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6 Affirmation: This document does  
7 not contain the social security  
8 number of any person.

9 IN THE ELEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
10 IN AND FOR THE COUNTY OF PERSHING

12 PERSHING COUNTY WATER  
13 CONSERVATION DISTRICT,

14 Petitioner,

15 v.

16 JASON KING, P.E., State Engineer of the  
State of Nevada, DIVISION OF WATER  
17 RESOURCES, DEPARTMENT OF  
18 CONSERVATION AND NATURAL  
RESOURCES,

19 Respondent.

Case No.

Department No. 01

**PETITION FOR WRIT OF MANDAMUS,  
OR IN THE ALTERNATIVE, WRIT OF  
PROHIBITION**

21 PETITIONER, Pershing County Water Conservation District (“PCWCD” or “District”),  
22 by and through Schroeder Law Offices, P.C. and its attorneys, hereby seeks a writ of mandamus,  
23 or alternatively, a writ of prohibition, to require the State Engineer to establish a critical  
24 groundwater management area over all over-appropriated groundwater basins within the  
25 Humboldt River Basin in order to: 1) bring all over-appropriated groundwater basins surrounding  
26 the Humboldt River back to their perennial annual yield; 2) eliminate the cone of depression



1 caused by over-allocation of groundwater pumping causing interference with surface water flows  
2 in the Humboldt River; and 3) regulate water used for mining and milling pursuant to Nevada  
3 statutory code.

4 PCWCD has worked extensively with the Nevada State Engineer (“State Engineer”) and  
5 Nevada Division of Water Resources (“NDWR”) to develop a plan which will allow the District  
6 to be served their senior decreed water rights, while at the same time limit, to the extent possible,  
7 curtailment of groundwater pumping that is pulling water away from the Humboldt River to the  
8 detriment of the District. The State Engineer has repeatedly failed to take action to effectively  
9 manage the water resources within the Humboldt River Basin, after many attempts by PCWCD  
10 to assist in developing a suitable plan. Accordingly, the District is now forced to take legal  
11 action in order to ensure their senior decreed water rights are served and protected under Nevada  
12 law.

13 This writ is based on the Memorandum of Points and Authorities and Affidavit of Bennie  
14 B. Hodges filed in conjunction herewith, the papers and pleadings that will be filed in this  
15 matter, and any argument the Court may allow.

16 **MEMORANDUM OF POINTS AND AUTHORITIES**

17 Pursuant to NRS 34.150 et seq., PCWCD hereby submits the following Memorandum of  
18 Points and Authorities in support of its *Petition for Writ of Mandamus, or in the alternative, Writ*  
19 *of Prohibition*.

20 A District Court may issue a writ of mandamus to compel the performance, or writ of  
21 prohibition to dispel the performance, of an act by one whom the law enjoins has a duty resulting  
22 from their public office. The State Engineer, in violation of Nevada law, has allowed the  
23 majority of groundwater basins surrounding the Humboldt River to become over-appropriated,  
24 and thereby capture Humboldt River water, in violation of Nevada’s statutory water code and the  
25 prior appropriation doctrine. There is no other plain, speedy, and adequate remedy at law, and  
26 the Court must therefore order the State Engineer to establish a critical groundwater management



1 area encompassing all over-appropriated groundwater basins within the Humboldt River Basin in  
2 order to:

- 3 1) Bring all over-appropriated groundwater basins surrounding the Humboldt River back  
4 to their perennial annual yield;
- 5 2) Eliminate the cone of depression caused by over-allocation of groundwater pumping  
6 causing interference with surface water flows in the Humboldt River; and
- 7 3) Regulate water used for mining and milling pursuant to Nevada statutory code.

8 **I. INTRODUCTION**

9 PCWCD is an irrigation district in Lovelock Nevada, formed under Chapter 539 of the  
10 Nevada Revised Statutes. *Affidavit of Bennie B. Hodges in Support of Petition for Writ of*  
11 *Mandamus, or in the alternative, Writ of Prohibition* (“Affidavit of Hodges”) ¶ 1. PCWCD is a  
12 quasi-municipal agency that is led by a Board of Directors and its manager Bennie Hodges.  
13 *Affidavit of Hodges* ¶¶ 1, 2. PCWCD owns, controls, and operates a water conveyance system  
14 that provides water to approximately 100 constituents holding approximately 37,506 acres of  
15 irrigated agricultural lands within the District boundaries. *Affidavit of Hodges* ¶ 3. PCWCD  
16 operates diversion structures and dams along the Humboldt River, as well as diversion structures  
17 within the District’s boundaries. *Affidavit of Hodges* ¶ 4.

18 The District controls an extensive amount of senior decreed surface water rights for the  
19 use of Humboldt River water. *Affidavit of Hodges* ¶ 5. In recent years, many water related issues  
20 have plagued the Humboldt River and the basin. Many of the Humboldt River Basin  
21 groundwater aquifers are greatly over-appropriated, and groundwater pumping within the  
22 vicinity of the river is pulling water away from the river. PCWCD’s land is situated at the lowest  
23 reaches of the Humboldt River Basin, therefore, while they hold very senior decreed water  
24 rights, little water is making it to the District’s service and water righted areas. *Affidavit of*  
25 *Hodges* ¶ 6. The District is in its second year with 0% water allocated to its constituents.  
26 *Affidavit of Hodges* ¶¶ 7, 8.



1 Due to the increase in groundwater pumping in the Humboldt River Basin, along with  
2 many temporary permits<sup>1</sup> to appropriate water being issued by the NDWR, less water is available  
3 in the Humboldt River for diversion. This “new” appropriation of water is creating a system of  
4 water allocation in violation of the prior appropriation doctrine, and Nevada’s statutory water  
5 code. The State Engineer has failed to take required action to sustainably manage the water  
6 resources in the Humboldt River Basin.

7 **II. ISSUE PRESENTED**

8 Must this Court issue a writ of mandamus, or in the alternative, writ of prohibition,  
9 ordering the State Engineer to sustainably manage groundwater in the Humboldt River basin  
10 according to Nevada law?

11 **III. FACTUAL BACKGROUND**

12 **a. Humboldt River Basin Groundwater Pumping**

13 The Humboldt River Basin is comprised of 34 separate and distinct hydrographic  
14 groundwater basins. *Affidavit of Hodges, Exhibit 1; Affidavit of Hodges* ¶ 10. According to  
15 NDWR, there are 1,852 wells within the Humboldt River Basin, and 1,291 groundwater permits  
16 with their point of diversion within 5 miles of the Humboldt River and its tributaries, of which  
17 273 capture 10% or more of their water from the Humboldt River. *Affidavit of Hodges, Exhibit 7*  
18 *at 19-21*. The total combined perennial yield<sup>2</sup> of all collective groundwater basins in the  
19 Humboldt River Basin is 476,400 AFA. *Affidavit of Hodges, Exhibit 2; Affidavit of Hodges* ¶ 11.  
20 However, the total combined permitted groundwater allocation is 753,394 AFA. *Id.* Of the 34  
21 hydrographic basins within the Humboldt River Basin, 23 are over-appropriated. *Id.*

22 ///

23 <sup>1</sup> A “temporary permit” is a permit issued to appropriate groundwater which is limited as to time. *See* NRS  
24 534.120(3)(a).

25 <sup>2</sup> Perennial Yield is “The amount of usable water of a ground water reservoir that can be withdrawn and consumed  
26 economically each year for an indefinite period of time. It cannot exceed the sum of the Natural Recharge, the  
Artificial (or Induced) Recharge, and the Incidental Recharge without causing depletion of the groundwater  
reservoir.” NDWR Water Words, <http://water.nv.gov/programs/planning/dictionary/wwords-P.pdf> at 236.





1 The majority of groundwater in the Humboldt River Basin is used for irrigation and  
2 mining purposes. *Id.* Of these groundwater permits, irrigation use accounts for 455,385 AFA of  
3 appropriation, and mining use accounts for 171,343 AFA of appropriation. *Id.* Water use for  
4 mining is most significantly used to dewater open pit mines, which is the current practice of  
5 extracting minerals in the Humboldt River Basin.<sup>3</sup> This practice often seeks to extract ore from  
6 below the water table, which requires the mining area to be “dewatered.”<sup>4</sup> Generally, the mine  
7 drills a number of wells around the mining pit, then pumps water to create a cone of depression  
8 under the pit, thereby drying up the mining area.<sup>5</sup> When the pit is not being dewatered, the pit  
9 fills up to the level of the water table, creating a pit lake.<sup>6</sup>

10 In Nevada, the State Engineer grants permits for mining and milling on a “temporary”  
11 basis. *See, Affidavit of Hodges, Exhibit 5.* However, rather than issuing one-year temporary  
12 permits, historically, the State Engineer issues permits for mining and milling akin to permanent  
13 water rights while side-stepping an analysis as to whether water is available for appropriation.  
14 *See, Affidavit of Hodges, Exhibits 9, 10.* The Humboldt River Chronology states that “mine  
15 dewatering and mine pit lake formation, and their potential near-term and long-term effects on  
16 groundwater levels and surface-water flows” has been identified as a principal water-related  
17 issue plaguing the Humboldt River Basin.<sup>7</sup> State Engineer Ruling 5876 states:

18 The State Engineers Office considers water used in mining and  
19 milling to be a temporary use of water and as such is not  
20 considered in the amount of water appropriated in a basin. The  
21 State Engineer finds if the water used for mining and milling is  
22 removed from the amount of water appropriated for each basin...  
23 there is water available for appropriation. The State Engineer finds

23 <sup>3</sup> Humboldt River Chronology Volume I, Part I, <http://water.nv.gov/mapping/chronologies/humboldt/hrc-pt1.pdf> at  
24 94.

24 <sup>4</sup> *Id.*

25 <sup>5</sup> *Id.*

26 <sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 14.



1 the perennial yield of the ground-water belongs to the basin and  
2 not to the Humboldt River.

3 *Affidavit of Hodges, Exhibit 5 at 2.* Accordingly, the State Engineer has not considered the use  
4 of water for mining and milling to be appropriative, and finds a lack of interconnection between  
5 surface and groundwater sources, and states that the perennial yield of the groundwater basin  
6 belongs to the basin and not the Humboldt River. *Id.*

7 In more recent years, the State Engineer has recognized interconnection between  
8 groundwater and surface water in the Humboldt River Basin. *Affidavit of Hodges, Exhibit 4.* In  
9 State Engineer Ruling 6299, the State Engineer changed the perennial yield for the Lovelock  
10 Valley groundwater basin, finding that it is over-appropriated, and denied applications due to a  
11 potential influence on decreed Humboldt River rights. *Affidavit of Hodges, Exhibit 4.*

12 **b. PCWCD's Water Rights**

13 Through the acquisition of additional water, including change applications approved by  
14 the State Engineer, PCWCD currently holds the following Humboldt River Decree<sup>8</sup> water rights  
15 of use<sup>9</sup>:

- 16 • Water Right Permit 12955 (Certificate 4861) has a combined duty of 14,432.32  
17 acre-feet per year ("AFA"), and a priority date ranging between January 1, 1873  
18 to January 1, 1887;
- 19 • Water Right Permit 12953 (Certificate 4436) has a combined duty of 4,154.08  
20 AFA, and a priority date of January 1, 1871;

21  
22  
23 <sup>8</sup> "Humboldt River Decree" or "decreed" rights referenced herein refer to surface water rights, issued subject to the  
adjudication of the Humboldt River, under Sixth Judicial District Court, County of Humboldt, Case No. 2804.

24 <sup>9</sup> A portion of the water rights referenced are currently held in trust by the United States Department of Interior  
25 (Permits: 12955, 12953, 12954, 12952, 12951, 12950, 12957, 12956, 10283) and Department of Reclamation  
26 (Permits: 12948, 12947, 12957), for the District. Currently, the water rights are in the process of being transferred  
back to the District as they have now fulfilled their repayment obligations pursuant to contracts entered into with the  
United States. (See, *Affidavit of Hodges* ¶ 13).



- 1 • Water Right Permit 12954 (Certificate 4437) has a combined duty of 1,925.52  
2 AFA, and a priority date ranging between January 1, 1873 to January 1, 1877;
- 3 • Water Right Permit 12952 (Certificate 4572) has a combined duty of 14,432.32  
4 AFA, and a priority date ranging between January 1, 1873 to January 1, 1887;
- 5 • Water Right Permit 12951 (Certificate 4435) has a combined duty of 1,282.87  
6 AFA, and a priority date of January 1, 1873;
- 7 • Water Right Permit 12950 (Certificate 4571) has a combined duty of 3,023.49  
8 AFA, and a priority date of January 1, 1874;
- 9 • Water Right Permit 12949 (Certificate 4570) has a combined duty of 2,626.30  
10 AFA, and a priority date ranging between January 1, 1874 to January 1, 1887;
- 11 • Water Right Permit 12948 (Certificate 4434) has a combined duty of 1,925.52  
12 AFA, and a priority date ranging between January 1, 1863 to January 1, 1866;
- 13 • Water Right Permit 12947 (Certificate 5040) has combined duty of 562.17 AFA,  
14 and a priority date ranging between January 1, 1873 to January 1, 1880;
- 15 • Water Right Permit 12957 (Certificate 5180) has a combined duty of 1,647.18  
16 AFA, and a priority date of January 1, 1877;
- 17 • Water Right Permit 12956 (Certificate 4506) has a combined duty of 100,000  
18 AFA for storage in Rye Patch Reservoir, and a priority date of December 12,  
19 1933;
- 20 • Water Right Permit 10283 (Certificate 9258) has a combined duty of 15,152.32  
21 AFA for storage in Rye Patch Reservoir, and a priority date of August 13, 1938;
- 22 • Water Right Permit 1098 (Certificate 2130) has a combined duty of 20,200 AFA,  
23 and a priority date of August 21, 1908;
- 24 • Water Right Permit 1948 (Certificate 2131) has a combined duty of 29,570 AFA,  
25 and a priority date of February 10, 1911.

26 *Affidavit of Hodges, Exhibit 3; Affidavit of Hodges ¶ 12.*



1           **c. PCWCD attempted to reach solution with the State Engineer.**

2           After feeling the effect of groundwater pumping that decreases flows within the  
3 Humboldt River, coupled with the ongoing drought in the West, the District sought the assistance  
4 of the State Engineer to develop a collective plan to ensure PCWCD's senior water rights are  
5 delivered, while at the same time attempting to allow junior rights to continue to allocate water  
6 to the greatest extent possible. *Affidavit of Hodges* ¶ 16. On August 21, 2014, PCWCD prepared  
7 a report for the State Engineer to assist in the development of such a plan. *Affidavit of Hodges* ¶  
8 17.

9           The report, titled *Water Management in a Prior Appropriation System: Conjunctive*  
10 *Management Solutions to Groundwater Withdrawals Affecting Surface Water Flows within the*  
11 *Humboldt River Basin*, is meant to provide the State Engineer with information about how other  
12 western states are approaching the issue of interconnection of water resources, as well as provide  
13 data regarding the interconnection issues in the Humboldt River Basin. *Affidavit of Hodges,*  
14 *Exhibit 6; Affidavit of Hodges* ¶ 17. The report then provides the State Engineer with a list of  
15 requested "Action Items" and asks the State Engineer to take action to: 1) develop a system of  
16 conjunctive management; 2) regulate mine dewatering under statutory code; 3) account for  
17 "temporary" permits in the hydrographic basins' annual budget; 4) regulate mining pit lakes  
18 under statutory code for water storage; 5) curtail junior groundwater rights in basins surrounding  
19 the Humboldt River, until perennial yield equilibrium is met; 6) require mandatory metering on  
20 groundwater wells in the Humboldt River Basin; 7) create an enforcement officer to regulate  
21 groundwater use; and 8) bring groundwater basins back to sustainability. *Id.* On September 9,  
22 2014, the PCWCD Board Members and Manager met with the State Engineer to discuss the  
23 report and request action. *Affidavit of Hodges* ¶ 18. While the District understands that not all  
24 actions taken by other states are applicable to the difficulties effecting Nevada, the point was to

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1 start the conversation to develop a system of water management that will work for Nevada.  
2 PCWCD received no written response to their report or otherwise.<sup>10</sup> *Id.*

3 On January 14, 2015 and January 15, 2015, the State Engineer held a series of workshops  
4 on the Humboldt River stating their intent to prepare a capture model in the basin, to be  
5 completed within 4 to 5 years. *Affidavit of Hodges, Exhibit 7 at 12; Affidavit of Hodges ¶ 19.*  
6 The State Engineer also demonstrated a simple “Glover” analysis capture model illustrating that  
7 groundwater pumping curtailment would supply additional water to the Humboldt River, but  
8 determined that the “Glover analysis shows that curtailment of pumping over one irrigation  
9 season will not cause an appreciable gain in Humboldt River flows.” *Affidavit of Hodges, Exhibit*  
10 *7 at 23.* The State Engineer concluded that “it is anticipated that there will be NO groundwater  
11 curtailment in 2015.” *Id.*

12 On March 24, 2015, with a second irrigation season with 0% allocation looming, the  
13 PCWCD Board Members again met with the State Engineer, this time presenting data through a  
14 District retained hydrogeologist. *Affidavit of Hodges ¶ 20.* The District provided to the State  
15 Engineer a *Request for Implementation of Water Management Strategies. Affidavit of Hodges,*  
16 *Exhibit 8; Affidavit of Hodges ¶ 20.* PCWCD expressly asked for a written response to their  
17 letter and presentation. *Id.* No response was received. *Id.*

18 **IV. ARGUMENT**

19 This Court must issue a writ of mandamus, or in the alternative, writ of prohibition,  
20 ordering the State Engineer to regulate the water resources of the Humboldt River Basin  
21 according to Nevada law. The District has exhausted every remedy available to them, and thus  
22 there is no plain, speedy, or adequate remedy available.

23 ///

24 ///

25 \_\_\_\_\_  
26 <sup>10</sup> The State Engineer has begun the process to require groundwater meters to be installed on wells within the Humboldt River Basin.



1           **a. A District Court may issue a writ of mandamus or prohibition to compel or**  
2           **dispel the performance by a state official of an act that the law requires.**

3           A district court may issue a writ of mandamus, or in the alternative, writ of prohibition, to  
4           compel or dispel the performance by a state official of an act the law requires. A writ of  
5           mandamus “may be issued by the Supreme Court, the Court of Appeals, a district court or a  
6           judge of the district court, to compel the performance of an act which the law especially enjoins  
7           as a duty resulting from an office, trust or station...” NRS 34.160. In other words, “[a] writ of  
8           mandamus may be issued to compel the performance of an act that the law requires as a duty  
9           resulting from an office, trust or station, or to control an arbitrary or capricious exercise of  
10          discretion.” *Diaz v. Eighth Judicial Dist. Court*, 116 Nev. 88, 93 (2000). A writ of mandamus  
11          “shall be issued in all cases where there is not a plain, speedy and adequate remedy in the  
12          ordinary course of law.” NRS 34.170; see also, *Diaz v. Eighth Judicial Dist. Court*, 116 Nev. 88,  
13          93 (2000). “Mandamus is an extraordinary remedy, and the decision as to whether a petition will  
14          be entertained lies within the sound discretion of this court.” *Brewery Arts Ctr. v. State Bd.*  
15          *Examiners*, 108 Nev. 1050, 1053 (1992). A formal order refusing to perform is not required.  
16          See, *Whitehead v. Nevada Comm'n on Judicial Discipline*, 873 P.2d 946, 964 (1994).

17          A writ of prohibition “is the counterpart of the writ of mandate.” NRS 34.320. “It arrests  
18          the proceedings of any tribunal, corporation, board or person exercising judicial functions, when  
19          such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board  
20          or person.” *Id.* “While a writ of prohibition is most often used to restrain courts or judicial  
21          tribunals, it can also be used to restrain persons in other classes who are exercising or attempting  
22          to exercise judicial or quasi-judicial functions beyond their powers.” *Mineral County v. State*,  
23          117 Nev. 235, 243-244 (2001).

24          This Court must issue a writ of mandamus, or in the alternative, writ of prohibition,  
25          because there is no plain, speedy, and adequate remedy at law, and the State Engineer has failed  
26          to take action and sustainably manage the groundwater basins surrounding the Humboldt River.



1 The State Engineer has a statutory duty to sustainably manage the groundwater basins within the  
2 Humboldt River Basin, and ensure that junior groundwater use does not impact senior decreed  
3 surface water rights, and must perform such duties prescribed by law.

4 **b. The State Engineer has failed in his statutory duty to manage groundwater in**  
5 **the Humboldt River Basin sustainably, and is prohibited by law from granting**  
6 **applications that conflict with a prior decree, senior water right, are detrimental**  
7 **to the public interest, or where there is no water available at the proposed**  
8 **source.**

9 The Nevada State Engineer has a duty to manage groundwater in a sustainable manner,  
10 and cannot grant an application to appropriate water in the State of Nevada, if such appropriation  
11 conflicts with a decree or senior water right, is detrimental to the public interest, or where there  
12 is no water available at the proposed source. Chapter 533 of the Nevada Revised Statutes  
13 governs the State Engineer's ability to grant a new or change application to appropriate water in  
14 Nevada. Each time an application is made to appropriate new water, or change an existing right,  
15 the State Engineer must perform a multi-step process to determine whether the application may  
16 be granted.

17 NRS 533.370(2) sets the test the State Engineer is required to perform prior to granting  
18 an application to appropriate water, and provides as follows:

19 [W]here there is no unappropriated water in the proposed source of  
20 supply, or where its proposed use or change conflicts with existing  
21 rights...or threatens to prove detrimental to the public interest, the  
22 State Engineer shall reject the application and refuse to issue the  
23 requested permit.

24 *See also, Redrock Valley Ranch, LLC v. Washoe County, 254 P.3d 641, 647 (2011).*

25 Similarly, NRS 533.371 governs the issuance of a temporary permit to appropriate water,  
26 and states:

The State Engineer shall reject the application and refuse to issue a  
permit to appropriate water for a specified period if the State  
Engineer determines that:

1. The application is incomplete;
2. The prescribed fees have not been paid;
3. The proposed use is not temporary;
4. There is no water available from the proposed source of supply without exceeding the perennial yield or safe yield of that source;
5. The proposed use conflicts with existing rights; or
6. The proposed use threatens to prove detrimental to the public interest.

The State Engineer violated his statutory duties by allowing groundwater allocation within basins surrounding the Humboldt River where there 1) is no unappropriated water, 2) that conflict with existing rights, 3) that are detrimental to the public interest, and 4) that conflict with the Humboldt River Decree. Further, the State Engineer violated his statutory duties by finding that groundwater used for mining and milling is a temporary use of water, and is not appropriative.

**1. The State Engineer violated his statutory duties by allowing groundwater allocation where there is no unappropriated water available.**

The State Engineer cannot grant an application to appropriate water when there is no unappropriated water at the proposed source to fulfill the application. NRS 533.370(2). To make this determination, the State Engineer must assess whether there is “unappropriated” water available. *Id.* The amount of unappropriated water available is based on the perennial yield of the groundwater basin where application is sought. The term “perennial yield” is defined as:

The amount of usable water of a ground water reservoir that can be withdrawn and consumed economically each year for an indefinite period of time. It cannot exceed the sum of the Natural Recharge, the Artificial (or Induced) Recharge, and the Incidental Recharge without causing depletion of the groundwater reservoir. Also referred to as Safe Yield.<sup>11</sup>

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<sup>11</sup> NDWR Water Words, <http://water.nv.gov/programs/planning/dictionary/wwords-P.pdf> at 236.





1 Similarly, the Nevada Supreme Court has stated that “[t]he perennial yield of a hydrological  
2 basin is the equilibrium amount or maximum amount of water that can safely be used without  
3 depleting the source.” *Pyramid Lake Paiute Tribe of Indians v. Ricci*, 245 P.3d 1145, 1147  
4 (2010). If granting an application to appropriate water causes the groundwater basin to exceed  
5 its “perennial yield” then there is no “unappropriated water in the proposed source of supply”  
6 and the “State Engineer shall reject the application and refuse to issue the requested permit.”  
7 NRS 533.370(2).

8 The Humboldt River Basin contains 34 groundwater basins, of which 23 are over-  
9 appropriated. *Affidavit of Hodges, Exhibit 2*. Over-allocation of groundwater resources  
10 surrounding the Humboldt River directly violates NRS 533.370(2), requiring the State Engineer  
11 to deny applications to appropriate water when there is not enough water in the groundwater  
12 basin to serve the application. In violation of his statutory duties, the State Engineer has granted,  
13 and continues to grant applications to appropriate groundwater in excess of perennial yield, when  
14 “there is no unappropriated water in the proposed source of supply...” *Id.*

15 **2. The State Engineer violated his statutory duties by allowing groundwater**  
16 **pumping that conflicts with existing rights.**

17 The State Engineer cannot grant an application to appropriate water that conflicts with an  
18 existing right. NRS 533.370(2). Pursuant to NRS 533.030, “[a]ll appropriation of water in the  
19 State of Nevada for a beneficial use, is subject to existing rights.” Regarding groundwater, an  
20 application can only be granted if “rights of holders of existing appropriations can be  
21 satisfied...” NRS 534.110(5). The State Engineer cannot allow a new or changed appropriation  
22 to conflict with another’s pre-existing water right of use. Allowing conflicting water use violates  
23 both Nevada statutory law and the prior appropriation doctrine.<sup>12</sup>

24 \_\_\_\_\_  
25 <sup>12</sup> In 1885, the Supreme Court of Nevada firmly repudiated the common law riparian doctrine and confirmed that  
26 prior appropriation is the law in Nevada. *Jones v. Adams*, 19 Nev. 78, 84-88, 6 P. 442 (1885). Once prior  
appropriation became the law in Nevada, the prior appropriation doctrine required a claimant to show actual  
physical diversion of water from its source with intent to apply the water to beneficial use within a reasonable time



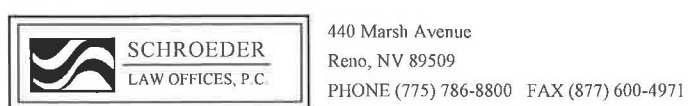
1 PCWCD holds senior decreed surface water rights to the Humboldt River. Because their  
2 rights are senior in priority to almost every other groundwater right within the Humboldt River  
3 Basin, groundwater rights granted by the State Engineer with a priority date junior to that of the  
4 District's decreed rights cannot conflict with the District's senior rights. Any "conflict" violates  
5 NRS 533.370(2) and the prior appropriation doctrine.

6 The State Engineer has granted hundreds of permits to appropriate groundwater within  
7 the Humboldt River Basin. *Affidavit of Hodges, Exhibit 7*. Upon consideration of each  
8 application to appropriate water, the State Engineer is required to determine whether the  
9 appropriation will conflict with existing rights. *See* NRS 533.370(2). The State Engineer  
10 recognizes that groundwater pumping in the Humboldt River Basin is pulling water away from  
11 the Humboldt River, making less water available to decreed surface water right holders. *Affidavit*  
12 *of Hodges, Exhibit 7*.

13 While the State Engineer has historically not found that groundwater pumping conflicts  
14 with surface water rights (*Affidavit of Hodges, Exhibit 5*), in recent years, the State Engineer has  
15 denied some applications because "additional pumping would cause an increase in infiltration of  
16 the surface water of the Humboldt River into the groundwater aquifer, thereby potentially  
17 reducing river flow to the extent that it could conflict with existing decreed Humboldt River  
18 water rights." *Affidavit of Hodges, Exhibit 4 at 11*. This inconsistent water resource management  
19 demonstrates that while the State Engineer now recognizes that Humboldt River decreed  
20 "existing rights" are negatively impacted by groundwater pumping, other applications were  
21 granted to the detriment of decreed Humboldt River rights. This impact and conflict is  
22  
23

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24 (Cont.)  
25 to establish a possessory interest in water. *Application of Filippini*, 66 Nev. 17, 22 (Nev. 1949). Generally, an  
26 appropriation of water relates back to the time when the first step to secure it was taken, if the work was prosecuted  
with reasonable diligence. *Irwin v. Strait*, 18 Nev. 436, 436 (1884). Water allocation in the State cannot interfere  
with earlier senior appropriations. *See generally, Desert Irrigation, Ltd. v. State*, 113 Nev. 1049, 1051 (1997). This  
doctrine does not distinguish between groundwater and surface water.



1 something the State Engineer should have taken into consideration before allowing the junior  
2 groundwater use, and before allowing the basins to become over-appropriated.

3 Because junior rights continue to conflict with senior rights, the State Engineer violated  
4 his statutory duties by approving the conflicting groundwater use, by allowing the groundwater  
5 basins to become over-appropriated, and by allowing the groundwater use to continue when it  
6 conflicts with the District's senior decreed rights. *See* NRS 533.370(2).

7 **3. The State Engineer violated his statutory duties by allowing groundwater**  
8 **pumping that is detrimental to the public interest.**

9 The State Engineer cannot grant an application to appropriate water when such  
10 appropriation is in detriment to the public interest. NRS 533.370(2). The State Engineer must  
11 perform a public interest assessment prior to allowing any appropriation of water in the state. A  
12 public interest determination requires the State Engineer to review both environmental and  
13 economic interests in the area, and determine whether these interests are impacted. *See generally,*  
14 *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 112 Nev. 743.

15 Humboldt River surface flows are being pulled away from the river, and being allocated  
16 by groundwater users in the Basin. *Affidavit of Hodges, Exhibit 7*. This interconnection causes  
17 great economic and environmental hardship to PCWCD and its constituents. With less water in  
18 the river, the District's constituents are unable to produce viable crops in sufficient quantity to  
19 justify continued agricultural use, something detrimental to both the economic and  
20 environmental interests in the area. *Affidavit of Hodges* ¶ 8. These public interest factors should  
21 have been taken into consideration by the State Engineer before allowing the over-appropriation  
22 of the groundwater basins surrounding the Humboldt River.

23 The State Engineer violated NRS 533.370(2) by allowing groundwater use that is  
24 detrimental to the public interest.

25 ///

26 ///



1                   **4. The State Engineer violated his statutory duties by finding that**  
2                   **groundwater use for mining and milling is not appropriative, and issuing**  
3                   **permanent water rights.**

4                   Similar to the above analysis, the State Engineer is required to assess temporary uses of  
5 water pursuant to NRS 533.371. Under NRS 533.371, groundwater appropriations in conflict  
6 with existing rights, that are detrimental to the public interest, and where there is no  
7 unappropriated water available, are not allowed. Further, a statutory temporary change in use of  
8 water cannot be granted for a period of more than one year. NRS 533.345. The State Engineer  
9 also cannot grant a statutory temporary application to appropriate water when the use of water is  
10 not actually a temporary use. NRS 533.371.

11                  In the Humboldt River Basin, the State Engineer considers water used for mining and  
12 milling to be a “temporary use” of water, and does not consider this use of water to be  
13 appropriative. *Affidavit of Hodges, Exhibit 5 at 2.* Water used for mining and milling purposes,  
14 among other uses, is used to “dewater” open pit mines, which use often continues for many years,  
15 even after the mine ceases operations. Rather than issuing “temporary” permits for this use, and  
16 conducting the necessary analysis under NRS 533.371, the State Engineer allows this  
17 “temporary” use of water to continue indefinitely under a permanent water right. *See, Affidavit of*  
18 *Hodges, Exhibits 9, 10.*

19                  Even if the State Engineer were to issue the proper statutory temporary permit for mining  
20 and milling use, his action would again violate Nevada law, because water used for mining and  
21 milling is not a temporary use of water. *See NRS 533.371.* While the mines may not be in  
22 operation forever, the effects the pit lakes created when the mine ceases to pump will hold water  
23 open to the air and land surface, and out of the enclosed groundwater aquifer indefinitely. Also,  
24 the State Engineer refuses to recognize the evaporative losses pit lakes create as an appropriation  
25 requiring a water right. *See, Affidavit of Hodges, Exhibit 11 at 5.* The State Engineer violated  
26



1 Nevada Law by issuing permanent water rights for mining and milling in the Humboldt River  
2 Basin, without considering the appropriative nature of such use.

3 **5. The State Engineer violated his statutory duties by allowing groundwater**  
4 **pumping in conflict with a State issued court decree.**

5 In addition to the State Engineer's power over the approval of groundwater appropriation,  
6 the State Engineer is an officer of the Court in its administration of Court issued State decrees.  
7 The State Engineer must uphold State issued decrees, and ensure no interference occurs. NRS  
8 533.0245 states:

9 The State Engineer shall not carry out his or her duties pursuant to  
10 this chapter in a manner that conflicts with any applicable  
11 provision of a decree or order issued by a state or federal court, an  
12 interstate compact or an agreement to which this State is a party  
for the interstate allocation of water pursuant to an act of  
Congress.

13 As demonstrated above, the State Engineer has allowed numerous groundwater basins  
14 surrounding the Humboldt River to become over-appropriated. This over-appropriation is now  
15 pulling water away from the Humboldt River, thereby making less water available to  
16 downstream senior water right users such as PCWCD. By allowing groundwater pumping to  
17 impact Humboldt River Decree rights, the State Engineer is violating the Humboldt River  
18 Decree, the very Decree he is charged to uphold, and in doing so, he also violates NRS 533.0245.

19 **c. The State Engineer has tools available to sustainably manage over-appropriated**  
20 **groundwater basins and bring them back to perennial yield, including**  
21 **designating a critical groundwater management area.**

22 The State Engineer, in violation of his statutory duties, has allowed the groundwater  
23 basins surrounding the Humboldt River to become over-appropriated. The State Engineer has  
24 statutory tools available to more effectively manage over-appropriated groundwater basins and  
25 bring them back into perennial yield, and has a legal obligation to do so, including designating a  
26 critical groundwater management area. Pursuant to NRS 534.110(7), the State Engineer "may  
designate as a critical management area any basin in which withdrawals of groundwater



1 consistently exceed the perennial yield.” This designation gives the State Engineer additional  
2 power to more effectively carry out groundwater basin management.

3       Upon designation as a critical management area, groundwater users within the designated  
4 basin may petition the State Engineer for approval of a groundwater management plan. NRS  
5 534.037(1). This plan, if approved, allows groundwater users to take steps to bring the basin  
6 back to sustainability, and eventually remove the critical management basin designation. *Id.* If a  
7 plan is not approved, and sustainability is not reached within 10 years, the State Engineer is then  
8 required to curtail groundwater pumping. NRS 534.110(7)(b). “If a basin has been designated as  
9 a critical management area for at least 10 consecutive years, the State Engineer shall order that  
10 withdrawals, including, without limitation, withdrawals from domestic wells, be restricted in that  
11 basin to conform to priority rights, unless a groundwater management plan has been approved  
12 for the basin pursuant to NRS 534.037.” *Id.* In other words, the designation allows groundwater  
13 appropriators time to develop a plan to bring the basin back to sustainability, and alleviate  
14 curtailment to the greatest extent possible.

15       By designating the over-appropriated basins surrounding the Humboldt River a critical  
16 groundwater management areas, the State Engineer can begin to develop a plan with the  
17 groundwater users to bring the basins back to their sustainable yield. This in turn will begin to  
18 ease the impact this over-appropriation has on the surrounding river, and the negative effect on  
19 the District’s senior decreed water rights. The State Engineer must use his statutory powers to  
20 correct his previous violations allowing the over-appropriation in the first place. If the State  
21 Engineer does not use his statutory powers to bring the groundwater basins back to  
22 sustainability, he has no choice but to curtail groundwater use by priority, and pursuant to the  
23 prior appropriation doctrine.

24 ///

25 ///

26 ///



1           **d. The District has exhausted every remedy in an attempt to have their senior**  
2           **rights served.**

3           The District owns and controls a substantial number of senior Humboldt River decreed  
4 water rights. *See, Affidavit of Hodges, Exhibit 3.* In turn, the District and its constituents have a  
5 great deal to lose should groundwater pumping be allowed that continues to deplete surface  
6 water flows. The District has met with the State Engineer on multiple occasions to discuss  
7 options and develop a plan to better manage the water resources within the Humboldt River  
8 Basin, and to ensure they receive their water, pursuant to the Humboldt River Decree. The  
9 District has further provided the State Engineer with research, information, and data regarding  
10 other states' methods, as well as data pertaining to the Humboldt River Basin. *See, Affidavit of*  
11 *Hodges, Exhibit 6.* The District has made written requests for action by the State Engineer. *See,*  
12 *Affidavit of Hodges, Exhibits 6, 8.* The District has asked for a written response to their requests.  
13 *See, Affidavit of Hodges, Exhibit 8.* The State Engineer has made no response to the District's  
14 requests, and has taken little action in response to the ongoing over-allocation of water in the  
15 basin, in violation of the prior appropriation doctrine. *Affidavit of Hodges* ¶ 20. By making no  
16 response, the District is deprived of the opportunity for an adequate and speedy legal remedy.

17           Historically, the State Engineer has not recognized the connection between surface and  
18 groundwater sources, however, now concedes that connection does exist between the two water  
19 sources. *See, Affidavit of Hodges, Exhibits 4, 7.* In his January 2015 Humboldt River workshop,  
20 the State Engineer provided a Glover analysis in an attempt to determine groundwater pumping's  
21 effect on surface water flows. This simplified scenario used water wells capturing at least 10%  
22 of their water from the Humboldt River, and ran the scenario over one (1) 180-day irrigation  
23 season. It was determined that curtailment of groundwater pumping will place additional water  
24 into the river. This solution did not take into consideration the years of pumping before the  
25 scenario, and did not take into consideration the effect of curtailment moving forward more than  
26





1 a single irrigation season. The benefit of groundwater basin sustainability will be greater when  
2 one takes into account the history and future of groundwater pumping.

3 By failing to take any immediate action to bring the over-appropriated groundwater  
4 basins surrounding the Humboldt River back to perennial yield, the State Engineer continues to  
5 violate Nevada statutory code, and the prior appropriation doctrine. PCWCD has exhausted all  
6 options and therefore, there is no other plain, speedy, and adequate remedy to bring the  
7 groundwater basins back to perennial yield, and to eliminate the negative effect to the Humboldt  
8 River.

### 9 **V. REQUESTED RELIEF**

10 The District has a beneficial interest in obtaining writ relief. The State Engineer has  
11 granted groundwater applications in excess of perennial yield in the Humboldt River Basin, and  
12 in violation of Nevada's statutory water code and the prior appropriation doctrine. Groundwater  
13 pumping in the Humboldt River Basin is pulling water away from the Humboldt River, leaving  
14 less water to serve decreed water right holders. PCWCD and its constituents hold some of the  
15 most senior decreed rights to the Humboldt River, rights senior to most groundwater users.  
16 When a junior water right captures water meant to serve a senior right, this action violates  
17 Nevada law and the prior appropriation doctrine. The State Engineer has failed to take action to  
18 sustainably manage groundwater as required under Nevada law.

19 This Court must issue a writ of mandamus, or in the alternative, writ of prohibition  
20 ordering the State Engineer to establish a critical groundwater management area over all over-  
21 appropriated groundwater basins within the Humboldt River Basin in order to:

- 22 1) Bring all over-appropriated groundwater basins surrounding the Humboldt River back  
23 to their perennial annual yield;
- 24 2) Eliminate the cone of depression caused by over-allocation of groundwater pumping  
25 causing interference with surface water flows in the Humboldt River; and
- 26 3) Regulate water used for mining and milling pursuant to Nevada statutory code.





1 If the State Engineer fails to use his statutory powers to bring sustainability back to the  
2 Humboldt River Basin groundwater aquifers, curtailment is necessary to achieve sustainability  
3 pursuant to the prior appropriation doctrine.

4 This Court should order Respondent to show cause before the Court, at a time and place  
5 set by the Court, why he has not fulfilled his statutory duties established herein.

6  
7 RESPECTFULLY SUBMITTED, this 12th day of August, 2015.

8  
9 SCHROEDER LAW OFFICES, P.C.

10  
11 

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on August 12, 2015, I caused a copy of the forgoing *PETITION*  
3 *FOR WRIT OF MANDAMUS, OR IN THE ALTERNATIVE, WRIT OF PROHIBITION* to  
4 be deposited with the United States Postal Service within the State of Nevada for mailing,  
5 postage pre-paid, as noted below:

6 Nevada State Engineer  
7 901 South Stewart Street, Suite 2002  
8 Carson City, NV 89701  
9 Certified Mail #7013 2630 0000 0975 0670

9 Nevada Attorney General  
10 Office of the Attorney General  
11 100 North Carson Street  
12 Carson City, NV 89701  
13 Certified Mail #7013 2630 0000 0975 0663

14 Dated this 12th day of August, 2015.



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