No. 85137

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.

On Appeal from the Eighth Judicial District Court of the State of Nevada
Case No. A-20-816761-C

STATE ENGINEER'S ANSWERING BRIEF

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ROUTING STATEMENT

The State Engineer agrees that the Supreme Court should retain jurisdiction over this appeal. Appellants, Coyote Springs Investment, LLC (CSI), and Lincoln County Water District and Vidler Water Company, Inc. (Lincoln-Vidler), correctly note that the Supreme Court will retain the appeal involving the underlying district court order addressing the State Engineer's Order 1309. Joint Opening Brief at 1. But this case also presents a matter of first impression and of statewide public importance on whether NRS 533.450(8) provides for a recovery of attorney fees. NRAP 17(a)(11) and (12). The Supreme Court should retain the case for that reason too.

INTRODUCTION

The district court correctly denied CSI and Lincoln-Vidler's motions for attorney fees. First, no statutory provision of NRS Chapter 533 (or any other provision of Nevada water law) provides for recovery of attorney fees in a case like this one, which presents a challenge to an order of the State Engineer under NRS 533.450. The history behind NRS 533.450, the inclusion of a provision for recovery of costs and not attorney fees, and this Court's decisions addressing analogous statutory provisions all support that conclusion. Second, even if Lincoln-Vidler and CSI could pursue attorney fees under NRS 18.010(2)(b), CSI and Lincoln-Vidler have not shown that the State Engineer's defense of Order 1309

"was brought or maintained without reasonable ground or to harass" CSI and Lincoln-Vidler, let alone show that the district court abused its discretion when denying their motions. Identifying water resources within the State of Nevada is a fundamental part of the State Engineer's statutory duties—express and implied—under Nevada water law. That is all the State Engineer did in Order 1309, and the procedures the State Engineer undertook before issuing that order complied with the flexible demands of due process for the benefit of all participants—CSI and Lincoln-Vidler included.

This Court should affirm.

STATEMENT OF THE ISSUES

1. Whether the district court correctly rejected CSI and Lincoln-Vidler's motion for attorney fees by concluding that such fees are unavailable in a petition for judicial review filed under NRS 533.450.
2. Whether the district court abused its discretion when it determined that CSI and Lincoln-Vidler failed to show that the State Engineer's asserted frivolous or groundless defense to Order 1309.

STATEMENT OF THE CASE

This case arises out of consolidated proceedings filed under NRS 533.450, challenging the State Engineer's Order 1309. The substance of the instant appeal involves a challenge to a district court order denying two motions for attorney fees.

The district court issued an order granting various petitions for judicial review and vacated Order 1309, but that order remains stayed while it is being reviewed by the Nevada Supreme Court. And the district court subsequently denied the motions for attorney fees filed by CSI and Lincoln-Vidler.

STATEMENT OF THE FACTS

I. Early Study of the Connection Between the LWRFS and the Muddy River

A 1966 water resource bulletin shows that scientists have been studying groundwater flow in southeastern Nevada for more than half a century. 2 JA 361. "One of the assumptions on which these studies originally were predicated was the generally accepted concept that most hydrologic systems were more or less co-extensive with the topographically closed basins in the Basin and Range province." 2 JA 361; *see also* 2 JS 0378 ("In basin and range hydrology, mountains usually are assumed to be hydraulic barriers. Ordinarily few data are available to demonstrate this assumption as a fact, but one or more of several factors provide the basis for this generally correct assumption."). But that belief was dispelled by studies showing "that groundwater systems in certain valleys of eastern and southern Nevada extended beyond the limits of the particular valley." 2 JA 361. And that regional system was thought to comprise six valleys: White River, Pahroc, Pahranagat, Kane Spring, Coyote Spring, and upper Moapa. 2 JA 362. And when engaging in comparison of gradients across those valleys, it was thought that

"the relative altitudes of the principal springs, wells in key locations, and regional topography support the inference of regional groundwater gradient to the south." 2 JA 370.

The link between all of those valleys is a layer of Paleozoic rocks, which are more than half carbonate rocks, that exceeds a thickness of 30,000 feet. 2 JA 363, 367. And the carbonate rocks are associated with surface spring flow, including the Muddy River Springs. 2 JA 367–368. Thus, at that time, "information favor[ed] the theory that most of the water supplying the Muddy River Springs is derived from within the boundaries of the regional groundwater system described in this report." 2 JA 380.

Since then, understanding the flow of the Muddy River springs and their connectivity to the carbonate aquifer has become important for two reasons. First, the springs are the source for the flow of the Muddy River, which serves senior decreed water rights. 1 JA 126. Additionally, those springs serve as the habitat for the Moapa dace, an endangered species of minnow endemic to the Muddy River springs. *See, e.g.*, 1 JA 121, 129–130.

II. The State Engineer Issues Order 1169 to Study Water Availability Across the Carbonate Aquifer

As early as 1984, the State Engineer recognized the need to study the carbonate aquifer, which would require "substantial amounts of money. . . ." 2 JA 289–290; *see also* 2 JA 376 ("Transmissibility, one of the hydraulic properties

of an aquifer, is usually determined by pumping tests under controlled conditions.”). Based on the lack of available data, the State Engineer established stages for development of the carbonate aquifer. 2 JA 291–292. It was not possible to determine “what part of the water budget could be captured without a great deal of uncertainty, and that the question cannot be resolved without stressing the system.” 2 JA 293.

The opportunity to conduct a pumping test arose when the State Engineer issued Order 1169 on March 8, 2002. There, the State Engineer recognized his statutory authority to “postpone action on an application in areas where studies of water supplies are necessary” under NRS 533.370(2)(b), and his authority under NRS 533.368 to require “a hydrological study, an environmental study or any other study that is necessary before he makes a final determination on an application. . . .” 2 JA 294, 296. The State Engineer then identified six basins to be included in the pumping test, which would be conducted through the participation of, at a minimum, Las Vegas Valley Water District, Southern Nevada Water Authority, Coyote Springs Investment, LLC, Nevada Power, and Moapa Valley Water District, who were to split the cost of the pumping test evenly. 2 JA 295. The order held all pending applications for groundwater pumping in the identified basins in abeyance until completion of the test, at which time the State Engineer would “make a

determination if he has sufficient information to proceed" on the pending applications. 2 JA 295–296.

III. The State Engineer Issues Ruling 5712, Excluding the Kane Springs Valley From the Order 1169 Pumping Test, but Only Partially Granting Lincoln-Vidler's Application for Groundwater Pumping

Initiation of the pumping test was delayed and would not begin until 2010, but in 2005, Lincoln-Vidler filed applications seeking groundwater appropriations in Kane Springs Valley. 2 JA 285, 300–301. Lincoln-Vidler sought a combined total of 5,000 afa, while requesting that two other permits be held in abeyance. 2 JA 321. At the time Lincoln-Vidler made the applications, no other permits existed in the Kane Springs Valley. 2 JA 302, 317.

Various stakeholders protested the applications, initially including the United States Fish and Wildlife Service. But the Fish and Wildlife Service later withdrew its protest based on a stipulation with Lincoln-Vidler. 2 JA 302–303. That stipulation (1) recognized the potential impact of Lincoln-Vidler's pumping in the Kane Springs Valley on the Muddy River Springs/Warm Springs Area; (2) expressly declared that "[t]he common goal of the Parties is to manage the development of the regional carbonate-rock aquifer and overlying basin-fill aquifer systems as a water resource without causing any injury to senior federal water rights and water resources of the FWS"; and (3) stated, "The Parties expressly acknowledge that the Nevada State Engineer has, pursuant to both statutory and case law, broad authority to administer

groundwater resources in the State of Nevada and, furthermore, that nothing contained in this Stipulation shall be construed as waiving or in any manner diminishing such authority." 2 JA 405–408.

Other protests to the permit applications remained unresolved. Among the remaining protests, the National Park Service asserted that the State Engineer should hold the applications in abeyance and include Kane Springs Valley in Order 1169 based upon the belief that "Kane Springs Valley and Coyote Spring Valley, while administratively classified as separate hydrographic basins, are actually a single distinct hydrologic drainage basin and should be managed as such." 2 JA 303.

Experts "interpreted the evidence as indicating that the southwestern portion of the basin is underlain by a significant thickness of carbonate rocks." 2 JA 306. And the State Engineer generally found "the available data" to be consistent with "ground-water movement in the Kane Springs Valley from the northeast to the southwest and into Coyote Spring Valley. . . ." 2 JA 306. Finally, the State Engineer stated, "Given the unique hydrologic connection between the Kane Springs Valley Hydrographic Basin and the Coyote Springs Hydrographic Basin, the development of ground water within Kane Springs Valley will ultimately affect water levels and flows in the White River regional carbonate-aquifer system." 2 JA 314. But the State Engineer believed that "a small amount of water can be developed in the Kane Springs Valley and not unreasonably impact existing rights in the discharge areas of

the White River carbonate-aquifer system, which are already fully appropriated," and limited the amount of water that could be appropriated to 1,000 afa. 2 JA 314. He also denied the request that the applications be held in abeyance because "there is not substantial evidence that the appropriation of a limited quantity of water in Kane Springs Hydrographic Basin will have any measurable impact on the Muddy River Springs that warrants inclusion of Kane Springs Valley in Order No. 1169." 2 JA 719

Based on the foregoing, on February 2, 2007, the State Engineer granted Lincoln-Vidler's request, in part. 2 JA 321–322. Despite concluding that Lincoln-Vidler's "inflow and outflow analyses lack sufficient data to provide a reliable estimate of basin boundary flows" and "that sufficient date were not collected or presented to substantiate [Lincoln-Vidler's] estimate of subsurface flow into or out of the Kane Springs Hydrographic Basin," the State Engineer granted Lincoln-Vidler a permit for 1,000 afa of the 5,000 afa requested, subject to a monitoring plan to be approved by the State Engineer. 2 JA 309, 320–322.

IV. Data Collected During the Pumping Test Confirms Suspicions About the Connectivity Between the Carbonate Aquifer and the Muddy River Springs, and the State Engineer Denies all Pending Applications

After significant delay, the Order 1169 pumping test began on November 15, 2010. 2 JA 285. Then the State Engineer declared the test completed as of December 31, 2012, and invited test participants to file reports "by June 28, 2013,

addressing the information obtained from the study/pumping test, impacts of pumping under the pumping test and the availability of water pursuant to the pending applications." 2 JA 285. The pumping test included measurements of pumpage from 31 different wells, stream diversions of the Muddy River, "natural discharge of the Muddy River and of several of the Muddy River's headwater springs," and water levels from "79 monitoring and pumping wells." 2 JA 431–432.

SNWA submitted a report that identified minimal "[d]ecline in flow at Warm Springs West" and "did not recognize any other surface flow reductions caused by groundwater pumping at the MX-5 well." 2 JA 342–343. The report also addressed a correlation between groundwater levels and spring flows with climate, noting recovery of groundwater "after the wet winter of 2005." 2 JA 343. And the report "point[ed] out that the flows of the Muddy River at Moapa did not decline during the period of the pumping test and assert[ed] that the river flows are primarily impacted by valley fill pumping, primarily by NV Energy, and not carbonate pumping." 2 JA 343. Finally, the report identified a lack of clarity on additional development in the Coyote Spring Valley, north of the Kane Spring fault. 2 JA 343. CSI agreed with SNWA by submission of a letter that requested approval of their pending applications "in whole or part." 2 JA 343.

The U.S. Department of Interior Bureaus also submitted information, but it contrasted SNWA's report. 2 JA 343–346. The Bureaus identified "drawdown"

across the region and predicted that from pumping then current rights "the headwaters of the Muddy River, and the Muddy River itself above Moapa, would cease to flow in less than 200 years. 2 JA 344. Based on modeling, the Bureaus believed that both Pedersen springs would go "dry in 3 years or less." 2 JA 345. And based on their conclusion "that the effects of pumping from the MX-5 well are spread out over a 1,100 square-mile area," the Bureaus "suggest that five basins within that area, Coyote Spring Valley, Muddy River Springs Area, Hidden Valley, Garnet Valley, and California Wash should be managed as one hydrographic area because of their uniquely immediate hydrologic connection." 2 JA 345. Finally, the Bureaus concluded "[t]hat there is no water available for new appropriation within the five-basin area delineated through their groundwater analyses." 2 JA 345.

The Moapa Band of Paiutes also submitted a report. Although MBOP found less drawdown than the Bureaus, "they contend that carbonate pumping in Coyote Spring Valley and Muddy River Springs Area will have a 1:1 impact on Muddy River flows." They asserted that there is a separate southern flow field that "includes California Wash, Hidden and Garnet valleys, and portions of the Black Mountain Area," which "Is hydrologically isolated and could be developed without impacting spring flows." And they argued "for the creation of a new water management unit that would include upgradient basins including at least the Muddy River Springs Area, Coyote Spring Valley and Kane Springs Valley." 2 JA 347.

Moapa Valley Water District submitted a report addressing declines in the spring flows "attributable to MX-5 pumping." 2 JA 347. The Great Basin Water Network submitted a report indicating the same. 2 JA 348. And the Center for Biological Diversity used the same report. 2 JA 348. GBWN and CBD agreed that no water remained available for appropriation.

The State Engineer then issued a series of rulings denying all of the pending applications, including Ruling 6255, which addressed the pending applications in the Coyote Spring Valley. 2 JA 327–356. In that Ruling, the State Engineer recognized that Order 1169 "tied" the basins together "because it is well established that the spring discharge in the Muddy River Springs Area was produced from a distinct regional carbonate aquifer that underlies and uniquely connects the basins." 2 JA 340. And the State Engineer expressly referenced the "flat potentiometric surface in these basins," noting that "[c]hanges in the potentiometric surface in any one of these basins occurs in lockstep directly affecting the other basins, further demonstrating the regional nature of the aquifer across these basins." 2 JA 340.

The State Engineer then recognized that "impacts of pumping from the MX-5 well, and other existing wells, during the pumping test are widespread, and extend north in Coyote Spring Valley at least to Kane Springs Valley, south to Hidden Valley and Garnet Valley, and southeast to the Muddy River Springs Area and California Wash." 2 JA 349. He also determined that MX-5 well pumping

"contributed significantly to decreases in spring flow at high-elevation spring (Pedersen Springs) sources of the Muddy River and contributed to measurable decreases in flow at Baldwin and Jones Springs and to the numerous springs whose combined flows are measured at the Warm Springs West and Iverson gages." 2 JA 349. Finally, he noted that "pumping test effects documented Coyote Spring Valley, Muddy River Springs Area, Hidden Valley, Garnet Valley, California Wash, and part of the Black Mountains Area provide clear proof of the close hydrologic connection of the basins that distinguish these basins from other basins in Nevada." 2 JA 349.

Relevant here, the State Engineer addressed the issue of perennial yield in Ruling 6255, noting that information produced in the years after issuance of Order 1169 "significantly expands on the available knowledge of the hydrology and water resources of the [LWRFS] in Coyote Spring Valley, the Muddy River Springs Area and the surrounding basins." 2 JA 350. He noted that "[t]he vast majority of the scientific literature supports the premise that, unlike other separate and distinct basins in Nevada that do not feature carbonate-rock aquifers, all of the Order 1169 basins share virtually the same supply of water." 2 JA 352. And he concluded that Coyote Spring Valley, Muddy River Springs Area, Hidden Valley, Garnet Valley, and California Wash "will be jointly managed," before noting that the perennial yield for the collective basins would have to account for sharing the same water

supply with the "Muddy River and Muddy River springs" and that "the amount and location of groundwater than can be developed without capture of and conflict with senior water rights on the Muddy River and springs remains unclear, but the evidence is overwhelming that unappropriated water does not exist." 2 JA 352.

Finally, in Ruling 6255, the State Engineer addressed existing rights and the need to deny applications that conflict with existing rights under NRS 533.370(2). 2 JA 353. He then placed particular emphasis on the impact (1) the pumping test had on the Muddy River springs and, therefore, the Muddy River; and (2) the potential for future conflicts if any further permits were granted in Coyote Spring Valley. 2 JA 353–354. And he also addressed the public interest based on NRS 533.370(2), including protection of the Moapa dace, before concluding "that there is no additional groundwater available for appropriation in the Coyote Spring Valley Hydrographic Basin without conflicting with water rights in the Order 1169 basins." 2 JA 355.

V. The State Engineer Initiates Proceedings that Lead to Issuing Interim Order 1303

After denying all pending permits, with input from participating stakeholders, the State Engineer issued Interim Order 1303. 2 JA 186–200. Interim Order 1303 identified Coyote Spring Valley, Muddy River Springs Area, Hidden Valley, Garnet Valley, California Wash, and part of the Black Mountains Area as a "joint

administrative unit, which shall be known as the Lower White River Flow System (LWRFS).” 1 JA 186.

Interim Order 1303 solicited reports on specific factual inquiries:

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 relationship between the location of pumping and 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.

1 JA 198–99.

The State Engineer issued a notice of hearing and an amended notice of hearing. 1 JA 205–243. At the prehearing conference, the Hearing Officer made statements emphasizing that the hearing would not address policy or management issues because the Order 1303 hearing was only to be the first step in the process of making future management decisions involving the LWRFS. 2 JA 253.

VI. The State Engineer Holds a Hearing and Issues Order 1309, Delineating the Boundaries of the LWRFS and Identifying a Pumping Threshold for the Entire System that Protects the Current Flow of the Muddy River Springs

The State Engineer conducted a two-week hearing with stakeholders receiving an opportunity to present expert testimony and documentary evidence and to cross-examine the experts presented by other participants. 1 JA 128. At the conclusion of the hearing, each participant was given the opportunity to make a closing statement in writing. 1 JA 128. The State Engineer then issued a written decision. The order delineates the LWRFS, identifies a sustainable limit for pumping to preserve the flow of the Muddy River springs, provides for protection of the Moapa dace, requires "applications for the movement of existing groundwater rights among sub-basins" to be "processed in accordance with NRS 533.370," lifts the moratorium established by Interim Order 1303, and rescinds "other matters set forth in Interim Order 1303 that are not specifically addressed" in Order 1309. 1 JA 182–183.

VII. The State District Court Grants Relief by Vacating Order 1309, and this Court Stays the Order Pending Appeal

Eight stakeholders filed petitions for judicial review, with differing points of view. As the ongoing litigation addressing Order 1309 shows, some of those stakeholders—like CSI and Lincoln-Vidler—challenged Order 1309 in its entirety, but others—Southern Nevada Water Authority, Muddy Valley Irrigation Company,

and the Center for Biological Diversity—agreed that the State Engineer had authority to issue Order 1309 generally, and only challenged certain parts of Order 1309. The State Engineer defended Order 1309, responding to all the arguments made by all of the petitions for judicial review. 4 JA 710–762. And the district court ultimately granted CSI and Lincoln-Vidler's petitions for judicial review, concluding that the State Engineer lacked authority to issue Order 1309 and also found that Order 1309 resulted in a violation of due process. 9 JA 1939–1978.

The State Engineer, along with Southern Nevada Water Authority, Muddy Valley Irrigation Company, and the Center for Biological Diversity all appealed the district court's order. This Court ordered the appeals consolidated and stayed the district court's order pending appeal. Order Granting Motions to Consolidate, *Sullivan v. Lincoln Cty. Water Dist.*, No. 84739 (June 7, 2022); Order Granting Stay, *Sullivan v. Lincoln Cty. Water Dist.*, No. 84739 (Oct. 3, 2022).

VIII. The District Court Denies CSI and Lincoln-Vidler's Motions for Attorney Fees, and CSI and Lincoln-Vidler Appeal

CSI and Lincoln-Vidler filed motions for attorney fees in the district court. Both motions sought fees under NRS 18.010(2)(b). But the district court denied those motions, first concluding that attorney fees are not recoverable under NRS 533.450. 12 JA 2557–2558. And, in the alternative, the district court concluded that even when applying NRS 18.010(2)(b) the State Engineer's defense of Order 1309 was not brought or maintained without reasonable ground or to harass

the prevailing parties." 12 JA 2558. Instead, the district court recognized that "Order 1309, and the defense maintained by the State Engineer, presented substantial issues of public policy and issues of first impression that are now pending on appeal at the Nevada Supreme Court." 12 JA 2558.

SUMMARY OF THE ARGUMENT

Because the sole means for challenging an order of the State Engineer is to file a petition in the district courts under NRS 533.450, this Court must look to NRS 533.450 to determine whether it provides for an award of attorney fees. Review of NRS 533.450 shows that the Legislature has not provided for a recovery of attorney fees in an appeal from a decision of the State Engineer under NRS 533.450. The absence of a specific statutory provision for attorney fees controls the outcome here.

CSI and Lincoln-Vidler read too much into NRS 533.450(8), which says that "the practice in civil cases applies" when someone challenges the State Engineer's orders or decisions under NRS 533.450. The relevant language became part of the statute long before attorney fees were recoverable under NRS 18.010. This Court has already interpreted NRS 533.450(8) to mean that the Rules of Civil Procedure apply in appeals from decisions of the State Engineer, so long as they do not conflict with an applicable statute. This Court has already determined that attorney fees are unavailable under other parts of NRS Chapter 533 and in analogous proceedings

brought under NRS Chapter 233B, even though the Rules of Civil Procedure also apply under NRS Chapter 233B. And CSI and Lincoln-Vidler fail to adequately explain why this Court should reach a different result here.

Furthermore, NRS 533.450(7) addresses the availability of costs, but it is silent on the issue of fees, which is further proof against legislative intent that attorney fees be recoverable in an appeal brought under NRS 533.450. The inclusion of a provision addressing the recovery of costs but not attorney fees, which are both addressed by NRS Chapter 18, counsels against reading NRS 533.450(8) as incorporating NRS 18.010 and allowing for a recovery of attorney fees in an appeal brought under NRS 533.450.

Finally, even assuming NRS 18.010(2)(b) were applicable here, CSI and Lincoln-Vidler's claim for fees would fail. The State Engineer's defense of Order 1309 in the district court was reasonably grounded in law and fact. Thus, CSI and Lincoln-Vidler plainly fail to establish that the district court abused its discretion when, despite granting CSI and Lincoln-Vidler's petitions for judicial review, the district court determined that "the defense maintained by the State Engineer, presented substantial issues of public policy and issues of first impression that are now pending on appeal at the Nevada Supreme Court." 12 JA 2558.

For those reasons, this Court should affirm.

ARGUMENT

I. Standard of Review

Generally, Nevada's appellate courts review an award or denial of attorney fees under NRS 18.010(2)(b) for an abuse of discretion. *Mack-Manley v. Manley*, 122 Nev. 849, 860, 138 P.3d 525, 533 (2006). However, a district court may not award attorney fees unless authorized by statute, rule or contract. *State, Dep't of Human Res., Welfare Div. v. Fowler*, 109 Nev. 782, 784, 858 P.2d 375, 376 (1993) (citing *Nev. Bd. of Osteopathic Med. v. Graham*, 98 Nev. 174, 175, 643 P.2d 1222, 1223 (1982)).

This case requires the interpretation of NRS 533.450. Statutory interpretation are questions of law reviewed *de novo*. *Zenor v. State, Dep't of Transp.*, 134 Nev. Adv. Op. 14, 412 P.3d 28, 30 (2018) (citing *Albios v. Horizon Cmtys., Inc.*, 122 Nev. 409, 417, 132 P.3d 1022, 1028 (2006)). "The leading rule of statutory construction is to ascertain the intent of the legislature in enacting the statute. *McKay v. Bd. of Sup'rs of Carson City*, 102 Nev. 644, 650, 730 P.2d 438, 443 (1986). This Court gives the words in a statute their plain meaning. *Application of Filippini*, 66 Nev. 17, 24, 202 P.2d 535, 538 (1949). And "[t]he maxim 'expressio Unius Est Exclusio Alterius,' the expression of one thing is the exclusion of another, has been repeatedly confirmed in this State." *Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967).

II. The District Court Correctly Determined that an Award of Attorney Fees is not Available to Parties Challenging an Order or Decision to the State Engineer Under NRS 533.450

"[T]he water law and all proceedings thereunder are special in character, and the provisions of such law not only lay down the method of procedure but strictly limits it to that provided." *Application of Filippini,* 66 Nev. 17, 27, 202 P.2d 535, 540 (1949). For that reason, NRS 533.450 provides the exclusive means for challenging an order or decision of the State Engineer, and nowhere in NRS 533.450 is there any provision providing for an award of attorney fees. *See* NRS 533.450. Therefore, parties challenging decisions or orders of the State Engineer, even if successful in the district court, are not entitled to an award of attorney fees.

A. The history behind NRS 533.450(8) cuts against allowing an award of attorney fees

More than a century has passed since Nevada began codifying its water law and created the State Engineer's office. 1915 Nev. Stat. ch. 253, § 75 at 378–386; *see also Filippini,* 66 Nev. at 21, 202 P.2d at 537. The Legislature's statement that "the practice in civil cases applies to the informal and summary character of such proceedings, as provided in this section"—language that now appears in NRS 533.450(8) and is the source of CSI and Lincoln-Vidler's claim for recovery of fees—has been part of the statutory framework since the beginnings of statutory water law in Nevada with only a slight, immaterial modification occurring in 1977. 1977 Nev. Stat. ch. 241, § 1 at 427; 1915 Nev. Stat. ch. 253, § 75 at 384–85

("[T]he practice in civil cases shall apply and be consistent with the informal and summary character of such proceedings, as herein provided.").

But it was only in 1951, that Nevada statutory law first provided a basis to recover attorney fees under what is now NRS 18.010. 1951 Nev. Stat. ch. 54, § 1 at 59 ("In cases in which (1) the plaintiff does not seek recovery of one thousand dollars ($1,000), or (2) in which the defendant does not seek recovery of one thousand dollars ($1,000), the court may, in its discretion, make an allowance of attorney fees to the prevailing party."). And the specific provision of NRS 18.010(2)(b) that CSI and Lincoln-Vidler rely upon as a basis for recovering attorney fees here finds its roots in a 1985 legislative amendment. 1985 Nev. Stat. ch. 83, § 1 at 327.

The State Engineer is unaware of this Court ever addressing whether the language of NRS 533.450(8) provides for recovery of attorney fees by incorporating NRS 18.010. But the relevant historical perspective cuts against that conclusion because, as the foregoing analysis proves, the "practice in civil cases" did not include rules allowing for recovery of attorney fees when the Legislature included that language in what is now codified at NRS 533.450.

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B. This Court has already rejected the availability of attorney fee awards under other parts of NRS Chapter 533 when the relevant statute provided for recovery of costs but is silent on recovery of attorney fees

This Court, in an unpublished order, has concluded that attorney fee awards are unavailable under other parts of NRS Chapter 533 because, like NRS 533.450, those statutes specifically provide for a recovery of costs, which does not include attorney fees under Nevada law. *See Rand Props., LLC v. Filippini*, 2016 WL 1619306, Docket No. 66933 (Nev., April 21, 2016) (unpublished disposition). In *Rand*, a case dealing with water law, albeit not involving a challenge to a State Engineer's order under NRS 533.450, this Court declined to award attorney fees under NRS 533.190(1) and NRS 533.240(3). 2016 WL 1619306, at *6. In doing so, this Court reasoned that "[t]hese statutes specifically provide for an award of costs, but under Nevada law, attorney fees are not considered costs." *Id*. (citing *Smith v. Crown Fin. Serv. of Am*., 111 Nev. 277, 287, 890 P.2d 769, 776 (1995)). Additionally, the Court found that attorney fees were not mentioned anywhere in the statute, and therefore attorney fees could not be sustained under NRS 533.190(1) or NRS 533.240(3). *Id.*

NRS 533.450(7) provides for the payment of costs, but does not provide for the payment of fees, and even the payment of costs only applies to parties other than the State Engineer. 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*." (Emphasis added)).

It is significant that NRS 533.450 does not include a provision for awarding attorney fees but does include a provision regarding the recovery of costs. This Court has long treated "the expression of one thing and the exclusion of another" to be intentional when considering legislative intent. *Galloway*, 83 Nev. at 26, 422 P.2d at 246. That NRS 533.450(7) expressly addresses recovery of costs, but the statute remains silent on attorney fees, demonstrates the Legislature's intent that attorney fee awards are unavailable in a proceeding brought under NRS 533.450.

And even more significant is that this costs provision specifically exempts the State Engineer and the State. It makes little sense that the Legislature would intend to protect the State Engineer from recovery of costs but allow a recovery of attorney fees, which typically far exceed recoverable costs.

Nowhere in NRS 533.450, or anywhere else in Nevada's water law (NRS Chapters 532, 533, 534 and 540), is there a provision authorizing the award of attorney fees against the State Engineer. Where Nevada water law mentions attorney's fees, it either authorizes only the State Engineer to collect attorney's fees or expressly prohibits the use of certain State General Fund accounts for the payment of attorney's fees. For example, NRS 533.481(2) and NRS 534.193(3) allow the State Engineer to require the payment of attorney's fees when an administrative fine is imposed against a person or the person is ordered to replace any water. On the other hand, NRS 532.200(2) expressly prohibits the use of the Adjudication

Emergency Account for the payment of attorney's fees, while NRS 534.360(5) explicitly prohibits the use of funds from the Water Rights Technical Support Account for attorney's fees.

C. This Court has already determined that NRS 18.010 does not apply in analogous proceedings under NRS Chapter 233

Although this Court has never specifically addressed whether NRS 533.450(8) allows for recovery of fees, this Court has interpreted that provision to merely incorporate the Rules of Civil Procedure. *Desert Valley Water Co. v. State*, 104 Nev. 718, 720, 766 P.2d 886, 887 (1988). And this Court has already concluded that attorney fee awards are unavailable in proceedings brought under the Nevada Administrative Procedure Act, NRS Chapter 233B, to which the Rules of Civil Procedure also apply. *Zenor*, 134 Nev. 28, 412 P.3d 28 (2018); *Fowler*, 109 Nev. 782, 858 P.2d 375; *see also Dep't of Corr. v. DeRosa*, 136 Nev. 339, 341, 466 P.3d 1253 (2020) (recognizing that the Nevada Rules of Civil Procedure govern NRS Chapter 233B proceedings to the extent they do not conflict with the controlling statutory framework). The analysis performed by this Court in *Zenor* and *Fowler* applies here too and implores the same result regarding NRS 533.450. Indeed, the history behind the statutory language of NRS 533.450 analyzed above makes an even stronger case against recovery of fees.

In reviewing the statutory provisions providing for judicial review of decisions of state agencies subject to NRS Chapter 233B, this Court noted that

"NRS 233B.130 does not contain any specific language authorizing the award of attorney's fees in actions involving petitions for judicial review of agency action." *Fowler*, 109 Nev. at 785, 858 P.2d at 377. The action in Fowler was brought pursuant to NRS Chapters 284 and 233B, and "[b]ecause neither of these chapters authorized an award of attorney's fees" and because NRS 18.010(2)(a) was inapplicable, this Court held that the district court erred in awarding attorney's fees. *Id.*, 109 Nev. at 788, 858 P.2d at 379.

This Court extended *Fowler* in *Zenor*, holding specifically that NRS 233B.130 prohibited attorney fees in petitions for judicial review of agency determinations, including those attorney fees requested pursuant to NRS 18.010(2)(b). 134 Nev. at 110–11, 412 P.3d at 30. This Court concluded that the Legislature did not provide an attorney fee remedy because NRS Chapter 233B is "the exclusive means of judicial review of" an agency determination. *Id*. (citing NRS 233B.130(6)). And it was not for this Court "to fill in alleged legislative omissions based on conjecture as to what the legislature would or should have done." *Id*. (citing *McKay v. Bd. of Cty. Comm'rs of Douglas Cty*., 103 Nev. 490, 492, 746 P.2d 124, 125 (1987)).

This Court has "repeatedly refused to imply provisions not expressly included in the legislative scheme." *State Indus. Ins. Sys. v. Wrenn*, 104 Nev. 536, 539, 762 P.2d 884, 886 (1988). In *Wrenn*, the Court declined to award attorney fees

because "the legislature has not expressly authorized an award of attorney's fees in worker's compensation cases. . . . [and] we decline to allow a claimant recovery of attorney's fees in a worker's compensation case absent express statutory authorization." *Id*.

This Court should do the same here. NRS 533.450(1) provides that "any person feeling aggrieved by any order or decision of the State Engineer . . . may have the same reviewed by a proceeding for that purpose, insofar as may be in the nature of an appeal . . . ." Though this language is slightly different from 233B.130(6), it has the same import: there is only one means to seek judicial review of a State Engineer order or decision, which is to file a petition for judicial review under NRS 533.450. And because NRS 533.450(8) does not have the meaning that Respondents impose on it, NRS 533.450 lacks a statutory provision that allows for recovery of attorney fees.

D. CSI and Lincoln-Vidler's reliance on *Wilson v. St. Clair* and *In re Nevada State Engineer Ruling No. 5823* is misplaced

CSI and Lincoln-Vidler read too much into this Court's decision in *Wilson v. St. Clair*, 2020 WL 1660026, Docket No. 77651 (Mar. 27, 2020) (unpublished disposition). True, in *St. Clair*, this Court reversed a district court order granting attorney fees, and the underlying district court proceeding involved a challenge to a decision of the State Engineer under NRS 533.450. *St. Clair*, 2020 WL 1660026 at *2. But this Court, in that unpublished decision, stated, "We conclude that

NRCP 54(d)(2) applied to a motion for attorney fees brought under NRS 18.010(2)(b). . . ." *Id.* It did not, however, hold that an award of attorney fees is available because it did not need to reach that issue. *Id.* at *2 n.3 ("Insofar as the parties raise arguments not specifically addressed in this order, we have considered them and conclude that they are either without merit *or need not be reached given our disposition in this appeal*.") (emphasis added); *see also Appellant's Opening Brief, Wilson v. St. Clair*, Case No. 77651 at 9–16 (Apr. 30, 2019) (arguing that attorney fee awards are unavailable to parties challenging decisions or orders of the State Engineer under NRS 533.450).

CSI and Lincoln-Vidler also read too much into this Court's reference to NRS 533.450(8) in *In re Nev. State Eng'r Ruling No. 5823*, 128 Nev. 232, 277 P.3d 449 (2012). In that case, this Court addressed the meaning of the phrase "matters affected" in NRS 533.450(1) to decide whether initiating a proceeding under NRS 533.450(1) in the correct district court relates to subject matter jurisdiction or is merely a matter of venue. *In re Nev. State Eng'r Ruling No. 5823*, 128 Nev. at 238, 244–45, 277 P.3d at 453, 457. After concluding that identifying the right district court under NRS 533.450(1) is not a question of subject matter jurisdiction, but only one of venue, this Court suggested that the district court could rely upon the general venue statutes of NRS Chapter 13 to aid in its application of specific statutory language of NRS 533.450(1). *Id.* at 245, 277 P.3d at 457 ("This court has

long drawn on procedures and law applicable to civil actions generally in water law cases, *to the extent consistent with the governing statutes*, *see Carpenter v. Dist. Ct.*, 59 Nev. 42, 53, 84 P.2d 489, 491 (1938), *aff'g on reh'g Carpenter v. Dist. Ct.*, 59 Nev. 42, 73 P.2d 1310 (1937)."") (emphasis added). Using the same analysis that the Court used to make NRS Chapter 13 applicable to NRS 533.450, cuts against NRS 533.450(8) providing a path to recovery of attorney fees.

There, consideration of the venue statutes would create no conflict with the legislative intent of NRS 533.450(1). But allowing a recovery of attorney fees under NRS 18.010(2)(b) does create a conflict because it is inconsistent with the absence of an express attorney fee remedy in NRS 533.450.

* * *

In the absence of a statute, rule, or agreement between the parties granting the right to recover attorney fees, litigants are responsible for compensating their own counsel. As the analysis above shows, neither the history behind the language of NRS 533.450(8), nor the construction of NRS 533.450 as a whole—which addresses recovery of costs under certain circumstances, *see* NRS 533.450(7), but is silent on recovery of attorney fees—support CSI and Lincoln-Vidler's interpretation of NRS 533.450(8). And this Court's decisions in other analogous situations further support the conclusion that attorney fee awards are not an available remedy under NRS 533.450.

III. The district court did not abuse its discretion by concluding that CSI and Lincoln-Vidler are not entitled to fees under NRS 18.010(2)(b)

The district court did not abuse its discretion when it said that attorney fees are unavailable because "Order 1309, and the defense maintained by the State Engineer, presented substantial issues of public policy and issues of first impression that are now pending on appeal at the Nevada Supreme Court." 12 JA 2558. This Court has recognized that fees are unavailable under NRS 18.010(2)(b) when a case presents a novel issue of first impression. *Rodriguez v. Primadonna Co., LLC*, 125 Nev. 578, 588–89, 216 P.3d 793, 800–01 (2009). A party cannot obtain attorney fees under NRS 18.010(2)(b) when "reasonable minds could disagree" about the basis for the party's claim or defense. *Bower v. Harrah's Laughlin Inc.*, 125 Nev. 470, 494, 215 P.3d 709, 726 (2009). Attorney fees are only available "when a party has alleged a groundless claim that is not supported by any credible evidence at trial." *Frantz v. Johnson*¸ 116 Nev. 455, 472, 999 P.2d 251, 362 (2000) (citing *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 996, 860 P.2d 720, 724 (1993)). But CSI and Lincoln-Vidler fail to make that showing here.[1] Instead, they wrongly argue that

[1] Indeed, it is hard to imagine circumstances where CSI and Lincoln-Vidler could make that showing in the face of this Court's decision to stay the district court's order vacating Order 1309 pending appellate review. True, this Court's order granting a stay focused on preservation of the status quo. Order Granting Stay, *Sullivan v. Lincoln Cty. Water Dist.*, No. 84739 (Oct. 3, 2022). But this Court has recognized that a stay is unavailable if the appellant has not at least identified a substantial legal issue for resolution on appeal. *Hansen v. Eighth Jud. Dist. Ct.*, 116 Nev. 650, 658–59, 6 P.3d 982, 987 (2000); *see also Mikohn Gaming Corp. v.*

the district court should have granted their motion simply because they prevailed below, not because the State Engineer's position in the district court would meet the standard for an award of fees under NRS 18.010(2)(b).

A. The district court did not abuse its discretion in concluding that the State Engineer's defense on the authority to issue Order 1309 was reasonably grounded in law and fact

Numerous statutory provisions support the State Engineer's authority to delineate the boundaries of the carbonate aquifer now known as the LWRFS and to identify a sustainable pumping limit for the aquifer. And even if those statutory provisions do not provide express authority for the State Engineer to do so, that authority can be implied because identifying water resources and determining how much water is available within those resources is inherent to the State Engineer's ability to carry out his express statutory duties.

The State Engineer has the powers that the Legislature has expressly or implicitly delegated. *Wilson v. Pahrump Fair Water, LLC*, 137 Nev. 10, 13, 481 P.3d 853, 856 (2021). And the State Engineer cited multiple statutory provisions to support this argument in the district court, while defending against collective arguments that he lacked authority to consider the effect of any water use

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McCrea, 120 Nev. 248, 253, 89 P.3d 36, 30 (2004) (noting that a stay should be denied when "the appeal appears to be frivolous"). And if the State Engineer (along with the other Appellants) prevail in appealing the district court's order vacating Order 1309, that too would dispositively undermine CSI and Lincoln-Vidler's position in this appeal. *Bower*, 125 Nev. at 494, 215 P.3d at 726.

that transcends basin boundaries: NRS 533.024(1)(c); NRS 533.024(1)(e); NRS 533.430(1); NRS 533.450(9); NRS 534.020(1); NRS 534.110(6). 4 JA 746–748. Perhaps with the exception of NRS 534.110(6), which the State Engineer specifically addresses below, CSI and Lincoln Vidler provide no analysis of the language of these provisions to show that the State Engineer's reliance upon them was unreasonable for purposes of arguing that the Legislature has expressly or implicitly delegated to him the authority to delineate the boundaries of an aquifer and determine the capacity of that aquifer for groundwater pumping, even if the boundaries of an aquifer are larger than the geographic area of a management basin. Nor have they shown that the State Engineer's defense of his decision addressing a novel, complex issue of hydrology was groundless within the meaning of NRS 18.010(2)(b). *Rodriguez*, 125 Nev. at 588–89, 216 P.3d 800–01. For those reasons, CSI and Lincoln-Vidler decidedly fail to establish that the district court abused its discretion in rejecting their theory that the State Engineer presented a groundless defense with respect to his authority to issue Order 1309.

B. The State Engineer's defense on the alleged violations of due process was reasonably grounded in law and fact

CSI and Lincoln-Vidler provide no specific analysis to explain how the district court abused its discretion in concluding that the State Engineer's defense on due process did not meet the standard for recovery of fees under NRS 18.010(2)(b). But even if they had made such an argument, it would fail because the record in this

case shows that the State Engineer provided proper notice of the Order 1303 hearing. 1 JA 205–243. And the Order 1303 hearing provided stakeholders an opportunity to be heard on the factual matters the State Engineer addressed in Order 1309: the boundaries of the LWRFS and the sustainable limit for groundwater pumping that will protect the current flow of the springs at the headwaters of the Muddy River. 1 JA 118–185.

C. CSI and Lincoln-Vidler's arguments otherwise fail to establish that the district court abused its discretion[2]

To recover attorney fees under NRS 18.010(2)(b), a "prevailing party" must show that a "claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass

[2] In their statement of facts, CSI and Lincoln-Vidler list purportedly unreasonable positions of the State Engineer which are substantially addressed in their argument. But this Court should decline to consider anything identified in the statement of facts that CSI and Lincoln-Vidler do not otherwise cogently address in their argument. *See, e.g.*, *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this Court."). Furthermore, NRS 18.010(2)(b) requires CSI and Lincoln-Vidler to show that the State Engineer's "defense" was unreasonable or intended to harass them. It is not a vehicle to dissect and nitpick the State Engineer's district court brief line-by-line in search of a statement they think is unreasonable. The district court found the State Engineer's defense to be reasonable. 12 JA 2558. And, in any event, even when considering everything they raise in the context of this case, CSI and Lincoln-Vidler fail to establish that the district court abused its discretion when recognizing that "the defense maintained by the State Engineer, presented substantial issues of public policy and issues of first impression" that foreclosed relief under NRS 18.010(2)(b). 12 JA 2558; *see also Rodriguez*, 125 Nev. at 588–89, 216 P.3d 800–01.

the prevailing party." CSI and Lincoln-Vidler misstate the relevant standard by suggesting that the district court should have granted their motion for attorney fees simply because the district court granted their petitions for judicial review. Joint Opening Brief at 40. If that were the standard, CSI and Lincoln-Vidler would only have to show that they are a prevailing party. But that is not the rule; NRS 18.010(2) demands more than merely prevailing in the district court to recover fees. And CSI and Lincoln-Vidler's arguments do not make that necessary additional showing.

CSI and Lincoln-Vidler reference the State Engineer's comments regarding AB 51 during the 2019 legislative session, but those statements do not contradict the State Engineer's defense of Order 1309. Joint Opening Brief at 41. Review of the State Engineer's full comments shows that, through AB 51, the State Engineer sought particular management tools to aid in his ability to carry out the Legislature's directive that the State Engineer "manage conjunctively the appropriation, use and administration of all waters of this State, regardless of the source of water" in NRS 533.024(1)(e). *See* Minutes of the Meeting of the Assembly Committee on Natural Resources, Agriculture, and Mining, 80th Sess. of the Nev. Leg., Feb. 27, 2019.[3]

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[3] Available at https://www.leg.state.nv.us/App/NELIS/REL/80th2019/Meeting/7331?p=2007331.

But he did not say that he lacked the authority to issue an order like Order 1309, which delineates the LWRFS and identifies a sustainable pumping limit for the LWRFS that will not impact the current flow of the springs at the headwaters of the Muddy River. *Id.* Furthermore, that AB 51 failed to pass could be construed as supporting the conclusion that the Legislature did not agree with the State Engineer's suggestion that he needed additional legislative direction to act on the issue of conjunctive management. *Cf. Diamond Nat. Res. Prot. & Conservation Ass'n v. Diamond Valley Ranch, LLC*, 138 Nev. Adv. Op. 43, __, 511 P.3d 1003, 1010 (Nev.) (noting that unpassed legislation leads to conflicting inferences).

CSI and Lincoln-Vidler also incorrectly argue that the State Engineer has historically limited his management authority to acting in a single basin at a time. Joint Opening Brief at 41, 44.[4] If that were the historical position of the State

[4] Ruling 6255 undermines CSI and Lincoln-Vidler's point that the State Engineer historically has never considered impacts of water uses that transcend basin boundaries before Order 1309. The order explicitly recognizes the need to jointly administer the basins, while also "conclude[ing] that there is no additional groundwater available for appropriation in the Coyote Springs Valley Hydrographic Basin *without conflicting with existing water rights in the Order 1169 Basins*." 2 HA 352, 355.

So too does Ruling 5712. Lincoln-Vidler's applications for groundwater pumping appropriations were the first applications for appropriations of groundwater in the Kane Springs Valley. 2 JA 302, 317. Yet, the State Engineer only granted their applications in part, after acknowledging the interconnectivity of Kane Springs Valley with the LWRFS, and the potential that "the appropriation of water in an amount greater than permitted under this ruling *will conflict with existing rights and threaten to prove detrimental to the public interest*." 2 JA 720 (emphasis added). The only plausible explanation for that ruling is that the State Engineer was

Engineer, one would think that CSI and Lincoln-Vidler would be able to identify more than a single 20-year-old district court brief purportedly asserting that position. And a close review of that brief shows that the State Engineer said nothing there about a lack of authority to address groundwater resources that cross basin boundaries. But the brief they cite does demonstrate that the State Engineer identified the need to consider hydrologic connectivity between groundwater and surface water systems when determining the availability of groundwater for pumping in that brief. 10 JA 2096–2097 (discussing the State Engineer's consideration of the hydrologic between groundwater and surface water). Thus, this brief does not even support CSI and Lincoln-Vidler on the merits of their challenge to Order 1309; it supports the State Engineer's position on the issue of conjunctive management. And, as a result, the brief wholly undermines CSI and Lincoln-Vidler's

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considering the impact of groundwater pumping in the Kane Springs Valley on existing rights in adjacent groundwater basins. *See also* 2 JA 313 ("In determining the amount of water available for appropriation in basins where outflow from one basin is part of the inflow to another basin, the State Engineer must take into consideration the amount of water appropriated in the upgradient basin and discount the amount from inflow into the down gradient basin. If the ground water appropriated in an upgradient basin is not deducted from the amount which discharges to the downgradient basin, it creates the potential for double accounting and regional over appropriation. Thus, the State Engineer is still able to manage the ground-water basins as they have been historically managed administratively, *but also take into consideration the concerns that arise for ground-water basins that are hydrologically connected*.") (emphasis added).

position that that the district court abused its discretion in applying NRS 18.010(2)(b).

CSI and Lincoln-Vidler (and district court too) misread Order 1309 in suggesting that the State Engineer displaced the doctrine of prior appropriation, erased basin boundaries, or reordered priority of any rights. Joint Opening Brief at 41–43. Order 1309 identifies the characteristics of an aquifer by delineating its boundaries and identifying a sustainable pumping limit. 1 JA 182. It does not erase any boundaries; it specifically maintains the existing basins as sub-basins of the LWRFS. 1 JA 182. It does not reorder priority; it says nothing about order of priority and, therefore, rescinded a provision of Interim Order 1303 that did address priority. 1 JA 183; 1 JA 198. Thus, they have not shown that the district court abused its discretion in rejecting their motion.

And CSI and Lincoln-Vidler cannot legitimately claim that what the State Engineer did in Order 1309 was "unknowable." Joint Opening Brief at 41. First and foremost, Interim Order 1303 explicitly invited stakeholders to produce reports addressing the two key factual issues the State Engineer later addressed in Order 1309: delineating the boundaries of the LWRFS and identifying a sustainable pumping limit for the aquifer that would not impair the existing flow of the springs at the headwaters of the Muddy River. 1 JA 182, 198–99. And counsel for CSI, in

arguing the motion for attorney fees, admitted that he fully understood that the State Engineer would be delineating the LWRFS as early as 2017. 12 JA 2550.

CSI and Lincoln-Vidler's remaining list of arguments also fail to establish their entitlement to attorney fees. First, they fail to provide any analysis of the statutory language that the State Engineer cited to establish that State Engineer's defense was groundless. Joint Opening Brief at 43; *see also supra* Part III(A). As a result, they fail to show that the district court's decision resulted in an abuse of discretion.

CSI and Vidler incorrectly argue that "[a]ll statutory enactments since adoption of Nevada's groundwater statues in 1939 direct management of groundwater on a basin-by-basin approach." Joint Opening Brief at 43. But they fail to identify any authority that substantiates their view that under NRS Chapter 534, "basin" must refer to the 232 hydrographic areas. And they therefore fail to explain how giving the term "basin" any meaning other than the one they desire, including characterizing the carbonate aquifer as a basin, meets the standard for a fee award under NRS 18.020(2)(b).

CSI and Vidler also misstate the State Engineer's arguments from the district court about the criteria identified in Order 1309. Joint Opening Brief at 44. The State Engineer said that *hydrologic connectivity* is the "lodestar" for determining inclusion in the LWRFS. 4 JA 729. The State Engineer did not characterize the criteria he used

to explain how he determined hydrologic connectivity as the "lodestar" for determining hydrologic connectivity. Joint Opening Brief at 44. And CSI and Lincoln-Vidler fail to explain how use of that criteria prejudiced them. In particular, in discussing the inclusion of Kane Springs Valley in Order 1309, the State Engineer explicitly recognized that further study is needed to understand the connectivity of those areas to the LWRFS, so that he can more effectively and fairly manage the water in those sub-basins and the LWRFS. 1 JA 171.

CSI and Lincoln-Vidler correctly note that suspicion of connectivity throughout the LWRFS arose as early as the 1960s. Joint Opening Brief at 44. But they fail to acknowledge the limitations on the evidence available at the time and the need for further study. Joint Opening Brief at 44. A pumping test is the best means of addressing transmissibility. *See*, *e.g.*, 2 JA 376. And the aquifer pump test performed between 2010 and 2012 gave the State Engineer the data he needed to confirm that original suspicion and to obtain a greater understanding of the LWRFS. In particular, the data that has since been collected, in conjunction with the consideration of all the evidence presented during the Order 1303 hearing, provided him with the information he needed to delineate the boundaries of the LWRFS and identify its capacity for groundwater pumping in relation to the flow of the springs at the headwaters of the Muddy River. 1 JA 118–185. Thus, CSI and Lincoln-Vidler fail to explain how what was known in the 1960s made the State Engineer's defense

in the district court groundless and proves that the district court abused its discretion in denying their motions.

CSI and Lincoln-Vidler also challenge the State Engineer's reliance on NRS 534.110(6), asserting that the State Engineer did not follow the procedures to conduct such an investigation and because the State Engineer previously did not order such an investigation. Joint Opening Brief at 44–45. But they fail to identify what the procedures are that the State Engineer purportedly failed to follow. Joint Opening Brief at 44–45. And they fail to cite anything that required the State Engineer to do more than he did in Interim Order 1303 when he provided explicit notice of his intent to investigate the boundaries of the LWRFS and identify a sustainable pumping limit for the aquifer that would not decrease the current flow of the springs at the headwaters of the Muddy River. Joint Opening Brief at 44–45; 1 JA 198. Thus, CSI and Lincoln-Vidler fail to show that the State Engineer's reliance on NRS 534.110(6) meets the standard for obtaining fees under NRS 18.010(2)(b), let alone that the district court abused its discretion in denying their motions.

CSI and Lincoln-Vidler make various assertions about the State Engineer's position on Kane Springs in Order 1309. But the position that the State Engineer took in the Order is not the proper subject of a fee motion; the language of NRS 18.010(2)(b) requires them challenge the defense the State Engineer advanced

in the district court. *Cf. Frantz*, 116 Nev. at 472, 999 P.2d at 361 (noting that attorney fee awards are not permitted under NRS 18.010(2)(b) "for acting maliciously or engaging in unacceptable discovery tactics"). And the only relevant link they identify between their assertions about Kane Springs Valley and the defense in the district court is to say that the State Engineer "inexplicably opined that he 'was not obligated to follow Ruling 5712.' 4 JA 738." But they cite no authority to demonstrate that the State Engineer is bound by all prior decisions and cannot consider new scientific data, which is especially important when considering the State Engineer issued Ruling 5712 before the Order 1169 pump test began.

Finally, CSI and Lincoln-Vidler challenge the State Engineer's reliance on NRS 534.030 as a basis to defend his authority to delineate the LWRFS in Order 1309 because the State Engineer has never designated Kane Springs Valley under NRS 534.030. Joint Opening Brief at 46. To succeed on that argument, CSI and Lincoln-Vidler would need to show not that the State Engineer's reliance on other statutory provisions was not only wrong, but unreasonable. They have failed to make that showing for all the reasons stated above.

* * *

CSI and Lincoln-Vidler demonstrably fail to carry their burden of establishing that the district court abused its discretion when it found they had not satisfied NRS 18.010(2)(b). For that reason, if this Court concludes that NRS 18.010(2)(b)

applies in this proceeding, this Court should still affirm the district court's denial of the motions for attorney fees.

CONCLUSION

For the reasons addressed above, this Court should affirm the district court's denial of CSI and Lincoln-Vidler's motions for attorney fees.

RESPECTFULLY SUBMITTED this 9th day of February, 2023.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this 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 10 in 14 pitch Times New Roman.

2. I further certify that this 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 10,060 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 sanctions in

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

RESPECTFULLY SUBMITTED this 9th day of February, 2023.

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CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 9th day of February, 2023, I served a copy of the foregoing STATE ENGINEER'S ANSWERING BRIEF, by this Court's electronic filing system and consistent with NEFCR 9.

Participants in the case who are registered with this Court's electronic filing system will receive notice that the document has been filed and is available on the court's electronic filing system.

/s/ Dorene A. Wright