the various stream segments at critical locations, it has at its disposal many optimal locations at which it could measure "affect." These measurements could act as the "yardstick" to allow calls on the Humboldt River by senior surface water users early in the season to be regulated by NDWR in the upper reaches to avoid a situation wherein the available water has already been appropriated upstream so as not to be available to fulfill the senior surface water users' call.

Comment 17: Additionally, the Proposed Order fails to address how NDWR will use those tools it has under Nevada statutes to address impacts to senior water users. These tools include: (1) designating over appropriated basins in the Humboldt River Region as critical management areas; (2) beginning forfeiture proceedings of unused water rights; (3) cancelling permits where applicant is not developing infrastructure and therein not proceeding in good faith as required by NRS 533.395; and (4) exploring the creation and designation of an additional hydrographic area

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or designation area along the Humboldt River corridor to facilitate more targeted management within the area providing the most significant impacts.

Comment 18: Given the numerous delays and the fact that the groundwater capture model will always be “a work in progress,” such a fact, cannot preclude the development of clear mechanisms to manage existing conflicts between groundwater rights and decreed Humboldt River surface water rights. The State Engineer has succeeded in developing clear mechanisms for mitigating new appropriations and change applications that will rely on the groundwater capture model. The mechanisms for both of these future conflicts relies on a determination of “capture” which is defined in the Proposed Order as “modeled capture of surface water of the Humboldt River and its tributaries by groundwater pumping, *as is simulated by USGS and DRI groundwater models.*” Proposed Order, p. 7 (Emphasis added). As such, NDWR has demonstrated its ability to develop clear mechanisms to combat conflicts, even though “capture” or similar measurements are dependent on the “completion” of the groundwater capture model. Therefore, NDWR should act now to create a clear mechanism for combating the conflicts of more immediate concern to senior right holders, those that already exist. The incomplete model should not be used as an excuse to do nothing given the ongoing drought and the 2021 water budget. The incomplete model has collected much data that is available as a tool for regulation. This data should be used by NDWR to regulate junior groundwater withdrawals.

Comment 19: NDWR should consider alternative forms of water conservation and mitigation. Duty based curtailment is one example. Increased efficiency through use of sprinkler irrigation could result in curtailment of duty from 4 acre-feet to 3 acre-feet without “unduly restricting valid existing groundwater rights.” *Proposed Order*, p. 8.

Comment 20: Further, NDWR’s legislative mandate to conjunctively manage the state’s water resources, requires NDWR to consider reducing groundwater duties to conform to the Humboldt River Decree. For example, in recognizing the limited water resource, the Bartlett Decree limits the duty of Humboldt River water for harvest crops (cultivate crops and native or other grass lands sufficient to produce hay) to 3 acre-feet, meadow pasture to 1.5 acre-feet, and diversified pasture to .75 acre-foot. *See Bartlett Decree*, p. 52. Under conjunctive management, groundwater rights in the region should be similarly limited.

Comment 21: The Proposed Order should bar interbasin transfers to conserve the already stretched water resources within their respective basins and the Humboldt River Region.

Comment 22: NDWR should consider working with interested parties such as PCWCD to draft jointly sponsored legislation for the 2023 legislature. This proposed legislation would provide legally defensible opportunities to regulate groundwater uses and pumping. This would allow the state to have clear and separate regulatory tools to require curtailment for individual groundwater rights that are conflicting with senior surface water rights, based on manner of use and proximity to the river or tributaries. Curtailment could then be enforced on the river corridor wells, while still protecting municipal, industrial, and domestic water sources. The proposed legislation could also include a capture reduction credit system for projects or transfers that make

Nevada Division of Water Resources  
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a notable reduction to river capture. For example, 50% of reduction could be applied as a credit that could be leased or sold to provide incentives for lower-value wells near to the river to cease pumping and provide an easier mechanism for offsetting impacts. Lastly, the legislation could include a system to penalize, monetarily or otherwise, unused water rights.

We thank you for considering PCWCD's comments during the development of the Proposed Order. Please contact our office at (775)786-8800 if you have any questions.

Very truly yours,  
SCHROEDER LAW OFFICES, P.C.

Laura A. Schroeder  
Therese A. Ure Stix

LAS:crs

cc: Client

[REDACTED]

Exhibit 6 Page 07

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NGM0307



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

**ORDER**

**#1329**

**ESTABLISHING INTERIM PROCEDURES FOR MANAGING GROUNDWATER  
APPROPRIATIONS TO PREVENT THE INCREASE OF CAPTURE AND CONFLICT  
WITH RIGHTS DECREED PURSUANT TO THE HUMBOLDT RIVER  
ADJUDICATION**

**I.**

**OVERVIEW**

**WHEREAS**, it is well established that the source of water to a pumping well originates from three primary sources; first from groundwater storage, then increasing over time from capture of streamflow (where present in a hydrographic system) and evapotranspiration.<sup>1,2</sup> The terms “stream capture” or simply “capture,” as used in this Order, refer to a reduction in streamflow caused by groundwater pumping. Decades of groundwater pumping in the Humboldt River Region (Region) has led to increasing capture of the Humboldt River and its tributaries, resulting in growing conflict with rights of the Humboldt Decree.

**WHEREAS**, there are a range of actions or strategies that may be implemented by water users, whether in cooperation with the State Engineer or through other means, to mitigate or avoid conflict. Regional groundwater models currently in development by the United States Geological Survey (USGS) and Desert Research Institute (DRI) are an important tool that will be used to demonstrate the effectiveness of different management strategies and possible administrative actions. Public participation throughout the process of developing a long-term management strategy is an essential component for communication, transparency, and successful implementation. Through the State Engineer’s engagement with the community of water users within the Humboldt Region, several viable strategies have come under consideration, and include:

- Prohibition on pumping within a determined capture zone under certain thresholds of predicted seasonal water supply;
- Credit systems that account for non-use or for return flow from artificial recharge;

<sup>1</sup> Charles V. Theis, 1940, *The Source of Water Derived from Wells -Essential factors controlling the response of an aquifer to development*, Civil Engineering, v. 10, no. 5, p. 277-280.

<sup>2</sup> Barlow, P.M., and Leake, S.A., 2012, *Streamflow Depletion by Wells – Understanding and Managing the Effects of Groundwater Pumping on Streamflow*, U.S. Geological Survey Circular (Dec. 1, 2021, 1:06 p.m.) 1376, 84 p., <https://doi.org/10.3133/cir1376>

- Enhanced storage capacity, including aquifer storage and recovery that benefits the Humboldt River system;
- Use of conservation funds to enact measures that benefit the Humboldt River such as purchase of groundwater rights that are in immediate/frequent conflict with the Humboldt decree;
- Other private party agreements to resolve conflict; and/or
- Withdrawal or abandonment of existing committed rights.<sup>3</sup>

**WHEREAS**, the primary mechanism available to the State Engineer to unilaterally address conflict among water right holders is to order that withdrawals of groundwater be restricted to conform to priority rights per NRS 534.110(6). However, it is also well established that groundwater use in the Humboldt River Region is fundamental to the Region's culture, communities and economic vitality. Strict curtailment would be a draconian measure resulting in significant and lasting economic harm. It is further recognized that permitted groundwater use is a beneficial use. Additionally, a varying amount of the source of water to pumping wells originates from sources other than stream capture and this use is not in conflict with the Humboldt Decree. For these reasons, among others, strict curtailment is not a preferred option. Rather, implementation of a management framework based on the quantifiable impact of each groundwater well's capture of streamflow will more precisely address harm from any conflict with Humboldt decreed rights.

**WHEREAS**, the State Engineer recognizes that any comprehensive solution will require extensive outreach to those impacted by any future decisions and management strategies, including water right holders, tribal communities, water users, representatives of conservation and environmental interests, and other interests (collectively referred to as "stakeholders"). The State Engineer seeks to collaborate with stakeholders on the development of long-term management strategies, supported by groundwater models that are currently in development, to address conflict caused by stream capture without arbitrary curtailment or other administrative restrictions on groundwater use. The State Engineer anticipates that any future management framework shall consider active water replacement plans carried out by groundwater right holders, local water resource plans developed in accordance with NRS 278.0228, implementation of Water Conservation Plans pursuant to NRS 540.131, preferred uses of water in the interest of public

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<sup>3</sup> See generally, comments received from the draft interim order; notes from Working Group meetings, notes from Humboldt River Basin Water Authority meetings, official records of the Nevada Division of Water Resources.

welfare pursuant to NRS 534.120(2), and domestic well protections under NRS 533.024(b). It is also anticipated that any such framework will be supported by the use of the USGS and DRI models to demonstrate effectiveness in preventing conflict resulting from groundwater use within the Humboldt River Region.

**WHEREAS**, the State Engineer recognizes that under the current conditions there are substantial implications for the water users in the Humboldt River Region. The State Engineer also acknowledges and appreciates that the water users understand the issue and share in the desire to see an effective management strategy that addresses the issues relating to groundwater use that conflicts with senior decreed rights and the need for a defensible outcome. While the science that will be used to inform those long-term management strategies is being finalized, an interim protocol is necessary to avoid exacerbating existing problems. This Order establishes the management framework that the State Engineer is adopting for this period to avoid additional harm to water rights above what is already occurring.

## **II.**

### **BACKGROUND OF THE HUMBOLDT RIVER REGION**

**WHEREAS**, the Humboldt River Region is delineated by the topographic boundary of the Humboldt River watershed, extending over 11,000 square miles, including 34 hydrographic basins in eight Nevada counties. Hydrographic basins within the Humboldt River Region include Marys River Area (042), Starr Valley Area (043), North Fork Area (044), Lamoille Valley (045), South Fork Area (046), Huntington Valley (047), Dixie Creek-Tenmile Creek Area (048), Elko Segment (049), Susie Creek Area (050), Maggie Creek Area (051), Marys Creek Area (052), Pine Valley (053), Crescent Valley (054), Carico Lake Valley (055), Upper Reese River Valley (056), Antelope Valley (057), Middle Reese River Valley (058), Lower Reese River Valley (059), Whirlwind Valley (060), Boulder Flat (061), Rock Creek Valley (062), Willow Creek Valley (063), Clovers Area (064), Pumpnickel Valley (065), Kelly Creek Area (066), Little Humboldt Valley (067), Hardscrabble Area (068), Paradise Valley (069), Winnemucca Segment (070), Grass Valley (071), Imlay Area (072), Lovelock Valley (073), Lovelock Valley-Oreana Subarea (073A), and White Plains (074).

**WHEREAS**, the Bartlett Decree<sup>4</sup> dated October 20, 1931, in the Sixth Judicial Court of the State of Nevada, establishes relative rights to the use of the waters of the Humboldt River and setting forth the dates of priority and duties of water for the decreed claims. The Bartlett Decree determined the waters of the stream system to be fully appropriated, and that in an average year there existed no surplus water for irrigation. Subsequent decrees, orders and writs made corrections to the Bartlett Decree, collectively forming the Humboldt River Adjudication, hereafter referred to as the "Humboldt Decree." This process was complete by 1938. The most senior decreed surface water right in the Humboldt River system has a priority date of 1861 and the most junior right has a priority date of 1921.<sup>5</sup> The Humboldt Decree does not include the Little Humboldt River adjudication or Reese River vested claims.

**WHEREAS**, Humboldt River flow measured at the Palisade gage is the primary tool utilized for determining and scheduling delivery amounts of Humboldt River decreed rights.<sup>6</sup> Deliveries are scheduled during the irrigation season based on the daily flow measurement at the gage.<sup>7</sup> When daily flows at the Palisade gage are sufficient to deliver all decreed rights on the Humboldt River and its tributaries, all water rights irrespective of location above or below the gage are scheduled to receive their full duty of water. When flows are not sufficient to deliver all decreed rights, those rights with senior priority dates are served first. In practice, actual deliveries over the expanse of the Humboldt River Region may be different than exact scheduled deliveries due to a wide range of variables including water distribution and management practices and climatic variations that affect riparian evapotranspiration rates, streambank storage, and baseflow.

**WHEREAS**, during the 2012–2015 period the Humboldt River Region experienced one of the worst droughts since 1902.<sup>8</sup> Annual flow at the Palisade gage for that 4-year period averaged 82,872 acre-feet, which is 30% of the historical average annual flow of 287,846 acre-feet for the

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<sup>4</sup> Bartlett Decree, incorporated as Section 1 into the Decree entered *In the Matter of the Determination of the Relative Rights of Claimants and Appropriators of the Waters of the Humboldt River Stream System and its Tributaries*, Case No. 2804, Sixth Judicial District Court of the State of Nevada, In and For the County of Humboldt (October 20, 1931).

<sup>5</sup> *In the Matter of the Determination of the Relative Rights of Claimants and Appropriators of the Waters of the Humboldt River Stream System and Tributaries*, Case No. 2804, Sixth Judicial District Court of the State of Nevada, In and For the County of Humboldt (October 20, 1931).

<sup>6</sup> Bartlett Decree, the decreed irrigation season begins March 15th downstream of Palisade and April 15th upstream of Palisade and ends on varying dates depending on location and culture.

<sup>7</sup> United States Geological Survey (USGS) Gage 10322500, Humboldt River at Palisade.

<sup>8</sup> Period of record for the Palisade gage begins in 1902.

period of record spanning 112 years.<sup>9</sup> At the headwaters of the Humboldt River system during 2012–2015, upstream of any significant groundwater pumping, Lamoille Creek also experienced its lowest 4-year flow since at least 1944 when continuous flow measurements on Lamoille Creek started.<sup>10</sup> By the end of the irrigation seasons in 2014 and 2015 the Humboldt River at Imlay was dry and water was unavailable to allocate to downstream surface water users in the Lovelock area. In the midst of the unprecedented drought, senior decreed water right holders alleged that junior groundwater appropriators were capturing surface flows of the Humboldt River and that groundwater use conflicted with the delivery of their surface water rights. In a writ petition filed in the 11th Judicial District Court for Pershing County in 2015, senior water right holders requested that the Court require the State Engineer to take action within his statutory authority to address the alleged conflict.<sup>11</sup>

**WHEREAS**, nearly all groundwater uses within the Humboldt River Region are junior to decreed surface water rights in the Humboldt River and its tributaries. There are only four active groundwater permits having a priority date earlier than 1921, the date of the most junior Humboldt Decree right.<sup>12</sup> Groundwater development began to increase more substantially in the 1960s and has gradually increased in the decades since. Groundwater is now extensively relied upon for all manners of use, supporting communities and industry throughout the Region. Groundwater rights were approved in accordance with existing Nevada law over the years by the State Engineer based upon findings that unappropriated water was available and its use would not conflict with existing rights or the public interest.

**WHEREAS**, it is scientifically understood that groundwater pumping has the potential to capture streamflow when surface water and groundwater are hydraulically connected, either by inducing greater infiltration losses from the stream channel or by reducing the amount of

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<sup>9</sup> For water years between 1902–1906 and 1912–2019.

<sup>10</sup> USGS Gage 10316500, Lamoille Creek Near Lamoille. Note that flow measurements also exist for a period between 1915 and 1923.

<sup>11</sup> *Petition for Writ of Mandamus, or in the Alternative, Writ of Prohibition*, In the Eleventh Judicial District Court of the State of Nevada In and For the County of Pershing, (Case No. CV 15-12019), *Pershing County Conservation District v. Jason King, P.E., State Engineer of the State of Nevada, Division of Water Resources, Department of Conservation and Natural Resources*.

<sup>12</sup> See Permit 1843, Certificate 139; Permit 2397, Certificate 399; Permit 3520, Certificate 995; and Permit 4589, Certificate 749, Nevada Division of Water Resources' Water Rights Database, official records of the Nevada Division of Water Resources, <http://water.nv.gov/hydrographicabstract.aspx>

groundwater that would otherwise discharge as baseflow to the stream.<sup>13</sup> The potential for hydraulic connectivity and capture by itself does not necessarily demonstrate that conflict is occurring or will occur in the future, or that surface water deliveries cannot be met. However, because stream capture due to pumping necessarily reduces streamflow, any amount of capture in a fully appropriated river system when not in full priority will reduce surface water that would otherwise have been delivered to surface water right holders. In addition, with climate models forecasting a continuing pattern of increasing frequency and intensity of droughts and flood events,<sup>14</sup> drought-accentuated natural losses from the river, combined with the likelihood for greater drawdown due to increased reliance on groundwater during drought, may increase the future potential for insufficient surface flow to fully serve decreed rights. The hydrologic connection between surface water and groundwater was not a consideration in the Humboldt Decree, but these long-term dynamics underscore the difficulty in developing and implementing conjunctive management strategies for future administration of groundwater and surface water in the Humboldt River Region.

### III.

#### ACTIONS TAKEN SINCE THE 2012–2015 DROUGHT

WHEREAS, a basic tenet of prior appropriation is that if there is not enough water to serve all users then senior water right holders are entitled to water before junior right holders.<sup>15</sup> During the drought period of 2012–2015 available data were insufficient to identify to what extent groundwater pumping was causing the inadequacy of water supply for Humboldt River senior decreed right holders and to what extent it was the result of natural low flow because of drought.

<sup>13</sup> *Charles v. Theis*, 1940, *The Source of Water Derived from Wells—Essential factors controlling the response of an aquifer to development*, Civil Engineering, v. 10, no. 5, p. 277-280.

<sup>14</sup> USGCRP, 2017, Climate Science Special Report: Fourth National Climate Assessment, Volume I [Wuebbles, D.J., D.W. Fahey, K.A. Hibbard, D.J. Dokken, B.C. Stewart, and T.K. Maycock (eds.)]. U.S. Global Change Research Program, Washington, DC, USA, 470 pp., See Chapter 8, page 237.

<sup>15</sup> See NRS 534.110, providing for curtailment by priority. See also *Wilson v. Pahrump Fair Water, LLC*, 481 P. 3d 853, 860 (2021) (“That some water rights must necessarily acquiesce to senior water rights is a natural consequence of the prior appropriation doctrine” quoting *Fox v. Skagit Cty.*, 372 P.3d 784, 796 (Wash. App. 2016)); *U.S. v. Orr Water Ditch Co.*, 600 F.3d 1152, 1158-59 (9th Cir. 2010) (“Surface water contributes to groundwater, and groundwater contributes to surface water...[Surface rights granted by decree] cannot be defeated by allocation of water to others—whether by allocation of surface water or groundwater.”).

Analysis of the data at the time indicated that curtailing junior groundwater pumping to protect senior decreed rights would result in a negligible addition to flow in the River and that such action would not likely be legally defensible without additional data and scientific analysis. However, such action would have had devastating and severe impacts to the communities and economies throughout the Region that rely on groundwater.<sup>16</sup> Consequently, no curtailment was imposed.

**WHEREAS**, in the years since the end of the 2012–2015 drought, the State Engineer initiated several measures to improve the available data in the Region and thus provide an informed and sound basis to render decisions with regard to avoiding potential conflict. Among these measures:

1. All non-designated basins within the Region were designated pursuant to NRS 534.030;
2. Totalizing meter installation and reporting were required by State Engineer's Order 1251;
3. Field investigations were completed to verify installation and meter data;
4. The Nevada Division of Water Resources enhanced its database capacity to maintain and manage the pumping data in a publicly accessible manner;
5. The State Engineer established a policy requiring water rights for pit lake evaporation; and,
6. Applications to appropriate groundwater or to change the point of diversion (POD) of existing groundwater rights were denied if granting the application would conflict with existing senior rights due to stream capture.

**WHEREAS**, in 2016, the State Engineer assembled the Humboldt River Working Group<sup>17</sup> to assist in developing draft regulations to resolve future conflict between surface and groundwater rights. The Working Group members included both surface water and groundwater users representing municipalities, agriculture, mining, and other community interests across the Humboldt River Region. Over the course of the next three years, the Working Group developed a conjunctive management approach whose objective was to protect senior water interests while at the same time maximizing beneficial use of surface water and groundwater. This effort culminated in a set of draft regulations that relied on a combination of mitigation plans and financial compensation to avoid future conflict. However, in the 2019 Legislative session, the statutory

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<sup>16</sup> Nevada Division of Water Resources, public presentations on the Humboldt River in Lovelock, Winnemucca, and Elko, February 12–13, 2015. Analysis available in the files of the Nevada Division of Water Resources.

<sup>17</sup> The Humboldt River Working Group consists of representatives from key stakeholder and water user groups from within the Humboldt River Region with the common purpose to propose, negotiate, and provide feedback on conjunctive use management regulations.

revisions required to give the State Engineer the authority to implement the draft regulations were unsuccessful.<sup>18</sup> Surface water users expressed no interest in financial mitigation in lieu of water. Groundwater users likewise expressed no interest in being assessed fees for capture that had yet to be quantified by best available science.<sup>19</sup>

**WHEREAS**, since 2016, the State Engineer has worked with the USGS and DRI to develop improved groundwater budgets at the basin scale and to develop numerical groundwater capture models for the Humboldt River Region. These peer-reviewed products are intended to serve as a basis for determining the effect of groundwater pumping on flows in the Humboldt River and its tributaries.<sup>20</sup> When published, and made publicly available, this model study will provide a consistent basis and a scientifically sound measure to evaluate different management strategies. These products will allow for the development of capture maps, which identify the relative potential for the capture of surface water flow at any given well location and the potential for the capture of surface water flow over different durations of time. This study will also serve as a foundation for review of the perennial yield<sup>21</sup> values for the Region, first estimated from the early USGS Reconnaissance Series Reports and Water Resource Bulletins, which are the primary guidelines used by the State Engineer to determine the water budget for any particular basin.<sup>22</sup>

**WHEREAS**, while the completion of the Humboldt River Region groundwater model study is expected in 2022, preliminary findings from that effort provide insight into the dynamics of stream capture by groundwater pumping. These findings indicate that there may be important non-linear, climate-driven behaviors that influence interactions between the surface water and

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<sup>18</sup> AB 51 (2019).

<sup>19</sup> See *Minutes of the Meeting of the Assembly Committee on Natural Resources, Agriculture and Mining*, February 27, 2019, (Dec. 2, 2021, 1:08 p.m.) <https://www.leg.state.nv.us/Session/80th2019/Minutes/Assembly/NRAM/Final/309.pdf>

<sup>20</sup> See *Nevada Water Science Center: Evaluation of Streamflow Depletion Related to Groundwater Withdrawal, Humboldt River Basin*, (December 2, 2021, 1:10 p.m.) <https://nevada.usgs.gov/humboldtdepletion/index.html>

<sup>21</sup> Perennial yield is defined as the maximum amount of groundwater that can be withdrawn each year over the long term without depleting the groundwater reservoir. Perennial yield is ultimately limited to the maximum amount of natural discharge that can be utilized for beneficial use. The perennial yield cannot be more than the natural recharge to a groundwater basin and in some cases is less. See Office of the State Engineer, *Water for Nevada, State of Nevada Water Planning Report No. 3*, p. 13, Oct. 1971.

<sup>22</sup> See, e.g. Hydrographic Area Summary for Marys River Area, (042), (December 2, 2021, 1:10 p.m.) [https://nevada.usgs.gov/humboldtdepletion/HumboldtDepletionProposal\\_Public.pdf](https://nevada.usgs.gov/humboldtdepletion/HumboldtDepletionProposal_Public.pdf) official records in the Nevada Division of Water Resources.



groundwater systems. These behaviors suggest that pumping-related capture of surface water tends to increase during wet years when excess water is available and decrease during dry years when the potential for conflict is greater.<sup>23</sup> Understanding these phenomena is necessary to accurately define both the timing and distribution of capture so that conflict attributable to groundwater pumping can be characterized and quantified. Long-term management strategy will rely on completion of the modeling effort and a process of public review and deliberation to determine best practices that satisfy legislative directives of prior appropriation, beneficial use and the public interest. Until then, the interim management practices described herein focus on statutorily available mechanisms for avoiding conflict due to increased capture caused by new appropriations or changes to existing groundwater permits.

**WHEREAS**, as of the date of this Order (Fall 2021) the Region is two years into a Severe to Extreme Drought.<sup>24</sup> Humboldt River flows for the summer of 2021 were running at or below 10th percentile flow levels,<sup>25</sup> very little decreed water was served during the 2021 irrigation season, and current Rye Patch Reservoir storage is approximately 7,000 acre-feet, which is 4% of the reservoir's capacity. This current condition highlights the difficult issues that face the water users in the Region, which are especially apparent during droughts like these.

#### 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**, NRS 533.024(1) was amended in 2017 adding a new subsection declaring that it is the policy of Nevada "[t]o manage conjunctively the appropriation, use and administration of all waters of this State, regardless of the source of the water."<sup>26</sup>

**WHEREAS**, NRS 532.120 authorizes the State Engineer to make such reasonable rules as

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<sup>23</sup> Steven Jepsen, Kip Allander, and Kyle Davis, "Behavior and prediction of stream capture under varying streamflow conditions," presentation at Nevada Water Resources Association Annual Conference, Jan. 26, 2021, (Dec. 2, 2021 1:11 a.m.)

[https://www.youtube.com/watch?v=2vLa1hesE\\_E](https://www.youtube.com/watch?v=2vLa1hesE_E)

<sup>24</sup> U.S. Drought Monitor, Nevada Map, October 5, 2021, (Dec. 2, 2021, 1:12 p.m.)

[https://droughtmonitor.unl.edu/data/pdf/20211005/20211005\\_nv\\_trd.pdf](https://droughtmonitor.unl.edu/data/pdf/20211005/20211005_nv_trd.pdf)

<sup>25</sup> USGS gaging stations (10318500, 10321000, 10325000, 10327500, 10333000).

<sup>26</sup> NRS 533.024(1)(e).

may be necessary for the proper and orderly execution of the powers conferred by law.

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

**WHEREAS**, NRS 533.370(2) requires that, in review of an application to appropriate water or to change water already appropriated, the State Engineer must consider whether there is unappropriated water in the source of supply, whether the uncommitted groundwater has been reserved pursuant to NRS 533.0241, whether the proposed use or change conflicts with existing rights or protectable interests in existing domestic wells, and whether it threatens to prove detrimental to the public interest.

**WHEREAS**, the State Engineer's procedures to evaluate applications to appropriate water or to change existing appropriations must be applied in a manner that is consistent and understandable to water right holders and their representatives.

**WHEREAS**, the State Engineer is responsible for establishing procedures to evaluate applications that provide clarity to water users about how to meet the needs of communities and local economies while avoiding conflict with senior decreed water rights.

**WHEREAS**, procedures established by this Order are intended to allow for efficient administration of groundwater rights, with provisions for in-stream replacement water and withdrawal or duty limitation of groundwater permits, when necessary. The intent is to provide needed flexibility for water right holders without increasing conflict by adding to any capture impacts above what is already occurring. In the short term, these procedures will make progress toward avoiding conflicts and preserving the availability of surface water in the Humboldt River Region to serve senior priority rights.

**WHEREAS**, during this interim period before the USGS and DRI models are published and while long-term strategies are being developed with involvement from the stakeholder community, the State Engineer may adopt further conjunctive management measures necessary to address capture impacts.

#### **ORDER**

**NOW THEREFORE, IT IS HEREBY ORDERED**, that in addition to those considerations required by NRS 533.370 and established by previous State Engineer's Orders discussed herein, the following procedures are being implemented by the State Engineer for the review of applications for groundwater rights in the Humboldt River Region:

1. Applications for groundwater rights will be reviewed for increases to stream capture,

and cannot increase conflict along the Humboldt River or its tributaries. Capture shall be determined by the State Engineer using established analytical or numerical methods along with any available knowledge of aquifer properties associated with the points of diversion. These rules apply to:

A. New appropriations of groundwater where annual capture is predicted to exceed 10% of duty for any year during 50 years of continual pumping.<sup>27</sup> Continual pumping is defined as the annualized duty amount requested under the application. Where there is a non-consumptive return flow component of the application, the annualized duty amount only applies to the consumptive portion.

B. Applications to change the point of diversion of existing rights that are predicted to result in an increase of net capture on the system or a tributary, defined as the difference between capture at the proposed POD and capture at the existing POD, and where annual capture at the proposed POD is predicted to exceed 10% of the permitted duty in any year during 50 years of continual pumping.

C. Temporary applications filed under NRS 533.345 to change the point of diversion of an existing groundwater right and applications for new groundwater appropriations filed under the provisions of NRS 533.371.

2. Capture shall be offset by not diverting an existing decreed right (in-stream replacement water), or by the withdrawal of an existing groundwater permit (meaning that the groundwater permit is no longer active, in part or in its entirety) so the resulting availability of streamflow is not less than it was prior to the appropriation or the change in the point of diversion.

A. In-stream replacement water or withdrawn groundwater rights shall be sufficient to equal or exceed the predicted annual capture amount if there is a reasonable probability that the replacement water will be available, in both time and quantity, as determined by the State Engineer. The State Engineer finds that "reasonable probability" would be an 80% probability threshold, which is established to ensure a replacement surface water right or a groundwater withdrawal right is of sufficient quantity and priority to reliably offset annual capture in 40 out of 50-years after an application is approved. In the case of replacement water, probabilities can be determined based on historical

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<sup>27</sup> This threshold is considered to represent the range of certainty of the methods currently being used to calculate capture.

Humboldt River flow and diversion records. In the case of withdrawal of a groundwater right, probabilities can be determined based on analytical or numerical model predictions of recovered capture amounts.


- B. If in-stream replacement water is used to offset capture, then the following applies:
    - i. If a decreed water right is the source of replacement water, it shall be for a crop-type, duty amount, and priority date that is sufficient to equal or exceed the predicted total capture amount of the new appropriation over a 50-year period of use, as determined by the State Engineer.
    - ii. Replacement water shall have an existing place of use that can and will be stripped of use. Water use on areas of natural flooding and other areas where water cannot be physically removed from the land will not be considered for replacement water.
  - C. If withdrawal of an existing groundwater right is used to offset capture, whether withdrawn in its entirety or an adequate portion of the existing right, the predicted total capture amount of the withdrawn right shall be sufficient to equal or exceed the predicted total capture amount of the new appropriation over a 50-year period of use, as determined by the State Engineer.
  - D. Where a change application moves an existing POD capture source from the Humboldt River or a tributary to either an upstream reach or to a different tributary, offset will be required for capture impacts on the new reach or tributary as well as for net capture on the Humboldt River. If capture impacts occur on a new reach or tributary, the applicant will have to offset the entire amount of capture on the new reach or tributary.
  - E. If either temporary in-stream replacement water or temporary withdrawal of a groundwater permit is used to offset capture, the predicted capture offset amount of the replacement water or withdrawn right must equal or exceed the predicted 50-year total capture amount of the temporary application within 10 years of the application's approval, as determined by the State Engineer.
3. These procedures do not apply:
- A. to any application where pumping at the proposed POD results in capture less than 10% of the permitted duty every year during 50 years of continual pumping.
  - B. to change applications where capture at the proposed POD is less than or equal to capture at the existing POD.
  - C. to any application for groundwater where annual capture associated with pumping at

the proposed place of use does not exceed 5 acre-feet during a 50-year period of use.<sup>28</sup>

D. to temporary applications to change PODs within an area designated by State Engineer order allowing for multiple PODs from a single representative POD for mining, milling, and dewatering operations.

4. Uncommon or unforeseeable circumstances will be treated on a case-by-case basis, as determined by the State Engineer, with the same overall objective of preventing additional stream capture.

5. This order is in effect until it is replaced by a subsequent order establishing long term management practices addressing conflict caused by capture to the satisfaction of the State Engineer, or it is superseded by another order or decision.

  
ADAM SULLIVAN, P.E.  
State Engineer

Dated at Carson City, Nevada this

7<sup>th</sup> day of December, 2021.

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<sup>28</sup> This exemption is equivalent to a capture rate of less than 0.01 cfs and would effectively exempt all domestic use, much stockwater use, and other pumping resulting in nominal capture.

FILED

2022 JAN -6 PM 3:57

TAMI RAE SPENO  
DIST. COURT CLERK

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7  
8 IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
9 IN AND FOR THE COUNTY OF HUMBOLDT

\* \* \*

10 U.S. Water and Land, LLC,

11 Petitioner,

12 vs.

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

16 Respondent.

CASE NO.: CV0022918

DEPT. NO.: 2

17  
18 **PETITION FOR JUDICIAL REVIEW**

19 COMES NOW, Petitioners, U.S. Water and Land, LLC, (hereinafter "Petitioners"), by and  
20 through their attorney of record, PAUL G. TAGGART, Esq. and TIMOTHY D. O'CONNOR, ESQ. of  
21 the law firm of TAGGART & TAGGART, LTD., and hereby petitions the Court to reverse or remand  
22 his Order 1329, attached hereto as Ex 1.

23 This Petition for Judicial Review as well as Notice of Appeal is filed pursuant to NRS 533.450.  
24 The State Engineer's findings of fact and conclusions of law in Order 1329 will injuriously affect  
25 Petitioners because Order 1329 is vague and overbroad, is unclear as to its regulation on existing change  
26 applications for water rights, is unclear as to its approach to determining 'capture,' and makes findings  
27 of conflict unsupported by evidence. Petitioners have water rights which will be affected by Order  
28 1329, and request judicial review of the Order.

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NGM0321

**JURISDICTIONAL STATEMENT**

Pursuant to NRS 533.450(1), rulings of the State Engineer are subject to judicial review “in the proper court of the county in which the matters affected or a portion thereof are situated.” The real property to which the water at issue in this appeal is appurtenant lies within Humboldt County. Therefore, the Sixth Judicial District Court of the State of Nevada in and for Humboldt County is the proper venue for judicial review of Order 1329.

**REQUEST FOR REVIEW**

The State Engineer’s Order 1329 attempts to set new regulations for the movement of water rights along the Humboldt River. However, Order 1329 leaves the regulations vague and overbroad, leaving Petitioners without an understanding of how the regulations would be implemented, if at all, to Petitioner’s existing change applications and future applications. Order 1329 simply states that “the State Engineer using established analytical or numerical methods along with any available knowledge of aquifer properties associated with the points of diversion” but Petitioners do not know what the methods are, how they will be implemented, and what considerations the State Engineer will have regarding “[u]ncommon or unforeseeable circumstances will be treated on a case-by-case basis” as stated in Order 1329.

Additionally, the State Engineer made improper findings of conflict in Order 1329. Order 1329 states without evidence or reasoning that “[d]ecades of groundwater pumping... has led to increasing capture of the Humboldt River and its tributaries, resulting in growing conflict with rights of the Humboldt Decree.” Order 1329 fails to identify the source of the ‘conflict,’ which rights are ‘conflicted’ with, and whether the chosen remedy would adequately address the conflict. Order 1329 carries no discussion of how the State Engineer determined a ‘conflict’ to exist, nor does it address what portion of the water shortage is occurring from pumping, and what portion is climate-driven. The Order admits the State Engineer’s “Humboldt River Region groundwater model study is expected in 2022, preliminary findings from that effort provide insight into the dynamics of stream capture by groundwater pumping. *These findings indicate that there may be important non-linear, climate-driven behaviors that influence*” Humboldt River system. Without adequate evidence on the effects on climate and pumping, the State Engineer has not relied on substantial evidence to determine that the groundwater pumping has resulted “in growing conflict with

rights of the Humboldt Decree.”

Finally, the State Engineer’s Order 1329 should be overturned because it does not comply with the State Engineer’s settlement agreement in earlier litigation, making the decision necessarily arbitrary and capricious. In 2015, the Pershing County Water Conservation District (“PCWCD”) initiated an action calling for regulation on the Humboldt River due to a lack of water in the system. Petitioners were party to that action. On November 20, 2020, the Court dismissed PCWCD’s action pursuant to a filed situation that was approved by the Court. The stipulation required that the State Engineer, among other items, would develop an administrative order for “groundwater applications within the Humboldt River Region *as informed by the Model*.”<sup>1</sup> The Model is not complete, yet the State Engineer was bound to produce a Draft Order reliant on the Model by February 2021 by the terms of the settlement agreement.<sup>2</sup> Order 1329 admits that it does not employ the Model, yet attempts to set regulations for the Humboldt River anyway – long after the settled upon timeframe.

### CONCLUSION

For the reasons explained above, and others that may be discovered during the pendency of this appeal, Petitioners respectfully request this Court to grant their Petition for Judicial Review and reverse or remand Order 1329.

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<sup>1</sup> Exhibit 1 at 3.

<sup>2</sup> *Id.*




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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 persons.

DATED this 5 day of January, 2022.

TAGGART & TAGGART, LTD.  
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By:   
PAUL G. TAGGART, ESQ.  
Nevada State Bar No. 6136  
TIMOTHY D O'CONNOR, ESQ.  
Nevada State Bar No. 14098  
Attorneys for Petitioners

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b) and NRS 533.450, I hereby certify that I am an employee of TAGGART & TAGGART, LTD., and that on this date I served, or caused to be served, a true and correct copy of this Petition for Judicial Review, as follows:

☐ By **U.S. CERTIFIED, RETURN RECEIPT POSTAL SERVICE**: I deposited for mailing in the United States Mail, with postage prepaid, an envelope containing the above-identified document, at Carson City, Nevada, in the ordinary course of business, addressed as follows:

☒ By **HAND DELIVERY**, via:

☐ Reno-Carson Messenger Service

☒ Interoffice-type messenger

☐ other type of delivery service: \_\_\_\_\_

by placing a true and correct copy of the above-identified document in an envelope addressed as follows:

Adam Sullivan, P.E.  
Nevada Division of Water Resources  
901 South Stewart Street, Suite 2002  
Carson City, Nevada 89701

DATED this 6 day of January, 2022.



\_\_\_\_\_  
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# **EXHIBIT 1**

# **EXHIBIT 1**

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

ORDER

#1329

ESTABLISHING INTERIM PROCEDURES FOR MANAGING GROUNDWATER  
APPROPRIATIONS TO PREVENT THE INCREASE OF CAPTURE AND CONFLICT  
WITH RIGHTS DECREED PURSUANT TO THE HUMBOLDT RIVER  
ADJUDICATION

I.

OVERVIEW

**WHEREAS**, it is well established that the source of water to a pumping well originates from three primary sources; first from groundwater storage, then increasing over time from capture of streamflow (where present in a hydrographic system) and evapotranspiration.<sup>1,2</sup> The terms “stream capture” or simply “capture,” as used in this Order, refer to a reduction in streamflow caused by groundwater pumping. Decades of groundwater pumping in the Humboldt River Region (Region) has led to increasing capture of the Humboldt River and its tributaries, resulting in growing conflict with rights of the Humboldt Decree.

**WHEREAS**, there are a range of actions or strategies that may be implemented by water users, whether in cooperation with the State Engineer or through other means, to mitigate or avoid conflict. Regional groundwater models currently in development by the United States Geological Survey (USGS) and Desert Research Institute (DRI) are an important tool that will be used to demonstrate the effectiveness of different management strategies and possible administrative actions. Public participation throughout the process of developing a long-term management strategy is an essential component for communication, transparency, and successful implementation. Through the State Engineer’s engagement with the community of water users within the Humboldt Region, several viable strategies have come under consideration, and include:

- Prohibition on pumping within a determined capture zone under certain thresholds of predicted seasonal water supply;
- Credit systems that account for non-use or for return flow from artificial recharge;

<sup>1</sup> Charles V. Theis, 1940, *The Source of Water Derived from Wells -Essential factors controlling the response of an aquifer to development*, Civil Engineering, v. 10, no. 5, p. 277-280.

<sup>2</sup> Barlow, P.M., and Leake, S.A., 2012, *Streamflow Depletion by Wells – Understanding and Managing the Effects of Groundwater Pumping on Streamflow*, U.S. Geological Survey Circular (Dec. 1, 2021, 1:06 p.m.) 1376, 84 p., <https://doi.org/10.3133/cir1376>

- Enhanced storage capacity, including aquifer storage and recovery that benefits the Humboldt River system;
- Use of conservation funds to enact measures that benefit the Humboldt River such as purchase of groundwater rights that are in immediate/frequent conflict with the Humboldt decree;
- Other private party agreements to resolve conflict; and/or
- Withdrawal or abandonment of existing committed rights.<sup>3</sup>

**WHEREAS**, the primary mechanism available to the State Engineer to unilaterally address conflict among water right holders is to order that withdrawals of groundwater be restricted to conform to priority rights per NRS 534.110(6). However, it is also well established that groundwater use in the Humboldt River Region is fundamental to the Region's culture, communities and economic vitality. Strict curtailment would be a draconian measure resulting in significant and lasting economic harm. It is further recognized that permitted groundwater use is a beneficial use. Additionally, a varying amount of the source of water to pumping wells originates from sources other than stream capture and this use is not in conflict with the Humboldt Decree. For these reasons, among others, strict curtailment is not a preferred option. Rather, implementation of a management framework based on the quantifiable impact of each groundwater well's capture of streamflow will more precisely address harm from any conflict with Humboldt decreed rights.

**WHEREAS**, the State Engineer recognizes that any comprehensive solution will require extensive outreach to those impacted by any future decisions and management strategies, including water right holders, tribal communities, water users, representatives of conservation and environmental interests, and other interests (collectively referred to as "stakeholders"). The State Engineer seeks to collaborate with stakeholders on the development of long-term management strategies, supported by groundwater models that are currently in development, to address conflict caused by stream capture without arbitrary curtailment or other administrative restrictions on groundwater use. The State Engineer anticipates that any future management framework shall consider active water replacement plans carried out by groundwater right holders, local water resource plans developed in accordance with NRS 278.0228, implementation of Water Conservation Plans pursuant to NRS 540.131, preferred uses of water in the interest of public

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<sup>3</sup> See generally, comments received from the draft interim order; notes from Working Group meetings, notes from Humboldt River Basin Water Authority meetings, official records of the Nevada Division of Water Resources.

welfare pursuant to NRS 534.120(2), and domestic well protections under NRS 533.024(b). It is also anticipated that any such framework will be supported by the use of the USGS and DRI models to demonstrate effectiveness in preventing conflict resulting from groundwater use within the Humboldt River Region.

**WHEREAS**, the State Engineer recognizes that under the current conditions there are substantial implications for the water users in the Humboldt River Region. The State Engineer also acknowledges and appreciates that the water users understand the issue and share in the desire to see an effective management strategy that addresses the issues relating to groundwater use that conflicts with senior decreed rights and the need for a defensible outcome. While the science that will be used to inform those long-term management strategies is being finalized, an interim protocol is necessary to avoid exacerbating existing problems. This Order establishes the management framework that the State Engineer is adopting for this period to avoid additional harm to water rights above what is already occurring.

## **II.**

### **BACKGROUND OF THE HUMBOLDT RIVER REGION**

**WHEREAS**, the Humboldt River Region is delineated by the topographic boundary of the Humboldt River watershed, extending over 11,000 square miles, including 34 hydrographic basins in eight Nevada counties. Hydrographic basins within the Humboldt River Region include Marys River Area (042), Starr Valley Area (043), North Fork Area (044), Lamoille Valley (045), South Fork Area (046), Huntington Valley (047), Dixie Creek-Tenmile Creek Area (048), Elko Segment (049), Susie Creek Area (050), Maggie Creek Area (051), Marys Creek Area (052), Pine Valley (053), Crescent Valley (054), Carico Lake Valley (055), Upper Reese River Valley (056), Antelope Valley (057), Middle Reese River Valley (058), Lower Reese River Valley (059), Whirlwind Valley (060), Boulder Flat (061), Rock Creek Valley (062), Willow Creek Valley (063), Clovers Area (064), Pumpnickel Valley (065), Kelly Creek Area (066), Little Humboldt Valley (067), Hardscrabble Area (068), Paradise Valley (069), Winnemucca Segment (070), Grass Valley (071), Imlay Area (072), Lovelock Valley (073), Lovelock Valley-Oreana Subarea (073A), and White Plains (074).

**WHEREAS**, the Bartlett Decree<sup>4</sup> dated October 20, 1931, in the Sixth Judicial Court of the State of Nevada, establishes relative rights to the use of the waters of the Humboldt River and setting forth the dates of priority and duties of water for the decreed claims. The Bartlett Decree determined the waters of the stream system to be fully appropriated, and that in an average year there existed no surplus water for irrigation. Subsequent decrees, orders and writs made corrections to the Bartlett Decree, collectively forming the Humboldt River Adjudication, hereafter referred to as the "Humboldt Decree." This process was complete by 1938. The most senior decreed surface water right in the Humboldt River system has a priority date of 1861 and the most junior right has a priority date of 1921.<sup>5</sup> The Humboldt Decree does not include the Little Humboldt River adjudication or Reese River vested claims.

**WHEREAS**, Humboldt River flow measured at the Palisade gage is the primary tool utilized for determining and scheduling delivery amounts of Humboldt River decreed rights.<sup>6</sup> Deliveries are scheduled during the irrigation season based on the daily flow measurement at the gage.<sup>7</sup> When daily flows at the Palisade gage are sufficient to deliver all decreed rights on the Humboldt River and its tributaries, all water rights irrespective of location above or below the gage are scheduled to receive their full duty of water. When flows are not sufficient to deliver all decreed rights, those rights with senior priority dates are served first. In practice, actual deliveries over the expanse of the Humboldt River Region may be different than exact scheduled deliveries due to a wide range of variables including water distribution and management practices and climatic variations that affect riparian evapotranspiration rates, streambank storage, and baseflow.

**WHEREAS**, during the 2012–2015 period the Humboldt River Region experienced one of the worst droughts since 1902.<sup>8</sup> Annual flow at the Palisade gage for that 4-year period averaged 82,872 acre-feet, which is 30% of the historical average annual flow of 287,846 acre-feet for the

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<sup>4</sup> Bartlett Decree, incorporated as Section 1 into the Decree entered *In the Matter of the Determination of the Relative Rights of Claimants and Appropriators of the Waters of the Humboldt River Stream System and its Tributaries*, Case No. 2804, Sixth Judicial District Court of the State of Nevada, In and For the County of Humboldt (October 20, 1931).

<sup>5</sup> *In the Matter of the Determination of the Relative Rights of Claimants and Appropriators of the Waters of the Humboldt River Stream System and Tributaries*, Case No. 2804, Sixth Judicial District Court of the State of Nevada, In and For the County of Humboldt (October 20, 1931).

<sup>6</sup> Bartlett Decree, the decreed irrigation season begins March 15th downstream of Palisade and April 15th upstream of Palisade and ends on varying dates depending on location and culture.

<sup>7</sup> United States Geological Survey (USGS) Gage 10322500, Humboldt River at Palisade.

<sup>8</sup> Period of record for the Palisade gage begins in 1902.



period of record spanning 112 years.<sup>9</sup> At the headwaters of the Humboldt River system during 2012–2015, upstream of any significant groundwater pumping, Lamoille Creek also experienced its lowest 4-year flow since at least 1944 when continuous flow measurements on Lamoille Creek started.<sup>10</sup> By the end of the irrigation seasons in 2014 and 2015 the Humboldt River at Imlay was dry and water was unavailable to allocate to downstream surface water users in the Lovelock area. In the midst of the unprecedented drought, senior decreed water right holders alleged that junior groundwater appropriators were capturing surface flows of the Humboldt River and that groundwater use conflicted with the delivery of their surface water rights. In a writ petition filed in the 11th Judicial District Court for Pershing County in 2015, senior water right holders requested that the Court require the State Engineer to take action within his statutory authority to address the alleged conflict.<sup>11</sup>

**WHEREAS**, nearly all groundwater uses within the Humboldt River Region are junior to decreed surface water rights in the Humboldt River and its tributaries. There are only four active groundwater permits having a priority date earlier than 1921, the date of the most junior Humboldt Decree right.<sup>12</sup> Groundwater development began to increase more substantially in the 1960s and has gradually increased in the decades since. Groundwater is now extensively relied upon for all manners of use, supporting communities and industry throughout the Region. Groundwater rights were approved in accordance with existing Nevada law over the years by the State Engineer based upon findings that unappropriated water was available and its use would not conflict with existing rights or the public interest.

**WHEREAS**, it is scientifically understood that groundwater pumping has the potential to capture streamflow when surface water and groundwater are hydraulically connected, either by inducing greater infiltration losses from the stream channel or by reducing the amount of

<sup>9</sup> For water years between 1902–1906 and 1912–2019.

<sup>10</sup> USGS Gage 10316500, Lamoille Creek Near Lamoille. Note that flow measurements also exist for a period between 1915 and 1923.

<sup>11</sup> *Petition for Writ of Mandamus, or in the Alternative, Writ of Prohibition*, In the Eleventh Judicial District Court of the State of Nevada In and For the County of Pershing, (Case No. CV 15-12019), *Pershing County Conservation District v. Jason King, P.E., State Engineer of the State of Nevada*, Division of Water Resources, Department of Conservation and Natural Resources.

<sup>12</sup> See Permit 1843, Certificate 139; Permit 2397, Certificate 399; Permit 3520, Certificate 995; and Permit 4589, Certificate 749, Nevada Division of Water Resources' Water Rights Database, official records of the Nevada Division of Water Resources, <http://water.nv.gov/hydrographicabstract.aspx>

groundwater that would otherwise discharge as baseflow to the stream.<sup>13</sup> The potential for hydraulic connectivity and capture by itself does not necessarily demonstrate that conflict is occurring or will occur in the future, or that surface water deliveries cannot be met. However, because stream capture due to pumping necessarily reduces streamflow, any amount of capture in a fully appropriated river system when not in full priority will reduce surface water that would otherwise have been delivered to surface water right holders. In addition, with climate models forecasting a continuing pattern of increasing frequency and intensity of droughts and flood events,<sup>14</sup> drought-accentuated natural losses from the river, combined with the likelihood for greater drawdown due to increased reliance on groundwater during drought, may increase the future potential for insufficient surface flow to fully serve decreed rights. The hydrologic connection between surface water and groundwater was not a consideration in the Humboldt Decree, but these long-term dynamics underscore the difficulty in developing and implementing conjunctive management strategies for future administration of groundwater and surface water in the Humboldt River Region.

### III.

#### ACTIONS TAKEN SINCE THE 2012–2015 DROUGHT

WHEREAS, a basic tenet of prior appropriation is that if there is not enough water to serve all users then senior water right holders are entitled to water before junior right holders.<sup>15</sup> During the drought period of 2012–2015 available data were insufficient to identify to what extent groundwater pumping was causing the inadequacy of water supply for Humboldt River senior decreed right holders and to what extent it was the result of natural low flow because of drought.

<sup>13</sup> *Charles v. Theis*, 1940, *The Source of Water Derived from Wells—Essential factors controlling the response of an aquifer to development*, Civil Engineering, v. 10, no. 5, p. 277-280.

<sup>14</sup> USGCRP, 2017, Climate Science Special Report: Fourth National Climate Assessment, Volume I [Wuebbles, D.J., D.W. Fahey, K.A. Hibbard, D.J. Dokken, B.C. Stewart, and T.K. Maycock (eds.)]. U.S. Global Change Research Program, Washington, DC, USA, 470 pp., See Chapter 8, page 237.

<sup>15</sup> See NRS 534.110, providing for curtailment by priority. See also *Wilson v. Pahrump Fair Water, LLC*, 481 P. 3d 853, 860 (2021) (“That some water rights must necessarily acquiesce to senior water rights is a natural consequence of the prior appropriation doctrine” quoting *Fox v. Skagit Cty.*, 372 P.3d 784, 796 (Wash. App. 2016)); *U.S. v. Orr Water Ditch Co.*, 600 F.3d 1152, 1158-59 (9th Cir. 2010) (“Surface water contributes to groundwater, and groundwater contributes to surface water...[Surface rights granted by decree] cannot be defeated by allocation of water to others—whether by allocation of surface water or groundwater.”).

Analysis of the data at the time indicated that curtailing junior groundwater pumping to protect senior decreed rights would result in a negligible addition to flow in the River and that such action would not likely be legally defensible without additional data and scientific analysis. However, such action would have had devastating and severe impacts to the communities and economies throughout the Region that rely on groundwater.<sup>16</sup> Consequently, no curtailment was imposed.

**WHEREAS**, in the years since the end of the 2012–2015 drought, the State Engineer initiated several measures to improve the available data in the Region and thus provide an informed and sound basis to render decisions with regard to avoiding potential conflict. Among these measures:

1. All non-designated basins within the Region were designated pursuant to NRS 534.030;
2. Totalizing meter installation and reporting were required by State Engineer's Order 1251;
3. Field investigations were completed to verify installation and meter data;
4. The Nevada Division of Water Resources enhanced its database capacity to maintain and manage the pumping data in a publicly accessible manner;
5. The State Engineer established a policy requiring water rights for pit lake evaporation; and,
6. Applications to appropriate groundwater or to change the point of diversion (POD) of existing groundwater rights were denied if granting the application would conflict with existing senior rights due to stream capture.

**WHEREAS**, in 2016, the State Engineer assembled the Humboldt River Working Group<sup>17</sup> to assist in developing draft regulations to resolve future conflict between surface and groundwater rights. The Working Group members included both surface water and groundwater users representing municipalities, agriculture, mining, and other community interests across the Humboldt River Region. Over the course of the next three years, the Working Group developed a conjunctive management approach whose objective was to protect senior water interests while at the same time maximizing beneficial use of surface water and groundwater. This effort culminated in a set of draft regulations that relied on a combination of mitigation plans and financial compensation to avoid future conflict. However, in the 2019 Legislative session, the statutory

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<sup>16</sup> Nevada Division of Water Resources, public presentations on the Humboldt River in Lovelock, Winnemucca, and Elko, February 12–13, 2015. Analysis available in the files of the Nevada Division of Water Resources.

<sup>17</sup> The Humboldt River Working Group consists of representatives from key stakeholder and water user groups from within the Humboldt River Region with the common purpose to propose, negotiate, and provide feedback on conjunctive use management regulations.

revisions required to give the State Engineer the authority to implement the draft regulations were unsuccessful.<sup>18</sup> Surface water users expressed no interest in financial mitigation in lieu of water. Groundwater users likewise expressed no interest in being assessed fees for capture that had yet to be quantified by best available science.<sup>19</sup>

**WHEREAS**, since 2016, the State Engineer has worked with the USGS and DRI to develop improved groundwater budgets at the basin scale and to develop numerical groundwater capture models for the Humboldt River Region. These peer-reviewed products are intended to serve as a basis for determining the effect of groundwater pumping on flows in the Humboldt River and its tributaries.<sup>20</sup> When published, and made publicly available, this model study will provide a consistent basis and a scientifically sound measure to evaluate different management strategies. These products will allow for the development of capture maps, which identify the relative potential for the capture of surface water flow at any given well location and the potential for the capture of surface water flow over different durations of time. This study will also serve as a foundation for review of the perennial yield<sup>21</sup> values for the Region, first estimated from the early USGS Reconnaissance Series Reports and Water Resource Bulletins, which are the primary guidelines used by the State Engineer to determine the water budget for any particular basin.<sup>22</sup>

**WHEREAS**, while the completion of the Humboldt River Region groundwater model study is expected in 2022, preliminary findings from that effort provide insight into the dynamics of stream capture by groundwater pumping. These findings indicate that there may be important non-linear, climate-driven behaviors that influence interactions between the surface water and

<sup>18</sup> AB 51 (2019).

<sup>19</sup> See *Minutes of the Meeting of the Assembly Committee on Natural Resources, Agriculture and Mining*, February 27, 2019, (Dec. 2, 2021, 1:08 p.m.) <https://www.leg.state.nv.us/Session/80th2019/Minutes/Assembly/NRAM/Final/309.pdf>

<sup>20</sup> See *Nevada Water Science Center: Evaluation of Streamflow Depletion Related to Groundwater Withdrawal, Humboldt River Basin*, (December 2, 2021, 1:10 p.m.) <https://nevada.usgs.gov/humboldtdepletion/index.html>

<sup>21</sup> Perennial yield is defined as the maximum amount of groundwater that can be withdrawn each year over the long term without depleting the groundwater reservoir. Perennial yield is ultimately limited to the maximum amount of natural discharge that can be utilized for beneficial use. The perennial yield cannot be more than the natural recharge to a groundwater basin and in some cases is less. See Office of the State Engineer, *Water for Nevada, State of Nevada Water Planning Report No. 3*, p. 13, Oct. 1971.

<sup>22</sup> See, e.g. Hydrographic Area Summary for Marys River Area, (042), (December 2, 2021, 1:10 p.m.) [https://nevada.usgs.gov/humboldtdepletion/HumboldtDepletionProposal\\_Public.pdf](https://nevada.usgs.gov/humboldtdepletion/HumboldtDepletionProposal_Public.pdf) official records in the Nevada Division of Water Resources.

groundwater systems. These behaviors suggest that pumping-related capture of surface water tends to increase during wet years when excess water is available and decrease during dry years when the potential for conflict is greater.<sup>23</sup> Understanding these phenomena is necessary to accurately define both the timing and distribution of capture so that conflict attributable to groundwater pumping can be characterized and quantified. Long-term management strategy will rely on completion of the modeling effort and a process of public review and deliberation to determine best practices that satisfy legislative directives of prior appropriation, beneficial use and the public interest. Until then, the interim management practices described herein focus on statutorily available mechanisms for avoiding conflict due to increased capture caused by new appropriations or changes to existing groundwater permits.

**WHEREAS**, as of the date of this Order (Fall 2021) the Region is two years into a Severe to Extreme Drought.<sup>24</sup> Humboldt River flows for the summer of 2021 were running at or below 10th percentile flow levels,<sup>25</sup> very little decreed water was served during the 2021 irrigation season, and current Rye Patch Reservoir storage is approximately 7,000 acre-feet, which is 4% of the reservoir's capacity. This current condition highlights the difficult issues that face the water users in the Region, which are especially apparent during droughts like these.

#### 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**, NRS 533.024(1) was amended in 2017 adding a new subsection declaring that it is the policy of Nevada "[t]o manage conjunctively the appropriation, use and administration of all waters of this State, regardless of the source of the water."<sup>26</sup>

**WHEREAS**, NRS 532.120 authorizes the State Engineer to make such reasonable rules as

<sup>23</sup> Steven Jepsen, Kip Allander, and Kyle Davis, "Behavior and prediction of stream capture under varying streamflow conditions," presentation at Nevada Water Resources Association Annual Conference, Jan. 26, 2021, (Dec. 2, 2021 1:11 a.m.)

[https://www.youtube.com/watch?v=2vLa1hesE\\_E](https://www.youtube.com/watch?v=2vLa1hesE_E)

<sup>24</sup> U.S. Drought Monitor, Nevada Map, October 5, 2021, (Dec. 2, 2021, 1:12 p.m.)

[https://droughtmonitor.unl.edu/data/pdf/20211005/20211005\\_nv\\_trd.pdf](https://droughtmonitor.unl.edu/data/pdf/20211005/20211005_nv_trd.pdf)

<sup>25</sup> USGS gaging stations (10318500, 10321000, 10325000, 10327500, 10333000).

<sup>26</sup> NRS 533.024(1)(e).

may be necessary for the proper and orderly execution of the powers conferred by law.

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

**WHEREAS**, NRS 533.370(2) requires that, in review of an application to appropriate water or to change water already appropriated, the State Engineer must consider whether there is unappropriated water in the source of supply, whether the uncommitted groundwater has been reserved pursuant to NRS 533.0241, whether the proposed use or change conflicts with existing rights or protectable interests in existing domestic wells, and whether it threatens to prove detrimental to the public interest.

**WHEREAS**, the State Engineer's procedures to evaluate applications to appropriate water or to change existing appropriations must be applied in a manner that is consistent and understandable to water right holders and their representatives.

**WHEREAS**, the State Engineer is responsible for establishing procedures to evaluate applications that provide clarity to water users about how to meet the needs of communities and local economies while avoiding conflict with senior decreed water rights.

**WHEREAS**, procedures established by this Order are intended to allow for efficient administration of groundwater rights, with provisions for in-stream replacement water and withdrawal or duty limitation of groundwater permits, when necessary. The intent is to provide needed flexibility for water right holders without increasing conflict by adding to any capture impacts above what is already occurring. In the short term, these procedures will make progress toward avoiding conflicts and preserving the availability of surface water in the Humboldt River Region to serve senior priority rights.

**WHEREAS**, during this interim period before the USGS and DRI models are published and while long-term strategies are being developed with involvement from the stakeholder community, the State Engineer may adopt further conjunctive management measures necessary to address capture impacts.

#### **ORDER**

**NOW THEREFORE, IT IS HEREBY ORDERED**, that in addition to those considerations required by NRS 533.370 and established by previous State Engineer's Orders discussed herein, the following procedures are being implemented by the State Engineer for the review of applications for groundwater rights in the Humboldt River Region:

1. Applications for groundwater rights will be reviewed for increases to stream capture,

and cannot increase conflict along the Humboldt River or its tributaries. Capture shall be determined by the State Engineer using established analytical or numerical methods along with any available knowledge of aquifer properties associated with the points of diversion. These rules apply to:

A. New appropriations of groundwater where annual capture is predicted to exceed 10% of duty for any year during 50 years of continual pumping.<sup>27</sup> Continual pumping is defined as the annualized duty amount requested under the application. Where there is a non-consumptive return flow component of the application, the annualized duty amount only applies to the consumptive portion.

B. Applications to change the point of diversion of existing rights that are predicted to result in an increase of net capture on the system or a tributary, defined as the difference between capture at the proposed POD and capture at the existing POD, and where annual capture at the proposed POD is predicted to exceed 10% of the permitted duty in any year during 50 years of continual pumping.

C. Temporary applications filed under NRS 533.345 to change the point of diversion of an existing groundwater right and applications for new groundwater appropriations filed under the provisions of NRS 533.371.

2. Capture shall be offset by not diverting an existing decreed right (in-stream replacement water), or by the withdrawal of an existing groundwater permit (meaning that the groundwater permit is no longer active, in part or in its entirety) so the resulting availability of streamflow is not less than it was prior to the appropriation or the change in the point of diversion.

A. In-stream replacement water or withdrawn groundwater rights shall be sufficient to equal or exceed the predicted annual capture amount if there is a reasonable probability that the replacement water will be available, in both time and quantity, as determined by the State Engineer. The State Engineer finds that "reasonable probability" would be an 80% probability threshold, which is established to ensure a replacement surface water right or a groundwater withdrawal right is of sufficient quantity and priority to reliably offset annual capture in 40 out of 50-years after an application is approved. In the case of replacement water, probabilities can be determined based on historical

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<sup>27</sup> This threshold is considered to represent the range of certainty of the methods currently being used to calculate capture.

Humboldt River flow and diversion records. In the case of withdrawal of a groundwater right, probabilities can be determined based on analytical or numerical model predictions of recovered capture amounts.

- B. If in-stream replacement water is used to offset capture, then the following applies:
    - i. If a decreed water right is the source of replacement water, it shall be for a crop-type, duty amount, and priority date that is sufficient to equal or exceed the predicted total capture amount of the new appropriation over a 50-year period of use, as determined by the State Engineer.
    - ii. Replacement water shall have an existing place of use that can and will be stripped of use. Water use on areas of natural flooding and other areas where water cannot be physically removed from the land will not be considered for replacement water.
  - C. If withdrawal of an existing groundwater right is used to offset capture, whether withdrawn in its entirety or an adequate portion of the existing right, the predicted total capture amount of the withdrawn right shall be sufficient to equal or exceed the predicted total capture amount of the new appropriation over a 50-year period of use, as determined by the State Engineer.
  - D. Where a change application moves an existing POD capture source from the Humboldt River or a tributary to either an upstream reach or to a different tributary, offset will be required for capture impacts on the new reach or tributary as well as for net capture on the Humboldt River. If capture impacts occur on a new reach or tributary, the applicant will have to offset the entire amount of capture on the new reach or tributary.
  - E. If either temporary in-stream replacement water or temporary withdrawal of a groundwater permit is used to offset capture, the predicted capture offset amount of the replacement water or withdrawn right must equal or exceed the predicted 50-year total capture amount of the temporary application within 10 years of the application's approval, as determined by the State Engineer.
3. These procedures do not apply:
- A. to any application where pumping at the proposed POD results in capture less than 10% of the permitted duty every year during 50 years of continual pumping.
  - B. to change applications where capture at the proposed POD is less than or equal to capture at the existing POD.
  - C. to any application for groundwater where annual capture associated with pumping at

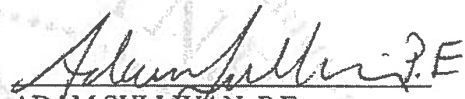


the proposed place of use does not exceed 5 acre-feet during a 50-year period of use.<sup>28</sup>

D. to temporary applications to change PODs within an area designated by State Engineer order allowing for multiple PODs from a single representative POD for mining, milling, and dewatering operations.

4. Uncommon or unforeseeable circumstances will be treated on a case-by-case basis, as determined by the State Engineer, with the same overall objective of preventing additional stream capture.

5. This order is in effect until it is replaced by a subsequent order establishing long term management practices addressing conflict caused by capture to the satisfaction of the State Engineer, or it is superseded by another order or decision.

  
ADAM SULLIVAN, P.E.  
State Engineer

Dated at Carson City, Nevada this

7<sup>th</sup> day of December, 2021.

<sup>28</sup> This exemption is equivalent to a capture rate of less than 0.01 cfs and would effectively exempt all domestic use, much stockwater use, and other pumping resulting in nominal capture.

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## **EXHIBIT 2**

## **EXHIBIT 2**

## **SETTLEMENT AGREEMENT AND MUTUAL RELEASE**

This Settlement Agreement and Release ("Agreement") is hereby entered into and effective upon the date of the full execution of this Agreement ("Effective Date"), by and between Pershing County Water Conservation District ("PCWCD"), and Tim Wilson, P.E., as State Engineer, Department of Conservation and Natural Resources, State of Nevada ("State Engineer").

### **RECITALS**

A. On August 12, 2015, PCWCD filed its original Petition for Writ of Mandamus, or in the Alternative, Writ of Prohibition in the Eleventh Judicial District Court of the State of Nevada in and for the County of Pershing ("the Court") in Case No. CV15-12019 ("the Dispute").

B. On January 2, 2018, after being granted leave to do so by the Court, PCWCD filed its First Amended Petition for Writ of Mandamus, or in the Alternative, Writ of Prohibition ("Amended Writ Petition").

C. On June 14, 2018, the Court held an evidentiary hearing on PCWCD's Amended Writ Petition, wherein the Court provided PCWCD with an opportunity to provide evidence to prove up the basis for its Amended Writ Petition.

D. On October 23, 2018, the Court issued its Order to Answer Writ of Mandamus, finding that PCWCD presented sufficient evidence to meet its initial burden that its Amended Writ Petition was proper and should go forward, and therefore requiring the State Engineer to Answer PCWCD's Amended Writ Petition to show why a writ should not issue, with an evidentiary hearing to follow.

E. On February 4, 2019, the State Engineer filed his Answer to PCWCD's Amended Writ Petition.

F. During a hearing before the Court on July 28, 2020, the Court ordered PCWCD to provide notice of the Dispute to holders of water rights in the Humboldt River Basin by mail as well as publish notice in newspapers of general circulation in the Humboldt River Basin by October 14, 2020. The Court also set an evidentiary hearing for March 22 through March 26, 2021, for the State Engineer to present evidence in opposition to PCWCD's Amended Writ Petition, as well as providing an opportunity for intervening parties to present supplemental evidence in opposition to PCWCD's Amended Writ Petition.

G. On October 12, 2020, pursuant to a stipulation submitted by the State Engineer and PCWCD, the Court entered its Order Staying Judicial Proceedings and All Currently Pending Matters, staying all proceedings in the Dispute for a period of 90 days so that the State Engineer and PCWCD could engage in settlement discussions.

H. While the Dispute has been proceeding in the Court, the State Engineer has undertaken the following endeavors in an effort to proactively manage the Humboldt River Region in an effort to balance the interests of the senior decreed rights of the Humboldt River with those groundwater uses in the region. These efforts include, but are not limited to:

- a. In 2016, in an effort to utilize the best available science to inform decisions relating to the appropriate management of the Humboldt River Basin, the State Engineer initiated work with the United States Geological Survey ("USGS") and the Desert Research Institute ("DRI") on a groundwater capture model ("the Model") for the Humboldt River Region to more accurately understand the relationships between groundwater and surface water, and to determine the effects of groundwater pumping on Humboldt River flows. The State Engineer retained USGS and DRI to develop a scientifically-sound calibrated numerical model and to develop improved groundwater budgets at the basin scale using modern methods to update estimates from early USGS Reconnaissance Series Reports and Water Resource Bulletins. The Model will be a science-based tool to determine to what extent groundwater withdrawals within the Humboldt River Region capture river flow, and to assist in determining effective measures to avoid conflict with deliveries of Humboldt River water.
- b. Recognition of the hydrologic connections between the Humboldt River and the tributary groundwater basins, in accordance with the Nevada Legislature's adoption of NRS 533.024(1)(e) declaring it the policy of the state to "manage conjunctively the appropriation, use and administration of all waters of [Nevada], regardless of the source of the water."
- c. Establishment of a policy relating to evaporative losses from pit lakes, including requirements that evaporative losses be accounted for through permanent relinquishment of groundwater rights and included within the basin groundwater budget.
- d. Continued communication and stakeholder outreach relating to the State Engineer's efforts within the Humboldt River Region to work toward data sharing and uniform management within the Humboldt River Region.
- e. Issuance of an order requiring the installation of totalizing meters and required reporting of water use, subsequent field verification of meter installation and data accuracy, and development of a database to manage and report groundwater pumping data.

I. Through negotiations, the State Engineer and PCWCD (together as "Parties" or separately as a "Party") have reached a compromise that will settle and resolve the Dispute.

NOW, THEREFORE, in consideration of the mutual promises and agreements herein and other good and valuable consideration, the receipt and sufficiency of which the Parties acknowledge, the Parties hereby agree to the following terms, conditions, and covenants:

#### **TERMS OF SETTLEMENT**

1. Recitals. The Recitals stated above are true and incorporated herein as though set forth in full.

2. Forthcoming Administrative Order. The State Engineer is in the process of developing an administrative draft order ("Order") that is intended to provide clear procedures and standards for review of groundwater applications within the Humboldt River Region as informed by the Model. These procedures will provide the following:

- a. New Groundwater Appropriations. The Order will set out specific thresholds for capture for new groundwater appropriations, including requirements to provide replacement water in a manner sufficient to avoid conflict resulting from the application. The mitigation requirements will be specific as to quantity, priority, and other considerations of the State Engineer to assure that the replacement water is sufficient to avoid conflict with existing rights.
- b. Groundwater Change Applications. The Order will set out specific thresholds for capture for applications to change existing groundwater appropriations that consider the changes in capture, and resulting potential for conflict, caused by a change in the point of diversion. Where such a change results in an increase in capture the Order will set out specific requirements to offset any increase in capture with surface water replacement or relinquishment of groundwater rights. Such requirements are intended to be specific and intended to assure any change is sufficiently mitigated so as to not increase any resulting capture and potential conflict.
- c. Addressing Future Conflicts. The Order will set out a mechanism to address future conflicts between valid existing groundwater uses and decreed Humboldt River rights within the Humboldt River Region. This will include articulating a basis upon which to make determination, based upon the best available science, as to issuing future orders that would restrict withdrawals to conform to priority of rights, and the establishment of specific considerations that would be reviewed by the State Engineer in determining whether to invoke a curtailment order.
- d. Notice. The Order will seek to notify all applicants of new rights, as well as those applying for changes to existing rights, that approval of the application does not constitute an exception to any long-term conjunctive management plan determined to be necessary by the State Engineer to prevent or avoid conflict so as to meet the needs of the water users.

The Order will first be issued as a Draft Order and will be subject to a public administrative process that will include taking comments from interested parties and the general public on the Draft Order as well as a public administrative hearing. A Final Order will be issued following the public administrative hearing.

3. Issuance of the Administrative Order. The State Engineer hereby agrees to issue the aforementioned Draft Order within ninety (90) days of the Effective Date of this Agreement.

4. Dismissal of PCWCD's Amended Writ Petition. In exchange for the State Engineer's agreement to issue the aforementioned Draft Order within the aforementioned time period, PCWCD agrees to dismiss its Amended Writ Petition with prejudice.

5. Full and Final Release. The Parties agree that this Agreement is intended to be a full and final compromise, release and settlement of all claims, demands, lawsuits, expenses, injuries, attorney fees, actions, suits, causes of action, known or unknown, suspected or unsuspected, against the other relating in any manner to the Dispute. Nothing herein shall be construed as a release of or otherwise affect the right of any party to enforce any right under this Agreement.

6. Dismissal of the Dispute. The Parties, through counsel, agree to fully execute the Stipulation and Order for Dismissal with Prejudice shown in Exhibit 1 hereto simultaneous with the execution of this Agreement.

7. Complete Agreement. The Parties understand and agree that this Agreement sets forth the full and complete agreement of the Parties, and that no statement or representation, other than those contained herein, have been made or relied upon by the Parties as an inducement for executing this Agreement. No part of this Agreement may be changed except in a writing executed by a duly authorized representative of each Party.

8. Representation by Counsel. All Parties to this agreement hereby represent and acknowledge that they have been represented by counsel regarding the terms of this Agreement and that their counsel have fully advised them with respect to the consequences associated with agreeing to its terms.

9. Litigation Attorneys' Fees. The Parties hereby acknowledge and agree to bear their own attorneys' fees and costs in connection with the Litigation and the preparation of this Agreement.

10. Miscellaneous:

a) Execution of Additional Documents: Each of the Parties hereto agrees to perform any and all acts and to execute and deliver any and all documents reasonably necessary to carry out the intent and the provisions of this Agreement.

b) Governing Law and Choice of Venue: This Agreement is executed and intended to be performed in the State of Nevada, and the laws of Nevada shall govern its interpretation and effect, and any dispute arising from this agreement shall be commenced before the First Judicial District Court, in and for Carson City, Nevada.

c) Severance: Should any term, part, portion or provision of this Agreement be decided or declared by the Courts to be, or otherwise found to be, illegal or in conflict with any law of the State of Nevada or the United States, or otherwise be rendered unenforceable or ineffectual, the validity of the remaining parts, terms, portions and provisions shall be deemed severable and shall not be affected thereby, providing such remaining parts, terms, portions or

provisions can be construed in substance to constitute the agreement that the parties intended to enter into in the first instance.

d) Successors and Assigns: This Agreement shall be binding and inure to the benefit of the Parties hereto, their predecessors, parents, subsidiary and affiliated business entities, all officers, directors, shareholders, members, agents, employees, attorneys, assigns, successors, heirs, executors, administrators and legal representatives of whatsoever kind or character in privity therewith.

e) Third-Party Beneficiary: This Agreement is for the benefit of the Parties, their successors and assigns only. No other third-party beneficiary rights are intended by this Agreement.

f) No Precedential Effect: Each of the parties hereto acknowledges and agrees that certain negotiated provisions of this Agreement were agreed as an accommodation to the Parties and may be unique to the facts and circumstances surrounding this particular relationship. By entering into this Agreement, it is not the intention of the State Engineer to establish any policy, procedure, course of dealing or plan of general application irrespective of any similarity in facts or circumstances involving such other person or party. This Agreement shall not be binding or controlling in any proceeding before the State Engineer or any court reviewing the State Engineer's decisions, other than to enforce the terms of this Agreement.

g) No Liability: This Agreement is a compromise and is not to be construed as an admission of liability on the part of any Party. Nothing in this agreement shall be construed as an admission against the interest of any Party.

h) Counterparts: This Agreement may be executed in counterparts, one or more of which may be facsimiles or color scanned copies but all of which shall constitute one and the same Agreement. Facsimile or scanned signatures of this Agreement shall be accepted by the Parties to this Agreement as valid and binding in lieu of original signatures.

IN WITNESS WHEREOF, this Agreement is executed as of:

**SIGNATORIES**

**On Behalf of Nevada Division of Water Resources:**

By:

  
Tim Wilson, P.E.  
State Engineer

Date: 10/19, 2020

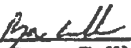
By:


  
James Bolotin, Esq.  
Senior Deputy Attorney General

Date: 10/19, 2020

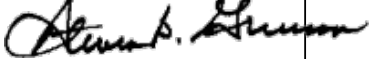
**On Behalf of Pershing County Water Conservation District:**

By:  Date: 10/15, 2020  
Ronnie Burrows  
PCWCD President

By:  Date: 10-15-, 2020  
Ryan Collins  
PCWCD Secretary/Manager

By:  Date: 10/15, 2020  
Therese A. Ure Stix, Esq  
Attorney for PCWCD





1 **NOAS**  
2 AARON D. FORD  
3 Attorney General  
4 STEVE SHEVORSKI (Bar No. 8256)  
5 Chief Litigation Counsel  
6 JAMES N. BOLOTIN (Bar No. 13829)  
7 Senior Deputy Attorney General  
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9 Deputy Solicitor General  
10 LAENA ST-JULES (Bar No. 15156)  
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18 [kireland@ag.nv.gov](mailto:kireland@ag.nv.gov)  
19 [lstjules@ag.nv.gov](mailto:lstjules@ag.nv.gov)  
20 *Attorneys for Respondent State Engineer*

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

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

16 Petitioners,

17 vs.

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

21 Respondent.

22 And All Consolidated Cases.

Case No. A-20-816761-C

Dept. No. 1

Consolidated with:

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

24 **NOTICE OF APPEAL**

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

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

7 **AFFIRMATION**

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

10 DATED this 13th day of May, 2022.

11 AARON D. FORD  
12 Attorney General

13 By: /s/ James N. Bolotin

14 STEVE SHEVORSKI  
15 Chief Litigation Counsel  
16 JAMES N. BOLOTIN  
17 Senior Deputy Attorney General  
18 KIEL B. IRELAND  
19 Deputy Solicitor General  
20 LAENA ST-JULES  
21 Deputy Attorney General  
22 *Attorneys for Respondent, State Engineer*

23 **CERTIFICATE OF SERVICE**

24 I certify that I am an employee of the State of Nevada, Office of the Attorney General,  
25 and that on this 13th day of May, 2022, I served a true and correct copy of the foregoing  
26 NOTICE OF APPEAL, by electronic service to the participants in this case who are  
27 registered with the Eighth Judicial District Court's Odyssey eFileNV File & Serve system  
28 to this matter.

/s/ Dorene A. Wright

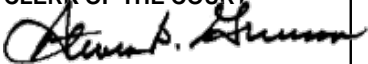
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**INDEX OF EXHIBITS**

<b>EXHIBIT No.</b>	<b>EXHIBIT DESCRIPTION</b>	<b>NUMBER OF PAGES</b>
1.	Notice of Entry of Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review filed April 19, 2022	44

# EXHIBIT 1

# EXHIBIT 1



1 NEFF

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14 Attorneys for Petitioners, LINCOLN COUNTY  
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  
24 Nevada State Engineer, et al.,

25 Respondent.

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

28 ///

ALLISON MacKENZIE, LTD.  
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Telephone: (775) 687-0202 Fax: (775) 882-7918  
E-Mail Address: law@allisonmackenzie.com

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

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

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

*/s/ Dylan V. Frehner*  
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COMPANY, INC.**

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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

ALLISON MacKENZIE, LTD.  
402 North Division Street, P.O. Box 646, Carson City, NV 89702  
Telephone: (775) 687-0202 Fax: (775) 882-7918  
E-Mail Address: law@allisonmackenzie.com

**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.

1 240 miles from southern Elko County in the north to the Muddy River Springs Area in the south,  
2 was identified as early as 1966.<sup>9</sup> The area designated by Order 1309 as the LWRFS consists  
3 generally of the southern portion of the White River-Muddy River Springs flow system.<sup>10</sup>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



1 **B. The Muddy River Decree**

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

15 **C. The Moapa Dace**

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

22  
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>

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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.

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

17 Reports filed with the Office of the State Engineer should address the  
18 following matters:

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

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

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

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

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

SE ROA 647-48, Ex. 6.

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

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

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

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<sup>47</sup> SE ROA 70-88.

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

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

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

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

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

7 **F. Order 1309**

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

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

25 SE ROA 66, Ex. 1.

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

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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.



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

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

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

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

1 in the Muddy River;

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

8 **III.**

9 **DISCUSSION**

10 **STANDARD OF REVIEW**

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

16 **A. Questions of Law**

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

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

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

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

9 **B. Questions of Fact**

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

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

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

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

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

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

### 16 CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. **The Prior Appropriation Doctrine**

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

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

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

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

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

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

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

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

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

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

5 **2. Joint Administration**

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

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

20 While such statements of policy are accorded deference in terms of statutory interpretation,  
21 the Nevada Supreme Court has specifically held that they are not binding. *See McLaughlin v. Hous.*  
22 *Auth. of the City of Las Vegas*, 227 P.2d 206, 93 (1951) (“It has often been said that the declaration  
23 of policy by the legislature, though not necessarily binding or conclusive upon the courts, is entitled  
24 to great weight, and that it is neither the duty nor prerogative of the courts to interfere in such  
25 legislative finding unless it clearly appears to be erroneous and without reasonable foundation.”); *see*  
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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  
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1 authority, the Nevada State Engineer could change the boundaries of the existing basins. Each  
2 boundary change would upend the priority of water right holders as they relate to the other water  
3 right holders in the new, scientifically-dictated “basin.” This would lead to an absurd result as it  
4 relates to the prior appropriation doctrine. Every water right holder would be insecure in their  
5 priority, as their relative priority could change at any moment that science advances in determining  
6 further interconnectivity of water below the surface. In the administration of water rights, the  
7 certainty of those rights is particularly important and prior appropriation is “largely a product of the  
8 compelling need for certainty in the holding and use of water rights.” *Mineral Cty. v. Lyon Cty.*, 136  
9 Nev. at 518, 473 P.3d at 429 (quoting *Arizona v. California*, 460 U.S. 605, 620 (1983)). Science in  
10 and of itself cannot alter common law and statutes. Thus, the State Engineer’s reliance on NRS  
11 533.024(1)(c) for giving him authority to create a superbasin out of seven existing basins is  
12 misplaced.

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

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

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

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

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

20 **3. Conjunctive Management**

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

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

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

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

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

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,  
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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.

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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28 <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.

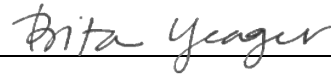
4 IT IS FURTHER ORDERED that the petition for review of the Nevada State Engineer's  
5 Order No. 1309 filed by Petitioners Nevada Cogeneration Associates Nos. 1 and 2 is GRANTED.

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

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16 Bita Yeager  
17 District Court Judge  
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1 **CSERV**

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3 DISTRICT COURT  
CLARK COUNTY, NEVADA

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5  
6 Southern Nevada Water  
Authority, Plaintiff(s)

CASE NO: A-20-816761-C

7 vs.

DEPT. NO. Department 1

8  
9 Nevada State Engineer, Division  
of Water Resources,  
10 Defendant(s)

11  
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  
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