IN THE SUPREME COURT OF THE STATE OF NEVADA

COYOTE SPRINGS INVESTMENT, LLC; LINCOLN COUNTY WATER DISTRICT; AND VIDLER WATER COMPANY, INC., Appellants, vs. ADAM SULLIVAN, P.E., NEVADA STATE ENGINEER, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, Respondent.	Electronically Filed Dec 27 2022 02:43 PM Elizabeth A. Brown Clerk of Supreme Court **Supreme Court No. 85137** District Court Case No. A816761

APPELLANTS' JOINT OPENING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the justices of the Court may evaluate possibly disqualifications or recusal.

Appellant Coyote Springs Investment, LLC ("CSI") is a Nevada limited liability company. Wingfield Nevada Group Holding Company, LLC is a parent company of CSI, and no publicly traded company owns 10% or more of its stock.

CSI is presently represented by Kent Robison and Hannah Winston of Robison, Sharp, Sullivan & Brust; Bradley Herrema of Brownstein Hyatt Farber Schreck, LLP; William Coulthard of Coulthard Law; and Emilia Cargill.

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In the course of the proceedings leading up to this appeal, CSI was also represented by Therese Shanks.

Dated this 27th day of December, 2022.

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Appellant, LINCOLN COUNTY WATER DISTRICT ("Lincoln"), is a political subdivision of the State of Nevada, created for the purpose of providing adequate and efficient water service within Lincoln County, Nevada. Appellant, VIDLER WATER COMPANY, INC. ("Vidler"), is a Nevada corporation authorized to conduct business in the state of Nevada.

Appellant Vidler's parent company is D.R. Horton, Inc., a Delaware corporation and a publicly held company that owns 10% or more of Vidler's stock.

Appellant Lincoln is presently represented by the Lincoln County District Attorney and Great Basin Law. Vidler is represented by Allison MacKenzie, Ltd.

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Snell & Wilmer, L.L.P. has been substituted out of this case and no longer represents Lincoln.

Dated this 27th day of December, 2022.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to NRAP 3(A)(b)(8) as this appeal involves a post-judgment order denying a motion for attorney fees, which is generally appealable. *See* NRAP 3A(b)(8) (providing that "[a]n appeal may be taken from ... [a] special order entered after final judgment").

NRAP 17 ROUTING STATEMENT

This matter is presumptively assigned to the Court of Appeals as it is an appeal from a post judgment order. *See* NRAP 17(b)(7). The Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals because the Supreme Court will hear and decide the appeals involving the State Engineer's water determination consolidated into Case No. 84739. *See* NRAP 17(a)(8). The Supreme Court should decide all issues involved in Case No. 84739 and this appeal because this appeal concerns whether the State Engineer's defense of Order 1309 was without reasonable ground. To maintain uniformity of decisions, the Supreme Court should decide both appeals. Moreover, this appeal presents an issue of first impression that should be decided by the Supreme Court.

INTRODUCTION

Order 1309 is the most recent order from the State Engineer in a series of improper decisions aimed at defeating CSI's master planned community and halting the use of existing water rights in the area created by the State Engineer now known as the Lower White River Flow System ("LWRFS"). Order 1309, for the first time in Nevada history, purports to combine seven distinct hydrographic basins into one, reordering water right priorities and abandoning the basin-by-basin management practice set forth in Nevada's water law statutes that have been used and relied upon by the State Engineer, Nevada courts, and water right holders for decades. Worse, Order 1309 includes Kane Springs Valley Hydrographic basin ("Kane Springs") into the "superbasin" after the State Engineer expressly excluded it on more than one occasion. Rather than acknowledge the limits of his authority, the State Engineer defended (and continues to defend on appeal) Order 1309 by obfuscation, misrepresentation, and deflection.

For over five years, the State Engineer has unreasonably and unlawfully prevented CSI from proceeding with its fully approved and entitled Coyote Springs master planned community. Without any technical or scientific support, the State Engineer imposed a moratorium on CSI's development. It did so with a May 16, 2018 letter which deprived CSI of any advanced notice or opportunity to be heard. After CSI initiated litigation, the State Engineer conceded the impropriety of a

unilaterally imposed moratorium on CSI's constructions plans and agreed to withdraw its arbitrary moratorium order. That process was the kind of unreasonable conduct that NRS 18.010(2)(b) was enacted to prevent.

Rather than learn by his capricious act of depriving CSI due process, the impropriety of the State Engineer's strategy to harm CSI soon worsened. Again, without scientific or technical support, the State Engineer issued Interim Order 1303 in January of 2019. While the State Engineer admitted in Order 1303 that technical and appropriate scientific investigation was yet to be conducted, 1303 again ordered a moratorium on CSI's development. CSI was not afforded any opportunity to be heard before the State Engineer stopped all of CSI's construction and development efforts with Order 1303. Again, that process, along with the State Engineer's conduct defending Order 1309 as specifically outlined below, was and is the kind of unreasonable conduct that NRS 18.010(2)(b) was enacted to prevent.

Order 1309 was issued in June of 2020. Eight water permit holders challenged Order 1309 with Petitions for Judicial Review, contending that the State Engineer did not have legal authority to combine multiple hydrographic basins into one. Although more than ten Nevada statutes mention basins, the State Engineer professed not to know what the Petitioners meant by the word "basin". Although the State Engineer's web site and Water Words Dictionary identify 232 Hydrographic basins in the State of Nevada, he persisted in arguing that the word

"basin" means whatever the State Engineer says its means. This position was fostered even though in previous orders, rulings, and judicial proceedings, the State Engineer conceded that water in Nevada is managed on a basin-by-basin basis. The District Court saw through the State Engineer's inconsistent and disingenuous defense of Order 1309. The District Court declared Order 1309 void as it unlawfully attempted to combine seven separate hydrographic basins into one "super basin". Furthermore, the District Court concluded that the State Engineer violated the Appellants' due process rights, noting the especially egregious violation of including Kane Springs in the super basin.

From the beginning of these conflicts, throughout the various lawsuits, and now in the companion appeal filed by the State Engineer to revive Order 1309, the State Engineer has considered himself as an omnipotent force neither appreciative, respectful, nor willing to abide by Nevada legislation, his prior Orders, due process, and decisions of this Honorable Court. The State Engineer's position gives him great latitude to harm water right holders and cause them to incur substantial fees—especially in this case where Order 1309 is so clearly unsupported by the law. Such conduct warrants, if not begs for, a finding that the inartful and disingenuous defense of 1309 was "without reasonable ground" to deter this type of conduct in the future. The District Court erred in concluding otherwise.

STATEMENT OF THE ISSUES

1. Whether the District Court erred in interpreting NRS 533.450 by concluding that the statute precludes an award of attorney fees when it specifically incorporates "the practice in civil cases".
2. Whether the District Court abused its discretion in concluding that the State Engineer's defenses asserted to justify Order 1309 were not frivolous or without reasonable ground.

STATEMENT OF THE CASE

This lawsuit concerns whether attorney's fees should be awarded against the State Engineer for his abuse of power and unlawful entry of Order 1309. Order 1309 improperly combined seven separate hydrographic basins into one for "joint administration". CSI, Lincoln, and Vidler challenged Order 1309 by way of petitions for judicial review, which the District Court granted, and which are the subject of the appeal in Case No. 84739. Thereafter, CSI, Lincoln, and Vidler moved for their attorney fees from the State Engineer pursuant to Nevada Revised Statute 18.010(2)(b) because the State Engineer's defense of Order 1309 was frivolous and without reasonable ground. The District Court denied CSI's motion for fees as well as Lincoln and Vidler's motion for fees, concluding that NRS 533.450 precludes an award of attorney fees and regardless, the State Engineer's defense of Order 1309 was not frivolous or without reasonable ground. This appeal follows.

STATEMENT OF THE FACTS

The seven hydrographic basins subject to Order 1309 include Kane Springs Valley Basin (Basin 206) ("Kane Springs"), Coyote Spring Valley Basin (Basin 210) ("Coyote Spring Valley"), Muddy River Springs Area a.k.a Upper Moapa Valley Hydrographic Basin (Basin 219) ("MRSA"), California Wash Hydrographic Basin (Basin 218) ("California Wash"), Hidden Valley (north) Hydrographic Basin (Basin 217) ("Hidden Valley"), Garnet Valley Hydrographic Basin (Basin 216) ("Garnet Valley"), and the northwest portion of the Black Mountains Area Hydrographic Basin (Basin 215) ("Black Mountains"). *See* 1 JA 50-117 (Order 1309).[1]

The basins impacted by Order 1309 are shown in dark brown and red on the following map:

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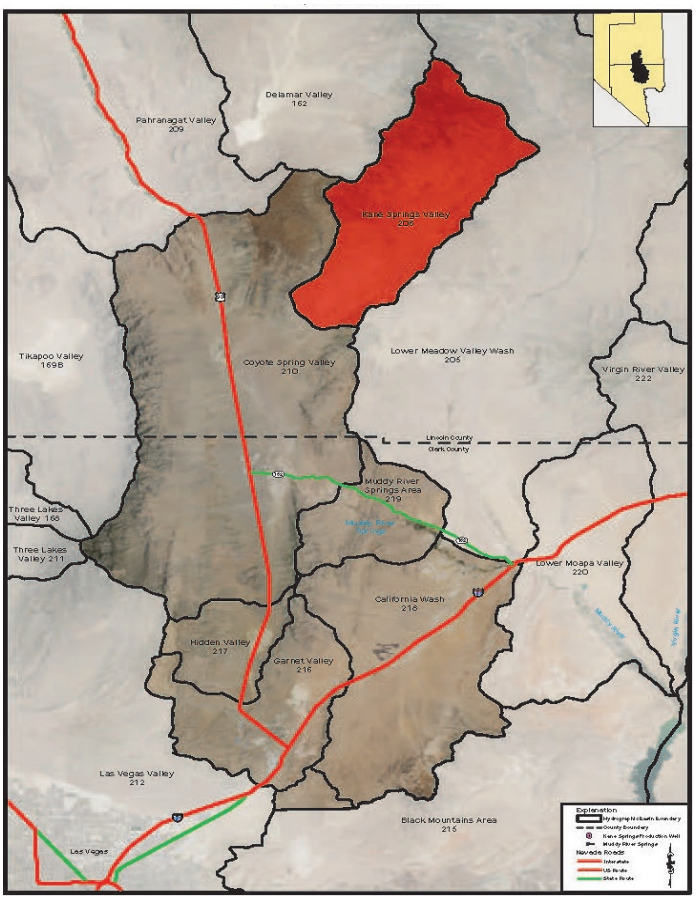
[1] Order 1309 is also attached as an Addendum to this brief.



3 JA 558 (Figure 2-1. Location Map of the LWRFS (Kane Springs shown in red because what was previously referred to as the LWORFS did not include Kane Springs but rather, included the basins shown in dark brown)).

Order 1309 is the latest order in a string of orders and rulings that have been issued by the State Engineer over the past two decades concerning the area underlying the LWRFS. Those orders and rulings comprise the key factual and procedural background that preceded the State Engineer issuing Order 1309. Further, and as discussed in more detail below, those orders and rulings demonstrate why the State Engineer's reliance on certain statutory provisions as providing statutory authority for Order 1309 is incorrect.

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I. The Appellants.

CSI is the developer of the master planned community Coyote Springs. 1 JA 1, 6-7. CSI holds water rights with a 2002 priority date. *Id*. at 4-5. CSI has certificated and permitted water rights in the amount of 4,140 acre-feet annually ("afa") in the Coyote Spring Valley. *Id*. CSI also holds 246.96 afa of permitted water rights in Kane Springs. *Id*. Moreover, Lincoln County Water District holds 253.04 afa for the sole benefit of CSI and the Coyote Springs community. *Id*.

Lincoln County Water District is a political subdivision of the State of Nevada, created for the purpose of providing adequate and efficient water service within Lincoln County, Nevada. 1 JA 33. Lincoln and Vidler hold underground municipal water rights that are the most senior vested groundwater rights granted by the State Engineer in Kane Springs. *Id*. at 1-2.

II. In 2001, the State Engineer Issued Order 1169 to Investigate the Amount of Water Available for New Water Rights in Certain Basins in the LWRFS.

In 2001, several parties, including SNWA, MVWD, and CSI, filed applications for new and additional groundwater rights in Coyote Spring Valley, Black Mountains Area, Garnet Valley, Hidden Valley, Muddy River Springs Area ("MRSA"), and Lower Moapa Valley. *See* 2 JA 289. In response, the State Engineer issued Order 1169 on March 8, 2002, explaining that the applications would be held in abeyance pursuant to NRS 533.370(2)(b) due to the lack of information necessary

to determine if additional water was available for new water right appropriation under these new applications. *Id*. The State Engineer had already issued 50,465 afa of underground water rights in these basins. *Id*. at 294.

In Order 1169, the State Engineer described the thick layers (nearly 10,000 feet in many areas) of the dense carbonate-rock aquifer system that underlies Southern Nevada, north and east to White Pine County and the Utah border. *Id*. at 291. The State Engineer acknowledged significant research had already been done but explained that several complicated factors needed to be addressed to better understand the availability of additional water in these basins. *Id*. at 295. Thus, the State Engineer ordered the applicants to conduct a study pursuant to NRS 533.368 over a five-year period of time during which at least 50% of the water rights then-permitted in the Coyote Spring Valley Basin be pumped for at least two consecutive years. *Id*.

Thus, the 1169 Pump Test was designed to try to quantify the availability of unallocated groundwater for *additional* appropriation, not to determine whether existing water rights should be curtailed. The 1169 Pump Test was designed to only monitor Coyote Spring Valley, Black Mountains Area, Garnet Valley, Hidden Valley, California Wash, and MRSA. *See id*. Kane Springs Valley was not included in the 1169 Pump Tests. *See generally id*. at 289-96.

III. In 2006, Certain Parties Enter Agreements Related to the Preservation of the Moapa dace.

On February 14, 2005, Lincoln and Vidler filed applications to appropriate groundwater in Kane Springs. 2 JA 300. The United States Department of the Interior, Fish and Wildlife Service ("USFWS") filed a protest, contending among other things that Kane Springs should be included in the 1169 Pump Tests. 2 JA 405. On August 1, 2006, Lincoln and Vidler and the USFWS entered into an Amended Stipulation for Withdrawal of Protests for Applications 72218, 72219, 72220 and 72221 ("Amended Stipulation for Withdrawal of Protests"). 2 JA 405-416.

The Amended Stipulation for Withdrawal of Protests contains, among other things, triggers acceptable to USFWS to reduce Lincoln's and Vidler's groundwater pumping for protection of the Moapa dace. *Id*. at 414-15. USFWS agreed to groundwater pumping from Kane Springs subject to certain conditions notwithstanding the Order 1169 proceedings, including the direct payment of $50,000 to USFWS for the restoration of the Moapa dace habitat. *Id*. at 412-16. From 2006 to date, Lincoln and Vidler and USFWS have performed and continue to perform under the terms of the Amended Stipulation for Withdrawal of Protests.

Also in 2006, CSI, Moapa Valley Water District ("MVWD"), USFWS, SNWA, and the Moapa Band of Paiutes, entered into a memorandum of agreement

(the "MOA"), which adopted mitigation policies to support the Moapa dace, a protected species, while CSI continued developing the Community. *See* 1 JA The MOA anticipated, but did not authorize, possible future groundwater withdrawals of up to 16,100 afa of State Engineer approved groundwater rights in the Coyote Spring Valley. *Id*. at 5-6; 53.

The MOA detailed mitigation measures each party would take to reduce potential adverse effects to the Moapa dace or its habitat. *Id*. at 5-6; 55. These measures included, among other things, financial payments by SNWA and CSI, and CSI's relinquishment of 460 afa of its water rights to remain in the deep aquifer. *Id*. CSI's financial obligations have been satisfied and CSI relinquished 460 afa of water. *Id*. The MOA parties continue to work together for the survival and recovery of the Moapa dace and its habitat.

IV. In 2007, the State Engineer Expressly Excluded Kane Springs Valley from the 1169 Pump Tests.

On February 2, 2007, the State Engineer issued Ruling 5712, which partially approved Lincoln's and Vidler's applications and granted Lincoln and Vidler 1,000 afa of water rights in Kane Springs. 2 JA 300-22.

In Ruling 5712, the State Engineer specifically determined Kane Springs would not be included in the Order 1169 study area because there was not substantial evidence that the appropriation of a limited quantity of water in Kane Springs would

have any measurable impact on the Muddy River Springs that warranted the inclusion of Kane Springs in Order 1169. *Id*. at 320.

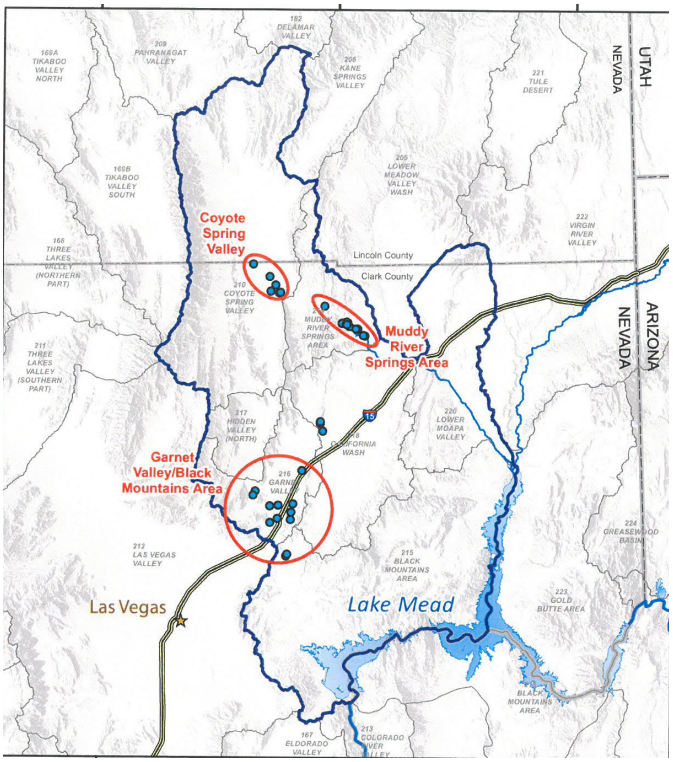
Moreover, the State Engineer denied the request to hold the Lincoln and Vidler applications in abeyance under NRS 533.368 and refused to include Kane Springs in the 1169 Pump Tests. *Id*. The State Engineer specifically rejected the argument that the Kane Springs' water rights could not be appropriated based upon senior appropriated rights in the down gradient basins. *Id*. at 314.

The State Engineer expressly excluded Kane Springs Valley from participation in the 1169 Pump Tests based upon the physical characteristics of the aquifers in Kane Springs Valley. *Id*. at 320 (the State Engineer explaining that "marked difference in head supports the probability of a low-permeability structure or change in lithology between [KSV] and the southern part of [CSV]"). The State Engineer found that the groundwater elevations in Kane Springs were significantly higher (between 50 and 75 feet higher) than the groundwater elevations in Coyote Spring Valley to the south and this elevation difference was strong support for a low permeable structure or change in lithology (barrier to flow) between Kane Springs and the southern part of Coyote Spring Valley. *Id*.

V. In December 2012, the State Engineer Issued Order 1169A.

Order 1169A described the pump test provided for in Order 1169 to "stress" the Carbonate Aquifer through two years of aggressive pumping, combined with

examination of water levels in monitoring wells located throughout the LWRFS. 2 JA 284. Participants pumping their water rights in the Aquifer test were SNWA/Las Vegas Valley Water District ("LVVWD"), Moapa Valley Water District, CSI, Moapa Band of Paiutes, and Nevada Power Company. *Id.* Pumping included 5,300 afa in Coyote Spring Valley, 14,535 afa total carbonate pumping, and 3,840 afa of alluvial pumping. 2 ROA 6, Ex. 1. The 1169 Pump Test wells are shown on the following map:



3 JA 562 (citing from SNWA Expert Report)

The participants submitted their pump test results in 2013. 2 JA 342.

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VI. Following the 1169 Pump Tests, the State Engineer Entered Ruling 6255, which Protected Senior Water Right Holders.

In January 2014, the State Engineer issued Ruling 6255, which denied *pending* applications in Coyote Spring Valley. *See* 2 JA 327, 355-56. Relying on the 1169 Pump Test results, the State Engineer found that granting additional water rights in Coyote Spring Valley could cause a decline in down gradient water levels that would conflict with senior water rights. *See id*. Thus, Ruling 6255 protected *existing* water right holders, such as CSI.

VII. In January 2019, the State Engineer Issues Interim Order 1303, which Placed a Moratorium on Processing Tentative Map Applications.

On January 11, 2019, the State Engineer issued Interim Order 1303 ("Interim Order 1303"). *See* 1 JA 186-204. In Interim Order 1303, the State Engineer designated Coyote Springs, MRSA, Hidden Valley, Garnet Valley, California Wash, and a portion of the Black Mountains Area as a "joint administrative unit". *See id*. at 186. Kane Springs was not included in Interim Order 1303. *See generally* 1 JA 186-204. Interim Order 1303 also imposed a temporary moratorium on approvals for subdivisions pending yet another public process to determine the total quantity of groundwater available in the LWRFS. *See id*. at 199.

In Interim Order 1303, the State Engineer directed that reports should be filed that address the following matters:

a. The geographic boundary of the hydrologically connected groundwater and surface water systems comprising the Lower White River Flow System;

b. The information obtained from the Order 1169 aquifer test and subsequent to the aquifer test and Muddy River headwater spring flow as it relates to aquifer recovery since the completion of the aquifer test;

c. The long-term annual quantity of groundwater that may be pumped from the Lower White River Flow System, including the relationships between the location of pumping on discharge to the Muddy River Springs, and the capture of Muddy River flow;

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.

See id. at 198-99.

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. *Id*. at 244-49. On August 9, 2019, the State Engineer held a prehearing conference. 2 JA 250-89. On August 23, 2019, the State Engineer issued a Notice of Hearing (which he 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. 1 JA 205-10; 1 JA 226-31 (Amended Notice). The Hearing Officer also made it clear that "any other matter believed to be relevant" as specified in ordering paragraph 1(e) of Order 1303 would not include any discussion at the

hearing (the "1303 Hearing") of the administrative impacts of consolidating the basins or of any policy matters affected by the decision. 2 JA 253.

VIII. The 1303 Hearing.

The 1303 Hearing was conducted for two weeks in the fall of 2019. At the start of the administrative hearing, the State Engineer reminded the parties the public administrative hearing was not a "trial-type" proceeding, thus not a contested adversarial proceeding. 3 JA 52962 (Transcript 6:4-6, 24 to 7:1 (Hearing Officer Fairbank). The hearing consisted of expert testimony, closing statements, and/or briefs presented by the participants CSI, FWS, National Park Service ("NPS"), the Paiutes, SNWA and LVVWD, MVWD, Lincoln and Vidler, the City of North Las Vegas, the Center for Biological Diversity ("CBD"), Georgia Pacific Corporation and Republic, Nevada Cogeneration Associates Nos. 1 and 2, Muddy Valley Irrigation Company ("MVIC"), Western Elite Environmental, Inc. and Bedroc Limited, LLC (collectively "Bedroc"), and NV Energy.

Following the submission by the participating stakeholders of closing statements at the beginning of December 2019, the State Engineer engaged in no additional public process and solicited no additional input regarding "future management decisions, including policy decisions, relating to the Lower White River Flow System basins." *See* 9 JA 1932, 1952.

IX. In June 2020, the State Engineer Issued Order 1309, which, for the First Time in Nevada History, Combined Separate Hydrographic Basins into One Hydrographic Basin.

The State Engineer issued Order 1309 on June 15, 2020. *See* 1 ROA 118. The first three ordering paragraphs state as follows:

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

Id. at 182.

The Order does not provide guidance about how the new "single hydrographic basin" will be administered and provided no clear analysis as to the basis for setting the maximum sustainable yield of the new "super basin" at 8,000 afa. *See generally id*. at 118-83.

In Order 1309, the State Engineer indicated that it "considered this evidence and testimony [regarding basin inclusion and basin boundary] on the basis of a common set of criteria that are consistent with the original characteristics considered critical in demonstrating a close hydrologic connection requiring joint management in Rulings 6254-6261." *Id*. at 164-65. However, the State Engineer did not disclose these criteria to the stakeholders before or during the Order 1303 proceedings. 9 JA 1953. Instead, he disclosed them for the first time in Order 1309, after the stakeholders had engaged in extensive investigations, expert reporting, and the factual hearing requested by Order 1303. *Id*. The six new criteria are:

> 1. Water level observations whose spatial distribution indicates a relatively uniform or flat potentiometric surface are consistent with a close hydrologic connection.
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> 2. Water level hydrographs that, in well-to-well comparisons, demonstrate a similar temporal pattern, irrespective of whether the pattern is caused by climate, pumping, or other dynamic is consistent with a close hydrologic connection.
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> 3. Water level hydrographs that demonstrate an observable increase in drawdown that corresponds to an increase in pumping and an observable decrease in drawdown, or a recovery, that corresponds to a decrease in pumping, are consistent with a direct hydraulic connection and close hydrologic connection to the pumping location(s).
>
> 4. Water level observations that demonstrate a relatively steep hydraulic gradient are consistent with a poor hydraulic connection and a potential boundary.
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> 5. Geological structures that have caused a juxtaposition of the carbonate-rock aquifer with low permeability bedrock are consistent with a boundary.

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

1 JA 164-65.

After consideration of the above criteria, the State Engineer combined the separate hydrographic basins into a single hydrographic basin, designated as the "Lower White River Flow System" or "LWRFS." *Id*. at 182. The State Engineer also added the previously excluded Kane Springs Hydrographic Basin to the LWRFS and modified the portion of the Black Mountains area that is in the LWRFS. *See id*. Although Order 1309 did not specifically address priorities or conflict of rights, as a result of the consolidation of the basins (and, the State Engineer's pumping cap of 8,000 afa in the "superbasin"), the relative priority of all water rights within the seven affected basins were reordered and the priorities considered in relation to all water rights holders in the consolidated basins, rather than in relation only to the other users within the original separate basins. 9 JA 1954.

Notably, as stated above, following the submission by the participating stakeholders of closing statements at the beginning of December 2019, the State Engineer engaged in no additional public process whatsoever and solicited no additional input regarding "future management decisions, including policy

decisions, relating to the Lower White River Flow System basins." Thus, the Order 1303 Hearing was not just the first step in the State Engineer's decisions concerning the LWRFS basin management set forth in Order 1309, it was the only step.

X. In April 2022, the District Court Entered its Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review.

Following substantial briefing and oral argument, the District Court entered its Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review ("District Court Order"). 9 JA 1939-78. In the District Court Order, the District Court concluded that: (1) the State Engineer does not have legal authority to jointly administer multiple basins by creating the LWRFS "Superbasin", *id*. at 1957-65; (2) the State Engineer does not have legal authority to conjunctively manage the "Superbasin", *id*. at 1965-67; (3) Order 1309 violates the prior appropriation doctrine, *id*. at 1959-61; and (4) the State Engineer violated the Petitioners' due process rights in failing to provide notice to Petitioners or an opportunity to comment on the administrative policies inherent in the basin consolidation, *id*. at 1967-73. Thereafter, the State Engineer, SNWA, MVIC, and CBD appealed the District Court Order, which have been consolidated into Case No. 84739.

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XI. The State Engineer's Defense of Order 1309 in the District Court was Unreasonable and Without Reasonable Ground.

The following positions taken by the State Engineer in the lower court proceeding highlight the unreasonableness of the State Engineer's defense of Order 1309:

1. The State Engineer contended that the Petitioners were "[m]anufacturing a new 'basin-by-basin' management rule [that] would have no basis in Nevada water law and be contrary to the policy of conjunctive management." 4 JA 710, 747. The State Engineer made this argument despite the fact that Nevada's water has *always* been managed in a basin-by-basin approach, which the State Engineer knows and has confirmed in other cases and legislative sessions. *See* State Engineer's Answering Brief, filed in *Pyramid Lake Paiute Tribe of Indians v. Ricci*, Case No. CV01-05764. The State Engineer's awareness of the hypocrisy of this argument is also shown in the legislative history of AB 51. This legislative effort was pursued by the State Engineer because he testified and acknowledged before a legislative committee that no statutory authority existed for conjunctive management of multiple hydrological basins. The State Engineer's lobbying effort to ask the Legislature to allow him to conduct joint management failed, and AB 51 did not pass.

2. The State Engineer represented that he "cited several bases for his legal authority to jointly administer the LWRFS" in Order 1309. 4 JA 728. That is false.

The State Engineer has never identified any statute or case that supports Order 1309. On direct questioning from the District Court at oral argument, the State Engineer admitted no explicit statutory authority existed for "joint management" of multiple basins. *See* 6 JA 1250.

3. The State Engineer argued that the 1303 Hearing was not intended to determine policy, conflicts, or curtailment, while simultaneously contending that "Order 1309 gives force to that rule [of prior appropriation] by determining the amount of water that can be pumped by holders of junior rights without interfering with senior rights." 4 JA 728.

4. The State Engineer characterized the six factors applied in Order 1309 to determine hydraulic connection as the "lodestar" for such analysis when those factors had never been used nor identified by the State Engineer (or anyone) prior to Order 1309. *Id*. at 729.

5. The State Engineer randomly added Kane Springs Valley to the LWRFS when the 1169 Pump Tests were not even conducted in Kane Springs because the State Engineer excluded Kane Springs from the 1169 Pump Tests.

6. The State Engineer repeatedly and specifically excluded Kane Springs from the factfinding and preliminary proceedings leading up to Order 1309. Kane Springs was excluded from the Order 1169 Pump Tests. 2 JA 300, 320. Kane Springs was also specifically excluded from the Order 1303 proceedings. 1 JA 198.

Despite this fact, the State Engineer reversed course and included Kane Springs in the LWRFS based on the very same water supply numbers the State Engineer used when he excluded Kane Springs from Order 1169 and the LWRFS. 1 JA 159, 192-93; 2 JA 293.

7. Kane Springs, and thus, neither Lincoln nor Vidler, were included by the State Engineer in any of the preliminary proceedings even though certain entities, including the USFWS and SNWA, requested that Kane Springs be included in the Order 1169 proceedings and Order 1303 proceedings. 2 JA 301-02, 319. In fact, the State Engineer specifically overruled the protests by the NPS in granting an appropriation of water to Lincoln and Vidler and refusing to hold the applications in abeyance. *Id*. at 320.

8. The State Engineer issued Ruling 5712 granting 1,000 afa water rights to Lincoln and Vidler after he issued Order 1169 requiring additional pump tests before any further applications could be acted upon in the six other basins of the LWRFS. 2 JA 321.

9. The State Engineer found in Ruling 5712 that pumping groundwater up to 1,000 afa would not have "any measurable impact on the Muddy River Springs that warrants the inclusion of Kane Springs Valley in Order No. 1169." 2 JA 320.

10. As part of the purpose for issuing Order 1309, the State Engineer's stated rationale was to protect the Moapa dace. 1 JA 159-60. However, the State

Engineer ignored Lincoln and Vidler's stipulation with the USFWS to protect the Moapa dace [2 JA 405-16] which provided the same triggers he recognized in Order 1309 to reduce Lincoln's and Vidler's groundwater pumping to protect the dace. The State Engineer also ignored the USFWS Biological Opinion obtained by Lincoln and Vidler that pumping in Kane Springs was not likely to jeopardize the continued existence of the dace [2 JA 420-87], and testimony from SNWA's expert who was the former USFWS Field Supervisor that Lincoln and Vidler were compliant with the Endangered Species Act. 3 JA 520-21. 53442

11. Prior to issuing Order 1309, the State Engineer designated the six other hydrographic basins comprising the LWRFS as areas in need of further administration under NRS 534.030. 1 JA 118-19. Kane Springs has never been designated as an area in need of further administration by the State Engineer under NRS 534.030.

12. Other than the test pumping of groundwater by Lincoln and Vidler to prove water resources were available for appropriation (which led to the issuance of Ruling 5712 and the granting of their Applications in Kane Springs), no pumping has occurred in Kane Springs which could lead to any decision that groundwater pumping would have a deleterious impact on any other ground or surface water or the Moapa dace.

13. The State Engineer included Kane Springs in Order 1309 despite the fact that the data from the Order 1169 pump test was "muted, lagged, obscured by climate response, or comprised by low-resolution data" and "attenuated." 1 JA 53.

14. Order 1309 allegedly found that the "best available science" indicated that the seven hydrographic basins of the LWRFS were interconnected dictating that they must be managed as one "superbasin". But the State Engineer has known since at least 1966 that the entirety of the White River Flow System has been connected but continued to manage the hydrographic basins separately until issuing Order 1309. 2 JA 361.

15. Despite issuing Ruling 5712 and permitting 1,000 afa to Lincoln and Vidler which resulted in a vested property right, *Application of Filippini*, 66 Nev. 17, 22, 202 P.2d 535 (1949) ("'vested right' is . . . a term describing a water right which has become fixed and established either by diversion and beneficial use or by permit procured pursuant to the statutory water law relative to appropriation."), the State Engineer stated in this litigation that upon issuing Order 1309, "[t]he State Engineer was not obligated to follow Ruling 5712." 4 JA 738.

16. Finally, in 2007, Lincoln and Vidler met with the State Engineer regarding a petition for judicial review filed on the denial of additional applications to appropriate water in Kane Springs. *See* 1 JA 36. As part of that settlement, the State Engineer agreed to consider granting Lincoln and Vidler additional rights in

Kane Springs if Lincoln and Vidler accumulated additional, upgradient data to support the applications. *Id.*; *see also* 2 JA 382-97. Kane Springs Agreement (memorializing agreement). In 2009, those applications were again summarily denied leading to a second petition for judicial review. 1 JA 36, ¶ 15-16. The State Engineer settled this petition with Lincoln and Vidler agreeing to reinstate those applications and consider further hydrological studies conducted by Lincoln and Vidler. *See* 2 JA 382-97. Despite those agreements resolving active litigation, the State Engineer effectively denied those applications without considering the data provided when he issued Order 1309 by limiting pumping in the LWRFS to 8,000 afa. 1 JA 66.

17. The State Engineer tried to frame his attempt to combine distinct basins into one "superbasin" as a "factual determination" in order to argue that the determination was shielded from District Court review because the State Engineer knew that there was no statutory authority to take such action. 4 JA 734.

18. The State Engineer's argument regarding his statutory authority was completely without legal basis or reasonable ground. The State Engineer argued that "[c]hallenges to the State Engineer's authority start with the text" and "[h]ere, they can end there too". *Id*. at 746. But the State Engineer did not identify any "text" to support the actions taken in Order 1309. Instead, the State Engineer took the position that if the statutes do not say he *cannot* do something, then he must be able to do it.

Id. ("That language does not constrain the State Engineer's fealty to decrees and vested rights depending on a basin-by-basin approach.").

19. The State Engineer falsely claimed that Order 1309 was the result of an investigation under NRS 534.110(6) when it clearly was not, as the State Engineer did not follow the proper procedure to conduct such an investigation and Order 1169 did not order an investigation under NRS 534.110(6). *Id*. at 746-47.

20. The State Engineer argued that he was "acting pursuant to an express power from the Legislature and conducting fact finding that he is uniquely qualified to do under Nevada law." *Id*. at 747. The State Engineer never identified a Nevada statute that authorized Order 1309. The State Engineer's argument was false and unsupported.

21. The State Engineer feigned confusion at the "Petitioners' *concept* of a basin" when the State Engineer, all water rights holders, and Nevada courts have all shared the same understanding of what a basin is for decades. *Id*. at 748 (emphasis added).

22. While citing his own Water Words Dictionary that defines what the basins are in Nevada, the State Engineer argued that "[t]he number 232 (the number of groundwater basins in Nevada) is not a magic legal number. It is found nowhere in the Nevada Revised Statutes to constrain the State Engineer's view of what

constitutes a basin." *Id*. at 749. The State Engineer's arguments about what a basin is (or is not) are frivolous.

23. The State Engineer did not even attempt to conduct a statutory interpretation analysis and dismissed—without any legal basis or reasonable ground—CSI's actual statutory interpretation analysis. *See generally* 4 JA 710-62.

24. The State Engineer argued that the basins were "determined for 'water planning and management purposes' and not because of any statutory reason", 4 JA 750, but the statutes define how water within basins are managed. The State Engineer's representation that the Petitioners "cite no statute requiring the State Engineer to manage Nevada's water basin-by-basin" is false. Moreover, the State Engineer's attempt to change Nevada basins based on supposed hydraulic connection is inconsistent with Nevada law. The basins were not created based on hydraulic connection.

25. The State Engineer's argument that the "Legislature left it to the State Engineer to identify basins as a management and planning tool" is blatantly false and unsupported. *Id*. at 750.

26. The State Engineer's attempt to admonish the District Court not to question his authority to create a "superbasin" was completely unreasonable. *Id*. at p. 34 ("To ask this Court to overrule the State Engineer's view that the LWRFS is a

basin is to not only stray into the unfamiliar but also to delve into a scientific question where courts lack special scientific expertise."). *Id*. at 750.

27. The State Engineer argued that "Nothing in Order 1309 jeopardizes priority or finality of vested water rights. There is not a sentence in Order 1309 that adjusts the priority of water rights or lessens their finality." *Id*. at 750. Yet Order 1309 severely impacted priority rights because, as the District Court acknowledged, it is the relative priority rights in a basin that determines the value of the right. The State Engineer, again, acted like this was a novel concept when he (and all water rights holders) knows this fundamental concept of Nevada water and property law.

28. The State Engineer attempted to mislead the District Court regarding the standard of review by arguing that "[w]hen discussing the persuasive character of the State Engineer's interpretation of Chapters 533 and 534, the Nevada Supreme Court has been mindful of NRS 533.450(9)".[2] *Id*. at 748. However, this Court has explained that the interpretation and construction of a statute is a "purely legal question" not subject to the presumption in NRS 533.450(10). *See In re Nevada State Eng'r Ruling No. 5823*, 128 Nev. 232, 239, 277 P.3d 449, 453 (2012) ("A decision of the State Engineer enjoys a presumption of correctness. NRS 533.450(10). The presumption does not extend to purely legal questions, such as the

[2] The State Engineer incorrectly cited NRS 533.450(9), which is an outdated version of the statute. The current version of the statute is NRS 533.450(10).

construction of a statute, as to which the reviewing court may undertake independent review.") (internal quotation marks omitted).

Based on the foregoing, CSI, Lincoln, and Vidler moved for attorney fees under NRS 533.450(8) and NRS 18.010(2)(b). 9 JA 1979-1998; 11 JA 2221-2386. The District Court concluded that NRS 533.450 does not permit an award of attorney fees against the State Engineer under NRS 18.010(2)(b). 12 JA 2555, 2557-58. Moreover, the District Court concluded that even if NRS 533.450 allowed attorney fees, the State Engineer's defense of Order 1309 was not frivolous or without reasonable ground. *Id*. at 2558. These appeals followed.

SUMMARY OF THE ARGUMENT

The District Court erred in interpreting NRS 533.450 as precluding an award of attorney fees under NRS 18.010(2)(b) because NRS 533.450(8) provides that "[t]he practice in civil cases applies to the informal and summary character of such proceedings, as provided in this section". The "practice in civil cases" includes NRS 18.010, which is found under "Title 2 – Civil Practice" of the Nevada Revised Statutes. Using NRS 533.450(8) as justification, this Court has previously applied both NRS Chapters in Title 2 and the Nevada Rules of Civil Procedure to water adjudication cases, thus recognizing the scope of "Civil Practice." The Court should recognize that NRS 18.010(2)(b) attorneys' fees motions brought in water adjudication cases is also "civil practice" and should formally adopt that process.

Moreover, the District Court abused its discretion in concluding that even if NRS 18.010(2)(b) applied, that the State Engineer's defense of Order 1309 was not frivolous or without unreasonable ground because the State Engineer has never been able to identify a Nevada statute that authorizes him to combine multiple basins into one. The State Engineer's defense of Order 1309 was frivolous and without reasonable ground because the State Engineer mispresented the history, force, and effect of Order 1309 to the District Court in asserting his defenses of the Order. Attorney fees should be imposed to deter such conduct in the future.

ARGUMENT

I. The District Court Improperly Interpreted NRS 533.450 by Concluding that the Statute Precludes and Award of Attorney Fees Under NRS 18.010(2)(b).

A. Standard of Review.

When eligibility for attorneys' fees is a matter of statutory interpretation, the interpretation is a matter of law which this Court reviews de novo. *Lepome v. Berkson*, 125 Nev. 550, 552, 216 P.3d 239, 241 (2009). "Issues of law, including statutory interpretation, are also reviewed de novo." *Mardian v. Greenberg Fam. Tr.*, 131 Nev. 730, 733, 359 P.3d 109, 111 (2015).

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B. NRS 533.450(8) Allows an Award of Attorney Fees Because It Provides that the "Practice in Civil Cases Applies" to Petitions for Judicial Review of the State Engineer's Decisions.

Relying primarily on inapplicable caselaw under the Administrative Procedure Act, the District Court incorrectly concluded that fees are not recoverable because NRS 533.450 does not expressly allow for an award of attorney fees. However, a plain reading of the applicable statute makes it clear that proceedings under Chapter 533 of the Nevada Revised Statutes are governed by the "civil practice" in Nevada, which includes attorneys' fees under NRS 18.010. Specifically, petitions for judicial review filed pursuant to NRS 533.450 are governed by the "practice in civil cases . . . ." NRS 533.450(8).[3] Nevada law governing an award of fees in this case is contained in NRCP 54 and NRS 18.010, which is part of Title 2 of the Nevada Revised Statutes titled simply: "Civil Practice" and comprising Chapters 10 through 22. In Nevada's civil practice, attorney fees can be awarded "[w]ithout regard to the recovery sought, when the court finds that the claim, . . . or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party." NRS 18.010(2)(b).

This Court has already concluded that the Nevada Rules of Civil Procedure apply to NRS Chapter 533 cases pursuant to the incorporation of "civil practice"

[3] This section reads in full: "The practice in civil cases applies to the informal and summary character of such proceedings, as provided in this section."

contained in NRS 533.450. *Desert Valley Water Co. v. State*, 104 Nev. 718, 720, 766 P.2d 886, 887 (1988).[4] And this Court further concluded that NRCP 54 governing the timing of a motion for attorneys' fees under NRS 18.010 applies in NRS Chapter 533 proceedings. *See Wilson v. St. Clair*, Docket No. 77651, 2020 WL 1660026, Order of Reversal at 1-2 (Mar. 27, 2020) (unpublished disposition).

In *Wilson*, the State Engineer denied a request for a temporary change in a point of diversion. *Id.* The permittee prevailed on a petition for judicial review in district court, and this Court affirmed. *Id.*; *see also King v. St. Clair*, 134 Nev. 137, 414 P.3d 314 (2018). Thereafter, the permittee moved for fees under NRS 18.010(2)(b), which the district court granted. *Wilson*, at 1. This Court concluded that NRCP 54 governed the timing of motions for fees under NRS 18.010(2)(b) when brought in water rights cases. *Id.* Importantly, while this Court ultimately concluded that the motion for fees was untimely in *Wilson*, this Court did not conclude that fees were unavailable in proceedings initiated under NRS Chapter 533. This application of the Nevada Rules of Civil Procedure and NRS 18.010 is consistent with the Appellants' request for fees in this case.

Moreover, interpreting NRS 533.450(8) as incorporating NRS 18.010 in water cases furthers the Legislative mandate that the "court shall liberally construe the

[4] This case references NRS 533.450(7) which contained the language for what is now NRS 533.450(8). The statute was amended in 2009 when subsection 7 was moved to its current location as subsection 8.

provisions [of NRS 18.010(2)(b)] in favor of awarding attorney's fees in all appropriate situations." NRS 18.010(2)(b). Therefore, the District Court erred by concluding fees are unavailable in this NRS 533.450 proceeding.

While the Legislature determined that the State Engineer could not be liable for *costs* under NRS 533.450, it made no such exclusion for fees. There is no indication under NRS 533.450 that attorney fees are not available under NRS 18.010, and if the Legislature so intended, it would have included a prohibition against attorney fees under NRS 533.450, just as it did for costs in NRS 533.450(7) ("Costs must be paid as in civil cases brought in the district court, except by the State Engineer or the State.").

The District Court, however, ignored the plain language of NRS 533.450(8) and concluded that to award fees against the State Engineer, the Legislature had to expressly provide for fees rather than indicate that "civil practice" applies in proceedings commenced under NRS Chapter 533. 12 JA 2570 (citing *Zenor v. State, Dep't of Transportation*, 134 Nev. 109, 109, 412 P.3d 28, 29 (2018)).

The District Court's reliance on the Nevada Supreme Court's discussion of NRS Chapter 233B and *Zenor* is misplaced. In *Zenor*, the Court did not pronounce the broad rule that the State Engineer asked the District Court to impose in this case—that attorney fees are never permitted where a petition for judicial review is filed. Rather, the Court in *Zenor* applied a specific statute, NRS 233B.130(6), and

held that the language of that provision prevented an award of attorney fees. *See Zenor*, 134 Nev. at 109, 412 P.3d at 29 ("We hold that NRS 233B.130(6), which states that the provisions of NRS Chapter 233B provide the exclusive means of judicial action in a petition for judicial review, prohibits an award of attorney fees under NRS 18.010(2)(b) in petitions for judicial review."). There is no analogous provision in NRS Chapter 533 that supports the same conclusion in this case. In the same vein, the relevant provisions that demonstrate fees are warranted (NRS 533.450(7) and NRS 533.450(8)) are not present in NRS 233B.

Unlike in the Administrative Procedure Act, the Legislature in NRS 533.450(8) specifically stated that petitions for judicial review are governed by the "practice in civil cases . . . ." In addressing this language to determine whether Nevada's venue statutes applied to water law cases, this Court explained that it "has long drawn on procedures and law applicable to civil actions generally in water law cases, to the extent consistent with the governing statutes". *In re Nevada State Eng'r Ruling No. 5823*, 128 Nev. 232, 245, 277 P.3d 449, 457 (2012). Here, applying NRS 18.010(2)(b) is consistent with NRS 533.450(7) and NRS 533.450(8) because the Legislature did not prohibit an award of fees like it did costs, and NRS 18.010 is part of Nevada's civil practice. Accordingly, the District Court erred in interpreting NRS 533.450(8), and this Court should reverse the District Court's Order.

As noted above, petitions for judicial review filed under NRS Chapter 533 are distinct from those filed under the Administrative Procedure Act, and the Legislature has promulgated separate provisions for each. NRS 233B.130(6) provides it is the "exclusive means of judicial action" under the Administrative Procedures Act. NRS Chapter 233B does not contain a provision incorporating "the practice in civil cases" into the administrative process as NRS 533.450(8) does. Thus, the result in *Zenor* is distinguishable from this case. This Court has recognized that "NRS Chapter 533 is a separate statutory scheme" from NRS Chapter 233B. *Liberty Mut. v. Thomasson*, 130 Nev. 28, 31-32, 317 P.3d 831, 834 (2014). This Court has interpreted the NRS 233B.130 requirements as "mandatory and jurisdictional" while under NRS 533.450(1), this Court has noted certain language of the statutory provision relates to the venue for petitions rather than subject matter jurisdiction. *Compare Washoe Cnty. v. Otto*, 128 Nev. 424, 282 P.3d 719 (2012), *with In re Nev. State Engineer Ruling No. 5823*, 128 Nev. 232, 245, 277 P.3d 449, 457 (2012).

In fact, this Court has applied Nevada's venue statutes contained in NRS Title 2, Chapter 13 to water cases pursuant to the civil practice language of NRS 533.450(8). *See Lincoln County Water District v. Wilson,* Docket No. 81792, 2021 WL 1440402, Order of Affirmance (April 15, 2021) (unpublished disposition); *In re Nev. State Engineer Ruling No. 5823*, 128 Nev. at 245, 277 P.3d at 457; *see also Humboldt Lovelock Irrigation Light & Power Co. v. Smith*, 25 F. Supp. 571 (D. Nev.

1938). A natural extension of that application is to apply NRS 18.010(2)(b) as well. To hold otherwise would be to cherry pick which portions of the "Civil Practice" apply and which do not—a result the Legislature did not include in Chapter 533.

Finally, the District Court's analysis of an unpublished disposition interpreting different sections of NRS Chapter 533 is inapposite. *See Rand Props., LLC v Filippini*, Docket No. 6693, 2016 WL 1619306, Order of Reversal and Remand (Apr. 21, 2016) (unpublished disposition). In *Rand Properties*, this Court concluded that neither NRS 533.190(1) nor NRS 533.240(3) permitted an award of fees to private parties in a statutory adjudication of water rights. *Id.* at *14. *Rand* is not instructive here because the movant did not seek fees under NRS 18.010(2)(b) as permitted by NRS 533.450(8). Thus, the Court did not consider the language in NRS 533.450(8) incorporating "the practice in civil cases" under NRS Chapter 533 nor was it considering whether an award of fees under NRS 18.010 was appropriate. The District Court's reliance on *Rand* was therefore, misplaced.

The District Court erred by concluding that attorneys' fees are not available in this case because: (1) the plain language of NRS 533.450(8) incorporates civil practice in proceedings under NRS Chapter 533; (2) this Court has concluded that the Nevada Rules of Civil Procedure governing timing of motions for fees apply to petitions for judicial review under NRS 533; and (3) Nevada's "Civil Practice"

includes NRS Chapter 18. Accordingly, the Appellants respectfully request that this Court reverse the District Court's Order denying the Appellants' motions for fees.

II. The District Court Should Have Awarded Attorneys' Fees Because the State Engineer's Defense of Order 1309 was Frivolous and Without Reasonable Ground.

A. Standard of Review.

This Court reviews a district court's attorney fee award for an abuse of discretion. *Frederic & Barbara Rosenberg Living Tr. v. MacDonald Highlands Realty, LLC*, 134 Nev. 570, 580, 427 P.3d 104, 112 (2018). "A district court may award attorney fees to a prevailing party when it finds that the opposing party brought or maintained a claim without reasonable grounds." *Id*. at 580, 427 P.3d at 113 (citing NRS 18.010(2)(b)). This Court has explained that "[f]or purposes of NRS 18.010(2)(b), a claim is frivolous or groundless if there is no credible evidence to support it." *Id*. (citing *Semenza v. Caughlin Crafted Homes,* 111 Nev. 1089, 1095, 901 P.2d 684, 687-88 (1995)). Moreover, "[a]lthough a district court has discretion to award attorney fees under NRS 18.010(2)(b), there must be evidence supporting the district court's finding that the claim or defense was unreasonable or brought to harass." *Id*. at 580-81, 427 P.3d at 113.

Courts consider a factual claim groundless if the allegations are not supported by evidence at trial. *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1354, 971 P.2d 383, 387 (1998). To support an award of

fees under NRS 18.010(2)(b), there must be evidence in the record that the defense was maintained without reasonable grounds. *Kahn v. Morse Mowbray*, 121 Nev. 464, 479, 117 P.3d 227, 238 (2005). An abuse of discretion occurs when a trial court ignores guiding legal principles in failing to award fees or bases its ruling on an erroneous view of the law. *Franklin v. Bartsas Realty, Inc.*, 95 Nev. 559, 562-63, 598 P.2d 1147, 1149 (1979) (*citing Gakiya v. Hallmark Props., Inc.*, 722 P.2d 460, 463 (Haw. 1986)).

B. The District Court Abused Its Discretion by Failing to Award Attorney Fees Because the State Engineer Asserted Frivolous and Groundless Defenses in an Effort to Support Order 1309.

The District Court abused its discretion by concluding that the State Engineer had reasonable grounds to maintain all of the asserted defenses of Order 1309, especially given that the District Court rejected the State Engineer's defenses outright. Indeed, in the order vacating Order 1309, the District Court properly concluded that: (1) the State Engineer "exceeded his statutory authority and had no authority" for Order 1309, 9 JA 1939, 1957; (2) Order 1309 impermissibly "strips senior rights holders of their priority rights" in violation of the bedrock principle of prior appropriation, *id*. at 1959-61; and (3) the State Engineer violated Appellants' due process rights in the process leading to the issuance of Order 1309, *id*. at 1967-73. These findings led the District Court to ultimately conclude that "Order 1309 is arbitrary, capricious, and therefore void", *id*. at 1973.

Because the District Court concluded that the State Engineer had "no authority" to issue Order 1309 and that the Order was arbitrary and capricious, it should also have concluded that the State Engineer maintained his defenses of Order 1309 without reasonable ground. Indeed, even if certain of the State Engineer's defenses were colorable, many of the proposed defenses of Order 1309 were groundless and had no basis in law. *See Bergman v. Boyce*, 109 Nev. 670, 675-76, 856 P.2d 560, 563 (1993) ("The prosecution of one colorable claim [or defense] does not excuse the prosecution of five groundless claims.").

The State Engineer's defense of Order 1309 was entirely groundless because there simply is no statutory authority or historic practice that would support the State Engineer's actions in issuing Order 1309. Even if any of the State Engineer's arguments were colorable, the majority of the State Engineer's defenses of Order 1309 were disingenuous, misleading, and without reasonable grounds.

First, the legal arguments made by the State Engineer were not only rejected wholesale by the District Court, but also, prior to the issuance of Order 1309, the State Engineer admitted he did not have statutory authority to conjunctively manage the hydrographic basins. In a 2019 hearing before a Legislative committee, then State Engineer Tim Wilson testified that "existing statute does not provide the framework necessary to effectively implement the Legislature's policy direction." *See* Minutes of the Meeting of the Assembly Committee on Natural Resources,

Agriculture and Mining, 80th Session of the Nevada Legislature, February 27, 2019.[5] This statement was made in support of A.B. 51, a proposed measure that would have given the State Engineer authority to adopt regulations for conjunctive management. Despite this statement to the contrary, the State Engineer both issued Order 1309 without statutory authority and also unreasonably defended it by citing to inapplicable statutes and disregarding all historic precedent and even pretending to the District Court that basin-by-basin management did not exist under Nevada law. 4 JA 710, 747.

The State Engineer is supposed to be the protector of the cornerstone of Nevada water law—the doctrine of prior appropriation. *See, e.g.*, NRS 534.110(7). The State Engineer should be the champion of the statutory process and procedures contained in the Nevada Revised Statutes—not the creator of new, extra-statutory processes that are unknowable to water rights holders subject to the State Engineer's regulations and arbitrary decisions. Despite the statutory mandate to protect and implement the prior appropriation doctrine, the State Engineer issued Order 1309 which "*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." 9 JA 1966 n. 67. Worse, the State Engineer

[5] The minutes are available at https://www.leg.state.nv.us/App/NELIS/REL/80th2019/Meeting/7331?p=2007331.

continued (and continues) to argue that Order 1309 does not alter priority rights because the language of Order 1309 does not expressly say it does. Rather, according to the State Engineer, Order 1309 is simply "joint administration" or "joint management".

The State Engineer uses such intentionally misleading terms, which the District Court appropriately rejected, explaining that these terms actually mean "erasing the borders of seven already established legal administrative units and creating one legal superunit in the LWRFS superbasin." 9 JA 1965. Moreover, the State Engineer's argument ignores the obvious and practical consequences that result from his attempt to combine multiple basins into one. *Id*. at 1966-67 (the District Court explaining that "by the very nature of erasing the existing basins and putting all of the water rights holders in one superbasin, he has already reprioritized certain rights as they relate to one another, even if their priority dates remain the same." This reprioritization of water rights found by the District Court is clear evidence that the State Engineer deviated from his statutory authority and role. The defense of Order 1309 was therefore groundless and frivolous.

Other examples of the State Engineer maintaining groundless defenses of Order 1309 infected the proceedings below. The most egregious examples of the State Engineer asserting defenses without reasonable grounds include:

- The State Engineer cited six statutes for his authority for Order 1309, 9 JA 1958-59, but the District Court concluded that none of the statutes provided any basis or Legislative authority for the State Engineer's actions taken in Order 1309. *See id*. Nothing in NRS Chapters 532, 533, or 534 provide for joint administration of hydrographic basins or combining distinct basins for joint administration and it was unreasonable for the State Engineer to argue that any of those statutes could be interpreted to support his actions.

- Order 1309 effectively upended the prior appropriation doctrine by reordering the relative seniority of appropriations within the LWRFS. Despite this clear effect of Order 1309, the State Engineer unreasonably maintained the position that "Nothing in Order 1309 jeopardizes priority or finality of vested water rights. There is not a sentence of Order 1309 that adjusts the priority of water rights or lessens their finality." 4 JA 750. This defense is baseless and ignores the effect of Order 1309.

- All statutory enactments since adoption of Nevada's groundwater statutes in 1939 direct management of groundwater on a basin-by-basin approach. *See, e.g.*, NRS 534.011, NRS 534.030, NRS 534.110. The State Engineer refused to acknowledge the existing statutory scheme or the role Order 1309 took in upending those express statutes.

- The State Engineer has historically managed groundwater on a basin-by-basin approach. *See* 9 JA 1964; *see also, e.g.*, 2 JA 289-99 (Order 1169); 2 JA 284-88 (Order 1169A); 2 JA 300-322 (Ruling 5712); 2 JA 327-57 (Ruling 6255). The State Engineer has acknowledged this in previous litigation. *E.g.*, *Pyramid Lake Paiute Tribe of Indians v. Ricci*, Case No. CV01-05764. The State Engineer, however, took the opposite approach in defending Order 1309 by asserting that groundwater was not historically managed on a basin-by-basin basis, which completely deviated from all historic applications of statutory authority.

- The State Engineer described the six criteria to combine basins as the "lodestar" for hydrologic connectivity, but those factors were never created or disclosed during any process prior to Order 1309. 4 JA 729.

- The State Engineer has known since at least 1966 that the basins in the LWRFS were hydrologically connected but asserted in these proceedings that this was a new and novel discovery based on developing science and a new "investigation" resulting in the need for joint administration. *Id*. at 746-47.

- The State Engineer falsely claimed that Order 1309 was the result of an investigation under NRS 534.110(6) when it clearly never was as the State Engineer: (1) failed to follow the proper procedures to conduct a subsection 6 investigation; and (2) no prior orders leading to Order 1309 ordered an

investigation pursuant to that subsection. The State Engineer's defense of Order 1309 on this basis is groundless and unreasonable.

- The State Engineer excluded Kane Springs from the Order 1169 proceedings for nearly 20 years and from the Order 1303 proceedings before suddenly changing course in Order 1309 despite the fact that no pump tests were conducted in Kane Springs during the Order 1169 proceedings.

- The State Engineer issued Ruling 5712 granting Lincoln and Vidler's groundwater application in Kane Springs during the Order 1169 proceedings and concluded that pumping 1,000 afa would not have "any measurable impact on the Muddy River Springs that warrants the inclusion of Kane Springs Valley in Order 1169." Then, without any pumping in Kane Springs or evidence of impacts from pumping in Kane Springs, the State Engineer readjudicated that permit when he issued Order 1309.

- In issuing Ruling 5712, the State Engineer adjudicated and overruled several requests that Kane Springs be included in the Order 1169 pump test. The LWRFS proceedings readjudicated the same issue in Order 1309, and the State Engineer inexplicably defended this action, asserting that the science was somehow new when the connection between Kane Springs and the LWRFS was addressed in Ruling 5712, and Kane Springs was excluded from the Order 1169 proceedings. 4 JA 738-39.

- In defending Order 1309, the State Engineer inexplicably opined that he "was not obligated to follow Ruling 5712." 4 JA 738.

- Kane Springs was never a basin designated as an area in need of further administration before it was included in the LWRFS in Order 1309. The other six basins comprising the LWRFS were previously designated by the State Engineer pursuant to NRS 534.030. Notwithstanding, the State Engineer defended Order 1309 as being authorized by NRS 534.030.

These arguments demonstrate that the State Engineer asserted groundless arguments and inapplicable defenses in the petition for judicial review proceedings. The State Engineer's issuance of Order 1309 and the defense thereof in the District Court and in the related appeal has caused the Appellants substantial attorney fees, not to mention serious damages and delay to CSI's development. The State Engineer holds a significant position of power to harm water right holders' property rights. The State Engineer's effort to defend Order 1309 through misrepresentation, obfuscation, and deflection should be deterred through the imposition of attorney fees.

The District Court abused its discretion by concluding otherwise and by failing to award attorneys' fees to Appellants.

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CONCLUSION

The State Engineer, like private litigants, must be deterred from pursuing and maintaining frivolous defenses of unlawful orders that have significantly harmed the Appellants and caused an exorbitant amount of attorney fees to be incurred. Accordingly, CSI, Lincoln, and Vidler respectfully request that this Court enter an Order reversing the District Court's denial of the request for attorney fees.

Dated this 27th day of December, 2022.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Opening Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word 16 in 14 font and Times New Roman type.

2. I further certify that this opening brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 10,209 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to

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sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I certify that on the 27th day of December 2022, I served a copy of **APPELLANTS' JOINT OPENING BRIEF** upon all counsel of record:

☐ BY MAIL: I placed a true copy thereof enclosed in a sealed envelope addressed as follows:

☐ BY FACSIMILE: I transmitted a copy of the foregoing document this date via telecopier to the facsimile number shown below:

■ BY ELECTRONIC SERVICE: by electronically filing the foregoing document with the Nevada Supreme Court's electronic filing system, which sends an electronic notification to the following parties at the email address on file with the Nevada Supreme Court:

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ADDENDUM

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