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.	 **Supreme Court No. 85137** District Court Case No. A816761

APPELLANTS' JOINT REPLY 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 March 2023.

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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Snell & Wilmer, L.L.P. has been substituted out of this case and no longer represents Lincoln.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 March 2023.

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INTRODUCTION

How does one prove another party has taken an unreasonable and frivolous position in a legal proceeding? Both can be shown by duplicitous conduct. Both can be shown by obfuscation. Both can be shown by revealing the willingness to ignore statutes and create new, albeit inappropriate, procedures to justify the abandonment of applicable law. Both can be shown by detailing the blatant willingness to compromise one's credibility by taking completely contradictory and inconsistent positions in the same lawsuit with different courts.

Order 1309 expressly states that seven separate hydrographic basins "are hereby delineated as a single hydrographic basin." 1 JA 182. Order 1309 is the first State Engineer order that purports to combine multiple basins into one. The State Engineer's counsel recognized this during oral argument in the District Court. Notwithstanding, the State Engineer argues in the PJR Appeal[1] that the Respondents in that appeal "are wrong when they repeatedly claim that Order 1309 represents the first time in Nevada history that the State Engineer jointly administered multiple groundwater basins." Appellants' Joint Reply Brief, 12. Now, in this appeal, the State Engineer argues that fees cannot be awarded when a case involves an issue of first impression.

[1] CSI, Lincoln, and Vidler refer to the related appeal (Case No. 84739) of the District Court's order granting judicial review as the "PJR Appeal".

The State Engineer's inconsistent positions demonstrate the frivolous defenses being employed to defend Order 1309. Rather than candidly admit that Order 1309 is an unprecedented approach to water management that has never been attempted before, the State Engineer misrepresents his historical management practices, conflates the terms "joint administration" and "conjunctive management" with his attempt to combine basins, rewrite Nevada's water law statutes, and ignore the language used in Order 1309 to misrepresent the impact that it has on water right holders. This defense strategy is unreasonable and frivolous.

The State Engineer's litigation strategy in the District Court and on appeal demonstrates why it is necessary for fees to be available to deter the State Engineer from these litigation tactics. This deterrent effect is especially important because the State Engineer is generally not subject to the NRS 233B rulemaking statutes because he can issue orders and rules without them first being subject to public scrutiny – his power is plenary.[2]

Accordingly, CSI, Lincoln, and Vidler respectfully request that this Court enter an order reversing the District Court's order denying the motions for attorney fees.

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[2] NRS 233B.039(1)(i) provides the State Engineer is entirely exempt from the requirements of NRS Chapter 233B except for rules of practice and procedure adopted for protest hearings as set forth in NRS 533.365(7).

ARGUMENT

I. NRS 533.450(8) PERMITS AN AWARD OF ATTORNEY FEES UNDER NRS 18.010(2)(b).

A. The State Engineer Ignores NRS 533.450's Incorporation of "the practice in civil cases" and Encourages a Statutory Construction that Would Lead to an Absurd and Impracticable Result.

The State Engineer argues that because NRS 533.450 does not address attorney's fees specifically, they are never available. State Engineer's Answering Brief ("RAB") 20-26. But that argument ignores the plain language of both NRS 533.450(8), which incorporates "the practice in civil cases" and NRS 18.010, which provides for fees "[i]n addition to the cases where an allowance is authorized by specific statute . . . ." Moreover, the State Engineer's argument concerning the timeline the Legislature enacted NRS 533.450(8) and NRS 18.010 do not support the conclusion that fees are unavailable under NRS 533.450(8). While NRS 533.450(8) existed prior to the adoption of NRS 18.010, that fact actually demonstrates that the Legislature was aware of the impact NRS 18.010 would have on laws incorporating civil practice. *Boulder City v. Gen. Sales Drivers Local Union No. 14*, 101 Nev. 117, 118-19, 694 P.2d 498, 500 (1085) ("It is presumed that in enacting a statute the legislature acts with full knowledge of existing statutes relating to the same subject.").

Finally, the cases upon which the State Engineer relies are either distinguishable from the facts of this case or inapposite—the statutes considered in

those cases do not incorporate "the practice in civil cases" as does NRS 533.450(8). Not only does a plain reading of NRS 18.010 and NRS 533.450 lead to the logical conclusion that attorney's fees are available, but any interpretation of the statutes that eliminates a portion of civil practice would result in piecemeal application of "the practice in civil cases" and lead to confusion regarding which portions of civil practice apply and which do not.

B. The State Engineer's Argument That NRS 533.450(8) Does Not Incorporate All of the "civil practice" Ignores the Plain Language of the Statute.

The State Engineer first argues that the history of NRS 433.450(8) dictates an interpretation that "the practice in civil cases" does not include NRS 18.010's award of attorney's fees. RAB 20-22. He bases this argument on the fact that some form of the language "the practice in civil cases" has been in Nevada's water law since its inception, but NRS 18.010 was added in 1951. *Id.*

First, where the meaning of a statute is clear on its face, there is no need to go beyond the language of the statute to determine the meaning. *Rosequist v. Int'l Ass'n of Firefighters*, 118 Nev. 444, 448, 49 P.3d 651, 653 (2002). Here, both applicable statutes are clear and unambiguous. Only by ignoring their plain language does the State Engineer reach a different conclusion—that the civil practice in Nevada does not include NRS 18.010. The State Engineer's approach is improper. *See S. Nevada Homebuilders Ass'n v. Clark Cnty.*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005)

("When interpreting a statute, this court must give its terms their plain meaning, considering its provisions as a whole so as to read them in a way that would not render words or phrases superfluous or make a provision nugatory.") (internal quotation marks omitted).

The State Engineer instead argues that a statute must contain an explicit authorization to award attorney's fees for fees to be available. RAB 20. But NRS 18.010 addresses this as well—it provides that the award of fees is "in addition to the cases where an allowance is authorized by specific statute," thus putting to rest the notion that Nevada water law must contain an express mention of fees. NRS 18.010(2). This language is a clear expression that the Legislature intended NRS 18.010 to apply regardless of a specific statute allowing for fees and without regard to the recovery sought, directly contradicting the State Engineer's argument.

Moreover, the statute provides that "[t]he court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations." NRS 18.010(2)(b). The Legislature clearly intended to deter frivolous or vexations claims and defenses by mandating a liberal construction even in the absence of a second statute specifically allowing a fee award. *Id.*

Second, the State Engineer ignores this Court's precedent that the Legislature is presumed to act "with full knowledge of existing statutes relating to the same subject." *Boulder City*, 101 Nev. at 118-119, 694 P.2d at 500. In fact, when

interpreting a later-enacted statute, this Court confirmed that it would assume the Legislature was aware of other, potentially conflicting statutes and would read them in harmony. *See, e.g.*, *Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 587, 97 P.3d 1132, 1140 (2004).

Moreover, the phrase "relating to the same subject" has been read by this Court to mean statutes which generally impact another. *See, e.g.*, *Cable v. State ex. rel. ITS Emplrs. Ins. Co.*, 122 Nev. 120, 127 P.3d 528 (2006). For example, in *Cable*, the Legislature enacted S.B. 37, which privatized the State Industrial Insurance System ("SIIS"). *Id.* at 122-23, 127 P.3d at 530. Before SIIS was privatized, employee benefits and retirement were administered under the Public Employees Retirement System ("PERS"). *Id.* at 123, 127 P.3d at 530. After a private corporation took control of SIIS, all the formerly public employees became employees of the private corporation. *Id.* In determining that the formerly public employees were entitled to the buyout provisions of the PERS statutes (NRS Chapter 286), this Court found that the Legislature was certainly aware of the PERS statutes when it enacted legislation privatizing SIIS. *Id.* at 125, 127 P.3d at 531.

Here, this Court should presume that the Legislature was aware when it enacted NRS 18.010 governing civil practice, that it would be included in statutes that incorporate "the practice in civil cases" such as NRS 533.450(8). Moreover, these statutes can only be read harmoniously if attorney's fees are available here. If

a different conclusion is reached and NRS 18.010 is not part of Nevada's civil practice, the incorporation of civil practice in NRS 533.450 is rendered meaningless.

C. Because NRS 533.450(7) Alters the Standard Award of Costs, its Inclusion in Water Law in No Way Changes the Availability of Fees to the Prevailing Party.

Next, the State Engineer argues that because NRS 533.450 specifically mentions costs and not fees, no fees are available. RAB 22-24. But this argument ignores the fact that the statute *alters* the civil practice for an award of costs by allowing it against other parties, but not the State Engineer. NRS 533.450(7). The specific alteration of the manner in which costs are allowed further supports that fees are available under NRS 18.010.

The State Engineer does not dispute that the normal practice in civil cases allows for costs in favor of the prevailing party under certain circumstances. NRS 18.020. And Nevada's civil practice statutes specifically contemplate an award of costs and fees against public officers and agencies. NRS 18.150(1).

NRS 533.450(7) alters the normal procedure in awarding costs by excluding the State Engineer from such an award—an exclusion not mentioned in the civil practice statutes. Thus, the Legislature both incorporated the practice in civil cases while also altering that portion of the practice.

Critically, NRS 533.450(7) does <u>not</u> identify which costs are available in water cases nor does it set forth the procedure for seeking costs—those terms are

filled in by NRS Chapter 18 which contains the statutory practice for civil cases. *See* NRS 18.005 (defining "Costs" available for an award); NRS 18.110 (providing manner of obtaining an award of costs by verified memorandum and opposing party's challenge by motion to retax). Thus, the mention of costs (and not fees) is logical. If the Legislature wanted to alter "the practice in civil cases" as it pertains to fees, it could have explicitly so stated, just as it did with costs. But it did not. And reading "the practice in civil cases" as excluding an award of attorney's fees because the same statute alters the statutory cost awards would lead to an absurd result—the Legislature would have to specifically mention NRS 18.010 every time it wanted fees to be available. Instead, the Legislature stated that fees are available under NRS 18.010 in addition to fees available by specific statute. NRS 18.010(2).

If the State Engineer's position is adopted, this Court is left with the impossible task of determining which portions of the civil practice statutes and rules apply to water cases and which do not. Fortunately, the Legislature did not leave the Court or litigants with that impossible task. Instead, the Legislature specifically modified certain portions of the civil practice (*e.g.,* the provision on awarding costs) leaving the remainder of civil practice intact.

The State advocates for selective application of the phrase "the practice in civil cases" only if a specific procedure is mentioned explicitly (such as costs). But that is not a reasonable interpretation of the statutes. The phrase means that the

practice in civil cases applies to appeals from a State Engineer's decision under NRS 533.450—including NRS 18.010—or that phrase has no meaning at all.

D. The State Engineer Cites Inapposite Case Law to Support its Fallacious Interpretation of NRS 533.450.

The State Engineer attempts to liken NRS 533.450(8) either to NRS 233B or to other portions of Chapter 533, both of which, including the caselaw interpreting those statutes, are inapposite. None of the statutes contain an incorporation of "the practice in civil cases" contained in NRS 533.450(8).

First, the State Engineer cites an unpublished disposition that addressed NRS 533.190(1) and NRS 533.240(3). RAB 22-23 (citing *Rand Props., LLC v. Filippini*, Docket No. 66933, 2016 WL 1619306, *Order of Reversal and Remand* (Apr. 21, 2016) (unpublished disposition). In *Rand*, the district court interpreted the word "costs" in NRS 533.190(1) and NRS 533.240(3) to also include attorney fees. *Id*. at *5-6. The Court explained that "under Nevada law, attorney fees are not considered costs" and "attorney fees are not mentioned anywhere in the statute." *Id*. at *6. Thus, the Court concluded that the award of fees intermingled with costs could not be sustained. *Id*.

The lower court in *Rand* improperly interpreted the statutes to include fees within an award of costs when it is well established that costs and fees are different. Moreover, the statutes in *Rand* do not incorporate "the practice in civil cases" like

the statute here. Finally, the prevailing party in *Rand* did not seek fees pursuant to NRS 18.010(2)(b). Accordingly, *Rand* has no application to this case.

Second, Nevada's Administrative Procedures Act (NRS 233B) does not support the State Engineer's argument. RAB 24-26. The State Engineer argues that fees are not available in NRS 233B proceedings even though the Nevada Rules of Civil Procedure still apply. *Id.* (citing *Dep't of Human Resources v. Fowler*, 109 Nev. 782, 858 P.2d 375 (1993); and *Dep't of Corr. v. DeRosa*, 136 Nev. 339, 466 P.3d 1253 (2020)).

The State Engineer cites inapplicable statutes with different language that do not incorporate "the practice in civil cases". Cases brought under NRS 233B are governed by the Nevada Rules of Civil Procedure based on the terms of the rules themselves, not because the statutes incorporate "civil practice." *Whitfield v. Nevada State Pers. Comm'n*, 137 Nev. 345, 350, 492 P.3d 571, 576 (2021) (recognizing that pursuant to NRCP 81(a), the Rules govern statutory proceedings unless they are inconsistent or in conflict with the procedure stated in statute).

NRS 533.450(8) expressly incorporates civil practice, but NRS 233B.130(6) provides just the opposite—that it is the exclusive means of judicial action. Further, the State Engineer is explicitly excluded from the provisions of the Administrative Procedures Act except for circumstances not salient here. NRS 233B.039(1)(i). Therefore, the cases cited by the State Engineer cannot support the exclusion of NRS

18.010 from Nevada's "practice in civil cases" as that is adopted by NRS 533.450(8), and the District Court erred by concluding otherwise.

II. THE STATE ENGINEER'S DEFENSE OF ORDER 1309 WAS FRIVOLOUS.

A. Cases Involving Issues of First Impression are Not Exempt from NRS 18.010(2)(b).

Citing *Rodriguez v. Primadonna Co., LLC*, 125 Nev. 578, 588-89, 216 P.3d 793, 800-01 (2009), the State Engineer contends that "fees are unavailable under NRS 18.010(2)(b) when a case presents a novel issue of first impression". RAB 29. However, this Court has never held that, as a matter of law, cases involving issues of first impression are exempt from NRS 18.010(2)(b). Rather, in *Rodriguez*, this Court expressly concluded that the plaintiff's claims were "based upon a *nonfrivolous* argument for the extension of the law defining negligent eviction". *Id*. at 588, 216 P.3d 793, at 802 (emphasis added). Thus, the Court did not condone the litigation strategy employed by the State Engineer in this case, which has been—and continues on appeal to be—driven by obfuscation, misrepresentation, and a steadfast refusal to acknowledge the reality that there is no statutory authority to combine multiple hydrographic basins into one.

The State Engineer's reliance on *Rodriguez* might be more persuasive if the State Engineer had adopted the same approach as the plaintiff in *Rodriguez*. For example, the State Engineer could have candidly admitted that Order 1309 is a novel

attempt to manage water in the seven separate basins at issue, and he could have advocated for a change in Nevada law. Instead, he chose to (1) advance unreasonable interpretations of the water law statutes that have never been used before, (2) misrepresent Nevada's water law statutes and their application, (3) ignore the implications of Order 1309 on water right holders and the prior appropriation doctrine, and (4) argue that CSI, Lincoln, Vidler, and the other petitioners were "manufacturing" a basin-by-basin management approach.

A novel argument for the expansion of Nevada law is not tantamount to a frivolous argument. But the State Engineer's disingenuous arguments in the District Court were frivolous. The choice to defend Order 1309 by making frivolous arguments that are highly misleading or often simply untrue is the type of unreasonable, groundless defense that warrants the imposition of fees under NRS 18.010(2)(b). The District Court erred by concluding otherwise. Accordingly, the District Court's Order denying fees should be reversed.

B. The State Engineer Should be Estopped from Taking Inconsistent Positions in this Appeal and in the PJR Appeal.

As discussed above, the State Engineer argues that fees are not warranted because this case involves an issue of first impression. RAB 29. But in the PJR Appeal, the State Engineer argues to this Court that the prevailing parties in the District Court, including CSI, Lincoln, and Vidler, "are wrong when they repeatedly claim that Order 1309 represents the first time in Nevada history that the State

Engineer has administered multiple groundwater basins." *See* Appellants' Joint Reply Brief (filed in Case No. 84739), 12. Indeed, the State Engineer attached a 147-page "pamphlet" to the Appellants' Joint Reply Brief to support the argument that "[i]n some cases, the State Engineer established a joint perennial yield for multiple groundwater basins, similar to what [the State Engineer] did for the LWRFS in Order 1309." *Id*.

The State Engineer's arguments continue to be intentionally misleading. If, as the State Engineer represents to this Court in the PJR Appeal, Order 1309 is the same as numerous other State Engineer orders, then this case cannot possibly involve an issue of first impression as the State Engineer contends in this appeal and which he admitted in the District Court. *See, e.g.*, 12 JA 1241 (admitting during oral argument that Order 1309 "is the first time that the State Engineer has actually determined conjunctive management and joint management" and that Order 1309 is the first time that the State Engineer has "put[ ] multiple already existing of the 230 some odd basins together").

The State Engineer should be estopped from asserting different positions based on his perception of which position is more beneficial to him. The State Engineer cannot seek lenience from this Court and the District Court by arguing that this case presents novel issues of Nevada water law to justify his frivolous defense

of Order 1309 while also representing to this Court in the related appeal that Order 1309 is nothing new.

The State Engineer's inconsistent positions in the pending appeals and attempt to ignore the implications of Order 1309 demonstrate that the State Engineer fears no consequence in asserting unreasonable, groundless arguments. Notably, the State Engineer does not even identify what the issue of first impression is in his Answering Brief nor does he articulate the novel issues of law or public policy that need to be addressed. This is because identifying the issue of first impression would require acknowledging that Order 1309 is in fact the first time the State Engineer has combined multiple hydrographic basins into one. Rather than admit this fundamental truth, the State Engineer continues to deflect and evade addressing the primary issue of whether he has statutory authority to combine multiple hydrographic basins into one.[3] Clearly, the State Engineer fears no consequence and remains undeterred in asserting frivolous arguments, which is directly contrary to the purpose of NRS 18.010(2)(b).

[3] Of course, there were no other issues of first impression discussed. It is well established that the State Engineer is a creature of statute, only has the powers set forth in statutes, and that water rights are vested property rights subject to constitutional due process protection. *See Wilson v. Pahrump Fair Water, LLC*, 137 Nev. 10, 13, 481 P.3d 853, 856 (2021; *Eureka Cty. v. Seventh Jud. Dist. Ct.*, 134 Nev. 275, 281, 417 P.3d 1121, 1126 (2018); *see also* 9 JA 1965, 1967, 1972-1973.

NRS 18.010(2)(b) provides direct instruction that courts should award attorney fees "to punish for and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public." There is no reason the State Engineer should not face the same consequences as other civil litigants. To the contrary, the gamesmanship and litigation tactics employed by the State Engineer in the District Court and on appeal demonstrate the need for deterrence. The State Engineer holds great power to delay, degrade, and harm water right holders' water rights. Issuing unlawful orders and frivolously defending them through years of litigation only compounds that delay and harm. Accordingly, this Court should reverse the District Court's order denying fees.

C. The State Engineer Has Never Identified a Statute that Authorizes Him to Combine, Alter, or Change Nevada's Hydrographic Basins.

In the Opening Brief, the Appellants argued that "[n]othing 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." AOB 43. Rather than identify any statute that authorizes the State Engineer to combine multiple basins into one as he purported to do in Order 1309, the State Engineer argues that the Appellants failed to establish that his defense of

Order 1309 was frivolous because they did not conduct an analysis of every statute cited by the State Engineer in the District Court. RAB 31. Noticeably absent from the Answering Brief is citation to any statute that authorizes him to combine multiple basins into one. This is because no such statute exists.

Moreover, the State Engineer ignores that the Appellants argued that it is the *manner* in which he defended Order 1309 that renders the defense frivolous and shows an improper attempt to defend an unlawful order by any means necessary. For example, the choice to argue that the petitioners in the District Court manufactured a basin-by-basin management approach is misleading and frivolous. The State Engineer's argument that combining seven basins into one does not alter the relative priority rights of the water right holders in those separate basins is frivolous. It is groundless for the State Engineer to contend that Order 1309 could have been entered pursuant to NRS 534.120 because that statute allows the State Engineer to issue rules, regulations and orders in basins that have been designated under NRS 534.030, and Kane Springs Valley has never been so designated.

Furthermore, it is patently unreasonable and groundless for the State Engineer to assert now that Order 1309 was entered pursuant to NRS 534.110(6), which allows for *curtailment investigations*. The State Engineer has never initiated a curtailment investigation or proceeding in any of the seven basins at issue nor did he ever provide notice to the participants in the Order 1303 proceedings that he was

purportedly conducting such a curtailment investigation if that is what he was attempting. It is these types of arguments that are frivolous and misleading.

It appears that the State Engineer believes that CSI, Lincoln, and Vidler should have repeated the same statutory analysis presented in their answering brief in the PJR Appeal herein. Thus, the State Engineer contends that CSI, Lincoln, and Vidler have failed to cogently argue that the defense was frivolous. However, all parties to this appeal have agreed that this Court should retain this appeal and decide both the appeals together. Therefore, this Court does not need duplicative briefing on the overlapping issues in the appeals.

Notably, the State Engineer has adopted new theories to attempt to justify Order 1309 in the PJR Appeal. Citing new statutes, the State Engineer now contends in the PJR Appeal that the "first step" in water management is "defining the aquifer" and therefore, that is what the State Engineer did in Order 1309. *See* Appellants' Joint Opening Brief, 23. Moreover, the State Engineer has developed a new theory of what the term "basin" means in Nevada's water law statutes. *See id*. at 35-36. As noted above, the State Engineer has now completely disavowed that this case involves an issue of first impression. The ever-changing arguments of the State Engineer demonstrate that the State Engineer's attempt to justify a clearly unlawful order is frivolous and unreasonable.

The District Court abused its discretion by excusing the State Engineer's improper arguments simply because this case involves an issue of first impression. The State Engineer should not be permitted to impose unlawful orders and defend them with frivolous arguments without any consequence. Accordingly, this Court should reverse the District Court's order denying fees.

III. THE STATE ENGINEER'S STATEMENT OF FACTS UNDERSCORES HIS FRIVOLOUS DEFENSE OF ORDER 1309.

A. The State Engineer Ignores that the 232 Hydrographic Basins were Indexed with the Knowledge that Some Basins Had a Connection with Other Basins.

The State Engineer's recitation of facts in his Answering Brief reveals how unreasonable his defense of Order 1309 truly is. Indeed, the State Engineer has defended Order 1309 by arguing that the "science" shows that there is a connection between these certain basins that requires that all seven basins be managed as one. 6 JA 1229 ("This finding that it acts as one basin was the primary basis behind Order 1309."). But the State Engineer's own Statement of Facts confirms that the 232 hydrographic basins in Nevada were not indexed based on the supposed connection or "boundary" of the water source.

To be sure, the Statement of Facts focuses on the decades-long surmised connection between the carbonate aquifer groundwater in certain hydrographic basins and the Muddy River. RAB 3-4. The State Engineer relies on Thomas E. Eakin's Report, A Regional Interbasin Ground-Water System in the White River

Area, Southeastern Nevada (the "Eakin Report") which was written in **1966**. *See id.*; *see also* 2 JA 359-81 (the Eakin Report). The Eakin Report details the interconnected regional groundwater system across numerous valleys in southeastern Nevada. 2 JA 361.

But it was with this knowledge that **two years later, in 1968**, the United States Geological Survey ("USGS") office, with cooperation from the State Engineer, indexed and identified Nevada's 232 hydrographic basins. *See* Rush, F.E., 1968, Index of hydrographic areas in Nevada: Nevada Division of Water Resources Information Report 6, 38 (the "Rush Report").[4] Therefore, the distinct 232 hydrographic basins were established notwithstanding the supposed connectivity of a water source. Likewise, they were not identified based on the "boundary of the aquifer" as the State Engineer contends on appeal.

The Rush Report confirms this. Rush explains that "Nevada is composed of more than 200 valleys bounded by mostly northtrending mountain ranges." *Id*. at p. 2. "Each valley is partly filled with alluvium, mostly derived by weathering and erosion from surrounding mountains." *Id*. Rush notes that "[t]he alluvium is the principal storage reservoir for ground water." *Id*. Important to understanding the reason water rights are allocated and managed in a basin-by-basin manner, Rush

[4] *available at* http://images.water.nv.gov/images/publications/Information%20series/6.pdf (the "Rush Report").

acknowledges that "[t]he valley floors are the principal ground-water and surface-water use areas." *Id*. "Thus, the valley commonly has become the basic unit of social, economic, and water-development activity in Nevada." *Id*.

"For the study, research, development, management, and administration of water resources, a need for a systematic identification of "valleys," or preferably "hydrographic areas," of Nevada was recognized by both the U.S. Geological Survey and the State Engineer's office." *Id*. Therefore, the USGS and the State Engineer's office compiled a map showing the hydrographic areas in Nevada. *Id*. Rush explains that, "[t]he *primary purpose* for the report and map is to *define and describe specifically the hydrographic regions, basins, and areas so that these descriptions and map can be available as an official guide to all water-resources and other natural-resources agencies*." *Id*. (emphasis added).

Demonstrably then, the Rush Report established what the State and Federal governments consider to be Nevada's hydrographic basins. *See id*.[5] This index was created with the knowledge that there was an interconnected regional groundwater system for several basins. However, water is managed *for people to use*. Therefore, the basins were established based on where people most commonly live and use water—valley floors.

[5] Indeed, the Water Words Dictionary relies on the Report without identifying it. *See Water Words Dictionary by Letter - B*, at 25-26.

The Rush Report demonstrates why Nevada's water law statutes require a basin-by-basin management approach that the State Engineer and the Legislature have historically implemented. Different areas of Nevada have different land uses, population sizes, and consequently, different water needs. Nevada's water law statutes require the State Engineer to make basin-by-basin water management decisions because each basin will have different "social, economic, and water development activity". *Id*.

Although the State Engineer cites the Eakin Report for the proposition that at one point in time, hydrologists thought that mountains served as hydraulic barriers, *see* RAB 3, the Eakin Report refuted that notion. Indeed, the State Engineer argues, "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." RAB 3 (citing the Eakin Report). Therefore, it is unreasonable for the State Engineer to have defended Order 1309 by arguing that "the facts and science show this is one basin, and it needs to be managed as one basin." 6 JA 1218.

The Statement of Facts not only ignores that the 232 hydrographic basins were indexed with this knowledge, but also ignores that during all those ensuing decades, the State Engineer continued to administer and manage groundwater rights on a basin-by-basin basis.

B. The State Engineer's Sole Reliance on the Order 1169 Pump Tests to Support Order 1309 and Include Kane Springs in the New "Megabasin" Shows How Frivolous His Defense of Order 1309 is.

The State Engineer cites the results of the Order 1169 pump test as a basis to include Kane Spring Valley ("Kane Springs") in the new "Lower White River Flow System ("LWRFS") hydrographic basin". In doing so, the State Engineer ignores his conclusion in Ruling 6255 in 2014 that the information from the pump test was only sufficient to document the effects of pumping on water levels and springs flows in the basins where the pump tests occurred.

The State Engineer ignores Appellants' contentions that his defense of Order 1309 was without reasonable ground and was frivolous given the State Engineer's sudden decision to include Kane Springs in the "LWRFS basin" when he intentionally excluded Kane Springs from the pump tests. It was only when the State Engineer realized that CSI could use water rights in Kane Springs that he decided the "science" now showed that Kane Springs should be included in Order 1309. Order 1309 is a blatant attempt to defeat CSI's master planned community.

The State Engineer continues to defend his decision to include Kane Springs in the "LWRFS basin" even after the District Court found it violated due process and was done without any authority. 9 JA 1965, 1967, 1972-1973. The State Engineer downplays the simple truth that Kane Springs was intentionally excluded from the "LWRFS" until Order 1309.

Ruling 5712 expressly excluded Kane Springs from the Order 1169 pump test even after the United States Department of the Interior, Fish and Wildlife Service and the National Park Service ('NPS") protested Lincoln and Vidler's applications and requested the State Engineer include Kane Springs in the Order 1169 study area. 2 JA 301-303, 320-321. Both agencies requested the applications be held in abeyance and no appropriations be granted in Kane Springs, as was ordered for the basins subject to the Order 1169 pump test. 2 JA 303.

The State Engineer still granted Lincoln and Vidler 1,000 afa of water rights in Kane Springs. 2 JA 321-322. The State Engineer specifically determined Kane Springs would not be included in the pump tests 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. *Id*. at 320. The State Engineer thus overruled the NPS protest and rejected the argument that groundwater in Kane Springs could not be appropriated based upon senior appropriated rights in the down gradient basins. *Id*. at 314. Neither the NPS nor anyone else objected to or appealed these determinations.

The State Engineer's discussion of Ruling 5712 focuses only on the Ruling's partial approval of Lincoln and Vidler's applications and the State Engineer's conclusion that pumping in Kane Springs could have an effect on water levels in other basins in the carbonate aquifer. Regardless of the amount of water approved,

the State Engineer approved applications in Kane Springs while applications pending in the basins subject to Order 1169 were held in abeyance.

The State Engineer relies on reports submitted by multiple parties that allegedly support the connectivity between the carbonate aquifer and the Muddy River Springs to defend Order 1309. RAB 9-11. These reports were cited in Ruling 6255 issued in 2014—therefore, they were all submitted *before* Order 1303. Notwithstanding, the State Engineer still excluded Kane Springs from Order 1303.[6]

In Order 1309, the State Engineer stated the results from the Order 1169 pump test, along with evidence and testimony presented at the Order 1303 hearing, "requires that Kane Springs Valley be included within the geographic boundary of the LWRFS." 1 JA 170. Counsel for the State Engineer also attributed the results of the Order 1169 pump test as "new scientific data" for the inclusion of Kane Springs. 6 JA 1246; RAB 40.

This argument contradicts the State Engineer's own conclusions in 2014. First, the Order 1169 pump test was conducted to "provide information on the effect of pumpage of those rights which have already been issued from the carbonate-rock aquifer." 2 JA 295. In Order 1169A, the State Engineer declared the pump test complete because he believed "sufficient information has been obtained through the

[6] The Joint Appendix only contains Ruling 6255 (2 JA 327-357) which cites these reports; the reports themselves are not included in the Joint Appendix.

pumping test and related monitoring in order to make a determination on the applications pending in these basins." 2 JA 285.

The State Engineer then issued Ruling 6255, which denied new applications to appropriate water in Coyote Springs Valley. In this Ruling, the State Engineer found the "information obtained from the pumping test satisfied the goal of the test and is ***sufficient to document the effects of pumping on water levels and spring flows in the Order 1169 basins***." 2 JA 348 (emphasis added). The State Engineer did not find the Order 1169 information sufficient to document the effects of pumping on water levels and spring flows in any other basins, including Kane Springs. Further, the State Engineer denied the pending applications on the grounds that "there is no additional groundwater available for appropriation in the Coyote Spring Valley Hydrographic Basin without conflicting with existing water rights ***in the Order 1169 basins***." 2 JA 355 (emphasis added).

To subsequently take the position that "new scientific data", *i.e.*, the Order 1169 pump test, warranted the inclusion of Kane Springs in the "LWRFS" is therefore without reasonable grounds when the State Engineer previously relied on that same information to exclude Kane Springs. *See* 2 JA 348; *cf.* Answering Brief at 40; 4 JA 738 (argument in the Respondents' Answering Brief that the pump test results provided more comprehensive data to support including Kane Springs).

Further, Order 1303 did not state the pump test results would be used to determine geographic boundaries of the "LWRFS" but stated those results would be used to help the State Engineer determine the quantity of groundwater that may be developed in the "LWRFS" or to develop a long-term Conjunctive Management Plan for the "LWRFS" and Muddy River. *See* 1 JA 196 (" . . . the State Engineer finds that input by means of reports by the stakeholders in the ***interpretation of the data from the aquifer test and from the years since the conclusion of the aquifer test is important to fully inform the State Engineer prior to setting a limit on the quantity of groundwater that may be developed in the LWRFS*** or to developing a long-term Conjunctive Management Plan for the LWRFS and Muddy River") (emphasis added). Item b of Order 1303 listed the matters to be addressed in stakeholder reports and referenced that the Order 1169 pump test results would be reviewed as they relate to aquifer recovery - - not to determine the geographic boundaries of the "LWRFS": "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***". 1 JA 198 (emphasis added).

The State Engineer continues to defend Order 1309 even though his own recitation of his version of the "facts" contradicts his arguments. The frivolity of Order 1309 is particularly shown by the random inclusion of Kane Springs, a

decision the District Court found to be particularly egregious. 9 JA 1972-73. Accordingly, the State Engineer's defense of Order 1309 is, and remains to be, frivolous and unreasonable.

C. Order 1309 was Aimed to Defeat CSI's Development.

The Answering Brief omits facts concerning CSI's planned development because the background and procedural history demonstrate that Order 1309 was issued to defeat CSI's development. CSI has been submitting its tentative map application for the first phase of its development for nearly 5 years. *See, e.g.*, 2 JA 417-419. Rather than consider CSI's tentative map application, the State Engineer has issued numerous letters and orders, some of which he rescinded because of challenges from CSI, to delay CSI's development. *See, e.g.*, *id*. Order 1309 is only the latest in the string of orders and letters that have destroyed CSI's development.

The State Engineer uses fear-tactics and arguments about "science" to excuse and hide the obvious. Order 1309 is unlawful. Order 1309 improperly purports to combine seven distinct hydrographic basins into one single hydrographic basin. There is no statutory authorization for the State Engineer to "delineate", change, alter, or combine basin boundaries.

The reality is that in 2018, the State Engineer became aware that CSI was ready, willing, and able to start developing its project by submitting a subdivision map application. *See* 2 JA 417-419. This was problematic for the State Engineer

who, for certain political reasons, did not want CSI's development to proceed. However, the plain language of the water law statutes did not provide a mechanism for the State Engineer to lawfully halt CSI's development.

For instance, the perennial yield of Coyote Spring Valley Hydrographic Basin (Basin 210) was likely sufficient to meet the needs of the water right holders in that basin. *See* Supplemental Appendix[7], 1 (Hydrographic Summary for Coyote Spring Valley Hydrographic Basin). Therefore, the State Engineer did not order an investigation under NRS 534.110(6) in Basin 210 or initiate curtailment proceedings in Basin 210 to curtail CSI's water rights. *See* 2 JA 417-419. Instead, the State Engineer decided to manufacture artifices to circumvent Nevada's water law statutes: Order 1303 and Order 1309.

The State Engineer decided that the "science" (that has been well known for "over half a century") *now* shows that Basin 210 needs to be managed as one hydrographic basin with six other hydrographic basins. According to the State Engineer, he can *only* implement Nevada's basin-by-basin management scheme if he first circumvents it by combining the basins into a single hydrographic basin. *See* 6 JA 1233-34 ("And so by laying out basically the rules of the road with LWRFS, that *that brings it into its one basin, and the rest of his authority does apply to*

[7] CSI's existing rights are a portion of the 13,600 afa of municipal rights listed in the summary.

managing on a basin by basin basis.") (emphasis added). The State Engineer essentially admits that he had to manufacture a means to curtail CSI's water rights in Basin 210 in favor of other water right holders in other basins.

Frivolous is an understatement. The defense of Order 1309, especially when viewed in the appropriate context as related to CSI's master plan community, is frivolous and without reasonable grounds.

CONCLUSION

The Appellants respectfully request that this Court enter an Order reversing the District Court's denial of their requests for attorney fees.

Dated this 27th day of March, 2023.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Reply 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.

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3. Finally, I hereby certify that I have read this 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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CERTIFICATE OF SERVICE

I certify that on the 27th day of March 2023, I served a copy of **APPELLANTS' JOINT REPLY 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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